Victorian Inquiry into the Labour Hire Industry and Insecure Work

Final Report

31 August 2016

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Industrial Relations Victoria
Department of Economic Development, Jobs, Transport & Resources
121 Exhibition Street, Melbourne Victoria 3000
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Ordered to be published

VICTORIAN GOVERNMENT PRINTER
October 2016
PP 229, Session 2014–16

Print managed by Finsbury Green

Victorian Inquiry into
the Labour Hire Industry
and Insecure Work

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Dear Premier and Minister Hutchins

Victorian Inquiry into the Labour Hire Industry and Insecure Work

Pursuant to the Establishing Instrument for the Inquiry, and section 107 of the *Inquiries Act 2014* (the Act), I now provide the Final Report of the Victorian Inquiry into the Labour Hire Industry and Insecure Work, dated 31 August 2016.

The Report contains the evidence presented to the Inquiry, and the Inquiry's findings and recommendations to address the issues set out in the Terms of Reference. The Report also includes a number of adverse findings.

Under the Act I understand that the Government has discretion to table a report of a Formal Review in Parliament. In this regard, I note that the parliamentary protections for any publication of the Report and its contents are enlivened by tabling of the Report in Parliament, in accordance with the process set out in section 109 of the Act.

Thank you for giving me the opportunity to conduct this important Inquiry.

Yours faithfully

Professor Anthony Forsyth
Chairperson
31 August 2016

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List of abbreviations

2003 RMIT Study	Brennan, L. Valos, M. and Hindle, K. *On-hired Workers in Australia: Motivations and Outcomes*, RMIT Occasional Research Report, School of Applied Communication, RMIT University, Design and Social Context Portfolio (2003)
2005 Independent Contracting Report	Parliament of Australia, House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation Committee, *Making it Work: Inquiry into independent contracting and labour hire arrangements,* (Canberra, August 2005)
2005 Victorian Inquiry Report	Parliament of Victoria, Economic Development Committee, Inquiry into Labour Hire Employment in Victoria, *Interim Report, December 2004 and Final Report, June 2005*
2012 Howe Inquiry	Australian Council of Trade Unions, Report of the Independent Inquiry into Insecure Work in Australia, *Lives on Hold – Unlocking the potential of Australia's Workforce, 2012*
2015 Proposed ESIC	RCSA, proposed *Employment Services Industry Code, Public Exposure Draft*, May 2015
2016 Proposed ESIC	RCSA, *Consultation Prototype – Employment Services Industry Code 2016*
ABN	Australian Business Number
ABS	Australian Bureau of Statistics
ACAS	Advisory, Conciliation and Arbitration Service
ACCC	Australian Competition and Consumer Commission
ACCI	Australian Chamber of Commerce and Industry
ACN	Australian Company Number
ACREW Study	Australian Centre for Research in Employment and Work, *Labour Hire Research Report: Best Practice Models for Managing Joint Responsibilities in the Labour Hire Sector*, Monash University, Faculty of Business and Economics (August 2007)
ACTU	Australian Council of Trade Unions
AEU	Australian Education Union
Agri Labour	Agri Labour Australia
Ai Group	Australian Industry Group
AIER	Australian Institute of Employment Rights
AIRC	Australian Industrial Relations Commission
ALP	Australian Labor Party
AMCA	Air Conditioning and Mechanical Contractors Association
AMIEU	Australian Meat Industry Employees Union
AMMA	Australian Mines and Metals Association
AMWU	Australian Manufacturing Workers Union
ANMF	Australian Nursing and Midwifery Federation
ANZSIC	Australian and New Zealand Standard Industrial Classifications
ASU	Australian Services Union
ASU Private Sector	Australian Services Union Private Sector Victorian Branch
ASU Authorities and Services	Australian Services Union Authorities and Services Division Victoria Tasmania Branch
ATO	Australian Taxation Office

Azarias Report	John Azarias, Jenny Lambert, Peter McDonald and Katie Malyon, *Robust New Foundations*, Independent review into Integrity in the Subclass 457 Programme, September 2014
Baiada Inquiry Report	Australian Government, Fair Work Ombudsman, *A report on the Fair Work Ombudsman's Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales*, June 2015
BLA	Business Licensing Authority
BOOT	Better Off Overall Test
CC Act	*Competition and Consumer Act 2010* (Cth)
CELRL	Centre for Employment and Labour Relations Law
CFMEU Construction	Construction Forestry Mining and Energy Union Construction and General Division Victorian Branch
CFMEU Mining and Energy	Construction Forestry Mining and Energy Union Mining and Energy Division Victorian Branch
CIETT	International Confederation of Private Employment Agents
CPSU	Community and Public Sector Union
CPSU Communications	Community and Public Sector Union Communications and Science Branch
CRTs	Casual relief teachers
CWU	Communication Workers Union
DET	Victorian Government Department of Education and Training
DWG	Designated work group
EA Act	Employment Agencies Act 1973 (UK)
EASI	Employment Agency Standards Inspectorate
EO Act	*Equal Opportunity Act 2010* (Vic)
ES	Education Services
Establishing Instrument	Establishing instrument for the Inquiry into the Labour Hire Industry and Insecure Work
EU	European Union
Eurofound	European Foundation for the Improvement of Living and Working Conditions
Fair Work Act	*Fair Work Act 2009* (Cth)
FCA	Franchise Council of Australia
FOE	ABS Forms of Employment
FGC	First Placement Group of Companies
FWC	Fair Work Commission
FWO	Fair Work Ombudsman
GLA	Gangmasters' Licensing Authority, United Kingdom
GLA Act	Gangmasters (Licensing Act) 2004 (UK)
GLAA	Gangmasters and Labour Abuse Authority
GTHC	Geelong Trades Hall Council
GVP	Gross Value of Production
HACSU	Health and Community Services Union
Hazeldene's	Hazeldene's Chicken Farm Pty Ltd
HIA	Housing Industry Association

HILDA	Household, Income and Labour Dynamics in Australia Survey
HMRC	Her Majesty's Revenue and Customs
Horticulture Award	*Horticulture Award 2010*
HSE	Health and Safety Executive
HSR	Health and safety representative
HWU	Health Workers Union
IC Act	*Independent Contractors Act 2006* (Cth)
ICA	Independent Contractors Australia
ICT	Information and Communication Technology
IEU	Independent Education Union
ILO	International Labour Organization
IRV	Industrial Relations Victoria
Inquiries Act	*Inquiries Act 2014* (Vic)
Inquiry	Inquiry into the Labour Hire Industry and Insecure Work
ISCRR	Institute for Safety, Compensation and Recovery Research
ITCRA	Information Technology, Contract and Recruitment Association
JBS	JBS Australia
LSA	Labour Solutions Australia
LSL Act	*Long Service Leave Act 1992* (Vic)
Master Builders	Master Builders Association of Victoria
MCG	Melbourne Cricket Ground
MEAA	Media, Entertainment and Arts Alliance
NCA	National Crime Agency
NES	National Employment Standards
NMLLEN	Northern Mallee Local Learning and Employment Network
NTEU	National Tertiary Education Union
NUW	National Union of Workers
ODFC Act	*Owner Drivers and Forestry Contractors Act 2005* (Vic)
OHS	Occupational Health and Safety
OHS Act	*Occupational Health and Safety Act 2004* (Vic)
PC Workplace Relations Framework Report	Productivity Commission, *Workplace Relations Framework: Inquiry Report* (Volumes 1 and 2), No. 76 (30 November 2015)
PCBU	Person conducting a business or undertaking
PHW Act	*Public Health and Wellbeing Act 2008* (Vic)
PHW Regulations	*Public Health and Wellbeing Regulations 2009* (Vic)
PMA-ANZ	Produce Marketing Association – Australia New Zealand
PSWPS	Pacific Seasonal Worker Pilot Scheme
PwC	Price Waterhouse Coopers
Queensland Inquiry Report	Parliament of Queensland, Finance and Administration Committee, *Inquiry into the practices of the labour hire industry in Queensland*, Report no. 25, 55th Parliament (June 2016)
RCSA	Recruitment and Consulting Services Association
RSRT	Road Safety Remuneration Tribunal
SDA	Shop, Distributive and Allied Employees Association
Seasonal Worker Program Report	Parliament of Australia, Joint Standing Committee on Migration, *Seasonal Change - Inquiry into the Seasonal Worker Program*, (May 2016)

SEMMA	South East Melbourne Manufacturers Alliance
Senate Work Visa Report	Commonwealth of Australia, Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (17 March 2016)
Sham Contracting Inquiry	Australian Government, Office of the Australian Building and Construction Commissioner, Sham Contracting Inquiry: Report
STLC	Sunraysia Trades and Labour Council
Sunraysia ECC	Sunraysia Ethnic Mallee Community Council
SWA	The Connect Group - Seasonal Workers Australia
SWP	Seasonal Workers Program
TANVIC	Teacher Agency Network Victoria
TCF	Textile, clothing and footwear
TCFUA	Textile, Clothing and Footwear Union of Australia
Temporary Staff Services Report	Alen Allday, IBISWorld Industry Report N7212, *Temporary Staff Services in Australia* (May 2016)
TUC	Trades Union Congress
TWA	Temporary work agency
TWU	Transport Workers Union
UV	United Voice
VACC	Victorian Automobile Chamber of Commerce
VCCI	Victorian Chamber of Commerce and Industry
VCOSS	Victorian Council of Social Services
VFF	Victorian Farmers Federation
VLA	Victoria Legal Aid
VTHC	Victorian Trades Hall Council
VWIRS	Victorian Workplace Industrial Relations Survey, 2008
WHM	Working Holiday Maker
Wine Industry Award	*Wine Industry Award 2010*
WIRC Act	Workplace Injury, Rehabilitation and Compensation Act 2013 (Vic)
WIRE	Women's Information and Referral Exchange
WorkSafe	WorkSafe Victoria

Chairperson's Foreword

This Report presents the information obtained from participants in the Inquiry into the Labour Hire Industry and Insecure Work, through written submissions and evidence given in both public and closed hearings around Victoria.

I was extremely pleased with the level of public interest in the Inquiry, and the extent of engagement by a broad range of stakeholders. These included labour hire agencies and other employers, employer/industry associations, individual workers, trade unions and union peak bodies, community groups, academics and other participants.

The Inquiry received 695 primary written submissions, comprising 91 from organisations and 604 from individuals. The Inquiry also heard from a total of 221 individual witnesses during 113 hearing sessions, over 17 days of hearings held from November 2015 to March 2016.

I am extremely grateful to all of the individuals and organisations that took the time to participate in the Inquiry. Their contributions have enabled me to form a clear picture of the various issues relating to labour hire and insecure work in Victoria, which the Terms of Reference required me to examine.

The Report also contains the Inquiry's findings and recommendations.

Of all the many aspects of the evidence presented to the Inquiry, which have informed my findings and recommendations, two things in particular stand out:

- First, there are various ways in which labour hire workers in Victoria are treated almost like a 'second class' of worker. This treatment ranges from outright exploitation in certain sectors – principally the horticulture, meat and cleaning industries – through to differential treatment in respect of issues like health and safety, dismissal and rostering. While the labour hire model of engagement plays a very important role in meeting the business needs of employers, it is generally preferable that we do not allow workers to be treated adversely in our workplaces based on their being engaged through a labour hire relationship.
- Secondly, while the very concept of insecure work was strongly contested by some employer groups, I heard many compelling accounts of the extent and impact of non-permanent working arrangements – especially casual and fixed term engagement – experienced by Victorian workers. The outcomes for these workers frequently include financial insecurity, difficulty planning and saving for the future, and stress (including in the management of working time and family commitments). Many workers in this kind of position would prefer more ongoing or permanent forms of work.

The main recommendations I outline for addressing these issues include a sector-specific licensing scheme for labour hire agencies; a voluntary code of practice for the Victorian labour hire industry; and the adoption of procurement policies by the Victorian Government through which preference would be given in government contracting to businesses that adopt more secure forms of work.

In total, I have made 35 Recommendations which are set out, along with the Inquiry's key findings, from page 17 below.

Throughout the Inquiry, I was provided with outstanding assistance by the staff within the Inquiry Secretariat based in Industrial Relations Victoria (IRV). This included assistance in the organisation and running of the Inquiry's hearings around Victoria, and its parallel schedule of informal stakeholder consultations; media communications; reviewing hearing materials and written submissions; and preparation of Inquiry materials.

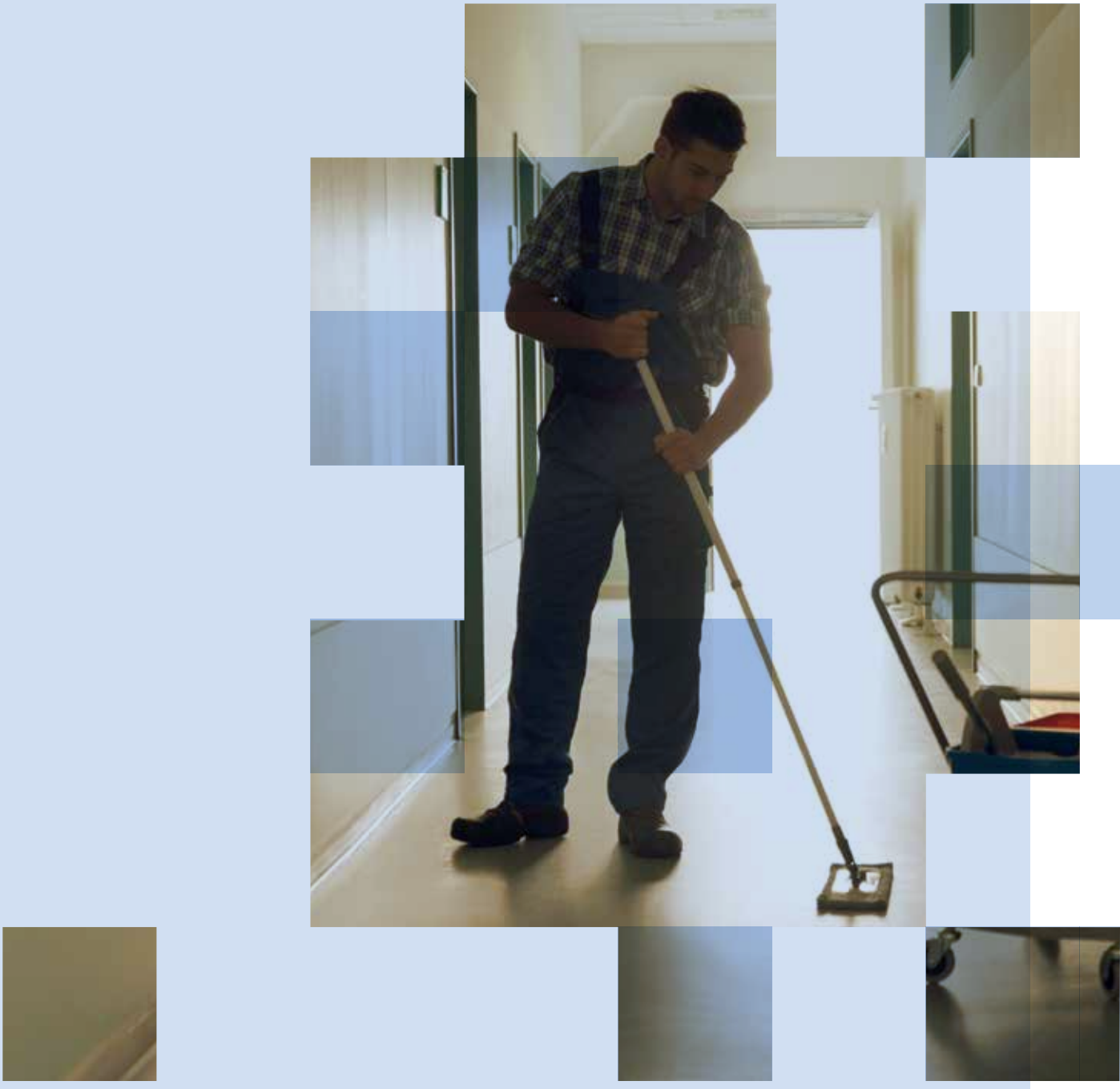
For their dedication to this work, I would particularly like to thank:

- Kath Fawcett, Legal Consultant in the Inquiry Secretariat, who played a leading role in the planning and organisation of the Inquiry; undertook a considerable amount of the research, writing and editing involved in compiling this Final Report; and prepared other Inquiry materials including legal and procedural documents and correspondence.
- Lissa Zass, Director – Private Sector and Compliance in IRV, who supported the establishment, management and resourcing of the Inquiry; and provided me with unfailingly reliable advice and valuable input throughout the process.

I also thank all of the following IRV and departmental staff who played important roles in assisting the Inquiry at various stages: Russell Bancroft, Lativa Childerhouse, Grant Clarke, Daniel Feiber, Adam Frost, Cassandra Devine, Tim Lenders, Matt O'Connor, Paul Robinson, Dave Sheridan, Gabrielle Starr, Sarah Turberville, Marcelle West, Alex Wilson, Jackie Winn and Stephen Witts.

Professor Anthony Forsyth, Inquiry Chair
RMIT University, Graduate School of Business and Law
Wednesday 31 August 2016

SUMMARY OF FINDINGS AND RECOMMENDATIONS



SUMMARY OF FINDINGS AND RECOMMENDATIONS

CHAPTER 2

The labour hire industry

2.1

The labour hire industry has developed over the last 20 to 30 years to become a significant employer of Victorian workers and a major contributor to the Victorian economy. Labour hire is present in almost all Victorian industries; Australia-wide data indicates that it is used most extensively in administrative and support services, mining and manufacturing.

2.2

There are deficiencies in and inconsistencies between the available data relating to the prevalence of labour hire employment arrangements in Victoria and Australia, both in respect of the proportion of labour hire workers and the proportion of workplaces which use labour hire.

Recommendation 1:

The Victorian Government should develop or resource targeted data collection to investigate the prevalence and nature of labour hire employment within the state.

2.3

There are various legitimate and sound commercial reasons for Victorian businesses to utilise labour hire arrangements. Labour hire enables a flexible approach to the engagement of labour which assists businesses to deal with peaks and troughs in demand, without some of the constraints associated with engaging ongoing employees.

2.4

There is a wide spectrum of legal compliance within the labour hire industry in Victoria. At one end of the spectrum are labour hire agencies and arrangements which are highly transparent and compliant with workplace laws, awards and other industrial instruments, health and safety legislation and other applicable legal requirements. At the other end of the spectrum are 'invisible' labour hire agencies and arrangements, operating almost entirely outside the existing regulatory framework. These have been described as 'rogue' labour hire operators, and their activities frequently involve breaches of applicable workplace and safety legislation, award obligations and other regulations. The boundaries between labour hire agencies at the two ends of the spectrum are not always clear. There is a range of agencies and arrangements falling between the two extremes.

2.5

While there is evidence that some workers are attracted to the flexibility that labour hire offers and see it as a path to ongoing employment, many workers accept labour hire engagements as the only choice open to them and would prefer permanent positions. There is also considerable financial insecurity attached to many labour hire engagements.

CHAPTER 3

Mode of engagement

3.1

The overwhelming mode of engagement of labour hire workers in Victoria is casual employment. To a lesser extent, labour hire workers may be engaged as independent contractors, particularly in professional roles in industries such as information technology. To a significantly lesser extent, labour hire employees are engaged on a fixed term employment basis. Permanent employment is rare. Whilst each of these non-permanent forms of engagement is present across the broader Victorian labour market, their cumulative prevalence within the labour hire industry is considerably greater.

Minimum terms and conditions of engagement

3.2

It is an unavoidable consequence of the engagement of labour hire workers as casual employees, or as independent contractors, that they do not receive the benefit of many/any minimum employment conditions under the National Employment Standards. Labour hire workers engaged as fixed term employees receive most but not all of the minimum National Employment Standards conditions. Casual labour hire employees also miss out on many award conditions, so are often worse off than directly engaged permanent employees of the host, even taking into account the casual loading.

3.3

Modern awards play a critical role in ensuring that labour hire employees have the protection of minimum hourly rates of pay; and certain other minimum conditions (which vary depending on whether they are casuals or fixed term employees). The on-hire provisions in most modern awards appear to operate effectively to ensure the extension of award terms and conditions to labour hire employees performing work covered by the relevant award, reflecting the principle that labour hire employers and their employees should be covered by the award covering the host employer to whom the employees are on-hired.

3.4

Casual conversion clauses in awards have not proved to be an effective mechanism to assist labour hire casuals to obtain permanent employment.

3.5

Contractual provisions which require an employee to pay a fee or commission to a labour hire agency in order to obtain work, and contractual provisions which prevent or hinder a labour hire employee from obtaining direct employment with a host, should be discouraged. These issues are addressed further in Recommendation 26, at 5.6.4.

Enterprise bargaining and the application of enterprise agreements

3.6

Some labour hire employers seek to use enterprise agreements as a mechanism to drive down employment conditions. Vigorous application of the Better Off Overall Test by the Fair Work Commission is needed to prevent this from occurring.

3.7

In many instances, host enterprise agreements do not apply to labour hire employees, resulting in differential treatment (i.e. lower pay and conditions) for those workers compared with direct employees of the host whom they work alongside. This problem is more pronounced where (as the Inquiry heard is common in some sectors) labour hire employees have been working at the site of one host over a lengthy period.

Recommendation 2:

Labour hire employees should have the opportunity to be covered by enterprise agreements applying at a host's workplace – whether this occurs de facto (arising from the voluntary decision of the labour hire employer to observe the site enterprise agreement); or because of the application of a parity clause in the host's enterprise agreement.

On that basis, there should not be impediments to the negotiation of parity clauses in enterprise agreements (such as the prohibition recommended by the Productivity Commission). Given that the view has developed in the case law that parity clauses are a 'matter pertaining' to the employment relationship, and are therefore permitted matters in agreements, whether or not they are included should remain a matter of negotiation between bargaining representatives.

The Victorian Government should advocate the above position in any consultation processes instigated by the Federal Government over implementation of the Productivity Commission's report.

Employment conditions of casual relief teachers

3.8

There is a two-tiered system of terms and conditions in respect of casual relief teachers working in government schools. Those who are directly engaged by school councils are entitled to the benefit of the terms and conditions set out in the Victorian Government's Ministerial Order – conditions which are more generous than the relevant modern award. Those who are engaged by school councils through a third party are not entitled to these more beneficial terms and conditions. This disparity of conditions arises through the Victorian Government's own legislative framework and Ministerial Order, and is thus within its power to remedy.

Evidence to the Inquiry suggested that there are many benefits of using a labour hire arrangement for both school councils and for casual relief teachers themselves. These benefits would continue to be available notwithstanding parity of conditions being afforded.

Recommendation 3:

I recommend that the Victorian Government legislate to remove the disparity in minimum terms and conditions between casual relief teachers engaged by school councils directly, and those engaged by school councils via a labour hire agency.

Protections from unfair or discriminatory treatment

3.9

The current unfair dismissal provisions in the Fair Work Act operate, in practice, to limit substantially the protections from unfair dismissal for labour hire workers. This principally arises from the exclusions of most casuals, as well as fixed term/specified task employees and contractors, from being able to bring an unfair dismissal claim.

3.10

Even for labour hire employees who can bring an unfair dismissal claim, the relevant provisions are sometimes interpreted by the Fair Work Commission so as to enable the labour hire agency to 'hide' behind the actions of the host and/or their commercial relationship with the host. This approach enables both the host and the labour hire employer to avoid having to account for their respective roles in causing or contributing to the termination of the labour hire employee's employment.

3.11

These limitations of the Fair Work Act unfair dismissal provisions act to reduce job security for labour hire workers, and likely act as an incentive for businesses to utilise labour hire rather than engage direct employees.

3.12

One option for addressing these issues would be to adopt one of the forms of 'joint employment' discussed in chapter 3. These include Thai's proposal to amend the Fair Work Act to enable a labour hire employee to bring an unfair dismissal claim against both the labour hire agency and host (with a statutory test modelled on United States jurisprudence to determine whether the host/client is a joint employer that may have liability for the employee's dismissal and any remedies arising from a finding of unfairness). However the imposition of such a framework in the Australian context would be a major leap, with significant economic effects on the users of labour hire services.

3.13

The Fair Work Commission is currently exhibiting different approaches to determining the extent to which a labour hire employer can be held responsible for the fairness or otherwise of the host's decision-making in terminating an engagement with a labour hire employee. In practice, an approach by labour hire agencies which minimises use of the contractual relationship between the labour hire agency and host to defeat the rights of a dismissed employee to seek a remedy is to be preferred and should be encouraged. These issues are addressed further in Recommendation 26, at 5.6.4.

3.14

The evidence presented to the Inquiry, and the relevant case law, illustrate a number of ways in which labour hire employees miss out on protections against unfair treatment at work enjoyed by other workers.

Recommendation 4:

The Government should introduce amendments to the *Equal Opportunity Act 2010* (Vic) to clarify that the protections from discrimination in respect of an employee engaging in employment activity, and reasonable adjustments for an employee with a disability, apply in the context of a host's relationship with a labour hire employee.

3.15

In relation to rostering and notice of shifts, the evidence of a number of labour hire agencies indicated that labour hire works best for the labour hire agency, employee and host when rostering and shift allocation are undertaken in a transparent and fair manner. Conversely, much evidence demonstrated that poorly managed rostering can have a significantly detrimental impact on labour hire workers and their families. Labour hire agencies should be encouraged to manage rostering so that notice and planning of shifts work for the mutual benefit of all parties involved in labour hire relationships. This issue is dealt with further in Recommendation 26, at 5.6.4.

Occupational health and safety

3.16

Under Victorian law, while labour hire agencies and hosts have shared obligations to safeguard the health and safety of workers placed at host sites, some ambiguities and 'grey areas' arise. That there is in some instances a lack of clarity in practice, as to the reach of duties owed as between a labour hire agency and host, is demonstrated by the evidence provided to the Inquiry about health and safety risks/breaches experienced by labour hire workers. This is despite what appear to be the best efforts of many labour hire agencies and hosts to ensure compliance with their obligations under the *Occupational Health and Safety Act 2004* (Vic).

3.17

A clear attempt has been made, in the Model Work Health and Safety Act, to overcome the ambiguities arising from the traditional approach to centering occupational health and safety obligations on employers (and independent contractors engaged by employers) in respect of employees (and deemed employees). The Model Act's imposition of occupational health and safety duties on persons conducting a business or undertaking in respect of the broadly defined category of workers, and the explicit inclusion in that definition of labour hire employees placed with a host, is a more appropriate regulatory approach to ensure the safety of labour hire workers than current Victorian regulation. This conclusion is strengthened once the 'horizontal' (concurrent) consultation obligation of relevant duty-holders is also taken into account.

Recommendation 5:

I recommend that the Model Work Health and Safety Act approach to regulating labour hire relationships be adopted in Victoria. In the absence of Victoria adopting wholesale the approach under the model laws, I recommend that Victoria adapt an approach which matches the substantive provisions under the model laws in this regard.

3.18

The evidence provided to the Inquiry indicates that some labour hire workers do not exercise their rights to report safety incidents, risks or hazards in the workplace – largely due to concerns that doing so may jeopardise their future engagement at the host's worksite, or their employment with the labour hire agency. This suggests that the framework for representation and protection of labour hire employees against victimisation for asserting their rights in occupational health and safety matters, by either the labour hire agency or the host, should be as robust as possible. Similarly, labour hire employees should have access to the same rights of representation in relation to occupational health and safety issues as other Victorian employees. However, the *Occupational Health and Safety Act 2004* (Vic) offers only limited protection to labour hire staff, particularly in respect of their treatment or representation at the main locus of activity: the host's worksite.

Recommendation 6:

I recommend that the Model Work Health and Safety Act approach to regulating to provide for worker representation and to protect workers against victimisation for asserting their rights in *Occupational Health and Safety Act 2004* (Vic) matters, by either a labour hire agency or a host should be adopted in Victoria. In the absence of Victoria adopting wholesale the approach under the model laws, I recommend that Victoria adapt an approach which matches the substantive protections under the model laws in this regard.

3.19

The evidence presented to the Inquiry shows that injury rates for labour hire workers are higher than for other Victorian workers; and that there is in some instances a lack of cooperation on the part of hosts with return to work arrangements for injured labour hire workers. However, noting the reservations expressed by the Hanks Inquiry and more recently by WorkSafe, I do not recommend any change or increase in the statutory duties owed by hosts in this area. Rather, best practice return to work arrangements should form part of the voluntary code of practice recommended at 5.6.4.

Recommendation 7:

An accurate picture of occupational health and safety risk factors in the labour hire sector, and of injured labour hire workers in Victoria, requires the establishment of an occupational injury and illness monitoring and reporting system that extends beyond injury compensation claims data. With such data available it would be possible to identify occupational health and safety risks for labour hire workers, and develop interventions to minimise or remove those risks. I recommend that the Victorian Government collect this data and, periodically, make it publicly available.

CHAPTER 4

Hazeldene's and Luke Martin – see 4.2.2

4.1

I find that Hazeldene's actions on the 24 February 2016 and 8 March 2016, including the issuing of the 24 February Letter and the 8 March Letter, may constitute detrimental action by Hazeldene's against Mr Martin in possible contravention of section 121 of the Inquiries Act. In particular, the 8 March Letter clearly states that Mr Martin's employment will be in jeopardy. I further consider that the two letters may constitute a threat of detrimental action of the same nature.

4.2

I find that the actions by Hazeldene's on 24 February 2016 and 8 March 2016, in providing Mr Martin with the 24 February 2016 Letter and the 8 March 2016 Letter, may have been taken for the substantial reason that Mr Martin provided information to the Inquiry – in possible contravention of section 121 of the Inquiries Act.

4.3

I have referred documents and information regarding Hazeldene's actions towards Mr Martin to Victoria Police, pursuant to section 116 of the Inquiries Act, for further investigation should Victoria Police consider it appropriate to do so.

Recommendation 8:

Section 121 of the Inquiries Act should be amended so that it applies not only to employer-employee relationships, but also to other relationships in which a worker carries out work for a business or undertaking.

Horticulture, meat and cleaning industries

4.4

There is evidence of non-compliant labour hire practices across various sectors of the Victorian economy. However evidence to the Inquiry, along with various other studies, media reports and other recent inquiries suggest that there are three industries in which non-compliance amongst labour hire agencies is particularly prevalent. These industries are: horticulture; meat and cleaning.

The extent of non-compliance with workplace and other laws involving labour hire agencies, in the horticulture, meat and cleaning industries in Victoria, detailed in chapter 4, requires a regulatory response. The various proposals for regulatory reform put forward by Inquiry participants, and the licensing scheme proposal which I recommend be adopted, are detailed in chapter 5 of this Report.

Accommodation and labour hire

4.5

I find, in respect of the conduct of Mr Serdar Donmez's job search business in the Mildura area:

- That Mr Donmez misrepresented the availability of work in the Mildura area to potential job search workers, which led them to travel to Mildura to use his services.
- That the fee paid by persons using his services was in fact paid in part for accommodation; and that the terms and conditions document which he required users of his services to sign, insofar as it provided for 'free' accommodation, was a sham designed to avoid regulatory requirements.
- That the accommodation provided by Mr Donmez was substandard as it was overcrowded with insufficient amenities.
- That a significant proportion of persons using Mr Donmez's services either left of their own accord or were evicted by him within a short time of arriving in the Mildura area, and where this occurred, Mr Donmez would not refund their $150 deposit and/or $300 two-week advance fee.
- That Mr Donmez falsely signed or refused to sign visa documentation (confirming that users of his services had completed the 88-day requirement to obtain a second year on their working holiday visa), irrespective of a job search worker's actual working hours.
- That Mr Donmez's business model was designed to avoid current regulation.

Further, I have referred documents and information regarding this matter to the Mildura Rural City Council and Consumer Affairs Victoria pursuant to s 116 of the Inquiries Act, for further investigation should those organisations consider it appropriate to do so.

4.6

It is apparent that the Victorian regulatory framework outlined in chapter 4 has not been effective to address the problems with provision of accommodation associated with labour hire arrangements, which have been illustrated in evidence provided to the Inquiry and from other sources. The incidence of these accommodation models appears to have grown extremely quickly, consistent with the general growth of labour hire arrangements and the use of temporary migrant workers over the last 10 years or so.

Recommendation 9

That the Victorian Government introduce legislation to amend the *Public Health and Wellbeing Act 2008* (Vic) to clarify the limitation applicable to the section 3 definition of prescribed accommodation, subparagraph (b), that the accommodation must be provided on payment of consideration. Circumstances where accommodation is provided notionally without charge, as part of a broader arrangement between the parties to the relevant transaction, should be included within the definition.

Recommendation 10

That the *Public Health and Wellbeing Act 2008* (Vic) section 3 definition of prescribed accommodation, subparagraph (c), be amended to reflect a wider range of working situations than simply the provision of accommodation by an employer to an employee under an award or contractual provision. The definition should include provision of accommodation to a worker by a labour hire operator, as part of the arrangement under which that operator facilitates the placement of the worker with a host.

The role of piece rates

4.7

The operation of the piece rate award provisions, particularly in the horticulture industry, creates the possibility that employees may be paid below the minimum hourly rate, and accordingly undermines the minimum safety net intended to be established by minimum hourly rates. In the horticulture industry, the safeguards which attach to piece rate systems do not appear to be utilised in practice. Further, the use of piece rates in that industry contributes to a level of subjectivity and uncertainty regarding what rate is payable to an employee, and underlies a number of problematic outcomes. In addition to the following recommendations, measures to address these issues are dealt with in Recommendation 26, at 5.6.4.

Compliance activities

Recommendation 11

The Victorian Government should advocate for the Fair Work Ombudsman to focus more of its compliance activity on underpayment/non-payment of award rates in the horticulture and meat industries; unlawful deductions (e.g. for accommodation) and the imposition of piece rate arrangements in those sectors; and sham contracting in the cleaning industry.

Recommendation 12

The Victorian Government should advocate for the Federal Government to implement, as quickly as possible, its 2016 election commitments to increase the Fair Work Ombudsman's investigatory powers and to increase the penalties applicable under the Fair Work Act for award breaches and failure to maintain proper employment records.

Chapter 5

A licensing system for labour hire agencies

5.1

The evidence provided to the Inquiry shows that there is a problem with the presence of 'rogue' labour hire operators in Victoria. While it is difficult to be precise about the extent of this problem, rogue operators are particularly evident in the horticultural industry (including the picking and packing of fresh fruit and vegetables), and the meat and cleaning industries. In many instances, the activities of rogue operators have led to exploitation of vulnerable workers including underpayment of award wages, non-payment of superannuation, provision of sub-standard accommodation and non-observance of statutory health and safety requirements.

This problem stems in large part from the ease of access, or absence of barriers to entry, for persons/organisations wishing to provide labour hire services in this state. In addition, the problem stems from the lack of visibility of these rogue operators, who operate in the informal economy and outside the reach of existing regulators.

The problem requires a regulatory solution which addresses each of these underlying causes: as the submissions of those advocating increased regulation demonstrate, there is a wide range of options available. In my view, a sector-specific licensing scheme for labour hire operators is the best of those options.

Recommendation 13:

I recommend that Victoria advocate through the Council of Australian Governments process for the national adoption of a sector-specific labour hire licensing scheme. As a national approach may take some time to develop – or may not eventuate at all – I recommend that Victoria lead the way in reforming the labour hire sector, through the introduction of its own sector-specific licensing scheme. In implementing this reform, Victoria should explore the opportunities for developing cooperative arrangements with other states.

5.2

In devising a regulatory scheme that will address the problem that has been identified by this Inquiry, I am concerned to ensure that the impact on the large proportion of reputable labour hire operators is minimised. Evidence presented to the Inquiry has shown that while reputable labour hire companies are generally compliant with applicable workplace laws (i.e. there is little if any evidence of exploitation), various other issues arise from the high use of labour hire arrangements in certain sectors (e.g. manufacturing, logistics, warehousing). These issues include the gradual replacement of permanent workforces with casualised labour hire staff, lower job security, differential wages/conditions (where a site enterprise agreement is not applied to labour hire employees) and concerns about rostering, minimal notice of shifts, difficulty managing carer/family responsibilities and uncertainty arising from shared occupational health and safety responsibilities. Some of these issues are addressed in other recommendations.

Recommendation 14

I recommend that Victoria introduce a licensing scheme for labour hire agencies, that is initially targeted at those supplying labour in the following specific sectors: the horticultural industry (including the picking and packing of fresh fruit and vegetables), and the meat and cleaning industries. I also recommend that capacity be provided within the framework for the proposed Victorian labour hire licensing system, allowing it to be expanded to cover other industry sectors, or to be contracted in response to changing (improved) practices in the regulated industries.

5.3

It is intended that the licensing scheme would apply to conventional labour hire relationships (e.g. the provision of workers by a labour hire agency to a host organisation to fill short-term vacancies or on a longer-term basis, to carry out seasonal work, to staff a particular business function or even to staff the entire business). The key requirement for application of the scheme would be the existence of the triangular relationship between the labour hire provider, a host organisation and a worker (although it would also apply in situations where the provision of worker(s) by provider to host occurs through an intermediary). It is not intended that the scheme would apply to contracting out or outsourcing arrangements, unless these involve a labour hire relationship of the type described above.

Recommendation 15:

The scheme which I am recommending would require that any person or organisation supplying a worker to another person/organisation (whether directly or through an intermediary), in the specific industry sectors (identified in Recommendation 14) in the state of Victoria, must be a licensed labour hire operator; and must only carry on such activity through a registered business or company. The precise definition of the sectors covered by the proposed licensing scheme could be identified from the Australian and New Zealand Standard Industrial Classifications (ANZSIC).

Recommendation 16:

To obtain a licence under the proposed Victorian labour hire licensing scheme, the labour hire operator would need to provide identifying details of the business through which they operate (e.g. Australian Business Number, Australian Company Number, business/company/trading name), and meet the criteria set out below. It is envisaged that the obligation would be imposed on licence applicants to provide a statutory declaration and information demonstrating their compliance (both initially to be licensed and then as a condition of remaining licensed) with the following criteria:

- **the business/company and its key personnel must pass an objective 'fit and proper person' test, which would include no past convictions for offences involving fraud, dishonesty or violence and no past involvement in insolvent businesses or breaches of workplace or occupational health and safety laws;**
- **the business/company must demonstrate (e.g. through employment records) that it pays its employees in accordance with the minimum rates specified in applicable industrial instruments, and affords its employees all other employment conditions (e.g. leave entitlements, rest breaks, limits on working hours) under those instruments and/or legislation;**

- the business/company must be registered with the Australian Taxation Office and be deducting taxation and remitting superannuation contributions on behalf of employees as required by federal legislation;
- if accommodation is provided to employees in connection with the arrangements they enter into with a labour hire business/company, the business/company must show that the accommodation meets the standards required under applicable Victorian/local authority laws and regulations;
- the business/company must be registered with WorkSafe and be paying any required premiums;
- the business/company must provide details of its systems for ensuring compliance with occupational health and safety legislation and ensuring the safety of workers provided to host organisations (including safety in the transportation of workers to the host's work-site, where the labour hire business/company is involved in such transportation); and
- the business/company must demonstrate compliance with federal migration laws, including systems for ensuring that all employees have a right to work in Australia.

Recommendation 17:

To the extent permissible under federal law, the labour hire licensing scheme should also require the business/company to provide specified information to the licensing authority relating to the numbers and categories of workers engaged on temporary work visas. This is to enable a clearer picture to be developed about the prevalence of temporary visa workers engaged by labour hire agencies in Victoria in the regulated sectors, and the type of visa those workers hold.

Recommendation 18:

A labour hire operator meeting the licensing criteria would have to pay an initial licence fee, and an annual fee for renewal of their licence.

Recommendation 19:

Accompanying the introduction of a sector-specific labour hire licensing scheme in Victoria, I recommend that hosts operating in the regulated sectors be subject to a legal obligation to use only a licensed labour hire provider.

Recommendation 20:

There should be a public register of all licensed labour hire operators. In addition, a system modeled on the Gangmasters Licensing Authority 'Active Check' service could be implemented to assist host organisations to ensure they are using licensed providers (including through updates on any changes to, or revocation of, issued licences).

Recommendation 21:

Civil liability provisions and/or criminal offences should be created in respect of the following:

- a labour hire provider operating in the regulated sectors without holding a licence; and
- a host organisation using the services of an unlicensed operator.

In addition, liability provisions/offences should be created in respect of the following actions on the part of a labour hire business/company covered by the licensing scheme:

- the business/company must not coerce or restrict a worker's freedom of movement in any way (e.g. by entering into unfair debts/loans, retention of migration papers or refusal to sign off on the 88-day requirement for obtaining a second year working holiday visa);
- the business/company must not sub-contract the provision of a worker through a non-licensed operator; and
- the business/company must not provide false or misleading information to the licensing authority.

Recommendation 22:

The Victorian Government should explore whether the Business Licensing Authority would be the appropriate body to administer the proposed labour hire licensing scheme, or whether a specific licensing authority should be established.

Recommendation 23:

The licensing authority should maintain the public register of licensed labour hire operators.

Recommendation 24:

As far as possible, the emphasis should be on licence applicants and licence-holders providing the information required to demonstrate that they meet the criteria for issuing/renewing a licence. Licensing authority staff would approve or reject applications for new licences or renewals objectively on the basis of the information presented.

Recommendation 25:

Legislation establishing the proposed labour hire licensing scheme will also need to address:

- the rights of persons from whom enforcement officers seek information;
- the obligations of licence-holders to provide information;
- data protection and the powers of the licensing authority to share that information for law enforcement and compliance purposes (e.g. with Victoria Police, the Fair Work Ombudsman, the Australian Taxation Office);
- the powers and conduct of licensing enforcement officers (whether engaged by the licensing authority or through a new entity);
- the processes for complaints, dispute resolution, and appeals (including appeals against licensing decisions or processes to revoke a licence); and
- A voluntary code for labour hire agencies

A voluntary code for labour hire agencies

5.4

In addition to the proposed licensing scheme, a range of issues have been considered throughout this Report in respect of which I have identified practices of labour hire agencies which are not unlawful, but might be considered unfair and/or which have the effect of labour hire workers being treated differently from other workers. These are matters which

a responsible labour hire industry could go a long way towards addressing by modifying its own conduct, and setting/promoting standards of best practice that all labour hire agencies could aspire to meet.

This is a process which should be encouraged and facilitated by the Victorian Government, ensuring that all relevant stakeholders have a voice in the development of those standards in the form of a voluntary code of practice for the labour hire industry.

Recommendation 26:

I recommend that through a tripartite process involving government, representatives of the labour hire industry and representatives of labour hire workers, the Victorian Government develop a voluntary code of practice for the labour hire industry. The code would establish best practice requirements for labour hire employment arrangements, including in the following areas:

- **Contractual arrangements between labour hire agencies and hosts, and labour hire agencies and their workers, should not include terms which prevent or hinder a labour hire employee from obtaining direct employment with a host, or terms requiring an employee to pay a fee or commission to a labour hire company in order to obtain work.**
- **Labour hire agencies should adopt fair processes in decisions leading to dismissal of labour hire employees, and should not not use the contractual relationship between the labour hire agency and host to defeat the rights of a dismissed employee to seek a remedy.**
- **Labour hire agencies should be encouraged to manage rostering so that notice and planning of shifts work for the mutual benefit of all parties involved in labour hire relationships.**
- **Labour hire agencies should adopt a best practice approach to the use of piece rates in sectors such as the horticulture and meat industries, including fair and transparent processes for entering into piece rate arrangements, and should not use piece rates as a device to pay workers below the minimum time based rate of pay.**

CHAPTER 6

Insecure work

6.1

Insecure work can arise in working arrangements which are traditional, standard or long standing. Similarly, forms of work which have lower levels of regulatory protections for workers can nonetheless be secure, due for example to demand for a worker's skills. However, there are certain forms of engagement which, because of their lower level of regulatory protections, are more likely to provide the environment for worker insecurity. These include casual and fixed term employment, which are examined in chapter 6, and independent contracting which is examined in chapter 8.

6.2

The very notion of insecure work was challenged by many employer submissions to the Inquiry. However, I heard extensive evidence about the extent and impact of non-permanent working arrangements – especially casual and fixed term engagement – that demonstrated characteristics commonly described in the Australian and international literature on insecure or precarious work. To some extent, the label attached to these arrangements is immaterial. It is more important to focus attention on the outcomes for workers, which frequently include financial insecurity, difficulty planning and saving for the future, and stress (including in the management of working time and family commitments). Many workers in this kind of position would prefer more ongoing or permanent forms of work.

6.3

The shift to more flexible forms of engagement is, like the evolution of labour hire examined earlier in this Report, now an entrenched feature of the Australian labour market and the broader economy. The data examined in chapter 6 also demonstrates, however, that after an intensification in the adoption of alternative forms of employment from the 1980s its growth has recently plateaued. I recognise that there have been legitimate drivers for businesses to utilise the various non-permanent modes of engaging workers.

CHAPTER 7

Temporary migrant worker visa programs

7.1

There is some evidence of non-compliance with workplace laws affecting 457 visa holders and Seasonal Worker Program participants. However, there is a much more extensive body of evidence – including evidence provided to this Inquiry, other recent inquiries, and in recent academic studies, media and other reports - demonstrating that Working Holiday Maker and student visa holders in Australia are being subjected to exploitation in the labour market. These exploitative practices are occurring in the Victorian horticulture and food services sectors, among others.

7.2

Whilst the Working Holiday Maker and student visa schemes do not have work as their primary purpose, in practice they are the predominant mechanism by which temporary migrant work is undertaken in Australia, dramatically outweighing the use of 457 and Seasonal Worker Program visa programs. This reality should be acknowledged by the Federal Government, industry and the community.

7.3

There is a fundamental lack of cohesion in Australia's framework for permitting work to be performed by temporary migrant workers. Whilst Australia's 'formal' temporary work visa programs are designed based on criteria relating to demonstrable labour market need, coupled with safeguards for temporary migrant workers, these are not features of the temporary migrant work arrangements facilitated by the Working Holiday Maker and student visa streams.

7.4

The addition of appropriate safeguards to ensure the fair treatment of overseas workers holding Working Holiday Maker and student visas is for the most part a matter for the Federal Government to address. This could include encouraging the Fair Work Ombudsman to devote additional resources to ensuring that Working Holiday Maker and student visa holders are aware of their employment rights; and to bringing enforcement proceedings in suitable cases. The Victorian Government also has a role to play in this area.

Recommendation 27:

I recommend that the Victorian Government consider further funding measures to provide assistance to temporary visa workers through established community organisations and networks, including the provision of employment rights information to international students through Victorian universities.

Gendered nature of insecure work

7.5

It is clear from evidence provided to the Inquiry and academic and other sources that the working arrangements commonly associated with insecure work, especially casual and fixed term work, disproportionately affect women – with detrimental consequences for women's financial security, control over working hours and career advancement.

CHAPTER 8

Independent contractors

8.1

Genuine independent contracting is a legitimate business arrangement, and as a mode of work can afford flexibility, autonomy, recognition and reward which goes beyond that which would be available in an employment relationship. A genuine independent contractor with a successful business may well have equal or greater work security than an employee due to these factors.

8.2

There is considerable evidence that where independent contracting arrangements are entered into by workers because they are essentially a requirement of a particular market or industry, they are not beneficial for those workers (irrespective of the genuineness or otherwise of the independent contracting arrangement). For example, the Inquiry heard of considerable detrimental impacts regarding rates of pay, predictability of working hours and occupational health and safety issues for tip truck owner drivers and parcel delivery contractors in the postal industry.

8.3

Evidence suggests that there remain an indeterminate but not insignificant proportion of independent contracting arrangements which are not genuine, and are designed instead to disguise an employment relationship in order to avoid the regulation associated with that relationship.

8.4

Many submissions proposed a statutory definition of independent contracting, or other regulation directed at limiting the mischaracterisation of employees as independent contractors. However, recent decisions suggest an increasing willingness by the courts to assess the genuineness of independent contractor arrangements by considering whether the worker is genuinely working in his or her own business, rather than for the business of the other party. The common law test has proved to be flexible enough to permit an assessment of the true nature of an engagement, irrespective of its label. I do not consider it desirable to replace the common law test with a statutory test.

Further, the *Independent Contractors Act 2006* (Cth) significantly curtails Victoria's capacity to regulate independent contractor relationships, and accordingly the Victorian Government is limited in its ability to direct address most of the concerns raised by critics of independent contracting arrangements. However, Victoria can advocate for changes to improve the regulatory framework for independent contractor arrangements operating under federal law.

8.5

A key issue raised with the Inquiry, and which has been the subject of consideration in a number of other inquiries, is the effectiveness of the Fair Work Act sham contracting provisions. In particular, the prohibition on employer misrepresentation of an employment contract as a contract for services in s 357 does not apply where the employer did not know and was not reckless as to whether the contract was a contract of employment or a contract for services.

8.6

The Productivity Commission Workplace Relations Framework Report noted that the Fair Work Act post-implementation review recommended replacing the recklessness test in Fair Work Act s 357(2) with a reasonableness test, and went on to make a similar recommendation. I agree with that analysis.

Recommendation 28:

The Victorian Government should advocate for changes to s 357 of the Fair Work Act in any consultation processes instigated by the Federal Government over implementation of the Productivity Commission's Workplace Relations Framework Report, so that it is unlawful to misrepresent an employment relationship or proposed employment arrangement as an independent contracting arrangement where the employer could be reasonably expected to know otherwise.

8.7

I note the approach proposed by the Information Technology, Contract and Recruitment Association of a 'Fair Engagement Checklist,' based on a minimum hourly rate and other factors, as a tool for businesses to ensure contracting relationships are genuine and non-coercive.

Recommendation 29:

I recommend that the Victorian Government develop and promote a fair engagement checklist for the engagement of independent contractors.

Transport industry regulation

8.8

In light of the issues described at 8.2.4, there is merit in the Transport Industry Council exploring whether a comprehensive, industry-specific rates and costs schedule and/or code could be developed for the tip truck industry. I note that the particular features which the Transport Workers Union seeks to have incorporated in such a schedule go beyond the present scheme of the *Owner Drivers and Forestry Contractors Act 2005* (Vic), which is primarily facilitative rather than mandatory. However, a facilitative scheme could go some way towards addressing the particular issues in that industry.

Recommendation 30:

I recommend that the Victorian Transport Industry Council give consideration to developing a comprehensive, industry based rates and costs schedule and/or code under the *Owner Drivers and Forestry Contractors Act 2005* (Vic) which would apply to the tip truck industry. This schedule should be primarily facilitative, and not mandatory in nature.

8.9

Another issue with the application of the present scheme to the tip truck industry is the threshold at which the requirement for a hirer to provide a driver with the relevant rates and costs schedule is triggered. The *Owner Drivers and Forestry Contractors Act 2005* (Vic) requires hirers to provide a copy of the relevant schedule to an owner driver only where the owner driver is hired for a period of at least 30 days, or more than 30 days within a three month period. As the evidence from the Transport Workers Union demonstrated, the ad hoc nature of engagement of tip truck drivers may mean that these threshold requirements are sometimes not satisfied.

Recommendation 31:

I recommend that the Victorian Government review the threshold requirements upon hirers to provide the applicable rates and costs schedule to owner drivers under s 16 of the *Owner Drivers and Forestry Contractors Act 2005* (Vic), so as to ensure that the requirement is triggered based on the usual hiring practices in the tip truck industry.

Industry-based supply chain regulation

8.10

Financial pressures from parties higher up the supply chain have the potential to significantly influence the employment practices of parties at the bottom of the supply chain. This pressure can work both ways, in that it may lead to detrimental outcomes for workers, or it may alternatively be used to promote improvements in employment conditions within the supply chain. Steps by major retailers to effect changes to exploitative working arrangements within their own supply chain are positive and should be encouraged.

Recommendation 32:

I recommend that the Victorian Government take steps to encourage and facilitate the implementation of industry based supply chain regulation by major retailers, addressing exploitation of workers within those supply chains.

CHAPTER 9

Insecure work

9.1

While the very concept of insecure work was strongly contested by some employer groups, I heard many compelling accounts of the extent and impact of non-permanent working arrangements – especially casual and fixed term engagement – experienced by Victorian workers. The outcomes for these workers frequently include financial insecurity, difficulty planning and saving for the future, and stress (including in the management of working time and family commitments).

9.2

Each of the proposals suggested by Inquiry participants for addressing insecure work is squarely within the scope of the Federal Government's regulatory power. For the most part, the various types of insecure work examined in this Report, and factors contributing to insecure work, are matters that can only be regulated at the federal level, given the Federal Government's constitutional powers and Victoria's referral of industrial relations powers.

In addition, many of the proposals are being independently considered in other forums. Rather than traverse what are in some instances well worn debates about many of these issues, I have sought instead to focus on specific actions which may be taken by the Victorian Government, to address those issues which were most prominently raised with the Inquiry.

9.3

The Victorian Government has a potentially important role to play in promoting the adoption of more secure forms of engagement in the labour market. In particular, there are three key mechanisms through which Victoria should pursue this objective.

Victorian Government as employer

9.4

The Victorian Government already has in place a number of commitments to utilise secure forms of engagement in respect of its own public sector workforce, including in the Public Sector Industrial Relations Policies 2015 and the Victorian Public Service Enterprise Agreement 2016.

9.5

The extent to which these various broad principles and commitments relating to secure employment are being observed, in practice, by the Victorian Government is unclear. There is an information gap in respect of these matters, which it is desirable to fill.

Recommendation 33:

I recommend that the Victorian Government, in conjunction with affected employees and their representatives, develop and implement a process for monitoring and assessment of the extent to which the secure employment commitments in the Victorian Public Service Enterprise Agreement 2016 are being adhered to; the extent to which enterprise agreements across the Victorian public sector include similar commitments to limit fixed term and casual forms of engagement; whether such commitments are being observed in practice; any barriers to their observance, and how these may be overcome.

9.6

Whilst I am unable to reach any conclusion about the extent of, or reasons for, the use of fixed term contracting in public education, in my view, its use should be minimised. I do not propose a wholesale revision of the manner in which the Victorian Department of Education and Training organises its recruitment and selection of staff, as I recognise that there will be broader implications which I have not been able to examine. However, in light of the evidence I have heard about the detrimental effects of fixed term contracting on the employees involved, I would encourage the Department of Education and Training to explore alternatives to mitigate against those adverse effects wherever possible.

Recommendation 34:

I recommend that the Victorian Government through the Department of Education and Training, in conjunction with affected employees and their representatives, review available data on the extent and reasons for use of fixed term employment in public schools, identify areas where its use can be minimised, and implement alternatives to its use.

Victorian Government procurement

9.7

Professor John Howe's extensive body of work has examined the use and effectiveness of government procurement programs to drive particular labour market outcomes. Governments have increasingly utilised the option of 'making government purchases of goods and services conditional upon contractors and supply chains observing desired labour practices linked to job quality', as a 'soft law' alternative to directly imposing employment regulations. Federal and state governments in Australia (including the Victorian Government) have long used procurement mechanisms to pursue various workplace reform and policy objectives in the construction industry.

9.8

In light of the limits on the Victorian Government's legislative power to address the various issues relating to insecure work which were raised with this Inquiry, use of its own purchasing power is an obvious alternative mechanism to effect changes in the employment practices of private sector businesses. Of course, promotion of secure work practices throughout government supply chains would need to be balanced against existing purchasing criteria including value for government expenditure, accountability, probity and minimisation of risk.

Recommendation 35:

The Victorian Government should establish procurement principles or standards that must be met by successful tenderers for a range of contracts with government departments and agencies, including those for the provision of IT, cleaning, security, transport, hospitality and other similar services. The precise application and limits of the scheme (including whether it should apply only to contracts above a specified monetary value) will need to be determined with reference to other competing procurement criteria. The principles/standards should be objective and measurable, however they should be directed towards requiring the successful tenderer to demonstrate that:

- **The organisation predominantly engages workers in secure employment, rather than as casuals or on fixed term contracts (this could be assessed on the basis of the tenderer's provision of information about the composition of its workforce).**
- **Independent contractor relationships are genuine rather than sham arrangements.**
- **Employees are receiving at least the wages and conditions under any applicable industrial instruments (award or enterprise agreement), and applicable legislation (e.g. National Employment Standards under the Fair Work Act, federal superannuation legislation, Victorian long service leave legislation).**
- **Proactive arrangements are in place to ensure health and safety compliance through the tenderer's occupational health and safety management system.**
- **The cost structure of the tender submitted clearly demonstrates how workers will be accorded their legal employment entitlements over the life of the contract.**
- **Appropriate contractual arrangements require any further subcontracting by the primary contractor to include the above principles/standards as a term and condition applicable to the subcontractor's provision of services.**

Best practice standards

9.9

With the exception of a labour hire licensing body (if existing business licensing arrangements cannot be utilised), I am not inclined to recommend that the Victorian Government establish a new body in addition to existing state bureaucracy to implement the various measures which I have recommended throughout this Report.

The measures I am recommending would allow the Victorian Government to play a positive role in the development of best practice standards to address insecure work, through a range of non-legislative or soft law techniques, either in the public sector, or in the private sector through government procurement.

1. INTRODUCTORY MATTERS

On 10 September 2015, the Minister for Industrial Relations, the Hon. Natalie Hutchins MP, announced the establishment of an independent Inquiry into the Labour Hire Industry and Insecure Work (**the Inquiry**).

On 13 October 2015 the Inquiry was established by instrument (**the Establishing Instrument**), and I was appointed to chair the Inquiry. Minor amendments were subsequently made to the Establishing Instrument on 9 March 2016 and 11 July 2016.

The Inquiry constitutes a Formal Review under Part 4 of the *Inquiries Act 2014* (Vic) (**Inquiries Act**).

The Establishing Instrument requires me to provide a final report to the Premier and the Minister for Industrial Relations by 31 August 2016, following the granting of my request for a one-month extension to the original time-frame of 31 July 2016.

1.1 Terms of Reference

(a) The extent, nature and consequence of labour hire employment in Victoria, including but not limited to:

i. the employment status of workers engaged by labour hire companies;

ii. the use of labour hire in particular industries and/or regions;

iii. the use and impact of labour hire arrangements in the supply chains of particular sectors, and the roles and responsibilities of various entities in those supply chains;

iv. the application of industrial relations laws and instruments;

v. the legal rights and obligations of labour hire employees, companies and host organisations/entities and any ambiguity that exists between them;

vi. allegations that labour hire and sham contracting arrangements are being used to avoid workplace laws, and other statutory obligations, and the current effectiveness of the enforcement of industrial relations, occupational health and safety and workers compensation laws;

vii. the need for labour hire companies and host organisations/entities to provide workers with suitable accommodation; and

viii. the extent and impact on long-term workforce needs of the practice of replacing permanent employees, apprentices and trainees with labour hire workers.

(b) The extent, nature and consequence of other forms of insecure work in Victoria, including but not limited to:

i. the use of working visas, particularly in insecure, low paid, unskilled or semi-skilled jobs and trades;

ii. exploitation of working visa holders and other vulnerable classes of workers including female workers;

iii. sham contracting and the use of 'phoenix' corporate structures;

iv. the impact of insecure work on workers, their families and relationships, and on the local community, including financial and housing stress;

v. the social and economic impacts for Victoria; and

vi. the ways in which unscrupulous employment practices create an uneven playing field for competing businesses.

(c) In making recommendations, the Inquiry should have regard to matters including:

i. the limitations of Victoria's legislative powers over industrial relations and related matters and the capacity to regulate these matters;

ii. the powers of the Commonwealth as they extend to work visas;

iii. regulation in other Australian jurisdictions and in other countries, including how other jurisdictions regulate labour hire;

iv. the impact, benefits, or possible drawbacks of any regulatory regime applying to labour hire businesses, on Victorian business;

v. the ability of any Victorian regulatory arrangements to operate in the absence of a national approach;

vi. regulatory mechanisms to meet the objectives of protecting the rights of vulnerable workers; and

vii. Australia's obligations under international law, including International Labour Organisation Conventions.

1.2 Conduct and procedures of the Inquiry

Section 99 of the Inquiries Act provides that a Formal Review may conduct its inquiry in any manner it considers appropriate, subject to the requirements of procedural fairness, the Establishing Instrument and the requirements of the Inquiries Act, regulations and any other Act.

The Establishing Instrument for the Inquiry provides that this process will include, but is not limited to:

a) *obtaining written submissions from interested persons and organisations. For the avoidance of doubt, this includes publication of submissions, other than a submission (or part of a submission) that the author has asked be kept confidential, or a submission that the Chair has determined should remain confidential, to the public at large;*

b) *conducting consultations and interviews with interested persons and organisations;*

c) *conducting public meetings in regions particularly affected by matters raised in the Terms of Reference;*

d) *conducting a literature review for the purpose of publishing a Background Paper for consultation and/or other reference material to assist persons making submissions to the inquiry, and to support preparation of the inquiry reports;*

e) *conducting a review of available statistical data; and*

f) *conducting research into the activities of other jurisdictions regarding matters relevant to the inquiry.*

The Establishing Instrument further provides that interested persons or organisations may include, but are not limited to:

a) *relevant regulatory agencies;*

b) *peak bodies for employment services;*

c) *labour hire companies;*

d) *significant users of labour hire or supply chains in Victoria;*

e) *workers of labour hire companies;*

f) *workers in insecure work;*

g) *workers working pursuant to working visas;*

h) *trade unions and the ACTU;*

i) *employer or industry organisations;*

j) *representatives of vulnerable and migrant workers;*

k) *regional councils, employer or employee groups;*

l) *migration agents; and*

m) *academics.*

1.3 Engagement with the Victorian community

From its inception the Inquiry actively engaged with the Victorian community to generate interest and participation. Key mechanisms for engagement included the following.

1.3.1 Inquiry website

The Inquiry website: www.economicdevelopment.vic.gov.au/labourhireinquiry was a key communication interface with the Victorian community. It included Inquiry publications such as fact sheets, a short video message from the Chair, published submissions, and information about hearings.

The website also contained information about the Inquiry in Arabic, Chinese, Hindi, Korean, Persian and Vietnamese. These languages were chosen following consultation to reflect key languages for Victorian workers from migrant backgrounds.

1.3.2 Background paper

On 16 October 2015, the Inquiry, with the assistance of the Secretariat provided by Industrial Relations Victoria (**IRV**), published a Background Paper[1] calling for written submissions from interested participants. Whilst not intended to exhaustively cover all matters relevant to the Terms of Reference, the Background Paper provided an overview of material relevant to the Inquiry's Terms of Reference, and proposed a range of questions for participants to address in their submissions. Interested individuals and organisations were also encouraged to address any additional matters considered relevant.

1.3.3 Direct stakeholder contact

The Inquiry established a stakeholder contact database of over 200 interested persons and organisations including unions, employer groups, ethnic community councils and migrant organisations, labour hire agencies, backpackers, media contacts, community organisations and academics. The database was updated as the Inquiry progressed. The database was used to communicate directly with stakeholders by both email and letter, including to:

- notify them of the release of the Background Paper and provide a copy;
- invite submissions to the Inquiry; and
- invite participation in a public hearing.

In addition, in the course of preparation for each regional hearing, the Inquiry Secretariat gathered information on local organisations with a potential interest in the subject matter of the Inquiry, and contacted them directly by telephone or email to invite them to attend a hearing and/or make a submission. Approximately 60 additional persons and organisations were approached in this manner, resulting in significant local representation at Inquiry hearings.

Finally, the Inquiry email address: labourhire.inquiry@ecodev.vic.gov.au facilitated direct email contact from a large number of additional organisations and individuals.

1.3.4 Advertising and media

The Inquiry took a proactive approach to raising awareness through media coverage, including both paid advertising and media reporting, in order to maximise participation in and engagement with the Inquiry by the Victorian community.

1. Victorian Inquiry into the Labour Hire Industry and Insecure Work, *Background Paper*, (October 2015).

Advertisements calling for submissions were placed in the *Herald Sun, Weekly Times*, major regional newspapers and major ethnic community newspapers. Targeted social media advertising was also used. Prior to Inquiry public hearings, paid advertisements were placed in relevant metropolitan, regional or local papers. Key journalists in relevant metropolitan, regional and local newspapers, television and radio stations were advised of the hearings. I conducted targeted interviews with television, radio and print outlets prior to the commencement, and (in some instances) at the conclusion, of the public hearings.

There were over 90 media news stories, telecasts and broadcasts regarding the Inquiry between September 2015 and July 2016. These are listed in ATTACHMENT A.

1.4 Submissions

The Inquiry achieved a very high level of engagement and participation through receipt of written submissions from interested persons and organisations.

The Inquiry received 695 primary submissions, comprising 91 from organisations and 604 from individuals.[2]

The Victorian Trades Hall Council (**VTHC**) and the National Union of Workers (**NUW**) engaged closely with the Inquiry soon after its establishment, to propose a mechanism for collecting submissions on behalf of individual workers through an online portal. The Inquiry worked with those organisations in finalising the form of the portal, and the mechanism for receiving these submissions. This innovative approach proved highly successful, resulting in 583 submissions from individual workers, who otherwise would have been difficult for the Inquiry to reach. These submissions are referred to throughout the Report. In addition, a table summarising key features of the workers' submissions is contained in SCHEDULE 1 of the Report.

The Inquiry also invited participants to make supplementary submissions, confined in scope to specifically addressing matters raised in primary submissions or public forums. The Inquiry received nine supplementary submissions.

A list of persons and organisations that made submissions is contained in ATTACHMENT B.

2. The Inquiry has referred throughout this Report to a selection of submissions relevant to the particular issues being considered. Notwithstanding that not all submissions are referred to, each submission received by the Inquiry has been read and considered.

Table 1.1 provides a further breakdown of the nature of persons and organisations from which primary submissions were received:

Table 1.1: Breakdown of submissions received

Number	Category
29	Unions
16	Employer bodies or industry bodies
10	Labour hire agencies
21	Individuals
12	Community organisations
21	Academics, law firms and public policy organisations
3	Government agencies and members of Parliament, including internationally
121	Individuals via the Victoria Trades Hall Council submission portal
28	Individuals via the Construction, Forestry, Mining and Energy Union submission portal
110	Individuals via the Australian Education Union submission portal
34	Individuals via the Australian Manufacturing Workers' Union submission portal
137	Individuals via the National Union of Workers submission portal
98	Individuals via the National Tertiary Education Union submission portal
55	Individuals via the Australian Nursing and Midwifery Federation submission portal

1.5 Hearings

The Inquiry also attracted a high level of attendance by interested participants at its public hearings.

The procedures of the Inquiry's public hearings are reflected in *Practice Direction No 1 – Conduct of Hearings of the Inquiry*, issued on 20 November 2015. A copy of Practice Direction No 1 is contained in ATTACHMENT C.

The Inquiry conducted 17 days of public hearings across Victoria, commencing in Mildura on 23 November 2015 and concluding in Morwell on 1 March 2016. Hearings were also held in Dandenong, Geelong, Melbourne CBD, Shepparton, Melton and Ballarat. The Inquiry heard from a total of 221 individual witnesses during 113 hearing sessions. Eighty-three hearing sessions were public and 53 witnesses provided information in 30 closed hearing sessions.

Table 1.2 provides a breakdown of the nature of persons and organisations from which information was received at hearings:

Table 1.2: Breakdown of hearing participants

Number	Category
25	Unions and union peak bodies
20	Industry bodies, businesses and users of labour hire
19	Labour hire agencies
60	Individual workers
21	Community organisations, community members and government representatives
1	Accommodation providers

A list of organisations which provided information at a hearing is contained in ATTACHMENT D.

On 25 May 2016, the Inquiry conducted a forum involving academic contributors and policy-based organisations, to examine a range of academic and policy material brought to the Inquiry's attention through submissions. This was an invaluable opportunity for the Inquiry to hear a range of experts discuss their work in areas relevant to the Inquiry. A list of academic forum attendees is contained in ATTACHMENT E.

The Inquiry's close engagement with the peak body for on-hire agencies in Australia, the Recruitment and Consulting Services Association (**RCSA**), proved invaluable in facilitating the appearance of several diverse labour hire agencies at Inquiry hearings. The evidence of these labour hire agencies from hearings (along with material received through submissions) is referred to throughout the Report. In addition, a table summarising key features of the submissions and evidence of labour hire agencies is contained in SCHEDULE 2 of the Report.

1.6 Informal consultations

In addition to receiving submissions and holding hearings, the Inquiry conducted a series of informal private meetings with a range of stakeholders.

Whilst the Inquiry has not relied upon the information obtained through these meetings in making findings, the meetings were nonetheless important for explaining the work of the Inquiry to stakeholders, obtaining the frank views of stakeholders and assisting the Inquiry in identifying issues to explore through the Inquiry's more formal processes.

In addition, I was able to organise a series of consultations, coinciding with a previously-planned trip to the United Kingdom in March 2016. The UK Gangmasters' Licensing Authority **(GLA)**, which itself made a submission to the Inquiry, facilitated meetings for me with a range of government agencies and other organisations involved in addressing issues relating to labour hire/agency work, insecure work, migrant workers and measures to address labour market exploitation in the UK and the European Union. These meetings were of great assistance in understanding the activities of other jurisdictions in addressing matters relevant to the Inquiry.

A list of organisations with which the Inquiry conducted informal consultations is contained in ATTACHMENT F.

1.7 Direct requests for information

In addition to the above, the Inquiry wrote directly to over 100 persons or organisations named in submissions and evidence to the Inquiry, in order to draw attention to relevant evidence and give them an opportunity to provide information in response, if they wished to.

As a result of this process, the Inquiry received 17 responses providing information. Where this Report includes reference to evidence in respect of which a response has been received, the response is also reflected in the Report.

1.8 Other sources of information relevant to the Inquiry

Separate to its work in gathering relevant information from members of the public and interested stakeholders, the Inquiry reviewed a large volume of additional material, which informed the content of this Report. This included:

- a large volume of Australian and international academic literature regarding matters relevant to the Inquiry;

- various statistical data, including from the Australian Bureau of Statistics (**ABS**); IBISWorld; the Victorian Workplace Industrial Relations Survey 2008 (**VWIRS**); and the Household, Income and Labour Dynamics in Australia (**HILDA**) Survey, conducted by the Melbourne Institute at the University of Melbourne;
- material relating to regulatory models in other comparable jurisdictions relevant to issues raised by the Terms of Reference; and
- decided cases, legislation and various sources of commentary regarding the applicable legal framework in Victoria, around Australia and in comparable jurisdictions.

Issues relevant to the Inquiry were the subject of considerable public attention during the course of the Inquiry and were the subject of concurrent examination, reporting and legislative proposals in a number of other jurisdictions. This material has informed the Inquiry's consideration of relevant issues throughout this Report. Activity of this nature included:

- A Queensland Government parliamentary inquiry into labour hire, which reported in June 2016 (**Queensland Inquiry Report**).[3]
- A Senate inquiry into the temporary work visa regime, whose report, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, was released in March 2016 (**Senate Work Visa Report**).[4]
- A Commonwealth Parliament Joint Standing Committee inquiry into the seasonal worker programme, which reported in May 2016 (**Seasonal Worker Program Report**).[5]
- A Commonwealth Ministerial Working Group, established in October 2015, to consider policy options to protect vulnerable foreign workers in Australia. The Ministerial Working Group reportedly considered a range of options including a labour hire licensing scheme.[6] This followed on from the establishment in July 2015 of Taskforce Cadena, a joint operation between the Commonwealth Department of Immigration and Border Protection, Australian Customs and Border Protection Services and the Fair Work Ombudsman (**FWO**), to conduct operations targeting visa fraud, illegal work and the exploitation of foreign workers particularly in the labour hire industry.[7] Separately, FWO was also reportedly inquiring into the terms and conditions of working holiday visa holders and whether they are being exploited by employers.[8]
- A South Australian Government parliamentary inquiry,[9] established on 11 June 2015. Submissions to the South Australian inquiry closed on 27 July 2015. The Committee heard evidence between November 2015 and 17 March 2016. As at 17 August 2016, it had not released a report.

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3. Parliament of Queensland, Finance and Administration Committee, *Inquiry into the practices of the labour hire industry in Queensland,* Report no. 25, 55th Parliament (June 2016).
4. Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (17 March 2016).
5. Parliament of Australia, Joint Standing Committee on Migration, *Seasonal Change - Inquiry into the Seasonal Worker Program* (May 2016).
6. Senator The Hon Michaelia Cash, *Ministerial Working Group to help Protect Vulnerable Foreign Workers,* Media Release (15 October 2015).
7. House of Representatives, Questions in Writing, *Foreign Workers (Question No. 1556)*, 23 November 2015.
8. FWO, *Fair Work Ombudsman to review entitlements of overseas visa-holders on working holidays*, Media Release (4 August 2014), at: https://www.fairwork.gov.au/about-us/news-and-media-releases/2014-media-releases/august-2014/20140804-working-holiday-entitlements-review.
9. The Parliament of South Australia, Economic and Finance Committee, *Inquiry into the Labour Hire Industry*.

In addition, both major political parties went to the federal election in July 2016 with policies to address concerns about labour market exploitation, particularly in respect of vulnerable migrant workers. These policies are examined at 5.4.2. Further, in 2015 the Australian Greens introduced a bill to enable employees of a franchisee to recover any unpaid wages or other entitlements from the franchisor or its head office entity.[10] This is also examined further at 5.4.2 and 8.3.2.

The Inquiry has also had regard to past inquiries and consultations into matters which touch upon the Terms of Reference, where relevant. These past inquiries and reviews include:

- The Australian Government, Productivity Commission, *Inquiry into the Workplace Relations Framework* (**PC Workplace Relations Framework Report**), including an examination of alternative forms of work, sham contracting, subcontracting, labour hire, and migrant workers. The PC Workplace Relations Framework Report was released on 21 December 2015.[11]
- Australian Government, Fair Work Ombudsman, *A report on the Fair Work Ombudsman's Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales*, June 2015 (**Baiada Inquiry Report**).
- Australian Government, Fair Work Ombudsman, *Inquiry into the Victorian Department of State Development and Business Innovation – labour hire and independent contractor arrangements, Inquiry Findings*, February 2015.
- John Azarias, Jenny Lambert, Peter McDonald and Katie Malyon, *Robust New Foundations*, Independent review into Integrity in the Subclass 457 Programme, September 2014 (**Azarias Report**).
- Andrew Stewart and Rosemary Owens, Adelaide Law School, *Experience or Exploitation?*, Report for the Fair Work Ombudsman, January 2013.
- Pricewaterhouse Coopers, Report for the Australian Government, Fair Work Ombudsman, *Phoenix Activity – Sizing the problem and matching solutions*, June 2012.
- Fair Work Building and Construction, Report prepared by TNS Consultants, *Working arrangements in the building and construction industry: further research resulting from the 2011 Sham Contracting Inquiry*, December 2012.
- Australian Government, Office of the Australian Building and Construction Commissioner, *Sham Contracting Inquiry Report*, 2011 (**Sham Contracting Inquiry**).
- Australian Council of Trade Unions, Report of the Independent Inquiry into Insecure Work in Australia, *Lives on Hold – Unlocking the potential of Australia's Workforce*, 2012 (**2012 Howe Inquiry**).
- Parliament of Victoria, Economic Development Committee, Inquiry into Labour Hire Employment in Victoria, *Interim Report, December 2004 and Final Report, June 2005* (**2005 Victorian Inquiry Report**).
- Parliament of Australia, House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation Committee, Making it Work: Inquiry into independent contracting and labour hire arrangements (Canberra, August 2005) (**2005 Independent Contracting Report**).

10. Fair Work Amendment (Recovery of Unpaid Amounts for Franchisee Employees) Bill 2015.

11. Productivity Commission, *Workplace Relations Framework: Inquiry Report* (Volumes 1 and 2), No. 76 (30 November 2015).

PART I
LABOUR HIRE

2. THE LABOUR HIRE INDUSTRY

Findings and recommendations

2.1

The labour hire industry has developed over the last 20 to 30 years to become a significant employer of Victorian workers and a major contributor to the Victorian economy. Labour hire is present in almost all Victorian industries; Australia-wide data indicates that it is used most extensively in administrative and support services, mining and manufacturing.

2.2

There are deficiencies in and inconsistencies between the available data relating to the prevalence of labour hire employment arrangements in Victoria and Australia, both in respect of the proportion of labour hire workers and the proportion of workplaces which use labour hire.

Recommendation 1:

The Victorian Government should develop or resource targeted data collection to investigate the prevalence and nature of labour hire employment within the state.

2.3

There are various legitimate and sound commercial reasons for Victorian businesses to utilise labour hire arrangements. Labour hire enables a flexible approach to the engagement of labour which assists businesses to deal with peaks and troughs in demand, without some of the constraints associated with engaging ongoing employees.

2.4

There is a wide spectrum of legal compliance within the labour hire industry in Victoria. At one end of the spectrum are labour hire agencies and arrangements which are highly transparent and compliant with workplace laws, awards and other industrial instruments, health and safety legislation and other applicable legal requirements. At the other end of the spectrum are 'invisible' labour hire agencies and arrangements, operating almost entirely outside the existing regulatory framework. These have been described as 'rogue' labour hire operators, and their activities frequently involve breaches of applicable workplace and safety legislation, award obligations and other regulations. The boundaries between labour hire agencies at the two ends of the spectrum are not always clear. There is a range of agencies and arrangements falling between the two extremes.

2.5

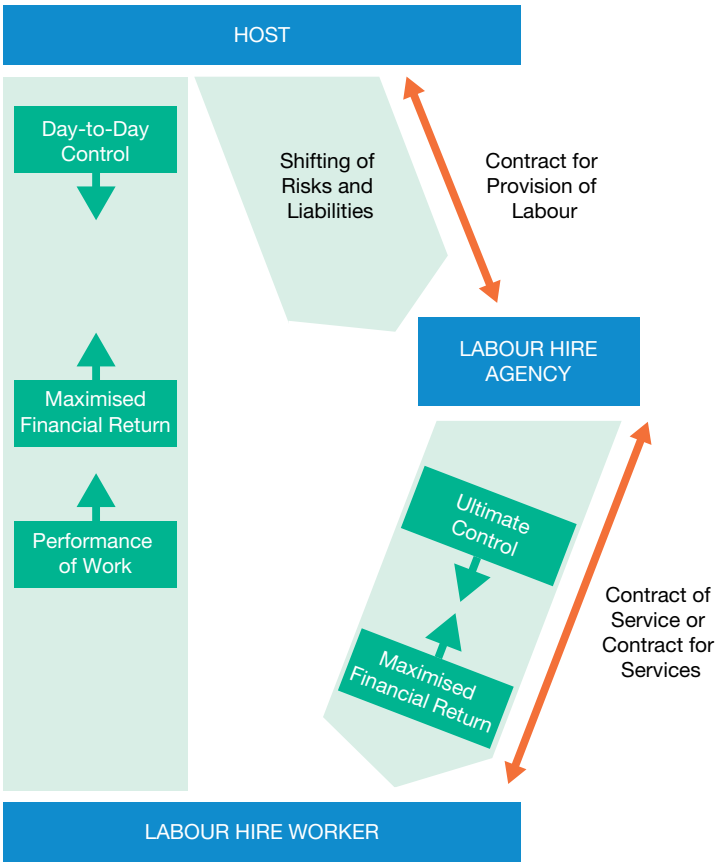
While there is evidence that some workers are attracted to the flexibility that labour hire offers and see it as a path to ongoing employment, many workers accept labour hire engagements as the only choice open to them and would prefer permanent positions. There is also considerable financial insecurity attached to many labour hire engagements.

2.1 What is labour hire?

2.1.1 Introduction

Labour hire employment arrangements typically involve a 'triangular relationship'[12] in which a **labour hire agency** supplies the labour of a **labour hire worker** to a third party (**host**) in exchange for a fee (**labour hire employment arrangement**).[13] In a labour hire employment arrangement, there is no direct employment or contractual relationship between the host and the labour hire worker. Instead, the worker is engaged by the labour hire agency, either as an employee or as an independent contractor.

Figure 2.1: Typical labour hire arrangement



Source: Adapted from Richard Johnstone, Shae McCrysal, Igor Nossar, Michael Quinlan, Michael Rawling, Joellen Riley, *Beyond Employment: The legal regulation of work relationships*, (The Federation Press, Annandale, 2012), 61 (Figure 3.5).

12. Richard Johnstone, Shae McCrystal, Igor Nossar, Michael Quinlan, Michael Rawling and Joellen Riley, *Beyond Employment: The Legal Regulation of Work Relationships* (The Federation Press, Annandale, 2012), 60.

13. Throughout this Report, I refer to the three parties to a labour hire employment arrangement as the host, labour hire agency and labour hire worker/employee respectively.

Stewart et al explain the 'usual' labour hire arrangement in more detail, as follows:

> *… [it] involves the agency entering into an agreement with the worker, and arranging to hire out their services to a host, or to a series of hosts. The worker generally performs these services at the host's premises, and may be supervised (if their work requires supervision at all) either by the host's staff or by other workers supplied by the same, or a different, agency. The worker is paid by the agency, but aside from any requirement to submit timesheets may have relatively little contact with it. The host, on the other hand, pays a fee to the agency which covers the worker's remuneration and any associated on-costs. … In many instances the nature of the arrangement is such that there is no obligation on either side to give or accept work. If an assignment is accepted, a contract is formed (usually on the agency's standard terms). But in between assignments, there may be no mutuality of obligation and hence no contract.*[14]

The labour hire model, and some of the legal challenges and uncertainties it creates, were outlined in the following terms in a recent Fair Work Commission (**FWC**) decision:

> *The business model of labour hire companies is generally that they employ persons (usually on a casual basis), and place those persons in the businesses of other companies with which the labour hire agency has a contractual relationship (host employers). In some cases the labour hire employees will work intermittently or for specific periods of time at the premises of the host employer – for example to replace the employee of a host employer temporarily absent from the workplace for a specified period, which is ascertained in advance of the placement or which may be extended or terminated during the period of the placement if circumstances change. The labour hire employee may have been required by the host employer to meet a seasonal or operational fluctuation. In other cases, labour hire employees may be required to work at the host employer's premises for lengthy periods; under the supervision and management of the host employer; integrating with the employees of the host employer; and for all intents and purposes forming part of the host employer's workforce.*
>
> *The diversity of such arrangements is considerable, reflecting the need for flexibility in modern workplaces. However, these arrangements can be a minefield for all concerned, both in practical terms and in terms of rights and obligations arising under legislation, industrial instruments and contracts of employment. The actions of a host employer – particularly when its managers and supervisors engage in disciplinary action against labour hire employees – can have a direct and fundamental impact on the rights and obligations, as between the labour hire agency and its employees.*[15]

2.1.2 Academic studies regarding the growth of labour hire in Australia

Labour hire employment arrangements have been a feature of the Australian labour market since the 1950s, in the form of 'temping' agencies to fill short term vacancies for hosts.[16] However, from the late 1980s and throughout the 1990s there was dramatic growth in what has been referred to as the 'pure' labour hire industry, which offers contract labour as a flexible alternative to ongoing employees or workforces across a wide range of industries.[17]

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14. Andrew Stewart, Anthony Forsyth, Mark Irving, Richard Johnstone and Shae McCrystal, *Creighton and Stewart's Labour Law* (6th edition, The Federation Press, Annandale, 2016), [10.23] (references omitted).
15. *Kool v Adecco Industrial Pty Ltd T/A Adecco* [2016] FWC 925, [45]-[46].
16. Richard Hall, *Labour Hire in Australia: Motivation, Dynamics and Prospects* (Working Paper 76, ACIRRT, University of Sydney, April 2002).
17. P Laplagne, M Glover and T Fry, *The Growth of Labour Hire Employment in Australia* (Productivity Commission Staff Working Paper, Melbourne, February 2005); see also Hall, Ibid; Steve O'Neill, *Labour Hire, Issues and Responses*, Research Paper No. 9, 2003-4 (Information and Research Services, Parliamentary Library, Australian Government).

This industry has become well established in Australia in the past two decades.[18]

Several academic studies have examined the reasons for this growth.[19]

In 2002, Hall examined the growth of the labour hire industry in Australia over the previous 10 years.[20] He described its development from the 1980s when a number of small specialist firms began to offer contract labour as a way for employers to replace or supplement existing staff in highly unionised and dispute-prone industries.[21] Hall considered the essential quality of the labour hire industry to be a split between the contractual and control relationships, whereby the worker is under the control of the host organisation but is paid by the labour hire firm.[22] He contended that the industry grew from a benevolent 'temp employment agency' model to one that drives down labour costs, seeks to replace the current workforce with a more compliant one and sees employers attempting to minimise their responsibilities and liabilities.[23]

In 2004, Campbell, Watson and Buchanan profiled temporary agency work in Australia.[24] They described temporary agencies as ranging from the very large to the very small. The authors outlined that temporary agency work probably began as a way of organizing office workers to meet occasional needs, however had since diversified and spread to numerous other occupations. They cited Australian Workplace and Industrial Relations Survey data to suggest that over 20% of workplaces with 20 or more employees were using agency workers.[25]

In a 2005 paper, Laplagne, Glover and Fry identified a number of demand-side factors which led to the growth in labour hire employment between 1990 and 2002, both in terms of the number of firms using labour hire and the rate of use.[26] They attributed this growth in part to changes in the broader industrial relations landscape in the early 1990s including the move away from compulsory unionism, the increase in human resource management approaches and the spread of workplace bargaining. The authors described these changes as having a 'threshold' effect only, encouraging firms to use labour hire where they had previously not done so.[27] They considered that competitive pressures which intensified in the early 1990s also contributed to the growth of labour hire.[28]

A further examination of the evolution of the temporary agency work sector in Australia was conducted in 2005 by Burgess and Connell.[29] They noted that whilst labour hire employment

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18. Alen Allday, IBISWorld Industry Report N7212, *Temporary Staff Services in Australia* (May 2016), 4. On the growth of the 'temporary staffing industry' in the USA in the post-war period, see Nik Theodore and Jamie Peck, 'Selling Flexibility: Temporary Staffing in a Volatile Economy' in Judy Fudge and Kendra Strauss (eds), *Temporary Work, Agencies and Unfree Labour: Insecurity in the New World of Work* (Routledge, New York, 2014), 26. For a broader global survey, see Neil Coe and Kevin Ward, 'The Creation of Distinctive National Temporary Staffing Markets' in Fudge and Strauss (2014) 94.
19. Labour hire arrangements were also the subject of a number of government inquiries and studies in the early 2000s: see New South Wales Labour Hire Task Force, *Final Report* (Sydney, December 2001); 2005 Victorian Inquiry Report.
20. Hall (2002).
21. Ibid, 3.
22. Ibid, 5.
23. Ibid, 16.
24. Iain Campbell, Ian Watson and John Buchanan, 'Temporary agency work in Australia (Part I)' in John Burgess and Julia Connell (eds), *International Perspectives on Temporary Agency Work* (Routledge, London, 2004), 129.
25. Ibid, 131.
26. Laplagne et al (2005).
27. Ibid, 17-8.
28. Ibid, 28.
29. John Burgess and Julia Connell, 'Temporary Agency Work: Conceptual, Measurement and Regulatory Issues' (2005) 13:2 *International Journal of Employment Studies* 21.

arrangements had previously primarily been used to fill temporary absences, the average duration of labour hire placements had increased, with a quarter of workers estimated to have been on labour hire contracts for more than two years.[30]

Coe, Johns and Ward's 2009 analysis of the Australian temporary staffing market[31] illustrated that in 2005, the eight largest agencies accounted for only 20% of the market, indicating very low barriers to entry into the sector with agencies mainly competing on price.[32] Further, the authors noted that due to the Australian temporary staffing industry comprising small, locally oriented firms targeting blue collar and clerical workers, the industry had become highly segmented and fragmented.[33]

In 2013, Bonet, Cappelli and Hamori examined the growth and increasing prominence of labour market intermediaries in Australia.[34] The authors classed labour hire agencies as 'administrators'. Administrators directly hire workers, become their legal employer and supply those workers to a host organisation. Administrators manage the employees' wage and other costs but also accept the risk of the employment relationship.[35] The authors distinguished labour hire agencies from two other kinds of labour market intermediaries: information providers such as job boards, social media sites, and outplacement agencies;[36] and 'matchmakers', which describes the traditional recruitment role.[37]

The form of labour hire arrangements has also been the subject of some academic studies.

Burgess and Connell referred to the description of types of labour hire arrangements by the 2001 NSW Taskforce on Labour Hire,[38] including:

- supplementary labour – short term hires, usually on an hourly basis;
- managed services – the provision of outsourced services on a project basis;
- direct contract arrangements – placement of individuals into contract arrangements; and
- recruitment services.[39]

In a 2005 paper, Underhill[40] similarly described how labour hire arrangements had evolved to take many forms, including:

- the supply of short term placements;
- outsourcing of specific functions such as maintenance;
- providing a substantial proportion of an organisation's workforce for an extended period of time, including in call centres and retail organisations; and
- providing the entire workforce for a host.[41]

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30. Ibid, 30.
31. Neil Coe, Jennifer Johns and Kevin Ward, 'Agents of casualization? The temporary staffing industry and labour market restructuring in Australia' (2009) 9 *Journal of Economic Geography* 55.
32. Ibid, 65.
33. Ibid, 77-9.
34. Rocio Bonet, Peter Cappelli and Monika Hamori, 'Labour Market Intermediaries and the New Paradigm for Human Resources' (2013) 7:1 *The Academy of Management Annals* 341.
35. Ibid, 361.
36. Ibid, 351.
37. Ibid, 360.
38. Burgess and Connell (2005), 23, referring to New South Wales Labour Hire Task Force (2001).
39. Ibid.
40. Elsa Underhill, 'The importance of having a say: Labour hire employees' workplace voice', *Reworking work: Proceedings of the 19th conference of the Association of Industrial Relations Academics of Australia and New Zealand* (Sydney, February 9-11, 2005), 528.
41. Ibid.

Stewart et al note the following in relation to the growth of the Australian labour hire sector:

> *In days gone by, labour hire agencies were primarily used to meet short-term labour needs – for example, by supplying 'temps' who could fill in until permanent staff returned from leave or a vacancy could be filled. Increasingly, however, many workers supplied by agencies can find themselves working for a particular host on an ongoing basis. … During the 1990s in particular, the number of labour hire workers grew by over 15% a year, to the point where at least 2% of all employees are now engaged on this basis.*[42]

2.1.3 Inquiry evidence

The Inquiry received extensive information, in submissions and evidence given at hearings, about the nature of labour hire arrangements in Victoria.

Key sources of this information from industry were: the RCSA, as the key industry representative for on-hire agencies in Victoria; other industry bodies such as the Australian Industry Group (**Ai Group**) and the Victorian Chamber of Commerce and Industry (**VCCI**) (with memberships consisting of both labour hire agencies and host businesses that use labour hire); representatives of labour hire businesses in particular industries, such as the Information Technology, Contract and Recruitment Association Ltd (**ITCRA**) and the Teacher Agency Network Victoria (**TANVIC**); the International Confederation of Private Employment Agencies (**CIETT**), the global representative of labour hire agencies; and several labour hire agencies.

Key sources of information from workers included: the Australian Council of Trade Unions (**ACTU**); the VTHC; several unions representing workers engaged by labour hire companies; workers engaged by host companies which use labour hire; several individual labour hire workers; and a number of community organisations whose constituents have experience of labour hire.

Labour hire encompasses a diverse range of activities

The types of labour hire agencies which the Inquiry heard about, and from, varied widely. They included:

- large, multinational corporations with thousands of staff;
- mid-tier labour hire providers;
- small, regionally-based, industry-based or occupationally-based companies where the agency owners know each of their workers personally;
- not for profit groups utilising labour hire as a means to improve employment opportunities in communities;
- accommodation proprietors who procure work for backpackers; and
- operators consisting of an individual (or a few individuals) with a van and mobile phone, known only by their first name(s).

The types of labour hire arrangements the Inquiry heard about were equally diverse, and included:

- labour hire workers filling short term vacancies for a host;
- labour hire workers performing seasonal work for a host on a short-term basis;
- labour hire workers performing long term work for a host, alongside permanent direct employees of the host;
- staffing of a host's entire business, or a specific business unit, with labour hire workers; and
- contracting out a host's particular business function to a labour hire agency.

42. Stewart et al (2016), [10.22]; see further 2.2 on data relating to the extent of labour hire in Victoria.

A number of stakeholders raised issues with the lack of precision of the descriptor 'labour hire' in referring to this broad range of business structures and staffing models.

RCSA indicated its opposition to the use of the term 'labour hire' as it is 'imprecise and non-descriptive', more suited to blue-collar occupations, does not account for the method of engagement of the worker, and has grown in use to extend to outsourcing arrangements which go beyond on-hire of workers. RCSA also proposed more specific terminology to describe the particular nature of the worker's engagement. It preferred the term 'on-hire' to 'labour hire'. However this term appears to be essentially interchangeable with 'labour hire', without what RCSA considered to be blue-collar connotations.[43]

Ai Group submitted that defining the labour hire industry with precision is difficult, referring to a failure to recognise the different categories and types of work and models of labour supply. It drew a distinction between 'short term' labour hire or 'temps', 'ongoing' labour hire to supplement a permanent workforce, 'outsourced workforce solutions' such as the contracting out of a function like mechanical maintenance, and 'project based workforce solutions' involving a performance-based outcome. The former two models involve supervision of workers by the host agency, whereas the latter two involve supervision by the labour hire firm.[44]

The ACTU noted a distinction between 'outsourcing', which it said is defended by business 'referring to the external service offerings and industry expertise that outsourcing is claimed to provide'; and 'provision by a third party of labour only' without any particular kind of expertise beyond that already held by employees of the host organisation.[45]

RCSA also drew a distinction between what it referred to as 'on-hire employee services' and 'contracting services', relating to whether payment is made based on an hourly fee, or for a defined scope of work.[46]

The ACTU and some unions, such as United Voice (**UV**), the Media, Entertainment and Arts Alliance (**MEAA**) and the Australian Services Union Private Sector Victorian Branch (**ASU Private Sector**), also described a further dimension of labour hire, whereby a primary labour hire operator contracts further with labour hire subcontractors and other smaller players for the provision of labour.[47]

The Terms of Reference for the Inquiry are broad, and permit an examination of each of the various models of labour hire referred to above.[48] I have had regard to the width and diversity of business models broadly encompassed within the Victorian labour hire industry in framing regulatory responses to issues examined by the Inquiry.

'Reputable' and 'rogue' labour hire operators

RCSA and a number of labour hire agencies sought to draw a distinction between the activities of 'reputable' labour hire businesses on the one hand, which are highly compliant with their legal obligations and perform an important function in the labour market for both business and workers, and 'labour contractors' or 'rogue operators' on the other.[49]

Features of a 'labour contractor' were described to the Inquiry by a range of stakeholders. For example, MADEC, a community based not-for-profit labour hire agency, described

43. RCSA, Submission no 110, 4.
44. Ai Group, Submission no 53, 7-8.
45. ACTU, Submission no 76, 24.
46. RCSA, Submission no 110, 5.
47. ACTU, Submission no 76, 25; UV, Submission no 98, 7-13; MEAA, Melbourne Hearing, 8 February 2016; ASU Private Sector, Submission no 47, 11-13.
48. Terms of Reference, (a).
49. RCSA, Submission no 110, 19.

labour contractors as: generally working as an individual or husband and wife; rarely having a business name or business premises; operating out of a car; rarely having a business name; providing cash-in-hand payments; not providing records; having workers indentured to local housing or accommodation providers; and who may source workers (particularly young Asian workers) directly from overseas countries. Labour contractors often work on a lump sum fee for a host for a particular result, rather than on the basis of an hourly rate.[50]

Prestige Staffing Personnel, another labour hire agency, described indicators of labour contractors to be a large number of foreign workers working within one place, all being paid by one single identity with no real business presence like an office or website, often run out of a backpackers hostel or connected to an organisation that engages with refugees.[51] Springvale Monash Legal Centre suggested that labour contractors utilise advertising on the basis of Gumtree or similar social media sites to attract workers.[52]

A number of stakeholders identified the absence of barriers to entry to the labour hire industry as contributing to the existence of labour contractors. For example, Per Capita submitted that all that is required is 'a shelf agency, a bank account, a workers' compensation policy and internet access'. It submitted that there are no requirements for physical premises, skill, experience, systems or finance (unless imposed by a client); and that the business model relies on an often small margin between the amount paid by the client and the wages and entitlements paid to workers.[53]

Evidence and submissions received by the Inquiry indicated that there is certainly a wide spectrum of legal compliance within the labour hire industry (broadly defined). At one end of the spectrum are labour hire agencies and arrangements which are highly transparent and compliant with workplace laws, awards and other industrial instruments, health and safety legislation and other applicable legal requirements. At the other end of the spectrum are 'invisible' labour hire agencies and arrangements, operating almost entirely outside the existing regulatory framework. However, the boundaries between them are not clear. There is a range of agencies and arrangements falling between the two extremes. For example, in Mildura the Inquiry heard about an accommodation provider being involved in referring workers to underpaid work with a grower.[54] Sometimes, the reputable and rogue operators interact. For example, in Shepparton the Inquiry heard evidence of a 'reputable' operator subcontracting to an unscrupulous labour contractor.[55]

Some industry representatives and participants argued against the Inquiry recommending extra and burdensome regulation which would apply to the reputable labour hire industry, in order to address problems with the rogue elements of the labour hire sector.[56] However, concerns raised with the Inquiry about the labour hire industry were by no means confined to the rogue operators. The Inquiry received a large volume of submissions and evidence from unions, workers and community organisations relating to some practices of reputable labour hire operators. While these practices were not alleged to be lawful, it was submitted that they had undesirable social, economic and health consequences for workers.[57]

50. MADEC, Submission no 9, 3.
51. Prestige Staffing Personnel, Submission no 60, 2-3.
52. Springvale Monash Legal Service, Submission no 101, 1.
53. Per Capita, Submission no 89, 2.
54. John George, Mildura Hearing, 23 November 2015.
55. Labour hire agency, Closed Hearing 22, Shepparton, 15 February 2016.
56. See e.g. RCSA, Submission no 110, 20; VCCI, Submission no 25, 5; see also 5.5.1 below.
57. See chapter 3 below.

2.2 Extent of labour hire in Victoria

2.2.1 Data

There is a range of sources of data on the extent of labour hire in Victoria which, taken together, form a reasonably clear although not definitive picture of the sector.

IBISWorld Report on the temporary staff services industry in Australia

In May 2016, IBISWorld published its latest industry report on Temporary Staff Services in Australia (**Temporary Staff Services Report**).[58] It describes the industry as follows:

> *Operators in the industry provide temporary staffing solutions for client companies on a fee or contract basis. Temporary staff services companies provide their own staff to client businesses to carry out temporary assignments. These temporary staff members work under the control of the client at the client's work site for operational purposes, but remain legally employed by (and are paid by) the temporary staff provider.*[59]

The main activities of the industry are described as: contract labour services; labour on-hiring services; labour staffing services; labour supply services; and temporary labour hire services. The industry is distinguished from employment placement and recruitment services, which are businesses that provide employment placement services or recruit staff for permanent positions for client companies.[60]

The Temporary Staff Services Report notes that the growth in temporary staffing industries over the past two decades has been fuelled by a general trend towards outsourcing of non-core activities. Whilst growth in the past five years has slowed, it remains moderate due to comparatively low unemployment, increasing client demand for a flexible workforce and labour market confidence amongst employees switching jobs.[61]

Features which affect demand for temporary staff services include:

- The national unemployment rate: increased demand for temporary staffing services corresponds with a decline in the unemployment rate (which was projected for 2015/16).
- Demand from business process outsourcing in Australia: an increase in business outsourcing means more companies require staff from the industry, and more independent contractors are available to work for client companies. Business outsourcing in the private sector was projected to increase for 2015/16.
- Demand from information media and telecommunications, construction, mining and health care and social assistance: these industries are major users of temporary staff services. Demand in each industry, except construction, was projected to increase in 2015/16.

A significant feature of the industry is that market share concentration is low. The top four[62] operators account for less than 22% of the total industry market share, and the industry includes a large number of small firms. Given this, internal industry competition is high, as the large number of small operators each compete for clients and workers, entry barriers are low (as it is relatively inexpensive to establish a company in the industry) and net profit margins are typically small.[63] This intensified competition has put pressure on pricing levels and contributed to a decline in profit margins over this period, despite growing revenue.[64]

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58. Allday (2016).
59. Ibid, 2.
60. Ibid.
61. Ibid, 6.
62. Ibid, 4-5.
63. Ibid, 18-20
64. Ibid, 6.

The low barriers to entry into the industry have also contributed to strong growth in the number of enterprises within the industry over the past five years.[65] This growth has included increased operations in regional areas.[66]

For the 2014/5 year, it is estimated that there were 6,332 businesses within the temporary staff services industry across Australia. Table 2.1 demonstrates the growth in numbers of enterprises, and employees, between 2006/7 and 2014/5, across Australia. Significantly, the number of enterprises grew by approximately 12% between 2012/3 and 2014/5, although the number of employees engaged in the industry grew by only 3.2%.[67]

Table 2.1: Key statistics - temporary staff services industry in Australia, 2006/7 to 2014/5

Year	Revenue ($m)	Enterprises (Units)	Employment (Units)	Wages ($m)
2006-07	16,703.6	4,416	275,300	10,463.3
2007-08	17,100.6	4,744	287,800	10,997.0
2008-09	16,519.9	4,816	303,800	11,640.2
2009-10	16,606.7	5,129	293,700	11,181.6
2010-11	16,872.1	5,350	302,100	11,476.0
2011-12	17,565.1	5,690	305,300	11,995.2
2012-13	18,379.1	5,582	314,500	12,602.3
2013-14	18,468.9	5,876	319,700	12,879.8
2014/15	**18,993.6**	**6,332**	**324,900**	**13,133.6**

Source: Alen Allday, IBISWorld Industry Report N7212, Temporary Staff Services in Australia, May 2016

Further, in 2015/16, around a quarter of establishments in the industry were located in Victoria.[68]

The Temporary Staff Services Report predicts that:

> *[t]he importation of foreign labour will continue to be a contentious issue for the industry and employers over the next five years. Expected increases in migrant labour may benefit the industry as client companies look to use workers for short periods of time to increase their operational flexibility and minimise permanent placements.*[69]

It notes that tightening of regulations regarding the use of 457 visa holders, following allegations of underpayments from some workers, has increased the level of regulation of the industry.[70]

65. Ibid, 7.
66. Ibid, 4.
67. Ibid, 29.
68. Ibid, 16.
69. Ibid, 8.
70. Ibid, 28.

WorkSafe Victoria data

In Victoria, data provided by WorkSafe Victoria (**WorkSafe**)[71] indicates that the number of labour hire businesses[72] registered for WorkCover premium services has remained stable over the last four years, as follows:

- 2011/12: **968**;
- 2012/13: **947**;
- 2013/14: **916**; and
- 2014/15: **933**.

In 2014/15, of the 933 labour hire businesses registered with WorkSafe, 531 employed 100 or less labour hire employees; 136 employed 500 or less labour hire employees; and 52 employed more than 500 labour hire employees. Total remuneration spend on Victorian labour hire in 2014/15 was highest in the administrative and support services sector, professional, scientific and technical services sector, manufacturing sector and financial insurance services sector. However, this may partly reflect higher salaries rather than higher numbers of labour hire employees in these sectors.[73]

The 2005 Victorian Inquiry Report, based on evidence from the Victorian WorkCover Authority, found that there were around 1200 labour hire agencies in Victoria, many of which were small businesses.[74] The number of labour hire businesses registered with WorkSafe in 2014/15 is significantly less than this estimate.

Australian Bureau of Statistics, Characteristics of Employment, August 2014

Data released by the ABS about the characteristics of employment in Australia provides an indication of the number of people, in particular industries and occupations, who found their job through and were paid by a labour hire firm or employment agency.[75] If a person has found their job through such firms/agencies and then continues to be paid by them, this category of worker can reasonably be construed as a 'labour hire employee', in that the hiring agency becomes the employer (albeit that the work being paid for is undertaken for another business/organisation).[76]

Table 2.2 details the composition of the Australian workforce sourced and paid/not paid by a labour hire firm/employment agency by industry, occupation and all employees.

This data indicates that approximately 1.1% of all employed persons across Australia are labour hire employees.[77]

71. Data provided by WorkSafe, derived from internal premium systems.
72. The WorkSafe data excludes businesses predominantly engaged in listing employment vacancies and referring or placing applicants for permanent employment (employment placement agencies).
73. Data provided by WorkSafe, derived from internal premium systems.
74. 2005 Victorian Inquiry Report, xxii.
75. ABS, *Characteristics of Employment, Australia* (Cat. No. 6333.0, August 2014, released 27 October 2015, First Issue).
76. ABS, *Australian Labour Market Statistics, Jan 2010: Labour Hire Workers* (Cat. No. 6105.0, January 2010), derived from the 2008 Forms of Employment survey, 2.
77. ABS, 6333.0 (2015).

Table 2.2: Australian workforce sourced and paid/not paid by labour hire firm/ employment agency by industry and occupation and all employees – 2014

Industry of main job	Paid by agency 000's	Was not paid by agency 000's	Total agency employees	Total employee popn.	Percentage paid by/ found job by agency	Percentage paid by agency/ all employees
Agriculture, forestry and fishing	0.9	3.5	4	296.9	22.5	0.3
Mining	6.6	17.4	24	233.0	27.5	2.8
Manufacturing	23.5	74.9	98.5	914.4	23.9	2.6
Electricity, gas, water and waste services	2.5	6.8	9	136.5	27.8	1.8
Construction	10.5	28.6	42	1,037.3	25.0	1.0
Wholesale trade	3.7	26.9	31.6	406.4	11.7	0.9
Retail trade	5.5	29.3	33.8	1,250.4	16.3	0.4
Accommodation and food services	3	18.8	20.9	787.6	14.4	0.4
Transport, postal and warehousing	5.9	37.2	43.7	599.5	13.5	1.0
Information media and telecommunications	3	14.3	18.3	218.6	16.4	1.4
Financial and insurance services	3	46.6	51.8	424.0	5.8	0.7
Rental, hiring and real estate services	0	12.2	11.8	217.3	0.0	0.0
Professional, scientific and technical services	3.8	39.5	42.9	938.2	8.9	0.4
Administrative and support services	20.5	16.8	38.2	378.7	53.7	5.4
Public administration and safety	12.4	27.6	39.1	714.1	31.7	1.7
Education and training	2.2	17.1	20.4	940.0	10.8	0.2
Health care and social assistance	11.9	44	54.6	1,413.6	21.8	0.8
Arts and recreation services	1.4	4.3	7.8	209.6	17.9	0.7
Other services	1.3	9.2	12.2	474.9	10.7	0.3
Total	121.6	475	604.6	11,591	20.1	1.0
Managers	7.2	59.4	66.6	1,537.5	10.8	0.5
Professionals	21.7	101.1	123.3	2,613.5	17.6	0.8
Technicians and trades workers	23.3	52.1	75.4	1,706.0	30.9	1.4
Community and personal service workers	6.7	28.6	35.3	1,154.2	19.0	0.6

Table 2.2 *(continued)*

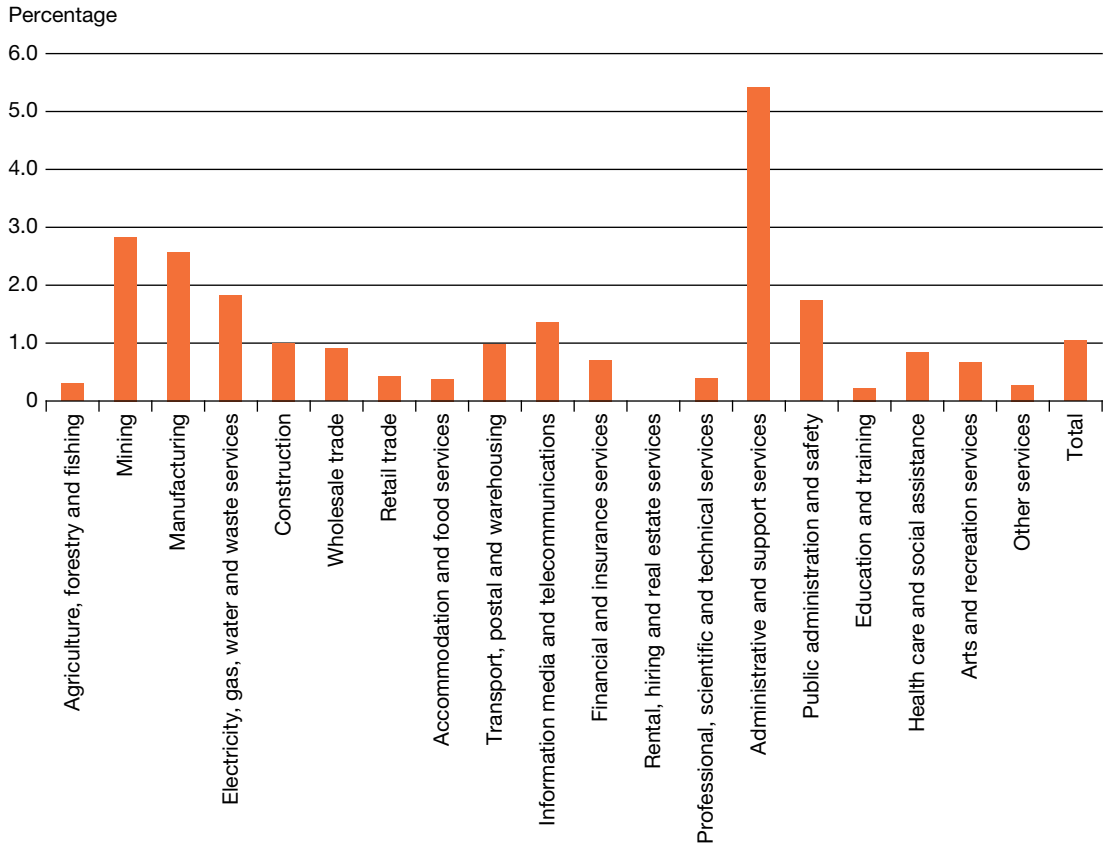
Industry of main job	Paid by agency 000's	Was not paid by agency 000's	Total agency employees	Total employee popn.	Percentage paid by/ found job by agency	Percentage paid by agency/ all employees
Clerical and administrative workers	15.6	95.6	114.5	1,619.1	13.6	1.0
Sales workers	1.6	22.9	27.0	1,122.1	5.9	0.1
Machinery operators and drivers	21.6	54.6	74.7	753.8	28.9	2.9
Labourers	26.2	56.4	84.9	1,081.8	30.9	2.4
Total	**123.9**	**470.7**	**601.7**	**11,588**	**20.6**	**1.1**

Source: ABS Catalogue No. 6333.0 (Adapted from Table 9 and 42)

Figure 2.2 demonstrates the estimated presence of labour hire employees, as a percentage of the Australian workforce, within specified industries. This was notable in the following industries:

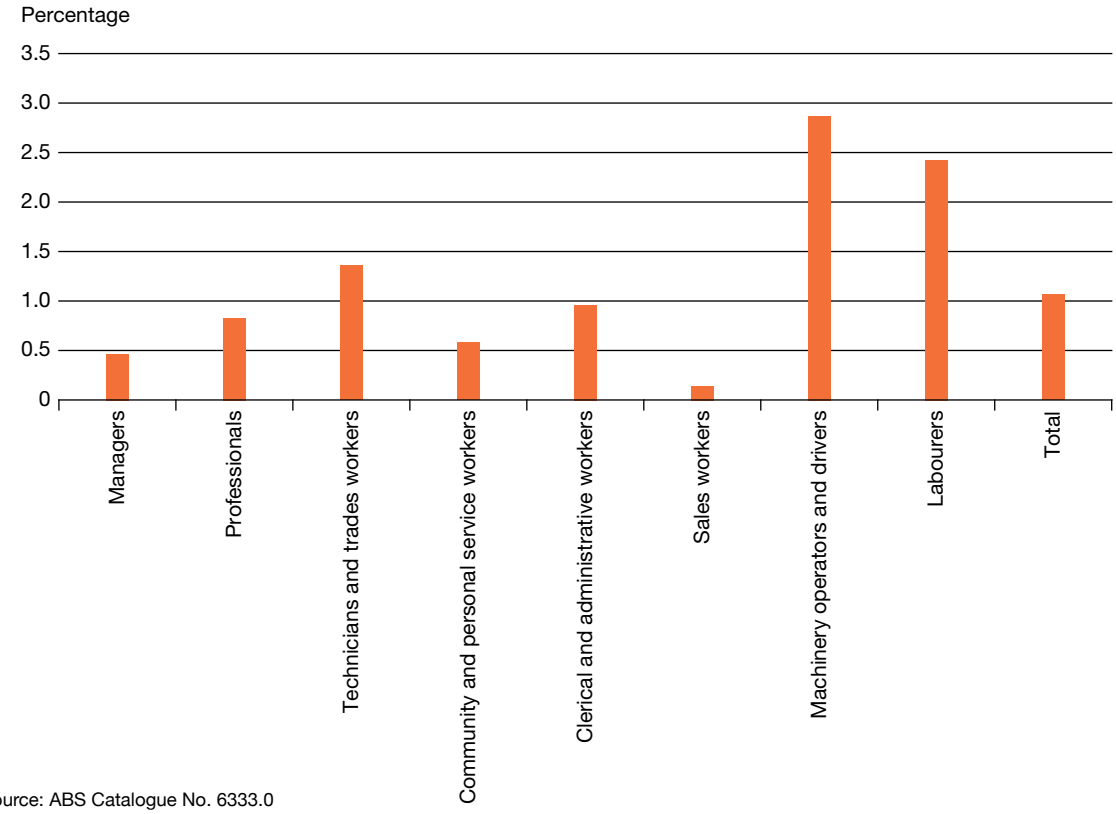
- administrative and support services (5.4%);
- mining (2.8%);
- manufacturing (2.6%);
- electricity, gas and water services (1.8%);
- public administration and safety (1.7%); and
- information, media and telecommunications (1.4%).

Figure 2.2: Employees paid by labour hire firm/employment agency by industry – percentage of all employees - 2014



Source: ABS Catalogue No. 6333.0

Figure 2.3: Employees paid by labour hire firm/employment agency by occupation – percentage of all employees – 2014



Source: ABS Catalogue No. 6333.0

Figure 2.3 demonstrates the estimated presence of labour hire employees, as a percentage of the Australian workforce, within specified occupations. This was notable in the following occupations:

- machinery operators and drivers (2.9%);
- labourers (2.4%);
- technicians and trades workers (1.4%); and
- clerical and administrative workers (1.0%).

ABS data also indicates what proportion of the persons who source their job from a labour hire firm or employment agency are also paid by the labour hire firm or employment agency (as distinct from being paid by the firm where they are ultimately placed). This provides an indication of the prevalence of labour hire within the general recruitment labour market.

Table 2.2 demonstrates the proportion of persons who found their job via a labour hire firm or employment agency and are paid by that firm or agency, within particular industries. It indicates that the prevalence of labour hire employees within the general recruitment labour market was most significant in the administrative and support services (53.7%); public administration and safety (31.7%); electricity, gas water and waste services (27.8%); mining (27.5%) and construction (25%) industry sectors.

Table 2.2 also demonstrates the proportion of persons who found their job via a labour hire firm or employment agency and are paid by that firm or agency, within particular occupations. It indicates that the prevalence of labour hire employees within the general recruitment labour market was most significant within the following occupations: labourers (30.9%), technicians and trade workers (30.9%); and machinery operators and drivers (28.9%).

Australian Bureau of Statistics – November 2008 Forms of Employment – labour hire workers

In its January 2010 release of Australian Labour Market Statistics (6105.0), the ABS also released a feature article on labour hire workers across Australia.[78] Although somewhat dated, the data is useful because it isolates a range of employment characteristics for the subcategory of people who found their job through an employment agency and who continued to be paid by that agency. Consistent with the approach taken above, the ABS states that this group 'can be considered employees of a labour hire firm, as they were paid by the labour hire firm.'[79]

The article indicates the following key characteristics in respect of labour hire workers:

- The total number of labour hire workers was 122,200.
- The majority of labour hire workers were male (61%). Over a third of male labour hire workers fell within the 15 to 24 year age bracket. In contrast, only 9% of female labour hire workers were aged 15 to 24.
- Whilst the distribution of labour hire workers across states and territories was similar to the distribution of all employees, Victoria had a relatively high concentration of labour hire workers compared to its proportion of all employees.
- Labour hire workers were more likely to work full time hours than the general workforce. This was particularly true for female labour hire workers. Almost two thirds of female labour hire workers worked full time hours compared to only 57% across the workforce generally.[80]

78. ABS, 6105.0 (2010).
79. Ibid, 2.
80. Ibid, 2-4.

- Labour hire employees were significantly more likely to be without paid leave entitlements (79%) than the general workforce (23%). Absence of paid leave entitlements is an indicator of casual employment.[81]
- A greater proportion of labour hire workers worked on a fixed term basis (15%) than the proportion of all employees (3%).[82]

Victorian Workplace Industrial Relations Survey data

The VWIRS was most recently conducted by Industrial Relations Victoria in 2008.[83] The 2008 data provides an alternative snapshot of the extent of agency employment in Victoria, by industry. Participants were asked 'Do you have any labour hire or agency workers at this workplace?' At 7%, the VWIRS data provides a much higher estimate of the proportion of the overall Victorian workforce who are labour hire/agency workers. Table 2.3 indicates that labour hire/agency employment was particularly prevalent in the recreation and personal services, mining and utilities and hospitality industries. As the VWIRS data is quite dated and produces different results to the ABS and HILDA data (see below), it should be regarded with some caution.

Table 2.3: Labour hire/agency employment by industry, Victoria, 2008 (percentage)

Industry sector	Percentage of labour hire/agency employees
Mining and utilities	14
Manufacturing	3
Construction	9
Transport and wholesale trade	7
Retail trade	3
Hospitality	2
Finance, insurance and business services	13
Health and education	2
Recreation and personal services	15
All workplaces	7

Source: VWIRS (2008)

81. Ibid, 4.
82. Ibid
83. The data was collected through a 20 minute telephone survey with managers in Victorian workplaces. The sample was stratified by workplace size from small (five to 19 employees), medium (20 to 99 employees) to large (100-plus employees) and by industry. Workplaces excluded from the survey were in the agriculture, forestry, and fishing industry and those in public administration. The survey was drawn from Dunn and Bradstreet business listings and weighted using the ABS business register counts. The purpose of the survey was to collect data on a range of relevant policy issues including: the workforce and workplace profile; methods of setting pay and conditions in the workplace; wages and entitlements of the workforce; information on union membership and industrial relations within the workplace; workforce additions and reductions; profits, labour costs and productivity; policies in place; and attitudes held by managers.

The VWIRS data also provides information about the extent to which labour hire/agency workers are utilised by Victorian workplaces, set out in Table 2.4.

Table 2.4: Workplaces by industry utilising labour hire/agency workers, arrangements, Victoria, 2008 (percentage)

Industry sector	Workplaces using agency workers
Mining and utilities	10
Manufacturing	19
Construction	10
Transport and wholesale Trade	23
Retail trade	2
Hospitality	7
Finance, insurance and business services	8
Health and education	6
Recreation and personal services	4
All workplaces	10

Source: VWIRS 2008

Household, Income and Labour Dynamics in Australia Survey data

In a 2013 working paper, Buddelmeyer, McVicar and Wooden examined a range of non-standard employment arrangements and their impact on job satisfaction using data from waves one to 10 of the HILDA survey.[84] The survey, based primarily on face to face interviews, identifies persons employed through a labour hire firm or temporary employment agency. The data indicated the following proportions of labour hire workers (Table 2.5):

- 2.5% of all workers;
- 2.6% of male workers; and
- 2.4% of female workers.

Table 2.5: Distribution of HILDA sample by employment type labour hire (in main job) – 2001 - 2010

Employment type	Males (No.)	Males (%)	Females (No.)	Females (%)	All (No.)	All (%)
Labour hire	1,136	2.6	922	2.4	**2,058**	**2.5**
Total	43,371	100	39,083	100.0	**82,454**	**100.0**

Source: Adapted from Buddelmeyer, McVicar and Wooden (2013), Table 1, p. 28. Note: The figures reported are unweighted person-wave observations drawn from the first ten waves (2001 to 2010) of the HILDA Survey

84. Hielke Buddelmeyer, Duncan McVicar and Mark Wooden, *Non-Standard "Contingent" Employment and Job Satisfaction: A Panel Data Analysis* (Melbourne Institute Working Paper Series Working Paper No. 29/13, 2013).

Productivity Commission – Forms of Work in Australia

In a 2013 Productivity Commission Working Paper, Shomos, Turner and Will examined a range of features of different forms of work in Australia.[85] One of these was 'labour hire workers', which they defined as:

> *… workers paid by a labour hire or employment (recruitment) agency while working in another business. They are typically employed by the agency as casual employees, but can also be fixed term employees or independent contractors.*[86]

Table 2.6 constitutes the authors' collation of available data regarding the prevalence of labour hire workers from 2001 to 2011.

Table 2.6: Prevalence of labour hire workers, 2001 to 2011 (percentage)[a,b]

Survey	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
FOE 2001[c]	1.8							1.2			
FOE 2008[d]								1.2			1.2
HILDA	3.1	3.1	3.1	3.0	2.7	2.5	2.2	2.6	2.4	2.3	

Sources: ABS (Forms of Employment, Cat. no. 6359.0); Authors' estimates based on unpublished data from ABS (Labour Force and Forms of Employment Survey 2008) and the HILDA survey, release 10[87]

Shomos et al note that the HILDA and ABS Forms of Employment (**FOE**) surveys return different estimates of the level of labour hire workers:

> *In 2010, there were about 260,000 labour hire workers according to the HILDA survey, compared with about 140,000 in 2011 using the forms of employment survey. One possible reason for this difference is the collection method used in the FOE survey, where responses for all adults in a household are from only one person … [possibly] leading to underestimation of labour hire worker numbers. On the other hand, it is also possible… that some direct employees of employment and labour hire agencies are included in the HILDA measure of labour hire workers (leading to overestimation of the measure)… . [T]he conclusion that Laplagne and Glover[88] … made was that on balance, the HILDA survey allows the most reliable and consistent estimate of the prevalence of labour hire employment.*[89]

85. Anthony Shomos, Erin Turner and Lou Will, *Forms of Work in Australia - Productivity Commission Staff Working Paper* (Australian Government, Productivity Commission, April 2013).

86. Ibid, 7.

87. **a** Contributing family workers and unpaid workers are excluded from the estimates. The latter also exclude employees who answered 'other' to a question about their contract of employment. **b** HILDA survey data are based on the response to the question 'Are you employed through a labour-hire firm or temporary employment agency? That is, the agency pays your wage?' FOE survey estimates relate to people who report that they are paid by a labour hire firm or employment agency. **c** Estimates based on the 2001 FOE survey methodology are for employed people aged 15 to 69 years. The estimate for 2008 has been adjusted for employees reclassified in that year by the ABS as independent contractors. For comparability with 2001, estimates are for labour hire employees only (that is, they do not include labour hire workers among independent contractors). **d** Estimates based on the 2008 FOE survey methodology are for all employed people. These estimates have not been adjusted for employees reclassified in that year, and subsequent years, by the ABS as independent contractors. These estimates include labour hire workers within all categories of employment.

88. Laplagne et al (2005).

89. Shomos et al (2013), 83.

Productivity Commission – Workplace Relations Framework Report

In its November 2015 Report into Australia's workplace relations framework, the Productivity Commission examined available data regarding labour hire workers. It noted that:

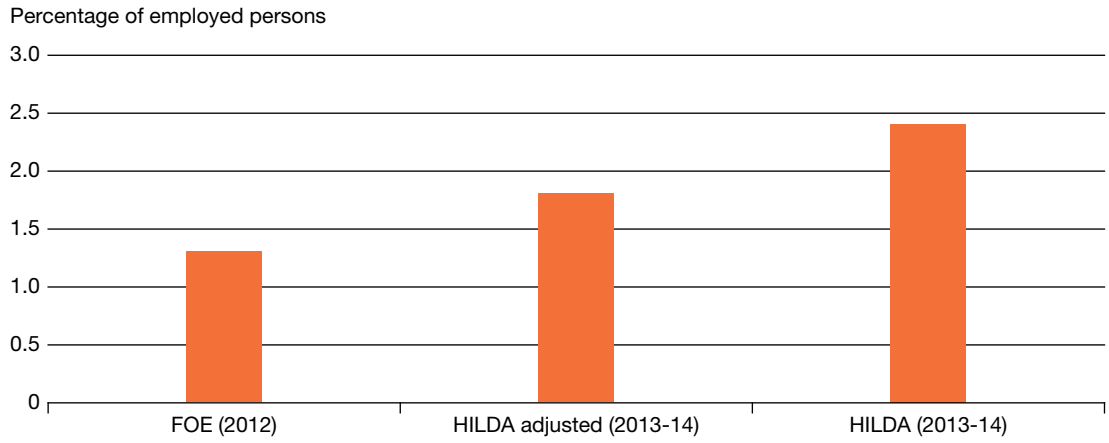
> *The FOE and HILDA surveys suggest that independent contractors and business owners can be engaged through labour hire arrangements. Productivity Commission estimates based on HILDA survey data suggest that around 10 per cent of independent contractors and 7 per cent of business owners are engaged using labour hire arrangements.*[90]

In ascertaining numbers of labour hire employees, the Productivity Commission observed that:

> *The estimates of the proportion of employed persons paid through labour hire arrangements are of a similar (small) magnitude, but vary slightly between the ABS FOE and HILDA surveys. The ABS reports that in 2011, 1.3 per cent of employed persons were paid through a labour hire arrangement and the estimate from HILDA for 2013 14 is 2.4 per cent. The latter is broadly in line with a 2002 HILDA estimate of 2.9 per cent presented in a Productivity Commission staff working paper (Laplagne, Glover and Fry 2005).*[91]

The Productivity Commission only examined the proportion of labour hire workers who were subject to the *Fair Work Act 2009* (Cth) **(Fair Work Act)**. As the labour hire category in both the FOE and HILDA surveys includes employees, independent contractors and business operators who are hired by labour hire firms, the Productivity Commission restricted the HILDA estimates to this group, finding that around 1.8% of employed persons are employees on labour hire arrangements. However, Figure D.6 of its report, reproduced below, reflects all three measures.

Figure 2.4: PC Workplace Relations Framework Report, Prevalence of Fair Work Act labour hire employees[92]



Source: Productivity Commission estimates based on ABS (Forms of Employment, Australia, November 2012, Cat. no. 6359.0, April 2013) and HILDA

90. PC Workplace Relations Framework Report (2015), 1081.
91. Ibid, 1092.
92. Ibid, 1092.

2.2.2 Inquiry evidence

A number of industry organisations suggested in submissions that labour hire is not a significant form of work arrangement in overall terms.[93] For example, the Housing Industry Association (**HIA**) described labour hire as 'far from a new or emerging type of work'.[94] VCCI described labour hire as 'a relatively niche form of employment.'[95]

However, the Centre for Employment and Labour Relations Law (**CELRL**) submitted that there is a 'growing normalisation of agency work arrangements' which warrants particular consideration.[96] Several other stakeholders provided the Inquiry with important qualitative information regarding labour hire based on direct experience as a particular feature of industries, occupations and regions throughout Victoria.

Submissions and evidence received by the Inquiry suggest that labour hire is a feature across most, if not all, Victorian industries.

The Inquiry heard that labour hire is particularly prevalent in the manufacturing industry. The Australian Manufacturing Workers Union (**AMWU**) estimates that there may be close to 7,000 manufacturing labour hire workers in Victoria, comprising nearly 20% of all Victorian labour hire workers. It submitted that based on its experience, labour hire workers are present in all sectors of the manufacturing industry, including metals, engineering, food and printing, and in all parts of the state. It submitted that whilst labour hire is more common amongst smaller businesses, many large companies also engage a significant number of labour hire workers at any given time.[97]

UV submitted that traditionally, labour hire in the manufacturing sector was used as a supplementary workforce to cover seasonal fluctuations in demand. However in recent times, it has been more commonly used as a semi-permanent flexible workforce all year round. UV provided the example of Coca Cola at Moorabbin, where there are approximately 58 permanent workers, and at any given time there are up to 30 labour hire casuals performing the same functions as the permanent workers, with the company seeking to increase this number through enterprise agreement negotiations.[98]

The South East Melbourne Manufacturers Alliance (**SEMMA**) estimates that between 5% and 10% of the employees of its members would at any one time be temporary labour staff.[99]

The Textile, Clothing and Footwear Union of Australia (**TCFUA**) submitted that labour hire is a common feature of the TCF Industry.[100]

The Shop, Distributive and Allied Employees Association (**SDA**) submitted that labour hire employees are used largely throughout warehousing and distribution, with some businesses using labour hire to supplement direct employees, and others using more labour hire workers than direct employees.[101]

93. See e.g. HIA, Submission no 45, 6; VCCI, Submission no 25, 3.
94. HIA, Submission no 45, 6.
95. VCCI, Submission no 25, 3.
96. CELRL, Submission no 99, 5.
97. AMWU, Submission no 95, 3.
98. UV, Submission no 98, 8.
99. SEMMA, Dandenong Hearing, 30 November 2015.
100. TCFUA, Submission no 92, 3.
101. SDA, Submission no 36, 5, 9.

UV submitted that labour hire, including extensive subcontracting, is prevalent in the private security industry and the contract cleaning industry, and is an increasingly common way of engaging hotel room attendants.[102]

Master Builders Association of Victoria (**Master Builders**) submitted that labour hire is regularly utilised in the building and construction industry to meet peaks and troughs in demand.[103] HIA submitted that for many decades, labour hire has been a feature of the construction industry.[104]

The Australian Services Union Authorities and Services Division (**ASU Authorities and Services**) detailed its experiences of labour hire in local government, across all Victorian Councils, particularly in operational, blue-collar type roles such as parks, gardens and garbage collection; and white-collar roles such as administration of local laws, customer service, building inspectors, planning and engineering.[105]

The Inquiry heard that in both the public and the non-government education sectors, labour hire agencies are used most prevalently in the engagement of casual relief teachers (**CRTs**).[106]

The MEAA detailed the significant expansion of the use of labour hire and agency staff in the major events industry in Victoria over the past five years.[107]

The Inquiry also heard that in some industries, labour hire is present but not prevalent. For example, the Victorian Automobile Chamber of Commerce (**VACC**) submitted that labour hire serves important functions within the Victorian automotive industry, but it is not particularly prevalent.[108] The Australian Mines and Metals Association (**AMMA)** submitted that whilst a number of significant resource activities occur within Victoria, to which labour hire may be relevant, the majority of Australia's largest resource operations are not located in Victoria.[109]

2.2.3 Conclusions

Taking each of the above data sources together, some general observations can be made regarding the extent of labour hire in Victoria and Australia.

Estimates as to the proportion of workers in Australia and Victoria who are labour hire workers vary considerably. Taking into account these various sources of data, presently labour hire employees make up between 1%-2.5% of the Australian workforce. However, VWIRS data from eight years ago puts the estimate of the proportion of the Victorian workforce much higher, at 7%. Similarly, industry data from the Temporary Staff Services Report places employment numbers for the industry in 2014/5 at 324,900, which is considerably higher than the estimated number of labour hire employees in Table 2.2, sourced from ABS data, of between 121,600 and 123,900 employees.

Whilst this variation in data makes it difficult to precisely establish the proportion of the overall workforce who are labour hire employees, it nonetheless has remained over time a significant form of employment, and appears to now be an ongoing feature of the Victorian and Australian labour market.

102. UV, Submission no 98, 9.
103. Master Builders, Submission no 38, 3.
104. HIA, Submission no 45, 6.
105. ASU Authorities and Services, Submission no 31, 10.
106. AEU, Submission no 103, 1; IEU, Submission no 81, 2.
107. MEAA, Melbourne Hearing, 8 February 2016.
108. VACC, Submission no 51, 3.
109. AMMA, Submission no 59, 1.

ABS and VWIRS data indicate significant variations of labour hire employment across various industries. However, labour hire employment nonetheless features across most industry sectors and occupations. This is consistent with evidence to the Inquiry which traversed labour hire arrangements in a wide variety of industries and occupations.

Given the above, there is a strong basis for enhanced data collection regarding the prevalence of labour hire employment arrangements in Victoria, both in respect of the proportion of labour hire workers and the proportion of workplaces which use labour hire.

2.3 Reasons for the use of labour hire

2.3.1 Data and academic studies

ABS (2010) states that 'the most common reason cited for employees using a labour hire firm was the ease of obtaining work' (71%).[110]

The ABS November 2008 Forms of Employment (**FOE**) survey provides a further breakdown of the reasons that employees use a labour hire/employment agency (Table 2.7).[111]

Table 2.7: Reasons that employees use a labour hire firm/employment agency, November 2008 (percentage)

All reasons for using a labour hire firm/ employment agency	Persons %
Ease of obtaining work	55.7
Hassle free	15.6
Like short term work	2.8
Unable to find work in their line of business	7.1
Condition of working in job/industry	9.2
Lack of experience prevents finding permanent job	2.4
Gain more experience	2.8
Flexibility	7.4
Other	17.8

Source: ABS, 6359.0, Forms of Employment, November 2008, 39 (Table 12)

Several academic studies have examined the motivations of both firms and workers for engaging in labour hire arrangements, in Australia and internationally. These demonstrate a diverse array of findings regarding the motivations for use of labour hire.

In 2004, Casey and Alach analysed a qualitative study from 2001/2002 of 45 women working in temporary employment in New Zealand.[112] Their findings were overwhelmingly positive about the reasons the women took on temporary work, which included returning to work after travel or redundancy and a desire for flexible employment given family commitments or other personal interests.[113] The authors concluded that the conventional view that temporary work involves: 'subjectification, intractable marginality and exploitation in traditionally powerless and gendered ways must be revised.'[114]

110. ABS, 6105.0 (2010), 1-2.
111. ABS, 6359.0, Forms of Employment, November 2008, 39 (Table 12).
112. Catherine Casey and Patricia Alach, 'Just a temp? Women, temporary employment and lifestyle' (2004) 18:3 *Work, Employment and Society* 459.
113. Ibid, 468-469.
114. Ibid, 477.

In a 2009 study, De Jong, De Cuyper, De Witte, Silla and Bernhard-Oettel explored the motivations behind acceptance of temporary work assignments by workers in the EU.[115] They found, based on a survey of 645 workers from the manufacturing and retail industries in Europe, that over half of the workers had involuntary motivations, meaning that they would prefer permanent to temporary employment,[116] along with using the job as a stepping stone to other work.[117] A second group were motivated only by using the job as a stepping stone to permanent employment.[118] A third cluster comprised 'non-involuntary' workers who were ambivalent about, rather than positively inclined towards, temporary work.[119] This third group were described by the authors as a 'resigned group' who have become trapped in temporary work, despite their relatively high scores on perceived employability.[120]

In 2008, De Ruyter, Kirkpatrick, Hoque, Lonsdale and Malan conducted a study into the increase in agency work by National Health Service nurses and local authority social workers in the United Kingdom.[121] The authors identified (from previous research) two possible contributing factors: the perceived deteriorating quality of permanent jobs resulting from efforts to modernise the public services; and attractiveness of agency work as offering more pay and flexibility. Interviews with 43 individuals led the authors to conclude that financial benefits of agency work were a motivating factor.[122] In addition, they found that for many, increased pressure of job targets and budget constraints associated with permanent employment overshadowed negatives of agency work such as losing pecuniary benefits, and the sense of identity and well-being associated with regular employment.[123]

Mitlacher, Waring, Burgess and Connell compared temporary agency work and workers in Germany and Singapore in a 2014 paper.[124] They observed that in Germany, a coordinated market economy, employers appear to be using temporary employment as a way of avoiding protective labour law, which is consistent with previous research finding that temporary employment agencies flourish in developed labour markets where there may be constraints over hiring and firing.[125] In contrast, the light labour market regulation in Singapore, coupled with a high demand for labour and a contingent labour supply from abroad means there has been limited growth in non-standard forms of employment amongst locals. However, temporary migrant labour is easily accessible and foreign agency workers typically experience poor working conditions and precarious employment arrangements.[126]

115. Jaron de Jong, Nele De Cuyper, Hans De Witte, Inmaculada Silla and Claudia Bernhard-Oettel, 'Motives for accepting temporary employment: a typology' (2009) 30:3 *International Journal of Manpower* 236, 237-238.

116. Ibid, 238.

117. Ibid, 246.

118. Ibid, 246.

119. Ibid.

120. Ibid, 247.

121. Alex de Ruyter, Ian Kirkpatrick, Kim Hoque, Chris Lonsdale and Judi Malan, 'Agency working and the degradation of public service employment: The case of nurses and social workers' (2008) 19:3 *The International Journal of Human Resource Management* 433.

122. Ibid, 434.

123. Ibid, 442.

124. Lars Mitlacher, Peter Waring, John Burgess and Julia Connell, 'Agency Work and Agency Workers – Employee Representation in Germany and Singapore' (2014) 22:2 *International Journal of Employment Studies* 6, 21.

125. Ibid.

126. Ibid, 16-17.

In respect of Australia, Hall (2002) found that motivations for employers' use of labour hire included: capacity outsourcing to deal with peaks and troughs in demand; cost reduction; and contracting out industrial relations problems.[127] Burgess and Connell (2005) argued that increased global competition and introduction in new technologies had contributed to the growth in the Australian temporary agency work sector.[128]

In 2003, Brennan, Valos and Hindle undertook a study of on-hire work, funded by the RCSA (**2003 RMIT Study**).[129] The study was based upon survey research, a literature review and in-depth interviews with employees and employment agencies.[130] A survey of 150 host employer organisations indicated that their motives for use of labour hire employees included:

- additional staffing requirements (46.7%);
- to cover absences of own employees (25.3%);
- to outsource administrative burden (17.3%);
- to overcome skills shortage (13.3%);
- to ensure a thorough recruitment process (16%); and
- to reduce staffing costs by paying less (3.3%).[131]

The 2003 RMIT Study survey data indicated that amongst on-hired employees, approximately two thirds of employees chose to work as a temporary or on-hired employee whereas one third did not have a choice, and similar proportions preferred to have direct employment over temporary employment.[132]

In 2015, Knight and Wei examined the use of temporary agency workers by firms in the Australian residential aged care sector.[133] They found that over 45% of facilities used temporary agency workers. The main reasons for this were that recruitment of employees is slow, and finding those with specialist skills is difficult.[134] Additional motivations for using agency workers included reducing labour costs such as recruitment, payroll and managing employee benefits.[135] Aged care facilities were less likely to use temporary agency workers when the skills shortage was due to the geographic location of the facility.[136] Facilities with larger employee numbers were more likely to use agencies. The authors noted that large firms may be better able to afford the costs of using an agency whereas small facilities might try to manage temporary staff themselves.[137] Knight and Wei concluded that use of temporary employment agencies in the industry seemed targeted and specific rather than being a broad and widespread strategy.

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127. Hall (2002), 8.
128. Burgess and Connell (2005), 28.
129. L Brennan, M Valos and K Hindle, *On-hired Workers in Australia: Motivations and Outcomes*, RMIT Occasional Research Report, School of Applied Communication, RMIT University, Design and Social Context Portfolio (2003).
130. Ibid, 1.
131. Ibid, 18.
132. Ibid, 89-90.
133. Genevieve Knight and Zhang Wei, 'Isolating the Determinants of Temporary Agency Worker Use by Firms: An Analysis of Temporary Agency Workers in Australian Aged Care' (2015) 18:2 *Australian Journal of Labour Economics* 205. The authors conducted their research by analysing the 'Australian National Aged Care Workforce Census and Survey 2012' which was sent to all residential and community care facilities.
134. Ibid, 228.
135. Ibid, 232.
136. Ibid, 229.
137. Ibid, 231.

Dr Robyn Cochrane submitted an article published in 2015 to the Inquiry, co-authored with Dr Tui McKeown, containing the findings of a recent study of eight labour hire agencies in Victoria which matched workers with clerical assignments.[138] The labour hire agencies selected were all members of the RCSA, but had diverse characteristics with respect to their size, period of establishment, client base, services offered and industries serviced. Questionnaires were sent to 757 employees, with 178 (24%) returning usable responses. Open-ended questions regarding advantages and disadvantages of agency work formed the basis for the study. Cochrane and McKeown identified from previous literature that some workers prefer, and thrive in, agency work arrangements, for a wide range of reasons. These 'supply side drivers' included the following:

- Family-related and flexibility reasons, e.g. the flexibility to balance work and family or personal needs, fewer working hours or greater scheduling flexibility, flexibility of temporary employment and freedom to choose hours of work.
- Economic reasons: agency work provides an employment option for individuals, allows supplementary wages to be earned quickly and offers reasonable or superior pay rates.
- Self-improvement reasons, such as the opportunity to try out employers and jobs, to perform challenging and meaningful work and to develop marketable, transferable or new skills.
- Personal preferences for autonomy, control and independence, obtaining a better match for work preferences, variety, freedom from organisational constraints and personal transitional periods.
- A view that agency work may provide a pathway to a permanent or more stable job.[139]

Their own study found evidence of economic, psychological and social vulnerabilities for labour hire workers although favourable features were also reported. They considered this to reflect linkages between features of nonstandard work, worker preferences, individual characteristics and the experience of worker vulnerability.[140]

2.3.2 Inquiry evidence

Reasons that hosts use labour hire

The Inquiry received a significant number of submissions and evidence about the important role that labour hire agencies play in the Victorian (and Australian) labour market. Ai Group submitted that the use of labour hire is an established and essential mechanism to address economic and business challenges faced by employers.[141] The Victorian Farmers Federation (**VFF**) submitted that labour hire provides expertise and flexibility for changing demands of project work and temporary labour needs, can provide a large number of skilled workers who have undergone assessments and reference checks immediately, and can look after administrative or specialised human resources tasks such as payroll, workers compensation and associated elements.[142]

RCSA referred the Inquiry to the 2003 RMIT Study indicating the main reason that organisations use on-hire employee services is to resource extra staff (30%), cover in-house employee absences (17%), reduce the administrative burden of employment (17%) and overcome skills shortage issues (9%).[143]

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138. Dr Cochrane, Submission no 1, comprising Robyn Cochrane and Tui McKeown, 'Vulnerability and agency work: from the workers' perspectives' (2015) 36(6) *International Journal of Manpower* 947.
139. Ibid, 952-3.
140. Ibid, 947.
141. Ai Group, Submission no 53, 11.
142. VFF, Submission no 49, 4.
143. RCSA, Submission no 110, 14.

MADEC submitted that many of its clients do not have systems to manage a flexible workforce, and labour hire provides convenience, workload and risk management.[144]

A number of other labour hire agencies which provided information to the Inquiry indicated the main reason they considered clients use their services to be fluctuating workforce requirements, and the need to obtain labour quickly.

Adecco told the Inquiry that the vast majority of its clients use labour hire 'in the way it was intended', for short and medium term skills gaps or in areas without internal capability. The main drivers for its clients' use of labour hire is the ability to 'flex up' for short periods, such as for a specific project in the manufacturing industry or seasonal peaks/new product lines in the food industry. In addition, labour hire enables annual leave and maternity leave to be covered in white collar occupations. Other examples included the provision of event staff for the Royal Melbourne Show, and exam supervisors for educational institutions.[145] Another labour hire agency also told the Inquiry that labour hire is generally used for short term contracts, such as civil construction projects or for events.[146]

Australia Wide Personnel told the Inquiry that the main reason host employers use its services is:

> *… to tap into our expertise, experience and connections to high quality labour. It's not easy what we do. … Our consultants have been with us an average of about 11 years; they have loads of experience and expertise, so I think that really would be the number one reason. Clients don't have time to recruit - it's not their core business.*

Australia Wide Personnel also cited the flexibility to quickly bring in and let go of labour as business requirements change, and cash flow, as other drivers for the use of labour hire.[147]

Another labour hire agency told the Inquiry in closed session that its clients like to be able to 'ramp up' and 'ramp down' their workforce, and use labour hire to backfill for projects they may be running or works they had in the pipeline that they cannot control with their permanent workforce. The agency gave examples of providing labour for a company which oversees a large shutdown for a manufacturing employer, requiring 70 workers for a three week period; and an eight month road building project.[148]

SEMMA told the Inquiry that for the majority of medium sized manufacturers, and some of the smaller ones, the ability to 'flex' their labour force is important. SEMMA also indicated that a number of companies have issues finding people, particularly skilled full time staff, in the Dandenong area because of a lack of skills and people willing to work in the manufacturing industry.[149] The Inquiry also heard from a small manufacturing company, ABeCK Group, which uses labour hire for convenience, to cover short term contracts for two to four weeks, or for when workers are needed in a hurry.[150]

An additional reason for the engagement of labour hire agencies, cited in submissions, was that it operates as a form of probation or trial period for workers which may lead to more permanent engagement. Ai Group submitted that 'thousands of companies engage on-hire workers for the purpose of assessing whether or not the workers are suitable for direct employment with the company.'[151] RCSA submitted that 19% of on-hire employees of RCSA members eventually become permanent employees of the host organisation they are assigned

144. MADEC, Submission no 9, 3.
145. Adecco, Dandenong Hearing, 30 November 2015.
146. Labour hire agency, Closed Hearing 08, Dandenong, 30 November 2015.
147. Australia Wide Personnel, Dandenong Hearing, 30 November 2015.
148. Labour hire agency, Closed Hearing 08, Dandenong, 30 November 2015.
149. SEMMA, Dandenong Hearing, 30 November 2015.
150. ABeCK Group, Dandenong Hearing, 1 December 2015.
151. Ai Group, Submission no 53, 20.

to work for.[152] Chandler Macleod informed the Inquiry that it encourages employees to transition to direct employment by enabling them to 'get their foot in the door' with a host, and there is less risk for employees in this model as they have had an opportunity to experience the host's workplace and know whether it is a good fit for them. Chandler Macleod does not charge the host a fee where one of its employees takes up direct employment with a host after a specified period. It submitted that this provides less risk for hosts, and reduces their recruitment and sourcing costs, as there is a pool of 'work ready' candidates who know their supervisors and the business.[153]

The ACTU, in contrast, criticised the use of labour hire as a form of 'indefinite probation', citing evidence to the 2012 Howe Inquiry from a worker who felt that 'the only way to get a traditional permanent full time job is to go via casual or labour hire types of employment.'[154] The TCFUA submitted that labour hire workers often stay in the same job hoping to be made permanent, but are rarely converted into permanent employees.[155] Dr Elsa Underhill submitted that in Australia, using labour hire employees as a form of probationary employment may contribute to a 'stepping stone' effect, but there is no evidence that this is a common reason for organisations using labour hire employees.[156]

Dr Underhill also submitted that Australian and international research shows that the main reasons organisations use labour hire workers is to reduce labour costs and increase flexibility, and that in so doing, they displace permanent, direct hire employees.[157] A number of participants referred to the impact of cost pressure from supermarkets and other downward supply chain pressure as a contributing factor in what they viewed as the increasing use of labour hire arrangements.[158] In contrast, RCSA referred the Inquiry to the 2003 RMIT Study's indication that only 2% of organisations surveyed gave pay as the primary reason for using on-hire employees; 51% of organisations using on-hire employees would not necessarily employ an equivalent number of employees directly if they were unable to use on-hire employees; and 19% of organisations said they would rarely do so.[159]

Dr Underhill told the Inquiry:

> *I think it is also important to recognise that employers are using labour hire for shifts that are difficult to staff otherwise or for rosters that might need short-term allocations, which are jobs which an employer would ordinarily do, but because they are difficult HR jobs, they have a tendency to pass them on to labour hire. For example, you can go into a factory on the night shift or go down the docks at midnight and all of the workers are labour hire workers. There is no inherent reason for these people to be labour hire workers because they could just as readily work as employees of the host. But it is easier for the HR side of [a] business to simply contract it out to a labour hire company.*[160]

Most organisations, including unions, accepted that there is a legitimate role for the use of labour hire by host companies as a mode of employment, for example to deal with short-term, specialised or fluctuating workforce needs.[161] However the ACTU and other organisations submitted, particularly where labour hire is used on a long term basis, that its purpose is:

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152. RCSA, Submission no 110, 12.
153. Chandler MacLeod, Submission no 114, 6.
154. ACTU, Submission no 76, 20.
155. TCFUA, Submission no 92, 3.
156. Dr Underhill, Submission no 32, 4.
157. Ibid.
158. See e.g. NUW, Submission no 91, 6; East Gippsland Food Cluster, Morwell Hearing, 29 February 2016.
159. RCSA, Submission no 110, 14.
160. Dr Underhill, Deakin University, Academic Forum, 25 May, 2016.
161. See e.g. SDA, Submission no 36, 1; AMWU, Submission no 95, 4.

> *… purely and simply to permit industry to avoid industrial relations laws and consequently shift risk to workers, so business can take the benefit of labour without the burden of complying with laws that are premised on workers being protected in the labour market and given a fair share of the profits generated.*[162]

Similarly, the AMWU submitted that labour hire employment is primarily used in the manufacturing industry to replace roles that were previously, and could still be, undertaken by permanent employees.[163]

Reasons that employees take on labour hire engagements

Both Ai Group and the CFMEU Construction and General Division Victorian Branch (**CFMEU Construction**) referred to the ABS data cited above.[164] CFMEU Construction characterised this data as reflecting that the overwhelming majority of employees used a labour hire firm due to the ease of finding work or an inability to find work otherwise.[165] This was echoed by Dr Underhill, who submitted that all studies of the employment preferences of labour hire workers have found that these workers overwhelmingly would prefer to be employed directly rather than work for a labour hire employer, with the very small minority who prefer agency work having a choice of when they work and for whom they work, a choice not available to most labour hire workers.[166]

The AMWU provided the Inquiry with results of a survey of labour hire workers which it had recently conducted. A large majority of the workers who responded to the AMWU survey indicated that they would prefer to be in other forms of employment. The AMWU submitted that this may reflect the lack of choice these workers had in selecting their type of work in the first place, with 81% (100 of 123) saying that they became a labour hire worker because that was the only type of employment they were offered. Additionally, 72% of respondents (89 of 123) indicated that they continue to work as labour hire workers because they do not have another choice. The clear preference of labour hire workers was to be engaged as permanent employees, with their host employer. When asked, 60% said that they would like the opportunity to become permanent employees. When asked whether labour hire workers should be able to convert to a direct employee of their host employer, 91% (118 of 130) agreed or strongly agreed that they should have that right.[167]

Jesuit Social Services told the Inquiry that some of its program participants apply for work through labour hire firms, as this can be a good way to gain some short-term work experience and a recent employment reference, for example for people coming out of prison. However it noted that many labour hire firms still require people with recent experience, who are job ready, and have experience and skills in particular areas.[168]

Agri Labour Australia (**Agri Labour**) submitted that in its experience after six years of operation, the majority of workers are happy to work flexibly and are not necessarily looking for permanent employment. However, it noted there is a certain percentage of workers and candidates looking for ongoing employment and, from time to time, hosts offer those opportunities. Agri Labour facilitates permanent employment either through permanent on-hire or by direct employment with the host.[169]

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162. ACTU, Submission no 76, 24.
163. AMWU, Submission no 95, 4.
164. ABS, 6359.0 (2008); ABS, 6105.0, (2010); Ai Group, Submission no 53, 11; CFMEU Construction, Submission no 27, 13.
165. CFMEU Construction, Submission no 27, 13.
166. Dr Underhill, Submission no 32, 4.
167. AMWU, Submission no 95, 4-5.
168. Jesuit Social Services, Submission no 52, 3.
169. Agri Labour, Submission no 107, 2.

2.4 Impacts of labour hire

2.4.1 Benefits for business

Several industry organisations submitted that there are a great many benefits for business arising from the use of labour hire arrangements.[170] In summary, the benefits include:

- business can obtain specialist expertise it does not otherwise have;
- business can address skills shortages in particular areas;
- assisting business meet the labour demands of short term projects;
- providing the capacity for business to address fluctuating workloads and changing labour needs;
- allowing business to source ready labour quickly;
- reducing the administrative burden of employment for business;
- allowing business to supplement and improve its internal HR and safety systems through the expertise of labour hire operators; and
- allowing business to observe workers for a period prior to determining whether to hire the worker permanently.

RCSA submitted that as specialist employment outsource service providers, on-hire worker services allow Australian business and government employers, large and small, to reduce undue administrative and compliance costs to allow them to focus on core business.[171]

Ai Group relied upon ABS statistics regarding all employees who had found their job through an agency (including those who were paid by the host, not the labour hire agency)[172] to highlight that the labour hire industry is extremely important for employers, employees and the Australian economy.[173]

VCCI submitted that employers value these alternative forms of employment because they can improve productivity or lower costs in circumstances such as infrequent tasks that require specialised skills, work that is seasonal, sporadic, or short term, or work with a definable end date. It submitted that where flexible forms of employment lower costs, the wider community benefits through lower prices and higher service levels.[174]

Master Builders endorsed the list of benefits of labour hire set out in the Inquiry's Background Paper, in particular the fact that labour hire arrangements help businesses in the building and construction industry to conveniently access a supply of labour to meet peaks and troughs in demand.[175]

ITCRA described the critical importance of labour hire – a flexible supply of quality labour – for the ICT industry, as an enabler for accessing knowledge, information and communications. These are increasingly important elements in today's economic and social interactions between people, firms and nations, as well as being a productivity driver. ITCRA submitted that in order for Victoria to capitalise on the significant productivity gains ICT has to offer to the Victorian

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170. See e.g. Ai Group, Submission no 53; RCSA, Submission no 110; Adecco, Dandenong Hearing, 30 November 2015; MADEC, Submission no 9; Australia Wide Personnel, Dandenong Hearing, 30 November 2015; SEMMA, Dandenong Hearing, 30 November 2015. See also summary of submissions and evidence at 2.3.2.
171. RCSA, Submission no 110, 10.
172. ABS, 6333.0, (2015).
173. AiGroup, Submission no 53, 10.
174. VCCI, Submission no 25, 4.
175. Master Builders, Submission no 38, 3.

economy, it is vital that policy development and regulation supports, rather than hinders, the industry and this includes the talent that enables the industry.[176]

VFF submitted that as businesses in the horticulture industry get bigger there is more need for a flexible and often seasonal labour force. For picking, packing, pruning and other tasks, businesses have a short term need for a readily-accessible workforce. Labour hire arrangements also allow businesses to reduce time spent on administrative tasks related to employment. Business would become unviable if all workers were required to be permanent. For most businesses, profit margins are tight and they cannot sustain employing permanent employees if there is no work available.[177]

The Australian Chamber of Commerce and Industry (**ACCI**) submitted that business and modes of work are fundamentally changing in response to the rapid evolution of digital technology and changing consumer and worker preferences, with people demanding more convenience, flexibility and diversity in how and when they shop and work. It submitted that as our sources of economic activity shift, the regulatory framework must adapt to permit the structuring of work in a way that best enables businesses to interact with the market. If goods and services are not in line with demand, employment outcomes will be negatively impacted. ACCI rejects work structured around the 9am to 5pm Monday to Friday paradigm, regarding it as 'a thing of the past in many workplaces' in our 24/7 digital and global economy. It submitted that this provides opportunities for people to pursue pathways to economic independence through new work and business opportunities that complement their personal needs and preferences. In businesses in dynamic but high risk establishment and growth phases, work is not always ongoing or guaranteed and a broad range of work arrangements is fundamental. ACCI argues that through a choice of work options, businesses are able to scale up and down to meet volatile demand and can fill skill and labour gaps as required.[178]

2.4.2 Impacts for workers

Positive impacts

A number of submissions, generally from employers and industry groups, pointed out the advantages of labour hire for workers.[179] For example, RCSA argued that on-hire worker services deliver decent work through a combination of flexibility and security, whereby disparate direct hire casual and contract work can be pooled through an employment service provider to become a permanent or semi-permanent engagement.[180]

One labour hire agency told the Inquiry in closed hearing that a lot of its decisions about forms of employment came down to the personal preference of the worker. It indicated that some people are offered permanency and refuse, not wanting to lose the casual loading. Many are registered with multiple agencies. This agency offers its ongoing casuals permanency after six months, but most of the time it is refused by the worker.[181]

Another labour hire agency told the Inquiry in a closed hearing that where it engaged the bulk of its workers as casuals rather than fixed term for an eight month project, that was in some instances due to the choice of the workers.[182] Another agency indicated that labour hire gives

176. ICTRA, Submission no 39, 5.

177. VFF, Submission no 49, 65.

178. ACCI, Submission no 55, 15.

179. See e.g. RCSA, Submission no 110, 11; Adecco, Dandenong Hearing, 30 November 2015; Labour hire agency, Closed Hearing 08, Dandenong, 30 November 2015.

180. RCSA, Submission no 110, 11.

181. Closed Hearing 05, Mildura, 24 November 2015.

182. Closed Hearing 08, Dandenong, 30 November 2015.

workers flexibility, access to industries where they may not have otherwise been able to work, or where a client is not taking on workers directly.[183]

Adecco cited other advantages of labour hire as career cross-skilling, and the benefits of generally being paid site rates plus a 25% (casual) loading.[184]

SDA submitted that the growth in labour hire engagement has benefits and drawbacks for labour hire workers. Benefits included flexibility to work when they want and capacity to refuse a shift.[185]

Negative impacts

Non-observance of minimum employment standards

The Inquiry heard evidence from a significant number of witnesses and submitters regarding some labour hire agencies' non-compliance with legal obligations, including underpayment and non-payment of wages, unsafe working conditions and substandard accommodation arrangements. This evidence is detailed further in Chapter 4 – Unlawful conduct by labour hire agencies.

Lack of financial security

A large number of participants described the lack of financial security for labour hire workers, and the adverse effects of this on their lives.

For example, the AMWU submitted that many labour hire staff highlight financial insecurity as a particular hardship arising from their engagement as casual employees, and the experience of living 'week to week'; being unable to 'financially plan [as] income is not guaranteed' is quite a common complaint. The union submitted that many labour hire workers find it 'harder to get home loans' due to the insecure nature of their employment and, if they are able to secure one, are concerned about the difficulty in making repayments. It quoted one labour hire worker who stated that: 'when the company ran out of work, we are sent off that day with no real warning… This was hard for my wife and I to balance the budget. The fatigue and low morale certainly put a dampener onto my home life as well.'[186]

Jesuit Social Services highlighted a significant problem with the unpredictable and inconsistent availability of work in labour hire for people on Centrelink benefits. The 'on-again, off-again' nature of labour hire work creates considerable administrative difficulties for these workers in relation to Centrelink payments, including eligibility for Health Care Cards. This has led to some workers constantly re-negotiating Centrelink payments and being cut off all income for periods of time. Jesuit Social Services submitted that Centrelink require people on the Newstart allowance to notify them on the day they commence employment so that their benefits can be reduced for that fortnight. However, individuals taking up labour hire work often do not receive income from the labour hire firm for up to four weeks. This situation can be repeated many times over a period of months. Jesuit Social Services also submitted that labour hire work can create havoc with other compliance issues related to Centrelink benefits, such as attending appointments with job services providers.[187]

183. Closed Hearing 08, Dandenong, 30 November 2015.
184. Adecco, Dandenong Hearing, 30 November 2015.
185. SDA, Submission no 36, 1.
186. AMWU, Submission no 95, 6.
187. Jesuit Social Services, Submission no 52, 3-4.

Training, career development and apprenticeships

The Inquiry heard that labour hire workers often have less access to training and career development than direct employees.

The AMWU submitted that a lack of training for labour hire workers had long term implications. It said that 35% of labour hire workers it surveyed did not get access to training at all, and 35% believe they did not get promoted or reclassified because they were labour hire workers. It submitted that this has flow-on effects for the overall economy because it creates less skills investment and industry wide skills shortages.[188]

The Inquiry received contrary submissions regarding the impact of labour hire on apprenticeships.

Dr Underhill submitted that in Australia, only the very largest labour hire agencies employ apprentices.[189] The Construction Forestry Mining and Energy Union Mining and Energy Division Victorian Branch (**CFMEU Mining and Energy**) submitted that in the power industry in the La Trobe Valley, apprenticeship numbers have dropped from around 120 to around 20 since the privatisation of the energy companies in the region; and in light of occupations such as fitters, boilermakers, riggers and (to a lesser degree) electricians being engaged by contractors and being transient workers from interstate.[190]

JobWatch described the use of apprentices and trainees as labour hire workers as a growing problem. It regularly receives calls from apprentices or trainees who are working under labour hire arrangements. It submitted that these workers are young and already at risk of exploitation due to their inherent vulnerability as a result of their employment status, and labour hire arrangements increase that risk.[191]

In contrast, the Inquiry heard positive evidence regarding group training schemes, which are in effect 'a form of labour hire'.[192] Both the HIA and VACC provided the Inquiry with details of the group training schemes which they operate.

HIA submitted that these schemes have evolved to provide an essential source of workforce development for the housing industry. Group training allows apprentices to obtain and complete their apprenticeships while being exposed to a diversity of work opportunities and construction environments, and permits builders and contractors to train apprentices without committing to a full three to four year contract of training, after which there may not be work available. The schemes also provide pastoral care and support mechanisms that may not otherwise be in place.[193]

VACC submitted that its scheme has greatly assisted in bringing apprentices through the automotive industry and has had a positive effect. It submitted that the cost to business of running apprenticeship schemes directly and the complexity of the legal framework make group training schemes, such as the one operated by VACC, an effective means for addressing the skills shortfall. VACC submitted that an apprentice's final host employer invariably offers full time employment as a tradesperson once the apprentice completes his or her contract of training with VACC. The organisation considers that whilst group training schemes are a form of labour hire, organisations which provide group training are different to labour hire agencies and should be treated separately.[194]

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188. AMWU, Submission no 95, 5.
189. Dr Underhill, Submission no 32, 4.
190. CFMEU Mining and Energy, Geoff Dyke, Morwell Hearing, 29 February 2016.
191. JobWatch, Submission no 46, 25-26.
192. VACC, Submission no 51, 8.
193. HIA, Submission no 45, 7.
194. VACC, Submission no 51, 8.

The Australian Meat Industry Employees Union (**AMIEU**) described a scenario in the meat industry involving JBS Australia (**JBS**), which has a contract with Labour Solutions Australia (**LSA**), a labour hire agency with an office on site at JBS in Brooklyn. LSA recruit new potential employees, and another company called Top Recruitment facilitates the offering of a five-day induction course which is provided by MISS, a registered training organisation. Workers are given Certificate III training in meat processing. However, JBS select only a small number of the workers to actually gain employment with LSA. The training is delivered with both federal and state government funding.[195] A significant number of Chin community members have been approached and received this 'induction' training but have not gained employment. AMIEU submitted that: 'Advertising for non-existent jobs appears to lead to vulnerable workers being used so that RTOs can access government funding.'[196] The Senate Work Visa Report detailed similar training scams in the meat industry in other states.[197]

Impact on permanent employment

A number of unions submitted that labour hire was increasingly being used to replace permanent staff.[198] UV provided the example of the Coca Cola site in Moorabbin, where there are significant numbers of individual casual labour hire workers who have been performing beverage production work at the site for a number of years, working more than 38 hours per week. When permanent staff leave the site, they are replaced with casual labour hire staff. During recent enterprise bargaining, Coca Cola sought to further increase the number of labour hire casuals on site by making almost all permanent staff redundant, and proposed to replace all of these workers with labour hire casual staff.[199] UV also provided the example of PPG, a paint production site of around 100 workers. As permanent staff have left the site, they have been replaced by labour hire casuals, with around 20% of workers now labour hire employees. A number of workers told the Inquiry that they had been engaged by successive labour hire agencies to perform the same work, for the same host companies.[200]

The TCFUA told the Inquiry as follows:

> *[W]e recently had an experience in Geelong where a company had closed, but then reopened and when they reopened they employed a whole lot of people through one of the local Labour Hire companies.… [T]he workers prior to the close were covered by an agreement … but because they came back in under a Labour hire agency that agreement didn't cover them.*
>
> *The company … wanted to re-employ the workers, but they didn't want to go back to the old workplace agreement, and they didn't seek to terminate that agreement. So what they did is they only employed a couple of workers out of quite a few, and they did a workplace agreement with three, or four workers and then they told the others at the Labour hire agency, "If you want to re-employ you have to take this agreement", so it was take it or leave it and it's significantly less conditions than what they would have had under the workplace agreement that previously used to operate.*[201]

195. AMIEU, Melbourne Hearing, 10 February 2016.
196. AMIEU, Submission no 77, 4-5.
197. Senate Work Visa Report, 174.
198. See e.g. UV, Submission no 98, 2; CPSU Communications, Submission no 61, 1; AMWU, Submission no 95, 4.
199. UV, Submission no 98, 8.
200. Union and worker, Closed Hearing 09, Dandenong, 1 December 2015; NUW and workers, Dandenong Hearing, 30 November 2015; Union, Closed Hearing 14, Geelong, 7 December 2015; Union and workers, Closed Hearing 20, Shepparton, 15 February 2016; CPSU Communications, Submission no 61.
201. TCFUA, Geelong Public Hearing, 7 December 2016.

Another union official told the Inquiry about a food manufacturing company in regional Victoria, as follows:

> *We're actually doing enterprise bargaining at the moment and there's no site rate clause in the agreement which allows them to use as many [labour hire] casuals as they like, basically, and there's an incentive to use more [labour hire] casuals because they work out cheaper than the permanents, who are on about $30 an hour. It's really disempowering for the workers because all the [labour hire] casuals there live in a state of fear. … [A] lot of them don't want to join the union because they're scared that they won't get any more shifts, so that really affects their power that they have. They're not getting a say in these negotiations that are being discussed, it's only, obviously, the direct staff and the company that are having a say.*[202]

Whilst RCSA submitted that labour hire does 'not necessarily' replace direct hire employment opportunities, the data it referred to suggests that this may occur in many instances. The 2003 RMIT Study found that 51% of organisations using on-hire employees would 'not necessarily' employ an equivalent number of direct employees, and 19% of organisations indicated they would only rarely do so.[203] However, these figures appear to suggest that 49% of organisations would otherwise employ a direct employee (rather than labour hire), 32% may do so, and 19% would rarely do so.

2.4.3 Impacts on the community and economy

RCSA argued that labour hire services are beneficial to the labour market generally. It submitted that: 'on-hire worker services facilitate an efficient allocation of labour and management by sourcing, matching, assigning and supporting the best individuals for the job at hand within the most effective engagement model for both worker and hirer.' RCSA argued that labour hire facilitates the free flow of information between business and workers, enables adaptation to change in increasingly volatile and complex labour markets, and reduces unemployment by creating new jobs and providing a better and faster match between supply and demand. Further, on-hire work enables individuals to transition from education to work, from unemployment to employment and from job to job.[204]

One labour hire agency told the Inquiry that labour hire facilitates jobs, where otherwise host employers would not have the resources or time to recruit, particularly for short term placements.[205]

Others indicated that labour hire can improve the human resources systems and compliance of host firms. The Inquiry heard from a labour hire agency (in a closed session) that where there is a smaller or less sophisticated host, the labour hire agency can assist that host to put in place the systems required for safety and broader HR compliance obligations. This particular agency provided this service at its own cost.[206] Another labour hire agency told the Inquiry that its clients use its services to bring the client's own occupational health and safety (**OHS**) practices in line.[207]

Another labour hire agency told the Inquiry that the labour hire model meant that:

> *we can keep our hands on some good people by placing them elsewhere on the days off that they have with the prime client, keep them working and at the same time they're getting virtually a full-time wage but they're getting to see varying clients of ours so it gives us the ability to backfill and keep them in permanent hours but maybe not with the same host employer.*[208]

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202. Union and workers, Closed Hearing 20, Shepparton, 15 February 2016.
203. Brennan et al (2003), 28, cited by RCSA, submission no 110, 12.
204. RCSA, Submission no 110.
205. Labour hire agency, Closed Hearing 01, Mildura, 23 November 2015.
206. Labour hire agency, Closed Hearing 05, Mildura, 24 November 2015.
207. Labour hire agency, Closed Hearing 08, Dandenong, 30 November 2015.
208. Labour hire agency, Closed Hearing 08, Dandenong, 30 November 2015.

The Australian Education Union (**AEU**) and the Community and Public Sector Union (**CPSU**) argued that standards of service delivery are weakened through the use of labour hire in the public sector.[209]

Some submissions argued that the use of labour hire, particularly with a temporary migrant workforce, was having a negative effect on local employment in communities. The Bendigo Uniting Churches Social Justice Group submission refers to local businesses 'bussing in' remote workers, in a context where unemployment is dramatically increasing in the region.[210] John George, backpacker proprietor, submitted that local employers in the Sunraysia region seem to prefer visa holders for seasonal work as they are generally more reliable and motivated than local workers.[211] One labour hire agency told the Inquiry in closed hearing that it had no trouble placing local workers in jobs which were very uncomfortable or unpleasant but which were remunerated accordingly: 'Where the pay is appropriate, certainly the locals will do the work'.[212]

2.5 Conclusions, findings and recommendation – the labour hire industry

The range of evidence and other information examined in this Chapter enables the following findings to be made about the labour hire sector in Victoria.

The labour hire industry has developed over the last 20-30 years to become a significant employer of Victorian workers and a major contributor to the Victorian economy. Labour hire is present in almost all Victorian industries; Australia-wide data indicates that it is used most extensively in administrative and support services, mining and manufacturing.

There are deficiencies in and inconsistencies between the available data relating to the prevalence of labour hire employment arrangements in Victoria and Australia, both in respect of the proportion of labour hire workers and the proportion of workplaces which use labour hire.

Recommendation 1:
The Victorian Government should develop or resource targeted data collection to investigate the prevalence and nature of labour hire employment within the state.

There are various legitimate and sound commercial reasons for Victorian businesses to utilise labour hire arrangements. Labour hire enables a flexible approach to the engagement of labour which assists businesses to deal with peaks and troughs in demand, without some of the constraints associated with engaging ongoing employees.

There is a wide spectrum of legal compliance within the labour hire industry in Victoria. At one end of the spectrum are labour hire agencies and arrangements which are highly transparent and compliant with workplace laws, awards and other industrial instruments, health and safety legislation and other applicable legal requirements. At the other end of the spectrum are 'invisible' labour hire agencies and arrangements, operating almost entirely outside the existing regulatory framework. These have been described as 'rogue' labour hire operators, and their activities frequently involve breaches of applicable workplace and safety legislation, award obligations and other regulations. The boundaries between labour hire agencies at the the two ends of the spectrum are not always clear. There is a range of agencies and arrangements falling between the two extremes.

209. AEU, Submission no 103, 1, 3; CPSU, Submission no 94, 26.
210. Bendigo Uniting Churches Social Justice Group, Submission no 18, 2.
211. John George, Submission no 29, 6.
212. Labour hire agency, Closed Hearing 05, Mildura, 24 November 2015.

While there is evidence that some workers are attracted to the flexibility that labour hire offers and see it as a path to ongoing employment, many workers accept labour hire engagements as the only choice open to them and would prefer permanent positions. There is also considerable financial insecurity attached to many labour hire engagements.

In conclusion, 'best practice' labour hire arrangements in which workers are treated in accordance with their legal rights can have many positive economic and social effects. However, the nature of the three-way relationship between a labour hire agency, its employee and the host organisation where the employee works means that the framework of legal rights and obligations for employers and employees in Victoria does not always apply in the same way. The Victorian and federal regulatory framework for labour hire is examined further in chapter 3. In addition, the triangular arrangement creates some scope for non-observance of minimum employment standards.[213] The extent to which this occurs in Victoria is developed in chapter 4.

213. A similar conclusion is drawn in the Government Members' Statement of Reservation in the Queensland Inquiry Report (2016), 51; see also the main report at 14-26.

3. LABOUR HIRE EMPLOYMENT ARRANGEMENTS WITHIN THE CURRENT REGULATORY FRAMEWORK

Findings and recommendations

Mode of engagement

3.1

The overwhelming mode of engagement of labour hire workers in Victoria is casual employment. To a lesser extent, labour hire workers may be engaged as independent contractors, particularly in professional roles in industries such as information technology. To a significantly lesser extent, labour hire employees are engaged on a fixed term employment basis. Permanent employment is rare. Whilst each of these non-permanent forms of engagement is present across the broader Victorian labour market, their cumulative prevalence within the labour hire industry is considerably greater.

Minimum terms and conditions of engagement

3.2

It is an unavoidable consequence of the engagement of labour hire workers as casual employees, or as independent contractors, that they do not receive the benefit of many/any minimum employment conditions under the National Employment Standards. Labour hire workers engaged as fixed term employees receive most but not all of the minimum National Employment Standards conditions. Casual labour hire employees also miss out on many award conditions, so are often worse off than directly engaged permanent employees of the host, even taking into account the casual loading.

3.3

Modern awards play a critical role in ensuring that labour hire employees have the protection of minimum hourly rates of pay; and certain other minimum conditions (which vary depending on whether they are casuals or fixed term employees). The on-hire provisions in most modern awards appear to operate effectively to ensure the extension of award terms and conditions to labour hire employees performing work covered by the relevant award, reflecting the principle that labour hire employers and their employees should be covered by the award covering the host employer to whom the employees are on-hired.

3.4

Casual conversion clauses in awards have not proved to be an effective mechanism to assist labour hire casuals to obtain permanent employment.

3.5

Contractual provisions which require an employee to pay a fee or commission to a labour hire agency in order to obtain work, and contractual provisions which prevent or hinder a labour hire employee from obtaining direct employment with a host, should be discouraged. These issues are addressed further in Recommendation 26, at 5.6.4.

Enterprise bargaining and the application of enterprise agreements

3.6

Some labour hire employers seek to use enterprise agreements as a mechanism to drive down employment conditions. Vigorous application of the Better Off Overall Test by the Fair Work Commission is needed to prevent this from occurring.

3.7

In many instances, host enterprise agreements do not apply to labour hire employees, resulting in differential treatment (i.e. lower pay and conditions) for those workers compared with direct employees of the host whom they work alongside. This problem is more pronounced where (as the Inquiry heard is common in some sectors) labour hire employees have been working at the site of one host over a lengthy period.

Recommendation 2:

Labour hire employees should have the opportunity to be covered by enterprise agreements applying at a host's workplace – whether this occurs de facto (arising from the voluntary decision of the labour hire employer to observe the site enterprise agreement); or because of the application of a parity clause in the host's enterprise agreement.

On that basis, there should not be impediments to the negotiation of parity clauses in enterprise agreements (such as the prohibition recommended by the Productivity Commission). Given that the view has developed in the case law that parity clauses are a 'matter pertaining' to the employment relationship, and are therefore permitted matters in agreements, whether or not they are included should remain a matter of negotiation between bargaining representatives.

The Victorian Government should advocate the above position in any consultation processes instigated by the Federal Government over implementation of the Productivity Commission's report.

Employment conditions of casual relief teachers

3.8

There is a two-tiered system of terms and conditions in respect of casual relief teachers working in government schools. Those who are directly engaged by school councils are entitled to the benefit of the terms and conditions set out in the Victorian Government's Ministerial Order – conditions which are more generous than the relevant modern award.

Those who are engaged by school councils through a third party are not entitled to these more beneficial terms and conditions. This disparity of conditions arises through the Victorian Government's own legislative framework and Ministerial Order, and is thus within its power to remedy.

Evidence to the Inquiry suggested that there are many benefits of using a labour hire arrangement for both school councils and for casual relief teachers themselves. These benefits would continue to be available notwithstanding parity of conditions being afforded.

Recommendation 3:

I recommend that the Victorian Government legislate to remove the disparity in minimum terms and conditions between casual relief teachers engaged by school councils directly, and those engaged by school councils via a labour hire agency.

Protections from unfair or discriminatory treatment

3.9

The current unfair dismissal provisions in the Fair Work Act operate, in practice, to limit substantially the protections from unfair dismissal for labour hire workers. This principally arises from the exclusions of most casuals, as well as fixed term/specified task employees and contractors, from being able to bring an unfair dismissal claim.

3.10

Even for labour hire employees who can bring an unfair dismissal claim, the relevant provisions are sometimes interpreted by the Fair Work Commission so as to enable the labour hire agency to 'hide' behind the actions of the host and/or their commercial relationship with the host. This approach enables both the host and the labour hire employer to avoid having to account for their respective roles in causing or contributing to the termination of the labour hire employee's employment.

3.11

These limitations of the Fair Work Act unfair dismissal provisions act to reduce job security for labour hire workers, and likely act as an incentive for businesses to utilise labour hire rather than engage direct employees.

3.12

One option for addressing these issues would be to adopt one of the forms of 'joint employment' discussed in this chapter. These include Thai's proposal to amend the Fair Work Act to enable a labour hire employee to bring an unfair dismissal claim against both the labour hire agency and host (with a statutory test modelled on United States jurisprudence to determine whether the host/client is a joint employer that may have liability for the employee's dismissal and any remedies arising from a finding of unfairness). However the imposition of such a framework in the Australian context would be a major leap, with significant economic effects on the users of labour hire services.

3.13

The Fair Work Commission is currently exhibiting different approaches to determining the extent to which a labour hire employer can be held responsible for the fairness or otherwise of the host's decision-making in terminating an engagement with a labour hire employee.

In practice, an approach by labour hire agencies which minimises use of the contractual relationship between the labour hire agency and host to defeat the rights of a dismissed employee to seek a remedy is to be preferred and should be encouraged. These issues are addressed further in Recommendation 26, at 5.6.4.

3.14

The evidence presented to the Inquiry, and the relevant case law, illustrate a number of ways in which labour hire employees miss out on protections against unfair treatment at work enjoyed by other workers.

Recommendation 4

The Government should introduce amendments to the *Equal Opportunity Act 2010* (Vic) to clarify that the protections from discrimination in respect of an employee engaging in employment activity, and reasonable adjustments for an employee with a disability, apply in the context of a host's relationship with a labour hire employee.

3.15

In relation to rostering and notice of shifts, the evidence of a number of labour hire agencies indicated that labour hire works best for the labour hire agency, employee and host when rostering and shift allocation are undertaken in a transparent and fair manner. Conversely, much evidence demonstrated that poorly managed rostering can have a significantly detrimental impact on labour hire workers and their families. Labour hire agencies should be encouraged to manage rostering so that notice and planning of shifts work for the mutual benefit of all parties involved in labour hire relationships. This issue is dealt with further in Recommendation 26, at 5.6.4.

Occupational health and safety

3.16

Under Victorian law, while labour hire agencies and hosts have shared obligations to safeguard the health and safety of workers placed at host sites, some ambiguities and 'grey areas' arise. That there is in some instances a lack of clarity in practice, as to the reach of duties owed as between a labour hire agency and host, is demonstrated by the evidence provided to the Inquiry about health and safety risks/breaches experienced by labour hire workers. This is despite what appear to be the best efforts of many labour hire agencies and hosts to ensure compliance with their obligations under the *Occupational Health and Safety Act 2004* (Vic).

3.17

A clear attempt has been made in the Model Work Health and Safety Act, to overcome the ambiguities arising from the traditional approach to centering occupational health and safety obligations on employers (and independent contractors engaged by employers) in respect of employees (and deemed employees). The Model Act's imposition of occupational health and safety duties on persons conducting a business or undertaking in respect of the broadly defined category of workers, and the explicit inclusion in that definition of labour hire employees placed with a host, is a more appropriate regulatory approach to ensure the safety of labour hire workers than current Victorian regulation. This conclusion is strengthened once the 'horizontal' (concurrent) consultation obligation of relevant duty-holders is also taken into account.

Recommendation 5:

I recommend that the Model Work Health and Safety Act approach to regulating labour hire relationships be adopted in Victoria. In the absence of Victoria adopting wholesale the approach under the model laws, I recommend that Victoria adapt an approach which matches the substantive provisions under the model laws in this regard.

3.18

The evidence provided to the Inquiry indicates that some labour hire workers do not exercise their rights to report safety incidents, risks or hazards in the workplace – largely due to concerns that doing so may jeopardise their future engagement at the host's worksite, or their employment with the labour hire agency. This suggests that the framework for representation and protection of labour hire employees against victimisation for asserting their rights in occupational health and safety matters, by either the labour hire agency or the host, should be as robust as possible. Similarly, labour hire employees should have access to the same rights of representation in relation to occupational health and safety issues as other Victorian employees. However, the *Occupational Health and Safety Act 2004* (Vic) offers only limited protection to labour hire staff, particularly in respect of their treatment or representation at the main locus of activity: the host's worksite.

Recommendation 6:

I recommend that the Model Work Health and Safety Act approach to regulating to provide for worker representation and to protect workers against victimisation for asserting their rights in occupational health and safety matters, by either a labour hire agency or a host, should be adopted in Victoria. In the absence of Victoria adopting wholesale the approach under the model laws, I recommend that Victoria adapt an approach which matches the substantive protections under the model laws in this regard.

3.19

The evidence presented to the Inquiry shows that injury rates for labour hire workers are higher than for other Victorian workers; and that there is in some instances a lack of cooperation on the part of hosts with return to work arrangements for injured labour hire workers. However, noting the reservations expressed by the Hanks Inquiry and more recently by WorkSafe, I do not recommend any change or increase in the statutory duties owed by hosts in this area. Rather, best practice return to work arrangements should form part of the voluntary code of practice recommended at 5.6.4.

Recommendation 7:

An accurate picture of occupational health and safety risk factors in the labour hire sector, and of injured labour hire workers in Victoria, requires the establishment of an occupational injury and illness monitoring and reporting system that extends beyond injury compensation claims data. With such data available it would be possible to identify occupational health and safety risks for labour hire workers, and develop interventions to minimise or remove those risks. I recommend that the Victorian Government collect this data and, periodically, make it publicly available.

3.1 Introduction

This chapter examines the current regulatory framework for labour hire employment arrangements in Victoria, and the implications of this framework in practice.[214] The principal source of employment rights and obligations for most Victorian employees and employers across the private and public sectors is the Fair Work Act. Accordingly, much of this chapter is devoted to examining features of that legislation.[215]

As noted in 2.1.3, many labour hire businesses in Victoria are already highly compliant with their legal obligations. However, evidence received by the Inquiry about the labour hire industry was not confined to rogue labour hire operators exhibiting unlawful practices. The Inquiry heard considerable evidence about adverse effects of labour hire employment arrangements which operate entirely in accordance with the current regulatory framework, and the Terms of Reference require consideration of these matters.

The starting point for a review of labour hire employment regulation in Victoria is that labour hire, as an employment model, is entirely lawful. Further, there is little specific regulation of the labour hire sector. Cochrane and McKeown describe Australia as having a 'lightly regulated framework' for agency work. They note that there are few national regulations surrounding agency work, such as sectoral limitations or limitations on reasons for hire, maximum duration of hire, maximum renewal or total duration.[216] In contrast to the approaches of many other countries, some of which are outlined at 5.2, there are presently no federal or state laws which specifically prohibit, qualify or curtail the use of labour hire employment.[217]

A second key observation regarding the regulatory framework governing labour hire employment in Victoria is that, generally speaking, employment laws do not differentiate between labour hire employment and any other type of employment. In a direct employment relationship, the employer and the party controlling the day-to-day work of an employee are one and the same. However, in a labour hire employment arrangement, the party with de facto control over the employee's work is not the labour hire agency employer, but the host. The employee commences and concludes work in accordance with the requirements of the host, works at the direction of the host, at the host's workplace, and in many cases alongside direct employees of the host. Further, irrespective of the length and regularity of a labour hire employee's work for a host, the labour hire employee's engagement at the host's business is, of its nature, temporary.

These inherent features of labour hire employment arrangements mean that despite the equal application of employment regulation to labour hire employment and non-labour hire employment in a formal sense, there are quite different substantive consequences for the obligations of labour hire employers and hosts, and the rights of labour hire employees. The FWC recently observed that: 'these arrangements can be a minefield for all concerned, both in practical terms and in terms of rights and obligations arising under legislation, industrial instruments and contracts of employment.'[218]

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214. See Terms of Reference, (1)(iv)-(vi).

215. The Chapter deals with regulation which impacts labour hire employment, rather than other commercial or business regulation affecting labour hire arrangements. In addition to the Fair Work Act, other Federal laws may impact upon labour hire employees in Victoria. The *Independent Contractors Act 2006* (Cth), *Migration Act 1958* (Cth) and Part 6-4A of the Fair Work Act regarding TCF outworkers are considered further in Part II of this Report. This Report does not consider the operation of the general commercial law framework under, for example, the *Competition and Consumer Act 2010* (Cth) and *Australian Consumer Law and Fair Trading Act 2012* (Vic).

216. Cochrane and McKeown (2015), 948.

217. Although note that modern awards and some federal enterprise agreements include provisions regulating aspects of labour hire relationships; see 3.2.3 and 3.3.4.

218. *Kool v Adecco Industrial Pty Ltd* [2016] FWC 925, [46].

3.2 Minimum terms and conditions of engagement for labour hire workers

3.2.1 Mode of engagement of labour hire employees in Victoria

A key determinant of the minimum terms and conditions of labour hire workers in Victoria is their mode of engagement.

Data regarding mode of engagement

There is consistent evidence that the overwhelming majority of labour hire employees are engaged as casual employees.

ABS data indicates that compared to employees generally, labour hire workers were more likely to be without paid leave entitlements (79% compared to 23% of employees overall), which is commonly used as an indicator of casual employment.[219] Further, the data indicates that a greater proportion of labour hire workers were engaged on a fixed term contract basis compared to all employees (15% compared with 3%).[220]

The 2003 RMIT Study survey of employment service agencies indicated as follows:

- Three quarters of on-hire employees received casual loadings.[221]
- Agencies which were members of the RCSA reported a mean of 80.8% engagement of employees, and 17.1% engagement of independent contractors. Non-RCSA agencies reported a much higher engagement of independent contractors, at 37.6%, with 61.6% employees.[222]

Inquiry evidence

Also consistent with the above, the Inquiry heard that overwhelmingly, labour hire workers are engaged as casual employees. Many participants submitted that the most common mode of engagement within the labour hire industry is casual employment.

The vast majority of labour hire agencies who provided submissions and evidence to the Inquiry indicated that they employed workers either exclusively or overwhelmingly as casual employees.[223] Schedule 2 to this Report, summarising the information provided to the Inquiry by labour hire agencies, indicates that many of these agencies engage 90% to 100% of their labour hire employees as casuals.

The AMWU submitted that of the 157 labour hire workers who responded to the AMWU Survey, 129 (82%) were casual.[224]

Most participants also accepted that permanent employment of labour hire workers was uncommon. RCSA, referring to the 2003 RMIT Study, put the figure at 16%.[225] The AMWU survey indicated that 18% of workers were permanent.[226] The Inquiry heard some examples of labour hire workers being engaged as independent contractors. In the case of the information

219. ABS, 6105.0 (2010), 4.
220. Ibid.
221. Brennan et al (2003), 87.
222. Ibid 50.
223. See e.g. Chandler MacLeod, Submission no 114, 2; Australia Wide Personnel, Dandenong Hearing, 30 November 2015.
224. AMWU, Submission no 95, 4.
225. RCSA, Submission no 110, 13.
226. AMWU, Submission no 95, 4.

and communication technology (**ICT**) industry, the Inquiry heard that independent contracting and on-hiring was common.[227] It also heard of instances of this practice in certain other industries such as the cleaning and security industries[228] and in respect of some CRTs.[229] The CELRL submitted that in many cases, agencies engage workers using the so-called 'Odco' system, through which an agency purports to engage workers as independent contractors before on-hiring them to host organisations.[230]

However, RCSA submitted that there is a common misconception that on-hire workers are primarily engaged as independent contractors, whereas the majority of on-hire workers are employees. On-hire workers engaged as independent contractors are primarily in the professional category. RCSA did not accept the engagement of unskilled and semi-skilled workers as independent contractors because of a view that such workers are typically incapable of fulfilling the indicia required to sustain a genuine business to business relationship.[231]

The engagement of labour hire workers as independent contractors, as with directly engaged independent contractors, means that most employment regulation does not apply at all to these workers. The use of independent contracting in Victoria is examined more generally at 8.2.

Conclusions and findings - mode of engagement

The overwhelming mode of engagement of labour hire workers in Victoria is casual employment. To a lesser extent, labour hire workers may be engaged as independent contractors, particularly in professional roles in industries such as information technology. To a significantly lesser extent, labour hire employees are engaged on a fixed term employment basis. Permanent employment is rare. Whilst each of these non-permanent forms of engagement is present across the broader Victorian labour market, their cumulative prevalence within the labour hire industry is considerably greater.

This has implications for the minimum terms and conditions which apply to labour hire workers.

3.2.2 Statutory minimum standards

The Fair Work Act contains a number of statutory minimum standards with general application to national system employees.[232]

The National Employment Standards

The National Employment Standards (**NES**) are a set of statutory minimum conditions about hours of work, various leave entitlements, notice of termination, redundancy pay and

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227. ITCRA, Submission no 39, 6; Professionals Australia, Submission no 34, 4; Dr G. V. J. Forsyth, Submission no 5, 2.
228. UV, Submission no 98, 11.
229. AEU, Submission no 103, 4.
230. CELRL, Submission no 99, 8, referring to the contractor arrangements upheld as lawful in *Building Workers Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104.
231. RCSA, Submission no 110, 13.
232. The Fair Work Act applies primarily to national system employers and their employees: see s 14. Its particular application differs: between Territories and States; between referring States and Western Australia (which has not referred industrial relations powers to the Commonwealth); and between each referring State depending upon the nature of its referral. Generally speaking, the Fair Work Act applies to all constitutional corporations in Australia; to unincorporated businesses, except those in WA; to almost all employment in Victoria, and all employment in the Territories; and to the federal public sector. State public sector employment in NSW, Queensland, SA, Tasmania and WA is not covered by the Fair Work Act; and it does not apply to local government employment in all of those states (except Tasmania). State industrial laws continue to apply to public sector and local government workers in the relevant states.

other matters. They cannot be displaced by an employment contract, award or enterprise agreement. [233]

The application of these standards to labour hire workers differs depending upon the mode of engagement of the labour hire worker. Table 3.1 summarises the application of the NES across the main modes of engagement of labour hire workers.

Table 3.1: Application of National Employment Standards to labour hire workers

National Employment Standard	Application to casual labour hire employees	Application to independent contractor labour hire workers [235]	Application to fixed term labour hire employees
Maximum weekly working hours plus reasonable additional hours [236]	√	X	√
Capacity to request flexible work arrangements [237]	Where the employee has been employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months; and has a reasonable expectation of continuing employment	X	Where the employee has had more than 12 months' continuous service with the employer
Unpaid parental leave and related entitlements [238]	Where the employee has been employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months; and has a reasonable expectation of continuing employment	X	Where the employee has had more than 12 months' continuous service with the employer
Annual leave [239]	X	X	√
Paid personal/ carer's leave [240]	X	X	√
Unpaid carer's leave [241]	√	X	√

233. Fair Work Act ss 44(1), 55(1), 56, 61.
235. With the exception of TCF outworkers, pursuant to Fair Work Act Part 6-4A Division 2, which deems TCF contract outworkers to be employees for purposes of the NES.
236. Fair Work Act Part 2-2 Division 3.
237. Fair Work Act Part 2-2 Division 4.
238. Fair Work Act Part 2-2 Division 5.
239. Fair Work Act Part 2-2 Division 6.
240. Fair Work Act Part 2-2 Division 7, Subdivision A.
241. Fair Work Act Part 2-2 Division 7, Subdivision B.

Table 3.1: Application of National Employment Standards to labour hire workers *(Cont.)*

National Employment Standard	Application to casual labour hire employees	Application to independent contractor labour hire workers	Application to fixed term labour hire employees
Paid compassionate leave[242]	X	X	√
Unpaid compassionate leave[243]	√	X	X
Community service leave[244]	√	X	√
Paid jury service[245]	X	X	√
Award-derived long service leave[246]	Depends upon terms of award-derived long service leave	X	Depends upon terms of award-derived long service leave
Entitlement to be absent on a public holiday[247]	Where an employer's request to work on a public holiday is unreasonable, having regard to a number of factors including: the type of employment; the nature of the work performed; and whether it could reasonably be expected that the employer would make the request	X	Where an employer's request to work on a public holiday is unreasonable, having regard to a number of factors including: the type of employment; the nature of the work performed; and whether it could reasonably be expected that the employer would make the request
Notice of termination or payment in lieu of notice[248]	X	X	X
Redundancy pay[249]	X	X	X
Provision of Fair Work Information Statement[250]	√	X	√

242. Fair Work Act Part 2-2 Division 7, Subdivision C, s 106.
243. Fair Work Act Part 2-2 Division 7, Subdivision C, s 106.
243. Fair Work Act Part 2-2 Division 8.
244. Fair Work Act Part 2-2 Division 8, s 111.
245. Fair Work Act Part 2-2 Division 9.
246. Fair Work Act Part 2-2 Division 10.
247. Fair Work Act Part 2-2 Division 11, Subdivision A.
248. Fair Work Act Part 2-2 Division 11, Subdivision B.
249. Fair Work Act Part 2-2 Division 12.

Table 3.1 demonstrates that as casual employees, most labour hire employees are not entitled to annual leave, paid personal/carer's leave, paid compassionate leave, paid jury service leave, notice of termination, payment in lieu of notice or redundancy pay under the NES. Other minimum standards which only apply in limited circumstances include the right to request flexible working arrangements, the right to unpaid parental leave and public holidays.

The loading on base hourly pay rates, which casual employees are entitled to, addressed further at 3.2.3, is intended to compensate for the absence of some of these minimum terms and conditions.

Some but not all NES entitlements apply to labour hire employees engaged on a fixed term basis. However, the NES do not apply at all to labour hire workers who are engaged as independent contractors.

Long service leave

The *Long Service Leave Act 1992* (Vic) (**LSL Act**) provides for paid long service leave for employees, based on the employee's period of continuous employment with one employer.[250]

Eligibility for long service leave arises after seven years of continuous employment if the employment ends,[251] and after 10 years of continuous service otherwise.[252]

Casual and seasonal employees are entitled to long service leave, provided that the employee is not absent from work for three months or more, other than when this is due to the terms of the engagement or the seasonal nature of the employment.[253] However, some interruptions from employment do not count towards the qualifying period of employment.[254]

Notwithstanding the application of the LSL Act to casual and seasonal employees, most labour hire employees are unlikely to complete the requisite period of service to entitle them to take long service leave, in light of the temporary nature of their engagement. ABS data from 2010 indicates that a greater proportion of labour hire workers had been with their current employer for less than a year (60%) compared with 23% of all employees.[255] Further, as periods between engagements do not count towards the qualifying period, unless the labour hire employee had continuous engagements for the seven or 10 year period, it would take longer than this period of time to accrue the requisite period of service.

Labour hire workers who are independent contractors are not entitled to long service leave under the LSL Act.

250. LSL Act ss 60, 62.
251. LSL Act s 58.
252. LSL Act s 56.
253. LSL Act s 62A.
254. LSL Act s 63.
255. ABS, 6105.0 (2010), 4.

3.2.3 Modern awards

The Fair Work Act provides for the making, application and enforcement of modern awards, which set minimum terms and conditions for employees in particular industries or occupations. They supplement the NES.[256] There are currently 122 modern awards in operation, and the majority of these are industry based.[257] Typical features of a modern award include a wage and skill-based classification system or career structure, arrangements for when work is performed, rostering, overtime and weekend penalty rates, allowances and dispute resolution and consultation processes.[258]

Inquiry evidence

The majority of submissions and evidence received by the Inquiry indicated that the industrial instrument which most commonly directly applies to labour hire employees is the relevant modern award applicable to the host's industry.[259] Some industry groups and labour hire agencies indicated that enterprise agreements covering either the host and its employees, or the labour hire agency and its employees, applied to labour hire relationships. This is addressed further at 3.3.2.

Award regulation of labour hire

During the modern award-making process, the then Australian Industrial Relations Commission (**AIRC**) determined not to make a specific modern award for labour hire employment. Most participants in that process:

> *... took the view that labour hire or on-hire employers and their employees should be covered by the award covering the host employer to whom the employees are on-hired and that most modern awards should have a provision in the coverage clause to that effect.*[260]

The AIRC developed the following labour hire/on-hire model provisions for insertion in modern awards:

> ***Industry awards***
>
> *Insert in definitions clause:*
> *"on-hire means the on-hire of an employee by their employer to a client, where such employee works under the general guidance and instruction of the client or a representative of the client."*
>
> *Insert in coverage clause:*
> *"This award covers any employer who supplies labour on an on-hire basis in the industry (or industries) set out in clause (clauses) xxx in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry (those industries). This sub-clause operates subject to the exclusions from coverage in this award."*

256. Fair Work Act s 132.

257. See: https://www.fwc.gov.au/awards-and-agreements/awards/modern-awards/modern-awards-list.

258. See Fair Work Act s 139 – Terms that may be included in modern awards.

259. See e.g. NUW and four workers, Dandenong Hearing, 30 November 2015; Labour hire agency, Closed Hearing 08, Dandenong, 30 November 2015; ASU Authorities and Services, Submission no 31, 8; UV, Submission no 98, 7; MEAA, Melbourne Hearing, 8 February 2016; Labour hire agency, Closed Hearing 01, Mildura, 23 November 2016.

260. *Award Modernisation* [2009] AIRCFB 917.

Occupational awards

Insert in definitions clause:
*"**on-hire** means the on-hire of an employee by their employer to a client, where such employee works under the general guidance and instruction of the client or a representative of the client."*

Insert in coverage clause:
"This award covers any employer who supplies on-hire employees in classifications set out in clause (clauses) xxx and those on-hire employees, if the employer is not covered by another modern award containing a classification which is more appropriate to the work performed by the employee. This sub-clause operates subject to the exclusions from coverage in this award."

Industry and occupational awards

Insert in definitions clause:
*"**on-hire** means the on-hire of an employee by their employer to a client, where such employee works under the general guidance and instruction of the client or a representative of the client."*

Insert in coverage clause:
"(a)This award covers any employer who supplies labour on an on-hire basis in the industry (or industries) set out in clause (clauses) xxx in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry (those industries)." This sub-clause operates subject to the exclusions from coverage in this award."

(b) This award covers any employer who supplies on-hire employees in classifications set out in clause (clauses) xxx and those on-hire employees, if the employer is not covered by another modern award containing a classification which is more appropriate to the work performed by the employee. This sub-clause operates subject to the exclusions from coverage in this award." [261]

In addition, some awards contained pre-existing provisions in relation to labour hire employees, and these were retained in the relevant modern awards.[262]

However, as with the NES, modern award terms do not apply to independent contractors.[263] Similarly, many award entitlements do not extend to casual employees. However, most modern awards also prescribe a casual loading, usually 25%, above the prescribed hourly rate of pay for a permanent employee under the modern award[264] to compensate for the non-provision of other entitlements under awards or the NES.[265]

Some modern awards provide a right for casual employees to request permanent employment after a specified period.[266] Eligibility for casual conversion arises for some casual employees engaged in regular work with the same employer over a six month period. It provides a right for the employee to elect to have their contract converted to a full time or a part time contract. Employers have a right to refuse, so long as the refusal is not unreasonable.[267]

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261. *Award Modernisation* [2009] AIRCFB 945, Attachment B.

262. *Award Modernisation* [2009] AIRCFB 945, [111], referring to *Aluminium Industry Award 2010*; *Black Coal Mining Industry Award 2010; Contract Call Centres Award 2010*; *Electrical Power Industry Award 2010*; *Hydrocarbons Industry (Upstream) Award 2010; Mining Industry Award 2010, Salt Industry Award 2010;* and the *Telecommunications Services Award 2010.*

263. With the exception of TCF contract outworkers, to which the *Textile, Clothing, Footwear and Associated Industries Award 2010* applies.

264. *Award Modernisation* [2008] AIRCFB 1000, [47]-[50].

265. The adequacy of the casual loading is addressed further in Part II of this Report, at 9.1.8.

266. These clauses were only included in Modern Awards where they had become an industry standard, or in other exceptional circumstances: *Award Modernisation* [2008] AIRCFB 1000, [51].

267. See e.g. *Manufacturing and Associated Industries and Occupations Award Modern Award 2010*, clause 14.4.

Evidence to the Inquiry suggested that casual conversion clauses have not had any significant impact on labour hire employment.[268] This is likely to be for a number of reasons. Conversion clauses are only contained in some modern awards where they constitute an industry standard, or in other exceptional circumstances, thus are not universally available.[269] Further, the criteria for accessing the right of conversion, such as the minimum period of employment required, and the requirement to have worked on a regular and systematic basis, are less likely to arise in a labour hire context. In addition, evidence to the Inquiry regarding the reluctance of labour hire workers to voice concerns about employment conditions suggests that requests for conversion may not be made, even where a right exists.[270] Alternatively, labour hire workers may prefer to remain casuals in order to retain their casual loading.[271] Finally, the structure and nature of labour hire employment is likely (in many instances) to provide a reasonable basis for refusal of a casual conversion request by a labour hire employer.

Consistent with these observations, in March 2016, the AMWU made a submission to the FWC's four yearly Modern Award Review (Casual and Part-Time Employment) seeking the insertion of award provisions deeming casuals to be permanent employees after six or twelve months' employment. The union argued that casual conversion clauses in awards had been ineffective due to the vulnerability of non-permanent employees.[272]

3.2.4 Contractual provisions applying to labour hire workers

In addition to the statutory framework, labour hire workers' terms and conditions are determined by the content of their contract of engagement with the labour hire agency.

The Inquiry heard that in some cases, labour hire workers were afforded contractual entitlements above the statutory minimum requirements. For example, Adecco told the Inquiry that it used market rates to determine most of its employment conditions, particularly in white collar professions.[273]

However, the Inquiry also heard of two types of contract terms which disadvantaged labour hire workers.

Firstly, the Inquiry was told about the use of restraint of trade clauses in labour hire contracts, with the effect of preventing the labour hire worker from engaging in direct employment with the host. Dr G Forsyth submitted that restraint clauses were a hallmark of labour hire professional services contracts. He said:

> *The clause on restraint of trade is to protect the labour hire firm and prevent the host firm from engaging the contractor directly. Contractors are placed in a position of being exposed to a claim where any "related party" is cited by the agent. …Such a clause can be used to prevent a contractor to, for example, a Federal government agency from working in any other agency of the Federal government.*[274]

In addition to such terms being found in labour hire employee contracts, the Inquiry heard that as a term of commercial arrangements between hosts and labour hire agencies, fees may apply where the host engages the labour hire employee as a direct employee.[275]

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268. E.g. Australia Wide Personnel, Dandenong Hearing, 30 November 2015.
269. *Award Modernisation* [2008] AIRCFB 1000 (19 December 2008), [51].
270. E.g. AMWU, Submission no 95, 13.
271. E.g. Australia Wide Personnel, Dandenong Hearing, 30 November 2015;
272. 'Bid for casual "deeming" provision begins', *Workplace Express*, 14 March 2016.
273. Adecco, Dandenong Hearing, 30 November 2015.
274. Dr G Forsyth, Submission no 5, 5.
275. E.g. Australia Wide Personnel, Dandenong Hearing, 30 November 2015; Labour hire agency, Closed Hearing 08, Dandenong, 30 November 2015.

Secondly, the Inquiry heard evidence that in some cases, workers are required to make up-front payments in order to be eligible for work through a labour hire agency. For example, the AMIEU described a practice at LSA whereby the worker must sign an authority to deduct the costs of a pre-employment medical, Q fever testing and vaccine, split vaccine, drug and alcohol screening, compulsory screening and secondary screening (if required) from the worker's pay. The AMIEU submitted that this means that to obtain a placement in the meat industry the worker is forced to pay $670 to $870.[276] There was also evidence of fee requirements in the public education sector.[277] The IEU submitted that the Victorian Government should ensure that labour hire agencies are prohibited from levelling charges on employees; and that employers should be liable for any costs associated with the provision of the labour hire service.[278]

The Fair Work Act requires employees' wages to be paid in full, unless deductions are authorised by law, or otherwise agreed in writing by the employee and are principally for the employee's benefit.[279] It also prohibits an employer from unreasonably requiring an employee to spend any amount of their wages.[280] The practice of deducting fees from labour hire employees was the subject of a recent court decision. The labour hire agency, Oz Staff Career Services, had charged an 'administration fee', usually $25 per week, to 102 employees working at Federation Square and Crown Casino in Melbourne. The labour hire agency admitted that the deductions contravened the relevant Fair Work Act provisions.[281]

3.2.5 Conclusions and findings – minimum terms and conditions for labour hire workers

It is an unavoidable consequence of the engagement of labour hire workers as casual employees, or as independent contractors, that they do not receive the benefit of many/any minimum employment conditions under the NES. Labour hire workers engaged as fixed term employees receive most but not all of the minimum NES conditions. Casual labour hire employees also miss out on many award conditions, so are often worse off than directly engaged permanent employees of the host, even taking into account the casual loading.

Modern awards play a critical role in ensuring that labour hire employees have the protection of minimum hourly rates of pay; and certain other minimum conditions (which vary depending on whether they are casuals or fixed term employees). The on-hire provisions in most modern awards appear to operate effectively to ensure the extension of award terms and conditions to labour hire employees performing work covered by the relevant award, reflecting the principle that labour hire employers and their employees should be covered by the award covering the host employer to whom the employees are on-hired.

Casual conversion clauses in awards have not proved to be an effective mechanism to assist labour hire casuals to obtain permanent employment.

Contractual provisions which require an employee to pay a fee or commission to a labour hire agency in order to obtain work, and contractual provisions which prevent or hinder a labour hire employee from obtaining direct employment with a host, should be discouraged. These issues are addressed further in Recommendation 26, at 5.6.4.

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276. AMIEU, Submission no 77, 3.

277. See 3.3.7.

278. IEU, Submission no 81, 10.

279. Fair Work Act ss 323, 324.

280. Fair Work Act s 325.

281. *FWO v Oz Staff Career Services Pty Ltd & Ors* [2016] FCCA 105; see 'Illegal wage deductions', *Shortlist*, 25 February 2016.

3.3 Enterprise bargaining and the application of enterprise agreements to labour hire employees in Victoria

3.3.1 Introduction

The Fair Work Act provides for the making of enterprise agreements. These are instruments negotiated between employers and their employees, sometimes with the involvement of unions, which prescribe enterprise-specific wages and other employment conditions.[282]

The Fair Work Act also contains a framework which facilitates bargaining in good faith for enterprise agreements, provides for representation during bargaining (including by unions) and permits industrial action to be taken in support of bargaining claims.[283]

When an enterprise agreement applies to an employer and employee, it has the effect of displacing the application of the modern award which would otherwise apply to that employer and employee.[284] Employees must be better off overall under an enterprise agreement than the applicable modern award (this is known as the 'Better Off Overall Test' or '**BOOT test**').[285]

Nothing in the Fair Work Act prevents a labour hire employer and its employees from making an enterprise agreement which would cover the performance of work by the labour hire employees on a host's site.

The Inquiry heard from Ai Group that enterprise agreements are common in the labour hire industry, and that there is no evidence that the coverage of labour hire employees under enterprise agreements is lower than the coverage of employees under agreements generally. In fact Ai Group submitted that given the large number of enterprise agreements which exist in the labour hire industry and the fact that virtually all of the large labour hire agencies have enterprise agreements, it is likely that a higher proportion of employees in the labour hire industry are covered by an enterprise agreement compared to employees across other industries.[286]

Master Builders submitted that in the construction industry, a number of labour hire businesses have enterprise agreements with construction unions such as the CFMEU.[287] However it submitted that often these agreements are in identical or similar terms to those covering employees of the host employer, and that occasionally labour hire employees may have superior terms to employees of the host employer.[288]

Adecco told the Inquiry it has around 30 active enterprise agreements in highly unionised worksites, which are generally site and industry specific. However, Adecco also said:

282. Fair Work Act Part 2-4. 'Greenfields' enterprise agreements may be made between employers and employee organisations, for a genuine new business venture or project where there are no employees yet employed in the relevant enterprise (Fair Work Act s172(2)(b), (4)). Greenfields agreements are not specifically addressed in this Report.
283. Fair Work Act Parts 2-4 and 3-3.
284. Fair Work Act s 57.
285. Fair Work Act Part 2-4 Division 4 Subdivision C.
286. Ai Group, Submission no 53, 14.
287. Master Builders, Submission no 38, 3.
288. Master Builders, Submission no 38, 3.

> *[w]e are seeing a large drop off in that because of the rise of popularity of the parity clause, so most of the large employers that we work with have EBAs in place with parity clauses, so it is like for like; there is actually no difference between the employees that are directly hired through ourselves or those that are directly hired through the client.*[289]

In addition to the evidence presented to the Inquiry, a number of FWC decisions indicate that some labour hire agencies which seek to implement their own enterprise agreements have had proposed agreements rejected by the tribunal because they did not pass the BOOT test.[290] In *MP Resources Pty Ltd*, the FWC made the following observations in considering an application to approve a labour hire employer's agreement in the meat industry:

> *There have been a number of applications for approval of enterprise agreements covering labour hire agencies in the same industries which appear to be competing against each other on the basis of inferior terms and conditions. No unions or other employee representatives are involved in the negotiation of these enterprise agreements, which are poorly drafted and involve complex wages provisions. The employees are geographically dispersed from each other and from the employer. The agreements are broad reaching in the scope of work covered and in their geographical application.*
>
> *A common feature of the applications for approval of these agreements appears to be reliance on exceptional circumstances in a small area of the proposed coverage of the agreement to justify the inferior conditions that will apply to all employees.*
>
> *This approach is contrary to the objects of the Act which provide for the guaranteed safety net of "fair, relevant and enforceable minimum terms and conditions" through, among other things, modern awards and achieving "productivity and fairness" through an emphasis on enterprise agreements. At best, the repeated attempts to gain approval of agreements in terms that have previously been rejected by the Commission or modified by the provision of undertakings is careless, at worst it lacks integrity.*[291]

Evidence to the Inquiry suggests that, notwithstanding some labour hire agencies having enterprise agreements with their employees, the directly applicable industrial instrument for labour hire employees is more commonly the modern award.[292] In most cases, even where labour hire agencies pay employees market rates, or host agreement rates, the modern award will be the instrument which sets the legal minimum terms and conditions which the employee is entitled to.

3.3.2 Inquiry evidence regarding the application of host enterprise agreement terms and conditions to labour hire employees

The Inquiry heard differing accounts of whether, and how often, enterprise agreement terms and conditions were applied to labour hire employees. However, consistent with the accounts of Master Builders and Adecco above, where enterprise agreement terms were applied, this commonly occurred with reference to the terms of a host's enterprise agreement. The most common device to achieve this is the application of a 'parity' clause (usually referred

289. Adecco, Dandenong Hearing, 30 November 2015.

290. See e.g. *Mk2 Recruitment Pty Ltd* [2015] FWC 6600; this agreement was subsequently approved (with undertakings) after the employer increased its proposed hourly rate rise from 5 to 15 cents and withdrew some of the proposed terms removing award conditions, see *Mk2 Recruitment Pty Ltd* [2015] FWCA 6915.

291. [2015] FWC 6820, [37]-[39]. The FWC referred (at [28]) to several other decisions in which agreements were not approved: *Top End Consulting Pty Ltd* [2010] FWA 662; *Mondex Group Pty Ltd* [2015] FWC 1148; *Agri Labour Pty Ltd* [2015] FWC 5332. See also 'UV takes action against hospitality labour hire firm over penalty rates', *Workforce*, No 19842, 20 October 2015; 'Hospitality X terminates EA 'scam' amid union court action', *Workforce*, No 19973, 17 February 2016.

292. See e.g. NUW and four workers, Dandenong Hearing, 30 November 2015; Labour hire agency, Closed Hearing 08, Dandenong, 30 November 2015; ASU Authorities and Services, Submission no 31; UV, Submission no 98; MEAA, Melbourne Hearing, 8 February 2016; Labour hire agency, Closed Hearing 01, Mildura, 23 November 2016.

to as a 'site rates' or 'jump up' clause) in the host's agreement. These have been described as: 'clauses seeking to extend employees' wages and conditions under an agreement to contractors or labour hire workers engaged at the workplace.'[293] The Inquiry also heard evidence from some labour hire employers that they simply apply the host's enterprise agreement (although not legally obliged to do so). Parity clauses are discussed further at 3.3.4.

Evidence from labour hire companies

A number of labour hire agencies indicated that in all or the majority of cases, they will engage employees on the relevant enterprise agreement rates applying at a site, irrespective of whether the host's agreement contains a 'site rates' clause. For example, Chandler Macleod submitted that in many instances, productivity is retained or enhanced on a site where pay and conditions parity is maintained between direct hire and on-hire employees. Chandler Macleod noted however that where there is no 'site rates' clause in a host company's enterprise agreement, then the relevant industrial instrument is the applicable modern award, which it regards as a fair and consistent benchmark for the particular industry or occupation.[294]

One labour hire agency told the Inquiry that:

> *…[w]e'll make sure that parity is kept on site and the conditions and pay rates are the same for all on site, should that be a part of the agreement. If there's not a clause in the agreement that states that labour hire will be based on the same conditions, we would advise our client that it's probably in their best interests to make sure that parity is kept on site and we pay to the EBA conditions, and the majority of clients will follow that…. The occasional one won't and I guess it depends on the situation, but I don't come across too many where a client of that size that has an EBA won't agree to pay to the EBA. I'm not saying it doesn't happen, but we try and avoid that as best we can…. It causes probably too much grief from our end in the people that we employ going to a site where everyone else that's working alongside them is being paid a higher rate, so it doesn't make for good business sense from us and doesn't give us the name that we want.*[295]

As noted above, Adecco told the Inquiry that it used market rates to determine most of its employment conditions. In some smaller workplaces it would pay award rates where those rates are the norm. In white collar professions, it would pay an attractive rate to obtain candidates.[296]

Australia Wide Personnel told the Inquiry that in instances where its client has an enterprise agreement on the site, it will always pay those individuals according to the site enterprise agreement, regardless of whether the agreement has a clause requiring it to do so:

> *We see that our employee will be working probably next to a person who is employed directly by that company under that EBA, doing the same sort of role and we think it can probably only lead to headaches for our client if we are paying a different rate to the person who is doing exactly the same job standing next to them.*[297]

Another labour hire agency told the Inquiry it pays site rates as a matter of its own policy and practice, not because of any legal requirement.[298]

Other labour hire providers, such as an agency which provided information in a closed hearing, generally do not pay according to a host's enterprise agreement. This agency considered that paying in accordance with the host's agreement confused employees and led them to believe

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293. Stewart et al (2016), [14.38].
294. Chandler MacLeod, Submission no 114, 9.
295. Labour hire agency, Closed Hearing 08, Dandenong, 30 November 2015.
296. Adecco, Dandenong Hearing, 30 November 2015.
297. Australia Wide Personnel, Dandenong Hearing, 30 November 2015.
298. Labour hire agency, Closed Hearing 13, Geelong, 7 December 2015.

they were employed by the host employer.[299] Another labour hire agency described a situation where a host employer decided to move labour hire workers from the modern award to the relevant enterprise agreement. This led to a decision some months later to lay off several labour hire workers, as the budget for the service had not increased commensurate with the increase in pay rates that flowed from that decision.[300]

Evidence from unions and employees

Evidence from unions and employees suggested that it was common for the applicable rate for labour hire workers at a site with an enterprise agreement to be less than that provided by the host's enterprise agreement.[301]

CFMEU Construction referred to the 2003 RMIT Study finding that 31% of host companies did not require employment agencies to provide the equivalent basic terms and conditions of employment they provide to their own employees, while another 9% only did so sometimes.[302]

In a number of cases, the Inquiry heard that the rate of pay provided to casual labour hire workers was less than that of a permanent direct employee of the host, even taking into account the casual loading (typically 25%) applicable to the casual's rate of pay under the applicable modern award. For example, UV told the Inquiry that at the Coca Cola Moorabbin site, casual labour hire workers are not covered by the site enterprise agreement and earn around $21 per hour compared to permanent wage rates on site of about $44 per hour for performing largely the same role.[303] Similarly, casual employees at PPG (a paint production site) are paid $20 to $23 per hour compared to permanent employees earning over $40 per hour.[304]

ASU Authorities and Services submitted that labour hire workers experience lesser standards of pay and conditions than employees at host organisations within the ASU's industrial areas of coverage. Pay rates are vastly different, with staff directly employed by councils paid better than their labour hire counterparts; leave entitlements are significantly better at councils than for employees engaged by labour hire employers; and in some instances, labour hire agencies consider the employees to be award-free and consequently they are paid below the minimum classification level of the applicable award, and denied rostered days off and paid overtime.[305]

MEAA told the Inquiry that it has enterprise agreements with the operators of all of the publicly-owned Victorian entertainment/event venues such as Melbourne Park and the Convention Centre. When labour hire workers are engaged at those sites, the modern award applies. With on-costs, it is not much cheaper for the businesses to engage labour hire, however it results in a lower rate of pay for the workers.[306]

The AMWU submitted that many labour hire workers state that they have worked alongside permanent employees for half the money and fewer conditions, despite doing the same job. The AMWU characterises this practice as an effort by an employer to undercut the pay in their workplaces, undermine the enterprise bargaining framework and deny workers their rights.[307]

In addition, the Inquiry heard that even where site rates are extended to labour hire workers, other enterprise agreement terms and conditions were not applied to labour hire workers,

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299. Labour hire agency, Closed Hearing 26, Morwell, 29 February 2016.
300. Labour hire agency, Closed Hearing 01, Mildura, 23 November 2015.
301. See e.g. SDA, Submission no 36, 3; MEAA, Melbourne Hearing, 8 February 2016; HACSU, Submission no 35, 8.
302. CFMEU Construction, Submission no 27, 11.
303. UV, Submission no 98, 8.
304. UV, Submission no 98, 15.
305. ASU Authorities and Services, Submission no 31, 11.
306. MEAA, Melbourne Hearing, 8 February 2016.
307. AMWU, Submission no 95, 6-7.

such as site grievance procedures and performance management processes[308] and casual conversion clauses.[309]

3.3.3 Legal framework for application of host's enterprise agreement to labour hire employees

In contrast to the approach outlined above in respect of modern awards, where the applicable terms and conditions for labour hire workers are determined with reference to the conditions applicable under the award for direct employees of the host, the framework for enterprise agreement-making under the Fair Work Act does not readily facilitate the application of a host's enterprise agreement to a labour hire employee working in that business.

The primary focus of the Fair Work Act agreement-making framework is upon the making of agreements at the enterprise level,[310] called 'single enterprise agreements'.[311] Single enterprise agreements may be made by one employer (and its employees), or by two or more employers (and their employees) where the employers have a sufficiently common enterprise.[312] Thus, a single enterprise agreement applying to both the host employer and the labour hire employer could not readily be made, without those parties having some additional common interest (e.g. being subject to the same funding arrangements or a common funding source). The Inquiry did not hear of any examples of this.

Labour hire employees are not permitted to take part in bargaining for a host's enterprise agreement. Agreements may only be made between the host and its direct employees.[313] It follows that labour hire employees have no capacity to be represented in any negotiations for a host employer's enterprise agreement.[314] They are also not permitted to participate in any industrial action to support or advance claims for a proposed agreement.[315] The impact of a host's enterprise agreement on any labour hire employees working in the business is irrelevant in the FWC's consideration of whether the agreement should be approved.[316]

Once approved, enterprise agreements apply only to the relevant employer and its own direct employees.[317] Additionally, the permissible content of enterprise agreements is limited to matters pertaining to the relationship between an employer and its own employees; and the relationship between the employer and a union covered by the agreement.[318] Accordingly, a host's enterprise agreement cannot include conditions for labour hire employees unless there is a sufficient connection between those conditions and the relationship between the host and its own direct employees or their union. Limits or qualifications on the employer's ability to utilise labour hire employees generally do not have the requisite connection.[319]

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308. SDA, Submission no 36, 8.
309. AMWU, Submission no 95, 13.
310. See Fair Work Act s 171(a).
311. Fair Work Act s 172(2). Multi-enterprise agreements may also able be made, although these are not widely utilised in practice: s 172(3). Note also the special provisions for the making of multi-enterprise agreements covering low-paid employees: Part 2-4 Division 9.
312. Fair Work Act s 172(5). This includes related corporations, or employers engaged in a joint venture or common enterprise. See also the capacity to obtain a single interest employer authorisation, Part 2-4 Division 10.
313. Fair Work Act s 172(2)(a).
314. On bargaining representatives for non-greenfields agreements, see Fair Work Act s 176.
315. See Fair Work Act ss 409, 410.
316. Fair Work Act Part 2-4 Division 4 Subdivision B.
317. Fair Work Act s 51-53.
318. Fair Work Act s 172(1)(a)-(b). Agreements may also contain matters relating to deductions from wages for employees covered and how the agreement will operate: s 172(1)(c)-(d).
319. *R v Commonwealth Industrial Court; Ex parte Cocks* (1968) 121 CLR 313; see the discussion of cases in which this principle has been applied to contemporary agreement clauses in Stewart et al (2016), [14.38].

The Inquiry heard mixed views about whether the Fair Work Act should permit or facilitate the participation of labour hire workers in bargaining for a host's agreement, or whether a host's agreement should apply to labour hire workers.

Many submitters called for the benefits of an enterprise agreement made and approved under the Fair Work Act, and applying to a host employer's business, to be extended to labour hire workers performing work within the scope of that agreement at the employer's business.[320] Women's Information and Referral Exchange (**WIRE**) suggested legislating to the effect that a host employer's workplace agreement applies to all workers in connection with that employer, including labour hire, agency, temporary, casual and contract employees, where that agreement is superior to the applicable award or other employment conditions.[321]

CFMEU Construction submitted that labour hire agencies should be required to pay workers at 'market rate'.[322] The Health and Community Services Union (**HACSU**) and the Independent Education Union (**IEU**) submitted that the workers engaged by a labour hire agency should be regarded under Part 2-4 of the Fair Work Act as employees for the purposes of bargaining and, as a result, be covered by the host employer's enterprise agreement.[323]

The ACTU submitted that labour hire workers cannot bargain for a collective agreement with the host employer, or participate in bargaining for such an agreement. Whilst labour hire workers can make a collective agreement with the labour hire agency (subject to the practical barriers which attach to their predominantly casual form of engagement), the agency is not the entity which on a day-to-day basis controls the work that they perform and the conditions under which and location where it will be performed.[324]

The NUW submitted that under the current bargaining framework, a company that directly employs its workers part time or full time is obliged to afford paid sick leave, annual leave entitlements and bargain collectively with its workers, while a company that chooses to engage significant numbers of non-permanent employees through a third party can ensure it keeps wages low by avoiding having to collectively bargain.[325]

In contrast, VCCI and other employer groups argued that an employer should have the prerogative to determine the mix of employment forms that minimises costs or maximises productivity.[326] Master Builders rejected the notion that 'an employee of one employer (the labour hire agency) should be entitled to enjoy the same rates of pay and benefits negotiated by employees of another employer.'[327]

3.3.4 Parity clauses

Legal framework

Notwithstanding the limits on host enterprise agreement application to labour hire workers outlined above, some agreements include 'parity,' 'site rates,' or 'jump-up' clauses.[328] The effect of a parity clause is to provide that where a labour hire worker is performing work which is the subject of an enterprise agreement, that employee is entitled to be paid at the same rate, and receive the same conditions, as a direct employee of the host performing that work.

320. SDA, Submission no 36, 2; Lucy, Submission no 2, 3; ASU Authorities and Services, Submission no 31, 12; HACSU, Submission no 35, 20; IEU, Submission no 81, 9; NUW, Submission no 91, 22.
321. WIRE, Submission no 13, 2.
322. CFMEU Construction, Submission no 27, 25.
323. HACSU, Submission no 35, 20; IEU, Submission no 81, 9.
324. ACTU, Submission no 76, 24.
325. NUW, Submission no 91, 5.
326. VCCI, Submission no 25, 4; Ai Group, Submission no 53, 7.
327. Master Builders, Submission no 38, 3.
328. See 3.3.2 for a description of parity clauses.

Parity clauses may be included in enterprise agreements where they sufficiently relate to the job security of the host's direct employees.[329] However, terms of a host's enterprise agreement relating to use of, or conditions relating to, labour hire employees are not able to be directly enforced by the labour hire employees who are supposed to benefit from a parity clause in the agreement. As those employees do not fall within the scope of the agreement, they are not considered to be 'covered' by it within the meaning of s 53(1) of the Fair Work Act, a necessary prerequisite for being able to enforce the agreement. Only a union that is also covered by the agreement could take enforcement action if the parity clause in a host's enterprise agreement is not being observed in respect of particular labour hire employees.

Support and opposition

The Inquiry heard both support for and opposition to parity clauses.

Some unions described the benefits of parity clauses in their enterprise agreements with employers.[330] The SDA submitted that it is common practice for labour hire workers to be paid at the same rate of pay as direct employees in a number of large retail warehouses it covers, with only one example of a large warehouse which does not pay the enterprise agreement rate to labour hire workers. However, SDA noted that where the enterprise agreement rate applies, one common concern is that labour hire workers are only paid the minimum, entry level rate of pay in the agreement.[331]

A number of employer organisations oppose parity clauses. VCCI called for the removal of the capacity for enterprise agreements to include terms that act to restrict an employer's ability to choose the employment mix suited to their business.[332] ACCI and Ai Group shared this view.[333] ACCI's opposition extended to a situation where labour hire workers are working alongside workers who are covered by the enterprise agreement but being paid the award, for months or even years. ACCI indicated that the mechanism of a parity clause was not the best way for that issue to be resolved. However its representative expressed the view that this seemed more a question of work of equal value being paid equally, indicating that the practice (of direct employees and labour hire employees receiving different pay rates at the same site) at first blush sounded unfair.[334]

Productivity Commission recommendation and Inquiry evidence

The PC Workplace Relations Framework Report recently proposed that enterprise agreement terms which restrict the 'engagement of independent contractors and labour hire workers, or regulate the terms of their engagement, should constitute unlawful terms under s. 194 of the Act.'[335] This prohibition would mean that parity clauses could no longer be included in agreements, even where an employer, employees and/or union wished to include them.

Notwithstanding that parity clauses do not limit a host's discretion to engage labour hire workers, the Productivity Commission classed parity clauses as being in the same category as other terms which 'act to restrict an employer's prerogative to choose the employment mix suited to their business.'[336] The Productivity Commission acknowledged that parity clauses 'are

329. Fair Work Bill 2008 Explanatory Memorandum, [672]. See also *Asurco Contracting v Construction, Forestry, Mining and Energy Union* (2010) 197 IR 365; *Australian Industry Group v Fair Work Australia* (2012) 205 FCR 339.

330. ASU Private Sector, Submission no 47, 5; SDA, Submission no 36, 9.

331. SDA, Submission no 36, 7.

332. VCCI, Submission no 25, 4, Ai Group, Submission no 53, 7.

333. Ai Group, submission no 53, 15; ACCI, Submission no 55, 18; ACCI, Melbourne Hearing, 10 February 2016.

334. ACCI, Submission no 55, 18; ACCI, Melbourne Hearing, 10 February 2016.

335. PC Workplace Relations Framework Report (2015), Recommendation 25.2, 820.

336. Ibid, 819-20.

not a strict impediment to hiring contractors'. However, on the basis that parity clauses 'do act to regulate the price of contract labour,' it concluded that they therefore 'presumably … must indirectly discourage the employment of contract labour'[337] (and, it is assumed the Commission also meant, must discourage the use of labour hire arrangements).

However, the capacity to pay labour hire employees at a lower rate than the applicable enterprise agreement rate was not a matter of any significance in evidence to the Inquiry regarding the reasons hosts use labour hire arrangements. Any productivity gains and cost savings measures associated with use of labour hire, including reduction in labour costs, were reported to arise from other aspects of the labour hire arrangement, such as the capacity to quickly obtain suitable labour and the flexibility to rapidly respond to peaks and troughs in demand for products or services.[338] Further, as outlined at 3.3.2, many labour hire agencies indicated that they recommended that hosts extend enterprise agreement conditions to labour hire workers, even in the absence of a parity clause, for reasons relating to productivity, workplace harmony and fairness. Where labour hire agencies told the Inquiry that they did not recommend paying enterprise agreement rates, it was for other reasons.

The 2003 RMIT Study survey indicated that only 3.3% of hosts cited reduction of staffing costs as one of their reasons for using labour hire.[339] Further, it indicated that 60% of hosts required labour hire agencies to mirror basic terms and conditions of employment (such as rates of pay, overtime and hours of work) which the host provided to its own employees, and an additional 9% sometimes did.[340] The 2003 RMIT Study further found, based on its survey of labour hire agencies, that 66% of blue collar and 68% of white collar labour hire employees would receive equivalent rates of pay to the host's pay rates.[341]

The Productivity Commission acknowledged that the 'capacity of an employer to contract with lower cost or more flexible forms of labour may undermine employees' collective bargaining power in reaching EAs…'. [342] However, the Commission concluded that this was unlikely to occur 'to any great extent'[343] because 'labour hire is [a] far from perfect substitute for ongoing labour.'[344] In contrast, though, the Inquiry heard substantial evidence of labour hire employment arrangements being used to either replace permanent staff or to supplement a smaller permanent workforce on an ongoing basis. The Inquiry also heard about the negative impacts of this model for employees in collective bargaining.[345]

337. Ibid, 817.
338. See 2.3.
339. Brennan et al (2003), 18.
340. Ibid 24.
341. Ibid, 66.
342. PC Workplace Relations Framework Report (2015), 815.
343. Ibid, 817.
344. Ibid, 817.
345. See 2.4.2 re impact of labour hire on permanent employment.

3.3.5 Transfer of business

Ai Group called for amendments to the transfer of business provisions in Part 2-8 of the Fair Work Act, to clarify that where a worker transitions from on-hire employment to direct employment, this does not constitute a transfer of business.[346]

The transfer of business provisions relevantly provide that a transfer of business will occur where:

- an employee's employment with the old employer is terminated;
- within three months, the employee begins performing the same or substantially the same work for a new employer; and
- there is a specified connection between the old and new employers, such as a transfer of assets, outsourcing, or ceasing to outsource work.[347]

Where a transfer of business occurs, subject to an order of the FWC to the contrary, the old employer's enterprise agreement will transfer to the new employer.[348] Further, the transferring employee's service with the old employer will be recognised for certain purposes as employment with the new employer[349] (such as in respect of the minimum employment period to lodge an unfair dismissal claim).[350]

Ai Group submitted that in its view, 'temp' to 'perm' arrangements do not constitute a transfer of business for purposes of Part 2-8 of the Fair Work Act. However, it pointed the Inquiry to a number of inconsistent FWC decisions, including the decision in *Whitehaven Coal Mining Ltd*,[351] which have held otherwise.

The Inquiry did not hear any further evidence about transfer of business, and therefore I do not consider that there is a sufficient basis to make any findings or recommendations on this issue.

3.3.6 Findings and recommendation – enterprise bargaining and the application of enterprise agreements

Based on the above material, I consider that there are two main problematic aspects of the application of the Fair Work Act framework of enterprise agreements and bargaining in the labour hire context.

Some labour hire employers seek to use enterprise agreements as a mechanism to drive down employment conditions. Vigorous application of the BOOT test by the FWC is needed to prevent this from occurring.

In many instances, host enterprise agreements do not apply to labour hire employees, resulting in differential treatment (i.e. lower pay and conditions) for those workers compared with direct employees of the host whom they work alongside. This problem is more pronounced where (as the Inquiry heard is common in some sectors) labour hire employees have been working at the site of one host over a lengthy period.

346. Ai Group, Submission no 53, 18.
347. Fair Work Act Part 2-8, Division 2.
348. Ibid.
349. Fair Work Act s 22(5) and (7)(b)(ii).
350. Fair Work Act s 384.
351. [2010] FWA 1142.

Recommendation 2

Labour hire employees should have the opportunity to be covered by enterprise agreements applying at a host's workplace – whether this occurs de facto (arising from the voluntary decision of the labour hire employer to observe the site enterprise agreement); or because of the application of a parity clause in the host's enterprise agreement.

On that basis, there should not be impediments to the negotiation of parity clauses in enterprise agreements (such as the prohibition recommended by the Productivity Commission). Given that the view has developed in the case law that parity clauses are a 'matter pertaining' to the employment relationship, and are therefore permitted matters in agreements, whether or not they are included should remain a matter of negotiation between bargaining representatives.

The Victorian Government should advocate the above position in any consultation processes instigated by the Federal Government over implementation of the Productivity Commission's report.

3.3.7 Parity of terms and conditions for casual relief teachers

The Inquiry heard evidence regarding differential terms and conditions of engagement of CRTs engaged through labour hire agencies. Whilst this does not arise through the application or otherwise of an enterprise agreement, it is reminiscent of the disparity in conditions often evident between labour hire employees and direct employees under a host's enterprise agreement.

The AEU submitted that in the public education sector, there is a great deal of variability in fees charged, pay-rates, and other conditions applied by labour hire agencies, which means that there are differential outcomes for both schools and employees. The AEU submitted that some labour hire agencies charge commissions to CRTs for placing them in work whilst others charge schools. Other agencies charge an annual fee or sign-up fee, whilst some charge a commission set as a percentage of daily or weekly earnings. There are also different industrial arrangements for CRTs employed by schools and those employed by agencies. The daily pay rate available to school-employed CRTs is $293.30, set by Ministerial Order.[352] Agency-employed CRTs are covered by the *Education Services (Teachers) Award 2010*. However the AEU submitted that these rates and conditions are not always adhered to, and many agencies pay CRTs below the minimum daily rate for their level of experience. Teachers employed by agencies often report a daily pay rate of around $235.[353]

TANVIC has a membership of around eight or nine labour hire agencies who place or on-hire teaching staff to schools. TANVIC's President, Lyn MacMillan, told the Inquiry's Melton hearing that the teaching roles it fills are CRTs. Ms MacMillan told the Inquiry that agencies within TANVIC employ all their staff as casual employees, and do not operate on a contract basis. Staff are employed based on the conditions in the 2010 modern award for teachers. TANVIC members are looking towards developing their own enterprise agreement to address what Ms MacMillan described as complexities of the various applicable industrial instruments. Ms MacMillan told the Inquiry that TANVIC is concerned that schools which directly employ CRTs demonstrate a lack of compliance, and that agencies are better placed to perform that role.[354]

352. Victorian Government, Department of Education and Training, *Ministerial Orders 2009* – Order No. 200. http://www.education.vic.gov.au/hrweb/Documents/Ministerial_Order_200.pdf

353. AEU, Submission no 103, 2.

354. TANVIC, Melton Hearing, 22 February 2016.

Ms MacMillan said that under the modern award there are 12 classifications for a CRT, and the mid-range is level four. She explained that a teacher must present to the agency their prior teaching experience within a two-week period, and the agency must then determine where the teacher would fit best.[355]

Robert Brunner, Managing Director of Standby Staff Services, told a Melbourne Hearing that Standby Staff had operated as a labour hire firm for 18 years in the education sector. Standby Staff teachers have casual employment status, are paid above modern award rates, receive superannuation irrespective of their minimum employment earnings and are provided with professional indemnity insurance. Mr Brunner told the Inquiry that one of the bigger issues in the education sector is that some agencies use 457 visa and working holiday visa teachers when there is already not enough work available for registered teachers. These workers are charged a fee to become a member of the agency, and are sent out to schools 'at a much lower rate than pretty much everybody else in the industry,' typically around $28 per day less.

Mr Brunner told the Inquiry that Standby Staff does not charge commission to teachers, and pays teachers a rate that is a few dollars less than the Ministerial Order which applies to direct employees, but is much higher than the award. He said that all teachers are paid the same rate, equivalent to around Grade 6 (or seven years' experience) under the modern award, to prevent schools favouring cheaper teachers.[356]

The Inquiry also heard that agencies in the public education industry charge commission to workers for a placement.[357]

In contrast to most government school teachers in Victoria, who are employed by the Department of Education and Training (**DET**), individual school councils are responsible for the direct employment or engagement of CRTs.

As indicated above, there are two relevant instruments which determine the minimum entitlements for CRTs. The first, which applies to all CRTs, is the relevant modern award.[358] The second, which applies only to CRTs who are employed directly by school councils, is a Ministerial Order.[359] The minimum hourly rate for a CRT under the Ministerial Order is $48.88, with a maximum rate of $293.30 per day.[360] The modern award prescribes a minimum daily rate of $276.21 for a CRT employed for less than five consecutive days,[361] and for a CRT engaged for more than five consecutive days, as low as $224.14 for a beginning teacher.[362]

The Inquiry met informally with DET, but due to the timing of these consultations, DET was not able to provide a formal response to the matters raised above within the Inquiry's reporting time frame. However, DET provided references to public information relevant to the Inquiry's work.[363]

Findings and recommendation

It is apparent from the information and documents referred to above that there is a two-tiered system of terms and conditions in respect of CRTs working in government schools. Those who are directly engaged by school councils are entitled to the benefit of the terms and conditions

355. TANVIC, Melton Hearing, 22 February 2016.
356. Standby Staff Services, Melbourne Hearing, 25 February 2016.
357. AEU, Submission no 103, 2.
358. *Education Services (Teachers) Award 2010.*
359. Victorian Government, Department of Education and Training, *Ministerial Orders 2009* – Order No. 200.
360. Ibid, Schedule 1.
361. *Education Services (Teachers) Award 2010*, clause 14.1, 14.3 and 14.5(a)(i).
362. *Education Services (Teachers) Award 2010*, clauses 13, 14.1, 14.3 and 14.5(a)(ii).
363. Letter from DET to Inquiry, 13 August 2016.

set out in the Victorian Government's Ministerial Order – conditions which are more generous than the relevant modern award. Those who are engaged by school councils through a third party are not entitled to these more beneficial terms and conditions.

This disparity of conditions arises through the Victorian Government's own legislative framework and Ministerial Order, and is thus within its power to remedy.

Evidence to the Inquiry suggested that there are many benefits of using a labour hire arrangement for both school councils and for CRTs themselves. These benefits would continue to be available notwithstanding parity of conditions being afforded.

Recommendation 3
I recommend that the Victorian Government legislate to remove the disparity in minimum terms and conditions between casual relief teachers engaged by school councils directly, and those engaged by school councils via a labour hire agency.

3.4 Protections from unfair or discriminatory treatment

This section examines the evidence received by the Inquiry regarding treatment at work and employment security for labour hire workers, in the context of the current legal framework of protections against unfair dismissal, discrimination, workplace bullying and other treatment at work.

3.4.1 Inquiry evidence about job security

RCSA submitted to the Inquiry that labour hire casuals have greater job security than direct casual employees because they can be immediately placed in another assignment by the labour hire employer.[364] An example of this was provided by Chandler MacLeod, whereby one of its clients was closing their manufacturing business, and close to 90% of its casual workforce were redeployed to other clients within one week of the closure occurring.[365]

However, the problems with accessing an unfair dismissal remedy and other associated protections were cited by many unions and workers as having a negative effect on the job security of labour hire workers.

A number of submitters referred to the capacity for a labour hire agency to suddenly and without explanation stop offering an employee work at a host employer, at the direction of the host company, with little to no legal recourse available to the labour hire worker against the host company or the labour hire employer.[366] The ACTU submitted that labour hire workers cannot make an unfair dismissal claim against a host employer, even where the host employer is the decision maker as to whether the worker will have a continuing job at the workplace or not; and that the Fair Work Act general protections provisions adapt poorly to this situation because they are focused on protecting the labour hire agency, not its workers, from adverse action.[367] CELRL submitted that a labour hire worker who wants to bring an unfair dismissal claim against the labour hire agency in this circumstance faces a series of challenges, including providing evidence of the 'dismissal' if he/she remains on the books of the agency as a casual employee; and demonstrating the unfairness of the dismissal effected by the agency in

364. RCSA, Submission no 110, 13.
365. Chandler Macleod, Submission no 114, 5.
366. SDA, Submission no 36, 8; ACTU, Submission no 76, 26.
367. ACTU, Submission no 76, 25.

circumstances where the agency has received instructions from the host company to no longer supply the worker.[368]

The AMWU submitted that insecurity is worse for labour hire workers, even when compared to other casual workers, because the labour hire agency has a strong motivation to provide workers who do not cause problems for the host, even if those problems relate to underpayment, safety or other concerning practices in the workplace. It reported a perception amongst many labour hire workers that 'if you complain, you were gone'.[369]

Construction worker John Islip submitted:

> *I was employed through a labour hire agency less than a year ago. I was told 50 hours a week, 8 weeks work. It was in fact 32 hours a week, 2 weeks work. I passed up another job opportunity because the employment agency lied to me about these hours and contract length. The wind was fiercely blowing a temporary fence which I had to work next to. I was made to provide my own hard hat and safety protection clothes. I had a doctor's appointment. I gave the supervisor on site a few days prior notice. The agency rang me demanding to know where I was and what's wrong with me. They were suggesting I was getting a medical for another job when in fact I was having a yearly cardiologist appointment. Being a casual, I had one hour's notice of work termination. Because you could have work terminated in an hour, I was always stressed it could be my last hour.*[370]

Many participants submitted that this acted as a disincentive for labour hire workers to claim entitlements or raise issues. Geelong Trades Hall Council (**GTHC**) described a common complaint from workers engaged by labour hire firms that after raising an employment issue or a safety issue with their employer or the host, they are not provided with any more work. When they contact the employer to ask about the reason, they are simply told that there is not any work for them. Often the workers know that they have been replaced by another employee. Because their employment is not formally terminated, it is difficult for workers to challenge the decision or to obtain unemployment benefits.[371]

AMWU labour hire workers indicated that speaking up about issues inevitably results in termination, stating that (for example): 'if you raise any questions your employer will ring the labour hire agency and tell them not to send you back' and 'I found out I was getting less than the permanent employees in the host company. Other employees had complained about this and were fired the same day.'[372]

An anonymous labour hire worker, working for Public Transport Victoria, Metro and Yarra Trams, submitted that: '[o]ne does not complain as it is a fair assumption that if you complain you will not be called for further work. It makes for a very compliant workforce as well as a fairly non trusting culture between colleagues and with management.'[373]

Victoria Legal Aid (**VLA**) referred to its labour hire employee clients requesting sick leave, questioning their entitlements or making a complaint and then being told that they were no longer required by the host agency, without being provided with any reason. VLA submitted that while the labour hire agency may know the true reason, it has a stronger commercial interest in maintaining good relations with the host company than with the individual worker.'[374]

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368. CELRL, Submission no 99, 23.
369. AMWU, Submission no 95, 8.
370. VTHC on behalf of individual workers, Submission no 41.
371. GTHC, Submission no 83, 1.
372. AMWU, Submission no 95, 13.
373. VTHC on behalf of individual workers, Submission no 41.
374. VLA, Submission no 84, 1.

3.4.2 Unfair dismissal

The Fair Work Act contains protections for employees against unfair dismissal.[375] However, there are a range of impediments to the application of unfair dismissal laws to labour hire employees,[376] which are reflected in the practical experiences of labour hire employees that were brought to the Inquiry's attention.

Statutory limits

Some impediments to the application of unfair dismissal laws arise from express limits on the ability to bring an unfair dismissal claim in the Fair Work Act.[377]

Unfair dismissal protections do not apply to independent contractors as they are not employees. Unfair dismissal protections apply to ongoing employees with a minimum employment period of six months, or 12 months if the employee works in a small business.[378] However, the protections only apply to casual employees where the employment is on a regular and systematic basis, and the employee has a reasonable expectation of continuous employment by the employer on such a basis.[379] In light of the evidence regarding the main forms of engagement of labour hire employees discussed at 3.2.1, these provisions operate to prevent a large proportion of labour hire employees from accessing the unfair dismissal protections.

In addition, unfair dismissal protections do not apply to an employee whose employment is limited to a fixed period of time, specified task, or specified season, and the employment terminates at the end of that period, task or season.[380] In some cases labour hire agencies structure their arrangements with labour hire employees to limit the employee's employment to a specified task, namely the assignment with a particular host – which can have the effect of excluding them from the unfair dismissal protections.[381]

However, a Full Bench of the FWC recently held, in *Dale v Hatch Pty Ltd*, that:

> *We cannot, with respect, accept that an employment contract to perform work of an ongoing and generic nature for a third party client until that client no longer requires the person to perform the work constitutes an employment contract for a specified task. …We do not consider that the employment "task" of an employee can be defined simply by reference to the currency of a commercial labour hire arrangement between the employer and a client without doing violence to the ordinary meaning of the word. Nor do we consider that a task is something which can be regarded as completed for the purpose of s.386(2)(a) when a third party client decides it does not want the employee of the employer to perform the relevant work anymore. A "task", properly understood, is one which is completed when the employee finishes the work involved in it.*[382]

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375. Fair Work Act Part 3-2.

376. Pauline Thai, 'Unfair dismissal protection for labour hire workers? Implementing the doctrine of joint employment in Australia' (2012) 25 *Australian Journal of Labour Law* 152, 157-60; Trina Malone, *Vulnerability in the Fair Work-place: Why unfair dismissal laws fail to adequately protect labour-hire employees in Australia*, Centre for Employment and Labour Relations Law, University of Melbourne, Student Working Paper No. 6 (May 2011), 9-23.

377. Clearly, a labour hire employee has no unfair dismissal claim against a host as it is not the employee's employer: see e.g. *Cresp v Nissan Casting Plant (Australia) Pty Ltd* [2016] FWC 3845.

378. Fair Work Act ss 382(a), 383.

379. Fair Work Act s 384(2)(a).

380. Fair Work Act s 386(2)(a). These exceptions do not apply when a substantial purpose of the employment of the person under a contract of that kind was to avoid the operation of the unfair dismissal laws: Fair Work Act s 386(3).

381. See e.g. *Derar v Recruitco Pty Ltd* [2013] FWC 9791 (the termination of a labour hire employee's assignment by a client/host, where he had worked for over six years, was found not to constitute a 'dismissal' by the labour hire agency because he had been engaged for the specific task of that assignment).

382. [2016] FWCFB 922, [15]; this view was expressed in direct response to the FWC single member's decision in *Derar v Recruitco Pty Ltd* [2013] FWC 9791.

The Full Bench found that the 'specified task' exclusion from unfair dismissal protections did not apply to the 'automatic' termination of a labour hire employee's demobilisation from the construction project (AAMC) she had been assigned to:

> *… Ms Dale's employment did not end because she had completed any particular task. Although the volume of duties she performed had diminished, the work which she had been required to perform continued and was performed by AAMC employees. The cause of her termination was the decision by AAMC to restructure its workforce with the result that the role filled by Ms Dale was abolished. … We do not consider therefore that Ms Dale was employed under a contract of employment for a specified task or that her employment terminated on the completion of any specified task.*[383]

Structural impediments to establishing unfair dismissal

Even where a labour hire employee can overcome the exclusions from access to unfair dismissal claims discussed above, the employee may then face other difficulties – arising from the structure of labour hire relationships – in establishing that the dismissal was unfair.

As noted throughout Part I of the Report, an inherent feature of labour hire employment arrangements is the division between an employee's legal employment relationship with the labour hire agency and the practical control over the employment exercised by the host.

It is well established that an employment relationship between a labour hire employee and host does not result from this arrangement. In *Arcadia v Accenture Australia*,[384] VP Watson held as follows:

> *I have considered all of the material relied on by the parties and conclude that Diversiti and Ms Arcadia made a labour hire arrangement whereby Ms Arcadia would supply services to Accenture. None of the circumstances created an employment relationship between Accenture and Ms Arcadia. I do not consider that it is significant that Ms Arcadia performed work at Accenture's premises, worked on Accenture equipment, reported to Accenture employees and worked alongside Accenture employees. Those circumstances are consistent with the express terms of the agreement between Diversiti and Ms Arcadia. Labour hire arrangements of this type are common in industry and have generally been held to create no employment relationship between a client and a worker. Where the documentation signed by the parties is clear as to the nature of the respective relationships and consistent with practices adopted by the parties it is appropriate to give those terms their full effect.*[385]

In some cases, courts and tribunals have looked behind this division and found that the host is the true employer,[386] although it has been argued that: 'these cases represent the exception rather than the rule. …These were not 'genuine' instances of labour hire.'[387] However in most cases, the structure of labour hire employment relationships, and this division between practical and legal control, is considered legitimate.

This structure creates two key impediments for labour hire employees' access to unfair dismissal remedies.

Firstly, it is often difficult for a labour hire employee who is no longer required by a host to perform work to establish that a 'dismissal,' or termination at the employer's initiative,[388] has occurred. Where a host terminates an employee's assignment with a labour hire employee,

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383. [2016] FWCFB 922, [21].

384. (2008) 170 *IR* 2008.

385. Ibid, 292.

386. See e.g. *Damevski v Guidice* (2003) 202 ALR 494; cf *FP Group Pty Ltd v Tooheys Pty Ltd* [2013] FWCFB 9605.

387. Stewart et al (2015), [10.26] (footnote omitted).

388. Fair Work Act s 386(1).

commonly the labour hire employee will nonetheless remain 'on the books'[389] of the labour hire agency, despite not being provided with further work.[390] For example, the FWC observed in the recent decision in *Kool v Adecco Industrial Pty Ltd*:

> *Where a labour hire employee is placed with a host employer and the labour hire employee is engaged on arrangements such as those outlined in Adecco's Candidate Declaration, the end of the placement will generally not constitute dismissal of the labour hire employee so that the labour hire employee could make an application for an unfair dismissal remedy.*[391]

Secondly, where a dismissal is able to be established, it will generally be as a result of the actions of the host in terminating the engagement of the labour hire worker, rather than the direct action of the labour hire agency. Thus, the reason for the termination on the part of the labour hire employer is considered legitimate, namely the unavailability of ongoing work for the employee. As was observed by the FWC in *Kool v Adecco Industrial Pty Ltd*:

> *Where managers of a host employer inform a labour hire employee that he or she is to be removed from site on the basis of conduct, capacity or work performance, the actions of the host employer may be tantamount to dismissal. This is particularly so where managers or supervisors of the host employer have also been involved in disciplining the labour hire employee. A labour hire employee seeking to contest such action by making an application for an unfair dismissal remedy, faces considerable difficulty, principally because the host employer is not the employer of the labour hire employee. It is also the case that a labour hire agency may face considerable difficulty preventing a host employer from taking disciplinary action against an employee of the labour hire agency.*[392]

Yet in *Kool v Adecco Industrial Pty Ltd* and in another recent decision, *Pettifer v MODEC Management Services*,[393] differing approaches were taken to whether the basis for a host's termination of an engagement is a relevant consideration in considering the fairness or otherwise of a dismissal which results from it.

In *Pettifer v MODEC*, the host terminated the engagement of the labour hire worker due to a safety breach he allegedly committed on the project (an offshore vessel) where he had been engaged. This resulted in the termination of his employment by the labour hire agency. The FWC observed that the commercial contract between the labour hire agency and the host gave the latter specified rights as to those who were permitted to work on the host's project,[394] and considered the host's exercise of those contractual rights to be a matter beyond the labour hire agency's control. The FWC held: '[t]here was nothing, in practical terms, the respondent could do as to the circumstances that had unfolded concerning the actions and decision of [the host].'[395] On this reasoning, the usual considerations as to whether an unfair dismissal had occurred (set out in Fair Work Act s 387) could not be applied. For example, the question whether there was a valid reason for the employee's dismissal based on his capacity or conduct did not arise, as the host had exercised its contractual right to direct that the employee be removed from the project.[396]

On appeal, a Full Bench of the FWC found that the tribunal at first instance had erred in determining that the issue of whether there was a 'valid reason' for termination did not arise

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389. See Malone (2011), 13.

390. See e.g. *Bradford v Toll Personnel Pty Ltd T/A Toll Ipec* [2013] FWC 1062; *Shelton v Ultra NDT ATF The O & A Kavanagh Family Trust T/A Ultra NDT Pty Ltd* [2014] FWC 2646. Cf *Garcia Orjuela v Toll Personnel Pty Ltd T/A Toll People* [2016] FWC 4433, where a failure of the labour hire agency to provide shifts to a labour hire employee for a three-month period after six months of regular shifts was found to constitute a dismissal.

391. [2016] FWC 925, [47].

392. [2016] FWC 925, [48].

393. [2106] FWC 3194.

394. [2016] FWC 3194, [7], [27].

395. [2016] FWC 3194, [27].

396. [2016] FWC 3194, [20]-[26], [27].

for consideration. Even so, in the Full Bench's view, the host's prohibition of the employee returning to the work site meant that the employee was not capable of performing that work - i.e. there was a valid reason for his dismissal based on an 'incapacity' within the meaning of s 387(a) of the Fair Work Act.[397] In effect, therefore, the employer was still able to rely on its contractual relationship with the host as the basis for dismissing the employee.

In contrast, in the earlier decision in *Kool v Adecco*, the FWC had determined that:

> *the contractual relationship between a labour hire agency and a host employer cannot be used to defeat the rights of a dismissed employee seeking a remedy for unfair dismissal. Labour hire companies cannot use such relationships to abrogate their responsibilities to treat employees fairly. If actions and their consequences for an employee would be found to be unfair if carried out by the labour hire agency directly, they do not automatically cease to be unfair because they are carried out by a third party to the employment relationship. If the Commission considers that a dismissal is unfair in all of the circumstances, it can be no defence that the employer was complying with the direction of another entity in effecting the dismissal. To hold otherwise would effectively allow labour hire employers to contract out of legislative provisions dealing with unfair dismissal.*[398]

In that case, the host (Nestle) alleged that the labour hire employee (who had worked at its site for 38 hours per week, five to six days per week for two years and five months) had engaged in misconduct. The FWC found that the employee's placement 'was ended by Adecco at the behest of Nestle in circumstances where Nestle management had determined that Ms Kool had engaged in misconduct. … Ms Kool's employment was terminated at the initiative of Adecco.'[399] Further, Adecco's acquiescence in the removal of the employee by the host, and its failure to independently verify the reason for the removal, contributed to a finding that the dismissal was unfair.[400] The employee was subsequently awarded the maximum compensation available (six months' pay).[401] The *Kool v Adecco* decision is presently under appeal.

Is there a role for joint employment obligations?

'Joint employment' is a legal doctrine, developed in the United States, which 'provides that two separate legal entities which exercise control over a worker may be regarded as joint employers to whom employment-related obligations can be ascribed.'[402]

The Western Community Legal Centre submitted that the concept of joint employment and/or vicarious liability should be recognised generally.[403] Recognition of joint employment was particularly directed at identifying a mechanism to allow labour hire employees to be able to complain about their unfair treatment or dismissal by a host.[404] IEU submitted that the concept of joint employment would mean that both the employment agency and the host employer would be required to abide by natural justice and procedural fairness (in the process leading to dismissal of a labour hire worker) as if each was the sole employer.[405] JobWatch submitted that for purposes of unfair dismissal regulation, two separate entities should be deemed to be joint employers in circumstances where they share or co-determine matters governing employment.[406]

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397. *Pettifer v MODEC Management Services Pty Ltd* [2016] FWCFB 5243, [32]-[37]; see also [40]-[41].
398. [2016] FWC 925, [49].
399. Ibid, [64].
400. Ibid, [72]-[73].
401. *Kool v Adecco Industrial Pty Ltd* [2016] FWC 2278. Fair Work Act s 392 sets out the maximum compensation payable.
402. Thai (2012), 154.
403. Western Community Legal Centre, Submission no 62, 61.
404. SDA, Submission no 36, 3.
405. IEU, Submission no 81, 10.
406. JobWatch, Submission no 46, 15.

However, Ai Group strongly opposed the doctrine of joint employment being adopted within Australian employment law, submitting that it would create uncertainty about whether the actual employer (i.e. the labour hire agency) or the client company (i.e. host) is responsible for the employment relationship and consequent employee entitlements and obligations.[407]

Whilst there have been various attempts to assert that joint employment arises from a labour hire employment arrangement,[408] and some decisions of courts and tribunals have been open to the concept,[409] joint employment does not currently form part of Australian law.[410] Instead, in situations where there is ambiguity between two or more parties as to who is the employer, courts and tribunals have tended to resolve that ambiguity by selecting one of those parties.[411] In the context of a labour hire employment arrangement, that will invariably be the labour hire agency, unless the arrangement is found to be a sham.[412]

In *FP Group Pty Ltd v Tooheys Pty Ltd*,[413] in confirming the rejection of an argument at first instance that the labour hire agency and host were joint employers, a Full Bench of the FWC observed that any acceptance of the joint employment concept would require 'a very considerable development of the common law'.[414] Introducing the concept of joint employment also has the capacity to lead to a lack of clarity about allocation of responsibility for employee entitlements.[415]

Thai observes that joint employment cannot operate effectively within the existing common law framework, and instead would need to be implemented by statute.[416] She proposes a model whereby difficulties with the application of the unfair dismissal framework to labour hire employment arrangements can be overcome through a limited statutory acceptance of the concept of joint employment.

More generally, in my view the doctrine of joint employment does not seem appropriate for adoption in the context of the federal workplace relations framework and labour hire relationships in Victoria. The weight of Australian judicial authority is against application of the concept in this country. Further, it must be borne in mind that joint employment has developed in the very different context of United States legislation regulating employment standards and collective bargaining.[417] More extensive investigation is required of the full implications, for the many different aspects of labour hire relationships, of adopting the joint employment doctrine.

Conclusions, findings and recommendations – unfair dismissal

The current unfair dismissal provisions in the Fair Work Act operate, in practice, to limit substantially the protections from unfair dismissal for labour hire workers. This principally arises from the exclusions of most casuals, as well as fixed term/specified task employees and contractors, from being able to bring an unfair dismissal claim.

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407. Ai Group, Submission no 53, 15.
408. See e.g. *Damevski v Guidice*, (2003) 202 ALR 494; cf *FP Group Pty Ltd v Tooheys Pty Ltd* [2013] FWCFB 9605.
409. See e.g. *Morgan v Kittochside Nominees Pty Ltd* (2002) 117 IR 152; and the cases referred to in Thai (2012), 154.
410. Apart from the shared obligations of labour hire employers and hosts in relation to workplace health and safety: see Stewart et al, [10.32].
411. *FP Group Pty Ltd v Tooheys Pty Ltd* [2013] FWCFB 9605.
412. See e.g. *FWO v Eastern Colour Pty Ltd (No 2)* [2014] FCA 55.
413. [2013] FWCFB 9605.
414. Ibid, [41].
415. *Costello v Allstaff Industrial Personnel (SA) Pty Ltd* [2004] SAIRComm 13; Stewart et al (2016), [10.30].
416. Thai (2013), 171-173.
417. *Fair Labor Standards Act 1938, Family and Medical Leave Act 1993* and *National Labor Relations Act 1935*; see Thai (2012), 160-166.

Even for labour hire employees who can bring an unfair dismissal claim, the relevant provisions are sometimes interpreted by the FWC so as to enable the labour hire agency to 'hide' behind the actions of the host and/or their commercial relationship with the host. This approach enables both the host and the labour hire employer to avoid having to account for their respective roles in causing or contributing to the termination of the labour hire employee's employment.

These limitations of the Fair Work Act unfair dismissal provisions act to reduce job security for labour hire workers, and likely act as an incentive for businesses to utilise labour hire rather than engage direct employees.

One option for addressing these issues would be to adopt one of the forms of 'joint employment' discussed above. These include Thai's proposal to amend the Fair Work Act to enable a labour hire employee to bring an unfair dismissal claim against both the labour hire agency and host (with a statutory test modelled on United States jurisprudence to determine whether the host/client is a joint employer that may have liability for the employee's dismissal and any remedies arising from a finding of unfairness).[418] However the imposition of such a framework in the Australian context would be a major leap, with significant economic effects on the users of labour hire services.

The FWC has exhibited different approaches to determining the extent to which a labour hire employer can be held responsible for the fairness or otherwise of the host's decision-making in terminating an engagement with a labour hire employee. In practice, an approach by labour hire agencies which minimises use of the contractual relationship between the labour hire agency and host to defeat the rights of a dismissed employee to seek a remedy is to be preferred and should be encouraged. These issues are addressed further in Recommendation 26, at 5.6.4.

3.4.3 Protections from discrimination and unfair treatment

As with other aspects of employment regulation, labour hire employees are entitled to the same protections as other employees from discrimination and other adverse action under federal and state anti-discrimination laws, in respect of their employment.[419] In the case of a labour hire employee, the relevant statutory provisions apply so as to preclude the labour hire agency from engaging in discrimination against the employee.

The difficulties identified throughout this Report with the division between legal responsibility for the employment relationship, and practical control of decision-making, arise again in the context of anti-discrimination laws insofar as they apply to the labour hire agency and not the host. Generally speaking, the labour hire agency gives effect to the legal consequences arising from the practical actions and decisions of the host. The labour hire agency is thus one step removed from the party whose actions or motivations may be discriminatory, and is thus effectively quarantined from the legal consequences of those actions.

However, in contrast to the position under unfair dismissal laws, the breadth of the anti-discrimination framework under both federal and state laws means that the conduct of hosts vis-à-vis labour hire employees is in some cases directly captured by this framework. Notwthstanding this, the application of discrimination laws in this manner remains inconsistent.

418. Thai (2012), 173-177.

419. See Fair Work Act Part 3-1; *Age Discrimination Act 2004* (Cth); *Disability Discrimination Act 1992* (Cth); *Sex Discrimination Act 1984* (Cth); *Racial Discrimination Act 1975* (Cth); *Equal Opportunity Act 2010* (Vic).

Fair Work Act General Protections

Part 3-1 of the Fair Work Act contains protections from various forms of 'adverse action'[420] by employees, employers, independent contractors and unions against employees, independent contractors and other parties because they hold or exercise a workplace right,[421] engage in lawful industrial activity,[422] or for other discriminatory reasons.[423]

In the labour hire setting, some of these protections extend to adverse action taken for a proscribed reason, by a host organisation against an employee or a contractor of a supplier.

Section 340 of the Fair Work Act prohibits a person from taking adverse action against another person because the other person has a workplace right.[424] Section 342 sets out what action, by what persons, against whom, constitutes adverse action. It includes action by a 'principal' who has entered, or is proposing to enter, into a contract for services with an independent contractor, against the independent contractor, or a person employed or engaged by an independent contractor.[425]

The characterisation of 'independent contractor' was considered in *State of Victoria v Construction, Forestry, Mining and Energy Union*.[426] There, the Full Federal Court held that for purposes of s 342, there is no limitation, express or implied, on the size of an independent contractor or the number of employees employed by it, and that 'independent contractor' encompasses a large organisation with many employees.[427] Based upon this decision, a labour hire firm can constitute an independent contractor, and thus a host can constitute the 'principal'.

The protections afforded by s 342 therefore extend to both labour hire employees and labour hire contractors, as 'person[s] employed or engaged by' the labour hire agency, apparently offering these workers some protection from discriminatory treatment by a host. The proscribed action under Fair Work Act Part 3-1 includes where the principal terminates the contract or refuses to engage the independent contractor, injures or prejudicially alters its position, refuses to make use of services it offers or refuses to supply goods or services to the independent contractor.[428]

Two relatively recent Federal Circuit Court decisions have touched upon the limitations on use of the general protections provisions in a labour hire context.

In *Askaro v Leading Synthetics Pty Ltd & Anor*[429] a labour hire employee brought proceedings against both his labour hire employer and the host whose business he was working in, regarding a change in shift arrangements which followed a complaint by the employee to FWO regarding his award entitlements. The Federal Circuit Court found that for the purposes of column 1 of item 3 of s 342,[430] the host was a 'principal', the labour hire agency was an

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420. Fair Work Act s 342.

421. Fair Work Act s 340; see s 341 for the meaning of 'workplace right'.

422. Fair Work Act s 346.

423. Fair Work Act s 351. There are also prohibitions on coercion and the making of certain misrepresentations: ss 348-349.

424. Fair Work Act s 340.

425. Fair Work Act s 342, items 3 and 4, column 1.

426. [2013] FCAFC 160.

427. Ibid, [120].

428. Fair Work Act s 342, item 3 and 4, column 2.

429. [2014] FCCA 2081.

430. Column 1 of Item 3 of the Table relates to adverse action taken by 'a person (the *principal*) who has entered into a contract for services with an independent contractor against the independent contractor, or a person employed or engaged by the independent contractor.'

'independent contractor' and the applicant was an employee of the independent contractor.[431] However, it then found that the host's action in changing the employee's shift arrangements did not constitute adverse action, as the action proscribed by that provision is confined to adverse action against the independent contractor (i.e. the labour hire agency), not its employees:

> *I find that the action referred to in Item 3, column 2(c) is action taken by the principal against the independent contractor only which may have the consequence of adversely affecting the position of the independent contractor's employees. I concur with the applicant's submissions that this construction of Item 3, column 2(c) does operate to exclude action taken by a principal which alters only the position of an employee of an independent contractor (such as a labour hire agency) to his or her prejudice. However, this is a matter for Parliament and not the Court.*[432]

In *Vij v Cordina Chicken Farms Pty Ltd*[433] a labour hire employee posted notices in his host's workplace advising workers of their rights not to be bullied and made a complaint to FWO about unpaid overtime. He was then transferred by the host to a part of the workplace where the work requirements were more onerous, and subsequently his employer was informed by the host that his services were no longer required. Mr Vij, who was self-represented, brought an adverse action claim on the basis that he was an employee or prospective employee of the host, but this argument was unsuccessful. However the Court did not consider whether Mr Vij could have brought the claim against the labour hire agency as a 'principal' in its decision dismissing his application.

Notwithstanding the decisions referred to above, as Stewart et al (2016) have observed: '[t]he capacity to use this provision to deal with the exercise of power by a principal to prevent employees of an independent contractor (such as a catering contractor) exercising workplace and industrial rights remains largely unexplored.'[434]

Anti-discrimination laws

The Fair Work Act general protections include protections from discrimination on the basis of a range of personal attributes, including sex, race, disability, religion and others.[435] However, these protections apply only to employees or prospective employees in respect of the actions of their employer. They do not extend to actions by a host against a labour hire employee.

In contrast, the *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1992* (Cth), *Sex Discrimination Act 1984* (Cth) and *Racial Discrimination Act 1975* (Cth) contain protections from discrimination in the workplace which are not limited to an employment relationship, and most of which are broad enough to encompass discrimination by hosts against labour hire workers.

The *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1992* (Cth), and *Sex Discrimination Act 1984* (Cth) prohibit various forms of workplace discrimination by a 'principal' against a 'contract worker' on grounds relating to age, disability and gender respectively. In each case, 'contract worker' means 'a person who does work for another person under a contract between the employer of the first mentioned person and that other person' and 'principal' means a person for whom the contract worker does work under a contract between the employer of the contract worker and the person.[436]

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431. [2014] FCCA 2081, [45].
432. Ibid, [52].
433. (2012) 222 IR 91.
434. Stewart et al (2016), [20.49]. Note also the consideration of whether an employer or independent contractor can hold a workplace right in *Ai Group v Fair Work Australia* [2012] FCAFC 108, [62]; *CFMEU v BHP*, [2015] FCAFC 25, [179].
435. Fair Work Act s 351.
436. *Age Discrimination Act 2004* (Cth), s 20; *Disability Discrimination Act 1992* (Cth), ss 4, 17; *Sex Discrimination Act 1984* (Cth), ss 4, 16.

The *Racial Discrimination Act 1975* (Cth) prohibits race discrimination in employment.[437] It provides that 'employment' includes 'work under a contract for services'[438] but does not clearly encompass the employees of a labour hire agency in respect of discriminatory action by a host.[439]

The *Equal Opportunity Act 2010* (Vic) (**EO Act**) prohibits discrimination based on a broader range of attributes than those covered by the above federal laws (i.e. sex, disability, race, age, sexual orientation, expunged homosexual conviction, lawful sexual activity, gender identity, marital status, status as parent/carer, pregnancy, breastfeeding, religious or political belief/ activity, employment activity, industrial activity).

The provisions of the EO Act governing discrimination at work have application beyond traditional employment relationships. The EO Act, as with the *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1992* (Cth), and *Sex Discrimination Act 1984* (Cth), extends protections to discriminatory actions by principals against contract workers.[440] The EO Act defines these in similar terms. Section 4 provides that:

> ***contract worker*** *means a person who does work for a principal under a contract between the person's employer and the principal;*
>
> ***principal****, in relation to a contract worker, means a person who contracts with another person for work to be done by employees of the other person;*

The protections for contract workers under s 21(1) include discrimination by a principal:

- in the terms on which the principal allows the contract worker to work; or
- by not allowing the contract worker to work or continue to work; or
- by denying or limiting access by the contract worker to any benefit connected with the work; or
- by subjecting the contract worker to any other detriment.[441]

In addition, s 22 provides that a principal must not, in relation to the work arrangements of a contract worker, unreasonably refuse to accommodate the parental or carer responsibilities of the contract worker.

Notwithstanding the apparent application of these provisions to hosts in respect of labour hire employees, some submitters to the Inquiry raised concerns that other workplace discrimination protections do not adequately extend to labour hire workers.

JobWatch submitted that whilst the EO Act is generally applicable to labour hire workers, there are two deficiencies in the manner in which the protections under this legislation apply to certain workers.[442]

Firstly, whilst employers and parties to independent contracting arrangements with workers are required to provide reasonable adjustments for a worker with a disability, it is not clear that this obligation extends to third party hosts who have no direct contractual relationship with the relevant workers. VLA echoed this concern.[443]

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437. *Racial Discrimination Act 1975* (Cth), s 15.
438. Ibid, s 4.
439. However, prohibitions of offensive behaviour based on racial hatred contained in Part IIA of the Act apply to any act done in a public place, which is likely to include a workplace. Accordingly, the protections in Part IIA would apply.
440. EO Act ss 21, 22.
441. Subsection 21(2) provides that subsection (1) does not apply to anything done or omitted to be done by a principal in relation to a contract worker that would not contravene the Act if done or omitted to be done by the employer of that contract worker.
442. JobWatch, Submission no 46, 9.
443. VLA, Submission no 84, 3.

Section 20 of the EO Act requires an employer to make reasonable adjustments for an employee with a disability, unless the employee cannot adequately perform the genuine and reasonable requirements of the employment, even after the adjustments are made. Whilst the meaning of employee, employer and employment in s 4 of the EO Act encompass direct independent contracting arrangements, there is no equivalent provision which requires a principal to make reasonable adjustments for a contract worker, thus the application of this protection to the relationship between hosts and labour hire workers is unclear.

JobWatch submission – failure to provide reasonable adjustments at host organisation

Tracey, our client and young mother, was employed by a labour hire agency as a casual employee to work as a process worker at the host organisation. The host organisation required Tracey and its other workers to work on 5 different machines per day on a rotational basis.

Tracey suffered a back injury and was unable to work on one of the machines. She sought reasonable adjustments from the host company to accommodate her disability but the host refused on the basis that it would be too disruptive to the other workers and would interfere with their food processing system.

Tracey filed a claim at the Victorian Civil and Administrative Tribunal (VCAT) alleging indirect disability discrimination and failure to provide reasonable adjustments. We advised Tracey that her claim was a test case in relation to whether the host employer has to provide reasonable adjustments under the Equal Opportunity Act 2010 (Vic). The matter settled at mediation at VCAT.[444]

The second concern raised by JobWatch was that the EO Act protections from discrimination based on 'employment activity' do not apply to actions of hosts against labour hire workers.[445]

Section 6(c) of the EO Act prohibits employers from discriminating against employees for engaging in 'employment activity'.

Section 4 defines employment activity as:

> *an employee in his or her individual capacity—*
>
> *(a) making a reasonable request to his or her employer, orally or in writing, for information regarding his or her employment entitlements; or*
>
> *(b) communicating to his or her employer, orally or in writing, the employee's concern that he or she has not been, is not being or will not be, given some or all of his or her employment entitlements;*

'Employment entitlements', in relation to an employee, include:

> *the employee's rights and entitlements under an applicable—*
>
> *(a) contract of service; or*
>
> *(b) federal agreement or award; or*
>
> *(c) minimum wage order under the Fair Work Act 2009 of the Commonwealth; or*
>
> *(d) contract for services; or*
>
> *(e) Act or enactment; or*
>
> *(f) law of the Commonwealth; ...*

444. JobWatch, Submission no 46, 9.

445. JobWatch, Submission no 46, 9.

Because of the extended meaning of *employee, employer* and *employment*, the protection against discrimination based on employment activity extends to independent contracting arrangements. However, there is no express extension of this protection in the EO Act to 'contract employees' and 'principals,' in contrast to the approach to extending other protections (see above). Thus, while an employee engaged under a labour hire arrangement has the benefit of this protection in respect of their labour hire employer, the protection does not appear to extend to communications between the employee and host in respect of the employment entitlements of the labour hire employee.

Fair Work Act anti-bullying laws

The Fair Work Act contains provisions permitting a worker who is bullied at work to make an application to the FWC for an order to stop the bullying.

The Fair Work Act bullying protections are not confined to employees, but instead apply to *'workers'*. Section 789FC(2) provides that worker has the same meaning as in the *Work Health and Safety Act 2011*, but does not include a member of the defence force. A note to that provision provides:

> *Broadly, for the purposes of the Work Health and Safety Act 2011, a worker is an individual who performs work in any capacity, including as an employee, a contractor, a subcontractor, an outworker, an apprentice, a trainee, a student gaining work experience or a volunteer.*

Similarly, the persons who may be subject to an order to stop the bullying are not confined to employers, or co-employees, but can be any individual or a group of individuals, provided that the relevant conduct occurs while the worker is 'at work' in a business which the provisions apply to.[446]

These provisions can have application in the labour hire context, for example where a labour hire employee alleges bullying by a direct employee of the host.[447]

Fairness in offering work

The Inquiry heard evidence from labour hire workers that some labour hire practices relating to rostering, and short notice of shifts, had a detrimental impact upon workers.

For example, in a closed hearing, the Inquiry heard from employees of a large labour hire agency working at a manufacturing site in a regional centre. Around a third of the workers at the factory were labour hire workers. One of the employees had worked at the factory for a number of periods over 20 years, for three different labour hire companies. When the employee commenced with the current labour hire employer, she was getting nearly a full week's work every week. However, she now gets offered constantly fluctuating shifts:

> *It's gone down to one shift a week, two shifts a week, three shifts a week, then all of a sudden you'll get five shifts a week, but I can't afford to live on little dribs because I've got responsibility of buying my home, paying my bills …. Every Friday I wait for a text message … it's starting to really affect my health.*[448]

Another of the labour hire employees at the same site is offered only a small number of shifts per week. She told the Inquiry:

> *I've got three kids to support, so I find it very hard to live on one to three shifts a week and they have a habit of calling me up with no notice, even though they know I live 40 minutes away and I rely*

446. Fair Work Act s 789FD(1)(a). The provisions apply to a 'constitutionally covered business' as defined in s 789FD(3).

447. See e.g. *Harpreet Singh* [2015] FWC 5850 (although the employee's bullying claim was not substantiated in that case).

448. Worker, Closed Hearing 20, Shepparton, 15 February 2016.

solely on a babysitter to work … If I say, "No, I'm sorry, I can't do the shift", they'll get very agro and say, "Why can't you do the shift, you said you were available" and I say, "Well, I've got to rely on a babysitter, I can't give them no notice at 11 o'clock of a night because she's got kids as well."[449]

When these workers ask why their shifts have been reduced, they are not provided with any explanation. One told the Inquiry:

I rang up her on Friday and asked her, "How come I only got two shifts for the week?" and she said, "Well, that's what was available." That's her answer to me… I've learned from experience, if you say something back, she'll just - the following week, she won't give you no shifts, so you be quiet, you don't say nothing….. I think the power has gone to her head, she's better than you, and she doesn't care if you've got children or she doesn't care if you're the only income in your home, but she'll expect you to be on call 24/7 and if you say "No" - and a lot of the casuals are getting to the - they don't answer their phones after hours or whatever because the fact is they - it's five minutes - like it might be 10 past 11 and you're supposed to start at 11 o'clock, "Can you get there as soon as possible?"[450]

The Inquiry heard that there was no reduction in overall work available at this site, but that the labour hire agency engaged 10 to 15 new casuals each month, and used shift allocation as a form of retribution, for example when workers called in sick.[451]

Similarly, CFMEU Mining and Energy described the practice of holding casual workers captive by keeping an available panel of such workers far in excess of the company's requirements and penalising those who accept other work at other employers by 'black banning' them from getting casual work.[452] 'Lucy', an individual worker, also submitted that labour hire creates underemployment, driven by the desire of labour hire agencies to have 'more people on their books'. Lucy also described fear of being blacklisted if she is not available for a shift. She submitted that labour hire agencies that have contracts with hosts should be made to give a nominal 'fixed amount' of scheduled weekly hours to each employee.[453]

GLA observed (in the UK context) that in some cases there are more workers on the records of a labour hire agency than it needs to supply, and it may vary who works/what hours they work. It submitted that this may also be used as a method of control'.[454]

Jesuit Social Services submitted that the requirement for on-hired workers to be available at short notice to travel to different locations can be particularly difficult for people who (due to limited income) may not have access to a reliable car, or may be sharing one vehicle amongst many family members. Access to a mobile phone can also be problematic for disadvantaged groups.[455]

This evidence demonstrates the vulnerability of labour hire workers arising from being part of a flexible workforce. However, a number of labour hire agencies told the Inquiry that their rostering and shift practices take into account the needs of their employees. There was other evidence from a labour hire agency which regarded poor rostering practices as mismanagement. It said that labour hire or 'temp' work is on a casual basis, and provided both parties are aware of that there should not be any issues. It does not expect its employees to sit by the phone and wait for the next job to come up.[456]

449. Worker, Closed Hearing 20, Shepparton, 15 February 2016.
450. Worker, Closed Hearing 20, Shepparton, 15 February 2016.
451. Union and workers, Closed Hearing 20, Shepparton, 15 February 2016.
452. CFMEU Mining and Energy, Submission no 42, 1.
453. Lucy, Submission no 2, 2.
454. GLA, Submission no 15, 7.
455. Jesuit Social Services, Submission no 52, 4.
456. Labour hire agency, Closed Hearing 26, Morwell, 29 February 2016.

The Inquiry also heard from Ablecare Staffing, a nursing agency that had been operating for around 11 months. Ablecare provides staff to aged care facilities in the Goulburn Valley and surrounding areas. Ablecare offers available shifts to all staff simultaneously, via the same text message, unless a particular staff member has been requested by the host. Ablecare described its rostering practices as follows:

> *We don't put any pressure on our staff to work. They work when they can, and they don't when they don't want to. So their family - and that's one of the things we say to them, "We want to give you an even lifestyle between work and family life". We have a staff member at the moment whose wife has bowel cancer so he works when he can and we offer him as much support and tell him he takes as much time as he needs and he'll say to us, "Don't give me any calls this week because I can't fill the shift, I'll be in Melbourne." And we say "Fine" and then when he comes back he just says "I'm back up for a couple of shifts" and we put him back on the list again. So we try and be really flexible around peoples' needs.*[457]

A key purpose of labour hire employment arrangements is to provide hosts with ready access to workers at short notice. It is therefore a necessary consequence of this arrangement that labour hire employees often will experience less certainty regarding their hours of work.There is obviously a business imperative for a labour hire agency to have multiple workers on their books, to ensure they can provide a reliable supply when required.

The regulatory framework which applies to labour hire employees in this respect is not significantly different to that which applies to directly employed casual workers. The Inquiry did hear some similar evidence regarding directly hired casuals.[458] However, concerns of the nature set out above were more prevalent amongst labour hire casuals. Some features of labour hire employment arrangements may potentially explain this.

Firstly, whilst modern awards generally provide minimum shift length guarantees,[459] and some protections in relation to periods between shifts,[460] they do not regulate notification times for shifts, or require particular patterns of work for casual employees. More commonly, provisions of this nature will be found in enterprise agreements, tailored to the requirements of the host's business. As set out at in 3.3, labour hire employees often do not receive the benefit of a host's enterprise agreement, meaning any provisions directed at ameliorating these concerns are less likely to apply to labour hire employees.

Secondly, the most relevant laws to an employer's decision-making in respect of offering (or not offering) work are the various protections against discrimination and unfair dismissal. As noted above in this section, there are some difficulties with the application of these protections to labour hire employees in respect of their engagement by a host (such that he relevant protections are not as complete as those available to directly employed workers).

Conclusions, findings and recommendation – protections from discrimination and unfair treatment

The evidence presented to the Inquiry, and the relevant case law, illustrate a number of ways in which labour hire employees miss out on protections against unfair treatment at work enjoyed by other workers.

The Victorian Government could take direct action to address the two shortcomings in the application of the EO Act in the labour hire context which were discussed above.

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457. Ablecare staffing, Shepparton Hearing, 16 February 2016.

458. See 6.2.4.

459. See e.g. *Meat Industry Award 2010*, clause 34.

460. See e.g. Ibid, clause 33.5.

Recommendation 4
The Government should introduce amendments to the *Equal Opportunity Act 2010* (Vic) to clarify that the protections from discrimination in respect of an employee engaging in employment activity, and reasonable adjustments for an employee with a disability, apply in the context of a host's relationship with a labour hire employee.

In relation to rostering and notice of shifts, the evidence of a number of labour hire agencies indicated that labour hire works best for the labour hire agency, employee and host when rostering and shift allocation are undertaken in a transparent and fair manner. Conversely, much evidence demonstrated that poorly managed rostering can have a significantly detrimental impact on labour hire workers and their families. Labour hire agencies should be encouraged to manage rostering so that notice and planning of shifts work for the mutual benefit of all parties involved in labour hire relationships. This issue is dealt with further in Recommendation 26, at 5.6.4.

3.5 Labour hire and workplace health and safety

3.5.1 Occupational health and safety obligations

Academic research

There is a significant body of literature which indicates that labour hire workers are subject to greater risks to health and safety than directly employed workers.

In 2006, Johnstone and Quinlan analysed some of the problems faced by OHS regulators in Australia resulting from the use of temporary agency workers.[461] The researchers examined prosecutions involving labour hire firms, analysed documentary records (union, industry and government reports) and conducted approximately 200 interviews with regulatory officials, employers and union representatives. The research covered all Australian jurisdictions.

They found growing evidence that agency workers are at a greater risk of injury than other workers undertaking the same task, yet are more likely to be denied protection under OHS legislation.[462] They observed that despite a growing number of successful prosecutions for breaches of legislative duties by hosts and temporary employment agencies, the triangular labour hire relationship and the temporary nature of most placements pose serious problems for government agencies in enforcing health and safety standards.[463]

Johnstone and Quinlan observed that prosecutions start from the position that labour hire agencies and host firms have equal responsibility for the health, safety and welfare of labour hire workers. Labour hire agencies and host organisations are both required to conduct safety inductions for workers and ensure other safety measures are in place. However, the authors pointed to evidence suggesting that these obligations were often not being met.[464]

The authors concluded that there is a compelling case for further regulation ensuring that minimum employment standards are observed safeguarding temporary workers' capacity to raise OHS complaints with both the host organisation and the agency.[465]

461. Richard Johnstone and Michael Quinlan, 'The OHS regulatory challenges posed by agency workers: evidence from Australia' (2006) 28:3 *Employee Relations* 273.
462. Ibid, 275.
463. Ibid, 273.
464. Ibid, 287.
465. Ibid.

In a 2011 article, Underhill and Quinlan reported on a project undertaken in Queensland in 2010 examining OHS issues arising from the growth of temporary agency work.[466] The authors note, referring to previous research, that precarious workers experience more OHS issues than those in more stable employment due to a combination of economic pressures which can lead to corners being cut, disorganisation such as inexperience and poor communication, and regulatory failure.[467] Underhill and Quinlan identify several factors contributing to this, including:

- agency workers not participating in the OHS consultation and representation process;
- shared responsibility leading to confusion and blame-shifting between parties;
- the high turnover of small agencies that cease operation once prosecuted;
- the complex nature of working relationships at workplaces involving multiple parties;
- temporary agency workers' vulnerability to termination for reasons other than job performance;
- contingent workers' poor knowledge of legal rights and obligations, as well as their limited access to OHS and workers' compensation rights;
- a greater prevalence of fractured or disputed legal obligations in workplaces with multiple employers; and
- non-compliance coupled with (a lack of) regulator oversight, which is often an outcome of insufficient resources.[468]

Some observations arising from the focus groups conducted in the Underhill and Quinlan study included that many labour hire agencies invested considerable resources into the safe placement of their employees. Among the positive steps taken were the following: retaining long-term relationships between the host and agency;[469] regular interaction between agency representatives and the host organisation;[470] developing niche agency operations with greater knowledge of the industry supplying appropriate workers;[471] and providing hosts with guidance material on how to select the most appropriate agency.[472] However, small host firms and small temporary agencies pose OHS problems, with the hosts being identified as lacking OHS knowledge or not caring about OHS or engaging in calculated avoidance. One respondent noted that some host firms grow so quickly that they find themselves in trouble because they retain the mentality of being a small business.[473]

Underhill and Quinlan identified particular OHS challenges relating to foreign workers under temporary visa arrangements;[474] workers who are inexperienced or formally unemployed;[475] and problems with the reward systems for temporary employment agencies which led to signing up businesses which may not have satisfactory OHS standards.[476] They concluded that the creation of barriers to entry to the industry, such as licensing arrangements, could be an effective path to increasing levels of OHS compliance.[477]

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466. Elsa Underhill and Michael Quinlan, 'Beyond statutory enforcement – alternative approaches to improving OSH in the temporary agency sector' (2011) 9:2 *Policy and Practice in Health and Safety* 109.
467. Ibid, 110.
468. Ibid, 110-111.
469. Ibid, 119.
470. Ibid, 121.
471. Ibid, 123.
472. Ibid, 124.
473. Ibid, 113.
474. Ibid, 125.
475. Ibid.
476. Ibid, 126.
477. Ibid, 128.

Quinlan, Bohle and Rawlings-Way examined the health and safety of homecare workers engaged by temporary employment agencies in South Australia. Their 2015 article notes that despite little previous work on home-based care work, there is evidence that precarious work arrangements, such as agency work, have negative effects on mental and physical health, injury rates, and regulatory compliance.[478] They identify difficulties for OHS inspectorates in regulating the homecare industry arising from the 'wide dispersion of workplaces, insufficient guidance material, fractured management responsibility arising from subcontracting, and failure to undertake pre-placement risk assessments or implement adequate OHS management protocols.'[479] Inadequate OHS training and in some cases a lack of OHS reporting contributed to the finding that homecare agencies vary in the quality of their OHS management.[480] Industry-specific factors causing this included the fact that home-based care work mainly occurs in settings that are highly unlikely to be visited by an OHS inspector.[481] Consistent with international research on the negative OHS implications of agency work, this study found that homecare workers suffer emotional stress and physical injuries as well as irregular and long working hours and poor OHS management.[482] It concluded that: 'Homecare work is symptomatic of emerging trends in the service sector toward widespread precarious work, poorly understood and managed OHS hazards, and weak regulation of even basic OHS standards'.[483]

A 2006/07 study by the Australian Centre for Research in Employment and Work commissioned by WorkSafe (**ACREW Study**) examined best practice models for managing joint responsibilities in the labour hire sector.[484] It concluded that management commitment to OHS within firms was a key determinant of achieving best practice:

> *Commitment to achieving best OHS practice extends from the highest executive level down through to supervisors and workers at their toolbox and other meetings. The principal challenge to efforts to achieve best practice, then, is that commitment, from which flow corporate values, systems development, sufficient resources and communication. Best practice for organisations of every size is according safety of all workers the highest priority. Conversely, a narrow focus on short-term competitive advantage through cost reduction poses a risk to OHS and is unlikely to be associated with a sound business decision'.*[485]

Inquiry evidence

The impact of labour hire on health and safety in the workplace was the subject of a significant amount of evidence to the Inquiry. The Inquiry heard about a broad spectrum of approaches in the labour hire industry regarding health and safety. These ranged from best practice models implemented by labour hire agencies, which enhance health and safety within a host's workplace, through to use of labour hire arrangements as a means of avoiding legal responsibilities.

The Inquiry heard from a number of labour hire agencies about the highly compliant approach they take to OHS obligations. Many labour hire agencies provided the Inquiry with details of

478. Michael Quinlan, Phillip Bohle and Olivia Rawlings-Way, 'Health and safety of homecare workers engaged by temporary employment agencies' (2015) 57:1 *Journal of Industrial Relations* 94, 95.

479. Ibid, 97.

480. Ibid, 107.

481. Ibid, 110-111.

482. Ibid, 109.

483. Ibid, 111.

484. Australian Centre for Research in Employment and Work, *Labour Hire Research Report: Best Practice Models for Managing Joint Responsibilities in the Labour Hire Sector*, Monash University, Faculty of Business and Economics (August 2007).

485. Ibid, 6.

the OHS procedures they utilise when placing employees with a host. For example, Adecco described its process, including:[486]

- OHS checks of the host's site before any placements occur;
- an inspection and systems assessment on site;
- continual visits throughout a placement;
- noting of hazards and corrective action in its own system;
- checking in with staff; and
- soon to be introduced – anonymous hazard reporting, to address concerns that workers' jobs may be at risk if they report an OHS concern.

Australia Wide Personnel reported paying for external health and safety assessments of a site prior to deciding whether or not it will place any person on that site.[487]

A number of labour hire agencies told the Inquiry that they would not place employees with a host where the conditions on site were not safe.[488] Others indicated that some hosts were able to improve their own internal OHS systems through the engagement of the labour hire agency.[489]

Another labour hire agency in closed session told the Inquiry about an incident in which a sand wall collapsed onto an excavator driven by an on-hire employee. The host did not notify the labour hire agency, which found out through the employee. After trying to address the situation directly with the host without success, the labour hire agency called in WorkSafe. Ultimately, WorkSafe was satisfied with the labour hire agency's policies and procedures, but the host was fined.[490]

In contrast, however, a number of participants told the Inquiry that OHS standards were lower in the labour hire sector. The Safety Institute of Australia submitted that:

> *…supervision is usually of a lesser standard, induction and job-specific training can be bypassed as labour hire workers are often called in at the last moment. This can lead to omissions of basic OHS requirements such as personal protective equipment, consultation and risk management.*[491]

Kevin Jones of the Safety Institute of Australia, told the Inquiry:

> *The OHS law says everybody is entitled to the same rights under legislation, but a lot of the discussion seems to be that there is a two-tiered sector on health and safety, the treatment of injuries, the notification of injuries, the response of inspectorates, all of those sorts of things.*[492]

The Inquiry heard about experiences of labour hire agencies which failed to do any formal safety induction for workers at the host employer's site,[493] failed to provide adequate OHS supervision[494] and failed to check the qualifications of the labour hire worker sent to a site.[495] Many labour hire workers are trained on the job by other casual employees, with little or no

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486. Adecco, Dandenong Hearing, 30 November 2015.
487. Australia Wide Personnel, Dandenong Hearing, 30 November 2015.
488. Australia Wide Personnel, Dandenong Hearing, 30 November 2015; Labour hire agency, Closed Hearing 02, Mildura, 24 November 2015.
489. See e.g. Labour hire agency, Closed Hearing 08, Dandenong, 30 November 2015; Labour hire agency, Closed Hearing 01, Mildura, 23 November 2015.
490. Labour hire agency, Closed Hearing 26, Morwell, 29 February 2016.
491. Safety Institute of Australia, Submission no 48, 1.
492. Kevin Jones, Fellow, Safety Institute of Australia, Academic Forum, 25 May 2016.
493. NUW, Geelong Hearing, 8 December 2015.
494. AMWU, Melbourne Hearing, 9 February 2016.
495. AMWU, Melbourne Hearing, 9 February 2016.

supervision.[496] This is particularly prevalent among migrant workers, many of whom lack basic knowledge of OHS standards.[497] Where OHS training is provided to labour hire staff, it is sometimes only provided in the form of an online training module, which poses a problem for people with low IT and literacy skills.[498]

An anonymous construction worker in Melbourne submitted as follows:

> *Safety? What safety? Only provided a flimsy paper mask provided despite using an angle grinder on concrete. Digging trenches by hand. Carrying unreasonably heavy things with no trolley or safe lifting measures in place. Operating power tools with no training or gloves provided. The only safety gear is what I pick up around the work site. No WorkSafe training or information. Bullied and yelled at.*[499]

A labour hire worker in the chocolate packing industry submitted that as a labour hire casual, the worker was required to work in a dangerous working environment. '[N]o one wear safety vest, the forklift was driving around the factory without any warning. Once the forklift were crush my friends' feet and the company asked him to pay his own medical bills.'[500]

The Inquiry also heard from various witnesses in relation to a wide range of substandard working conditions for labour hire workers, constituting risks to workers' health and safety. For example:

- hot working conditions, long hours without breaks, and transportation across long distances in unsafe vehicles;[501]
- lack of masks, tools, gloves, information and safety training;[502]
- unsafe, broken, dirty or dilapidated equipment;[503]
- lack of toilet facilities, water, or rest breaks;[504]
- lack of safety equipment;[505]
- dangerous work practices, insecure trolley loads, and no protective equipment while chemicals were being sprayed;[506]
- lack of wet weather gear and protective clothing;[507]
- no breaks, and no access to water in hot conditions;[508]
- lack of food or kitchen facilities, and no medical treatment available for health issues; [509] and
- long hours.[510]

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496. Union and worker, Closed Hearing 10, Dandenong, 1 December 2015.
497. Community/Government, Closed Hearing 07, Mildura, 24 November 2015.
498. Jesuit Social Services, Submission no 52, 4.
499. VTHC, on behalf of individual workers, Submission no 41.
500. NUW on behalf of individual workers, Submission no 75, lxiv.
501. Sunraysia Mallee Ethnic Communities Council, Mildura Hearing, 23 November 2015.
502. VTHC on behalf of individual workers, Submission no 41.
503. VTHC on behalf of individual workers, Submission no 41.
504. VTHC on behalf of individual workers, Submission no 41.
505. VTHC on behalf of individual workers, Submission no 41.
506. Workers, Closed Hearing 4, Mildura, 24 November 2015.
507. NUW, Dandenong Hearing, 30 November 2015.
508. STLC, Mildura Hearing, 23 November 2015.
509. Community/Government, Closed Hearing, Mildura, 24 November 2015.
510. NUW, Geelong Hearing, 7 December 2015.

The Inquiry also heard from a number of witnesses who experienced, or knew labour hire workers who had experienced, sexual harassment, assault, discrimination or bullying at the workplace.[511]

OHS concerns were raised with the Inquiry by workers across a wide variety of industries, including, teachers, hospitality workers, public servants working through labour hire agencies and construction workers.[512]

The Inquiry heard of particular health and safety issues in the horticulture industry, with seasonal workers treated poorly with untreated boils on their legs because of poor diet and poor food practices by the host, yet still expected to go to work,[513] and long hours of work, sexual harassment in the workplace and uncompensated injuries in the workplace.'[514]

Legal framework of health and safety duties

The *Occupational Health and Safety Act 2004 (Vic)* (**OHS Act**) establishes workplace health and safety standards for Victorian employers, and protections for workers, which apply to both labour hire agencies and hosts in respect of a labour hire employee.[515]

The primary subject of regulation under the OHS Act is an 'employer', defined as a 'person who employs one or more other persons under a contract of employment or a contract of training.'[516]

Section 21(1) of the OHS Act provides that employers: 'must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health.' This includes duties specified in s 21(2) to:

- provide safe plant and systems of work;[517]
- make arrangements to ensure safe use, handling, storage and transport of plant or substances;[518]
- maintain each workplace under the employee's management and control in a safe condition;[519]
- provide adequate facilities for the welfare of employees;[520] and
- provide such information, instruction, training and supervision to employees as is necessary to enable them to perform work safely.[521]

Section 21(1) and (2) clearly apply to a labour hire agency in respect of its employees.

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511. Workers, Closed Hearing 4, Mildura, 24 November 2015; Springvale Monash Legal Service, Dandenong Hearing, 1 December 2015.
512. VTHC on behalf of individual workers, Submission no 41; CFMEU on behalf of individual workers, Submission no 54; Confidential, Submission no 97.
513. Sunraysia ECC, Mildura Hearing, 23 November 2015; Community/Government, Closed Hearing 7, Mildura, 24 November 2015.
514. Workers, Closed Hearing 04, Mildura, 24 November 2015.The horticulture industry is examined further below at 4.2.1.
515. There are also parallel common law duties upon labour hire agencies and hosts: see e.g. *Hazeldene's Chicken Farm Pty Ltd v Victorian Workcover Authority* [2005] VSCA 185, [9]; *Jurox Pty Ltd v Fullick* [2016] NSWCA 180.
516. OHS Act s 5. Other duty-holders include self-employed persons, employees, designers, manufacturers and suppliers of certain plant, structures and equipment: see Part 3 Divisions 3-5.
517. OHS Act s 21(2)(a).
518. OHS Act s 21(2)(b).
519. OHS Act s 21(2)(c).
520. OHS Act s 21(2)(d).
521. OHS Act s 21(2)(e).

Section 21(3) provides that for the purposes of the above provisions:

- a reference to an employee includes a reference to an independent contractor engaged by an employer and any employees of the independent contractor; and
- the duties of an employer extend to an independent contractor engaged by an employer and any employees of the independent contractor, in relation to matters over which the employer has control, or would have control if not for any agreement purporting to limit or remove that control.

Section 21(3) has the effect of extending the operation of duties under the above provisions so that they apply to hosts in respect of labour hire employees, in relation to matters over which the host has control. The meaning of 'engaged by' in section 21(3) has been held to extend to all engagements in respect of matters over which the employer has control, whether the engagement is through a direct contract with the employer or a contract between the contractor and some other person, and 'regardless of the layers of contractual relations that might separate the contractor from the employer.'[522]

The OHS Act specifies a number of other health and safety duties in addition to the primary duty set out in s 21. Some of these are directed at 'employers' and some at other parties.

Some of the additional employer duties only apply to a labour hire agency in respect of its employees, and do not bind a host in respect of a labour hire employee. For example, s 22 of the OHS Act requires an employer: to pro-actively monitor its employees' health;[523] provide health and safety information to employees (including how to make an enquiry or complaint);[524] keep health and safety records regarding the employee;[525] and engage appropriate experts to advise on employee health.[526] None of these obligations extend beyond the employment relationship.[527]

However, other obligations under the OHS Act are described in terms which are not confined to employers or employees. For example, the employer is required to: monitor conditions at any workplace under its management or control;[528] and ensure persons other than employees are not exposed to risks to their health or safety arising from the conduct of the employer's undertaking.[529] Further, a person who has (to any extent) the management or control of a workplace must ensure so far as is reasonably practicable that the workplace and the means of entering or leaving it are safe and without risks to health.[530] Each of these duties applies beyond the employment relationship, and is broad enough to encompass a host holding the relevant duty in respect of a labour hire employee.

Respective obligations of labour hire agencies and hosts

In general then, the statutory framework provides that in a labour hire employment arrangement, both the labour hire agency and the host will hold a range of duties in respect of the labour hire employees and/or the workplace. However, the precise boundaries of the duties of each party will depend on the circumstances in each case.

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522. *R v A C R Roofing Pty Ltd* (2004) 11 VR 187, 55.
523. OHS Act s 22(1)(a).
524. OHS Act s 22(1)(c).
525. OHS Act s 22(2)(a).
526. OHS Act s 22(2)(b).
527. Breen Creighton and Peter Rozen, *Occupational Health and Safety Law in Victoria* (3rd edition, The Federation Press, Sydney, 2007), [647].
528. OHS Act s 22(1)(b).
529. OHS Act s 23.
530. OHS Act s 26(1).

Johnstone and Quinlan note that particularly in New South Wales and Victoria, prosecutions of labour hire agencies and host firms have been pursued regularly since 1998.[531]

In Victoria, WorkSafe has developed a significant amount of guidance material which comprehensively addresses the respective health and safety obligations of labour hire agencies and hosts. These publications include:

- *Placing workers in safe workplaces: Safety management systems guide for labour hire agencies*
- *Labour hire agencies: Managing the safety of on-hired workers*
- *Labour Hire Workers: OHS Rights and Responsibilities*
- *Host Employers: Managing the safety of labour hire workers*
- *Placing Workers in Safe Workplaces*
- *Case studies in labour hire - examples and learnings.*[532]

WorkSafe also has a public register of labour hire companies registered for WorkSafe insurance in Victoria, established in response to the 2005 Victorian Inquiry Report.[533]

Agency obligations

Underhill and Quinlan note that case law and guidance material in jurisdictions such as Victoria makes it clear that:

> *…to meet their obligations agency employers must ensure their workers have sufficient training to perform tasks safely, conduct pre-placement risk assessments at host workplaces, assess and monitor hosts' OHS management systems, and develop agreements with hosts on the allocation of shared responsibilities. In this way, agency employers ensure hosts' workplaces are safe at the time of placement, and on an ongoing basis.*[534]

As the 'employer', labour hire agencies hold direct health and safety duties in respect of their employees. It is well established that the relationship between a labour hire agency and the host does not diminish the agency's health and safety obligations, and does not provide a basis for imposing a lesser duty. To the contrary, an employer which sends employees to another workplace, over which it exercises limited control, is under a particular positive obligation to ensure that it takes steps to minimise any threats to the health and safety of its employees,[535] and must take a positive and proactive approach with the host[536] to ensure this. The duties owed by labour hire employers to their employees cannot be delegated to hosts.[537]

WorkSafe informed the Inquiry that there are very few difficulties prosecuting labour hire agencies for breaches of health and safety duties as they have clear employer duties under the OHS Act.[538] It noted that limited disputation might arise where there is a concurrent duty between the labour hire agency and the host, for example in respect of training and supervision. It provided the Inquiry with three prosecution summaries with respect to labour

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531. Johnstone and Quinlan (2006), 279. The authors note that in Victoria, the first successful prosecution of an agency and host firm both took place in 1999 (see the Victorian Magistrates Court decisions in, respectively, *Extrastaff Pty Ltd and NCI Specialty Metal Products Pty Ltd*, summarised at: https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0019/21745/Recent_Pros_99.pdf).

532. See: http://www.worksafe.vic.gov.au/safety-and-prevention/health-and-safety-topics/labour-hire.

533. Information provided by WorkSafe to Inquiry. The public register is accessible at: http://www.worksafe.vic.gov.au/__data/assets/pdf_file/0003/188364/labourhire_register_20160204.pdf.

534. Underhill and Quinlan, (2011) 110.

535. *Drake Personnel Limited v Workcover Authority of NewSouth Wales (Inspector Ch'ng)* (1999) 90 IR 432, 455. See also *Inspector Blume v TMP Worldwide eResourcing* [2003] NSWIRComm 37. ; and 'Labour hire business fined for unqualified safety assessment', Shortlist, 17 August 2016.

536. *Labour Co-operative Ltd v Workcover Authority of New South Wales (Inspector Robins)* (2003) 121 IR 278, 84-5.

537. *Boland v Big Mars Pty Ltd* [2016] SAIRC 11; *Boland v Fix-Force (Qld) Pty Ltd* [2016] SAIRC 16.

538. Cf. Elsa Underhill, 'Should host employers have greater responsibility for temporary agency workers' employment rights?' (2010) 48:3 *Asia Pacific Journal of Human Resources* 338, 343.

hire agencies (see below). In addition to these, Worksafe estimates that it has prosecuted between 10 to 20 smaller specialised contractors whose sole or predominant undertaking is to provide personnel to a principal.

> *Challenge Recruitment Pty Ltd*
> *On 9 March 2010, a worker was injured as a result of being hit by commercial drinks fridge while the fridge was being unloaded from his delivery truck. Challenge Recruitment Pty Ltd pleaded guilty to one charge pursuant to sections 21(1) and 21(2)(e) of the Occupational Health and Safety Act 2004. On 31 May 2012 the company was fined $30,000 and ordered to pay costs in the sum of $2,795.02. (Moorabbin Magistrates' Court).*
>
> *Skilled Group Limited*
> *On 13 April 2011 a worker was seriously injured after he was dragged into a roller of a needling loom. Skilled Group Limited pleaded guilty to one charge pursuant to sections 21(1) and 21(2)(a) of the Occupational Health and Safety Act 2004. The company was ordered without conviction to undertake a specified improvement project costing $200,000 pursuant to section 136 of the Occupational Health and Safety Act 2004. Skilled Group Limited was ordered to pay costs in the sum of $8,243.00. (Geelong Magistrates' Court).*
>
> *Skilled Group Limited*
> *On 4 July 2011, a new labour hire employee of Skilled Group Limited was working as a roundsman at the Incitec Pivot Limited fertiliser factory in North Shore. Whilst scraping off fertiliser build up from an overhead conveyor with a shovel, he was drawn into an in-running nip point and suffered serious, permanent injuries to his shoulder. Skilled Group Limited pleaded guilty to one charge under subsections 21(1) and 21(2)(a) of the Occupational Health and Safety Act 2004 for failing to provide a safe system of work for its employee by failing to adequately ascertain the nature of the work he would be doing at Incitec's workplace, and for failing to check that Incitec had properly trained him for the job. On 9 May 2013 at Geelong Magistrates' Court, Skilled Group Limited was convicted and fined $70,000 (costs of $3,554.50).*[539]

Host obligations

Australian courts have made clear that the duties of a host towards a labour hire employee are the same as the host's duties towards its direct employees.[540]

Underhill and Quinlan describe hosts' obligations towards labour hire employees as:

> *…akin to those owed to their own employees. They must provide training and supervision to enable the safe performance of tasks, conduct risk assessments, monitor working conditions to ensure new OHS risks are not introduced, and advise the agency employer should a change of job tasks arise for agency employees. These obligations reflect, in part, the extent to which agency workers OHS is contingent on the constant involvement of the host.*[541]

In *Hazeldene's Chicken Farm Pty Ltd v Victorian Workcover Authority*,[542] the Victorian Court of Appeal described the significance of the host's control of the workplace to its duties under both common law and the OHS Act in the following way:

> *This appeal, accordingly, raises the important issue of the relative responsibilities for workplace safety of a labour hire supplier on the one hand and a host employer on the other. It is well established that a common law duty of care is owed to an employee … both by the labour hire firm … which employs her, and by the host employer … which operates the workplace at which she carries out her duties. The same position obtains under the [OHS Act]. …The critical difference between the labour hire employer firm and the host employer … is that the host controls the workplace and the conduct of the operations which take place there during the work day.*[543]

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539. Information provided to Inquiry by WorkSafe Victoria.
540. Johnstone and Quinlan (2006), 279.
541. Underhill and Quinlan, (2011), 110-111.
542. [2005] VSCA 185.
543. [2005] VSCA 185, [9]-[10].

Discussion

Stewart et al observe that:

> *Multiple duty-holders are a common feature of modern business activities such as labour hire arrangements, contractor arrangements, supply chains, joint ventures, alliances and franchise arrangements. There will be many situations in which more than one person will have an obligation to identify hazards and control risks. An essential aspect of ensuring the health and safety of all workers is the coordination of work activities and work health and safety measures.*[544]

As noted above, in a labour hire employment arrangement, both the labour hire agency and the host hold a range of duties in respect of the labour hire employees and/or the workplace. However, the precise boundaries of the duties of each party will depend on the circumstances in each case.

Some participants in the Inquiry submitted that notwithstanding the joint nature of OHS obligations, there is uncertainty regarding which obligations lie with a labour hire agency and which lie with a host employer.[545]

Maurice Blackburn submitted that the High Court decision in *Baiada Poultry v R*,[546] highlights the ambiguity in this area of the law and demonstrates how the obligations to provide a safe workplace can become complex when dealing with contractors, sub-contractors and employees. In that case, the principal of one contractor of Baiada was killed resulting from the unlicensed operation of that contractor's forklift by the employee of another contractor.

The High Court overturned the conviction of Baiada in that case on a technical basis related to the directions provided to the jury by the trial judge. However, the High Court's comments on the subject matter of those directions illustrate the difficulty in ascertaining with precision the scope of a host's OHS obligation vis-à-vis a labour hire contractor. The High Court held that whilst Baiada's legal right to issue safety instructions to its contractors meant that it was possible for Baiada to do so, the existence of the right was not enough to establish that a failure to exercise that right constituted a failure to meet its duty under the OHS Act. In their joint judgment, French CJ, Gummow, Crennan and Hayne JJ added:

> *That question required consideration not only of what steps Baiada could have taken to secure compliance but also, and critically, whether Baiada's obligation obliged it: (a) to give safety instructions to its (apparently skilled and experienced) subcontractors; (b) to check whether its instructions were followed; (c) to take some step to require compliance with its instructions; or (d) to do some combination of these things or even something altogether different. These were questions which the jury would have had to decide in light of all of the evidence that had been given at trial about how the work of catching, caging, loading and transporting the chickens was done.*[547]

Some of the ambiguities which Maurice Blackburn suggests may arise in practice from this decision include situations where:

- an employer owes a statutory duty to particular categories of worker, including a labour hire worker, a contractor, a sub-contractor or employee, and the steps required to discharge those obligations;
- a principal is required to give directions to a contractor or other category of worker regarding a safe system of work, or monitor a system of work controlled by a contractor or other category of worker; and
- a principal may rely on contractors and sub-contractors to discharge their obligations.[548]

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544. Stewart et al, (2016) [18.49].
545. Maurice Blackburn, Submission no 79, 11; JobWatch, Submission no 46, 32.
546. [2012] HCA 14.
547. [2012] HCA 14, [33]; see also [38].
548. Maurice Blackburn, Submission no 79, 10-11.

This ambiguity has also been recognised in the academic literature. For example, Underhill and Quinlan summarised five sources of 'regulatory weaknesses' of the OHS regulatory regime in respect of agency workers previously identified by Johnstone and Quinlan in 2006.[549] These included 'the operationalisation of shared responsibility, with the overlap creating confusion and encouraging blame shifting between the parties' and 'the complex nature of relationships at workplace involving multiple parties'[550] with regulators encountering increased difficulty monitoring and identifying responsibility in multi-employer work sites.[551]

It is clear that the current legislative framework in Victoria imposes substantial obligations upon both the labour hire agency and the host. However, the continued focus of the OHS Act upon the 'employer' as the determinative characteristic by which key duties are allocated places it in contrast with the approach taken at the federal level and in most other states and territories.

The National Review into Model Occupational Health and Safety Laws was conducted following an agreement between the Federal Government, states and territories in 2008 to explore national harmonisation of health and safety laws.[552] It considered whether an entity's status as 'employer' was the appropriate conceptual mechanism through which to impose health and safety duties.

In its first report, the Review Panel stated as follows:

> *As the discussion earlier in this chapter demonstrates, using the employment relationship as the determinant of the application of the primary duties under OHS legislation is no longer valid.*
>
> *The changing nature of work organisation and relationships means that many who perform work activities do so under the effective direction or influence of someone other than a person employing them under a contract of service. The person carrying out the work:*
>
> - *may not be in a direct employment relationship with any person (e.g. share farming or share fishing; or as a contractor working under a contract for services, who may be carrying out work for only one principal);*
> - *may be employed by someone who is simply organising the provision of labour (e.g. a labour hire or placement organisation) with the effective control and direction of the work being by another (commonly known as the 'host employer' or principal); and*
> - *their employer may have limited ability to exercise discretion as to work systems and methods, because of the direction and requirements of another party (as may be found in some transport arrangements with the requirements of the consignor).*
>
> *We consider that the model Act must provide a broader scope for the primary duty of care, to require those in effective control or influencing the way work is done to protect the health and safety of those carrying out the work.*[553]

Accordingly, the Review Panel recommended that:

> *To ensure that the primary duty of care continues to be responsive to changes in the nature of work and work relationships and arrangements, the duty should not be limited to employment relationships. The duty-holder is any person conducting the business or undertaking.*[554]

Similarly, the Review Panel considered that the persons to whom a duty is owed should be sufficiently broad so that it:

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549. Johnstone and Quinlan (2006).

550. Underhill and Quinlan, (2011), 111.

551. Ibid.

552. For background on the harmonisation process and the development of the model work health and safety legislation, see Stewart et al (2016), [18.23]-[18.26].

553. Australian Government, National Review into Model Occupational Health And Safety Laws, *First Report To The Workplace Relations Ministers' Council*, October 2008, 62-3.

554. Ibid, 62.

> *…allows broad coverage of the primary duty of care. The definition of 'worker' should extend beyond the employment relationship to include any person who works, in any capacity, in or as part of the business or undertaking.*[555]

The Model Work Health and Safety Act, which has been adopted (with some variations) in all Australian jurisdictions except for Victoria and Western Australia,[556] gives effect to each of these recommendations. It provides that the primary duty-holder is a 'person conducting a business or undertaking' (**PCBU**).[557] Duties are owed to 'workers', which includes employees, contractors and a broad range of other types of work situations. A person is a worker under the Model Act 'if the person carries out work in any capacity for a person conducting a business or undertaking,'[558] including 'an employee of a labour hire agency who has been assigned to work in the person's business or undertaking.'[559] In the labour hire context, these provisions have application as follows:

> *…both the labour hire PCBU and the host PCBU have duties to ensure the health and safety of labour hire workers so far as is reasonably practicable. These duties must be fulfilled to the extent to which each PCBU has the capacity to influence and control the matter.*[560]

The Model Act also makes express provision for circumstances in which two or more parties hold concurrent duties. It provides that each duty-holder must comply with its duty to the standard required by the Act, and must discharge its duty to the extent it has the capacity to influence and control the matter (or would have had that capacity but for an agreement purporting to limit or remove it).[561]

The Model Act further imposes a duty on joint duty-holders, so far as is reasonably practicable, to consult, co operate and co-ordinate activities with all other persons who have a duty in relation to the same matter.[562] To date, there has been one successful prosecution for breach of this concurrent duty-holder consultation duty, under s 46 of the *Work Health and Safety Act 2012* (SA).[563] A not-for-profit organisation was found, by the South Australian Industrial Relations Court, to have breached the duty when a roofer it had placed with a contractor suffered severe injuries while carrying out roofing work. It was found that the placement organisation had not engaged in the necessary safety audit, other safety measures or consultation with other duty-holders in respect of the worker placed on the contractor's site; and a fine of $12,000 was imposed.

Ai Group submitted, in respect of the OHS Act, that:

> *…[t]he obligations are not as clearly defined as those in the model Work Health and Safety Act (which has been adopted in most Australian jurisdictions), which includes specific obligations for duty-holders with overlapping obligations to consult, cooperate and coordinate in relation to health and safety duties….*
>
> *Furthermore, significant changes introduced by the model WHS laws over the past few years (since 2011) have assisted in better reflecting the arrangements common to the labour hire industry. With the introduction of the term 'person conducting a business or undertaking' (PCBU), which replaced the term 'employer', suggestions that on-hire workers were the sole responsibility of the labour hire firm have been strongly dispelled. The introduction of the term 'worker' replacing the term 'employee' also recognised and captured a broader scope of employment and contracting relationships.*[564]

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555. Ibid, 54 (recommendation 16).
556. See Stewart et al (2016), [18.26].
557. See e.g. *Work Health and Safety Act 2011* (Cth) ss 5, 19.
558. *Work Health and Safety Act 2011* (Cth) s 7(1).
559. *Work Health and Safety Act 2011* (Cth) s 7(1)(d).
560. Safe Work Australia, *Labour hire: duties of persons conducting a business or undertaking*, Legislative Fact Sheet Series (February 2012), 2; see also Stewart et al (2016), [18.30].
561. *Work Health and Safety Act 2011* (Cth) s 16.
562. *Work Health and Safety Act 2011* (Cth) s 46.
563. *Boland v Trainee and Apprentice Placement Service Inc* [2016] SAIRC 14.
564. Ai Group, Submission no 53, 22.

Conclusions, findings and recommendations – occupational health and safety obligations

The above overview of the position under Victorian law indicates that while labour hire agencies and hosts have shared obligations to safeguard the health and safety of workers placed at host sites, some ambiguities and 'grey areas' arise. That there is in some instances a lack of clarity in practice, as to the reach of duties owed as between a labour hire agency and host, is demonstrated by the evidence provided to the Inquiry about health and safety risks/breaches experienced by labour hire workers. This is despite what appear to be the best efforts of many labour hire agencies and hosts to ensure compliance with their obligations under the OHS Act.

A clear attempt has been made, in the Model Work Health and Safety Act, to overcome the ambiguities arising from the traditional approach to centering OHS obligations on employers (and independent contractors engaged by employers) in respect of employees (and deemed employees). The Model Act's imposition of OHS duties on PCBUs in respect of the broadly defined category of workers, and the explicit inclusion in that definition of labour hire employees placed with a host, is a more appropriate regulatory approach to ensure the safety of labour hire workers than current Victorian regulation. This conclusion is strengthened once the 'horizontal' (concurrent) consultation obligation of relevant duty-holders[565] is also taken into account.

Recommendation 5

I recommend that the Model Work Health and Safety Act approach to regulating labour hire relationships be adopted in Victoria. In the absence of Victoria adopting wholesale the approach under the model laws, I recommend that Victoria adapt an approach which matches the substantive provisions under the model laws in this regard.

3.5.2 Complaining about safety and reporting injuries

Inquiry evidence

As noted elsewhere, the Inquiry received a significant amount of evidence suggesting that labour hire workers are reluctant to report OHS risks and incidents.[566] The key reason for this, according to the submissions and evidence, is a concern that reporting an incident or risk within the host's workplace will lead to the labour hire employee's engagement with the host being terminated.

For example, a casual security guard employed through a labour hire agency submitted that he had questioned his boss about the lack of training received on the job. He was then told not to come back the next day.[567]

An anonymous worker from the mining, oil and gas industry submitted that:

> *If the job is unsafe, nothing is said because the phone will never ring again for work. You get told the safety rules but on the job that's a different story. Contractors and night shift will get any job done.*[568]

Labour hire worker Harry Marshall submitted that he had raised a safety issue with his supervisor. The employer reproached him for raising safety concerns. That weekend the labour hire agency sent him a text message telling him not to come back on the following Monday.

565. Stewart et al (2016), [18.38].

566. Institute for Safety, Compensation and Recovery Research, Submission no 70, p 3; TCFUA, Geelong Hearing, 7 December 2015; Union and workers, Closed Hearing 09, Dandenong, 1 December 2015; NUW, Dandenong Hearing, 30 November 2015.

567. VTHC on behalf of individual workers, Submission no 41.

568. VTHC on behalf of individual workers, Submission no 102, xxiii.

He submitted that the majority of labour hire agencies that he has worked for have a complete disregard for workers' health and safety. He told the Inquiry:

> *I held great concerns about keeping my position, and usually I would walk away from a worksite such as this for my own wellbeing, but I desperately needed the work and the pay. … [A]s soon as you speak up and say, "Look mate, that's just really unsafe", you don't get the call back the next day, you are unrequired for work.*[569]

Construction worker Justin Milner submitted that: 'You can't ask for more, not when you're constantly reminded how good you have it... People who complain too much don't keep jobs. I asked for a week off to undergo surgery, and lost my job because of it ... .'[570] Another anonymous construction industry worker submitted that:

> *I was employed through a labor (sic) hire agency in my current job. Previous to me being in the site, people had brought up genuine safety concerns and were then told by the foreman to get their booked (sic) signed and f&@k off and not return to that site.*[571]

There are two features of the OHS Act which have the capacity to address under-reporting of safety risks or incidents by labour hire employees. These are effective consultation and representation in the host's workplace, and protections from discrimination at the hands of the host for reporting a risk or making a health and safety complaint. However, the OHS Act does not provide labour hire employees with the same substantive rights as direct employees in relation to either of these matters.

Effective representation in the workplace

The ACREW Study found that a key component of best practice in labour hire safety management is the implementation of appropriate mechanisms for consultation and representation between hosts and agencies, and between agencies, hosts and workers. A key factor was implementing 'appropriate and responsive communication with on-hire workers whether or not those workers are represented by a union' and having 'a systematic, responsive approach to dealing with health and safety representatives'.[572]

Section 35(1) of the OHS Act obliges an employer to consult with employees over a range of matters relating to health and safety at the workplace. These consultation obligations are extended, pursuant to s 35(2), to employees of an independent contractor. Consultation of this nature must include a health and safety representative (**HSR**), if the employees are represented by one.[573]

Under the OHS Act, a HSR can only be elected after the formation of a designated work group (**DWG**). Part 7 of the OHS Act sets out rights and obligations in this respect. It contains two different procedures for establishing DWGs.

The first, set out in Division 1, applies (in the labour hire context) only in respect of direct employees of a host. It gives a number of rights to employees to require the formation of a DWG. In particular:

- an employee may initiate the establishment of the DWG with the employer;[574]

569. Harry Marshall, Submission no 93, 1-2.
570. CFMEU on behalf of individual workers, Submission no 54, vi.
571. Ibid, xxiv.
572. ACREW Study, 7.
573. OHS Act s 36(2).
574. OHS Act s 43(1).

- the employer is required to do everything reasonable to ensure that negotiations over the formation of the DWG commence within 14 days;[575] and
- where agreement is not reached with the employer over the formation of a DWG, an employee may request that an inspector determine any unresolved matters, and the parties are required to implement that determination.[576]

A DWG established in respect of direct employees of a host may be 'authorised also to represent independent contractors … and any employees of such independent contractors.'[577] However, this is a matter for negotiation with the employer. Further, it does not facilitate the participation of a labour hire employee in the formation of the DWG, participation in the subsequent election of a HSR,[578] or standing for election as a HSR[579] as the labour hire employee is not a member of the DWG.

Of course, it is open for labour hire employees to request that the labour hire agency form a Division 1 DWG and elect a HSR. However, in circumstances where labour hire employees are placed within the host's business, the most effective form of OHS representation would most likely be in respect of the host's workplace, not that of the labour hire agency.

The second mechanism for establishing a DWG is set out in Division 2 of Part 7 OHS Act. Division 2 DWGs may be made between employees of more than one employer.[580] Therefore, a DWG consisting of labour hire employees and direct employees of a host could be formed using this mechanism.[581] However, a Division 2 DWG can only be formed by agreement with each of the employers concerned. If an employer withholds agreement, its employees cannot be part of the group. If no employer agrees, no DWG can be formed, and no HSR subsequently elected.

In contrast, the Model Work Health and Safety Act provides that labour hire employees may be part of a host's DWG, in a manner similar to that provided for direct employees under the OHS Act Part 7 Division 1. Under the model legislation,[582] a DWG:

- may be requested by a 'worker' within the broader meaning of that term, which includes a labour hire employee in respect of a host;[583]
- may have membership consisting of all workers carrying out work for the PCBU;[584]
- may be established for multiple businesses (i.e. a DWG 'for workers carrying out work for 2 or more persons conducting businesses or undertakings at 1 or more workplaces')[585]; and
- may be determined, in the absence of agreement, by an inspector of the regulator.[586]

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575. OHS Act s 43(3); see also s 44 on the matters that may be the subject of negotiation in relation to the proposed DWG.
576. OHS Act s 45.
577. OHS Act s 44(1)(e).
578. OHS Act s 54(1).
579. OHS Act s 54(2).
580. OHS Act s 47.
581. Creighton and Rozen (2007), [1134].
582. See also Safe Work Australia, *Worker Representation and Participation Guide* (undated), at: http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/645/Worker_Representation_and_Participation_Guide.pdf.
583. See e.g. *Work Health and Safety Act 2011* (Cth) s 50; see also the discussion at 3.5.1.
584. *Work Health and Safety Act 2011* (Cth) s 50.
585. *Work Health and Safety Act 2011* (Cth) s 55.
586. *Work Health and Safety Act 2011* (Cth) s 54.

Making a safety complaint

The Fair Work Act general protections provisions offer workers protections from adverse action in respect of a range of workplace rights. A 'workplace right' includes being entitled to the benefit of, or having a role or responsibility under, a workplace law.[587] 'Workplace law' has been found to include OHS legislation.[588] As discussed at 3.4.3, it is unclear to what extent this extends to adverse action taken by hosts against labour hire employees.

The OHS Act also contains protections for employees from victimisation. Part 7 Division 9 provides both criminal and civil remedies for an employee or prospective employee, where an employer or prospective employer engages in specified discriminatory conduct because the employee or prospective employee has taken a range of action available under the OHS Act.

The criminal offence provisions (ss 76-78) and civil action provisions (see below) are similar, but not identical. However they share the key limitation, in the labour hire context, of applying only to action taken by a labour hire employer in respect of its own employee or prospective employee. The protections do not apply in respect of action taken by a host to the detriment of a labour hire employee. The civil provisions provide as follows:

> ***78A Prohibition of discriminatory conduct***
>
> *(1) An employer or prospective employer must not engage in **discriminatory conduct** for a prohibited reason.*
>
> *(2) For the purposes of this subdivision, an employer or prospective employer engages in discriminatory conduct if—*
>
> *(a) the employer of an employee—*
>
> *(i) dismisses the employee, injures an employee in the employment of the employer or alters the position of the employee to the employee's detriment; or*
>
> *(ii) threatens to do any of those things to the employee; or*
>
> *(b) the employer or prospective employer of the prospective employee refuses or fails to offer employment to the prospective employee, or treats the prospective employee less favourably than another prospective employee would be treated in offering terms of employment.*
>
> ***78B Prohibited reasons***
>
> *(1) Conduct referred to in section 78A is for a **prohibited reason** if it is carried out because the employee or prospective employee—*
>
> *(a) is or has been a health and safety representative or a member of a health and safety Committee; or*
>
> *(b) exercises or has exercised a power as a health and safety representative or as a member of a health and safety Committee; or*
>
> *(c) assists or has assisted, or gives or has given any information to, an inspector, an authorised representative of a registered employee organisation, a health and safety representative or a member of a health and safety Committee; or*
>
> *(d) raises or has raised an issue or concern about health and safety to an employer, an inspector, an authorised representative of a registered employee organisation, a health and safety representative, a member of a health and safety Committee or an employee of the employer.*

587. Fair Work Act s 341(1)(a).

588. *AMWU v Visy Packaging Pty Ltd* (No 2) (2011) 213 IR 48; *Stephens v Australian Postal Corporation* (2011) 207 IR 405.

(2) For the purposes of section 78A, an employer or prospective employer may be found to have engaged in discriminatory conduct for a prohibited reason if a reason mentioned in subsection (1) is a substantial reason for the conduct.

Section 78C provides that: 'a person must not request, instruct, induce, encourage, authorise or assist an employer or prospective employer to engage in discriminatory conduct in contravention of section 78A.' However, this is ineffective in capturing the discriminatory actions of a host against a labour hire employee, unless there is first discriminatory action taken by the labour hire employer (in which the host is involved in one of the ways referred to in s 78C).

Again, the Model Work Health and Safety Act provides an alternative approach, as it includes anti-discrimination provisions with much broader application. The obligations contained in Part 6 Division 1 of the Model Act apply to a 'person' in respect of a 'worker'.[589] The discriminatory conduct it prohibits includes dismissal, altering the position of the worker to the worker's detriment, and putting a worker to his or her detriment in the engagement of the worker.[590] The protections afforded by these provisions appear capable of application to the discriminatory actions of a host in respect of a labour hire employee who has exercised their rights in safety matters.[591]

Conclusions, findings and recommendations – representation and making a safety complaint

The evidence provided to the Inquiry indicates that some labour hire workers do not exercise their rights to report safety incidents, risks or hazards in the workplace – largely due to concerns that doing so may jeopardise their future engagement at the host's worksite, or their employment with the labour hire agency. These concerns reflect the other aspects of job insecurity of labour hire workers identified elsewhere in this Report.[592]

This suggests that the framework for representation and protection of labour hire employees against victimisation for asserting their rights in OHS matters, by either the labour hire agency or the host, should be as robust as possible. Similarly, labour hire employees should have access to the same rights of representation in relation to OHS issues as other Victorian employees. However, the OHS Act offers only limited protection to labour hire staff, particularly in respect of their treatment or representation at the main locus of activity: the host's worksite.

Recommendation 6

I recommend that the Model Work Health and Safety Act approach to regulating to provide for worker representation and to protect workers against victimisation for asserting their rights in occupational health and safety matters, by either a labour hire agency or a host, should be adopted in Victoria. In the absence of Victoria adopting wholesale the approach under the model laws, I recommend that Victoria adapt an approach which matches the substantive protections under the model laws in this regard.

589. See e.g. *Work Health and Safety Act 2011* (Cth) ss 104-105.

590. Ibid, s 105(1).

591. See e.g. *Halls v Woolworths Limited and Ors* [2015] SAIRC 19 (18 June 2015).

592. See 2.4.2.

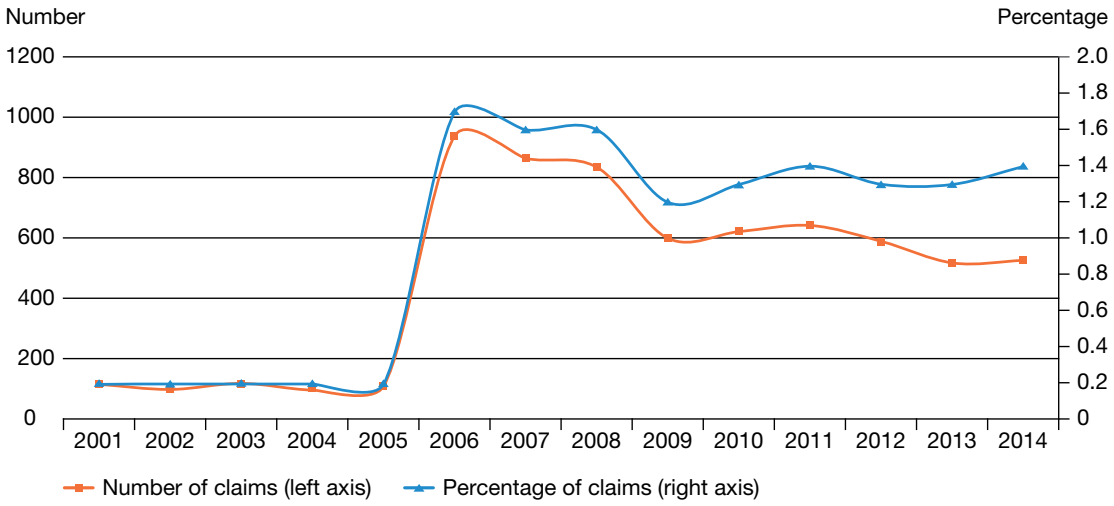
3.5.3 Workplace injuries and return to work

Incidence of workplace injuries for labour hire employees

RCSA submitted that labour hire agencies received fewer workers' compensation claims (per million dollars of remuneration) than non-labour hire employers, and that this indicates that labour hire agencies have better OHS standards than non-labour hire businesses. The data provided in the RCSA's submission indicates that the level of workers' compensation claims in the labour hire industry compared to overall rates is higher for labour hire agencies in the construction, administrative and support services, and wholesale trade industries; roughly equal in the manufacturing industry; and lower in the transport, postal and warehousing industry.[593]

However, in its submission to the Inquiry, the Institute for Safety, Compensation and Recovery Research outlined findings from its Compensation Research Database, which contains detailed records of all accepted work-related injury compensation claims in Victoria. The Institute examined the total number of compensable work-related injuries reported from workers in the labour hire sector as a percentage of all work-related claims. The Institute notes that the striking increase in injury claims from 2005 to 2006 corresponds with the introduction of a labour-hire specific industry code. The Institute submitted that this jump in reporting demonstrates the underrepresentation of injury rates amongst labour hire workers before 2006. It further submitted based upon its data analysis that despite the improved visibility of injured labour hire workers from 2006 onwards, these workers remain underrepresented in the Victorian compensation system. The Institute notes that the work-related injury rate in the labour hire sector comprises between 1.3-1.4% of all work-related injuries in Victoria (Figure 3.1) despite labour hire workers comprising, in the Institute's estimate, 2-4% of the Victorian workforce.[594]

Figure 3.1: The number and percentage of labour hire sector injuries as a percentage of all work-related injuries from all sectors) of work-related injury claims in the labour hire sector in Victoria



Source: ISCRR, Submission no 70.

593. RCSA, Submission no 110, 18-19.

594. ISCRR, Submission no 70, 2-3.

Further, the Institute notes that in Victoria, the proportion of injured workers across the labour market who make compensation claims is estimated to be as low as 19%.[595] The most common reasons stated for failing to claim workers' compensation include concerns about the impact on the employment relationship. The Institute considers that this may be a contributing factor to the under-representation of labour hire workers on compensation system databases.

Noting data limitations, the Institute provided a summary assessment of what the data reveals about the demographic, employment, occupation and injury characteristics of injured labour hire workers in Victoria, relative to the 'average' injured Victorian worker, as follows:[596]

> ***Demographics:*** *Our analysis revealed that injured labour-hire workers are younger than the average injured Victorian worker with 65% of injured labour hire workers under 30 years of aged compared to 21% for total injured Victorian data. In addition, the injured labour-hire workers comprised a greater percentage of males compared to the overall injured Victorian data (82.5% vs 65.6%, respectively).*
>
> ***Contract status:*** *Compared to an average injured worker in Victoria, injured labour hire workers are less likely to be employed in a full time (71% for Vic and 22% for injured labour hire workers) or part time (13.7% for Vic to 3.3% for injured labour hire workers) capacity, but more likely to be reported as a full time first year or other apprentice (1.4% to 24.8%).*
>
> ***Occupation:*** *Compared to the average Victorian injured worker, injured labour hire workers are more likely to be employed as technicians and trades workers, community and personal service workers and machinery operators and drivers and less likely to be managers, professionals and community and personal service workers. Further analysis revealed that within trade workers, the occupations which were identified to be the most represented in the injured labour hire worker data were construction workers, automotive engineering and trade workers, electricians and factory process workers such as food process workers, packers and product assemblers. Furthermore, we observed that 32.6% of labour hire worker injuries were caused by materials and substances compared to 21.30% of all other Victorian injuries.*
>
> ***Work-related injury type:*** *Analysis of the 2006-2014 claims data revealed that compared to the total work-related injury rates in Victoria, injuries sustained in labour hire workers are more likely to result in wounds and burns and less likely to result in musculoskeletal, mental and chronic conditions. That is, while on average 20% of all work-related injuries in Victoria are classified as wounds, 38% of the labour hire work-related injuries are classified as wounds.*[597]

Underhill observes that agency workers in Victoria and elsewhere have a higher rate of workplace injuries, notwithstanding that the dual responsibilities for OHS suggest that:

> *Risks at a host workplace will be "double-checked" – by the agency and the host; training will be provided to meet general and specific OHS needs; and the worker OHS representation system allows worker participation at both the host workplace and in the employment agency's OHS system.*[598]

Underhill notes many explanations for this, including:

- economic pressures, disorganisation and regulatory failure;
- an industry dominated by small employers where cost pressures dominate and only the largest of agencies allocate sufficient resources to meet their obligations;
- poor OHS training provided by agency employers, inadequate risk assessment of host workplaces, and insufficient attention to matching agency employees' skills and capabilities to the host's job requirements;

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595. Citing ABS, *Work-related Injuries* 2013/2014, Cat. No. 6324.0 (November 2014).

596. The Institute submitted that this should be interpreted with caution and not taken as representative of the totality of injured labour hire workers, due to data limitations.

597. ISCRR, Submission no 70, 4-5.

598. Elsa Underhill, 'Should host employers have greater responsibility for temporary agency workers' employment rights?', (2010) 48(3) *Asia Pacific Journal of Human Resources* 338, 347.

- host expectations that agency workers will be appropriately placed for the task, and capable of performing those tasks immediately, without the need for extensive training or supervision;
- ambiguities arising from shared responsibilities and buck passing between agency and hosts, with neither party resolving OHS problems; and
- unwillingness of agencies to interfere in hosts' workplace practices or demand workplace changes for fear of loss of commercial contracts, and resistance by hosts to interference[599]

The Inquiry heard evidence of a number of specific workplace injuries/incidents, including:

- a labour hire worker whose colleague's knee was injured at work and was told to 'deal with it himself';[600]
- a worker whose workmate had his foot crushed by a forklift, and the company asked him to pay his own medical bills;[601]
- a migrant worker who injured her back on the job and filled out a WorkCover claim but did not receive any WorkCover payments;[602] and
- a labour hire employee whose hand was left bleeding after being caught in a security barrier, who would not report the incident due to her lack of job security and not wanting to 'create waves'.[603]

Steve Moncur, a labour hire warehousing worker, submitted that: 'I had a workplace accident and within two weeks was no longer required. I have been sacked for complaining about bald tyres on my forklift.'[604]

There was also some concern expressed by industry representatives regarding claims for workplace injuries. For example, one labour hire agency told the Inquiry:

> *I think there is a bit of an issue …where if someone has to make a claim, are they claiming on us? Do they say it's our fault? Is it the person's fault? Is it their employer's fault as an agency? So I think there's a few grey areas there which probably need looking at.*[605]

SEMMA raised recovery actions by WorkCover as a concern for its members, relating to injuries to temporary workers on the host employer's work site some years earlier, and where the host employer had not been consulted or had input in respect of the injury.[606]

Legal framework

The Workplace Injury Rehabilitation and Compensation Act 2013 (Vic) (**WIRC Act**) governs entitlements to compensation arising from workplace injuries. It also imposes obligations on employers in respect of allowing an injured employee to return to work.

The primary responsibility for managing a labour hire employee's return to work after an injury lies with the labour hire agency. Part 4 Division 2 of the WIRC Act requires employers, for a period of 52 weeks, to provide injured workers with suitable employment and to return workers to pre-injury employment, when the worker no longer has an incapacity for work.[607] Employers are also required to develop return to work plans,[608] consult with the worker and medical/

599. Ibid, 347-8 (citations omitted).
600. NUW, Geelong Hearing, 8 December 2015.
601. NUW on behalf of individual workers, Submission no 75, lxiv.
602. Workers, Closed Hearing 04, Mildura, 24 November 2015.
603. Confidential, Submission no 97.
604. NUW on behalf of individual workers, Submission no 75, iii.
605. ABeCK Group, Dandenong Hearing, 1 December 2015.
606. SEMMA, Dandenong Hearing, 30 November 2015.
607. WIRC Act s 103.
608. WIRC Act s 104.

rehabilitation personnel about the terms of the return to work,[609] and in some circumstances appoint a Return to Work Co-ordinator.[610]

Hosts also have obligations under the WIRC Act in respect of an injured employee returning to work. Section 109 of the WIRC Act, Host to co-operate with labour hire employer, provides:

> *(1) This section applies if—*
>
> *(a) the services of a worker are let on hire to another person **(host)** by the employer **(labour hire employer)** with whom the worker had entered into a contract of employment; and*
>
> *(b) there is caused to the worker an incapacity for work resulting from or materially contributed to by an injury arising out of or in the course of employment with the labour hire employer whilst the worker is let on hire to the host.*
>
> *(2) A host must, to the extent that it is reasonable to do so, co-operate with the labour hire employer, in respect of action taken by the labour hire employer in order to comply with sections 103, 104 and 105 to facilitate the worker's return to work.*
>
> *In the case of a natural person, 120 penalty units; In the case of a body corporate, 600 penalty units.*

Section 109 was inserted in the predecessor of the WIRC Act *(Accident Compensation Act 1985* (Vic)) by amending legislation in 2010[611] which implemented the recommendations of the Hanks review of accident compensation legislation.[612] The Review concluded:

> *… that the reduction in suitable employment opportunities for labour hire workers places greater pressure, not only on the health of individual workers, but also on the costs of workers' compensation claims for labour hire agencies and the scheme as a whole.*
>
> *Cooperation between workplace parties is critical for achieving the best return to work and rehabilitation outcomes. I believe that a requirement that (host) employers take all reasonable steps to cooperate with labour hire agencies in the return to work of injured labour hire workers would signal the importance of this approach.[613]*

The Review rejected the option of imposing further obligations on hosts to provide injured labour hire employees with appropriate return to work duties, considering that 'if applied generally, [this] would be oppressive and undermine the cost-effectiveness of labour hire arrangements.'[614]

The obligations of a host set out in s 109 are derivative of those of the labour hire agency. The obligation is to co-operate with the actions of the agency/employer in respect of the return to work of the latter's injured employee. The obligation to cooperate is moderated by a reasonableness test.

Both JobWatch and Maurice Blackburn were critical of the minimal level of obligations currently imposed upon a host employer to support an injured employee's return to work under the WIRC Act. Both submitted that these obligations should be strengthened.[615] JobWatch noted that host companies must, to the extent that is reasonable, co-operate with the labour hire employer in respect of the labour hire employer's obligation to plan an injured worker's return to work and consult with the worker about their return to work. However, JobWatch submitted

609. WIRC Act s 105.

610. WIRC Act s 106.

611. *Transport Accident and Accident Compensation Legislation Amendment Act 2010 (Vic)*.

612. Peter Hanks QC, *Accident Compensation Act Review: Final Report* (Department of Treasury and Finance/Victorian Workcover Authority, 2008); see Recommendation 20, at 24.

613. Ibid, 153.

614. Ibid.

615. JobWatch, Submission no 46, 11, Maurice Blackburn, Submission no 79, 8.

that the extent of cooperation that is required to comply with this obligation in unclear. Maurice Blackburn submitted that the obligations of a host under s 109 constitutes no obligation to support an injured worker's return to work' and that:

> *in all likelihood, a labour hire agency will have no suitable alternative duties available to the worker. As a result, labour hire workers are less likely to be offered a return to work program that sees them returning to their job with the host employer.… Consequently, the prospects of a successful return to work for a labour hire worker are significantly reduced.*[616]

These views of the return to work obligations under the WIRC Act are consistent with research undertaken by Underhill. She states that: '[c]ompliance by temporary agency employers with return-to-work obligations has been acknowledged as especially problematic by inspectorates and several government inquiries.'[617] Underhill conducted an analysis of 'a sample of Victorian workers' compensation claims files of injured agency and comparable direct hire workers (198 of each)',[618] finding that:

- 35% of agency workers returned to work with their employer post-injury, compared to 58% of comparable direct hire employees;
- 36% of agency staff were offered no further placements (they were effectively dismissed); and
- 19% of agency employees found employment elsewhere while awaiting the offer of another placement from their employer.[619]

Underhill describes hosts' discretion over whom they accept from an agency as a 'major barrier to agency workers exercising their right to return post-injury.'[620] She concludes that: 'without the co-operation of hosts, agency employers cannot meet their legal obligations and injured agency workers are left with few employment options.'[621]

There is evidence that some labour hire agencies attempt to assist an injured employee return to work, although Underhill refers to a number of sources indicating that this sometimes involves placement of 'injured agency workers with charities, often performing menial tasks far below their pre-injury capabilities.'[622] The Safety Institute of Australia provided, as part of a best practice safety example, a case study of a labour hire agency which provides the services of a labour hire employee injured at the workplace to the host at no cost, until the labour hire employee can return to full duties.[623] However, ACREW found that despite a positive approach to return to work by many firms, it could not be said that there was a 'systematic, positive and coordinated approach to return to work that recognised both agency responsibility for workers and the benefits for host employers in supporting such programs.'[624]

WorkSafe expressed concern to the Inquiry that any amendment to the WIRC Act to place greater responsibility upon a host in respect of return to work could have unintended consequences.[625]

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616. Maurice Blackburn, submission no 79, 9.
617. Underhill (2010), 348 (references omitted).
618. Ibid, 339.
619. Ibid, 348.
620. Ibid.
621. Ibid.
622. Ibid (citations omitted).
623. Safety Institute of Australia, Submission no 48, 7.
624. ACREW Study, 8.
625. Email to Inquiry from WorkSafe, 26 June 2016.

WorkSafe has produced an information sheet for employers, 'Labour hire and return to work', which outlines the respective obligations of hosts and labour hire agencies. The information sheet lists host obligations, where the worker's injury is caused while let on hire to the host, as follows:

> *While every host's circumstances are different, the following are examples of how a host can cooperate with a labour hire employer:*
>
> - *respond as soon as possible to the labour hire employer's request for cooperation*
> - *provide the labour hire employer with a nominated workplace contact for return to work issues*
> - *provide the labour hire employer and other parties involved in the return to work process with reasonable access to the workplace*
> - *be available for discussions initiated by the labour hire employer on providing duties, return to work planning and consultation*
> - *provide the labour hire employer with information regarding progress of the injured worker's rehabilitation and their return to work duties*
> - *explore with the labour hire employer options for providing suitable duties at the host's workplace, consistent with the injured worker's capacity*
> - *explore solutions with the labour hire employer that address barriers to the injured worker's return to work*
> - *provide reasons to the labour hire employer for a decision to not provide the injured worker with suitable duties.*[626]

WorkSafe informed the Inquiry that a Return to Work Inspector can investigate whether host employers are cooperating with labour hire employers to facilitate a worker's return to work. Further, Return to Work Improvement Notices can be issued to employers, specifying how an employer can comply with the obligation to consult and the date by which they must comply.[627]

Conclusions, findings and recommendations – workplace injuries and return to work

The evidence presented to the Inquiry shows that injury rates for labour hire workers are higher than for other Victorian workers; and that there is in some instances a lack of cooperation on the part of hosts with return to work arrangements for injured labour hire workers. However, noting the reservations expressed by the Hanks Inquiry and more recently by WorkSafe, I do not recommend any change or increase in the statutory duties owed by hosts in this area. Rather, best practice return to work arrangements should form part of the voluntary code of practice recommended at 5.6.4.

Recommendation 7

An accurate picture of occupational health and safety risk factors in the labour hire sector, and of injured labour hire workers in Victoria, requires the establishment of an occupational injury and illness monitoring and reporting system that extends beyond injury compensation claims data. With such data available it would be possible to identify occupational health and safety risks for labour hire workers, and develop interventions to minimise or remove those risks. I recommend that the Victorian Government collect this data and, periodically, make it publicly available.

626. WorkSafe Victoria, Information for Employers, *Labour hire and return to work*, July 2013.

627. See WorkSafe Victoria, *Information about Return to Work Inspectors*, WSV11555/04/07.13 (July 2013)

4. EVIDENCE OF NON-COMPLIANT LABOUR HIRE PRACTICES

Findings and recommendations

Hazeldene's and Luke Martin – see 4.2.2

4.1

I find that Hazeldene's actions on the 24 February 2016 and 8 March 2016, including the issuing of the 24 February Letter and the 8 March Letter, may constitute detrimental action by Hazeldene's against Mr Martin in possible contravention of section 121 of the Inquiries Act. In particular, the 8 March Letter clearly states that Mr Martin's employment will be in jeopardy. I further consider that the two letters may constitute a threat of detrimental action of the same nature.

4.2

I find that the actions by Hazeldene on 24 February 2016 and 8 March 2016, in providing Mr Martin with the 24 February 2016 Letter and the 8 March 2016 Letter, may have been taken for the substantial reason that Mr Martin provided information to the Inquiry – in possible contravention of section 121 of the Inquiries Act.

4.3

I have referred documents and information regarding Hazeldene's actions towards Mr Martin to Victoria Police, pursuant to section 116 of the Inquiries Act, for further investigation should Victoria Police consider it appropriate to do so.

Recommendation 8:

Section 121 of the Inquiries Act should be amended so that it applies not only to employer-employee relationships, but also to other relationships in which a worker carries out work for a business or undertaking.

Horticulture, meat and cleaning industries

4.4

There is evidence of non-compliant labour hire practices across various sectors of the Victorian economy. However evidence to the Inquiry, along with various other studies, media reports and other recent inquiries suggest that there are three industries in which non-compliance amongst labour hire agencies is particularly prevalent. These industries are: horticulture; meat and cleaning.

The extent of non-compliance with workplace and other laws involving labour hire agencies, in the horticulture, meat and cleaning industries in Victoria detailed in this chapter, requires a regulatory response. The various proposals for regulatory reform put forward by Inquiry participants, and the licensing scheme proposal which I recommend be adopted, are detailed in chapter 5 of this Report.

Accommodation and labour hire

4.5

I find, in respect of the conduct of Mr Serdar Donmez's job search business in the Mildura area:

- That Mr Donmez misrepresented the availability of work in the Mildura area to potential job search workers, which led them to travel to Mildura to use his services.
- That the fee paid by persons using his services was in fact paid in part for accommodation; and that the terms and conditions document which he required users of his services to sign, insofar as it provided for 'free' accommodation, was a sham designed to avoid regulatory requirements.
- That the accommodation provided by Mr Donmez was substandard as it was overcrowded with insufficient amenities.
- That a significant proportion of persons using Mr Donmez's services either left of their own accord or were evicted by him within a short time of arriving in the Mildura area, and where this occurred, Mr Donmez would not refund their $150 deposit and/or $300 two-week advance fee.
- That Mr Donmez falsely signed or refused to sign visa documentation (confirming that users of his services had completed the 88-day requirement to obtain a second year on their working holiday visa), irrespective of a job search worker's actual working hours.
- That Mr Donmez's business model was designed to avoid current regulation.

I have referred documents and information regarding this matter to the Mildura Rural City Council and Consumer Affairs Victoria pursuant to section 116 of the Inquiries Act, for further investigation should those organisations consider it appropriate to do so.

4.6

It is apparent that the Victorian regulatory framework outlined in chapter 4 has not been effective to address the problems with provision of accommodation associated with labour hire arrangements, which have been illustrated in evidence provided to the Inquiry and from other sources. The incidence of these accommodation models appears to have grown extremely quickly, consistent with the general growth of labour hire arrangements and the use of temporary migrant workers over the last 10 years or so.

Recommendation 9

That the Victorian Government introduce legislation to amend the *Public Health and Wellbeing Act 2008* (Vic) to clarify the limitation applicable to the section 3 definition of prescribed accommodation, subparagraph (b), that the accommodation must be provided on payment of consideration. Circumstances where accommodation is provided notionally without charge, as part of a broader arrangement between the parties to the relevant transaction, should be included within the definition.

Recommendation 10

That the *Public Health and Wellbeing Act 2008* (Vic) section 3 definition of prescribed accommodation, subparagraph (c), be amended to reflect a wider range of working

situations than simply the provision of accommodation by an employer to an employee under an award or contractual provision. The definition should include provision of accommodation to a worker by a labour hire operator, as part of the arrangement under which that operator facilitates the placement of the worker with a host.

The role of piece rates

4.7

The operation of the piece rate award provisions, particularly in the horticulture industry, creates the possibility that employees may be paid below the minimum hourly rate, and accordingly undermines the minimum safety net intended to be established by minimum hourly rates. In the horticulture industry, the safeguards which attach to piece rate systems do not appear to be utilised in practice. Further, the use of piece rates in that industry contributes to a level of subjectivity and uncertainty regarding what rate is payable to an employee, and underlies a number of problematic outcomes. In addition to the following recommendations, measures to address these issues are dealt with in Recommendation 26, at 5.6.4.

Compliance activities

Recommendation 11

The Victorian Government should advocate for the Fair Work Ombudsman to focus more of its compliance activity on underpayment/non-payment of award rates in the horticulture and meat industries; unlawful deductions (e.g. for accommodation) and the imposition of piece rate arrangements in those sectors; and sham contracting in the cleaning industry.

Recommendation 12

The Victorian Government should advocate for the Federal Government to implement, as quickly as possible, its 2016 election commitments to increase the Fair Work Ombudsman's investigatory powers and to increase the penalties applicable under the Fair Work Act for award breaches and failure to maintain proper employment records.

4.1 Introduction

This chapter is primarily concerned with examining practices of the labour hire industry in Victoria which do not comply with the applicable regulatory framework.

The focus on non-compliance in this chapter should not be taken to suggest that all labour hire agencies operate in this manner. For example, the Inquiry heard from many labour hire agencies about the steps they take to ensure correct wages and conditions are afforded to their employees, and the systems they use for ensuring best practice health and safety management. However, as described at 2.1.3, the Inquiry heard that there is a wide spectrum of legal compliance within the labour hire industry in Victoria, ranging from labour hire arrangements which are highly transparent and compliant with legal obligations, to those operating entirely outside of the law in what is often referred to as the informal economy.[628] Further, evidence to the Inquiry suggests that the line between compliance and non-compliance is not always clear.

628. See e.g. ILO, *Decent work and the informal economy*, International Labour Conference, 90th Session, 2002.

This is consistent with international experience. The International Labour Organization (**ILO**) has observed that:

> *There is no clear dichotomy or split between the "informal economy" and the "formal economy". What happens in the informal economy will have an impact on workers and employers in the formal economy, and vice versa. Informal enterprises create unfair competition for formal enterprises by not paying taxes or social security contributions for workers or avoiding other business costs incurred in the formal economy. Measures to reduce excessive business transaction costs and institutional barriers would promote the legalization of informal enterprises, benefit workers in these enterprises and also reduce the unfair competition for formal businesses. Therefore, it is useful to adopt the view that formal and informal enterprises and workers coexist along a continuum, with decent work deficits most serious at the bottom end, but also existing in some formal jobs as well, and with increasingly decent conditions of work moving up the formal end.*[629]

Many participants in the Inquiry complained of a lack of compliance with legal obligations by labour hire agencies. Non-compliant practices were evident across a wide and diverse range of industries.

A labour hire worker who worked in hospitality and agriculture submitted that:

> *I was [a] casual worker less than a year ago, washing dishes $15 per hour, cash in hand. Picking letters [sic], piece rate $0.30 cent per bunch. The labour hire company charged transportation fees, the time sheet all depends on the employer, sometimes in the peak season, I have to work more than 10 hours a day. The accommodation and transportation fees will deduct from our salary, supervisor will deduct some of picking rate from our time sheet, my payment was never clear. The piece rate equal $2.5 dollars per box, it's far way below to the minimum. And none of these employers pay for the work cover, that's means if we got injured we have to depends on ourselves.*[630]

An anonymous worker from the mining, oil and gas industry submitted that:

> *I was employed through a labour hire agency less than a year ago. I work for various employers. You always need to check pay. When the pay is wrong after the job has finished you never say anything because you may never get another call for work.*[631]

A labour hire worker in the security industry submitted as follows:

> *I was employed through a labour hire agency in my current job. An under $20 flat rate, for all hours and shift lengths regardless of warning, overtime, casual loading, night loading. No roster, 24/7 on call. The company I work for changed its ABN and business name every 3 months without warning. They cut our pay with no warning. I just noticed a lower pay rate in my payslip and asked, and that's when they told me we had a pay cut. I am constantly on call thus cannot go out because with friends or schedule things a week in advance because I may get called into work and need to be there in less than 30 minutes from the call in.*[632]

VLA submitted that its clients report examples of labour hire arrangements being used by employers to evade workplace laws and other legal obligations.[633]

The TCFUA submitted that in its experience, labour hire work is often characterised by non-compliance with minimum award wages and conditions. Workers often do not receive their minimum entitlements including overtime, penalty rates or superannuation.[634]

Labour hire worker Harry Marshall told the Inquiry that he had worked in labour hire for around six years with a multitude of companies. He submitted that:

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629. Ibid, 4.

630. NUW on behalf of individual workers, Submission no 75, cxvii.

631. VTHC on behalf of individual workers, Submission no 102, xxiii.

632. VTHC on behalf of individual workers, Submission no 41.

633. VLA, Submission no 84, 1-5.

634. TCFUA, Submission no 92, 3.

> *... there are a small amount of companies that comply with agreements, and supply you with an adequately safe work place and paying the correct wages and also being open to discussions about safety. But the majority of labour hire agencies that I have worked for have operated unprofessionally, in breach of their own "agreements", with a complete disregard for workers' health and safety, and with a general lack of respect, professionalism, or even have basic knowledge about the particular field or skills that you as a worker provide to employers.*[635]

Mr Marshall also described 'major issues' with being paid on time.[636]

Labour hire warehousing worker Chris McCallum submitted that he had not been paid for five hours' work unloading a container:

> *I had to leave early and the manager ... was not there so I told ... a team leader that I needed to leave to pick my son up and that I'll be back in the morning to fill in a time sheet but the agency told me that I would not be going back there.*[637]

In some instances, employees engaged through a labour hire agency were not paid for compulsory training, in breach of the employer's obligations under the Fair Work Act. One anonymous worker, who made an individual submission through the NUW, said:

> *The agency I worked for said I would be paid for the training I underwent after I worked for 100 hours. After the 100 hours and nearing more like 200 hours I asked about the money. Management said it would be put in my account. It never turned up. I asked again the next week, they said the same thing. This continued for over a month. Then the agency stopped giving me any shifts.*[638]

AUSVEG submitted that a common example of exploitation arises where a labour hire firm and a grower arrange for the firm to supply a set amount of employees at a particular rate of pay, and the firm then underpays their workers and pockets the difference for themselves without the grower being aware. AUSVEG submitted that it is aware of other exploitative and abusive treatment of temporary workers by labour hire firms, including firms keeping workers in squalid accommodation and forcing them to work extended periods of overtime without breaks.[639]

Dan Gelder, a labour hire worker in the food industry, submitted that:

> *I was employed through a labour hire agency less than 3 months ago. After three months the company would sack me then rehire me so they wouldn't have to put me on permanent. Very rarely got payed (sic) correct hourly rate … I had a small welding burn to my arm. When explaining what happened to the rep he flat out said I was lying and then said it again in front of the whole work crew. Shortly after I was sacked!*[640]

An anonymous construction worker in Melbourne submitted:

> *I am employed through a labour hire agency in my current job. I travel 2 hours to work and back, was told I would be paid a travelling allowance but wasn't. No paperwork on commencement of work, working upwards of 40 hours a week for $1100 a fortnight. No training or protection gear provided. Not paid when rained out, not paid award rate. No payslips provided for months yet I repeatedly asked. When I did receive pay slips they were an invoice template with no mention of tax or super. Told I would have to do 3 months of probation before my pay would go up to $25 an hour but it didn't go up and still no tax withholding paperwork for me to fill out. No overtime pay, money taken out for uniform, and when it rains so some fortnights I've only been paid $900.*[641]

A labour hire worker in the chocolate packing industry submitted that as a labour hire casual, the worker received cash in hand of $10 per hour and was required to work more than eight hours a day.[642]

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635. Harry Marshall, Submission no 93, 2.
636. Harry Marshall, Submission no 93, 3.
637. NUW on behalf of individual workers, Submission no 75, xi.
638. NUW on behalf of individual workers, Submission no 75, (xxxv).
639. AUSVEG, Submission no 22, 4.
640. AMWU on behalf of individual workers, Submission no 58.
641. VTHC, on behalf of individual workers, Submission no 41.
642. NUW on behalf of individual workers, Submission no 75, lxiv.

The Uniting Church submitted that it is concerned at the level of undetected exploitation and human trafficking of temporary visa holders in Australia. It submitted that common to many cases of human trafficking and exploitation of employees on temporary visas is the presence of a labour hire business.[643]

A number of businesses lamented the unfair competitive advantage obtained by companies which are acting unlawfully. For example, a long established labour hire agency which engages permanent employees submitted that businesses twist and break rules which exploit the needs of people desperate to work, and that the system falls well short of dealing with them fairly.[644] MADEC submitted that it regularly approaches growers to offer services that are lawful, but finds itself priced out of competition as other companies are offering rates well below the award wage.[645]

A confidential submission from a labour hire agency stated that:

> *[s]ince the founding of our business 18 months ago, we have hired many contractors on working holiday visas. Whilst our business has grown well, we have struggled to match the prices of a competitor… We have since discovered that they are paying …well below the … Award.*

The agency provided the Inquiry with copies of payslips which demonstrated that employees had been paid around $5 per hour less than required by the relevant award.[646]

There is evidence of non-compliant labour hire practices across various sectors of the Victorian economy. However evidence to the Inquiry, along with various other studies, media reports and other recent inquiries suggests that there are three industries in which non-compliance amongst labour hire agencies is particularly prevalent. These industries are: horticulture; meat; and cleaning. Practices in these industries are examined further at 4.2.

There were two other areas of non-compliance which the Inquiry heard were prevalent in respect of the labour hire sector. Firstly, the provision of accommodation associated with labour hire arrangements was the subject of significant evidence to the Inquiry. Issues relating to provision of accommodation are examined at 4.3. Secondly, the intersection between the use of temporary migrant workers and labour hire arrangements was a prominent theme in evidence and submissions. Some of the evidence and submissions referred to in this chapter relate to the treatment of temporary migrant workers. However, as the Terms of Reference require the Inquiry to examine this category of worker more generally, broader issues relating to temporary migrant workers, including in respect of labour hire agencies, are examined in Part II of this Report.

Finally, this chapter examines FWO's compliance activities directed towards labour hire agencies.

4.2 Industries most affected by non-compliance

4.2.1 Horticulture

About the industry

Table 4.1 below provides a snapshot of the horticulture industry in Victoria, indicating the number of businesses within each sector, and the gross value of production of each sector of the industry.

643. Uniting Church, Submission no 57, 1.
644. Jones Engineering, Submission no 117, 1.
645. MADEC, Submission no 9, 3.
646. Confidential, Submission no 14.

Table 4.1: Victorian horticulture industry: number of businesses and gross value of production 2012/3

Sector	Number of businesses	Gross value 2012/3 ($ million)
Grape	2001	323
Vegetable	573	985
Fruit and nut	1562	1,000
Lifestyle[650]	636	446
Total	4772	2755

Source: Victorian Government, Department of Economic Development, Jobs, Transport and Resources, *The Contribution of Food and Fibre to the Victorian Economy, Key Economic Data,* March 2015

Some Inquiry participants also gave an indication of the scale and value of different aspects of the industry, placing the use of labour hire in context.

PMA Australia-New Zealand (**PMA-ANZ**) submitted that the approximate value of the fresh produce industry in Australia is approaching $10 billion, with Victoria and Queensland being the dominant production states.[648]

AUSVEG, the state body representing the interests of Victorian vegetable and potato growers, submitted that the largest sector of Victoria's horticulture industry is the vegetable industry, with a gross value of production (**GVP**) of over $970 million, comprising 840 business operations. In vegetable production, 40% takes place in the Port Phillip and Westernport regions surrounding Melbourne, with other key growing areas being Gippsland, the Mallee and Goulburn regions. The industry is heavily reliant on manual labour. Labour costs comprised an average of nearly a third of total cash costs for Victorian vegetable growers.[649]

East Gippsland Food Cluster[650] is a collaborative network of East Gippsland agri-food businesses including retailers, food processors, large horticulturalists, broad acre graziers and meat producers, cheese makers and boutique food and wine producers. Dr Nicola Watts, the Executive Officer of the Cluster, told the Inquiry that in the Gippsland region the agri-food sector underpins the economy.

FWO estimates there are approximately 30,000 growers nationally employing approximately 130,000 people.[651] Underhill and Rimmer note, however, that it is difficult for a variety of reasons to quantify the size of the workforce in Australian horticulture.[652]

Prevalence of labour hire in the horticulture industry

There was a widespread view amongst Inquiry participants that labour hire is used extensively, and relied upon heavily, in the horticulture industry.[653] Participants suggested that the key reasons for this are the seasonal nature of the work, unpredictable and variable workplace needs, domestic labour shortages and the lack of time and human resources capabilities amongst growers.

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647. Nurseries, cut flowers and turf.
648. PMA-ANZ, Submission no 85, 1.
649. AUSVEG, Submission no 22, 3.
650. East Gippsland Food Cluster, Submission no 106, 1.
651. FWO, *Horticulture Industry Shared Compliance Program 2010 Final Report* (Australian Government, November 2010).
652. Elsa Underhill and Malcolm Rimmer, 'Layered Vulnerability: Temporary migrants in Australian Horticulture,' *Journal of Industrial Relations* (forthcoming) 5.
653. VFF, Submission no 49, 4.

The member of the Victorian Parliament for Mildura, Peter Crisp MP, submitted to the Inquiry that seasonal labour is vital for business in the agricultural sector. In his view, there needs to be a structure in place that ensures future labour supply, which is dependent on workers having confidence that they will be treated fairly in the region. Seasonal industries include the citrus industry in winter and early spring, asparagus in spring and autumn, avocado in spring and early summer, table grapes principally in January to April, and some fresh vegetables.[654]

AUSVEG submitted that most growers do not have the time or resources to manage their temporary labour needs, especially when they are forced by domestic labour shortages to take on overseas workers on temporary work visas. As a result, they rely on external contractors, often in the form of labour hire firms, to take over responsibility for sourcing and administering their operation's labour requirements.[655]

MADEC provided examples of the unpredictability of work including: a grower who could be picking grapes for export and then the order is put on hold with no notice; the availability of packaging sheds to take fruit; weather influences; and variable client demand. Even more predictable crop types, such as almonds, are still highly seasonal in nature.[656]

The VFF submitted that labour hire workers are predominantly used to harvest crops, where hosts may have to engage large numbers of pickers for a very short period. It provided the example of the benefits of using labour hire for the eight-week long cherry and asparagus harvests, with no impact on direct employment because of the short harvest period.[657]

A confidential submitter and two witnesses told the Inquiry of the treatment of around 60 to 70 Asian workers, mostly women, at a vegetable packing company in the Sunraysia region. The submitter and witnesses described abuse, swearing, threats, working hours of 60 to 70 per week, and an air of intimidation with frequent outbursts by the employer and physical altercations. One witness had attempted to communicate with the migrant workers but they were too intimidated to respond, and the witness was castigated for approaching them. The witness told the Inquiry that on one occasion, there was an immigration raid; however the company appeared to have been 'tipped off' as the illegal workers did not attend work that day and for some weeks after. The witness observed the sexual harassment of one worker. The witness felt ashamed of how these workers were treated.[658]

Independent Contractors Australia (**ICA**) submitted that finding labour for the picking industry is exceedingly difficult because pay rates are at the bottom end of the income scale, and networks in relevant communities (which farmers do not have) are necessary to find workers.[659]

The shift from direct employment to the use of labour contractors in the horticulture industry appears to have been relatively recent, occurring within the last 10 years.

According to Dr Underhill's submission, the supply of harvest workers by labour hire contractors emerged in the late 2000s and has spread rapidly.[660] Bernard Constable, General Secretary of the Shearers' and Rural Workers' Union, has worked as a sheep shearer and fruit picker for over 30 years. He described the proliferation of labour contractors in the Goulburn Valley as follows:

> *10 years ago fruit picking contractors did not exist in the Goulburn Valley, now they would be involved in the harvest of 60-70 per cent of the pears and apples grown in this area. The incidence of Harvest*

654. Peter Crisp MP, Submission no 4, 1.
655. AUSVEG, Submission no 22, 3.
656. MADEC, Submission no 9, 3.
657. VFF, Submission no 49, 4.
658. Confidential, Submission no 87; Union and worker, Closed Hearing 03, Mildura, 24 November 2015.
659. ICA, Submission no 71, 15.
660. Dr Underhill, Submission no 32, 7.

> *Contractors in the grapes, citrus, stonefruit and vegetable industry in Victoria is overwhelming. Their workers are overseas students, backpackers, refugees. The emergence of contractors in the fruit industry has changed the industry. In the days before contractors, growers had to find pickers and keep them. … Now, growers will ring up a contractor and say "I need 200 bins off the trees" and a contractor will send a big mob of pickers who will pick that fruit then leave…*[661]

Mr Crisp told the Inquiry that the method of sourcing labour depends upon the 'scale and preference of the property operator', with some growers hiring seasonal labour directly and others using labour hire contractors or accommodation providers.[662]

Underhill and Rimmer conducted a study of working conditions in the Australian horticultural industry during 2013 and 2014, consisting of extensive interviews including in Bendigo, Maffra and Mildura in Victoria, coupled with telephone interviews and surveys.[663] They observed as follows regarding the prevalence of labour hire in the industry:

> *[R]ecent studies reveal several levels of labour-hire contractors in horticulture. One study observed 'at the highest level there are legitimate labour hire agents who provide a full labour hire service to their clients, many using backpacker labour ... at the other end of the spectrum illegal contractors work with agents/facilitators overseas to recruit workers ... and farmers are very willing to abrogate responsibilities to these labour hire contractors including with regard to the extent to which they employ illegal workers'. Contractors and agencies are attractive to farmers because they remove the problems of workforce recruitment and management. Importantly, growers can delegate to contractors the duty of checking the visa status of their workers, thus abrogating responsibility for the use of undocumented workers.*[664]

Non-compliant labour hire practices in the industry

There is a significant body of evidence, including evidence presented to the Inquiry and other sources, which demonstrates that many labour hire operators in the horticulture industry in Victoria do not comply with their legal obligations towards their workers.[665]

Underhill and Rimmer, on the basis of their 2013/14 study of the Australian horticulture industry (including Victoria), examined the comparative working conditions for workers engaged directly by farmers (198 workers) and those engaged through labour contractors (75 workers). Dr Underhill's submission to the Inquiry referred further to this material:

- the mean hourly earnings for workers paid by contractors ($12.66) was less than that of workers paid by farmers ($14.86), and substantially less than $21.09, the minimum award hourly rate of pay for a casual employee at the time of the study;
- non-payment of wages was a significant problem for workers engaged by contractors – 15% of survey respondents had experienced not being paid for work performed, and working for a contractor rather than a farmer directly more than doubled the likelihood of non-payment of wages;
- very short working hours were twice as likely amongst contractor employees, resulting in an inadequate income, and conversely, around a fifth of all workers reported long hours. Dissatisfaction with the number of working hours was considerably greater amongst employees of contractors;
- seasonal workers employed by contractors endured far harsher conditions of employment than when working for a farmer, being more likely to work in extreme heat and miss drink breaks; and

661. Bernard Constable, Shearers and Rural Workers Union, Submission no 21; Shepparton Hearing, 15 Februay 2016, 1.
662. Peter Crisp MP, Submission no 30, 2.
663. Underhill and Rimmer (forthcoming), 3-4.
664. Ibid, 10 (citations omitted).
665. Similar evidence was provided to the Queensland Labour Hire Inquiry, see Queensland Inquiry Report, 19-21, 24-25.

- workers, hostel owners and migrant community representatives reported a high level of violence, and threats of violence by contractors supplying labour in horticulture.[666]

Many other participants told the Inquiry about unscrupulous labour hire practices in the horticulture industry.[667]

MADEC submitted that the horticulture industry and some food processing organisations were more inclined to use unlawful labour contractors, including because 'it is cheap labour in an industry where margins are thin and there is pressure to keep costs down.'[668] One labour hire agency submitted confidentially that it had made a decision several years ago not to engage in business development activity in the agriculture sector:

> *... as our fees were regularly being undercut to the extent it was no longer cost effective to operate in these sectors and where based on a logical analysis of wages and statutory costs, our competitors were either operating at a loss or not paying appropriate wages or taxes and insurance.*[669]

Agri Labour told the Inquiry it is concerned about the prevalence of labour contractors that fail to meet even the most basic work law compliance obligations. It submitted that illegal labour is continuing to be offered in the horticulture industry in Victoria because of client commercial requirements to keep cost to a minimum, combined with ignorance of growers as to what it truly costs to employ somebody.[670]

The Inquiry heard from Mr Mark MacDonald, who formerly ran a hotel in Lake Boga, near Swan Hill, about the contracting and accommodation practices in the horticulture industry in that region. He described a number of Chinese and Malaysian labour contractors in the fruit picking and packing industries paying well below award wages, and using false visas, unregistered vehicles and requiring workers to stay in substandard accommodation in order to gain work. He provided the Inquiry with a list of contractors which he had also provided to the Department of Immigration and the Swan Hill Police. One contractor, known as Akhong, hit Mr MacDonald over the head with a cricket bat after he threatened to go to the police regarding the contractor's conduct. Mr McDonald's attempts to report the conduct to the Department of Immigration and the Swan Hill police were unsuccessful. Mr McDonald wanted to speak on the record despite being concerned about being injured again, saying that threats had been made against him.[671]

The Inquiry heard about the activities of labour contractor Sam Huor and his former company Chompran Enterprises from a confidential witness, the NUW and Kayla Ying Ho. Ms Ying Ho was employed by Chompran Enterprises to work at Covino Farms, one of Australia's biggest salad and vegetable growers supplying supermarket chains and fast food outlets including KFC, Red Rooster and Subway. The Inquiry heard that until mid-2015, around 100 migrant workers engaged at Covino through Chompran were grossly underpaid, worked excessive hours and did not receive superannuation. The Inquiry also heard that after the involvement

666. Dr Underhill, Submission no 32, 7-9; referring to Elsa Underhill and Malcolm Rimmer, 'Itinerant foreign harvest workers in Australia: the impact of precarious employment on occupational safety and health' (2015) 13:2 *Policy and Practice in Health and Safety* 24; Underhill and Rimmer (forthcoming), 2-4.

667. See e.g. AUSVEG, Submission no 22; MADEC, Submission no 9; NUW, Submission no 98; Mark MacDonald, Morwell Hearing, 1 March 2016; STLC, Mildura Hearing, 23 November 2016; Andrew Young, Melbourne Hearing, 9 February 2016.

668. MADEC, Submission no 9, 2-3.

669. Confidential, submission no 105.

670. Agri Labour, Submission no 107, 3.

671. Mark MacDonald, Morwell Hearing, 1 March 2016.

of the NUW, in mid-2015 Covino Farms replaced Chompran Enterprises with a directly owned labour hire agency and now pays award rates.[672] However, the NUW informed the Inquiry that because Chompran is no longer registered, and had little or no assets or capital, former workers have been unable to recover their lost wages and entitlements, yet Mr Huor is able to continue to operate through another corporate entity.[673]

The NUW estimates that the 100 workers employed at Covino Farms are owed at least $1.2 million in unpaid wages.[674] Ms Ying Ho told the Inquiry that in Gippsland, Covino is just one case, and that Mr Huor, the director of Chompran, is continuing to operate. She said searching the internet will show hundreds of jobs advertised, on a cash in hand basis, paying between $13 to $15 per hour.

The NUW and two of its members provided the Inquiry with a large number of advertisements for work at below award rates in foreign language publications and on social media sites. They also referred the Inquiry to foreign language blogs relating to the availability of work at between $10-$13 per hour in Gippsland, Sale, Bairnsdale, Swan Hill, Robinvale and Shepparton. These witnesses referred to two Malaysian-based companies advertising work in Australia, one of which has almost 32,000 Instagram followers. These companies are agents who are either also contractors or linked to contractors. They promote farm jobs online, and Malay workers pay them a fee of between $800 to $1,500 to get work.[675]

Dean Wickham, of the Sunraysia Mallee Ethnic Community Council (**Sunraysia ECC**) told the Inquiry that:

> *[w]e have got people who want to take charge of their lives who are being asked to work within an industry that is being controlled by layers and layers of people, so the farmer down to the main contractor, the subcontractor, and I am not sure how anyone makes any money by the time the dollar value gets to the actual person doing the work.*[676]

Mr Wickham and another confidential group of witnesses told the Inquiry that workers from the Pacific Islands, who are part of the Seasonal Worker Program (**SWP**), working in the horticultural industry near Robinvale, were treated poorly with untreated boils on their legs because of poor diet and poor food practices by the host (yet the workers were still expected to go to work).[677] One group of workers from Fiji was threatened with jail for walking off the job.[678]

The Inquiry heard in a closed hearing from two young women workers from Hong Kong on working holiday visas. They stated that they had worked for a number of contractors on a vegetable farm near Robinvale where they were required to work 60 to 70 hours per week. One of the women was sexually harassed by a co-worker, but when she complained to management, she was told if she was not happy she should leave. The workplace was unsafe, and both women suffered injuries in the workplace but did not receive any workers' compensation entitlements. The workers were belittled because they were from Asia. One of the women described Robinvale as: 'one part of dark in Australia. Just like the dark. Many, many bad things there.'[679]

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672. Kayla Ying Ho, Morwell Hearing, 1 March 2016.

673. See also the evidence provided by the NUW to the Senate inquiry into temporary work visas: Senate Work Visa Report, 167-169. Allegations relating to Covino Farms were also aired on the ABC Four Corners program, 'Slaving Away', on 4 May 2015.

674. NUW, Submission no 91, 17.

675. NUW and Kayla Ying Ho, Morwell Hearing, 1 March 2016.

676. Sunraysia ECC, Mildura Hearing, 23 November 2015.

677. Sunraysia ECC, Mildura Hearing, 23 November 2015; Community/Government, Closed Hearing 7, Mildura, 24 November 2015.

678. Community/Government, Closed Hearing 7, Mildura, 24 November 2015.

679. Workers, Closed Hearing 04, Mildura, 24 November 2015.

Some Inquiry participants suggested that a degree of tolerance, or turning a blind eye, to the unlawful practices of labour contractors exists within the industry.

The Inquiry was told by Mr Jeff Sim that most members of the Sunraysia community are scared to say anything about labour abuse, as many of the owners of farms are influential people in the community, and many people and small businesses rely on the patronage of these large businesses in rural areas to survive:

> *Some of these farmers wouldn't think twice about punishing those that spoke out. I think the relaxing of the regulations on student/short term work visas in the last decade have exacerbated the problem. The agriculture lobby groups know what's going on, but just don't care as it suits their low wage agenda.*[680]

Mr Andrew Young, a salad grower from Robinvale, gave evidence at an Inquiry hearing in Melbourne. He told the Inquiry that he wanted to give evidence because sometimes 'bad things happen when good people say nothing'; he wants to protect vulnerable people and he wants his industry to operate within the law. He described the use of contract labour hire by farmers who pay well below award wages. He told the Inquiry it is the most vulnerable groups who are being targeted for this including migrant groups, illegal workers and backpackers. He described the inadequate use of piece rates, and sham arrangements such as a labourer getting paid $17 per hour but who was then expected to give $1.70 of this back to the supervisor in cash.[681]

Mr Young said he assumed the significance and the scale of the problem has been acknowledged, but he wants to protect vulnerable people and level up the competition, because his business is doing the right thing and some of his competitors are not. He thinks part of the problem is that wages and conditions are too good in Australia, but he does not think that is a good enough excuse. Mr Young directly employs his workers, after a bad experience with a contractor. He told the Inquiry that directly employing a worker costs something like $25 or $26 per hour for a base employee, level one, as opposed to around $20 through a contractor.[682]

Mr John George, backpacker proprietor, described practices of both labour contractors and growers such as:

- ignorance of the correct pay rate by growers;
- being unable to afford to pay the correct rate and paying less;
- paying cash in hand;
- applying piece rates where the applicable award does not permit this practice;
- no written piece rate agreement;
- changing paid employment to voluntary after the employment has commenced;
- lack of clarity over whether payments are taxed;
- inadequate payslips;
- harassment, bullying and sexual harassment;
- unfair sacking;
- accommodation in farm sheds with a mattress on the floor;
- lack of training and supervision; and
- lack of record keeping.[683]

680. Jeff Sim, Submission no 69, 1.

681. Andrew Young, Melbourne Hearing, 9 February 2016.

682. Ibid.

683. John George, Submission no 29, 1-2.

Mr George described one instance of a contractor passing on only half of a per-hectare fee from the grower to workers, with an estimated 40% profit going to the contractor. This particular contractor has 'an ABN, an address, a first and second name, is registered for GST, presumably pays tax on their taxable income, owns land and a house, has business cards and actually exists'. Mr George told the Inquiry that in the past:

> *... we have dealt with various gentlemen and ladies of middle eastern or Asian origin, often with only a first name, a rudimentary command of English and a mobile phone number, who pay cash in white envelopes and mysteriously disappear at the drop of a hat when payment or other issues arise.*[684]

In contrast to the above, the evidence of some participants in the Inquiry demonstrated that despite the difficulties with labour supply and cost pressures within the horticulture industry, it is nonetheless possible for compliant labour hire arrangements to be very successful.

Mr Peter Hall and Mr Nabi Baqiri told the Inquiry at its Shepparton hearing of the labour hire arrangement between them. Mr Hall operates a large orchard in the Goulburn Valley, with around 1000 acres of deciduous fruit trees. His employment needs vary seasonally, from 75 to in excess of 200 staff. Whilst Mr Hall said that there are unscrupulous contractors in the region, he described a different arrangement which his business has with two Afghani labour hire companies.[685]

Mr Hall said that when Afghan community members originally started coming to the area in 1999 he employed them on a direct basis. However, through their own processes and community organisation they formed groups of workers, and Mr Hall's company helped them form their own labour hire businesses. Mr Hall said that the Afghani contractors particularly provided a place where Afghani workers with low language skills could find work at reputable orchards being paid award rates.[686]

Mr Baqiri, one of the contractors, told the Inquiry that he had formed his own business in 2009, employing between 20 and 40 people from Afghanistan with low English skills. He described how he ensures all legal entitlements are afforded to his workers. He has also become an orchardist.[687]

East Gippsland Food Cluster[688] has produced a 'sustainable workforce solution' strategy which it provided as a submission to the Inquiry. Its Executive Officer, Dr Nicola Watts, told the Inquiry that labour hire service provision in the region had perhaps not kept pace with the needs of many of its sectors. The organisation's strategy involves targeted activity on all fronts around labour hire, including working with local governments in relation to specific fit-for-purpose accommodation solutions, working with schools and education providers and developing a traineeship program for young local residents. Dr Watts told the Inquiry that more recently the organisation is seeing increased utilisation of the Federal Government SWP, which delivers win-win outcomes particularly for horticultural businesses as well as for temporary workers who come from developing economies. She also described a lot of taking back of seasonal workforces in-house, rather than the engagement of labour hire contractors that had been seen in the past, corresponding with an increasing investment in an internal human resources capability in the horticulture sector.[689]

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684. John George, Submission no 29, 5.

685. Peter Hall, Shepparton Hearing, 15 February 2016.

686. Ibid.

687. Nabi Baqiri, Shepparton Hearing, 15 February 2016.

688. East Gippsland Food Cluster, Submission no 106, 1-2.

689. East Gippsland Food Cluster, Morwell Hearing, 29 February 2016.

4.2.2 Meat industry

About the industry

IBISWorld describes the meat processing industry as including the slaughtering, boning, freezing, preserving or packing of meat (excluding poultry, seafood and smallgoods), and manufacturing from abattoir byproducts.[690] It describes the cured meat and smallgoods industry as comprising the manufacture of bacon, ham, smallgoods and other prepared meat products.[691] It describes the poultry processing industry as comprising the processing of live poultry into cuts and value-added products, including abattoir operation, dressing, frozen poultry manufacturing, poultry meat manufacturing and poultry packing.[692] These various industries are referred to collectively as the meat industry in this Report.

Together, these three industries accounted for $31.9 billion in revenue in 2015/16 across Australia.[693]

In 2015/16, 23% of businesses in the meat processing industry[694] and 28.3% of businesses in the cured meat and smallgoods industry[695] were in Victoria. In 2016/17, 23.9% of businesses in the poultry processing industry were in Victoria.[696]

The three major companies in the meat processing industry in Australia, JBS, Thomas Foods International Consolidated Pty Ltd and Teys Australia Pty Ltd, make up almost 50% of the Australian market.[697] The two major companies in the cured meat and smallgoods industry, Food Investments Pty Ltd and (again) JBS, make up 44.3% of the Australian market.[698] The two major companies in the poultry processing industry in Australia, Baiada Poultry Pty Limited and Ingham Holdings II Pty Ltd, make up 60.8% of the market.[699]

In Victoria, beef and veal meat production increased by 26% in the five years to 2013/4.[700] In 2013/14, 71% of Victorian beef and veal production was exported, with the value of fresh, chilled or frozen beef exports from Victoria increasing by almost 55% between 2012/3 and 2013/4.[701] The Victorian meat processing industry employs around 9000 people, of which 4376 were employed in abattoirs and meat packing facilities. Of the 9000 employees in the meat and meat product manufacturing industry, 3,766 were employed in metropolitan Melbourne.[702]

In 2013/14, Victoria accounted for 22% of Australia's chicken meat production. The chicken meat industry is vertically integrated with companies often owning facilities across the supply chain. Processing facilities are generally located within 100km of the farms which supply them. Production is located primarily in the Port Phillip and Westernport region (64% by gross value of production), Barwon (18%), Gippsland (9%) and Loddon (7%) regions. Well over 95% of the chicken meat grown and eaten in Australia is produced by seven privately owned Australian

690. Brooke Tonkin, *Meat Processing in Australia* (IBISWorld, June 2016), 1.
691. Arna Richardson, *Cured Meat and Smallgoods Manufacturing in Australia* (IBISWorld, May 2016), 1.
692. Nathan Cloutman, *Poultry Processing in Australia* (IBISWorld, July 2016).
693. Tonkin (2016), 3; Cloutman (2016), 4; Richardson (2016), 29.
694. Tonkin (2016), 17.
695. Richardson (2016), 4.
696. Cloutman (2016), 4.
697. Tonkin (2016), 24.
698. Richardson (2016), 25.
699. Cloutman (2016), 22.
700. Victorian Government, Department of Economic Development, Jobs, Transport and Resources, *Victoria's Beef Cattle Industry* (December 2014), 1.
701. Ibid, 2.
702. Ibid, 4.

chicken meat processing companies.[703] There are four main processing companies in Victoria – Inghams Enterprises, Baiada Poultry Pty Ltd, Hazeldene's Chickens Pty Ltd and Turi Foods Pty Ltd.[704] In 2012/13, the gross value of production for Victoria's poultry meat industry was $563 million. Supply to the domestic market has historically come from processors within the state of production. This is particularly the case for fast food and food service outlets, which generally require daily deliveries of fresh chicken.[705] In 2011, around 1522 people were employed on poultry farms in Victoria and around 2660 were employed in the manufacturing of poultry products in Victoria.[706]

Labour hire practices in the industry

The Inquiry heard that labour hire is prevalent in the meat industry.

The AMIEU submitted that labour hire use in the meat industry ranges from workplaces where initial employment is through a labour hire agency but after three months or six months, the employment is transferred to the host employer; through to workplaces fully staffed by labour hire employees with no direct employees. In 2015 the AMIEU launched the National Meatworkers Call Centre for international workers in the meat industry in Australia. It submitted that, to date, 74% of callers to the centre were employed by labour hire firms.[707]

The AMIEU submitted to the Inquiry that the use of 417 Working Holiday Maker (**WHM**) visa workers to fill the local jobs in the Australian meat industry is now at unprecedented levels. It links this expansion to the union's campaign to expose and eventually curb the exploitation of workers on 457 visas, and said many meat industry employers have turned to 417 visas instead. The union submitted that many investigations have demonstrated these workers are exploited either by labour hire agencies or host companies, or both.[708]

A typical scenario for a 417 visa worker in the meat industry is described by the union as follows:

- In the media in Korea, Taiwan or Hong Kong labour hire agencies advertise for young workers in the meat industry. The agency then assists the workers to apply for a 417 visa. The backpacker purchases a return ticket and comes to Australia.
- The backpacker is then placed in a meat industry workplace in regional Australia, often with substandard housing and numerous costs deducted from their wages. They are still employed by the labour hire agency which advertised in the country of origin. After 6 months the backpacker is moved to another employer. At the end of another six months, if the worker is still healthy and is sufficiently compliant with the employer, the labour hire agency may assist the worker to have the visa extended for a further year. During the next 12 months there are likely to be a further two six-month placements in the meat industry. At the end of this period, the worker returns to the country of origin.
- Too often, however, these workers have no knowledge of their industrial entitlements. Additionally there is no requirement for the workers to have any proficiency in English literacy, so often they cannot access industrial, health and safety, or workers compensation information needed to be able to claim entitlements.[709]

The union provided several examples of non-compliant labour hire agencies in the industry.

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703. Victorian Government, Department of Economic Development, Jobs, Transport and Resources, *Chicken Industry Profile* (December 2014), 2.
704. Ibid.
705. Ibid, 4.
706. Ibid, 6. This includes a large number employed in egg production.
707. AMIEU, Submission no 77, 1, 9.
708. AMIEU, Submission no 77, 6.
709. AMIEU, Submission no 77, 7.

One example related to a regional workplace where approximately 40% of workers were Taiwanese backpackers. The workplace started operating on Sundays and paid the backpackers at ordinary time rates, despite a legal obligation to pay double time. The backpackers could not read the relevant EBA and did not know that they were being underpaid. The union submitted that there were experienced local workers who claim to have applied for work in that abattoir but had not obtained employment.[710]

A long term worker at Midfield Meats in Warrnambool estimated that about 90% of the workers there are backpackers, despite the Midfield Group saying it is '100 per cent Australian owned and operated. We are a staunch supporter of the area where we are based, employing more than 1200 people.' These Korean and Taiwanese workers are required to provide an ABN to work at Midfield Meats and are employed by a labour hire agency based in Sydney.[711]

Eric Jhou, a labour hire worker in the meat industry, submitted that he received: 'no penalty rate for over time. This is a hazard working environment, people always get hurt.'[712]

An anonymous submission from a worker at a poultry factory ('they keep changing their name') submitted that they were informally employed more than a year ago, was not paid superannuation, was paid less for overtime, was abused at work by other workers and was told to ignore it. The worker submitted that they had worked long hours and had been required to use other people's work boots. The worker submitted: 'I did get injured, depression, anxiety, am scared to go to work.'[713]

The Bendigo Uniting Churches Social Justice Group submitted that over the last decade, large local meat industry employers have moved from a direct to an indirect employment model using contracted labour hire firms. The Group submitted that this has created a two-tiered system of employment whereby some workers have secure, well-paid jobs, while other workers are employed on a casual basis with no sick leave, with some workers of labour contractors grossly underpaid, having excessive working hours and little control over accommodation.[714] However, this trend is not universal. The Inquiry heard directly from a large meat industry business in regional Victoria, in a closed hearing. Recent changes to the staffing model of its operations, achieved through enterprise bargaining, meant that it was able to reduce its casual and labour hire use by around half, and increase its permanent workforce. The changes involved a reduction in its pay rates for new permanent employees, and changes to rostering patterns which permit employees to work more hours during busy production times and bank the extra time worked for payment during low production times.[715]

Luke Martin, a NUW delegate employed at Hazeldene's Chicken Farm Pty Ltd (**Hazeldene's**) in Bendigo, made a submission and gave evidence at the Inquiry's public hearing in Ballarat in February 2016. Mr Martin's submission from November 2015 stated that Hazeldene's is Bendigo's largest private employer, employing around 720 people directly and around 640 indirectly. It stated that around 200 of the 640 indirect employees were migrant workers 'bussed up' from Melbourne every day.

Mr Martin described the difficulty in obtaining clear information about the workers' wages and conditions. From workers 'brave enough' to talk to him, he had heard they were paid below the applicable award rate, cash in hand, did not get paid overtime, casual loading or receive paid leave, and pay around $50 to $100 a week back to their employer for the bus ride to work.

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710. AMIEU, Submission no 77, 7.

711. AMIEU, Submission no 77, 7.

712. NUW on behalf of individual workers, Submission no 75(xxxviii).

713. CFMEU on behalf of individuals, Submission no 54, xviii.

714. Bendigo Uniting Churches Social Justice Group, Submission no 18, 2.

715. Labour hire client, Morwell Hearing, 1 March 2016.

They are afraid of coming forward and speaking out about their situation.[716] Mr Martin told the Ballarat hearing that since he had written his submission, things had changed dramatically at Hazeldene's and that he believed this may have been due to the Inquiry. He told the Inquiry that he had recently observed employment declaration forms and tax declarations being signed by labour hire workers, and payslips being received. He believes that there are still around 200 migrant labour hire workers engaged in the boning room at Hazeldene's.[717]

Hazeldene's told the Inquiry it is fully compliant with all of its legal obligations. It said the allegations made by Mr Martin were unfounded. It said that it had taken proactive steps to ensure that labour hire contractors comply with their obligations to their employees, and had worked with a range of its contractors to establish a third party payroll system through which their employees are paid in accordance with the relevant industrial instrument. It said it continues to engage in continuous improvement including introducing a biometric finger scanning system for a range of contractors.[718]

Allegations of worker mistreatment by labour hire operators in the meat industry are not confined to Victoria.

The Queensland Parliament Labour Hire Inquiry heard evidence of mistreatment and exploitation of workers in the meat industry.[719]

In addition to evidence relating to Victoria, the Senate Work Visa Report referred to evidence of some limited use of labour contractors in the pork industry,[720] considerable evidence of temporary visa workers in sheep processing in Tamworth in New South Wales and layers of labour contracting in Murray Bridge in South Australia.[721]

The Senate Committee found that labour hire companies and employers are using the WHM visa program to fill potential shortfalls in labour and to access cheaper labour. It considered the use of labour hire companies to supply contract workers to be a deliberate strategy to cut labour costs above any need for flexibility. The Committee acknowledged this strategy may be in response to cost-cutting by competitors or pressures from major supermarket chains.[722] The Committee described evidence of practices in the meat industry as outlining 'a litany of activities, many of them illegal, including below-award wages, non-payment of entitlements under the law, coercion and threats against union members, substandard and illegal living conditions in accommodation provided by labour hire contractors, health and safety conditions, as well as the labour hire business model.'[723]

FWO recently conducted an extensive inquiry into the labour supply chains of a major poultry processor, the Baiada Group in New South Wales.[724] The Baiada group operates a 'complete growing, processing and supply operation.'[725] The Inquiry followed media reports of alleged underpayments to overseas workers and the provision of substandard accommodation. The Baiada Inquiry Report found that:

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716. Luke Martin, Submission no 20, 1-2.

717. Ibid.

718. Hazeldene's, Letters to Inquiry dated 27 April 2016, 8 July 2016. See also Hazeldene's evidence to the Senate temporary visa inquiry: Commonwealth of Australia, Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (17 March 2016), 114-115.

719. Queensland Inquiry Report (2016), 25.

720. Senate Work Visa Report, 54.

721. Ibid, 111.

722. Ibid, 120.

723. Ibid, 170.

724. Australian Government, Fair Work Ombudsman, *A report on the Fair Work Ombudsman's Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales*, June 2015.

725. Ibid, 6.

- Baiada sourced labour from six principal contractors through verbal agreements, and paid them a rate determined by reference to the kilogram of poultry processed.
- These principal contractors subcontracted to at least seven second-tier contractors.
- The first and second tier contractors were generally not directly involved in the sourcing of labour.
- The second tier contractors often contracted down a further two or three tiers.
- During the inquiry, 23 of 39 identified contractors evidenced financial instability and four of the six principal contractors ceased operations.
- Taiwanese and Hong Kong working holiday maker visa holders were the dominant source of labour for Baiada's poultry processing sites.
- These workers were found to have been exploited, involving significant underpayments, extremely long hours of work, high rents for overcrowded and unsafe accommodation, discrimination and misclassification as contractors.[726]

Under a Proactive Compliance Deed entered into between Baiada and FWO in October 2015, the company has been required to implement new processes for resolving underpayment issues and provide FWO with details of all its labour supply contractors; further, contractors must be audited to ensure compliance with workplace laws.[727]

In Western Australia, FWO recently entered an enforceable undertaking with a labour hire agency supplying workers, many of them from overseas, to perform meat packing and storage duties at an abattoir.[728]

Participation in the Inquiry by Luke Martin, NUW delegate at Hazeldene's Chicken Farm

Background

As noted above, Mr Luke Martin, employee of Hazeldene's and NUW delegate, provided a submission to the Inquiry regarding Hazeldene's use of labour hire workers. Mr Martin also provided information to the Inquiry at a public hearing in Ballarat on 23 February 2016.

An article was published in the *Bendigo Advertiser* online later that day, and in the print edition on the next day, 24 February 2016, referring to Mr Martin's evidence to the Inquiry (**Bendigo Advertiser Article**). It read as follows:

> *Workers get cash in hand: delegate - By Alex Hamer*
>
> *A UNION delegate has told a Victorian government inquiry foreign workers at Hazeldene's chicken farm in Lockwood are being paid cash in hand and working up to 70 hours per week, without penalty rates. National Union of Workers delegate Luke Martin told the inquiry into the labour hire industry the 417 and 457 visa holders had only recently started receiving pay slips.*
>
> *"Most of the people I've spoken to have no idea of their rights, [what] wages and conditions are supposed to look like," he said. "I was told these people were being paid a flat rate of $14.50 an hour, working extremely long days, 15, 16-hour days.*
>
> *"I've been really concerned about their welfare, working at Hazeldene's." Mr Martin also told the inquiry the companies engaged to provide the contract workers "constantly change their names,"*

726. Ibid, 2-3, 10-13. The Baiada case was extensively examined by the Senate temporary visa inquiry: Senate Work Visa Report Chapter 7.

727. 'Baiada required to engage HR specialist to report back to regulator', *Workplace Express*, 26 October 2015.

728. FWO, 'Backpackers working at abattoir short-changed more than $35,000', Media Release (31 May 2016).

and "re-register as a different company". Mr Martin claimed he had flagged his concerns with Hazeldene's management, saying union organisers had seen one of the contractors drop "a box full of cash".

"I told him there were workers being paid cash in hand on the site, but he was more concerned with the fact that the union officials were there," he said.

In a statement yesterday, Hazeldene's said it continually reminded the NUW of its responsibilities should they be aware of any evidence of unlawful or unethical practices by contractors. "On numerous occasions Hazeldene's has requested evidence of specific incidents to enable appropriate investigation. None has been produced," the statement read. "The matter of labour hire employees has been discussed extensively since May 2015. Consistent feedback from independent auditors is that Hazeldene's is exceeding its legal and ethical obligations. These sessions are interpreted as required."

At a Senate inquiry in June, Hazeldene's people and performance manager Ann Conway could not confirm whether the contracted workers in the boning facility were paid in cash, instead stating "they are being paid appropriately".

At a subsequent hearing, the NUW provided the Inquiry with a copy of a letter dated 24 February 2016 on Hazeldene's letterhead, with recipient details redacted, but which is now known to have been received by Mr Martin (**24 February Letter**). The 24 February Letter stated as follows:

Further to our conversation today, I confirm that Hazeldene's is concerned by the false allegations regarding the business which have been attributed to you in the media. As we have previously advised you, Hazeldene's has made several requests to you to provide evidence in order to substantiate these allegations. To date, you have not provided any such evidence. In addition, Hazeldene's has made several enquiries into your allegations and once again has not been able to substantiate your allegations.

As discussed we will await the transcript of the Inquiry and review your comments prior to asking you to respond to any concerns we may have. You will have the opportunity to have a support person/representative attend this meeting.

In the meantime you are directed to:

- *Not make any derogatory, offensive or misleading comments regarding Hazeldene's*
- *Attend the Lockwood site for the duration of your shift in accordance with the Return to Work Plan*
- *Ensure you comply with all Hazeldene's policies and procedures and not disrupt the workplace.*

Please note, failure to comply with the above will lead to disciplinary action.

Once again, we remind you that if you have any concerns regarding any employee, including contractors, you must bring specifics of the matter to our attention immediately (as we have told you on numerous occasions) together with facts to enable us to investigate the matter.

I sought and obtained further information from both Hazeldene's and Mr Martin regarding the circumstances surrounding the 24 February Letter. Both parties informed the Inquiry that a further letter was sent to Mr Martin on 8 March 2016 by Hazeldene's (**8 March Letter**). The 8 March Letter stated that:

Further to our letter of 24 February 2016, I advise that transcripts are not available to the public. However, Hazeldene's once again reminds you that if you have any allegations and supporting evidence this should be brought to our attention.

Additionally at the meeting held on 24 February 2016 you raised further allegations regarding Hazeldene's operation. Specifically you stated that ever since Hazeldene's has been in operation they have been exploiting workers. You provided no evidence to support this generalised and extremely serious allegation.

As an employee you have a duty of fidelity to Hazeldene's and therefore any unsubstantiated comments breaches that duty and thereby places the working relationship in jeopardy. Further your manner in this and the subsequent meeting, was in direct breach of the code of conduct.

We put you on notice that should you make any further unsubstantiated allegations against Hazeldene's and/or should your behaviour be disrespectful and aggressive towards any employee or contractor at Hazeldene's (as displayed in these meetings) your employment will be in jeopardy.

Once again, we remind you that if you have any concerns regarding any employee, including contractors, you must bring those concerns and relevant evidence to our attention immediately (as we have told you on numerous occasions) together with facts to enable us to investigate the matter.

Mr Martin provided a statement to the Inquiry, which indicated the following, amongst other things:

- That the Bendigo Advertiser Article quoted excerpts of Mr Martin's evidence to the Inquiry.
- That around mid-morning on 24 February 2016, Mr Martin was directed to attend a meeting with Hazeldene's Human Resources. During the meeting Hazeldene's representatives accused him of making false allegations at the Inquiry. He denied this allegation. Hazeldene's then advised him it would be requesting a copy of the transcript of the hearing on 23 February 2016 so that they could make specific allegations against him.
- That towards the end of Mr Martin's shift on 24 February 2016, he was again directed to attend a meeting with Hazeldene's Human Resources at which he was provided with the 24 February 2016 letter. Hazeldene's demanded that he provide evidence to support the allegations made at the Inquiry. He advised that he was merely relating the contents of discussions he had had with a number of labour hire employees at Hazeldene's. He further advised that these employees had not wanted to be identified.
- That he felt Hazeldene's actions were intended to intimidate him from making any further statements about alleged unlawful practices by labour hire agencies operating on Hazeldene's sites, and that he believed that had Hazeldene's obtained a copy of the transcript of the Inquiry hearing on 23 February it would have used the transcript to take disciplinary action against him.

Hazeldene's provided extensive information to the Inquiry regarding this matter. Its response is set out in detail below.

Inquiries Act

As indicated in Chapter 1, this Inquiry is established as a Formal Review pursuant to Part 4 of the Inquiries Act. The Inquiries Act provides a number of protections for persons who provide information to a Formal Review. In particular, s 121 of the Inquiries Act provides as follows:

Offence for employers to take detrimental action against employees

(1) An employer must not dismiss or threaten to dismiss an employee or take or threaten to take any other detrimental action against an employee because—

(a) the employee has given information to a Formal Review; or

(b) the employer believes that the employee has given or will give information to a Formal Review.

Penalty: 120 penalty units or imprisonment for 12 months.

Notes

1 See also section 72 of the Criminal Procedure Act 2009 , which deals with the evidential burden of proof.

2 Section 128 applies to an offence against this subsection.

(2) It is a defence in a proceeding for an offence against subsection (1) if the reason referred to in subsection (1)(a) or (b) was not a substantial reason for the dismissal or other detrimental action.

(3) Subsection (1) does not apply if an employer dismisses or threatens to dismiss an employee or takes or threatens to take any other detrimental action against an employee because—

(a) the employee unlawfully gave information to a Formal Review; or

(b) the employee contravened section 120 in respect of the information given to a Formal Review.

Further, s 116 of the Inquiries Act relevantly provides that a member of a Formal Review may at any time provide or disclose information to any person or body, if the member considers that the information, document or other thing is relevant to the performance of the functions of the person or body; and it is appropriate to disclose the information or give the document or other thing to the person or body.

'Detrimental action'

Section 121 of the Inquiries Act relevantly prohibits an employer from taking, or threatening to take, any other detrimental action against an employee.

'Detrimental action' is not defined in the Inquiries Act. However, it is a term used in a number of other Victorian statutes.[729]

In the *Public Administration Act 2004* (Vic), detrimental action is defined to include 'action causing injury, loss or damage; and intimidation or harassment.'[730] The *Victoria Police Act 2013* (Vic) provides that detrimental action means action:

Causing, comprising or involving any of the following—

(a) injury, damage or loss;

(b) intimidation or harassment;

(c) ostracism;

(d) discrimination, disadvantage or adverse treatment in relation to employment;

(e) dismissal from, or prejudice in, employment;

(f) disciplinary proceedings. [731]

Section 76 of the OHS Act provides that it is an offence if an employer, amongst other things, 'alters the position of an employee to the employee's detriment'. Detriment in this context may arise through the issuing of warning letters.[732]

The definition of detrimental action in the *Victoria Police Act 2013* (Vic) provides that it includes prejudice in …employment. Similar provisions in the Fair Work Act (and predecessor legislation) prohibit alteration of the position of an employee or independent contractor to their

729. See e.g. *Protected Disclosure Act 2012* (Vic) s 43; *Victoria Police Act 2013* (Vic) s 173; *Safe Drinking Water Act 2003* (Vic) s 26H; *Public Administration Act 2004* (Vic) s 107.

730. *Public Administration Act 2004* (Vic), s 4.

731. *Victoria Police Act 2013* (Vic), s 173(4).

732. *Victorian Workcover Authority v Patrick Stevedoring Pty Ltd,* Magistrates Court of Victoria, Case No Y03015739 (unreported), at [16]; decision upheld on appeal, however the issue of what constitutes a detriment was not considered in the appeal: *Patrick Stevedoring Pty Ltd v James Reid Chasser (Victorian Workcover Authority)* [2011] VSC 597.

'prejudice.'[733] There have been many cases considering what constitutes a prejudicial alteration of employment. The High Court has found it to constitute 'a broad additional category which covers not only legal injury but any adverse affection of, or deterioration in, the advantages enjoyed by the employee before the conduct in question.'[734] Actions which render an employee's employment less secure may constitute a prejudicial alteration.[735] Such actions may include counselling or the issue of a written warning[736] or the laying of disciplinary charges.[737]

Finding 4.1

I find that Hazeldene's actions on the 24 February 2016 and 8 March 2016, including the issuing of the 24 February Letter and the 8 March Letter, may constitute detrimental action by Hazeldene's against Mr Martin in possible contravention of section 121 of the Inquiries Act. In particular, the 8 March Letter clearly states that Mr Martin's employment will be in jeopardy. I further consider that the two letters may constitute a threat of detrimental action of the same nature.

'Substantial reason'

Section 121(4) of the Inquiries Act provides that it is a defence in a proceeding for an offence under s 121(1) if the relevant proscribed reason was not a substantial reason for the dismissal or other detrimental action.

The Industrial Court in *Bowling v General Motors-Holdens Pty Ltd,*[738] in considering whether discrimination had occurred 'by reason of', or whether an employer was 'actuated by', an employee's status as a shop steward, found that the reason must be 'a substantial and operative factor' influencing him to take that action. Further, an employer may be said to have been actuated by a particular reason if it was a substantial and operative factor influencing him to take that action, although that reason was but one of a number of reasons which so influenced him.[739]

In considering the meaning of 'substantial' in the context of s 6(2) of the *Equal Opportunity Act 1984* (SA), the South Australian Supreme Court observed that:

> *... [t]he meaning of the word "substantial" varies according to context. In his judgment in Terrys Motors Ltd v Rinder (1948) SASR 167 at 180, Mayo J briefly noted the variety of meanings of "substantial". In the 40 years since that judgment the variety of those meanings might have increased. In s.6(2) it connotes that which is of substance or weight as opposed to that which is illusory or of little moment. It is not intended to denote a ground which predominates over other grounds.*[740]

733. See Fair Work Act s 342(1); *Workplace Relations Act 1996* (Cth) s 792(1)(c).

734. *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1; [1998] HCA 30, [4].

735. Ibid, [20].

736. *Construction, Forestry Mining and Energy Union v Coal and Allied Operations Pty Ltd* [1999] FCA 1531, [95]; *Finance Sector Union of Australia v Australian & New Zealand Banking Group Limited* (2002) 114 IR 352, [137]-[139].

737. *United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board* [2003] FCA 480, [90]-[91].

738. (1975) 8 ALR 197.

739. *Bowling v General Motors-Holdens Pty Ltd* (1975) 8 ALR 197 at 200; upheld in *General Motors-Holdens v Bowling* (1976) 12 ALR 605, per Mason J at 616, 619.

740. *Yfantidis v Jones* [1993] SASC 4337, [47].

Further, the New South Wales Supreme Court considered the meaning of the term 'on the ground of', and found that the 'ground' must be a 'substantial and operative factor'. The Court considered this required the ground to afford a rational explanation as to why an action was taken, and must be more than a mere temporal conjunction of events, an incidental but non-causal relationship, or speculation.'[741]

Hazeldene's informed the Inquiry that the 24 February Letter was a direct result of the Bendigo Advertiser Article, not Mr Martin's evidence to the Inquiry. However, the article describes no more than the information provided by Mr Martin to the Inquiry directly. The article refers to Mr Martin having 'told a Victorian government inquiry,' 'told the inquiry into labour hire' and 'also told the inquiry' various matters. Each of the matters attributed to Mr Martin in the article directly correspond with matters which Mr Martin told the Inquiry. My review of Mr Martin's evidence at the 23 February 2016 public hearing demonstrates that the information provided by Mr Martin at that hearing directly corresponds with the information contained in the article. This evidence included that:

- Foreign workers at Hazeldene's chicken farm in Lockwood are being paid cash in hand and working up to 70 hours per week, without penalty rates.
- 417 and 457 visa holders had only recently started receiving pay slips.
- Most of the people Mr Martin had spoken to have no idea of their rights, [or what their] wages and conditions are supposed to look like.
- He was told these people were being paid a flat rate of $14.50 an hour, working extremely long days, 15 – 16 hour days.
- He's been really concerned about their welfare, working at Hazeldene's.
- The companies engaged to provide the contract workers constantly change their names and re-register as a different company.
- Mr Martin had flagged his concerns with Hazeldene's management.
- Union organisers had seen one of the contractors drop a box full of cash.
- Mr Martin had told the company there were workers being paid cash in hand on the site, but it was more concerned with the fact that the union officials were there.

It is a feature of public hearings of the Inquiry that they may be attended by the general public, including media, and may be reported upon. In my view, there is no meaningful distinction between the actions of Hazeldene's being occasioned by the provision of information by Mr Martin to the Inquiry, and the subsequent reporting of that information by the Bendigo Advertiser.

In any event, the text of both the 24 February 2016 Letter and the 8 March 2016 Letter indicate on their face that Hazeldene's actions were directly connected to what Mr Martin told the Inquiry. The 8 March 2016 Letter states that 'transcripts are not available to the public. However, Hazeldene's once again reminds you that if you have any allegations and supporting evidence this should be brought to our attention.' It then goes on to state that any unsubstantiated comment(s) 'places the working relationship in jeopardy' and that 'should you make any further unsubstantiated allegations against Hazeldene's … your employment will be in jeopardy.'

741. *Penhall-Jones v State of New South Wales* [2007] FCA 925, [85].

Finding 4.2

I find that the actions by Hazeldene's on 24 February 2016 and 8 March 2016, in providing Mr Martin with the 24 February 2016 Letter and the 8 March 2016 Letter, may have been taken for the substantial reason that Mr Martin provided information to the Inquiry – in possible contravention of section 121 of the Inquiries Act.

Information given unlawfully or in contravention of section 120

The Inquiries Act provides (in s 121(3)) that the offence in s 121 does not apply if the relevant information was given to the Inquiry unlawfully, or in contravention of s 120 of the Inquiries Act (i.e. that the information was false or misleading).

I do not have any material before me to form the view that the information provided by Mr Martin was provided unlawfully or in contravention of s 120 of the Inquiries Act. The material before me indicates that Mr Martin qualified the information he provided to the Inquiry, in respect of its source, timing and reliability. Mr Martin made clear that a number of the allegations related to past conduct, and that in many cases the source of the information is what other people have told him, or that he's 'only guessing', or that it is 'only talk' and that it's hard to get actual information, and that he's 'piecing little pieces together' from where he has heard it. Further, Mr Martin told the Inquiry that since he had made his written submission, things had changed dramatically at Hazeldene's.

Hazeldene's response

Section 108 of the Inquiries Act provides that if a Formal Review proposes to make a finding which is adverse to a person, it must be satisfied that the person is aware of the matters upon which the proposed finding is based, and has had an opportunity at any time during the course of the Inquiry to respond to those matters. It further provides that where a finding which may be adverse to a person is included in the report of a Formal Review, the report must also fairly set out the response of that person to the proposed findings.

The matters upon which my findings above are based were brought to the attention of Hazeldene's in correspondence from the Inquiry dated 6 April 2016, 22 June 2016 and 16 July 2016. Hazeldene's provided its responses in correspondence to the Inquiry dated 27 April 2016, 8 July 2016 and 27 July 2016.

In summary, Hazeldene's response to the matters outlined above was as follows:

- It understands and acknowledges that all employees have a right to appear before the Inquiry and to give evidence without being subjected to any form of disciplinary action.
- The 24 February Letter was not sent as a result of Mr Martin appearing before the Inquiry, but rather as a direct result of an article Hazeldene's became aware of on 23 February 2016, published by the Bendigo Advertiser, titled 'Workers get cash in hand: delegate'. The article made false and misleading comments about Hazeldene's which aimed at causing damage to its business, and attributed comments to Mr Martin and directly quoted Mr Martin.
- Hazeldene's met with Mr Martin on 24 February 2016 'to only discuss' the article. Mr Martin denied making the comments to the Bendigo Advertiser and went on to say that he didn't make the comments to the Inquiry. Whilst the purpose of the meeting was simply to discuss the article, in order to confirm that Mr Martin did not make the comments to the newspaper, Hazeldene's advised Mr Martin that it would attempt to get a copy of the transcript.

- Mr Martin became aggressive during the meeting. He made unsubstantiated allegations against Hazeldene's in the meeting to the effect that 'everyone knows Hazeldene's has been exploiting employees' for years. Mr Martin has failed to substantiate this allegation. The 24 February Letter reflects the meeting and Mr Martin's conduct during the meeting, and was 'not as a result of Mr Martin's attendance at the Inquiry.'
- The 8 March Letter was subsequently sent to Mr Martin on behalf of Hazeldene's.
- At no time has Mr Martin been disciplined nor has Hazeldene's taken any detrimental action against Mr Martin because he attended the Inquiry. Further, Hazeldene's understands it is an offence to take detrimental action against any employee for attending the Inquiry. Hazeldene's continues to take its legal obligations very seriously and respects the integrity of the Inquiry.[742]

Hazeldene's was advised of my proposed findings. In summary, its response was as follows:

- Hazeldene's is committed to following sound and lawful practices, extending to full compliance with legal obligations in all facets of its operations, including those arising under the Inquiries Act.
- The 24 February Letter was not sent 'because' of Mr Martin's appearance before the Inquiry, but rather as a result of serious allegations made in the Bendigo Advertiser Article. Hazeldene's has no concern about any employee performing their civic duties.
- The allegations in the Bendigo Advertiser Article are without substance.
- Whilst the Bendigo Advertiser Article makes reference to the Inquiry, it is unclear whether it is no more than a fair report on the conduct of the proceedings or whether it was based in whole or part on information separately provided.
- On 24 February, Mr Martin denied making the comments ascribed to him to the Inquiry therefore Hazeldene's could not have been acting against him for doing so.
- The 24 February Letter does not constitute or evidence actual or threatened detrimental action. The 24 February Letter simply foreshadows possible further discussions after perusal of the transcript, and provides an unremarkable reminder of the obligations attaching to the employment relationship. It resulted in no action against Mr Martin, nor is any action threatened.
- There is a real question about whether false or misleading information was provided by Mr Martin to the Inquiry.
- The 8 February Letter does not constitute actual or threatened detrimental action.
- The statement in the 8 February Letter that:

  > *We put you on notice that should you make any further unsubstantiated allegations against Hazeldene's and/or should your behaviour be disrespectful and aggressive towards any employee or contractor at Hazeldene's (as displayed in these meetings) your employment will be in jeopardy.*

  was not because of evidence Mr Martin gave to the Inquiry. The cause for concern was the further allegations made by Mr Martin in the meeting on 24 February and his conduct in that meeting.
- The findings foreshadowed would be contrary to the approach taken in *CFMEU v BHP Coal* (2013) 253 CLR 243 concerning the approach to ascertaining the reason for the taking of action by the employer.
- Providing evidence to the Inquiry does not give an employee immunity from the usual disciplinary processes and expectations concerning conduct and behavior.

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742. Letter to Inquiry from Hazeldene's, 27 April 2016.

- Hazeldene's is well aware of its legal obligations, including those arising under the *Inquiries Act*. It has not breached those obligations. If there is a finding to the contrary, Hazeldene's will take all action necessary to protect its good standing and reputation.[743]

Hazeldene's also raised three procedural matters in its letter to the Inquiry dated 8 July 2016. These were:

- that it was unclear whether the proposed findings related to conduct other than the issuing of the two letters to Mr Martin;
- that it had been refused access to a copy of the transcript of Mr Martin's evidence to the Inquiry; and
- that it was not given the opportunity to be represented before the Inquiry.

In response, the Inquiry:

- Clarified to Hazeldene's that the proposed findings related to its actions in issuing the 24 February 2016 Letter and the 8 March 2016 Letter to Mr Martin, taking into account all of the relevant surrounding circumstances.
- Advised that the Inquiry had no record of Hazeldene's requesting a copy of the transcript.
- Advised that whilst the Inquiry's general Practice Direction only provides for transcripts to be requested by a witness, in the circumstances the Inquiry would provide a copy to Hazeldene's.
- Noted that Hazeldene's had been invited by letter dated 6 April 2016 to provide information to the Inquiry either by way of written submission or at a hearing.
- Provided Hazeldene's with a further opportunity to provide information to the Inquiry.[744]

Hazeldene's advised the Inquiry in further response that:

- It did not have access to the transcript when issuing the 24 February Letter or 8 March Letter as it understood that transcript was not available to the public, and thus did not know whether Mr Martin had made the statements ascribed to him, whether within or outside the Inquiry.
- No action will be, or has been, taken against Mr Martin because of the information provided by him to the Inquiry.

In reaching my findings in respect of this matter, I have fully considered the information and responses provided by Hazeldene's. In particular, I do not accept that Mr Martin denied to Hazeldene's that he had made the statements to the Inquiry. I have formed this view in light of Mr Martin's statement to the Inquiry to the contrary, and the inconsistency of Mr Martin having done so with other statements of Hazeldene's regarding Mr Martin's actions, namely that Mr Martin continued to make the allegations.

Conclusion - participation in Inquiry by Luke Martin

The Inquiry was informed by a range of witnesses that workers were reluctant to provide information to the Inquiry due to fear of reprisals or negative consequences for their employment. This had the potential to impair the work of the Inquiry as it may have deterred persons with relevant information from bringing this information to the Inquiry's attention.

With the public release of this Report, which details the information and evidence provided by many employees, I consider it important to ensure that any person who wishes to lawfully

743. Letter to Inquiry from Hazeldene's, 8 July 2016.

744. Letter to Hazeldene's from Inquiry, 13 July 2016.

provide information to a Formal Review such as this Inquiry is free to do so, without any reprisals or negative consequences.

Accordingly, I have referred documents and information regarding Hazeldene's actions towards Mr Martin to Victoria Police, pursuant to s 116 of the Inquiries Act, for further investigation should Victoria Police consider it appropriate to do so.

Participation in the Inquiry by Derek Dent

A further matter potentially involving s 121 of the Inquiries Act arose during the Inquiry. Whilst it did not occur in the meat industry, I deal with it here for convenience.

On 13 May 2016, the Inquiry received correspondence drawing its attention to disciplinary action allegedly taken by Devondale Murray Goulburn Leongatha against a witness at the Inquiry's Morwell hearing on 29 February 2016, Mr Derek Dent. On the face of the documents provided to the Inquiry, the alleged disciplinary action appeared to relate to a radio interview conducted with Mr Dent subsequent to his appearance at the Inquiry.

On 20 June 2016, I wrote to Devondale Murray Goulburn inviting it to provide information to the Inquiry regarding that matter.

On 5 July 2016, Stewart Green, Head of People – Operations, Supply and Logistics, Devondale Murray Goulburn contacted the Inquiry to request an extension of time to consider the invitation. An extension until 19th July 2016 was confirmed by email by Inquiry staff, and acknowledged by Mr Green by return email.

No further response was received from Devondale Murray Goulburn.

The Inquiry advised Mr Green by email that any further information which Devondale Murray Goulburn sought to provide must be received by close of business on 4 August 2016. No further response was received from Devondale Murray Goulburn at any time.

In the absence of a response from Devondale Murray Goulburn, and only limited information regarding the treatment of Mr Dent, I do not have a sufficient basis for making any findings or recommendations regarding this matter. However, I note that it is open to Mr Dent to make a complaint to the appropriate authorities directly, should he wish to do so.

Adequacy of s 121 of the Inquiries Act

One matter of some irony is that s 121 of the Inquiries Act provides protection for employees from dismissal or detrimental action by their direct employer, but does not extend to actions by a host against a labour hire employee.

For reasons consistent with those set out at 3.5.2, in my view this protection should extend to all workers of a business or undertaking, in respect of the person conducting that business or undertaking, and should not be confined to an employer/employee relationship.

Recommendation 8
Section 121 of the Inquiries Act should be amended so that it applies not only to employer-employee relationships, but also to other relationships in which a worker carries out work for a business or undertaking.

4.2.3 Contract cleaning industry

Evidence presented to the Inquiry, along with many media reports and studies, indicate that both labour hire and complex supply chains are particularly prominent features of the cleaning industry. The issues which the Inquiry has examined in respect of the cleaning industry go beyond labour hire, and extend to other forms of outsourcing and broader issues arising from the utilisation of complex supply chains in this industry.

The Inquiry's Terms of Reference provide, amongst other things, that the Inquiry is to consider the use and impact of labour hire arrangements in the supply chains of particular sectors, and the roles and responsibilities of various entities in those supply chains.[745] Whilst a broader examination of supply chains is undertaken in Part II of the Report, I have considered the cleaning industry here, due to the prevalence of labour hire arrangements within the broader supply chain structures in that industry.

UV provided the Inquiry with a number of examples of labour hire, supply chains and outsourcing in the cleaning industry.

UV submitted that a 2014 investigation it conducted of cleaners engaged to work at the Melbourne Cricket Ground (**MCG**) found that the MCG had engaged cleaning services from ISS Facility Services, which in turn subcontracted to the First Placement Group of Companies (**FGC**). According to the union:

> *Interviews with seven cleaners working at the MCG under FGC showed all were international students who had been recruited to work the sham arrangements. They were required to hold an ABN but were also required to wear ISS uniforms. Cleaners working on ABNs for FGC reported being underpaid between $6 per hour on Monday to Friday and up to $16 an hour on Sundays. Cleaners also reported not receiving payment of their wages for extended periods.*[746]

UV also submitted that in 2015, a group of cleaners working at Crown Casino were discovered to have been engaged through a labour hire agency called OZSCS Group, which had been engaged to provide labour to the principal contractor, Challenger Services Group. The cleaners had never met anyone from the labour hire agency, and their only contact with their purported 'employer' was via a mobile phone number apparently connected to a person in Sydney.[747] In response to an invitation to provide information, Crown informed the Inquiry that this matter had been resolved in consultation with the union. It further advised that following this issue, Crown had put in place further protections to ensure that all contractors and service providers remunerate their employees consistent with the relevant modern award. In addition to periodic auditing, Crown's procurement process now required every contractor to sign a binding confirmation every six months to affirm their compliance with relevant awards and employment laws.[748]

At the Geelong hearing, the Inquiry heard from Mr Ramandeep Dhaliwhal, who had worked as a cleaner at Werribee Plaza. Mr Dhaliwhal told the Inquiry he worked as a contractor, and was not being paid correct rates. He and four other workers then sought permanent employment directly with the head contractor. When the subcontractor who had engaged him heard of this, the other workers were dismissed. Mr Dhaliwhal tried unsuccessfully to become a permanent employee but ultimately left the job. He was owed $26,000 in unpaid entitlements, which he was ultimately able to recover, with assistance from UV. Ms Erin Keough from the union told the Inquiry that the contracting structure involved a head contractor, Millennium Cleaning, then a subcontractor known only by an individual's name, who then further subcontracted

745. Terms of Reference, (a)(iii).

746. UV, Submission no 98, 18.

747. UV, Submission no 98, 19.

748. Letter from Crown Casino to Inquiry, 19 July 2016.

to another individual, who engaged Mr Dhaliwhal. However, Mr Dhaliwhal was required to wear Milliennium Cleaning's uniform, and follow direct instructions from Millennium Cleaning supervisors.[749]

In response to an invitation to provide information to the Inquiry, Millennium advised that the company holding the cleaning contract at Werribee plaza was Millennium Hi-Tech Holdings Pty Ltd and not Millennium Services Group. It said Millennium employed 37 cleaners at Werribee Plaza, 36 as direct employees of the company and one under a labour hire contract. Millennium requires that any contractor can only sub-contract after obtaining permission from the company. Millenium said that Ramandeep Dhaliwal was never an employee of Millennium but was an employee of Superior Facilities. Millenium understood that any monies owing to Mr Dhaliwal had been repaid by Superior Facilities.[750]

GTHC told the Inquiry that K Mart contracted Just One Call to clean its Belmont store. It said the contractor employed local asylum seekers and paid them cash in hand. GTHC said the scam relies on paying one person, who has a work permit, who was then required to pay three other workers cash from his account. This created a paper trail that only leads to one worker and has the appearance of above award payments. GTHC said that when it attempted to contact the employer about the breaches, he filed for insolvency and has not been seen since.[751]

In response to an invitation to provide information to the Inquiry, K Mart advised that it contacted the service provider, Just One Call, which checked with its subcontractor, One Service Call (Aust) Pty Ltd which claimed that all workers were being paid lawfully. K Mart informed the Inquiry that subsequently, Just One Call discovered One Service Call had gone into external administration. Just One call ceased to use this subcontractor as it had not disclosed that status. A new subcontractor was engaged by Just One Call to perform the Belmont K Mart store cleaning. K Mart said it expected all its cleaning contractors to pay the relevant minimum rates of pay and entitlements and to comply with all workplace laws.[752]

GTHC also told the Inquiry that the City of Greater Geelong engaged a large cleaning contractor called Quayclean to clean the three public swimming pools in Geelong. In turn, Quayclean subcontracted the cleaners through a labour hire agency that recruited workers on bridging visas, knowing they had no work permits. The workers had to work the first two weeks for free and were only paid $10 per hour cash in hand. They could not read English and were forced to sign documents stating they had received training. GTHC told the Inquiry that this case was satisfactory resolved with the assistance of the city council and Quayclean.[753]

In October 2015, ABC's *7.30* program aired allegations that cleaners working in Myer stores were engaged as subcontractors, through a contracting chain operated by Spotless (which held the cleaning contract with Myer). It was alleged that cleaning workers were paid below award rates of pay, did not receive penalty rates and were responsible for meeting their own tax, superannuation and insurance requirements. Both Myer and Spotless released statements stating that they would investigate the allegations. INCI Corp, one of the contracting companies, claimed that workers had requested to be engaged as contractors on ABNs.[754]

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749. Ramandeep Dhaliwhal, Geelong Hearing, 7 December 2015.

750. Email from Millennium to Inquiry, 17 June 2016.

751. GTHC, Submission no 83, 1.

752. Letter from K Mart General Manager, Corporate Affairs, Tracie Walker, 17 June, 2016, 1-3.

753. GTHC, Submission no 83, 2.

754. Myer cleaners accuse retailer of underpayment, denying entitlements with 'sham contracting' practice', *ABC News*, 22 October 2015. See also Maria Azzura Tranfaglia, 'Law allows Myer to outsource responsibility for labour hire workers', *The Conversation*, 28 October 2015.

It was subsequently alleged that one of the cleaners engaged by INCI Corp had been dismissed, because he had provided information for the *7.30* investigation.[755] The worker, Rafael Colobon, was reinstated following the commencement of Federal Court proceedings by UV.[756]

UV told the Inquiry that its investigation and a subsequent media investigation revealed that cleaners in Myer department stores were being underpaid by as much as $7 per hour, resulting in debts of more than $10,000 per cleaner in lost wages and other entitlements.[757] UV said that these cleaners have now been re-engaged as employees and have begun to receive appropriate minimum wages. However, the union indicated that cleaners have not been compensated for the underpayments that occurred earlier in 2015, and that Myer has deferred responsibility to Spotless (the contractor supplying the cleaners). UV submitted that this followed on from a previous revelation of serious exploitation occurring in relation to Myer cleaners in late 2014, where FWO discovered underpayments totalling more than $12,000 involving four cleaners.[758]

In response to a request from the Inquiry to Spotless to provide relevant information, Spotless said that the events arising from the contract entered into between Spotless and Myer were regrettable. It said that the adverse effects for the employees concerned had been rectified by the actions of Spotless. It said that the events leading to the situation were not systemic in nature nor were they reflective of the employment practices of Spotless. They arose from the actions of a single manager, acting on his own and whose employment has now been terminated as a consequence of his actions.[759]

UV also submitted that about 95% of cleaners working in Melbourne office buildings were born overseas, and 56% were international students. Within this same group, one in four reported being engaged through a subcontracting arrangement. UV submitted that these workers are often unaware of their legal entitlements, or are concerned about the implications of pursuing underpayments on their ability to remain employed or on their visa status: 'These fears are often relied upon, or exaggerated, by subcontracting companies to ensure that the workforce do not pursue their entitlements.'[760] UV contacted almost 250 cleaners across 100 Melbourne office buildings, and conducted 41 key interviews, in its study of the contract cleaning industry in Melbourne's CBD. Its 2013 report, *A Dirty Business*,[761] found that:

- *More than half (56%) of CBD cleaners are international students from countries such as India, Sri Lanka, Bangladesh and Colombia.*
- *'Reputable' cleaning contractors are cutting costs by using shadowy cleaning sub-contractors that exploit international students, whom they employ as cleaners in Melbourne's CBD office buildings by under-paying them up to $15,000 a year.*
- *Many of these 'ghost workers' are being employed illegally in what appears to be sham contracting arrangements on Australian Business Numbers and sometimes without any paperwork.*
- *Three out of four international students know little or nothing about their rights at work, and many are subject to abuse and intimidation.*[762]

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755. Whistleblower sacked after lifting lid on Myer cleaner 'sham contracts", *ABC News*, 25 November 2015.
756. Anna Patty, 'Myer cleaner and whistleblower Rafael Colbon reinstated after sacking', *The Sydney Morning Herald*, 27 November 2015.
757. UV, Submission no 98, 17.
758. UV, Submission no 98, 17.
759. Letter to Inquiry from Spotless, 20 June, 2016.
760. UV, Submission no 98, 21.
761. United Voice, *A Dirty Business - The exploitation of international students in Melbourne's office cleaning industry* (2013).
762. Ibid, 3.

The UV report found underpayments in at least one in four city office buildings.[763]

A number of academic studies have examined supply chain issues in the contract cleaning industry.

Holley (2014) observed, based on a case study of New South Wales Government school contract cleaners, that cleaners' labour standards are regulated predominantly through commercial contracts for services. This was concerning because these contracts are designed to facilitate commercial objectives such as competition and efficiency and are poorly designed to protect labour standards. Holley found that when used as a mechanism to enforce labour standards, contracts fail to meet the requirements of responsive regulation; contracts have limited enforcement tools and a weak credible threat of a 'big stick' style of punishment for infringements.[764] This left a significant group of vulnerable workers poorly protected.[765]

Campbell and Peeters (2008) documented low hourly rates and short and irregular hours of paid work for contract cleaners, along with problems with work schedules and workloads. They observed that the dominant profile for cleaning work is one of low pay, compressed schedules and high work intensity. The authors related this to practices of property owners, property tenants and cleaning companies. They described labour cost cutting as a key industry imperative, which pushes contract cleaning companies to intensify work and to avoid minimum labour standards.[766]

A report commissioned by the New Zealand Department of Labour into precarious employment in 2004 focused on the cleaning industry along with some others. The cleaning industry case study found a high degree of uncertainty for employees due to rotating rosters, and that the complex nature of cleaning supply chains can make it difficult to ensure that wages are paid fairly. In addition, due to the competitive nature of the tender process, contractors drive down prices which serves to depress employee wages.[767]

4.2.4 Non compliance by labour hire agencies

There is evidence of non-compliant labour hire practices across various sectors of the Victorian economy. However evidence to the Inquiry, along with various other studies, media reports and other recent inquiries suggest that there are three industries in which non-compliance amongst labour hire agencies is particularly prevalent. These industries are: horticulture; meat and cleaning.

The extent of non-compliance with workplace and other laws involving labour hire agencies, in the horticulture, meat and cleaning industries in Victoria, detailed above, requires a regulatory response. The various proposals for regulatory reform put forward by Inquiry participants, and the licensing scheme proposal which I recommend be adopted, are detailed in chapter 5 of this Report.

763. Ibid.

764. Sasha Holley, 'The monitoring and enforcement of labour standards when services are contracted out' (2014) 56:5 *Journal of Industrial Relations* 672.

765. Ibid, 686.

766. Iain Campbell and Manu Peeters, 'Low Pay, Compressed Schedules and High Work Intensity: A study of Contract Cleaners in Australia' (2008) 11:1 *Australian Journal of Labour Economics 27*.

767. Centre for Research on Work Education and Business Limited, New Zealand, *Report of Exploratory Case Study Research into Precarious Employment*, March 2004, 12-13.

4.3 Accommodation

4.3.1 Labour hire and substandard, exploitative accommodation arrangements

The Inquiry heard considerable evidence indicating a strong link between non-compliant labour hire agencies and provision of inadequate accommodation to workers, often at exorbitant rates. This appears to be particularly prevalent in rural and regional areas which rely primarily on WHM visa holders and other seasonal workers.

Underhill and Rimmer considered the role of accommodation providers in the supply of labour to the horticulture industry. They found that:

> *Many hostels act as information brokers between horticulturalists and WHMs, sourcing jobs from growers so they can fill their beds. One hostel operator in Victoria described his business model as 'being about building relationships with growers' (Hostel Manager Interview, 7 February 2013). He had acquired his hostel complete with a telephone sim card and spreadsheet allegedly plotting farm contacts. Most had lapsed so the network had to be rebuilt. Most hostel income is earned by charging from $120.00 to $180.00 a week for accommodation, and sometimes a daily fee of $5.00 to $8.00 for transport to farms. Driven by the imperative to fill beds, hostels sometimes advertise work when it is not available.*[768]

Dr Underhill submitted to the Inquiry that:

> *... [w]orking holiday maker visa holders typically stay in working backpacker hostels, or caravan parks, that often also act as intermediaries between farmers and workers. The "better" hostels focus upon providing workers to farmers rather than contractors. In some locations, these accommodation business models are now undermined by contractors that house their workers in private housing, thereby eliminating the need for hostel accommodation. We were consistently informed of employees living in houses supplied by contractors, with as many as 25 people in a 3 bedroom house. The workers were charged around $80 per week each, and then charged up to $10 daily for being driven to the farm where they work.*[769]

Adam Aldgate of the Sunraysia Trades and Labour Council (**STLC**) told the Inquiry that the main concerns regarding exploitation of labour hire workers all tend to centre on accommodation providers with labour hire businesses attached to them. He said that one in particular had over 400 workers, getting wages of $12 an hour then deducting $5 for transport every day, $130 for accommodation with half a dozen people in one room, sometimes worse, sometimes people living in sheds.[770]

Agri Labour told the Inquiry that labour is continuing to be supplied to growers in the Sunraysia district by backpacker hostels and, in other cases, by labour contractors that offer to pick a farm or field for a fixed lump sum price. It submitted that fixed price work can be conducted lawfully, but requires a knowledgeable and reputable contracting firm to ensure that any quote can sustain the lawful employment of workers and often, this is not the case. Agri Labour told the Inquiry that non-compliant labour contractors in the horticulture industry operate with a very small footprint with no registered or physical office, multiple business names which change regularly, and non-specific advertising of services with limited information being provided on wages and conditions for workers. It submitted that many of the non-compliant labour contractors 'offer' accommodation and logistics as part of a packaged solution to labourers and, in many cases, engage foreign workers with limited knowledge of their rights or an unwillingness to pursue their rights because of their vulnerabilities as migrants.[771]

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768. Underhill and Rimmer (forthcoming), 9-10.
769. Dr Underhill, Submission no 32, 7.
770. STLC, Mildura Hearing, 23 November 2015.
771. Agri Labour, Submission no 107, 3.

Ms Lin Yuan Chan submitted that she found a job ad on Gumtree for cherry picking in Mooroopna. She called and spoke to a caravan park owner. She was told there were 15 different farm jobs, as long as she agreed to stay in the caravan park. She transferred two weeks' rent to the caravan park owner on that day, and was required to pay a third week's rent on arrival. She was required to use the caravan park owner's transport, at a cost of $7 per day, and was not permitted to use her own car. Very little work materialised for her or her boyfriend as the cherry picking season had just finished. They decided to leave after two days but were unable to recover their three weeks' rent.[772]

Mr John George, the owner and operator of two backpacker hostels located in Mildura, has first-hand experience of the local horticultural labour market. He described a gross level of non-compliance with industrial laws in the region. He said he could 'count on the fingers of one hand over seven years the labour hire organisations and many employers that operate consistently according to my understanding of industrial law in Australia'. Initially Mr George sourced work for backpackers from wherever he could find it. However, he has since built up a group of contacts. The majority of work sourced is direct from the grower/employer. He has gradually reduced dependence on finding work for backpackers through labour hire contractors 'owing to the lack of certainty around almost everything they do'.[773]

Mr George indicated that he is forced by the local labour market to organise workers for growers even where he knows they are being underpaid by the grower: 'The issue for us is if we take a stand and say no, the pay rate contravenes the award rate we lose the work and the backpacker misses out on some days that could go towards their 88 days to get [a] second year visa.'[774]

Mr George's two backpacker hostels offer 75 beds in total. He told the Inquiry that predominantly, backpackers staying at the hostels have 417 WHM Visas or 462 Work and Holiday Visas. 417 visa holders are generally seeking to satisfy the 88 day requirement to be able to apply for a second year on their visa. Backpackers also seek to experience Australia away from the major cities and tourist routes. Sourcing work for backpackers in Mildura is an important feature of the provision of accommodation. Mr George does not charge backpackers for finding them work, or employers for providing them with workers.

Mr George said some contractors rent houses then charge them out to workers at $100 per week, thus undercutting hostels and avoiding costs which are imposed on registered hostels.[775]

A witness told the Inquiry in closed hearing that in Robinvale, across from the witness's home, a house owned by a labour contractor with three bedrooms was housing approximately 20 people. The kitchen had been taken over as accommodation and the residents were cooking in the yard.[776]

A confidential submitter told the Inquiry that in Mildura, a number of hostels act as labour hire contractors for 417 visa holders and other foreign workers. In some instances, hostels advertise via Facebook and other websites that they can arrange work, and supply transport. Some have mini vans specifically to transport workers to jobs. There are reputable hostel owners and operators in the region, but there are others about which there are persistent rumours of poor and illegal practices. Hostels can be large or small, but some act as major sources of workers to farms. As an example, at the height of the picking season, a hostel in Merbein is estimated to have 200 backpacker workers staying at its premises and going out each day to sites around the region. Reports of hourly rates paid to workers sourced from various hostels range from $10 to $15 an hour. Workers are given an envelope with cash in

772. NUW on behalf of individual workers, Submission no 75, lvii.

773. John George, Submission no 29, 1.

774. John George, Submission no 29, 3.

775. Ibid.

776. Community/Government, Closed Hearing 7, Mildura, 24 November 2015.

it, from which accommodation, transport and often a finder's fee have been deducted. Piece rates, or contract rates as they are also known, are common. There are instances where workers end up with only $20 to $40 a day after expenses are deducted, for a full day's work.[777]

The NUW and Ms Ying Ho told the Inquiry about Mr Sam Huor, a former director of Chompran Enterprises. As recounted at 4.2.1, Chompran was a labour hire agency providing workers to Covino Farms. The company deregistered, owing at least $1.2 million in unpaid wages to its former workers. The NUW and Ms Ying Ho told the Inquiry that Mr Huor continues to operate.

Many of the overseas workers he engages live in Sale, often with up to 15 people in one residence, with each person paying $80 to $100 weekly to Mr Huor.[778] A confidential witness told the Inquiry that the local council was aware of Mr Huor's 'doss houses in Sale', but have taken no action: 'no inspections, no requirements, 15-20 people to a house, stacked in like rabbits in a burrow, and they are all paying a hundred bucks a week rent'.[779]

The Inquiry heard that often, workers do not have a choice as to whether they use accommodation provided by or through the labour hire operator through which they obtain work.

The Safety Institute of Australia submitted that workers in regional areas are often required to make use of employer-provided accommodation, giving the examples of remote or seasonal work such as mining, hospitality, shearing or fruit picking. It submitted that accommodation for labour hire workers is usually provided by the host employer; or at least the costs of accommodation are covered by the host.[780]

The NUW submitted that in some instances, workers are forced to live in the accommodation provided, even if they would have otherwise preferred to arrange their own accommodation. In the words of one worker: 'Workers have to live on the farm. I feel I am like a prisoner here.'[781]

The Inquiry also heard extensive evidence about health and safety concerns arising from the provision of accommodation associated with labour hire agencies. Mr Aldgate of the STLC told the Inquiry: '[t]here are some very serious issues in regard to the health and safety of people in some of these accommodations.'[782] Another witness said: 'We have so many illegal boarding houses in [Mildura] that the CFA is very very concerned that there are power boards on power boards on power boards, and it's only a matter of time with these families cooking their meals at night where there's an overload of power and the next thing the CFA is going in to drag out 20 charred bodies.'[783]

In contrast to the above, Mr Andrew Young, a grower who directly engages his workers, told the Inquiry that he houses his workers on his farm. The accommodation, which he has recently renovated at his own cost, houses up to six people. He charges $80 per week for the accommodation, and fills it for five or six months of the year. He told the Inquiry that he provides the accommodation at a loss: '[w]e try to make it sort of close to level, but it's not.'[784]

Tranfaglia has observed that in many cases workers, 'very often migrants on Working Holiday Visas engaged by a middleman who runs a backpackers hostel and offers accommodation as well as work – miss out on basic rights like minimum wages, penalties, loadings, overtime, allowances and leave.'[785]

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777. Confidential, Submission no 87.
778. Kayla Ying Ho, Morwell Hearing, 1 March 2016.
779. Community member, Closed Hearing 29, Morwell, 1 March 2016.
780. Safety Institute of Australia, Submission no 48, 2-3.
781. NUW, Geelong Hearing, 8 December 2015.
782. STLC, Mildura Hearing, 23 November 2015.
783. Community/Government, Closed Hearing 7, Mildura, 24 November 2015.
784. Andrew Young, Melbourne Hearing, 9 February 2016.
785. Maria Azzura Tranfaglia, 'Australian dream a nightmare for many labour hire employees', *The Conversation* (18 February 2015).

The problem of substandard and exploitative accommodation arrangements associated with labour hire agencies is not unique to Victoria. In its Baiada Inquiry Report,[786] FWO stated that visits undertaken by Fair Work Inspectors identified migrant workers living in overcrowded residential houses in the Beresfield area surrounding the Baiada Group plant:

> *Workers advised they were informed by their recruiters that they would not get work unless they rented accommodation from the contractor. They alleged rent was then deducted from their pay. One Beresfield property was found to have sleeping accommodation for 21 people. Residents in the overcrowded house were identified as being migrant workers at the Baiada plant. The Newcastle City Council issued a Notice of Intent to serve an order to cease operating as a backpacker hostel. The Notice resulted in the owner negotiating with the council to reduce the number of occupants to prevent the council serving the order. Land title searches show this property was purchased by an individual from Sydney for use as a tenancy in March 2012 for $370,000. Based on 20 people paying $100 per week, the potential rental income for this property is over $100,000 per year.*[787]

4.3.2 Business models designed to avoid accommodation regulation

Mr Peter Crisp MP informed the Inquiry that in Mildura, difficult issues arise with establishments providing accommodation that are not registered under relevant Victorian laws. Accommodation providers are not required to state whether they are registered or not in any advertising they use to attract backpackers. The cost of accommodation in and around Mildura is typically around $150 per week, which is competitive with what backpacker hostels charge. Whilst most hostel operators provide suitable accommodation, those labour hire companies/hostels trying to circumnavigate the system can provide accommodation of a substandard nature.[788]

Mr George's hostels are registered by Mildura Council and subject to the *Public Health and Wellbeing Act 2008* (Vic) and regulations made thereunder, meaning that these premises can be inspected without notice. He told the Inquiry that some operators charge backpackers to find work rather than for accommodation, and thereby avoid the statutory registration requirements and inspection framework. They provide accommodation for 'free'.

The Inquiry received a number of confidential submissions and other information regarding a particular business model run by Mr Serdar Donmez, involving the provision of labour contracting and accommodation services to backpackers in Mildura.[789]

The features of the business model, as described to the Inquiry, are as follows:

- Backpackers answer an advertisement for work in the Mildura area placed on Gumtree. On telephoning the mobile phone number in the advertisement, they speak to another backpacker who assures them that there is plenty of well-paying work, as well as accommodation, for $150 per week. Based on this conversation, the backpacker will travel to Mildura. Mr Donmez pays the person who takes the call $10 for each new backpacker recruited.
- Upon arrival in Mildura, the backpacker first meets Mr Donmez. He requires the backpacker to sign a 'terms and conditions' document. The terms and conditions document provides as follows:
  - The signatory is required to make a two week advance payment of a 'job search fee' of $150 per week, which is non-refundable.
  - The signatory is required to make payment of a $150 deposit, which is refundable only where one week's written notice of cancellation of the agreement is provided, and if there is no property damage.

786. See 4.2.2.

787. FWO (2015), 13.

788. Peter Crisp MP, Submission no 30, 5.

789. Confidential, Submission no 4; Community/Government, Closed Hearing 06, Mildura, 24 November 2015; Community and Government, Closed hearing 18, Melbourne, 9 December 2016.

- It is not a rental agreement, and the signatory is not paying for accommodation.
- Accommodation is provided free of charge, however this may be revoked at any time, and the signatory must vacate immediately when asked.
- The agreement can be terminated at any time.
- There is no guarantee of employment and the owner/operator is excluded from employment issues.

- The backpacker is required to pay the labour contractor $450 up front, constituting two weeks' 'job search fee' and $150 deposit. Sometimes the new backpackers are driven to the ATM by Mr Donmez to withdraw this amount if they do not have it on their person.
- The backpacker is then taken to either a house in Mildura, or a block of land upon which there are a number of caravans. The accommodation is overcrowded and substandard. The house is a four bedroom, two bathroom house, and it is configured to sleep a total of 32 persons, including 12 in the garage of the house. The caravan park reportedly sleeps up to 40 people and there are two showers and toilets.
- Upon arriving at the accommodation the backpacker discovers from talking to others staying at the accommodation that work is scarce. Sometimes no work is provided in the first two weeks. Where work is provided, it is sometimes not enough to cover the job search fee, and is sometimes paid at below legal pay rates.
- Mr Donmez does not advise backpackers of the availability of work until after 11pm at night for the next morning on regular occasions. He attends the accommodation at night. There are security cameras at the premises and Mr Donmez makes audio and video recordings of backpackers without their consent.
- Mr Donmez regularly requires backpackers to vacate the premises in an arbitrary way, and utilises the services of security guards to do so.
- Many backpackers stay only a short period before providing the required notice to have their deposit refunded and leave. Mr Donmez often requires them to vacate the property prior to the notice period ending, without refunding the deposit. Often this occurs late at night, meaning obtaining alternative accommodation is very difficult.
- Most backpackers who come to Mildura to work do so in order to obtain 88 days' relevant work so that they satisfy the requirement to obtain a second 12 month working holiday visa. Mr Donmez promises to sign off on this work, however regularly refuses to verify the work which has been completed towards this target.

Complaints to various authorities by many different people have been made, over time, in relation to the above practices; however they have not resulted in any successful regulatory intervention. The arrangement has been described variously in confidential material provided to the Inquiry as 'horrific', a 'prison of fear' and 'immoral'. The accommodation has been described as 'uninhabitable', 'beyond poor' and a 'slum'.

Mr Donmez independently contacted the Inquiry and sought to provide information. He gave evidence to the Inquiry in a closed hearing in Melbourne on 25 February 2016. At Mr Donmez's request, a further hearing was convened for 7 June 2016 to allow him to conclude his evidence to the Inquiry with a legal representative present. In addition, on 3 May 2016, Mr Donmez was provided by the Inquiry with a list of matters in writing about which his response was sought.

Mr Donmez confirmed by telephone with Inquiry staff that he had received notification of the 7 June hearing date and time, and the list of matters for response. Inquiry staff verbally confirmed the date and time of the hearing with him, and sent him a further copy of the relevant correspondence to a new postal address which he had provided. A hearing was duly convened at 10 am on Tuesday 7 June 2016. However Mr Donmez did not attend the hearing, nor contact the Inquiry Secretariat to explain his non-attendance. The hearing concluded in his absence

at 10.18 am. Mr Donmez later contacted Inquiry staff to advise that his non-attendance was due to his belief that the hearing commenced at 11.30 am. He requested that the hearing be reconvened that day. This request was refused.

On 8 June 2016 the Inquiry received from Mr Donmez, by express post:

- A copy of an 18 page hand-written document dated 7 June 2016 commencing with 'To the Supreme Court and all parties involved in my defamation case'.
- A copy of a one page Supreme Court of Victoria document header from proceeding SCI 2013 05971.
- A copy of a Victorian Legal Services Board and Commissioner 'with compliments' slip.

The material from Mr Donmez contained a number of allegations regarding the conduct of various persons and bodies including Channel Nine, Victoria Police, Mildura Rural City Council, Peter Crisp MP, Andrew Broad MP, Craig and John George, Consumer Affairs Victoria, MADEC Harvest Office, Mildura Tourism Office and FWO. In particular, Mr Donmez alleged that:

- These various parties have together engaged in a vicious attack on him, and his business.
- Persons have been pressured and abused to post warnings and allegations about him on social media; individuals using his business services have been manipulated and enticed to provide statutory declarations 'knowing beyond reasonable doubt that none if any of the allegations made truthfully'; and persons who have left the Mildura area have been harassed and badgered to provide negative statements concerning him and his business, despite them being satisfied with his services and holding a good opinion of him.
- Attempts by Mr Donmez to report crimes to Victoria Police have been ignored.
- Victoria Police have targeted Mr Donmez and harassed him with infringement notices and escalation to multiple criminal charges.
- Mildura Rural City Council have personally targeted Mr Donmez with racism, difficulties in obtaining permits, unnecessary court proceedings, raids on his properties and targeting him with police presence.
- Various parties have made public comment to the effect that they will seek legislative change to shut down his business as he is a rogue trader.
- Mr Crisp MP has an inappropriate relationship with Mr Craig George and Mr John George, and has approached state and federal parliaments with statutory declarations, 'un-doubtedly aware that the statutory declaration and evidence submitted to be false.'
- Mr Donmez has never been formally questioned about the allegations against him, and proper investigations have never been conducted.
- This has caused serious detriment to Mr Donmez and his family.

In the material received from Mr Donmez on 8 June 2016, he also alleged as follows regarding the Inquiry:

- The Inquiry was established as a result of allegations against him, in particular by Mr Peter Crisp MP.
- At a hearing of the Inquiry (the 25 February 2016 hearing), his proposal to establish an independent company to address serious issues in the industry such as tax evasion, underpayment and other problems seemed to have been supported by the Inquiry.
- Just prior to the end of his hearing at the Inquiry, the Inquiry directed questions to him regarding his business practices, and 'produced a document recognised to be a contract agreement signed by patrons upon commencement of my services.'
- The Inquiry refused to answer his questions and continued to 'interrogate' him regarding allegations made public via media and during the course of the campaign, 'confirming the source to be no other than Mr Crisp.'

- He refused to answer 'due to the current proceedings for defamation and the fact that [he] had no legal representatives'.
- He offered to provide evidence to the Inquiry 'that would show the statutory declarations were provided to them with this knowledge of the contained to be false (sic)' but members of the Inquiry stopped him doing so, stating he would have another opportunity to do so.
- The Inquiry has asked him a list of questions in correspondence which are similar to the allegations in the defence of Channel Nine in his defamation proceedings, and this suggests that all parties have conspired and have been negligent to accept evidence offered by him.

Mr Donmez was informed by letter dated 22 June 2016 that I was proposing to make findings which may be adverse to him in respect of matters relating to his business activities. A range of possible adverse findings against Mr Donmez was outlined in writing. Mr Donmez was informed that the material received from him on 8 June 2016 would be taken into account as his response to these matters. In addition, the Inquiry provided Mr Donmez with a further and final opportunity to respond, in writing, to the matters which were to be addressed at the 7 June hearing, by no later than 11 July 2016. Mr Donmez was advised that any other document or information he sought to bring to the attention of the Inquiry must also be provided by no later than that time. A list of the matters upon which my proposed adverse findings were based was enclosed.

On 11 July 2016, Mr Donmez responded by email, acknowledging that date as the final date for submitting relevant evidence and answers to questions. In summary, his email stated that:

- He is engaged in Supreme Court defamation proceedings and is in the process of exhibiting evidence in his defence, and is unable to comment further at this point in time beyond what he stated in his initial hearing and in his written document dated 7 June 2016.
- The Inquiry had neglected to address the proposal he put forward to form an independent company to address problems in the industry, and has persisted in interrogating him about allegations that have been in the public forum and subject to extensive investigations during the 'obvious campaign conducted prior to the establishing of the independent inquiry'.
- He contacted the Inquiry of his own accord and the Inquiry should have instead requested his involvement.
- The authorities who have been investigating him for a number of years should be questioned about any adverse findings against him, and the Inquiry should assist him with the procedure and available evidence upon which these findings are based.
- He is disappointed that he has not received gratitude for raising the serious issues surrounding the visa program and its threat to the nation's security, but that he has instead been further victimised.
- He seeks an available time and date to meet to submit additional information regarding his company proposal, and seeks the Inquiry's advice as to whether it would support a submission to Parliament.

Mr Donmez was advised by Inquiry staff on 12 July 2016 that the evidence gathering phase of the Inquiry had ended, and that his response would be taken into consideration by the Inquiry. Further correspondence from Mr Donmez on 29 July 2016 did not contain any further responses of substance to the matters raised.

I have considered Mr Donmez's response to the matters regarding the business model operated by him, which are set out above. His response did not directly address most of the matters put to him regarding his business activities, although I have taken his response to amount to a denial of each of the matters, and opposition to each of the possible adverse findings in respect of these matters.

Instead, Mr Donmez alleged that there is effectively a conspiracy against him at the highest

levels to attack and damage his business. I did not find Mr Donmez's allegations in this regard to be convincing. Further, despite many opportunities to do so, Mr Donmez did not produce any documents or evidence to the Inquiry to substantiate his allegations.

In contrast, the Inquiry heard credible and consistent evidence from a number of witnesses which supports the making of a number of findings in respect of the operations of Mr Donmez's job search business.

As outlined earlier in this chapter, s 108 of the Inquiries Act provides that if a Formal Review proposes to make a finding which is adverse to a person, it must be satisfied that the person is aware of the matters upon which the proposed finding is based, and has had an opportunity at any time during the course of the inquiry to respond on those matters. It further provides that where a finding which may be adverse to a person is included in the report of a Formal Review, the report must also fairly set out the response of that person to the proposed findings.

As outlined above, Mr Donmez has been made aware of the matters providing the basis for the proposed adverse findings, and has provided a response. Part of his response was provided in the closed hearing on 25 February 2016. The hearing was closed at Mr Donmez's request. Accordingly, those aspects of his response obtained at the hearing are not set out here. However I have taken them into account. The remainder of his response has been fairly summarised above.

Finding 4.5

I find, in respect of the conduct of Mr Serdar Donmez's job search business in the Mildura area:

- That Mr Donmez misrepresented the availability of work in the Mildura area to potential job search workers, which led them to travel to Mildura to use his services.
- That the fee paid by persons using his services was in fact paid in part for accommodation; and that the terms and conditions document which he required users of his services to sign, insofar as it provided for 'free' accommodation, was a sham designed to avoid regulatory requirements.
- That the accommodation provided by Mr Donmez was substandard as it was overcrowded with insufficient amenities.
- That a significant proportion of persons using Mr Donmez's services either left of their own accord or were evicted by him within a short time of arriving in the Mildura area, and where this occurred, Mr Donmez would not refund their $150 deposit and/or $300 two-week advance fee.
- That Mr Donmez falsely signed or refused to sign visa documentation (confirming that users of his services had completed the 88-day requirement to obtain a second year on their working holiday visa), irrespective of a job search worker's actual working hours.
- That Mr Donmez's business model was designed to avoid current regulation.

Further, I have referred documents and information regarding this matter to the Mildura Rural City Council and Consumer Affairs Victoria pursuant to s 116 of the Inquiries Act, for further investigation should those organisations consider it appropriate to do so.

A key problem exposed by the business model described above is that the application of existing regulatory mechanisms relating to employment conditions, provision of accommodation and consumer protections is not straightforward. This is examined further below.

4.3.3 Regulatory framework for labour hire accommodation

Three different Victorian regulatory schemes have potential application to the provision of accommodation associated with labour hire agencies. These are:

- the *Public Health and Wellbeing Act 2008* (Vic) (**PHW Act**) and associated regulations, in particular regarding the requirement for 'prescribed accommodation' to be registered;
- the *Residential Tenancies Act 1997* (Vic) and the *Rooming House Operators Act 2016* (Vic), in respect of regulation of rooming houses; and
- local government planning schemes.

Public Health and Wellbeing Act 2008 (Vic)

The PHW Act requires the proprietor of prescribed accommodation to register that accommodation with the relevant local council. A breach of this provision attracts a penalty of 60/300 penalty units for an individual/corporation.[790]

Section 3 of the PHW Act defines prescribed accommodation to mean any of the following which is prescribed, or is of a class which is prescribed, to be prescribed accommodation:

> *(a) land on which persons are permitted to camp, on payment of consideration, and facilities for their use;*
>
> *(b) any premises used as a place of abode, whether temporary or permanent, fixed or mobile, where a person or persons can be accommodated on payment of consideration;*
>
> *(c) any accommodation provided to an employee in accordance with a term of an award governing the employment of the employee, or a term of the employee's contract of service, for use by the employee during that employment or service.*

Regulation 13 of the *Public Health and Wellbeing Regulations 2009* (Vic) (**PHW Regulations**) provides that the following (relevant) classes of accommodation are prescribed for the purposes of s 3 of the PHW Act:

- residential accommodation – defined to mean 'any house, building, or other structure used as a place of abode where a person or persons can live on payment of consideration to the proprietor', excluding a hotel or motel, hostel, student dormitory, holiday camp or rooming house;[791]
- hostels – defined to mean 'any house, building or structure, whether temporary or permanent, which is used primarily for the accommodation of travellers';[792] and
- rooming houses – defined in reg 4 to mean 'a building in which there is one or more rooms available for occupancy on payment of rent in which the total number of people who may occupy that room or those rooms is not less than 4.'[793]

There is also a series of exemptions from prescribed accommodation.[794]

Section 235(b) of the PHW Act provides that the regulations may prescribe a range of specific matters in respect of prescribed accommodation, including, for example, the number of people who can be accommodated, hygiene and cleanliness, provision of water, cooking, washing

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790. PHW Act s 67.

791. PHW Regulations, regs 4, 13(a).

792. PHW Regulations, regs 4, 13(c).

793. PHW Regulations, regs 4, 13(f).

794. PHW Regulations, reg 14. Potentially relevant exemptions are a house under the exclusive occupation of the occupier (reg 14(a)), any house, building or structure to which Part 4 of the Residential Tenancies Act 1997 applies (reg 13(g)), any vessel, vehicle, tent or caravan (reg 13(h)) or premises in which, other than the family of the proprietor, not more than 5 persons are accommodated, and which is not a rooming house (reg 13(i)).

and bathing facilities, interior finishes, safety requirements, maintenance, advertising and obligations of a registration holder. Division 2 of Part 5 of the PHW Regulations prescribes a number of specific requirements for prescribed accommodation and imposes a penalty of 20 penalty units for contravention. These include regulations relating to overcrowding, maintenance, cleanliness, water and drinking water, sewage and waste, refuse, toilet and bathing facilities, register of occupants and advertising.

The PWH Act permits the regulations to prescribe for registration:

> *any accommodation provided to an employee in accordance with a term of an award governing the employment of the employee, or a term of the employee's contract of service, for use by the employee during that employment or service.*[795]

The limitations of this definition include the following:

- it does not encompass accommodation provided by any party which is not the direct employer; and
- it does not encompass accommodation in the absence of an express contractual or award entitlement to that accommodation.

The regulations prescribe 'hostels', which are defined as 'any house, building or structure, whether temporary or permanent, which is used primarily for the accommodation of travellers'.[796] This provision may capture some of the forms of accommodation which are provided to workers as part of labour hire arrangements, described in this section of the Report. However, the PHW Act limits the classes of accommodation which may be prescribed by the regulations, to where the accommodation is provided on payment of consideration,[797] a limitation which is likely to be read into the relevant regulation.

The Mildura Rural City Council informed the Inquiry that in the past 12 months, it had received 35 formal customer requests regarding accommodation complaints. Thirty of these related to suspected unregistered accommodation, with five relating to cleanliness or overcrowding of registered premises. Of the unregistered accommodation, the council found that:

- Most were not required to be registered under the current scheme, for reasons including non-payment of consideration.
- All but one were residential houses, the other was a disused caravan park.
- The majority of houses had international people living in them, who worked on blocks (i.e. picking, pruning etc).
- Some houses were found to be housing members of the same family (or stating they were).
- Three houses were allegedly operated by the same person. The person stated that he put his name on leases for houses (owned by the same person and rented through a real estate agent) and then allowed his 'friends' from overseas (mainly Malaysia) to stay for 'free.' These persons did not pay rent but allegedly paid the owner of the house directly and paid their own bills. The council was unable to obtain evidence of who was receiving money for their stay and the complainant was unable to be contacted further.
- The council is unable to gain access to the premises in most cases.
- Many complainants are neighbours, concerned about the number of people living in the house, or concerned after having seen 'a white van and many people of international appearance' that the accommodation arrangement is illegal.[798]

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795. PHW Act, s 3(1) definition of prescribed accommodation, (c).

796. PHW Regs, regs 4, 13(c).

797. PHW Act, s 3(1) definition of prescribed accommodation, (b), which provides that the following may be prescribed: any premises used as a place of abode, whether temporary or permanent, fixed or mobile, where a person or persons can be accommodated on payment of consideration.

798. Correspondence to Inquiry from Mildura Rural City Council, 20 June 2016.

Particular difficulties with the present prescribed accommodation scheme identified by Mildura Rural City Council were:

- Difficulty in gaining sufficient supporting evidence that prescribed accommodation is being provided, including obtaining evidence of payment, and statements from operators that all residents are family members.
- The accommodating of a large number of people in standard residential houses, not designed nor intended to be used in that manner.
- In the PHW Regulations, no restriction on the number of bedrooms in a house, meaning that other rooms such as the lounge room may be used as a bedroom.
- A current lack of consequences for operators doing the wrong thing:

> *There are some houses with approx. 20 people living in them each paying $150 rent per week (alleged to be). This is approx. $3000.00 income each week, the infringements and penalties in the Public health and wellbeing act don't really act as a deterrent, especially if operators are aware of the loop holes "payment of consideration".*[799]

Residential Tenancies Act 1997 (Vic) and Rooming House Operators Act 2016 (Vic)

The Residential Tenancies Act regulates, amongst other things, rooming houses.

A rooming house is defined as:

> *a building in which there is one or more rooms available for occupancy on payment of rent, in which the total number of people who may occupy those rooms is not less than four (or in respect of which a ministerial declaration has been made).*[800]

However, the Act does not apply to a tenancy agreement created or arising under the terms of a contract of employment, or entered into in relation to such a contract.[801] The requirement that rent be paid, and the exclusion of tenancy agreements entered into in relation to an employment contract, are both factors which (on their face) create difficulties with the application of these laws to the business model described at 4.3.2.

Planning and Environment Act 1987 (Vic)

The Planning and Environment Act is the legislation under which local government planning schemes are made. The *Victoria Planning Provisions* are template provisions which can be adapted by local councils.[802] In some cases, a permit is required to use certain types of buildings. The template provisions contain an exemption to that requirement for 'Shared Housing'. Provision 52.23 provides:

> *52.23 SHARED HOUSING*
>
> *A permit is not required to use a building, including outbuildings normal to a dwelling, to house a person, people and any dependants or 2 or more people if the building meets all of the following requirements:*
> - *Is in an area or zone which is used mainly for housing.*
> - *Provides self-contained accommodation.*
> - *Does not have more than 10 habitable rooms.*

The exclusion from the scheme of all premises with 10 or less habitable rooms means that most domestic homes, where several people are accommodated in a small number of rooms, will not be caught by the requirement to obtain a permit for use of the property in that manner.

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799. Correspondence to Inquiry from Mildura Rural City Council, 20 June 2016.
800. *Residential Tenancies Act 1997* (Vic) s 3.
801. *Residential Tenancies Act 1997* (Vic) s 12.
802. See: http://planningschemes.dpcd.vic.gov.au/schemes/vpps.

Employment and safety regulation

Some employment and OHS regulation also touches upon the provision of accommodation.

Section 325(1) of the Fair Work Act prohibits the practice of unreasonable deductions from an employee's wages, providing that:

> *an employer must not directly or indirectly require an employee to spend any part of an amount payable to the employee in relation to the performance of work if the requirement is unreasonable in the circumstances.*

The WorkSafe *Compliance Code – Workplace Amenities And Work Environment* makes provision for occupational health and safety standards for employer-provided accommodation.[803] It provides as follows:

> *Employer-provided accommodation*
>
> *112. Employees working in regional and remote areas are often required to make use of employer-provided accommodation. Examples of these arrangements are where accommodation is provided for remote or seasonal work such as mining, hospitality, shearing or fruit picking.*
>
> *How to comply*
>
> *113. The accommodation needs to be separated from any hazards at the workplace likely to present a risk to the health or safety of an employee using the accommodation. The facilities also need to meet the following standards:*
>
> - *the accommodation is lockable, with safe access and egress*
> - *fire safety arrangements are in place*
> - *electrical safety standards are implemented*
> - *drinking water is available*
> - *there are appropriate toilets, as well as washing, bathing and laundry facilities*
> - *procedures are in place to ensure cleanliness*
> - *suitable sleeping accommodation is provided, ensuring noise is reduced so far as is reasonably practicable*
> - *crockery, utensils and dining facilities are available*
> - *rubbish is collected*
> - *heating, cooling and ventilation meet the standard of workplaces*
> - *adequate lighting is available*
> - *there are storage cupboards and other appropriate furniture*
> - *a refrigerator or cool room is provided*
> - *the accommodation meets all relevant structural and stability requirements*
> - *the fittings, appliances and any other equipment supplied are maintained in good repair.*

The Safety Institute of Australia submitted that this compliance code should be extended to any accommodation provided by labour hire providers. In addition, the Institute recommended that additional resources be provided to WorkSafe to undertake accommodation inspections.[804]

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803. WorkSafe, *Compliance Code – Workplace amenities and work environment* (Edition 1, September 2008), 21.

804. Safety Institute of Australia, Submission no 48, 2-3.

Findings and recommendations – regulatory framework for labour hire accommodation

It is apparent that the Victorian regulatory framework outlined above has not been effective to address the problems with provision of accommodation associated with labour hire arrangements, which have been illustrated in evidence provided to the Inquiry and from other sources. The incidence of these accommodation models appears to have grown extremely quickly, consistent with the general growth of labour hire arrangements and the use of temporary migrant workers over the last 10 years or so.

Regulating the provision of accommodation is difficult because of the many and varied models of housing which exist in Victorian society. Regulating to address one type of living arrangement, such as large groups of residents in small domestic properties, may have unintended implications for other types of living arrangements. Nevertheless, I make the following recommendations:

Recommendation 9
That the Victorian Government introduce legislation to amend the ***Public Health and Wellbeing Act 2008*** (Vic) to clarify the limitation applicable to the section 3 definition of prescribed accommodation, subparagraph (b), that the accommodation must be provided on payment of consideration. Circumstances where accommodation is provided notionally without charge, as part of a broader arrangement between the parties to the relevant transaction, should be included within the definition.

Recommendation 10
That the ***Public Health and Wellbeing Act 2008*** (Vic) section 3 definition of prescribed accommodation, subparagraph (c), be amended to reflect a wider range of working situations than simply the provision of accommodation by an employer to an employee under an award or contractual provision. The definition should include provision of accommodation to a worker by a labour hire operator, as part of the arrangement under which that operator facilitates the placement of the worker with a host.

I note also that in the United Kingdom, the GLA regulates accommodation provided by labour hire agencies to workers in the agriculture and shellfish gathering sectors, and related processing/packaging work. Labour hire providers need to declare whether they provide accommodation or have a commercial arrangement in relation to accommodation. Any accommodation classified as a 'house of multiple occupation' must be licensed and is subject to review and inspection by the local authorities, including the fire brigade. Accommodation standards also form part of the requirements for obtaining a licence from the GLA to operate as a labour provider.[805]

Similarly, the Victorian licensing scheme which I recommend in Chapter 5 would include a requirement to demonstrate compliance with applicable accommodation regulations. It is therefore important that the relevant Victorian laws clearly address the concerns about the provision of accommodation by labour hire providers highlighted in this section of the Report.

4.4 The role of piece rates

Overwhelmingly, the Inquiry heard that workers of labour hire agencies in the horticultural industry were paid based on the results of their work. Variously, this depended upon on having picked a certain volume or weight of product, or having completed work over a certain area.

805. GLA, Submission no 15, 5.

Often this method of payment resulted in very low wage rates for workers in the industry, when calculated over the period of time spent working.

For example, Mr Crisp's submission to the Inquiry supported the use of piece rates as a payment mechanism, however he described issues occurring where there is an intermediary involved (i.e. a labour hire contractor), who not only does not adequately communicate remuneration, but also takes commission for arranging the work and charges for transport: 'This then leads to the examples of people working for very little money at the end of the day.' He submitted that new arrivals in the Mildura region (e.g. backpackers) are the most vulnerable to this kind of treatment.[806]

Evidence to the Inquiry from piece rate workers, and others describing the use of piece rates, almost universally indicated that they did not have any say in determining whether they would be paid by piece rates, or what the rate would be.

For example, Mr Dean Wickham of the Sunraysia ECC stated that migrant workers get contacted by contractors, who ask if they want work and tell them how much it pays, and that the workers take the work and may or may not get what they were promised in terms of dollars per hour or piece rates.[807]

Mr Adam Aldgate, from the STLC, told the Inquiry that:

> *… as far as piece rates are concerned, it is quite common, more so in the vegetable-picking and, I suppose, oranges as well, by bin and so on where employees will go out and work on that piece rate and by the time they have been charged their travel, their accommodation and so on, they basically would break even and sometimes owe money with these arrangements that are happening. Obviously some will make very small amounts of money, but I have heard of people making $10 and $20 a day after costs and people going backwards. It is commonly referred to around the region as "contract rate" not "piece rate", seems to be the terminology that they use.*[808]

The NUW provided the Inquiry with a bundle of foreign language advertisements and blogs advertising work in the horticultural industry. One such advertisement was translated to the Inquiry as follows:

> *So what they have said is that the pay is between ten to $13 an hour and the work hours are between eight to ten hours a day, six to seven days a week. There are also instances where farms are, for example, grape farms and orange and apple farms. They usually pay piece rates and the total pay that a farm worker usually gets per day is $80 for the whole day ...*[809]

The two main instruments governing employment terms and conditions for workers in the industry are the *Horticulture Award 2010* (**Horticulture Award**) and the *Wine Industry Award 2010* (**Wine Industry Award**). Both are modern awards made under the Fair Work Act.[810]

Clause 15 of the Horticulture Award provides that an employer and a full time, part time or casual employee may enter an agreement for the employee to be paid a piecework rate.[811] There are certain requirements relating to a piecework agreement, namely: that it is in writing and signed by both parties;[812] that the employer keeps a copy, and gives the employee a copy, of the agreement;[813] and that it has been 'genuinely made …without coercion or duress.'[814]

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806. Peter Crisp MP, Submission no 30, 2-3.
807. Sunraysia ECC, Mildura Hearing, 23 November 2015.
808. STLC, Mildura Hearing, 23 November 2015.
809. NUW, Morwell Hearing, 1 March 2016.
810. See further 3.2.3 above.
811. Horticulture Award, cl 15.1.
812. Horticulture Award, cl 15.7.
813. Horticulture Award, cl 15.8.
814. Horticulture Award, cl 15.6.

The piecework rate is required to be set by reference to the minimum hourly rate. Clause 15.2 provides as follows:

> *The piecework rate fixed by agreement between the employer and the employee must enable the average competent employee to earn at least 15% more per hour than the minimum hourly rate prescribed in this award for the type of employment and the classification level of the employee. The piecework rate agreed is to be paid for all work performed in accordance with the piecework agreement.*

Significantly, the piecework rate absorbs any casual loading which a pieceworker would otherwise be entitled to.[815] Further, it is paid 'instead of the minimum wages specified in clause 14 – Minimum wages.'[816] This provides that a pieceworker can be paid at a rate which is below the minimum time-based wage under the award. To the extent that there was otherwise any doubt about this, it is confirmed in clause 15.9, which provides that:

> *Nothing in this award guarantees an employee on a piecework rate will earn at least the minimum ordinary time weekly or hourly wage in this award for the type of employment and the classification level of the employee, as the employee's earnings are contingent on their productivity.*

Underhill and Rimmer, in their 2013/14 study, found that piecework rate hourly earnings in the horticulture sector averaged well below the award minimum wage, by around $5 per hour. They concluded that:

> *This evidence points strongly towards widespread non-compliance with the award – a finding that resonates with focus group complaints such as 'long hours for terrible pay' and 'awful pay for hard work.… the low average pay of piece workers suggests that horticulturalists fix piece rates too low on the basis of exaggerated performance expectations of the 'average competent worker'.*[817]

The piecework provisions in the Wine Industry Award, whilst similar in nature to those in the Horticulture Award, are slightly more beneficial to employees than the Horticulture Award provisions. Differences include:

- the minimum piece rate under the Wine Industry Award is a rate which allows 'an employee of average capacity' to earn at least 20% more per hour than the relevant minimum hourly rate,[818] compared to 15% under the Horticulture Award; and
- greater safeguards for employees in the piecework agreement-making process. These include a requirement that an employer seeking to enter a piecework agreement provide the proposed written agreement to the employee, and where the employee's understanding of written English is limited, the employer must take measures including translation into an appropriate language to ensure the employee understands the agreement.[819] Any agreement reached must expressly set out that the piecework rate replaces the minimum hourly rate, as well as the other conditions in the Wine Industry Award which will not apply to the employee.[820]

The payment by results (or incentive payment system) provisions in the *Meat Industry Award 2010*, applicable to meat industry establishments, contain even greater safeguards for employees.[821] Under that scheme:

- the incentive payment system must be fully explained and in writing in a form enabling it to be readily understood;

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815. Horticulture Award, cl 15.3.
816. Horticulture Award, cl 15.4.
817. Underhill and Rimmer (forthcoming), 12.
818. Wine Industry Award, cl 23.2.
819. Wine Industry Award, cl 23.9.
820. Wine Industry Award, cl 23.6.
821. Meat Industry Award, cl 24.

- the employer must record how payments are calculated and payments made;
- the scheme can only be modified by agreement between the employer and the majority of employees covered by it;
- the scheme must be based on the minimum hourly rate of pay for the employee's classification, plus incentive and daily hire loadings ranging between 30% to 45% for casual or daily hire employees;
- the scheme must take account of overtime rates; and
- employees have an express right to union representation in negotiations for an incentive payment scheme.[822]

Findings – piece rates

The operation of the piece rate award provisions, particularly in the horticulture industry, creates the possibility that employees may be paid below the minimum hourly rate, and accordingly undermines the minimum safety net intended to be established by minimum hourly rates. In the horticulture industry, the safeguards which attach to piece rate systems do not appear to be utilised in practice. Further, the use of piece rates in that industry contributes to a level of subjectivity and uncertainty regarding what rate is payable to an employee, and underlies a number of problematic outcomes. In addition to the recommendations which follow in this chapter, measures to address these issues are dealt with in Recommendation 26, at 5.6.4.

4.5 Compliance activities relating to labour hire agencies

The Inquiry heard a considerable number of views regarding the effectiveness of FWO in monitoring compliance with workplace laws by labour hire operators.

Peter Crisp MP noted that FWO had been a regular visitor to Mildura but it was a challenge to collect evidence and proceed to prosecution, particularly in the case of WHM visa holders leaving the country before enforcement proceedings can be launched. Difficulties with obtaining evidence included seasonal workers being paid in cash, not receiving pay slips and not being able to identify or locate the employer.[823]

The need for a direct complainant to trigger a FWO investigation was criticised by some. Mr John George submitted that whilst workers can complain to FWO, it is not an easy process given that they are transient, and he understands he cannot pursue a complaint on their behalf.[824] A confidential labour hire agency sought to refer evidence of underpayment of WHM visa workers by a competitor to FWO. The evidence included payslips which detailed underpayments of around $5 per hour, along with underpayment of allowances; however, FWO indicated that it would only take further action if the employee involved contacted it directly. Meanwhile, the underpayments continued for nine months.[825]

Some participants were critical of the level of enforcement in their region. Mr Bernard Constable called for much greater policing of labour hire companies and contractors in rural industries.[826] GTLC submitted that there is almost no regulatory inspection of workplace compliance in Geelong, with the FWO office closing several years ago and a hotline phone

822. Ibid.
823. Peter Crisp MP, Submission no 30, 7-8.
824. John George, Submission no 29, 8
825. Confidential, Submission no 14.
826. Bernard Constable, Shearers and Rural Workers Union, Submission no 21, 2.

number that does not provide an advocacy service.[827] Agri Labour submitted that both state and federal governments should respond to illegal labour contractors by significantly increasing levels of compliance enforcement within the horticulture and agriculture industry, stating that in its experience, there is very little enforcement work being undertaken in the field by the likes of FWO, WorkSafe or any other body with an enforcement role.[828]

ACCI noted that exploitation of vulnerable workers, whether by employers who are labour hire organisations or otherwise, is a practice that should be targeted by enforcement agencies. It also referred to FWO already being active in monitoring compliance and pursuing contraventions involving vulnerable workers.[829]

Ai Group supports greater resources for FWO to investigate and prosecute illegitimate labour hire businesses that are breaking the law.[830]

The GLA also identified the importance of an enforcement body being able to assess the reality of the employment status of individuals, and it not being left to workers to bring claims themselves to employment tribunals and similar judicial structures.[831] JobWatch suggested a confidential complaint hotline be set up within a community legal centre or FWO.[832]

Consistent with evidence to the Inquiry about the main industries in which non-compliance with workplace laws occurs, in recent years, FWO's compliance activities touching upon labour hire arrangements have been most prominent in the horticulture and meat industries.[833]

In 2010, FWO established a Horticulture Industry Shared Compliance Program. The six-month program consisted of an education phase and a compliance phase. As at the publication of its report in November 2010 the program had recovered $227,308 for 585 workers. It conducted 277 audits, and of these found 36% of employers were contravening workplace laws nationally. However in Victoria, whilst the non-compliance rate was 39%, this was derived from only 31 audits, due to non-seasonal workforces being limited to family members, meaning that many employers were unable to be audited.[834]

In August 2013, FWO commenced a three year 'Harvest Trail Campaign'. The Harvest Trail is a Federal Government initiative linking jobseekers to jobs in the horticulture industry in Australia.[835] The FWO campaign was established to review compliance within the fruit and vegetable industry across Australia 'as a result of persistent complaints and underpayments in the horticulture sector'.[836] It summarises these complaints as follows:

827. GTHC, Submission no 83, 3.

828. Agri Labour, Submission no 107, 3.

829. ACCI, Submission no 55, 2.

830. Ai Group, Submission no 53, 24.

831. GLA, Submission no 15, 8.

832. JobWatch, Submission no 46, 36.

833. FWO has also conducted campaigns and compliance activities in respect of supply chains which may involve labour hire companies in the trolley collecting and cleaning industries. These activities are discussed further in chapter 8.

834. FWO, *Horticulture Industry Shared Compliance Scheme*, Final Report, November 2010.

835. See National Harvest Labour Information Service, *Harvest Guide – Work your way around Australia* (13th Edition, June 2016), at: www.harvesttrail.gov.au.

836. Fair Work Ombudsman, *Growers, hostels, labour-hire contractors cautioned over backpacker, seasonal worker entitlements*, Media Release, 5 January 2015, at: https://www.fairwork.gov.au/about-us/news-and-media-releases/2015-media-releases/january-2015/20150105-dont-get-ripped-off-this-harvest-season.

- *Being ripped off on transport or accommodation costs – this is usually encountered through new arrivals agreeing to enter into arrangements with someone (normally an unscrupulous labour hire provider) who meets them at a regional airport or bus depot and promises work, accommodation and transport for a certain sum of money. They are then normally driven to the accommodation via an ATM and asked to provide money in advance for bond, transport and accommodation costs. They are also promised work, normally at a farm that has some sort of arrangement with the so-called labour hire provider. The work is normally at a piece rate so low that it is not possible to pick enough fruit to make at least the minimum hourly rate required. When they complain or raise the issue with the provider they may be bullied or told that they will not get their bond back, nor would they have their visa extension signed off.*
- *Often the complaints also relate to a dodgy provider who has advertised on a local or foreign website or social media and simply provides an offer of work fruit or vegetable picking and a mobile number to call.*
- *The Fair Work Ombudsman often receives complaints regarding sub-standard accommodation, or accommodation that is crowded and unliveable – these complaints are referred to local authorities such as the police, councils or even the fire service.*
- *Other issues include providers gouging or inflating expenses, such as transport.*
- *In some cases, the Fair Work Ombudsman has encountered situations where a person is virtually bonded to a particular provider on the basis that they have been told that they will not have their visa extensions signed unless they "see out the season with them". These situations are often able to be addressed in conjunction with the local police and Department of Immigration and Border Protection (DIBP).*
- *The most common issue encountered by the Fair Work Ombudsman is in relation to rates of pay or piece work agreements. Often this relates to piece work agreements that do not provide a person with the opportunity, or ability, to pick the required amount of fruit to make at least more than the casual hourly rate under the Horticulture Award. The current hourly rate for a casual fruit or vegetable picker under the Horticulture Award is $21.08.*
- *A piece work agreement, which must be provided to the worker in writing, needs to be set at a rate that would allow an average competent worker to pick enough to earn 15 per cent above the hourly rate.*

FWO has also highlighted the role that growers and accommodation providers play in maintaining these problems, with growers accepting offers from labour hire agencies which offer to supply labour for less than the minimum hourly rate, and accommodation providers for bonding backpackers to a particular hostel and requiring them to work for non-compliant labour hire agencies.[837]

Some of FWO's compliance activity as part of this campaign has been in Victoria. In 2014, FWO conducted inspections of strawberry growers in the Yarra Valley in Victoria. It reported that many strawberry growers in the region use the services of contractors to provide pickers and other seasonal workers. It reported discovering one farmer paying a labour hire contractor a fee per worker equating to $2 less than the minimum wage.[838] FWO has also recently reported on underpayments by labour hire contractors in horticulture in regional Queensland[839] and South Australia.[840]

FWO reports being informed by local employers in the Hunter Valley in NSW that its compliance activities in the region 'stopped some dodgy contractors from coming to the area'.[841]

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837. Ibid.

838. Fair Work Ombudsman, *Results of Yarra Valley strawberry farm visits*, Media Release, 10 November 2014.

839. Fair Work Ombudsman, *Lettuce farm contractor signs workplace pact after short changing almost 100 overseas workers*, Media Release, 10 November 2014.

840. Fair Work Ombudsman, *Adelaide employer underpays visa-holder $22,000*, Media Release, 10 November 2014.

841. Fair Work Ombudsman, *Fair Work Ombudsman's presence helped ensure 'level playing field' for Hunter Valley grape harvest,* Media Release, 27 November 2014.

In contrast, Mr Young told the Inquiry that a history of threats and warnings from the 'authorities' (which does not necessarily refer to FWO), that have not eventuated, has led to a culture in the Mildura district where a lot of good people running good businesses knowingly cover their tracks when they are using contractors.[842]

Recent media releases and reports indicate that FWO compliance activity is continuing to occur in respect of labour hire arrangements in the horticulture and food processing industries across Australia. These include:

- Proceedings against a family farm and its manager in Queensland, who were fined $60,000 in the Federal Court for setting up sham companies to avoid overtime obligations for fruit pickers. Eastern Colour, acting on advice from workplace law firm Livingstones, set up two sham companies. One would pay the worker up to 40 hours a week and the other would record the worker's overtime hours but levied at standard rates.[843]
- Proceedings against a Sydney businesswoman and her labour hire agency in the Federal Circuit Court in 2016 for allegedly underpaying overseas workers by $45,000 at three Sydney factories that supply pastries, vitamin pills and desserts to businesses including Coles, Woolworths and airline companies. The workers were allegedly underpaid minimum hourly rates, casual loadings, Saturday penalty rates and overtime. It was also alleged that some workers had bonds of up to $300 unlawfully deducted from their wages.[844]
- An enforceable undertaking with a NSW mushroom grower caught using overseas workers who had been significantly underpaid. Gromer Enterprise Pty Ltd signed up to the enforceable undertaking after FWO said it must share responsibility for underpayments by labour provider TDS International Investment Group. FWO had found that TDS engaged 52 Chinese and Taiwanese nationals, most of whom could not speak English, to pick mushrooms at the farm at a flat rate of $16.37 an hour, resulting in $92,381 in underpayments from 2013/2014.[845]

In August 2016, the FWO entered into a formal Memorandum of Understanding with RCSA to share information on labour hire sector issues, with the objective of improving compliance standards in the sector.[846]

Findings and recommendations – compliance activities

The above evidence indicates that despite some targeted activity by FWO in respect of labour hire in the horticulture and food processing sectors, some members of the Victorian community consider that the solution to many of the problems of non-compliance in these sectors is a matter of increased enforcement of existing workplace laws.

842. Ibid.

843. *Fair Work Ombudsman v Eastern Colour Pty Ltd* (No 3) [2016] FCA 186.

844. Anna Patty, 'Overseas workers supplying pastries, desserts and vitamins to Coles and Woolworths allegedly underpaid', *The Age*, 29 January 2016.

845. Anna Patty, 'Chinese and Taiwanese mushroom pickers short changed $92,000', *The Sydney Morning Hearld (Business Day)*, 2 March 2016.

846. FWO, 'New workplace pact aims to improve compliance', Media Release, 26 August 2016.

Recommendation 11

The Victorian Government should advocate for the Fair Work Ombudsman to focus more of its compliance activity on underpayment/non-payment of award rates in the horticulture and meat industries; unlawful deductions (e.g. for accommodation) and the imposition of piece rate arrangements in those sectors; and sham contracting in the cleaning industry.

Recommendation 12

The Victorian Government should advocate for the Federal Government to implement, as quickly as possible, its 2016 election commitments to increase the Fair Work Ombudsman's investigatory powers and to increase the penalties applicable under the Fair Work Act for award breaches and failure to maintain proper employment records.

5. LABOUR HIRE LICENSING AND OTHER REGULATORY RESPONSES

Findings and recommendations

A licensing system for labour hire agencies

5.1

The evidence provided to the Inquiry shows that there is a problem with the presence of 'rogue' labour hire operators in Victoria. While it is difficult to be precise about the extent of this problem, rogue operators are particularly evident in the horticultural industry (including the picking and packing of fresh fruit and vegetables), and the meat and cleaning industries. In many instances, the activities of rogue operators have led to exploitation of vulnerable workers including underpayment of award wages, non-payment of superannuation, provision of sub-standard accommodation and non-observance of statutory health and safety requirements.

This problem stems in large part from the ease of access, or absence of barriers to entry, for persons/organisations wishing to provide labour hire services in this state. In addition, the problem stems from the lack of visibility of these rogue operators, who operate in the informal economy and outside the reach of existing regulators.

The problem requires a regulatory solution which addresses each of these underlying causes: as the submissions of those advocating increased regulation demonstrate, there is a wide range of options available. In my view, a sector-specific licensing scheme for labour hire operators is the best of those options.

Recommendation 13:

I recommend that Victoria advocate through the Council of Australian Governments process for the national adoption of a sector-specific labour hire licensing scheme. As a national approach may take some time to develop – or may not eventuate at all – I recommend that Victoria lead the way in reforming the labour hire sector, through the introduction of its own sector-specific licensing scheme. In implementing this reform, Victoria should explore the opportunities for developing cooperative arrangements with other states.

5.2

In devising a regulatory scheme that will address the problem that has been identified by this Inquiry, I am concerned to ensure that the impact on the large proportion of reputable labour hire operators is minimised. Evidence presented to the Inquiry has shown that

while reputable labour hire companies are generally compliant with applicable workplace laws (i.e. there is little if any evidence of exploitation), various other issues arise from the high use of labour hire arrangements in certain sectors (e.g. manufacturing, logistics, warehousing). These issues include the gradual replacement of permanent workforces with casualised labour hire staff, lower job security, differential wages/conditions (where a site enterprise agreement is not applied to labour hire employees) and concerns about rostering, minimal notice of shifts, difficulty managing carer/family responsibilities and uncertainty arising from shared occupational health and safety responsibilities. Some of these issues are addressed in other recommendations.

Recommendation 14:

I recommend that Victoria introduce a licensing scheme for labour hire agencies, that is initially targeted at those supplying labour in the following specific sectors: the horticultural industry (including the picking and packing of fresh fruit and vegetables), and the meat and cleaning industries. I also recommend that capacity be provided within the framework for the proposed Victorian labour hire licensing system, allowing it to be expanded to cover other industry sectors, or to be contracted in response to changing (improved) practices in the regulated industries.

5.3

It is intended that the licensing scheme would apply to conventional labour hire relationships (e.g. the provision of workers by a labour hire agency to a host organisation to fill short-term vacancies or on a longer-term basis, to carry out seasonal work, to staff a particular business function or even to staff the entire business). The key requirement for application of the scheme would be the existence of the triangular relationship between the labour hire provider, a host organisation and a worker (although it would also apply in situations where the provision of worker(s) by provider to host occurs through an intermediary). It is not intended that the scheme would apply to contracting out or outsourcing arrangements, unless these involve a labour hire relationship of the type described above.

Recommendation 15:

The scheme which I am recommending would require that any person or organisation supplying a worker to another person/organisation (whether directly or through an intermediary), in the specific industry sectors (identified in Recommendation 14) in the state of Victoria, must be a licensed labour hire operator; and must only carry on such activity through a registered business or company. The precise definition of the sectors covered by the proposed licensing scheme could be identified from the Australian and New Zealand Standard Industrial Classifications (ANZSIC).

Recommendation 16:

To obtain a licence under the proposed Victorian labour hire licensing scheme, the labour hire operator would need to provide identifying details of the business through which they operate (e.g. Australian Business Number, Australian Company Number, business/company/trading name), and meet the criteria set out below. It is envisaged that the obligation would be imposed on licence applicants to provide a statutory declaration and information demonstrating their compliance (both initially to be licensed and then as a condition of remaining licensed) with the following criteria:

- the business/company and its key personnel must pass an objective 'fit and proper person' test, which would include no past convictions for offences involving fraud, dishonesty or violence and no past involvement in insolvent businesses or breaches of workplace or occupational health and safety laws;
- the business/company must demonstrate (e.g. through employment records) that it pays its employees in accordance with the minimum rates specified in applicable industrial instruments, and affords its employees all other employment conditions (e.g. leave entitlements, rest breaks, limits on working hours) under those instruments and/or legislation;
- the business/company must be registered with the Australian Taxation Office and be deducting taxation and remitting superannuation contributions on behalf of employees as required by federal legislation;
- if accommodation is provided to employees in connection with the arrangements they enter into with a labour hire business/company, the business/company must show that the accommodation meets the standards required under applicable Victorian/local authority laws and regulations;
- the business/company must be registered with WorkSafe and be paying any required premiums;
- the business/company must provide details of its systems for ensuring compliance with occupational health and safety legislation and ensuring the safety of workers provided to host organisations (including safety in the transportation of workers to the host's work-site, where the labour hire business/company is involved in such transportation); and
- the business/company must demonstrate compliance with federal migration laws, including systems for ensuring that all employees have a right to work in Australia.

Recommendation 17:

To the extent permissible under federal law, the labour hire licensing scheme should also require the business/company to provide specified information to the licensing authority relating to the numbers and categories of workers engaged on temporary work visas. This is to enable a clearer picture to be developed about the prevalence of temporary visa workers engaged by labour hire agencies in Victoria in the regulated sectors, and the type of visa those workers hold.

Recommendation 18:

A labour hire operator meeting the licensing criteria would have to pay an initial licence fee, and an annual fee for renewal of their licence.

Recommendation 19:

Accompanying the introduction of a sector-specific labour hire licensing scheme in Victoria, I recommend that hosts operating in the regulated sectors be subject to a legal obligation to use only a licensed labour hire provider.

Recommendation 20:

There should be a public register of all licensed labour hire operators. In addition, a system modeled on the Gangmasters Licensing Authority 'Active Check' service could be implemented to assist host organisations to ensure they are using licensed providers (including through updates on any changes to, or revocation of, issued licences).

Recommendation 21:

Civil liability provisions and/or criminal offences should be created in respect of the following:

- a labour hire provider operating in the regulated sectors without holding a licence; and
- a host organisation using the services of an unlicensed operator.

In addition, liability provisions/offences should be created in respect of the following actions on the part of a labour hire business/company covered by the licensing scheme:

- the business/company must not coerce or restrict a worker's freedom of movement in any way (e.g. by entering into unfair debts/loans, retention of migration papers or refusal to sign off on the 88-day requirement for obtaining a second year working holiday visa);
- the business/company must not sub-contract the provision of a worker through a non-licensed operator; and
- the business/company must not provide false or misleading information to the licensing authority.

Recommendation 22:

The Victorian Government should explore whether the Business Licensing Authority would be the appropriate body to administer the proposed labour hire licensing scheme, or whether a specific licensing authority should be established.

Recommendation 23:

The licensing authority should maintain the public register of licensed labour hire operators.

Recommendation 24:

As far as possible, the emphasis should be on licence applicants and licence-holders providing the information required to demonstrate that they meet the criteria for issuing/renewing a licence. Licensing authority staff would approve or reject applications for new licences or renewals objectively on the basis of the information presented.

Recommendation 25:

Legislation establishing the proposed labour hire licensing scheme will also need to address:

- the rights of persons from whom enforcement officers seek information;
- the obligations of licence-holders to provide information;
- data protection and the powers of the licensing authority to share that information for law enforcement and compliance purposes (e.g. with Victoria Police, the Fair Work Ombudsman, the Australian Taxation Office);
- the powers and conduct of licensing enforcement officers (whether engaged by the licensing authority or through a new entity);
- the processes for complaints, dispute resolution, and appeals (including appeals against licensing decisions or processes to revoke a licence); and
- a voluntary code for labour hire agencies.

A voluntary code for labour hire agencies

5.4

In addition to the proposed licensing scheme, a range of issues have been considered throughout this Report in respect of which I have identified practices of labour hire agencies which are not unlawful, but might be considered unfair and/or which have the effect of labour hire workers being treated differently from other workers. These are matters which a responsible labour hire industry could go a long way towards addressing by modifying its own conduct, and setting/promoting standards of best practice that all labour hire agencies could aspire to meet.

This is a process which should be encouraged and facilitated by the Victorian Government, ensuring that all relevant stakeholders have a voice in the development of those standards in the form of a voluntary code of practice for the labour hire industry.

Recommendation 26:

I recommend that through a tripartite process involving government, representatives of the labour hire industry and representatives of labour hire workers, the Victorian Government develop a voluntary code of practice for the labour hire industry. The code would establish best practice requirements for labour hire employment arrangements, including in the following areas:

- **Contractual arrangements between labour hire agencies and hosts, and labour hire agencies and their workers, should not include terms which prevent or hinder a labour hire employee from obtaining direct employment with a host, or terms requiring an employee to pay a fee or commission to a labour hire company in order to obtain work.**
- **Labour hire agencies should adopt fair processes in decisions leading to the dismissal of labour hire employees, and should not not use the contractual relationship between the labour hire agency and host to defeat the rights of a dismissed employee to seek a remedy.**
- **Labour hire agencies should be encouraged to manage rostering so that notice and planning of shifts work for the mutual benefit of all parties involved in labour hire relationships.**
- **Labour hire agencies should adopt a best practice approach to the use of piece rates in sectors such as the horticulture and meat industries, including fair and transparent processes for entering into piece rate arrangements, and should not use piece rates as a device to pay workers below the minimum time based rate of pay.**

5.1 International regulation of labour hire

The Terms of Reference for the Inquiry require consideration of Australia's obligations under international law.[847]

There are many ILO conventions and recommendations relevant to the issues considered by the Inquiry, including instruments aimed at promoting decent work and the prevention of insecure work.[848] This section is limited to discussion of ILO standards specifically relevant to labour hire.

The ILO implemented the *Private Employment Agencies Convention, 1997* (No. 181) to require member states to ensure that national law and practice provide adequate protections to employees of private employment agencies, including employers providing labour to third parties, particularly in the following areas:[849]

- freedom of association;
- collective bargaining;
- minimum wages;
- working time and other working conditions;
- statutory social security benefits;
- access to training;
- occupational safety and health;
- compensation in case of occupational accidents or diseases;
- compensation in case of insolvency and protection of workers' claims; and
- maternity protection and benefits, and parental protection and benefits.

A 2009 ILO issues paper regarding Convention No. 181 noted that the convention was developed in response to the growth in private employment agencies arising from diminishing funding for public employment services and an increase in economic liberalism and international competition.[850] This growth was considered to be characterised by certain key features including: a rapid expansion of the industry since the mid 1990s both in numerical terms and penetration rates; the emergence of a small group of transnational agencies; and similarities in characteristics of agency workers across leading markets around the globe in areas such as gender and age as well as an increased representation from females and older workers.[851]

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847. Terms of Reference, c(vii).

848. See e.g. *ILO Declaration on Fundamental Principles and Rights at Work*, 1998; *ILO Declaration on Social Justice for a Fair Globalization*, 1998; *Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87); *Freedom of Association and Collective Bargaining Convention*, 1949 (No. 98); *Discrimination (Employment and Occupation) Convention*, 1958 (No. 111); *Termination of Employment Convention,* 1982 (No. 158).

849. ILO Convention 181, clause 11; see also clause 12, under which the national laws of member states are to determine the lines of responsibility for these issues as between private employment agencies and user enterprises (i.e. host organisations).

850. ILO, 'Private employment agencies, temporary agency workers and their contribution to the labour market: Issues paper for discussion at the Workshop to promote ratification of the Private Employment Agencies Convention, 1997 (No. 181), 20-21 October 2009', *International Labour Office, Sectoral Activities Programme* (2009), 5.

851. Ibid, 25.

The ILO issues paper states that Convention No. 181 balances business needs for flexibility to expand or reduce with workers' needs such as employment stability and a safe work environment.[852] It aims to contribute to better functioning labour markets by setting general parameters for the regulation, placement and employment of workers by temporary employment agencies.[853] The issues paper describes Convention No. 181 as 'an engine for job creation, structural growth, improved efficiency of national labour markets, better matching of supply and demand for workers, higher labour participation rates and increased diversity.'[854]

The issues paper noted the expectation that following the global economic crisis, the private employment agency industry would continue to diversify and internationalise. Further, workers placed through agencies are some of the first to lose their jobs, and despite growing pressure on governments to protect the rights of workers placed through temporary agencies, reform has been slow or non-existent.[855]

However, as Australia has not yet ratified ILO Convention No. 181, there is presently no obligation under international law to ensure compliance with the convention domestically.

Australia also has not ratified the ILO's *Fee-Charging Employment Agencies Convention (Revised), 1949* (No. 96), which was originally aimed at the gradual abolition of fee charging employment agencies including labour suppliers, then sought to subject these bodies to strict regulation.

CIETT has argued that:

- ILO Convention No. 181 is 'a key instrument to improve workers' conditions and protection as well as the performance of … labour markets'; and
- countries which have ratified Convention No. 181 offer workers better conditions, and more meaningful social dialogue over temporary agency work than states which have ratified Convention No. 96.[856]

5.2 Regulation of labour hire in other countries

The Terms of Reference also require the Inquiry to have regard to regulation in other countries, including how other jurisdictions regulate labour hire.[857] A number of submissions addressed this issue, outlining various approaches to regulating labour hire in other countries. For example, Dr Elsa Underhill submitted that:

> *most national governments have introduced regulatory arrangements for labour hire employers (commonly known internationally as temporary work agencies) over the past 10- 15 years. In the European Union, the licensing of temporary agencies was seen as essential to operationalising the EU's Temporary Worker Directive. In Singapore, licensing was introduced to ensure the reputation of agencies importing labour was not tarnished thereby threatening a steady flow of workers. In other Asian countries, licensing has been introduced following ratification of ILO Convention 181, and in response to public outcry at high levels of exploitation of agency workers.*[858]

852. Ibid, 5.

853. Ibid, 7.

854. Ibid, 41.

855. Ibid, 35.

856. International Confederation of Private Employment Agencies (CIETT), *Workers enjoy more protection in countries that have ratified ILO Convention No. 181 on private employment agencies*, at: http://www.ciett.org/uploads/media/Ciett_assessment_C181_and_C96_with_infographics_01.pdf.

857. Terms of Reference, c(iii).

858. Dr Underhill, Submission No 32, 8. See also Elsa Underhill, *A Review of Licensing Arrangements for Labour Hire Firms*, Report prepared for the National Union of Workers, Deakin University (December 2013).

Dr Underhill notes that the United States is one of the few exceptions, without a national licensing scheme, although some American states have limited licensing arrangements.

Ms Maria Azzurra Tranfaglia, in the CELRL submission, provided the Inquiry with a comprehensive overview of the approach to labour hire regulation in Italy.[859] The ACTU drew the Inquiry's attention to the approach to labour hire arrangements in Namibia.[860] The Inquiry also received submissions from the GLA and Professor Whyte regarding the UK approach.[861] Each of these is examined further below.

The European Foundation for the Improvement of Living and Working Conditions (**Eurofound**) has provided the following up-to-date overview of approaches to regulation of temporary work agencies (**TWAs**) across the European Union:

> *… most [EU] Member States have some form of licensing, while over half of the countries (Austria, Croatia, Cyprus, the Czech Republic, Germany, Greece, Hungary, Latvia, Luxembourg, Malta, Portugal, Romania, Slovakia, Slovenia and Spain) require all TWAs – as a minimum – to have authorisation prior to commencing activity. A further seven countries (Belgium, Bulgaria, France, Italy, Netherlands, Norway and Poland) have registration systems …*[862]

These various forms of regulation in many EU countries are imposed to ensure that relevant authorities are aware of who is operating as a labour market intermediary, and to safeguard against the risk to workers' and states' finances from unrestricted access to this sector (hence the common requirements to show no criminal convictions/civil violations and to pay financial bonds or guarantees).[863]

Similarly, in the UK context it is considered that:

> *The licensing function ensures that there is a clear decision making process and public register that identifies those that are fit to operate, and eliminates from the market place those that are not. Hence licensing helps to create growth for legitimate business, provides them with a level playing field for lawful competition and helps to create growth of compliant businesses through the removal of non-compliant competitors.*[864]

In addition to licensing and registration schemes, two other common regulatory approaches to labour hire/agency work internationally are to:

- prohibit such arrangements in certain industries, e.g. construction, port transport, security, seafaring or where dangerous work is involved (Japan, Korea); and
- establish a statutory maximum period for an on-hire posting or assignment with a host organisation, e.g. nine months or 15 months with government approval (Israel), 3-18 months (Belgium), three years (Italy, Japan).[865]

859. CELRL, Submission no 99, 31.

860. ACTU, Submission no 76, 29.

861. GLA, Submission no 15; Professor David Whyte, Submission no 17, 1-4.

862. Eurofound, *Regulation of labour market intermediaries and the role of social partners in preventing trafficking of labour* (Publications Office of the European Union, Luxembourg, 2016), 21.

863. Ibid, 22-23.

864. Gangmasters Licensing Authority, *The Preventative Impact of Licensing on Labour Exploitation* (June 2015), 1.

865. Michael Grabell and Lena Groeger, 'Temp worker regulations around the world', *ProPublica* (24 February 2014), based on OECD data on employment protection laws.

5.2.1 United Kingdom

Statutory rights of agency workers

In the UK, labour hire is referred to as 'agency work' and is subject to the provisions of the *Agency Workers Regulations 2010*.[866]

These regulations provide temporary agency workers with a range of minimum legal entitlements, including the national minimum wage; holidays; rest breaks and limits on working time; protection from discrimination; workplace health and safety; and access to shared services at the workplace (e.g. staff common room, child care, parking).[867]

In addition, after 12 weeks in the same job with the same hirer (i.e. host), an agency worker becomes entitled to the same basic employment terms and conditions as any comparable employee of the hirer relating to: key elements of pay, limits on working time, night work, rest periods/breaks and annual leave. Anti-avoidance provisions operate to ensure that agency assignments are not deliberately structured to prevent workers from completing the 12 week qualifying period.

The employer of the agency worker (i.e. labour hire agency) is primarily responsible for meeting all minimum employment entitlements of agency workers.

In Wynn's view, the Agency Workers Regulations reflect the position adopted by the UK in resisting, then watering down, the EU Directive on which they are based.[868] As a result:

> *The regulations, despite giving the appearance of a protective framework for temporary agency workers, in fact achieve the opposite. The UK has in effect designed its own version of "flexicurity" which has removed security from the most vulnerable workers – i.e. those who perform successive short-term contracts on a regular if intermittent basis.*[869]

Wynn also questioned the effectiveness of the regulations' provision for equal rights on an agency worker's completion of 12 weeks' work with the hirer, on the basis that:

- 'the scope of comparison has been limited to the terms of similarly recruited workers by the hirer'; and
- where 'an agency worker is a unique hire' and no employment conditions apply generally in the hirer's workplace (because there are no pay scales or collective agreements), 'the agency worker will have difficulty in finding a comparator' against which to establish equal treatment rights after 12 weeks with the hirer.[870]

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866. The regulations constitute the UK's implementation of *Directive 2008/104/EC on Temporary Agency Work* of the European Union. See Michael Wynn, 'Power Politics and Precariousness: The Regulation of Temporary Agency Work in the European Union' in Judy Fudge and Kendra Strauss (eds), *Temporary Work, Agencies and Unfree Labour: Insecurity in the New World of Work* (Routledge, New York, 2014), 48. On the approach of the judiciary in the UK to agency work relationships (for purposes of unfair dismissal rights, for example) see David Renton, *Struck Out: Why Employment Tribunals Fail Workers and What Can Be Done* (Pluto Press, London, 2012), 42-49; Sir Brian Langstaff, 'Changing Times, Changing Relationships At Work … Changing Law?' (2016) 45:2 *Industrial Law Journal* 131. The general tendency in the case law has been to reject the notion of an 'implied contract' between an agency worker and the hirer who contracts with an agency for provision of the worker's services; see (most recently) *Smith v Carillion (JM) Limited* [2015] EWCA Civ 209.

867. See Department for Business Innovation and Skills, *Agency Workers Regulations: Guidance* (May 2011).

868. Wynn (2014), 53-62.

869. Ibid, 63.

870. Ibid, 65.

Similarly, Renton considered that if an employer were to recruit only agency workers and provide them low rates of pay 'there would be no directly employed comparator on whom the agency workers could rely.'[871]

A 2014 study of the impact of the Agency Workers Regulations conducted for the UK Advisory, Conciliation and Arbitration Service (**ACAS**),[872] based on interviews with agencies, unions and employers, found that:

- *overall, the agencies interviewed felt that the regulations had not had the effect expected by some that demand for temporary agency labour would reduce, as a result [of] rising costs associated with equal treatment provisions;*[873]
- *most [unions] shared a broad collective view that the regulations do not provide enough protection for agency temps. Most unions perceived that the week twelve rights, whilst a step forward from the previous position left a lot of vulnerable agency workers relatively unprotected, and provided employers with some scope for adjustment of their strategies;*[874]
- *compliance with the regulations had not been perceived to be particularly onerous for the employers interviewed. There was some evidence that the regulations had had an impact upon their use of agency labour, although these changes were difficult to decouple from the effects of economic conditions and public sector cuts.*[875]

Overall the study concluded that a key issue is:

> *the imbalance of power in the agency-clientworker relationship, which responses to the regulations have highlighted. Workers were, according to many of the agency interviewees often unaware of their rights under the [regulations]. The panoply of contracting forms in the agency sector, … renders the relationship between agency temp, client firm and worker more complex than ever*[876]

Regulation of employment agencies

Apart from the sector-specific licensing scheme overseen by the GLA (see below), employment or temporary work agencies in the UK are not required to be licensed. A licensing scheme introduced in 1973 was abolished by the conservative government in 1994.[877] However, a limited scheme of regulation remains in place under the *Employment Agencies Act 1973* (UK) (**EA Act**) and regulations made under that legislation. This scheme applies to both 'employment agencies' (in Australian terms, recruitment companies) and 'employment businesses' (i.e. labour hire agencies).

The scheme is overseen by the Employment Agency Standards Inspectorate (**EASI**), which has inspection and enforcement powers[878] in respect of compliance by employment agencies/businesses with the national minimum wage, working hours regulations, paid leave and other statutory minimum entitlements. The EASI also aims to ensure compliance with specific protections for agency workers, including prohibitions on fees being charged to work seekers for finding work, making unlawful deductions from pay or withholding payment (e.g. because the agency has not been paid by the hirer. Work-seekers must also be provided with certain

871. Renton (2012), 52.

872. Chris Forde and Gary Slater, *The Effects of Agency Workers Regulations on Agency and Employer Practice* (ACAS Research Paper 01-14, 2014).

873. Ibid, 28.

874. Ibid, 34.

875. Ibid, 36.

876. Ibid, 37.

877. Michael Wynn, 'Regulating Rogues: Employment Agency Enforcement and Sections 15-18 of the Employment Act 2008' (2009) 38:1 *Industrial Law Journal* 64, 70.

878. See Wynn (2009), 66.

details of their employment arrangements.[879] Non-compliance may result in warnings being issued to offending agencies, requirements to take corrective measures, or (in extreme cases) prosecution and the prohibition of persons from being involved in running agencies for up to 10 years.

Additions to the EASI's enforcement powers in 2008, intended to enhance protections for vulnerable workers, were described by Wynn at the time as 'a modest improvement to existing measures' and 'a continuation of the "light touch" approach' to regulation of the agency sector.[880] Wynn also pointed to the narrow focus of the EASI inspection regime ('risk based and targeted at isolated non-compliances');[881] and the substantial under-resourcing of the EASI, which had only 12 field inspectors in 2005/06.[882] As at 2008, the ratio of EASI inspectors to regulated organisations was estimated by the Trades Union Congress (**TUC**) to be 1:654 (compared with 1:92 for the GLA).[883] It seems that the number of inspectors fell further before increasing again marginally just recently:

> *[EASI] resource was doubled in 2014/15 and has been increased again for the financial year 2015/16, bringing the number of [EASI] inspectors to nine. The additional resource is being used for targeted enforcement in high risk sectors and locations in order to protect the most vulnerable agency workers.*[884]

The EASI regulatory scheme does not apply to any employment agency/business meeting the definition of a 'gangmaster' and therefore subject to the GLA licensing scheme.

UK Gangmasters Licensing Authority

Background

The GLA was established under the *Gangmasters (Licensing Act) 2004* (UK) (**GLA Act**).[885] The GLA scheme was introduced following the drowning deaths of 23 undocumented Chinese cockle-pickers, hired through a labour intermediary, at Morecambe Bay in February 2004.[886] This regulatory initiative was supported by all major political parties and key stakeholders including the major UK supermarkets and the National Farmers Union.[887] Support from businesses in the regulated sectors continues now on the basis that GLA licensing 'promotes fair competition'.[888]

Strauss notes that there has been long standing experience in the UK of gangmasters employing workers in 'gangs' and hiring them 'on a short term seasonal basis to meet the demand for cheap flexible labour' in the agricultural, horticultural and shellfish industries.[889] Even prior to the Morecambe Bay tragedy, which 'was a turning point in the regulation of this type of intermediated labour', there had been concerns about health and safety breaches and other exploitative practices (e.g. intimidation and coercion, confiscation of documents, unfair

879. See *Conduct of Employment Agencies and Employment Businesses Regulations 2003* (UK).
880. Wynn (2009), 67, 72.
881. Ibid, 71.
882. Ibid, 68.
883. Ibid, 69.
884. Department of Business Innovation and Skills (**BIS**) and Home Office, *Tackling Exploitation in the Labour Market: Consultation* (October 2015), 15.
885. The following discussion is primarily based upon information provided by GLA, Submission no 15 to the Inquiry; where other sources are also relied upon, references are provided.
886. Kendra Strauss, 'Unfree Labour and the Regulation of Temporary Agency Work in the UK' in Fudge and Strauss (2014), 164.
887. Professor David Whyte, Submission no 17, 4.
888. GLA, *Gangmasters Licensing Authority: Annual Report and Accounts: 1 April 2014 to 31 March 2015* (July 2015), 12.
889. Strauss (2014), 164.

deductions for housing and transport, low pay rates).[890] More recently, attention has been focused on the scope for exploitation created by the high numbers of migrant workers in the UK workforce, particularly from Eastern Europe.[891]

The GLA licensing scheme

The GLA licensing scheme requires organisations providing workers to employers in the agriculture and shellfish-gathering sectors, and associated processing/packaging activities, to register and obtain a licence through the GLA. Users of these labour provision services must not enter into arrangements with unlicensed gangmasters. Under s 4(2) of the GLA Act, 'acting as a gangmaster' (and therefore carrying out activity subject to the GLA licensing scheme) is defined as the supply of a worker by one person (A) to do work to which the legislation applies for another person (B). For these purposes it does not matter:

- whether the worker works under a contract with A or is supplied by another person;
- whether the worker is supplied directly under arrangements between A and B or indirectly through an intermediary; or
- whether the work is done under the control of A, B or an intermediary.[892]

Under s 5(3), the GLA scheme applies 'where a person acts as a gangmaster, whether in the [UK] or elsewhere, in relation to work to which this Act applies'. Therefore if work in the GLA regulated sectors takes place in the UK, a licence is required even if the labour supply business is located outside the UK.[893]

Criminal offences including fines and imprisonment can be imposed on gangmasters who operate without a GLA licence, and those who use their services. For example the maximum sentence for operating without a licence is 10 years' imprisonment, with seven years' imprisonment being the highest sentence imposed to date. The GLA and its inspectors have a wide range of enforcement powers under the GLA Act, including powers of entry to premises and to require production of documents; powers of entry under force and 'search and seize' powers in criminal investigations; and surveillance/interception powers. Since 2006 the GLA has brought 58 successful prosecutions against unlicensed gangmasters, and 24 against users of the services of unlicensed operators.[894]

The licensing standards against which GLA licences are issued (or refused), and renewed (or not), are aimed at protecting workers from poor treatment and exploitation, and cover the following eight areas:

- **Fit and proper test** (including whether those involved in running a labour supply business have been convicted of any criminal offences (unspent) particularly relating to fraud, violence, forced labour, human trafficking, blackmail, etc; have contravened other relevant regulatory requirements, e.g. minimum wage, health and safety; or been involved in an insolvent business).
- **Pay and tax matters** (including registration with Her Majesty's Revenue and Customs (**HMRC**), paying at least the national minimum wage, and records to show compliance with minimum leave entitlements for employees).

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890. Strauss (2014), 164.

891. See e.g. Migration Advisory Committee, *Migrants in low-skilled work: The growth of EU and non-EU labour in low-skilled jobs and its impact on the UK* (Summary Report, July 2014); GLA Submission No 15.

892. Section 4(3)-(6) sets out a number of other potential transactions/work arrangements to which the GLA Act applies.

893. GLA, *Licensing Standards* (May 2012), at: http://www.gla.gov.uk/i-am-a/i-supply-workers/i-need-a-gla-licence/licensing-standards/.

894. BIS and Home Office (2015), 18.

- **Prevention of forced labour and mistreatment of workers** (prohibitions of debt bondage, retention of employees' identity documents, withholding wages, etc).
- **Accommodation** (including safety for occupants, compliance with regulatory standards, etc where accommodation is provided in connection with employment).
- **Working conditions** (including compliance with statutory provisions regarding rest periods, annual leave, working hours, right of employees to join unions, grievance processes and prohibitions of discrimination and supplying employees to replace striking workers).
- **Health and safety** (cooperation with the labour user to ensure agreed responsibility for managing day to day health and safety of workers, instruction and training, etc; and specific obligations of licence holders re safe transport of workers, and planning/supervision of workers to gather shellfish).
- **Recruiting workers and contractual arrangements** (prohibition of fees being charged to workers for finding work; compliance with applicable visa restrictions; provision to workers of details of their working arrangements, e.g. type of work, pay rates, notice of termination; maintenance of employment records, and details of agreements entered into with labour users including fees payable).
- **Sub-contracting and using other labour providers** (requirements to use only licensed subcontractors or other providers).[895]

As at 31 March 2015, 954 licences issued by the GLA were in operation.[896] These include licences not only to small local providers but also large global temporary staffing agencies such as Adecco and Manpower.[897] Licence fees range from around A$865 to A$5,630 depending on business turnover; inspection fees also apply. Licences are generally granted for a 12-month period, and the GLA may conduct inspections in determining whether to issue or renew a licence (or for other compliance purposes). In 2014/15, 104 licence application inspections were carried out and 103 compliance inspections, resulting in 27 licence refusals (and 23 licences being revoked).[898] Over the same period, steps were taken to recover £3.5 million on behalf of workers and to protect 3064 workers (with assistance provided to 779 workers to remove them from exploitative situations).[899]

The GLA is strongly focused on 'proactive and intelligence-led inspection'[900] and works in close collaboration with other agencies including:

- the EASI;
- HMRC (national minimum wage and taxation enforcement);
- Home Office and UK Border Agency (enforcement of immigration rules);
- National Crime Agency (**NCA**) and UK police forces (modern slavery and human trafficking offences,[901] among others);

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895. For details see the *Gangmasters (Licensing Conditions) Rules 2009* (UK) and GLA, *Licensing Standards* (May 2012), at: http://www.gla.gov.uk/i-am-a/i-supply-workers/i-need-a-gla-licence/licensing-standards/.

896. GLA (2015), 28.

897. Strauss (2014), 165.

898. GLA (2015), 5.

899. Ibid, 11, 27.

900. Strauss (2014), 169.

901. In addition to the criminal law framework, under the *Modern Slavery Act 2015* (UK) businesses with an annual turnover of at least £36 million must disclose the steps they have taken to eliminate slavery and human trafficking in their supply chains globally (see Ingrid Landau, 'UK companies poised to act on forced labour, but Australia lags behind', *The Conversation*, 17 February 2016; Jennifer Hewitt, 'Slave labour in global supply chains', *Australian Financial Review*, 1 June 2016). The *Modern Slavery Act* also included a provision requiring the Secretary of State to engage in a public consultation process on the future role of the GLA (as to which, see further below).

- Health and Safety Executive (**HSE**); and
- enforcement partners in other countries, mainly in Eastern Europe.

The GLA also plays an important role in 'raising awareness among workers and the broader public about the potential exploitation of agricultural workers'.[902] This includes the provision of training to participants in the supply chain, in partnership with the University of Derby and the Ethical Trading Initiative, through the GLA Academy.[903]

Effectiveness of the GLA licensing scheme

Wilkinson, Craig and Gaus's study of the effectiveness of the GLA, commissioned by Oxfam, was undertaken through fieldwork (including interviews with stakeholders) between August 2008 and January 2009.[904] Among the key findings of the study were the following:

- Stakeholder respondents reported a reduction in the form and scale of exploitation (fewer abuses, increased transparency in employment conditions) in the sectors covered by GLA licensing.[905]
- 'One of the GLA's great strengths has been the forging of positive relationships with major retailers. Retailers were highly supportive of the GLA's success in uncovering and terminating malpractice.' Licensing had also provided a clearer signpost to retailers (including leading supermarkets) of legitimate/illegitimate operators in their supply chain.[906]
- The regulated sector was also supportive: 'the majority of employment agencies clearly consider the GLA to be beneficial to the sector and to be stamping out bad practice.'[907]
- 'The GLA has provided invaluable intelligence to other government departments, most notably [HMRC and human trafficking authorities], in order to exert pressure on exploiters.'[908]
- Compared with the GLA's active focus on unannounced inspections (frequently leading to applications for revocation of licences) and other compliance activity aimed at licence-holders or those who should be licensed,[909] insufficient attention was directed towards users of labour services. As a result: 'It is clear that some labour users are either not aware of their own obligations under the [GLA Act], or are simply choosing to ignore them.'[910]

These findings were also described by Wilkinson in the following terms:

> *the GLA and its licensing regime were considered highly effective by labour providers, unions, retailers and representatives of vulnerable workers, for its significant work in improving working conditions for migrant workers and at the same time, creating a more level playing field for employers.*[911]

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902. Strauss (2014), 170.
903. GLA (2015), 13-14.
904. Mick Wilkinson, Gary Craig and Aline Gaus, *Forced Labour in the UK and the Gangmasters Licensing Authority* (Contemporary Slavery Research Centre, Wilberforce Institute, University of Hull, undated).
905. Ibid, 8; see also 38.
906. Ibid, 8-9; see also the discussion at 35-36 of downward pressures on prices for growers in the fresh food supply chain from the intense competition between UK supermarkets (leading to instances of worker exploitation) prior to the GLA's establishment.
907. Ibid, 9.
908. Ibid, 11.
909. Ibid, 12-15.
910. Ibid, 17.
911. Mick Wilkinson, 'New Labour, the Gangmasters Licensing Authority and the woefully inadequate protection of migrant workers in the UK' (Unpublished paper drawn from findings of an independent evaluation of the efficacy of the GLA undertaken in 2008-09, Contemporary Slavery Research Centre, Wilberforce Institute, University of Hull), 12.

Yet the research also concluded that a high number of unlicensed gangmasters were still in operation, and severe exploitation was reported in GLA-regulated sectors.[912]

According to Wynn, the GLA licensing model:

> *exemplifies a stronger enforcement policy and a more rigorous compliance regime than applies to employment agencies across the rest of the economy: it covers a range of standards designed specifically to prevent worker abuse and exploitation backed up with a stronger range of sanctions.*[913]

The UK Government's most recent triennial review of the GLA, in 2014, endorsed the agency's continuing enforcement role and: 'confirmed the value of a mandatory licensing scheme for all businesses in the sector to provide a consistent and transparent landscape and supported the need to strongly tackle the minority of operators who wilfully break the rules, in the most targeted way.'[914]

However, Weatherburn and Toft recently highlighted the findings of a 2015 study for the EU Agency for Fundamental Rights, in which experts indicated that GLA licensing 'no longer takes the form of proactive monitoring, where agents and workplaces are inspected, as the GLA's resources and workforce have been reduced.'[915]

CELRL submitted to the Inquiry that the formal sanctions available to the GLA, combined with consumer pressure and reputational concerns, have led to the authority building a relationship with leading supermarket chains. This collaboration has led to the development of a Good Practice Guide for Labour Users and Suppliers, and a Supermarkets and Suppliers' Protocol supported by major food retailers and supplier representatives.[916] CELRL submitted that the collaborative approach of GLA is 'instructive for Victoria' and that the GLA licensing model is a 'promising experiment' in an industry which was plagued by problems of worker exploitation and with high numbers of temporary foreign workers, given improvements in compliance and reduction of exploitation which it has brought about.[917]

Support from the regulated sector has been a key ingredient of the GLA's success. This is reflected in the biennial survey of GLA licence holders' perceptions, conducted by the Association of Labour Providers (the industry body for temporary labour providers in the food and agricultural sectors). In the April/May 2015 survey:

- 93% of providers perceived the GLA to be doing a good job (up from 49% in 2011);
- 93% favoured licensing (up from 71%);
- 79% felt that licensing had improved conditions for workers, and reduced fraud/illegal acts (up from 42% and 69% respectively); and
- 67% believed it had provided a level playing field (up from 42%).[918]

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912. Ibid, 13; see also Wilkinson, Craig and Gaus (undated), 19-33.

913. Wynn (2009), 70; see the discussion of the EASI regulatory scheme, above.

914. GLA (2015), 8.

915. Amy Weatherburn and Alex Toft, 'Managing the Risks of Being a Victim of Severe Labour Exploitation: Findings from a Research Project Exploring the Views of Experts in the UK' (2016) 45:2 *Industrial Law Journal* 257, 260, referring to EU Agency for Fundamental Rights, *Severe Labour Exploitation: Workers Moving within or into the European Union (UK National Report)* (June 2015). See also Professor David Whyte, Submission no 17.

916. See: http://www.gla.gov.uk/whats-new/press-release-archive/23310-supermarkets-and-suppliers-protocol-with-the-gla/ and http://www.gla.gov.uk/whats-new/press-release-archive/171015-home-secretary-backs-new-gla-protocol/

917. CELRL, submission no 99, 30.

918. Association of Labour Providers, *Response: Tackling Exploitation in the Labour Market Consultation,* 27 November 2015.

Professor David Whyte of the University of Liverpool submitted that 'the GLA has become very closely associated with the *regulation of migrant workers'* in the UK and that this would continue under proposed changes before Parliament at the time of his submission (see further below). He argued that the reform 'effectively envisages GLA as part of an extended system of immigration control'. Professor Whyte argued that there is a 'danger' in this approach, i.e. 'rather than aiming to raise the bar on working conditions and ensuring the law is being upheld by employers, it becomes reduced to a new form of policing workers.'[919]

Sector-specific focus of the GLA

Until now, one of the most significant features of the GLA scheme has been its application only to the sectors specified in the GLA Act. In Strauss's view, this has meant that 'the most exploitative employers are free to operate with virtual impunity in other sectors unrelated to agriculture and fisheries', with particular concerns about the potential for exploitation in the construction, care, hospitality, cleaning and domestic services sectors.[920] While there are high numbers of migrant workers and temporary agencies are active in these other sectors, these are also 'more individualised occupations' without the same level of large-scale recruitment of workers for short seasonal periods.[921] Strauss concludes that:

> *… the GLA needs to be understood not as a model, but as a regulatory choice made by the state in the context of competing demands and discourses. [It] has achieved gains, through its licensing and inspection regime, in oversight and compliance … . The GLA has also raised the profile, and awareness, of labour exploitation in the sectors it covers. … Yet [these achievements] are not likely to fundamentally change the nature of temp agency work … . It is from this perspective that the GLA must be understood as only a partial solution.*[922]

Wynn concluded his comparative analysis of the EASI and the GLA regulatory schemes with this observation:

> *While licensing is no panacea to solve the ills of non-compliance among a significant minority of "rogue" providers, the GLA activity in one sector of the economy has highlighted the prevalence of major exploitative practices in a highly vulnerable workforce and provided new examples of policy tools to combat this.*

However, in his view: 'Single-policy options are clearly not sufficient to tackle complex networks' and 'the problems of international gangmaster recruitment channels'.[923]

A 2007 study by Geddes, Scott and Nielsen found 'no evidence to suggest that the issues faced by the GLA and addressed by licensing were only restricted to the sectors covered by the GLA'; noting the increasingly transnational approach of gangmaster activity, the study also indicated higher non-compliance with GLA licensing standards on the part of businesses employing migrant labour.[924]

Wilkinson's study of the GLA found gangmaster/employment agency abuse in the UK to be widespread, at times meeting the ILO definition of forced labour. It recommended that:

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919. Professor David Whyte, Submission No 17; see also TUC, *Tackling Exploitation in the Labour Market: TUC Response to BIS/Home Office Consultation* (2015), 5. More generally see Hannah Lewis, Peter Dwyer, Stuart Hodkinson and Louise Waite, *Precarious Lives: Experiences of Forced Labour among Refugees and Asylum Seekers in England* (University of Salford/University of Leeds July 2013).

920. Strauss (2014), 170. See also Wilkinson (undated), 2, 13-15; and Wynn (2009), 72.

921. Strauss (2014), 173.

922. Strauss (2014), 179.

923. Wynn (2009), 72.

924. A Geddes, S Scott and K Nielsen, *Gangmasters Licensing Authority Evaluation Study Baseline Report* (GLA, 2007), quoted in Wynn (2009), 71.

> *... in order to protect all vulnerable workers employed through gangmasters, the GLA's remit must immediately be extended to the sectors of construction, hospitality and social care, and that in the longer term, one single enforcement agency should be created to be responsible for regulating all agency labour across every industry in the UK.*[925]

The UK Government considers that:

> *Since its creation in 2006, the GLA has established itself as a world leader in licensing the activity of gangmasters in certain sectors and has uncovered many instances of labour market exploitation … But it has been limited to investigation of licensing-related offences in the regulated sectors. This has necessarily limited its ability to tackle worker exploitation.*[926]

It was also noted that the GLA has limited powers focused mainly on licensing, which restrict its capacity to pursue criminal sanctions in tackling broader instances of serious exploitation (e.g. forced labour, human trafficking).[927]

The GLA itself submitted that the ability to tackle labour exploitation effectively across any industry requires a combination of civil and criminal sanctions, 'without any regulatory restrictions to narrow industry sectors.' It noted that its licence holder data identified that most if not all licence holders supply labour into other sectors than those subject to GLA licensing: 'Logically therefore, if an employer operates exploitative practices in agriculture they will operate them in any part of their business, and effective enforcement must be capable of tackling it wherever it is found.' [928]

A new economy-wide approach to combating labour market exploitation in the UK

The UK Government's recent consultation paper on 'Tackling Exploitation in the Labour Market' observed that:

> *there has been a change in the nature of non-compliance with labour market regulation over the last ten years, with a shift from abuses of employment regulation towards increasingly organised criminal activity engaged in labour market exploitation. Feedback from enforcement officers suggests that serious and organised crime gangs are infiltrating legitimate labour supply chains across a number of sectors, and that the incidence of forced labour may be growing at a faster rate than other forms of exploitation.*[929]

Based on these developments, the Government proposed a reconsideration of 'the effectiveness of the way it tackles non-compliance with labour market regulation across the spectrum', based on four specific proposals:

- to establish a statutory Director of Labour Market Enforcement, who will set priorities for the enforcement bodies across the spectrum of non-compliance, from criminally-minded exploitation to payroll errors;
- to create a new offence of aggravated breach of labour market legislation;
- to increase intelligence and data sharing between the existing enforcement bodies and also other bodies to strengthen the targeting of enforcement; and
- to widen the remit, strengthen the powers and change the name of the GLA to enable it to tackle serious exploitation.[930]

As then Prime Minister David Cameron put it in May 2015, the government wished to coordinate the responsibilities currently split between four different agencies (GLA, HMRC,

925. Wilkinson (undated), 2, 17; see also Wilkinson, Craig and Gaus (undated), 39-41.
926. BIS and Home Office (2015), 32.
927. Ibid, 35-36. NCA and UK Human Trafficking Centre statistics indicate that 16% of all potential human trafficking victims are from the GLA regulated sector: GLA (June 2015), 2-3.
928. GLA Submission No 15; see also Professor David Whyte, Submission no 17.
929. BIS and Home Office (2015), 8; see also 18-20.
930. BIS and Home Office (2015), 8-9; see also 20-44.

HSE and EASI), making a 'crucial change: creating a new enforcement agency that cracks down on the worst cases of exploitation'. The rationale, according to the Prime Minister, was that: 'while one employer or gangmaster can still exploit a worker in our country, luring them here with the promise of a better life, but delivering the exact opposite – low or no wages; horrendous housing; horrific working conditions – our task is not complete'.[931]

Following a two month consultation process, the government announced in January 2016 that it would proceed with the foreshadowed proposals (with the exception of the proposed new labour market offence).[932] These changes formed part of the recently-passed *Immigration Act 2016* (UK), with the relevant provisions taking effect on 1 October 2016. The key overall change is the creation of the new Director of Labour Market Enforcement sitting across the revamped GLA, HMRC and EASI:

> *The Director's remit will stretch across the whole of the labour market – including direct employment as well as labour providers – and the whole of the spectrum of non-compliance, from accidental infringement to serious criminality. As set out in the Immigration Bill, the Director will produce an annual labour market enforcement strategy which will set the annual priorities for the work of the three enforcement bodies. This will bring greater coherence to their efforts and allow for a more targeted approach to enforcement.*[933]

Interaction between the Director, the three enforcement agencies and other relevant bodies (including immigration enforcement authorities, Independent Anti-Slavery Commissioner, HSE, NCA) will be enhanced by a new intelligence hub for sharing relevant intelligence and data.[934]

The government further explained the proposed expansion of the GLA's role as follows:

> *There was broad support to reform the role of the GLA to enable it to tackle labour exploitation. We will reform its mission, functions and powers to ensure that the GLA can prevent, detect and investigate worker exploitation across all labour sectors, not only those in which it operates currently. Although concerns were expressed about the risk that this may affect the current GLA functions, we believe that the new enforcement role will complement the current licensing role to provide a more coherent response to exploitation, wherever it is found. By giving the GLA this mission and role, we establish it as a strong component of the Government's broader work to tackle labour exploitation. In recognition of this, we will change the name of the GLA to the Gangmasters and Labour Abuse Authority. We believe that this reflects the new focus of its remit, while retaining the links with its previous role.*[935]

The GLA licensing scheme will also be changed, with the Director of Labour Market Enforcement able to recommend changes (to the relevant Secretaries of State) in the scope and sectors covered by licensing requirements, in response to changing risks of labour market exploitation.[936] This clearly envisages that the licensing scheme administered by the new Gangmasters and Labour Abuse Authority could be expanded beyond agriculture, shellfish-gathering and associated sectors. However, the TUC has expressed concern that the new framework could allow a dilution of licensing standards and enforcement (rather than their expansion into areas where other vulnerable workers are at risk of exploitation like hospitality, social care and construction).[937]

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931. Speech by the Prime Minister on 21 May 2015, quoted in GLA (2015), 10.

932. BIS and Home Office, *Tackling Exploitation in the Labour Market: Government Response*, January 2016; instead of the proposed aggravated labour market offence, a new type of enforcement order (i.e. undertaking) has been created with an underlying criminal offence for non-compliance, see 25-26.

933. Ibid, 24; see further 24-25.

934. Ibid, 26-28.

935. Ibid, 28.

936. Ibid, 29.

937. TUC (2015), 3, 9-10; see also Ethical Trading Initiative, *ETI Response to Government Consultation: Tackling Exploitation in the Labour Market* (4 December 2015).

5.2.2 Canada

Various approaches to regulation of labour hire agencies, and those involved in foreign worker recruitment, can be found in a number of Canadian provinces.[938]

Manitoba, Nova Scotia and Saskatchewan

Under the *Worker Recruitment and Protection Act*,[939] anyone who assists foreign workers to obtain a job or assists employers to find foreign workers in Manitoba is considered to be engaging in 'foreign worker recruitment', and must obtain a licence. The licence requirement applies even if no fees are charged, and offences may be committed for engaging in recruiting without a licence. The application process is aimed at obtaining details about the business and character of licence applicants, who must be a member of one of the Canadian law societies or of the Immigration Consultants of Canada Regulatory Council. In conjunction with licensing, there are also registration requirements for employers wishing to recruit foreign workers (whether directly or through a recruiter), which provide 'a mechanism for screening out unscrupulous employers'.[940]

This combined scheme has been lauded as a model for adoption across Canada:

> *Unlike most provinces, Manitoba knows where its temporary foreign workers are working. Businesses must register with the province to get a work permit for a TFW. That allows inspectors to check on their working conditions to make sure they meet employment standards and health and safety rules.*[941]

In fact, the Manitoba model has since been adopted in two other Canadian provinces: Nova Scotia and Saskatchewan.[942]

Faraday's 2014 study found that Manitoba's approach of 'proactive recruiter licensing has virtually eliminated exploitative recruiters from operating in the province'.[943]

Dr Joanna Howe calls for a stronger enforcement agency and a more targeted regulatory regime that makes employers, intermediaries and workers acutely aware of their roles and responsibilities. She refers to the licensing regime in Manitoba, Canada, as an example.[944]

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938. In addition to Manitoba and Ontario, discussed below, a licensing scheme applies to employment agencies in British Columbia with additional registration requirements for the employment of domestic workers; while in Québec, in contrast, there is almost no specific regulation of temporary agency work. See, respectively, Judy Fudge and Daniel Parrott, 'Placing Filipino Caregivers in Canadian Homes: Regulating Transnational Employment Agencies in British Columbia' in Fudge and Strauss (2014) 70; Stéphanie Bernstein and Guylaine Vallée, 'Leased Labour and the Erosion of Workers' Protection: The Boundaries of the Regulation of Temporary Employment Agencies in Québec' in Fudge and Strauss (2014) 184.

939. See Employment Standards, Manitoba, *Foreign Worker Recruitment Licence Information – Fact Sheet* (29 April 2016), at: https://www.gov.mb.ca/labour/standards/doc,wrpa-license_info,factsheet.html.

940. Fudge and Parrott (2014), 87.

941. Joe Friesen, 'Manitoba's foreign worker strategy called a model for other provinces, *The Globe and Mail*, 2 July 2014; see also the more comprehensive assessment in Fudge and Parrott (2014), 85-88.

942. Fay Faraday, *Profiting from the Precarious: How recruitment practices exploit migrant workers* (Metcalf Foundation, April 2014), 8, 39-44.

943. Ibid, 41 (references omitted).

944. Joanna Howe, "Predatory Princes', 'Migration Merchants' or 'Agents of development'? An examination of the Legal Regulation of Labour Hire Migration Intermediaries", Draft paper for the workshop: 'The Evolving Project of Labour Law', Centre for Employment and Labour Relations Law, University of Melbourne (February 2016), 19.

Ontario

Ontario has had legislation in place since 2009 to protect 'temporary help agency' employees,[945] principally by ensuring that these employees are accorded the minimum terms and conditions applicable under the *Employment Standards Act 2000*. In addition, the Ontario legislation:

- precludes a temporary help agency from restricting the ongoing employment of a worker by a host organisation;
- prohibits agencies from imposing fees on workers involved in agency assignments;
- requires agencies to provide employees with detailed information about the agency, the host organisation, the nature (including pay and conditions) of the assignment, and the employee's rights under the Employment Standards Act.[946]

However Vosko has criticised the limitations of the Ontario legislation. She observes that it sought to maintain the role of temporary employment agencies, whilst responding to public concerns about agency worker's access to labour protection.[947] Vosko notes that while the Act does offer some protections to employees, several of its features take the province 'back to the future' and 'threaten to perpetrate the precarious character of temporary agency work in Ontario' due to the limits on its application to temporary help agencies, and its neglect of other triangular employment relationships.[948] Arrangements which are not covered by the Ontario legislation include an overlapping group of private employment agencies, agencies devoted to permanent employment placement, or homecare workers subcontracted by the provincial government.[949]

5.2.3 Other approaches

Italy

Ms Maria Azzurra Tranfaglia, in the CELRL submission, provided the Inquiry with a comprehensive overview of the approach to labour hire regulation in Italy.[950]

Italy has moved from an outright ban on agency work prior to the 1990s, to a position (over the last two decades) of encouraging the use of agency work as a preferable form of non-standard work within strict regulatory parameters. Agency workers cannot be classed as independent contractors, and are identified by the law as either fixed term or ongoing employees of the agency. During an assignment, agency workers are entitled to the same basic working conditions as a comparable direct employee, assessed on an overall basis.

The operation of labour market intermediaries in Italy is strictly controlled by way of a stringent licensing system. Agencies are required to be registered, and to meet certain legal and financial requirements. Agencies must demonstrate adequate professional competence and expertise in industrial relations and human resource management. There is a minimum capital requirement of €600,000, along with required guarantees to secure workers' entitlements of at least €350,000.

In addition, the contract between the agency and the host company must be in writing and must contain prescribed information, including:

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945. *Employment Standards Amendment Act (Temporary Help Agencies), 2009*.
946. Ontario Ministry of Labour, *What temporary help agencies and their clients need to know*, at: http://www.labour.gov.on.ca/english/es/pubs/brochures/br_tempagencies.php.
947. Leah Vosko, 'A New Approach to Regulating Temporary Agency Work in Ontario or Back to the Future?' (2010) 65:4 *Industrial Relations* 632.
948. Ibid, 646.
949. Ibid, 644. See also the critique of the Ontario approach in Faraday (2014), 35-38.
950. CELRL, submission no 99, 30.

- a reference to the employment agency's authorization;
- the number of employees to be supplied, the place and time of work, working conditions, required tasks and duration of assignments;
- reasons justifying the use of agency work;
- the agency's obligation to meet all salary obligations and social security contributions; and
- the host's obligation to disclose the salary of comparable direct employees, to reimburse the agency for payments and to pay agency workers directly if the agency breaches its payment obligations.

In the event of non-compliance with these requirements, agency workers may be entitled to a permanent employment contract with the host, capped damages, and the host and agency may be subject to a range of criminal and administrative sanctions.

Japan

Labour hire in Japan is regulated by the *Worker Dispatch Act*, which imposes a three year time limit on each specific worker dispatch engagement[951] (see further below). Staffing companies are also subject to licensing requirements, which include the provision of information to the licensing authority such as numbers of dispatched workers, locations and working hours.[952] Following a relaxation of dispatched worker regulations in 2012, amendments which came into effect in September 2015 have again increased protections: 'by creating schemes for improving the quality of worker dispatching undertakings, [and] giving support for career formation including the conversion of dispatched workers to regular employees.'[953]

However some view these changes as intended to offset a substantial weakening of protection under the 2015 amendments: the removal of the previous general three-year limit on dispatch placements, with the limit now applicable to each separate engagement (so, for example, after three years a dispatched worker could be moved to a different division of the client firm). Further, dispatches can be 'rolled over' for subsequent three-year periods following minimal consultation with workers' representatives.[954]

Namibia

The ACTU drew the Inquiry's attention to the approach to labour hire arrangements in Namibia.[955] In 2007, Namibia passed laws prohibiting labour hire, however these were subsequently overturned by the Namibian Supreme Court. Following that, Namibia sought the technical advice of the ILO and in 2011/12 developed a model of labour hire regulation in conformity with ILO principles.

Labour hire firms are required to be licensed under the Namibian model. Host firms are deemed employers of labour hire workers, unless an exemption is granted in which case hosts and agencies are jointly liable for employment conditions. Hosts are prohibited from engaging labour hire workers on less favourable terms and conditions than those applicable to direct employees, or applying different employment policies and practices. Labour hire employees

951. Japan Institute for Labor Policy and Training (JILPT), *Labor Situation in Japan and Its Analysis: General Overview 2015/2016* (JILPT, Tokyo, 2016), 162.

952. Underhill (2013), 14.

953. JILPT (2016), 162. For an assessment of dispatch working in Japan and aspects of its regulation, see e.g. Akiko Ono, 'Job Security Concern among Temporary Agency Workers in Japan' (2012) 9:3 *Japan Labor Review* 30.

954. Hifumi Okinuki, 'Legal change will make temp purgatory permanent for many Japanese workers', *The Japan Times*, 27 September 2015.

955. ACTU, submission no 76, 29.

must not be used in respect of a strike or lockout, or to perform work of employees dismissed in the previous six months. Agencies are prohibited from supplying workers to employers who have certain enforcement actions outstanding against them.

New Zealand

There is no specific regulation of labour hire agencies in New Zealand. However concerns over the exploitation of vulnerable workers, particularly migrants, in the horticulture, retail, hospitality and construction sectors[956] and in the Christchurch/Canterbury rebuild[957] led to the passage of the *Employment Standards Legislation Act* which came into effect on 1 April 2016.

The Act is aimed at 'the worst transgressions' of minimum employment standards (e.g. minimum wage, annual holidays) by employers, imposing maximum penalties of the greater of NZ$100,000 or three times the financial gain for companies engaging in exploitation. In addition, the Act includes measures to ensure that directors, senior managers, legal advisers and other entities within corporate groups can be held accountable for employment standards breaches. For example, individuals could be banned from a managerial role, if found to be involved in serious or persistent employment standards breaches or exploitation of migrant workers. The Act also included changes to strengthen the Labour Inspectorate, and to reduce the focus on mediation in employment standards cases in the judicial system (reflecting the need to adopt a tougher approach to systemic or intentional breaches).[958]

In assessing the changes implemented by the *Employment Standards Legislation Act*, Professor Gordon Anderson of Victoria University of Wellington observed as follows:

> *The suite of reforms … are of course to be welcomed, especially the strong measures devised to protect some of the most vulnerable groups of workers. However the success of these reforms has yet to be seen and will be conditional on a number of factors. … First is the willingness to enforce the provisions, something that will only occur if the funding and resources of the labour inspectorate are increased to be commensurate with the task allocated. Strong, but inadequately resourced, legislative reforms make for good political publicity but little effective action. Given that the more substantial penalties can only be sought by a Labour Inspector proper funding will be critical.*[959]

United States of America

Apart from licensing schemes in several states, there are very few legal protections for temporary workers in the USA, leading to concerns in some quarters about the rise of 'perma-temping'[960] and the 'temping of America'.[961] Some states, such as Massachusetts, have legislation requiring information provision to temporary agency staff about their employer, job description, pay rate, start and finish times, and expected duration of the assignment.[962]

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956. See e.g. 'Abuse of young and migrant workers uncovered', Radio NZ, 21 December 2015; NZ Council of Trade Unions, *Submission on the Employment Standards Legislation Bill* (October 2015), 42-44. See further Margaret Wilson, 'Precarious Work – New Zealand Experience' (2014) 39:2 *New Zealand Journal of Employment Relations* 22.

957. NZ Ministry of Business, Innovation and Employment, *Vulnerable Temporary Migrant Workers: Canterbury Construction Industry* (July 2015); NZ Council of Trade Unions (October 2015), 42.

958. NZ Ministry of Business, Innovation and Employment, *Strengthening Enforcement of Employment Standards* (11 April 2016), at: http://www.mbie.govt.nz/info-services/employment-skills/legislation-reviews/employment-standards-legislation-bill/strengthening-enforcement-of-employment-standards.

959. Gordon Anderson, *Reinforcing and Enforcing New Zealand's Minimum Employment Standards* (Victoria University of Wellington, April 2016), at: http://www.victoria.ac.nz/som/clew/files/CLEWd-IN-Apr2016-LEGAL-UPATE-GAFINAL.V2-pdf.pdf.

960. See e.g. Michael Grabell, 'US lags behind world in temp worker protections', *ProPublica*, 14 February 2014.

961. Nik Theodore and Jamie Peck, 'Selling Flexibility: Temporary Staffing in a Volatile Economy' in Fudge and Strauss (2014) 26, 40.

962. *Healthcare Cost Containment Act*, 2012 Mass. Acts S 2400.

Some courts in the United States have recognised 'the concept of 'joint employment', whereby two employers who each exercise significant control over a worker and 'co-determine' their terms of employment may both be held to be the worker's employer.'[963] However, as noted in chapter 3 of this Report, the joint employment doctrine has not been accepted in Australian law.[964]

5.2.4 Comparing Australia's approach

The analysis presented above shows that various forms of regulation of labour hire/agency work can be found in many countries around the world. In comparison, in Australia there is little in the way of specific regulation of labour hire arrangements (beyond the application of laws generally applicable to employment or independent contracting, examined in chapter 3).

A number of academics and commentators have also observed that, in international terms, the labour hire industry in Australia is largely unregulated.

A 2004 Parliamentary Library Research Paper concluded that, when compared with other countries, Australia has few formal restrictions on temporary work contracts and while governments have sought to respond to the role of labour hire in the economy, they appear to generally accept the usefulness of the industry.[965]

In 2009, Coe, Johns and Ward examined the Australian temporary staffing industry in comparison with similar 'neoliberal' labour markets abroad. The authors argue that the factors contributing to the evolution of distinctive national temporary staffing markets include government regulation, the effectiveness of trade unions and the capacity of domestic agencies to withstand competitive pressures from transnational agencies.[966] They note that the Australian market is the most valuable outside the top six (France, Germany, Japan, The Netherlands, UK and USA) yet relatively little is known about it.[967] The authors attribute the significant recent growth in the Australian temporary staffing market to growing regulatory costs of mainstream employment and under-regulation.[968]

Mitlacher and Burgess have compared the growth of temporary agency work in Germany, with its highly regulated temporary employment industry, and Australia, where there is very little regulation of labour hire.[969] The authors explored how the differences in regulatory structures influence the deployment of agency work. In order to conduct their comparison, they focused on regulation of the product market, the labour market and industrial relations.[970] The authors argued that the 'Australian non-regulation of agency employment reflects what is seen as the move towards voluntarism and limited minimum standards where individual contracting is the primary means for establishing employment conditions.'[971] They found that despite the differences in regulatory approaches, temporary agency work is precarious in its nature in both cases;[972] and concluded that any new regulatory approach needs to combine security for the employee and flexibility for the employer.[973]

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963. Stewart et al (2016) [10.29].
964. See 3.4.2.
965. O'Neill (2003/4), 23.
966. Neil Coe, Jennifer Johns and Kevin Ward, 'Agents of casualization? The temporary staffing industry and labour market restructuring in Australia' (2009) 9 *Journal of Economic Geography* 55, 62.
967. Ibid, 56.
968. Ibid, 80.
969. Lars Mitlacher and John Burgess, 'Temporary Agency Work in Germany and Australia: Contrasting Regulatory Regimes and Policy Challenges' (2007) 23:3 *The International Journal of Comparative Labour Law and Industrial Relations*, 403.
970. Ibid, 405-406.
971. Ibid, 424.
972. Ibid, 428.
973. Ibid, 430.

In a 2014 Working Paper, Tranfaglia presents a comparative assessment of the differences in regulatory approaches to agency work in Europe and Australia.[974] She observes that the EU, where agency work has 'long been banned and restricted',[975] has more recently sought to balance business needs and social goals by encouraging the use of agency work as a preferable form of non-standard employment. Accordingly, a deregulation agenda is evident. In contrast, the status of agency workers in Australia is not defined by statute, resulting in many labour hire workers being employed as casual workers or independent contractors. This has prompted calls for an improved protection framework for agency workers.[976]

These accounts, insofar as they describe the absence of regulatory measures applying to the labour hire industry in Australia, are consistent with the RCSA's view. It observes, in the introduction to the most recent version of its proposed Employment Services Industry Code (**2016 Proposed ESIC**),[977] that:

> *[m]ost Australian states and territories have so far resisted the restrictive regulatory measures encountered in other jurisdictions – such as licensing, bonds and guarantees, quotas, maximum length of assignment, site-rate parity (with or without derogation by reason of payment between assignments), sectoral bans, prohibitions on replacing striking workers, and restrictions on reasons for which employment services may be acquired.*[978]

5.3 Regulation of labour hire in other Australian states

As in Victoria, the Fair Work Act regulates most employment arrangements in the other Australian states and territories[979] including the relationship between a labour hire agency and an employee whom it assigns to a host. In addition, as in Victoria, other state and territory laws regarding occupational health and safety[980] and anti-discrimination[981] sometimes extend to coverage of the conduct of a host towards a labour hire employee. This section does not examine laws of a similar nature to those which are examined in the Victorian context in Chapter 3. Nor does it examine business licensing laws of general application which may also apply to labour hire businesses in specified industries.[982]

RCSA, in its most recent draft proposed Employment Services Industry Code,[983] suggests that the 'current debate about employment agency licensing can be understood from within its historical context.'[984] It describes the operation of a number of schemes regulating short term supply of labour, and prohibiting charging of fees to work seekers. The RCSA states that

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974. Maria Azzurra Tranfaglia, 'Agency work in Europe and Australia: A comparative assessment of different regulatory approaches', *Draft Working Paper presented to the Australian Labour Law Association Conference*, 2014 .

975. Ibid, 1.

976. Ibid, 9.

977. RCSA, Consultation Prototype – Employment Services Industry Code 2016.

978. RCSA, 2016 Proposed ESIC, 12.

979. See footnote 232 at 3.2.2 for a description of the application of the Fair Work Act across different states and territories in Australia.

980. See e.g. *Work Health and Safety Act 2011* (Qld); *Work Health and Safety (National Uniform Legislation) Act 2011* (NT); *Work Health and Safety Act 2011* (NSW); *Work Health and Safety Act 2011* (ACT); *Work Health and Safety Act 2012* (SA); *Work Health and Safety Act 2012* (Tas).

981. See e.g. *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1984* (WA); *Anti-Discrimination Act 1998* (Tas); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1992* (NT).

982. E.g. the *Construction Occupations (Licensing) Act 2004* (ACT) may require some labour hire agencies to be licensed.

983. RCSA, 2016 Proposed ESIC, 13.

984. Ibid.

'during the late 1980s and into the 1990s, several licensing schemes were dismantled as they were considered to be anti-competitive.'[985] It describes the remaining state laws which apply to segments of the employment services industry as vestiges of these previous arrangements.[986]

Whilst no state or territory in Australia specifically regulates the labour hire industry or labour hire employment arrangements[987] as a discrete category, most other states regulate the provision of employment agency services in some way, including through licensing.

The scope of this Inquiry does not require an examination of whether legislation regulating employment agents is necessary or desirable in Victoria. However, the position in other states and territories is nonetheless relevant in considering a licensing scheme which would apply to labour hire agencies in Victoria. These schemes are therefore examined below.

5.3.1 Australian Capital Territory

The *Agents Act 2003* (ACT) requires persons carrying on business as an employment agent to be licensed. It provides that a person without a licence commits a strict liability offence, with a maximum penalty of 100 penalty units and/or one year's imprisonment, if the person carries on business as an employment agent, or pretends to be a licensed employment agent.[988]

Application of the scheme

Section 22 of the Act provides that a person 'carries on business as an employment agent if the person provides, or offers to provide, an employment agent service' for a principal for reward.[989] Employment agent services include finding, or helping to find, a person to carry out work for a principal,[990] whether or not the work or employment is to be carried out under a contract of employment or otherwise.[991] The Act also provides that a person is not entitled to bring a proceeding to recover a commission, fee or reward for a service provided by the person as an agent if the person was not licensed to provide the service when the service was provided.[992] The Act excludes from the definition persons who merely publish advertisements.[993]

The RCSA has expressed some doubt over the Act's application to labour hire. The introduction to the 2016 Proposed ESIC provides that the ACT scheme:

> *…regulates placement and, seemingly, on-hire services. However, there remains doubt about whether it has any operation beyond a strict principal and agent relationship; and it does not appear to cover workforce contracting or contractor management services, where there is no sourcing service that is supplied.*[994]

985. Ibid.
986. Ibid.
987. See 3.1 re Victoria.
988. *Agents Act 2003* (ACT) s 22.
989. *Agents Act 2003* (ACT) s 22(1).
990. *Agents Act 2003* (ACT) s 22(2)(a).
991. *Agents Act 2003* (ACT) s 22(3).
992. *Agents Act 2003* (ACT) s 23.
993. *Agents Act 2003* (ACT) s 15.
994. RCSA, 2016 Proposed ESIC, 14.

Requirements to obtain a licence

The Agents Act permits both individuals and companies to be licensed.[995] For a corporation to be eligible to hold a licence, it must have at least one director who also holds a licence and no directors who are disqualified from holding a licence.[996]

The factors which disqualify a person from holding a licence include:

- conviction for an offence involving dishonesty;
- bankruptcy, personal insolvency or involvement in management of a corporation in administration or subject to a winding up order;
- mental incapacity;
- disqualification by, or contravention of an order of, the ACT Administrative Tribunal or under a corresponding law or body;
- holding a suspended licence;
- for a corporation, having a controller or administrator appointed or being the subject of a winding up order; or
- contravening a licence condition or relevant provision of the Act.[997]

Applications for a licence must be accompanied by a police certificate,[998] and must state the place which will be the applicant's main place of business.[999] Licence applicants must give public notice of their intention to apply.[1000] The current fees upon application, and for the required annual payment, are $762 for a one year licence and $2286 for a three year licence.[1001]

Regulation of licence-holder's conduct

The Agents Act contains a number of provisions regulating the conduct of licensed agents, including employment agents. The Act permits the ACT Administrative Tribunal to make occupational discipline orders in respect of agents which breach fair trading legislation or licensing requirements.[1002] Agents are required to advise in writing of any change to their main place of business.[1003] Agents must not publish false or misleading advertisements.[1004] They must keep written records of a range of transactions for a five year period.[1005] Further, the Commissioner for Fair Trading must enter a series of information about the agent on a public register.[1006]

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995. *Agents Act 2003* (ACT) s 24.
996. *Agents Act 2003* (ACT) s 24(3).
997. *Agents Act 2003* (ACT) s 27(1). Some exceptions are provided in s 27(2) and (3).
998. *Agents Act 2003* (ACT) s 29(2)(b).
999. *Agents Act 2003* (ACT) s 29(2)(a).
1000. *Agents Act 2003* (ACT) s 28.
1001. See: https://www.accesscanberra.act.gov.au/app/answers/detail/a_id/2300/~/employment-agent-licensing#!tabs-4
1002. *Agents Act 2003* (ACT) Division 3.4.
1003. *Agents Act 2003* (ACT) s 68.
1004. *Agents Act 2003* (ACT) s 79.
1005. *Agents Act 2003* (ACT) Division 8.1.
1006. *Agents Act 2003* (ACT) ss 160-161.

In addition the Agents Act contains specific prohibitions applicable to an employment agent in respect of fees. Section 96(1) and (2) provide:

> ***96 Employment agents must only take fee from employer***
>
> *(1) A licensed employment agent commits an offence if—*
>
> *(a) the agent asks for, or accepts, a benefit from a person for a service; and*
>
> *(b) the person is not—*
>
> *(i) seeking to have work carried out; or*
>
> *(ii) a model or performer.*
>
> *Maximum penalty: 50 penalty units.*
>
> *(2) An offence against this section is a strict liability offence.*

Section 171 of the Act enables rules of conduct which must be observed by licensed agents to be prescribed by regulation. The *Agents Regulations 2003* contain rules of conduct. Part 8.2 of Schedule 8 to the Regulations contains a statutory code of conduct that applies to employment agents and other licensees under the Act. The rules of conduct are expressed in general terms, and include: knowledge of relevant legislation; honesty, fairness, professionalism, skill, care and diligence; acting in the client's best interests; and a prohibition against 'high pressure tactics, harassment or harsh or unconscionable conduct'.

5.3.2 Queensland

Regulation of agents

The *Private Employment Agent Act 2005* (Qld) regulates agents in the business of finding work or workers for persons, or acting as agent for a model or performer.[1007] However, s 4 of the Act expressly excludes labour hire agents who participate in labour hire employment arrangements, as follows:

> *3) Also, a person is not a **private employment agent** if, for an agreed rate of payment to the person—*
>
> *(a) the person makes a worker of the person available to perform work, whether under a contract of service or a contract for service, for a client of the person; and*
>
> *(b) the worker works under the client's direction; and*
>
> *(c) the person is responsible for performing the obligations owed by a person to the worker, including paying the worker for the work.[1008]*

It also excludes persons who merely publish advertisements offering employment opportunities.[1009]

The Act facilitates the development of a code of conduct, which is contained in the *Private Employment Agents (Code of Conduct) Regulation 2015* (Qld). Some examples of the requirements and prohibitions covered by the code of conduct include:

1007. *Private Employment Agents Act 2005* (Qld) s 4.

1008. *Private Employment Agents Act 2005* (Qld) s 4(3). RCSA considers that there is some doubt regarding whether the exemption is sufficient to exclude an on-hire firm that charges a 'temp-to-perm fee': 2016 Proposed ESIC, 13.

1009. *Private Employment Agents Act 2005* (Qld) s 4(2).

- knowledge of statutory obligations;[1010]
- honest, fair and professional conduct;[1011]
- promotion of compliance with relevant legislation or industrial instruments by work seekers and persons looking for workers;[1012]
- various obligations to act ethically towards work seekers;[1013]
- a prohibition on referring work seekers who are not legally entitled to work in Australia or another country where the work is sought;[1014]
- a prohibition on charging fees for providing services such as resume or interview preparation to work seekers, or fees, deposits or bonds as a condition of finding work for a work seeker temporarily residing in Australia, for work in Australia;[1015]
- maintenance of a register of work seekers, employers and placements, along with other records, for a six year period;[1016]
- prohibitions on providing false information to a work seeker about the availability of work, employment legislation or relevant industrial instrument;[1017]
- a requirement to identify the private employment agent on documentation it publishes; and[1018]
- a requirement to provide work seekers with an information statement about their rights under the Act.[1019]

Queensland Parliament labour hire inquiry

The Parliament of Queensland Finance and Administration Committee Inquiry into the practices of the Labour Hire Industry in Queensland was established on 2 December 2015, and released the Queensland Inquiry Report in June 2016.[1020] It considered a range of similar issues to those considered by this Inquiry, and made a number of similar findings about the prevalence of 'rogue' labour hire operators in certain sectors.

The Queensland Inquiry made a single recommendation unrelated to direct regulation of labour hire in that state: that the relevant Queensland Minister progress 'through COAG meetings to work together with the Federal Government to address the issuance of ABNs to employees as a way for labour hire agencies to avoid their employer obligations'.[1021]

However, the Committee members were unable to agree on the more significant issue of whether a state based licensing system should be established to regulate labour hire agencies operating in Queensland. This proposal was supported by government members of the Committee, while non-government members argued that a licensing scheme would 'increase red-tape' and 'the current regulatory framework is sufficient and could be more effective if it is better resourced'.[1022]

1010. *Private Employment Agents (Code of Conduct) Regulation 2015* (Qld) r 5.
1011. *Private Employment Agents (Code of Conduct) Regulation 2015* (Qld) r 6.
1012. *Private Employment Agents (Code of Conduct) Regulation 2015* (Qld) r 8(2)(a).
1013. *Private Employment Agents (Code of Conduct) Regulation 2015* (Qld) rr 9-15.
1014. *Private Employment Agents (Code of Conduct) Regulation 2015* (Qld) rr 16-17.
1015. *Private Employment Agents (Code of Conduct) Regulation 2015* (Qld) rr 18-19.
1016. *Private Employment Agents (Code of Conduct) Regulation 2015* (Qld) rr 20-25.
1017. *Private Employment Agents (Code of Conduct) Regulation 2015* (Qld) r 26.
1018. *Private Employment Agents (Code of Conduct) Regulation 2015* (Qld) r 27.
1019. *Private Employment Agents (Code of Conduct) Regulation 2015* (Qld) r 29.
1020. Queensland Inquiry Report (2016).
1021. Ibid vii.
1022. Ibid, 39; see also 61-65.

The government members issued a Statement of Reservation which included two recommendations in addition to the one on which all Committee members agreed (see above).[1023] The first additional recommendation was that:

> *The Parliament should legislate to:*
>
> - *Establish a register of labour hire employers in Queensland*
> - *Provide that only registered labour hire employers shall be permitted to contract for the provision of labour hire; and*
> - *Require that continued registration is conditional upon compliance with:*
>   - *Fair Work legislation and associated employment conditions, including time and wage records*
>   - *WorkCover insurance obligations*
>   - *Workplace health and safety legislation*
>   - *Anti-discrimination Act 1991 and similar federal legislation*
>   - *Accommodation standards for employees*
>   - *Taxation and Superannuation Guarantee legislation*
>   - *Criminal Code Act 1889*
> - *Provide a 'fit and proper person' test for the disqualification of persons for eligibility to be a labour hire employer*
> - *Minimise the impact on employers by … providing a simple application and renewal process, with exclusion from the register on application to QCAT.*[1024]

The second recommendation by government members of the Committee relates to regulation of what is described in the report as a 'third party contractual relationship.'[1025] It provides as follows:

> *The Parliament should legislate to provide that labour hire contracts used by registered labour hire employers must provide:*
>
> - *Payment of wages and conditions in accordance with the Fair Work Act 2009 is a requirement of the contract; and*
> - *Where the employee is unable to seek recovery of unpaid wages from the labour hire employer due to administration, liquidation or an inability to locate the labour hire employer, the employee may recover unpaid wages from the host; and*
> - *The employee shall be able to sue upon the terms of the contract.*

As at 17 August 2016, the Queensland Government was yet to foreshadow any legislative change arising from the Queensland Inquiry Report.

1023. It is noted that the Government members of the Committee rejected the imposition of bonds to ensure that labour hire employers can meet employees' entitlements (even if the employing entity has gone into liquidation): ibid, 58.

1024. Ibid, 57.

1025. Ibid, 59.

5.3.3 South Australia

Regulation of agents

The South Australian *Employment Agents Registration Act 1993* and *Employment Agents Registration Regulations 2010* establish a licensing system for employment agents.

The Act defines 'employment agent' to mean:

> *a person who, for monetary or other consideration, carries on the business of—*
>
> *(a) procuring workers for persons who desire to employ or engage others in any kind of work; or*
>
> *(b) procuring employment for persons who desire to be employed or engaged by others in any kind of work,*
>
> *but does not include—*
>
> *(c) a charitable or benevolent organisation which carries on any such activity on a non-profit basis; or*
>
> *(d) an organisation or association of a class excluded from this definition by the regulations; …*[1026]

The Regulations provide, for the purposes of sub-paragraph (d) of the above definition, that:

> *An organisation or association is excluded from the definition of employment agent in section 3 of the Act insofar as it administers a group training scheme jointly funded by the Commonwealth and State Governments for—*
>
> *(a) the procurement of apprentices or trainees for persons who desire to employ or engage such persons in any kind of work; or*
>
> *(b) the procurement of employment for apprentices or trainees.*[1027]

The Act provides that a person must not carry on business as an employment agent or hold himself or herself out as an employment agent, unless that person holds a licence.[1028]

An additional exclusion, according to guidance material issued by the South Australian Government, is that of:

> *An organisation that operates a labour hire business. A labour hire arrangement is one where a labour hire agency or agency provides individual workers to a client or to a host, where the workers are under the host company's direction; however the labour hire agency remains ultimately responsible for the worker's (their employee's) remuneration.*[1029]

RCSA takes a different view as to the application of the Act, stating that it 'regulates placement (including work seeker representation) and on-hire services.' [1030]

Features of the South Australian agents registration scheme include:

- licensing requirements such as a fit and proper person test;[1031]
- prohibitions on recovering fees for acting as an unlicensed employment agent;[1032]

1026. *Employment Agents Registration Act 1993* (SA) s 3.
1027. *Employment Agents Registration Regulations 2010* (SA) r 3.
1028. *Employment Agents Registration Act 1993* (SA) s 6.
1029. Safework SA, *Guide For Applicants For A Licence To Carry On The Business Of An Employment Agent* (1 January 2013) at: http://www.safework.sa.gov.au/show_page.jsp?id=2280#.V5FG8TZf2Ul.
1030. 2016 Proposed ESIC, 15.
1031. *Employment Agents Registration Act 1993* (SA) s 7(11).
1032. *Employment Agents Registration Act 1993* (SA) s 14.

- a requirement to register premises;[1033]
- a requirement to display at the premises a scale of fees; and[1034]
- some limits on charging fees to workers, although as RCSA observed: 'curiously, the scheme tacitly permits fees to be charged to work seekers in so far as it preserves provisions that allow "deposits" to be taken from work seekers - presumably to be held against fees that they may be required to pay.' [1035]

South Australian Parliament Labour Hire Inquiry

The Parliament of South Australia Economic and Finance Committee's Inquiry into the Labour Hire Industry, was established on 11 June 2015. Its terms of reference include whether there is exploitation or harassment of labour hire workers; non-payment or under-payment of wages and superannuation; avoidance of taxation; as well as the responsibilities of host companies, registration of labour hire businesses and support for a coordinated national approach to labour hire regulation.[1036] Submissions to the South Australian Inquiry closed on 27 July 2015. The Committee heard evidence between November 2015 and 17 March 2016, and as at 17 August 2016, was yet to report.

5.3.4 Other states

New South Wales does not have any licensing system for employment agents. However, Part 4 Division 3 of the *Fair Trading Act 1987* (NSW) regulates employment placement services, defined as:

> *… a service provided by a person as an agent for the purpose of:*
>
> *(a) finding or assisting to find a person to carry out work for a person seeking to have work carried out, or*
>
> *(b) finding or assisting to find employment for a person seeking to be employed,*
>
> *whether or not the employment or work is to be undertaken or carried out pursuant to a contract of employment.*[1037]

Section 49 of the Act prohibits charging fees from a person seeking employment for the provision of employment placement services. Again, RCSA suggests that this is applicable to on-hire arrangements.[1038]

Western Australia's *Employment Agents Act 1976* creates a licensing system for employment agents, but expressly exempts labour hire arrangements.[1039] The scheme does not appear to cover workforce contracting or contractor management services, where no sourcing service is supplied. However, an agent may be excluded from the industry if they have breached standards set down in the Act.

1033. *Employment Agents Registration Act 1993* (SA) s 16.
1034. *Employment Agents Registration Act 1993* (SA) s 19.
1035. *Employment Agents Registration Act 1993* (SA) s 20; 2016 Proposed ESIC, 15.
1036. See: https://www.parliament.sa.gov.au/Committees/Pages/Committees.aspx?CTId=5&CId=173.
1037. *Fair Trading Act 1987* (NSW) s 48(1). This excludes mere advertising (s 48(2)), and the modeling and entertainment industry (s 48(3)).
1038. 2016 Proposed ESIC, 14.
1039. *Employment Agents Act 1976* (WA) s 5(3) provides as follows: 'A person who, as principal, is the employer responsible for the payment of wages or other lawful obligations to an employee and who, as such employer, provides to other persons the services of his employees to perform tasks of a temporary nature on the basis of predetermined rates agreed between those other persons and himself as such employer, no fee or expense being incurred by the employee in or in relation to the performance of such tasks, shall not be deemed by reason only of that fact to be an employment agent.'

During 2015, the Western Australian Government conducted a review of its licensing scheme and advanced a number of proposed changes to move to a negative licensing system and changes to conduct requirements.[1040] Under a negative licensing system, employment agents would be required to comply with regulated standards in terms of work or conduct.

The Northern Territory does not have legislation relating to employment agents or labour hire arrangements.

5.3.5 Conclusion

It is apparent from the above summary that whilst the position in other states varies, Victoria (along with the Northern Territory) is one of only two jurisdictions without some form of regulation touching upon employment agents.

The schemes operating elsewhere in Australia are not generally directed towards labour hire agencies, and a number expressly exclude labour hire. The basis for exclusion of labour hire from most of these schemes is not clear. Whilst they draw a distinction between providing recruitment services for persons who will ultimately be employed by the host and sourcing work for persons who are employed directly by an agency, this distinction is not material to the matters which are regulated under these schemes. It is apparent from evidence provided to the Inquiry that many of the concerns which the various employment agent schemes seek to address also occur within labour hire arrangements.

Further, it seems likely that many labour hire agencies would also provide what can broadly be described as 'recruitment' services, which appear to be the primary target of the various schemes, and thus would be required to hold a licence or otherwise comply with the statutory requirements prescribed under each scheme. In addition, even a labour hire agency which does not provide standard recruitment services may also be caught by the provisions. For example, RCSA has noted that whilst the Queensland legislation is intended to exempt on-hire agencies, 'on-hire agencies that charge temp-to-perm fees, or "deemed placement" fees, may be brought back within the scope of the legislation because the fee is for a service outside the strict scope of on-hire.'[1041]

5.4 Recent proposals for labour hire regulatory reform

5.4.1 Federal parliamentary inquiries

Two federal parliamentary inquiries have considered and reported on matters relating to the regulation of labour hire this year.

Firstly, as noted earlier in this Report, in March 2016, the Australian Government Senate Education and Employment References Committee concluded its inquiry into the impact of Australia's temporary work visa programs on the Australian labour market and on temporary work visa holders.

The Labor-Greens Majority Senate Work Visa Report[1042] made several recommendations for regulatory reform, including in respect of the labour hire industry (in respect of which it found significant evidence of mistreatment of migrant workers).[1043] These recommendations included the introduction of a national licensing regime for labour hire contractors, requiring

1040. See: https://www.commerce.wa.gov.au/consumer-protection/employment-agents-act-review-2015.

1041. RCSA, Guidance Note No. 0409-02, 13 March 2009.

1042. Senate Work Visa Report (2016).

1043. See also chapter 4.

demonstrated compliance with all workplace, employment, tax and superannuation laws, and providing that businesses can only use a licensed labour hire contractor, including where labour hire is subcontracted. The majority members of the Senate Committee also recommended the creation of a public register of all labour hire contractors.[1044] The case in favour of licensing and registration was presented as follows:

> *A significant benefit of labour hire licensing is the creation of a level playing field for legitimate labour hire companies and for businesses that use labour hire contractors to source labour. A public register of licensed labour hire contractors would also help supermarkets and other lead firms assure themselves that their supply chains are free of worker exploitation.*
>
> *Labour hire licensing would also allow the FWO and trade unions to easily locate a particular labour hire contractor and verify whether that contractor is licensed and operating lawfully.*
>
> *…*
>
> *The Committee is of the view that a licensing regime for labour hire contractors is vital to disrupt the current business model of unscrupulous labour hire contractors in Australia (who use their connections with labour hire agencies located overseas) to supply vulnerable temporary visa workers to pre-allocated jobs in Australia.[1045]*

Coalition members of the Senate Committee supported some aspects of the majority report, but rejected a number of the key recommendations, including the introduction of labour hire licensing.[1046]

On 15 October 2015, whilst the Senate Inquiry was under way, the Employment Minister Senator The Hon Michaelia Cash announced the establishment of a Ministerial Working Group to consider policy options to protect vulnerable foreign workers in Australia.[1047] The Ministerial Working Group was reportedly considering a range of options including a labour hire licensing scheme.[1048]

This followed on from the establishment in July 2015 of Taskforce Cadena, a joint operation between the Department of Immigration and Border Protection, Australian Customs and Border Protection Services and FWO, to conduct operations targeting visa fraud, illegal work and the exploitation of foreign workers particularly in the labour hire industry.[1049]

Secondly, the Commonwealth Parliament Joint Standing Committee on Migration released its Seasonal Worker Program Report May 2016.

Whilst, again, this Inquiry was not specifically focused upon labour hire, it reported that:

> *[t]owards the end of the inquiry, the Seasonal Worker Program… received some negative media coverage over the alleged mistreatment of seasonal worker participants. These reports alleged that seasonal workers were underpaid, housed in substandard accommodation, refused medical access and pastoral care, and verbally abused and underfed.'[1050]*

The report sets out substantial evidence of unlawful practices by labour hire operators.[1051] The Committee stated it was 'of the view that labour hire companies and, in particular, the so

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1044. Senate Work Visa Report (2016), 328.

1045. Ibid.

1046. Ibid, from 331.

1047. Senator The Hon Michaelia Cash, *Ministerial Working Group to Help Protect Vulnerable Foreign Workers*, Media Release (15 October 2015).

1048. House of Representatives, Questions in Writing, *Foreign Workers (Question No. 1556)*, 23 November 2015.

1049. Senator The Hon Michaelia Cash, *Ministerial Working Group to help Protect Vulnerable Foreign Workers*, Media Release (15 October 2015).

1050. Seasonal Worker Program Report (2016), 135.

1051. See also Chapter 4.

called 'phoenix' operators are particularly harmful to the industry and seasonal workers.[1052] The report includes the following recommendation, which is significant because it was supported by all members of the Joint Standing Committee:

> *The Committee notes the Senate Education and Employment References Committee's recommendation that:*
>
> > … a licensing regime for labour hire contractors be established with a requirement that a business can only use a licensed labour hire contractor to procure labour. There should be a public register of all labour hire contractors. Labour hire contractors must meet and be able to demonstrate compliance with all workplace, employment, tax and superannuation laws in order to gain a license [sic]. In addition, labour hire contractors that use other labour hire contractors, including those located overseas, should be obliged to ensure that those subcontractors also hold a license [sic].
>
> *The Committee supports the recommendation of our Senate colleagues and urges the Australian Government to establish a licensing regime for labour hire contractors.*[1053]

5.4.2 Major parties' policies for the 2016 election

In the lead up to the 2016 federal election, the Australian Labor Party (**ALP**) committed to implementing a national licensing regime for the labour hire industry, to commence from 1 July 2017.[1054] This formed part of a broader policy package aimed at addressing the issue of worker exploitation.[1055]

The Liberal/National Coalition's election policy[1056] committed a future Coalition government to a range of reforms (although no proposals directed specifically at the labour hire industry). Some of the proposals in the policy, such as stronger accessorial liability for 'parent companies' in respect of breaches of the law by subsidiaries, may apply to labour hire in the rare cases where there is a corporate relationship between the labour hire agency and the host. The Coalition policy is considered further at 8.3.

The Australian Greens did not have an election policy directed towards regulatory reform of labour hire. A proposal of the Australian Greens in relation to franchising is also considered further at 8.3.

5.4.3 Historical proposals for reform

The recent focus on regulatory reform relating to labour hire has occurred against the backdrop of similar proposals in the mid-2000s, following a range of similar public inquiries.

The New South Wales Government established a Labour Hire Industry Task Force in 2000, which provided its final report in 2001. The majority of the taskforce recommended that the New South Wales Government give in-principle approval to the establishment of a licensing regime for labour hire companies.[1057] This recommendation was not implemented.[1058]

The 2005 Victorian Inquiry Report made several recommendations, the majority of which were directed towards labour hire and occupational health and safety. These included a recommendation that a registration system for labour hire agencies be established and

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1052. Seasonal Worker Program Report (2016), 149.

1053. Ibid, 149-150.

1054. ALP, *Protecting Rights at Work: Licensing Labour Hire*, Policy for the 2016 Election.

1055. ALP, *Protecting Rights at Work- Fact Sheet, 2016*; ALP, *A Fairer Temporary Work Visa System – Fact Sheet*, 2016.

1056. Liberal/National Coalition, *The Coalition's Policy to Protect Vulnerable Workers*, May 2016.

1057. New South Wales Labour Hire Task Force, *Final Report* (Sydney, December 2001), 53.

1058. 2005 Victorian Inquiry Report, 9.

administered by the (then) Victorian WorkCover Authority.[1059] This register was subsequently developed and continues to be maintained by WorkSafe.[1060]

The Federal Government's 2005 Independent Contracting Report[1061] included recommendations in respect of labour hire primarily related to improved data collection and occupational health and safety. Its recommendations included that a voluntary labour hire industry code of practice be established by 2007, endorsed by the Australian Competition and Consumer Commission.[1062] The report noted that if the labour hire industry did not readily accept or comply with the code, it could be made mandatory.[1063] The dissenting report recommended the establishment of a 'mandatory register to ensure that labour hire companies comply with proper employment and business practices.'[1064]

5.5 Should the Inquiry recommend regulatory reform?

5.5.1 Participants opposing regulation

A threshold question for the Inquiry to consider is whether regulation to address the problems identified with labour hire is desirable or appropriate. Many unions, individual workers, community groups and academics argued in support of such regulation in their submissions and evidence to the Inquiry.[1065]

In contrast, a number of industry organisations submitted that regulation is undesirable, irrespective of the findings that the Inquiry ultimately makes. A key concern for Victorian industry is the economic context in which businesses in Victoria operate, which VCCI described as 'fragile', citing a soft labour market, an only recently reduced unemployment rate, precarious business sentiment and difficult trading conditions for small business.[1066] AMMA suggested that imposing additional employment costs on business would be counterproductive to the Victorian Government's employment creation and investment attraction goals, particularly in the resource industry.[1067] The imposition of additional labour costs to business was cited by several Inquiry participants to be undesirable.[1068]

Another key basis of opposition to regulation expressed in submissions and evidence is a view that a legislative response would be disproportionate to the size and scale of the problem to be tackled. Some industry bodies considered that recent high profile examples of exploitation of workers are not widespread, and 'do not represent the conduct of the great majority of Australian businesses.'[1069] ACCI submitted that there is no conclusive evidence suggesting that employers operating labour hire businesses, or employers that hire employees sourced through labour hire agencies, are any less compliant with their employment obligations relative to the

1059. Parliament of Victoria, Economic Development Committee, Inquiry into Labour Hire Employment in Victoria, *Interim Report, December 2004*, recommendation 5.1.

1060. See 3.5.

1061. Parliament of Australia, House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation Committee, *Making it Work: Inquiry into independent contracting and labour hire arrangements* (Canberra, August 2005).

1062. Ibid, 93.

1063. Ibid, 92.

1064. Ibid, 239.

1065. See 5.6.1.

1066. VCCI, Submission no 25, 2.

1067. AMMA, Submission no 59 7-8.

1068. See e.g. VCCI, Submission no 25; Ai Group, Submission no 53; RCSA, Submission no 110.

1069. VCCI, Submission no 25, 5.

general employer population.[1070] AMMA expressed concern about additional and unwarranted costs to business across the board in response to what it describes as 'isolated complaints raised by individuals within particular companies and confined to particular sub-sectors of the Victorian economy.'[1071] A VCCI member expressed concern that additional regulation would impact the many compliant operators in the labour hire sector, including those operating solely with high skill/high wage employment where there is little risk of exploitation.[1072]

A further significant basis of opposition to regulation is the view that workplace relations are already highly regulated with detailed and complex laws in place to address improper practices, and the existing regulatory framework is sufficient.[1073] VCCI observed that 'in recent high profile cases where employees involved in temporary work have been adversely impacted, it is typically where existing workplace laws have been breached.'[1074]

A related argument against regulation is that resources should instead be directed towards 'greater education and support for employers and employees', improved complaint resolution and increased resourcing for compliance and enforcement of existing laws.[1075]

The cost of further regulation to already compliant businesses was another key basis of opposition amongst industry groups and labour hire companies, particularly in respect of any labour hire licensing scheme. For example, Standby Staff told the Inquiry that licensing would likely cost it around $10,000 to $20,000, and that would probably cause a number of smaller agencies to close, and other agencies would never grow.[1076] Similarly, a number of participants submitted that whilst another layer of regulation would impose additional costs, it would be unlikely to have any impact on rogue operators who are already flouting their legal obligations. These submissions are summarised at 5.6.2.

5.5.2 Some proposals for regulation of labour hire received by the Inquiry

Introduction

The Inquiry heard a number of proposals about how to improve regulation of labour hire in Victoria and nationally. Proposals relating solely to labour hire regulation are set out in this chapter. Other proposals which may relate to labour hire but also have broader application to insecure work are set out in Part II.[1077]

National Union of Workers

Dr Underhill's submission included a 2013 desktop review of licensing arrangements internationally, which she had conducted on behalf of the NUW.[1078] As a result of this review, Dr Underhill identified four important characteristics of a licensing system. Firstly, she argued that licensing systems need to create sufficient barriers to entry to offer protection of labour hire workers' employment conditions. This could take the form of minimum capital requirements, past labour law compliance or minimum experience and qualifications. Secondly, licensing

1070. ACCI, Submission no 55, 5.
1071. AMMA, Submission no 59, 2.
1072. VCCI, Submission no 25, 5.
1073. ACCI, Submission no 55, 5.
1074. VCCI, Submission no 25, 5.
1075. VCCI, Submission no 25, 5.
1076. Standby Staff Services, Melbourne hearing, 25 February 2016.
1077. The Inquiry received a small number of additional proposals for legislative reform which are not considered in this Report, for example proposals relating to the *Payroll Tax Act 2007* (Vic) and *Protected Disclosures Act 2012* (Vic).
1078. Dr Underhill, Submission no 32 and Underhill (2013).

systems increasingly incorporate minimum employment requirements for agency workers, which provides leverage for compliance. Thirdly, penalties for breaches of licensing laws need to be balanced so that they are stringent enough to encourage compliance, but not so onerous as to create an imperative to circumvent the licensing scheme. Finally, penalties are increasingly being imposed on both host companies and labour hire operators. Importantly, Dr Underhill finds that licensing systems which only require the supply of key information from the licensee, such as contact details, are ineffective. Underhill also identified proper enforcement as key to the success of licensing systems, as well as ensuring that workers who have been victims of illegal conduct by agencies be given an avenue through which they can lodge a complaint.[1079]

The NUW proposal for a labour hire licensing scheme broadly adopts these characteristics. NUW submitted that the Victorian Government should implement a licensing scheme model with five essential features. These include:

- payment of a bond and annual licence fee by a company to the Victorian Government to operate a labour hire agency in Victoria (a bond of at least $50,000 is proposed);
- maintenance of a threshold capital requirement, to act as a barrier to entry by small, under-capitalised companies and also to reduce the incidence of phoenixing;
- a series of core requirements for licence holders and related parties, including a fit and proper person test, licensing requirements for natural persons managing or controlling the company (as well as the company itself), annual reporting requirements and workplace law compliance;
- a dedicated compliance unit with inspection and compliance powers, which would establish and maintain a public register; and
- mandatory workplace rights and entitlements training for labour hire workers by a relevant trade union.[1080]

RCSA

RCSA is opposed to a labour hire licensing system and any state-based regulation of the industry. Instead, it proposes an industry code pursuant to the *Competition and Consumer Act 2010* (Cth) (**CC Act**). It has released two versions of its proposed code, a public exposure draft in 2015 (**2015 Proposed ESIC**)[1081] and the updated 2016 Proposed ESIC.[1082]

Notwithstanding RCSA's opposition to a licensing system, the 2015 Proposed ESIC contained a number of features which were not dissimilar to the types of obligations which have been proposed by Inquiry participants for inclusion in a licensing system. In particular, the proposed ESIC would have:

- *required an employment services provider to disclose in writing, upon reasonable request, the identity of all parties in a tiered supply chain or an outsourced/delegated arrangement;*
- *restricted misleading job advertisements;*
- *contained two subdivisions dealing expressly with Worker Protections and Fair Work Practices, including a clause prohibiting exploitation of workers as follows:*

  An employment services provider must not engage in or facilitate any act that exploits a person, who may be vulnerable to exploitation by reason of any:

1079. Underhill (2013), 11. See also Mitlacher, Waring, Burgess and Connell (2014), 22. These authors noted that there is merit in the registration and regulation of employment agencies but only if it is coupled with, 'a well-resourced system of inspection and enforcement to prevent illegal or non-registered agencies from circumventing rules.'

1080. NUW, Submission no 91, 18.

1081. *Employment Services Industry Code, Public Exposure Draft*, May 2015.

1082. *Consultation Prototype – Employment Services Industry Code 2016.*

(a) attribute in respect of which it would be unlawful to discriminate against the person; or

(b) perceived lack of legal status and protections; or

(c) language barriers; or

(d) limited employment options; or

(e) dependency on the employment services provider; or

(f) poverty and immigration related debts; or

(g) social isolation;

- *prohibited forced labour;*
- *included a ban on charging most fees to a work seeker and a requirement to keep a register of fees charged;*
- *prohibited engagement of a work seeker in any manner that is not a 'genuine reflection of the true work relationship';*
- *prohibited the supply of labour to replace workers taking lawful protected industrial action;*
- *prohibited harsh or unfair contracts including those designed to avoid legal requirements; and*
- *prohibited provision of an employment service that facilitates multiple hiring to avoid overtime and penalty rate requirements.*

Ai Group submitted that it was not convinced of the merits of a formal code applying under the CC Act, as proposed by the RCSA. Its concerns relate to both the concept of a formal code under the CC Act, which would impose onerous obligations on labour hire agencies and their clients, and the content of various clauses in the 2015 Proposed ESIC.[1083]

CELRL submitted that it was not yet clear whether the RCSA's proposed code would be adopted by the federal government, and that it was inherently uncertain as to whether the Australian Competition and Consumer Commission (**ACCC**) would be willing to devote the necessary resources to ensure adequate implementation of the code, especially in the sectors which have proved to be most problematic from a compliance and enforcement perspective.[1084]

NUW submitted that a code or registration system of the kind promoted by the RCSA would be 'entirely inadequate in preventing the kinds of abuses in the industry that have been presented to the Inquiry.'[1085]

The structure of the 2016 Proposed ESIC is fundamentally different to the 2015 Proposed ESIC.

Rather than containing a series of mandatory rights and obligations, the 2016 Proposed ESIC now contains five 'principles', and a series of required 'outcomes' which are mandatory.

As described in the 2016 Proposed ESIC, *'the prescription of such a code may provide a less restrictive and cumbersome response to labour market exploitation, and one that preserves the goals of a Seamless National Economy and a National Workplace Relations System'.* It is drafted as:

> *… outcomes based regulation consistently with what is understood to be the Federal Government's preference for principles and outcomes-based regulation. … Whilst the ESI Code sets out mandatory Principles and outcomes, outcomes-based regulation allows you to consider how you can most effectively achieve those outcomes in ways that reduce regulatory burdens and preserve scope for innovation and competitiveness.*

1083. Ai Group, Submission no 53, 25.

1084. CELRL, Submission no 99, 21.

1085. NUW, Supplementary Submission no 9, 4.

The five principles are: equal opportunity and diversity; service; integrity and fair dealing; co-operation and assurance. The mandatory outcomes are divided into categories relating to: you and your work seekers; you and your customers; you and your supply chain; you and your competitors; and you and your business.

Of particular relevance is the following outcome in the 'you and your work seekers' section:

> *O(1.15) Exploitation*
>
> *You avoid causing or contributing to the exploitation of any work seeker, who may be vulnerable to exploitation by reason of any:*
>
> - *attribute in respect of which it would be unlawful to discriminate against the person; or*
> - *perceived lack of legal status and protections; or*
> - *language barriers; or*
> - *limited employment options; or*
> - *dependency on the employment services provider; or*
> - *poverty and immigration related debts; or*
> - *social isolation.*

The code also then contains a range of 'indicative behaviours' and 'contra indications' which are not mandatory, but describe the kinds of behaviours which might indicate whether an outcome has been met. The 'contra indications' (ie non mandatory provisions) in respect of the outcomes under 'you and your work seekers' codify (albeit as a guide only) the types of behavior which are likely to contribute to an exploitative work arrangement. These include:

> *CI(1.1) Coercion - Coercing a work seeker to accept work arrangements, pay or conditions less than the standard required by the Code.*
>
> *CI(1.2) Mistreatment - Subjecting a work seeker to physical or mental mistreatment or bullying.*
>
> *CI(1.3) Retention travel, ID or work documents - Unreasonably retaining a work seekers immigration, travel, identity, licensure or other work related documents.*
>
> *CI(1.4) Restraints - Subjecting a work seeker to any unreasonable restraint of trade, movement, or communication.*
>
> *CI(1.5) Foreign advertising - Advertising Australian jobs, sourcing, or recruiting work seekers exclusively or predominantly in an overseas jurisdiction or in a language other than English.*
>
> *CI(1.6) Adverse finding - Being the subject of any finding or decision of a court or tribunal having appropriate jurisdiction that you have caused or contributed to, or are to be treated as having caused or contributed to any breach of a workplace right or other adverse human rights impact.*
>
> *CI(1.7) Inadequate Records - Failing to make and keep appropriate records to evidence that your work seekers receive all pay and entitlements as befits their true work relationship, status, and classification.*
>
> *CI(1.8) Deceptive record keeping - Making false or deceptive records in relation to any of your responsibilities under the Code.*
>
> *CI(1.9) Payslips - Failing to provide work seekers with appropriate payslips in a timely manner.*
>
> *CI(1.10) Withholding information (informed consent) - Withholding information in such manner as to prevent work seekers making informed decisions about:*
>
> *(a) whether and how you will represent them;*
>
> *(b) the options available to them;*
>
> *(c) whether to accept any offer of work that is made to them.*

CI(1.11) Withholding information (concealment of exploitation)- Withholding information in such manner as to prevent work seekers discovering that:

(a) the terms and conditions upon which they are working or are to work do not meet the requirements of an Australian law;

(b) they have been subjected to adverse human rights impacts,

CI(1.12) Work Specs - Failing to reasonably obtain and evaluate the scope and nature of work for which you present your work seekers.

CI(1.13) Forced goods or services - Forcing your work seekers unreasonably to obtain:

(a) specified goods or services; or

(b) goods or services from a specified source.

CI(1.14) Dubious debts - Creating debts between you and your work seeker that prevent your work seeker freely seeking work from other sources.

CI(1.15) Penalties - Subjecting, or threatening to subject, your work seeker to any penalty or other unfair detriment because the work seeker has terminated or given notice to terminate an engagement to perform work, or because the work seeker proposed to accept work from another source.

CI(1.16) Usurious Arrangements - If a work seeker is loaned money directly or indirectly by you to meet travel or other work related expenses:

(a) requiring the work seeker to pay a sum greater than the sum loaned; or

(b) failing to provide in writing full details of the repayment terms of the loan.

CI(1.17) Outsource Monitoring - Failing to monitor arrangements for the outsourcing or cession to another person of your responsibilities with regard to a work seeker appropriately so as to avoid adverse human rights impacts or breaches of the work seeker's workplace rights

CI(1.18) Sub standard accommodation - Failing to provide, or take reasonable steps to ensure that, any accommodation provided in connection with work performed (or potentially to be performed) by your work seekers is safe and appropriate for the occupants.

CI(1.19) Sub standard travel arrangements - Failing to provide, or take reasonable steps to ensure that, any travel arrangements that you make (or require to be made), directly or indirectly, in connection with work performed by your work seekers is safe and appropriate for them.

In addition, the code makes provision for (presumably voluntary) accreditation in the 'Schedule – Accreditation Guidelines'. Guidelines for accreditation do not appear to require any of the above matters to be taken into account. Accreditation Guideline 9 – Proportionality provides as follows: 'Assessment is carried out adopting a proportionate approach that is more concerned with identifying persistent and systematic exploitation, breaches of workplace rights or other adverse human rights impacts than with identifying isolated non-compliances.'

AUSVEG

AUSVEG proposed the creation of a national register of labour hire firms with a proven history of compliance with Australian laws and standards. AUSVEG stated that this would not be a licensing system per se, but instead a publicly available list of organisations, administered by the Commonwealth Department of Employment, to which growers and visa applicants could be directed and encouraged to deal with. The register could also act as an intelligence database for government monitoring and enforcement of compliance with workplace laws in the sector. To be eligible for inclusion on the list, a labour hire organisation would need to prove a history of compliance with Australia's workplace, industrial relations and taxation laws, and then be subject to regular inspection or auditing to prove continuing compliance. AUSVEG proposed that approval from the ATO, the Department of Employment, the Department of

Immigration and Border Protection and state occupational health and safety regulators would be required prior to inclusion on the register.[1086] AUSVEG indicated during their appearance at the Inquiry's Melbourne hearing that the scheme it proposes would be mandatory, in that a grower who utilised a labour hire provider not on the register would be subject to penalties.[1087]

The Connect Group (Seasonal Workers Australia)

Connect Group Pty Ltd and its trading arm Seasonal Workers Australia (**SWA**), whilst not proposing a licensing system as such, proposed the implementation of a grower reporting system in the horticulture industry. In conjunction with growers' existing obligations, any grower utilising the services of a contractor would be required to forward electronically all details of any contractor they engaged to a central federal government body. The details would be provided on a standard form, and include the contractor's:

- Australian Company Number (**ACN**), ABN and trading name and addresses;
- bank details; and
- workers' names and tax file numbers/visa/passport details.

A central body would receive this information electronically, and could then simply divert the relevant information to the appropriate state and federal bodies. These would include:

- the ATO for tax and superannuation;
- various state revenue offices for payroll tax;
- various state workers compensation authorities for workers' compensation premiums;
- the Department of Immigration and Border Protection for visa cross checks; and
- FWO for award compliance.

A grower complying fully and wholly with this request would satisfy due diligence obligations under the law. A non-complying grower would face prosecution under a strengthened regime that would incorporate more severe sanctions and a simple burden of proof.[1088]

Other proposals

An alternative approach, suggested by VLA, would be to require contracts between host companies and labour hire agencies to contain mandatory terms, including that:

- host companies fulfil their legal obligations to protect labour hire staff in the host's workplace from bullying, discrimination and unsafe work practices;
- if labour hire staff make a complaint of bullying, discrimination or unsafe work practices, the labour hire agency will investigate at the host company's expense; and
- a substantiated complaint by a staff member of a labour hire agency would entitle the agency to terminate the contract with the host, and damages for the breach would be payable by the host company.[1089]

The Inquiry also received some proposals that aspects of labour hire regulation could be undertaken by outsourcing this function to private companies.[1090]

1086. AUSVEG, Submission no 22, 6; AUSVEG, Melbourne Hearing, 8 February 2016.
1087. AUSVEG, Melbourne Hearing, 8 February 2016.
1088. SWA, Submission no 40, 8.
1089. VLA, Submission no 84, 6.
1090. See e.g. Caleb Tan, Geelong Hearing, 7 December 2015; Labour hire agency, Closed Hearing 25, Melbourne, 25 February 2016.

5.5.3 Does Victoria have the capacity to implement a licensing scheme?

Introduction

The Inquiry's Terms of Reference provide that in making recommendations, it should have regard to matters including '[t]he limitations of Victoria's legislative powers over industrial relations and related matters and the capacity to regulate these matters'[1091] and 'the ability of any Victorian regulatory arrangements to operate in the absence of a national approach'.[1092]

Inquiry evidence about the capacity and desirability of Victorian regulation

The Inquiry received several submissions and evidence regarding both the desirability of, and Victoria's capacity to introduce, regulation to address issues identified by the Inquiry.

Some participants were opposed to any further regulation at a state level. For example, HIA submitted that 'piecemeal, state based legislation' would undermine the national workplace relations system. HIA does not consider it appropriate that the Victorian Government take stand alone actions with respect to these issues at this time.[1093] VCCI questioned why the Victorian Government is undertaking the Inquiry given that the majority of examples of harm to workers cited in the Background Paper relate to non-compliance with federal laws.[1094]

Other participants supported a greater regulatory role for the Victorian Government. For example, Per Capita submitted that it is in the public interest for Victoria to regulate labour hire agencies, arising from:

> *a need to ameliorate the negative effects of some practices in the industry identified in evidence to the inquiry, a need to protect the interests of those businesses operating legitimately and with due regard to appropriate standards, and the need to provide a practical mechanism to deal with these issues at their source.*[1095]

Many of those who support Victorian Government regulation nonetheless recognise the difficulties of Victoria legislating in isolation in respect of employment or industrial relations matters. Dr Jill Murray submitted that changes to the Fair Work Act are needed to deal with many elements of the problems associated with exploitative labour hire, and with current laws permitting a high degree of insecurity, uncertainty and vulnerability at work.[1096] Dr Murray noted the constitutional limitations upon the Victorian Government's capacity to legislate, submitting that 'the question for this Inquiry is what practical steps the Victorian Government can and should take in this area'.[1097] Similarly, Per Capita noted that the Federal Government has clear primacy in workplace relations given the use of the corporations power to legislate in this area; and because of previous referrals of power by Victorian Governments. However, Per Capita considered that these limitations would not prevent the introduction of a properly designed state-based licensing system for labour hire agencies.[1098]

The ACTU provided the Inquiry with a detailed analysis of the law with respect to the scope of Victorian regulatory power, and in particular the extent to which the Fair Work Act operates to exclude state laws, or otherwise covers the relevant field. The ACTU submitted, based on its analysis, that the express exclusions of certain state laws in the Fair Work Act do not prevent

1091. Terms of Reference, (c)(i).
1092. Terms of Reference, (c)(v).
1093. HIA, Submission no 45, 15.
1094. VCCI, Submission no 25, 6.
1095. Per Capita, Submission no 89, 4.
1096. Dr Jill Murray, Submission no 16, 2.
1097. Dr Jill Murray, Submission no 16, 2.
1098. Per Capita, Submission no 89, 3.

regulation of labour hire businesses, other than in respect of their relationships with their employees. In particular, the ACTU submitted that Victorian regulation of, firstly, relationships between labour hire workers and the customers of labour hire agencies, and secondly, relationships between labour hire agencies and their customers, is not excluded by the Fair Work Act.[1099]

The ACTU submission indicates that because of the Fair Work Act general protections provisions,[1100] it may be problematic for the Victorian Government to impose industrial relations requirements upon licence-holders under a state-based labour hire licensing system. However other requirements, such as minimal capital reserves, fees and financial reporting requirements, could more readily be imposed. The ACTU further submitted that notwithstanding the general protections provisions, Victorian legislation could regulate the relationship between a labour hire agency and its customers by reference to the rates of pay afforded to the labour hire agency's employees, provided it did not do so by reference to particular workplace instruments.[1101]

The ACTU submission concludes that an optimal structure for a Victorian based legislative scheme would involve two elements:

- firstly, laws applying directly to labour hire agencies dealing with licensing, capitalisation, reporting requirements and other matters; and
- secondly, laws applying to customers of labour hire agencies requiring them to use only licensed operators, and addressing conditions for workers of labour hire agencies within the limits suggested above.

The ACTU acknowledges that legislative action by the Victorian Government may nonetheless be subject to a High Court constitutional challenge, or reactive legislation by the Federal Government. However, it submitted that neither of these are sufficient reasons for the Victorian Government not to act.[1102]

Ai Group, in contrast, submitted that any state or territory law imposing a licensing system that seeks to regulate or enforce employment terms and conditions would be excluded under s 26 of the Fair Work Act. It also contended that the creation of a licensing system of the description advanced by the ACTU and AMWU, could offend the CC Act.[1103]

Both the ACTU and Per Capita ultimately support a national licensing scheme for labour hire operators, or complementary state schemes. However, ACTU submitted that this process 'has to start somewhere'[1104] and Per Capita submitted that the desirability of a national scheme does not undermine the case for action by Victoria.[1105]

Per Capita submitted several broad bases upon which regulation of labour hire in Victoria is justified, including that:

- labour hire arrangements facilitate the avoidance of, or render inadequate, certain existing legislative protections;
- a state based licensing system would complement existing regulation and assist with the enforcement of existing standards;

1099. ACTU, Submission no 76, 50; see also Per Capita, Submission no 89, 55-7.

1100. See 3.4.3 for a discussion of the general protections provisions and their application to labour hire.

1101. ACTU, Submission no 76, 61-2.

1102. ACTU, Submission no 76, 36.

1103. Ai Group, Supplementary Submission no 7, 4-5.

1104. ACTU, Submission no 76, 32.

1105. Per Capita, Submission no 89, 4.

- regulation would be directed at the market for labour hire agencies, not employment relationships;
- regulation of labour hire through licensing would be consistent with the state's regulation of a range of businesses and industries where a public interest in doing so has been identified, such as liquor and security;
- such a regime would promote fair competition on a level playing field amongst agencies by eliminating businesses prepared to compete on the basis of unethical, inappropriate or unlawful conduct; and
- the significance of manufacturing and logistics to Victoria's economy, and Victoria's significance as a destination for new migrants to Australia, weigh in favour of regulation.[1106]

Victorian business licensing schemes

Prima facie it is within the legislative capacity of the Victorian Parliament to regulate the conduct of businesses within the state. A key way in which this already occurs in Victoria is through business licensing.

Victoria has a number of existing business licensing and registration schemes, some of which are administered by the Business Licensing Authority (**BLA**) within Consumer Affairs Victoria (**CAV**). They cover businesses and industries as diverse as real estate agents, motor vehicle traders, second hand dealers, and some operators in the sex industry. Other regulators cover licensing of private security and other businesses.

Legislative licensing models used in Victoria vary.

These models include registration/licensing systems requiring personal or business characteristics as a pre-requisite to obtaining registration, with the licensing authority having the ability to impose further conditions on registration/licensing. This model has the advantage of allowing the regulator to identify industry participants for compliance and enforcement purposes, and licensing/registration fees are used to finance the scheme.

Within this category:

- Registration schemes usually rely upon eligibility criteria that can be objectively assessed, for example, that the person is not bankrupt, or currently disqualified from being a director of a company, or has not had a comparable licence cancelled in another Australian jurisdiction within the last five years. More focus can be placed on identifying those businesses that, once operating, demonstrate improper conduct that should disqualify them from continuing to operate. The Victorian second hand dealers scheme is an example of this model.
- Licensing schemes more commonly rely upon eligibility criteria that may include both objective (as above) and subjective elements (e.g. that the applicant is not a person likely to carry on such a business honestly and fairly, or the applicant does not have, or is not likely to continue to have, sufficient financial resources to carry on the business of trading). This discretion is what makes a licensing scheme more costly to administer as it focuses the most energy upon preventing 'dodgy operators' entering the market. The Victorian motor car traders schemes is an example of this model.

These models also include 'negative' licensing – where permission to operate is not required, but the scheme creates certain prohibitions which might prevent a person or business from commencing or continuing to operate, for example, if they have been found guilty of certain serious disqualifying offences. In addition, in some Victorian registration and licensing schemes, there are specific arrangements to allow a person or business to apply for permission to operate or to continue to operate, where they would otherwise be ineligible.

1106. Per Capita, Submission no 89, 4.

Commonwealth laws

The potential limitations regarding any Victorian regulation of labour hire agencies, or hosts, which has been raised most commonly by Inquiry participants relates to the extent to which this would have the effect of regulating employment and contracting conditions. This is due to the substantial exclusion of state laws of this nature under the Fair Work Act and the *Independent Contractors Act 2006* (Cth) (**IC Act**).

Fair Work Act

The Fair Work Act significantly curtails Victoria's capacity to regulate employment relationships and industrial relations matters. Part 1-3 Division 2 sets out the manner in which the Fair Work Act expressly excludes state and territory laws.

Section 26(1) provides that the Fair Work Act is intended to apply to the exclusion of all state or territory industrial laws.[1107] A state or territory industrial law includes a range of laws which apply to employment generally and regulate matters such as terms and conditions of employment, workplace relations matters or adverse treatment in employment.[1108] A law or an Act applies to employment generally if it applies to all employers and employees in the state,[1109] or all employers and employees in the State except those identified (by reference to a class or otherwise) by a law of the state.[1110]

Section 27 then sets out a series of laws which are not excluded by s 26. These include: the *Equal Opportunity Act 2010 (Vic)*;[1111] laws prescribed by regulation;[1112] and laws dealing with 'non-excluded matters' or rights and remedies incidental to those matters.[1113] Section 28 of the Fair Work Act permits regulations to be made to exclude a State law, including to override a 'non-excluded matter.'

In addition to the exclusions above, modern awards or enterprise agreements made under the Fair Work Act prevail over state laws to the extent of any inconsistency,[1114] other than in

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1107. Insofar as they would otherwise apply in relation to a national system employee or a national system employer. All private sector and most public sector employers in Victoria are national system employers as defined in s 14 of the Fair Work Act, as extended by s 30D of the Fair Work Act as a result of Victoria's referral of powers to the Commonwealth. A national system employee is an individual so far as he or she is employed or usually employed by a national system employer. See *Fair Work (Commonwealth Powers) Act 2009* (Vic), Fair Work Act ss 13, 30C.

1108. See Fair Work Act ss 26(2)(b)(i)-(vi); 26(2)(c). A State or territory industrial law also includes laws providing for a court or tribunal constituted by a law of the State or Territory to make an equal remuneration order; providing for the variation or setting aside of employment rights and obligations on unfairness grounds; a law permitting trade union right of entry; an instrument of legislative character made under any of the above laws, or a law or instrument of a legislative character prescribed by regulation: Fair Work Act s 26(2)(d)-(h).

1109. Fair Work Act s 26(4)(a).

1110. This is so whether or not it also applies to other persons, or whether or not an exercise of a power under the law affects all the persons to whom the law applies: Fair Work Act s 26(4)(b).

1111. And rights or remedies incidental to it: Fair Work Act s 27(1A), (1)(d)(i).

1112. Fair Work Act s 27(1)(b), (1)(d)(ii).

1113. Fair Work Act s 27(1)(c), s 27(1)(d)(iii). Non excluded matters include superannuation; workers compensation; occupational health and safety; matters relating to outworkers; child labour; training arrangements, except in relation to some terms and conditions of employment; long service leave, except in relation to certain employees with Fair Work Act entitlements; leave for victims of crime; jury or emergency service duties; declaration, prescription or substitution of public holidays (other than employment rights and obligations); matters relating to provision of essential services or to situations of emergency; regulation of employee and employer associations and their members; workplace surveillance; business trading hours; claims for enforcement of contracts of employment other than where excluded by s 26(2)(e), and any other matters prescribed by the regulations: Fair Work Act s 27(2).

1114. Fair Work Act s 29(1).

respect of the non-excluded matters listed above.[1115] However, again, this qualification may be overridden by regulation.[1116] Further, the Fair Work Act provides that the above is not a complete statement of the circumstances in which the Fair Work Act and instruments made under it are intended to apply to the exclusion of, or prevail over, laws of the States.[1117]

Other Fair Work Act provisions which may potentially impact upon a state based licensing scheme include provisions within Part 3-1, General Protections. Section 340 of the Fair Work Act prohibits a person from taking adverse action against another person because the other person has a workplace right. Section 343 of the Fair Work Act prohibits action by a person with intent to coerce another person in respect of the exercise of a workplace right.[1118] A key concern raised in the ACTU's submission was whether a requirement in the proposed licensing system that a labour hire customer only enter a contract for services with a licensed labour hire agency may be inconsistent with these prohibitions, in light of a licensing requirement to be compliant with the Fair Work Act.[1119]

Independent Contractors Act

The IC Act curtails Victoria's capacity to regulate some independent contractor relationships.

A key purpose of the IC Act is to prevent interference with the terms of independent contracting arrangements by excluding laws of the states and territories that confer or impose rights, entitlements, obligations or liabilities of a kind more commonly associated with employment relationships upon independent contracting arrangements.[1120]

Part 2 of the IC Act excludes certain state or territory laws which affect the rights, entitlements, obligations or liabilities of a party to a 'services contract'.[1121] 'Services contract' is defined as a contract for services to which an independent contractor is a party, 'that relates to the performance of work by the independent contractor'.[1122] Section 7 provides (subject to exceptions relating to outworkers and owner drivers)[1123] that state and territory laws do not affect a party to a services contract to the extent that the law would otherwise:

- deem or treat a party to the services contract as an employer or employee for the purposes of a workplace relations law;[1124]
- confer or impose rights and obligations which would be workplace relations matters if the parties were in an employment relationship;[1125] or
- allow a court to alter a services contract on an unfairness ground.[1126]

'Workplace Relations Matters' are defined in s 8 through both inclusions and exclusions. Relevantly, excluded from the definition is 'professional or trade regulation.'[1127]

1115. Fair Work Act s 29(2).
1116. Fair Work Act s 29(3).
1117. Fair Work Act s 30.
1118. Fair Work Act s 340.
1119. ACTU, submission no 76, Schedule 1.
1120. See IC Act s 3(2)(c).
1121. IC Act s 7.
1122. IC Act s 5(1). Note: Conditions or collateral arrangements relating to a services contract may be taken to be part of the services contract: see subsection (4). The contract must also have the requisite constitutional connection, set out in 5(2).
1123. IC Act s 7(2).
1124. IC Act s 7(a).
1125. IC Act s 7(b).
1126. IC Act s 7(c). *Unfairness Ground* is defined in s 9.
1127. IC Act s 8(2)(j).

Section 4 of the IC Act provides that 'independent contractor' is not limited to a natural person. There has been limited and inconclusive judicial consideration of the nature of a services contract, and in particular when a contract will be considered to '[relate] to the performance of work by the independent contractor.'[1128]

Can Victoria implement a legislative licensing scheme?

As noted above, business licensing is a common matter of regulation under Victorian law. A licensing scheme for labour hire agencies would in many respects be no different in character to many other business licensing schemes already operating in this state. Nothing in the provisions of the Fair Work Act or IC Act, which are examined above, would operate to preclude this.

The express and other exclusions in the Fair Work Act may be enlivened should a scheme under Victorian law be applied to employment generally, and seek to require, as a licensing condition, that a labour hire agency afford its employees particular employment-like conditions. However, a scheme which merely required a labour hire agency to demonstrate compliance with the existing legal framework (such as the Fair Work Act and the OHS Act) would not involve any further regulation of the kind enlivened by the Fair Work Act exclusions. It is common for Victorian licensing schemes to require the licensee to demonstrate compliance with particular existing legal obligations (for example taxation laws or criminal laws).[1129]

The IC Act may impact the state's capacity to regulate conditions between a labour hire agency and a labour hire worker engaged as an independent contractor. However, a licensing scheme need not do that. Beyond that, the IC Act exclusions would only apply to any Victorian regulation of the contract between a host and the labour hire agency if that contract could be characterised as a 'services contract'. This is unlikely, and even if it were able to be so characterised, the nature of the regulation imposed upon that contract is unlikely to be affected by the exclusions in the IC Act.

Notwithstanding the above, there are no doubt some limits imposed by the current Commonwealth regulatory framework on any proposed Victorian legislative labour hire licensing scheme. I have had regard to these limits in considering the matters below, and they would need to be closely considered in the framing of any new Victorian legislation arising from my recommendations.

5.6 A labour hire licensing scheme for Victoria

5.6.1 Participants' support for a licensing scheme

As set out in 5.2, a number of other countries have implemented licensing or registration schemes for labour hire agencies.

By far the most common reform proposal put forward by stakeholders was the introduction of a licensing system for labour hire operators in Victoria. The discussion below relates to a range of different but related options that were addressed in submissions and evidence, including licensing, registration and accreditation (for convenience, I use the term 'licensing scheme').

1128. See e.g. *Kerrisk v DC Holdings Western Australia Pty Ltd* [2013] FCA 2117; *ATS (Asia Pacific) Pty Ltd v Dun Oir Investments Pty Ltd* [2012] FCA 1004; *ATS (Asia Pacific Pty Ltd v Dun Oir Investments Pty Ltd* [2012] FCA 1460; *Jy Smile Centre Pty Ltd and Anor v Idameneo (No123) Pty Ltd* [2013] FCCA 336.

1129. See e.g. *Estate Agents Act 1980 (Vic)* s 14(5); *Motor Car Traders Act 1986* (Vic), s 13(4); *Second Hand Dealers and Pawn Brokers Act 1989* (Vic) s 6.

There was almost universal support for the implementation of a labour hire licensing scheme in Victoria in the submissions and evidence provided by trade unions to the Inquiry.[1130] The particular features proposed by unions for such a scheme are explored further below. Amongst unions and other participants in the Inquiry who supported licensing, there was wide variation in terms of the particular model, scope and jurisdiction of a licensing scheme.

Dr Underhill submitted that the introduction of a licensing regime for labour hire agencies would bring Victorian regulation into line with the now well-established approach in many other countries, including most of Australia's major trading partners. She submitted that a licensing scheme has the potential to improve compliance with minimum employment and health and safety standards, and to curtail the use of undocumented workers and the exploitation of temporary migrant workers in horticulture and other industries.[1131]

As Dr Underhill told the Inquiry:

> *[Licensing] has to be, I think at least in part, to get rid of the small operators who continually fail to comply with their legal obligations, and licensing would be one way of creating a barrier. Yes, of course, there will always be a black market, but if you sort of get a balance between making it not too onerous to be licensed, then the incentive for the black market tends to disappear as well.*[1132]

The Bendigo Uniting Churches Social Justice Group submitted that a licensing system for labour hire agencies would provide meaningful oversight of an industry where all that is currently required to set up a labour hire agency is '$500, a computer with spread sheet capability and an internet connection.'[1133]

Some participants supported a national licensing scheme, but not a state-based scheme.[1134] The GLA submitted that if licensing was introduced in Victoria, which did not operate elsewhere, this state might encounter labour hire agencies changing approach and only supplying labour outside of Victoria. It suggests considering whether a national approach could be adopted to avoid such risks.[1135]

Similarly, some supported a scheme confined to particular industries, such as the horticulture industry. Mr Peter Crisp MP supports a national licensing or registration scheme for labour hire contractors operating in the seasonal labour market. He considers the scheme should operate nationally, as many labour contractors operate across state borders. The scheme he envisages would provide for labour contractors to be identified, and deregistered if found to have questionable business practices such as engaging undocumented workers. Advertising by contractors should include their registration number. A requirement for registration would be the provision of appropriate information to workers about the job to be undertaken, the method of payment, and details of who is responsible for paying the worker. The registration scheme would ensure that contractors as well as the employer are identified and liable in the chain of responsibility. In Mr Crisp's view, most contractors operate ethically and a minimum set of standards would have little impact on their operations. Mr Crisp submitted that he had been advised by a number of registered hostel operators and labour hire businesses that any drawbacks in administering a higher regulatory regime would be more than offset by the improvement in the perception of the industry.[1136]

1130. See e.g. ASU Private Sector, Submission no 31, 20-21; HACSU, Submission no 35, 19-20; CPSU Communications, Submission no 61, 27; ACTU, Submission no 76, 3; NUW, Submission no 91, 26.

1131. Dr Underhill, Submission no 32, 11.

1132 Dr Underhill, Deakin University, Academic Forum, 25 May 2016.

1133. Bendigo Uniting Churches Social Justice Group, Submission no 18, 3.

1134. See e.g. AUSVEG, Submission no 22, 6; Melbourne Hearing, 8 February 2016.

1135. GLA, Submission no 15, 8.

1136. Peter Crisp MP, submission no 30, 4.

In contrast, the NUW submitted that concerns with labour hire are systemic not sectoral, and that it would be 'a mistake to subject only those industries where migrant or temporary, foreign workers predominate to a licensing system, while allowing the current *laissez faire* attitude towards labour hire in other industries to continue.'[1137]

As indicated in the earlier discussion,[1138] a key reason for the success of the GLA scheme in the UK appears to have been the high level of involvement and support from major industry players. In the Victorian context, there is some support for a licensing scheme from the labour hire sector itself, and other industry bodies, although it is far from universal.

The East Gippsland Food Cluster supports tighter regulation of labour hire providers. Its Executive Officer, Dr Watts, told the Inquiry that the organisation would like to see much stricter regulatory oversight of the labour hire sector in order that employers, as well as employees and other stakeholders more broadly across the supply chain, can actually have confidence in the integrity of the labour hire operators.[1139]

AUSVEG and the Connect Group indicated support for a particular model of labour hire regulation, each of which bears some similarities to a licensing model. These are explored further above.[1140]

Agri Labour indicated a willingness to explore any initiative, such as licensing, to bring about greater compliance. However it was sceptical about the capacity of a licensing scheme to capture those operators already functioning outside the law. It considered threshold requirements of any regulatory scheme to include that:

- it would not tie up cash flow;
- industry would be fully and properly consulted in the design of any scheme to ensure that it is workable;
- the scheme would cover all forms of third party labour supply, not just 'labour hire'; and
- consideration of an 'accreditation system' as an alternative be undertaken.[1141]

Dr Joanna Howe told the Inquiry:

> *Vegetables WA has asked me and some other academics to write a submission to their government around why they want a licensing scheme for labour hire because they feel then it protects them from risks like the Four Corners episode exposed last year.*[1142]

MADEC submitted that a mandatory certification process for labour hire providers, run by industry and vetted by government, would be useful, suggesting that the influence of the 'demand side' (such as exporters and larger supermarkets) could be used to change practices in the labour market and enforce ethical procurement standards.[1143] It submitted that a licensing system without certification would be a 'waste of time'. Its proposal envisaged that clients could still use non-certified labour hire agencies, but MADEC considers that a certification system would reduce the extent to which that would occur, particularly if it was a requirement of supply to upstream purchasers.[1144]

1137. NUW, Supplementary Submission no 9, 4-5.

1138. See 5.2.1.

1139. Dr Nicola Watts, East Gippsland Food Cluster, Morwell Hearing, 29 February 2016.

1140. See 5.5.2.

1141. Agri Labour, Submission no 107, 4.

1142. Dr Joanna Howe, Adelaide University, Academic Forum, 25 May 2016.

1143. MADEC, Submission no 9, 4.

1144. MADEC, Submission no 9, 4.

One labour hire agency confidentially submitted that as long as it was not onerous or costly, the agency would be happy to be a part of a licensing scheme.[1145] Another considered that a licensing system would work in part if there were serious ramifications for businesses that choose not to use licensed labour hire companies, and the process was not more costly and time-consuming for companies already complying with legal obligations.[1146]

A large user of labour hire services, including the provision of WHM visa workers, supported licensing as an excellent idea to implement a level playing field.[1147]

5.6.2 Participants' opposition to a licensing scheme

A number of key industry groups are opposed to the introduction of a labour hire licensing scheme, or as outlined above, any additional regulation of labour hire. Ai Group considered that there would be a number of particularly problematic aspects of a Victorian licensing scheme, including:

- the application of a Victorian-based licensing system to labour hire providers operating in more than one state;
- the scope of any scheme, and its application to specialised managed services performed by businesses both within and outside the labour hire industry (such as maintenance, IT management, construction, project management or facilities management), and its application to vertically integrated labour hire services within a business;
- whether the licensing scheme would in fact be effective at targeting a small minority of unscrupulous labour hire providers, or whether it would simply be further regulation which is ignored by such providers;
- difficulties in identifying the criteria for a licensing scheme and the risks of additional scope for union interference in business relationships; and
- the costs of a licensing scheme to business.[1148]

Similarly, many labour hire agencies expressed concern about a licensing scheme.

A number expressed the view that those who are not doing the right thing will continue not to do so, whether there is licensing in place or not.[1149] One labour hire agency argued:

> *we are one of the most tightly regulated employment markets in the world and yet we still have these rogue elements operating, so would a licensing scheme actually change that? If they are already non-compliant, adding regulation and punishing those that are already compliant as well to the exception, if there is nothing going to compel those others who are non-compliant to become compliant, you are just adding a regulatory burden that is not necessarily going to achieve anything.*[1150]

Others raised the cost implications of a licensing scheme. For example, one labour hire agency said: '[r]egistration and regulation or legislation adds cost. It then needs to be policed, and … that is an incurred cost as well.'[1151] Another said:

> *I think licensing would perhaps be a cost inhibitor for what is otherwise quite a lean margin industry, and I think the majority of certainly the big players do the right thing anyway, but to have [an]… audit process I think would probably be a better licensing system, whereas a third party auditor comes in to ensure you're adhering to standard recruitment practices.*[1152]

1145. Confidential, Submission no 14.
1146. Prestige Staffing Personnel, Submission no 60, 1-2.
1147. Labour hire client, Closed Hearing 30, Morwell, 1 March 2016.
1148. Ai Group, Submission no 53, 24-25.
1149. See e.g. Labour hire agency, Closed Hearing 01, Mildura, 23 November 2015.
1150. Adecco, Dandenong Hearing, 30 November 2015.
1151. Labour hire agency, Closed Hearing 05, Mildura, 24 November 2015.
1152. Labour hire agency, Closed Hearing 13, Dandenong, 30 November 2015.

Australia Wide Personnel opposed a licensing scheme in favour of the 2015 Proposed ESIC, but argued that as Australia has a national industrial relations system, any further regulation in this area should be implemented on a national level.[1153]

Adecco also expressed 'massive concerns' about the labour hire licensing system proposed by the NUW, characterising it as giving the union more control over a company's ability to engage labour hire, through union involvement in the licensing scheme or minimum requirements for union engagement in the licensing scheme.[1154]

ITCRA raised concerns about the potential cost of a licensing scheme, and argued that it would not change industry behaviour. It submitted that a national, industry-wide code was preferable to licensing.[1155]

In his submission, Professor David Whyte from the University of Liverpool warns that the major danger of a registration or licensing system is that rather than aiming to raise the bar on working conditions and ensuring the law is being upheld by employers, it becomes reduced to a new form of policing migrant workers. He cautions that any system of registration must explicitly be distanced from authorities that deal with immigration and the criminalisation of workers. He also identifies the risk that additional regulation will stimulate 'grey' or illegal markets on the periphery.[1156]

5.6.3 Submissions about the potential features of a licensing scheme

A wide range of potential features of a licensing system were proposed by stakeholders. Some of the most commonly proposed features are set out below.

Financial capability of the licensee and funding of the scheme

The three main proposals for features which establish the financial capability of the labour hire agency included:

A minimum capital requirement, either as a start-up measure or an ongoing measure[1157]
The NUW and CFMEU Construction submitted that this requirement would help stop phoenixing amongst a corporate group. It would also act as a barrier to entry to the industry. However, CELRL was critical of this proposal, suggesting it would tie up valuable working capital and would be difficult to monitor on an ongoing basis.[1158]

A bond[1159]
CFMEU Construction submitted that this would act as security for failure of a labour hire agency to meet its employment obligations, and would discourage violation of regulations. Per Capita submitted the amount of the bond could be scaled, based on the size of the business. NUW submitted that the bond should be $50,000.

1153. Australia Wide Personnel, Dandenong Hearing, 30 November 2015.

1154. Adecco, Dandenong hearing, 30 November 2015.

1155. ITCRA, Supplementary Submission no 5, 9-10.

1156. Professor David Whyte, Submission no 17, 2, 3; see also 5.2.1.

1157. See e.g. ASU Authorities and Services, Submission no 31, 17-18; ASU Private Sector, Submission no 47, 20; Western Community Legal Centre, Submission no 62, 5; ACTU, Submission no 76, 31; VTHC, Submission no 86, 4; ANMF, Submission no 88, 5; AMWU, Submission no 95, 9; NUW, Submission no 91, 26, CFMEU Construction, Submission no 27, 5.

1158. CELRL, Submission no 99, 16.

1159. ASU Authorities and Services, Submission no 31, 17-18; HACSU, Submission no 35, 19; ASU Private Sector, Submission no 47, 20; Western Community Legal Centre, Submission no 62, 5; VTHC, Submission no 86, 4; ANMF, Submission no 88, 5, Per Capita, Submission no 89, 5; NUW Submission no 91, 26; AMWU, Submission no 95, 9.

An annual licence or registration fee[1160]

CFMEU Construction submitted that this would cover the administration of the licensing scheme and contribute to proof of financial capacity. NUW suggested that this fee be set at $5,000-$10,000.

Characteristics of the company and its key personnel

A large number of stakeholders submitted that licensing requirements should include the following matters:

Licence-holders should be both the company and its key management personnel[1161]

Per Capita submitted that the granting and maintenance of the licence should be subject to the corporate entity, its directors, and key management personnel meeting tests as to capacity and character. The corporate tests should focus on solvency, capital adequacy and compliance systems.[1162] Under the GLA licensing model, where a company or individual holding a licence changes its legal status, it must apply for a new licence using that legal status. If the new legal entity operates without a licence, it commits a criminal offence. GLA submitted that where such changes occur it is essential to review whether the old company is significantly in tax debt, and whether the change of status is an attempt to evade those responsibilities. Where this is confirmed, a new licence may be refused.[1163]

A 'fit and proper person' test should apply to personnel[1164]

NUW submitted that the fit and proper person test would preclude persons from operating in the labour hire industry where they have been convicted of an offence, including offences involving fraud or dishonesty, intentional use of violence, breaches of workplace laws and breaches of occupational health and safety laws. SDA submitted that persons who are bankrupt should be excluded. Ryan Carlisle Thomas submitted that there are appropriate examples in existing Victorian legislation, such as Part III of the *Estate Agents Act 1980* (Vic) and the new provisions in the *Rooming House Operators Act 2016* (Vic).[1165]

Education and compliance with existing industrial relations laws

Many stakeholders regarded features relating to compliance with existing industrial relations and other laws to be important conditions of a licence being granted, including:

Information and training for employees as to their rights[1166]

HACSU submitted that labour hire workers should receive mandatory workplace rights and entitlements training, and that unions should be entitled to attend site inductions.[1167] The Uniting Church submitted that labour hire businesses in sectors where there have been significant levels of human trafficking, forced labour and/or

1160. HACSU, Submission no 35, 19; JobWatch, Submission no 46, 34; ASU Private Sector, Submission 47, 20; Western Community Legal Centre, Submission 62, 5; NUW, Submission no 91, 12; AMWU, Submission no 95, 9.

1161. NUW, Submission no 91, 14.

1162. Per Capita, Submission no 89, 5.

1163. GLA, Submission no 15, 7

1164. Per Capita, Submission no 89, 5; NUW, Submission no 91, 14;VTHC, Submission no 86, 4, ASU Authorities and Services, Submission no 31, 17; SDA, Submission no 36, 13; ASU Private Sector, Submission no 47, 21; JobWatch, Submission no 46, 34; Western Community Legal Centre, Submission no 62, 5; ANMF, Submission no 88, 5; AMWU, Submission no 95, 9.

1165. Ryan Carlisle Thomas, Submission no 104, 2.

1166. CFMEU Construction, Submission no 27, 24; ASU Authorities and Services, Submission no 31,18; HACSU, Submission no 35, 19; JobWatch, Submission no 46, 34-35; VTHC, Submission no 86, 4; Per Capita, Submission no 89, 5; ANMF, Submission no 88, 6; NUW, Submission no 91, 18; Western Community Legal Centre, Submission no 62, 5.

1167. HACSU, Submission no 35, 20.

egregious exploitation, should be required to introduce employees on temporary work visas to a non-government organisation (e.g. a union) that is able to assist the migrant worker to understand their rights and responsibilities.[1168]

Compliance with industrial relations and occupational health and safety laws[1169]
This was a key proposed licensing requirement for several unions and community organisations. For example, the NUW submitted that demonstrating ongoing compliance with these laws would be required to maintain a licence.

Transparency and accountability

Two key transparency measures were proposed as features of a licensing system. These were:

A public register of licensed operators[1170]
This would function as a means for host employers to identify which operators are licensed.

Reporting requirements[1171]
A range of reporting requirements were proposed. For example, HACSU proposed annual reporting requirements, including in relation to the numbers of workers and their pay rates.

Restrictions on operation

Some stakeholders proposed imposing licensing conditions which would restrict the circumstances in which labour hire could be utilised. These included:

Requirement to have objective reason for labour hire use
The Australian Nursing and Midwifery Federation (**ANMF**) proposed that registration should only be approved where there is an objective reason for the use of labour hire which is temporary in nature (such as the need to replace an absent worker or to perform a role not ordinarily carried out in the business).[1172]

Restriction on labour hire replacing striking workers
The ANMF also proposed the imposition of a requirement upon registered labour hire agencies not to supply labour to replace workers who are taking lawful industrial action.[1173]

Additional workplace standards

A number of stakeholders suggested imposing additional workplace standards upon labour hire agencies as a condition of licensing. These include:

Equality with direct workers
The ANMF proposed a licensing requirement that labour hire workers must be treated at least equally with the workers within the host workplace in respect to pay and terms and conditions of employment.[1174]

No barriers to direct employment
The AMWU proposed a licensing requirement that labour hire agencies not engage in

1168. Uniting Church, Submission no 57, 2.
1169. HACSU, Submission no 35, 19-20; JobWatch, Submission no 46, 34; ASU Private Sector, Submission no 47, 20-21; Western Community Legal Centre, Submission no 62, 4-6, 61 ; NUW, Submission no 91, 21-24.
1170. CFMEU Construction, Submission no 27, 24; NUW Submission no 91, 15.
1171. HACSU, Submission no 35, 20; Western Community Legal Centre, Submission no 62, 5,60-61; VTHC, Submission no 86, 4; Per Capita, Submission no 89, 5; NUW Submission no 91, 15.
1172. ANMF, Submission no 88, 5.
1173. ANMF, Submission 88, 6.
1174. ANMF, Submission no 88, 5.

any practice which would prevent or limit the ability of the host employer to engage a labour hire worker directly.[1175]

No engagement of independent contractors

JobWatch proposed a licensing requirement that labour hire agencies not engage workers as independent contractors.[1176]

Conversion to direct employment after a specified period

The AMWU proposed a licensing requirement that labour hire employees convert to direct employment by a host company after a specified period.[1177]

Compliance with principles/code of conduct

A number of unions and other organisations proposed that labour hire agencies be required to comply with a code of conduct, or principles relating to acting in good faith and affording workers dignity at work.[1178]

Requiring the use of a model contract between hosts and labour hire agencies

The AMWU proposed developing a model labour hire contract for the relationship between the labour hire agency and host, including provisions requiring pay parity with direct workers; and extending any rights conveyed to workers at the host agency under an award or enterprise agreement to the labour hire workers.[1179]

Potential limits in the scope of a licensing scheme

A key question for any labour hire licensing scheme is to define precisely the activities which are regulated.

The NUW submitted that the intention of their licensing model is to encompass labour hire agencies, triangular contracting arrangements and other contracting mechanisms where host companies are supplied with labour by third parties.[1180]

Ai Group raised a concern that any licensing scheme may extend into areas regarded as outside the 'labour hire' industry, such as specialist third party contractors and vertically integrated labour providers. The boundaries of what is considered to be labour hire, in contrast to, for example, outsourcing, are not clear.[1181] Other industry bodies raised concerns about what is meant by 'labour hire' and the potential misuse of that label to describe other outsourcing arrangements.[1182]

Some stakeholders considered that a licensing or regulatory scheme should be limited to particular industries, such as the horticulture industry.[1183] The Uniting Church proposed that a Victorian licensing scheme should apply to labour hire businesses in selected industry sectors where there is evidence of significant levels of human trafficking, forced labour and/or egregious exploitation. Such sectors should include agriculture, food processing, construction, hospitality and laundries.[1184]

1175. AMWU, Submission no 95, 10.
1176. JobWatch, Submission no 46, 18.
1177. AMWU, Submission no 95, 10.
1178. AMWU, Submission no 95, 9; SDA, Submission no 36, 13; ACTU, Submission 76, 31; AIER, Submission no 73, 3.
1179. AMWU, Submission no 95, 10.
1180. NUW, Submission no 91, 12.
1181. Ai Group, Submission no 53, 20.
1182. See e.g. RCSA, Submission no 110, 4.
1183. AUSVEG, Submission no 22, 2 and 6; PMA-ANZ, Submission no 85, 4; Peter Crisp MP, Submission no 30, 10.
1184. Uniting Church, Submission no 57, 2.

The GLA, however, submitted that regulatory restrictions to several narrow industry sectors hamper the ability to effectively tackle labour exploitation. Its submission refers to licence holder data which identifies that most, if not all, licence holders do not solely supply labour to the agricultural sector. GLA submitted that if an employer operates exploitative practices in agriculture, they will do so in any part of their business, and effective enforcement must be capable of tackling exploitation wherever it is found.[1185] Per Capita also opposed industry-based limits on a licensing scheme.[1186]

A VCCI member, whose business focuses on the placement of very high-skill, high-value workers, stressed the need for any approach to addressing issues in the labour hire sector to clearly differentiate between low and high wage placements, as there is little risk of workers earning more than double average weekly earnings being exploited.[1187]

Obligations of host companies

A number of participants submitted that, as part of the establishment of a licensing scheme, hosts should be legally required to utilise only licensed or registered labour hire companies.[1188]

Maurice Blackburn submitted that a host should be required to make reasonable enquiries as to whether or not the labour hire provider holds a current licence. The host would be subject to penalties and be liable to guarantee the payment of any entitlements owed by the labour hire provider to its workers in specified circumstances. These would include where a host has engaged the services of an unlicensed labour hire provider, or knowingly or recklessly engaged the services of a licensed labour hire provider that is breaching licence conditions.[1189]

The Uniting Church submitted that the host employer should be required by law to take reasonable steps to ensure that any labour hire business they obtain employees from is complying with all legal requirements around the pay and conditions of the employees.[1190]

Administration and resourcing of a labour hire licensing scheme

Most participants that recommended a licensing scheme be established also proposed the establishment of some form of licensing body or compliance unit within the Victorian Government.[1191] An alternative suggestion was an independent officer supported by an advisory body made up of industry representatives and unions.[1192]

Activities which it has variously been suggested would be performed by the licensing body would include:

- considering licence applications;
- approving licences;
- monitoring the conduct of licence-holders;
- investigating potential breaches of the licensing scheme, including by host companies;
- revoking, suspending or imposing conditions on licences; and
- educative functions.[1193]

1185. GLA, Submission no 15, 3.

1186. Per Capita, Submission no 89, 5.

1187. VCCI, Submission no 25, 5.

1188. NUW, Submission no 91, 16; SDA, Submission no 36, 13; AUSVEG, Submission no 22, 6; ACTU, Submission no 76, 30-31.

1189. Maurice Blackburn, Submission no 79, 4.

1190. Uniting Church, Submission no 57, 2.

1191. See e.g. ASU Authorities and Services, Submission 31, 17; HACSU, Submission no 35, 19; ANMF, Submission no 88, 5; VTHC, Per Capita, Submission no 89, 4-5; NUW, Submission no 91, 12; Maurice Blackburn, Submission no 79, 5.

1192. Per Capita, Submission no 89, 3-4.

1193. CFMEU Construction, Submission no 27, 23.

Some stakeholders suggested that as part of a licensing scheme, a trust scheme should be created and administered, to hold and distribute funds received (by the licensing body) to workers in respect of unpaid employment entitlements in the case of insolvency or redundancy.[1194]

A range of enforcement mechanisms and penalties to deal with breaches of the licensing scheme requirements were proposed by various participants. These range from restricting or cancelling licences, to significant fines and imprisonment. Many unions submitted that there should be a capacity for parties such as employees and affected individuals to bring legal actions in the event of non-compliance.[1195]

Resourcing of any licensing scheme is another key issue that must be considered. A number of participants suggested that licensing fees be utilised to fund the scheme.[1196] Professor Whyte submitted that the public could reasonably expect any Victorian licensing scheme to have a similar level of resourcing to other public safety measures, citing the recent introduction of Victoria Police Protective Services Officers at a cost of $212 million. He indicates that a similar funding commitment would provide 177 investigators on the ground, which he submitted would be a reasonable public expectation from a new licensing and enforcement agency.[1197]

5.6.4 Conclusions, findings and recommendations – labour hire licensing

The evidence provided to the Inquiry shows that there is a problem with the presence of 'rogue' labour hire operators in Victoria. While it is difficult to be precise about the extent of this problem, rogue operators are particularly evident in the horticultural industry (including the picking and packing of fresh fruit and vegetables), and the meat and cleaning industries. In many instances, the activities of rogue operators have led to exploitation of vulnerable workers including underpayment of award wages, non-payment of superannuation, provision of sub-standard accommodation and non-observance of statutory health and safety requirements.

This problem stems in large part from the ease of access, or absence of barriers to entry, for persons/organisations wishing to provide labour hire services in this state. In addition, the problem stems from the lack of visibility of these rogue operators, who operate in the informal economy and outside the reach of existing regulators.

Licensing

The problem that has been identified by the Inquiry requires a regulatory solution which addresses each of these underlying causes: as the submissions of those advocating increased regulation demonstrate, there is a wide range of options available. In my view, a sector-specific licensing scheme for labour hire operators is the best of those options.

Outlined below are the key relevant considerations in devising such a scheme, and my specific recommendations in respect of these issues.

National or Victorian regulation

As has been noted, a number of industry/employer submissions opposed the notion that Victoria should introduce new regulation of the labour hire sector in isolation from other states and the Federal Government. Evidence from media reports and other sources[1198] indicates that

1194. Per Capita, Submission no 89; AMWU, Submission no 95, 8.

1195. ACTU, Submission no 76, 31; Western Community Legal Centre, Submission no 62, 5: NUW, Submission no 91,16: CFMEU Construction, Submission no 27, 23.

1196. See e.g. NUW, Submission no 91, 15.

1197. Professor David Whyte, Submission no 17, 3.

1198. See e.g. Senate Work Visa Report (2016); Seasonal Worker Program Report (2016); Queensland Inquiry Report (2016).

the problem of unscrupulous labour hire operators is not limited to Victoria. Ideally, a national approach to regulation of the labour hire sector should be adopted (as recommended by various recent inquiries).[1199]

The recently re-elected Coalition Federal Government adopted a policy to introduce new protections from exploitation for vulnerable workers (particularly migrant workers).[1200] These measures include strengthening the investigative powers of FWO; significantly increasing penalties for workplace law breaches; and imposing additional liability for breaches on franchisors and parent companies (in certain situations). A labour hire licensing scheme would complement these proposals by also addressing exploitation where workers are provided through third party intermediaries.

Recommendation 13:
I recommend that Victoria advocate through the Council of Australian Governments process for the national adoption of a sector-specific labour hire licensing scheme. As a national approach may take some time to develop – or may not eventuate at all – I recommend that Victoria lead the way in reforming the labour hire sector, through the introduction of its own sector-specific licensing scheme. In implementing this reform, Victoria should explore the opportunities for developing cooperative arrangements with other states.

General or sector-specific licensing

In considering regulatory options, one of the central issues is whether a licensing scheme for labour hire operators should apply 'across the board' in Victoria, or only within specific sectors. Many union submissions to the Inquiry urged the adoption of a general, rather than sector-specific, regulatory response. From a theoretical perspective, it is generally considered that universal labour regulation is preferable to ensure the achievement of the policy goals of protective labour laws. However, Davidov has argued a compelling case for 'justified selectivity' in the scope and application of labour legislation, especially where existing laws and compliance mechanisms have failed to protect workers with particular vulnerabilities.[1201] This may include sector-specific regulations to address the sectoral disadvantage that some workers experience.[1202]

Similarly, Weil has identified the prevalence of vulnerable workers in low-paid jobs and their concentration in certain sectors of the United States economy (e.g. retail, food services, agriculture).[1203] He then focuses on the business structures in those industries, with high levels of subcontracting, temporary employment, self-employment and other forms of 'fissuring' which 'make the tie between worker and employer tenuous'.[1204] Weil argues that the vulnerabilities for workers which are exacerbated by these asymmetric business relationships challenge 'many of the traditional assumptions underlying workplace regulation', such that:

1199. See the Labor/Greens majority recommendations in Senate Education and Employment References Committee (March 2016) and the cross-party recommendations in Parliament of Australia (May 2016).

1200. Liberal/National Coalition, *The Coalition's Policy to Protect Vulnerable Workers* (May 2016), at: https://www.liberal.org.au/coalitions-policy-protect-vulnerable-workers.

1201. Guy Davidov, 'Special Protection for Cleaners: A Case of Justified Selectivity?' (2015) 36 *Comparative Labor Law and Policy Journal* 219.

1202. Ibid, 235, referring also to Einat Albin, *Sectoral Disadvantage: The Case of Workers in the British Hospitality Sector* (Unpublished PhD Dissertation, University of Oxford, 2010). See further Guy Davidov, 'Setting Labour Law's Coverage: Between Universalism and Selectivity' (2014) 34 *Oxford Journal of Legal Studies* 543.

1203. David Weil, 'Rethinking the Regulation of Vulnerable Work in the USA: A Sector-based Approach' (2009) 51:3 *Journal of Industrial Relations* 411, 414-416.

1204. Ibid, 417; see further David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014).

'a sector-level approach to regulation provides a critical means for changing the underlying conditions driving vulnerability'.[1205]

The GLA licensing scheme which has operated in the UK since 2006 imposes licensing requirements on labour suppliers and the users of their services in specific sectors: agriculture, shellfish-gathering and related food processing and packaging industries. As explained earlier, under recent legislative changes, the GLA will soon be re-named the Gangmasters and Labour Abuse Authority (**GLAA**) and given a broader role in tackling labour exploitation across the UK economy. The experience of the GLA over the last 10 years provides a successful example of a targeted regulatory solution to the problem of exploitation of vulnerable workers arising from third party provision of labour – which can then be evaluated and assessed for potential extension beyond the initial 'problematic' sectors.

In devising a regulatory scheme that will address the problem that has been identified by this Inquiry, I am concerned to ensure that the impact on the large proportion of reputable labour hire operators is minimised. Evidence presented to the Inquiry has shown that while reputable labour hire companies are generally compliant with applicable workplace laws (i.e. there is little if any evidence of exploitation), various other issues arise from the high use of labour hire arrangements in certain sectors (e.g. manufacturing, logistics, warehousing). These issues include the gradual replacement of permanent workforces with casualised labour hire staff, lower job security, differential wages/conditions (where a site enterprise agreement is not applied to labour hire employees) and concerns about rostering, minimal notice of shifts, difficulty managing carer/family responsibilities and uncertainty arising from shared OHS responsibilities. Some of these issues are addressed in other recommendations.[1206]

Recommendation 14:
I recommend that Victoria introduce a licensing scheme for labour hire agencies, that is initially targeted at those supplying labour in the following specific sectors: the horticultural industry (including the picking and packing of fresh fruit and vegetables), and the meat and cleaning industries. I also recommend that capacity be provided within the framework for the proposed Victorian labour hire licensing system, allowing it to be expanded to cover other industry sectors, or to be contracted in response to changing (improved) practices in the regulated industries.

I note that there are bound to be some technical difficulties in precisely defining the industry sectors to be covered by the proposed licensing scheme. I am also aware that this will mean some reputable labour hire operators which provide services to hosts in the relevant industries will be affected by the proposed licensing requirements. However, taking a sectoral approach means that the regulatory burden on business and the Victorian economy can be minimised to those sectors where the evidence of exploitation and undesirable conduct has been most demonstrated through the course of the Inquiry.

Of course, in determining its response to the recommended licensing approach, it remains open to the Victorian Government to consider introducing a labour hire licensing scheme of general application. For example, it may be considered that the problems in the design and application of a sector-specific scheme are too difficult to overcome. Alternatively, in assessing implementation and compliance costs upon business, it may be determined that a broad ranging scheme is overall less cumbersome to administer, or is likely to prove easier for all parties to understand and comply with, reducing the risk that arguments about coverage will undermine the effectiveness or operation of the licensing regime. A detailed assessment of

1205. Weil (2009), 417-421. See also Annette Bernhardt, Michael Spiller and Nik Theodore, 'Employers Gone Rogue: Explaining Industry Variation in Violations of Workplace Laws' (2013) 66:4 *Industrial and Labor Relations Review* 808.

1206. See 3.5 and Recommendation 26.

the costs and benefits of a broad or a sectoral approach to licensing is outside the scope of the Terms of Reference for the Inquiry, but I understand that this assessment is something that the Victorian Government would normally conduct when considering how to implement recommendations from the Inquiry which it decides to adopt.

Scope of the licensing scheme

It is intended that the licensing scheme would apply to conventional labour hire relationships (e.g. the provision of workers by a labour hire agency to a host organisation to fill short term vacancies or on a longer term basis, to carry out seasonal work, to staff a particular business function or even to staff the entire business). The key requirement for application of the scheme would be the existence of the triangular relationship between the labour hire provider, a host organisation and a worker[1207] (although it would also apply in situations where the provision of worker(s) by provider to host occurs through an intermediary). It is not intended that the scheme would apply to contracting out or outsourcing arrangements, unless these involve a labour hire relationship of the type described above.

Recommendation 15:

The scheme which I am recommending would require that any person or organisation supplying a worker to another person/organisation (whether directly or through an intermediary), in the specific industry sectors (identified in Recommendation 14) in the state of Victoria, must be a licensed labour hire operator; and must only carry on such activity through a registered business or company. The precise definition of the sectors covered by the proposed licensing scheme could be identified from the Australian and New Zealand Standard Industrial Classifications (ANZSIC).[1208]

Licensing standards/criteria

I have considered the various proposed licensing standards suggested by various Inquiry participants, and the licensing standards applied by the GLA in the UK and in other comparable licensing schemes.

Recommendation 16:

To obtain a licence under the proposed Victorian labour hire licensing scheme, the labour hire operator would need to provide identifying details of the business through which they operate (e.g. Australian Business Number, Australian Company Number, business/company/trading name), and meet the criteria set out below. It is envisaged that the obligation would be imposed on licence applicants to provide a statutory declaration and information demonstrating their compliance (both initially to be licensed and then as a condition of remaining licensed) with the following criteria:

- the business/company and its key personnel must pass an objective 'fit and proper person' test, which would include no past convictions for offences involving fraud, dishonesty or violence and no past involvement in insolvent businesses or breaches of workplace or occupational health and safety laws;

1207. The following definition of 'on-hire' arrangements, drawn from modern awards, could be used or adapted to define the relationship that acts as the trigger for application of the licensing scheme: 'the on-hire of an employee by their employer to a client, where such employee works under the general guidance and instruction of the client or a representative of the client'.

1208. ABS, *Australian and New Zealand Standard Industrial Classification (ANZSIC), 2006 (Revision 1.0)*, at: http://www.abs.gov.au/ausstats/abs@.nsf/0/20C5B5A4F46DF95BCA25711F00146D75?opendocument.

- the business/company must demonstrate (e.g. through employment records) that it pays its employees in accordance with the minimum rates specified in applicable industrial instruments, and affords its employees all other employment conditions (e.g. leave entitlements, rest breaks, limits on working hours) under those instruments and/or legislation;
- the business/company must be registered with the Australian Taxation Office and be deducting taxation and remitting superannuation contributions on behalf of employees as required by federal legislation;
- if accommodation is provided to employees in connection with the arrangements they enter into with a labour hire business/company, the business/company must show that the accommodation meets the standards required under applicable Victorian/local authority laws and regulations;
- the business/company must be registered with WorkSafe and be paying any required premiums;
- the business/company must provide details of its systems for ensuring compliance with occupational health and safety legislation and ensuring the safety of workers provided to host organisations (including safety in the transportation of workers to the host's work-site, where the labour hire business/company is involved in such transportation); and
- the business/company must demonstrate compliance with federal migration laws, including systems for ensuring that all employees have a right to work in Australia.

Recommendation 17:
To the extent permissible under federal law, the labour hire licensing scheme should also require the business/company to provide specified information to the licensing authority relating to the numbers and categories of workers engaged on temporary work visas. This is to enable a clearer picture to be developed about the prevalence of temporary visa workers engaged by labour hire agencies in Victoria in the regulated sectors, and the type of visa those workers hold.

Licence fees, bonds, etc

Recommendation 18:
A labour hire operator meeting the licensing criteria would have to pay an initial licence fee, and an annual fee for renewal of their licence.

I do not consider that payment of a bond or demonstrating a minimal capital threshold should form part of the licensing requirements (as recommended in many submissions), as these would be particularly burdensome for smaller operators. The other proposed licensing requirements, and the imposition of obligations on hosts (see below), should be sufficient to impose barriers to entry to the labour hire sector that will drive out the 'rogue' elements. Further, including a licensing condition relating to no past involvement in defunct companies should have a similar practical effect without the financial impost of a bond.

Legal obligations on users of labour hire services

A key component in any effective licensing scheme is the imposition of obligations, not just on labour hire providers to obtain a licence, but also on host organisations to ensure that they only utilise the services of a licensed operator. Indeed the imposition of such an obligation on end users has significant capacity to eradicate 'rogue' operators from the sector, especially if it is reinforced by a sufficiently onerous penalty.[1209]

1209. See Eurofound (2016), 44.

Recommendation 19:
Accompanying the introduction of a sector-specific labour hire licensing scheme in Victoria, I recommend that hosts operating in the regulated sectors be subject to a legal obligation to use only a licensed labour hire provider.

Recommendation 20:
There should be a public register of all licensed labour hire operators. In addition, a system modeled on the Gangmasters Licensing Authority 'Active Check' service[1210] could be implemented to assist host organisations to ensure they are using licensed providers (including through updates on any changes to, or revocation of, issued licences).

Compliance/enforcement/offences

Another essential feature of effective licensing is the establishment of a robust compliance and enforcement framework. This must include the appropriate balance of civil, and where necessary criminal, penalties to ensure that the licensing requirements are taken seriously by labour hire operators and host organisations.

Recommendation 21:
Civil liability provisions and/or criminal offences should be created in respect of the following:

- a labour hire provider operating in the regulated sectors without holding a licence; and
- a host organisation using the services of an unlicensed operator.

In addition, liability provisions/offences should be created in respect of the following actions on the part of a labour hire business/company covered by the licensing scheme:

- the business/company must not coerce or restrict a worker's freedom of movement in any way (e.g. by entering into unfair debts/loans, retention of migration papers or refusal to sign off on the 88 day requirement for obtaining a second year working holiday visa);
- the business/company must not sub-contract the provision of a worker through a non-licensed operator; and
- the business/company must not provide false or misleading information to the licensing authority.

Administration

The function of administering the licensing system will need to be properly resourced by the Victorian Government if it is to be effective. A clear administrative model already exists in Victoria, with the BLA having oversight of a wide range of business licensing schemes.[1211]

Recommendation 22:
The Victorian Government should explore whether the Business Licensing Authority would be the appropriate body to administer the proposed labour hire licensing scheme, or whether a specific licensing authority should be established.

Recommendation 23:
The licensing authority should maintain the public register of licensed labour hire operators.

1210. See: http://www.gla.gov.uk/media/2354/gla-brief-issue-27-active-check-notifications-final-a.pdf

1211. See: https://www.consumer.vic.gov.au/bla

Recommendation 24:
As far as possible, the emphasis should be on licence applicants and licence-holders providing the information required to demonstrate that they meet the criteria for issuing/renewing a licence. Licensing authority staff would approve or reject applications for new licences or renewals objectively on the basis of the information presented.

Recommendation 25:
Legislation establishing the proposed labour hire licensing scheme will also need to address:

- the rights of persons from whom enforcement officers seek information;
- the obligations of licence-holders to provide information;
- data protection and the powers of the licensing authority to share that information for law enforcement and compliance purposes (e.g. with Victoria Police, the Fair Work Ombudsman, the Australian Taxation Office);
- the powers and conduct of licensing enforcement officers (whether engaged by the licensing authority or through a new entity);
- the processes for complaints, dispute resolution, and appeals (including appeals against licensing decisions or processes to revoke a licence); and
- a voluntary code for labour hire agencies.

Voluntary code

In addition to the proposed licensing scheme, a range of issues have been considered throughout this Report in respect of which I have identified practices of labour hire agencies which are not unlawful, but might be considered unfair and/or which have the effect of labour hire workers being treated differently from other workers. These are matters which a responsible labour hire industry could go a long way towards addressing by modifying its own conduct, and setting/promoting standards of best practice that all labour hire agencies could aspire to meet.

This is a process which should be encouraged and facilitated by the Victorian Government, ensuring that all relevant stakeholders have a voice in the development of those standards in the form of a voluntary code of practice for the labour hire industry.

Howe and Landau have examined the effective use of codes of practice of this nature by state governments in Australia, and note as follows:

> *Codes can be a mechanism by which governments seek to enhance firms' commitment to self-regulate in a socially responsible manner, by requiring them to develop a code, perhaps in conjunction with other stakeholders. In other words, the state can play a role in setting process based standards.*[1212]

1212. John Howe and Ingrid Landau, '"Light Touch" Labour Regulation by State Governments in Australia' (2007) 31 *Melbourne University Law Review* 368, 386-390.

Recommendation 26:

I recommend that through a tripartite process involving government, representatives of the labour hire industry and representatives of labour hire workers, the Victorian Government develop a voluntary code of practice for the labour hire industry. The code would establish best practice requirements for labour hire employment arrangements, including in the following areas:

- Contractual arrangements between labour hire agencies and hosts, and labour hire agencies and their workers, should not include terms which prevent or hinder a labour hire employee from obtaining direct employment with a host, or terms requiring an employee to pay a fee or commission to a labour hire company in order to obtain work.
- Labour hire agencies should adopt fair processes in decisions leading to the dismissal of labour hire employees, and should not not use the contractual relationship between the labour hire agency and host to defeat the rights of a dismissed employee to seek a remedy.
- Labour hire agencies should be encouraged to manage rostering so that notice and planning of shifts work for the mutual benefit of all parties involved in labour hire relationships.
- Labour hire agencies should adopt a best practice approach to the use of piece rates in sectors such as the horticulture and meat industries, including fair and transparent processes for entering into piece rate arrangements, and should not use piece rates as a device to pay workers below the minimum time based rate of pay.

PART II

INSECURE WORK, VULNERABLE WORKERS AND THE ROLE OF BUSINESS STRUCTURES AND PRACTICES

6. INSECURE WORK

Findings and recommendations

Insecure work

6.1

Insecure work can arise in working arrangements which are traditional, standard or long standing. Similarly, forms of work which have lower levels of regulatory protections for workers can nonetheless be secure, due for example to demand for a worker's skills. However, there are certain forms of engagement which, because of their lower level of regulatory protections, are more likely to provide the environment for worker insecurity. These include casual and fixed term employment, which have been examined in this chapter, and independent contracting which is examined in chapter 8.

6.2

The very notion of insecure work was challenged by many employer submissions to the Inquiry. However, I heard extensive evidence about the extent and impact of non-permanent working arrangements – especially casual and fixed term engagement – that demonstrated characteristics commonly described in the Australian and international literature on insecure or precarious work. To some extent, the label attached to these arrangements is immaterial. It is more important to focus attention on the outcomes for workers, which frequently include financial insecurity, difficulty planning and saving for the future, and stress (including in the management of working time and family commitments). Many workers in this kind of position would prefer more ongoing or permanent forms of work.

6.3

The shift to more flexible forms of engagement is, like the evolution of labour hire examined earlier in this Report, now an entrenched feature of the Australian labour market and the broader economy. The data examined in this chapter also demonstrates, however, that after an intensification in the adoption of alternative forms of employment from the 1980s its growth has recently plateaued. I recognise that there have been legitimate drivers for businesses to utilise the various non-permanent modes of engaging workers.

6.1 Framing the concept of insecure work

The Inquiry's Terms of Reference require consideration of the extent, nature and consequence of other forms of insecure work in Victoria;[1213] the impact of insecure work on workers, their families and relationships, and on the local community, including financial and housing stress;[1214] and the social and economic impacts for Victoria.[1215]

The traditional model of ongoing, full time employment has been under challenge in Australia and most industrialised countries since the 1980s. Successive waves of downsizing, restructuring and outsourcing in the private and public sectors, and the increased use of on-call, temporary, fixed term and labour hire arrangements, have all combined to erode that traditional model.[1216] Similar developments have been occurring globally over the same period.[1217]

'Insecure work' is an imprecise and contested term, used to describe some of these outcomes. Closely related are terms such as 'non-standard', 'precarious', 'unacceptable' and 'vulnerable' work or workers. These terms are used in contrast to 'traditional', 'standard' or 'decent' work.

Given the Terms of Reference, I adopt the use of the term 'insecure work' in relevant parts of the Report. This section provides context to what is meant by insecure work, in order to frame the examination of forms of insecure work, types of workers, and workforce organisation which follows in the remainder of Part II of the Report.

6.1.1 Views of Inquiry participants

A large number of submissions from unions framed the concept of insecure work based on the definition developed by the 2012 Howe Inquiry instigated by the ACTU, as follows:

> *Insecure work [is] poor quality work that provides workers with little economic security and little control over their working lives. The characteristics of these jobs can include:*
>
> - *unpredictable and fluctuating pay;*
> - *inferior rights and entitlements;*
> - *limited or no access to paid leave;*
> - *irregular and unpredictable working hours; and*
> - *a lack of any say at work over wages, conditions and work organisation.*[1218]

The ACTU submitted that 'non-standard' work includes casual employment, independent contracting, 'agency' or labour hire arrangements and fixed term or fixed task contracts, describing such work as temporary, precarious and resulting in a range of socio-economic disadvantages for workers.[1219]

1213. Terms of Reference, (b).

1214. Terms of Reference, (b)(iv).

1215. Terms of Reference, (b)(v).

1216. See e.g. Johnstone et al (2012). See also Michael Walton, 'The Shifting Nature of Work and Its Implications' (2016) 45:2 *Industrial Law Journal* 111.

1217. See e.g. Judy Fudge, 'Blurring Legal Boundaries: Regulating for Decent Work' in Judy Fudge, Shae McCrystal and Kamala Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Hart Publishing, Oxford, 2012) 1; Lisa Rodgers, *Labour Law*, *Vulnerability and the Regulation of Precarious Work* (Edward Elgar, Cheltenham, 2016) 6-7.

1218. See e.g. VTHC, Submission no 86, 5.

1219. ACTU, Submission no 76, 3.

The Australian Institute of Employment Rights (**AIER**) submitted that the concept of decent work and work with dignity must underpin secure work. Insecure work is not decent work. Insecure work risks workers being treated as commodities rather than being accorded dignity. The AIER's submission highlights the limits of Australia's regulatory system in fostering decent work, and proposes that the key purpose of regulating work is to balance inequality in bargaining power between all those who perform work and those for whom work is performed.[1220]

Dr Jill Murray's submission proposed the multidimensional model of 'unacceptable forms of work', developed by Dr Deirdre McCann and Professor Judy Fudge, as an appropriate framework through which to consider the issues raised by the Inquiry's Terms of Reference. Dr Murray submitted that this model is relevant as it illustrates the 'interconnectedness of a range of elements in the creation of insecurity and vulnerability'. She proposed that the Inquiry have regard to the following aspects of the model, which may be either fundamental or supplementary features of unacceptable forms of work: work organisation; forced labour; health and safety; income; security; working time; representation and voice; child labour; social protection; equality; human rights and dignity; legal protection and family and community life. The submission identified the fundamental and supplemental nature of these various features.[1221]

Evidence from business groups

On the other hand, several employer and industry bodies were highly sceptical and critical of the concept of 'insecure work'. AMMA submitted that insecure work: 'remains indistinguishable from a union campaign slogan.'[1222] AMMA considers that the term is not useful, because all working arrangements (including ongoing, permanent full time employment) are not guaranteed to continue, and the health and viability of a business in our globalised and competitive economy ultimately impacts the creation and duration of all jobs.[1223]

Similarly, Ai Group submitted that the 'bogus scourge of "job insecurity" is being used by the union movement and an array of misguided interest groups to pursue further workplace restrictions on businesses, particularly in relation to casuals.' It submitted that in reality there is no insecure work problem, that the proportion of permanent employees has been 'drifting up slowly over many years' and the proportion of casual workers is 'relatively stable'.[1224]

ICA's submission recognised a conception of secure work, in a sense, in stating that the outcome workers seek is income continuity and certainty. However, ICA submitted that whether this is achieved via permanent full time work, casual, seasonal or fixed term work, independent contracting or a combination of these is not relevant; it may be achieved in different ways for different people and may well change during individuals' work lifecycles and over time. Worker income continuity and certainty can be achieved through use of labour hire, investments, social welfare support as well as paid work in all its forms.[1225]

HIA particularly disagreed with the characterisation of non-permanent work arrangements such as labour hire, independent contracting and those holding working visas as 'insecure work'. It submitted that assessing non-permanent work arrangements through this prism is misconceived, and an improper basis through which to assess or consider the various forms of work arrangements that currently prevail. It noted that the term 'insecure work' is not a legal term, but a term of art designed to drive a certain view of non-permanent work arrangements.[1226]

1220. AIER, Submission no 73, 2
1221. Dr Jill Murray, Submission no 16, 2; see further 6.1.2 below.
1222. AMMA, Submission no 59, 2.
1223. AMMA, Submission no 59, 2.
1224. Ai Group, Submission no 53, 25.
1225. ICA, Submission no 71, 3.
1226. HIA, Submission no 45, 4.

The relationship between flexibility and insecure work

Examination of the various participants' positions regarding insecure work demonstrates that, broadly speaking, many of the features of working arrangements which workers, unions, academics and other organisations attribute to an increase in insecurity of work are the very same features that business seeks to retain as essential flexibilities.

Many business groups submitted that various forms of 'flexible work' are essential to ensure business and economic benefits more generally.

VCCI submitted that it was important for the inquiry to acknowledge the broader economic benefits of flexible employment options.[1227] It submitted that businesses in a modern, global marketplace are requiring a higher level of labour market adaptability and flexibility that is being met by flexible forms of employment. This approach assists firms to structure their business operations in the most efficient and productive manner, which increases the efficiency of the labour market and the productivity of the economy.

ACCI described an 'agile and adaptable workforce' as critical to a business's sustainability, and submitted that work modes such as casual and fixed term employment, independent contracting and labour hire play a key role in supporting an agile and adaptable workforce.[1228]

HIA submitted that non-permanent forms of engagement are critical and should be encouraged in order to suit the needs of both businesses and individuals, particularly independent contracting.[1229]

Ai Group submitted that to remain efficient and globally competitive, businesses must have the flexibility to engage the forms of labour they need; and that this includes all forms of employment, such as full time, casual, part time, fixed term, fixed task and seasonal employees, trainees and apprentices, labour hire and independent contracting.[1230]

ICA submitted that the perception of 'insecure' work is excessively narrow, erroneous, and misses the reality of the changing nature of work in society. It assumes that 'secure' work comes from a full time, permanent job. In ICA's view, however, this is a perception that is unhelpful to the formulation of good public policy. It submitted that no work is any longer 'secure', whatever its legal form or structure, and the perception of 'security' arising from permanent, full time employment is largely an irrelevant myth. ICA argued that the only practical difference between full time, permanent employees and casuals and independent contractors is the way in which 'insecurity' is managed within and by firms and government departments.[1231]

In reference to similar notions that permanent jobs no longer exist, therefore insecure work does not exist, Mr Tim Lyons said there is a view that:

> *Millennials are no longer interested in any employment security. It seems remarkably convenient that they stopped wanting job security exactly the moment the economy stopped offering them any job security.*[1232]

Per Capita's submission identified the relationship between employer flexibility and worker insecurity in terms of risk attribution. Per Capita submitted that the distinguishing aspect of non-standard forms of employment in an economic sense is the transfer of risk from an

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1227. VCCI, Submission no 25, 4.
1228. ACCI, Submission no 55, 4.
1229. HIA, Submission no 45, 10.
1230. Ai Group, Submission no 53, 6-7.
1231. ICA, Submission no 71, 3.
1232. Tim Lyons, Per Capita, Academic Forum, 25 May 2016.

employer to the individual worker (and by extension to their household). An employer who engages workers permanently manages the risks associated with there being insufficient work to be performed via workforce planning and business management. Where insecure work is used, a large part of this risk is transferred to the worker: if there is no work available, then the worker receives no work (or pay) and the employer has no (or vastly reduced) wage costs. Per Capita submitted that this 'outsourcing' of risk is significant, permanent and deliberate, and amounts to a change in the traditional 'social contract' associated with work.[1233]

6.1.2 Academic and other studies conceptualising insecure work

In 1999, the ILO reframed its agenda in response to changes in the global landscape of work, including:

> *…a set of socio-economic trends that had transformed the international policy landscape (most prominently intensifying economic globalization, the end of the Cold War, the growing hegemony of neoliberal economics, and the spread of various forms of non-standard or informal work … .*[1234]

The resulting 'decent work agenda' of the ILO is described by Fudge and McCann as 'the guiding contemporary image of an acceptable working life', which has 'become a prominent theme of broader global labour, social and development policy agendas.'[1235]

According to the ILO, decent work:

> *…sums up the aspirations of people in their working lives. It involves opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men.*[1236]

The 'antithesis' of decent work is 'unacceptable forms of work.'[1237] The ILO describes unacceptable forms of work as 'work in conditions that deny fundamental principles and rights at work, put at risk the lives, health, freedom, human dignity and security of workers or keep households in conditions of poverty.'[1238] Protecting workers from unacceptable forms of work was one of the eight areas of critical importance identified for priority action by the ILO in 2013.[1239]

Fudge and McCann, in a 2015 report prepared for the ILO, examined the concept of unacceptable forms of work, stating as follows:

> *It has become apparent to both researchers and policy-makers that in countries around the world there are cohorts of working people that are profoundly adrift from decent work. These working lives are singled out in the national and international debates through a range of terminology: precarious work, vulnerable workers, informal employment, etc. The diverse terminology betrays a degree of confusion about how to identify, categorise and improve these working relations.*

1233. Per Capita, Submission no 89, 1. The concept of risk transfer has also been adopted in academic analyses of precarious and vulnerable work, see e.g. Weil (2009).

1234. Judy Fudge and Diedre McCann, *Unacceptable forms of work: A global and comparative study* (International Labour Organization, 2015), 3 (references omitted).

1235. Ibid.

1236. See: http://www.ilo.org/global/topics/decent-work/lang--en/index.htm.

1237. Fudge and McCann (2015), 5.

1238. Ibid, xiii, citing ILO, *Towards the ILO centenary: Realities, renewal and tripartite commitment*, Report I(A), International Labour Conference, 102nd Session, Geneva (2013).

1239. International Labour Office, Governing Body, *Area of Critical importance: Protecting workers from unacceptable forms of work*, ILO GB.323/POL/1, 323rd session, Geneva, 12-27 March 2015.

> *Each of the relevant debates, however, conveys a set of guiding insights: that certain workers are laboring in unacceptable conditions; that these working relationships are growing in many countries both in the global south and in the advanced industrialised economies; that these forms of work are centred among groups who are already at risk of social and economic disadvantage and exclusion – for example women, the young, ethnic minorities, migrant workers; and that policies to improve these forms of work are both urgently needed and potentially an entry point for a broader social and economic upgrading.*[1240]

In an attempt to develop a globally applicable depiction of unacceptable forms of work, Fudge and McCann examine the following 12 substantive dimensions that determine whether work is acceptable or not:

- work organization;
- forced labour;
- health and safety;
- income;
- security;
- working time;
- representation;
- child labour;
- social protection;
- equality;
- legal protection; and
- family life.[1241]

As Fudge and McCann explain:

> *The model captures the range of dimensions of working life, including the nexus of work and family, social protection, collective and individual aspects, job content and the degree of legal protection afforded to workers to identify and enforce their entitlements. It also encompasses the four [ILO] fundamental principles and rights at work.*[1242]

They further clarify that the focus on unacceptable forms of work has not replaced the ILO's decent work agenda, rather it is intended to enhance that agenda by 'sharpening its strategic focus and demanding prioritization of efforts and resources'.[1243]

Cochrane and McKeown argue in a 2015 paper that: '[t]he simple dichotomy of nonstandard vs standard employment is part of a more complex worker-employer/organisation relationship.'[1244] They review a broad range of literature establishing the following economic, social and psychological features which contribute to worker vulnerability (particularly in the context of agency work):

- Economic vulnerabilities: economic or job insecurity; no paid employment entitlements; sick leave or annual leave; few fringe benefits; health insurance or pensions; periods of unwanted unemployment or underemployment; generally low or variable pay rates and low advancement or limited promotion prospects.

1240. Fudge and McCann (2015), xiii.

1241. Ibid, 45; see further 49-51.

1242. Ibid, 46.

1243. Ibid, xiv.

1244. Cochrane and McKeown (2015), 949.

- Social vulnerabilities: isolation and limited social integration; alienation and social exclusion; host employees' negative attitudes or disinterest and being treated as an outsider; differently to regular employees.
- Psychological vulnerabilities: client dominated arrangements; underutilisation of skills; zero hours' notice or employment at will; repeatedly looking for or aligning work; higher rates of injuries; harassment; poor health and well-being; undesirable duration; location or hours of an assignment; feeling dispensable as only a 'temp' or low status; lack of control over labour process or tasks; diminished life course predictability; distance from employing agency; limited access to induction; training and learning opportunities; little influence in negotiating work conditions; and ambiguities or conflict due to serving multiple masters.[1245]

In contrast, Rodgers points to some instances of agency work where 'gold-collar' workers have greater bargaining power than so-called 'standard' workers, to illustrate the point that 'non-standard work is extremely heterogeneous and not all non-standard work can be designated precarious'.[1246]

Countouris, on the other hand, describes precarious work as any work which deviates from the standard employment relationship, and considers it to generally connote that the precarious nature of the work is involuntary on the part of the worker. He identifies the following five categories of precarious employment:

- immigration status precariousness: legal or financial insecurity as a result of a worker's legal rights based on their immigration status;
- employment status – instability due to the casual or informal nature of the worker's employment status, and the lack of legal rights or benefits associated with that status;
- temporal precariousness – due to the fixed term, temporary or non-ongoing nature of the work performed;
- income precariousness – instability as a result of not having a fixed income or as result of the country of employment failing to have, or regulate, a minimum wage; and
- organisational control precariousness – the inability of the worker to have any say over the way in which work is performed.[1247]

Some literature drew distinctions between the various descriptors of insecure work.

Albin notes the differing definitions of precarious work and non-standard work, arguing that non-standard work is a relatively neutral term that defines any work that differs from a direct employment relationship, whereas precarious work has evolved to include work performed by marginal or vulnerable groups, and/or who are insecurely situated within the labour market.[1248]

Stewart et al observe that:

> *With so many workers now engaged on a part-time, casual or self-employed basis, it makes little sense to think of these arrangements as 'atypical'. … A more appropriate description for such workers is 'marginal' or 'precarious', which helps to convey not just the relative insecurity of their working arrangements but the fact that they tend to receive far less protection and significantly fewer benefits from the law compared to 'regular' employees.*[1249]

1245. Ibid, 949-50.

1246. Rodgers (2016), 8 (reference omitted); see further 131-133.

1247. Nicola Countouris, 'The legal determinants of precariousness in personal work relations: A European perspective' (2012-13) 34:1 *Comparative Labour Law and Policy Journal 27*, 28-34.

1248. Einat Albin, 'Introduction: Precarious Work and Human Rights' (2012-13) 34:1 *Comparative Labour Law and Policy Journal 2*.

1249. Stewart et al (2016), 11-12.

In a study published in 2006, Louie, Ostry, Quinlan, Keegel, Shoveller and La Montagne conducted a random survey to develop a nuanced definition of precarious employment and to provide an accurate picture of the prevalence of different employment types. The authors concluded that previous definitions of precarious employment had been overly simplistic, as they had grouped various non-traditional forms of employment in with each other. They considered it difficult to generalise across the various different employment types, given that each had very different characteristics. Nevertheless, the authors developed eight mutually exclusive employment categories based on job characteristics, finding that the non-permanent categories (casual, fixed term, labour hire) reported the highest job insecurity.[1250]

Morrison's 2015 paper, drawing upon responses to a survey conducted in Australia and New Zealand in the 1990s and 2000s, considered workers' subjective experience of job security.[1251] Morrison finds, based on a random sample of adults in the two countries, that between 80% and 90% of people include job security among the attributes they most value, but only a quarter place security above all other attributes.[1252] Job security was subjectively viewed as an important attribute in employment, but other factors, such as wages, were viewed as a higher priority when respondents were forced to choose.[1253] He found that people with lower education levels and incomes value job security more than people with higher incomes and education levels.[1254] Other factors, including age and levels of risk aversion, also lead people to preference more secure work. Morrison observes that concern over job security rises as growth declines, and that job security becomes a greater priority as people age. The survey responses revealed that women placed less of a priority on job security than men, placing the responses at odds with other recent studies that found no particular gender-specific preferences.[1255]

Some literature referred to the link between particular business models and insecure work (see further chapter 8 of this Report). For example, Rawling and Kaine contend that business outsourcing and restructuring have contributed to the growth of precarious work arrangements in Australia and around the developed world.[1256] Similarly, Johnstone et al use 'precarious work' to describe 'various forms of contracting, including labour hire arrangements, complex contractual chains and modern forms like franchising'.[1257]

1250. Amber Louie, Aleck Ostry, Michael Quinlan, Tessa Keegel, Jean Shoveller and Anthony La Montagne, 'Empirical Study of Employment Arrangements and Precariousness in Australia' (2006) 61:3 *Relations Industrielle*s 466.

1251. Philip Morrison, 'Who cares about Job Security?' (2015) 18:2 *Australian Journal of Labour Economics* 195.

1252. Ibid, 207.

1253. Ibid, 205.

1254. Ibid, 207.

1255. Ibid, 203.

1256. Michael Rawling and Sarah Kaine, 'Regulating supply chains to provide a safe rate for road transport workers' (2012) 25 *Australian Journal of Labour Law* 237.

1257. Johnstone et al (2012), 2.

6.2 Prevalence and nature of alternative employment forms

6.2.1 General

This section examines the prevalence and nature of employment forms other than ongoing employment. It looks generally at the overall prevalence of alternative forms of work, including independent contracting, then examines more closely casual employment, fixed term contracting, and underemployment.

Inquiry evidence

ACCI submitted that there has been no significant structural change in security of work in recent years, despite structural changes within the economy.[1258] However, Per Capita and VTHC submitted that insecure work is prevalent in Australia, and that this country has (by comparison with other developed economies) a very high rate of insecure or non-standard work.[1259] The ACTU notes that Australia: 'now has one of the highest rates of non-permanent employees in the OECD – double the OECD average of 12% of employees on what the OECD terms 'temporary contracts' and casual workers in Australia enjoy lower conditions and protections than temporary workers in other countries.'[1260]

The Inquiry received submissions about insecure work and vulnerable workers in a number of specific industries.

ASU Authorities and Services submitted that precarious employment is endemic in the social and community services sector, with community sector organisations almost entirely dependent on limited tenure government funding, compounded by the competitive nature of tendering.[1261]

HACSU submitted that insecure work is a lived reality for its members in the mental health and disability sector.[1262]

The CELRL submitted that three industries which have recently been publicly scrutinised for exploitative work practices, namely horticulture, food processing and convenience stores, have certain common features. These include intense price pressures, a concentration of market power at the head of a supply chain or network, small and geographically dispersed employers, a large proportion of vulnerable workers (including many temporary foreign workers), relatively low levels of unionisation and a high level of subcontracting, outsourcing, labour hire or franchising.[1263]

The Inquiry heard from the National Tertiary Education Union (**NTEU**), AEU and IEU that work insecurity arising from fixed term contacting and casual work is highly prevalent in the university, TAFE, public education and non-government education sectors.[1264]

1258. ACCI, Submission no 55, 4.
1259. Per Capita, Submission no 89, 1; VTHC, Submission no 86, 5.
1260. ACTU, Submission no 76, 7.
1261. ASU Authorities and Services, Submission no 31, 7.
1262. HACSU, Submission no 35, 4.
1263. CELRL, Submission no 99, 3.
1264. NTEU, Submission no 100, 4; AEU, Submission no 103, 1; IEU, Submission no 81, 2.

The MEAA submitted that approximately three-quarters of workers in the creative industries are self-employed or employed on a contingent basis. However in many cases, this kind of employment is preferred by an artist or has become the acknowledged norm due to the episodic nature of work in the artistic sector. For this reason, MEAA does not always use the term 'insecure' to describe the nature of its members' employment.[1265]

Professor Sara Charlesworth told the Inquiry:

> *... we have got a regulatory system that is becoming increasingly irrelevant to the proliferation of various forms of employment relationships and the different interests and the different players.*[1266]

The Inquiry was also provided with many examples of insecure work in industries such as manufacturing; textiles, clothing and footwear; retail and fast food; cleaning; security; major events; and warehousing and distribution.[1267]

Data on prevalence of alternative employment forms

ABS Data

Table 6.1: Form of employment – Victoria and Australia – number and percentage – November 2013

Form of employment	Vic		Aus	
	000s	%	000s	%
Employees with paid leave entitlements	**1,815.0**	**62.8**	7,324.2	63.3
Employees without paid leave entitlements	**511.7**	**17.7**	2,249.7	19.4
Employees on a fixed term contract	**na**	**na**	**369.1**	**3.9**
Independent contractors	**279.3**	**9.7**	986.4	8.5
Other business operators	**283.3**	**9.8**	1,013.5	8.8
Totals	**2,889.3**	**100.0**	**11,573.8**	**100.0**

Source: ABS Catalogue No. 63590 Forms of Employment, Australia, November 2012 and November 2013

Table 6.1 shows ABS data demonstrating that in Victoria, 62.8% of workers are employees with paid leave entitlements. The remaining 37.2% constitute employees without paid leave entitlements (commonly used as a proxy for casual employment), independent contractors and other business operators. This is slightly higher than the equivalent figure for Australia as a whole (36.7%).

In Australia, 3.9% of employees are engaged on a fixed term contract. As described above in chapter 2, around 1% to 2.5% of Australian employees are labour hire employees.[1268]

Victorian Workplace Industrial Relations Survey 2008

VWIRS data shown in Tables 6.2 and 6.3 provides an alternative snapshot of the extent of non-standard forms of employment in Victorian workplaces based on employer responses. However, it produces quite different results to ABS data, which indicates limited changes to the overall proportions of forms of work over time. Accordingly it should be regarded with some caution.

1265. MEAA, Submission no 37, 2.

1266. Professor Sara Charlesworth, RMIT University, Academic Forum, 25 May 2016.

1267. See e.g. TCFUA, Submission no 92, 3-5; SDA, Submission no 36, 7-12; AMWU, Submission no 95, Appendix A; NUW, Submission no 91, 13-14.

1268. See 2.2.

Table 6.2: Non-standard employment by type and industry, Victoria, 2008 (percentage)

Industry sector	Casual	Fixed term	Agency	Part time	Total
Mining and utilities	12	5	14	5	36
Manufacturing	5	1	3	5	14
Construction	3	1	9	4	17
Transport and wholesale trade	7	1	7	6	21
Retail trade	15	0.5	3	15	33.5
Hospitality	57	0.1	2	13	72.1
Finance, insurance and business services	17	21	13	10	61
Health and education	11	4	2	48	65
Recreation and personal services	41	6	15	9	71
All workplaces	17	7	7	13	44

Source: VWIRS 2008

The VWIRS data also provides information about the extent to which these forms of employment were engaged by Victorian workplaces, set out in Table 6.3.

Table 6.3: Workplaces by industry utilising non-standard employment arrangements, Victoria, 2008 (percentage)

Industry sector	Workplaces using casuals	Workplaces using agency workers	Workplaces using fixed contract workers	Workplaces using contractors
Mining and utilities	50	10	19	54
Manufacturing	49	19	6	23
Construction	21	10	2	53
Transport and wholesale trade	44	23	11	33
Retail trade	58	2	9	29
Hospitality	78	7	5	19
Finance, insurance and business services	44	8	12	34
Health and education	50	6	18	40
Recreation and personal services	51	4	18	37
All workplaces	49	10	10	33

Source: VWIRS 2008

6.2.2 Casual employment

Incidence of casual employment in Victoria

There was some disagreement between participants to the Inquiry regarding whether casual employment is an increasing phenomenon.

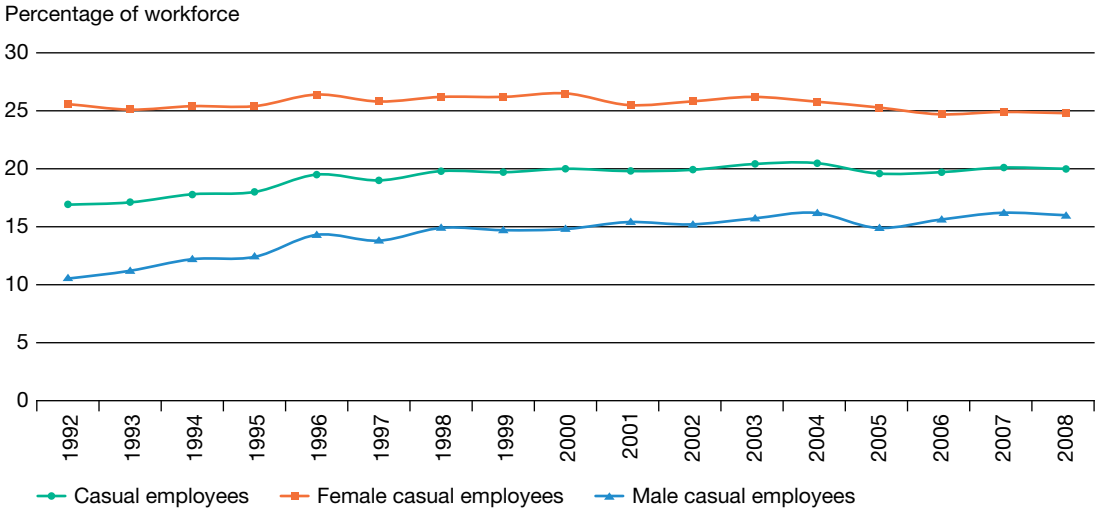
The ACTU submitted that significant growth in casualisation has occurred in virtually all industries, including manufacturing, which traditionally had little experience of it. It submitted that this growth has arisen from a combination of employer choices about the structure of employment, and opportunities provided by gaps in the award and regulatory system, rather than any underlying structural changes or needs. The ACTU referred to the financial, operational, legal and administrative advantages attaching to casual employment (for employers), and the absence of regulatory restrictions upon its use, as a key driver for the perceived increase.[1269]

Employer submissions refuted the suggestion that casualisation had increased, or that it leads to insecure work outcomes. Ai Group submitted that the level of casual employment in Australia today is about the same as it was five and 10 years ago – about 20% of the workforce – and there is no casualisation problem in Australia. Ai Group describes the problem to be the ongoing attempts by unions and others to limit flexibility for employers and employees. Ai Group states that many employees prefer casual employment due to the casual loading and employee flexibility, and most casuals working on a long term, regular and systematic basis have no desire to convert to permanent employment.[1270]

Dr Robin Cochrane observed that:

> *Australia is unique, other than perhaps Spain, with the level of casualisation we have and how it is enshrined in legislation……. it is going to be difficult to go from nothing to regulate, or to have an accreditation or licensing system is going to be a big shake-up.*[1271]

Figure 6.1: Proportion of casual employees in Australia by gender – 1992 to 2008



Source: ABS Catalogue No. 6105.0 Australian Labour Market Statistics (3 July 2009)

1269. ACTU, Submission no 76, 9.

1270. Ai Group, Submission no 53, 26.

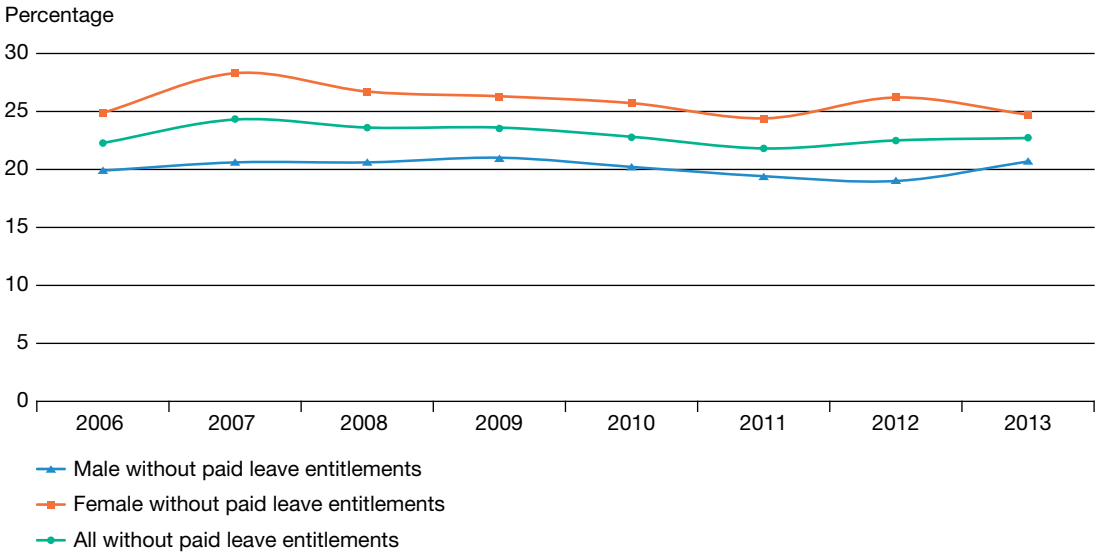
1271. Dr Robyn Cochrane, Monash University, Academic Forum, 25 May 2016.

Figure 6.1 indicates that during the 1990s, there was a significant growth in casual employment in Australia,[1272] with a rise in male casual employment being the key contributor. The level of female casual employment was relatively steady at around 25% of the total female workforce between 1992 and 2008. Shomos et al note that the share of casuals in employment doubled between 1982 and 2011,[1273] while according to Watson: '[t]he vast majority of new jobs created in Australia during the 1990s were casual jobs'.[1274]

However Shomos et al attribute most of this change to the period prior to 2001, with casual employees no more prevalent in 2011 than in 2001.[1275] Similarly, ABS data indicates that the casual employee population in Victoria – that is, those employees without paid leave entitlements – has remained relatively stable since 2006. In 2013, casual employees comprised 22.7% of all employees (excluding owner managers). This represented a small increase from 2006, when casual employees comprised 22.3% of the Victorian employee population.

ABS *Forms of Employment* data from November 2013 shown in Figure 6.2 measures whether employees do or do not have access to paid leave entitlements. Employees who do not have leave entitlements can be used as a proxy for casual employees.[1276] Based on this ABS data, as at 2013, 22.7% of Victorian employees were casual employees.[1277]

Figure 6.2: Victorian employees without paid leave entitlements by gender – 2006 to 2013



Source: Customised Report ABS Catalogue No. 6359.0 Forms of Employment

Women were more likely to be in casual employment than men in Victoria throughout the period 2006 to 2013. In 2013, 24.7% of Victorian female employees were without paid leave entitlements (Figure 6.2 and Table 6.4), compared to 20.7% of male employees.

1272. See also Ian Watson, John Buchanan, Iain Campbell and Chris Briggs, *Fragmented Futures – New Challenges in Working Life* (Federation Press, Sydney, 2003), 68 and Figure 6.2.

1273. Shomos et al (2013), 33 and Figure 3.1.

1274. Ian Watson, 'Bridges or Traps? Casualisation and Labour Market Transitions in Australia' (2013) 55:1 *Journal of Industrial Relations* 6, 7.

1275. Shomos et al (2013), 34; See also Ian Watson, *Contented Casuals in Inferior Jobs? Reassessing Casual Employment in Australia* (ACCIRT Working Paper 94, University of Sydney, 2003), 1; 2005 Victorian Inquiry Report, 46.

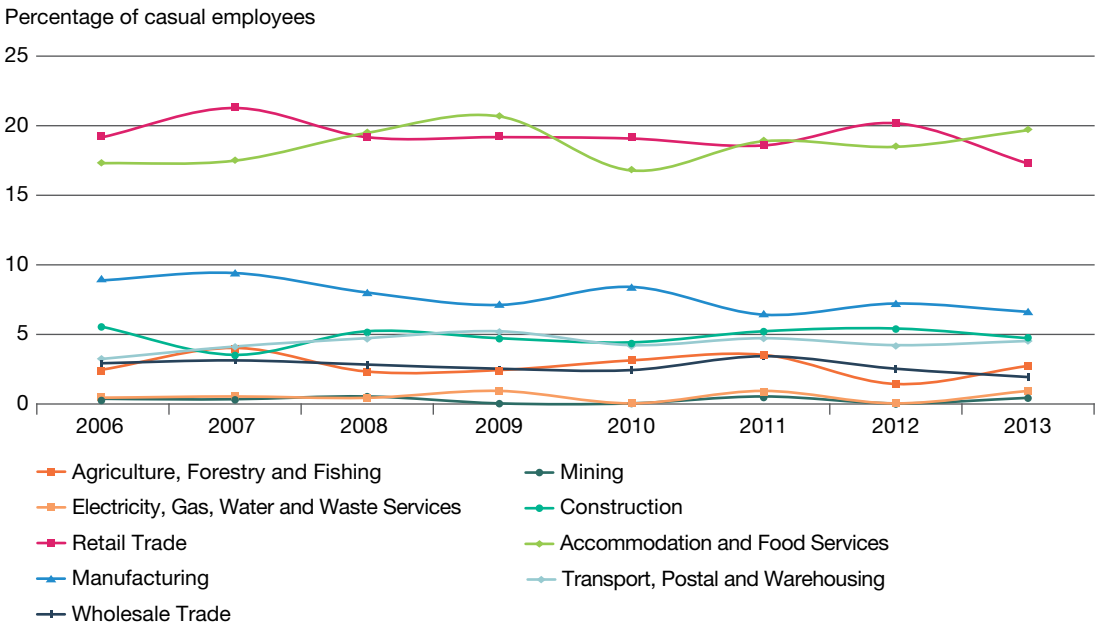
1276. Shomos et al, 32.

1277. ABS 6359.0 (2013), Customised Report.

Table 6.4: Form of employment in Victoria by gender (percentage) – 2006 to 2013								
Form of employment/gender	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**
Male employees (excluding owner managers)	75.8	78.0	76.6	76.6	77.4	77.5	77.6	76.5
Male with paid leave entitlements	80.1	79.4	79.4	79.0	79.8	80.6	81.0	79.3
Male without paid leave entitlements	**19.9**	**20.6**	**20.6**	**21.0**	**20.2**	**19.4**	**19.0**	**20.7**
Male owner managers (incorporated)	9.9	8.8	10.0	9.3	10.5	10.8	11.0	10.2
Male owner managers (unincorporated)	14.3	13.2	13.4	14.1	12.1	11.7	11.4	13.2
Female employees (excluding owner managers)	87.0	87.1	87.3	88.2	87.6	86.7	86.9	86.9
Female with paid leave entitlements	75.1	71.7	73.3	73.7	74.3	75.6	73.8	75.3
Female without paid leave entitlements	**24.9**	**28.3**	**26.7**	**26.3**	**25.7**	**24.4**	**26.2**	**24.7**
Female owner managers (incorporated)	4.8	4.6	5.2	4.1	4.9	4.6	5.3	4.3
Female owner managers (unincorporated)	8.2	8.2	7.5	7.7	7.5	8.6	7.8	8.8
All employees (excluding owner managers)	80.9	82.1	81.4	81.9	82	81.7	81.9	81.3
All with paid leave entitlements	77.7	75.7	76.4	76.4	77.2	78.2	77.5	77.3
All without paid leave entitlements	**22.3**	**24.3**	**23.6**	**23.6**	**22.8**	**21.8**	**22.5**	**22.7**
All owner managers (incorporated)	7.6	6.9	7.8	6.9	8.0	8.0	8.4	7.5
All owner managers (unincorporated)	11.5	11	10.7	11.2	10	10.3	9.8	11.2

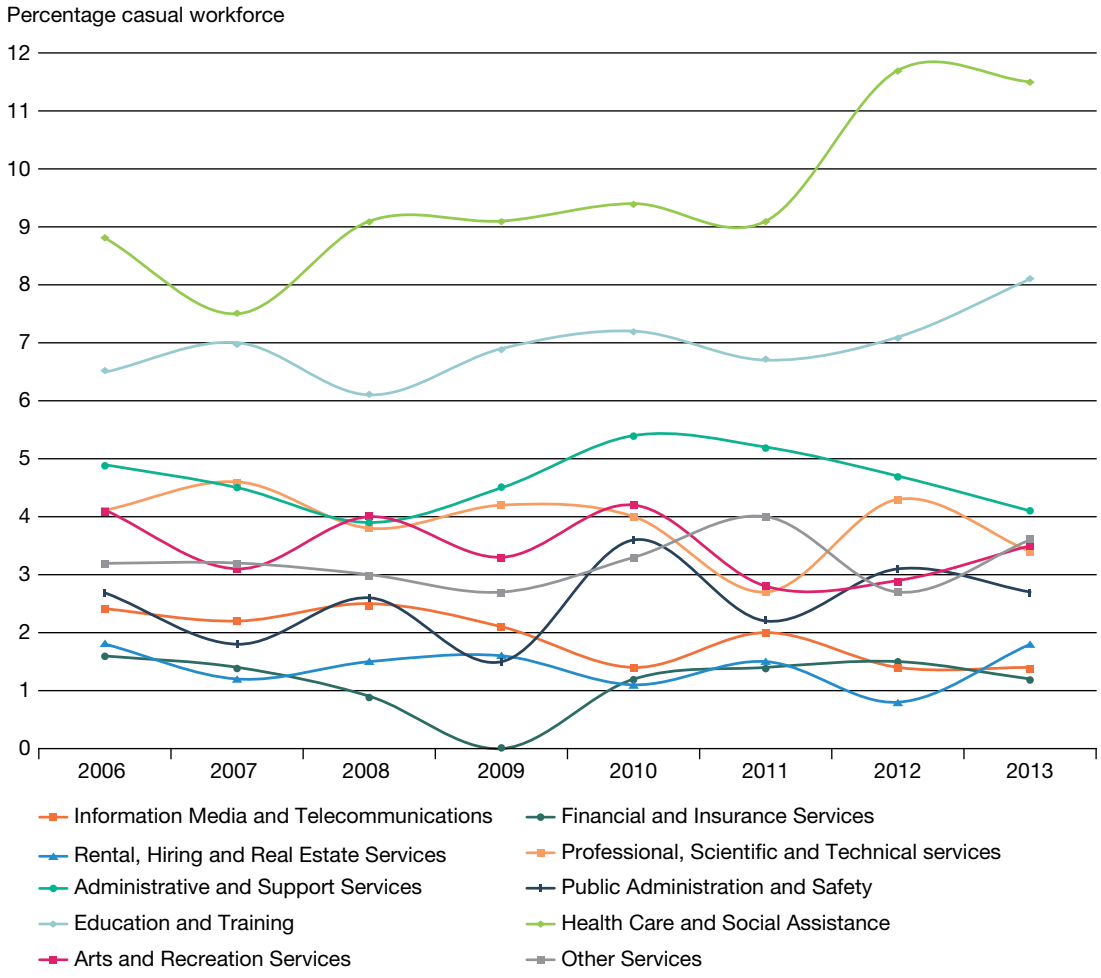
Source: Customised Report ABS Catalogue No. 6359.0 Forms of Employment

Figure 6.3: Victorian employees without paid leave entitlements by industry – 2006 to 2013



Source: Customised Report ABS Catalogue No. 6359.0 Forms of Employment

Figure 6.4: Victorian employees without paid leave entitlements by industry – 2006 to 2013



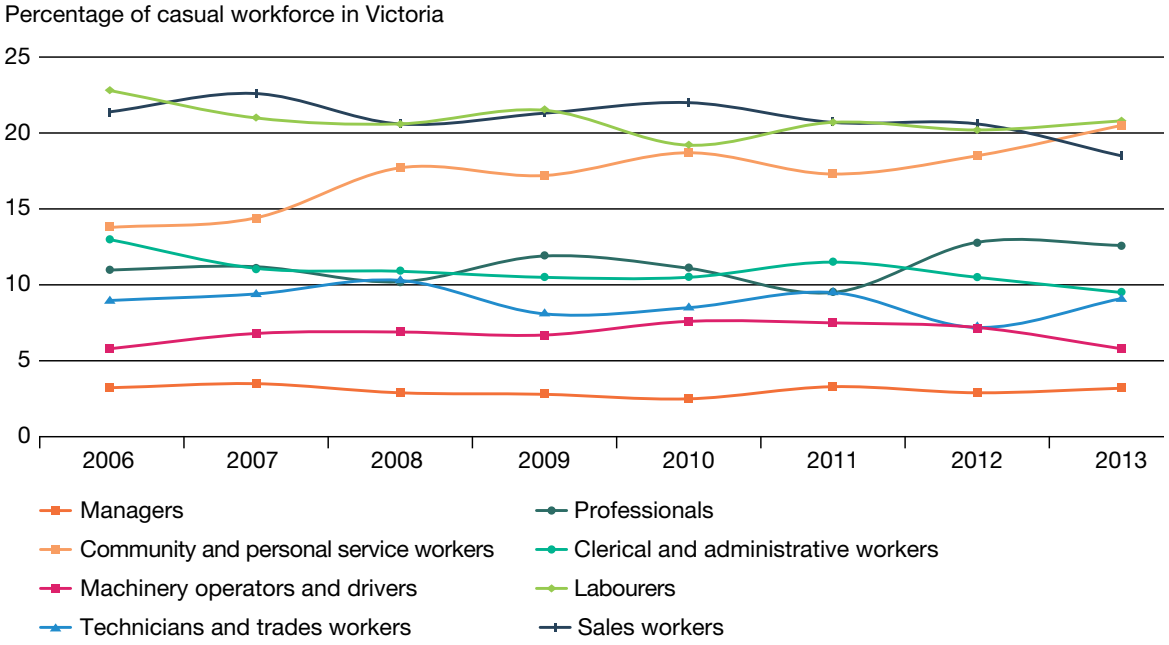
Source: Customised Report ABS Catalogue No. 6359.0 Forms of Employment

Figure 6.3 illustrates the proportion of total Victorian employment which was casual employment, by industry, over the period 2006 to 2013. It demonstrates that the proportion of casual employment was highest in accommodation and food services, and retail trade. It also demonstrates that there has not been any significant change in the level of casualisation in the industries displayed over the last 10 years, with the possible exception of manufacturing, where the level of casualisation has consistently declined.

Figure 6.4 demonstrates the industry breakdown of the total casual workforce in Victoria between 2006 and 2013. It indicates that casual workers are concentrated in the financial and insurance services industry and the information media and telecommunications industry, and that this concentration has increased over the relevant period.

Figure 6.5 indicates the concentration of Victoria's total casual workforce by occupation, over the period 2006-2013. The most common occupations of Victoria's casual workers are labourers (20.8%), community and personal services workers (20.5%) and sales workers (18.5%). There has been a significant rise in the proportion of casual community and personal services workers over the relevant period (from 13% in 2006 to 20.5% in 2013). A small rise in the proportion of casual workers who are professionals is also evident (from 11% to 12.6%). Conversely, the proportion of casual clerical and administrative workers has fallen slightly.

Figure 6.5: Victorian employees without paid leave entitlements by occupation (percentage of casual workforce) – 2006 to 2013



Source: Customised Report ABS Catalogue No. 6359.0 Forms of Employment

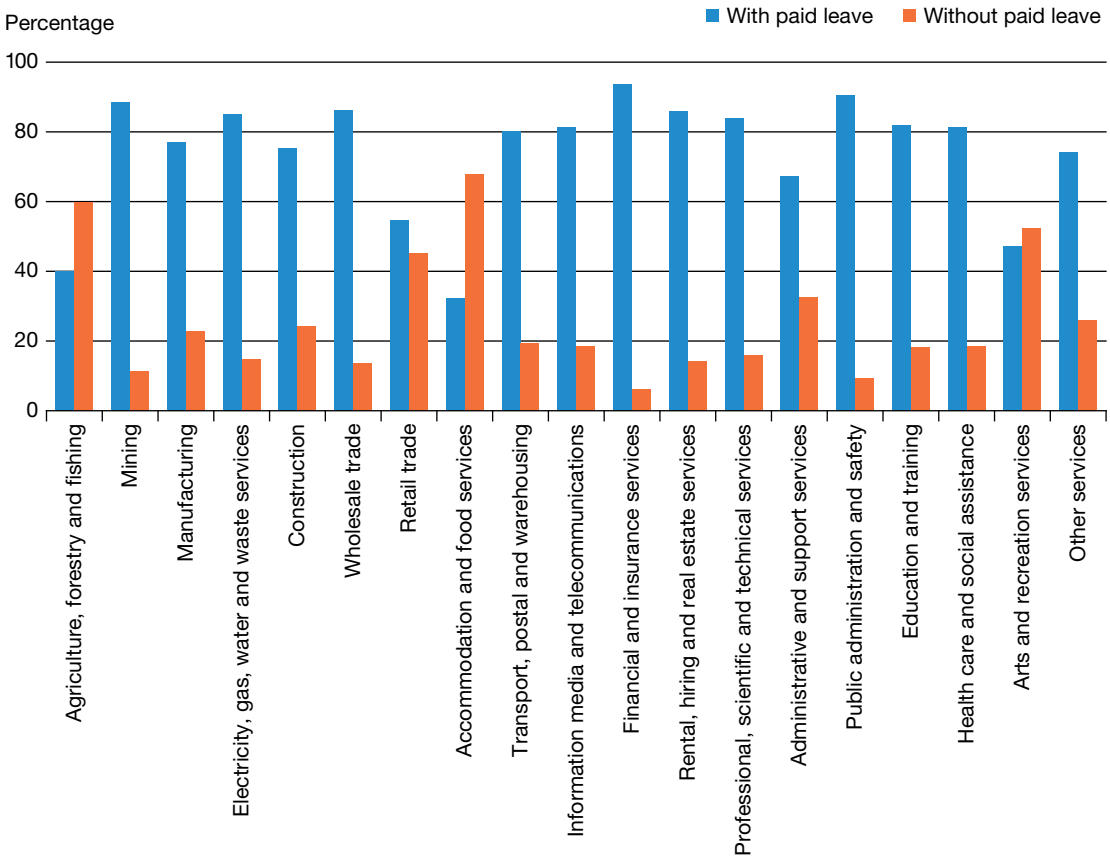
The level of casualisation for women compared to men in some Victorian industries is particularly high. In November 2013, over 70% of casual workers in the occupations of clerical and administrative workers, community and personal service workers and sales workers were women (Figure 6.6 and 6.7). In November 2013, women without paid leave entitlements were overrepresented in particular industries (Figure 6.6):

- agriculture, forestry and fishing (59.8%);
- accommodation and food services (67.9%); and
- arts and recreation services (52.7%).

In addition – in comparison to men without leave entitlements – female casual employees were overrepresented in particular industries as follows (Figure 6.7):

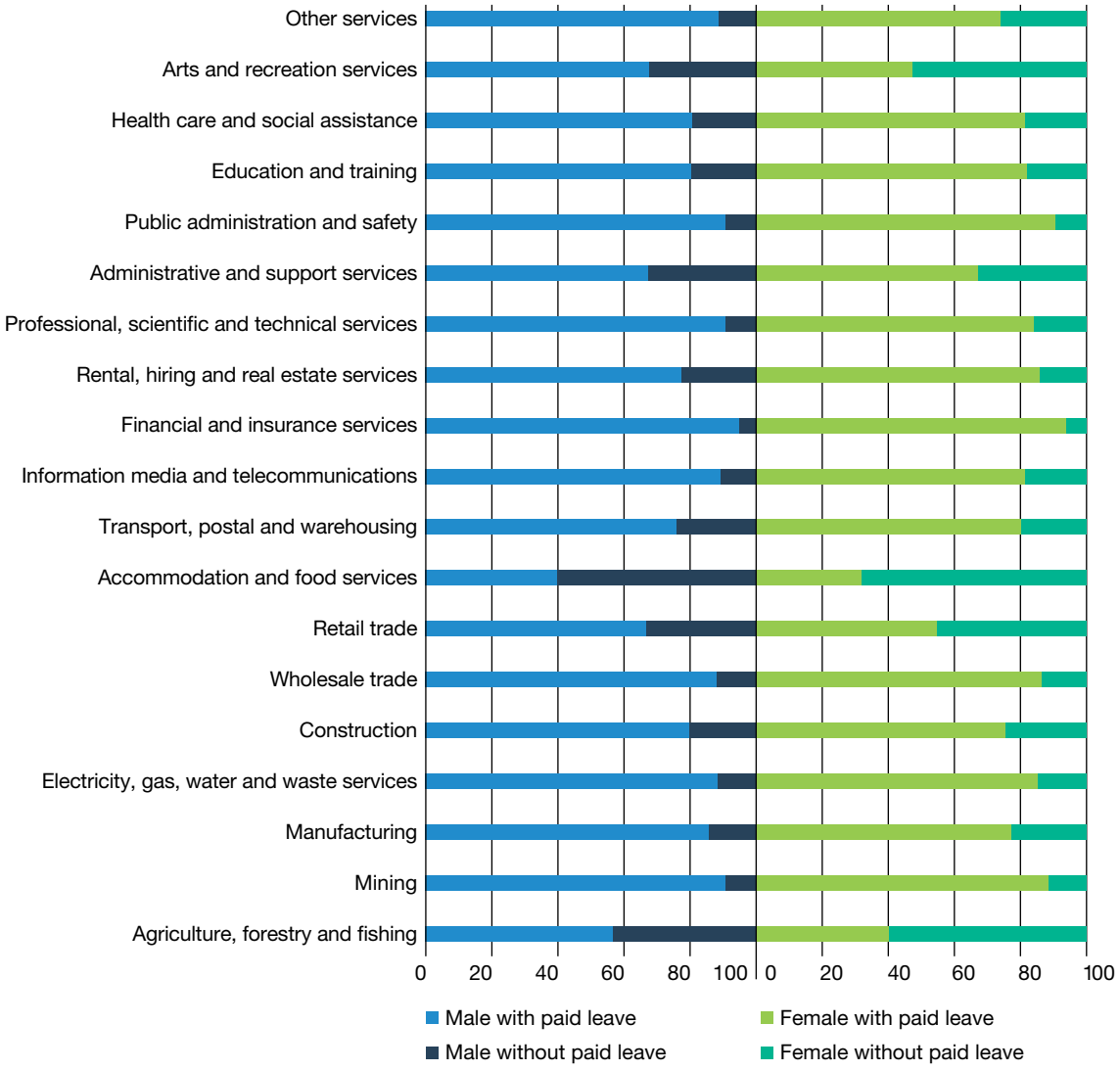
- agriculture, forestry and fishing (59.8% women to 43.2% men);
- manufacturing (22.8% women to 14.5% men);
- retail trade (45.2% women to 33.4% men); and
- arts and recreation services (52.7% women to 32.2% men).

Figure 6.6: Female employees with and without paid leave entitlements by industry (percentage) – November 2013



Source: ABS Catalogue No. 6359.0 Forms of Employment, Australia, November 2013, Table 7

Figure 6.7: Proportions of male and female employees with and without paid leave entitlements by industry (November 2013)



Source: ABS Catalogue No. 6359.0 Forms of Employment, Australia, November 2013, Table 7

Inquiry evidence about casual employment in Victoria

The Inquiry heard from a number of participants about the extent and nature of casual employment in Victoria.

The AMIEU submitted that in many cases long term workers in the meat industry are engaged as casuals, such as at Ingham's Enterprises, where a significant proportion of the workers have worked on the afternoon shift every week for seven or eight years. In many cases remaining casual is not by choice. It means that workers are unable to obtain credit such as home loans, and feel that if they speak up, ask questions, report injuries or exercise rights such as claiming workers compensation, they will no longer be employed.[1278]

The NTEU submitted that it is beyond doubt that there is substantial and endemic casualisation in the Victorian higher education sector. NTEU estimates that 50 to 60% of all staff working in public higher education institutions in Victoria are employed on a casual basis. There is a further substantial proportion of staff on fixed term contracts – as many as half of non-casual

1278. AMIEU, Submission no 77, 6.

staff in some institutions. Permanent staff members have a significant range of beneficial conditions over and above rates of pay. NTEU submitted that the 25% casual loading is not sufficient to account for the beneficial conditions that casual workers do not receive.[1279]

The Inquiry received a confidential submission detailing the submitter's experience of working as a casual sessional teacher across a number of universities:

> *I found, in practice by maintaining multiple jobs with multiple universities, the most I could expect to work if there were no cancellations was 8 teaching hours per week (during teaching weeks), with on average 4 of these being repeat tutorials. Some universities are on a trimester system and some are on a semester system, hence their teaching-free weeks are different, meaning in a non-teaching week in one university I might still have a few hours' work in another university, making it difficult to try and supplement non-teaching weeks with freelance work. As you can imagine, it is extremely time consuming and stressful trying to balance different employer's timetables and requirements to try and get sufficient hours. This means I could at best earn approximately $30,000 per annum before tax from teaching work with no paid holidays or paid sick leave, despite having to be available full-time in order to achieve this and the disruption to my life being equivalent to that of a full time job except for an essentially extended unpaid holiday twice per year during university vacation.… To make things clear, I want to emphasise that I was not just a temporary tutor covering someone else. In some instances I was the sole tutor/lecturer teaching the entire unit. So despite my lack of job security my level of responsibility was often very high and I did this work for a long time - over 6 years at three of the universities.*[1280]

The ASU Authorities and Services submission described casualisation as a prevalent form of precarious employment among councils and their contractors. It referred to workers who undertake de facto full time work over the course of years, yet are not recognised as such and thus miss out on the employment security which a permanent position brings. The union submitted that in local government, casualisation tends to cluster around certain roles: leisure services; customer services; home care; and areas where union density is lowest, the workforce is relatively young, the workforce is predominantly female, or a combination of all three factors.[1281]

MEAA submitted that around 80% of the 6500 cinema workers across Australia are engaged as casuals.[1282]

The submission of Mr Michael Rizzo, National Industrial Officer of the Australian Services Union (**ASU**), detailed the case study of workers performing meter reading on behalf of Powercor Australia for over a decade. The meter readers had been direct permanent employees of Powercor Australia until the company outsourced the meter reading work to a series of other contracting companies, commencing in 1997. The employees then became employed by the contracting companies as casual employees, primarily paid on a per-metre piece rate. The ASU and the employees campaigned unsuccessfully for many years for their employment to be recognised as permanent.[1283]

The Inquiry received confidential submissions and heard confidential information from casual patient services assistants employed in a public hospital. The key issues raised were the dramatic variation in shifts provided, ranging from 50 to 60 hours one week to four hours the next week. The process for allocating shifts was described as arbitrary and unfair, with shifts often being offered at very short notice:

1279. NTEU, Submission no 100, 6.

1280. Confidential, Submission no 24.

1281. ASU Authorities and Services, Submission no 31, 6.

1282. MEAA, Submission no 37, 6.

1283. Michael Rizzo, Submission no 7, 1-3.

> *The system for covering vacancies arising through staff absence is purported to be a wholly transparent medium. However management claim that it needs to be 'mediated' for the Patient Service Assistants employee group. This is not done for other employee groups in the hospital. This 'mediation' by managers has led to favouritism whereby some Patient Service Assistants have an advantage and get more shifts at the expense of others.*[1284]

Rostering was described as being subject to the whim of a particular manager, and based on potentially discriminatory criteria. One employee described the impact on their life as follows:

> *On a personal basis, in the past I was allocated enough working shifts to allow me to plan my life in terms of paying the bills and supporting my family. However I have now been relegated to a position where I am offered a very small allocation of shifts which I cannot rely on leaving me with very little control over my life. I always take any and every shift that is offered, which means I must stay at home and near my phone each morning for a possible call to fill a shift. However it is not enough to survive on and I have had continuous work weeks where my pay is below Centrelink payments.*[1285]

An individual submitted that employers abuse casual contracts, and that casual workers are not afforded the same rights and feel threatened due to their vulnerability.[1286]

To some extent running against the trends described by most other unions, the ANMF submission described features of the industrial arrangements applying to its membership which limit the unfettered use of casual workers. Enterprise agreements covering nurses in public hospitals define a casual worker as:

> *... one who is engaged in relieving work or work of a casual nature and whose engagement is terminable by an employer in accordance with the employer's requirements without the requirement of prior notice by either party, but does not include an employee who could properly be classified as a full-time or part-time employee.*[1287]

In aged care enterprise agreements, there are further limits on the use of casual employment, for example: 'that casual employment will only be utilised as bank staff to assist with genuine peaks and troughs or shortages of labour where permanent staff are not available'. Other agreement clauses include a right to request conversion from casual employment to permanent employment after six months. In most major health networks, a permanent pool of workers is used to perform relieving roles.[1288]

Many employer groups submitted that the flexibility to utilise casual employment is essential for Victorian employers. Ai Group submitted that:

> *The flexibility to engage casuals is critical for businesses as it assists them to better balance the supply of labour with demand for the businesses' products or services. The availability of casual employment is also critical for many employees who need or want the flexibility that casual employment offers.*[1289]

ACCI submitted as follows:

> *Work modes that vary from the model of permanent employment such as casual and fixed-term employment, independent contracting and labour hire play a key role in supporting an agile and adaptable workforce and care needs to be exercised to preserve the legitimacy of these arrangements and facilitate ease of access to these arrangements.*[1290]

1284. Confidential, Submission no 44.
1285. Confidential, Submission no 44.
1286. Benedict Lim, Submission no 6, 1.
1287. ANMF, Submission no 88, 3.
1288 ANMF, Submission no 88, 4.
1289. Ai Group, Submission no 53, 25.
1290. ACCI, Submission no 55, 4.

Aspects of the nature and effects of casual employment in the labour hire context were examined in chapter 3 of this Report.

6.2.3 Fixed term employment

Incidence of fixed term employment

ABS data

Table 6.5 indicates the proportion of workers engaged on fixed term contracts, by industry and occupation across Australia, as at November 2012. It demonstrates that across all industries, 3.9% of employees were engaged on a fixed term contract. The industry with the highest proportion of employees engaged on fixed term contracts was the education and training sector, with fixed term contracting making up 14.3% of that sector's workforce. This is more than double the rate of fixed term contracting of the industry with the next highest rate, being public administration and safety with 6.1%.

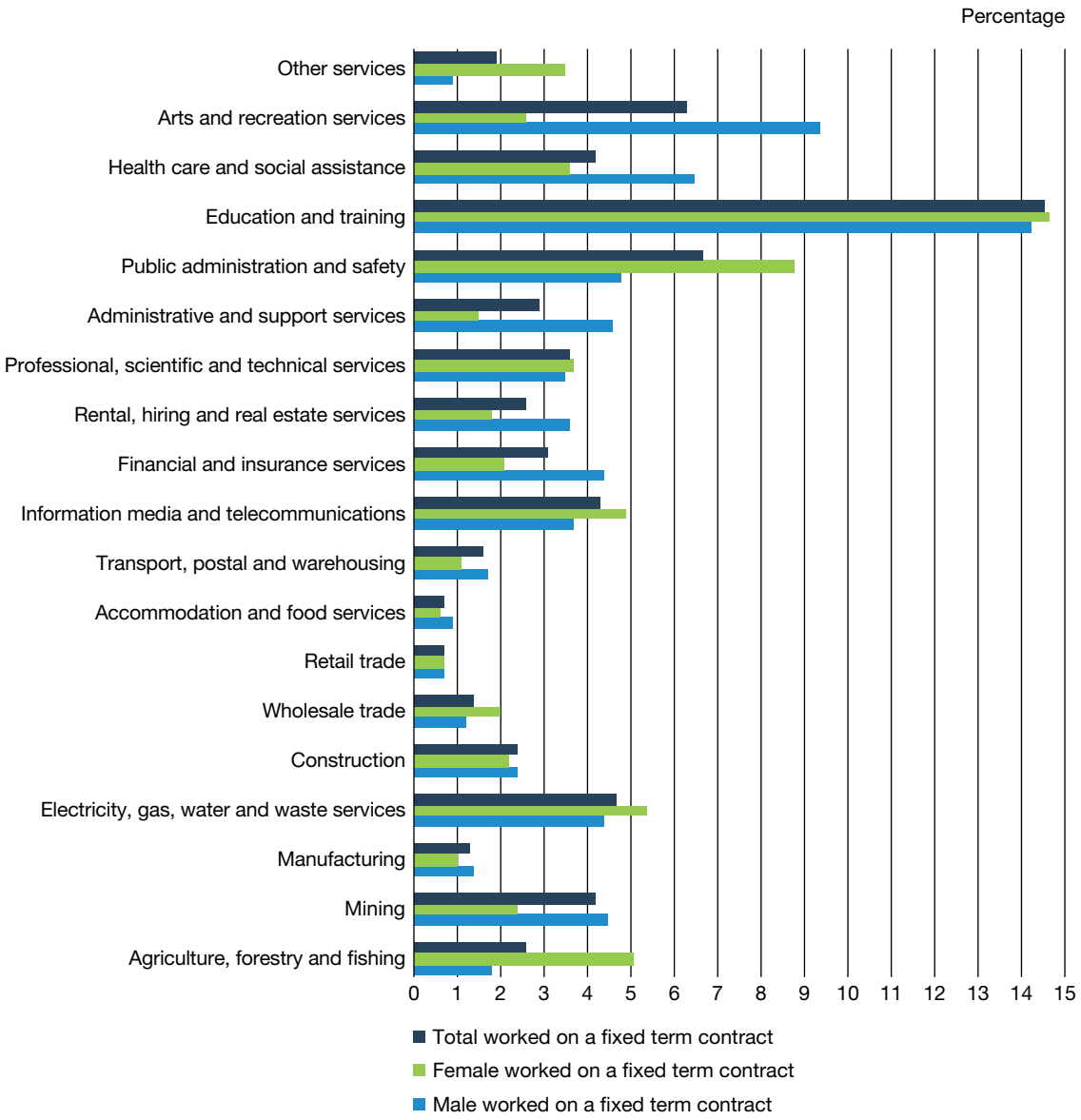
Table 6.5: Fixed term contract employees – industry and occupation (November 2012)

Fixed term contract employees – industry and occupation	Worked on a fixed term contract '000	Did not work on a fixed term contract '000	Total '000	Worked on a fixed term contract %	Did not work on a fixed term contract %	Total %
Industry of main job						
Agriculture, forestry and fishing	2.6	127.6	130.2	2.0	98.0	100.0
Mining	8.5	242.0	250.4	3.4	96.6	100.0
Manufacturing	17.7	816.4	834.0	2.1	97.9	100.0
Electricity, gas, water and waste services	7.8	126.9	134.7	5.8	94.2	100.0
Construction	14.2	602.0	616.2	2.3	97.7	100.0
Wholesale trade	3.8	351.0	354.8	1.1	98.9	100.0
Retail trade	9.6	1,075.0	1,084.6	0.9	99.1	100.0
Accommodation and food services	2.3	675.0	677.3	0.3	99.7	100.0
Transport, postal and warehousing	9.3	478.4	487.8	1.9	98.1	100.0
Information media and telecommunications	7.4	191.7	199.2	3.7	96.3	100.0

Table 6.5: Fixed term contract employees – industry and occupation (November 2012) (cont)						
Fixed term contract employees – industry and occupation	Worked on a fixed term contract '000	Did not work on a fixed term contract '000	Total '000	Worked on a fixed term contract %	Did not work on a fixed term contract %	Total %
Financial and insurance services	13.1	351.5	364.5	3.6	96.4	100.0
Rental, hiring and real estate services	1.0	148.0	149.0	0.7	99.3	100.0
Professional, scientific and technical services	21.5	624.2	645.7	3.3	96.7	100.0
Administrative and support services	8.4	262.7	271.1	3.1	96.9	100.0
Public administration and safety	41.3	636.6	677.9	6.1	93.9	100.0
Education and training	121.3	729.6	851.0	14.3	85.7	100.0
Health care and social assistance	60.7	1,203.6	1,264.2	4.8	95.2	100.0
Arts and recreation services	12.3	147.0	159.4	7.7	92.3	100.0
Other services	6.4	294.1	300.5	2.1	97.9	100.0
Occupation of main job						
Managers	33.3	890.6	924.0	3.6	96.4	100.0
Professionals	194.9	1,925.8	2,120.7	9.2	90.8	100.0
Technicians and trades workers	28.7	1,219.7	1,248.4	2.3	97.7	100.0
Community and personal service workers	28.6	979.5	1,008.1	2.8	97.2	100.0
Clerical and administrative workers	52.6	1,422.3	1,474.9	3.6	96.4	100.0
Sales workers	7.5	986.9	994.4	0.8	99.2	100.0
Machinery operators and drivers	9.9	686.2	696.2	1.4	98.6	100.0
Labourers	13.5	972.4	985.9	1.4	98.6	100.0
Total	*369.1*	*9,083.3*	*9,452.5*	*3.9*	*96.1*	*100.0*

Source: ABS Catalogue No. 6359.0 Forms of Employment, Australia, November 2012

Figure 6.8: Fixed term contract employees by industry and gender (percentage) – November 2012



Source: ABS Catalogue No. 6359.0 Forms of Employment, Australia, November 2013

Figure 6.8 and Table 6.6 demonstrate the proportion of fixed term contracting by industry and gender across Australia. As noted above, fixed term contracting is most prevalent in education and training, and public administration and safety. Table 6.6 indicates that in both of the sectors, women made up the significant majority of employees engaged on fixed term contracts, with 71.4% of fixed term contract employees in education and training being women, and 62.8% of those in public administration and safety.

Table 6.6: Fixed term contract employees by industry and gender (percentage) – November 2013

Industry of main job	Male fixed term contract %	Male not fixed term contract %	Female fixed term contract %	Female fixed term contract %	Total fixed term contract %	Total not fixed term contract %	Female fixed term contract – all fixed contract %	Female fixed term contract – all employees %
Agriculture, Forestry and Fishing	1.8	98.2	5.1	94.9	2.6	97.4	47.4	1.2
Mining	4.5	95.5	2.4	97.6	4.2	95.8	8.6	0.4
Manufacturing	1.4	98.6	1.0	99.0	1.3	98.7	20.2	0.3
Electricity, Gas, Water and Waste Services	4.4	95.6	5.4	94.6	4.7	95.3	25.4	1.2
Construction	2.4	97.6	2.2	97.8	2.4	97.6	11.4	0.3
Wholesale Trade	1.2	98.8	2.0	98.0	1.4	98.6	43.8	0.6
Retail Trade	0.7	99.3	0.7	99.3	0.7	99.3	58.7	0.4
Accommodation and Food Services	0.9	99.1	0.6	99.4	0.7	99.3	45.8	0.3
Transport, Postal and Warehousing	1.7	98.3	1.1	98.9	1.6	98.4	15.8	0.2
Information Media and Telecommunications	3.7	96.3	4.9	95.1	4.3	95.7	53.5	2.3
Financial and Insurance Services	4.4	95.6	2.1	97.9	3.1	96.9	37.8	1.2
Rental, Hiring and Real Estate Services	3.6	96.4	1.8	98.2	2.6	97.4	34.2	0.9
Professional, Scientific and Technical Services	3.5	96.5	3.7	96.3	3.6	96.4	46.9	1.7
Administrative and Support Services	4.6	95.4	1.5	98.5	2.9	97.2	31.2	0.9
Public Administration and Safety	4.8	95.2	8.8	91.2	6.7	93.3	62.8	4.2
Education and Training	**14.3**	**85.7**	**14.7**	**85.3**	**14.6**	**85.5**	**71.4**	**10.4**
Health Care and Social Assistance	6.5	93.5	3.6	96.4	4.2	95.8	70.8	2.9
Arts and Recreation Services	9.4	90.6	2.6	97.4	6.3	93.7	19.2	1.2
Other Services	0.9	99.1	3.5	96.5	1.9	98.1	73.0	1.4

HILDA data

Shomos et al considered the prevalence of fixed term employment in Australia using both ABS and HILDA data.

They observed that the prevalence of fixed term employees from the HILDA data was higher than that derived using ABS data. This was the case consistently over the period 2001–2010. Table 6.7 sets out Shomos et al's compilation of the two datasets.

Table 6.7: Prevalence of fixed term employees, 2001 to 2011[a b] % [1289]

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
FOE 2001[c]	3.2							3.0			
FOE 2004[d]				2.9		3.7	3.5	3.0			
FOE 2008[e]								3.0	3.1	3.1	3.4
HILDA	7.4	7.8	7.4	6.9	8.0	7.7	7.6	7.3	8.2	8.6	

Shomos et al referred to a previous Productivity Commission report setting out possible explanations for the difference, and noted the Productivity Commission's conclusion that:

> *On balance, it is likely that the HILDA approach to identifying fixed term employees allows for better estimates than those obtained by FOES. The FOES survey embodies known sources of underestimation of the number of fixed term employees… By contrast, possible biases in the HILDA survey may lead to an under or over estimation.*[1292]

According to the latest HILDA report (Waves 1 to 14), a significant characteristic of employees on fixed term contracts is that they take significantly less sick leave and annual leave.[1293]

Inquiry evidence about fixed term employment in Victoria

Consistent with the above data, the Inquiry heard evidence and received submissions about extensive use of fixed term contracts in both the public and independent education sectors in this state.

1291. **a** Contributing family workers and unpaid workers are excluded from the estimates. The latter also exclude employees who answered 'other' to the question about their contract of employment. **b** FOE survey estimates of fixed term employees include people who nominate as casuals. This is not the case for HILDA survey. **c** Estimates based on the 2001 FOE survey methodology are for employed people aged 15 to 69 years. **d** Estimates based on the 2004 FOE survey methodology are for all employed people. **e** Estimates based on the 2008 FOE survey methodology have not been adjusted for employees reclassified by the ABS as independent contractors. An adjustment has been made to the 2008 estimates reported for the FOE 2001 and 2004 methodologies. Employees recoded in this way in 2008 were recoded as fixed term employees in line with the proportions of fixed term employees among employees with leave entitlements (4.3%) and without leave entitlements (4.2%) in 2007. OMIEs and OMUEs recoded as employees by the ABS in the 2008 FOE survey have been excluded from estimates reported for the FOE 2001 and 2004 methodologies on the grounds that they were no coded this way in years prior to 2008.

1292. Shomos et al (2013), 82, citing Productivity Commission, *The Role of Non-Traditional Work in the Australian Labour Market* (Productivity Commission Research Paper, May 2006), 132.

1293. R Wilkins, *The Household, Income and Labour Dynamics in Australia Survey: Selected Findings from Waves 1 to 14: The 11th Annual Statistical Report of the HILDA Survey* (University of Melbourne, 2016), 53, Table 4.4.

The AEU submitted that the proportion of government teaching service staff employed on fixed term contracts grew from 6% in 1995 to around 19% in 2011. The union's submission refers to the 2015 DET annual report, showing that that the proportion of teaching service staff employed on a fixed term or casual basis in 2015 was 26%, and the proportion of Education Services (**ES**) staff was 65%. The AEU submitted that the proportion of teaching staff in insecure employment in Victoria is around twice that of New South Wales, where around 91% of staff are employed on an ongoing basis. The union further submitted that ES and teaching staff in government schools experience a high rate of contract churning or rollovers due to the decentralised nature of workforce planning and uncertain funding streams for schools.[1294] The Inquiry heard from several education support workers and teachers that they had been successively engaged on fixed term contracts. For example, ES employee Kerry Jackson told the Inquiry that in her 25 years' employment, she had been on one ongoing contract and 14 fixed term contracts. She told the Inquiry that she had been working at Broadford Secondary College for five years, and in the last five years she has been employed under seven separate six month contracts.[1295]

The AEU described the impact of insecure work in the public education sector not only extending to the affected employees, but reducing the capacity of the system and the workforce to deliver quality learning and welfare outcomes for Victorian students. In the AEU's 2014 Beginning Teachers Survey, 70% of contract teachers agreed that the requirement to reapply for positions had a negative effect on their teaching. Staff churn adversely affects the consistency of program delivery and teacher-student relationships.[1296] The Inquiry also heard evidence from a number of ES staff and teachers about the personal and professional effect of this mode of engagement.[1297] Some examples of the impact of these working arrangements are set out at 9.1.7 and my recommendation as to how to address these issues is set out at 9.2.2. As noted in chapter 3, the Inquiry met informally with DET, but due to the timing of these consultations, DET was not able to provide a formal response to the matters raised above within the Inquiry's reporting timeframe.

Similarly, the IEU submitted that the largest and most pernicious form of insecure employment, affecting both teaching and non-teaching staff in the independent schools sector, is fixed term employment. Recent studies, such as the 'Staff in Australia's Schools Report' 2007 and 2013, record an increase in the use of fixed term contracts in the education sector, with contract and casual employment increasing from 10% to 15% for secondary teachers and 17% to 22% for primary teachers.[1298]

The ANMF again referred the Inquiry to measures it had taken through bargaining to limit the use of fixed term contracting to 'true fixed term arrangements', including employment in graduate nurse positions; replacement of employees on maternity leave, long term WorkCover, parental leave or long service leave; employment in special projects; and postgraduate training. The ANMF submitted that unlike the higher education sector, the health sector does not have large numbers of funding-dependent positions. This occasionally happens in research areas or for specific project development and implementation.[1299]

JobWatch referred to a significant number of calls to its advice service from individuals on fixed term contracts, many of whom have been on a series of back-to-back fixed term contracts for over two years and (not infrequently) for much longer than that.[1300]

1294. AEU, Submission no 103, 5.

1295. AEU and workers, Melbourne Hearing, 10 February 2016.

1296. AEU, Submission no 103, 6.

1297. AEU and workers, Melbourne Hearing, 10 February 2016, 25 February 2016.

1298. IEU, Submission no 81, 2.

1299. ANMF, Submission no 88, 21.

1300. Jobwatch, Submission no 46, 28.

The VFF submitted that it is unrealistic to expect businesses to employ only permanent employees. The government, as a major employer, has used the fixed term contract option when it employs staff. In the education sector, fixed term contracts are utilised and also in other sectors. Most senior executives are engaged under a fixed term contract.[1301]

6.2.4 Underemployment or variability of hours

Underemployment – part time workers compared to casual workers

Recently released data from the ABS[1302] Participation, Job Search and Mobility Survey shown in Table 6.8, conducted in February 2015, provides an indication of working time preferences of part time employees. Table 6.8 indicates that in February 2015, nearly one third (32.7%) of part time employees[1303] had a preference for working more hours, with part time employees without paid leave entitlements accounting for over two thirds (68.4%) of that cohort of employees.

Table 6.8: Part time workers – preference for more hours, with/without paid leave entitlements (2015)

Employee type	Total want more hours (000s)	Percentage want more hours
All part time employees	829.2	32.7
With paid leave entitlements	259.0	31.2
Without paid leave entitlements	567.4	68.4

Source: ABS Catalogue No. 6226.0 Participation, Job Search and Mobility, Australia, February 2015, Table 6.1.

The variability of hours of work associated with some alternative forms of employment have had a significant impact on workers, according to a number of Inquiry participants.

Dr Dan Woodman, Professor Johanna Wyn, Dr Hernan Cuervo and Dr Jessica Crofts from the University of Melbourne Graduate School of Education have conducted a longitudinal study tracking the transitions of two generations of Australians, following two cohorts of around 1000 young Australians from the end of their secondary schooling. The first cohort finished school in 1991 and was tracked through to age 40. The second cohort left school in 2006 and has been tracked to date into their mid-20s. The study indicated that a third of participants have variability in when they work. These patterns are often presented as less harmful and even beneficial for young people. However, this view was described in Woodman et al's study as 'emphatically not the case'. Participants highlighted similar impacts from such work patterns as are associated with older employees. Even in 2008, at the age of 19, participants saw 'unsocial' hours and variability as having a negative impact on the quality of their relationships.[1304]

HACSU submitted that periods of work for casual workers can be accompanied by long gaps or really short call-in times, and many casual workers find it hard to predict their income, to pay bills and make ends meet, let alone plan for the future or save to buy a house, or plan family time.[1305]

1301. VFF, Submission no 49, 6.
1302. ABS, Participation, *Job Search and Mobility, Australia, February 2015*, Cat. No. 6226.0 (June 2016).
1303. The ABS defines part-time employed persons as those who usually work less than 35 hours per week.
1304. Dr Woodman, Submission no 23, 2.
1305. HACSU, Submission no 35, 15.

Victorian Council of Social Services (**VCOSS**) submitted that inadequate hours of work place employees at risk of financial hardship, noting that almost one third (29%) of casual employees are underemployed, compared with just under 10% of ongoing employees. On average, underemployed workers in Victoria would prefer to work an additional 14 hours each week. Reasons for underemployment cited include too many applicants or no vacancies, unsuitable hours, lacking necessary skills or education, being considered too old or too young by employers, jobs being located too far away or a lack of available transport to get to jobs, family responsibilities or lack of child care options, as well as health, disability and language difficulties.[1306]

6.2.5 Conclusions and findings – insecure work

Insecure work can arise in working arrangements which are traditional, standard or long standing. Similarly, forms of work which have lower levels of regulatory protections for workers can nonetheless be secure, due for example to demand for a worker's skills. However, there are certain forms of engagement which, because of their lower level of regulatory protections, are more likely to provide the environment for worker insecurity. These include casual and fixed term employment, which have been examined in this chapter, and independent contracting which is examined in chapter 8.

As noted earlier in this chapter, the very notion of insecure work was challenged by many employer submissions to the Inquiry. However, I heard extensive evidence about the extent and impact of non-permanent working arrangements – especially casual and fixed term engagement – that demonstrated characteristics commonly described in the Australian and international literature on insecure or precarious work. To some extent, the label attached to these arrangements is immaterial. It is more important to focus attention on the outcomes for workers, which frequently include financial insecurity, difficulty planning and saving for the future, and stress (including in the management of working time and family commitments). Many workers in this kind of position would prefer more ongoing or permanent forms of work.

The shift to more flexible forms of engagement is, like the evolution of labour hire examined earlier in this Report, now an entrenched feature of the Australian labour market and the broader economy. The data examined in this chapter also demonstrates, however, that after an intensification in the adoption of alternative forms of employment from the 1980s: 'the growth in some of these arrangements seems to have peaked or at least plateaued in recent years'.[1307] I recognise that there have been legitimate drivers for businesses to utilise the various non-permanent modes of engaging workers.

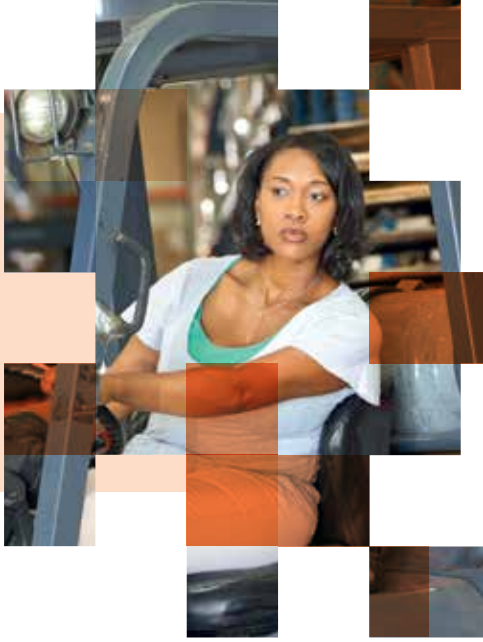
The impacts of insecure employment, and measures to address some of the issues raised above, are considered in chapter 9.

The degree to which a worker may experience insecurity is not only determined by the regulatory settings applying to the worker's legal relationship with the party which engages them. It is also determined by the broader social, economic and institutional context which can contribute to worker vulnerability. Chapter 7 considers the position of temporary migrant workers and women workers in this context.

1306. VCOSS, Submission no 33, 6.

1307. Richard Johnstone and Andrew Stewart, 'Swimming against the Tide? Australian Labor Regulation and the Fissured Workplace' (2015) 37 *Comparative Labor Law and Policy Journal* 55, 60.

7. VULNERABLE WORKERS



Findings and recommendations

Temporary migrant workers

7.1

There is some evidence of non-compliance with workplace laws affecting 457 visa holders and Seasonal Worker Program participants. However, there is a much more extensive body of evidence – including evidence provided to this Inquiry, other recent inquiries, and in recent academic studies, media and other reports - demonstrating that Working Holiday Maker and student visa holders in Australia are being subjected to exploitation in the labour market. These exploitative practices are occurring in the Victorian horticulture and food services sectors, among others.

7.2

Whilst the Working Holiday Maker and student visa schemes do not have work as their primary purpose, in practice they are the predominant mechanism by which temporary migrant work is undertaken in Australia, dramatically outweighing the use of 457 and Seasonal Worker Program visa programs. This reality should be acknowledged by the Federal Government, industry and the community.

7.3

There is a fundamental lack of cohesion in Australia's framework for permitting work to be performed by temporary migrant workers. Whilst Australia's 'formal' temporary work visa programs are designed based on criteria relating to demonstrable labour market need, coupled with safeguards for temporary migrant workers, these are not features of the temporary migrant work arrangements facilitated by the Working Holiday Maker and student visa streams.

7.4

The addition of appropriate safeguards to ensure the fair treatment of overseas workers holding Working Holiday Maker and student visas is for the most part a matter for the Federal Government to address. This could include encouraging the Fair Work Ombudsman to devote additional resources to ensuring that Working Holiday Maker and student visa holders are aware of their employment rights; and to bringing enforcement proceedings in suitable cases. The Victorian Government also has a role to play in this area.

Recommendation 27:

I recommend that the Victorian Government consider further funding measures to provide assistance to temporary visa workers through established community organisations and networks, including the provision of employment rights information to international students through Victorian universities.

Gendered nature of insecure work

7.5

It is clear from evidence provided to the Inquiry and academic and other sources that the working arrangements commonly associated with insecure work, especially casual and fixed term work, disproportionately affect women – with detrimental consequences for women's financial security, control over working hours and career advancement.

7.1 Introduction

The Inquiry's Terms of Reference require it to examine:

- the use of working visas, particularly in insecure, low paid, unskilled or semi-skilled jobs and trades;[1308] and
- exploitation of working visa holders and other vulnerable classes of workers, including female workers.[1309]

Various dimensions of vulnerability and precariousness in the labour market were examined in chapter 6.

In addition, Fudge has observed that precariousness in employment arises not only from the insecurity and instability associated with contemporary employment relationships, but also from the interaction of other institutional, social and political factors.[1310]

Similarly, Per Capita submitted to the Inquiry that:

> *…vulnerability is both cause and a consequence of insecure work. What might be called the burden of these forms of work does not fall evenly across the community. While insecure work is widespread, its worst forms are more common at the bottom of the income distribution, amongst those with lower skills, the young and new migrants / residents…*[1311]

Burgess and Connell note that vulnerable employment is a growing phenomenon which is characterized by the insecure nature of work and the lack of social protections, poor job quality, low income and hardship.[1312] They observe that there is no generally accepted definition of vulnerable work, as it is not a legal employment type, but can be characterised by more than just employment type. Some workers may be vulnerable due to their age or migrant status, or lack of fluent English speaking skills.

Burgess and Connell note that not all vulnerable employees are engaged in insecure work. However, vulnerable workers as a whole are more likely to be in insecure work due to discrimination or shift patterns. The authors also draw strong links between vulnerability,

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1308. Terms of Reference, (b)(i).

1309. Terms of Reference, (b)(ii).

1310. Fudge (2012), 99.

1311. Per Capita, Submission no 89, 2.

1312. John Burgess and Julia Connell, 'Vulnerable work and strategies for inclusion: an introduction' (2015) 36:6 *International Journal of Manpower* 794.

recession, downsizing, and restructures.[1313] Similarly, Burgess, Connell and Winterton note that vulnerability and precariousness are not synonymous, though the distinction between the two concepts may be lost from time to time. In their view, whereas precarious work is distinguished by its short time frames or lack of expectation of ongoing work, vulnerability is associated with uncertainty over income, employment conditions and continuity.[1314]

The Inquiry received submissions about a number of vulnerable classes of workers.

For example, the Young Workers Centre submitted that young working people bear the brunt of increased labour market insecurity. It submitted that one third of jobs created in Australia over the past 25 years are less secure, and that young people are more likely to be employed casually, work irregular hours and be without paid leave entitlements. The same insecurity is reflected in the proportion of young people working irregular hours, with seven in 10 working weekends, evening or night shift work.[1315]

JobWatch submitted that it is contacted largely by workers with little bargaining power in the worker-employer relationship (including young workers, older workers, low skilled workers, inexperienced workers, overseas students and workers from migrant backgrounds). However, JobWatch reported receiving many calls from workers in positions which would have once been relatively secure, including academic staff in universities, teachers, health professionals, administrative staff in government departments, cooks in hospitals and canteen staff in state schools. Accordingly, it submitted that workers across all industries, all occupations and at all levels are at risk of insecure work.[1316]

VCOSS and the Western Community Legal Centre outlined the vulnerabilities faced by workers who are refugees or from newly arrived communities.[1317]

VCOSS and Jesuit Social Services also referred to the level of a worker's educational attainment as a contributing factor to their vulnerability to insecure work. Jesuit Social Services submitted that education plays a critical role in addressing many of the overlapping issues encountered by vulnerable and disadvantaged groups, but that in Australia, the most vulnerable people still face significant barriers to successful participation in the education system. It submitted that in Victoria, more than 36,000 people aged 15 to 19 (about 10%) are not in education, training or employment. In addition, around one in five young people leave school before completing year 12. Almost half of these young people end up marginalised in the labour force, either in insecure employment or out of work. Children from disadvantaged backgrounds are over-represented among early school leavers, with a lower rate of year 12 completion. People in the lowest socioeconomic areas are approximately 20% less likely to attain year 12 or equivalent educational qualifications. The consequence is a significant cohort of people who lack the literacy, numeracy and problem solving skills necessary for obtaining secure employment and earning a decent wage. Jesuit Social Services submit that addressing this inequality is perhaps the most fundamental change that would alter the life opportunities of disadvantaged people.[1318]

VCOSS[1319] and the Young Workers Centre submitted that indigenous Australians are over represented in insecure work. The Young Workers Centre submitted that young indigenous workers are more likely than non-indigenous workers to be employed in 'low status'

1313. Ibid.

1314. J Burgess, J Connell and J Winterton, 'Vulnerable workers, precarious work and the role of trade unions and HRM' (2013) 24:22 *International Journal of Human Resource Management* 4083, 4084-5.

1315. Young Workers Centre, Submission no 82, 4.

1316. JobWatch, Submission no 46, 24-5.

1317. VCOSS, Submission no 33, 16-17; Western Community Legal Centre, Submission no 62, 10.

1318. Jesuit Social Services, Submission no 52, 5.

1319. VCOSS, Submission no 33, 17.

occupations and to be more insecurely attached to the labour force. It referred to a longitudinal study showing 59% of young indigenous people wanted to work more hours compared with 31.7% of non-indigenous people. This entrenches disadvantage for young indigenous people.[1320]

Other vulnerable groups of workers identified in submissions included unpaid interns,[1321] people involved in the justice system,[1322] and workers with disabilities.[1323]

Some submissions indicated that people who are in insecure work are more likely to be in low paid jobs.[1324] VCOSS submitted that this is true even for full time casual workers, who are three times more likely to have low-paid jobs compared with permanent or contract employees.[1325] The ACTU submitted that those most affected by the rise of insecure work are at the middle and lower end of the earnings spectrum, which has contributed to a rise in inequality in Australia.[1326]

Consistent with the Terms of Reference, and reflecting the volume and nature of evidence received, the Inquiry has focused on the vulnerability of two classes of workers, being temporary migrant workers and women.

7.2 Temporary migrant workers

The Terms of Reference for the Inquiry do not require an investigation of working visas generally. Instead, they are directed towards an examination of the use of working visas in Victoria in insecure, low-paid, or semi or unskilled jobs; the exploitation of working visa holders; and the impact on workers and local communities. To gain a full appreciation of the role that temporary migrant workers play in the labour market in Victoria, it is necessary to examine briefly the schemes under which they are permitted to work in Australia. However, a full scale examination of Australia's temporary migration scheme and its broader impacts on the economy and society are beyond the scope of this Inquiry.[1327]

In this section of the Report, I have adopted the definition proposed by Associate Professor Joo-Cheong Tham. Tham proposes use of the phrase 'temporary migrant workers' to discuss this category of workers, as it allows the experience of a range of visa holders to be considered, including those holding visas which are not primarily directed towards work and those with no legal right to work in Australia. He also notes that the reference to 'temporary' should not obscure the enduring aspects of temporary migrant work: firstly, that many such workers have lived in Australia for many years and aspire to continue to do so; and secondly, that in many industries and regions, reliance on such labour is not temporary but ongoing.[1328]

1320. Young Workers Centre, Submission no 82, 8-9.

1321. AIER, Submission no 73, 4; Young Workers Centre Submission no 82, 9.

1322. VCOSS, Submission no 33, 17; Jesuit Social Services, Submission no 52, 7.

1323. VCOSS, Submission no 33, 17.

1324. VCOSS, Submission no 33, 6; ACTU, Submission no 76, 10.

1325. VCOSS, Submission no 33, 9.

1326. ACTU, Submission no 76, 3.

1327. See e.g. Senate Work Visa Report; Australian Government, Productivity Commission, *Migrant Intake into Australia: Draft Report* (November 2015).

1328. Associate Professor Joo-Cheong Tham, Submission no 12 (incorporating by reference submissions made to the Inquiry of the Senate Education and Employment References Committee into 'The impact of Australia's temporary work visa programs on the Australian labour market and on temporary work visa holders': http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/Submissionshttp://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/Submissions).

The terms 'temporary migrant workers' and 'temporary labour migration' are also widely used in Australian and international literature exploring these issues.[1329]

I have considered each form of visa separately, along with some of the issues they have in common. However my conclusions and recommendations are set out below this regarding Australia's temporary migrant worker framework as a whole.

7.2.1 Academic studies of temporary migrant work

Much has been written about the particular vulnerabilities of temporary migrant workers, and the growth of temporary migrant work in Australia and globally.

Dr Joanna Howe has examined the ubiquitous presence of migration intermediaries in global labour migration and the challenges in regulating the relationship between intermediaries and temporary migrant workers, given that this relationship can begin in one country and continue in another.[1330] She argues that a business case exists for migration intermediaries, but unscrupulous intermediaries can be seen as merchants who profit from migration or predatory prices, who provide high interest loans luring migrant workers and often entrapping them in debt for jobs that are far below what was promised.[1331] Further, these operators enable recipient employers to cut costs and transfer responsibility for employment obligations.[1332]

Andrees, Nasri and Swiniarski note that all across the world, a disturbing number of reports have emerged about the exploitation and abuse of workers, especially migrant workers, by unscrupulous labour recruiters and fraudulent and abusive employment agencies.[1333] Their 2015 paper argued that many modern day labour hire arrangements had serious deficiencies. These derived from loopholes in existing labour laws, which failed to articulate the respective responsibilities of recruiting agents and final employers in providing safeguards against abusive practices, including forced labour. A key finding of this research was that the payment of recruitment fees by a worker increased their risk of ending up in forced labour.[1334] The authors presented three basic regulatory models, namely prohibitive legislation, licensing and registration systems. They argued there is growing recognition in national legislation that recruitment fees should not be charged to workers[1335] and noted the challenges of implementing joint liability schemes in the cross border context where implementation requires the collaboration of both countries of origin and destination.[1336] They also argued that current enforcement mechanisms are heavily focused on sanctioning unscrupulous actors, and more emphasis is needed on the victims of these actions and the remedies available to them.[1337]

A 2015 ILO paper, 'Global Labour Recruitment in a Supply Chain Context', describes the international temporary labour migration recruitment market as being controlled by moneylenders, notaries, brokers, and sub-agents, with every actor in the migration industry claiming a piece of the wage wedge, reducing the income for the employee.[1338] It notes

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1329. See e.g. Joanna Howe and Rosemary Owens (eds), *Temporary Labour Migration in the Global Era: The Regulatory Challenges* (Hart Publishing, 2016, forthcoming); OECD, *Temporary Labour Migration: An Illusory Promise?* (2008).

1330. Howe (2016), 1.

1331. Ibid, 2.

1332. Ibid, 3.

1333. Beate Andrees, Alix Nasri, Peter Swiniarski, *Regulating labour recruitment to prevent human trafficking and to foster fair migration: Models, challenges and opportunities*, Working paper No. 1/2015 (ILO, 2015), 5.

1334. Ibid,9.

1335. Ibid.

1336. Ibid.

1337. Ibid.

1338. Jennifer Gordon, Global Labour Recruitment in a Supply Chain Context, (ILO, 2015), 9-10.

that migrant workers can earn vastly more income in destination countries.[1339] It states that employers who use migrant workers tend to utilise outside agents to do their recruiting with the recruitment firms employing sub-agents to work on their behalf.[1340] The paper argues that there is a failure of both domestic and international regulation to address the abuses inherent in the international temporary migrant labour recruitment market. It notes there is no international authority systematically enforcing standards of labour migration, and argues that destination country governments pay little attention to the routine problems of recruitment as they have too much to lose if this trade is halted.[1341] Some origin country governments have invested in pre-departure education but this has done little to provide the worker with tools that can be used in the event of mistreatment.[1342] The paper identifies that few businesses will voluntarily cease advantageous recruitment behaviour. Further, in most jurisdictions, laws excuse those at the top of the supply chain from violations that occur lower down, even though those abuses reduce labour costs and deliver greater profits.[1343] The paper proposes ensuring employers take responsibility for the actions of their recruiters by creating negative market consequences for the employer for not doing so,[1344] also noting the licensing and registration scheme implemented in Manitoba, Canada in 2008.[1345]

7.2.2 Temporary visas for the express primary purpose of work

There are two main visa programs which have as their direct purpose supplementing specific skills gaps or labour supply deficiencies in the Australian labour market using temporary migrant workers. The first is the subclass 457 temporary skilled visa program, and the second is the SWP.[1346]

Subclass 457 visas

Nature and use

Subclass 457 visas were introduced to allow businesses to sponsor highly skilled overseas workers. The intention of the scheme is to supplement, not replace, the Australian workforce, to avoid adverse consequences for the Australian labour market and to protect visa holders from exploitation.[1347]

Subclass 457 visas permit skilled workers to work in Australia for an approved business for up to four years. The programme is uncapped, and driven by employer demand.[1348]

1339. Ibid, 9. Mexican workers in the United States are able to earn up to nine times as much as they would at home and Vietnamese workers up to 16 times as much by working in the Republic of Korea.
1340. Ibid, 15.
1341. Ibid, 6.
1342. Ibid, 9.
1343. Ibid, 15.
1344. Ibid, 22.
1345. Ibid. See also chapter 5.
1346. See e.g. John Azarias, Jenny Lambert, Prof. Peter MacDonald, Katie Malyon, *Robust New Foundations – A Streamlined, Transparent and Responsive System for the 457 Programme*, Independent Review into Integrity in the Subclass 457 Programme (September 2014), 20; Seasonal Worker Program Report, 3-4.
1347. Azarias et al (2014), 20.
1348. Senate Work Visa Report, 11.

Other key features of the 457 visa program include the following:

- 457 visa workers must be sponsored by an approved business;
- employers who seek to sponsor a 457 visa worker must be unable to find an Australian citizen or permanent resident to do the work;
- employers must pay 457 visa workers above the temporary skilled migration income threshold, which is designed to ensure that 457 visa workers earn sufficient money to be self-reliant in Australia;
- employers must guarantee that 457 visa workers will be paid the 'market salary rate'. As part of the sponsor obligation, terms and conditions, including pay and hours of work, must be no less favourable than the terms and conditions that would be provided to an Australia citizen performing the same work in the same location;
- 457 visa workers may only be engaged in a specified occupation, with the sponsor, and cannot cease employment for a period of more than 90 days; and
- employers must meet certain specified training benchmarks.[1349]

In addition, subclass 457 visas may be obtained through a labour agreement with the Federal Government which applies to a specific company, industry, designated area or project. In this case, 457 visa holders may perform work which sits outside the designated skilled occupations which apply in respect of the standard 457 visa program.[1350] Presently, there are labour agreements in several industries including: dairy; fast food; meat; pork; on-hire; and restaurant (fine dining).

Proponents of the 457 visa scheme dispute that it has any negative impact on local employment. There are requirements to undertake labour market testing under the scheme. Further, the additional costs associated with sponsoring and nominating 457 visa holders act as a price disincentive to the engagement of visa holders where local labour is available, meaning that visa holders are used only where there is a genuine skills shortage.[1351]

However, critics argue that the labour market testing requirements are lax, subject to little oversight, easy to evade and expensive to enforce in any meaningful way. Concerns have also been raised that the definition of 'skill' is too wide-ranging, and thus 457 visas are issued for occupations for which minimal training of local workers would be required.[1352]

Table 7.1: 457 visas granted with nominated position location in Victoria, 2005/6–2014/15

Visa type	05/06	06/07	07/08	08/09	09/10	10/11	11/12	12/13	13/14	14/15
Primary	7712	10181	11753	10917	8478	11511	13679	14392	12261	12664
Secondary	5502	8583	10566	9796	7401	9367	10356	11929	11147	11690
Total	13214	18764	22319	20713	15879	20878	24035	26321	23408	24354

Source: Australian Government, Department of Immigration and Border Protection, Subclass 457 visas granted pivot table, 2015-6 to 31 March 2106 – comparison with previous years: http://data.gov.au/

1349. See e.g. http://www.border.gov.au/Trav/Visa-1/457- ; Azarias et al (2014); Senate Work Visa Report (2015).

1350. Australian Government, Department of Immigration and Border Protection, *Labour Agreements – Information about requesting a labour agreement* (December 2015).

1351. Joanna Howe, 'Is the net cast too wide? An assessment of whether the regulatory design of the 457 visa meets Australia's skill needs' (2013) 41 *Federal Law Review* 443, 457.

1352. Ibid, 446, 456.

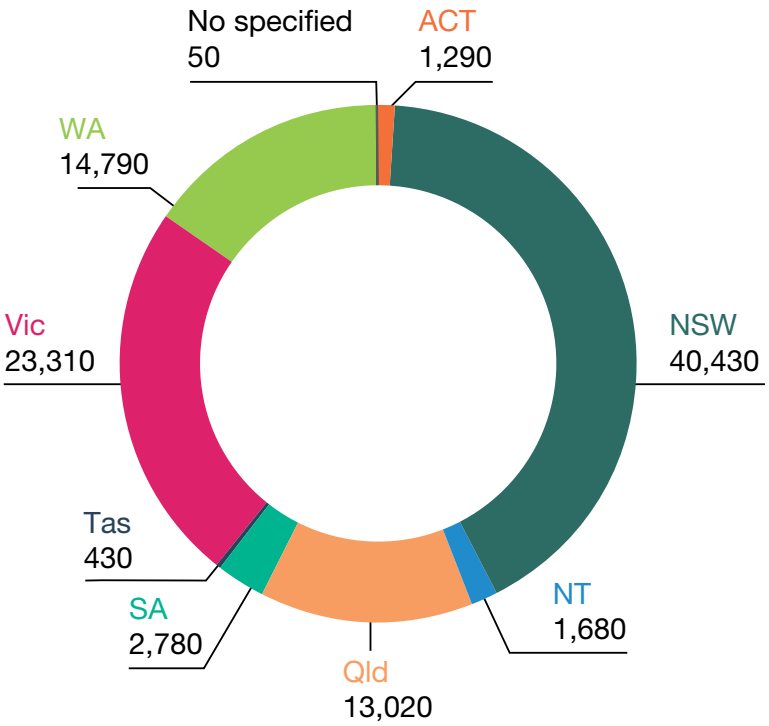
Table 7.2: 457 visa holders in Australia with nominated position location in Victoria, 31/3/10 – 31/3/16

Visa type	31/3/10	31/3/11	31/3/12	31/3/13	31/3/14	31/3/15	31/3/16
Primary	13207	15049	18491	21883	23897	24513	23307
Secondary	11516	12620	14186	16964	18943	20007	19414
Total	24723	27669	32677	38847	42840	44520	42721

Source: Australian Government, Department of Immigration and Border Protection, Subclass 457 visa holders in Australia at 31 March 2016 - comparison with previous quarters: http://data.gov.au/

Table 7.1 sets out the number of 457 visas granted in Victoria between 2005/6 and 2014/5. Table 7.2 shows the number of 457 visa holders in Australia with nominated position location in Victoria, as at 31 March in each year from 2010 to 2016. Whilst in each case numbers have fluctuated across the relevant period, both tables demonstrate greatly increased presence of 457 visa holders. Both tables also show that secondary visa holders, generally dependents, make up a significant proportion of the total number of visa holders. Secondary visa holders are not subject to the same restrictions as the primary visa holder, and may undertake unskilled work.[1353]

Figure 7.1: 457 visa holders in Australia by nominated position location as at 31/3/16



Source: Australian Government, Department of Immigration and Border Protection, Subclass 457 quarterly report (Quarter ending at 31 March 2016), 14.

1353. Howe and Reilly, in their submission to the Senate Visa Inquiry, observe that the partners and children of 457 visa holders have the right to unskilled work without the restrictions of the primary visa holder. The work rights of international students and WHM visa holders are not subject to the same regulatory controls as skilled temporary workers. They do not need to be paid market wages, they are not limited to employment in specified industries in which there is a shortage of workers and their employers are not required to show they have tried to employ Australian workers for the position: Dr Joanna Howe and Associate Professor Alexander Reilly, 'The impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders', Submission to the Senate Standing Committee on Education and Employment, May 2015, 5.

As demonstrated by Figure 7.1, the second highest number of 457 visa holders in Australia at 31 March 2016 had nominated their position location as Victoria, constituting around 24% of all visa holders.

In the 2014/15 year:

- There were 12,660 applications for 457 visas granted for Victoria.
- The highest number – around a third – of all 457 visa applications for Victoria were granted to citizens of India, followed by the United Kingdom then China.
- The top five sponsor industries in Victoria were: professional, scientific and technical (16.6%), other services (16.1%), accommodation and food services (13.9%), information, media and communications (13.9%) and health care and social assistance (8.9%).
- The top five nominated occupations for primary applications granted in Victoria were: cook (6.6%), developer/programmer (5.4%), software engineer (3.8%), cafe or restaurant manager (3.7%) and ICT business analyst (3.5%).[1354]

Victoria had the lowest average nominated base salary of all states and territories for 457 visa applications made during this period, at $82,300.[1355] The Victorian industry with the lowest average nominated salary was the accommodation and food services industry, at $57,500.[1356]

Inquiry and other evidence regarding 457 visa workers

The 457 visa program has been subjected to several inquiries over recent years – a matter described by the 2014 Azarias Review as 'a clear indication that it faces a politically and economically divided environment.'[1357] Broadly speaking, these reviews have recommended adjustments to the balance of the various features of the scheme, rather than any wholesale revision of its key features.[1358] The Productivity Commission, in its November 2015 draft report into Australia's migrant intake, observed that the Australian Government has agreed in principle to the majority of the recommendations of the Azarias Review, and should assess the effectiveness of changes implemented as a result of these recommendations, as well as addressing problems with the efficiency and effectiveness of current labour market testing arrangements.[1359]

Whilst the submissions and evidence of Inquiry participants regarding temporary migrant workers was largely directed towards other forms of visas, the subclass 457 visa was nonetheless brought to the Inquiry's attention by several participants.

The Air Conditioning and Mechanical Contractors Association (**AMCA**) submitted that its members have used 457 visa holders from time to time, however the mechanical contracting industry regards this as exceedingly complicated for both the host employer and the individual. AMCA submitted that member companies will only go to the trouble of recruiting employees through the visa system when they have exhausted the local employment market. It submitted that the classifications involved are project managers, senior drafting officers, estimators and other specialists that are either not available or not sufficiently experienced in Australia.[1360]

1354. Australian Government, Department of Immigration and Border Protection, *Subclass 457 quarterly report* (quarter ending at 30 June 2015), 45-46.

1355. Ibid, 13.

1356. Ibid.

1357. Azarias et al (2014), 7.

1358. Ibid, 49-78; Senate Work Visa Report, ix-x, recommendations 5-9.

1359. Productivity Commission (2014), 311, 314.

1360. AMCA, Submission no 67, 2.

HIA submitted that 457 working visa holders made up a small fraction of total workers in the residential construction industry and it is unaware of any issues with this form of work.

It referred to recent data published by the Department of Immigration and Border Protection indicating that only 340 visas were granted to construction workers in Victoria in 2014-2015, which is some 3.6% of the temporary work visas issued in that state.[1361]

In contrast, the Uniting Church submitted that the construction industry is a sector where 'very serious instances of exploitation' of temporary work visa holders occurs, with a large proportion of these instances involving workers on 457 visas. The Uniting Church also submitted that nursing, manufacturing and the meat industry are other industries experiencing similar exploitation of 457 visa holders.[1362]

Mr John Alldis submitted that the use of 457 visa holders in aircraft maintenance is inappropriate due to the need to have specific country knowledge, the risk of threats to return to country of origin, and the effect on training and workplace culture and generational knowledge.[1363]

JobWatch submitted that the power imbalance in an employment relationship is exacerbated for temporary migrant workers because the worker's residency status is tied to the ongoing sponsorship by the employer, adding a further level of domination that employers may and often do wield against workers.[1364]

A central feature of the 457 visa scheme is the inability for an employee to work for anyone other than the sponsoring business. This has been the subject of criticism in academic literature as a feature which contributes to the vulnerability of temporary migrant workers and the insecurity of their work. Fudge describes migrant workers who are not free to circulate in the labour markets of the host countries in which they are working as 'unfree labour'. She argues that these workers facilitate the reduction of overall wage levels, contribute to lower labour standards, and assist in introducing more flexible employment practices.[1365]

Associate Professor Tham, in a submission to the Inquiry, also argued that there are structural aspects of the 457 visa scheme which increase the likelihood that workers will be exploited. These are, firstly, that the worker has no choice to take up alternative employment and thus is dependent upon the employment continuing for ongoing residency. Secondly, termination of employment by the sponsoring employer effectively amounts to deportation. Thirdly, a worker's participation in an employer-driven breach of the 457 scheme requirements (such as performing a different kind of work than that for which the visa was granted) may also make the worker vulnerable to deportation.[1366]

In a 2014 article, Howe argues that there should be a clearer and more transparent process for compiling and amending the list of occupations in which 457 visa workers may be engaged, contending that it is too readily influenced by industry groups and business.[1367]

1361. HIA, Submission no 45, 9.

1362. Uniting Church, Submission no 57, 4.

1363. John Alldis, Submission no 10, 1.

1364. JobWatch, Submission no 46, 21.

1365. Judy Fudge, 'Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers' (2012-13) 34 *Comparative Labor Law and Policy Journal* 95.

1366. Associate Professor Joo-Cheong Tham, Submission no 12. See also Iain Campbell and Joo-Cheong Tham, 'Labour Market Deregulation and Temporary Migrant Labour Schemes: An Analysis of the 457 Visa Program' (2013) 26:3 *Australian Journal of Labour Law* 239.

1367. Joanna Howe, 'Accountability and transparency under the subclass 457 visa program: Is there cause for concern?' (2014) 21:3 *Australian Journal of Administrative Law* 139, 141.

In 2013, Howe argued that the labour market testing and other regulatory mechanisms are not effective in ensuring the 457 visa program meets its objectives, in particular the identification and meeting of skill shortages.[1368] She also argued that the broad description of the occupations permitted by the visa, coupled with a lack of scrutiny regarding whether the sponsored occupation is the one being performed by the visa holder, hampers the effectiveness of this visa. In Howe's assessment, this means 457 visas can be used to develop a more compliant workforce less likely to voice concerns over safety, pay and conditions because of a desire to remain in Australia on the visa or to one day achieve permanent residency through employer nomination.[1369] Howe advocates a mechanism that moves away from Australia's model of a demand-driven temporary migration scheme in favour of one that allows independent assessment of Australia's skill needs.[1370]

Wright and Constantin, in their submission to the Senate Visa Inquiry, presented a survey of 1600 Australian employers conducted in 2012 to examine why employers recruited workers on temporary skilled subclass 457 visas.[1371] Their study found that the vast majority of surveyed employers claimed to experience challenges recruiting workers from the local labour market. However, the authors argued that recruitment challenges and skilled job vacancies were not necessarily the same as skills shortages. Only a very small proportion of employer respondents claimed they would address skilled vacancies by increasing the salary being offered - generally considered a necessary precondition for a skills shortage to exist. Therefore, even where employers were using the 457 visa scheme because of skills shortages, the shortages that existed did not appear to be acute.[1372] The authors argued that whilst skilled migration was important for addressing skills shortages, alternative mechanisms such as improving job quality to attract a wider pool of candidates, greater investment in structured training to facilitate career development opportunities for existing and prospective employees, and other measures likely to engender long term workforce commitment and retention were likely to be more effective than the 457 visa scheme for helping these employers to alleviate their recruitment problems in a more systematic manner.[1373] Wright and Constantin further recommended the establishment of an independent mechanism to verify the existence of skills shortages before employers could use the 457 visa, and use of a more precise list of occupations for sponsorship.[1374]

Despite the risks identified by Tham's submission, described above, his assessment of the available evidence is that the overall level of non-compliance with workplace laws under the 457 visa scheme is low. However, he notes that in certain industries (such as construction, hospitality and retail) and business contexts (such as small businesses) the rate of non-compliance is higher.[1375]

On the other hand, there is recent evidence of non-compliance amongst some sponsors of 457 visa holders. In the two program years to 31 March 2015, the Department of Immigration and Border Protection monitored nearly 4,000 temporary work sponsors, the majority of whom

1368. Howe (2013).

1369. Ibid, 468.

1370. Ibid, 469.

1371. Chris Wright and Andreea Constantin, 'An analysis of employers' use of temporary skilled visas in Australia', *Submission to the Senate Education and Employment References Committee Inquiry into the impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holder*, 1 May 2015, 2.

1372. Ibid.

1373. Ibid, 3.

1374. Ibid.

1375. Associate Professor Joo-Cheong Tham, Submission no 12, 13.

were 457 sponsors. Almost one third of sponsors monitored were found to be in breach of their obligations under workplace laws.[1376] Between 1 July 2013 and 31 December 2014, FWO inspectors monitored just over 3,000 holders of 457 visas to ensure they were receiving their nominated salary, and performing their nominated position. During this time FWO identified concerns in 18% of cases.[1377] In addition, between 1 July and 31 December 2014, FWO referred 154 of 460 entities employing 457 visa holders to the Department of Immigration and Border Protection due to compliance concerns.[1378]

Seasonal Worker Program

Nature and use

The SWP provides low-skilled temporary migrant workers to employers in the agricultural industry, and selected locations in the accommodation industry in Australia. It replaced the Pacific Seasonal Worker Pilot Scheme (**PSWPS**), which ran from August 2008 and concluded on 30 June 2012.[1379] Participating countries in the SWP include Fiji, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands, Timor-Leste, Tonga, Tuvalu and Vanuatu.[1380]

The SWP's purposes are to provide labour to Australian employers in specified industries who cannot meet seasonal labour needs with local jobseekers, as well as contributing to the economic development of participating countries.[1381]

The SWP was originally demand-driven, with 12,000 visa places available over four years.[1382]

The SWP was expanded in June 2015, including to remove a cap on the annual limit on how many seasonal workers can participate in the program, and to include additional industries.[1383] In 2016, the Federal Government announced the expansion of the scheme to the broader agricultural sector[1384] and as a pilot project, into tourism in Northern Australia.[1385]

Seasonal workers must satisfy the following criteria to participate in the SWP:

- be of good character;
- be healthy and fit for the work specified;
- be aged over 21 at time of visa application;
- be a citizen of the participating country and in the participating country at the time of visa application;

1376. *Australian Government Department Submission*, Education and Employment References Committee, Senate Inquiry into the impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders (15 July 2015), 21, sourced from Department of Immigration and Border Protection, 2015 (BE8273.03), 13.

1377. Ibid, 24.

1378. Ibid.

1379. Seasonal Worker Program Report, 3.

1380. Ibid, 4.

1381. Ibid, 5, referring to evidence of the Department of Employment to the Inquiry on 24 June 2015.

1382. Jesse Doyle and Stephen Howes, *Australia's Seasonal Worker Program: Demand-side Constraints and Suggested Reforms*, Discussion Paper, World Bank Group, Washington, DC (2015).

1383. Australian Government, *Seasonal Worker Programme Expansion – Q & A* (Fact Sheet, 19 June 2015).

1384. Senator The Hon Michaelia Cash, *Seasonal workers expanding to greener pastures*, Media Release, 8 February 2016.

1385. Senator The Hon Michaelia Cash, *Seasonal worker programme Northern Australia tourism pilot takes off*, Media Release, 6 May 2016.

- have a genuine intention to enter Australia for seasonal work and return to the participating country after their employment ceases; and
- the partner country must verify that the stated identity of the candidate is their real identity.[1386]

Seasonal workers can participate in basic training opportunities funded by the Federal Government to a value of up to $825 (GST inclusive) per seasonal worker. First time seasonal workers are offered training opportunities in english literacy and numeracy, information technology and first aid. Returning seasonal workers may be able to access recognition of prior learning towards a Certificate I or II in the industry that they have been working in, for example horticulture or accommodation.[1387]

Approved employers need to test the labour market before recruiting seasonal workers. They must also demonstrate that seasonal workers will benefit financially from their participation.[1388]

Seasonal workers can be employed for up to six months, and seasonal workers recruited from Kiribati, Nauru or Tuvalu can be employed for up to nine months. For all periods of employment, approved employers must guarantee a minimum average of 30 hours' work per week to seasonal workers. A previous requirement to guarantee 14 weeks' employment was removed in June 2015.[1389]

The approved employer is responsible for paying for the entire return international airfare and domestic transfer costs for seasonal workers, to and from their work location. However, the approved employer can recover the amount of $500 from these transportation costs from the seasonal worker's pay over the course of their employment.[1390]

Table 7.3 Seasonal Worker Program stream of Subclass 416 – number of visa grants 2012/3 – 2014/5

Year:	2012–13	2013–14	2014–15
Visa grants:	1,492	2,014	3,177

Source: DIBP, Annual Report, (2014/5), 79.

As is apparent from Table 7.3, the numbers of participants in the SWP are very low in comparison to use of the 457 visa scheme (see Figure 7.1).

Inquiry and other evidence regarding the SWP

The Inquiry heard from two companies which engage workers under the SWP.

MADEC is a community based, not-for-profit business delivering employment, training and community development initiatives, including in Victoria. In the Mildura area, MADEC operates a labour hire business. Approximately 50% of its business stems from being an approved employer for the SWP.[1391]

In recent years, SWA was granted a licence by the Federal Government to operate the SWP. [1392]

1386. Australian Government, *Seasonal Worker Programme Expansion – Q & A* (Fact Sheet, 19 June 2015).
1387. Australian Government, *Add-on Skills Training and the Seasonal Worker Programme* (Fact Sheet, 19 June 2015).
1388. Australian Government, *Approved employers and the Seasonal Worker Programme* (Fact Sheet, 18 June 2015).
1389. Ibid.
1390. Ibid.
1391. MADEC, Submission no 9, 1.
1392. SWA, Submission no 40, 3.

SWA submitted that its involvement in the SWP, with a major exposure to the horticulture sector in Victoria, has come at considerable cost because it severely underestimated the prevalence of blatantly illegal contractors and their gangs, 'fly by night' labour hire companies, organised groups of overseas workers with no working rights in Australia, and finally, a major cohort of Australian citizens or residents who are working for cash payment whilst on Centrelink benefits. SWA submitted that at a Federal Government round table conference, it was estimated that between 60 to 65% of fruit and vegetables harvested in Australia were likely to be picked by contracting gangs of dubious bona fides.[1393]

SWA considers that as law enforcement improves, the SWP will become more significant. It describes Pacific Island workers as passionate, reliable, hardworking and productive and quick learners. It notes that returning workers hit the paddock running, with limited supervision or training required, making it cost effective for the grower. SWA submitted that there is minimal impact on domestic labour because the positions that Pacific Island nation workers will be competing for are jobs that Australian workers (adults, youth, men or women) do not want to do.[1394]

PMA-ANZ submitted that the SWP has some important benefits over the WHM visa program: workers tend to stay on the same property for the entirety of the season; the same workers return to the same property (or at least the same industry) each year; and stronger connections are formed between the workers and the employers and communities. It is a higher cost option for employers, although this is largely offset by greater productivity and lower costs of training and induction.[1395] This view was shared by the East Gippsland Food Cluster.[1396]

The Sunraysia ECC described having some issues with exploitation of workers engaged through the SWP. It has intervened on behalf of workers from the PNG, Solomon Islands and Fijian communities in respect of working conditions. It described a situation it was dealing with at the time of the Inquiry's Mildura hearing, with people who were working with food being improperly stored on site; no adequate access to fresh water on site; and having to get up at four in the morning to travel to where they were working. The host employer exercised significant control over the workers, and they were unable to speak to others in the community. Mr Wickham described 10 people walking off the program in the previous three weeks, so they were now facing visa condition breaches.[1397]

There was a media report in March 2016 of exploitation of Fijian SWP workers who were paid less than $10 per week by a labour hire agency that sponsored their visas. The workers were required to either return to work for the agency, or return to Fiji.[1398]

In a 2015 World Bank Discussion Paper, Doyle and Howes consider the SWP and its predecessor, the PSWPS.[1399] The paper assesses the PSWPS as never having reached its potential, and considers reforms to help lift employer demand through an evaluation of the views of a sample of employers and industry bodies across the horticulture industry.[1400]

1393. SWA, Submission no 40, 2.

1394. SWA, Submission no 40, 4.

1395. PMA-ANZ, Submission no 85, 2

1396. East Gippsland Food Cluster, Submission no 106, 12-13.

1397. Sunraysia ECC, Mildura hearing, 23 November 2015.

1398. Norman Hermant, 'Fijian seasonal workers told to return to work for contractor accused of exploitation or go home', *ABC News*, 27 March 2016, at: http://www.abc.net.au/news/2016-03-27/seasonal-workers-to-return-contractor-accused-of-exploitation/7270902.

1399. Doyle and Howes (2015).

1400. Ibid, 11-24.

In summary, Doyle and Howes found that the lack of an aggregate labour shortage due to the prevalence of illegal workers and backpackers in the horticultural industry remains a key constraint on employer demand for the SWP. It also found a lack of awareness of the scheme in some states and a belief on the part of growers that it was too costly and risky.[1401] They recommended that the scheme could be enhanced by:

- increased funding for compliance activities to reduce illegal workers in horticulture;
- removing or reducing the second year visa extension for backpackers;
- removing upfront costs for returning workers and covering those for new workers through a revolving fund;
- reducing the minimum fourteen week working requirement (as noted above, this requirement has since been removed);
- giving employers a greater role in worker selection;
- advertising the SWP though horticultural industry bodies;
- streamlining reporting requirements to governments; and
- easing labor market testing requirements for participating growers.[1402]

The Joint Standing Committee on Migration's Seasonal Worker Program Report, like the Doyle and Howes study, found a number of barriers hindering the effectiveness of the SWP. Most notable was the horticulture industry's significant reliance on WHM visa holders. The Committee noted that whilst the working holiday visa is primarily intended for cultural exchange, it fills a labour gap and is in direct competition with the SWP.[1403] The Committee further found that the regulations around the SWP were robust, but unable to prevent rogue employers/labour hire operators from exploiting workers in a very few cases. The intersection of vulnerable workers and unethical and illegal labour hire operators was considered to be a major concern.[1404]

The Committee recommended that the Federal Government review the SWP and working holiday maker programs by December 2017, to ensure they were not adversely impacting on each other or the local labour market. The Committee also recommended that the Federal Government:

- standardise labour market testing across the range of temporary work visas;
- undertake a review of current superannuation requirements for SWP participants;
- establish a three year pilot program for 17 to 24 year olds to train and work in the agricultural sector;
- increase employment opportunities for women in the SWP;
- advance the SWP to address labour shortages in aged care, child care, and disability care;
- review travel reimbursement costs to SWP workers; and
- establish a licensing scheme for labour hire contractors.[1405]

1401. Ibid, 1.

1402. Ibid; see further 24-27.

1403. Seasonal Worker Program Report, viii.

1404. Ibid, 142.

1405. Ibid, xvii-xix, 149-150.

7.2.3 Temporary visas with primary purposes other than work

There are two other significant groups of visa holders in Australia, whose visas do not have work as their primary purpose, but who nonetheless perform a significant amount of low and semi-skilled work. These are WHM visas, and student visas.

Working holiday maker (subclass 417 and subclass 462) visas

Nature and use

The WHM visa program is intended to 'foster closer ties and cultural exchange between Australia and partner countries.'[1406] According to the Department of Immigration and Border Protection website:

> *The Working Holiday Maker program allows young adults (18 to 30) from eligible partner countries to work in Australia while having an extended holiday. Work in Australia* ***must not be the main purpose of the visa holder's visit****. (emphasis added)*[1407]

WHM visa holders are permitted to stay in Australia for a 12-month period, and may work for the full duration of that stay, provided that (other than in specified circumstances) they cannot work for a single employer for longer than six months.[1408] First time subclass 417 WHM visa holders may obtain a second WHM visa by undertaking 88 days of specified work in regional Australia. Specified work includes work in the agriculture, mining and construction industries across large parts of rural and regional Australia.[1409]

The WHM program has been in existence since 1975, when it was confined to only a small number of commonwealth countries. It now extends to 38 countries and regions. Around half of these arrangements (subclass 462 visas) have caps on the number of visas, whereas the other half (subclass 417 visas) do not.[1410]

In a presentation to a 2015 Monash University symposium, Underhill and Rimmer outlined their research on the evolution and growth of the WHM visa program.[1411] The following figures are reproduced from updated data provided by Dr Underhill relating to figures presented in their presentation (with permission).

1406. Australian Government, Department of Immigration and Border Protection, *Working Holiday Maker visa programme report* (31 December 2015).

1407. See: https://www.border.gov.au/Lega/Lega/Form/Immi-FAQs/what-is-the-working-holiday-maker-program.

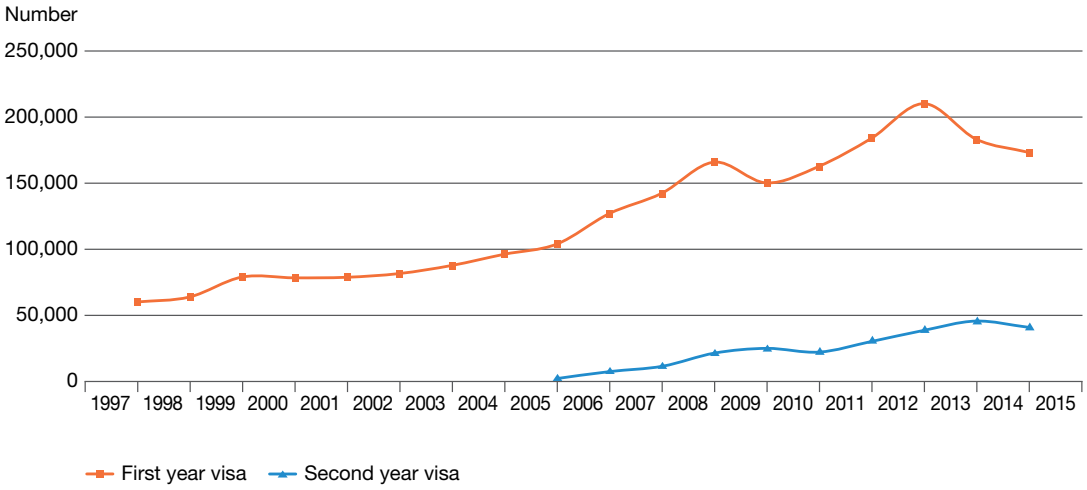
1408. DIBP (2015), 3.

1409. Ibid, 4.

1410. Ibid, 3-4.

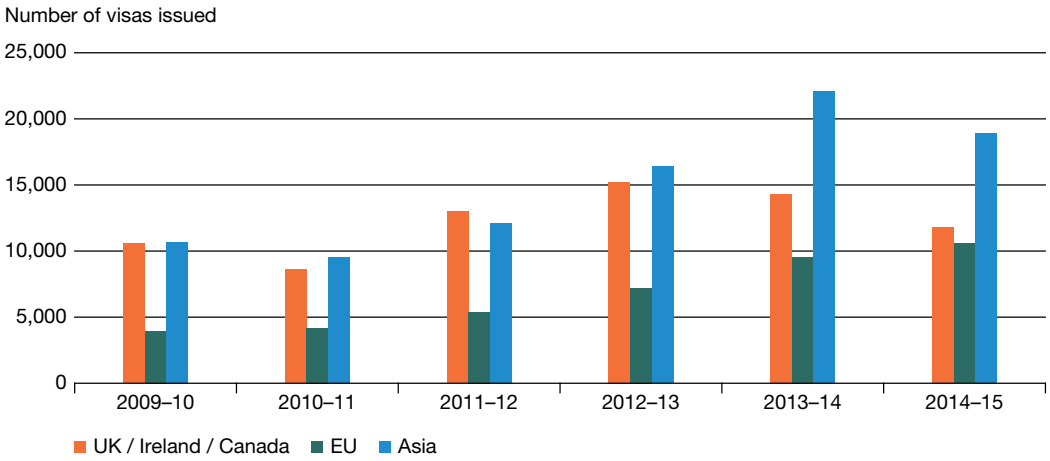
1411. Malcolm Rimmer and Elsa Underhill, *Asian Workers Harvesting in Australia: Employment Trends and Consequences*, Presentation to the Monash Business School Symposium 'Thinking empirically about employment relations and labour regulation in an Asia-Pacific context', Melbourne, 5 November 2015.

Figure 7.2: WHM visas issued – 1997/8 – 2012/3



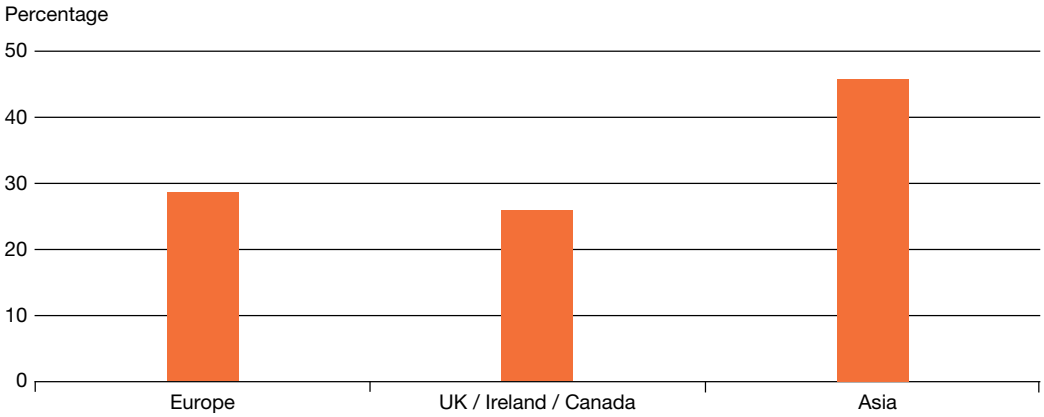
Source: Malcolm Rimmer and Elsa Underhill, Asian Workers Harvesting in Australia: Employment Trends and Consequences, Presentation to the Monash Business School Symposium 'Thinking empirically about employment relations and labour regulation in an Asia-Pacific context', Melbourne, 5 November 2015, and updated data provided by Dr Underhill to Inquiry.

Figure 7.3: Number of WHM visas issued by region of origin: 2009/10 – 2013/4



Source: Malcolm Rimmer and Elsa Underhill, Asian Workers Harvesting in Australia: Employment Trends and Consequences, Presentation to the Monash Business School Symposium 'Thinking empirically about employment relations and labour regulation in an Asia-Pacific context', Melbourne, 5 November 2015, and updated data provided by Dr Underhill to Inquiry.

Figure 7.4: Proportion of subclass 417 visa holders in Australia at 30 June 2015 by region of origin



Source: Australian Government, DIBP, Working Holiday Maker visa programme report (30 June 2015), 32

Figure 7.2 presents the numbers of 417 WHM visas issued between 1997 and 2013. Underhill and Rimmer's research demonstrates the extensive growth in numbers of WHM visas issued, from 60,291 in 1997/98 to a peak of 249,231 in 2012/13, including first and second year visas. In 2014/15, first and second year visas totalled 214,802.

Figure 7.3 demonstrates the growth of second year subclass 417 WHM visas issued by region since 2009. The number of second year 417 WHM visas issued to workers from Asian countries more than doubled between 2009/10 and 2013/4.

As at 30 June 2015, there were 136,892 subclass 417 WHM visa holders (including 35,434 second visas) and an additional 7,026 subclass 462 visa holders in Australia.[1412] Figure 7.4 illustrates that the greatest proportion of subclass 417 visa holders (40.1%) are from Asian countries.

Despite the stated primary objectives of the WHM visa program being unrelated to addressing labour market shortages in Australia, the development of the second year WHM visa was clearly connected to this objective. Underhill and Rimmer note that:

> *By 2005, concerns about WHMs being de facto guest workers were outweighed by labour market needs. Following a period of extreme labour shortage in horticulture, and lobbying by the National Farmers Federation, the Federal government amended WHM visas to grant a Second Year Visa for those who completed 88 days rural work during their first 12 months in Australia.*[1413]

The Productivity Commission Draft Report on Migration noted the Federal Government's recent proposals to amend the WHM visa program, to allow both subclass 417 and subclass 462 visa holders to work an additional six months with one employer in northern Australia if they work in specified high demand areas in the north, including agriculture, forestry and fishing, tourism, mining and disability and aged care.[1414] In addition, subclass 462 visa holders would be permitted to access a second 12 month visa if they work for three months in agriculture or tourism in the north. These changes came into effect on 21 November 2015.[1415]

The Productivity Commission noted that these change means subclass 462 visa holders can potentially 'work for the entire duration of their two year stay in Australia — increasing the supply of seasonal and temporary labour in the north.'[1416]

Further, notwithstanding the aim of 'cultural exchange' in some cases, the number of Australians accessing WHM visas to partner countries is very low. FWO has noted that in 2013, 15,704 Taiwanese were granted WHM visas by Australia, whereas only 31 Australians were granted WHM visas by Taiwan.[1417]

Inquiry and other evidence regarding WHM visas

The WHM visa program has increasingly attracted the attention of commentators and governments alike, no doubt in light of its massive and uncapped growth and a steady stream of media reporting of labour exploitation associated with it.[1418]

1412. Australian Government, DIBP, *Working Holiday Maker visa programme report* (30 June 2015), 31-34.
1413. Underhill and Rimmer (forthcoming), 6.
1414. Productivity Commission (2015), 302.
1415. See https://www.border.gov.au/Trav/Visi/Visi-1/work-holiday-visas-noth-aus.
1416. Productivity Commission (2015), 302.
1417. Senate Work Visa Report, 165, referring to FWO (2015), 13.
1418. See e.g. Anna Patty, 'Overseas workers supplying pastries, desserts and vitamins to Coles and Woolworths allegedly underpaid,' *The Age* (29 January 2016); Anna Patty, 'Chinese and Taiwanese mushroom pickers short changed $92,000', *Sydney Morning Herald* (2 March 2016); 'Managers personally liable for underpayments to visa workers: Court' *Workforce,* 14 October, 2015; 'Vic dairy company rips-off backpackers', *The Australian* (21 March 2016).

The Inquiry received substantial evidence of the prevalence of temporary migrant workers on WHM visas in the horticultural sector[1419] and the meat industry, and many instances of gross exploitation of these temporary migrant workers, generally involving labour hire agencies.[1420] It seems likely that WHM visa holders are concentrated in these industries in light of the capacity to obtain a second year visa through specified rural work.

A confidential submitter told the Inquiry that many people in Mildura and surrounds believe that organised crime originating in other countries is responsible for bringing in workers, some without appropriate visas, to work in the horticulture industry. In the case of a local packing company, allegations have been made that an individual believed to be from Taiwan was the head contractor who supplied workers who were underpaid, and consequently threatened, including with death. There are claims that he was involved in money laundering and that workers were forced to stay at his caravan park. The man in question had a driver's licence with a Mildura address.[1421]

The Inquiry was told by numerous participants that labour contractors are often from the same ethnic group as the workers they engage. Some have suggested that there is transnational organisation of workers, including the arrangement and purchase of passports offshore.[1422] Another confidential submitter told the Inquiry that some labour brokers providing these services receive 'commissions' from overseas recruitment brokers sourcing labour on their behalf, and charge a 'finder's fee' to the worker as well as other brokerage fees.[1423]

ICA informed the inquiry of its experience with the itinerant 'crop picking' industry where the supply of labour to the Gippsland and Swan Hill areas mostly comprises Asian workers drawn from the Springvale/Dandenong and Footscray suburbs of Melbourne. It submitted that for the most part, workers are supplied through very small labour hire businesses owned and operated by Asian Australians who have personal, community networks. It submitted that many of these operators are 'fly-by-nighters' which charge the farmers full rates but do not pay entitlements such as workers' compensation premiums, PAYG tax and superannuation, then close and disappear.[1424]

Dr Joanna Howe of the Adelaide Law School has conducted extensive research into the use of temporary migrant workers in the Australian horticulture industry. She submitted that the industry lends itself to the presence of migration intermediaries due to growers' lack of human resources experience, the seasonal and low skilled nature of the work, the need for labour at short notice, and pricing and scheduling pressure from major supermarkets.

She submitted that it is becoming common practice for growers to rely on labour contractors to facilitate labour supply, and for contractors to move teams of workers to different locations according to the needs of growers.[1425]

Dr Underhill submitted, based on her research, that labour contractors:

> *…supply labour at below award rates and are more likely to not pay wages owed when the work finishes. Instead, they move to another location, either taking their undocumented workers with them or hiring new working holiday visa holders. Their presence in horticulture is associated with violence, and high levels of exploitation across work, citizenship and living conditions.*[1426]

1419. See also FWO, 'Fruit-picking backpackers most likely to dispute pay', *Media Release*, 11 May 2016.

1420. See further chapter 4.

1421. Confidential, Submission no 87.

1422. NUW, Morwell Hearing, 1 March 2016.

1423. Confidential, Submission no 105.

1424. ICA, Submission no 71, 14.

1425. Dr Joanna Howe, Submission no 109, 3, 10.

1426. Dr Underhill, Submission no 32, 7.

Dr Underhill considers that the requirement for WHM visa holders to work in agriculture for 88 days in order to obtain a second year visa extension is a key reason that labour contractors are able to continue to offer substandard employment, and that without this requirement, contractors would struggle to find workers and would turn increasingly to supplying undocumented workers.[1427]

Mr Constable of the Shearers and Rural Workers Union described his experience as a direct employee working alongside 417 visa workers engaged by labour contractors. He was being paid $35 per bin of pears, and the pickers working for the contractor were working for $28 per bin. This suggested that the contractor was taking 20% from the payments that the workers should have received.[1428]

Underhill and Rimmer found that WHM visa holders of Asian origin were more likely than Australian workers or workers of other nationalities to be working for a contractor in the Australian horticultural industry and to receive lower hourly earnings.[1429] They observed that:

> *Horticulture in Australia until the 1990s was distinctive because few temporary migrants were used for harvest work. Since then reliance has grown on two different types of temporary migrants. First are WHMs. These are young travellers, without dependents, who can apply for a second 12-month working visa in Australia once they have completed 88 days' work in horticulture (or a limited range of other regional industries). Doyle and Howes found that nearly half of the growers they surveyed reported that backpackers were the main type of worker they employed. The second important group of temporary migrant workers are undocumented workers. While little is certain about their number, the evidence available suggests they have grown recently to form a significant part of the harvest workforce. Drawn largely from Asian countries outside of the WHM program, their exposure to exploitation appears to be very high, in part because they have no right to work in Australia and cannot claim legal protection for their employment conditions.*[1430]

Many participants in the Inquiry commented upon the impact of the WHM program on the local labour market, particularly in horticulture.

AUSVEG submitted that often, the labour sourced by growers includes overseas workers on temporary work visas, such as the WHM visa program, the 457 skilled work visa, or visa holders who come to Australia through the SWP. It submitted that these workers are a crucial part of the industry and play a vital role in preventing aggregate labour shortages for the entire vegetable industry. AUSVEG submitted that visas are used to fill both unskilled work (such as harvesting/picking crops) and semi-skilled to skilled work (including roles like mechanics and farm supervisors). The predominant visa class used by the vegetable industry is the WHM visa programme (subclasses 417 and 462), used for unskilled labour. In particular, the ability for backpackers to receive a second-year extension on this visa by completing 88 days' work in a designated regional industry led to some 40,000 or more backpackers now picking fruit every year. AUSVEG submitted that the subclass 457 visa and the SWP are also valuable sources of labour; further, without these visa programs, the Australian vegetable industry would face crippling labour shortages during peak seasonal periods, leading to a loss of food security and severe damage to not only the vegetable industry, but the regional economies in which Australia's vegetable-growing businesses operate.[1431]

The VFF submitted that the opportunity for WHM visa holders to apply for a second 12 months on their visa, after completing 88 days 'specified work' in an eligible regional Australian postcode, has made a significant difference in increasing the available workforce for the agriculture industry.[1432]

1427. Dr Underhill, Submission no 32, 8.

1428. Bernard Constable, Shearers and Rural Workers Union, Submission no 21, 1-2; Shepparton Hearing, 15 February 2016.

1429. Underhill and Rimmer (forthcoming), 14.

1430. Ibid, 2 (citations omitted).

1431. AUSVEG, Submission no 22, 5.

1432. VFF, Submission no 49, 8.

PMA-ANZ acknowledged that:

> *... the industry is increasingly relying on people from overseas whose primary motives are travel, study or temporary work leading up to permanent residency … Therefore the fresh produce industry would face considerable hardship if it did not have access to overseas workers and many producers of labour-intensive crops would collapse.*[1433]

It submitted that agriculture, forestry and fishing attracted the second largest percentage of working holiday makers, and that these visa holders work on farms because this gives them access to the second year visa (see below), with approximately 90% of working holiday makers who qualified for the second year visa performing agricultural work.[1434]

Part of the stated reason for this dependence is the difficulty growers have in finding casual labour within Australia. For example, PMA-ANZ submitted that 'many unemployed or under-employed people (who are capable of doing this type of work) are not prepared to move to the rural areas to seek these employment opportunities.'[1435]

However, AUSVEG submitted that Australian growers have a proven preference for employing local workers. It referred to a 2006 survey of growers in the Murray Valley which found that 31% of them would prefer to never employ overseas workers, and a further 36% were only interested in employing overseas workers in some years. It further found that 56% of growers believed there was an 'inadequate' or 'extremely inadequate' supply of seasonal horticultural workers in their region.[1436]

Other participants told the Inquiry that local workers are being overlooked in favour of temporary migrant workers. A confidential submitter stated as follows:

> *Sunraysia residents say that locals are desperate for work, and find that they can't even 'put their names down' at major blocks and processing sheds these days. It is a matter of fact that there are ever-diminishing opportunities for those would have traditionally done much of the work for which foreign workers are now supplied.*[1437]

Similarly, the Northern Mallee Local Learning and Employment Network (**NMLLEN**) expressed concern that labour hire firms, and the stream of backpackers providing a supply of labour into the local market, may have a 'crowding out effect' for youth in the local labour market.[1438] NMLLEN submitted that the labour market in Mildura and surrounds is very competitive with labour hire firms and the stream of backpackers providing a supply of labour into the local market, which may be having a detrimental effect on youth unemployment, and consequent social and community impacts.[1439] However, MADEC, which operates a labour hire business in Mildura, submitted that it finds difficulty in getting Australian workers to perform less desirable work, despite it being a requirement of the seasonal worker scheme to test the local market prior to engaging seasonal Pacific Island workers.[1440]

A confidential submitter told the Inquiry that traditionally, harvest trail work brought transient workers to the town of Mildura each season. They moved around the country with the crops. In Mildura, people recall the days when picking season meant casual work for locals, including adults and students. Young people could go out in school holidays and make good money, working hard for it. There was after-school work available too at some times of the year.

1433. PMA-ANZ, Submission no 85, 1-2.
1434. PMA-ANZ, Submission no 85, 1
1435. PMA-ANZ, Submission no 85, 1; see also MADEC, Submission no 9, 2.
1436. PMA-ANZ, Submission no 85, 1-2.
1437. Confidential, submission no 87.
1438. NMLLEN, Submission no 9, 2.
1439. NMLLEN, Submission no 8, 2.
1440. MADEC, Submission no 9, 2.

But those opportunities are no longer available.[1441]

There is also some evidence of exploitation of WHM visa holders in the hospitality industry around Australia, including:

- underpayment of several 417 visa workers working in a hospitality chain on the Gold Coast;[1442] and
- underpayment of one Japanese and three Korean backpackers at a Melbourne CBD restaurant.[1443]

A construction worker submitted to the Inquiry:

> *I was direct employed by the construction company as casual worker less than a year ago, I am holding working holiday visa, which gave me a fully entitlement to participate the local employment. However, the employer asked me to apply ABN at the beginning. And we have to work over 3 months otherwise our hourly rate will be only $10 dollars. I quit the job eventually, I report to FWO, no one reply. The work site was dangerous; all the workers were very cautious.*[1444]

A cleaning worker told the Inquiry:

> *I was direct employed by the company less than a year ago as casual worker. I was house keeper in Citi club hotel which located on Queen street, Melbourne. As a casual worker my hourly rate is $18 per hour, less than 20 hours per week. The manager asks me to finish one big room in 50 mins, and small one 30 mins, the clean time include other duty, ex: change the glass, no penalty rate for weekend work. One day I got fired without any warning, the manager said I wasn't quick enough to finish my duty in time. Our uniform says Smart Cleaning Solutions – Corporate", we have to use chemicals all the time for better clean. I think I am only do working but not holiday, the long working hours but limit days is not good.*[1445]

The Senate Work Visa Report set out considerable evidence of exploitation of WHM visa holders, particularly in the horticulture and meat industries.[1446] The Committee noted that this appeared to be strongly related to the operation of labour hire agencies in those industries. It described 'blatant and pervasive abuse of the WHM visa program by a network of labour hire companies supplying 417 visa workers to business in the horticulture sector and the meat processing industry.'[1447] It referred to the particular business model of Australian labour hire agencies with links to agencies in certain Asian countries such as Taiwan and South Korea, and described the scale of the abuse as 'extraordinary, both in terms of the numbers of young temporary visa workers involved, and also in terms of the exploitative conditions that they endure.'[1448] The Committee further noted the comparative vulnerability of WHM visa holders in contrast to workers engaged under the SWP.[1449]

The Seasonal Worker Program Report, similarly, identified exploitation of temporary visa workers including WHM visa holders in horticulture as a significant issue.[1450]

1441. Confidential, Submission no 87.
1442. FWO, *Cafe faces Court for allegedly requiring cook to pay back wages in exploitative cash-back scheme*, Media Release (22 July 2016).
1443. FWO, *Restaurant failed to check wage rates and underpaid Korean, Japanese visa-holders $40,000*, Media Release (28 July 2016).
1444. NUW on behalf of individual workers, Submission no 75, cxi.
1445. NUW on behalf of individua workers, Submission no 75, lxxxvi.
1446. Senate Work Visa Report, 163-199.
1447. Ibid, 196.
1448. Ibid.
1449. Ibid.
1450. Seasonal Worker Program Report, 142.

Somewhat against the tide of other current commentary, the Productivity Commission Draft Report into Migration notes that studies indicate WHM visa holders contribute more to total expenditure than they earn, and so, on balance, make a small contribution to increasing demand for Australian workers. It considered that restricting numbers of WHM visas is not warranted.[1451] Its draft recommendations included that a (further) public inquiry be commissioned into the labour market and broader economy wide effects of work rights for international students, temporary graduate visa holders and working holiday makers.[1452]

The Federal Government introduced a new requirement, from 31 August 2015, that all applicants for a second WHM visa must provide pay slips as evidence of appropriate remuneration with their application. The Department of Immigration and Border Protection states that this 'will help us ensure that work undertaken by Working Holiday visa holders is performed in accordance with workplace law'.[1453] The impact of this change in procedure is not yet known.

Student visas

Nature and purpose

There are eight types of international student visas permitting study in Australia. Student visas generally include a condition that allows most students to work for up to 40 hours per fortnight while their course is in session, and to work unlimited hours during course breaks. This 'reflects the purpose of a student visa; that it is to allow entry to Australia in order to study, not to work'.[1454] In addition, the temporary graduate visa permits a temporary period of work in Australia following graduation from a tertiary degree. There are no restrictions upon the form of work permitted by temporary graduate visa holders.[1455]

As at 30 June 2015, there were 374,566 student visa holders, and 26,260 temporary graduate visa holders in Australia.[1456]

Figure 7.5 demonstrates that over the past seven years, the highest proportion of student visa holders by country came from China, India, Vietnam, South Korea, Nepal, Thailand, Malaysia and Indonesia.

There is no comprehensive data on the prevalence of international student work, or the types of jobs these workers are employed in. However, it has been estimated that international students make up between 1% and 2% of the Australian workforce, and approximately 6% of the part time workforce.[1457]

1451. Productivity Commission (2015), 303-4.

1452. Ibid, 306.

1453. See: https://www.border.gov.au/WorkinginAustralia/Pages/employer-obligations-and-payslip-evidence.aspx

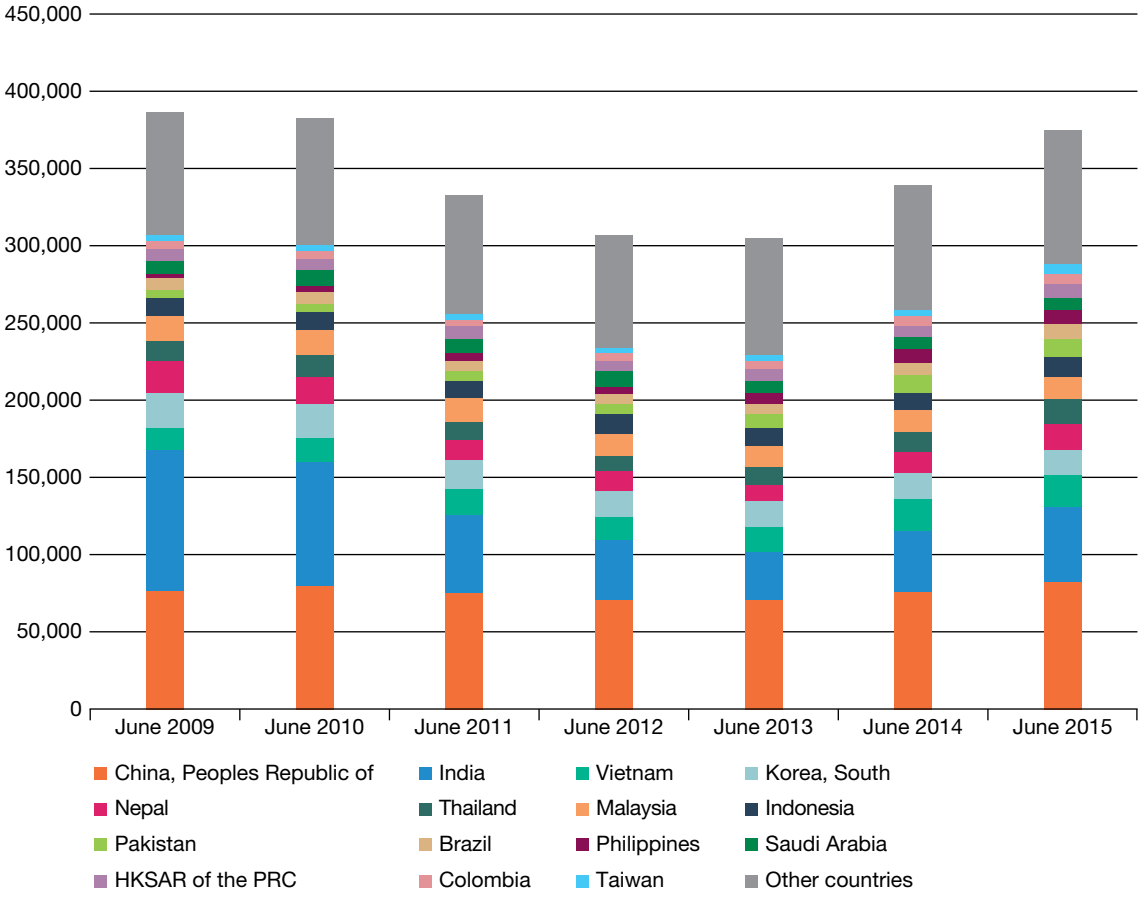
1454. Australian Government, DIBP, *Student visa and temporary graduate visa programme trends (2008-9 to 2014-5)*, 3-4.

1455. Ibid, 7.

1456. Ibid, 44, 52.

1457. Alexander Reilly, 'Protecting vulnerable migrant workers: The case of international students' (2012) 25:3 *Australian Journal of Labour Law* 181.

Figure 7.5: Student visa holders in Australia by citizenship country at 30 June each year 2009-2015



Source: Australian Government, DIBP, Student visa and temporary graduate visa programme trends (2008-9 to 2014-5)

Inquiry and other evidence regarding student visa workers

Associate Professor Tham submitted that international student work is invisible in public discussion of temporary migrant work. He submitted (extrapolating from two studies of international students across Australia in 2005 and 2006) that in 2011, in excess of 200,000 students were in paid employment in Australia, accounting for between 1% and 2% of the Australian workforce. Studies show that a significant proportion of student visa workers wereunderpaid. There is anecdotal evidence to suggest that employers require breaches of the restriction on hours of work, and then leverage the visa holders' non-compliance to further exploit student visa workers.[1458]

Associate Professor Tham submitted that there is a concentration of student visa workers in sectors of the workforce which are generally poorly compliant with, or not subject to, workplace laws (such as cleaning, taxi driving and hospitality). He described these industries as being 'governed by precarious work norms', which means that international students are 'vulnerable to established practices of non-compliance, and at the same time, their exploitation can further entrench these practices.'[1459]

Ms Laurynda Giles, an International Student Advisor at Deakin University, told the Inquiry that a lot of students come to her service with significant issues regarding their work rights and with a lack of awareness that they are being 'ripped off'. She said a lot of students are working cash in hand and are underpaid, but are worried about speaking up due to concerns it will

1458. Associate Professor Joo-Cheong Tham, Submission no 12, 16.

1459. Associate Professor Joo-Cheong Tham, Submission no 12, 20.

affect their visas. She said students report being told by their employers that they are entitled to a different hourly rate because they are an international student. She also said that students are offered extra shifts, beyond their cap on working hours, and this is used as leverage by employers subsequently.[1460]

In 2013, Reilly observed that Australia has seen a dramatic increase in the number of international students in tertiary education over the past 20 years, which has introduced a large pool of unskilled labour to the economy. He noted that these workers enter the labour market with no dedicated legal regime for their protection. Reilly demonstrated that these students are particularly vulnerable in the Australian workforce due to their youth, cultural and linguistic backgrounds, their insecure residence status and their limited social and political power as non-citizens.[1461] The restriction on working hours contributes to their vulnerability, because if students are found to have breached this restriction, their work is rendered illegal and they are liable to automatic cancellation of their visas.[1462]

Singh, in a 2014 article, drew on 35 individual and group interviews with Indians who arrived on student or spouse visas in 2005 or later, and 12 persons who occupied leading positions in Indian community organisations, media and local government.[1463] Singh found that Indian students who were financially constrained, and whose poor English and/or lack of prior experience made it unlikely for them to find jobs with non-Indian employers, sought work within Indian restaurants. Of the seven students who worked or inquired about work in an Indian restaurant, only one reported a 'positive' experience – which was that after he had worked for a period he began to earn $10 an hour. Others spoke of exploitation due to very low wages, and a sense of helplessness. A leader of an Indian religious organisation in Melbourne said they had taken steps to combat this exploitation, but not one student was willing to formally complain of low or no payments.[1464] Singh considered the experience of Indian students in the workplace to be similar to international students in general.[1465] This vulnerability was also evident in respect of the recent issues involving the 7-Eleven convenience store franchise, discussed at 8.3.2.

A forthcoming article by Campbell, Boes and Tham[1466] notes that academic studies of student visa workers are 'scattered and sparse'. They suggest that international students are 'clustered in a narrow range of low wage, low skill jobs as kitchenhands, waiters, cleaners, security guards, or petrol pump attendants, and that they are often subjected to poor treatment in these jobs.'[1467] The authors also note that 'the most dramatic evidence' [1468] of exploitation of student visa workers arises from the now well publicised 7-Eleven underpayments scheme.

Based on a set of qualitative interviews with international students in the food services industry in Melbourne, they find that the 'evidence indicates that poor employer treatment of international students in this sector is indeed widespread and that it centers on underpayment and nonpayment [sic] of wages, in breach of labour regulation.'[1469]

1460. Deakin University Student Services, Geelong hearing, 8 December 2015.

1461. Alexander Reilly 'Protecting vulnerable migrant workers: The case of international students' (2012) 25 *Australian Journal of Labour Law* 181, 182.

1462. Ibid.

1463. Supriya Singh, 'Indian students in Melbourne: Challenges to Multiculturalism' (2014) 32:6 *Journal of Intercultural Studies* 1.

1464. Ibid, 12.

1465. Ibid, 13.

1466. Iain Campbell, Martina Boese and Joo-Cheong Tham, 'Inhospitable workplaces? International students and paid work in food services' (2016) 52:3 *Australian Journal of Social Issues* (forthcoming).

1467. Ibid, 5 (references omitted).

1468. Ibid, 6.

1469. Ibid, 1.

Similarly, Clibborn's recent study (based on a survey and interviews with international students in Sydney) found that: '60% [of survey respondents] were paid under the National Minimum Wage of $17.29/hr and 35% were paid $12 per hour or less. Only half of all the students received a pay slip … and only 40% of their employers withheld any tax from their pay ... .'

The extent of exploitation of Chinese students was even higher, with 73.5% receiving less than the national minimum wage and 43% being paid $12 an hour or less.[1470] Clibborn suggests that the empirical contribution of the study is to verify media reports and smaller case studies by providing 'significant evidence of normalised underpayment of Chinese temporary migrant workers in Australia'.[1471]

7.2.4 Conclusions and recommendations – temporary migrant workers

Two tiers of temporary migrant workers

In the context of considering the subclass 457 visa program, the Azarias Review described 'broad agreement on several basic tenets' amongst the community and the political sphere regarding 'a carefully designed, robust and efficient temporary visa system.'[1472] It described these basic tenets as follows:

- employers have a legitimate need to employ skilled overseas workers;
- the main rationale for employing such workers is to fill gaps in the Australian workforce;
- overseas workers should not displace Australians;
- Australian workers should be trained; and
- employment rights and workplace entitlements for temporary migrant workers should be the same as those of Australian workers.[1473]

A further key feature of the participation of temporary migrant workers in our labour market is that the legal, social and institutional framework associated with their status within Australia brings with it an inherent vulnerability. There are a number of factors which contribute to this vulnerability. In a 2012 article, Fudge describes these as including: factors relating to the conditions of entry to a country (including duration of visa and mobility within a country); features of the employment permitted (such as labour market mobility, duration of the employment relationship, terms and conditions and legislative protections); and social citizenship entitlements (such as access to healthcare, social assistance, family unification and access to more secure migrant status).[1474]

Evidence to the Inquiry and the significant body of other literature considering the 457 visa program and the SWP identify certain deficiencies within the programs regarding their capacity to properly address labour market shortages and prevent exploitation of temporary migrant workers. Despite that, the 457 visa program and the SWP represent the high water mark in respect of Australia's regulation of temporary migrant workers' participation in the labour market. In each case, a recognition of the tenets identified by the Azarius Review, and an

1470. Stephen Clibborn, 'Multiple Frames of Reference: Why international students in Australia are underpaid', Comparative and International Perspectives on Australian Labour Migration Workshop, University of Melbourne Law School, 22 July 2016, 8.

1471. Ibid, 14. See also Simon Marginson, Christopher Nyland, Erlenawati Sawir and Helen Forbes-Mewett, *International Student Security* (Cambridge University Press, Port Melbourne, 2010), 136; and Ann Arnold, 'Taken to the cleaners: International students underpaid, exploited', *ABC RN – Background Briefing*, 3 June 2016.

1472. Azarias et al (2014), 6.

1473. Ibid.

1474. Fudge (2012), 104-5; see also Howe and Owens (2016).

acceptance of the inherent vulnerability of temporary migrant workers, is evident within the design of these programs.

In stark contrast is the absence of specific labour market regulatory arrangements relating to demonstrating genuine labour shortages, or providing appropriate protections from exploitation, within the WHM or student visa schemes. This means that alongside the 457 visa and SWP schemes are two concurrent channels by which temporary migrant workers may enter Australia and work, with little or no associated regulatory framework regarding labour market needs or protection from exploitation.[1475]

As at 30 June 2015, a total of 652,671 temporary migrants in Australia held visas in the four categories examined above.[1476] Noting that not all persons with work rights will necessarily participate in the labour market, this is nonetheless a significant number of people in the context of a total number of employed persons of approximately 11.93 million as at the same date.[1477] It is also consistent with the observations of Howe and Reilly that temporary labour migration has now become the norm in Australia, far outweighing permanent immigration. They note that whilst international students and WHMs are not on visas for a dedicated work purpose, a significant amount of unskilled and low skilled work is done by temporary migrants on these visas.[1478]

Table 7.4: Number of temporary migrant workers in Australia as at 30 June 2015, by four visa programs

Stated primary purpose is work		Stated primary purpose is not work		
457 visa program	SWP	WHM visa program	Student visa program	TOTAL
104,750	3,177	143,918	400,826	
107,927 or 17%		**544,744 or 83%**		**652,671**

Source: DIBP, Annual Report, (2014/5); Australian Government, Department of Immigration and Border Protection, Subclass 457 quarterly report (Quarter ending at 30 June 2015; Australian Government, DIBP, Student visa and temporary graduate visa programme trends (2008-9 to 2014-5); Australian Government, DIBP, Working Holiday Maker visa programme report (30 June 2015), 31-34.

Table 7.4 identifies the breakdown in numbers and percentage of all temporary migrant workers holding visas in these four categories.[1479] The most striking aspect of Table 7.4 is that the two temporary visa programs which are expressly directed at addressing labour or skills shortages – and are thus regulated accordingly – make up only a small proportion of the total number of temporary migrant workers in Australia holding a visa under one of these four categories. Whilst significant public debate and attention has been given to the 457 visa and SWP programs, and the preconditions, safeguards and limits associated with their use, the utilisation of other forms of temporary work visas has been permitted to grow alongside them, at an exponential rate, with very few preconditions, safeguards or limits. This is particularly

1475. See e.g. the finding of the Senate Inquiry into temporary work visas that: 'In effect, the government clearly views the WHM visa as a de-facto working visa to bring low-skilled labour into the country.' Senate Committee (2016), 119.

1476. See Table 7.4. The number of SWP participants applies for the whole 2014/15 year.

1477. According to ABS, *Labour Force, Australia, June 2016* (Cat. No. 6202.0, released 17 July 2016), there were 11,933,400 employed persons in Australia.

1478. Joanna Howe and Alexander Reilly, 'The impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders: Submission to the Senate Standing Committee on Education and Employment', May 2015, 5. See also Joanna Howe and Alexander Reilly, 'Meeting Australia's Labour Needs: The Case for a New Low-Skill Work Visa' (2015) 43 *Federal Law Review* 259.

1479. Other types of temporary visas permitting work such as the subclass 444 New Zealand visa, and other specific purpose visas, are not considered. Further, the number of SWP participants applies for the whole 2014/15 year.

concerning given the significant and growing body of evidence of exploitation of temporary migrant workers in the WHM and student visa categories.

The WHM visa program permits a visa holder to work for the duration of their stay in Australia. Further, incentives have been built into the scheme to encourage work in specific regions and industries. Whilst there is clearly a need for a large seasonal workforce in the horticulture industry, it does not follow that this should be a largely unregulated temporary migrant workforce which is highly vulnerable to various forms of exploitation.

Proposed regulatory changes regarding temporary visa workers

Inquiry participants made a range of submissions regarding improved rights and protections for temporary visa workers. These included the following:

- Introducing an amnesty for migrant workers who complain about workplace exploitation in respect of any alleged breach of their visa conditions.[1480]
- Excluding labour hire firms from engaging workers on WHM visas.[1481]
- Entitling temporary migrant workers who lose their employer's sponsorship because they have been dismissed, or who have been trafficked or subject to exploitation, to an automatic right to remain in Australia for the period that they are challenging their treatment or dismissal or pursuing civil remedies of compensation.[1482] Providing the FWC or the federal courts with power to order reinstatement of an employer's visa sponsorship obligations when dealing with unfair dismissal and general protections claims.[1483]
- The Department of Immigration and Border Protection providing the Fair Work Information Statement to migrants upon the issuing of their visas, and educational institutions providing the statement to their international students upon enrolment, in the appropriate language.[1484]
- Increasing the test for cancellation of visas to serious non-compliance with, or serious contravention of, visa conditions by visa holders; and identifying in the Migration Act a serious of factors to be taken into account, such as the visa holder's level of knowledge, the frequency and gravity of non-compliance, whether the non-compliance was brought about by others, including an employer, and whether there had been previous warnings from the Department of Immigration. Non-serious contraventions could be dealt with by way of civil penalties.[1485]
- Protecting whistleblowers, who alert authorities to illegal employment practices, from prosecution in relation to matters such as infringing visa conditions.[1486]
- Provision of some basic information to WHM visa holders and student visa holders about the labour hire industry and seasonal work in Australia, through an email to the visa applicant or holder.[1487]

1480. VLA, Submission no 84, 2; SDA, Submission no 36, 12.

1481. CFMEU Construction, Submission no 27, 9.

1482. JobWatch, Submission no 46, 35; Western Community Legal Centre, Submission no 62, 74.

1483. JobWatch, Submission no 46, 35.

1484. Associate Professor Joo-Cheong Tham, submission no 12, Attachment, 1 (Answers to questions on notice from Senate Education and Employment Committee, Inquiry into the impact of Australia's temporary work visa program on the Australian labour market and on the temporary work visa holders, 24 September 2015).

1485. Associate Professor Joo-Cheong Tham, submission no 12, Attachment, 3 (Answers to questions on notice from Senate Education and Employment Committee, Inquiry into the impact of Australia's temporary work visa program on the Australian labour market and on the temporary work visa holders, 24 September 2015); Western Community Legal Centre, Submission no 62, 6.

1486. WIRE, Submission no 13, 13.

1487. Peter Crisp MP, Submission no 30, 10.

- Separation of FWO inspectorate powers from any reporting obligations that they have with the Department of Immigration and Border Protection, so that workers do not feel that by complaining, they could be putting their visa entitlements at risk.[1488]
- In the case of the VFF and AUSVEG, reducing obligations upon growers or hosts under migration legislation to ensure that there are no illegal workers on the host farm, because in a labour hire context this requirement is impractical and unmanageable.[1489]

In addition, Howe and Reilly have recently argued that in light of the heavy utilisation of WHM and student visas, a 'new low skill visa pathway' should be created in Australia: 'a dedicated low skill work visa would increase transparency in the labour migration program, and better protect both migrant and domestic workers'.[1490]

It is apparent from the list above that the majority of these measures are within the scope of the Federal Government, not the Victorian Government, to implement. The capacity for Victoria to influence Australia's overall migration program in respect of these specific measures is uncertain.

However, having undertaken this investigation into the impacts of the temporary work visa programs, there is nonetheless value in adding the evidence and conclusions of this Inquiry to the growing body of material demonstrating the failings of the current WHM and student visa schemes.

Findings and recommendations – temporary migrant workers

There is some evidence of non-compliance with workplace laws affecting 457 visa holders and SWP participants.

However, there is a much more extensive body of evidence – including evidence provided to this Inquiry, other recent inquiries, and in recent academic studies, media and other reports – demonstrating that WHM and student visa holders in Australia are being subjected to exploitation in the labour market. These exploitative practices are occurring in the Victorian horticulture and food services sectors, among others.

Whilst the WHM and student visa schemes do not have work as their primary purpose, in practice they are the predominant mechanism by which temporary migrant work is undertaken in Australia, dramatically outweighing the use of 457 and SWP visa programs. This reality should be acknowledged by the Federal Government, industry and the community.

There is a fundamental lack of cohesion in Australia's framework for permitting work to be performed by temporary migrant workers. Whilst Australia's 'formal' temporary work visa programs are designed based on criteria relating to demonstrable labour market need, coupled with safeguards for temporary migrant workers, these are not features of the temporary migrant work arrangements facilitated by the WHM and student visa streams.

The addition of appropriate safeguards to ensure the fair treatment of overseas workers holding WHM and student visas is for the most part a matter for the Federal Government to address. This could include encouraging FWO to devote additional resources to ensuring that WHM and student visa holders are aware of their employment rights; and to bringing enforcement proceedings in suitable cases. The Victorian Government also has a role to play in this area.

1488. SDA, Submission no 36, 10.

1489. AUSVEG, Submission no 22, 4; VFF, Submission no 49, 8.

1490. Howe and Reilly (2015), 261; see further 273-285.

At the Victorian level, it is noted that the State Government recently provided additional funding for JobWatch to operate 'a new legal support service at the Study Melbourne Student Centre to assist [international] students with workplace issues'.[1491]

As Dr Amanda Sampson told the Inquiry:

> *….certainly in terms of migrant workers, there is a huge body of evidence showing in Australia that migrants do not have access to resources to outline those rights and responsibilities and employers may or may not manipulate that system.*[1492]

I recommend that further measures of the nature recently implemented by the Victorian Government be considered, including the provision of employment rights information to international students through Victorian universities.

In addition, the Inquiry's recommendations relating to labour hire licensing (see chapter 5) will assist in addressing exploitation of WHM and student visa holders in the regulated sectors.

Recommendation 27:
I recommend that the Victorian Government consider further funding measures to provide assistance to temporary visa workers through established community organisations and networks, including the provision of employment rights information to international students through Victorian universities.

7.3 The gendered nature of insecure work

7.3.1 Data and literature

It is well established that women are overrepresented in forms of employment associated with insecure work.[1493]

The data set out in chapter 6 regarding casual employment and fixed term employment consistently indicates a higher prevalence of women in each of these categories of work.

Table 7.5, along with Figure 6.1, demonstrate that the proportion of female casual employees in Australia was consistently higher than the proportion of male casual employees between 1992 and 2008, although over time the difference between male and female proportion of casualisation reduced. Figure 6.2 and Table 6.3 indicate that in Victoria, as at November 2013, 24.7% of female employees had no leave entitlements, compared to 20.7% of male employees.

1491. Hon Steve Herbert MP, Minister for International Education, 'Boosting Legal Support for International Students', *Media Release*, 7 August 2016.

1492. Dr Amanda Sampson, Institute of Safety, Compensation and Recovery Research, Academic Forum, 25 May 2016.

1493. See e.g. Leah Vosko, Martha MacDonald and Iain Campbell, *Gender and the Contours of Precarious Employment* (Routledge, 2009); Leah Vosko, *Managing the Margins – Gender, Citizenship and the International Regulation of Precarious Employment* (Oxford University Press, 2010); Judy Fudge and Rosemary Owens (eds), *Precarious Work, Women and the New Economy* (Hart Publishing, 2006).

Table 7.5: Proportion of casual employees in Australia by gender – 1992 to 2008 (percentage)			
Year	All casual employees	Female casual employees	Male casual employees
1992	16.9	25.6	10.5
1993	17.1	25.1	11.2
1994	17.8	25.4	12.2
1995	18.0	25.4	12.4
1996	19.5	26.4	14.3
1997	19.0	25.8	13.8
1998	19.8	26.2	14.9
1999	19.7	26.2	14.7
2000	20.0	26.5	14.8
2001	19.8	25.5	15.4
2002	19.9	25.8	15.2
2003	20.4	26.2	15.7
2004	20.5	25.8	16.2
2005	19.6	25.3	14.9
2006	19.7	24.7	15.6
2007	20.1	24.9	16.2
2008	20.0	24.8	16.0

Source: ABS Catalogue No. 6105.0 Australian Labour Market Statistics (3 July 2009)

Figure 6.8 and Table 6.5 demonstrate that in both of the sectors where fixed term contracting is most prevalent, women made up the significant majority of employees on fixed term contracts.[1494]

A 2010 Fair Work Australia report on award reliance also found that women were more likely to be engaged in part time employment.[1495] Although award reliance had generally fallen among the working population, women were more likely to be award reliant than men, due to women being more concentrated in service sector industries that also tend to pay lower wages.[1496]

Preston and Yu (2015) found that there was a significant financial penalty associated with part time employment, particularly for women employees engaged on a permanent part time basis.[1497] They found that women engaged in part time work were paid less than women with the same skill and education level engaged in full time work.[1498] They found, taking this differential into account, that the true premium for casual employment for women is not 25% but only 3.6%, meaning the true financial benefit of casual employment is unlikely to be sufficient to offset the loss of leave entitlements.[1499]

Similarly, Watson (2005) used HILDA earnings data to demonstrate that part time casual employees only earn a very modest premium over permanent full time employees. This was particularly the case for women, whose casual premium was assessed at 4% compared to 10%

1494. See 6.2.3.

1495. David Rozenbes, *An overview of compositional change in the Australian labour market and award reliance* (Fair Work Australia Research Report 1/2010, February 2010), 27.

1496. Ibid, 66.

1497. Alison Preston and Serena Yu, 'Is there a part-time/ full-time pay differential in Australia?' (2015) 57:1 *Journal of Industrial Relations* 31.

1498. Ibid, 38.

1499. Ibid, 44.

for men.[1500] Once Watson factored in other financial benefits that permanent employees accrue, he found that female casual workers were financially penalised by approximately 17%.[1501]

7.3.2 Inquiry evidence

A number of companies highlighted the benefits of flexible work arrangements for women. For example, in the labour hire industry, Adecco cited the desire for flexibility among women, particularly working mothers, as an attraction of labour hire: 'We have a very large contingent of females in the workplace; people looking to start out their careers as well and get experience, so career latticing, people trying things out.'[1502] Similarly, Australia Wide Personnel referred to employing lots of mothers in the electronics and food sectors who may have to cover school holidays and sick children, and who want flexibility to deal with those commitments.[1503]

However, a number of other submissions identified insecure work as an issue which particularly affects women.[1504] VTHC, VCOSS, the ACTU and a number of other organisations submitted that the Inquiry should regard insecure work as a gender equality issue.[1505]

The Health Workers Union (**HWU**) submitted that women account for almost 75% of Australia's health workforce and tend to be employed on a casual or part time basis.[1506] ASU Authorities and Services identified fixed term contracts as a feature of insecure work used particularly in the social and community sector, which is dominated by women.[1507]

HACSU described the disability sector as consisting of predominantly female workers (85% of the disability workforce in Victoria was female in 2012).[1508]

A number of organisations identified that casual employment is most common for women. The ASU Private Sector submitted that the financial implications of this for women are 'immense', noting some obvious consequences to be reduced superannuation savings, loss of leave entitlements (such as paid parental or personal leave), loss of control over hours of work and loss of promotion or professional development opportunities.[1509] The ACTU submitted that the adverse impacts of casual employment disproportionately affect women by contributing to the gender pay gap, less take home pay due to fluctuating hours and intermittency of work, lack of support for training, skill development and career progression and other barriers to workforce participation.[1510]

The ACTU further submitted that when a higher proportion of men have access to secure employment, it serves to increase pay inequity between the genders. The peak body submitted that the gender pay gap has risen in Australia over the last two years; and that this gap is a particular problem in the private sector, varying significantly by industry with a gap of over 30% in financial and insurance services, health and social assistance and professional, scientific

1500. Ian Watson, 'Contented workers in inferior jobs? Re-assessing casual employment in Australia' (2005) 47:4 *Journal of Industrial Relations* 371, 382-383.

1501. Ibid.

1502. Adecco, Dandenong hearing, 30 November 2015.

1503. Australia Wide Personnel, Dandenong hearing, 30 November 2015.

1504. Work and Family Policy Round Table, Submission no 90, 1.

1505. See e.g. ACTU, Submission no 76, 21; VCOSS, Submission no 33, 15; VTHC, Submission no 86, 4.

1506. HWU, Submission no 78, 41.

1507. ASU Authorities and Services, Submission no 31, 7.

1508. HACSU, Submission no 35, 13.

1509. ASU, Submission no 31, 9.

1510. ACTU, Submission no 76, 21.

and technical services.[1511] In addition, women are more likely than men to be under-employed; employed in poor quality, irregular, insecure or unsociable jobs; or unemployed.[1512]

Submissions most commonly indicated that the key cause of the disproportionate impact of insecure work for women is that women 'bear a disproportionate burden in relation to domestic activities and child/elder care'.[1513] The ASU Authorities and Services submitted that:

> *[t]hese expectations have their origins in social and family pressure that presumes women adopt caring responsibilities because of the gendered assumption that only women can or want to take on caring duties. Add to that the traditional perspective that men act as the family breadwinner, many families make arrangements for women to work part time or not at all for periods of time.[1514]*

WIRE submitted that:

> *[w]omen take time out of the workforce, particularly to care for young children. This career break can extend for a number of years and again has a direct impact on women's ability to gain and maintain secure employment. …. Often women are forced to return to roles that are part-time, lower paid, casualised, lack security and offer less opportunities for progression. The vast majority of men after starting a family do not change their working arrangements to manage the care needs of dependents. …The gender pay gap of 17.9 per cent often forces women to be [the] one to give up full-time work as it is their male partner that earns the primary income.[1515]*

A number of participants submitted that permanent employment is not sufficiently flexible to meet many women's needs, therefore women are often pushed into accepting insecure work.[1516] WIRE submitted that: 'our industrial system is predicated on a myth that women choose insecure work'.[1517] When women seek to return to work, the only forms of work available which meet their needs are commonly casual or fixed term positions. WIRE submitted that ironically, many women become casual employees to have the flexibility to meet their caring responsibilities such as taking children to and from school, but end up still struggling to balance work and family commitments with the added burden of having an irregular and inadequate income.[1518]

The ACTU noted data indicating that most jobs involving less than 35 hours' work per week in Australia are casual. The ACTU submitted that female preferences for part time hours are strongly linked to caring and family responsibilities, and the rise in casual employment and short term engagements has failed to adequately address the ongoing needs of women and workers with family and carer responsibilities. It submitted that the mode of engagement is usually dictated by employers, so that workers wanting part time hours are often asked to trade those hours for job security. In the end, the 'flexibility' that casual employment purportedly offers is, in practice, unilateral: employers dictate hours and days of work and the duration of employment.[1519]

An individual labour hire worker provided information to the Inquiry about her experience upon falling pregnant. The witness is a highly educated worker, in a highly specialised occupation. She had worked through a labour hire agency in her position for almost four years when she took maternity leave. She was advised by the host employer that she could have her job back

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1511. ACTU, Submission no 76, 22.

1512. See also Johnstone et al (2012), 38-40.

1513. ANMF, Submission no 88, 9.

1514. ASU Authorities and Services, Submission no 31, 9.

1515. WIRE, Submission no 13, citing Anne Manne, 'The Wife and Times', *The Monthly*, November 2014; and *Gender pay gap statistics*, Workplace Gender Equality Agency, September 2015.

1516. ANMF, Submission no 88, 9.

1517. WIRE, Submission no 13, 5.

1518. WIRE, Submission no 13, 5.

1519. ACTU, Submission no 76, 14.

after her leave if 'it was available', and that she would have to ask for it. Once she sought to return, she was told that there was no job available. She said: '…where I was working, the host employer, … there was lots of labour hire people for long-term like arrangements, but with no kind of security at all…. It is very much they have kind of just wiped their hands'.[1520]

VLA submitted that a number of its clients have reported losing their jobs because of circumstances outside of their control caused by family violence. Examples include clients who were dismissed because their estranged partner telephoned them constantly at work; and clients who had to take time off work to report property damage and stalking to the police, attend intervention order proceedings and ensure their child's safety, and their employer refused to make adjustments to enable compliance with an intervention order.[1521] The ASU Authorities and Services also noted that women who are subjected to family violence need to have secure work to enable them to leave a violent relationship and support themselves; however, often women have had a sporadic work history due to the violence they have experienced.[1522]

Some Inquiry participants submitted that the disadvantages women face in the workforce, and the insecure work they are engaged in, is a self-perpetuating and entrenching cycle. The ACTU submitted that casual employment is more likely for women than men to be a trap, rather than a pathway to more secure employment. Further, unemployed women may be more likely to find permanent full time work than casually-employed women; and longer job tenure for women as a casual employee is associated with reduced chances of becoming a permanent employee.[1523] The ACTU also submitted that casual employment entrenches vertical gender segregation as casual employees are less likely to be senior, high skilled or managerial employees (or have the career opportunities to become so). The ACTU described male oriented organisational cultures and insufficiently supportive practices to manage paid work and family care as contributing to this issue. It further submitted that casual employment entrenches gender segregation between industries, as industries that predominantly employ casual and insecure workers such as health care, social assistance and retail are female dominated.[1524]

WIRE submitted that lack of financial security brought about by insecure work can manifest into other significant social and economic problems for women, such as vulnerability to domestic violence and poverty in old age.[1525] VCOSS proposed that encouraging and supporting Victorian employers to offer more secure flexible work arrangements will help people balance their work and life commitments, while gaining the security of more permanent employment.[1526]

7.3.3 Finding

It is clear from evidence provided to the Inquiry and academic and other sources that the working arrangements commonly associated with insecure work, especially casual and fixed term work, disproportionately affect women – with detrimental consequences for women's financial security, control over working hours and career advancement.

The measures which I propose in chapter 9 at 9.2 are directed at alleviating some of these consequences.

1520. Community/Government, Closed Hearing 18, Melbourne, 9 February 2016
1521. VLA, Submission no 84, 4.
1522. ASU Authorities and Services, Submission no 31, 9.
1523. ACTU, Submission no 76, 23.
1524. ACTU, Submission no 76, 23.
1525. WIRE, Submission no 13, 15.
1526. VCOSS, Submission no 33, 15.

8. BUSINESS STRUCTURES AND PRACTICES

Findings and recommendations

Independent contractors

8.1

Genuine independent contracting is a legitimate business arrangement, and as a mode of work can afford flexibility, autonomy, recognition and reward which goes beyond that which would be available in an employment relationship. A genuine independent contractor with a successful business may well have equal or greater work security than an employee due to these factors.

8.2

There is considerable evidence that where independent contracting arrangements are entered into by workers because they are essentially a requirement of a particular market or industry, they are not beneficial for those those workers (irrespective of the genuineness or otherwise of the independent contracting arrangement). For example, the Inquiry heard of considerable detrimental impacts regarding rates of pay, predictability of working hours and occupational health and safety issues for tip truck owner drivers and parcel delivery contractors in the postal industry.

8.3

Evidence suggests that there remain an indeterminate but not insignificant proportion of independent contracting arrangements which are not genuine, and are designed instead to disguise an employment relationship in order to avoid the regulation associated with that relationship.

8.4

Many submissions proposed a statutory definition of independent contracting, or other regulation directed at limiting the mischaracterisation of employees as independent contractors. However, recent decisions suggest an increasing willingness by the courts to assess the genuineness of independent contractor arrangements by considering whether the worker is genuinely working in his or her own business, rather than for the business of the other party. The common law test has proved to be flexible enough to permit an assessment of the true nature of an engagement, irrespective of its label. I do not consider it desirable to replace the common law test with a statutory test.

Further, the *Independent Contractors Act 2006* (Cth) significantly curtails Victoria's capacity to regulate independent contractor relationships, and accordingly the Victorian Government is limited in its ability to direct address most of the concerns raised by critics of independent contracting arrangements. However, Victoria can advocate for changes to improve the regulatory framework for independent contractor arrangements operating under federal law.

8.5

A key issue raised with the Inquiry, and which has been the subject of consideration in a number of other inquiries, is the effectiveness of the Fair Work Act sham contracting provisions. In particular, the prohibition on employer misrepresentation of an employment contract as a contract for services in s 357 does not apply where the employer did not know and was not reckless as to whether the contract was a contract of employment or a contract for services.

8.6

The Productivity Commission Workplace Relations Framework Report noted that the Fair Work Act post-implementation review recommended replacing the recklessness test in Fair Work Act s 357(2) with a reasonableness test, and went on to make a similar recommendation. I agree with that analysis.

Recommendation 28:

The Victorian Government should advocate for changes to s 357 of the Fair Work Act in any consultation processes instigated by the Federal Government over implementation of the Productivity Commission's Workplace Relations Framework Report, so that it is unlawful to misrepresent an employment relationship or proposed employment arrangement as an independent contracting arrangement where the employer could be reasonably expected to know otherwise.

8.7

I note the approach proposed by the Information Technology, Contract and Recruitment Association of a 'Fair Engagement Checklist,' based on a minimum hourly rate and other factors, as a tool for businesses to ensure contracting relationships are genuine and non-coercive.

Recommendation 29:

I recommend that the Victorian Government develop and promote a fair engagement checklist for the engagement of independent contractors.

Transport industry regulation

8.8

In light of the issues described at 8.2.4, there is merit in the Transport Industry Council exploring whether a comprehensive, industry-specific rates and costs schedule and/or code could be developed for the tip truck industry. I note that the particular features which the Transport Workers Union seeks to have incorporated in such a schedule go beyond the present scheme of the *Owner Drivers and Forestry Contractors Act 2005* (Vic), which is primarily facilitative rather than mandatory. However, a facilitative scheme could go some way towards addressing the particular issues in that industry.

Recommendation 30:

I recommend that the Victorian Transport Industry Council give consideration to developing a comprehensive, industry based rates and costs schedule and/or code under the *Owner Drivers and Forestry Contractors Act 2005* (Vic) which would apply to the tip truck industry. This schedule should be primarily facilitative, and not mandatory in nature.

8.9

Another issue with the application of the present scheme to the tip truck industry is the threshold at which the requirement for a hirer to provide a driver with the relevant rates and costs schedule is triggered. The *Owner Drivers and Forestry Contractors Act 2005* (Vic) requires hirers to provide a copy of the relevant schedule to an owner driver only where the owner driver is hired for a period of at least 30 days, or more than 30 days within a three month period. As the evidence from the Transport Workers Union demonstrated, the ad hoc nature of engagement of tip truck drivers may mean that these threshold requirements are sometimes not satisfied.

Recommendation 31:

I recommend that the Victorian Government review the threshold requirements upon hirers to provide the applicable rates and costs schedule to owner drivers under s 16 of the *Owner Drivers and Forestry Contractors Act 2005* (Vic), so as to ensure that the requirement is triggered based on the usual hiring practices in the tip truck industry.

Industry-based supply chain regulation

8.10

Financial pressures from parties higher up the supply chain have the potential to significantly influence the employment practices of parties at the bottom of the supply chain. This pressure can work both ways, in that it may lead to detrimental outcomes for workers, or it may alternatively be used to promote improvements in employment conditions within the supply chain. Steps by major retailers to effect changes to exploitative working arrangements within their own supply chain are positive and should be encouraged.

Recommendation 32:

I recommend that the Victorian Government take steps to encourage and facilitate the implementation of industry based supply chain regulation by major retailers, addressing exploitation of workers within those supply chains.

8.1 Introduction

The Inquiry's Terms of Reference require consideration of:

- 'the use and impact of labour hire arrangements in the supply chains of particular sectors, and the roles and responsibilities of various entities in those supply chains';[1527]
- 'sham contracting and the use of 'phoenix' corporate structures';[1528] and
- 'the ways in which unscrupulous employment practices create an uneven playing field for competing businesses'.[1529]

Alongside the growth in non-standard forms of work has been a major shift in the way businesses organise their production and delivery of goods and services. The leading international exponent of these developments and their implications for labour standards compliance is US scholar, Professor David Weil:

> *By focusing on core competencies, lead businesses in the economy have shed the employment relationship for many activities, and all that comes with it. Shedding the tasks and production activities to other businesses allows lead companies to lower their costs … . It also does away with the need to establish consistency in those human resource policies, since they no longer reside inside the firm.*[1530]

Using the notion of 'the fissured workplace', Weil describes how these 'lead firms' have replaced the large workforces traditionally employed to fulfil their objectives with 'a complicated network of smaller business units', operating in highly competitive markets. This has created: 'downward pressure on wages and benefits, murkiness about who bears responsibility for work conditions, and increased likelihood that basic labor standards will be violated'.[1531]

A number of Inquiry participants raised concerns about business structures and contracting practices which contribute to work insecurity for employees and other workers. For example, CELRL described industries with a high level of subcontracting, outsourcing, labour hire or franchising as 'fragmented' and 'fissured', and submitted that such 'fissuring' can be seen in the Australian context in 'a diverse range of sectors from construction, cleaning, postal services, security, trolley-collecting, car-wash services and hospitality, amongst many others.'[1532]

Conversely, many industry representatives submitted that many of these structures and practices are legitimate, necessary and beneficial. For example, ACCI submitted:

> *Business models are adapting to reflect the changing social dynamic and changing sources of economic activity. As our sources of economic activity shift, our framework must adapt to permit the structuring of work in a way that best enables businesses to interact with the market. If goods and services are not in line with demand, employment outcomes will be negatively impacted.*
>
> *…*
>
> *Work is becoming increasingly focussed on outputs, as opposed to inputs. Greater value is placed on what a person produces, as opposed to how long they are physically based in a workplace. This is becoming less conducive to a workplace relations structure that promotes permanent employment with the one employer.*[1533]

1527. Terms of Reference, (a)(iii).
1528. Terms of Reference, (b)(iii).
1529. Terms of Reference, (b)(vi).
1530. Weil (2014), 11-12.
1531. Ibid, 8.
1532. CERLR, Submission no 99, 3.
1533. ACCI, Submission no 55, 15.

Master Builders submitted that:

> *… the building and construction industry is project based and requires different types of work for different periods of time throughout a project. The nature of this type of work necessarily requires the use of independent and skilled contractors to perform parts of the build project. This type of industry necessarily requires a mix of types of employment – and businesses need to be able to have the flexibility to draw upon these employment types.*[1534]

Many academic studies both in Australia and internationally have argued that this new, devolved model of business organisation contributes to insecure work.[1535]

In 2001, Johnstone, Mayhew and Quinlan identified that outsourcing grew substantially across a range of industries in most industrialised countries, including Australia, where survey data indicated that the number of contractors, agency workers, outworkers, and volunteers increased by almost 40% in the five years to 1997.[1536] The authors noted that outsourcing alters legal relations between the organisation that previously used its own employees to provide the product or task and those now contracted to do this. The legal status of outsourced workers may vary substantially from self-employed individuals or groups, the employees of small firms, casual employees and temporary labour supplied by labour hire agencies.[1537]

In their 2012 book, Johnstone et al note that:

> *The supply chain is another business structure that by its nature obscures the real economic relationship between business controllers and the workers who actually carry out the work.*
>
> *… These integrated supply chain systems are structure to insulate businesses at the apex of supply chains from liabilities towards workers at the base.*
>
> *… These arrangements enable firms at or near the apex of the chain to avoid the legal proximity with workers that may attract various obligations and liabilities, but at the same time enable them to maintain effective commercial control over the work performed.*[1538]

Johnstone et al point out that although supply chain structures are common in the Australian TCF, transport, construction and cleaning industries: 'beyond the regulation of clothing outwork and the trucking industry, there is little or no regulation specifically targeted at these supply chains to protect the workers at the base.'[1539]

Wright and Kaine observe, in a 2015 paper, that supply chains, production networks and other complex inter-organisational relationships are now defining features of contemporary business organisations. They note the structural shift in the nature of work and production from internal hierarchies contained within organisations to markets and networks stretching across multiple organisations.[1540]

Wright and Kaine attribute this growth of supply chains to competitive pressures in the private sector to outsource non-core activities; the rise of franchising, labour hire and subcontracting arrangements; and the growth of global supply chains resulting from trade liberalisation and

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1534. Master Builders, Submission no 38, 1.

1535. See e.g. Rawling and Kaine (2012); Fudge (2012), 2-3.

1536. Richard Johnstone, Claire Mayhew and Michael Quinlan, 'Outsourcing Risk? The regulation of occupational health and safety where subcontractors are employed' (2001) 22 *Comparative Labor Law and Policy Journal* 351.

1537. Ibid, 352.

1538. Johnstone et al (2012), 66 (reference omitted).

1539. Ibid, 68-69.

1540. Chris Wright and Sarah Kaine, 'Supply chains, production networks and the employment relationship' (2015) 57:4 *Journal of Industrial Relations* 483.

technological advancements that have combined to create a new international division of labour.[1541] They argue that this has major implications for the conventional understanding of employment relations, the role of institutions and regulatory organisations.[1542] This is particularly so for workers engaged by supplier firms at the bottom of the supply chain.[1543]

Johnstone and Stewart argue that that 'fissuring' or leased labour, franchising, supply chains and sub-contracting have become commonplace in Australia. They note that some features of Australian labour law have played a part in countering some of the adverse effects of fissuring.[1544] These include: modern awards and the NES, which protect, to some extent, employees at the foot of franchise, sub-contracting and supply chain arrangements; enforcement efforts of FWO (including enforcement proceedings based on the Fair Work Act accessorial liability provisions); transfer of business laws; measures to protect against sham contracting; and the model work health and safety laws which place responsibilities on the PCBU. They note that there has been some judicial acceptance of arguments that a worker at the foot of a fissured work structure is not a risk-taking entrepreneur but rather an employee protected by a safety net of minimum conditions.[1545] However, they describe the overall protections against fissuring as 'piecemeal'.[1546]

Similarly, Hardy contends that while Australian statutes are innovative and inclusive, critical regulatory gaps remain.[1547] She argues that whilst the Fair Work Act prescribes a comprehensive safety net for employees, making it less appealing for lead firms to shed direct employment, its continued reflection of the binary notion of employment and the unitary concept of the employer makes it more difficult for regulators and others to hold lead firms responsible for workplace contraventions taking place in their supply chains or franchises.[1548] Hardy argues that harnessing the power, position and resources of lead firms is critical to addressing exploitation at the bottom of supply chains.[1549]

James, Walters, Sampson and Wadsworth considered, firstly, how supply chain dynamics can adversely affect labour standards, and secondly, the role supply chain pressure could play in protecting and enhancing standards. They argued that rarely will market-related considerations on their own prompt purchasers to seek to directly influence the employment practices of their suppliers. Their examination of drivers of compliance in the construction and maritime industries leads them to conclude that there is a role for legally based regulation, and they discuss favourably the approach in Australia's model work health and safety laws.[1550]

1541. Ibid, 485.

1542. Ibid, 483.

1543. Ibid, 484.

1544. Richard Johnstone and Andrew Stewart, 'Swimming against the Tide? Australian Labor Regulation and the Fissured Workplace' (2015) 37 *Comparative Labor Law and Policy Journal* 60, 63-86.

1545. Ibid, 87.

1546. Ibid, 89.

1547. Tess Hardy, *Reconsidering the notion of "employer" in the era of the fissured workplace: should labour law responsibilities exceed the boundary of the legal entity?*, 2016 JILPT Tokyo Comparative Labour Law Seminar, Country Report, Australia (2016), 1.

1548. Ibid, 3-4.

1549. Ibid, 17. See also Tess Hardy, 'Who should be held liable for workplace contraventions and on what basis?' (2016) 29:1 *Australian Journal of Labour Law* 78.

1550. Phil James, David Walters, Helen Sampson and Emma Wadsworth, 'Regulating the employment dynamics of domestic supply chains', (2015) 57:4 *Journal of Industrial Relations* 526.

8.2 Independent contracting

8.2.1 Legal framework

At common law, the contract between an individual performing work for payment, and the party for whom the work is performed, is generally characterised in one of two ways. It may be characterised as a contract of service, or an employment contract, and the worker will be an employee at common law. Alternatively, it may be characterised as a contract for services, in which case the worker is not an employee, and is instead what is generally referred to as an independent contractor.[1551]

The key consequence of an independent contracting arrangement is that most employment-related protections, such as minimum wages, paid leave entitlements, regularity of engagement and notice of termination, do not apply. This is appropriate for those genuinely conducting their own enterprise and contracting out their services – self-reliant business people or entrepreneurs[1552] – and need not negatively impact their security of work.

However, there is some potential for an employment relationship to be mischaracterised or disguised as an independent contracting arrangement for the purpose of avoiding the obligations associated with employment, a practice often referred to as 'sham contracting'.[1553] The imposition on workers of a contractor relationship has arisen in the labour hire context, through use of the so-called 'Odco contracting system'.[1554] Notwithstanding this, such arrangements are often subjected to close scrutiny by the courts, and have on occasion been overturned – particularly where they have involved unskilled workers.[1555]

A further category of 'dependent contractors' has been identified by some commentators and researchers, to refer to contractors who despite the nature of their work arrangement, are economically dependent on a single client and/or have little control over their own work. Dependent contractors 'lack the economic freedom that is generally claimed as a justification for exempting them from labour laws'.[1556]

The common law test for determining an employment relationship relies on the application of a number of indicia to the arrangements in place between the worker and the putative employer.[1557] The indicia are useful as they cover a wide range of circumstances going to the reality of the parties' relationship, but mean that the application of the test is not always precise or clear cut. It can often be difficult to determine whether an independent contracting arrangement is legitimate, or a sham used to disguise what is in fact an employment relationship.[1558] Further, a statement in a contract describing its nature is not determinative –

1551. See generally Stewart et al (2016), 194-5.

1552. Johnstone et al (2012), 58; see also 88.

1553. See Cameron Roles and Andrew Stewart, 'The reach of labour regulation: Tackling sham contracting' (2012) 25:3 *Australian Journal of Labour Law* 258.

1554. Referring to the contractor arrangements upheld as lawful in *Building Workers Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104; see Johnstone et al (2012), 60-62; Roles and Stewart (2012), 281.

1555. Johnstone et al (2012), 63.

1556. Ibid (citation omitted).

1557. See e.g. *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 190 CLR 16.

1558. In *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] HCA 45, the High Court held that an arrangement whereby two housekeeping employees had their employment altered to engagement as independent contractors of a third party labour hire agency was a sham, notwithstanding the involvement of the third party (the case involved the application of the prohibition upon misrepresenting employment as contracting in Fair Work Act s 357, discussed below).

the parties cannot deem a relationship to be something which it is not. Instead, the totality of the relationship between the parties must be considered.[1559] This requires the balancing of a number of factors in a given factual situation. Over recent years, some of the factors which courts have considered relevant to determining whether an employment relationship exists are:

- Control, or potential control, of the engaging party over the worker – a high level of control over how work is performed indicates employment.
- Mode of remuneration – where the engaging party sets the rate and unilaterally imposes deductions for matters such as insurance, taxation, or other costs, this indicates employment.
- Provision and maintenance of equipment – where a worker provides his or her own equipment which is expensive or requires particular skill or training to operate, this will suggest a contractor relationship.
- Capacity to require work – control over hours of work and setting of rosters by the engaging party or the inability to refuse work on the part of the worker suggests an employment relationship.
- Delegation of work – the capacity to delegate work on the part of the worker suggests a contractor relationship.
- Presentation to the public – a requirement to wear uniforms, logos, or to follow the dress code of the engaging party suggests an employment relationship.
- Scope for other business activities – where the worker has limited scope for other business activities, this suggests an employment relationship.
- Potential profit or loss - where the worker is exposed to financial risk or potential gains from the running of a business, this suggests a contractor arrangement.

More recently, courts have been more inclined to consider the true substance of the arrangement between the contracting parties.[1560] For example in *On Call Interpreters*,[1561] the Federal Court endorsed an approach of considering whether the worker was 'an entrepreneur who owns and operates a business' and whether the work was being performed in and for that business, as distinct from the business receiving the work.[1562]

As noted at 5.5.3, the federal IC Act regulates independent contracting. A key purpose of the IC Act is to prevent interference with the terms of independent contracting arrangements by excluding state laws which would impose employment-like conditions on these arrangements.[1563] The IC Act significantly curtails Victoria's capacity to regulate independent contractor relationships.

1559. *Hollis v Vabu* (2001) 207 CLR 21, 33.

1560. Stewart et al (2016), 211-2.

1561. *On Call Interpreters and Translators Agency v Federal Commissioner of Taxation (No. 3)* (2011) 214 FCR 82.

1562. Ibid, [208]. This approach was continued by the majority in the Full Federal Court in *FWO v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346, [178]-[186], and was not disturbed by the High Court on appeal in *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] HCA 45: Stewart et al (2016), 211-212, 258.

1563. See IC Act s 3(2)(c).

Additionally, it is a contravention of the Fair Work Act to misrepresent an employment relationship as an independent contracting arrangement. Part 3-1 Division 6 of the Fair Work Act provides as follows:

> *357 Misrepresenting employment as independent contracting arrangement*
>
> *(1) A person (the employer) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.*
>
> *(2) Subsection (1) does not apply if the employer proves that, when the representation was made, the employer:*
>
> *(a) did not know; and*
>
> *(b) was not reckless as to whether;*
>
> *the contract was a contract of employment rather than a contract for services.*
>
> *358 Dismissing to engage as independent contractor*
>
> *An employer must not dismiss, or threaten to dismiss, an individual who:*
>
> *(a) is an employee of the employer; and*
>
> *(b) performs particular work for the employer;*
>
> *in order to engage the individual as an independent contractor to perform the same, or substantially the same, work under a contract for services.*
>
> *Note: This section is a civil remedy provision (see Part 4 1).*
>
> *359 Misrepresentation to engage as independent contractor*
>
> *A person (the employer) that employs, or has at any time employed, an individual to perform particular work must not make a statement that the employer knows is false in order to persuade or influence the individual to enter into a contract for services under which the individual will perform, as an independent contractor, the same, or substantially the same, work for the employer.*
>
> *Note: This section is a civil remedy provision (see Part 4 1).*

8.2.2 Prevalence of independent contracting

As outlined in Figure 8.1 and Table 8.1, in November 2013 there was a notably high percentage of the Victorian workforce engaged as independent contractors, compared with other states and territories and Australia as a whole: 8.5% of the Australian workforce was engaged as an independent contractor, whereas in Victoria, independent contractors accounted for 9.7% of the state's workforce. The Australian Capital Territory had the lowest proportion of independent contractors at 5.6%.

Figure 8.1: Proportion of workforce by state and territory engaged as independent contractors (November 2013)

Source: ABS Catalogue No. 63590 Forms of Employment, Australia, November 2013

As outlined in Table 8.2, in August 2014 in Australia, the majority of the independent contractor workforce was male at 73.7% overall, with independent contractors in Victoria slightly less likely to be male when compared with the other states and territories (71.1%). Further, female contractors were significantly more likely to work part time when compared with men at 64% overall, and this was pronounced in South Australia, where 85.3% of the state's independent contractor workforce were females working part time.

In Victoria in August 2014, the independent contractor workforce comprised of:

- 75.3% full time male workers;
- 24.9% part time male workers;
- 33.9% full time female workers; and
- 61.9% part time female workers.

8.2.3 Prevalence of sham contracting

Some academic studies indicate that there is a group of workers who have employment-like characteristics, but are nonetheless engaged as independent contractors.

Gunasekara observes that cleaners, construction workers, beauticians, call centre workers and drivers are among a growing, and under researched, group of workers engaged as independent contractors.[1564] The author notes that arguments relating to subcontractors' willingness and capacity to bargain with principal contractors may be overstated, and argues that some form of collective voice should be available to support the application of self-employed contracting.[1565]

Thornquist describes how false self-employment, or disguised employment, has been increasingly highlighted as a problem within the EU, characterised by persons with employee status in practice not being classified as such, in order to avoid costs such as taxes and social security contributions.[1566]

1564. Chrys Gunasekara, 'Independent contracting in low skilled low paid work in Australia' (2011) 19:1 *International Journal of Employment Studies* 50.

1565. Ibid, 63-64.

1566. Annette Thornquist, 'False self-employment and other precarious forms of employment in the 'grey area' of the labour market' (2015) 31:4 *International Journal of Comparative Labour Law and Industrial Relations* 411.

Table 8.1: Form of employment by state and territory – number and percentage – November 2013

Form of employment	NSW		Vic		Qld		SA		WA		Tas		NT		ACT		Aus	
	000s $	%	000s $	%	000s $	%	000s $	%	000s $	%	000s $	%	000s $	%	000s $	%	000s $	%
Employees with paid leave entitlements	2,305.4	63.6	**1,815.0**	**62.8**	1,470.5	62.0	484.1	60.4	859.1	64.9	144.0	63.9	92.1	70.8	153.9	74.0	7,324.2	63.3
Employees without paid leave entitlements	688.6	19.0	**511.7**	**17.7**	507.4	21.4	185.0	23.1	255.9	19.3	46.8	20.8	22.1	17.0	32.2	15.5	2,249.7	19.4
Independent contractors	280.5	7.7	**279.3**	**9.7**	217.6	9.2	60.7	7.6	111.0	8.4	16.0	7.1	9.7	7.5	11.6	5.6	986.4	8.5
Totals	3,623.1	100.0	**2,889.3**	**100.0**	2,372.2	100.0	801.9	100.0	1,323.9	100.0	225.4	100.0	130.1	100.0	207.9	100.0	11,573.8	100.0

Source: ABS Catalogue No. 63590 Forms of Employment, Australia, November 2013

Table 8.2: Independent contractors by state and territory – full time and part time – number and percentage – August 2014

State/ territory	Male full time independent contractor		Male part time independent contractor		Male total independent contractor		Female full time independent contractor		Female part time independent contractor		Female independent contractor total		All full-time independent contractor		All part time independent contractor		All total
	000s	%	000s	%	000s	%	000s	%	000s	%	000s	%	000s	%	000s	%	000s
NSW	171.6	76.8	51.1	22.9	223.3	76.1	25.6	35.9	44.6	62.6	71.3	24.3	197.3	67.2	97.9	33.4	293.4
Vic	138.0	75.3	45.7	24.9	183.2	71.1	25.8	33.9	47.2	61.9	76.2	29.6	163.8	63.6	94.5	36.7	257.7
Qld	130.2	78.7	35.7	21.6	165.4	72.4	22.0	35.3	39.0	62.5	62.4	27.3	150.2	65.8	77.1	33.8	228.4
SA	37.4	78.1	9.9	20.7	47.9	76.2	1.8	13.2	11.6	85.3	13.6	21.6	40.3	64.1	22.6	35.9	62.9
WA	64.3	72.8	23.6	26.7	88.3	73.2	9.2	27.7	23.1	69.6	33.2	27.5	75.7	62.8	44.4	36.8	120.6
Tas	8.8	65.7	4.2	31.3	13.4	77.0	2.1	42.0	2.7	54.0	5.0	28.7	10.7	61.5	7.2	41.4	17.4
NT	6.0	95.2	0.4	6.3	6.3	77.8	0.6	31.6	1.0	52.6	1.9	23.5	6.7	82.7	1.6	19.8	8.1
ACT	6.6	67.3	2.2	22.4	9.8	75.9	1.0	28.6	1.4	40.0	3.5	27.1	8.6	66.7	4.2	32.6	12.9
Aus	562.9	76.3	172.8	23.4	737.6	73.7	88.1	33.0	170.6	64	267.1	26.7	653.3	65	349.5	35	1,001.4

Source: ABS Catalogue No. 63330 Characteristics of Employment: Table 35.1, Australia, August 2014

Roles and Stewart noted the lack of data on the extent of disguised employment in Australia, in part because there is no agreement as to what constitutes such a practice. Based on data from the ABS Forms of Employment survey, the authors identified the proportion of independent contractors whose practices may indicate dependency, including that:

- *79.7% of contractors had no employees — in other words they provided predominantly their own labour;*
- *39.6% of contractors did not have authority over their own working procedures;*
- *33.7% of contractors were not able to subcontract the performance of work;*
- *17.6% of contractors did not have any say over their start and finish times; and*
- *53.3% of contractors had only one active contract during the reference week, with 23.9% usually unable to work on more than one contract at a time.*[1567]

However the authors considered that only tentative conclusions could be reached from this data, as some indicators of dependency were not inconsistent with genuine independent contracting.[1568]

Similarly, although only tentative conclusions can be reached based on ABS November 2013 data, there are certain indicators of an employment-like arrangement amongst a significant minority of independent contractors. Table 8.3 identifies a range of employment characteristics of independent contractors.

Table 8.3 indicates that:

- 79.9% of such persons engaged no employees;
- 35.6% of independent contractors were not able to sub-contract their work;
- a significant minority of male and female independent contractors did not have authority over their own working procedures (at 37.4% and 39.4% respectively); and
- for a further 12% of independent contractors, the source of authority of their work was an 'employer, supervisor, manager or foreman'.

1567. Roles and Stewart (2012), 271.

1568. Ibid.

Table 8.3: Independent contractors – number of employees and selected employment characteristics by gender (number and percentage) – November 2013

Characteristic	Males 000s	Females 000s	Persons 000s	Males %	Females %	Persons %
Number of employees						
None	580.0	208.2	788.2	78.0	85.7	79.9
1–4	118.1	21.5	139.5	15.9	8.8	14.1
5–9	26.3	7.5	33.9	3.5	3.1	3.4
10–19	10.4	2.4	12.8	1.4	1.0	1.3
20 or more	8.6	3.5	12.0	1.2	1.4	1.2
Whether usually able to work on more than one active contract						
Usually able to	560.5	176.8	737.4	75.4	72.8	74.8
Not usually able to	182.9	66.2	249.1	24.6	27.2	25.2
Whether had more than one active contract in reference week						
Had only one active contract	396.6	125.1	521.6	53.3	51.5	52.9
Had more than one active contract	346.8	118.0	464.8	46.7	48.5	47.1
Whether able to (sub)contract own work						
Able to (sub)contract own work	505.4	129.9	635.3	68.0	53.4	64.4
Was not able to (sub) contract own work	238.0	113.2	351.2	32.0	46.6	35.6
Who had authority over own working procedures						
Did not have authority over own work	277.9	95.8	373.7	37.4	39.4	37.9
Employer/supervisor/ manager/foreman	89.8	30.3	120.1	12.1	12.5	12.2
Business/person contracted to	91.4	31.1	122.5	12.3	12.8	12.4
Customer	43.6	12.4	56.0	5.9	5.1	5.7
Business partner	5.4	3.3	8.7	0.7	1.3	0.9
Board of management/ chairman of the board	4.3	2.7	7.0	0.6	1.1	0.7
Franchising company	4.0	2.0	6.0	0.5	0.8	0.6
Government or other regulation/standard	34.1	12.6	46.6	4.6	5.2	4.7
Other	5.4	1.4	6.8	0.7	0.6	0.7
Had authority over own work	465.5	147.2	612.7	62.6	60.6	62.1
Total	743.4	243.0	986.4	100.0	100.0	100.0

Source: ABS Catalogue No. 6359.0 Forms of Employment, Australia, November 2013

Recent research suggests possible misclassification of employees as independent contractors in 23% of enterprises in industries with a known prevalence of independent contracting.[1569] In the building and construction industry, misclassification affects 13% of contractors,[1570] with non-English speaking, vulnerable or less informed workers most affected by employer-driven arrangements.[1571]

8.2.4 Inquiry evidence

Several participants in the Inquiry submitted that self-employment through independent contracting is a legitimate and desirable model of work.

For example, ACCI submitted that 'many workers are taking control of their working lives through self-employment'. It referred to a study released by Upwork estimating that 4.1 million people, or around 32% of the workforce, have carried out freelance work in the past year: 'The majority of those surveyed said they made the shift by choice, now earn more and would not go back to a traditional job, no matter how much it paid.'[1572]

ACCI further submitted that:

> *…many workers do not want to be employees and actually enjoy the freedom and financial incentives associated with self-employment. Many value the opportunity to work at their own pace and to work their own hours without detailed supervision. Working for profit rather than a wage has some risk but the contracting model rewards productivity and delivers the fruits of one's own effort.*[1573]

VACC submitted that contractors in the automotive industry are entrepreneurs who do not seek the protections of industrial law.[1574]

ICA further submitted that the rise of self-employment in the United Kingdom: 'is a sign that entrepreneurship as a driver of economic development and human well-being is penetrating deeper into economies at the level of individual workers. It's something that should be understood and encouraged, certainly not blocked and definitely not demonized.'[1575]

In ICA's view, the Inquiry should reject discussion and consideration of 'dependent' contracting as an erroneous concept that is unhelpful for quality public policy consideration and is inconsistent with ILO standards.[1576]

On the other hand, some submissions stated that sham contracting was prevalent in certain industries in Victoria.

For example, the TCFUA submitted that sham contracting is prevalent in both the formal and home-based outworker sectors, with many workers who are characterised as contractors being completely dependent on the principal employer and subject to its control. The union contended that: '[s]ham contracting in the TCF outwork sector is characterised by a standard requirement for workers to obtain a business name (ABN) or establish a corporate structure

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1569. FWO, *Sham contracting and the misclassification of workers in the cleaning services, hair and beauty and call centre industries* (Report on the preliminary outcomes of the Fair Work Ombudsman Sham Contracting Operational Intervention, November 2011), 14.

1570. TNS Consultants, *Working arrangements in the building and construction industry: further research resulting from the 2011 Sham Contracting Inquiry* (December 2012), 6, 7.

1571. Fair Work Building and Construction, *Response to Working Arrangements in the Building and Construction Industry – further research resulting from the 2011 Sham Contracting Inquiry* (December 2012).

1572. ACCI, Submission no 55, 16.

1573. ACCI, Submission no 55, 19.

1574. VACC, Submission no 51, 6.

1575. ICA, Submission no 71, 10.

1576. ICA, Submission no 71, 3.

(ACN) in order to gain employment. If they refuse, it is likely that they will not be given work.' TCFUA submitted that sham contracting arrangements are imposed on workers with increasing inventiveness, to avoid obligations under modern awards, the Fair Work Act and state laws.[1577]

ASU Authorities and Services submitted that the use of contracting by local councils to engage family day carers 'approximates to sham contracting' in that the working conditions imposed are often below award rates.[1578]

SDA referred to recent media reports indicating that Pizza Hut franchisees have been using 'sham' contracts to underpay their delivery drivers. It submitted that it has an agreement in place that does not allow for the engagement of contractors.[1579]

Some participants identified both benefits and risks associated with the use of independent contracting.

For example, VACC, whilst stressing the importance of genuine contracting arrangements in the automotive industry, submitted that it does not support sham contracting arrangements and regularly advises members against engaging tradespeople as contractors. It submitted that this arrangement often occurs at the initiative of the employee.[1580]

AMCA submitted that an industry wide enterprise agreement contains a clause which makes it difficult for employers to be involved in sham contracting.[1581]

ITCRA submitted that protecting workers from exploitation and permitting individuals and business to contract as they choose are not mutually exclusive. It distinguished ICT workers as 'highly skilled professionals, with the sophistication and knowledge to understand the relative advantages and disadvantages of the various methods of engagement, and to negotiate an individual decision based upon their own personal circumstances.' However, ITCRA acknowledged that '[i]Increased protection for those most vulnerable to exploitation is required to maintain a high standard of conduct and ensure the formation of genuine, non-coercive independent contracting relationships.'[1582] It recognised the capacity for unscrupulous hirers to use contracting to avoid minimum benefits and protections under labour laws. It suggested that particular categories of worker should have the benefit of extra protections, such as:

- individuals under the age of 18;
- unskilled workers;
- low income earners; and
- new entrants to the market (for example ICT graduates seeking their first professional role).[1583]

TWU submitted that independent contracting arrangements are best viewed as a continuum, ranging from genuinely independent businesses to those with a high degree of vulnerability to exploitation due to the dependent nature of their contracting arrangements. TWU supports independent contractor arrangements provided that they are 'genuine and legitimate' and are not for the purpose of avoiding minimum industrial and legal entitlements.[1584]

1577. TCFUA, Submission no 92, 4.

1578. ASU Authorities and Services, Submission no 31, 15.

1579. SDA, Submission no 36, 11; see also Adele Ferguson and Sarah Danckert, 'Pizza hut drivers on 'sham' contracts', *The Age*, 23 November 2015.

1580. VACC, Submission no 51, 6.

1581. AMCA, Submission no 67, 2.

1582. ITCRA, Submission no 39, 4, 6.

1583. ITCRA, Submission no 38, 7.

1584. TWU, Submission no 80, 2.

The Inquiry also heard of instances whereby workers were engaged as contractors to avoid workers compensation obligations. A number of workers submitted they had been forced into sham contracting arrangements, were told to obtain an ABN and pay for their own WorkCover insurance, or were told not to report an injury or they would be fired.[1585] Adam Aldgate, Secretary of the STLC told the Inquiry he knew of:

...many stories of people being threatened not to go on WorkCover because they simply don't have the insurance….I have had a lot of people come and talk to me about these WorkCover issues that are occurring. There was a gentleman that had a nail into his eye. No WorkCover entitlement whatsoever.[1586]

Case study – professional contractors

A 2005 study by McKeown considers results from a survey of 240 professional workers in Australia who had moved into contract employment arrangements. The survey results suggested that the themes of marginalisation and disadvantage were just as relevant to the professional contractor as to other forms of non-standard employment.[1587] For some of the professionals, contracting was definitely a trap that they appeared unable to escape, whereas for others it was a bridge enabling them to pursue childcare or lifestyle options. Professional contracting in some cases was associated with unemployment, a lack of opportunities for permanent employment, or involuntary arrangements. In other cases, it emerged as a planned career move. Overall, rather than representing a privileged elite, there was evidence that some professional contractors were just as precarious as any other non-standard working arrangement.[1588]

Evidence to the Inquiry indicated a similar spread of experiences regarding professional independent contractors.

ITCRA submitted that 81% of ICT roles filled in the July to September 2015 quarter, in Victoria, were contract based.[1589] It submitted that this is 'candidate driven' with ICT professionals 'choosing to work as independent contractors because it affords them flexibility, recognition and diversity.' ITCRA further submitted that the high proportion of contractors 'reflects the nature of the ICT infrastructure projects, coupled with ongoing changes in government tendering arrangements and the business models of clients… .'[1590]

ITCRA submitted that ICT contractors are engaged across a broad range of industries, with a predominance in financial services (47.9%); ICT related industries (26%); and public administration (11.2%).[1591] It said that ICT is a younger workforce, with a high proportion of ICT professionals aged between 25 and 44 years of age.

Professionals Australia identified both advantages and disadvantages of contracting through a labour hire arrangement. It submitted that the labour hire firm can take responsibility for many of the more expensive and inconvenient aspects of a contractor-style engagement such as administration, insurances and recovering unpaid debts from principal employers. It also submitted that this model can allow professionals to:

1585. NUW on behalf of individual workers, Submission no 75.

1586. STLC, Mildura Hearing, 23 November 2015.

1587. Tui McKeown, 'Non-standard Employment: When even the elite are precarious' (2005) 47:3 *Journal of Industrial Relations* 276.

1588. Ibid, 292.

1589. ITCRA, Submission no 39, 6, citing Q3 (2015) *ICT Employment Trends Report*, Melbourne, October 2015.

1590. ITCRA, Submission no 39, 6.

1591. ITCRA, Submission no 39, 6, citing *Australia's Digital Pulse*, Deloitte Access Economics for the Australian Computer Society, Sydney, 2015.

> *…broaden their skills base, diversify their client base, and – acknowledging legitimate restraint clauses on the direct engagement of workers engaged previously via a labour hire firm – it can be a good way to "get a foot in the door" with the principal employer for future direct, permanent employment.*[1592]

Professionals Australia supports the use of independent contractors 'for those who are informed about their options and choose to operate under these arrangements', but oppose it 'where genuine choice does not exist, where individuals are not informed about the consequences of changed work arrangements, where contractors are engaged under less favourable pay and terms than equivalent employees or where the pay and conditions of permanent employees are threatened or undermined.[1593] Professionals Australia was critical of a number of features of the contracting model, including:

- where labour hire is used to divert liability for termination;
- Odco-style arrangements, which disproportionately allocate risk to the contractor rather than the labour hire agency or the host;
- lack of appropriate collective bargaining mechanisms;
- contracts being offered on a take it or leave it basis;
- use of 'outer limits' contracts which permit termination prior to the completion of the stated term;
- unfair non-solicitation clauses, lack of transparency regarding the rate paid by the host to the labour hire agency for the contractor's services and a lack of investment in professional development; and
- sham contracts providing benefits and conditions at a level below that of equivalent employees.[1594]

A submission from a professional services independent contractor with over 18 years in the management consulting sector questions the genuineness of many professional independent contracting arrangements, stating that to a casual observer, there is no difference between an employee and a contractor. He submitted that contractors are often front and centre of the host's business, and the more employee-like characteristics exhibited by a contractor, the greater the chance of their contract being maintained or extended. He describes the personal concern this can cause for a contractor, particularly in respect of taxation, that the arrangement is either 'operating outside the law or sailing close to the wind'.[1595]

This contractor submitted that some negative practices of labour hire firms in the professional sector include:

- oppressive terms in standard form contracts, with little or no scope to negotiate;
- unfair assignment of intellectual property and restraints of trade; and
- downward pressure on contractor rates, resulting in the labour hire agency recommending candidates which result in the most profit for the company.[1596]

1592. Professionals Australia, Submission no 34, 4.
1593. Professionals Australia, Submission no 34, 8.
1594. Professionals Australia, Submission no 34, 9.
1595. Dr Guy Forsyth, Submission no 5, 3.
1596. Dr Guy Forsyth, Submission no 5, 3.

Case study – transport contractors

Considerable academic attention over recent years has been given to work arrangements in the heavy transport industry. In particular, the contribution of supply chain and contracting structures to price pressures and ultimately road safety has been closely examined.[1597] However, the Inquiry heard about the particular impact of independent contracting in two other sectors of the transport industry.

TWU submitted that one type of transport contractor, tip truck owner drivers, are particularly vulnerable through subcontracting arrangements. It described an arrangement whereby a builder who needs earth works completed on a construction site contracts this work to a plant hirer. The plant hirer then engages the tip truck owner driver. TWU submitted that there are approximately 1000 'tippers' in Victoria, and that less than 100 are directly employed by a plant hire company or directly engaged by a builder. There are five main plant hire companies in Victoria which comprise around 80% of the industry.[1598]

The union further explained that tip truck owner drivers are engaged on an ad hoc basis by the plant companies. They often receive offers of work via text message. Generally, payment rates are not by the hour, but based on size or weight of load. Despite a tip truck owner driver accepting the work, it may be cancelled prior to commencement for any number of reasons, in which case no payment is received by the driver. Sometimes drivers wait for hours on site to commence work which is then cancelled. There is widespread undercutting of prices between the plant hire operators, which can result in lower prices for the drivers.[1599]

The TWU also submitted that rates of payment for tip truck owner drivers are driven by the demand for trucks on a given day. In some cases this results in below-award rates being paid (compared with the work performed by award-covered employees), and economic pressure exerted by the low rates forces drivers into unsafe behaviour, such as failing to take fatigue breaks.[1600]

The CWU, in its submission and evidence at the Melbourne hearing, informed the Inquiry about the contracting practices of Australia Post for its parcel delivery workers. It said parcel delivery has been contracted out by Australia Post since 1999. There are now approximately 1300 head contractors in Victoria. These head contractors often employ several other 'sub-contractors' or employees. The head contractors vary in size, with the largest engaging between 60 to 100 drivers.[1601]

CWU told the Inquiry that the remuneration, working conditions and safety of these parcel drivers is largely unregulated. Drivers are engaged as subcontractors, and paid a 'piece rate' per parcel which often does not equate to the minimum award rate under the *Road Transport and Distribution Award*. This rate does not include payment for non-delivery work such as driving to and from the collection point for parcels, sorting parcels into individual rounds or runs (two to three hours work per day), sequencing parcels and scanning parcels before delivery. CWU indicated that the most common 'per parcel rate' is around $1.10 per parcel if the 'head contractor' provides the delivery van, and $1.25 per parcel if the driver has his own van. It said that the rate can be as low as 80 to 95 cents per parcel. [1602]

CWU said that many drivers using vans owned by the head contractor are forced to pay for fuel, tyres, services, repairs and insurance excess if they are in accidents. Only a minority of workers in this sector are in receipt of superannuation and many are not covered by workers'

1597. See 8.4 for a description of the academic literature and regulatory measures regarding this industry.
1598. TWU, Submission no 80, 5.
1599. TWU, Submission no 80, 7.
1600. TWU, Submission no 80, 7.
1601. CWU, Submission no 28, 2.
1602. CWU, Submission no 28, 3.

compensation. Many drivers are required to work long hours in order to make enough money to live on. Because drivers must clear all parcels within the day, they can start work at 4am and continue to work until 5pm or longer. Most drivers have no access to paid or unpaid periods of leave, and many have told the union they have been forced to come to work even though they are ill. [1603]

CWU submitted that notwithstanding the contracting structure, Australia Post exercises a high level of control over the work of parcel delivery drivers, and unilaterally dictates changes to pricing structures. Australia Post considers these workers to be the responsibility of the 'head contractors', but the union submitted it constitutes sham contracting.[1604]

Case study – construction

The Inquiry heard that both the commercial and residential sectors of the construction industry in Victoria make extensive use of contracting arrangements.

Master Builders submitted that the commercial construction sector makes extensive use of sub-contracting, with a relatively small number of building and construction firms sub-contracting to a relatively large number and wide range of service firms. It submitted that in Victoria, there are 88,896 construction firms, and 60% of these are sole practitioners, with no employees at all. Master Builders further submitted that:

> *[t]o stifle the opportunity for businesses to employ independent contractors, and for labour hire companies to manage these arrangements, would necessarily have costly and detrimental impacts on the operation of businesses in the building and construction industry.[1605]*

HIA described independent contracting as a quintessential feature of the residential construction industry, and estimated that independent trade contractors perform up to 80% of the construction work that occurs on detached housing sites. It submitted that the aggregate residential industry contribution to the Australian economy is over $150 billion per annum. HIA contended that the subcontracting system contributes strongly to the efficiency, adaptability and cost-competitiveness of the housing industry. Further: 'contractors in the housing industry are essentially small business persons working for themselves. They do not wish to be employees and most are not members of unions even though they have the right to be.'[1606] HIA further identified that:

> *[i]n a boom, when demand for building work is high, contractors are able to pick and choose their work, and can obtain premium remuneration. When the economy is in recession, demand falls and contractors may struggle to keep their businesses afloat. But an employee (while they remain in employment) is paid more or less the same regardless of economic conditions. That, and not legal definitions, is the real difference between contractors and employees – contractors are in business and take risks in order to make a profit (but sometimes incur a loss), while employees take no risks and receive steady, predictable remuneration. From time to time, contractors receive less, overall, for their efforts than would an employee performing the same work. And from time to time they receive considerably more. Contractors choose to work under these arrangements because they want to run their own businesses and make money.[1607]*

CFMEU Construction submitted that independent contracting is particularly prevalent in the construction industry, with construction accounting for 33% of all independent contractors, and 36% of all persons working in the construction industry working as independent contractors. CFMEU Construction submitted that while legitimate contracting arrangements occur, there is

1603. CWU, Submission no 28, 3.
1604. CWU, Submission no 28, 4.
1605. MBA, Submission no 45, 1.
1606. HIA, Submission no 45, 3.
1607. HIA, Submission no 45, 2.

also widespread sham contracting. It said that the number of sham contracting arrangements in the construction industry in Australia in November 2010 was between 92,000 and 168,000.[1608]

CFMEU Construction took issue with the HIA submission that construction workers prefer to be engaged as contractors. It said that most constractors do not have a choice but to work as an independent contractor, and provided a number of examples of sham contracting arrangements, and job advertisements for positions which required an ABN, yet where uniform and tools were provided and hours of work and pay rates were set.[1609]

Master Builders, conversely, submitted that union claims of sham contracting in the Building and Construction Industry were 'greatly exaggerated', referring to research by the former Australian Building and Construction Commission and Fair Work Building and Construction. Master Builders submitted that the net effect of this research is that the workforce in the building and construction industry comprises 61% employees, 34% genuine independent contractors and 5% possibly misclassified contractors. It further submitted that 'possible misclassification' is not sham contracting, with sham contracting numbers likely to be far less.[1610]

A construction worker in the excavation industry told the Inquiry he was contracting with an ABN but to one employer only in his current job. He reported no penalty rates, rostered days off, sick leave or annual leave and said that he takes his chances working at the direction of other subcontractors.'[1611]

Another construction worker told the Inquiry:

> *I was contracting with an ABN but to one employer only more than a year ago. Bricky's laborer on ABN. $12-20 per hour. Site was often unsafe, no toilet paper. Grueling work. Fired on a whim a number of times and not paid. Back couldn't cope after a year of bending and lifting. Workers always made to ride barrow hoist. There was no security. Trouble paying for rent, food etc. Constant battle to get paid, not have pay docked for damaged equipment.*[1612]

In 2011, The Office of the Australian Building and Construction Commissioner conducted a study into sham contracting in the construction industry in Australia (**Sham Contracting Inquiry**).[1613] The Inquiry found that sham contracting was a real problem affecting workers in the building and construction industry. However, it found that there was a knowledge gap as to the extent and incidence of the problem.[1614]

Further research commissioned as a result of that Inquiry in 2012 indicated that:

- *13% of self-defined contractors are possibly misclassified (i.e. they should be being treated as employees);*
- *misclassified contractors appear more likely to:*
  - *include non-English speaking workers;*
  - *be based in metropolitan areas (with a greater concentration in NSW and Queensland – this finding is certainly consistent with FWBC's own investigation activity);*
  - *be engaged with small to medium size businesses; and*
  - *be less attached and more transient in their role;*

1608. CFMEU Construction, Submission no 27, 8.

1609. CFMEU Construction, Supplementary Submission no 2, 1-2.

1610. Master Builders, Submission no 38, 10.

1611. CFMEU on behalf of individual workers, Submission no 54, (v).

1612. CFMEU on behalf of individual workers, Submission no 54, (xxii).

1613. Australian Government, Office of the Australian building and Construction Commissioner, *Sham Contracting Inquiry: Report* (2011).

1614. Ibid, 91.

- *in terms of drivers for sham contracting:*
  - *worker-driven arrangements are associated with a sense of power and control in setting work arrangements and a perceived attraction of financial gain, control and stability;*
  - *employer-driven arrangements are associated with the opportunity to take advantage of sometimes vulnerable and less informed workers.*[1615]

8.2.5 Proposals to regulate independent contractors

A number of proposals were made by Inquiry participants to amend the Fair Work Act and/or the IC Act.

Master Builders proposed introducing a new statutory test to supplement the common law test for determining employment status, in order to reduce union claims that many bona fide contractual arrangements are artificial and that many subcontractors are, in fact, employees. The test would involve an independent contractor being registered with a dedicated Federal Government agency, preferably the ATO. The application for registration would be accompanied by a certificate from a legal practitioner or other suitably qualified professional, to the effect that having regard to the statutory criteria, the contractor should be registered; for how long; and for which particular project or job. The registration would be for fixed periods but would be renewable where circumstances changed, for example if the contractor was an individual who asked to work occasionally as an employee.[1616] Conversely, Ai Group submitted that whilst the distinction between employees and independent contractors is not always clear cut and can be subject to judicial scrutiny, the common law approach to defining an independent contractor should be retained.[1617]

Some other organisations called for the introduction of a statutory definition of independent contractor,[1618] or a statutory presumption of employee status, which can be disproved.[1619] Dr Guy Forsyth proposed extending fairness measures currently applicable to employees to independent contractors.[1620]

Western Community Legal Centre called for additional remedies in respect of independent contracting and mischaracterisation of employment arrangements. In particular, it proposed: expansion of the jurisdiction of the Federal Court/Federal Circuit Court so that a worker who considers themselves an employee at law can have their unpaid wages dispute heard, even if they are ultimately found to be a contractor; the imposition of a positive obligation on employers and principals to ensure they classify their workers appropriately; and removal of the recklessness/lack of knowledge defence to mischaracterisation.[1621]

ITCRA proposed the development of a fair engagement checklist to ensure the formation of genuine and non-coercive independent contracting relationships, which would be a compliance tool for businesses and also evidence of the parties' intention to enter into a principal-independent contractor arrangement. ITCRA proposed that a high fee threshold of $85 per hour could be a determinative factor for ensuring that genuine and non-coercive independent contracting relationships are excluded from scrutiny, on the basis that highly paid individuals are more likely to be in a position to negotiate appropriate contractual arrangements to protect their interests. They are also in a position to negotiate rates of pay which compensate for the statutory benefits afforded direct employees. The high fee threshold proposed was calculated

1615. Fair Work Building and Construction (2012), 3, describing the findings of TNS Consultants (2012).

1616. Master Builders, Submission no 38, 6.

1617. Ai Group, Submission no 53, 32.

1618. JobWatch, Submission no 46, 33; Western Community Legal Centre, Submission no 62, 66.

1619. NUW, Submission no 91, 23; IEU, Submission no 81, 11.

1620. Dr Guy Forsyth, Submission no 5, 6.

1621. Western Community Legal Centre, Submission no 62, 66, referring to the defence set out in Fair Work Act s 357(2).

by converting an annualised salary of $130,000 to an hourly rate of pay and then multiplying it by 1.3 to account for the loss of permanent employment benefits. The average hourly rate for ICT contractors in Victoria in the third quarter of 2015 was $94.22 per hour.[1622]

Some participants submitted that the ATO should apply more rigorous scrutiny before issuing ABNs to individuals, or in the labour hire industry.[1623]

Roles and Stewart argue that despite some recent judicial willingness to find that workers hired as independent contractors are at law employees, there remains a compelling case for a statutory definition that would make it harder to disguise employees as contractors. In the authors' view, the term 'employee' should be redefined by statute so that workers cannot be treated as contractors unless the worker is genuinely running his or her own business.[1624] This would then be the touchstone from which sham contracting, or an attempt to disguise an employment relationship as one of contracting, could be measured.[1625] They approve the approach stated by Bromberg J in *On Call Interpreters*, that viewed as a 'practical matter', independent contractors are those who perform work as entrepreneurs, owning and operating a business and performing work in and for their own business, not of the business receiving the work.[1626]

8.2.6 Findings and recommendations – independent contractors

Genuine independent contracting is a legitimate business arrangement, and as a mode of work can afford flexibility, autonomy, recognition and reward which goes beyond that which would be available in an employment relationship. A genuine independent contractor with a successful business may well have equal or greater work security than an employee due to these factors.

However, there is considerable evidence that where independent contracting arrangements are entered into by workers because they are essentially a requirement of a particular market or industry, they are not beneficial for those workers (irrespective of the genuineness or otherwise of the independent contracting arrangement). For example, the Inquiry heard of considerable detrimental impacts regarding rates of pay, predictability of working hours and occupational health and safety issues for tip truck owner drivers and parcel delivery contractors in the postal industry.

Further, evidence suggests that there remain an indeterminate but not insignificant proportion of independent contracting arrangements which are not genuine, and are designed instead to disguise an employment relationship in order to avoid the regulation associated with that relationship.

Many submissions proposed a statutory definition of independent contracting, or other regulation directed at limiting the mischaracterisation of employees as independent contractors. However, recent decisions suggest an increasing willingness by the courts to assess the genuineness of independent contractor arrangements by considering whether the worker is genuinely working in his or her own business, rather than for the business of the other party. The common law test has proved to be flexible enough to permit an assessment of the true nature of an engagement, irrespective of its label. I do not consider it desirable to replace the common law test with a statutory test.

1622. ITCRA, Submission no 39, 7.

1623. VFF, Submission no 49, 10; Master Builders, Submission no 38, 6.

1624. Roles and Stewart (2012), 279.

1625. Ibid, 263-264.

1626. Ibid, citing *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation* (No 3) (2011) 206 IR 252, [208].

Further, the IC Act significantly curtails Victoria's capacity to regulate independent contractor relationships, and accordingly the Victorian Government is limited in its ability to direct address most of the concerns raised by critics of independent contracting arrangements.

However, Victoria can advocate for changes to improve the regulatory framework for independent contractor arrangements operating under federal law.

A key issue raised with the Inquiry,[1627] and which has been the subject of consideration in a number of other inquiries,[1628] is the effectiveness of the Fair Work Act sham contracting provisions. In particular, the prohibition on employer misrepresentation of an employment contract as a contract for services in s 357 does not apply where the employer did not know and was not reckless as to whether the contract was a contract of employment or a contract for services.[1629] As Stewart et al explain:

> *Hence a business that has relied on independent and apparently reliable advice as to how to engage someone as a contractor can escape liability under these provisions, even if the advice turns out to be wrong. Indeed even in the absence of such advice, an employer may still be able to argue that it made an innocent mistake.*[1630]

The PC Workplace Relations Framework Report noted that the Fair Work Act post-implementation review recommended replacing the recklessness test in Fair Work Act s 357(2) with a reasonableness test,[1631] and went on to make a similar recommendation, as follows:

> *There do not appear to be any obvious disadvantages from switching to a 'reasonableness' test given that such tests are frequently applied in many other civil contexts without much concern. Such a shift would address the weaker incentives under the current regime. It may also help regulators to rectify sham arrangements out of court because any infringing business would be aware that it would have a lower probability of winning the matter in court. As noted earlier, litigation forms only a small part of the work of the FWO in relation to sham contracting. Moving to a 'reasonableness' test would not undermine this.*
>
> *RECOMMENDATION 25.1*
>
> *The Australian Government should amend the Fair Work Act 2009 (Cth) to make it unlawful to misrepresent an employment relationship or a proposed employment arrangement as an independent contracting arrangement (under s. 357) where the employer could be reasonably expected to know otherwise.*[1632]

I agree with that analysis and recommend that the Victorian Government advocate for the change recommended by the Productivity Commission.[1633]

1627. See e.g. Western Community Legal Centre, Submission no 62, 66, referring to the defence set out in Fair Work Act s 357(2).

1628. See e.g. PC Workplace Relations Framework Report, 815; R McCallum, M Moore and J Edwards, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (Department of Education, Employment and Workplace Relations, Canberra, 2012), 242-3.

1629. Fair Work Act s 357(2).

1630. Stewart et al (2016), 218, referring to *CFMEU v Nubrick Pty Ltd* (2009) 190 IR 175; *Director, FWBII v Bavco Pty Ltd (No 2)* (2014) 291 FLR 380; cf. *Director, FWBII v Linkhill Pty Ltd* (*No 7*) [2013] FCCA 1097.

1631. PC Workplace Relations Framework Report, 814, referring to McCallum et al (2012).

1632. PC Workplace Relations Framework Report, 815.

1633. It is noted that the Grattan Institute recently endorsed the Productivity Commission's recommendation, in the context of the likely increase in engagement of workers as contractors in the 'digital economy': see Jim Minifie, *Peer-to-Peer Pressure: Policy for the sharing economy* (Grattan Institute, April 2016).

Recommendation 28:
The Victorian Government should advocate for changes to s 357 of the Fair Work Act in any consultation processes instigated by the Federal Government over implementation of the Productivity Commission's Workplace Relations Framework Report, so that it is unlawful to misrepresent an employment relationship or proposed employment arrangement as an independent contracting arrangement where the employer could be reasonably expected to know otherwise.

I note the approach proposed by ITCRA of a 'Fair Engagement Checklist,' based on a minimum hourly rate and other factors, as a tool for businesses to ensure contracting relationships are genuine and non-coercive.[1634] I recommend that the Victorian Government promote a checklist of this nature as part of its role in promoting best practice, outlined at 9.2.4.

Recommendation 29:
I recommend that the Victorian Government develop and promote a fair engagement checklist for the engagement of independent contractors.

I also note Recommendation 11 above, that the Victorian Government advocate for FWO to focus more of its compliance activity on matters including sham contracting in the cleaning industry.

Finally, measures to address the issues raised by tip truck drivers are dealt with at 8.4 below.

8.3 Other business structures and practices

8.3.1 Labour supply chains and contracting

Many of the issues relating to labour supply chains and outsourcing were discussed in the introductory section of this chapter at 8.1.

Ms Maria Azzura Tranfaglia told the Inquiry about supply chain accountability in Italy:

> *Unlike in Australia, there are third party liability regimes to make lead firms accountability in a supply chain context or in a labour hire context. And so this kind of regime which is a joint and severable liability allows workers to actually take to court not only the direct employer but also all the other firms that are involved in the supply chain….. For example, the Italian provision about salary payments and social security contributions, so the liability of the lead firms and all the firms involved in the supply chain is limited to this to compensation for salaries or social security contributions.*[1635]

Some Inquiry participants submitted that supply chains and outsourcing pose particular problems for identifying and remedying worker exploitation.

UV submitted that '[t]he endless devolution of legal and moral responsibility within these chains results in significant challenges for enforcement and compliance.' It submitted that such arrangements allow the principal entity to defer, avoid and ignore moral and legal responsibility for the employment of people who perform work for them, to what is usually a much smaller, less stable entity:

> *Hosts and principals often express surprise and dismay when they find out that the people working for them are being exploited or ripped off despite the exploitation occurring at their own business or premises. They always blame the labour hire agency or contractor. Labour hire and subcontracting often allows a host or primary contractor to consciously ignore the manner in which the employees engaged at their work sites are paid and treated.*[1636]

1634. ITCRA, Submission no 39, 7.

1635. Maria Azzura Tranfaglia, Melbourne University, Academic Forum, 25 May 2016.

1636. UV, Submission no 98, 17.

ASU Authorities and Services submitted that the practice of contracting out local government services is the principal – though by no means only – cause of precarious employment within the local government sector in general: 'Precarious employment is inherent in contracting arrangements – after all contracts expire, must be re-tendered and the possibility exists for a new contractor to win the work from the previous contractor, leaving the workforce in limbo.'[1637]

The contract cleaning industry, where supply chains and outsourcing are extremely prevalent, has already been examined at 4.2.3. Other industries in which the Inquiry heard supply chains were prevalent included the call centre industry and the security industry.

ASU Private Sector submitted that the outsourcing of call centre work to the contract call centre industry has resulted in significant worker insecurity. It submitted that the results of its 2009 call centre industry survey demonstrated that stress related to job insecurity is a major factor impacting workers in call centres, and that 45% of respondents felt their job was not secure.[1638]

ASU Private Sector submitted that labour hire and temporary employment arrangements in the call centre sector are far more prevalent and represent a much higher proportion of the workforce than in in-house call centres, and other sectors over which the union has coverage and presence.

The union submitted that other features of the contract call centre industry included:

- the high turnover of labour;
- absence of coverage by industrial instruments at the host employer;
- employment of call centre operators 'by the contract' despite the call centre skills being transferrable to other work contracted to the business, and despite some labour hire and fixed term/temporary workers remaining for significant periods of time within one call centre;
- labour hire or temporary employees being subject to the host company's performance appraisal system, implemented by staff of the host employer;
- an absence of explanation or remedy where a long term labour hire placement ceases without explanation; and
- an increase in so called 'independent contractor' arrangements in call centres including an increase in home-based call centre work.[1639]

ASU Private Sector submitted that the conditions of home-based independent contractor call centre workers are particularly concerning, including:

- operators being paid as little as $1.98 per call with no limit on duration;
- operators who do not meet certain 'quality assurance' and 'adherence' targets have their call rate halved for all of the calls that week, with no capacity to find out why or to challenge the decision;
- operators being required to pay for their own costs including superannuation and insurance
- no remuneration for rostering duties of up to three hours per week;
- a requirement to produce a medical certificate if an operator cannot perform a shift; and
- a requirement to re-sign contractual documentation every two weeks.[1640]

UV told the Inquiry that private security services in Victoria are now almost entirely supplied by contract security firms and there is a growing practice within the contract security industry to supplement their directly employed labour force with the use of subcontracted labour. Amongst the examples provided was that of security officers working at special events such as the Spring Racing Carnival or the Melbourne Grand Prix, who may appear to be working

1637. ASU Authorities and Services, Submission no 31, 4.

1638. ASU Private Sector, Submission no 47, 7.

1639. ASU Private Sector, Submission No 47, 8-9.

1640. ASU Private Sector, Submission no 47. 9.

for a single private security company, but are in fact largely engaged by subcontractors – security officers who are supplied by a separate labour hire contractor to work at the venue wearing the principal contractor's uniform and livery. [1641]

At its Melbourne Hearing, the Inquiry heard from Mr Anthony Ellis, a security guard with 28 years experience, about the detrimental effect on wages, conditions and security standards which have resulted from increased use of labour hire and subcontracting arrangements in the industry.[1642]

8.3.2 Franchising

Franchising is:

> *... a method of growing a business in which a franchise owner (franchisee) is granted, for a fee, the right to offer, sell or distribute goods or services under a business system determined by the business founder (franchisor). The franchisor supports the franchised business group by providing leadership, guidance, training and assistance in return for ongoing service fees.*[1643]

In 2015/16, the franchise industry had revenue of $171.6 billion, and employed 570,000 people across Australia. There are 1180 enterprises comprising 92,950 establishments Australia-wide. Of these establishments, 25.1% or approximately 2,333 are located in Victoria.[1644]

The Franchise Council of Australia (**FCA**) submitted that the franchise sector has been a major contributor to the Australian economy.[1645] FCA also submitted that at the core of the success of franchising as a business model is that franchisors and franchisees are able to focus on different business activities, and that the effect of this is that small businesses are enabled to compete effectively against major corporations. It submitted that franchised businesses are often market leaders in their industry; and it is vital that the industry is not hamstrung by inappropriate legislation, regulatory duplication or red tape.[1646]

However, Johnstone et al see a number of risks for workplace law compliance arising from the franchise business model:

> *Outsourcing reaches a pinnacle of sophistication when it takes the form of business format franchising. …*
>
> *This business model allows the work provider and business controller, the originator of a business concept, to derive profits, without investing in any of the tangible assets required for the business, and without taking on the risks and responsibilities of employing any staff. …*
>
> *Many if not most of the risks associated with operating the business will be borne by the franchisees.*[1647]

7-Eleven

Several Inquiry participants noted that the role of franchising has been the subject of considerable recent examination, arising from the much publicised circumstances of the systemic underpayment of many temporary foreign workers across the 7-Eleven convenience store franchise.[1648]

1641. UV, Submission no 98, 9.
1642. Anthony Ellis, Melbourne Hearing, 8 February 2016.
1643. Claudia Burgio-Ficca, *Franchising in Australia*, IBISWorld Industry Report (May 2016), 2.
1644. Ibid, 3.
1645. FCA, Submission no 113, 4.
1646. FCA, Submission no 113, 4.
1647. Johnstone et al (2012), 70; see also Ashlea Kellner, David Peetz, Keith Townsend and Adrian Wilkinson, '"We are very focused on the muffins": Regulation of and compliance with industrial relations in franchises' (2016) 58:1 *Journal of Industrial Relations* 25, 29-30.
1648. See e.g. Maurice Blackburn, Submission no 79, 1; CELRL, Submission no 99, 13; SDA, Submission no 36, 9; Uniting Church, Submission no 57, 7, 12.

A joint Fairfax/ABC *Four Corners* investigation into 7-Eleven, aired in August 2015, exposed systemic exploitation of its largely migrant workforce through underpayments and doctoring of payroll records. The practice was said to be widespread throughout the franchise network.[1649] The investigation quoted a whistleblower as saying:

> *Head office is not just turning a blind eye, it's a fundamental part of their business. They can't run 7-Eleven as profitably as successfully as they have without letting this happen, so the business is very proud of itself and the achievements and the money it's made and the success it's had, but the reality is it's built on something not much different from slavery.*[1650]

A key allegation was that franchisees were conducting a 'half pay scam', whereby the franchisee would record and pay for only half the hours worked by the relevant employee. Many staff were international students, with visa work restrictions of 20 hours per week. Franchisees would threaten to report employees' visa breaches in response to any complaint about salary or working conditions. The range of illegal activity by franchisees was alleged to have extended beyond wage fraud to blackmail and withholding passports and drivers' licences of staff. It was alleged that franchisees continued to underpay staff even after being caught out by investigators from FWO.[1651]

Shortly after reports of the exploitation were aired, 7-Eleven established an independent wage panel, chaired by Professor Allan Fels AO, to investigate claims for underpayment by current and former employees of franchisees. At a Monash Business School seminar in October 2015, Professor Fels described a range of methods of underpayment that had been engaged in by 7-Eleven franchisees, including: simply underpaying by half of the required rate, only reporting half of the hours worked; unpaid training; deductions for losses such as robberies and petrol drive-offs; and the franchisee requiring repayment of salary by accompanying the employee to the ATM. Some students engaged as employees paid the franchisee or their agent a considerable fee prior to coming to Australia, and worked for free to pay the fee off. Some franchisees set up bogus educational institutions, run out of a room upstairs from the store. As at the time of the Monash seminar, 430 underpayment claims had been processed by Professor Fels' panel.[1652]

However, in May 2016, 7-Eleven terminated the independent wage panel arrangements, reportedly due to the panel's refusal to accept conditions which it considered would compromise the independence of its processes.[1653] 7-Eleven has now established its own internal wage repayment program, supported by Deloittes.[1654] According to the wage repayment program website, 648 wage claims have now been determined, to the value of almost $25 million.[1655]

A report by FWO following its inquiry into 7-Eleven found that several franchisees had breached the Fair Work Act through underpayment of employees and falsification of wages

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1649. ABC *Four Corners*, '7-Eleven: The Price of Convenience', 30 August 2015. See also Adele Ferguson, Sarah Danckert and Klaus Toft, '7-Eleven: Investigation exposes shocking exploitation of convenience store workers,' *Sydney Morning Herald*, 29 August 2015, and: http://www.smh.com.au/interactive/2015/7-eleven-revealed/.

1650. See: http://www.smh.com.au/interactive/2015/7-eleven-revealed/.

1651. Ibid.

1652. Allan Fels, Presentation to Monash Business School Seminar, *Falling through the gaps: Employment regulation and the protection of international students, migrant and other vulnerable workers*, Melbourne, 27 October 2015.

1653. Adele Ferguson and Sarah Dankert, '7-Eleven kills independent wage panel', *Sydney Morning Herald*, 11 May 2016; see also Adele Ferguson and Sarah Dankert, '7-Eleven 'spooked' by large claims', *The Age*, 14 May 2016.

1654. 7-Eleven, Wage Repayment Program, at: http://www.wagerepaymentprogram.com.au/.

1655. Ibid.

records.[1656] Although finding that 7-Eleven head office was not liable for the franchisees' conduct, FWO was critical of the company's failure to implement measures to prevent the conduct from occurring. Despite this, FWO determined that it did not have a sufficient basis to bring proceedings alleging that 7-Eleven was liable as an accessory to the contraventions under s 550 of the Fair Work Act.[1657]

FWO has brought a number of successful enforcement proceedings against 7-Eleven franchisees in respect of underpayments and other Fair Work Act breaches.[1658]

The 7-Eleven underpayments issue led to media speculation that other franchise enterprises may be similarly affected. For example in September 2015, *The Age* reported allegations of similar practices of underpayment in the franchise stores of Bakers Delight, United Petroleum, Subway, Dominos and Nando's.[1659]

SDA submitted to the Inquiry that the workplace issues it has seen include 7-Eleven employees working double the hours that are on their pay slip, and effectively getting half the pay. SDA submitted another common approach is that employees work correct hours, but are required to give back some wages as cash and this money is often used by the franchisee to pay other employees who do not appear on the books anywhere. SDA submitted that 7-Eleven employees have to compensate the franchisee for losses arising from shoplifting and, if their cash register is short, they have to make up the difference in the register at the end of their shift.[1660]

SDA described 7-Eleven employees as extremely vulnerable, young and in a foreign country, without the normal family and community support networks to seek advice from. Concern about visa breaches has resulted in a power imbalance and: 'a veil of silence sitting over this company, for a number of years. What we are seeing now is the lid being lifted on that—and not before time.'[1661]

CELRL submitted that the 7-Eleven case highlights some key problems facing regulators, seeking to curb employer non-compliance in franchises, in particular the challenges of effective detection and enforcement of minimum employment standards in 'fissured' workplace arrangements. It refers to investigative difficulties and limited deterrence effects because of the doctrine of limited liability and phoenix activity. CELRL submitted that the 7-Eleven case:

> *…shows that punishment of the putative employer (i.e. the franchisee) will not necessarily be effective in addressing some of the key drivers of compliance behaviour, which may be determined by the franchisor. Notwithstanding the fact that FWO had brought a series of enforcement proceedings against individual franchisees over the past five years, non-compliance with workplace laws appeared to remain both systemic and sustained within the 7-Eleven franchise network. It has been argued that this poor compliance behaviour may have been driven, at least in part, by the relevant business model.*[1662]

In contrast, FCA submitted that franchised brands are 'typically a force for good' and typically more compliant than other small businesses, because of strong internal systems, training and the need for accuracy in franchisee record-keeping. FCA submitted, however, that because franchised brands typically punch well above their weight in terms of profile and brand recognition they can sometimes be more visible than other businesses. It submitted that challenges faced by an entire industry are sometimes inappropriately focused upon franchised businesses because of this visibility. It submitted that:

1656. FWO, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven* (April 2016).

1657. On accessorial liability under Fair Work Act s 550, see 8.4.3.

1658. See e.g. *FWO v Mai Pty Ltd and Anor* [2016] FCCA 1481; *FWO v Hiyi Pty Ltd* [2016] FCCA 1634.

1659. Adele Ferguson, 'The labour market's dark side – the case for changing worker exploitation', *The Age*, 26 September, 2015.

1660. SDA, Submission no 36, 10.

1661. SDA, Submission no 36, 11.

1662. CELRL, Submission no 99, 14, citing Adele Ferguson, Sarah Danckert and Klaus Toft, '7-Eleven: A Sweatshop on Every Corner', *The Age*, 29 August 2015.

> *…one does not need to travel far in one's daily routine to discover non-franchised businesses where the cash economy flourishes, GST payments are ignored, OH&S and workplace compliance is likely to be problematic and one suspects record keeping is minimal…. [I]t is a cause of significant frustration to our members that compliance activities and media attention does not focus more closely on these businesses.*[1663]

FCA further submitted that:

> *…although 7-Eleven has borne the brunt of all allegations as it is a major brand there is no doubt that there are very many non-franchised businesses that operate with the protection of relative brand anonymity. Regulators need to ensure they enforce the law without fear or favour across all relevant industries and irrespective of the brand profile of the business. Similarly the problems in the 7-Eleven network were not franchising issues, but related to the 24 hour convenience store industry. It would be wrong to tarnish the franchise sector for a convenience industry issue.*[1664]

FCA also submitted that 7-Eleven was a unique example in that it employed a distinctive franchising model, and is a very large franchising operation.[1665]

CELRL submitted that casual work is more concentrated in franchising than in other commercial arrangements, which may partly reflect the sectors in which franchising is most concentrated, namely retail trade accommodation and food services, including fast food. It submitted that one feature which is unique to franchises, compared to the labour market overall, is that casualisation rates are growing amongst independent and company-owned franchisees, whereas the concentration of casual work has largely plateaued in other parts of the Australian economy. CELRL submitted that this data suggests that there are greater levels of insecure work in the franchise sector than in other parts of the economy.[1666]

Calls for further regulation of franchises

Presently, franchises are regulated by the *Franchising Code of Conduct*, a mandatory industry code made pursuant to the CC Act, and administered by the ACCC.

Hardy argues that the strategic position of head franchisors means they often exercise varying degrees of formal and informal control over the business practices of their franchisees. She notes that the code limits the capacity of a franchisor to terminate a franchisee, and argues that strengthening the termination rights of franchisors by amending the code is one way to ensure that franchisors can promptly halt franchisee misconduct and prevent further worker harm. However, she suggests another more controversial way to address some of the issues outlined above would be to make head franchisors more accountable for workplace contraventions that take place on their watch. She advocates for an approach which will change the 'compliance calculus' of all entities throughout the franchise network, noting that measures such as more rigorous monitoring of franchisee workplace practices and greater employment-related support and assistance for franchisees and workers may serve to ensure that businesses in the franchise network not only survive, but thrive.[1667]

Kellner, Peetz, Townsend and Wilkinson argue that franchises are based on transfer of risk – most obviously the transfer to franchisees of the financial risk involved in opening a branch of a business in a new location, but less obviously the transfer of industrial relations risk. They argue (based on three case studies of Australian food services franchises) that 'to franchisors, "good IR" was exhibited by a lack of known indiscretions. They were more focused on the muffins, on the internal regulation of product quality', than on compliance with industrial relations laws.[1668]

1663. FCA, Submission no 113, 5.
1664. FCA, Submission no 113, 5.
1665. FCA, Submission no 113, 5.
1666. CELRL, Submission no 99, 12.
1667. Tess Hardy, 'Franchising – all care and no responsibility', *The Conversation*, October 29, 2015.
1668. Kellner, Peetz, Townsend and Wilkinson (2016), 40-41.

In 2015, the Australian Greens introduced a bill to enable employees of a franchisee to recover any unpaid wages or other entitlements from the franchisor or its head office entity.[1669] This bill is modeled upon recovery of wages provisions for TCF outworkers (considered further below).

The Liberal/National Coalition took to the 2016 federal election a policy to introduce new protections from exploitation for vulnerable workers, which included imposing additional liability for workplace law breaches upon franchisors.[1670] The Coalition's policy stated that:

> *The 7-Eleven scandal revealed not only a systemic underpayment of workers, but also a widespread practice of franchisees paying their employees the lawful rate, but then coercing them to pay back a certain proportion of their wages to the employer in cash.*
>
> *The Coalition will deliver stronger protection for vulnerable workers by: … introducing new offence provisions that capture franchisors and parent companies who fail to deal with exploitation by their franchisees.*[1671]

The policy also indicated that new provisions would be introduced to apply to franchisors who fail to deal with exploitation by their franchisees:

> *The Fair Work Act will be amended to make franchisors and parent companies liable for breaches of the Act by their franchisees or subsidiaries in situations where they should reasonably have been aware of the breaches and could reasonably have taken action to prevent them from occurring. Franchisors who have taken reasonable steps to educate their franchisees, who are separate and independent businesses, about their workplace obligations and have assurance processes in place, will not be captured by these new provisions.*[1672]

A number of Inquiry participants submitted that franchisors should be liable for franchisee underpayments.[1673]

Overall, however, regulation of the franchise sector is a matter for federal rather than state-level regulation.

8.3.3 Phoenix activity

In 2012, Pricewaterhouse Coopers (**PwC**) prepared a report for FWO on the impact of phoenix activity on the workplace relations system. It defined phoenix activity as:

> *... the deliberate and systematic liquidation of a corporate trading entity which occurs with the fraudulent or illegal intention to:*
>
> - *avoid tax and other liabilities, such as employee entitlements;*
> - *continue the operation and profit taking of the business through another trading entity.*[1674]

Phoenix activity contributes to insecurity in employment, and places workers in a vulnerable position. The PwC report estimates that phoenix activity costs Australian employees between $191 million and $655 million per annum. Further, the report notes that in the lead up to the liquidation of a company as part of a phoenix arrangement, workers are pressured to take leave, have their employment status changed from ongoing to casual and are underpaid.[1675] Employees are often not rehired by the new company. If they are, there will often be a period of

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1669. Fair Work Amendment (Recovery of Unpaid Amounts for Franchisee Employees) Bill 2015.

1670. Liberal/National Coalition, *The Coalition's Policy to Protect Vulnerable Workers*, May 2016, at: https://www.liberal.org.au/coalitions-policy-protect-vulnerable-workers.

1671. Ibid. See also 'Labor promises to protect interns, underpaid franchise workers', *Workplace Express*, 1 July 2016.

1672. Ibid.

1673. SDA, Submission no 36, 13; Western Community Legal Centre, Submission no 62, 74.

1674. PwC, *Phoenix activity: Sizing the problem and matching solutions* (FWO, June 2012), 13.

1675. Ibid.

unemployment, and a loss of capacity to accrue superannuation and other entitlements.

Phoenix activity is also estimated to cost business $0.99 billion to $1.93 billion per annum, along with significant additional costs to government, with the total impact of phoenix activity estimated at between $1.78 and $3.19 billion per annum. In addition, operators engaging in phoenix activity obtain an unfair advantage over their business competitors who are not evading entitlements and other costs such as tax, and debts to other businesses.[1676]

Phoenix activity is often associated with a loss of employees' accrued entitlements. Anderson has argued that where loss of employee entitlements is related to misconduct by directors and managers of the employer company, it is proper that they are held accountable and that compensation for losses caused by the misconduct be obtained. She argues for an increased focus on enforcement of existing statutory provisions and suggests that FWO, rather than ASIC, should take a more substantial role in the protection of employee entitlements and should be equipped with additional investigatory powers and the ability to seek director disqualification.[1677] Anderson has also argued that the provision of the General Employee Entitlements and Redundancy Scheme (now Fair Entitlements Guarantee), whereby the Federal Government provides financial assistance for unpaid employee entitlements where employees lose their job due to the liquidation or bankruptcy of their employer,[1678] has led to an under-provision by businesses for entitlements. She argues that taxpayer money has supported employees who would otherwise have lost their accrued wages, leave and redundancy entitlements, which has socialised a cost that should have been borne by employers.[1679]

Some Inquiry participants expressed concern about phoenix activity, particularly where this is associated with labour hire or other contracting structures.

For example, AUSVEG submitted that one of its primary concerns with the current regulatory system is that it allows for phoenix activity. It submitted that the absence of some kind of accreditation system for labour hire firms means that even if a party is identified as exploiting or abusing workers, it can vanish and begin again under another name quickly and easily to avoid creditors or other legal consequences.[1680]

The AMIEU submitted that in 2011, a worker's arm was crushed and later amputated whilst he was operating an inadequately guarded meat mincing machine at an abattoir in Poowong. It said the worker was employed by a labour hire agency GBP Exports. In 2012, GBP Exports was fined $100,000 over the incident, however the company went into liquidation. The host employer, Poowong Abattoir, is still in operation and workers there are now provided through a new company called GBP Australia.[1681]

CFMEU Construction submitted that phoenix activity has been highlighted as a significant issue in the labour hire industry. It submitted that a typical labour hire phoenix arrangement will be structured as follows:

- a group of companies consisting of several entities includes a labour hire entity;
- the labour hire entity typically has a single director who is not the ultimate 'controller' of the group;
- the labour hire entity has few, if any, assets and minimal share capital;

1676. Ibid, iii.

1677. Helen Anderson, 'Corporate Insolvency and the Protection of Lost Employee Entitlements: Issues in Enforcement' (2013) 26:1 *Australian Journal of Labour Law* 101.

1678. See Department of Employment, *Fair Entitlements Guarantee*, at: https://www.employment.gov.au/fair-entitlements-guarantee-feg.

1679. Helen Anderson, 'Phoenix Activity and the Recovery of Unpaid Employee Entitlements – 10 Years On' (2011) 24:2 *Australian Journal of Labour Law* 141, 161.

1680. AUSVEG, Submission no 22, 4.

1681. AMIEU, Submission no 77, 4.

- the labour hire entity fails to meet its liabilities and is placed into administration or liquidation;
- a new labour hire entity is set up and the labour is moved across to this entity; and
- the process is repeated with the financial benefits from the unpaid liabilities shared amongst the group.[1682]

In contrast, some other submitters said that phoenixing was not an issue particular to labour hire or contracting arrangements. Master Builders submitted that labour hire: 'should not … be tainted with the notion of phoenix arrangements which by their nature are fraudulent in conception and application. The linking trait is one of fraud, not the method by which the fraud is perpetrated.'[1683]

HIA submitted that the mandatory licensing of builders in Victoria, and the home owners warranty insurance system, reduces the ability of directors to utilise phoenix arrangements in the residential construction industry. It submitted that in order to be licensed, residential builders are subject to strict financial and personal probity requirements including a 'fit and proper' person test and 'good character' requirements, and instances of insolvency are relevant for each of these.[1684]

8.4 Regulatory and other responses

8.4.1 Participants' proposals for regulatory reform

A key question which arises from the above discussion is the extent to which the law should regulate business conduct which adversely impacts workers, when that conduct is carried out by a party which is not the employer of the worker.

A similar question arises from the information and evidence set out in Chapters 3 and 4 in respect of labour hire. Accordingly, labour hire is considered as part of the analysis here.

Participants views' differed with respect to the obligations that non-employer parties in supply chains or business structures should hold.[1685]

ACCI submitted that there are limits upon the capacity of a person or organisation engaging labour through a third party to be responsible for policing and bearing the consequences of that third party's non-compliance with its legal obligations, and that: 'the law should not seek to focus on holding third parties responsible for the compliance or non-compliance with others' legal obligations, simply because they may have 'deeper pockets' or a greater 'public profile.'[1686] Similarly, the VFF submitted that the host does not have a role to play in the employer/employee relationship in the labour hire context.[1687]

In contrast, CELRL referred to the example of the FWO Baiada Group Inquiry, relating to the use of labour hire contractors and temporary migrant workers by the Baiada poultry group.[1688] CELRL submitted that FWO had recognised that the competitive procurement processes and poor governance arrangements which characterised the Baiada arrangements can (and did)

1682. CFMEU Construction, Submission no 27, citing PWC (2012); and Australian Government, *Action against fraudulent phoenix activity: Proposals paper* (November 2009), at: http://archive.treasury.gov.au/documents/1647/PDF/Phoenix_Proposal_Paper.pdf.

1683. Master Builders, Submission no 38, 11.

1684. HIA, Submission no 45, 14.

1685. Participants' views regarding independent contracting are summarised at 8.2.4.

1686. ACCI, Submission no 55, 6.

1687. VFF, Submission no 49, 7.

1688. Australian Government, Fair Work Ombudsman, *A report on the Fair Work Ombudsman's Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales*, June 2015; see also 4.2.2 and 4.3.1.

combine to create an environment ripe for worker exploitation. CELRL further highlighted the 'transfer costs and risks associated with the engagement of labour to an extensive supply chain of contractors responsible for sourcing and providing labour.'[1689] CELRL submitted that many of the measures which have now been implemented by Baiada could be adopted by principal contractors/host firms in order to better ensure workplace relations compliance throughout the production network, particularly in sectors which are notorious for non-compliance such as cleaning and security. CELRL also raises the prospect of these practices applying further up the contracting chain, such as in relation to supermarkets.[1690]

Several Inquiry participants proposed that the Victorian Government implement regulation of supply chains in various forms, as a regulatory response to address problems in the operation of labour hire, franchising, outsourcing, insecure work and the treatment of vulnerable workers. Transparency of contracting arrangements throughout a supply chain was a key factor for many submitters.[1691] ASU Private Sector submitted that the Victorian Government should require employers at the head of supply chains to keep detailed records of the supply chains operating within their business; and for that information to be available for inspection by the compliance unit associated with a labour hire licensing system, and by relevant unions.[1692]

The GLA outlined its efforts to regulate supply chains in the UK, referring to the importance of supply chains being aware of signs of forced labour and exercising due diligence, and submitting that prevention is a key to improved compliance in supply chains. The GLA has therefore engaged in raising awareness of the signs of forced labour, and providing guidance on what to review, how to spot signs of forced labour, ground rules for closer working with the supply chain, and an accredited training course for staff operating in supply chains.[1693]

8.4.2 Examples of supply chain regulation

There is no specific regulatory framework applying to supply chains in Victoria or Australia. However, there are three recent models of regulation which have been used in industry-specific circumstances.

Textile industry model

The TCFUA submitted that in the textile industry, labour supply chains are often long and complex, which can lead to a lack of transparency in contracting arrangements, and make it difficult to identify and remedy instances of exploitation.[1694] There is a significant body of academic literature which has documented contracting chains and the use of home-based workers in that industry.[1695] Australia has also developed a comprehensive regulatory framework for textile industry supply chains, reflected in the Fair Work Act,[1696] the relevant modern award[1697]

1689. CELRL, Submission no 99, 10.

1690. CELRL, Submission no 99, 11.

1691. UV, Submission no 98, 24; ASU Authorities and Services, Submission no 31, 18.

1692. ASU Private Sector, Submission no 47, 17.

1693. GLA, Submission no 15, 6.

1694. TCFUA, Submission no 92, 4.

1695. See e.g. Rosaria Burchielli, Annie Delaney and Kylie Coventry, 'Campaign strategies to develop regulatory mechanisms: Protecting Australian garment homeworkers' (2014) 56:1 *Journal of Industrial Relations* 81, 102; Igor Nossar, Richard Johnstone, Anna Macklin and Michael Rawling, 'Protective legal regulation for home-based workers in Australian textile, clothing and footwear supply chains' (2015) 57:4 *Journal of Industrial Relations* 585; Michael Rawling, 'Cross-jurisdictional and other Implications of Mandatory Clothing Retailer Obligations' (2014) 27:3 *Australian Journal of Labour Law* 191; Annie Delaney, Rosaria Burchielli and Tim Connor, 'Positioning women homeworkers in a global footwear production network: How can homeworkers improve agency, influence and claim rights?' (2015) 57:4 *Journal of Industrial Relations* 641.

1696. Fair Work Act Part 6.4A.

1697. *Textile, Clothing, Footwear and Associated Industries Award 2010*.

and complemented by a number of schemes established through state legislation.[1698]

Key features of supply chain regulation in the textile industry include:

- a requirement for supply chain participants who arrange for work to be performed on their behalf to be registered, and to only deal with other registered participants;[1699]
- a requirement to keep and file quarterly lists detailing supply chain activity;[1700]
- requirements to document the details of each engagement with a worker, directed at demonstrating compliance with the minimum award terms and conditions;[1701]
- provisions which require minimum terms and conditions to be afforded to outworkers, irrespective of their formal status as employee or contractor;[1702] and
- provisions allowing recovery of unpaid remuneration to be traced up the supply chain to parties other than the directly engaging party.[1703]

The TCFUA described the outworker model as a key and effective tool in ensuring transparency in contracting and supply chains in the TCF industry, and protecting the rights of vulnerable outworkers, and called for its expansion to other industries.[1704] Western Community Legal Centre proposed outworker protections in the Fair Work Act as a potential model for supply chain regulation in other industries such as horticulture, food production, distribution, retail, hospitality, cleaning, security, construction and other industries where workers at the bottom of the chain are vulnerable to exploitation.[1705] Maurice Blackburn also submitted that the outworker model of shifting compliance responsibilities to an ultimate beneficiary could be used in other supply chain industries and franchising industries where the risk of exploitation of vulnerable workers is high; this creates an incentive for the ultimate beneficiary to ensure that there is compliance with industrial laws by the direct employers of vulnerable workers.[1706] ASU Private Sector also submitted that this approach had been an effective tool for ensuring transparency in contracting and supply chains for vulnerable outworkers for many years.[1707]

A voluntary code also exists in the TCF industry, which supplements regulatory measures.[1708]

Transport industry model

In 2006, Mayhew and Quinlan described how changes to the long haul road freight industry in the previous 20 years, such as supply chain rationalisation, economic concentration of road freight users such as supermarkets, new work systems and government policies, had intensified competition, lowered operator returns and encouraged an array of cost-saving employment practices. These practices included increased subcontracting of driving tasks and use of contingent work and pay systems (such as delivery time bonus/penalties and linking pay to miles/kilometres travelled).[1709] The authors described these changes as enabling

1698. See e.g. *Outworkers (Improved Protection) Act 2003* (Vic).

1699. *Textile, Clothing, Footwear and Associated Industries Award 2010*, F.3.1.

1700. Ibid, F.3.3.

1701. Ibid, F.3.2, F.4.2.

1702. Fair Work Act Part 6.4A, Division 2.

1703. Ibid, Division 3; *Textile, Clothing, Footwear and Associated Industries Award 2010*, F.8.

1704. TCFUA, Submission no 92, 4-5.

1705. Western Community Legal Centre, Submission no 62, 72.

1706. Maurice Blackburn, Submission no 79, 7.

1707. ASU Private Sector, Submission no 47, 17.

1708. See: http://ethicalclothingaustralia.org.au/.

1709. Clare Mayhew and Michael Quinlan, 'Economic Pressure, multi-tiered subcontracting and occupational health and safety in Australian long haul trucking' (2006) 28:3 *Employee Relations* 212, 212-3.

large transport operators to become 'logistics' firms that largely outsource delivery to a raft of smaller operators, using an increasingly contingent workforce.[1710] They also pointed to evidence indicating a connection between economic pressure, the expansion of contingent work and negative OHS outcomes.[1711]

A 2008 National Transport Commission Report further examined the connection between rates of pay and safety in the road transport industry. It found that permitting the market to impose unsustainable payment levels on employees and owner-drivers, at the same time as permitting payment systems rewarding drivers who drive fast or worked long hours, were at odds with other nationally agreed safety reforms. The Commission endorsed the establishment of a national scheme for setting minimum safe rates for employees and owner drivers in the heavy vehicle industry.[1712]

In response, the former Labor Government established the Road Safety Remuneration Tribunal (**RSRT**) which commenced operating on 1 July 2012.[1713] Its functions included establishing minimum remuneration and other conditions for employees and independent contractors operating in the road transport industry.[1714] Rawling and Kaine (2012) argued that the RSRT had the potential to address the hazardous work practices arising from poor pay rates through development of a safe rates system across Australia, including client responsibility for those rates and planning for safe work performance.[1715]

Ai Group submitted to the Inquiry that the RSRT had been imposing anti-competitive arrangements on industry and distracting government and industry attention and resources away from the measures which are widely recognised as improving road safety, such as: risk identification and control; improved roads; fatigue management; education and training; drug and alcohol policies; use of technology; and strong compliance mechanisms. Ai Group called for the disbandment of the RSRT without delay.[1716]

The RSRT's first order specified contract and other requirements in the retail and long distance sector (without setting minimum rates),[1717] but did not go far enough according to Johnstone, Nossar and Rawling. They contended 'that the tribunal's first order primarily imposes obligations on direct work providers and drivers without making large, powerful consignors and consignees substantively responsible for driver pay and safety.'[1718]

The RSRT made its first substantive minimum remuneration order in December 2015, which was to take effect in April 2016.[1719] However, opponents of the road safety remuneration framework mounted 'a campaign against both the order and the RSRT itself, arguing that the new system would send smaller (and often family-owned) operators out of business.'[1720]

1710. Ibid, 213.

1711. Ibid, 212.

1712. National Transport Commission, *Safe Payments – Addressing the underlying causes of unsafe practices in the road transport industry* (October 2008), Executive Summary.

1713. *Road Safety Remuneration Act 2012* (Cth).

1714. Ibid, Part 2.

1715. Michael Rawling and Sarah Kaine, 'Regulating supply chains to provide a safe rate for road transport workers' (2012) 25 *Australian Journal of Labour Law* 237, 248.

1716. Ai Group, Submission no 53, 37.

1717. *Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2014.*

1718. Richard Johnstone, Igor Nossar and Michael Rawling, 'Regulating Supply Chains to Protect Road Transport Workers: An Early Assessment of the Road Safety Remuneration Tribunal' (2015) 43 *Federal Law Review* 397.

1719. See *Re Third Annual Work Program* [2015] RSRTFB 15; and C*ontractor Driver Minimum Payments Road Safety Remuneration Order 2016*.

1720. Stewart et al (2016), [7.72].

The Federal Government responded by abolishing the RSRT in April 2016.[1721]

In light of these recent developments, the Victorian Government has limited capacity to influence the Federal Government in respect of matters relating to the transport industry.

TWU submitted that a code of practice for tip truck owner drivers should be developed under the *Owner Drivers and Forestry Contractors Act 2005* (Vic) (**ODFC Act**),[1722] to mandate: engagement of drivers on an hourly basis, rather than based on load rates; minimum payments unless a job is cancelled within 24 hours to allow drivers to source alternative work; and the development of a cost model to ensure safety and a reasonable return for the driver.[1723]

The Victorian ODFC Act seeks to improve the position of owner drivers in the road transport industry, by helping them improve their business skills and better understand their cost structures and contracts, and providing a framework for the effective resolution of disputes.[1724] The ODFC Act applies to owner driver businesses that operate a maximum of three vehicles, where the owner also drives one of the vehicles.[1725] Part 7 Division 1 of the ODFC Act provides for the establishment of the Transport Industry Council, a body comprising representatives of unions, employer groups and government.[1726]

Provision is made, pursuant to Part 2 Division 2 of the ODFC Act, for rates and costs schedules to be published. A key function of the Transport Industry Council is to advise and make recommendations to the Minister for Industrial Relations on rates and costs schedules.[1727]

Presently, there are seven rates and costs schedules made pursuant to the ODFC Act, for the following classes of vehicles:

- 1 tonne van (general freight)
- 1 tonne van (courier/messenger);
- 4.5 tonne gross vehicle mass (GVM);
- 8 tonne (GVM);
- 12 tonne (GVM);
- Prime Mover (bogie drive); and
- Semi-Trailer (bogie drive, 6-axle).[1728]

The schedules do not prescribe minimum or other rates that must be paid by a hirer to an owner driver. They provide owner drivers and hirers with information about typical operating costs applying to their business, to facilitate better informed negotiations.

The ODFC Act also facilitates the making of a code of practice in relation to the engagement of contractors.[1729] Presently, the code of practice is reflected in the *Owner Driver and Forestry Contractors Regulations 2006.* It regulates matters such as conduct during negotiations, deductions from remuneration and allocation of work and working arrangements. The majority of the code's provisions are not mandatory. Instead, the code largely provides guidance

1721. Ibid; *Road Safety Remuneration Repeal Act 2016* (Cth).

1722. See Johnstone et al (2012), 114-115.

1723. TWU, Submission no 80, 8.

1724. Victorian Government, Department of Innovation, Industry and Regional Development, Industrial Relations Victoria, *Owner Driver and Forestry Contractors Act 2005 (Vic) Frequently Asked Questions* (December 2006).

1725. Ibid; ODFC Act s 8.

1726. ODFC Act s 56.

1727. ODFC Act s 14.

1728. Victorian State Government, *Victorian Owner Driver Information Booklet* (June 2016), 13.

1729. ODFC Act s 27.

regarding what conduct may breach provisions of the ODFC Act relating to unconscionable conduct and unjust contract terms,[1730] and promotes fair business practices.[1731] The mandatory requirements under the code include requiring a hirer to provide a written statement for deductions from invoiced fees,[1732] a prohibition on penalty payments[1733] and prohibition on contract termination due to temporary illness or family responsibilities.[1734]

The schedules cover a wide range of vehicles in the various weight classes, and most likely already apply to tip truck drivers. Similarly, the code also likely applies.[1735] However, in light of the issues described at 8.2.4, there is merit in the Transport Industry Council exploring whether a comprehensive, industry-specific rates and costs schedule and/or code could be developed for the tip truck industry. I note that the particular features which the TWU seeks to have incorporated in such a schedule go beyond the present scheme of the ODFC Act, which is primarily facilitative rather than mandatory. However, a facilitative scheme could go some way towards addressing the particular issues in that industry.

Recommendation 30:
I recommend that the Victorian Transport Industry Council give consideration to developing a comprehensive, industry based rates and costs schedule and/or code under the *Owner Drivers and Forestry Contractors Act 2005* (Vic) which would apply to the tip truck industry. This schedule should be primarily facilitative, and not mandatory in nature.

Another issue with the application of the present scheme to the tip truck industry is the threshold at which the requirement for a hirer to provide a driver with the relevant rates and costs schedule is triggered. The ODFC Act requires hirers to provide a copy of the relevant schedule to an owner driver only where the owner driver is hired for a period of at least 30 days, or more than 30 days within a three month period.[1736] As the evidence from the TWU demonstrated, the ad hoc nature of engagement of tip truck drivers may mean that these threshold requirements are sometimes not satisfied.

Recommendation 31:
I recommend that the Victorian Government review the threshold requirements upon hirers to provide the applicable rates and costs schedule to owner drivers under s 16 of the *Owner Drivers and Forestry Contractors Act 2005* (Vic), so as to ensure that the requirement is triggered based on the usual hiring practices in the tip truck industry.

Cleaning industry model

In the contract cleaning industry, a non-regulatory model has been applied in recent years. The model involves using voluntary industry based supply chain conduct to encourage parties higher up the supply chain to influence compliance with industrial laws by parties down the chain who are engaging workers. UV developed the Clean Start campaign, which involved head contractors signing up to the Clean Start Agreement, and governments and property owners tendering for contract cleaning services responsibly.[1737]

1730. ODFC Act ss 31, 32, 44(2).
1731. ODFC Regulations Schedule 1, 1.
1732. ODFC Regulations Schedule 1, 15(5).
1733. ODFC Regulations Schedule 1, 17.
1734. ODFC Regulations Schedule 1, 20.
1735. ODFC Regulations Schedule 1, 3, provides that the Code applies to hirers and owner drivers.
1736. ODFC Act s 16(3)-(4).
1737. See: www.cleanstart.org.au.

The former Labor Government implemented procurement principles to ensure cleaners received a living wage,[1738] however these were revoked by the Coalition Government in 2015.[1739]

The Victorian Government has procurement policies intended to ensure fair treatment of public school cleaners.[1740]

8.4.3 FWO activity in regulating supply chains

FWO has been particularly active in recent years in seeking to ensure parties at the top of supply chains take responsibility for underpayments and other breaches of workplace laws within their supply chain. In a recent media release,[1741] the Ombudsman Ms Natalie James described the organisation's findings about the role of Woolworths in addressing conditions of the contracted trolley collectors at its supermarkets, as follows:

> *Once again we find a big, established company at the top of a chain that involves worker exploitation, reaping the benefit of underpaid labour while failing to keep sufficient watch on what its contractors are paying the workers. …*
>
> *Multi-tiered sub-contracting arrangements created a faceless workforce at some supermarket sites and an entrenched culture of non-compliance in the supply chain.*
>
> *…*
>
> *The community is tiring of established businesses claiming they 'did not know' what was going on in their networks and labour supply chains, while at the same time failing to put adequate governance arrangements in place.*
>
> *You see no evil when you hold your hands over your eyes!*
>
> *With so many unauthorised layers of contracting, there were cases where the underpayment of workers was inevitable, with the insufficient money being paid by Woolworths for all the contractors to make a profit while meeting their employees' entitlements.*
>
> *Woolworths, like many other companies, says it takes its responsibilities under workplace laws very seriously. A decade after we first started investigating allegations of exploitation at its sites, I need more than words from Woolworths. It's time for Woolworths to show us all that it means it, and to commit to action.*[1742]

FWO has also recently explained its supply chain focus as follows: 'It is now business as usual for us to investigate the drivers of behavior in complex supply chains and develop strategies to shine a light on and stamp out non-compliance with workplace laws.'[1743]

1738. See: http://www.unitedvoice.org.au/tender/government.

1739. Phillip Thompson, 'Cleaners face wage cut under Prime Minister Tony Abbott as contracts expire,' *Canberra Times*, 9 March 2015.

1740. Victorian Department of Education and Training, 'School Contract Cleaning', at: http://www.education.vic.gov.au/school/principals/infrastructure/Pages/cleaning.aspx; see further 9.2.3.

1741. Natalie James, *You see no evil when you hold your hands in front of your eyes* (FWO Media Release, 25 June 2016), at: https://www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/june-2016/20160625-wooliestcopeed. See also Natalie James, *Directors exposed as we lift the corporate veil* (FWO Media Release, 23 June 2016).

1742. Ibid; See also FWO, *Inquiry into trolley collection services procurement by Woolworths Limited* (June 2016).

1743. FWO, 'The view from the top – building a culture of compliance in Australia's labour supply chains', *Address to the Australian Labour and Employment Relations Association National Conference by Natalie James, Fair Work Ombudsman* (27 May 2016), 2; see also FWO, '"The good", "the bad" and "the ugly" – navigating the road to compliance', *Address to Australian Industry Group PIR Conference by Natalie James, Fair Work Ombudsman* (2 May 2016), 8.

A key mechanism utilised by FWO in its campaign to increase responsibility for compliance with workplace laws in supply chains has been the accessorial liability provisions in the Fair Work Act. Section 550 of the Fair Work Act provides as follows:

> *(1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.*
>
> *(2) A person is involved in a contravention of a civil remedy provision if, and only if, the person:*
>
> *(a) has aided, abetted, counselled or procured the contravention; or*
>
> *(b) has inducted the contravention, whether by threats or promises or otherwise; or*
>
> *(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or*
>
> *(d) has conspired with others to effect the contravention.*

Over recent years, FWO has actively sought to utilise s 550 to establish legal responsibility for contraventions of workplace laws to parties not directly legally responsible for compliance. In 2014/15, 26 of 33 civil penalty matters instigated by FWO, then decided by a court, involved penalty orders against an accessory.[1744]

The capacity for s 550 to be utilised to attribute accessorial liability to a third party for breaches of the Fair Work Act was the subject of submissions to the Inquiry.

ACCI referred the Inquiry to comments from FWO that: '[b]usinesses that benefit from the labour of underpaid workers in their supply chain risk legal liability and damage to their reputation'.[1745] ACCI submitted that this provides sufficient deterrence for businesses against knowingly engaging workers through labour hire agencies who are not being paid in accordance with legal obligations. ACCI's submission also referred to s 550 of the Fair Work Act in this context.[1746]

However, CELRL submitted that so far, there have only been a handful of cases in which s 550 has been used against a separate corporation which is said to be 'involved in' a contravention of workplace laws by the direct employer, and there remains a level of uncertainty about the scope and operation of this provision. CELRL submitted that a recent case brought by FWO in relation to a security contractor shows that it is not impossible for s 550 to be used against a principal contractor in respect of workers which have been employed by a third party entity.[1747]

On most occasions, the accessorial liability provision is used to attach liability to an individual director or officer involved in the decision making which led to the relevant contravention.[1748] However, there have been a small number of matters in which a separate corporation has been held liable pursuant to s 550 for the employment law breaches of another corporation, including in a contracting chain.

Recent high profile examples of this can be found in a series of proceedings initiated in 2014 by FWO regarding the underpayment of trolley collectors who performed work, subject to supply chains with a number of parties, for Coles supermarkets. FWO commenced proceedings against Coles along with a number of other parties in the relevant supply chain,

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1744. FWO, *Annual Report 2014-15*, 34.

1745. ACCI, Submission no 55, 6,citing Fair Work Ombudsman, *Annual Report 2014-15*, 9.

1746. ACCI, Submission no 55, 6.

1747. CELRL, Submission no 99, 23.

1748. Tess Hardy and John Howe, 'Chain Reaction: A Strategic Approach to Addressing Employment Non-Compliance in Complex Supply Chains' (2015) 57(4) *Journal of Industrial Relations* 563. See e.g. *FWO v Konsulteq and Ors* [2015] FCCA 1882; *FWO v Liquid Fuel Pty Ltd and Ors* [2015] FCCA 2694; *FWO v Singh* [2016] FCCA 1335; *FWO v Step Ahead Security Services Pty Ltd and Anor* [2016] FCCA 1482.

as well as the direct employers of the workers. The litigation against Coles was resolved by Coles voluntarily entering an enforceable undertaking and agreeing to back pay the employees of the subcontractors. However, the litigation against other contracting parties continued, and a number of other contracting parties have been held liable pursuant to s 550.[1749]

In November 2015, a security company was found liable pursuant to s 550 for underpayments by its subcontractor to the subcontractor's employees.[1750]

However, a key limitation with the current formulation of the accessorial liability provision is the degree of intentional involvement and specific knowledge which courts have held to be required by the accessory, based on the jurisprudence in respect of a similar provision in the Australian Consumer Law. For this reason, FWO determined not to pursue accessorial liability against the 7-Eleven head office, notwithstanding the systemic nature of franchisee breaches in that case.[1751]

8.4.4 The role of supply chain price pressure

Some Inquiry participants suggested that a factor contributing to non-compliance with workplace law by labour hire companies and other employers at the bottom of supply chains is the downward price pressure from major retailers and Australia's main supermarket chains.

Underhill and Rimmer observe that:

> *Australia's two major supermarket chains [have] forced harsher contracts on produce suppliers and processors. Recent movements to curb the abuse of retailer market power have been met with proposals from Woolworths, Coles and the Australian Food and Grocery Council for a voluntary code of conduct which may not solve the problem. It is likely that growers transmit these pressures to their workforce.*[1752]

In its Baiada Inquiry, FWO cited an IBISWorld Report which identified that: 'Intensive discounting undertaken by the major supermarkets is reported to have placed downward pressure on profit margins in the industry which has led to diminished profits at the processing level.'[1753]

Professor David Whyte stressed the importance of a system of labour hire regulation ensuring that accountability is placed not merely at the bottom end of the supply chain, but instead takes account of the levels where key decisions are taken to deliberately drive conditions down and where the risks are created. He suggests a way of doing this is to incorporate a reporting mechanism in the supply chain that obliges the principal buying companies to demonstrate awareness of the origins of produce, and of labour conditions in firms they contract with, and to use this mechanism to trigger liability when they knowingly allow regulations to be breached.[1754]

MADEC observed that the fear of penalty does not worry unlawful labour contractors or growers, however demand side implications for contracts influence them; it submitted that reputation and upstream pressure has a greater impact than penalty.[1755]

1749. See e.g. *FWO v South Jin Pty Ltd* [2015] FCA 1456; *Fair Work Ombudsman v South Jin Ltd* (No 2) [2016] FCA 832; *FWO v Al Hilfi* [2016] FCA 193. See also the detailed discussion of these and other relevant decisions in Hardy (2016 *AJLL*), 87-90.

1750. See: https://www.fairwork.gov.au/about-us/news-and-media-releases/2015-media-releases/november-2015/20151120-sis (the Federal Circuit Court's decision in this matter, involving Security International Services Pty Ltd, has not been published).

1751. FWO (April 2016), 70-72.

1752. Underhill and Rimmer (forthcoming), 16 (citation omitted).

1753. Australian Government, Fair Work Ombudsman (2015), 7, citing Lin Ryan, *Poultry Processing in Australia*, IBISWorld Pty Ltd (February 2014).

1754. Professor David Whyte, Submission no 17, 4.

1755. MADEC, Submission no 9, 3.

One labour hire agency told the Inquiry in closed hearing:

> *I think the other way would be supply chain potentially, so where does this stuff end up? Now, if it's lettuce for McDonald's, you know, or Coles, if it's table grapes of Woolies … they'll come out and audit farms … or that they have a requirement for a cement floor in a coldroom … For example, is it that hard to see if the supply chain is able to extend that order to HR? How do you engage people and what is the method of engagement? Would it add cost to the end consumer? Possibly. Probably. If it would mean more jobs for local people and stop youth drain from regional centres that might be a win as well, but as I say, they're already auditing around food safety standards if that supply chain can do the same around IR and HR.*[1756]

The Senate Work Visa Report made the following observations:

> *Numerous submitters and witnesses remarked on the highly competitive nature of various supply chains, the squeeze on profit margins, and the consequent downward pressure on the wages and conditions of workers.*[1757]

There have been some recent moves to seek to address labour exploitation through supply chain mechanisms.

PMA-ANZ is the peak body for members of fresh food supply chains, including major retailers such as supermarkets and fast food chains. It outlined to the Inquiry the steps it had taken in response to allegations of malpractice by labour hire agencies in the industries it represents.[1758]

PMA-ANZ has been exploring industry-based solutions to regulating labour hire. It has developed best practice guiding principles for growers who employ overseas workers directly or use labour hire contractors. It is exploring labour hire contract templates including declarations that obligations to workers have been met. It is also considering options such as a 'preferred supplier' approach, labour contractor-funded audits as a contracting precondition, major retailers requiring grower audits and a harmonised standard, and a code of conduct for the industry.[1759]

The Inquiry heard confidentially from one legally compliant labour hire agency that over the last 12 months, increased scrutiny of the industry had resulted in a lot of changed behaviour on behalf of growers and corporations. It regarded pressure from suppliers, particularly the major supermarkets, as a factor contributing to this improvement. This had resulted in increased business for the labour hire agency. [1760]

It has been reported that Coles conducted a confidential national audit of all sites operated by its chicken supplier, Baiada, and worked with regulators, suppliers and other industry participants to address the extent of illegal work practices. Baiada also supplies chicken to Woolworths, IGA, Aldi, McDonald's, KFC, Pizza Hut, Red Rooster, Nando's and Subway. KFC also sought to meet with Baiada and FWO about similar issues.[1761] Similarly, Coles has taken steps to prevent the exploitation of trolley collectors in its supply chain.[1762]

1756. Labour hire agency, Closed Hearing 05, Mildura, 24 November 2015.

1757. Senate Work Visa Report, 317-318.

1758. PMA-ANZ, submission no 85, 1; Michael Worthington, Melbourne Hearing, 8 February 2016.

1759. PMA-ANZ, Melbourne Hearing, 8 February 2016.

1760. Labour hire agency, Closed Hearing 02, Mildura, 23 November 2015.

1761. 'Baiada to negotiate union EA at Adelaide in historic turnaround', *Workforce*, 16 October 2015.

1762. See 8.4.3.

Groutsis, Rimmer, Underhill and van den Broek, in a forthcoming publication,[1763] examine the role of supply chain codes of conduct in addressing exploitation of temporary migrant workers. They note the significance of these codes to be that:

> *they may prevent excessive retailer market power cutting growers' margins thus causing exploitative treatment of [temporary migrant workers]. In Australia, around 50% of the fruit and vegetable market is concentrated between two supermarket chains – Coles and Woolworths - potentially allowing them substantial influence over the employment practices of thousands of farmers at the end of the supply chain. Australia's major retailers have developed policies and ethical codes, typically as part of their corporate social responsibility portfolio.*[1764]

Financial pressures from parties higher up the supply chain have the potential to significantly influence the employment practices of parties at the bottom of the supply chain. This pressure can work both ways, in that it may lead to detrimental outcomes for workers, or it may alternatively be used to promote improvements in employment conditions within the supply chain. Steps by major retailers to effect changes to exploitative working arrangements within their own supply chain are positive and should be encouraged.

Recommendation 32:
I recommend that the Victorian Government take steps to encourage and facilitate the implementation of industry based supply chain regulation by major retailers, addressing exploitation of workers within those supply chains.

1763. Dr Dimitria Groutsis (University of Sydney), Emeritus Professor Malcolm Rimmer (La Trobe University) Dr Elsa Underhill (Deakin University) and Dr Diane van den Broek (University of Sydney), 'Migration Intermediaries and Codes of Conduct: Temporary Migrant Workers in Australian Horticulture' (draft publication, 2016).

1764. Ibid, 14 (citations omitted).

9. ADDRESSING THE IMPACT OF INSECURE WORK IN VICTORIA

Findings and recommendations

Insecure work

9.1

While the very concept of insecure work was strongly contested by some employer groups, I heard many compelling accounts of the extent and impact of non-permanent working arrangements – especially casual and fixed term engagement – experienced by Victorian workers. The outcomes for these workers frequently include financial insecurity, difficulty planning and saving for the future, and stress (including in the management of working time and family commitments).

9.2

Each of the proposals suggested by Inquiry participants for addressing insecure work is squarely within the scope of the Federal Government's regulatory power. For the most part, the various types of insecure work examined in this Report, and factors contributing to insecure work, are matters that can only be regulated at the federal level, given the Federal Government's constitutional powers and Victoria's referral of industrial relations powers.

In addition, many of the proposals are being independently considered in other forums. Rather than traverse what are in some instances well worn debates about many of these issues, I have sought instead to focus on specific actions which may be taken by the Victorian Government, to address those issues which were most prominently raised with the Inquiry.

9.3

The Victorian Government has a potentially important role to play in promoting the adoption of more secure forms of engagement in the labour market. In particular, there are three key mechanisms through which Victoria should pursue this objective.

Victorian Government as employer

9.4

The Victorian Government already has in place a number of commitments to utilise secure forms of engagement in respect of its own public sector workforce, including in the Public Sector Industrial Relations Policies 2015 and the Victorian Public Service Enterprise Agreement 2016.

9.5

The extent to which these various broad principles and commitments relating to secure employment are being observed, in practice, by the Victorian Government is unclear. There is an information gap in respect of these matters, which it is desirable to fill.

Recommendation 33:

I recommend that the Victorian Government, in conjunction with affected employees and their representatives, develop and implement a process for monitoring and assessment of the extent to which the secure employment commitments in the Victorian Public Service Enterprise Agreement 2016 are being adhered to; the extent to which enterprise agreements across the Victorian public sector include similar commitments to limit fixed term and casual forms of engagement; whether such commitments are being observed in practice; any barriers to their observance, and how these may be overcome.

9.6

Whilst I am unable to reach any conclusion about the extent of, or reasons for, the use of fixed term contracting in public education, in my view, its use should be minimised. I do not propose a wholesale revision of the manner in which the Victorian Department of Education and Training organises its recruitment and selection of staff, as I recognise that there will be broader implications which I have not been able to examine. However, in light of the evidence I have heard about the detrimental effects of fixed term contracting on the employees involved, I would encourage the Victorian Department of Education and Training to explore alternatives to mitigate against those adverse effects wherever possible.

Recommendation 34:

I recommend that the Victorian Government through the Department of Education and Training, in conjunction with affected employees and their representatives, review available data on the extent and reasons for use of fixed term employment in public schools, identify areas where its use can be minimised, and implement alternatives to its use.

Victorian Government procurement

9.7

Professor John Howe's extensive body of work has examined the use and effectiveness of government procurement programs to drive particular labour market outcomes. Governments have increasingly utilised the option of 'making government purchases of goods and services conditional upon contractors and supply chains observing desired labour practices linked to job quality', as a 'soft law' alternative to directly imposing employment regulations. Federal and state governments in Australia (including the Victorian Government) have long used procurement mechanisms to pursue various workplace reform and policy objectives in the construction industry.

9.8

In light of the limits on the Victorian Government's legislative power to address the various issues relating to insecure work which were raised with this Inquiry, use of its own purchasing power is an obvious alternative mechanism to effect changes in the employment practices of private sector businesses. Of course, promotion of secure work practices throughout government supply chains would need to be balanced against existing purchasing criteria including value for government expenditure, accountability, probity and minimisation of risk.

Recommendation 35:

The Victorian Government should establish procurement principles or standards that must be met by successful tenderers for a range of contracts with government departments and agencies, including those for the provision of IT, cleaning, security, transport, hospitality and other similar services. The precise application and limits of the scheme (including whether it should apply only to contracts above a specified monetary value) will need to be determined with reference to other competing procurement criteria. The principles/standards should be objective and measurable, however they should be directed towards requiring the successful tenderer to demonstrate that:

- **The organisation predominantly engages workers in secure employment, rather than as casuals or on fixed term contracts (this could be assessed on the basis of the tenderer's provision of information about the composition of its workforce).**
- **Independent contractor relationships are genuine rather than sham arrangements.**
- **Employees are receiving at least the wages and conditions under any applicable industrial instruments (award or enterprise agreement), and applicable legislation (e.g. National Employment Standards under the Fair Work Act, federal superannuation legislation, Victorian long service leave legislation).**
- **Proactive arrangements are in place to ensure health and safety compliance through the tenderer's occupational health and safety management system.**
- **The cost structure of the tender submitted clearly demonstrates how workers will be accorded their legal employment entitlements over the life of the contract.**
- **Appropriate contractual arrangements require any further subcontracting by the primary contractor to include the above principles/standards as a term and condition applicable to the subcontractor's provision of services.**

Best practice standards

9.9

With the exception of a labour hire licensing body (if existing business licensing arrangements cannot be utilised), I am not inclined to recommend that the Victorian Government establish a new body in addition to existing state bureaucracy to implement the various measures which I have recommended throughout this Report.

The measures I am recommending would allow the Victorian Government to play a positive role in the development of best practice standards to address insecure work, through a range of non-legislative or soft law techniques, either in the public sector, or in the private sector through government procurement.

9.1 Impact of insecure work

9.1.1 General

The Inquiry received a number of submissions and heard evidence regarding the impact of insecure work on workers. In addition, there is a considerable number of academic studies examining the impact of insecure work. All of this material is examined in this section.

Dr Woodman, referring to the Woodman et al study,[1765] submitted that there is no evidence that the current generation places a lesser value on job security than previous generations:

> *We have asked the participants a recurring question about the factors that are important when looking for a job. The item that consistently ranks highest is job security. In 2009, at age 20, 86 per cent of participants ranked job security as of high or very high importance in a job. In 2015 this had increased to 95 per cent. (The high concern over job security has also been a constant for our first cohort over more than two decades.)*[1766]

VCOSS submitted that: '[i]nsecure work can have diverse negative effects … including contributing to financial stress, housing instability, poor health and wellbeing, reduced chances of career progression and professional development, and greater risk of unemployment.[1767]

A significant source of information provided to the Inquiry came through submissions from over 600 individuals submitted online through their union and the VTHC. VTHC told the Inquiry that: '[t]hese submissions came from workers across all sectors and industries including health care workers and nurses; hospitality and food workers; teachers and university tutors; actors, construction workers and public servants.'[1768] VTHC said that its analysis of the worker submissions demonstrated that:

- half of workers reported that they did not have a predictable roster to plan their life around, and that they could not take leave without fear of losing their job;
- 18% of workers reported that they could not always pay their bills or buy food each week;
- 25% of workers reported that they could not always pay their rent or mortgage each week; and
- 86% of workers reported that they did not feel confident about the future of their job or income.[1769]

A further summary of these submissions is contained in Schedule 1 of this Report.

A confidential individual submitter from the education sector described lack of job security as having the following impact:

- *it was difficult to plan ahead for other job opportunities, holidays, and social engagements;*
- *disruption of my … practice due to varying hours of work;*
- *varying income from semester to semester. Without a partner, I would not have felt confident about being able to afford rent and bills; and*
- *added relationship stress.*[1770]

1765. See above at 4.1.4.
1766. Dr Woodman, Submission no 23, 2; See also Young Workers Centre, Submission no 82, 10.
1767. VCOSS, Submission no 33, 9.
1768. VTHC, Submission no 86, 5.
1769. VTHC, Submission no 86, 5.
1770. Confidential, Submission no 24.

One worker in the mining industry said this about the impact of insecure work:

> *They make you take unpaid leave to attend training courses and pay for your own courses. They sack you by text with 3 hours' notice. They notify you by text with 3 hours' notice that there is no work or to leave work. You're too scared to take any time off as you would lose your job. You come to work sick. You don't report incidents. There is bullying, intimidation and harassment. There is immense pressure on families. You can't get a home loan as NO permanent job. There's no money in the bank, so you can't socialize, and you can't spend money as you're too far in credit card debt.*[1771]

The AIER submitted that the increase in insecure work involves a shift away from social justice: 'The regulation of relationships in the workplace has been a significant factor in the prosperity and degree of social justice nations like Australia have experienced in recent times. The rise of insecure and precarious work puts these advances at risk.'[1772]

In contrast, VCCI submitted that there is little evidence to support the conclusion that casual, fixed term and seasonal work is inherently bad for employees, and only appropriate for short term engagements. It further submitted that there is little recognition given to the benefits of temporary and flexible working arrangements for both employees and employers. VCCI stated that:

> *...[a]lternative employment forms satisfy the wide variety of preferences across the workforce. Whether it be the autonomy of independent contracting, the flexibility and the higher wage rate typically accorded to casual workers or the reduction in job search costs for the labour hire worker. Each of these employment forms appeals to a large number of workers.*[1773]

VCCI went on to submit that flexible forms of employment can lead to higher levels of workforce participation, improved productivity or lower costs for employers: 'Where flexible forms of employment lower costs, the wider community benefits through lower prices and higher service levels.'[1774]

VCOSS also submitted that some forms of insecure work, such as casual or seasonal work, may suit certain people at certain times in their lives, while others may pursue insecure forms of work as a pathway to more permanent employment.[1775]

Some particular impacts emerging from academic research and submissions regarding the impact of insecure work are set out below.

9.1.2 Financial security

A 2010 Fair Work Australia research report examined recent changes to the Australian labour market as a result of structural changes within the Australian economy.[1776] It found that whilst award reliance had generally fallen among the working population, casual employees were more likely to be award reliant than permanent employees. Women were also more likely to be award reliant than men. This is likely due to the industrial composition of different industries, with women more likely to be employed in service sector industries that also tend to pay lower wages.[1777]

A number of submissions reported difficulties arising from the irregularity and uncertainty of income associated with insecure work.[1778] For example, Dr Woodman submitted (based on the Woodman et al study) that participants reported that insecure work has economic

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1771. VTHC on behalf of individual workers, Submission no 41.
1772. Australian Institute of Employment Rights, Submission no 73, 1.
1773. VCCI, Submission no 25, 4.
1774. VCCI, Submission no 25, 4.
1775. VCOSS, Submission no 33, 11.
1776. Rozenbes (2010), 10.
1777. Ibid, 66.
1778. E.g. VCOSS, Submission no 33, 9; ASU Private Sector, Submission no 47, 4.

consequences, making it hard to budget in the short term or to plan, or save, for the long term.[1779] VCOSS submitted that insecure employment can lead to financial stress, insecurity and greater risk of poverty for workers and their families, as a result of low income from low hourly pay or inadequate hours of work, or irregular and fluctuating income from week to week.[1780]

ASU Private Sector submitted that insecure work can cause adverse superannuation outcomes and lack of retirement income, particularly for women.[1781] The ACTU also submitted that insecure work results in lower accrued superannuation, posing serious issues and broader social problems for workers' retirement. It cites data indicating that:

- 72% of casual workers have superannuation in their current employment or through personal contributions, compared with 98% of ongoing workers; and
- casual full time males receive 98% of the amount of superannuation of a full time permanent male employee, with casual full time females receiving 77% and casual part time males and females receiving 29%.[1782]

9.1.3 Working hours

Venn (2003) examined the incidence of workers who work long or non-standard hours. She found that 15% of the labour force worked all of their working time during non-standard hours.[1783] The author found a strong correlation between educational attainment and skill level, and non-standard work, with lower skilled and lower paid employment tending to take place disproportionately outside of standard business hours.[1784]

Campbell and Chalmers (2008) examined hours of work and job quality in the retail industry. They noted that part time work tends to be divided into 'bad' jobs, meaning casual work, or 'good jobs', meaning permanent employment.[1785] The authors further observed that the Australian retail sector is characterised by high levels of part time employment. This form of work provides cost advantages to the business which allows employers to engage people on shorter shifts, thereby saving during idle times where the shop is not as busy. Part time workers are generally preferred due to the flexible nature of the work. According to the authors, the emerging literature in relation to job quality and employment type indicates that a constant influx of new staff members can lower staff morale. The authors suggest trialing certain techniques to give employees more control in the workplace. This could include the use of employee-choice rostering or increased leave entitlements.[1786]

Kelliher and Anderson (2008) examined the relationship between employee perceptions of job quality and 'flexible working practices'. The authors adopted a broad definition of flexible work, including working from home, compressed working days, and reduced hours, with the common theme being that the employee is freely choosing the way they work according to their own requirements. Based on survey data, they found that generally, participants felt they had control and autonomy over their work and working hours and were positive about their job

1779. Dr Woodman, Submission no 23, 3.

1780. VCOSS, Submission no 33, 9.

1781. See also Robbie Campo, 'Old way of paying for retirement is failing the modern, female workforce', *Sydney Morning Herald*, 2 March 2016.

1782. ACTU, Submission no 76, 20.

1783. Danielle Venn, *Non-standard work timing: evidence from the Australian time use survey* (Research paper 866, Department of Economics, University of Melbourne, 2003), 11.

1784. Ibid.

1785. Iain Campbell and Jenny Chalmers, 'Job quality and part-time work in the retail industry: An Australian case study', (2008) 19:3 *The International Journal of Human Resource Management* 487.

1786. Ibid.

satisfaction. They found 95% of all flexible workers felt they had good work life balance.[1787] However, the opportunities for career advancement were less positive. In particular, part time employees felt they had less time to work on skill development. In conclusion, the authors found that flexible work arrangements had a positive impact on job satisfaction, but a less positive impact on career progression.[1788]

9.1.4 Pathway to permanency

Watson (2013) examined HILDA data for the period 2001 to 2009 in order to determine whether casual employment acts as a bridge to more permanent employment, or whether in fact it serves to trap people into casual work on an ongoing basis.[1789] He found that location and age are two major factors that determine labour market destination outcomes. Whilst younger workers are generally able to use casual employment as a stepping stone to more permanent employment opportunities, the older a worker gets, the more likely they are to find themselves trapped in casual work, with no further opportunities available to them.[1790]

Watson also found that employees who live in areas with high rates of disadvantage are more likely to be engaged in casual employment, with fewer permanent opportunities available to them. Casual employees who are employed by smaller organisations with less opportunity for skill development are generally less likely to find permanent employment.[1791] Watson observed that education levels appeared to have very little effect on the likelihood of a casual employee finding permanent work. He concluded that casual jobs do tend to operate as labour market traps, by design, due to the desire of employers to exert more control over the labour market in a quest for additional flexibility.

9.1.5 Inability to commit to family activities, social activities or study

Skinner and Pocock (2013) examine data from the Australian Work Life Index to demonstrate the negative impact on workers that arises when employees do not use their full entitlement to annual leave.[1792] They found an association between work-life balance and paid leave, with employees who fail to take paid leave reporting higher levels of work-life interference. They observed that this effect was particularly strong for women balancing work and caring responsibilities.[1793] When given a choice between two weeks' additional paid leave and two week's increase in salary, the majority of Australian full time workers would choose more paid leave over a pay increase.[1794] The authors argue that this indicates a high level of support for leave entitlements among Australian workers. They made a number of recommendations, including that casual employees or other employees without leave entitlements should be granted a paid annual leave entitlement.[1795]

Craig and Brown (2015) used data from an ABS Time Use Survey from 2006, in order to examine the association between weekend work and time spent on non-work activities. In particular, the authors were seeking to determine whether employees engaged in weekend

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1787. Clare Kelliher and Dierdre Anderson, 'For better or for worse? An analysis of how flexible working practices influence employees' perceptions of job quality' (2008) 19:3 *The International Journal of Human Resource Management* 419, 426.

1788. Ibid, 427.

1789. Ian Watson, 'Bridges or Traps? Casualisation and Labour Market Transitions in Australia' (2013) 55:1 *Journal of Industrial Relations* 6, 12.

1790. Ibid.

1791. Ibid, 17.

1792. Natalie Skinner and Barbara Pocock, 'Paid annual leave in Australia: Who gets it, who takes it and implications for work-life interference' (2013) 55:4 *Journal of Industrial Relations* 681.

1793. Ibid, 687.

1794. Ibid, 690.

1795. Ibid, 694.

work were able to reschedule typical weekend activities, such as time spent with family, at other times during the week.[1796] The authors found that weekend workers were unable to make up time spent working on weekends at other times during the week. This was usually because employees engaged in weekend work had other responsibilities to attend to during the week, such as childcare. The study found empirical evidence to suggest that Sunday work, in particular, is disruptive to a mother's ability to spend time with her children.[1797] In addition, people who worked on weekends were more likely to spend time alone during the week, indicating that weekend work could lead to increased levels of social isolation during the week.[1798] The authors concluded that weekend work generates work-life conflict to a much greater degree than weekday work. They suggest that these findings provide support for the retention of existing penalty rates arrangements, including a higher rate for Sunday work than for Saturday work.[1799]

Dr Woodman submitted that the social consequences for insecure workers were greater than the financial impacts. The participants in the Woodman et al study reported finding it difficult to combine their paid employment with maintaining relationships with friends, partners and family:

> *'Young people working irregular hours find it very difficult to regularly get together with close friends, or to find the regular periods of time most people need to build new acquaintances into close friends (or, as some complained, intimate relationships). Maintaining these close connections becomes more difficult and requires more coordination.'*[1800]

HACSU submitted that many of its female members who are casual workers cannot commit to attending their children's school concerts, or caring for them when they are ill, as they felt if they do not accept the shifts offered, the employer will cease offering them available shifts.[1801]

A Wodonga worker who made a submission to the Inquiry explained the difficulty she faced as follows:

> *Not knowing from week to week how many shifts I would get, being on standby on the days that I'm not rostered on. Receiving phone calls at all hours of the night/day. Kids miss out on school activities, camps. Not having money to do things on the holidays. Not accruing any holiday, sick or long service leave.*[1802]

HWU submitted a case study of a casual employee seeking to study. The worker has frequently asked his employer for full time work or even permanent part time work so that he can get some certainty around his work hours. However his working hours vary almost every week, and he is offered shifts at short notice. His wish to study has been hampered because he cannot commit to on-campus classes and tutoring. He reported sitting by the phone waiting for his employer to call, and he rarely rejects a shift; every aspect of his life is superseded by the demands of his employer.[1803]

9.1.6 Workplace participation/voice

Some submitters indicated that insecure workers have less participation in the workplace and less workplace 'voice'.

1796. Lyn Craig and Judith Brown, 'Nonstandard employment and non-work activities, time alone and with others: Can weekend workers make up lost time?' (2015) 57:1 *Journal of Industrial Relations* 3 18.
1797. Ibid, 19.
1798. Ibid.
1799. Ibid.
1800. Dr Woodman, Submission no 23, 3.
1801. HACSU, Submission no 35, 16.
1802. VTHC on behalf of individual workers, Submission no 41.
1803. HWU, Submission no 78, 11.

For example, ACTU submitted that casual employment has been linked to feelings of powerlessness, fear, a lack of voice in the workplace and reluctance to speak up about concerns.[1804] Per Capita submitted that:

> *a worker without security does not have to be directly threatened to understand that agitation in relation to their wages, working conditions or safety is problematic: the power imbalance between worker and employer is even greater and more obvious to all involved than in a 'traditional' permanent employment relationship.'[1805] ACTU submitted that the negotiation of working hours is 'commonly a fraught process with workers reluctant to refuse shifts even at short notice or inconvenient times for fear of jeopardising future offers.[1806]*

HWU submitted that health sector employers utilise permanent part-time contracts with low stipulated minimum hours as a mechanism of control over employees, and reduce working hours to the minimum in response to workers joining the union or raising issues about their working conditions.[1807]

One individual worker submitted as follows:

> *I was employed through a labour hire agency more than a year ago. I was asked to unload a container full of sacks of a dusty product onto pallets, when I asked what the product was I got told "not to worry" when I insisted on knowing what the product was and what protective equipment I should wear due to the amount of dust being generated I was told to go home. I did not get a call with more work for a month at least, I had regular work up until I raised the concern.[1808]*

9.1.7 Health and wellbeing

Webber, Pacheco and Page (2015) found that poor health, especially poor mental health, is negatively correlated with workforce participation. The authors expected that people in poor health would be less likely to work in permanent employment and more likely to work in temporary employment. They also expected that part time and casual workers would have poorer health than permanent workers.[1809] Using data from the New Zealand General Social Survey, they found that people with negative mental health status were less likely to be employed in any category.[1810] Moreover, people in permanent and full time work had better health overall than other categories. However, contrary to expectations, they found that there was only a very weak relationship between temporary work and poor health.[1811]

Craig and Brown (2015) reviewed literature demonstrating that non-standard workers have poorer physical and mental health and are more likely to have marital problems than those in standard employment.[1812]

Benach, Vives, Amable, Vanroelen, Tarafa and Muntaner (2014) examined the effect of precarious employment on health status.[1813] By the 1990s, labour market flexibility was seen as a legitimate strategy to reduce unemployment in the face of increasing competition from labour markets within developing countries. This led to organisations undertaking major restructures

1804. ACTU, Submission no 76, 18.

1805. Per Capita, Submission no 89, 2.

1806. ACTU, Submission no 76, 18.

1807. HWU, Submission no 78, 11-12.

1808. VTHC on behalf of individual workers, Submission no 41.

1809. Don Webber, Gail Pacheco and Dominic Page, 'Temporary versus permanent employment: Does health matter?' (2015) 18:2 *Australian Journal of Labour Economics* 169 175.

1810. Ibid, 184.

1811. Ibid, 180.

1812. Craig and Brown (2015), 4.

1813. J Benach, A Vives, M Amable, C Vanroelen, G Tarafa and C Muntaner, 'Precarious Employment: Understanding an Emerging Social Determinant of Health' (2014) 35 *Annual Review of Public Health* 229, 231.

and downsizing as a way to ensure maximum flexibility.[1814] The authors reviewed the existing literature to determine that precarious work has negatively impacted on health outcomes in a variety of ways. They note the strong link between various forms of precarious employment and stress, dissatisfaction, and adverse health outcomes.[1815] The authors therefore contend that reducing the level of precarious work at a societal level could therefore improve community health and wellbeing; and that the impact of employment on health status should be a central consideration when determining policy priorities. Legislation, income transfers, and worker engagement should all be considered as policy tools to minimise the spread of precarious employment.[1816]

Richardson, Lester and Zhang (2012) used nine waves of panel survey data in order to assess the impact of different employment types on survey participants' subjective mental health ratings. Controlling for various factors, such as age, education levels, occupation and socioeconomic status, the authors found that whilst not all employees benefit from casual work, on balance, there is no systematic relationship between mental health and employment status. The authors conclude that mental health depends largely on individual characteristics and circumstances. They suggest that Australia's generous social welfare net may contribute to workers' sense of security and resilience, which may be sufficient to ameliorate any potentially harmful effects of casualised work.[1817]

Some submitters to the Inquiry reported various negative health and wellbeing impacts of insecure work.[1818]

A submission from warehouse worker Christine stated that:

> *I have worked for agencies for over 7 years and that's only because it's hard to get a job that doesn't go through an agency. You have to live off your credit card or you don't eat. The stress and depression you suffer not many people can understand. I wanted to kill myself on many occasions; if it wasn't for my kids I wouldn't be here.*[1819]

Another warehousing worker, Annebelle, said:

> *I couldn't take leave because I was so scared of losing my job. I would get very stressed and tired, but I would still go to work because I was scared of being fired. Every time I was offered a shift, I felt that I had to say yes otherwise I would stop getting shifts. I felt completely insecure.*[1820]

The Inquiry heard from the AEU and a number of ES employees of the DET at its Melbourne hearings. The group of workers told the Inquiry that ES employees are typically employed on fixed term contracts of 12 months' duration. In the final term of the school year, they therefore are required to apply to secure a contract for the following year. Some ES employees are employed on a seven year contract, but are still required to reapply for their positions annually if they are excess to their school's requirements.[1821]

Ms Mandy Brown described the relief she felt at receiving a seven year contract and then the impact of being told that she no longer fitted the school staffing profile and had 10 weeks to find another job:

1814. Ibid, 235.

1815. Ibid, 242.

1816. Ibid, 245.

1817. Sue Richardson, Laurence Lester and Guangyu Zhang, 'Are Casual and Contract Terms of Employment Hazardous for Mental Health in Australia?' (2012) 54:4 *Journal of Industrial Relations* 557, 575.

1818. VCOSS, Submission no 33, 10.

1819. VTHC on behalf of individual workers, Submission no 41.

1820. VTHC on behalf of individual workers, Submission no 41.

1821. AEU, Melbourne hearing, 10 February 2016.

> *This made us feel worthless and undervalued and humiliated, especially when we had to walk back in and continue to keep working as though nothing had happened. Meanwhile my world had been turned upside down. There's a feeling of animosity towards the other ES staff in the team when you don't really have a clear picture about why you were the chosen one, and when you work just as hard as everyone else you start to second guess yourself and your abilities to do your job properly. My eldest child said she felt really sad that I lost my job and she was really worried that we wouldn't be able to afford the things that we need. Some of my worries included how I pay for the mortgage, how I find another job in the timeframe, and will I get enough hours when I do find another job, and how I afford the basic necessities to be able to survive with two kids, and also if I do get my position back will this all happen again and will I be able to handle this stress again every year, especially around Christmas time.*[1822]

Ms Brown told the Inquiry that the following year she was forced to go through the same process again. She described it as follows:

> *When I got in there I felt sick in my stomach. I had sweaty palms and the worse thing was my heart was pounding so fast I thought I was actually going to have a heart attack. I couldn't even express any gratitude towards the principal when he told me that I was going to keep my job, because I was still suffering the physical and emotional stress of the whole situation.*[1823]

Another ES employee, Ms Kerry Jackson, who had been employed on successive contracts, said:

> *The end of the year brings the dreaded … you get that tap on your shoulder, you turn around and the principal says, "Can I see you in your office." You know exactly what that means. I know when I walk in that room I'm going to be within three minutes, my life will go into turmoil, I know what he's going to say and there's nothing I can do about it. … Over the last five years I have not received any pay for the December/January break. … It is extremely stressful, I know that all of us girls have just said how stressful it is, and I don't want to read this, I really want to tell you. It is horrendous, it is gut wrenching, your confidence is just ripped out from under you. I can't actually articulate the way that I think we all feel, and you feel worthless.*[1824]

9.1.8 Job satisfaction

Buddelmeyer, McVicar and Wooden (2013) examined data from the HILDA Survey between 2001/2011 to evaluate job satisfaction of employees engaged in non-standard contingent employment, which included labour hire work and employees on fixed term or 'regular casual' employment.[1825] The authors noted the prevailing hypothesis that employees in contingent or non-standard arrangements are less satisfied than permanent employees, primarily due to the insecurity and anxiety arising from these arrangements.[1826] The authors found that, among male employees, job satisfaction is lower for casual employees than for permanent employees. However, there is no real difference in job satisfaction levels among female casual and permanent workers. The authors surmise that this may be because women value different job characteristics more highly than men.[1827]

The Productivity Commission (2006), using data from the HILDA survey, found that employees in non-traditional employment have varying levels of job satisfaction and wellbeing, making it difficult to generalize about the impact of non-traditional employment on job satisfaction.[1828]

1822. AEU, Melbourne hearing, 10 February 2016.
1823. AEU, Melbourne hearing, 10 February 2016.
1824. AEU, Melbourne hearing, 10 February 2016.
1825. Hielke Buddelmeyer, Duncan McVicar and Mark Wooden, *Non-Standard "Contingent" Employment and Job Satisfaction: A Panel Data Analysis* (Melbourne Institute Working Paper Series Working Paper No. 329/13), 1, 10.
1826. Ibid, 8.
1827. Ibid, 7.
1828. Productivity Commission, *The Role of Non Traditional Work in the Australian Labour Market*, Commission Research Paper (Canberra, 2006), 10.

Employees engaged in non-traditional work have varying degrees of skill level, with casual employees generally less skilled than their counterparts on fixed term contracts. Although fixed term employees, students, and mothers generally report they are satisfied with their employment situation, men engaged in casual work are generally less satisfied with their employment situation.[1829] The report observed that it was difficult to generalise about the impact of employment type on overall wellbeing, as there are many other factors that contribute to this.[1830]

Wilson, Brown and Cregan (2008) compared job quality and satisfaction for permanent and casual employees. The authors noted that most research points to the idea that permanent jobs are higher quality than the equivalent casual position.[1831] They argued that the recent drive for more workplace 'flexibility' has resulted in two different approaches being taken. In high performance workplaces, it involved multi-skilling and other practices which have led to performance benefits for the team. However, in low performing workplaces, it merely involved the use of low-cost casual employees. The lack of job security and skill development for casual employees has meant that casuals are perceived to have lower job quality than permanent employees.[1832] The authors' findings suggest that casual employees have relatively low quality jobs when compared to permanent employees.[1833]

In a 2010 article, Green, Kler and Leeves examined HILDA data between 2001 to 2005 to measure and evaluate the concept of 'quality' as it relates to flexible employment. The authors noted a growing divide between high quality, highly paid and low quality, low paid jobs within the OECD.[1834] They noted that job satisfaction and quality could be measured through both subjective and objective factors. The study found that permanent employees tend to work longer hours and be paid more than casual employees, and casual employees generally have less access to career opportunities than permanent employees.[1835] On the other hand, permanent part time employees tend to have higher satisfaction levels. The authors accounted for this by noting that part time employees are more likely to have freely chosen their working hours. In conclusion, the authors found that casual employment rated below permanent employment on a range of factors, including wages, quality and satisfaction.[1836]

Casuals, pay differentials and job satisfaction

Wooden and Warren (2004) argued that casual workers do not view their employment as undesirable. They noted that definitional grey areas can make it difficult to assess the living standards, wages and satisfaction of casual workers.[1837] The authors found that employees on fixed term contracts are, in fact, more satisfied with their employment than permanent workers. Overall, part time casual employees have very similar satisfaction levels to permanent employees, although full time casual employees and male casual employees do tend to have lower levels of satisfaction than permanent employees. The authors concluded that it is misleading to categorise casual employment as inferior or sub-standard, and that many casual employees have freely chosen to remain casual over other options, with 55% of casual

1829. Ibid. 18.

1830. Watson (2013), 7.

1831. Kelly Wilson, Michele Brown and Christina Cregan, 'Job quality and flexible practices: An investigation of employee perceptions', (2008) 19:3 *The International Journal of Human Resource Management* 473.

1832. Ibid, 474.

1833. Ibid, 484.

1834. Colin Green, Parvinder Kler and Gareth Leeves, 'Flexible Contract Workers in Inferior Jobs: Reappraising the Evidence' (2010) 48:3 *British Journal of Industrial Relations* 605.

1835. Ibid, 609.

1836. Ibid, 623.

1837. Mark Wooden and Diana Warren, 'Non-standard employment and job satisfaction: evidence from the HILDA survey, (2004) 46:3 Journal of Industrial Relations 275, 280.

employees believing they could convert to permanent employment if they wished. On this basis, the authors cautioned against any legislation that could inhibit the take up of casual forms of employment or that would encourage permanent employment over casual work.[1838]

In response, Watson (2005) argued that Warren and Wooden considered only subjective measures of contentment among casual workers, when in fact objective measures of job quality are a more reliable indicator of the true effect of casualisation.[1839] Using earnings data from HILDA, Watson found that part time casual employees earn only a modest premium over permanent full time employees, resulting in their financial penalisation once the financial benefits that permanent employees accrue are taken into account. These findings are in sharp contrast to subjective measures of job quality, with most workers reporting high levels of agreement with the notion that they are fairly paid.[1840] Watson suggested that subjective indices of satisfaction are likely to be positional, rather than absolute. On the basis of the low wage differential between casual and permanent work, he argued that casual jobs are inferior to permanent employment, despite the apparent positional satisfaction of casual workers.[1841]

Similarly, Green, Kler and Leeves (2010) reviewed various studies which indicated that part time workers tend to be less satisfied with their employment than full time workers. They noted that this may be compensated for by a wage differential, such as the casual loading, which exists to compensate workers for reduced job quality and therefore workers in casual positions have higher average levels of satisfaction.[1842] However the authors found that casual workers have lower job satisfaction than permanent employees, and the casual loading of 20% was insufficient to compensate for low satisfaction levels.[1843]

Preston and Yu (2015) examined ABS data regarding the pay differential between part time and full time employees. The authors observed a significant financial penalty, particularly for women employees engaged on a permanent part time basis.[1844] They considered that this pay gap may be explained by the fact that certain industries and occupations are more likely to offer part time employment, and those same industries and occupations are also more likely to be low paid. The authors also considered that the true financial benefit of the casual loading is much less than it would otherwise appear, and is unlikely to be sufficient to offset the loss of leave entitlements.[1845]

9.1.9 Other factors

Underemployment and vulnerability to unemployment were reported by some submitters as impacts of insecure work.[1846] For example, HWU submitted that this is a cause for concern among those interested in the long-term productivity and efficiency of the Australian economy. It submitted that the rate of underemployment is concentrated among relatively disadvantaged groups such as indigenous workers, newly arrived migrants (especially refugees), young people that leave school early, and people that live in rural and remote regions of Victoria.[1847]

1838. Ibid, 295.
1839. Watson (2005), 373.
1840. Ibid, 377.
1841. Ibid, 382.
1842. Green, Kler and Leeves (2010), 607.
1843. Ibid, 611.
1844. Preston and Yu (2015), 31.
1845. Ibid, 44.
1846. VCOSS, Submission no 33, 10.
1847. HWU, Submission no 78, 38, citing M Wilson, *Precarious Work: The Need for a New Policy Framework* (Whitlam Institute, University of Sydney, 2013).

Some participants submitted that insecure work adversely affects training or professional development opportunities for workers.[1848] For example, HACSU submitted that time-limited and casual work create significant barriers for workers' access to training. It referred to a finding of the Industry Skills Council that almost half of casual workers in the health and community services industries did not complete any kind of training. It submitted that: '[t]his training gap has serious implications for the industry in the future.'[1849]

VCOSS submitted that insecure work can contribute to housing insecurity and homelessness.[1850]

9.2 Findings, proposals, and recommendations for addressing insecure work

9.2.1 Introduction

While the very concept of insecure work was strongly contested by some employer groups, I heard many compelling accounts of the extent and impact of non-permanent working arrangements – especially casual and fixed term engagement – experienced by Victorian workers. The outcomes for these workers frequently include financial insecurity, difficulty planning and saving for the future, and stress (including in the management of working time and family commitments).

A number of proposals were made by Inquiry participants to amend the Fair Work Act and extend job security conditions to insecure workers. These included:

- inclusion of insecure workers in the safety net system (for example extending the definition of 'employee') to provide equal entitlements to basic rights including some forms of paid leave, superannuation and insurance;[1851]
- proposals for mandatory conversion of casual employees to permanent employees after a specified period, such as six months' regular and systematic employment;[1852]
- proposals for mandatory or automatic conversion of fixed term employment to permanent employment after a specified period, such as 24 months;[1853]
- making available 'secure employment orders' which would allow insecure workers to elect to convert to permanent employment status;[1854]
- proposals to require regular and predictable hours of work so far as is practicable, such as a minimum weekly engagement after a short period of service;
- proposals to improve union representation rights, as some submitters and witnesses identified a reduction in these rights as contributing to increased worker exploitation or insecure employment;[1855] and
- proposals to expand carers' leave and the right to request flexible work arrangements.[1856]

1848. VCOSS, Submission no 33, 12; ASU Private Sector, Submission no 47, 4.
1849. HACSU, Submission no 35, 13.
1850. VCOSS, Submission no 33, 11.
1851. WIRE, Submission no 13, 12.
1852. HACSU, Submission no 35, 19; IEU, Submission no 81, 11; NUW, Submission no 91, 21.
1853. JobWatch, Submission no 46, 36; also IEU, Submission no 81, 11.
1854. WIRE, Submission no 13, 12.
1855. Sam Popovski, Submission no 11, 2.
1856. WIRE, Submission no 13, 12.

Each of these proposals is squarely within the scope of the Federal Government's regulatory power. For the most part, the various types of insecure work examined in this Report, and factors contributing to insecure work, are matters that can only be regulated at the federal level, given the Federal Government's constitutional powers and Victoria's referral of industrial relations powers.

In addition, many of the proposals are being independently considered in other forums. Rather than traverse what are in some instances well-worn debates about many of these issues, I have sought instead to focus on specific actions which may be taken by the Victorian Government, to address those issues which were most prominently raised with the Inquiry. Accordingly, I have not made any findings or recommendations relating to the above group of proposals.

In addition, there were a small number of other proposals for regulatory change which had little support from Inquiry participants, dealt with matters on the periphery of the Inquiry's considerations, or went obviously beyond what the Victorian Government could meaningfully respond to. I have reviewed all of these proposals, however not every proposal is addressed in this Report.

The Victorian Government has a potentially important role to play in promoting the adoption of more secure forms of engagement in the labour market. In particular, there are three key mechanisms through which Victoria should pursue this objective.

9.2.2 The Victorian Government's role as an employer

Inquiry evidence

Many unions and other participants pressed for the Inquiry to recommend that the Victorian Government reduce or eliminate insecure work practices, and set best practice standards for decent work within the public sector.[1857] Mr David Cragg's submission emphasised that the most important piece of legislation for the Inquiry to consider is the *Public Administration Act 2004* (Vic), and that public sector employment should set appropriate community standards for the treatment of insecure or precarious workers.[1858]

A number of participants suggested that the state government should apply a set of secure work principles, or model employer principles, to its own employment and engagement of workers.[1859] The CPSU submitted that these principles should be established in consultation with public sector unions and the Victorian Public Sector Commissioner.[1860] Dr Murray suggested that these principles could be reflected in a labelling scheme which identifies that relevant workers had the benefit of decent work.[1861]

There were various submissions as to the proposed content of a set of secure work/model employer principles, as well as other standards which the Victorian Government should apply across the public sector. These included:

- a commitment to employment security,[1862] maximising permanent employment across the public sector[1863] and direct engagement opportunities for long standing labour hire workers;[1864]

1857. VTHC, Submission no 86, 4; HACSU, Submission no 35, 5; Young Workers Centre, Submission no 82, 7; Sam Popovski, Submission no 11, 2.
1858. David Cragg, Submission no 43, 1.
1859. Sam Popovski, Submission no 11, 2; CPSU, Submission no 94, 6; Dr Jill Murray, Submission no 16, 4.
1860. CPSU, Submission no 94, 5.
1861. Dr Jill Murray, Submission no 16, 4.
1862. CPSU, Submission no 94, 28.
1863. ANMF, Submission no 88, 4.
1864. ANMF, Submission no 88, 19.

- limits on the use of casual work, and conversion rights for casual workers;[1865]
- limits on fixed term employment[1866] and conversion rights for fixed term employees;[1867]
- access to portable or pooled leave arrangements including annual and personal leave;[1868]
- adequate and regular workplace inductions and a commitment to training and skills development and career development;[1869]
- expanded graduate programs leading to permanent employment,[1870] and no unpaid internships;[1871]
- pay equity[1872] and public sector targets for disadvantaged groups;[1873] and
- fair and reasonable treatment,[1874] such as reasonable hours of work,[1875] adoption of fair rostering practices[1876] and integrity and transparency of employment arrangements.[1877]

Consideration, findings and recommendations regarding government's role as employer

The Victorian Government already has in place a number of commitments to utilise secure forms of engagement in respect of its own public sector workforce.

The government's document *Public Sector Industrial Relations Policies 2015* states 'secure employment' to be one of its 'industrial relations principles', as follows:

> *The Government recognises the importance of secure employment for strengthening Victoria's economy as well as enabling public sector employees and their families to fully participate in the community.*
>
> *Enterprise agreements should limit the use of fixed term and casual labour. Resort to agency or labour hire employees should not be used to undermine the job security of direct employees and should only be relied on in limited circumstances.*
>
> *Parties should consider the inclusion in agreements of a commitment to secure employment. …*
>
> *Whether as part of bargaining or otherwise, employers and unions should work together to identify methods to reduce the use of casual or fixed term engagements where concerns are raised. Employers, in consultation with unions should consider processes to convert casual and fixed term employees to more secure forms of employment where there are ongoing vacancies and taking into consideration merit selection requirements.*[1878]

1865. ANMF, Submission no 88, 17.
1866. ANMF, Submission no 88, 21.
1867. AEU, Submission no 103, 8.
1868. ANMF, Submission no 88, 3.
1869. ANMF, Submission no 88, 3; Sam Popovski, Submission no 11, 2.
1870. Young Workers Centre, Submission no 82, 7.
1871. Young Workers Centre, Submission no 82, 9.
1872. Sam Popovski, Submission no 11, 2.
1873. VCOSS, Submission no 33, 3.
1874. CPSU, Submission no 94, 28.
1875. Sam Popovski, Submission no 11, 2.
1876. ANMF, Submission no 88, 2.
1877. CPSU, Submission no 94, 28.
1878. Department of Economic Development, Transport, Jobs and Resources/Industrial Relations Victoria, *Public Sector Industrial Relations Policies 2015* (June 2016), 5.

The Victorian Public Service Enterprise Agreement 2016 includes the following clauses relating to 'Secure Employment':

> *14.1 The Employer acknowledges the positive impact that secure employment has on Employees and the provision of quality services to the Victorian community.*
>
> *14.2 The Employer will give preference to ongoing forms of employment over casual and fixed term arrangements wherever possible.*

Clause 15.6 provides that:

> *(a) The Employer will not use fixed term contract positions for the purpose of undermining the job security or conditions of full-time ongoing Employees.*

Limitations on the use of fixed term employment are then set out in clause 15.6(b), e.g. specifying that it should only be used for replacing employees on approved leave, filling other temporary vacancies, or for a specified task that is funded for a specific period. Clause 15.6(c) sets a maximum three year period for fixed term appointments.

Clause 15.7 provides, relevantly, that:

> *(a) The Employer will not use casual labour for the purpose of undermining the job security of ongoing Employees, for the purpose of turning over a series of casual workers to fill an ongoing employment vacancy or as a means of avoiding obligations under this Agreement.*
>
> *(b) In accordance with the principle set out in clause 15.7(a), the employment of casuals in all areas covered by this Agreement is limited to meeting short-term work demands or specialist skill requirements which are not continuing and would not be anticipated to be met by existing Employee levels.*

The extent to which these various broad principles and commitments relating to secure employment are being observed, in practice, by the Victorian Government is unclear. There is an information gap in respect of these matters, which it is desirable to fill.

Recommendation 33:
I recommend that the Victorian Government, in conjunction with affected employees and their representatives, develop and implement a process for monitoring and assessment of the extent to which the secure employment commitments in the Victorian Public Service Enterprise Agreement 2016 are being adhered to; the extent to which enterprise agreements across the Victorian public sector include similar commitments to limit fixed term and casual forms of engagement; whether such commitments are being observed in practice; any barriers to their observance, and how these may be overcome.

The Victorian Government Schools Agreement 2013, which applies to fixed term teachers and ES employees, currently contains limits on the use of fixed term employment, although the exceptions to the limits are broadly described. Clause 21 – Staffing – provides that the 'standard mode of employment in the Teaching Service is ongoing. However some fixed term or casual employment will continue to be necessary.'[1879] It provides in clause 21(2)(d) that employees will be employed ongoing, with the following exceptions:

> *(i) when an employee is employed for a fixed period of time to replace an employee who is absent on leave of twelve months or less, other than a parental absence;*
>
> *(ii) when an employee is employed for a fixed period of time to replace an employee during a parental absence he or she will be employed for seven years. Provided that where:*

1879. Victorian Government Schools Agreement 2013, cl 21(2).

- *the employee absent on leave associated with a parental absence returns to duty or his or her period of fixed term employment expires, the replacement employee's employment may cease prior to the expiration of the seven years on the employee being provided with not less than ten weeks' notice of termination.*

- *the employee absent on leave associated with a parental absence is ongoing and does not return to duty at the school, the employee employed to replace the ongoing employee absent on leave associated with a parental absence will be offered ongoing employment subject to a probationary period in accordance with subclause (4);*

(iii) when a person is employed in an education support class position for a fixed period of time and such employment is specifically linked to Student Support Funding (or any successor program), he or she will be employed for seven years. Provided that, where the funding or comparable funding reduces or ceases, the employment may cease prior to the expiration of the seven years on the employee being provided with not less than ten weeks' notice of termination;

(iv) when the principal, as the Employer's representative, has good reason to believe that, should an employee not be employed fixed term, an excess staff situation will arise. This may include predicted enrolment decline determined by the enrolment predictions of the Employer;

(v) when an employee is employed for a fixed period of time to undertake a specific project for which funding has been made available for a specified period of time provided that the vacancy is to be advertised for the duration of that funding;

(vi) where a fully qualified teacher is not available and a less than fully qualified teacher is employed for a fixed period of time, provided that such employment cannot exceed five years;

(vii) any other reason considered appropriate by the Employer.

Additional provisions in clause 21(2) of the Victorian Government Schools Agreement 2013 require the employer to identify the reason for each fixed term vacancy, implement proactive processes to ensure that the vacancies meet the required criteria and offer ongoing employment where a suitable position becomes available:

(e) In notifying vacancies the Employer will identify the reason for each fixed term vacancy and implement during the life of this agreement, proactive processes to ensure that fixed term vacancies satisfy the criteria set out in subclause (d). Relevant data will be provided to the union on a quarterly basis.

(f) The Employer should offer ongoing employment to any eligible employee where a suitable ongoing position becomes available in the school, subject to a probationary period as set out in subclause (4).

(g) For the purposes of subclause (f) an "eligible employee" means a fixed term employee employed continuously for longer than a complete school year inclusive of all school vacation periods:

(i) in response to a vacancy advertised for longer than 12 months;

(ii) in response to a vacancy advertised for 12 months or less resulting in two or more fixed periods of employment as a result of the operation of subclause (2)(c)(ii);

(iii) in response to two or more vacancies advertised for 12 months or less resulting in two or more fixed periods of employment; or

(iv) in response to an advertised parental absence vacancy in the second or subsequent year of that replacement.

Particular issues with insecure employment were raised by the AEU and employees in the public education sector (described at 6.2.3 and 9.1.7), including adverse financial and social effects arising from the use of fixed term contracts. As noted elsewhere in this Report, the

Inquiry met informally with DET, and whilst DET was able to refer the Inquiry to some relevant documents, DET was not able to provide a formal response to the matters raised within the Inquiry's reporting timeframe.

I note that clause 21(2)(d) of the Victorian Government Schools Agreement 2013 permits the employer to engage non-ongoing employees for a broad range of reasons, including 'any other reason considered appropriate by the Employer.'[1880] I note further that clause 21(2)(e) appears to facilitate recording of the reason for each fixed term engagement, which should permit a close analysis of the primary purposes behind the use of fixed term contracts in public schools. The agreement has a nominal expiry date of 31 October 2016. Its renegotiation may provide a vehicle for the inclusion of new measures to address any inappropriate use of fixed term contracting.

Whilst I am unable to reach any conclusion about the extent of, or reasons for, the use of fixed term contracting in public education, in my view, its use should be minimised. I do not propose a wholesale revision of the manner in which DET organises its recruitment and selection of staff, as I recognise that there will be broader implications which I have not been able to examine. However, in light of the evidence I have heard about the detrimental effects of fixed term contracting on the employees involved, I would encourage DET to explore alternatives to mitigate against those adverse effects wherever possible.

Recommendation 34:
I recommend that the Victorian Government through the Department of Education and Training, in conjunction with affected employees and their representatives, review available data on the extent and reasons for use of fixed term employment in public schools, identify areas where its use can be minimised, and implement alternatives to its use.

9.2.3 Victorian Government procurement

Participants' proposals

Many Inquiry participants submitted that the Victorian Government has the capacity to significantly influence issues relating to labour hire and insecure work through its own purchasing power.

Several participants submitted that the Victorian Government should require certain standards and practices in respect of labour hire and secure employment from parties who provide goods and services to government.[1881]

For example, ASU Private Sector submitted that as the biggest purchaser of services, the State Government has an important role to play in ensuring that procurement and investment decisions promote ethical employment. It submitted that businesses profiting through the exploitation of vulnerable workers and unethical or insecure forms of work, contracting out, supply chains or sham contracting should not be the recipients of any government procurement contracts, investment or grant assistance. ASU Private Sector referred to the ALP's 'Victorian Labor's Plan to Secure Local Jobs for Local Workers' which provides for establishing government procurement arrangements that require demonstrated compliance with employment related legal requirements, and preferences companies that provide sustainable, secure employment opportunities for local workers.[1882]

1880. See cl. 21(2)(d)(vii).

1881. UV, Submission no 98, 25-26; Young Workers Centre, Submission no 82, 7; Dr Jill Murray, Submission no 16, 4; ACTU, Submission no 76, 33; CELRL, Submission no 99, 27; ASU Private Sector, Submission no 47, 18.

1882. ASU Private Sector, Submission no 47, 18.

Professor John Howe told the Inquiry:

> *There is going to be some regulatory challenges for Victoria to deal with these problems, but it could deal with it in its own procurement because it is at the top of the supply chain in procurement.*[1883]

CPSU submitted that disclosure and reporting of the State Government's labour hire arrangements to Parliament should be required.[1884]

Many participants submitted that a code or set of principles should apply to Victorian Government procurement. Some submitted that tenders should be awarded to bidders who have demonstrated a commitment to secure employment, local employment and ethical workplace practices.[1885]

Specific requirements proposed to be imposed as a condition of procurement included that government contractors:

- employ at least 80% of their labour permanently and directly;[1886]
- have an enterprise agreement providing for the same wages and conditions for workers directly or indirectly engaged, casual conversion clause, representation and union induction rights;[1887]
- have appropriate internship practices;[1888]
- demonstrate transparency in contracting chains;[1889]
- specify the applicable industrial instrument;[1890]
- demonstrate that the bid they have submitted to government is sufficient to cover staff costs;[1891]
- directly engage workers unless the work required is temporary and/or specialist in nature and the position(s) cannot be reasonably filled by an existing employee;[1892]
- afford rates of remuneration and other conditions to labour hire workers that are no less than the applicable industrial instrument for direct workers, and that these arrangements be time-limited;[1893]
- undertake labour market testing prior to engaging visa holders as employees;[1894] and
- demonstrate certain secure employment outcomes.[1895]

1883. Professor John Howe, University of Melbourne, Academic Forum, 25 May 2016.
1884. CPSU, Supplementary Submission no 4, 5.
1885. See e.g. NUW, Submission no 91, 21; ASU Authorities and Services, Submission no 31, 16; ACTU, Submission no 76, 34.
1886. NUW, Submission no 91, 21.
1887. NUW, Submission no 91, 21.
1888. Young Workers Centre, Submission no 82, 9.
1889. Dr Jill Murray, Submission no 16, ACTU, Submission no 76, 34.
1890. ASU Authorities and Services, Submission 31, 18.
1891. ASU Authorities and Services, Submission 31, 7.
1892. MEAA, Submission no 37, 9.
1893. MEAA, Submission no 37, 9.
1894. ASU Authorities and Services, Submission no 31, 18.
1895. MEAA, Submission no 37, 9.

Master Builders called for the reinstatement of the Victorian Code of Practice for the Building and Construction Industry 2014, to stamp out unlawful behaviour and to provide a clear set of behavioural guidelines for the building and construction industry.[1896]

Submissions from a number of unions and community sector organisations recommended that the Victorian Government adjust its funding model in sectors such as the community, health and education sectors to provide employers in these industries with greater capacity to plan their workforce capacities into the future, and limit the use of fixed term contracting.[1897]

For example, VTHC submitted that the Victorian Government should recognise that short term contracts for government work result in short term contracts for those workers; and accordingly phase out insecure work across its outsourced community services and other contracted work.[1898] Dr Murray proposed that funding models which contribute to insecure work should be critically assessed, perhaps with targeted reviews of areas of current regulatory failure, such as contract labour in secondary teaching in Victoria.[1899]

Consideration, findings and recommendations – government procurement

Professor John Howe's extensive body of work has examined the use and effectiveness of government procurement programs to drive particular labour market outcomes. Governments have increasingly utilised the option of 'making government purchases of goods and services conditional upon contractors and supply chains observing desired labour practices linked to job quality', as a 'soft law' alternative to directly imposing employment regulations.[1900]

Federal and state governments in Australia (including the Victorian Government) have long used procurement mechanisms to pursue various workplace reform and policy objectives in the construction industry.[1901]

1896 Master Builders, Submission no 38, 11.

1897 HACSU, Submission no 35, 19; WIRE, Submission no 13, 11; ASU Authorities and Services, Submission no 31, 7; VTHC Submission no 86, 4; Dr Jill Murray, Submission no 16, 4.

1898 VTHC, Submission no 86, 4.

1899 Dr Jill Murray, Submission no 16, 4.

1900 John Howe, 'The Regulatory Impact of Using Public Procurement to Promote Better Labour Standards in Corporate Supply Chains', in Kate MacDonald and Shelley Marshall (eds), *Fair Trade, Corporate Accountability and Beyond* (Ashgate, 2010), 329, 330. See also John Howe, '"Money and Favours": Government Deployment of Public Wealth as an Instrument of Labour Regulation', in Chris Arup et al (eds), *Labour Law and Labour Market Regulation* (Federation Press, Sydney, 2006), 167; John Howe and Ingrid Landau, '"Light Touch" Labour Regulation by State Governments in Australia' (2007) 31 *Melbourne University Law Review* 368, 373-383; John Howe, 'Government as Industrial Relations Role Model: Promotion of Collective Bargaining and Workplace Cooperation by Non-Legislative Mechanisms' in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, New York, 2012), 182; and the former Labor Government's 'Fair Work Principles' and 'Commonwealth Cleaning Services Guidelines', both of which were revoked by the Abbott Government with effect from 1 July 2014: https://www.employment.gov.au/news/revocation-fair-work-principles-and-commonwealth-cleaning-services-guidelines.

1901 See now *Building Code 2013* (Cth) and Department of Employment, *Building Code 2013 – Supporting Guidelines* (April 2016); NSW Industrial Relations, *Implementation Guidelines to the NSW Code of Practice for Procurement: Building and Construction* (1 July 2013). The *2012 Implementation Guidelines to the Victorian Code of Practice for the Building and Construction Industry* were abolished with effect from 18 January 2015. For discussion of these various construction industry procurement mechanisms, and the federal Government's proposed *Building and Construction Industry (Fair and Lawful Building Sites) Code*, see Stewart et al (2016), Chapter 28; Breen Creighton, 'Government Procurement as a Vehicle for Workplace Relations Reform: The Case of the National Code of Practice for the Construction Industry' (2012) 40 *Federal Law Review* 349.

The former *Victorian Government's Ethical Purchasing Policy*, introduced checks on businesses prior to awarding a contract and during the life of a contract to ensure businesses meet their obligations to their employees under applicable industrial instruments and legislation. An Ethical Employment Reference Register was also established where businesses could be listed if they had been disqualified from a tenderer process, or a contract had been terminated as they did not satisfy the ethical employment standard.[1902] Presently, tendering requirements for public construction in Victoria require compliance with OHS management criteria and industrial relations management criteria.[1903]

The Victorian Government has also adopted procurement practices directed at ensuring the observance of minimum employment standards for cleaners in public schools.[1904]

In light of the limits on the Victorian Government's legislative power to address the various issues relating to insecure work which were raised with this Inquiry, use of its own purchasing power is an obvious alternative mechanism to effect changes in the employment practices of private sector businesses.

Of course, promotion of secure work practices throughout government supply chains would need to be balanced against existing purchasing criteria including value for government expenditure, accountability, probity and minimisation of risk.[1905]

Further, it must be considered whether the Fair Work Act general protections provisions (Part 3-1) may operate to curtail the capacity to implement procurement standards directed at government contractors' employment or engagement practices. However, there are numerous examples of procurement practices in recent years which have done exactly that. Where such schemes have been tested, courts have determined that withholding of funding or government work based on certain workplace agreement provisions does not amount to unlawful coercion under the Fair Work Act general protections provisions or their predecessors.[1906] Further, in *State of Victoria v Construction, Forestry, Mining and Energy Union*[1907] the Full Federal Court rejected an argument that the adoption and promulgation of the Victorian Government's former Code of Practice for the Building and Construction Industry was of itself invalid. It described the code and guidelines as 'statements of policy only',[1908] and thus not (of themselves) binding.

1902. Victorian Government Purchasing Board, *Former VGPB Policies A-Z* (January 2015); See: http://www.procurement.vic.gov.au/Buyers/FAQs-Buyers.

1903. Victorian Government, Guide to Ministerial Direction No 1: Tendering provisions for public construction (4 April 2016).

1904. See Victorian Department of Education and Training, 'School Contract Cleaning', at: http://www.education.vic.gov.au/school/principals/infrastructure/Pages/cleaning.aspx, discussed in CELRL, Submission no 94.

1905. Victorian Government Purchasing Board, *Annual Report 2014-2015*, 11.

1906. *NTEU v Commonwealth* (2002) 117 FCR 100; *Victoria v CFMEU* (2013) FCAFC 160. See Stewart et al (2016), [25.47].

1907. (2013) FCAFC 160.

1908. Ibid, [19], per Kenny J; see also [153], per Buchanan and Griffiths JJ.

Recommendation 35:
The Victorian Government should establish procurement principles or standards that must be met by successful tenderers for a range of contracts with government departments and agencies, including those for the provision of IT, cleaning, security, transport, hospitality and other similar services. The precise application and limits of the scheme (including whether it should apply only to contracts above a specified monetary value) will need to be determined with reference to other competing procurement criteria. The principles/standards should be objective and measurable, however they should be directed towards requiring the successful tenderer to demonstrate that:

- The organisation predominantly engages workers in secure employment, rather than as casuals or on fixed term contracts (this could be assessed on the basis of the tenderer's provision of information about the composition of its workforce).
- Independent contractor relationships are genuine rather than sham arrangements.
- Employees are receiving at least the wages and conditions under any applicable industrial instruments (award or enterprise agreement), and applicable legislation (e.g. National Employment Standards under the Fair Work Act, federal superannuation legislation, Victorian long service leave legislation).
- Proactive arrangements are in place to ensure health and safety compliance through the tenderer's occupational health and safety management system.
- The cost structure of the tender submitted clearly demonstrates how workers will be accorded their legal employment entitlements over the life of the contract.
- Appropriate contractual arrangements require any further subcontracting by the primary contractor to include the above principles/standards as a term and condition applicable to the subcontractor's provision of services.

The detailed implementation of these new procurement requirements can be undertaken in conjunction with the Victorian Government Purchasing Board, which oversees an array of existing procurement rules and schemes.[1909]

In respect of labour hire, Victorian government departments and agencies would be subject to the obligation under the proposed labour hire licensing scheme to only use licensed labour hire agencies in the regulated sectors (see 5.6.4).

9.2.4 Promoting 'best practice'

In addition to procurement,[1910] Professor Howe has also examined the use by governments of 'education and informational strategies, or *communication*, to shape or steer behaviour, by those they seek to regulate, whether individuals, businesses or other organisations'.[1911] He explains further that:

> *The promotion of 'best practice' is an example of government communication as a regulatory strategy. By providing information about 'good' labour practices, the state seeks to encourage or persuade private sector take-up of these practices by presenting them in a way which suggests consistency with ideals of good corporate (self) governance … .*[1912]

1909. See Victorian Government Purchasing Board (2014-2015).
1910. See 9.2.3.
1911. Howe (2012), 196 (reference omitted).
1912. Ibid (references omitted).

Adopting this kind of approach, the Victorian Government can play a positive role in the development of best practice standards to address insecure work, through a range of non-legislative or soft law techniques.

A number of the recommendations in this Report are directed towards this outcome, for example:

- the establishment of a voluntary labour hire code of practice (see 5.6.4);
- the creation of a 'Fair Engagement Checklist', based on a minimum hourly rate and other factors, as a tool for businesses to ensure contracting relationships are genuine and non-coercive (see 8.2.6);
- funding measures to provide assistance to temporary visa workers, including provision of employment rights information to international students through Victorian universities (see 7.2.4);
- promotion of best practice in Victorian public sector employment (see 9.2.2);
- promotion of secure employment practices within the Victorian Government's supply chain (see 9.2.3).

Participants' proposals for reform

A number of Inquiry participants proposed that the Victorian Government establish a statutory office to deal with issues relating to insecure work. Some suggested that this statutory office could jointly administer a labour hire licensing scheme, and conduct a broader range of activities.

For example, UV proposed that the Victorian Government immediately create a permanent inspectorate within IRV to combat the growing incidence of exploitative work practices arising from the use of labour hire and subcontracting.[1913] Western Community Legal Centre proposed that the Victorian Government set up a statutory agency to assist culturally and linguistically diverse workers to enforce their workplace rights.[1914]

The NTEU recommended the establishment of a 'Secure Work Ombudsman/Commissioner' to perform a range of functions directed towards reducing precarious work and advocating for secure work in all sectors of the Victorian economy; investigating employers which may be exploiting precarious workers; and resourcing prosecutions and reporting on compliance by employers.[1915]

Dr Murray proposed the establishment of an Office of Labour Market Integrity to perform a centralised range of functions in relation to labour hire and insecure work. The office would coordinate Victorian government efforts to alleviate unfair working practices, including education and media initiatives. The office would also undertake investigations into allegations of gross breaches of the principles of decent work. Dr Murray suggests that a 'non-binding opinion' by the office could perform a useful regulatory function, despite the fact that it would not finally determine relevant legal issues, as it would be persuasive and could be used in any subsequent enforcement proceedings. Finally, the office could be funded to support employment law test cases in matters which are deemed to have state-wide significance, and have a good chance of successful and productive clarification or advancement of the law.[1916]

1913. UV, Submission no 98, 23.

1914. Western Community Legal Centre, Submission no 62, 48.

1915. NTEU, Submission no 100, 39.

1916. Dr Jill Murray, Submission no 16, 7.

Findings – promoting best practice

I have carefully considered these proposals. However, with the exception of a labour hire licensing body (if existing structures cannot be utilised), I am not inclined to recommend that the Victorian Government establish a new body in addition to existing state bureaucracy to implement the various measures which I have recommended throughout this Report.

In respect of the proposals to undertake a broader education and advisory role in promoting secure employment within the Victorian community, in my view there would be too much of an overlap with the existing role performed by FWO in educating and informing employers and employees about their employment obligations and rights under the Fair Work Act and other federal laws.

The measures I am recommending would allow the Victorian Government to play a positive role in the development of best practice standards to address insecure work, through a range of non-legislative or soft law techniques, either in the public sector, or in the private sector through government procurement.

Attachment A – Inquiry media coverage

September 2015

- 'Victorian government's sweeping inquiry into the labour hire market', *The Age*, 10 September 2015
- 'Inquiry into labour hire firms exploiting foreign workers to be announced', *The Weekly Times*, 10 September 2015
- 'Forsyth heads inquiry into insecure work', *The Australian*, 11 September 2015
- 'Victoria labour hire inquiry to consider licensing system', *Workplace Express*, 11 September 2015
- 'Vic labour hire inquiry to draw from international regulation', *Workforce*, 11 September 2015
- 'Forsyth to head Labour Hire Inquiry', *ABC Radio Gippsland*, 14 September, 2015
- 'Packed houses killing industry', *Sunraysia Daily*, 14 September 2015
- News Report on *ABC Gippsland Radio*, 14 September 2015
- 'Mountain Bread exploited workers', *The Age*, 15 September
- Interview with Inquiry Chair on *ABC Country Hour Victoria*, 15 September 2015, at: http://www.abc.net.au/news/2015-09-15/vic-country-hour-podcast-14-september-2015/6777364
- 'Workers Tell Tales', *Weekly Times*, 16 September 2015
- Interview with Minister Natalie Hutchins about the inquiry on *ABC Radio Mildura*, 29 September 2015

October 2015

- 'Minister encourages Geelong's contribution to labour hire inquiry', *Geelong Business News*, October 2015
- 'Trafficking of workers a spider's web', Ben Schneiders and Royce Millar, *The Age*, 5 October 2015
- 'Human trafficking of workers a growing problem in Victoria', *Sydney Morning Herald*, 5 October 2015
- 'Inquiry calls agriculture workers', Toni Brient, *Sunraysia Daily*, 15 October 2015
- 'Victorian Government's labour hire inquiry to visit Mildura, Shepparton and Gippsland', Emma Field, *The Weekly Times*, 16 October 2015
- 'Backpacker "prison of fear"', *Sunraysia Daily*, 17 October 2015
- 'Inquiry seeks views on labour hire licensing', *Workplace Express*, 19 October 2015
- 'Vic considers ACT labour hire model', *Workforce*, Issue 19841, 19 October 2015
- 'Labour Hire Scrutinised', *Shepparton News*, 19 October 2015
- Interview with Inquiry Chair on *ABC Local Radio* (Drive with Nicole Chvastek), 21 October 2015
- 'Expose labour firms', *The Weekly Times*, 22 October 2015
- 'Accreditation key to stop labour abuse', *Sunraysia Daily* 23 October 2015

November 2015

- 'Labour hire, plight of insecure workers to be put under the spotlight', Anthony Forsyth, *The Conversation*, 18 November 2015, at: https://theconversation.com/labour-hire-plight-of-insecure-workers-to-be-put-under-the-spotlight-50463
- 'Labour hire probe starts', *Sunraysia Daily*, 21 November 2015
- 'Victorian labour hire inquiry chair Professor Anthony Forsyth talks about the upcoming hearings', interview on *ABC Rural*, 23 November 2015, at: http://www.abc.net.au/news/2015-11-23/vch-labour-inquiry/6963002
- *ABC Breakfast Radio Mildura*, Sheridan Stewart on the Inquiry, 23 November, 2015.
- *ABC Country Hour*, Emma Brown report, 23 November 2015
- 'Worker plea: Stop exploitation by labour hire firms, inquiry urged', *Sunraysia Daily*, 24 November 2015
- 'Warning for Job Seekers', *Sunraysia Daily*, 24 November, 2015
- 'Agricultural bodies urged to take action over labour hire companies', *ABC Radio Mildura*, 24 November, 2015
- 'Sunraysia Ethnic Communities Council doubts inquiry will change exploitation', *ABC Radio Mildura*, 24 November, 2015
- 'Vulnerable workers exploited', *Swan Hill Guardian*, 25 November 2015
- 'Backpacker probe "will look deeper"', *Sunraysia Daily*, 26 November 2015

- 'Workers Walk Off', *Sunraysia Daily*, 27 November 2015
- 'Accounts of worker abuse "confronting"', *Swan Hill Guardian*, 27 November 2015
- 'Workers 'need cover", *Sunraysia Daily*, 28 November 2015
- 'NUW pushes labour hire licensing system at Vic inquiry', *Workforce Daily*, 30 November, 2015
- 'Phoenixing a problem in agriculture: labour hire boss', *Workforce*, 30 November 2015

December 2015

- 'Employers push back against labour hire licensing' and 'AMMA accuses Vic inquiry chief of apparent prejudgment on licensing', *Workforce*, Issue 19902, 1 December 2015
- 'Inquiry hears of workers on $6 an hour', *Workforce Daily*, 2 December 2015
- 'Migrants and refugees targeted in online unpaid labour scams', *Dandenong Leader*, 3 December 2015
- 'Foreign labour rip-offs "rife"', *Geelong Advertiser*, 5 December 2015
- 'Workers exploited', *Geelong Advertiser*, 8 December 2015
- 'Unions use Victorian inquiry to call for regulations on labour hire', *ABC Radio PM*, 8 December 2015, at: http://www.abc.net.au/pm/content/2015/s4368302.htm (also broadcast on ABC radio in Sydney, Brisbane, Adelaide, Perth, Canberra, Newcastle and the Gold Coast)
- 'NUW calls for low cost tribunal to regulate labour hire', *ABC Gippsland*, 8 December 2015
- 'Council jobs in work scam', *Geelong Advertiser*, 9 December 2015
- 'Fight for back pay', *The Weekly Times*, 9 December 2015
- 'Plan To Help Migrants', *Sunraysia Daily*, 9 December 2015

February 2016

- 'Business and government to clash over crack-down on rogue labour hire firms', Nick Toscano, *The Age*, 5 February 2016
- 'Insecure work, loss of entitlements, underpayment – it's all in a day's work', Van Badham, *Guardian Australia*, 7 February 2016
- 'Many casual workers fear losing their jobs if they speak up about pay, conditions', Chloe Booker, *The Age*, 8 February 2016
- 'Vic inquiry into casual employment begins', *The West Australian* and *SBS*, 8 February 2016
- 'Union chief wants state regulator formed to investigate exploitation', *Workforce*, Issue 19961, 8 February 2016
- '"On the end of a mobile": union body sounds alarm on behalf of insecure workers', Nick Toscano, *The Age*, 9 February 2016
- 'Rotten deal: "Buck passed" on worker exploitation', Toni Brient, *Sunraysia Daily*, 12 February 2016
- *WIN-TV Shepparton/Bendigo*, Interview with Gary Godwill, Fruitgrowers Victoria and Jonas Ratz, 15 February 2016
- *WINTV Gippsland,* 'Calls for greater regulation from inquiry evidence', 15 February 2015
- *ABC Goulburn Murray*, Interview with Gary Godwill, 15 February 2016
- *ABC Central Victoria*, Country Hour interview with Chris Hazelman from the Shepparton Ethnic Communities Council, 16 February 2016
- 'Empty Pockets: Labour hire contractor stands accused of not paying African tomato workers properly', Emily Woods, *Shepparton News*, 16 February 2016
- 'Probe into dodgy dealings'; Emily Woods, *Shepparton News*, 16 February 2016
- 'Hurting Foodbowl Image' (editorial), *Shepparton News*, 16 February 2016
- 'Inquiry told of dodgy contractors', Emily Woods, *Shepparton News*, 18 February 2016
- 'Vulnerable are being exploited', Emily Woods, *Shepparton News*, 19 February 2016
- 'Backpackers left out of pocket by labour hire contractor, inquiry told', Dale Webster, *The Weekly Times*, 19 February 2016
- 'Inquiry looks at possible links', Matthew Dixon, *Bendigo Advertiser*, 23 February 2016
- 'Ballarat workers paid $6 an hour', Alex Hamer, *The Ballarat Courier*, 23 February 2016
- 'Workers get cash in hand: delegate', Alex Hamer, *Ballarat Courier*, 23 February 2016
- 'Victorian teachers demand better pay and A-plus conditions', Henrietta Cook, *The Age*, 23 February 2016
- 'Exploitation of Foreign Workers Must Cease' (editorial), *Bendigo Advertiser*, 24 February 2016

- "'Boot out contractors", head of Victoria's fruit growers says', Dale Webster, *The Weekly Times*, 24 February 2016
- 'Exploitation of foreign workers must cease' (editorial), *The Weekly Times*, 24 February 2016
- 'Workers need national plan', Toni Brient, *Sunraysia Daily*, 25 February 2016
- 'Contractor cons motel', *Shepparton News*, 29 February 2016
- 'Fruit picker not paid' *Shepparton News*, 29 February 2016
- Anthony Forsyth Interview with Jonathan Kendall, *ABC Gippsland Radio*, 29 February 2016
- Anthony Forsyth Interview on *WIN-TV Gippsland*, 29 February 2016
- *ABC 774 Melbourne* and *ABC Gippsland*, 'CFMEU warns inquiry about labour hire agencies', 29 February 2016
- News Reports, *ABC 774*, 29 February 2016

March 2016

- *ABC Gippsland Radio*, Interview with Derek Dent, NUW, 1 March 2016
- *ABC Gippsland Radio*, Interview with East Gippsland Food Cluster CEO, Dr Nicola Watts, 1 March 2016
- *ABC Breakfast Radio Gippsland*, Jonathan Kendall interview with Secretary Gippsland Trades and Labour Council, Steve Dodd, 1 March 2016
- 'Farmers to make pay checks', *Weekly Times*, 2 March 2016
- 'Backpackers targeted by "dodgy labor hire companies" in "culture of impunity"', *ABC The World Today*, 2 March 2016 at: http://www.abc.net.au/news/2016-03-02/backpackers-targeted-by-labour-hire-companies--inquiry-hears/7213328
- 'Unions claim labour hire firms underpaying workers', *ABC PM*, 4 March 2016 at: http://www.abc.net.au/pm/content/2016/s4419004.htm
- 'Malaysians working in Australia trapped in black market', *Singapore Today*, 3 March
- '"Workers significantly underpaid", Inquiry told', *Latrobe Valley Express*, 3 March 2016
- 'Labour abuse allegations disturbing', Toni Brient, *Sunraysia Daily*, 5 March 2016

May 2016

- 'Coalition MPs urge govt to set up labour hire licensing regime', *Workforce*, 6 May 2016

July 2016

- *SBS Insight*, 'Fair Work Fair Pay', 26 July 2016

Attachment B – List of submissions

1 Dr Robyn Cochrane

2 Ms Lucy

3 Mr Mark Cory

4 Confidential

5 Dr G V J Forsyth

6 Mr Benedict Lim

7 Mr Michael Rizzo

8 Northern Mallee Local Learning & Employment Network

9 MADEC

10 Mr John Alldis

11 Mr Sam Popovski

12 Associate Professor Joo-Cheong Tham

13 Women's Information and Referral Exchange

14 Confidential

15 Gangmaster's Licensing Authority

16 Dr Jill Murray

17 Professor David Whyte, University of Liverpool

18 Bendigo Uniting Churches Social Justice Group

19 Confidential

20 Mr Luke Martin

21 Bernard Constable, Shearers and Rural Workers Union

22 AUSVEG

23 Dr Dan Woodman

24 Confidential

25 Victorian Chamber of Commerce and Industry

26 Mr David Armstrong

27 Construction, Forestry, Mining and Energy Union Construction and General Division Victorian Branch

28 Communication Workers Union Postal and Telecommunications Branch

29 Mildura International Backpackers

30 The Hon. Mr Peter Crisp MP

31 Australian Services Union Victorian Tasmanian Authorities and Services Branch

32 Dr Elsa Underhill

33 Victorian Council of Social Service

34 Professionals Australia

35 Health and Community Services Union (Victorian Branch)

36 Shop, Distributive and Allied Employees Association (Victorian Branch)

37 Media, Entertainment and Arts Alliance

38 Master Builders Association of Victoria

39 Information Technology Contract and Recruitment Association

40 The Connect Group Pty Ltd (Seasonal Workers Australia)

41 Victorian Trades Hall Council on behalf of individual workers

42 Construction, Forestry, Mining and Energy Union Victorian District Mining and Energy

43 Mr David Cragg

44 Confidential

45 Housing Industry Association

46 JobWatch

47 Australian Services Union Victorian Private Sector Branch

48 Safety Institute of Australia

49 Victorian Farmers Federation

50 Ms Sou Abbas

51 Victorian Automobile Chamber of Commerce

52 Jesuit Social Services

53 Ai Group

54 Victorian Trades Hall Council and CFMEU on behalf of individual workers

55 Australian Chamber of Commerce and Industry

56 Australian Education Union on behalf of individual workers

57 Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church

58 Victorian Trades Hall Council and AMWU on behalf of individual workers

59 Australian Mines and Metals Association

60 Prestige Staffing Personnel

61 Community and Public Sector Union Communications and Science Branch

62 Western Community Legal Centre

63 Mr Caleb Tan

64 Anonymous

65 Robinvale Network House

66 Mr Yi Wang

67 Air Conditioning and Mechanical Contractors Association

68 Victorian Trades Hall Council and ANMF on behalf of individual workers

69 Mr Jeff Sim

70 Institute for Safety, Compensation and Recovery Research

71 Independent Contractors Australia

72 Confidential

73 Australian Institute of Employment Rights

74 Victorian Trades Hall Council and NTEU on behalf of individual workers

75 Victorian Trades Hall Council and NUW on behalf of individual workers

76 Australian Council of Trade Unions

77 Australian Meat Industry Employees Union

78 Health Workers Union

79 Maurice Blackburn Lawyers

80 Transport Workers Union

81 Independent Education Union

82 Young Workers Centre

83 Geelong Trades Hall Council

84 Victoria Legal Aid

85 PMA Australia-New Zealand

86 Victorian Trades Hall Council

87 Confidential

88 Australian Nursing and Midwifery Federation

89 Per Capita

90 Work + Family Policy Roundtable

91 National Union of Workers

92 Textile, Clothing and Footwear Union of Australia

93 Mr Harry Marshall

94 Community and Public Sector Union

95 Australian Manufacturing Workers Union

96 Dr Fiona MacDonald and Professor Sara Charlesworth

97 Confidential

98 United Voice

99 Centre for Employment and Labour Relations Law

100 National Tertiary Education Union

101 Springvale Monash Legal Service

102 Victorian Trades Hall Council on behalf of individual workers

103 Australian Education Union

104 Ryan Carlisle Thomas Lawyers

105 Confidential

106 East Gippsland Food Cluster

107 Agri Labour Australia

108 SlaveryLinks

109 Dr Joanna Howe

110 Recruitment and Consulting Services Association

111 Ethnic Council of Shepparton and District Inc

112 Rumbulara Aboriginal Cooperative

113 Franchise Council of Australia

114 Chandler McLeod

115 Ms Marita Taverner

116 Confidential

117 Jones Engineering

118 Confidential

119 Confidential

120 Ethical Clothing Australia

SS1 Dr Elsa Underhill

SS2 Construction, Forestry, Mining and Energy Union, Construction and General Division, Victorian Branch

SS3 Recruitment & Consulting Services Association

SS4 Community and Public Sector Union

SS5 Information Technology Contract and Recruitment Association

SS6 Confidential

SS7 Ai Group

SS8 Victorian Trades Hall Council

SS9 National Union of Workers

Attachment C – Practice Direction No 1

Victorian Inquiry into the Labour Hire Industry and Insecure Work

Practice Direction No.1 - Conduct of Hearings of the Inquiry

Introduction

1. On 13 October 2015, the Minister for Industrial Relations, the Hon. Natalie Hutchins MP, appointed me to constitute a Formal Review pursuant to section 93(2) of the Inquiries Act 2014 (Vic) (**the Act**), to inquire into and report on specified Terms of Reference (**the Inquiry**).

2. This Practice Direction is made pursuant to section 103(1) of the Act, and is to be read in conjunction with the Act.

3. This Practice Direction deals with procedural matters relating to all hearings of the Inquiry, including public hearings and closed hearings.

4. This Practice Direction may be varied from time to time. The Inquiry may, at any time, depart from this Practice Direction if it considers it appropriate to do so.

All Hearings

5. The Inquiry will hold a series of hearings to inform itself in relation to the Terms of Reference.

6. The conduct of hearings of the Inquiry is within the discretion of the Chairperson of the Inquiry, subject to the Act, the establishing instrument and the requirements of procedural fairness.

7. Hearings of the Inquiry will be conducted in an informal manner. In particular:

    a. The Inquiry is not bound by the rules of evidence or any practices or procedures applicable to courts of record, and may inform itself on any matter as it sees fit;

    b. The Inquiry may allow a person to be legally represented. However legal representation is neither expected nor required by the Inquiry; and

    c. Witnesses appearing at hearings will not be required to swear an oath or make an affirmation. However, witnesses should note that it is an offence under section 120 of the Act for a person to make a statement or provide a document to the Inquiry that the person knows to be false or misleading.

8. Inquiry hearings will be recorded and transcribed, for the Inquiry's internal use. The Inquiry will provide a witness with a copy of the transcript of his/her own evidence upon request by that witness.

9. Recording or filming the proceedings of a hearing of the Inquiry is not permitted, except in the following circumstances:

    a. Any opening statement by the Chairperson of the Inquiry may be filmed or recorded; and

    b. The Inquiry may authorise a recording to be made for the purpose of transcribing proceedings of the Inquiry (as provided for in paragraph 8 of this Practice Direction).

10. In accordance with section 111(4) of the Act, a witness giving information or evidence at a hearing of the Inquiry has the same protection and immunity as a witness in proceedings in the Supreme Court of Victoria. Further, in accordance with section 112(1) of the Act, subject to the exception in section 112(2), information or evidence given by a witness at a hearing of the Inquiry is not admissible in evidence or otherwise able to be used against that witness in any other proceedings, except proceedings for an offence against the Act or section 254 of the Crimes Act 1958 (Vic) (destruction of evidence) in relation to the Inquiry.

11. The Chairperson of the Inquiry may make an order excluding any person from a hearing in accordance with section 104 of the Act. Where a section 104 order is made during a hearing, a copy of the order will be posted on a door of, or in another conspicuous place where notices are usually posted at, the place where the hearing is being conducted.

12. The Chairperson of the Inquiry may make an order prohibiting or restricting publication of information in respect of a hearing in accordance with section 106 of the Act. Where a section 106 order is made during a hearing, a copy of the order will be posted on a door of, or in another conspicuous place where notices are usually posted at, the place where the hearing is being conducted.

Public Hearings

13. Subject to any contrary order made pursuant to the Act, hearings will be open to the public.

14. The dates, times and locations of public hearings will be published on the Inquiry website at www.economicdevelopment.vic.gov.au/labourhireinquiry.

Closed hearings

15. The Inquiry may, subject to the requirements of procedural fairness, hold closed hearings upon the request of a witness who wishes to appear at a closed hearing, or on the Chairperson's own motion, in the following circumstances:

    a. Where prejudice or hardship might be caused to any person, including harm to their safety or reputation;

    b. Where the nature and subject matter of the hearing is sensitive;

    c. Where there is a possibility of any prejudice to legal proceedings;

    d. Where the conduct of the proceeding would be more efficient and effective; or

    e. Where the Chairperson of the Inquiry otherwise considers it appropriate to do so.

16. Where the Chairperson of the Inquiry determines to hold a closed hearing, an order excluding all persons other than the Chair and members of staff of the Inquiry, the stenographer, the witness or witnesses and any legal representative or support person of the witness or witnesses will be made pursuant to section 104 of the Act. A copy of the order will be posted on a door of, or in another conspicuous place where notices are usually posted at, the place where the hearing is being conducted.

17. Where a witness provides evidence or information to the Inquiry in a closed hearing, unless the Inquiry specifically informs the witness otherwise, the evidence and information provided at that hearing will be used on a de-identified (anonymous) basis.

Professor Anthony Forsyth
Chairperson
Inquiry into the Labour Hire Industry and Insecure Work

Date: 20 November 2015

Attachment D - List of hearing participants

23 November 2015 - Mildura

- Sunraysia Mallee Ethnic Communities Council
- Sunraysia Trades and Labour Council, Australian Workers Union
- Mildura International Backpackers
- Northern Mallee Local Learning and Employment Network
- Murray Mallee Community Legal Service
- Australian Services Union and worker
- Closed hearing 01 – Labour hire agency

24 November 2015 - Mildura

- Closed hearing 02 – Labour hire agency
- Closed hearing 03 – Union and worker
- Closed hearing 04 – Two workers
- Closed hearing 05 – Labour hire agency
- Closed hearing 06 – Community/Government
- Closed hearing 07 – Community/Government

30 November 2015 - Dandenong

- National Union of Workers and four workers
- Closed hearing 08 – Labour hire agency
- South East Melbourne Manufacturing Association
- Adecco
- Australia Wide Personnel

1 December 2015 - Dandenong

- Closed hearing 09 – Union and worker
- ABeCK Group
- Springvale Monash Legal Service
- Closed hearing 10 – Union and worker
- Australian Manufacturing Workers Union and worker

7 December 2015 - Geelong

- Caleb Tan
- National Union of Workers and worker
- Closed hearing 11 – Worker
- Diversitat, the Geelong Ethnic Communities Council
- Closed hearing 12 – Community/Government
- Closed hearing 13 – Labour hire agency
- Textile Clothing and Footwear Union of Australia
- Closed hearing 14 – Union
- United Voice and worker
- Closed hearing 15 – Worker

8 December 2015 - Geelong

- Australian Manufacturing Workers' Union and worker
- Geelong Trades and Labour Council
- National Union of Workers and workers
- Closed hearing 16 – Small business owner
- Deakin University Student Services
- Closed hearing 17 – Worker

9 December 2015 - Melbourne

- The Hon. Mr Peter Crisp MP
- Closed hearing 18 – Community/Government

8 February 2016 - Melbourne

- Australian Industry Group
- Victorian Trades Hall Council, Media Entertainment and Arts Alliance, Health and Community Services Union, and worker
- United Voice, Council of International Students Australia and workers
- AUSVEG VIC
- Victorian Chamber of Commerce and Industry
- Australian Council of Trade Unions and National Union of Workers
- PMA Australia and New Zealand
- International Confederation of Private Employment Agents
- Information Technology Contract and Recruitment Association

9 February 2016 - Melbourne

- Women's Information Referral Exchange
- Victorian Council of Social Service
- Australian Manufacturing Workers' Union and workers
- Communication Workers Union and worker
- Housing Industry Association
- Western Community Legal Centre

- Construction, Forestry, Mining and Energy Union Construction Division and worker
- Vegetable grower Mr Andrew Young
- JobWatch
- Closed hearing 19 – Community/Government and worker

10 February 2016 - Melbourne

- Australian Education Union and workers
- National Union of Workers and worker
- Australian Nursing and Midwifery Federation
- Australian Chamber of Commerce & Industry
- National Tertiary Education Union
- Community and Public Sector Union
- Victoria Legal Aid
- Victorian Farmers' Federation
- Australasian Meat Industry Employees' Union Victorian Branch

15 February 2016 - Shepparton

- Closed hearing 20 – Union and workers
- Shepparton Fruit Growers' Association
- Fruit grower Mr Peter Hall
- Community/worker advocate
- Australian Workers Union
- Goulbourn Valley Trades and Labour Council
- Closed hearing 21 – Worker
- Labour contractor and workers
- Labour contractor Mr Nabi Baqiri and fruit grower Mr Peter Hall

16 February 2106 - Shepparton

- Ablecare Staffing
- Ethnic Council of Shepparton
- Closed hearing 22 – Labour hire agency
- Community member and informal accommodation provider

22 February 2016 - Melton

- Teacher Agency Network of Victoria
- Australian Services Union
- Closed hearing 23 – Union and worker
- National Union of Workers and worker
- Closed hearing 24 – Labour hire agencies
- Recruitment and Consulting Services Association
- Independent Education Union
- Uniting Church of Australia
- Chandler Macleod
- Transport Workers Union

23 February 2016 - Ballarat

- Ballarat Regional Trades and Labour Council
- Community and Public Sector Union and worker
- Australian Education Union and workers
- Simpson Personnel
- Bendigo Trades Hall Council

25 February 2016 - Melbourne

- Australian Education Union and workers
- Standby Staff Services
- Slavery Links Australia
- Shop, Distributive and Allied Employees' Association
- Worker
- Closed hearing 25 – Labour hire agency

29 February 2016 - Morwell

- CFMEU Mining and Energy Division
- Closed hearing 26 – Labour hire agency
- Closed hearing 27 – Labour hire agency
- Closed hearing 28 – Worker
- Gippsland Trades and Labour Council
- Closed hearing 29 – Community member
- National Union of Workers and workers
- East Gippsland Food Cluster

1 March 2016 - Morwell

- Accommodation provider
- Closed hearing 30 – Labour hire client
- National Union of Workers

Attachment E – List of academic forum participants

Professor Sara Charlesworth
Department of Management, RMIT University

Dr Robyn Cochrane
Department of Management, Faculty of Business and Economics, Monash University

Dr Joanna Howe
Senior Lecturer, University of Adelaide Law School and Consultant with Harmers Workplace Lawyers

Dr John Howe
Deputy Dean of the Melbourne Law School, and Co-Director of the Centre for Employment and Labour Relations Law, University of Melbourne

Mr Kevin Jones
Safety Institute of Australia, OHS Consultant, freelance writer

Mr Tim Lyons
Research Fellow, Per Capita

Dr Fiona Macdonald
Department of Management, RMIT University

Dr Tui McKeown
Faculty of Business and Economics, Monash University and Board Member, Independent Contractors Australia

Ms Claire Ozich
Executive Director, Australian Institute of Employment Rights

Ms Amanda Sampson
Research Officer within the Evidence Review Hub at the Institute for Safety, Compensation and Recovery Research

Ms Maria Azzurra Tranfaglia
PhD Candidate and Research Fellow, Centre for Employment and Labour Relations Law, University of Melbourne

Dr Elsa Underhill
Senior Lecturer, Faculty of Business and Law, Deakin University

Dr Dan Woodman
School of Social and Political Sciences, University of Melbourne

Attachment F – List of informal consultations

9 October 2015

- Victorian Trades Hall Council

30 October 2015

- National Union of Workers

2 November 2015

- Charles Cameron, representing Recruitment and Consulting Services Association

9 November 2015

- Recruitment and Consulting Services Association
- Australian Industry Group

17 November 2015

- South East Melbourne Manufacturers Alliance
- Victorian Chamber of Commerce and Industry

18 November 2015

- Australian Taxation Office

27 November 2015

- Employment Relations Policy, Labour Science and Enterprise Group – Ministry of Business, Innovation & Employment (New Zealand)
- NZ Labour Inspectorate
- NZ Council of Trade Unions
- Business NZ

14 December 2015

- Australian Taxation Office

19 January 2016

- Fair Work Ombudsman

1 February 2016

- Transport Workers Union
- Franchise Council of Australia
- Australian Council of Trade Unions
- Master Grocers Association – Independent Retailers
- Information Technology Contract & Recruitment Association

2 February 2016

- Australian Services Union
- Victorian Farmers' Federation
- Australian Workers' Union

16 March 2016

- UK Home Office & Migration Advisory Committee (proposed Labour Market Enforcement Undertakings & Code of Practice)
- Gangmasters' Licensing Authority (Overview of Licensing Scheme)
- International Organisation for Migration
- HM Revenue & Customs (National Minimum Wage Enforcement)
- Department for Business Innovation & Skills
- Operations Working Group – representatives of Home Office/BIS/GLA/HMRC

17 March 2016

- Employment Agency Standards Inspectorate
- Home Office (Modern Slavery Act and proposed Director of Labour Market Enforcement)
- UK Low Pay Commission
- National Crime Agency - UK Human Trafficking Centre
- University College London
- Anti-Slavery International and the Ethical Trading Initiative
- Trades Union Congress

18 March 2016

- Gangmasters' Licensing Authority (Enforcement & Compliance)
- Crown Prosecution Service (Forced Labour Offences)
- School of Management & Business, Kings College London

17 May 2016

- Mildura Rural City Council

2 June 2016

- Victorian Government, Department of Health and Human Services

8 June 2016

- WorkSafe Victoria

18 July 2016

- Victorian Government Department of Education and Training

1 August 2016

- Professor Judy Fudge, Kent Law School, University of Kent

Schedule 1 - summary of evidence received from individual worker submissions via online portal

Organisation	Category of employment	Industry	Underpayment	Access to workers compensation	Insecure future	Working conditions	Predictable roster
AEU Submission no 56 110 worker submissions	24 directly employed casuals 9 labour hire 4 sham contracting 73 on rolling contract 4 informally employed	Education: 102 Tourism: 1 Entertainment: 1 Food industry: 1	91 paid fairly 27 underpaid	89 reported access to workers compensation 29 reported no access to compensation	107 reported that they felt insecure about the future of their employment 11 said they felt secure	87 said they felt safe at work 31 reported unsafe working conditions	90 said they had a predictable roster 28 said they did not have a predictable roster
AMWU Submission no 58 34 worker submissions	12 directly employed casuals 3 labour hire 1 sham contracting 5 on rolling contract	Manufacturing: 9 Trades & services: 3 Mining, resources & energy: 3, Transport & logistics: 2 Warehousing: 2 Agriculture: 1 Mapping, surveying & town planning: 1 Auction house/ valuations: 1 Construction: 1	19 paid fairly 13 underpaid	14 reported access to workers compensation 18 reported no access to compensation	29 reported that they felt insecure about the future of their employment 3 said they felt secure	11 said they felt safe at work 21 reported unsafe working conditions	13 said they had a predictable roster 19 said they did not have a predictable roster

The information in this table is of a qualitative nature only, as not all submitters addressed each feature described in the table. Further, some submissions related to work outside Victoria.

Schedule 1 - summary of evidence received from individual worker submissions via online portal

Organisation	Category of employment	Industry	Underpayment	Access to workers compensation	Insecure future	Working conditions	Predictable roster
ANMF Submission no 68 55 worker submissions	19 directly employed casuals 27 labour hire 4 informally employed	Disability/ aged care/ health: 46	44 paid fairly 6 underpaid	33 had access to workers compensation 17 reported no access to compensation	37 reported that they felt insecure about the future of their employment 13 said they felt secure	28 said they felt safe at work 22 reported unsafe working conditions	11 said they had a predictable roster 39 said they did not have a predictable roster
CFMEU Submission no 54 28 worker submissions	8 directly employed casuals 11 labour hire 5 sham contracting 1 on rolling contract 1 informally employed	Construction: 13 Food industry: 2 Telecomm-unications: 2 Security: 1 Entertainment: 1 Mining: 1	15 paid fairly 11 underpaid	10 had access to workers compensation 16 reported no access to compensation	25 reported that they felt insecure about the future of their employment 1 said they felt secure	5 said they felt safe at work 21 reported unsafe working conditions	10 said they had a predictable roster 16 said they did not have a predictable roster
NTEU Submission no 74 98 worker submissions	75 directly employed casuals 3 labour hire 4 sham contracting 10 on rolling contract	Education: 79 Community services: 2 Health: 2 Hospitality: 1	53 paid fairly 40 underpaid	53 had access to workers compensation 40 reported no access to compensation	83 reported that they felt insecure about the future of their employment 10 said they felt secure	74 said they felt safe at work 19 reported unsafe working conditions	52 said they had a predictable roster 41 said they did not have a predictable roster

Schedule 1 - summary of evidence received from individual worker submissions via online portal

Organisation	Category of employment	Industry	Underpayment	Access to workers compensation	Insecure future	Working conditions	Predictable roster
NUW Submission no 75 137 worker submissions	68 Labour hire 43 direct casual 1 direct part time 7 sham contracting 1 on rolling contract 8 informally employed	Agriculture: 38 Warehousing: 27 Hospitality: 18 Market research: 6 Transport and logistics: 6 Manufacturing: 4 Call centre: 3 Retail/sales: 3 Construction: 2 Education: 2 Entertainment: 2 Mining, resources & energy: 2 Trades and services: 2 Health: 1	55 paid fairly 79 underpaid	54 had access to workers compensation 80 reported no access to compensation	113 reported that they felt insecure about the future of their employment 21 said they felt secure	63 said they felt safe at work 71 reported unsafe working conditions	47 said they had a predictable roster 87 said they did not have a predictable roster

Schedule 1 - summary of evidence received from individual worker submissions via online portal

Organisation	Category of employment	Industry	Underpayment	Access to workers compensation	Insecure future	Working conditions	Predictable roster
VTHC Submissions no 41 and 102 Supplementary Submission no 8 121 worker submissions	27 directly employed casuals 20 labour hire 6 sham contracting 8 on rolling contract 6 informally employed	Hospitality: 5 Security: 3 Disability/ aged care/ health: 4 Education: 9 Warehousing: 1 Construction: 7 Retail: 3 Acting: 1 Shipping: 1 Manufacture: 2 Law: 1	48 paid fairly 19 underpaid	41 had access to workers compensation 26 reported no access to compensation	61 reported that they felt insecure about the future of their employment 6 said they felt secure	41 said they felt safe at work 26 reported unsafe working conditions	32 said they had a predictable roster 33 said they did not have a predictable roster

Schedule 2 – summary of evidence received from labour hire agencies

Agency	Main form of engagement of workers	Usual duration of employment	Number of employees	Industry and occupational coverage	Use of temporary migrant workers	Main use by clients
Confidential	100% of the agency's workforce are casual workers. Casual employees receive a 25% casual loading.	In 95% of cases the employment duration is less than 12 months.	50 to 90 employees are assigned per week.	Coverage of both skilled and unskilled occupations and blue collar and white collar industries. Primarily administration, also shed hands, factory workers, process workers and forklift drivers.	There are a small percentage of temporary migrant workers engaged in blue collar positions.	Clients use their services when the client is not certain of their capacity to sustain a permanent role. Alternatively, where a business needs a temporary solution in performing or catching up on the workload for a certain aspect of business operations or due to workplace operational needs.
Confidential	Approximately 96% of their workforce are casual, about 4% are on fixed term contracts. They do not engage independent contractors or workers on ABNs.	The average duration of employment is generally less than 12 months. This is largely dependent on industry with many short term assignments.	The agency engages over 1000 workers each year in Australia. On average, they have around 190 FTE workers in employment each week.	The majority of work is unskilled; principally in the food processing and horticulture industries but also in some other industries such as construction and heavy manufacturing.	The agency recruits nearly 350 temporary migrant workers from overseas to work in Australia. They occasionally engage working holiday visa holders.	Not stated.

The information in this table is of a qualitative nature only, as not all participants addressed each feature described in the table.

Schedule 2 – summary of evidence received from labour hire agencies

Agency	Main form of engagement of workers	Usual duration of employment	Number of employees	Industry and occupational coverage	Use of temporary migrant workers	Main use by clients
Confidential	The agency engages some workers on fixed term contracts but the vast majority of the workforce (nearly 100%) is on a casual basis.	The employment duration varies depending on the situation of the client.	The agency employs about 600 recruitment staff across Australia. In addition, they engage about 15,000 to 20,000 people on a weekly basis in the on-hire industry or labour hire industry. 2000 of these are based in Victoria.	The agency estimates that about 31% of their workforce are unskilled or semi-skilled; a further 31% are skilled tradespeople or professional blue collar workers; and approximately 38% are professional white collar or managerial positions.	The agency does not engage temporary migrant workers but has observed other agencies doing so.	Clients use the agency's services to ramp up and ramp down their work capacity, and to respond faster to business demand. They are able to find staff quickly, and to staff business peaks and specific projects.
Confidential	Not stated.	Not stated.	Not stated.	Most of their workforce are blue collar – predominantly farming.	They primarily engage people on working holiday visas who need the 88 days to get their second year on the visa.	Not stated.
Confidential	All their workers are casual, but they generally use the terminology 'contractors' or 'labour hire'.	Not stated.	Not stated.	Their workforce is mostly white collar, especially government and public sector roles, as well as customer service, contact centre and professional services as well.	Not stated.	They get a lot of work with outsourced contact centres at short notice on large customer service campaigns.

Schedule 2 – summary of evidence received from labour hire agencies

Agency	Main form of engagement of workers	Usual duration of employment	Number of employees	Industry and occupational coverage	Use of temporary migrant workers	Main use by clients
Confidential	Their workers are always engaged as casuals.	Not stated.	They have 4000 casuals on the books across Australia.	They service everything from the public sector, to small to medium enterprises, and global blue chip companies.	Not stated.	Not stated.
Confidential	Their workforce are casuals.	Not stated.	They have about 30 staff.	They do not work in a particular industry.	They have no overseas workers.	Not stated.
Confidential	Their workforce is always casual.	Not stated.	They probably have 120 to 150 workers each week.	They will do anything from administrative and reception roles right up to CEO recruitment. They also engage blue collar workers including labourers, drivers, cleaners, production workers, and packers.	Not stated.	Not stated.
Confidential	The majority of the workforce are casual with some fixed term contracts and permanents.	Not stated.	Not stated.	They cover both skilled and unskilled occupations within the viticulture industry, with roles such as receptionists and vineyard hands.	The majority of the workforce are on working holiday visas.	Not stated.

Schedule 2 – summary of evidence received from labour hire agencies

Agency	Main form of engagement of workers	Usual duration of employment	Number of employees	Industry and occupational coverage	Use of temporary migrant workers	Main use by clients
Confidential	100% of their workforce are casual employees.	Not stated.	The agency has hundreds of employees on their books.	They specialise in a particular white collar occupation.	Some other agencies use workers on 457 or other temporary work visas.	They are used to fill temporary positions. The agency claims they have witnessed differential treatment of agency and permanent staff on matters such as superannuation, insurance, long service leave and reference checks.
Confidential	100% of their employees are casual, and terminable at one hour's notice. They offer each of their workers the option to convert to a permanent position after 13 weeks.	Not stated.	They have 186 staff.	Not stated.	They engage many working holiday visa holders.	Clients use their services to supplement their permanent staff due to fluctuating demand.
Chandler MacLeod Submission no 114 22 February 2016 Melton	90% of their workforce are casual, while around 10% are engaged on fixed term contracts.	Not stated.	The agency has about 13,000 workers on their books across Australia, and around 9110 in Victoria. They engage approximately 4000 workers per day.	The agency estimates that 26% of their workforce are in clerical and administrative roles, 26% are labourers, and 23% are machinery operators and drivers.	Not stated.	Not stated.

Schedule 2 – summary of evidence received from labour hire agencies

Agency	Main form of engagement of workers	Usual duration of employment	Number of employees	Industry and occupational coverage	Use of temporary migrant workers	Main use by clients
Agri Labour Australia Submission no 107	The agency does not engage independent contractors or workers on ABNs. The majority of their workers are casual employees, while a small number are in permanent positions.	The average employment duration is three months or less.	They engage approximately 700 employees per week.	Not stated.	Not stated.	Not stated.
The Connect Group/ Seasonal Workers Australia Submission no 40	They are licensed by the government to engage workers on the seasonal worker program.	Not stated.	Not stated.	Their workforce are seasonal workers and therefore classified as unskilled.	The vast majority of their workforce would be on SWP visas in the agriculture and horticulture industries.	Their clients are in the agriculture and horticulture industries.
Adecco 30 November 2015 Dandenong	90% of their workforce are casual employees, and around 10% are on-hire permanents.	Not stated.	They employ 8000 employees in Australia each day. They make around 160,000 placements a year.	Around 70% of their workforce are in blue collar roles – mainly transport logistics and manufacturing. The remaining 30% (approximately) are in white collar positions such as call centres, administration and clerical roles.	They engage some workers on student visas.	Clients use them to flex up their current labour, to manage seasonal peaks and to cover employees on leave.

Schedule 2 – summary of evidence received from labour hire agencies

Agency	Main form of engagement of workers	Usual duration of employment	Number of employees	Industry and occupational coverage	Use of temporary migrant workers	Main use by clients
Australia Wide Personnel 30 November 2015 Dandenong	100% of their labour hire business is in casual employment.	There is no typical length.	They employ 150 to 200 people on a daily basis in NSW and Victoria. They employed 600-700 employees in total last year.	Their workforce are primarily unskilled to semi-skilled in engineering and manufacturing roles.	Not stated.	Their work is seasonal and to match the needs of clients on a daily basis.
Kew Labour Solutions 1 December 2015 Dandenong	Their workers are always engaged as casuals.	There is no typical duration; it could be anywhere from four hours to under six months.	They have employed 500 to 600 people in the past couple of months.	They fill positions across the board from administration through to heavy plant operators and general labourers.	Not stated.	They do some seasonal work and a lot of event work.
Ablecare Staffing 16 February 2016 Shepparton	All employees are casual.	There is no set duration.	They employ around 100 workers.	They are primarily a nursing agency, with a skilled workforce.	They have some staff on working visas.	Clients use them to cover staff shortages and to address short term needs for labour as they arise.
Simpson Personnel 23 February 2016 Ballarat	The vast majority of their workers are casual.	The average work duration is about a month.	They have between 400 to 500 workers on the books per year.	They do both blue collar and white collar work, including harvesting and call centres.	They use 417 visa holders for a specific client because of a labour shortage in a particular area.	They are primarily engaged for seasonal work and harvesting.

Schedule 2 – summary of evidence received from labour hire agencies

Agency	Main form of engagement of workers	Usual duration of employment	Number of employees	Industry and occupational coverage	Use of temporary migrant workers	Main use by clients
John George, Mildura International Backpackers 23 November 2015 Mildura Submission no 29	Virtually all casuals.	Sometimes for a day and sometimes for many weeks or months.	They offer 75 beds and endeavor to find employment for all backpackers who stay with them.	Mainly horticultural growers in the local area. Unskilled fruit picking or other horticultural work.	They predominately have backpackers with 417 Working Holiday Visas or 462 Work and Holiday Visas. 417 Visa Holders are generally seeking specified work to satisfy the 88 day requirement to receive a second year visa extension.	The majority of work is direct with the grower/ employer. They have built up a regular group of employers who work with them to supply work for backpackers.
Everlasting Agricultural Management 15 February 2016 Shepparton	The employees are paid as casuals.	Not stated.	They place around 180 to 250 workers with growers during the peak harvest season.	Horticultural work.	Not stated.	To find labour for harvesting season.

Schedule 2 – summary of evidence received from labour hire agencies

Agency	Main form of engagement of workers	Usual duration of employment	Number of employees	Industry and occupational coverage	Use of temporary migrant workers	Main use by clients
Goulburn Valley Contractor Trust 15 February 2016 Shepparton	They pay employees at the casual rate.	The contracts are of short duration, and may last for 1 to 2 weeks before stopping for a month, then further work after that.	Generally they employ 20 to 40 people at a time. About 10 people have ongoing work for most of the year.	Horticultural work. Mainly stone fruit such as plums, cherries, peaches, apricots and some apples.	Their workforce mainly comes from the Afghani migrant community on permanent residency visas, but if they have a labour shortage they will hire employees from the backpacker hostels.	To find labour for harvesting season.
Jones Engineering Submission No 117	The company employs permanent employees.	Not stated.	Not stated.	Engineering and workshop manufacturing.	Not stated.	Outsourcing or insourcing of labour for small manufacturing and engineering projects.

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