

Senate Education & Employment References
Committee

THE INCIDENCE OF, AND TRENDS IN, CORPORATE
AVOIDANCE OF THE *FAIR WORK ACT 2009*

ACTU Submission

30 January 2017

Introduction

1. The Australian Council of Trade Unions ('ACTU') is pleased to make a submission to this Inquiry. The ACTU is the peak body representing almost 2 million working Australians. The ACTU and its affiliated unions have a long and proud history of representing workers' industrial and legal rights and advocating for improvements to legislation to protect these rights.
2. We note the terms of reference require this Inquiry to investigate:

"The incidence of, and trends in, corporate avoidance of the Fair Work Act 2009 with particular reference to:

- a) the use of labour hire and/or contracting arrangements that affect workers' pay and conditions;*
- b) voting cohorts to approve agreements with a broad scope that affect workers' pay and conditions;*
- c) the use of agreement termination that affect workers' pay and conditions;*
- d) the effectiveness of transfer of business provisions in protecting workers' pay and conditions;*
- e) the avoidance of redundancy entitlements by labour hire companies;*
- f) the effectiveness of any protections afforded to labour hire employees from unfair dismissal;*
- g) the approval of enterprise agreements by workers not yet residing in Australia that affect workers' pay and conditions;*
- h) the extent to which companies avoid their obligations under the Fair Work Act 2009 by engaging workers on visas;*
- i) whether the National Employment Standards and modern awards act as an effective 'floor' for wages and conditions and the extent to which companies enter into arrangements that avoid these obligations;*
- j) legacy issues relating to Work Choices and Australian Workplace Agreements;*
- k) the economic and fiscal impact of reducing wages and conditions across the economy; and*
- l) any other related matters.¹*

¹ See Australian Parliament, Senate Standing Committees on Education and Employment, The incidence of, and trends in, corporate avoidance of the *Fair Work Act 2009*, Terms of Reference, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/AvoidanceofFairWork/Terms_of_Reference.

3. Whilst our submission addresses a number of the Committee's terms of reference below in some detail, the overriding point that needs to be made before descending into the technicalities is a reasonably straightforward one: the industrial relations system in this country is dated and ill-equipped to deal with contemporary methods of labour utilisation. In saying this, we use the term "contemporary" very loosely.
4. The trends that ought to have been clear warning signs that the system needed to adapt were emerging decades ago. Instead of evolving to meet changed circumstances during that period, our system has essentially wavered between policy positions that seem to have had politically fixed outer limits:
 - a. Some form of safety net for direct employees of established business;
 - b. A collective bargaining framework that at a practical level is only capable of delivering meaningful improvements for workers in single enterprises where workers are directly employed and already highly organised;
 - c. Some level of protection against unfair dismissal of direct employees in standard employment relationships;
 - d. Some level of protection against discrimination at least for persons in traditional employment relationships; and
 - e. An independent umpire that has become increasingly fettered from dealing with the basic rights and wrongs of what happens in Australian Workplaces and insulated from the representatives of the industrial parties concerned.
5. The stasis of these outer limits stands in stark contrast to the contemporaneous shifts in the real world of labour relations:
 - a. Membership of unions and employer associations has declined significantly over the same period;
 - b. The legal minimum wage as a proportion of market medium wages has dropped some 8% over the last 20 years and wage growth generally has reached record low levels;
 - c. Australia has proved itself to not be immune from the growth in inequality observed in many other developed countries, nor its unpredictable political sequelae;

- d. New “innovators” have entered the labour market in the form of Uber, Airtasker, Freelancer, and countless two bit labour hire operators that moonlight as foreign labour recruitment agents and domestic accommodation providers;
 - e. Key labour standards developed through worker organisation and once thought central to our safety net – like redundancy pay – are now irrelevant and inaccessible by some 40% of the workforce who are now without job security;
 - f. A labour inspectorate has been increasingly resourced to deal with cases of worker exploitation, a task in which it will inevitably fail not only due to scale but also because it lacks the partisan position necessary to keep the system in anything resembling a sustainable balance.
 - g. Non compliance with safety net conditions is rife, and collective agreements even when entered into can be abandoned by employers with no associated capacity for the umpire to influence the terms of a new deal.
6. If one accepts the orthodox view that industrial relations systems are intended to provide protection to workers and to redistribute market incomes, the inescapable conclusion is that our system is failing. It simply does not reach many areas of the modern labour market.
7. Whilst this inquiry is an important opportunity to develop short term solutions to current issues in the implementation of the *Fair Work Act*, the problems with our industrial relations system are far more fundamental. The endemic issues associated with the increasing complexity of labour and production supply chains can only be addressed in an enduring way if the outer limits of the regulatory platform are significantly recast.

The use of labour hire and contracting arrangements

8. Labour hire is a component of Australia's insecure workforce. Whilst the use of labour hire fell 8 per cent between 2001 and 2008,² the industry had grown at over 30 per cent per annum throughout the 1990s and 2000s, one of the fastest rates in the world, leaving Australia near the top of OECD country rankings for use of agency work.³ Whilst

² ABS, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/6105.0Feature%20Article1Jan%202010>

³ Huiyan Fu, *Temporary Agency Work and Globalisation: Beyond Flexibility and Inequality*, 2015, p96.

data on the prevalence of labour hire is patchy, the ABS estimated that 576,700 workers or 5 per cent of employed people in 2008, had found their current job through a labour hire agency.⁴ Some 97 per cent of these were estimated to be employees and 3 per cent were estimated to be independent contractors.⁵

9. As various critics have noted, employers have used labour hire arrangements to minimise their costs and shift the risks posed by working life on to their workforce.⁶ It avoids standard employment entitlements and conditions attaching to direct employment such as the right to ongoing work via access to unfair dismissal protection and redundancy pay and protections. Risk-averse behaviour by employers in the wake of the GFC contributed to the growth of labour hire engagement.⁷
10. The consequences of this form of engagement for workers can be dire. Labour hire workers come closest to the 'disposable worker' model at the heart of the 'just-in-time' workforce that has cemented itself in the Australian labour market over the last twenty-five years. For example, labour hire workers experience the most volatile weekly hours of work⁸ and are unable to participate in collective bargaining at their worksite. Labour hire workers work alongside employees doing the same work but with inferior conditions. At times there are layers of these arrangements –for example outsourcing through competitive tendering, where the successful tenderer engages a labour hire sub contractor to supply the workforce that performs the contracted services. In such an arrangement, two corporate entities (or more) are placed in the supply chain between the worker and the ultimate purchaser of the labour and are deriving incomes from what would otherwise be incomes paid to the worker. Within these structures there are number of questionable sub layers, such as requiring the worker to pay a “membership fee” to the labour hire company (see caption over page), or transferring the worker between various labour hire companies without any benefit to them.
11. An enterprise that chooses to engage some or all of its workers through labour hire has very few obligations to those workers and, accordingly, those workers have very few rights to influence their relationship with that enterprise. This occurs notwithstanding that

⁴ Ibid.

⁵ ABS, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/6105.0Feature%20Article1Jan%202010>

⁶ Ibid.

⁷ See, for example, Huiyan Fu, *Temporary Agency Work and Globalisation: Beyond Flexibility and Inequality*, 2015, p96.

⁸ based on HILDA Wave 13 data.

those workers are under a contractual obligation to abide by the direction of their 'host employer'.

12. Unlike outsourcing, where accusations of avoidance behaviour are often met with denials by business referring to the external service offerings and industry expertise that outsourcing is claimed to provide, labour hire involves the provision by a third party of labour only, generally without provision of any particular kind of expertise beyond that already held by employees of the host organisation. Hence, the *raison d'être* of labour hire is 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. It is purely reactionary, a rejection of the basic policy intent that underlies the industrial relations system. This manifests in a number of ways as follows:

What to bring to work

Induction Day: passport, new employment form, VISA grant letter, Q-fever card & Q-fever registration form.

Membership fee

\$500.00 will be deducted from wage as membership fee. This fee is 100% refundable when you successfully complete a 6 months contract period.

3 Months Probationary Period

During probationary period your employer can carefully consider whether the new team member is able to meet the standards and expectations of the job. The employee can be terminated with a short notice during this period.

Q-fever Policy

All employees must present Q-fever registration Card to HR manager within 2 weeks from induction day.

I, _____ (full name) understand and agree to the terms and policies.

Sign:

Date:

1/1

y Ltd

PAYSLIP

FORM 000 512

Payee name:

PAY PERIOD	10/10/2016 - 23/10/2016			PAID ON	28-10-2016		
DESCRIPTION	Hours			Rates			AMOUNT
	ORDINARY	O/T x 1.5	O/T x 2	NORMAL	O/T x 1.5	O/T x 2	
DETAILS	60.6	7.74		\$21.08	\$27.50	\$36.66	\$ 1,490.23
OTHER ET.							\$ 85.45
SUPER GC							\$ 121.35
TAX WITHOLDING							\$ 221.00
DEDUCTION				THIS PAY			\$ 1,575.68
Mem. Fee	\$ 500.00			TAXABLE			\$ 1,575.68
				PAYG			\$ 221.00
				NET			\$ 854.68

- a. The common law does not see an employment relationship between the host employer that directs the work and the worker. Further, it has generally rejected the idea that there could be more than one employer;⁹
- b. 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 that on a day to day basis controls the work that they perform and the conditions under which and location where it will be performed;
- c. 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;
- d. The “General Protections” contained in the *Fair Work Act 2009* (Cth) adapt poorly to the work situations of labour hire workers because in the main they protect the labour hire agency itself from “adverse action” rather than the workers the agency employs and makes available to workplaces; and
- e. Workers in labour hire arrangements are less inclined to speak up about matters of concern to them as they understand that the decision to request that they no longer be supplied to the workplace can be made by the host employer at any time, and may mean they have an uncertain period of time before another host engagement becomes available.

13. It has been estimated that there are between 2000 and 3500 temporary agencies operating in Australia. The top ten agencies combined have a market share of less than 20 percent and fewer than 2 per cent of agencies employ more than 100 workers¹⁰ but the industry is largely directed by the largest firms such as Skilled, Manpower, Spotless, Programmed Maintenance Services and Chandler Macleod. The dominant organisations also subcontract to preferred panels of labour-hire subcontractors¹¹ and a multitude of

⁹ Because there can be only one employer, in exceptional cases, the common law is able to treat the imposition of a labour hire agency as sham, and look through that sham in order to treat the host employer as the actual employer. See *Nguyen v. A-N-T & Thiess* (2003) 128 IR 241.

¹⁰ *Ibid.*

¹¹ See, for example, the advertisement placed by Spotless seeking expressions of interest for “Security Labour Hire Subcontractors”; Sydney Morning Herald, March 2015.

smaller players. Hence, a labour hire employee may be legally situated deep within complex layers of inter-corporate subcontracting arrangements as well as the commercial arrangements between the labour hire and host. The case reported in *Matthew Reid v Broadspectrum Australia Pty Ltd*¹² identifies some of the practical difficulties that this can present; namely, complying with the practice and procedure *at one's workplace* can lead to one being terminated by one's employer – who is *not at one's workplace*.

14. The Howe Inquiry¹³ heard many personal accounts from workers engaged in labour hire arrangements. The inquiry's report relevantly contains the following:

“The weight of evidence we heard about the effects this has on workers was overwhelming. We heard of cases of:

Workplaces where the entire workforce was employed as casuals through a labour hire firm. Employees were expected to be available for a full-working week, and were notified by text message around 4pm each day of whether and when they were required to turn up the next day – but without any information about how long their shift would be;

Employers using labour hire in the workplace to foster divisions among their ongoing staff and temporary workers, weakening workers’ bargaining power and leading to lower rates of pay and lesser entitlements;

Indirect discrimination on the basis of union activity, age and other grounds being tacitly applied by simply not offering certain workers any more shifts;

Labour hire workers feeling unable to report bullying, injuries suffered in the workplace, or occupational health and safety risks for the fear that exercising their rights would lead to censure, the loss of shifts or the loss of a job altogether; and

Labour hire workers finding themselves unable to secure a home loan or a car loan because of their lack of job security.”¹⁴

15. Labour hire is not a new phenomenon in Australia. What is exceptional about it is that has been allowed to continue so untouched by mainstream regulation. It has surpassed its initial object of supplementing existing workforces and is now used also to replace them. At the extreme end, some labour hire agencies in fact recruit workers from overseas to perform work in Australia as labour hire workers on “working holiday” visas under exploitative conditions.¹⁵

¹² [2014] FWC 7108, [2015] FWCFB 519.

¹³ Independent Inquiry into Insecure Work in Australia (2012), “Lives on Hold: Unlocking the potential of Australia’s Workforce”.

¹⁴ *Ibid.*, at p34.

¹⁵ For example, see evidence given by temporary migrant workers to the public hearings on 26 June 2015 to the Senate Inquiry into [the Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders](#). An investigation by the Australian Broadcasting

16. Labour hire is overwhelmingly used as an avoidance strategy and its continued operation in the present regulatory setting is untenable unless one accepts that the workers who are engaged by labour hire agencies are second class citizens. There is no good reason why a situation should be allowed to continue whereby two workers can work side by side in the same role yet one has a lesser standard of employment protection or a lower rate of pay. Reform is necessary and, in the absence of outright restrictions on labour hire, measures must at least be taken to ensure that labour hire workers engaged in a workplace, however temporarily, have the same level of industrial citizenship as the employees they work with.

17. Our concerns regarding labour hire were raised with the Productivity Commission in the course of its inquiry into the Workplace Relations Framework. Its sole recommendation on the issue was that the *Fair Work Act* be amended to prohibit collective agreements from requiring that labour hire workers be paid the same as direct employees. In contrast, the Senate Education and Employment References Committee recommended in its report *A National Disgrace: the exploitation of temporary visa holders*¹⁶ that the Commonwealth develop a national labour hire licensing scheme, although the Government is yet to respond to that recommendation. Some State governments have, to date, been more receptive to these issues. In Victoria, an extensive inquiry was conducted which recommended the establishment of a system for licensing labour hire agencies operating in the horticultural, meat and cleaning industries¹⁷, which the Government has accepted. Such a system was recommended to involve a fit and proper person test along with reporting as to compliance with laws concerning industrial relations, health and safety, superannuation, taxation and workers compensation laws (as well as regulatory standards associated with accommodation where such accommodation is required)¹⁸. The Economic and Finance Committee of the South Australian House of Assembly made comparable recommendations on licensing, although not limited to any particular

Corporation's program Four Corners on 4 May 2015 that revealed the exploitation of migrant workers in the meat processing and horticultural industries where unscrupulous labour hire contractors were often implicated: see the Inquiry's Interim report, *Interim Report: Australia's Temporary Migrant Visa Programs*, June 2015, p4.

¹⁶ Senate Education and Employment References Committee (2016), "A National Disgrace: The Exploitation of Temporary Work Visa Holders", Commonwealth of Australia.

¹⁷ Victorian Inquiry into the Labour Hire Industry and Insecure Work (2016), Final Report, Victorian Government Printer, Recommendation 14.

¹⁸ Victorian Inquiry into the Labour Hire Industry and Insecure Work (2016) *Op. Cit.*, Recommendation 16.

industry sectors.¹⁹ The Queensland Government Office of Industrial Relations is currently conducting a consultation processes on Labour Hire regulation²⁰, following on from its own Parliamentary inquiry.²¹

Strategic voting cohorts

18. Aside for technical and procedural requirements, the making of an enforceable enterprise agreement under the *Fair Work Act* requires both an employee vote and the approval of the agreement by the Fair Work Commission. Before the Fair Work Commission can approve a collective agreement, section 186 (3) of the *Fair Work Act* requires that it be satisfied that the group of employees covered by the agreement was *fairly chosen*. Further, sections 186 (2) and 188 require that the Commission be satisfied that the agreement has been *genuinely agreed to* by employees. Taken at face value, this would suggest to the uninitiated that there are safeguards to prevent the approval of agreements that were achieved by contriving and confining the voting cohort to small and unrepresentative groups of workers in order to secure more widely applicable employer-favourable provisions and sub-standard wages and conditions. However, as the cases demonstrate, these safeguards are ineffective and the strategy is becoming more widespread.

19. For example, in *CFMEU v Main People Pty Ltd*²², a Full Bench of the Fair Work Commission upheld the approval of an agreement despite the fact that it was originally voted up by only three employees, all of whom were casual and who subsequently left the company. The agreement applied to a group of employees far wider than the three in Karratha who voted on it, covering 17 separate classifications and operating in all States and Territories. The Full Bench Said:

[18] It is in the nature of the scheme established by the FW Act that (a majority of) the employees employed at the time an enterprise agreement is made can agree to terms and conditions of employment that will then bind future employees employed under the terms of that agreement. Nor is there anything in the FW Act to prevent employees voting to approve an agreement that will affect employees in classifications or geographic locations other than their own (unless a relevant scope order has been made).

¹⁹ Parliament of South Australia, Economic and Finance Committee (2016), Inquiry into the Labour Hire industry (Final Report). The South Australian government is yet to indicate whether it will adopt the recommendations in the report.

²⁰ See Office of Industrial Relations (2016), "Regulation of the Labour Hire Industry", Queensland Government.

²¹ Queensland Parliament, Finance and Administration Committee (2016), "Inquiry into practices of the labour hire industry in Queensland".

²² [\[2014\] FWCFB 8429](#) (25 November 2014). See also [Main People Pty Ltd \[2015\] FWC 2560 \(14 April 2015\)](#);

[19] There is nothing unusual or necessarily untoward in a relatively new business making an enterprise agreement early in its life with a small number of employees, with an expectation that the business will grow and eventually employ a much larger number of employees, who would then be covered by the agreement. The evidence suggests that the respondent is a 'start up' venture.

20. The case of *CFMEU v John Holland*²³ concerned another approval of an agreement by the Commission that was voted on by some 3 employees with the potential to apply to a much larger cohort of employees and job classifications. In that case, the employer, John Holland, expected around 25 people to be ultimately employed under the agreement in a variety of roles, including ones additional to the three who voted to approve the agreement. A Full Bench of the Fair Work Commission had overturned the original decision to approve the agreement, noting with concern that..."As it is not possible to identify with any certainty the group of employees to be covered by the Agreement, it is not possible to be satisfied that the group of employees was fairly chosen..."²⁴ The employer sought a review of the Full Bench decision in the Federal Court and succeeded. The CFMEU then appealed the decision of Federal Court, bringing the matter before a Full Court.

21. The Full Court dismissed the union's appeal, leaving the approved agreement in force. The Full Court noted that under the statutory framework "it was possible, legally, for an agreement to be made with as few as three employees as John Holland proposed".²⁵ The Full Court's decision noted that:

*"...obviously questions may arise about the extent to which it is 'fair' for a very small group of employees to fix the terms and conditions of a larger group of employees who may be engaged during a period of years into the future. Whatever position is taken, once an agreement is approved it endures for up to four years and no protected industrial action is possible during the term of an agreement. Future employees, therefore, have less (if any) opportunity to bargain."*²⁶

22. However, the as Court went on to say, as per Buchanan J:

²³[2015] [FCAFC 16](#) (24 February 2015)

²⁴ As referred to in para [16] of the appeal to a single judge of the Federal Court in *John Holland v CFMEU* [2014] [FCA 286](#) (27 March 2014).

²⁵ See para 16.

²⁶ See para 20.

"[32] In my view, it is clear from those prescriptions that the references in s186(3) and (3A) to whether "the group of employees covered by the agreement was fairly chosen" must, in a case of the present kind, be a reference to a choice by the employer.

[33] There is no requirement that employees who vote to make an agreement must have been in employment for any length of time, and there is no requirement that they remain in employment after the agreement is made. Presumably, the presently employed members of such a group will act from self-interest, rather than from any particular concern for the interests of future employees. The potential for manipulation of the agreement-making procedures is, accordingly, a real one.."

23. There may incremental amendments that could *theoretically* help to address these types of situations or at least make them less prolific. For example, in considering the “genuinely agreed” or “fairly chosen” criteria, the Commission could be required to make a finding about whether a significant proportion of the work which the employer intends the employees covered by the agreement to perform is yet commence. If the Commission found that a significant proportion of that work was yet to commence, the Commission could then be required to make a finding about whether the employees who were asked to approve the agreement constitute a majority of the workforce that the employer expects to engage to perform that work over the next [x] months. This revision of the approval requirements could be complemented with an option for workers, upon demonstrating majority support, to bring forward the nominal expiry date of an agreement where the number or identify of the workforce changes significantly within one year of a non-greenfields agreement being approved.

24. Amendments of this nature would not however be capable of addressing the practical problems associated with contesting these agreements. A Commission or Tribunal is more likely to find that it is “satisfied” about a particular matter if it only hears from one party, being the party with an interest in the agreement being approved. The issue of legal standing for unions to intervene in and contest applications for approval problematic collective agreements an important. Often unions are unable to perform that role where the employees who voted to approve the agreement (and may have been a contrived voting co-hort in any event) are not members. The appeal decision of *CFMEU v Ron Southton*, although overturning a decision of the Commission to approve an agreement and to exclude the CFMEU from being heard in relation to it, confirms the various limitations on the right of unions who are not bargaining agents to be heard in

relation to the approval of enterprise agreements.²⁷ Hence, a contradictor able to challenge the fairness of the agreement is often absent. These types of agreements often occur under the radar without unions even being aware that they are being made.

25. This indeed was the case with the Agreement that underpinned the recent well publicised dispute involving persons working in the production facilities for Carlton & United Breweries: that agreement was reportedly “genuinely agreed to” by a “fairly chosen” group of 3 casual workers in Western Australia, one of who worked for the company concerned for a total of 6 days.²⁸ The agreement stated that it applied throughout Australia, and was the agreement that underpinned the labour hire contractor’s pitch for the work in Victoria - and provided pay as low as 50 cents above the Award. Recent developments in the coal mining industry follow the same format, where it appears that mining “start up” labour forces of as little as 3-11 mostly casual employees are, facially, “genuinely agreeing” to agreements that barely improve on Award minimums and thereby lock down conditions at that level on a national basis.

The use of agreement termination that affect workers' pay and conditions

26. The ACTU is aware of an alarming practice whereby employers are able to subvert the collective bargaining process by terminating old agreements or threatening to do so, leaving employees' pay and conditions to fall back to the award, instead of reaching a new agreement through the bargaining system.
27. One of the relatively early cases that considered the termination of agreement provisions in the *Fair Work Act* is *Re Tahmoor Coal*²⁹. It established a relatively high bar to agreement terminations, including that:

“..it will generally be inappropriate for FWA to intervene in the bargaining process so as to substantially alter the status quo in relation to the balance of bargaining between the parties so as to deliver to one of the bargaining parties effectively all that it seeks from the bargaining”.

²⁷ *CFMEU v Ron Southon Pty Ltd* [2016] FWCFB 8413 (19 December 2016). See also *CFMEU v Collinsville Coal Operations Pty Ltd* [2014] FWCFB 7940.

²⁸ See further ABC News report: <http://www.abc.net.au/news/2016-08-26/carlton-united-breweries-worker-dispute-exclusive-details/7785170>

²⁹ [2010] FWA 6468

28. The approach in *Re Tahmoor* was generally followed until the Full Bench Decision in *Aurizon*³⁰. In that decision, the Full Bench terminated 12 enterprise agreements. In its reasons, it departed from the view expressed in *Re Tahmoor* and found that there was no indication in the *Fair Work Act* that there should be a predisposition against the termination of enterprise agreement that had passed its nominal expiry date. The unions aggrieved by the Full Bench Decision sought judicial review, however the Full Court was unsympathetic. Further, the Full Court gratuitously took the step of arguably taking the matter beyond the Full Bench's view that there was no predisposition *against termination of an expired agreement*, by refining a proposition that there was no predisposition against termination of an expired agreement *while collective bargaining is taking place*³¹. The legal orthodoxy therefore is effectively that employers now have a new species of protected industrial action available to them in bargaining, which is to threaten to reduce workers terms and agreements to the award minimum, in order to economically coerce those workers to accept the offers it has made in bargaining.
29. It is our strong view that such a bargaining strategy is illegitimate, as it is effectively penalising workers for their stance in bargaining. The *Fair Work Act* is otherwise very clear in not permitting employers to engage in forms of economic coercion against their workforce during bargaining except by way of a lockout in response to protected industrial action. Whilst it is correct that agreement terminations have been possible under various iterations of the industrial laws, generally underwritten by a public interest test, the shift appears to be twofold:
- a. Firstly, the *Fair Work Act* itself does not apparently clearly articulate the public interest issues at stake, i.e. whether there is any public interest in employers actually continuing to be bound by the agreements they sign ;or any public interest in protecting workers from economic coercion when they seek to bargain collectively;
 - b. Secondly, the impact of agreement termination is more severe than was historically the case given the great chasm between modern award pay & conditions and those negotiated through mature bargaining relationships.
30. We understand that many employees or former employees of the Griffin coal mine, who were personally effected by such proceedings, will make or have made submissions to

³⁰ [2015] FWCFB 540

³¹ at [25]

this inquiry. In *AMWU v Griffin Coal*³², a Full Bench of the Fair Work Commission dismissed an appeal against the decision of the Commission to grant Griffin Coal Mining Company Pty Ltd's application to terminate an enterprise agreement in circumstances where the company was making losses and wished to cut costs and gain 'flexibility' in order to maintain and expand operations. Griffin Coal made the application after employees rejected a request to take a 26 per cent pay cut and to work an extra seven hours per week.³³ The termination had the effect of cutting workers' pay by up to 43 per cent, meaning they would earn more than \$50,000 per year less under the Black Coal Award. The AMWU reports that the decision is likely to inspire other multinationals to use the tactic to lower wages and conditions and other companies are already referring to the decision in enterprise bargaining.³⁴

31. That sizeable reductions in pay have devastating impacts on families and households is obvious, particularly where finance taken out to cover home purchases was based on bargained and legally enforceable incomes and in more remote or regional areas where alternative employment prospects are poor. It is also to be remembered that a pay cut impacts not only on immediate incomes but also the value of accrued entitlements such as long service leave. Further, there are flow on effects to communities as a result of reduced disposable incomes.
32. This impacts are compounded by the fact that Fair Work Commission is really only in a position to grant or dismiss the termination of an agreement – a binary choice where workers either keep their agreed conditions or drop back to the award minimums. We have long argued that the Fair Work Act would benefit from permitting the Fair Work Commission to take a more flexible approach to resolving bargaining disputes. This would permit it Commission to intervene in a graduated way in intractable disputes, with the parties cognisant that arbitration of their dispute (in whole or in part, or on an interim basis) is a real possibility.

The effectiveness of transfer of business provisions in protecting workers' pay and conditions

³² [2016] FWCFB 4620 (21 July 2016)

³³ See Rebecca Carmody, 'Griffin Coal win leaves Collie mine workers facing 43 per cent pay cut', [ABC News online](#), 12 June 2016.

³⁴ See Rebecca Carmody, 'Fair Work Commission upholds decision to cut Griffin Coal Mine workers' pay', [ABC News online](#), 23 July 2016.

33. We see the main difficulty in relation to transfer of business being the treatment of accruing entitlements, where there is potential for some unintended effects. Currently, there is provision for the second employer to refuse to recognise service with the first employer with respect to Annual Leave³⁵ and Redundancy entitlements³⁶ under the National Employment Standards. In those circumstances it would be assumed that the first employer should then be required to pay out the entitlements of Annual Leave and Redundancy.
34. However, where there has been no arrangement between the first and second employer for the second employer to recognise service, there have been circumstances where the first employer has also sought to avoid paying redundancy entitlements. If successful, this would result in the employee having their service with the first employer not recognised by their new second employer, while their accrued entitlements with their first employer would also not be paid out.
35. Allowing for employee redundancy entitlements to potentially disappear as a result of a change in contractors results in an unjustifiable windfall for the outgoing employer. The abnormal profit from the avoidance of redundancy entitlement creates an incentive for constant churning of contractors and outsourcing, which weighs against the benefits of capability building and investment in skills and knowledge which are the real drivers of productivity.
36. There is also an ability for employers who “obtain suitable alternative employment” for employees to have their redundancy pay obligations reduced. However, employers have sought to use these provisions to avoid redundancy pay where the alternative position does not provide the same level of job security through the recognition of service.
37. We have long argued that the Transfer of Business provisions should provide for a specific definition for outsourcing to ensure that successive rounds of outsourcing do not result in employees losing their entitlements. The provisions should ensure that in circumstances where service contracts come to an end and there is a change in the contractor providing the core service, if employees transfer from the old to the new contractor they should either be paid their redundancy and other entitlements on termination or have full service and associated accrued entitlements recognised by the

³⁵ s.91(1) of the *Fair Work Act*

³⁶ s.122(1) of the *Fair Work Act*

new employer. We understand that some provisions applicable in the United Kingdom cement the latter option³⁷. Employees' entitlements going into one end of a transfer of business process should not evaporate upon the completion of the transfer of business.

The avoidance of redundancy entitlements by labour hire companies

38. The [TCR Test Case](#) of 1984 first established a national standard for redundancy pay. Its purpose may be seen variously as "*a utilitarian response directed as far as it could reasonably be to the central core of the social and economic disadvantages of those displaced from employment*"³⁸ or as compensating employees for the loss of recognition of service with their employer. Hence, severance pay is directed towards compensating employees and fails to accommodate the non-standard workers such as labour hire workers that are now increasingly a part of the workforce.

39. Labour hire workers are typically engaged on a casual basis and hence, even if working on a long-term and regular basis, are ineligible for severance pay under the *Fair Work Act*.³⁹ It is to be noted that it is common for workers to be engaged as "casuals" for several years, including as a "Full time casual". Even when employed by a labour hire agency on a permanent basis, labour hire workers may not receive severance pay. Some agencies have sought in those circumstances to argue that an on-hire employee who loses his or her job as a result of the agency losing tenure with the host employer is due to the "ordinary and customary turnover of labour" exemption under the Act.⁴⁰ Furthermore, whilst it is correct that casual workers are *entitled* to a casual loading in part to "compensate" for the absence of other entitlements, the labour market reality is that they are paid less markedly less than permanent workers⁴¹.

³⁷ *Transfer of Undertakings (Protection of Employment) Regulations*. See for example: <https://www.gov.uk/transfers-takeovers/overview>

³⁸ See *Transport Ind Mixed Enterprises Redund (State) Award* [1994] NSWIRComm 75 (24 June 1994).

³⁹ see s.123(1)

⁴⁰ see s119(1)

⁴¹ The overall mean weekly earnings of casual employees in Australia working full-time hours are \$1,181 per week compared to \$1,412 per week for permanent employees. Median weekly earnings of casual employees overall are \$425, much lower than the \$1052 for permanent employees. Approximately 70 per cent of casual employees earn less than \$700 per week. Casual employees' average weekly earnings are less than permanent employees in all relevant categories: female full-time (\$931 versus \$1,224), male full-time (\$1,292 versus \$1,530), female part-time (\$351 versus \$685), male part time (\$373 versus \$707) and in terms of both mean and median earnings. *Source*: Reports Commissioned by the ACTU 2014-2015 from the Centre of Workforce Futures, available at https://www.fwc.gov.au/awards-agreements/awards/modern-award-reviews/4-yearly-review/common-issues/am2014197-casual?order=field_organisation&sort=asc

40. Hence, one of the primary purposes of labour hire is that it may be used by firms to hedge against the risk of future redundancy payments for example where a project length is unknown or future restructuring is planned or possible. It should not be so easy for employers to shift the risks of doing business onto workers in this way. Unless the industrial relations system progresses to provide more universal rights to the multiple classes of workers – including both substantive rights (such as safety net conditions) and process rights (such as bargaining rights), these practices will continue unabated.

The effectiveness of any protections afforded to labour hire employees from unfair dismissal

41. Labour hire engagements typically take the form of a triangular relationship (between the labour hire agency who acts as the employer, a host organisation and a worker) whereby the worker performs work for the host organisation but is employed by the labour hire agency. The standard view is that in the absence of a contract of employment between the worker and host, the host cannot be compelled to answer an unfair dismissal claim.⁴²

42. A Full Bench of the Fair Work Commission has confirmed that a labour hire agency will have a valid reason for dismissing an employee, even where there is no issue with the employee's performance or conduct where the host employer relies on a right to remove the worker under the contract between the host and labour hire agency.⁴³ In *Pettifer v Modec Management Services Pty Ltd*⁴⁴, Mr Pettifer was employed by a labour hire company, MODEC Management Services Pty Ltd and placed with BHP Billiton Petroleum Inc under a labour hire services agreement between MODEC and BHP. That contract allowed BHP to direct MODEC to remove any contractor from the BHP Site in circumstances where BHP considered the contractor's involvement "not to be in the best interests of the project". BHP relied on that provision after a 'near miss' incident on site and MODEC was contractually obliged to remove Mr Pettifer. MODEC sought to find alternative employment for Mr Pettifer unsuccessfully and then terminated his employment. Mr Pettifer had an unblemished employment record throughout his six years of employment with MODEC and MODEC did not agree Mr Pettifer's conduct justified BHP's disciplinary action. The Commission confirmed that independently of any reason relating to performance or conduct, as a result of BHP's exercise of its contractual right to

⁴² See *Arcadia v Accenture Australia* (2008) 170 IR 288.

⁴³ See *Pettifer v Modec Management Services Pty Ltd* [2016] FWCFB 5243.

⁴⁴ [2016] FWCFB 5243

remove MR Pettifer, he was unable to perform the inherent requirements of the job and so MODEC had a valid reason for dismissing him. Hence, his dismissal was not harsh, unjust or unreasonable.

43. The above demonstrates one way in which the unfair dismissal provisions are, by fundamental design, incapable of providing proper unfair dismissal protections against labour hire workers. It should also be remembered that the prevalence of casual work in labour hire also means that many workers are excluded from the system. Workers can also be moved between different labour hire subcontractors in order to ensure that they never achieve the minimum employment period that would entitle them to protection from unfair dismissal.

The approval of enterprise agreements by workers not yet residing in Australia that affect workers' pay and conditions

44. This is a species of “strategic voting cohort” which is particularly disturbing and initially came to our attention in the seagoing industry. It involves the intentional making of agreements with a small, temporary start up workforce for the purpose of locking down conditions in a workplace or a number of workplaces. The agreements are made by visa workers “voting” on collective agreements as an integral part of their sponsorship and employment arrangements before they actually commence any work in Australia.
45. Such agreements are exploitative by reason of information asymmetry and the economic dependence of the worker on the offer of work. They also serve to erode terms and conditions in an industry. This led to us adopting a policy at our 2012 Congress that relevantly stated:

“40. In any bargaining process, workers have a right to be represented and that right should not be defeated by practical barriers or a voting cohort that does not represent the workers who will ultimately be bound by the agreement. Accordingly:

a) For any proposed agreement, where the workforce to be covered by the agreement comprises one third or more of short or long term visa workers, the employer must (as a condition for Fair Work Australia approving the agreement) facilitate an opportunity for the workers to meet and confer with a representative from a union eligible to represent those workers (and any foreign language interpreter if required) within 14 days of the notification time for the agreement.

b) In circumstances where the number or identity of the workforce changes significantly within 1 year after a non greenfields agreement is approved, the workers upon demonstrating majority support should be able to bring forward the nominal expiry date of the existing agreement.”

The extent to which companies avoid their obligations under the Fair Work Act 2009 by engaging workers on visas

46. Undocumented work performed in breach of visa condition is a huge problem in Australia. The 7/11 matters provide examples of where International students who were legally allowed to work in Australia were required to work in excess of their visa conditions precisely so their employers could then exploit the technical breach of their visa conditions in order to underpay and rob them of their wages and workplace entitlements.
47. The incentive to pressure temporary workers and engage workers on visas exists because the *Fair Work Act* does not apply when a person has breached their visa conditions or has performed work in the absence of a visa consistent with any other visa requirements.⁴⁵
48. There is mounting evidence about the pressure that certain employers have exerted on temporary visa workers to breach a condition of their visa in order to gain additional leverage over the employee.
49. The potential for visa cancellation and exploitation puts temporary visa holders in a precarious position with regard to their employer. Considering the element of employer coercion involved in visa breaches the current penalties of visa cancellation and deportation facing temporary visa holders are disproportionate and draconian.
50. The *National Disgrace* report⁴⁶ highlights the prevalence to which companies are avoiding their obligations under the *Fair Work Act* and are putting pressure on temporary migrants to breach their visa conditions. To address this, it recommended that the *Migration Act* and the *Fair Work Act* be amended to state that a visa breach does not necessarily void a contract of employment and that the standards under the *Fair Work Act* apply even when a person has breached their visa conditions or has performed work in the absence of a visa consistent with any other visa requirements.⁴⁷
51. Proposals to make temporary migrant workers feel safer in coming forward to report instances of exploitation are urgently needed. The fear of being reported to the Department of Immigration and Border Protection and potential deportation due to visa

⁴⁵ The *Fair Work Act* applies to employment on the basis that contracts of employment are in place. However, breaches of visa conditions and the *Migration Act* might have the result that any such employment contracts are void *ab initio* on the grounds of illegality: See *Australian Meat Holdings v Kazi* [2004] QCA 147.

⁴⁶ Note 16

⁴⁷ Recommendation 23

breaches strongly discourages temporary visa holders from coming forward and acts as a brake on the reporting of claims by visa workers.

52. The chronic under reporting of exploitation by visa holders will continue without a concerted effort by government to address this issue. Changes to the laws, including that the standards under the *Fair Work Act* apply even with a visa breach, are required to encourage visa holders to come forward. Furthermore, visa cancellation should be limited to cases of serious noncompliance with a visa. Seriousness must consider whether the noncompliance was brought about by the conduct of employers.
53. The Working Holiday Maker visa in particular has unfortunately become synonymous with unscrupulous labour hire companies that abuse their workers. Exploitation of working holiday makers in the farm sector include cases of underpayment, provision of substandard accommodation, debt bondage, and employers demanding payment by employees in return for visa extensions
54. Evidence released from the Fair Work Ombudsman last year revealed the systemic exploitation of Working Holiday Makers (where those visa holders from Asian countries seem to be particular vulnerable). The report highlighted the following;
- 28 percent did not receive payment for work undertaken
 - 35 percent stated they were paid less than the minimum wage
 - 14 per cent revealed they had to pay in advance to get regional work
 - 66 per cent felt employers take advantage of people on Working Holiday Visas by underpaying them.
55. Given the ‘normalisation’ of underpayment of wages and breaches of workplace conditions amongst Working holiday Makers there is clearly a financial incentive to employ Working Holiday Makers. In 2014-15 the total number of Working Holiday maker visas granted was 226,812 and in the six months from July to December 2015-16 there were 116,750 visas’ granted. This is now equivalent to around 10.8% of the total Australian labour force aged 15-24. These figures have more than tripled since mid-2007 when working holiday visa holders numbered 74,450 and were 3.7% of the Australian workforce aged 15-24. There are over 150,000 more working holiday visas granted each year now than there were 8 years ago. It is notable that Australia has a substantially larger Working Holiday Maker program than comparable countries (e.g. the UK and Canada only have 20,000 each).

56. The Working Holiday Maker program unfortunately has become a fertile ground for unscrupulous labour hire companies that abuse their workers. There is now a growing consensus of this problem. The *National Disgrace* report stated:

“The WHM visa program is a poorly-regulated program, and the bulk of the evidence to the inquiry showed that the WHM visa program has been abused by unscrupulous labour hire companies in Australia with close links to labour hire agencies in certain south-east Asian countries (labour hire companies)are in fact not only using the program to fill potential shortfalls in labour, but also to gain access to cheaper labour”

57. As raised above, the *National Disgrace* report recommend the establishment of a labour hire licencing regime to assist in addressing this issue.

58. A systematic approach by labour hire companies to access cheap labour and use the Working Holiday Maker program as a low skilled work visa has knock on consequences for the domestic labour market. This was clearly not the intended consequence of the program. A visa intended for culture exchange has formed into something quite different from the original design and aims of the visa program. The cultural learning experience that it does provide to visitors of this country in a large number of cases is demonstrably not a positive one.

Whether the National Employment Standards and modern awards act as an effective 'floor' for wages and conditions and the extent to which companies enter into arrangements that avoid these obligations

59. The National Employment Standards and Modern Awards do not cover all people who work for reward in the Australian economy. They do not establish a level playing field. Even where they are applicable, there are practical difficulties with compliance and enforcement. Arrangements may be entered into to displace the National Employment Standards and Modern Awards that are not legally effective to achieve that aim, but dynamics of labour relations are such that these sham arrangements nonetheless determine the practical outcome.

60. The practice of sham contracting is one such example, and is common in industries such as cleaning, construction and IT. The assertion is that the worker is not an employee, and therefore employment rights, such as a minimum wage, do not apply. The arrangement shifts risk and administrative overheads to the worker and treats the relationship between the worker and the user of his or her labour as purely commercial transaction for a commoditised service. Whether the arrangement is legally effective or not is not always clear, and this is an area that is likely to be highly contested in medium

term through test cases outside of the traditional sham contracting industries and involving technology platforms that allocate labour. The bigger issue is to ask whether it *should* be allowable for a person to be treated differently to an employee when they are remunerated wholly or principally for their personal labour or skills and not paid to achieve a result (which is essentially the approach adopted by the Tax Office in relation to superannuation guarantee obligations). At the heart of the matter is the need to recognise that labour is not a commodity separable from the individuals that provide it. A failure to recognise this takes the law down a very dangerous path indeed.

61. There are also questionable, and well known, practices associated with the making of arrangements under the Fair Work Act. As raised above, the agreement making process can be easily manipulated including through the interplay between the workforce composition and the expressed and intended coverage of the instrument. Further, the “individual flexibility arrangements” that are facilitated by the *Fair Work Act* have proven to be problematic in ways not unlike those seen with the Australian Workplace Agreements made under the *WorkChoices* legislation⁴⁸.

62. The issue of “on the ground” compliance with Fair Work Instruments is also of concern, particularly in sectors which are highly award dependent. For example, a 2015 report of the Fair Work Ombudsman⁴⁹ detailed the results of an audit undertaken in the Restaurant, Café and Catering industries, which typically account for around 17% of the Award dependent workforce⁵⁰. Of the 1066 audits completed, there were 36% where contraventions were detected in relation to wages⁵¹. A follow up report in the Take Away Food sector⁵² similarly found a noncompliance rate of 33% in relation to wages. A recent audit of the cleaning sector found a 26% non-compliance rate in relation to wages⁵³. Education can help to an extent, but it needs to be able to reach those who need it. Education of employees is not an effective substitute for empowering them to raise their complaints without a well grounded fear that their employment will be prejudiced as consequence.

⁴⁸ ACTU (2014) “One Out: The Abbot Government and the return of unfair individual contracts”.

⁴⁹ Fair Work Ombudsman (2015), “National Hospitality Industry Campaign – Restaurants, Café’s and Catering (Wave 2)”

⁵⁰ ABS 6306 @ 2014

⁵¹ See FWO *Op Cit.*, at p.6

⁵² Fair Work Ombudsman (2016), “National Hospitality Industry Campaign – Restaurants, Café’s and Catering (Wave 3)”

⁵³ Fair Work Ombudsman (2016), “National Cleaning Services Compliance Campaign 2014/15”

63. Enforcement is also important, as it can assist with deterrence. However, the Fair Work Ombudsman, as with all regulators, does not presently have, and will never have the capacity to address all of these issues, due to their scale. So much is apparent from the raw numbers. For example, if we assume based on the reports referred to above that approximately one third of workers in the Restaurant, Café and catering industries are underpaid, that is potentially around 265,000 workers⁵⁴. The Fair Work Ombudsman's Annual report for 2015-2016⁵⁵ indicates that it "recovered more than \$27.3 million in back-payments by assisting over 11 150 customers". That is less than 5% of the expected number of underpaid employees in one industry. In addition, level of "assistance" provided varies, although generally workers are provided with information and encouraged to resolve matters directly with their employer. Some may be referred to some form assisted dispute resolution. For example, the 2015-16 annual report indicated that the mediation team at the Fair Work Ombudsman "assisted more than 1590 employees secure over \$7 million in back-payment". The informational; video on the Fair Work Ombudsman's "How we help you" web page⁵⁶ provides an insight into the manner in which complainants are directed to self help or dispute resolution. The opening voice over, mirrored in onscreen text, is "Did you know it takes an average of 3 months to resolve a workplace dispute through a full investigation? This is why we reserve investigation only for the most serious workplace matters".

Legacy issues relating to Work Choices and Australian Workplace Agreements

64. The transition from the *WorkChoices* system to the FW Act involved a number of necessarily technical transitional provisions. Regrettably, we have observed that these provisions have not been entirely effective in eradicating the sub-standard arrangements that proved to be the downfall of the *WorkChoices* system and its architects.

65. The legal position is that the minimum wages set by the Fair Work Commission (including those minimum wages contained in modern awards) override the minimum wages expressed in those legacy agreements, where the minimum wages expressed in those legacy agreements is lower. However, because the legacy agreements are legally effective in displacing all other award conditions, workers can in fact be paid overall less than what the modern award safety net provides for when allowances, overtime, penalty rates, casual loading and the like are taken into consideration. The transitional

⁵⁴ Accommodation and Food Services Employees as at May 2014 = 739,700 per ABS 6306.

⁵⁵ <https://www.fairwork.gov.au/annual-report/default>

⁵⁶ <https://www.fairwork.gov.au/how-we-will-help/how-we-help-you/help-resolving-workplace-issues>

arrangements therefore continued one of the more objectionable elements of the *WorkChoices* framework, being the dismantling of an effective safety net, for workers covered by those legacy agreements. The practical position of course could be even worse, as one cannot assume that employees would be aware of their entitlement to the higher base rates in awards.

66. Another concern about legacy instruments is that they remain amenable to extension to additional employees through the interplay between the transfer of business provisions and methods of corporate restructuring. For example, in *AWX Mining & Ors*⁵⁷ a labour hire company effected a transfer of business to 6 of its related companies, and secured an order that the legacy agreement would apply to non-transferring employees of those companies – the result being that the new and existing employees of those related entities became covered by the legacy agreement rather than the modern award.

The economic and fiscal impact of reducing wages and conditions across the economy

67. It is understandable why firms acting individually to increase their profits in a competitive economy would be superficially interested in reducing wages and conditions as a way of cutting costs and increasing profits. However, reducing wages has the opposite effect at the macro level. It in fact reduces profits and has a negative effect on the economy as well as lowering governments' fiscal position.
68. There are several ways in which reducing wages and indeed any reduced private or public spending has a detrimental effect on the economy, as borne out by Keynesian economic theory and 80 years of empirical evidence. Firstly, in the short term, reducing wages reduces consumer spending which diminishes demand which slows economic growth and leads to unemployment. As the economist Paul Krugman has argued, "...inadequate demand destroys supply. Economies with persistently weak demand seem to suffer large declines in potential as well as actual output."⁵⁸
69. The effect is worse at the lower end of the earnings spectrum as lower earners tend to spend, rather than save, a higher proportion of their income. Hence, whereas part of a higher earner's drop in wages may flow through to a drop in private savings, a higher proportion of a lower wage earner's income will directly reduce spending and

⁵⁷ [2012] FWA 7450

⁵⁸ Paul Krugman, 'Demand Creates Its Own Supply', [New York Times](#), 3 November 2015. See also Paul Krugman, 'Keynes Was Right', [New York Times](#), 29 November 2015.

consumption. A reverse multiplier effect applies to the impact of a reduction in wages as it ripples through the economy, hence the overall reduction in GDP will be greater than the quantum of reduced labour income.

70. Secondly, as even conservative economic institutions like the OECD now accept, a reduction in wages that increases wage differentials and inequality will inhibit long term economic growth.⁵⁹

71. Thirdly, reducing wages and thus consumer spending reduces public finances by reducing the tax take from the GST, income tax and tax on profits (which in any event the current government proposes to reduce). Lower government revenue means reduced public spending and investment, which also slows the economy, further reducing consumer spending and employment in the short term and productivity in the long term.⁶⁰

72. Hence measures such as labour hire and other forms of non-standard work that are used by employers to drive down wages and conditions to cut costs are detrimental to the economy and the public purse.

Any other related matters.

73. We understand that a number of our affiliates are providing more detailed accounts of their direct experiences in dealing with avoidance of the *Fair Work Act* in their submissions. Those submissions, and those of individual workers, will be particularly informative to the Committee.

⁵⁹ See OECD, *In It Together: Why Less Inequality Benefits All*, 2015.

⁶⁰ <https://www.oecd.org/forum/oecdyearbook/productivity-equality-nexus.htm>

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