

QUEENSLAND COUNCIL OF UNIONS  
SUBMISSION TO INQUIRY INTO THE INCIDENCE OF,  
AND TRENDS IN, CORPORATE AVOIDANCE OF THE  
FAIR WORK ACT 2009



**Queensland  
Council of Unions**

## INTRODUCTION

The Queensland Council of Unions (QCU) welcomes this inquiry as it addresses a number of continuing problems associated with the Australian industrial relations system and labour market.

The range of matters set out in the terms of reference are inter-related. Much of the concern that applies to one of these terms of reference coincides with another. To avoid repetition in addressing the terms of reference it is intended to summarise some broader issues common to a range of the specific terms of reference. The specific terms of reference are addressed later in the submission.

This submission includes a range of case studies that were previously included in submissions to an inquiry into labour hire undertaken by the Queensland Parliament. These case studies demonstrate problems associated with labour hire and the ambiguities associated with employment arrangements. The following section also briefly discusses the cases of a meat processing plant and sports club in the Brisbane area. It is understood that this Inquiry will be undertaking public hearings in 2017 and this will provide Senators with the opportunity to ask questions in relation to these local cases or other issues raised in this submission.

There is also a brief discussion concerning some of the more infamous non-compliance cases that have received considerable media attention. It is our submission that the restriction on the activities of unions which has been the focus of considerable legislative change has contributed to the ease with which non-compliance takes place. This submission includes a brief discussion about the restrictions currently imposed on unions that support the non-compliant employer.

## LABOUR HIRE

The growing use of labour hire in Australia has been the cause of considerable concern to employees, their representatives and elected governments. It is apparent that labour hire has gone well beyond its traditional use of providing supplementary, short-term labour (Crawley 2000:1; Hall 2002:16; Thai 2012:150; Underhill 2013:193; Watson et al 2003:73). The non-traditional use of labour

hire includes driving down wages and conditions and allowing employers to avoid their responsibilities. In addition, labour hire is significantly contributing to the growth of non-standard and insecure employment in Australia (Hall 2002:4; Underhill 2013:192). The level of concern is evidenced by several inquiries that have been undertaken in various Australian jurisdictions (Underhill 2005:30). Employment within labour hire is associated with an ongoing degradation of employment standards and an absence of protection for the employee (Hall 2002:6; Underhill 2005:31; Watson et al 2003:76). Closely associated with the degradation of employment standards is the disinclination of employees within the labour hire industry to speak out about their conditions (Hall 2002:7).

Employers have been motivated to use labour hire for a range of reasons. The decision could be made to outsource a particular capacity or subcontract a specific function to a specialist firm or individual (Hall 2005:16; Thai 2012:150). However, labour hire is often used to reduce costs and contract out industrial relations and employment obligations (Hall 2002:8). Moreover, the threat of labour hire is constantly used to ease organisational change by “substituting the existing workforce with a more compliant and more affordable workforce” (Hall 2002:9). It is not surprising that labour hire represents a major threat to the existing workforce (Belchamber 2012:313; Hall 2002:30; Naughton 2014:133; Watson et al 2003:74). The use of labour hire to reduce employment security, wages and conditions has an obvious adverse impact on existing workforces. In turn this adverse impact will have flow on effects in the broader community and regional economies (Commonwealth of Australia 2016). This experience was commonly reported by labour hire workers in mining communities in the Queensland inquiry into labour hire.

Underhill (2005:33/34) identifies five ways in which labour hire has been used in the Australian context:

- Short-term temporary replacement, that would be associated with the traditional use of labour hire;
- Outsourcing of specific functions, for example maintenance;
- Outsourcing a substantial proportion of the workforce, for example casual employees through labour hire and maintaining a core permanent workforce as directly employed;

- Contracting out an entire workforce; and
- The labour hire company operating its own workshop or call centre.

It is curious that only the traditional use of labour hire necessitates an on-call engagement of employees of labour hire companies. Yet the significant majority of employees of labour hire companies are casual employees, including many long-term casual employees (Hall 2002:5; Toner and Coats 2006:103; Underhill 2005:32; Yu 2014:214). Some estimates suggest that casual employment amounts to 97% of employees of labour hire companies (Hall 2005:5). Casual employment is also used as a coercive discipline over the workforce by the threat of unemployment.

Closely associated with casual employment is the absence of job security, in that the nature of casual employment allows an employer to simply not roster the casual employee again rather than overtly terminating that employee's employment. Employment security is patently less for the employee of a labour hire firm compared to the directly employed (Belchamber 2012:313; Commonwealth of Australia 2016; Thai 2012:152; Underhill 2005:30; Yu 2014:2014). Employment is even more tenuous for employees of labour hire firms because of the splitting of functions between the employer and the client or host (Commonwealth of Australia 2016; Thai 2012:153). The protections afforded to most employees against unfair dismissal are negated by the ability of the client to simply say that they do not want a particular employee without regard for matters of procedural fairness or any consideration of the employee's performance (Hall 2002:4; Thai 2012:153; Underhill 2005:32).

It also follows that if one of the common objectives of labour hire is to reduce labour costs, then employees of labour hire are going to suffer lower rates of pay than directly employed employees (Belchamber 2012:313; Gough 2013:38; Hall 2002:11). The implications for employees of a reduction to income will clearly impact upon those employees and their families' ability to maintain their existing lifestyle. The ability to meet existing financial commitments are jeopardised by a reduction in income. The low levels of unionisation and incidence of casual employment means that employees of labour hire companies have considerably less bargaining power than directly employed employees (Underhill 2005:54). The reduced bargaining power

of labour hire employees therefore makes it more difficult for this group of workers to be able to do anything about their circumstances. A range of other disadvantages face labour hire employees such as their hourly rate of pay differing from host employer to host employer making the already difficult job of budgeting considerably harder (Underhill 2005:47). Employees of labour hire have also reported a reluctance to take any form of leave, despite their on-going employment at a particular site, because of a fear that they will lose their position (Underhill 2005:42).

The dual nature of the employment under labour hire arrangements creates certain ambiguities in the employment relationship (Anderson 2013:84; Sappey et al 2006:197; Watson et al 2003:72), as we have previously noted with respect to unfair dismissal. Such ambiguity poses a potential threat to occupational health and safety standards with a lack of clarity over parties' specific responsibilities (Clayton, Johnstone and Sceats 2002:47; Crawley 2000:2; Hall 2002:11; Owen 2002:10; Reeve and McCallum 2001:205; Roles and Stewart 2012:280; Rozen 2013:347; Underhill 2013:196; Watson et al 2003:76). The precarious nature of the employment status of the labour hire worker leads to a serious under-reporting of workplace injuries (Rozen 2013:328; Underhill 2013:196). Another specific example of negative impacts on occupational health and safety is that the obligation and ability to rehabilitate injured workers that is often limited in the case of a labour hire company. A worker injured in the course of their duty will have fewer opportunities to be rehabilitated if the only return to work path is with the specific occupation in which the employee sustained the injury (Clayton, Johnstone and Sceats 2002:47).

Labour hire companies are driven to keep down their costs and as a result will not invest in training and development of staff. The growth in the use of labour hire has also had a deleterious impact on training and skill development (Hall 2002:6; Toner and Coats 2006:112). This not only adversely impacts upon the labour hire employees themselves but has a negative effect on the skill levels and productivity at an aggregate level within the economy.

In addition to the high incidence of casual employees, some labour hire firms have a practice of providing purported independent contractors (Hall 2002:5; Reeve and Stewart 2012:280; Watson et al 2003:73). There may be examples of genuine independent contractors

being subcontracted by labour hire firms, but where the labour hire “worker” is replacing an employee who is under the control of the client and/or labour hire firm, there is a high likelihood of such arrangement being a sham contract. It has been noted that employment growth in construction has been in the form of independent contractors (Toner and Coats 2006:102).

There is little evidence that labour hire arrangements work in favour of the employees (Watson et al 2003:72). The traditional temporary nature of labour hire may have suited some employees, particularly those in the twilight of their careers or women returning to the workforce after parental responsibilities. This traditional use of labour hire has been overtaken by labour hire that is used for one of the other purposes identified by Underhill above. It is apparent that most employees have little choice as to whether they are the employees of labour hire firms and feel that it is the only way in which they will be able to obtain employment in a given industry or occupation (Underhill 2005:37).

There is little doubt that labour hire provides advantages to employers, or hosts. The labour hire workforces becomes cheaper and more compliant, which translates to the euphemism of “flexibility” that is used to describe the advantages of labour hire employment. It is apparent that any flexibility resulting from labour hire is a one-way street to the employers’ favour (Underhill 2005:52). The absence of job security and decent employment standards makes the lot of a labour hire employee considerably less favourable compared to direct employment.

The broader literature surrounding labour hire employment demonstrates its precarious nature. This submission has focused on some of the challenges facing employees of labour hire companies. It is instructive to consider a small number of case studies that are able to provide a more detailed explanation of the features of labour hire.

## CASE STUDY # 1 MS JAYLEEN KOOL

Ms Kool was employed by the labour hire firm Adecco and worked at the Nestle Chalet Patisserie in Sumner Park Queensland. Following two years and five months’ employment Ms Kool had her employment terminated for reasons of misconduct. Ms Kool ran a case in Fair

Work Commission for relief from unfair dismissal. The facts of Ms Kool’s employment are set out detail in the decision of Deputy President Asbury of 17 February 2016 and are instructive as to common employment conditions that prevail within labour hire.

The case of Ms Kool demonstrates the ambiguity that is created within the employment relationship when labour hire is used for on-going employment. Of the ambiguous arrangements prevalent within labour hire, Deputy President Asbury made the following comments at paragraph [46] of her decision:

“, these arrangements can be a minefield for all concerned, both in practical terms and in terms of rights and obligations arising under legislation, industrial instruments and contracts of employment.”

Interestingly Ms Kool only reached an understanding that she was employed by Adecco and not an employee of Nestle after her employment had been terminated. Ms Kool took direction from Nestle management and submitted the time sheet to Nestle.

In this case Ms Kool had an on-going expectation of employment and consistently worked for at least 38 hours per week. Ms Kool was employed as a casual employee notwithstanding the on-going nature of her employment which is consistent with the general approach taken by labour hire companies. Of relevance, Deputy President Asbury made the following comments in relation to casual employment and the conduct of the employer at paragraph [78]:

“Managers of Adecco who dealt with Ms Kool’s case proceeded on the basis that she was a casual employee placed with Nestle and that her placement could be ended at any time for any reason.”

The misconduct that had been alleged of Ms Kool was that she had been involved in a practice of employees clocking off other employees. The evidence produced in the case is that where Ms Kool had previously engaged in this activity, it had occurred under the direction of a supervisor and that there was no impropriety involved. The event that had led to the termination of Ms Kool’s employment had been that Ms Kool had gone to get something to eat after working a complete shift without a break. She called her supervisor and advised that she was not able to return to work to which her supervisor replied that it was reasonable for Ms Kool to continue home. At no stage did Ms Kool ask her supervisor to

clock her off but this is what the supervisor did.

Ms Kool had a good employment record and in relation to an allegation of complaints being made by her, an allegation made subsequent to Ms Kool's dismissal, a witness described this as hard to believe. Ms Kool had a good attendance record and was one of the best workers on the site. The clocking off issue was not an on-going concern as was portrayed by Adecco.

The case of Ms Kool was particularly telling because of the lack of substantive and procedural fairness she received in the events that lead to her dismissal. It was management of Nestle that determined that Ms Kool should no longer work at Nestle, despite not being her employer. Nestle management put the allegations to Ms Kool but offered her no opportunity to respond. Nestle management, as per standard practice in a labour hire arrangement, simply advised Adecco that Ms Kool was not required at the site any longer.

Adecco management acted upon the direction from Nestle with no independent investigation and did not provide Ms Kool with any opportunity to explain the circumstances that gave rise to her removal from the Nestle site. Despite Adecco arguing that no termination of employment had taken place, Deputy President Asbury found that Ms Kool's employment was terminated, it was terminated for an invalid reason and that the termination was harsh unjust and unreasonable.

The case of Ms Kool demonstrates the ambiguity that arises where labour hire is used for on-going employment. In this case Nestle managed Ms Kool to an extent that she did not even realise that she was employed by Adecco. The use of casual employment made Adecco management wrongly believe that Ms Kool could have her employment terminated without providing procedural fairness. Nestle undertook a substandard investigation into the allegations against Ms Kool and effectively terminated her employment despite not being the employer. Nestle did this with impunity and Adecco wrongly believed that relying on a direction from their client would protect them from an unfair dismissal claim.

## CASE STUDY #2 DE-IDENTIFIED PASSENGER TRANSPORT INDUSTRY

This case study comes from the passenger transport

industry and has been de-identified to protect the individual employee involved. The individual is not a union member and fears reprisal if he is identified or if he and his colleagues take any action in relation to their current employment conditions. Being casuals, they are very afraid of having their hours reduced and/or changed to their detriment, if they even query any further issues associated with their base rate of pay and/or penalty rates.

These drivers are employed as casual employees by a labour hire company, are fixed shift workers who are regularly engaged at times which would command the payment of penalty rates if they were employed under the relevant modern Award. The individual in question raised some queries about his employment arrangements with his host employer, when he worked on a number of public holidays over the 2015 Christmas period and did not receive any additional payment for such work, particularly on Christmas Day. After asking for information on a number of occasions without any response, he was eventually advised that his employment with a labour hire company was covered by a collective agreement that was made in 2006 under the WorkChoices legislation, during a window of time where agreements did not need to pass any benchmark no disadvantage (NDT) or better off overall test (BOOT).

The agreement provides only for a single base ordinary hourly rate of pay for any and all hours worked and does not prescribe any penalties for shift work, ordinary hours on week-ends, working outside and/or in excess of ordinary hours, or on public holidays.

Enquiries have been made with the Workplace Ombudsman's office on behalf of the employee. It appears that the agreement that was made in the WorkChoices era is still valid as no one has sought to terminate or vary it in circumstances where it clearly does not, and has not for many years, pass the BOOT test. The existence and preservation of this agreement, that could not possibly be made under the existing law, provides this labour hire firm with an unfair competitive advantage over any other operator in the industry which may wish to tender for the work as well as disadvantaging the relevant casual employees by upwards of \$200 per week, when their regular weekly earnings are compared to those they would have to be paid under the relevant Award.

There would appear to be a most glaring and serious



flaw in the system which permits such an agreement to survive for many years post its expiry date, allowing its employer to operate under employment conditions which are so manifestly inferior to minimum standards, with no compulsion whatsoever to renew or replace it.

### CASE STUDY #3 CAPALABA SPORTS CLUB

Another case that is now famous in Queensland is that of the Capalaba Sports Club. This case demonstrated some obvious difficulties with the existing BOOT Test. It is not so much with the test itself but with the way in which an employer can apply the test to one set of circumstances for the purpose of passing the test, and then apply the resulting agreement to a completely different set of circumstances. Agreements being created in another jurisdiction, and then misapplied to a different group of workers, is well illustrated by the Capalaba Sports Club, south-east of Brisbane. The Club had contracted out its hospitality function to a labour hire company that was using its own non-union agreement that was made with employees in another state. The net result of the agreement would have been a loss of in the order of \$200 per week for at least one of the employees who had the courage to expose this travesty. This employee then had her employment terminated for refusing to accept the agreement that would provide such an obvious disadvantage.

### CASE STUDY #4 AGRIBUSINESS ENTERPRISE AGREEMENT 2013

On 25 November 2016, the Australasian Meat Industry Employees' Union (Queensland Branch) made submissions to the Senate Education and Employment Committee's inquiry into issues of corporate avoidance of the Fair Work Act 2009.

One of the matters raised by the AMIEU in their submissions, at paragraph [35], related to the usage of individual flexibility agreements by labour hire companies. Paragraph [35] of those submissions read as follows:

35. It has been reported to the AMIEU that there are labour hire employees in the meat industry who have been required by their employer to sign

individual flexibility agreements which provide for working additional hours at ordinary rates (i.e. no overtime). The supposed rationale given for this has been that the employer will not offer them additional hours if they do not agree to work them at ordinary rates, and therefore they are "better off" because they will get additional hours and income by signing the agreement. The AMIEU has no doubt that such a rationale fails to meet the legislative requirements that an employee is genuinely "better off" under the flexibility arrangement. Despite this, none of the employees subject to such arrangements were prepared to pursue the matter, because they understood that they would not receive any more work (and would be without remedy against such a dismissal due to the labour hire arrangements under which they were employed; see the discussion under Item (f) of the Terms of Reference, above.

The AMIEU has subsequently been able to obtain a copy of an example of such an arrangement used by one of the labour hire companies in question. A copy of that agreement is attached.

The agreement in question, headed "Application to Undertake Voluntary Overtime," is apparently not an Individual Flexibility Agreement (IFA) but is an agreement to apply particular exception clauses and was signed in 2016 by a foreign visa worker applying for employment with a labour hire company that supplied labour to a meat processing establishment in Queensland. The labour hire company in question was Agribusiness Pty Ltd, and the terms and conditions of employment for its employees in the meat processing sector is determined by the Agribusiness Enterprise Agreement 2013 (AG2013/7799 - "the Agribusiness Agreement").

Clause 18.2 of the Agribusiness Agreement provides that all overtime is worked at double time. However, clause 18.3 of the Agreement permits voluntary overtime to be performed at overtime rates in particular circumstances:

18.3 Notwithstanding the above clauses, an Employee may voluntarily agree to perform overtime. If such Employee agrees to voluntarily perform overtime then they will be paid at the rates provided for in clause 14 or 15 of this Agreement. This clause 18.3 only applies to the category of Employees listed in Appendix A. [emphasis added]

Equally, clause 19.2 of the Agribusiness Agreement provides that work performed on public holidays will be

paid at the rate of double time and a half. Again, clause 19.3 of the Agreement provides an exception, permitting public holidays to be worked at ordinary rate in specified circumstances.

19.3 Notwithstanding the provisions of clause 19.2, an Employee may choose voluntarily to work on a Public Holiday. If an Employee does choose to voluntarily work on a Public Holiday then they will be paid the hourly rates contained in clause 14 or 15 of this Agreement. This clause 19.3 only applies to the category of Employees listed in Appendix A. [emphasis added]

The exceptions mentioned in clause 18.3 and 19.3 of the Agreement limit themselves to the category of employees identified in Appendix A to the Agreement.

The relevant part of Appendix A to the Agreement reads as follows:

## APPENDIX A

The operation of the voluntary hours provisions in this Agreement is only available to Employees who can establish a genuine need and are:

(a) Employees engaged at meat manufacturing, processing and retail establishments who would have otherwise (but for the operation of the Agreement) been covered by the Meat Industry Award 2010 where those businesses are subject to seasonal fluctuations;

It is unclear to the AMIEU how the Fair Work Commission could have been satisfied that the Agribusiness Agreement met the BOOT Test and confer its approval on the agreement. Regardless of that, however, the Agreement presents itself as one which has a general rule (overtime rates and public holiday penalty rates), to which there are limited exceptions.

Appendix A provides that voluntary overtime and public holiday hours are available only to employees “who can establish a genuine need.” A further requirement is that, in the case of meat industry employees, is that they work in businesses subject to seasonal fluctuations.

The “Application to Undertake Voluntary Overtime” paints a completely different picture, however. The

person who photographed the document was given the application to sign when applying to work for the labour hire company. The establishment at which the applicant was applying for work was not a seasonal shed. The applicant was simply asked to sign a pre-printed document which includes a bald statement that they have a “genuine need to work voluntary overtime in order to maximise my income.” In short, the applicant (and presumably all other applicants) are required to sign a document which commits them to working overtime and public holidays at ordinary rate. Presumably, ordinary rate becomes not the exception, but the general rule, for employees employed under the Agribusiness Agreement.

Although the legality of the document is questionable – [for instance, signing a pre-printed form declaring you have a “genuine need” to work overtime at ordinary rate makes a mockery of the terms of Appendix A] – the labour hire company had good reason to be confident that its voluntary overtime agreements would not be challenged. The job applicant who signed this particular voluntary overtime application was not provided with a copy of the document. The applicant actually took a photograph of the document with his mobile telephone, which was observed by the person to whom he handed the application. The applicant was subsequently informed that he was not successful in obtaining employment at the establishment. The reason given to the employee was that his English language skills were not adequate for the requirements of the job. This reason is dubious at best, given that:

(a) The establishment for which the applicant was applying for work employs many non-English speaking visa workers, many of whom have limited English language skills; and

(b) The applicant succeeded a very short time later in securing employment, via a different labour hire company – working at the very same establishment – and has been able to maintain employment there without difficulty, notwithstanding his language limitations.

The above affords a good example of the inadequacy of the supposed legal safeguards surrounding provisions of enterprise agreements (or awards) which permit

flexibility / variation to be attained through “agreement” between the employer and individual employees.

## NON-COMPLIANCE

A level of non-compliance has always existed with respect to Australian workplace laws. Failure to comply with award provisions has been unacceptably commonplace in a range of industries, usually in less sophisticated enterprises. What is of increasing concern in recent events is that nationally-recognised brands are associated with non-compliance issues, apparently with little concern for their reputation. At the time of completing this submission, news of further Fair Work Ombudsman activity in relation to Pizza Hut was breaking (Workplace Express 2017). Widespread non-compliance, including sham contracting, was attributed to the franchises of this national brand. The Fair Work Ombudsman has issued compliance notices to recover wages for underpayments, infringement notices and formal letters of caution to Pizza Hut franchisees, ninety-two percent of whom were said to be non-compliant.

The union movement does not view underpayment of wages as an administrative error, but rather a deliberate decision to not pay employees their legal entitlements, which is tantamount to theft. In particular, sham contracting is not a clerical mistake but rather a wilful attempt by an employer to avoid a raft of obligations, including minimum wages. By comparison, the fate of a Pizza Hut employee who removed the equivalent cash from the till would be considerably different. The employee would at least have their employment terminated, and, at worst, face criminal charges and even incarceration.

Given the way in which the Abbott and Turnbull Governments have pursued unions and workers, particularly in the building and construction industry, for supposed breaches of industrial laws, the light treatment of non-compliant employers appears incongruous. In the case of Pizza Hut, eleven infringement notices were issued resulting in only \$6,300 in fines. The way in which the Fair Work Ombudsman is prepared to work with non-compliant employers to fix up the issues is at odds with the treatment of unions and workers who are said to have breached laws whose infringement has far less consequences, such as technical contravention of right of entry provisions (Workplace Express 2015B).

If anything, the Pizza Hut case highlights how under-resourced the Fair Work Ombudsman actually is in tackling endemic recovery of wages. The Fair Work Ombudsman received 144 requests for assistance dating back to 2010 and only began investigating in November 2015.

The Queensland Labour Hire Inquiry heard evidence that workers gave up on the Fair Work Ombudsman because of time delays (NUW 2016). This experience has been reported to the QCU by a number of affiliates. Clearly the Fair Work Ombudsman needs more resources. In addition, the Fair Work Ombudsman might also need to be stricter in their responses and employers clearly need to face greater penalties. Most importantly in our submission, the Fair Work Ombudsman can never do the job on its own. Unions need much stronger rights to investigate suspected breaches of employment law.

It is apparent that non-compliance with industrial instruments is rife within Australia. ABC’s Four Corners exposed widespread exploitation in the agricultural sector in Queensland in their program entitled *Slaving Away* (4 May 2015). Two other well known cases in Australia are that of 7-Eleven convenience stores (FWO 2016) and the Baiada Group (FWO 2015). In both cases, the extent of non-compliance has been so vast that the Fair Work Ombudsman has seen fit to release detailed reports. These cases are worthy of mention as they demonstrate high profile examples of corporate avoidance of the Fair Work Act.

All of these cases demonstrate a flagrant disregard for the law, including non-compliance with industrial instruments, poor or no governance and exploitation of vulnerable guest workers. In the 7 Eleven and Baiada cases, employers failed to cooperate with the Fair Work Ombudsman and have demonstrated neither remorse nor any concern for the consequences of breaking the industrial legislation. Clearly the deterrent posed by the current regulatory regime is insufficient. Major employers break the law and have no regard for the consequences. Both of these cases also demonstrate the adverse consequences for workers that can arise from indirect employment arrangements.

Compliance issues encountered by unions have been serious and systemic including the employment of entire sections of large workforces on a cash-in-hand basis. Cash in hand is commonly below the Award or minimum wage and makes no provision for entitlements such as



weekend penalty rates, shift allowances, public holiday pay, or superannuation. Pay slips are not provided and needless to say, the Australian Tax Office is denied revenue.

Instances of employment of international students under such arrangements often goes hand in hand with rostering arrangements that breach visa requirements. For example, a worker on an international student visa is able to work up to 40 hours per fortnight during their study semester. Employers will create rosters for the student that exceed the permitted hours, creating a breach of visa requirements, and in doing so, will effectively silence the worker from raising any complaint about working conditions. To do so would jeopardise their visa.

Investigating breaches of industrial legislation or industrial instruments is difficult under current federal Right of Entry laws as they initially restrict an investigation to the records of union members (section 481(1) and section 482(1)(c) of the Fair Work Act 2009 (FWA)). As mentioned above, migrant workers often have little awareness of workplace rights and are dissuaded from joining unions. One of the characteristics of workplaces in which systemic non-compliance occurs is that they have no, or low, levels of union membership. Even where there are a handful of union members, they are unlikely to want to expose themselves by having their records singled out as part of an inspection. Difficulty in obtaining information from impacted employees was in fact commented upon the Fair Work Ombudsman in its report into 7 Eleven (FWO 2016:21). It follows that if the regulatory body is finding difficulties, unions, faced with a range of legislative obstacles, would find the task even more difficult.

An application may be made by a union to the Fair Work Commission to gain access to the records of non-members (section 483AA(1)(a) and (b) of the FWA), however this can be a costly and time consuming process. It is noted that Right of Entry to investigate a suspected breach impacting on a textile, clothing and footwear award worker does not limit union officials to investigation of union members' records and does not require an application to the Fair Work Commission to gain access to non-member records (section 483A and 483B of the FWA).

Even when unions are able to exercise a Right of Entry to investigate a suspected breach, demonstrating the

breach on the basis of records alone can be difficult as unscrupulous employers may hold two sets of records – an official set for any employees who are employed legitimately, and another set, including rosters, for those who are employed cash in hand. In these instances, the success of an investigation relies heavily on interviews with employees. However, current laws only allow a union official to interview an employee about a suspected breach if the employee agrees to participate in such an interview (section 482(1)(b) of the FWA) and interviews must be held in a place agreed between the union official and the employer. Where such a place can't be agreed, the interview will be held in a place where employees will ordinarily take meal or other breaks (section 492 of the FWA).

In any event, the location will be reasonably public in that an employee will be seen voluntarily going to and from the interview. Being seen to volunteer to be interviewed by a union official about a suspected breach of an Act or an industrial instrument is viewed by many employees as a death sentence for their employment and they will simply not participate.

Since 1996, there have been increasing restrictions at a federal level on union Right of Entry to hold discussions with employees to ensure employees understand their rights, including their right to join a union and to organise, along with increasing restrictions on union Right of Entry to investigate suspected breaches of relevant legislation and industrial instruments. These restrictions have coincided with increasing instances of large scale non-compliance by employers. Unions have traditionally had an important role to play in protecting the rights of working people, including ensuring compliance with basic standards. Unions provide a cost effective way of ensuring workers have their rights and entitlements honoured. In doing so, it is more likely that appropriate tax and superannuation will be paid, lessening pressure on the public purse.

## LEGISLATION CONCERNING UNIONS AND LABOUR MARKET DEREGULATION

Since 1996, federal legislation covering union activity has been largely aimed at restriction rather than enablement. The rhetoric surrounding these restrictions has been of deregulation (now a term less favoured by politicians) or flexibility but in reality it has been different forms of regulation aimed at preventing

unions from performing some traditional important tasks. Union officials have always had a right of entry in relevant workplace arising from awards. Right of entry emerged from this activity being considered an industrial matter, and therefore capable of being contained in awards. Union right of entry was considered as being a necessary component of ensuring compliance with industrial instruments and legislation (Landau and Howard 2016).

Following the development of right of entry as an industrial matter it found its way into the federal legislation. A new section 42A was introduced into the Conciliation and Arbitration Act 1904 (Cth) in 1973 (Mills and Sorrell 1974). Section 42A enabled a union secretary to authorise an official of the union to enter premises bound by an award that the union was party to and to undertake inspection to ensure compliance. Similar provisions were retained in the Industrial Relations Act 1988 (Cth) (Shaw and Walton 1994) and had been contained in respective state jurisdictions, such as Queensland for example (Hall and Watson 1988).

The Workplace Relations Act 1996 introduced a number of restrictions in relation to union right of entry. Rather than the Secretary of a union authorising an official this became the function of the Registrar. There were also a range of restrictions placed on entry to a workplace including the need to give 24-hour written notice. The case for these restrictions was never made and it leaves unionists to speculate that it was to enable employers to undertake a conditioning of the workforce or to remove anything that might have been incriminating or problematic. In addition, the restrictions on right of entry only provided the industrial parties with something else to argue about. In industries, such as building and construction, union officials are painted as being lawless for not complying with laws that do nothing other than restrict the capacity of unions.

Restrictions on union activity were made more severe by the ill-fated WorkChoices legislation. WorkChoices had another more long-term impact and that was the transfer of the private sector (initially incorporated organisations) to the federal industrial relations system. In a state like Queensland this was a significant change as the majority of Queensland employees were covered by the state industrial jurisdiction. More favourable state right of entry provisions were replaced by the more restrictive provisions in the federal jurisdiction. The

restrictions have had consequences in allowing non-compliance to fester.

Australia has the rather unusual industrial instrument, the non-union collective agreement. First introduced in by the Industrial Relations Reform Act 1993, as the Enterprise Flexibility Agreement (EFA), the capacity for an employer to enter into an agreement directly with their employees was permitted, and even encouraged, by law (Coulthard 1996, Mitchell et al 1997, Pittard and McCallum 1996). The need for the EFA was the perceived need to accelerate the move to enterprise bargaining from the centralised award-based industrial relations system (Pittard and McCallum 1996). It was supposed that non-unionised businesses would be more likely to embrace enterprise bargaining if it did not necessitate negotiating with a union (Coulthard 1996). The EFA did provide unions with some standing in being able to make submissions as to the appropriateness of the content of the agreement and process through which it was approved by employees (Pittard and McCallum 1996). In order for unions to be heard in proceedings for certification of an EFA by the Australian Industrial Relations Commission, all a union needed to do was demonstrate that it was bound by an award covering the business the EFA intended to cover (Pittard and McCallum 1996). This seemed to be a logical and reasonable step in ensuring the transparency and fairness of the agreements.

The election of the Howard Government was the first time in a long time that a federal Government was elected that had a distinctly anti-Union agenda (Bray et al 2005:123; Gardner 2008:36; Gittens, R cited in Sappey et al 2006:226). The Workplace Relations Act 1996 built upon the decentralisation that had commenced under the Hawke Government and been accelerated under the Keating Government (Belnavé et al 2007:257-258; Bray et al 2005:141; Van Gramberg 2013:140). Section 170LK and s170LJ -agreements maintained the two forms of collective agreement (union and non-union) that had emerged, but the WRA placed a greater emphasis on these instruments (Bray et al 2005:123; Gardner 2008:36). The WRA also provided for the statutory individual agreement the Australian Workplace Agreement (AWA) (Belnavé et al 2007:132; Bray et al 2005:240) that had the effect of locking unions out of the worksite and the bargaining process (Bray et al 2005:241; Gardner 2008:36; McCrystal 2009:17).

AWAs were introduced with all of the predictable rhetoric

about productivity, under the assumption of equal bargaining power of employers and employees. The use of AWAs could be harnessed to tailor agreements to meet the needs of both the employer and the employee (Bray et al 2005:241; Belnave et al 2007:242; Van Gramberg 2013:140). Unions were restricted from entering premises for the purpose of inspecting time and wages records or holding discussions with employees covered by AWAs. A new agency was created to approve AWAs and their contents remained confidential (Sappey et al 2006:720). By comparison to the EFA, the process for approval of the AWAs was the antithesis of transparency and their secrecy was enshrined in legislation.

The subsequent election of the Rudd Government brought with it a more consultative approach to industrial relations legislation (Cooper 2009:288; Teicher and Bryan 2013:20). So much was this the case that it took several years for the Forward with Fairness policy it took to the 2007 election to be introduced in its entirety. The Rudd Government retained much of the WRA and WorkChoices provisions that were decidedly anti-union (Cooper 2009:288; Cooper and Ellem 2009:304; Jerrard and Le Queux 2013:51; McCrystal 2009:4; Pittard 2013:95).

Of relevance to this inquiry, it is probable that on-going restrictions to unions' right of entry and their capacity to intervene in non-union agreements have in fact lent themselves to an environment in which non-compliance is far easier for rogue employers. Policing industrial standards that was traditionally part of unions' roles has been intentionally made difficult, and at times impossible, by virtue of legislative changes that have been enacted in the name of "flexibility". The rhetoric associated with restrictions on union activity is couched in terms of protecting employers and their employees from unwanted third party intervention. The reality is that the combination of restriction has promoted the current atmosphere of non-compliance and we are now witnessing the results.

The remainder of this submission specifically addresses the terms of reference set for the inquiry.

(a) the use of labour hire and/or contracting arrangements that affect workers' pay and conditions;

There is now a myriad of cases and literature concerning the use and misuse of labour hire following inquiries in four states and associated submissions and academic

literature. In very brief terms, labour hire has gone well beyond its intended purpose of filling temporary gaps in employment. The extended use of labour hire has been to the detriment of employees.

A figure that has been used in literature and submissions that has not been challenged is that 97% of labour hire employees are engaged as casual employees (Hall 2005). Notwithstanding any other detrimental effect on employees associated with labour hire, the fact that almost all employees are casual impacts on a range of other employment rights.

The National Union of Workers made a submission to the Queensland inquiry into Labour Hire (NUW 2016). Included in that submission were a range of firsthand accounts from employees within the Labour Hire industry. The following stories are extracted from that submission in order to provide this inquiry with details of some of the problems for workers associated with labour hire.

Inquiries into Labour Hire arrangements in Queensland, South Australia and Victoria have recommended that Labour Hire licencing schemes be established. Each of those State Governments have also recognised the need for State and Federal cooperation on this issue and for the Federal Government to establish a labour hire licencing scheme. The QCU supports the establishment of a Federal labour hire licencing scheme to mirror, complement or supplement any state based schemes.

The QCU also recommends that industrial instruments should be able to cover all employees at a worksite so that labour hire cannot be used to avoid obligations. Labour hire employees must be able to bargain together with employees of the host employer and good faith bargaining provisions and the right to take protected action must be available to labour hire workers in this situation. The Federal Government and the inquiry should reject the findings of the Productivity Commission that Enterprise Agreements should not be allowed to include provisions that extend their application to labour hire employees. Negligible wage growth is already a significant problem for Australian workers and to the economy. Further restrictions on bargaining rights (as advocated by the Productivity Commission) which prohibit unions from negotiating wages and conditions for a whole site, and which therefore allow employers to contract out of deals struck with their permanent workforce, will only promote labour hire and put further



### **WORKER EXAMPLE 1:** [REDACTED]

#### **Caboolture.**

I was a casual worker employed through labour hire at [REDACTED] in Caboolture, Brisbane as a packer.

All of packers could not earn a reasonable salary. We were paid on piece rates per punnet of berries. The faster packers could earn \$12-14 au per hour before tax. The slower earn \$5-6 au per hour before tax (even when working in the peak season). The packing standard changed every day. Made us confused all the time. And they seldom declared the packing standard in front of everyone

There were different grades of berries. We needed to recognize fruits, determining which one is 'good', 'second' and 'rubbish'. We were required to sort and pack fruit into different punnets from 'second' trays. It was hard to make money packing 'second' trays. For example, I only could earn \$5-10 au per hour from second trays. We spent a lot of time to sorting fruits, but were not paid for this, only the amount of punnets.

With the low wages, most of us could only afford food and accommodation.

Regarding health and safety, we were asked to stand all day without a mat. We couldn't wear gloves when we are working. And we worked for a long, long time. Our break times were not enough in peak season. Sometimes, they even did not tell us we need to work late, and then we would have nothing to eat for dinner that day. Often our dinner break was only 15-20 mins!

Some of packers wanted to take a day off, but the response is 'if you have a day off and you would lose this job'.

The most disappointing thing was the attitude of officials to this exploitation. We went to Fair Work to for ask some information two times. The first time, we went to the office with our landlord who is local. The staff said this problem happened everywhere and didn't want to talk to us. He just wanted to pass the buck. The attitude was awful.

After few days, we sent our complaints to Fair Work. A month later we got a call from an inspector, although not everyone who made a complaint was called. The Inspector said the farm could not provide the information such as: our working hours, pay slips etc to him. Most of us offered our own records and pay slips to him but we felt he just wanted to finish this case but never tried to help us. He did not ever contact other complainants.

This made us very angry and disappointed. We wanted to leave, but we need the 2nd visa and most of the workers did not have car. Most of farms in this area do not even pay the tax to government!



**WORKER EXAMPLE 2: [REDACTED], Labour hire worker in the warehousing industry**

I've been working in the warehousing industry for about 10 years now. In my first two warehouse jobs, I was a full timer. For the last two years, I've been a labour hire casual at two different sites.

At my first labour hire job I was consistently working full 38 hour weeks as a labour hire casual for [REDACTED] yet I was never offered full time.

[REDACTED] didn't supply me all the correct PPE. We were told by [REDACTED] that it was compulsory that we purchase their branded hi-vis shirts for \$25 each while working, however, the host employer told us this was not the case at all.

The labour hire workers there were consistently bullied by management and treated differently. We were paid different rates from the full-time workers. I received a casual rate of \$23.50, which included casual loading. If we were paid the correct full time site rates plus loading, we would on been on \$24.96 per hour. Also, I couldn't get a personal loan from my bank because of my "insecure job status."

When I was working full time at [REDACTED] the company decided to start using labour hire workers through [REDACTED] even though the directly employed casuals were not receiving consistent shifts.

After chatting with the new labour hire workers, I found out that they were receiving a flat rate of nearly \$5 per hour less than the directly employed casuals, with no overtime rates, and they were even forced by the labour hire company to pay for their own pre-employment medical tests.

This happened despite an agreement between [REDACTED] with our Union, the NUW, to only engage labour hire workers in their warehouses if they were receiving the same pay and conditions as the directly employed casuals.

I believe that host employers are using labour hire workers to avoid responsibility for their workers. There is absolutely no reason why a worker should be forced to be a casual with consistent hours without the opportunity to become permanent.

In my experience labour hire companies are more than happy to break the law and exploit workers for a little extra profit.

I believe there should be much stricter controls of unscrupulous labour hire companies and more rights for workers to become permanent, such as casual-permanent conversion. It's very difficult to make ends meet and save any money as a labour hire casual with inconsistent hours, especially if you have children. It is impossible to plan for family holidays or be able to get a loan.

If I hadn't known my workplace rights as a labour hire worker, I fear that the situation would be even worse.



downward pressure on wages.

The Building and Construction Industry (Improving Productivity) Act 2016 legislation imposes such a restriction on negotiations which are subject to the Code for the Tendering and Performance of Building Work 2016 (The Code). The Code prohibits unions from negotiating Agreements that seek to provide consistent conditions for all workers on a site, whether they be directly employed or labour hire workers. As mentioned above, this provides an incentive for employers to engage workers through labour hire companies and sets up a race to the bottom on wages and conditions. The QCU recommends that this restriction be removed.

(b) voting cohorts to approve agreements with a broad scope that affect workers' pay and conditions;

The case of the Capalaba Sports Club demonstrates the absurd notion that an agreement entered into between an employer and a group of employees in another state can be imposed upon an unwilling group of employees. This has similarities to the much publicised case of maintenance employees at the CUB Brewery at Abbotsford. It is truly concerning that such an abuse of process appears to be gaining hold as a business model within certain labour hire providers. Moreover, this practice of imposing conditions of employment on a workforce that has no capacity to affect the content of the agreement, makes a mockery of the supposed purposes of enterprise bargaining.

The QCU supports the submissions of the ACTU in relation to "strategic voting cohorts" and directing the Fair Work Commission to make findings as to the application of the Agreement. In addition, the inquiry may consider allowing relevant unions to make submissions with respect to the reasonableness of the Agreement whether they are parties to the Agreement or not. Finally, the inquiry should consider the application of a Better Off Overall Test during the life of an Agreement rather than at the point of approval only.

(c) the use of agreement termination that affect workers' pay and conditions;

The most prominent case in relation to the termination of an agreement is that of Aurizon in 2015<sup>1</sup>. In this case several provisions of the existing agreements protected the on-going employment of Aurizon employees following privatisation (Workplace Express

1 Aurizon Operations Limited: Aurizon Network Pty Ltd Australia Eastern Railroad Pty Ltd [2015] FWCFB 540

2015A). This was a controversial privatisation that went some way to explaining the decimation of the Bligh Government at the 2012 Queensland election. The existence of provisions that protected employment were a significant bargaining chip that employees held in negotiations with their employer. Rather than negotiate however Aurizon preferred to terminate the agreements.

Unions had a belief that the public interest arguments required to bring about the termination of an agreement may have protected these employees. The interpretation placed on section 226 of the Fair Work Act 2009 in this case now places doubt over the protection offered by existing agreements. Furthermore, there has been a substantial increase in the number of employers using the termination of agreements as "bargaining" strategy (Workplace Express 2016A). Most recently the use of the threat of termination of agreement by Murdoch University demonstrates how widespread this coercive tactic has become amongst employers seeking to maximise their advantage at the expense of their employees (Workplace Express 2016B).

The potential of the safety net becoming a "safety pit" in the bargaining process was considered by a review into the Queensland industrial relations legislation in 1998 (Queensland Government 1998:123/4). Recommendation 125 of the 1998 Report was to enable the flow on of conditions of agreement into an award in particular circumstances. The resulting legislation<sup>2</sup> provided for such a flow on of certified agreements into awards in accordance with the report. This provision remains in the current form of the legislation in Queensland<sup>3</sup>. Such an ability at a national level may be of some assistance.

The other potential resolution to the spate of applications for termination of agreement is for a change of emphasis in section 226 of the Fair Work Act 2009. Rather than requiring the Commission to terminate an agreement in cases where "the FWC is satisfied that it is not contrary to the public interest to do so"; it might be more appropriate to reverse this discretion. That is that the Fair Work Commission should only terminate an agreement if it is in the public interest to do so.

(d) the effectiveness of transfer of business provisions in protecting workers' pay and conditions;

The provisions that were introduced by the Fair Work

2 Section 129 of Industrial Relations Act 1999 (Qld)

3 Section 145 of the Industrial Relations Act 2016 (Qld)

Amendment (Transfer of Business) Act 2012 (Cth) amended the FW Act and expanded transfer of business protections to outsourced state public sector workers. A new Part 6-3A of the FW Act provided the protection for terms and conditions of employment for outsourced public sector workers by creating a new federal instrument entitled a 'copied state instrument,' which preserves relevant state award or agreement terms and conditions in a transfer of business and empowered the FWC to modify the transfer of business rules (McCrystal and Orchiston 2013).

These amendments concerning transferring entitlements for outsourced employees were very timely as the Newman LNP Government was planning large scale privatisation at this point in time. As it turned out the Newman LNP Government did not outsource to any great extent instead preferring to simply downsize the public sector. The fact that Part 6-3A has not been used to any great extent might actually provide testimony to the possibility that it may have served its purpose insofar as the Newman Government was concerned. These provisions may have protected Queensland public services from being outsourced in order to reduce labour costs during the Newman Government.

(e) the avoidance of redundancy entitlements by labour hire companies;

As previous stated the extensive level of casual employment alone will impact upon any capacity for redundancy entitlements for employees within labour hire arrangements. In previous submissions the QCU has relied upon industry estimates that casual employment makes up 97 per cent of all employment within labour hire (Hall 2005:5), despite many employees working consistent rosters of at least 38 hours per week. The ACTU submission to this inquiry discusses this particular issue in the context of the Termination, Change and Redundancy (TCR) test case and its failure to capture non-standard employment.

(f) the effectiveness of any protections afforded to labour hire employees from unfair dismissal;

As previous stated the extensive level of casual employment alone will impact upon any protection from unfair dismissal for employees within labour hire arrangements. In addition, the case study involving Ms Jayleen Kool above demonstrates the precarious and vulnerable nature of the relationship between a worker and the host employer. The critical issue is that the

contractual relationship between the host employer and the labour hire company is such that the host employer can dictate who is to be engaged on site. The person making the decision to adversely impact upon the worker is not the employer at law and therefore one step removed from the actual termination of employment.

The employer at law will argue that "their hands are tied" and are contractually obliged to remove the worker from the site and have no alternative positions available therefore leading to the termination of the worker's employment. This triangular relationship is discussed in the ACTU submissions to this inquiry and the case of *Pettifer v Modec Management Services Pty Ltd*<sup>4</sup> is cited as an example. In Pettifer, the contractual right of BHP to remove the applicant rendered the applicant unable to perform the inherent requirements of the job, independent of any reason relating to performance or conduct.

(g) the approval of enterprise agreements by workers not yet residing in Australia that affect workers' pay and conditions;

The ACTU submission to this inquiry draws a parallel to the use of "start-up" workforces to "lock down" the conditions of employment for a workforce or even a series of workforces. As is discussed elsewhere in this submission under the heading "(b) voting cohorts to approve agreements with a broad scope that affect workers' pay and conditions" it is concerning that transposing conditions agreed to by a group of workers elsewhere is a business model adopted by some labour hire companies. It might be interesting to consider the validity of process in which agreements are approved by employees not yet residing in Australia.

(h) the extent to which companies avoid their obligations under the Fair Work Act 2009 by engaging workers on visas;

Much has been written about the layers of precariousness associated with being on a working visa. Increasing public attention is being paid to the combination of labour hire and migrant worker programs. As has been amply established, labour hire creates a precariousness for employees by comparison to direct employment. Temporary migrant workers face precariousness by virtue of a range of reasons including those associated with their migration status (Boese et al

<sup>4</sup> [2016] FWCFB 5243

2010:318; Toh and Quinlan 2009:458). The combination of employment by a labour hire firm and the migration status intensifies the state of vulnerability for these workers (Commonwealth of Australia 2016:169; Toh and Quinlan 2009:468).

The use of temporary migrant workers has been the subject of a substantial increase since the inception of the various forms of visas by the Howard Government in 1996 (Bissett and Landau 2008:143; Toh and Quinlan 2009:454). Temporary migrant workers, as the name suggests, are intended to fill temporary skill shortages, in many regards similar to the purported need for labour hire. Recent events however indicate that the use of temporary migrant workers is not to fill labour shortfalls but rather to reduce the cost of labour to host employers (Boese et al 2010:320; Commonwealth of Australia 2016:119).

Another similarity between temporary migrant workers and labour hire employment is the complex web of arrangements that is usually associated with employment of temporary migrant workers (Boese et al 2010:333; Campbell 2010:53; Commonwealth of Australia 2016:131). As we have seen with respect to labour hire, ambiguous employment relationships lend themselves to a lack of accountability (Commonwealth of Australia 2016:115). Recent events that have played out in the Australian media have demonstrated that much of the exploitation of temporary migrant workers has been as a result of unscrupulous labour hire firms with links to South-East Asia (Commonwealth of Australia 2016:119).

In the context of the Fair Work Ombudsman's role in relation to temporary migrant workers, Campbell (2010:52) expands upon the reason for their vulnerability. It is instructive to use this framework to consider the reasons why temporary migrant workers, particularly those employed within labour hire arrangements, are so vulnerable and why special attention needs to be paid to ensuring that Australia, and Queensland as the focus of this inquiry, is not using this compounding combination of precarious employment to create an exploited workforce.

Quite clearly language and cultural barriers make it more difficult for employees to be aware of employment rights, obligations and procedures (Bissett and Landau 2008:142; Campbell 2010:52; Toh and Quinlan 2009:457). These limitations allow for the potential of exploitation

with respect to wages, working conditions, occupational health and safety and other industrial and civil rights (Boese et al 2010:321; Toh and Quinlan 2009:457). It follows that such vulnerable workers would have limited knowledge of Australian workplace laws thereby automatically limiting the capacity of such employees to enforce workplace laws (Bissett and Landau 2008:142; Boese et al 2010:318).

A corollary to not understanding workplace laws is a greater likelihood of exploitation and drift into unlawful arrangements (Bissett and Landau 2008:14; Campbell 2010:52; Commonwealth of Australia 2016:168; Toh and Quinlan 2009:467). Recent events that have been highlighted principally in the meat processing and agricultural industries, demonstrate the propensity of unscrupulous labour hire and other companies to completely ignore Australian workplace laws particularly concerning rates of pay (Commonwealth of Australia 2016). The precariousness of the employment of the temporary migrant workers within labour hire arrangements extends beyond their employment status to virtually having no enforceable workplace rights at all (Bissett and Landau 2008:143; Boese et al 2010:321).

One particular example that is instructive is contained in the United Voice submission to the Queensland Labour Hire Inquiry (United Voice 2016). Under the heading "Jupiter's Casino outsourcing to Challenger Cleaning" a range of factors demonstrating the dangers of outsourcing to employees are traversed. However, in this case it was the employment of student visa holders that was the strategy adopted by Challenger. The United Voice submission describes how existing employees were "starved out" of their jobs by the reduction in rostered hours given to the existing workforce. The exiting workforce was systematically replaced by students who were rostered for hours in excess of that allowed to be worked in accordance with their student visa status. These students, who were being paid cash in hand at a rate below the prevailing award, were unwilling to make complaint about their employment conditions for fear of being in breach of their visa requirements.

As mentioned above, one of the sources of precariousness for migrant workers is their migration status. In addition to a possibly poor understanding of their industrial and civil rights, concern about being deported is a significant motivating factor in migrant workers not enforcing those rights of which

they are aware (Bissett and Landau 2008:143; Boese et al 2010:318; Campbell 2010:52). In addition to the inability or reluctance to enforce rights, temporary migrant workers have also been the subject of further exploitation by charging exorbitant prices for substandard accommodation (Commonwealth of Australia 2016:169) and training (Boese et al 2010:320; Commonwealth of Australia 2016:174). Labour hire employers that are willing to flout industrial laws will also be willing to ignore migration law as evidenced by the manipulation of visa status of temporary migrant workers by changing those workers' employers (Commonwealth of Australia 2016:171).

The QCU recommends that the committee considers each of the recommendations from the Commonwealth Senate Inquiry into the impact of Australia's temporary work visa. The QCU further recommends significant improvements to union Right of Entry provisions for officials to hold discussions with employees and to investigate suspected breaches of legislation and industrial instruments. Such improvements will aim to improve unions' ability to inform employees of rights and entitlements and to ensure compliance with employment conditions.

(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;

A growing concern to the union movement is the development of business models, based on dubious arrangements, that are established to appear to be that of independent contractor or partner. Unfortunately, sham contracting has long been a feature of the industrial landscape in Australia and the 2001 High Court decision in *Hollis v Vabu*<sup>5</sup> set the indicia used to consider the real relationship between the "worker", to use a neutral term, and the principal. In this case, the principal Vabu was a bicycle courier company that had established a relationship that attempted to paint the couriers as independent contractors. The High Court however, applied a range of indicia that would determine the real relationship between Vabu and the couriers as employer and employee.

Sham contracting has been the practice in a range of industries where workers will apply for a job advertised in positions vacant, as opposed to expressions of interest where an independent contractor may look

<sup>5</sup> *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21

for opportunities to tender for work. The worker, who has nothing to sell except their labour and some level of expertise, will upon contact with the principal be told that they will be required to obtain an Australian Business Number in order to get the job. Every other aspect of the relationship is clearly employer and employee, except of course for those obligations, such as workers compensation, superannuation, minimum wages and award conditions, that the sham contractor arrangement was created to avoid.

As previously mentioned in this submission, the Fair Work Ombudsman recently found widespread non compliance, including sham contracting, in 92% of Pizza Hut franchises that it investigated.

The following example was provided to the QCU in response to a request for information that may assist this inquiry. It demonstrates the use of sham contracting to avoid obligations in a skilled area of employment such as plumbing:

Qualified Roof Plumber and Carpenter, cert4 WHS, 30 years' experience in both domestic and commercial sites. Offered a salary package from a few roofing companies that include vehicle, super and an annual salary. The job requires between 45-50 + hours per week, if paid by hourly rate, the annual salary is half of what I would earn if paid under the award. Even less again if paid under the major construction agreement. Now paid hourly rate with no allowances, lucky to get five days a week work, never know from week to week.

If I agree to have an ABN and work as a "independent contractor" (sham contracting) I will get more work. I work with others who have agreed. Why is the award and the agreement so different for roofers, why is domestic and commercial rates so different? Understand some allowances apply to one or other, but the skills, experience and tools are the same for both. Why are companies allowed to offer salaries with no set hours then require you to 50+ hours per week and essentially pay you for 38.

More recently the growth of what has been described as the "gig economy" has seen the development of industries that base their business model on similarly



spurious arrangements. A recent case in the United Kingdom involving the ride share provider Uber has overturned the arrangement that was intended to be that of independent contractor (Espinier and Thomas 2016; Johnston 2016). The tribunal in this case described the purported arrangement as “pure fantasy” that bore “no relation to the dealings and relationships between the parties” (Workplace Express 2016C). Similarly, the National Labor Relations Board in the United States has issued recent decisions that broadened the definition of “employer” to consider this Uber style arrangement (Kochan and Riordan 2016:433).

A range of other operators such as Foodora and Deliveroo have been established on the same business model as Uber with the couriers supposedly being independent contractors (Workplace Express 2016). It would appear that non-employee nature of the courier is the basis upon which these new organisations compete. That is the ability to avoid the obligations of an employer allows a cost advantage to these new operators with an obvious deleterious impact on income, job protection and other benefits such as workers compensation and superannuation for the workers involved.

The current remedy for workers that suffer as a result of these sham arrangements would appear to be a court challenge. This is obviously beyond the means of workers who probably not even getting the award rate of pay. It would appear there is insufficient deterrents within our workplace relations system to prevent the misuse of sham arrangements to avoid the proper obligations placed on employers by law.

The QCU recommends significant improvements to union Right of Entry provisions for officials to hold discussions with employees and to investigate suspected breaches of legislation and industrial instruments. Such improvements will aim to improve unions’ ability to inform employees of rights and entitlements and to ensure compliance with employment conditions. Unions must be a critical part of any improved compliance regime.

The QCU also recommends a review of penalties applied to employers who do not comply with the law. We believe that currently, penalties do not act as an effective deterrent to non-compliance. There should also be a review of the approach adopted by the Fair Work Ombudsman when it encounters non-compliant employers. There appears to be a large

degree of tolerance for non-compliance with gentle and cooperative measures put in place to rectify problems. It may be time for the Fair Work Ombudsman to adopt a harder line on non-compliance.

The QCU also recommends an exploration of ways to ensure employers don’t use contracts, sham contract arrangements, ‘partnership’ arrangements and other means to avoid their obligations. The current arrangements, which require legal challenges to determine a workers’ employment status, worksite by worksite or employee by employee, is allowing employers to avoid their obligations. Such an exploration may review and broaden the definition of employee or may extend basic entitlements regardless of employment status.

#### (j) legacy issues relating to WorkChoices and Australian Workplace Agreements;

Agreements that were made in the WorkChoices era continue to operate. The agreements made when there was a poor NDT could not possibly be approved by the FWC under the current legislation. This is a farcical application of enterprise bargaining and business model used by unscrupulous labour hire companies and other employers. In the de-identified case within the transport industry a decade old agreement that was made under WorkChoices continues to operate in conjunction with the labour hire business model thereby enabling an avoidance of obligations that would apply under current industrial legislation.

The QCU recommends that these “WorkChoices” arrangements should be terminated where it can be demonstrated that they do not meet the BOOT.

#### (k) the economic and fiscal impact of reducing wages and conditions across the economy; and

Rising inequality is the greatest concern of the union movement in terms of the economic and fiscal impact of reducing wages and conditions. As was discussed at length earlier in this submission under the heading “Legislation concerning unions and labour market deregulation”, policy prescription in Australia has been towards labour market deregulation. The outlying extreme of this policy was the failed WorkChoices legislation of the Howard Government which would have no doubt widened income inequality further had it been able to remain in place. As is discussed elsewhere in this submission, some of the remaining legacies



of WorkChoices are testimony to what might have happened had the WorkChoices agenda taken hold for longer.

Australia has experienced growing income inequality over recent decades (Coelli and Borland 2016). Australia has also pursued a policy agenda that is obsessed with labour market reform, despite no tangible results being seen from such a policy for decades. Restrictions on the capacity of unions to do their jobs has been the primary focus of this supposed reform. This agenda is both misguided and counter-productive. Restricting union activity will ensure a reduction in wages and conditions but will not have any positive economic impact (Jaumotte and Buitron 2015). This is hardly surprising given international research into income inequality (Berg and Ostry 2011; Berg et al 2012). The International Monetary Fund has expressed concern as to growing inequality and sees unions as part of the solution to inequality. The fallacy of trickle-down economics has been demonstrated by the counterproductive effect of increasing the income share of the top 20% leading to a decrease in growth (Dabla-Norris et al 2015; Jaumotte and Buitron 2015).

Australia remains a relatively equitable nation largely because of the continuation of the labour market institutions that have served us so well. Reasonable minimum wages and conditions have prevented greater inequity from occurring. To draw a comparison, one only needs to look at the United States to see the impact of weaker labour market institutions has on earnings inequality and all that brings with it (Casselmann 2016). The emergence of a range of strategies aimed at emulating this inequality in Australia should ring alarm bells for policy makers.

The fact of inequality itself is sufficient motivation for the trade union movement to seek a change in policy direction. The fact that income inequality is counter-productive to broader economic objectives should influence policy makers to pursue a more equitable workplace relations framework.

#### (I) any other related matters

Another issue facing employees within labour hire and contracting industries is the inability to work for one employer long enough to be entitled to long service leave. This issue has been addressed in the Building & Construction industry for several decades with state-based portable long service leave schemes. More

recently, industries such as contract cleaning have also adopted a similar approach.

It would appear prudent to extend this type of scheme to all workers whose employment changes from one employer to another for reasons completely beyond their own control.

As has been stated throughout this submission precarious and insecure employment is increasing. There is a direct correlation between the incidence of insecure employment and the growth in labour hire.

The ability of employees to convert from casual to permanent employment is a feature of some modern Awards. It would also appear that these Award provisions are insufficient to deal with the volume of insecure employment – particularly within labour hire.

The QCU recommends consideration of any mechanism that would enable long term and systematically-rostered employees to convert from casual to permanent employment. The inquiry should also consider whether a definition of casual in legislation would assist in enabling employees to have their employment correctly categorised.

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ATTACHMENT

1.1	<b>Application to Undertake Voluntary Overtime</b>	
13.11.2015		
1 of 1		

  

**Agribusiness Pty Ltd**  
**Agribusiness Enterprise Agreement 2013**  
**APPLICATION TO UNDERTAKE VOLUNTARY OVERTIME HOURS**  
自願承擔進行加班時間申請

Note: It is a requirement that this form be completed by the employee before the employee engages in working voluntary overtime hours. 注：要求在員工從事自願加班前需填寫。

I, [REDACTED] (full name 全名) [REDACTED] (DOB 生日)

[REDACTED] (ADDRESS 地址)

wish to apply to undertake overtime voluntary overtime hours of work.  
希望申請自願加班的工作。

I acknowledge that my ordinary hours are to be worked between 6:00am to 8:00pm Monday to Friday.  
我同意，我一般上班時間為早上 6:00 之間進行合作直到下午 8:00，從週一至週五。

I have a genuine need to work voluntary overtime in order to maximise my income when these hours are available to be worked.  
我真誠的願意自願加班，為了能最大限度地提高我的收入，這些時間我都可以進行合作。

I also volunteer to work on a public holiday if such work is offered to me.  
應工作的要求，我也自願在國定假日工作。

I have been advised that this work constitutes voluntary overtime hours, and as such, is payable at the current ordinary rate of pay.  
我已被告知這項自願加班的工作，是工資當前的普通稅率繳納。

I understand that I will be employed by Agribusiness Pty Ltd – a division of [REDACTED] dedicated to the meat industry.  
我知道我是被 Agribusiness Pty Ltd 採用 - [REDACTED] 的一個部門，致力於肉類行業。

Employee Name (員工名字): [REDACTED]

Signature (簽名): [REDACTED]

Date(日期): [REDACTED]

[REDACTED] Rep: \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_