

## Labour hire

- 3.1 The labour hire industry has existed in Australia since at least the 1950s. Initially, labour hire agencies specialised in supplying clerical and administrative staff to workplaces to fill temporary gaps caused by staff absences or short-term peaks of activity. The labour hire industry has since evolved to operate in other parts of the economy, with communications, mining, manufacturing, finance and insurance, property and business services all reporting a high incidence of labour hire usage.
- 3.2 In recent years, there has been substantial growth in the labour hire industry. Labour hire has emerged as a substantial element of the Australian labour market and the economy with about 3 per cent of people working in labour hire arrangements.<sup>1</sup>

## Terminology

- 3.3 Labour hire is identified in a number of ways. The firm providing the workers can be referred to as a 'labour hire agency', 'labour hire firm', 'on-hired service provider' or 'employment agency'. The generally accepted term is 'labour hire agency'.<sup>2</sup> Labour hire agencies
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1 Ai Group, *Submission No. 49*, p. 5; CFMEU, *Submission No. 5*, Appendix 11: NSW Labour Hire Task Force Report, p. 15; Unions NSW, *Exhibit No. 33*, p. XII.

2 Due to this broader function, the Recruitment and Consulting Services Association (RCSA) states that on-hire should be the preferred description, RCSA, *Submission No. 67*, p. 3.

frequently also perform other types of work such as employment consulting in areas such as occupational health and safety or outsourced project work where a client outsources an entire function, such as payroll.

- 3.4 The firm to which the worker is on-hired is called the 'host business', 'host employer' or 'client'. Workers in labour hire arrangements may be employees of the labour hire agency or independent contractors.<sup>3</sup> For clarity and consistency, host business will be used for the firm where the worker is placed.

## Working arrangements

- 3.5 Labour hire is the practice of utilising the worker of a labour hire agency to work for a host business, generally for short periods of time. The labour hire agency can engage labour hire workers as casuals or on a fixed contract. It is less common for labour hire agencies to engage workers as permanent employees, and some argued that this arrangement does not support the foundations of a labour hire relationship.<sup>4</sup>
- 3.6 Labour hire is described generally as a triangular relationship that is formed when the services of a worker are on-hired by a labour hire agency to a host business.<sup>5</sup>
- 3.7 Labour hire workers may be employed directly by the labour hire agency, or as independent or dependent contractors.<sup>6</sup>
- 3.8 The essential quality of a labour hire arrangement is the splitting of contractual and control relationships. The 'standard' arrangement is:
- the worker at the site is under the direction or control of the host or client organisation in relation to the performance of work;
  - the labour hire agency has responsibility for the wages and other on-costs of the worker and has a direct contractual relationship with them; and

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3 DEWR, *Exhibit No. 25*, p. 24.

4 Job Watch, *Submission No. 23*, p. 5.

5 Qld Government, *Submission No. 66*, p. 13; DEWR, *Exhibit No. 25*, p. 24; CFMEU, *Submission No. 5*, Appendix 11: NSW Labour Hire Task Force Report, pp. 18-19; AMWU, *Submission No. 46*, p. 9.

6 CFMEU, *Submission No. 5*, Appendix 13: ACTU Submission to NSW Labour Hire Task Force, p. 2.

- the client or host pays the labour hire agency for providing the labour and thus has a contractual relationship with the labour hire agency.<sup>7</sup>
- 3.9 Workers can be provided to a host business on a casual, part-time, full-time or on-going basis as either temporary or relief workers, to supplement staff during periods of peak or seasonal demand, as specialist staff or on a more permanent basis following the outsourcing of part of a business.<sup>8</sup>
- 3.10 Evidence to the Committee identified a number of labour hire arrangements: the employee services model; contractor services model, otherwise known as the 'Odco' style; and Group Training Organisations. A study carried out by RMIT University (sponsored by RCSA), entitled '*On-hired Workers in Australia: Motivations and Outcomes*', identified five distinct categories of services supplied by labour hire agencies. These include labour hire employee services; labour hire contractor services; recruitment services; employment consulting services; and managed project /contract services.<sup>9</sup>

#### Labour hire employee services

- 3.11 Labour hire of employee services involves the employment of labour hire workers by a labour hire agency to a host business to meet specifically the organisation's production or service requirements. This arrangement is the most common method of labour hire.
- 3.12 The labour hire agency pays the worker and withholds income tax deductions. The worker may be employed casually (the majority), permanently, for a fixed term or contract on a full-time or part-time basis, or as a trainee or apprentice.
- 3.13 The employee services model is well established at common law. The labour hire agency will be found to be the employer of the worker rather than the host even though the general day-to-day control over the worker's performance rests with the host. This is because in a genuine labour hire arrangement, there is no contract between the host and the labour hire worker and therefore there cannot be an employment relationship between them.<sup>10</sup>

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7 Job Watch, *Submission No. 23*, p. 5; Ai Group, *Submission No. 49*, pp. 7-8.

8 CFMEU, *Submission No. 5*, Appendix 13: ACTU Submission to NSW Labour Hire Task Force, p. 2.

9 Ai Group, *Submission No. 49*, pp. 8-9.

10 DEWR, *Exhibit No. 25*, pp. 24-25.

### Labour hire contractor services

- 3.14 Labour hire of contractor services involves the labour hire agency hiring contractors (that is workers with their own Australian Business Numbers (ABNs), as determined by taxation legislation) to host businesses to meet the client's production or service requirements.
- 3.15 The contractor services model is based on 'Odco' arrangements, which are independent contracting arrangements in the labour hire industry. 'Odco' arrangements create an independent contracting arrangement where the workers are neither employees of the labour hire agency nor the host business. These kinds of arrangements were upheld in a full Federal Court decision, *Building Workers Industrial Union of Australia v Odco Pty Ltd*. On other occasions, courts have found that contractual arrangements did not confirm to 'Odco' arrangements, and have held on the facts that the workers in question were 'employees', notwithstanding having been described in contractual documents as 'contractors'.<sup>11</sup>
- 3.16 'Odco' arrangements operate in a range of industries. Independent contractors working under this system include farm hands, doctors, secretaries, personal assistants, family day-care workers, fishermen, salespeople, cleaners, security guards and building workers.<sup>12</sup>

### Recruitment services

- 3.17 Recruitment services also fall within the role of some labour hire agencies. Recruitment services source and place workers on behalf of a client business. Workers are employed directly by the host business under this arrangement. An example of a recruitment service is the Job Network Service.<sup>13</sup>

### Employment consulting services

- 3.18 Employment consulting services provide advice to assist a client business with employment issues. They provide consultants to specifically advise in areas such as human resources, organisational development, employee relations, outsourcing services, OHS, training and testing. These consultants may be either workers of the

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11 *Building Workers Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104 cited in DEWR, *Exhibit No. 25*, pp. 25-26.

12 DEWR, *Exhibit No. 25*, p. 25; Ai Group, *Submission No. 49*, pp. 8-9.

13 Ai Group, *Submission No. 49*, pp. 8-9.

employment consulting service or independent contractors, provided by the employment consulting service to the host business.<sup>14</sup>

### Managed project /contract services

3.19 Labour hire agencies can provide specific services to a client for a project or contract basis where the client has outsourced specific operational functions. The labour hire provider directly engages employees, contractors and other service providers to ensure satisfactory completion of the contract. For example, contract maintenance, engineering, security, catering, project IT, construction and outsourced call centres can be provided under managed project/contract services labour hire.<sup>15</sup>

### Group Training Organisations

3.20 Group Training Organisation's (GTOs) are not-for-profit entities and are established predominately to provide training and employment opportunities. GTOs employ apprentices and trainees and are responsible for ensuring that those employees receive suitable training and experience.<sup>16</sup>

3.21 From a general policy perspective, GTOs are often viewed as labour hire agencies. However, they are subject to additional legislative requirements and employment, in this instance, is the means for the delivery of training to the apprentice or trainee:

When you look at the way in which group training companies operate, they are, to all intents and purposes, on the same operating basis as a labour hire firm. Of course, the types of placements that they generate are slightly different but, nevertheless, when you look at the structure it is no different.<sup>17</sup>

3.22 However, other evidence to the Committee suggested that GTOs cannot be viewed as entirely labour hire agencies. While there are some initial similarities, Group Training Australia (GTA) states that it

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14 Ai Group, *Submission No. 49*, pp. 8-9.

15 Ai Group, *Submission No. 49*, pp. 8-9.

16 Mr J. Barron, GTA, *Transcript of Evidence*, 12 May 2005, p. 16; GTA, *Submission No. 36*, pp 3-4.

17 Ms D. Ralston, Qld Council of Unions, *Transcript of Evidence*, 12 May 2005, p. 13; see also Mr J. Hart, Restaurant and Catering Industry of Australia, *Transcript of Evidence*, 31 March 2005, p. 5;

is fundamentally different from labour hire.<sup>18</sup> GTOs are different in that they employ apprentices and trainees under an indenture and post the apprentice or trainee out to a host business. The apprentice or trainee obtains on the job training under the conditions of their indenture. The GTO also ensures that the apprentice or trainee receives the off the job training, through a Registered Training Organisation (RTO).<sup>19</sup>

## Advantages and disadvantages

3.23 The Recruitment and Consulting Services Association (RCSA) stated in their submission that there are many benefits in a labour hire arrangement for clients and workers. The benefits for the client company are that labour hire arrangements allow them:

... to have a flexible workforce to meet peaks in demand that enables companies to maintain a core workforce with the capacity to top up to immediately meet work schedules that reduces costs.<sup>20</sup>

3.24 This outsourcing of labour enables businesses to cover peak periods, staff illness or leave, or to manage specific work such as programmed maintenance. This is an important feature for manufacturers where production is cyclical and clearly focused on a just-in-time production approach.<sup>21</sup> The use of labour hire can reduce ongoing staff numbers, which may bring benefits for the company reporting requirements in some instances.<sup>22</sup>

3.25 Benefits that RCSA has identified for employees (as listed in Box 3.1) are that labour hire can provide a wider variety and diversity of work and offers increased flexibility.<sup>23</sup>

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18 Mr J. Barron, *GTA, Transcript of Evidence*, 12 May 2005, p. 16; CFMEU, *Submission No. 5*, Appendix 11: NSW Labour Hire Task Force Report, p. 51; Mr J. Priday, *GTA, Transcript of Evidence*, 12 May 2005, p. 17.

19 *GTA, Submission No. 36*, p. 8.

20 SKILLED Group, *Submission No. 52*, p. 5; RCSA, *Submission No. 67*, pp. 15-18.

21 SKILLED Group, *Submission No. 52*, p. 5.

22 Ms V. Nock, *Manpower, Transcript of Evidence*, 31<sup>st</sup> March 2005, p. 29.

23 DEWR, *Exhibit No. 25*, pp. 28-29.

## Box 3.1 Labour Hire Benefits

| To Clients   | To Employees  |
|--|---|
| <ul style="list-style-type: none"> <li>• Flexibility</li> <li>• Specialist skills</li> <li>• Access to skills – current skills shortage</li> <li>• Cover peaks in business</li> <li>• Outsource non-core areas</li> <li>• Staff illness/leave</li> <li>• Reduced costs</li> <li>• Manage key areas of expertise such as OHS</li> <li>• Access to large supply of suitable labour to meet peaks and troughs in production</li> <li>• Assess individuals before offering permanent employment</li> </ul> | <ul style="list-style-type: none"> <li>• Variety and diversity of work</li> <li>• Flexibility of working hours and balance of work and family life</li> <li>• Flexibility in choosing jobs</li> <li>• Multi-skilling through broad experience</li> <li>• On-the-job training</li> <li>• Superior wages and working conditions</li> <li>• Rehabilitation and return to work policies</li> <li>• Not having to take work home or do unpaid overtime;</li> <li>• Matching of skills with employment demands</li> </ul> |

Source Adapted from SKILLED Group, Submission No. 52, p. 6, based on SKILLED's Auspoll survey 2003-2004 and DEWR, Exhibit No. 25, pp. 28 – 29.

3.26 Workers can also benefit from labour hire arrangements. Labour hire can offer workers (including the unskilled, re-entrants to the labour market, and mature aged workers) the opportunity to gain a broad range of skills, experience and exposure to different working environments. For those who wish to work on a casual basis due to family or study commitments, it can provide the opportunity to maintain contact with the workplace. Similarly, it can help young people gain entry to the labour market, and provides a method for ageing workers to phase their withdrawal from the workforce.<sup>24</sup>

3.27 Evidence to the Committee from a range of sources suggests that people seeking full-time employment may view labour hire as a means of gaining skills and experience, which can lead to permanent full-time employment. The RCSA estimates that 55 per cent of labour hire workers look to temporary labour hire arrangements as a bridge to full-time employment.<sup>25</sup>

24 DEWR, Exhibit No. 25, p. 29; MBA, Submission No. 22, p. 12.

25 CFMEU, Submission No. 5, Appendix 11: NSW Labour Hire Task Force Report, p. 16; RCSA, Submission No. 67, p. 31; MBA, Submission No. 22, p. 12; Ai Group, Submission No. 49, pp. 17-18.

## Disadvantages

- 3.28 The Victorian Parliament interim report on *Labour Hire Employment in Victoria* acknowledged a number of concerns about the labour hire industry. The report identified that labour hire workers may find it unclear about the lines of responsibility in the labour hire arrangement and to whom they report.<sup>26</sup>
- 3.29 The Australian Council of Trade Unions (ACTU) commented that:
- Non-standard work arrangements are increasingly being used to undermine the employment relationship and the protections attached to it. The growth of these forms of work has also contributed to the lack of skills development and has serious implications for the management of occupational health and safety.<sup>27</sup>
- 3.30 Independent contractors working within a labour hire arrangement also raised concerns. Under this type of arrangement, the relationship between the agency is not one of direct employment and the worker does not have protections or entitlements that are attached to employment, such as awards.<sup>28</sup>
- 3.31 Evidence suggested that labour hire arrangements could in effect create a two-tier workplace, where labour hire workers may not receive the same rights and conditions as direct employees. Some evidence suggested that at times labour hire workers receive inferior rights and conditions.<sup>29</sup> The Victorian Parliament Interim Report suggested this concern may create a divisive culture within the workplace and could also predicate an erosion of the conditions for direct employees.<sup>30</sup>
- 3.32 The Transport Workers' Union (TWU) identified a number of disadvantages for labour hire workers. Labour hire workers often do not know whether they have work the following day. Job insecurity

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26 Parliament of Victoria, Economic Development Committee, *Labour Hire Employment in Victoria, Interim Report*, December 2004, p. 17.

27 ACTU, *Submission No. 60*, p. 1.

28 Parliament of Victoria, Economic Development Committee, *Labour Hire Employment in Victoria, Interim Report*, December 2004, pp. 19-20.

29 ACTU, *Submission No. 60*, p. 2; AMWU, *Submission No. 46*, pp. 24, 36.

30 Parliament of Victoria, Economic Development Committee, *Labour Hire Employment in Victoria, Interim Report*, December 2004, p. 22.

has a major economic, social, and health and safety impact for labour hire workers.<sup>31</sup>

- 3.33 For the individual labour hire worker, obtaining loans and meeting financial commitments can be extremely difficult in situations where there is a lack of job security. Labour hire workers often do not receive penalty payments for overtime. Moreover, they often do not receive annual leave, sick leave, long service leave and other entitlements associated with permanent employment, in part because they may not stay in a workplace long enough to accrue the entitlement.<sup>32</sup>
- 3.34 The Skilled Engineering survey of employees, cited by the CFMEU, found that the least advantageous aspects of labour hire work were employee morale, security of income, wages and conditions and access to training.<sup>33</sup>
- 3.35 The use of labour hire workers could contribute to a lack of investment in training. This may in turn impact upon a wider skills shortage that is a current major concern both at state and federal government levels.<sup>34</sup> The reduced access and level of training may contribute to injuries in the workplace.<sup>35</sup> (More detail is provided in Chapter 4.)

## Overview of labour hire employment

### Composition of the labour hire industry

- 3.36 Within the labour hire industry, there is some differentiation in the size and focus of companies. In the top layer, seven to eight large companies have the dominant share of the market. Some of these large organisations are Australian (eg. SKILLED Group) while others are large global organisations (eg. Adecco and Manpower).
- 3.37 The second layer of organisations comprises medium sized organisations, which are a combination of Australian owned and international companies.

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31 TWU-Vic./Tas., *Submission No. 56*, pp. 24-25, 27.

32 TWU-Vic./Tas., *Submission No. 56*, pp. 24-25, 27.

33 CFMEU, *Submission No. 5*, Appendix 11: NSW Labour Hire Task Force Report, p. 33.

34 Vic. Government, *Submission 71*, p. 19.

35 TWU-Vic./Tas., *Submission No. 56*, pp. 25, 27.

- 3.38 The third layer of labour hire agencies are either niche businesses, which cater for specific industries (eg. information technology), or small labour hire agencies that cover a wide range of industries.
- 3.39 The fourth layer consists of companies that focus on a particular industry sector.<sup>36</sup>

## Casual and permanent workers

- 3.40 Labour hire workers made up around 3 per cent of the total workforce in 2002.<sup>37</sup> In the general workforce, around 27 per cent of employees are reported to be casual employees. However, in the labour hire sector, the majority of labour hire workers are employed on a casual basis (about 75 per cent). This is approximately 2.25 per cent of the total workforce.<sup>38</sup>
- 3.41 Compared to other casual employees, labour hire workers tend to be employed in higher skilled occupations, be better educated and younger, and are more likely to be aged between 24 to 44 years.<sup>39</sup>
- 3.42 The Australian Manufacturing and Workers Union (AMWU), citing the 1998 Australian National Training Authority (ANTA) survey of labour hire workers, identified that 81 per cent of all labour hire contracts have a concluding time span of less than three weeks.<sup>40</sup>

Table 3.1 Proportion of labour hire workers by contract length - 1998

| Contract length   | Total workers | Percentage |
|-------------------|---------------|------------|
| Less than one day | 548           | 8          |
| 1-6 days          | 1569          | 24         |
| 1-3 weeks         | 3183          | 49         |
| 1-3 months        | 635           | 10         |
| 4 months or more  | 595           | 9          |
| <b>Total</b>      | <b>6530</b>   | <b>100</b> |

Source *AMWU, Submission No. 46, p 10, citing Campbell, I, Watson, I & Buchanan, J, 2004, "Temporary agency work in Australia Part I", in International Perspectives on Temporary Agency Work (eds. Burgess, J. & Connell, J.) Routledge, London, p. 139.*

36 Ai Group, *Submission No. 49*, p. 6; SKILLED Group, *Submission No. 52*, p. 9.

37 Unions NSW, *Exhibit No. 33*, p. 4.

38 Qld Government, *Submission No. 66*, p. 20 citing ABS Forms of Employment Survey (FOES) Cat. No. 6359.0, 2001 data.

39 DEWR, *Exhibit No. 25*, p. 27.

40 AMWU, *Submission No. 46*, p. 10.

- 3.43 Table 3.1 illustrates that although there are a large number of workers participating in contracts of 4 months or more, the majority of labour hire workers are employed on short-term contracts between 1 and 3 weeks.
- 3.44 Manpower informed the Committee that assignments vary in length and can last from four hours to several years. They identified cases where labour hire workers have been assigned to the same position for up to seven years.<sup>41</sup>

## The value of the industry

- 3.45 The Australian Industry Group (Ai Group) state that the labour hire industry is an integral part of the national labour infrastructure and contributes greatly to the national economy. The ABS has valued the employment services industry at \$10.2 billion for 2001-2002. The employment services industry increased its total income by 30.8 per cent between 1999 and 2002.<sup>42</sup>
- 3.46 The labour hire industry features a number of large companies. The impressive growth of these companies highlights the important contribution that the labour hire sector makes to the Australian economy. However, there is a low level of industry concentration with the top 20 companies accounting for less than 30 per cent of the market.<sup>43</sup>

## The growth of the labour hire industry

- 3.47 Labour hire employment is not a new type of work arrangement in Australia. The use of agencies or companies to provide workers to client companies dates back to the 1950s. It is in the last decade that labour hire has become increasingly prevalent. Labour hire workers numbered around 270 000 in 2002, equivalent to about 3 per cent of all employed persons.
- 3.48 In workplaces with 20 or more employees, the number of labour hire workers grew from 33 000 in 1990 to 190 000 in 2002. This was an

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41 Ms J. Hunt, Manpower Services, *Transcript of Evidence*, 31 March 2005, p. 25.

42 ABS, 2003, *Employment Services Australia 2001-02*, Cat. No. 8558.0, p. 7; CFMEU, *Submission No. 5*, Appendix 11: NSW Labour Hire Task Force Report, p. 18; SKILLED Group, *Submission No. 52*, p. 8.

43 Ai Group, *Submission No. 49*, p. 10; SKILLED Group, SSB Investor Conference Presentation Slides, p. 12, 26 November 2002, accessed 23 June 2005, <[www.skilled.com.au/Common/invest/media/asx\\_261102.pdf](http://www.skilled.com.au/Common/invest/media/asx_261102.pdf)>.

increase of 15.7 per cent a year. The percentage of employees who are labour hire workers grew from 0.8 per cent in 1990 to 3.9 per cent in 2002.<sup>44</sup>

- 3.49 It is estimated that over a quarter of Australian workplaces utilise labour hire agencies and that over 1 200 labour hire agencies are operating in Victoria alone.<sup>45</sup>
- 3.50 The growth of the labour hire industry between 1990 and 2002 can be attributed to a number of factors. The rise in enterprise bargaining and outsourcing have contributed to the increased use of labour hire arrangements. Reasons that companies may have increased their use of labour hire are reported to be due to changes in industrial relations and the increasingly competitive environment in which businesses operate.<sup>46</sup>

### Major users of labour hire (industry trends)

- 3.51 Large workplaces are the biggest clients of labour hire services. Almost 40 per cent of workplaces consisting of 200 to 500 employees use labour hire services, while 55 per cent of workplaces with more than 500 employees use labour hire agencies.<sup>47</sup>
- 3.52 The Productivity Commission Staff Working Paper *'The Growth of Labour Hire Employment in Australia'*, states that the probability of a client business using labour hire increases proportionally with its size. Forty-five per cent of businesses with more than 1 000 employees are likely to use labour hire. Whereas smaller workplaces, with 65 employees or less, have about a twenty per cent probability of using labour hire, but these businesses use it more intensively.<sup>48</sup>
- 3.53 Evidence to the Committee suggests that labour hire workers are most prevalent in a number of industries, particularly in manufacturing. As illustrated in Table 3.2 labour hire also seems to be prevalent in property and business services, health and community services,

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44 Ai Group, *Submission No. 49*, p. 11; CFMEU, *Submission No. 5*, p. 13; Unions NSW, *Exhibit No. 33*, p. XII.

45 CFMEU, *Submission No. 5*, Appendix 13: ACTU Submission to NSW Labour Hire Task Force, p. 2; Parliament of Victoria, Economic Development Committee, *Inquiry into Labour Hire Employment in Victoria*, Interim Report, December 2004, p. 8.

46 Unions NSW, *Exhibit No. 33*, p. XII.

47 CFMEU, *Submission No. 5*, Appendix 14: ACTU Submission to Victoria Labour Hire Inquiry, p. 1.

48 Unions NSW, *Exhibit No. 33*, p. 25.

finance and insurance, retail trade and transport and storage industries.<sup>49</sup>

Table 3.2 Distribution of Agency Workers in Australia, by industry - 2002

| Industry                              | Percentage of all Agency Workers |
|---------------------------------------|----------------------------------|
| Agriculture                           | 1.6                              |
| Mining                                | 2.8                              |
| Manufacturing                         | 19.6                             |
| Electricity, Gas and Water Supply     | 3.1                              |
| Construction                          | 3.1                              |
| Wholesale Trade                       | 4.6                              |
| Retail Trade                          | 7.4                              |
| Accommodation, Cafes and Restaurants  | 4.6                              |
| Transport and Storage                 | 5.0                              |
| Communication Services                | 7.9                              |
| Finance and Insurance                 | 5.6                              |
| Property and Business Services        | 13.8                             |
| Government Administration and Defence | 4.2                              |
| Education                             | 1.2                              |
| Health and Community Services         | 12.3                             |
| Cultural and Recreational Services    | 0.7                              |
| Personal and Other Services           | 2.6                              |
| <b>Total</b>                          | <b>100</b>                       |

Source adapted from AMWU, Submission No. 46, p 12, citing Hall, R using HILDA Wave 1 Confidentialised Unit Record Files, 2002. Nb. Rounding has occurred in this table.

## Difficulties due to differing definitions

- 3.54 Labour hire constitutes a major part of the employment services industry. The employment services industry also includes clients of businesses that primarily provide ancillary employment services, such as assistance in preparing resumes or career counselling.
- 3.55 The difficulty arises in reporting on the employment services industry and differentiating from those who facilitate labour hire placements and from those who provide other employment services.<sup>50</sup>

49 DEWR, Exhibit No. 25, p. 26; Qld Government, Submission No. 66, p. 14; Qld Council of Unions, Submission No. 41, p. 6; Job Watch, Submission No. 23, p. 8; MBA, Submission No. 22, p. 13.

50 Unions NSW, Exhibit No. 33, p. 37; DEWR, Exhibit No. 25, p. 7.

3.56 Evidence to the Committee noted concerns that there is a lack of reliable statistical information on the number of labour hire workers and labour hire agencies in Australia. The AMWU stated that:

... there are difficulties analysing the growth of labour hire and contracting based on the existing data. To understand the issues surrounding labour hire and contracting, and to develop an appropriate policy response, it is essential that we have an accurate estimation of the size of the labour hire industry and contracting.<sup>51</sup>

3.57 Similarly, in ABS publications it was found that time-series data specifically on self-employed contracting do not exist. FOES provides the most detail on different categories of employment, however self-employed contractors are classified within the employee, own-account worker, and employer groups, and can not be separately identified. Therefore, further analysis is required.<sup>52</sup>

## Recommendation 1

**The Committee recommends that the Australian Government Department of Employment and Workplace Relations:**

- **commission research into the prevalence of independent contracting and labour hire arrangements, ensuring comparability with earlier surveys and available data items; and**
- **work with the Australian Bureau of Statistics to expand existing survey categories in order to generate ongoing data on independent contracting and labour hire arrangements.**

51 AMWU, *Submission No. 46*, pp. 15-16; CFMEU, *Submission No. 5*, Appendix 11: NSW Labour Hire Task Force Report, p. 18; DEWR, *Exhibit No. 25*, p. 7.

52 Waite, M and Will, L, 2001, *Self-employed contractors in Australia: incidence and characteristics*, Productivity Commission Staff Research Paper, AusInfo, Canberra, p. 27; ABS, *Forms of Employment Survey*, Cat. No. 6359.0.

## Labour hire in operation

- 3.58 The increased prevalence of labour hire in the modern economy has led to some concerns about the operation of labour hire. A number of recommendations were made to the Committee, including establishing a national code of practice and revising legislation. A number of state inquiries into labour hire are also currently underway or have been recently completed.

## Industry code of practice

- 3.59 There has been much discussion about establishing various industry codes of practice.<sup>53</sup> The Cole Report, *'The Final Report of the Royal Commission into the Building and Construction Industry'* tabled in March 2003, recommended:

The Commonwealth initiate, through the Workplace Relations Minister's Council, the development of a Code of Conduct and Practice for Labour Hire in the building and construction industry.<sup>54</sup>

- 3.60 The Master Builders Australia (MBA) suggest that a Commonwealth code could be developed following input from labour hire agencies and other stakeholders at a conference called specifically for that purpose.

It is essentially the responsibility of the labour hire industry to develop solutions and standards appropriate for the industry.... it should be a national document that comprehensively and consistently deals with the intricacies of the three-way relationships founding labour hire arrangements<sup>55</sup>

- 3.61 The RCSA, the peak body of the labour hire industry has a Code of Professional Practice. The RCSA Code has operated for over ten years and was approved by the Australian Competition and Consumer Commission (ACCC) in 2003. The code of practice applies to all RCSA members, but is not enforceable on non-members.<sup>56</sup>

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53 Code of practice and code of conduct are used interchangeably in the report.

54 MBA, *Submission No. 22*, p. 13.

55 MBA, *Submission No. 22*, pp. 13-14.

56 AMWU, *Submission No. 46*, pp. 28-29; Mrs J. Hunt, Manpower Services, *Transcript of Evidence*, 31 March 2005, p. 23; RCSA, *RCSA Code for Professional Practice*, accessed 13 July 2005, <[www.rcsa.com.au/documents/cfpp/cfpp\\_2005.doc](http://www.rcsa.com.au/documents/cfpp/cfpp_2005.doc)>.

- 3.62 Issues regarding the possible development of a code of practice for the labour hire industry are discussed in more detail in Chapter 4.

## Current legislation

- 3.63 A host businesses' responsibilities to employees and other workers varies across state, territory and Commonwealth laws, industrial awards and agreements, tribunal decisions and contracts of employment. These variations have led to confusion about entitlements and obligations for labour hire workers and host businesses.
- 3.64 As discussed in Chapter 2, employee and employer are concepts established under common law in Australia. To decide whether a person is an employee, the courts will examine the circumstances between the worker and the business. Then they will determine whether the worker is engaged under a contract of service.
- 3.65 In most states and territories as well as the Commonwealth, the definitions of 'employer' and 'employee' depend upon common law definitions. There is no specific mention of labour hire. Victoria, the ACT and the NT are covered by federal workplace relations legislation, which currently does not contain labour hire provisions. Workplace relations legislation in SA, Tasmania and NSW similarly do not contain labour hire provisions.<sup>57</sup>
- 3.66 As of early 2005, the only states to contain provisions regarding labour hire workers were Queensland and Western Australia. Queensland and Western Australia's labour hire provisions in effect restate the common law position, that in the absence of a sham arrangement, a labour hire agency will be determined to be the employer, not the host business.<sup>58</sup>
- 3.67 Under the Queensland *Industrial Relations Act 1999*, labour hire agencies are included in the definition of 'employer'. Section 6(3) defines the term 'labour hire agency' as an entity that conducts a business that includes the supply of services of workers to others.<sup>59</sup> Section 6 (2) ( d) of the Act defines 'employer' in part as:

... a group training organisation or labour hire agency that arranges for an employee (who is party to a contract of

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57 DEWR, *Exhibit No. 25*, p. 30.

58 DEWR, *Exhibit No. 25*, p. 30; Qld Government, *Submission No. 66*, p. 8.

59 CFMEU, *Submission No. 5*, Appendix 11: NSW Labour Hire Task Force Report, p. 36.

service with the organisation or agency) to do work for someone else, even though the employee is working for the other person under an arrangement between the organisation or agency and the other person.<sup>60</sup>

- 3.68 The WA *Industrial Relations Act 1979* provides that a labour hire agency that arranges for a worker (who is party to a contract of service with the agency) to do work for someone else, is the employer of that worker. The legislation provides that this is the case even though the worker is carrying out duties for the host business under a labour hire arrangement.<sup>61</sup>
- 3.69 In 2005, the Queensland Government amended the *Private Employment Agents Act*. The amendments in Part 2 of the Act provides for a code of conduct as the main way of regulating the conduct of private employment agents in their relationships with persons looking for work or for workers.<sup>62</sup>
- 3.70 The SA Government commissioned a review into the SA industrial relations system, which was completed in October 2002. The review made 16 recommendations, including that legislation require that the employer be identified in a labour hire arrangement.
- 3.71 The *Fair Work Act 1994 (SA)* came into effect in May 2005. This Act covered many of these recommendations from the review, but omitted from final legislation some of the recommendations including the power to deem contractors to be employees and changing unfair dismissal claims by labour hire workers against host businesses.<sup>63</sup>

## Current state inquiries

- 3.72 The growth in the number of labour hire agency placements and concerns about conditions and the effect on direct employment has resulted in a number of states initiating their own inquiries into labour hire.

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60 CFMEU, *Submission No. 5*, Appendix 11: NSW Labour Hire Task Force Report, p. 36.

61 DEWR, *Exhibit No. 25*, p. 30.

62 Qld Government, *Private Employment Agents Act 2005*, accessed 31 May 2005, <[www.legislation.qld.gov.au/LEGISLTN/CURRENT/P/PrivatEmAgA05.pdf](http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/P/PrivatEmAgA05.pdf)>.

63 SA Government, *Fair Work Act 1994*, accessed 31 May 2005, <[www.eric.sa.gov.au/uploaded\\_files/fairwork\\_consolidated.pdf](http://www.eric.sa.gov.au/uploaded_files/fairwork_consolidated.pdf)>.

- 3.73 In August 2003, the NSW Labour Council filed an application for a 'Secure Employment Test Case' in the NSW Industrial Relations Commission. This application aims to:
- restrict the use of labour hire arrangements by requiring host businesses to offer permanent employment to labour hire workers after six months of regular engagement.
  - require host businesses to provide OHS training to labour hire workers; and
  - require host businesses to pay the equivalent amount in wages and conditions had those workers been direct employees of that host business.<sup>64</sup>
- 3.74 Hearings have concluded in the NSW Industrial Relations Commission with reporting expected in late 2005.
- 3.75 The Victorian Parliament's Economic Development Committee conducted an inquiry into labour hire employment in Victoria. An interim report was released in December 2004, which primarily looked into OHS standards in the labour hire industry. The Committee recommended that a registration system for labour hire agencies be established and be linked to a code of practice setting out safety standards.
- 3.76 The final report of the Victorian Parliament's Economic Development Committee was tabled in July 2005.
- 3.77 The Tasmanian Government is currently reviewing the *Industrial Relations Act 1984*. One of the proposed amendments is for a person engaged through a labour hire arrangement to be deemed an employee on application.

## **International aspects of temporary work and employment agencies**

- 3.78 Submissions to the inquiry drew attention to international conventions and codes relating to the labour hire industry. Comparing Australia's labour hire industry internationally is difficult. Although the term 'labour hire' is used in Australia, other terms such as 'contract labour' and 'temporary help' are used overseas.

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64 DEWR, *Exhibit No. 25*, pp. 10, 34; NSW Government, *Submission No. 35*, p. 42.

- 3.79 However it is described, labour hire is now an international phenomenon. Information from the International Confederation of Temporary Work Businesses (CIETT), the international representative of the on-hire industry, indicates that almost 350 million people work under on-hire arrangements in just 17 of the world's major economies. When other major economies are taken into account, the figure is likely to be closer to 400 million people working in this sector every day.<sup>65</sup>
- 3.80 CIETT indicate that industry usage in different economies and cultures varies significantly depending on the legal approach to regulating agency work. Percentages of workers employed through agency work range from 4.5 per cent in the Netherlands to 0.7 per cent in Spain.<sup>66</sup>
- 3.81 Australia's rate is around 3 per cent, which indicates that Australia has a comparably high level of participation of labour hire workers.<sup>67</sup>
- 3.82 For some years, the International Labour Organisation (ILO) sought to discourage labour hiring. ILO *Convention 96 Fee-Charging Employment Agencies Convention (Revised), 1949* sought to eliminate the labour hire business in ratifying states.<sup>68</sup>
- 3.83 However, Convention 96 was unsuccessful and since 1949, the labour hire industry has spread throughout the world. It now makes a key contribution to many diverse labour markets and economies.
- Labour hire agencies offer the flexibility both employers and employees look for. Their main objective is to find jobs for temporary workers, ensuring that they have work whenever they want. Both user companies and workers benefit from flexible working arrangements which suit their respective needs.<sup>69</sup>
- 3.84 The ILO describes three categories of contract labour:
- Job contracting (contracting out of work);
  - Labour only contracting; and
  - Direct contracting (that is independent contractors).<sup>70</sup>

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65 ACCI, *Submission No. 25*, pp. 35-36.

66 ACCI, *Submission No. 25*, pp. 35-36.

67 ACCI, *Submission No. 25*, pp. 44-45.

68 ACCI, *Submission No. 25*, pp. 44-45.

69 ACCI *Submission No. 25*, p. 45.

70 Ai Group, *Submission No. 49*, p. 7.

- 3.85 At the present time the ILO is focussing on defining the employment relationship, as described in a report prepared for the next ILO conference in early 2006, *'The employment relationship'*. This report, examines the definition of an employment relationship from a range of nation's perspective, including Australia's.<sup>71</sup>
- 3.86 The ILO *Convention No. 181, Private Employment Agencies, 1997* lists the general principles protecting workers in employment and job seekers against poor terms and conditions of employment. The Convention provides that Members States determine a regulatory framework for the operation of private employment agents in terms of a system of licensing or certification.
- 3.87 To date, Australia has not ratified this Convention.<sup>72</sup>
- 3.88 The ILO's committee of experts have agreed that a national policy might include but not be limited to:
- providing workers and employers with clear guidance concerning employment relationships, in particular the distinction between dependent workers and self-employed persons;
  - providing effective appropriate protection for workers;
  - combating disguised employment which has the effect of depriving dependent workers of proper legal protection;
  - not interfering with genuine commercial or genuine independent contracting;
  - providing access to appropriate resolution mechanisms to determine the status of workers.<sup>73</sup>
- 3.89 AMWU and ACTU, in evidence to the Committee, stated that the minimum requirements identified by the ILO should be considered when formulating a national policy on labour hire arrangements.<sup>74</sup>
- 3.90 Although Australia has not ratified the ILO Convention 181, as a member of CIETT, Australia follows the international CIETT Code of Practice. CIETT notes that the Code of Practice closely accords with the most up-to-date ILO Recommendation on labour hiring.<sup>75</sup>

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71 AMWU, *Submission No. 46*, p. 75; International Labour Conference, *The Scope of the employment relationship*, Report V, 95<sup>th</sup> Session 2006, International Labour Office, Geneva 2005.

72 CFMEU, *Submission No. 5*, Appendix 11: NSW Labour Hire Task Force Report, p. 51.

73 AMWU, *Submission No. 46*, p. 36.

74 AMWU, *Submission No. 46*, p. 36; ACTU, *Submission No. 60*, pp. 25-26.

75 ACCI, *Submission No. 25*, p. 44.

- 3.91 The CIETT International Labour Hire Code of Practice includes the following provisions:
- members shall ensure that agency workers are suitable for the assignment;
  - members shall protect the security of confidential information obtained from both agency workers and clients;
  - advertisements for job vacancies must be genuine;
  - agency workers shall be advised of:
    - ⇒ the conditions of the assignment & the kind of work
    - ⇒ the remuneration
    - ⇒ any changes to the above;
  - members shall not seek to prevent agency workers from seeking jobs where they wish to do so (including with the user); and
  - services by (agencies) shall be available to agency workers free of charge.<sup>76</sup>
- 3.92 The RCSA's Code of Professional Practice addresses many of CIETT's International Labour Hire Code of Practice criteria.
- 3.93 The RCSA code for professional practice covers the eight principles including: confidentiality and privacy; honest dealings; respect for work relationships, respect for laws, respect for safety, respect for certainty of engagement; professional knowledge principle; and good order.<sup>77</sup>
- 3.94 This international perspective may provide some guidance for actions that the Australian Government could undertake. Issues to consider include definitions, licensing and limits of engagement of labour hire.

## **Award restrictions and proposed federal legislation**

- 3.95 Some awards limit the use of labour hire arrangements. Award restrictions on use of labour hire can include a requirement that the host employer offer ongoing employment to any casual employee of the labour hire agency with six months of regular engagement. There may also be a requirement that labour hire workers receive wages and

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<sup>76</sup> ACCI, *Submission No. 25*, p. 44.

<sup>77</sup> RCSA *Code for Professional Practice*, accessed 31 May 2005, <[www.rcsa.com.au/documents/cfpp/cfpp\\_2005.doc](http://www.rcsa.com.au/documents/cfpp/cfpp_2005.doc)>.

- conditions no less than those they would have received as direct employees of the host business.<sup>78</sup>
- 3.96 Examples of awards that contain provisions that limit the placement of labour hire workers include the Fresh Start Bakeries Australia Pty Limited (NSW) Enterprise Award 2004, and the Hydro Aluminium Kurri Kurri Smelter Upgrade and Retro-Fit Project Consent Award 2004. Both of these awards place restrictions on the length of engagement that labour hire workers can undertake.<sup>79</sup>
- 3.97 On 30 March 2005, the Minister for Employment and Workplace Relations, the Hon Kevin Andrews MP released the discussion paper *'Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements.'* The paper canvasses legislative responses to regulate independent contracting and labour hire arrangements to protect:
- ... independent contracting arrangements (including 'Odco' arrangements) as commercial arrangements, not employment arrangements, under the law... [and ensure] 'sham' arrangements are not legitimised".<sup>80</sup>
- 3.98 Legislative change was foreshadowed in the 2004 Coalition election policy.
- 3.99 The discussion paper states that consideration could be given to amending the WR Act to include similar provisions of definitions of labour hire as Western Australia and Queensland. This would give statutory recognition to the current common law definition of a labour hire worker.<sup>81</sup> There has been some support for this proposal.<sup>82</sup>
- 3.100 In most Australian jurisdictions, apart from Victoria, Northern Territory and Tasmania, employment agencies are required to be licensed. However, in some jurisdictions, the relevant legislation may require some labour hire agencies to register as an employment agency.<sup>83</sup>

78 Qld Government, *Submission No. 66*, p. 21; DEWR, *Exhibit No. 25*, p. 34 proposals in NSW Secure Employment Test case.

79 NSW Department of Commerce, Office of Industrial Relations, accessed through Awards Online on 31 May 2005, <[www.industrialrelations.nsw.gov.au/awards/index.html](http://www.industrialrelations.nsw.gov.au/awards/index.html)>.

80 DEWR, *Submission No. 65*, pp. 1-2.

81 DEWR, *Exhibit No. 25*, p. 30.

82 Qld Government, *Submission No. 66*, p. 41; Mr M. Anderson, *Submission No. 70*, p. 5; DEWR- Australian Public Service Commission, *Exhibit No. 74*, p. 8; DEWR- Toll Transport Pty Ltd, *Exhibit No. 79*, p. 10.

83 CFMEU, *Submission No. 5*, Appendix 11: NSW Labour Hire Task Force Report, pp. 36-42.

- 3.101 Some evidence to the Committee suggests that governments, particularly at the state level, should introduce new legislation to impose further regulatory requirements, including registration of labour hire agencies.<sup>84</sup> Other evidence cautions against applying further regulatory requirements into workplace relations legislation.<sup>85</sup>
- 3.102 The Australian Government Department of Employment Workplace Relations (DEWR) discussion paper highlighted concerns about the impact that the variety of laws and regulations could have upon the labour hire industry. The paper proposes that the WR Act should be amended to contain provisions to discourage limitations that relate to engaging labour hire workers or imposing conditions on their terms of engagement.<sup>86</sup> These issues will be discussed in more detail in Chapters 4 and 6.

## In summary

- 3.103 Labour hire workers represented around 3 per cent of all employed persons in 2002 in Australia. In the past ten years, labour hire has become a more common type of employment in Australia as well as internationally.
- 3.104 This Chapter examined different labour hire arrangements including workers employed directly by the labour hire company, or as independent contractors.
- 3.105 Variation in definitions across different states and territories was identified. An industry code of practice was discussed and compared with international conventions and practices. The legislative framework under which labour hire currently operates was outlined along with proposals for future legislation.

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84 Mr G. Hargrave, SKILLED Group, *Transcript of Evidence*, 27 April 2005, p. 14; Mr D. Cameron, AMWU, *Transcript of Evidence*, 31 March 2005, p. 69; Mr C. Christodoulou, Unions NSW, *Transcript of Evidence*, 30 March 2005, p. 32; Ms S. Burrow, ACTU, *Transcript of Evidence*, 26 April 2005, p. 41.

85 Mr A. Cameron, RCSA, *Transcript of Evidence*, 26 April 2005, p. 21.

86 DEWR, *Exhibit No. 25*, pp. 29-30.

