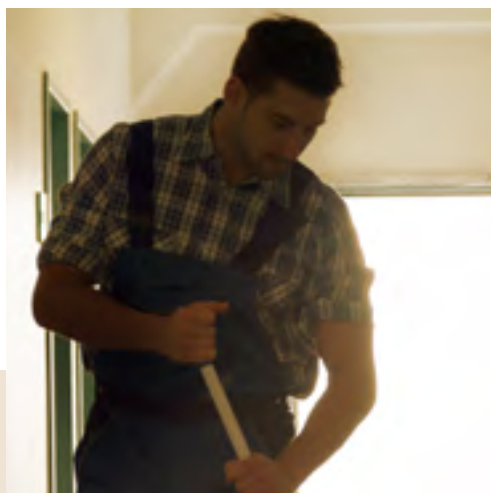




VICTORIAN INQUIRY INTO THE LABOUR HIRE INDUSTRY AND INSECURE WORK

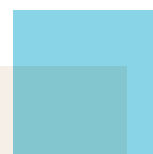
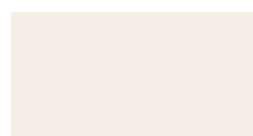
Background Paper

OCTOBER 2015



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Foreword



The Victorian Government has initiated this Inquiry to find out more about how work arrangements operate in the labour hire industry, and the extent of insecure work in Victoria.

Labour hire is a legitimate way of engaging workers that is now an established feature of the Australian labour market. The labour hire sector is a major employer and contributor to the Victorian and national economies.

However, there is evidence that some labour hire operators are engaging in exploitative behaviour, using labour hire arrangements to avoid legal obligations such as those under workplace relations, superannuation and taxation legislation.

In particular, there have been reports in the last 12 months of some labour hire companies exploiting vulnerable employees including migrant workers. This includes practices such as underpayment or non-payment of wages, poor workplace health and safety, and breaches of visa restrictions.

The Inquiry will seek to identify how widespread these problems are, and the sectors and locations in which they are mainly evident.

This will form part of a broader examination of the labour hire industry, including its benefits for Victorian businesses, workers and the community.

While this is primarily a fact-finding Inquiry, it will also consider options for regulatory reform including the viability of a licensing scheme for Victorian labour hire businesses and examples of the regulation of temporary work and agency work in overseas countries.

The Inquiry will also focus on the issue of insecure work. Over the last 20 years, the traditional Australian model of full-time, ongoing employment has been eroded with the rise of various new forms of working.

These include forms such as casual employment and independent contractor arrangements, which can often have real benefits for workers including flexibility over working time. But in some cases, workers are pressured into contractor relationships through 'sham' arrangements which are really designed to get around legal protections for employees. In others, long-term casuals take the place of ongoing employees, but without the protections.

The Inquiry will examine the extent, nature and impact of insecure work in Victoria, including its impact on workers' families and their financial and housing stability.

I welcome contributions from all Victorian workers, businesses, unions, community groups and other stakeholders on issues related to the Inquiry's Terms of Reference. I would especially like to hear from individual workers who are willing to 'tell their stories' to the Inquiry. Written submissions from interested parties can be provided by **27 November 2015** by email to labourhire.inquiry@ecodev.vic.gov.au; and/or you can appear at one of the public consultations soon to be scheduled. This can be done confidentially if you have any concerns about coming forward.

Professor Anthony Forsyth

16 October 2015

1. Inquiry and Terms of Reference

On 10 September 2015, the Minister for Industrial Relations, the Hon. Natalie Hutchins MP, announced the Chairperson and Terms of Reference for an Inquiry into Labour Hire and Insecure Work.

Professor Anthony Forsyth has been appointed to chair the Inquiry. Professor Forsyth teaches labour law and legal research at RMIT University, and is a consultant with the Corrs Chambers Westgarth Workplace Relations Group. His work on collective bargaining, workplace dispute resolution, trade unions and workplace privacy has been widely published in Australian and international books and journals. Professor Forsyth brings to the Inquiry a wealth of expertise in labour relations law and how the labour market operates, in Australia and other comparable countries.

The Inquiry constitutes a Formal Review under Part 4 of the *Inquiries Act 2014* (Vic). The Inquiry is required to report to the Premier and the Minister for Industrial Relations by 31 July 2016. The Terms of Reference for the Inquiry are as follows:

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.

2. Procedure of the Inquiry

The Inquiry will draw upon a range of evidence, including evidence to and findings of previous inquiries and reports, available statistical data, academic research, submissions and consultation with stakeholders.

2.1. Submissions from interested parties

This Background Paper includes a number of suggested questions and issues for participants to address in submissions. The Inquiry is particularly interested to receive submissions from persons or organisations who are able to provide evidence, examples or case studies which address the Terms of Reference.

Written submissions should be submitted by no later than **27 November 2015**.

The Inquiry will also receive supplementary submissions. Supplementary submissions should be confined in scope to specifically addressing matters raised in other submissions or in consultations/public forums, where the interested person or organisation has not already presented the relevant material in their primary submission.

Supplementary submissions should be submitted by no later than **29 February 2015**.

Submissions should be provided to the Inquiry by email in **Microsoft Word format** to labourhire.inquiry@ecodev.vic.gov.au. Emails must be no greater than 25 megabytes in size.

Unless individuals or organisations have requested that their submission remain confidential, submissions will be posted onto the Inquiry Website at the Inquiry Website shortly after their receipt. Documents will remain there indefinitely as a public document.

The Inquiry reserves the right not to publish on its website material that is offensive, potentially defamatory, or clearly out of scope for the Inquiry.

2.2. Consultations and public forums

In addition to receiving written submissions, the Inquiry will be conducting a range of stakeholder consultations and public meetings across Victoria, including in Mildura and other regional locations. The Inquiry Website will periodically be updated with information about these public meetings.

2.3. Purpose of this background paper

In summary, the Terms of Reference require the Inquiry to:

- (a) undertake an examination of the extent and nature of the labour hire sector in Victoria, and insecure work more broadly with a particular focus on vulnerable workers;
- (b) assess the implications of labour hire and insecure work for workers, businesses, the community and the economy; and
- (c) make recommendations based on the Inquiry's findings, taking into account the relative regulatory powers of the Victorian and Commonwealth governments, other regulatory approaches interstate and overseas, the objective of protecting vulnerable workers and Australia's international obligations.

This Background Paper has been produced by the Inquiry with the assistance of Industrial Relations Victoria. It aims to provide an overview of material that may be relevant to the issues raised by the Terms of Reference, to assist those preparing submissions. It is not intended to be exhaustive, and interested individuals and organisations are encouraged to address any other matters considered relevant to the Terms of Reference.

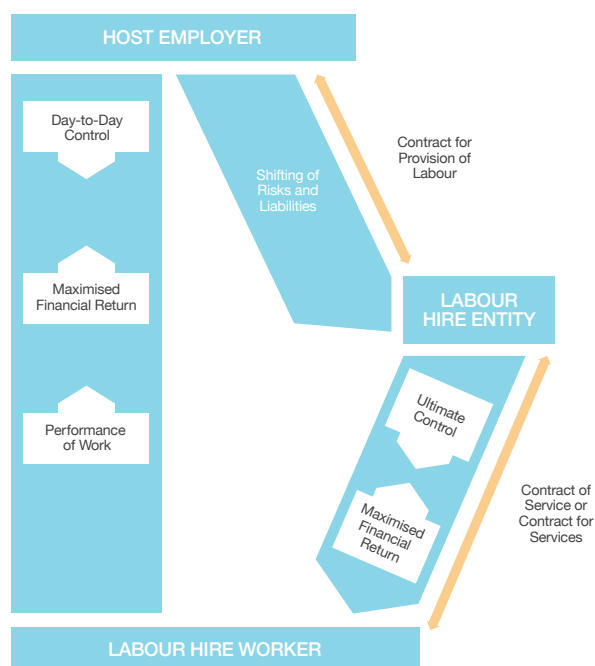
3. Labour hire

A key focus of the Inquiry is the extent and impact of labour hire arrangements in Victoria.

3.1. Prevalence and nature of labour hire arrangements

Labour hire arrangements typically involve a ‘triangular relationship’¹ in which a labour hire business (**the supplier**) supplies the labour of a worker (**the worker**) to a third party (**the host**) in exchange for a fee. In a labour hire arrangement, there is no direct employment or contractual relationship between the host and the worker. Instead, the worker is engaged by the supplier, either as an employee, or alternatively as an independent contractor.

Typical Labour Hire Arrangement



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

Labour hire in the form of temping agencies has been a feature of the Australian labour market since the 1950s.² 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.³ This industry has become well established in Australia in the past two decades.⁴ Host businesses use labour hire workers and suppliers in a variety of ways. These include:

- Filling very short term vacancies with labour hire workers, in a conventional ‘temping’ model.
- Filling regular seasonal requirements with labour hire workers, such as in the agricultural or food processing industries.
- Filling specific functions within the business with labour hire workers with particular skills, such as maintenance.
- Using labour hire as a longer-term supplement to an ongoing workforce, with ongoing and labour hire employees working alongside each other performing the same work.
- Using labour hire to entirely replace an ongoing workforce, such as in the meat industry.

According to a recent IBISWorld report, the temporary staff services industry in Australia generates annual revenue of \$18.5 billion and is expected to have annualised growth of 1.4 per cent through to 2020-21 (slightly down on the annual 1.8 per cent growth level in the five years to 2015-16). Around a quarter of the labour hire sector’s revenue is attributable to Victoria. The major users of labour hire services nationally are said to be the IT and telecommunications, construction and trades, health care and medical sectors.⁵ Government and defence, and the mining, energy and utilities sectors also play a part.

Over the past five years the number of labour hire enterprises in Australia has grown significantly, including increased operations in regional areas. There are now an estimated 5,798 temporary staff services enterprises across Australia, with IBISWorld suggesting around a quarter of these are located in Victoria.⁶

In Victoria, data provided by WorkSafe Victoria⁷ indicates that the number of labour hire businesses⁸ registered for WorkCover premium services has remained stable over the last four years, as follows:

- 2011-12: **968**
- 2012-13: **947**
- 2013-14: **916**
- 2014-15: **933**

In 2014-15, of the 933 labour hire businesses registered with WorkSafe Victoria, 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.⁹ These users are different from those noted in the national labour hire sector in the IBISWorld report, illustrating the variability of the data-sets.

Estimates of the proportion of labour hire workers in the Australian workforce are imperfect, and vary due to different methodologies, data sources and time periods. Two recent analyses indicate labour hire workers make up between 1.2 per cent¹⁰ and 2.5 per cent¹¹ of Australian workers. In 2012, the Independent Inquiry into Insecure Work in Australia (**Independent Inquiry into Insecure Work**), commissioned by the Australian Council of Trade Unions (ACTU), estimated the number of labour hire workers to be between 2 and 4 per cent of the workforce.¹² Applying these percentages to the current number of employed persons nationally¹³ equates to between 235,330 and 470,600 workers. Regardless of the precise figure, it is clear that labour hire as a form of work has stabilised as a significant feature of working arrangements in Australia.¹⁴ Further, Victoria has a relatively high concentration of labour hire workers, compared to its proportion of the Australian workforce.¹⁵

3.2. Impact of labour hire arrangements for workers, businesses and the community

There are many potential benefits of labour hire arrangements for workers, businesses, the community and the economy.¹⁶ These include:

- Labour hire arrangements provide greater operational flexibility for hosts in managing workforce options, providing the capacity to temporarily increase labour during times of high demand, without affecting ongoing workforce numbers.
- For workers, these arrangements may provide greater flexibility in hours of work, to assist in accommodating family responsibilities, study or other commitments.
- Labour hire arrangements allow hosts to reduce some operating costs, such as payroll tax, costs of compliance with labour regulations and internal human resources costs.
- Labour hire arrangements may provide a path to other employment, and/or ongoing employment. They provide employees with the opportunity to gain skills and experience¹⁷ in an industry where they may not otherwise have been able to secure employment.
- The labour hire industry has become a significant sector of the Australian economy in its own right, providing services and work opportunities across a wide range of unskilled, semi-skilled, labour-intensive and professional fields.

There are also potential disadvantages and risks for workers which result from a labour hire model of engagement,¹⁸ including the following:

- Some research suggests that labour hire workers are more likely to be in insecure work, leading to a lack of certainty around continuity in employment and income. This is supported by ABS data from 2008 which indicates that labour hire workers were more likely to be without paid holiday or sick leave entitlements (79 per cent compared with 23 per cent) and employed on a fixed term contract basis (15 per cent compared to 3 per cent of employees generally). Further, 60 per cent of labour hire workers had been with their current employer for less than one year, compared with 23 per cent of all employees.¹⁹
- Labour hire may be used to replace rather than supplement an ongoing workforce.

- Labour hire workers may not receive the same rates of pay and other beneficial conditions as direct employees of a host, for example because a collective agreement covering the enterprise does not extend to labour hire staff.
- Labour hire structures have been linked to instances of 'phoenix' activity, namely the transfer of assets of an indebted company into a new company (such as an associated labour hire entity operated by the same director/s), to evade tax, employment and other legal obligations.
- Labour hire workers may have less of a 'workplace voice' in the host's workplace than directly employed workers, may find it harder to join a union and may be excluded from collective bargaining about the conditions which apply to their work.
- Barriers to entry into the labour hire sector are low, meaning opportunistic operators can easily enter and work in the industry. Some labour hire suppliers are driven by price considerations, to the detriment of compliance with workplace laws. There are some recent serious examples of unscrupulous agencies or employers exploiting vulnerable workers and breaching workplace, health and safety, tax and migration laws on a systematic basis.

3.3 Questions for participants to address in submissions

To what extent is labour hire used in Victoria? In which industries and regions is it most prevalent?

What do labour hire suppliers in Victoria look like (e.g. size, sectors they operate in, local or part of national/multinational business)?

How are labour hire workers generally engaged? To what extent are they engaged as employees? Or as independent contractors?

What working conditions do labour hire workers typically have? What differences are there, if any, between the conditions of direct employees of a host organisation and labour hire workers?

To what extent is accommodation provided by labour hire companies to workers, and what is its nature and cost?

In what ways do hosts typically use labour hire workers? Are they used to supplement or to replace ongoing workforces or direct employees?

Does the use of labour hire impact the availability of apprenticeships and traineeships?

To what extent do hosts inquire into the labour practices of labour hire suppliers? Should this occur?

Is there evidence of labour hire being used to evade workplace laws and other legal obligations?

What role do labour hire companies play in supply chains for the provision of goods and services? Do other actors in those supply chains have responsibilities towards labour hire workers, whom they do not directly engage?

Does the use of labour hire arrangements lead to positive outcomes for Victorian workers, businesses and the broader community? What problems does it create?

4. Insecure work, vulnerable workers and the role of business structures and practices

The Terms of Reference also require the Inquiry to examine the extent and impact of other forms of insecure work in Victoria. This encompasses an examination of vulnerable workers, such as working visa holders and female workers, along with business structures and practices like sham contracting or 'phoenixing' which may result in insecure work, the exploitation of vulnerable workers or unfair disadvantage to other businesses.

4.1. Other forms of insecure work

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.²⁰ This has also led to an increased focus on, and concern about, insecure work.²¹

Insecure work is not a clearly defined concept. The Independent Inquiry into Insecure Work defined insecure work as 'poor quality work that provides workers with little economic security and little control over their working lives.'²² That inquiry identified the following indicators of insecure work:

- unpredictable and fluctuating pay
- inferior rights and entitlements
- limited or no access to paid leave
- irregular and unpredictable working hours
- uncertainty regarding the length of a job, and
- lack of any say at work over wages, conditions and work organisation.

Work insecurity may arise even in situations where the work arrangements appear stable or are long-standing. At the same time, no form of work arrangement is inherently insecure for all workers. For example, an independent contractor whose skills are in high demand, or a casual employee with genuine control over his or her hours, may have more secure work than an ongoing employee of a failing business.

However, some features of particular working arrangements, such as casual or fixed term employment, independent contracting and seasonal work, may contribute to a lack of security for workers. These types of working arrangements are highly prevalent in Australia. In 2013, around 17 per cent of workers were either independent contractors or business owners, and another 20 per cent were casual employees. Together these categories comprised over a third of all forms of employment.²³

Casual employment

Almost a quarter of all Australian employees are engaged as casual employees.²⁴ For employers, engaging casuals has advantages including flexibility in rostering and reducing obligations, such as the requirement to provide paid leave, although casual employees are generally entitled to be paid a loading on their base rate of pay.²⁵ Casuals have no entitlement to regular hours of work, or other benefits associated with ongoing employment such as paid leave, notice of termination or redundancy pay. The loading aims to compensate for this. Around 45 per cent of male casual workers and 18 per cent of female casual workers work full time hours.²⁶ Women and young workers are most likely to be engaged as casual employees.²⁷

Fixed term employment

The extent of fixed term employment in Australia is unclear. A 2013 Productivity Commission working paper on forms of employment identifies that according to ABS data, in 2010, 3.1 per cent of Australian employees were engaged on a fixed term contract. However, HILDA data for the same year indicates the level of fixed-term employment is more than double that number, at 8.4 per cent. The Productivity Commission considers that the HILDA data provide a better estimate.²⁸

Fixed term employment is concentrated in the education and training, arts and recreation, electricity, gas, water and waste services, and information, media and telecommunications industries.²⁹

By definition, fixed term contract employees do not have a guarantee of ongoing employment past the end date of the contract.

The Draft Report of the Productivity Commission Review of Australia's Workplace Relations Framework (**Productivity Commission Draft Report**) states that fixed term work is generally preferred by employees who enjoy changing jobs periodically or having a finite horizon for their work relationship.³⁰ In contrast, the report of the Independent Inquiry into Insecure Work reports multiple examples of employees who feel obliged to accept engagement on continual fixed term contracts which are 'rolled over' at the expiry of each term.³¹

Independent contracting, dependent contracting and sham contracting

In November 2013 there were 279,000 persons in Victoria who identified themselves as independent contractors, representing 10 per cent of all employed people in Victoria, and 28.3 per cent of independent contractors nationally.³²

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 entrepreneurs³³ – and need not negatively impact their security of work.

However, it gives rise to the 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, often referred to as 'sham contracting'.³⁴ The imposition on workers of a contractor relationship has arisen in the labour hire context, through use of the so-called 'Odco contracting system'.³⁵ However, such arrangements are often subjected to close scrutiny by the courts, and have on occasion been overturned – particularly where they have involved unskilled workers.³⁶

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'.³⁷

Recent research suggests possible misclassification of employees as independent contractors in 23 per cent of enterprises in industries with a known prevalence of independent contracting.³⁸ In the building and construction industry, misclassification affects 13 per cent of contractors,³⁹ with non-English speaking, vulnerable or less informed workers most affected by employer-driven arrangements.⁴⁰

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.⁴¹ The indicia are useful as they must cover a wide range of circumstances, 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.⁴² For example, a statement in a contract describing its nature is not determinative - 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.⁴³

This requires the balancing of a number of factors in a given factual situation, including:

- 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.

Seasonal work

Seasonal work describes work performed only at a particular time of the year when there is demand for that work, such as fruit and vegetable picking. It is not in itself a form of work engagement. Rather, seasonal workers may be engaged as casual employees, fixed term employees, casual employees or independent contractors – either directly or through a labour hire arrangement. The key feature of seasonal work is that it is for a limited period each year, for as long as the work is required.

Seasonal workers are highly concentrated in the agricultural, forestry and fishing sector. They are 'some of the lowest earning, least mobile and least secure workers in Australia.'⁴⁴

Seasonal workers commonly work for several seasons with one employer.⁴⁵ However generally these periods are treated as discrete engagements, rather than an ongoing employment relationship, for the purposes of employment entitlements. Seasonal employees are specifically excluded from unfair dismissal protection.

Impact of insecure work

Two recent considerations of the structural changes in the economy and the changing nature of working arrangements have highlighted some of the effects of this process of change for workers.

The Productivity Commission Draft Report⁴⁶ asserts that workers value different forms of work and that alternative forms of work satisfy the wide variety of preferences of workers, such as:

- Freedom of choice for independent contractors to choose their work and hours and capacity to work for more than one client simultaneously.
- The appeal of casual work for workers who value flexible hours with the option of declining work.
- The benefits for many casual workers of having both regular work and a higher rate of pay due to casual loadings.
- The capacity of labour hire workers to reduce job search costs by capitalising on the agency's ability to procure work.
- The preference for fixed term contracts for employees who enjoy changing jobs periodically or having a finite horizon for their work relationship, and to work with more than one client simultaneously.

Further, the Productivity Commission Draft Report notes that there is little evidence that prevalence of non-traditional work indicates low quality jobs.⁴⁷

In contrast, the report of the Independent Inquiry into Insecure Work conducted on behalf of the ACTU in 2012⁴⁸ describes 'a new divide' in the Australian workforce. On the one hand, the Insecure Work inquiry describes 'core' workers who are engaged in full-time ongoing employment or who hold skills for which there is steady demand. These workers have access to all the benefits of secure employment, along with genuinely beneficial flexibility to work in various industries and earn good money through a form of freelancing. On the reverse side are workers described as being on the 'periphery', for whom these alternative forms of work are not a temporary situation, and do not lead to a secure job.

Rather, they involve lower wages, a lack of training, having to fit family and other responsibilities around an unpredictable work schedule, where work is a 'series of unrelated temporary positions' needed to pay for the basic requirements for survival.

For employers, non-traditional forms of employment provide important flexibility and can result in lower costs and higher productivity, by allowing employers access to intermittently required skills, a more flexible source of labour to meet sporadic needs, or to meet project specific work.⁴⁹ The Independent Inquiry into Insecure Work describes this as a business model which shifts the risks associated with work from the employer to the employee and suggests this can lead to negative impacts on productivity.⁵⁰

The Productivity Commission Draft Report concludes that where use of alternative labour forms lowers costs to employers, the community will benefit through lower prices⁵¹. It also notes evidence that high levels of employment protection can create barriers to hiring employees, and lead to longer durations of unemployment for certain workers.⁵² However, it notes that businesses which use alternative forms of employment as a vehicle to exploit workers may obtain an unlawful competitive advantage over others in the market, and adversely affect the broader community through tax avoidance.⁵³ Further, the Independent Inquiry into Insecure Work identifies impacts upon workers' families, the community and government such as difficulties in securing home loans, car loans and rental accommodation, adverse health impacts, demand on welfare services, reduction in service quality and costs associated with reduced superannuation contributions.⁵⁴

4.2. Vulnerable workers

Working visa holders

The Terms of Reference do not require an inquiry into 457 visas, or working visas generally.⁵⁵ 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; the impact on employment security for local workers, and the impact on communities.

The total number of temporary visa holders with work rights at 31 March 2015 across Australia was over 1.5 million.⁵⁶ Whilst not all temporary visa holders with work rights will participate in work, this number is nonetheless significant in the context of a total of approximately 11.7 million employed persons in Australia as at March 2015.⁵⁷

There are several types of temporary visas which permit overseas workers to work in Australia.

457 visas

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.⁵⁸

In the year to 30 June 2013, there were 14,390 applications for 457 visas granted for Victoria, comprising 21 per cent of the total number of applications granted nationally.⁵⁹ The highest number - around a third - of all 457 visa applications were granted to citizens of India, followed by the United Kingdom, Ireland, China, United States of America and the Philippines. The top five sponsor industries in Victoria were professional, scientific and technical (14 per cent), other services (13 per cent), accommodation and food services (13 per cent), information, media and communications (12 per cent) and health care and social assistance (11 per cent).⁶⁰

Victoria had the lowest average nominated base salary of all States and Territories for 457 visa applications made during this period, at \$75,200. The Victorian industry with the lowest average nominated salary was the accommodation and food services industry, at \$54,100.⁶¹

Employers are required to afford 457 visa holders terms and conditions of employment that are no less favourable than the terms and conditions that are, or would be, provided to a domestic worker for performing equivalent work at the same location.⁶² However, concerns have been raised that these requirements can be circumvented,⁶³ including due to the 'underlying precarious labour market status'⁶⁴ of many 457 visa holders.

There is recent evidence of non-compliance amongst some sponsors of work 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 which were 457 sponsors. Almost one third of sponsors monitored were found to be in breach of their obligations under workplace laws.⁶⁵ Between 1 July 2013 and 31 December 2014, Fair Work Ombudsman 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 the FWO identified concerns in 18 per cent of cases.⁶⁶ In addition, between 1 July and 31 December 2014, the FWO referred 154 of 460 entities employing s 457 visa holders to the Department of Immigration and Border Protection with compliance concerns.⁶⁷

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,⁶⁸ meaning that visa holders are used only where there is a genuine skills shortage.

Critics argue that the labour market testing requirements are lax, subject to little oversight,⁶⁹ 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.⁷⁰

Working holiday and student visas

There are two other significant groups of visa holders in Australia, whose visas do not have work as their primary purpose, but nonetheless perform a significant amount of low and semi-skilled work.⁷¹

Firstly, as at 31 December 2014 there were 154,599 Working Holiday Maker (WHM) visa holders in Australia.⁷² WHM visa holders are permitted to stay and work in Australia for a 12-month period, but may not remain with any one employer for longer than 6 months. In the majority of cases, where the visa holder has had 88 days of 'specified work' in agriculture, mining or construction in regional areas, they are permitted to apply for a second visa.

WHM visa holders undertake a significant amount of unskilled and low-skilled work.⁷³ There is recent evidence of WHM visa holders at the tail end of complex supply chains suffering exploitation including significant underpayments, extremely long hours of work, being charged high rents for substandard accommodation, discrimination and misclassification as contractors.⁷⁴

Secondly, as at October 2014 there were 402,363 student visa holders in Australia.⁷⁵ Student visas permit most students to work for up to 40 hours per fortnight while their course is in session and for unlimited hours during course breaks.⁷⁶ In addition, there were 21,859 graduate visa holders in Australia, who are permitted to work temporarily here following the completion of their course of study. 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 per cent of the Australian workforce, and approximately 6 per cent of the part-time workforce.⁷⁷

International students have been described as 'particularly vulnerable participants in the Australian workforce.'⁷⁸ Factors which contribute to their vulnerability include the onerous financial visa requirements, language and cultural barriers, absence of security of residence, the work restrictions which they are subject to and the consequence of breaching those conditions, their youth in many cases, and their ignorance as to workplace rights.⁷⁹ There is evidence that international students are clustered in low-paid, service industry jobs, and that they are receiving below minimum wages in some cases.⁸⁰

Other vulnerable workers

The Terms of Reference also extend to examining exploitation of other vulnerable classes of workers, providing the example of female workers. There is evidence of female workers earning less income than male workers for comparable work, being concentrated in industries that attract lower wages, and being more likely to be represented in forms of work, which are often associated with insecure employment.⁸¹

Other vulnerable members of the workforce include workers from a non-English speaking or culturally diverse background, young or older workers, workers with a disability and workers with low levels of formal education.

The Inquiry welcomes submissions relevant to the treatment of these types of workers in the labour market in Victoria, and their experiences of insecure work.

4.3. Phoenix activity

In 2012, Pricewaterhouse Coopers (PwC) prepared a report for the 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.⁸²

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.⁸³ Employees are often not rehired by the new company. If they are, there will often be a period of unemployment, and a loss of capacity to accrue superannuation and other entitlements.

Phoenix activity is also estimated to cost business \$0.99 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–\$3.19 billion per annum.⁸⁴ 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.

4.4. Business structures

Complex labour supply chains and outsourcing

Complex labour supply chains and outsourcing are common features of modern business arrangements. These arrangements can be beneficial for all parties involved and do not necessarily result in insecure work or exploitation of workers.

However, there are features of complex labour supply chains and outsourcing of work in some Australian industries which have demonstrably resulted in an erosion of working conditions, risks to workers' health and safety, and in some cases the exploitation of workers.

Broadly speaking, a 'labour supply chain' is a business structure whereby the party requiring the production of goods or provision of services, at the apex of the chain, does not engage workers directly to perform the work associated with doing so. Instead, that party is separated from the worker by a series of contracts with and between intermediate parties. The price for supply of the goods or services is set by the party at the apex of the chain, not necessarily by reference to the actual labour cost associated with production of the goods or provision of the services. Further, the price paid by the party at the apex of the chain is successively eroded as it passes through each intermediate party and ultimately to the worker at the bottom of the chain. This can have the result that workers are underpaid, exploited and forced to work in a manner which is unsafe.⁸⁵ However, the party at the apex of the chain is quarantined from this outcome.

Supply chains of this nature have been well known for some time in the clothing industry in Australia.⁸⁶ Further examples are apparent in the road transport industry,⁸⁷ the contract cleaning industry⁸⁸ and, recently, in the food processing industry.⁸⁹

There have been a range of regulatory responses to this issue, often tailored to the particular industries in which these practices are most prevalent.

These have included supply chain regulation requiring registration, record-keeping, designated contractual terms and imposing responsibility and recovery rights for workers' entitlements at higher levels of the supply chain.⁹⁰ Industry codes are another mechanism for addressing these issues.⁹¹

The Commonwealth Road Safety Remuneration Tribunal is a recent regulatory response to safety and remuneration concerns arising from labour supply chains in the transport industry, with the Tribunal able to make road safety remuneration orders setting 'safe rates' of pay and imposing requirements on all supply chain participants.⁹²

Franchising

The Franchise Council of Australia defines franchising as 'a business relationship in which the franchisor (the owner of the business providing the product or service) assigns to independent people (the franchisees) the right to market and distribute the franchisor's goods or service, and to use the business name for a fixed period of time.' There are a number of models of franchising, however the most common, and fastest growing, involves the franchisor '[marketing] a service or product under a common name and standardised system, through a network of franchisees.'⁹³ Under this model, the commercial agreement between a franchisor and franchisee typically allows the franchisor to set the prices at which goods are sold, the cost at which they are purchased and the hours that the business operates.⁹⁴

Recently, allegations of systematic exploitation of vulnerable workers in some franchises have given rise to a concern that the model has the potential to lead to exploitation of vulnerable workers.⁹⁵ Some commentators have suggested that this may occur because the commercial obligations of the franchisee to the franchisor are so onerous that the franchisee is unable to comply with workplace laws.⁹⁶ Alternatively, the franchisee, who has less incentive to protect the brand than the franchisor, may simply seek to underpay its workers to boost its own profits.

4.5. Questions for participants to address in submissions

What experience or evidence can you provide of insecure work in Victoria?
What form of working arrangements give rise to this? Which industries and regions does it occur in?

What experience or evidence can you provide of sham contracting?

What experience or evidence can you provide of the use – or misuse – of working visas in Victoria? Which industries and regions are they used in? What kinds of jobs do working visa holders obtain?

What experience or evidence can you provide of exploitation of vulnerable workers in Victoria? This could include working visa holders, young or older workers, workers from a non-English speaking background, women workers, workers with low levels of formal education, workers with a disability or other vulnerable workers.

What experience or evidence can you provide regarding the use of phoenix activity, supply chains or franchising arrangements contributing to insecure work, the exploitation of vulnerable workers or unfairness for competing businesses?

What are the effects of insecure work on Victorian workers, including their family life, community involvement, housing and financial arrangements?

Do workers experiencing insecure work desire more ongoing working arrangements, and if so, of what kind? What barriers do you encounter in obtaining more secure working arrangements?

5. The current regulatory landscape and other regulatory approaches

The current regulatory landscape for labour hire and insecure work in Victoria is multi-faceted, with various federal and state laws impacting on the different forms of working arrangements outlined above.

There are many sources of rights and entitlements associated with work in Victoria. The brief examination of these sources below demonstrates that the central relationship these laws regulate is that of an employer and an employee. Moreover, many rights and conditions are afforded only to ongoing employees, or long-serving casual employees. Fewer rights, conditions and protections are extended to independent contractors.

5.1. Fair Work Act

The principal source of employment rights and conditions for Victorian employees is the *Fair Work Act 2009* (Cth). This federal legislation applies to most Victorian employees across both the private and public sectors. Features of the Fair Work Act include:

- National Employment Standards (NES): minimum conditions about hours of work, various leave entitlements, notice of termination, redundancy pay and other matters. These standards apply to ongoing employees. Only some of the standards apply to casual employees. The NES do not apply to independent contractors (apart from textile, clothing and footwear (TCF) outworkers).
- Modern Awards: instruments setting industry or occupational-based wage rates,⁹⁷ overtime and weekend penalty rates, allowances and other terms and conditions for employees which supplement the NES. Modern awards do not apply to independent contractors (again, except for TCF outworkers). Further, many award entitlements do not extend to casual employees. However, some modern awards provide a right for casual employees to request to become ongoing employees after a specified period. There is no specific modern award applying to labour hire employment. Rather, a labour hire employee will be covered by the award relevant to the type of work they are performing for the host organisation (e.g. if working in the construction industry, the Building and Construction General On-Site Award 2010 will apply).⁹⁸
- Enterprise Agreements: enterprise-specific instruments detailing wages and other employment conditions, which are negotiated between employers and their employees (often with union involvement). Employees must be better off overall under an enterprise agreement than the applicable modern award. In the labour hire context, a host organisation's enterprise agreement will generally not apply to an independent contractor engaged by the supplier. However, some enterprise agreements include provisions (known as 'site rates' or 'jump-up' clauses), extending the terms of the agreement to any employees or contractors of a labour hire company performing work with the host organisation. Further, some enterprise agreements include terms relating to an employer's use of labour hire, contract or agency employees and the job security of direct employees. The Productivity Commission has recently proposed that these matters should be prohibited from inclusion in enterprise agreements.⁹⁹
- Protections from unfair dismissal for ongoing employees after completion of certain qualifying periods (6 months' continuous service or 12 months' service in a small business), and for casual employees with regular and systematic employment and a reasonable expectation that it will continue.
- Protections from adverse action (such as termination of engagement) by an employer or a principal contractor against employees or independent contractors, because they hold or exercise a workplace right, engage in lawful industrial activity, or for discriminatory reasons. 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.
- Protections for employees against 'sham contracting', e.g. an employer must not misrepresent that an employment relationship is an independent contracting arrangement.
- Provisions enabling a broad range of workers to apply for orders to stop workplace bullying.

5.2. Victorian legislation

Several pieces of state legislation provide workplace rights and entitlements for Victorian workers. In particular:

- The *Long Service Leave Act 1992* (Vic) provides for paid long service leave for employees, including some casual and seasonal employees, based on the employee's period of continuous service with an employer. Independent contractors are not entitled to long service leave under this Act.
- The *Occupational Health and Safety Act 2004* (Vic) imposes health and safety duties on employers in respect of their employees and contractors, as well as other persons relating to the workplace or the employer's undertaking. In addition, this legislation imposes duties upon persons who manage or control a workplace in respect of that workplace, and upon employees and self-employed persons in respect of the health and safety of other persons. In the labour hire setting, both suppliers and host organisations have obligations for the safety of labour hire workers.
- The *Equal Opportunity Act 2010* (Vic) prohibits discrimination based on a range of attributes (e.g. sex, disability, race, age, sexual orientation) by an employer or principal contractor against employees or independent contractors.
- The *Workplace Injury, Rehabilitation and Compensation Act 2013* (Vic) provides an entitlement to compensation for injuries and illness arising out of or in the course of work, for both employees and deemed 'workers.' The latter include independent contractors who engage in door to door sales, timber contractors, owner drivers, taxi drivers and contractors who personally perform at least 80 per cent of their work for, and derive at least 80 per cent of their income from, one principal contractor.
- The *Residential Tenancies (Rooming House Standards) Regulations 2012* (Vic) set down minimum standards for the privacy, security, safety and amenity of rooming houses (this is relevant where rooming house accommodation is provided by an employer as part of an employment arrangement).
- The *Education and Training Reform Act 2006* (Vic) deals with terms of engagement for trainees and apprentices, as well as accreditation and other requirements for training providers.
- The *Owner Drivers and Forestry Contractors Act 2005* (Vic) provides contractual rights and dispute resolution processes for owner operators in the transport and forestry sectors.
- The *Child Employment Act 2003* (Vic) imposes various restrictions on the employment of children under the age of 15.
- The *Public Administration Act 2004* (Vic) regulates employment in the Victorian public service (along with the Fair Work Act and the Victorian Public Service Workplace Determination 2012).

5.3. Other relevant federal legislation

In addition to the Fair Work Act, the following federal laws impact upon the engagement of workers in Victoria:

- The *Competition and Consumer Act 2010* (Cth) prohibits employers from misleading prospective employees about the availability, nature, terms and conditions, or other aspects of a position they are applying for. The *Australian Consumer Law and Fair Trading Act 2012* (Vic) extends the application of this federal legislation in Victoria.
- The *Independent Contractors Act 2006* (Cth) provides limited avenues of redress for contractors that may be subjected to harsh or unfair contract arrangements. This legislation also limits the ability of state laws to provide certain minimum rights and entitlements for contractors covered by federal law.
- The *Migration Act 1958* (Cth) imposes restrictions and visa requirements on non-citizens seeking to work in Australia. The legislation creates offences for employers, including labour hire providers, who employ workers in breach of the Migration Act requirements or visa limitations. As outlined in section 4.2 above, common visa categories are student visas; working holiday visas; and the subclass 457 visa.
- The *Superannuation Guarantee (Administration) Act 1992* (Cth) and the *Superannuation Guarantee (Charge) Act 1992* (Cth) require employers to make minimum contributions on behalf of employees (currently 9.5 per cent of earnings) to superannuation funds.
- The *Tax Administration Act 1953* (Cth) requires the deduction of income tax from employees' earnings. Different arrangements apply for contractors, including the personal services income test, which is used to ensure that only contractors who are genuinely running their own business obtain more favourable tax treatment.
- Most states have legislation in place to protect TCF outworkers in clothing industry supply chains¹⁰⁰ complementing Part 6-4A of the Fair Work Act. Part 6-4A (introduced by the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012* (Cth)) extends the operation of most employee protections under the Fair Work Act to TCF outworkers (often engaged as contractors) as if they were employees. These workers are also covered by the Textile, Clothing, Footwear and Associated Industries Award 2010 including provisions enabling recovery of entitlements from other entities in the relevant supply chain.¹⁰¹

5.4. Labour hire reform proposals

The Recruitment and Consulting Services Association Australia and New Zealand (RCSA) has adopted two initiatives to improve the standards of operators in sectors including the on-hire provision of labour:

- The RCSA Code for Professional Conduct,¹⁰² which establishes ethical and professional conduct standards for RCSA member companies including labour hire providers, and provides for dispute resolution processes. Through the Code, RCSA members commit to compliance with all applicable legal and regulatory requirements.
- The proposed RCSA Employment Services Industry Code,¹⁰³ which the organisation is seeking to have adopted through federal regulation. This Code would apply to all Australian employment services and on-hire providers, as well as the users of their services, and establish a national licensing framework. The Code would impose a wide range of obligations on providers, including requirements relating to 'fair work practices.'

The ACTU has called for changes to the Fair Work Act to impose responsibility for workers' employment entitlements on both host organisations and labour hire suppliers; and the establishment of a national licensing scheme for labour hire operators.¹⁰⁴ Under the licensing system, minimum capital requirements would apply to any person or company intending to register as a labour hire provider, as well as requirements relating to compliance with minimum employment standards, superannuation, taxation, etc. Avenues would be provided for enforcement of licensing standards, with remedies including penalties and recovery of underpaid wages for employees.

5.5. Regulatory approaches in other Australian states and internationally

Australian jurisdictions

Some jurisdictions have legislation that reference labour hire in specific contexts, for example workers' compensation, long service leave entitlements, workplace privacy, or building and construction legislation including security of payment. For example, the ACT has a number of statutes of this type. Queensland requires persons carrying out building work to be appropriately licensed, and this can apply to labour hire businesses where they provide labour to carry out building work.¹⁰⁵

The *Agents Act 2003* (ACT) requires employment agents to be licensed, whilst some other jurisdictions retain employment agent-specific legislation but exclude labour-hire businesses, either by definition or by use of exemption provisions. For example, in South Australia, the *Employment Agents Registration Act 1993* (SA) operates with exclusions for charitable organisations and organisations operating a labour hire business. In Western Australia, labour hire companies are excluded from the operation of the *Employment Agents Act 1976* (WA).

Queensland legislation excludes labour hire companies on the basis that the company is the employer and responsible for performing the obligations owed by a person to the worker, including paying the worker for the work. Queensland's code of conduct for 'private employment agents' also excludes labour hire. NSW excludes employment placement services.¹⁰⁶

Labour hire providers are also subject to the Fair Work Act, other federal legislation, and similar state/territory laws to those operating in Victoria regulating employment generally (as outlined above). For example, the Model Work Health and Safety laws can apply to persons conducting a business or undertaking involving the provision of labour hire workers.¹⁰⁷

A Parliamentary Inquiry into the labour hire industry has been established in South Australia.¹⁰⁸ 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.

International Labour Organization Standards

There are many International Labour Organization (ILO) conventions and recommendations relevant to the issues to be considered by this Inquiry, including instruments aimed at promoting decent work and the prevention of insecure work.¹⁰⁹ 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:¹¹⁰

- 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
- maternity protection and benefits, and parental protection and benefits.

However, as Australia has not yet ratified ILO Convention 181, there is presently no obligation at 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.

The global industry body for the private employment agency sector (CIETT) has recently argued that:¹¹¹

- ILO Convention 181 is 'a key instrument to improve workers' conditions and protection as well as the performance of ... labour markets'
- countries which have ratified Convention 181 offer workers better conditions, and more meaningful social dialogue over temporary agency work, than states which have ratified Convention 96.

United Kingdom

UK Regulation of Agency Work

In the UK, labour hire is referred to as ‘agency work’ and is subject to the provisions of the *Agency Workers Regulations 2010*.¹¹² 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).

In addition, after 12 weeks in the same job with the same hirer (i.e. host organisation), an agency worker becomes entitled to the same employment terms and conditions as any comparable employee of the hirer.¹¹³ The employer of the agency worker (i.e. supplier) is primarily responsible for meeting all minimum employment entitlements.

UK Gangmasters Licensing Authority

Organisations providing workers to employers in the forestry, agriculture, horticulture, shellfish-gathering or food processing/packaging sectors must register and obtain a licence through the Gangmasters Licensing Authority (GLA).¹¹⁴ Licence fees range from around A\$865-A\$5,630 depending on business turnover; inspection fees also apply. Criminal offences including fines and imprisonment can be imposed on gangmasters who operate without a GLA licence, and those who use their services.

The licensing standards are aimed at protecting workers from poor treatment and exploitation, and cover the following eight areas:

- Fit and Proper Test
- Pay and Tax matters
- Prevention of Forced Labour and Mistreatment of workers
- Accommodation
- Working conditions
- Health and Safety
- Recruiting workers and Contractual Arrangements, and
- Sub-Contracting and Using Other Labour Providers.

The GLA scheme was introduced following the drowning deaths of 23 Chinese cockle-pickers at Morecambe Bay in 2004, and there are currently 960 licences issued.¹¹⁵

Canada

The Canadian province of Ontario has had legislation in place since 2009 to protect ‘temporary help agency’ employees,¹¹⁶ principally by ensuring that these employees are accorded the minimum terms and conditions applicable under the *Employment Standards Act, 2000* (Ont). In addition, the Ontario legislation:¹¹⁷

- 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.

United States of America

There are very few legal protections for temporary workers in the U.S.A., leading to concerns in some quarters about the rise of ‘perma-temping’.¹¹⁸ Some U.S.A. 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.¹¹⁹

Some courts in the U.S.A. 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.’¹²⁰ This concept has not been accepted in Australian law.¹²¹

Other Approaches

Two other common regulatory approaches to labour hire/agency work internationally are to:¹²²

- prohibit such arrangements in certain industries, e.g. construction, port transport, security, seafaring or where dangerous work is involved (Japan, Korea)
- establish a statutory maximum period for an on-hire posting or assignment with a host organisation, e.g. 9 months or 15 months with government approval (Israel), 3-18 months (Belgium), 3 years (Italy, Japan).

5.6. Questions for participants to address in submissions

What regulatory options are available to address the issues raised by the Terms of Reference, within the limits of Victoria's legislative powers?

What models could operate for a national approach to regulation of the labour hire industry?

What would be the impact of a statutory licensing scheme for labour hire operators in Victoria, including requirements for licensees to comply with minimum standards for the fair treatment of workers?

What evidence or experience do you have of regulatory models in other jurisdictions for addressing the issues raised in the Terms of Reference?

6. Other inquiries and activity

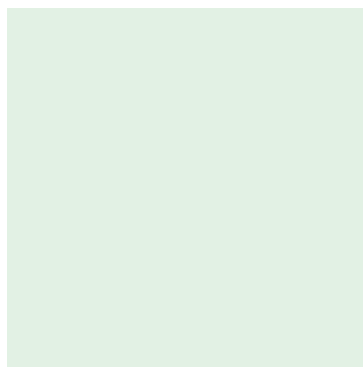
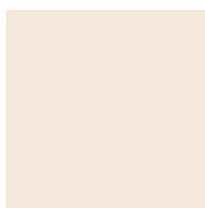
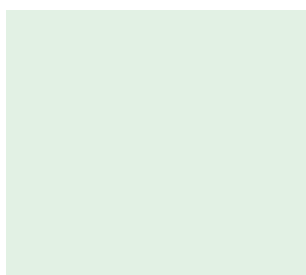
A range of other bodies are currently inquiring, or have in recent years inquired into matters which touch upon the Terms of Reference for the Inquiry, or have conducted relevant compliance activity. Interested persons and organisations may wish to have regard to this material in preparing submissions.

6.1. Current inquiries and other activity

- Australian Government, 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 holders, due to report by **11 February 2016**.
- Australian Government, Department of Immigration and Border Protection, Australian Customs and Border Protection Services and Fair Work Ombudsman, Taskforce Cadena, formally commenced on **1 July 2015**, to conduct operations targeting visa fraud, illegal work and the exploitation of foreign workers particularly in the labour hire industry.
- Australian Government, Productivity Commission, Inquiry into the Workplace Relations Framework, including an examination of alternative forms of work, sham contracting, subcontracting, labour hire, and migrant workers. The Productivity Commission released a draft report in August 2015 and is due to complete its final report in **November 2015**. In its draft report, the Productivity Commission acknowledged that some labour hire workers are exploited.
- Australian Government, Fair Work Ombudsman, Inquiry into the terms and conditions of working holiday visa holders and whether they are being exploited by employers.
- Parliament of South Australia, Economic and Finance Committee, Inquiry into the Labour Hire Industry, established on 11 June 2015, submissions to the inquiry closed on **27 July 2015**.
- Recruitment and Consulting Services Association, proposed Employment Services Industry Code, Public Exposure Draft, **May 2015**.
- On **14 July 2015**, the ACTU's national executive passed a resolution calling for a public registry of labour hire companies and a rigorous national licensing regime.

6.2. Past inquiry reports

- 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
- 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
- *Robust New Foundations, Independent review into Integrity in the Subclass 457 Programme*, September 2014
- Andrew Stewart and Rosemary Owens, Adelaide Law School, *Experience or Exploitation?, Report for the Fair Work Ombudsman*, January 2013
- Pricewaterhouse Coopers, for the Australian Government, Fair Work Ombudsman, *Phoenix Activity – Sizing the problem and matching solutions*, June 2012
- Fair Work Building & Construction, 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
- 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
- Parliament of Victoria, Economic Development Committee, Inquiry into Labour Hire Employment in Victoria, *Interim Report*, December 2004 and *Final Report*, June 2005



Endnotes

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2. Richard Hall, *Labour Hire in Australia: Motivation, Dynamics and Prospects* (Working Paper 76, ACIRRT, University of Sydney, April 2002).
3. 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, above n 2; Steve O'Neill, *Labour Hire, Issues and Responses*, Research Paper No. 9, 2003-4 (Information and Research Services, Parliamentary Library, Australian Government).
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10. Anthony Shomos, Erin Turner and Lou Will, *Forms of Work in Australia - Productivity Commission Staff Working Paper* (Australian Government, Productivity Commission, April 2013).
11. 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), 28, consolidating male and female figures from Table 1, which represent unweighted person-wave observations from the first two waves (2001-2010) of the HILDA Survey.
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14. IBISWorld, above n 4.
15. ABS, *Australian Labour Market Statistics, Jan 2010: Labour Hire Workers* (Cat 6105.0, January 2010), derived from the 2008 Forms of Employment survey.
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17. See for example, *Brown and Ors v Clermont Coal Operations Pty Ltd* [2015] FWC 3862
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23. ABS, *Australian Labour Market Statistics*, (Cat. 6105.0, 2014).
24. Ibid.
25. Johnstone et al, above n 1, 57.
26. ABS, above n 22. See also Ian Watson, 'Bridges or Traps? Casualisation and Labour Market Transitions in Australia' (2013) 55:1 *Journal of Industrial Relations* 6.
27. 54% of all casual employees are women, 39% of casual employees were aged 20-24 years, and 53% are aged 35 years or less: ABS, above n 23.
28. Shomos et al, above n 10, 80.
29. ABS, *Forms of Employment, Australia*, November 2013 (Cat. 6359.0, 2013).
30. Australian Government, Productivity Commission, *Workplace Relations Framework: Productivity Commission Draft Report* (August 2015), 716.
31. Independent Inquiry into Insecure Work in Australia, above n 12, 33.
32. ABS, above n 29.
33. Johnstone et al, above n 1, 58.
34. See Cameron Roles and Andrew Stewart, 'The reach of labour regulation: Tackling sham contracting' (2012) 25:3 *Australian Journal of Labour Law* 258.
35. 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, above n 1, 60-62; Roles and Stewart, above n 34, 281.
36. Johnstone et al, above n 1, 63.
37. Ibid (citation omitted).
38. 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.
39. TNS Consultants, *Working arrangements in the building and construction industry: further research resulting from the 2011 Sham Contracting Inquiry* (December 2012), 6, 7.
40. 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).
41. See e.g. *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 190 CLR 16.
42. Illustrating the difficulties in this area, differently composed benches of the Full Court of the Federal Court have recently adopted different conceptual approaches to the question of distinguishing an employee from an independent contractor: see *Tattsbet Limited v Morrow* [2015] FCAFC 62 and compare *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37 (the High Court has granted the FWO's application for special leave to appeal against this latter decision).
43. *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21.
44. Centre for Employment and Labour Relations Law, University of Melbourne, *Submission to Independent Inquiry into Insecure Work in Australia*, 10.
45. Ibid.
46. Australian Government, Productivity Commission, above n 30, 715-6.
47. Ibid, 100 (citations omitted).
48. Independent Inquiry into Insecure Work in Australia, above n 12, Foreword, 19-23.
49. Australian Government, Productivity Commission, above n 30, 716.
50. Independent Inquiry into Insecure Work in Australia, above n 12, 19.
51. Australian Government, Productivity Commission, above n 30, 716.
52. Ibid, 113 (citations omitted).
53. Ibid, 720.
54. Independent Inquiry into Insecure Work in Australia, above n 12, 20-21.
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56. 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).
57. ABS, *Labour Force* (Cat 6202.0, March 2015).
58. Azarius et al, above n 55, 20.
59. Australian Government, Department of Immigration and Border Protection, *Subclass 457 State/Territory summary report, 2012-13 to 30 June 2013*, 4, 6.
60. Ibid, 9.
61. Ibid, 7.
62. Migration Regulations 1994 (Cth), Regs 2.72 10(c), (cc) and 10AA.
63. 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, 446. 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.
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65. Australian Government Department Submission, above n 55, 13.
66. Ibid, 14.
67. Ibid, 24.
68. Howe, above n 63, 457.
69. Ibid, 446.
70. Ibid, 456.
71. Joanna Howe, 'Does Australia need an expert commission to assist with managing its labour migration program?' (2014) 27 *Australian Journal of Labour Law* 233, 248.
72. Australian Government, Department of Immigration and Border Protection, *Working Holiday Maker visa programme report* (December 2014), including subclass 417 and subclass 462 visas.
73. Howe, above n 71, 233.
74. FWO, above n 18.
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77. Alexander Reilly, 'Protecting Vulnerable Migrant Workers: The Case of International Students' (2012) 25:3 *Australian Journal of Labour Law* 181, 185.
78. Ibid, 182.
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80. United Voice, *A Dirty Business: The exploitation of international students in Melbourne's office cleaning industry* (undated); Tham, above n 79; Reilly, above n 77, 185, citing United Voice, *Submission to DIAC, Strategic Review of the Student Visa Program* (2011).
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82. PwC, *Phoenix activity: Sizing the problem and matching solutions* (FWO, June 2012), 13. See also Helen Anderson, 'Phoenix Activity and the Recovery of Unpaid Employee Entitlements – 10 Years On' (2011) 24:2 *Australian Journal of Labour Law* 141.
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87. 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.
88. United Voice, above n 80.
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92. Rawling and Kaine, above n 87; *Road Safety Remuneration Act 2012* (Cth).
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95. Ibid; 'Caltex defends franchise arrangements as SDA receives stream of complaints', *Workplace Express* (3 September 2015)
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99. Australian Government, Productivity Commission, above n 30, 729-733.
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105. *Workers Compensation Act 1951* (ACT); *Workplace Privacy Act 2011* (ACT); *Long Service Leave (Portable Schemes) Act 2009* (ACT); *Construction Occupations (Licensing) Act 2004* (ACT); *Queensland Building and Construction Commission Act 1991*; *Workplace Injury Management and Workers Compensation Act 1998* (NSW); *Building and Construction Industry Security of Payment Act 1999* (NSW).
106. *Agents Act 2003* (ACT); *Employment Agents Act 1976* (WA); *Employment Agents Registration Act 1993* (SA); *Private Employment Agents Act 2005* (Qld), section 4(3); *Commercial Agents and Private Inquiry Agents Licensing Act 2000* (NSW) and *Commercial and Private Agents Licensing Regulations 2006* (NSW).
107. *Work Health and Safety Act 2011* (Cth), Section 7; *Work Health And Safety (National Uniform Legislation) Regulations* (NT).
108. 'SA announces parliamentary inquiry into labour hire industry after Four Corners report', *ABC News* (6 May 2015).
109. 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).
110. 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).

111. International Confederation of Private Employment Agencies, *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
112. The regulations constitute the UK's implementation of Directive 2008/104/EC on Temporary Agency Work of the European Union.
113. Department for Business Innovation and Skills, *Agency Workers Regulations: Guidance* (May 2011).
114. Department for Food, Environment and Rural Affairs, Business and Enterprise – *Guidance: Gangmasters Licensing Authority*, at: <https://www.gov.uk/guidance/gangmasters-licensing-authority>
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Background Paper

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