ACTU
australian council of trade unions

level 6 365 queen street
melbourne victoria 3000
t +613 9664 7333
f +613 9600 0050
w actu.org.au

President Gerardine (Ged) Kearney
Secretary Dave Oliver

Research Director
Finance and Administration Committee
Parliament House
George Street
BRISBANE QLD 4000

Via e-mail: fac@parliament.qld.gov.au

7 April 2016

Dear Sir or Madam

Inquiry into the practices of the labour hire industry in Queensland

I refer to the above.

The ACTU has recently provided a detailed submission to an Inquiry being conducted by the Victorian Department of Economic Development, Jobs, Transport and Resources concerning "the labour hire industry and insecure work". Whilst the terms of reference of that inquiry are not at one with those of your own, we nevertheless consider that our submission to it may be of interest to your Committee. A copy of our submission is enclosed with this correspondence.

You would also no doubt be aware that since providing that submission, and also since the commencement of your inquiry, the Senate Standing Committee on Education and Employment Committee delivered its report *A National Disgrace: The Exploitation of Temporary Work Visa Holders*. The Committee's report contains a wealth of information on the operation of labour hire agencies in connection with their employment and exploitation of temporary workers. One matter that is discussed in that report, but which has not squarely arisen in the context of the Victorian inquiry, is the incidence of phoenix operators in the labour hire sector.

As the material provided for the purposes of your inquiry by Queensland Treasury observes, the minimal asset requirements associated with labour hire enterprises makes the option of phoenixing relatively uncomplicated. This can cause losses to be incurred by workers as well as other creditors including the Australian Tax Office and other regulators (an inferential case is built in the material from Queensland Treasury that WorkCover QLD may be one such regulator). A number of regulatory responses to this problem are discussed in the Senate Committee's report, including the use (or potential modification) of accessorial liability provisions to ensure that natural persons associated with a contravening company may be pursued not only for pecuniary penalties but also for underpayments which the defunct company was responsible for prior to its contrived demise.

We are very supportive of new regulatory initiatives that are capable of circumventing such avoidance behaviours. We note that a Private Members Bill, currently before the Senate, contains provisions for the making of *Phoenixing Compensation Orders.* The provisions, contained at item 14 of the *Fair Work Amendment (Protecting Australian Workers) Bill*, essentially permit a court to

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order that an underpayment be paid by managers of a phoenixed company unless they can prove they were blameless in connection with the initial contravention. We consider such proposals innovative and commendable.

We anticipate that your inquiry is not considering means by which agencies of the State of Queensland would directly enforce the *Fair Work Act*. However, we note with interest the comment in your briefing material from Queensland Treasury that "It is common for *the most repetitive and hazardous* tasks in any industry to be conducted by casual or labour hire workers", as well as the discussion concerning interacting duties of labour hire companies and their customers as persons conducting a business or undertaking in occupational health and safety law. It occurs to us that, in the event that a labour hire agency was eventually ordered to pay a fine for a health and safety breach, that obligation too may be all to easily avoided by phoenixing. In that context, the capacity to pursue directors or other managers of the failed company may be a useful regulatory tool that provides a greater level of deterrence than is currently the case. We recommend that this potential be considered in the course of your inquiry and note that the provisions of the *Fair Work Amendment (Protecting Australian Workers) Bill* referred to above might provide a general framework for approaching this issue, notwithstanding that they were designed with compensation rather than penalties in mind.

We would be pleased to assist your inquiry further as your Committee sees fit.

Yours faithfully,

[redacted]

Trevor Clarke
Director – Legal & Industrial

ACTU Submission to the Victorian Inquiry into Labour Hire and Insecure Work

3 December 2015

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Introduction

1. The Australian Council of Trade Unions ('ACTU') is pleased to contribute to the Victorian Government's Inquiry into the Labour Hire Industry and Insecure Work. The ACTU is the peak body of trade unions representing almost 2 million working Australians. The ACTU and its affiliated unions have a long and proud history of representing workers' industrial and legal rights and advocating for legislative change to improve worker's lives.

2. The following submission provides an overview of insecure work and labour hire in Australia and Victoria and some of its adverse impacts before outlining some options and considerations for reform. The ACTU proposes establishing a labour hire licensing system in Victoria, as well as a set of Secure Work Principles. We make some further recommendations aimed at addressing insecure work below. Schedule 1 considers some of the constitutional issues involved in establishing a labour hire licensing scheme and the legislative form it could take.

Insecure work

3. In the last few decades, Australia has witnessed unprecedented growth in 'non-standard' work and its attendant adverse impacts. Non-standard work includes casual employment, independent contracting, 'agency' or labour hire arrangements and fixed term or fixed task contracts. Such work has often replaced permanent employment and is temporary, precarious and results in a range of socio-economic disadvantages for workers.

4. Those most affected by the rise of insecure work are ordinary people. Insecure work affects most those at the middle and lower end of the earnings spectrum, contributing to a rise in inequality in Australia. Since the 1970s, whilst wages overall have increased, the level of inequality in Australia has risen from one of the lowest levels in the industrialised world to above the OECD average and to much higher levels than in the European Union.[1] Whilst for a long time wages kept pace with increases in labour productivity, since the year 2000 this has no longer been the case. The gains from labour productivity improvements are increasingly going to shareholders rather than workers.[2] The labour share of national

1 See OECD Income Distribution Database. Available at <http://stats.oecd.org/Index.aspx?DataSetCode=IDD>. Accessed March 2015.
2 Ibid.

income fell from approximately 75% in 1975 to approximately 60% in 2013[3] and low wage workers are falling further behind. The National Minimum Wage has fallen by more than 20 per cent of Average Ordinary Time Weekly Earnings in the 33 years since 1982: from 67% in June 1982 down to 43% as at June 2015. The OECD has recently warned that rising inequality is undermining the social fabric of member countries, including Australia, and inhibiting economic growth.[4]

5. The adverse consequences of insecure work include lower pay, reduced security of hours, reduced income, reduced levels of training and workplace participation and lower accrual of superannuation. Labour hire, casual work and other forms of precarious employment also reduce skill levels in the economy and provide an incentive to business to shortcut more productive forms of innovation, ultimately undermining productivity and growth.

6. This submission will focus on casual and labour hire workers who make up the majority of insecure workers (we note that labour hire and agency workers are predominantly hired on a casual basis also).

7. In 2011, the ACTU commissioned an independent inquiry into insecure work by an esteemed panel of experts chaired by the Honourable Brian Howe AO ('Howe Inquiry'). The Howe Inquiry was asked to investigate the extent and causes of insecure work, the workers most at risk of insecure work and why, as well as the impact of insecure work on workers, their families and the community.[5] The inquiry was also asked to make recommendations as to what may be done. The inquiry considered over 550 public submissions, conducted 25 days of public hearings in 22 towns and cities, and drew widely on published academic research.[6] The inquiry's final report, *Lives on Hold: Unlocking the Potential of Australia's Workforce* was released in 2012. The report defined insecure work as:

> *"...poor quality work that provides workers with little economic security and little control over their working lives. The characteristics of these jobs can include unpredictable and fluctuating pay; inferior rights and entitlements; limited or no access to paid leave; irregular and unpredictable working hours; a lack of security and/or uncertainty over the length of the job; and a lack of any say at work over wages, conditions and work organisation. These challenges are most often associated with non-permanent forms of employment like casual work,*

3 See *A Shrinking Slice of the Pie*, ACTU Working Australia Paper (2013), available at <http://www.actu.org.au/media/297315/Shrinking%20Slice%20of%20the%20Pie%202013%20Final.pdf>
4 See OECD, *In it Together: Why Less Inequality Benefits All* (2015). See also OECD, *Growing Unequal?* (2008), and OECD, *Divided We Stand: Why Inequality Keeps Rising (2011).*
5 See p1 of *Lives on Hold: Unlocking the Potential of Australia's Workforce (2012)* for the full terms of reference.
6 See ACTU *Lives on Hold*, p4 and p6.

fixed-term contracts, independent contracting and labour hire – all of which are growing."[7]

8. The report noted that the growth of these jobs has taken place to an extent "under the radar" with "40% of the workforce in non-permanent forms of employment, and… a quarter of employees with no entitlement to sick leave or paid leave."[8]

9. In the report, Mr Howe summarised the problem of insecure work in Australia as giving rise to a growing and precarious class of workers at the periphery of the workforce. As he notes:

> *"Over the past few decades, a new divide has opened in the Australian workforce. No longer between the blue-collar and white-collar worker, it is between those in the "core" of the workforce and those on the "periphery".*
>
> *Those in the core are likely to be in full-time employment, either permanently within organisations, in management positions, or possessing skills for which there is steady demand and for which they can charge a premium. They are likely to enjoy sick leave, paid holidays and in many cases parental leave above the government's universal scheme.*
>
> *For them, flexibility means the chance to work in a variety of industries, to work overseas, to earn good money freelancing or in a secure part-time arrangement. Periods of unemployment are likely to be short or voluntary.*
>
> *Below and around this group are those on the periphery. They are employed on various insecure arrangements, casual, contract or through labour hire companies, on low wages and with far fewer if any benefits.*
>
> *Many do not know what hours they will work from week to week, and often juggle multiple jobs to attempt to earn what they need.*
>
> *If their skills are low, or outdated, they are not offered training through work. They shift between periods of unemployment and underemployment that destroy their ability to save money.*
>
> *Their work is not a "career"; it is a series of unrelated temporary positions that they need to pay rent, bills and food.*
>
> *For them, flexibility is not knowing when and where they will work, facing the risk of being laid off with no warning, and being required to fit family responsibilities around unpredictable periods of work."*[9]

7 Ibid p14.
8 Ibid p17.

10. The emergence in Australia of a divide between a core workforce and a peripheral class with significantly inferior conditions bears some parallels with international developments. British economist Guy Standing describes the rise of the 'precariat' in industrialised countries, an emerging class of socio-economically insecure workers pushed to the periphery by decades of labour market flexibility policies. These policies began in the 1970s when:

> *"... a group of ideologically inspired economists captured the ears and minds of politicians. The central plank of their 'neo-liberal' model was that growth and development depended on market competitiveness; everything should be done to maximise competition and competitiveness, and to allow market principles to permeate all aspects of life.*
>
> *One theme was that countries should increase labour market flexibility, which came to mean an agenda for transferring risks and insecurity onto workers and their families. The result has been the creation of a global 'precariat', consisting of many millions around the world without an anchor of stability."*[10]

11. The precariat lack the seven labour-related securities on which the workplace relations systems of industrialised countries were founded after World War II. These securities are: labour market security, employment security, job security, work security, skill reproduction security, income security and representation security.[11] Standing provides the following examples of the wide variety of precariat workers: from the teenager who survives on fleeting café jobs, to the single mother who worries about where the money will come from to pay next week's bills, to the migrant worker evading police and surviving on his wits to string together informal jobs outside the system, to the man in his 60s relying on casual jobs to pay his medical bills.[12] This inquiry will hear many examples from precariat workers in Australia.

12. Unlike the working class from which the precariat devolved, precariat workers are unable to organise collectively; The precariat is disaggregated, disempowered, and disenfranchised. Meanwhile, the class of permanent wage and salary earning workers, the model of worker on which industrial relations systems were built, and on whose collective action the maintenance of labour conditions depends, is shrinking.

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9 *Lives on Hold* p5.
10 Guy Standing, *The Precariat: The New Dangerous Class* (2011) at p1.
11 Ibid p10.
12 Ibid 13.

13. There are few international instruments protecting against these developments. For example, to date, there is no international labour law instrument on temporary work.[13] Convention 181 on private employment agencies does not limit the proportion of workers who can be hired through such agencies although it does contemplate some general and specific protections.[14]

14. Higher industrial protections in Australia compared to the United States and the United Kingdom have prevented Australia from experiencing the extreme inequality that has developed in those countries in recent decades. However, workers in Australia have still been more affected by these changes than in most other industrialised countries. Australia now has one of the highest rates of non-permanent employees in the OECD – double the OECD average of 12 per cent of employees on what the OECD terms 'temporary contracts'[15] and casual workers in Australia enjoy lower conditions and protections than temporary workers in other countries. Indeed, comparisons between Australia and other countries are complicated by the fact that casual employees in Australia have far lower protections than temporary workers overseas.[16] Outside Australia, casual employment is prominent only in low-income developing countries and only in terms of informal waged employment.[17]

15. Much of Europe, on the other hand, restricts temporary and precarious employment to a designated start and end point with minimum weekly hours and with paid leave and other rights afforded to such workers on a pro rata basis.[18] Australia is alone, for example, in the OECD both in its high levels of casualisation and in excluding non-permanent employees from leave rights: even New Zealand, Australia's closest analogue, gives casual employees such rights.[19]

13 ILO, ACTRAV, *From Precarious Work to Decent Work: Outcome Document to the Workers' Symposium on Policies and Regulations to combat Precarious Employment* (2012), p59. Available at: http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/meetingdocument/wcms_179787.pdf.
14 Ibid.
15 See Tweedie, D. (2013) "Precarious work and Australian labour norms", *Economic and Labour Relations Review,* 24(3): 297-315.
16 Ibid.
17 See ILO, *Non-standard forms of employment: report for discussion at the Meeting of Experts on Non-standard forms of employment* (February 2015) p2, available at <http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/meetingdocument/wcms_336934.pdf>.
18 See Campbell, I., & Burgess, J. (2001). 'Casual employment in Australia and temporary work in Europe: Developing a cross national comparison'. *Work, Employment and Society*, 15(1), 171–184.
19 See Iain Campbell, Gillian Whitehouse and Janeen Baxter, 'Casual Employment, Part-time Employment and the Resilience of the Male-Breadwinner Model in Leah F. Vosko (ed*), Gender and the Contours of Precarious Employment* (Taylor and Francis 2009) 66.

16. In the United Kingdom, 'agency' workers are provided with a number of minimum protections under the *Agency Workers Regulations 2010* and, after 12 months with the same host employer, are entitled to the same rights and entitlements as employees of the host.[20]

17. In Australia, insecure work has arisen alongside profound broader changes in the nature and regulation of work in this country including:

    a. Deliberate concessions by governments to calls from business to 'de-regulate' industrial relations and provide more workplace 'flexibility' by removing restrictions on managerial prerogative;

    b. Increased outsourcing and contracting out of government services and functions within private enterprises to external providers. This has occurred alongside reduced government spending as a proportion of GDP and generally a ceding of government control and influence over the economy to the market;

    c. The demise of the classical wage earner, the model on which the industrial relations system was built; namely, that of the average worker as a male blue collar worker, working a standard week of 35 to 44 hours whilst supporting a wife and children;

    d. The dilution of the standard working week;

    e. The increased workforce participation of women;

    f. The decline of blue collar manufacturing jobs and increase in white collar services and information jobs, especially in finance;

    g. Flattened organisational structures, loss of middle management and downsizing of firms;

    h. A shift away from full employment and government expenditure policies designed to promote full employment to increased and chronic unemployment;

    i. The marginalisation of young workers, the rise of chronic youth unemployment and decline in entry level low skilled full-time jobs;

    j. The rapid and extensive casualisation of the workforce and rise in temporary and precarious work, including the rise of 'just in time' labour, where employers match variable demand with disposable casual labour;

    k. The downgrading of the role of the industrial relations commissions;

20 Department for Business Innovation and Skills (UK), Agency Workers Regulations: Guidance (May 2011) available at < https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32121/11-949-agency-workers-regulations-guidance.pdf>.

l. A dramatic decline in union density and the collective bargaining power of workers; and

m. Trade liberalisation, international competitive pressures, and the multi-nationalisation of firms.

18. Australia has experienced significant growth in casualisation in virtually all industries, including manufacturing, which traditionally had little experience of it.[21] The Howe Inquiry found that the key driver of the growth in insecure work has been the emergence of a business model that shifts the risks associated with work from the employer to the employee and minimises labour costs at the expense of job quality.[22] Employers have taken advantage of casual clauses in awards that allow for employers to be exempted from offering standard rights and benefits in a climate of increasing competitive pressures and decreasing labour conditions.[23] Hence, the growth is best explained by a combination of employer choices about the structure of employment and opportunities provided for by gaps in the awards and regulatory system rather than any underlying structural changes or needs.[24]

19. In essence, casual employment has grown because it is legal for employers to utilise the perceived financial, operational, legal and administrative advantages attaching to casual employment and there are few regulatory restrictions to employers doing so, including, generally, no limitation on the duration of casual employment, unlike in other countries.

20. The number of casual employees in Australia almost tripled between 1982 and 1999, rising from just below 700,000 to almost 2 million.[25] Casual density, the proportion of casual jobs out of all jobs, grew from 15.8 per cent in 1984 to a peak of 27 per cent in 2000-2003 before becoming relatively stable at about 24 per cent between 2005 to 2014.[26] This relative stabilisation was thought to be explained partly by the growth of other forms of insecure work such as fixed-term contracts, labour hire and independent contracting, which have given employers other options for minimising costs and shifting risks on to their employees.[27] The Australian Bureau of Statistics ('ABS') uses 'employees

21 See John Burgess, Ian Campbell & Robyn May, 'Pathways from Casual Employment to Economic Security: the Australian Experience', *Social Indicators Research* (2008) 88:161–178.
22 *Lives on Hold*, p10.
23 Ibid.
24 See Campbell, I. & Brosnan, P. (2005). 'Relative advantages: Casual employment and casualisation in Australia and New Zealand' in *New Zealand Journal of Employment Relations* 30(3), 33–45.
25 Campbell, I. 'The Spreading Net: Age and Gender in the Process of Casualisation in Australia' in *Journal of Australian Political Economy,* issue 45, June 2000, pp68-99 at p68.
26 Research and analysis by the Centre for Workforce Futures, Macquarie University, commissioned by ACTU in 2015 based on: Simpson, Dawkins and Madden (1997) 'Casual employment in Australia: incidence and determinants' *Australian Economic Papers* 36 (69) pp194-204 for data 1984-1987, and based on ABS, *Employment Benefits, Australia*, cat. no. 6334.0; ABS, *Weekly Earnings of Employees (Distribution),* cat. no. 6310.0, 1988-1997; ABS, *Employee Earnings, Benefits and Trade Union Membership,* cat. no. 6310.0, 1998-2013; ABS *Trade Union Members, Australia,* cat. no. 6325.0, 1996.
27 *Lives on Hold*, p10 and p14.

without paid leave entitlements' as its primary measure of casual employment.[28] The latest ABS statistics, released in November 2015, show that casual employment has continued to increase again, rising from 23.8% of all workers in August 2013 to 24.1% at August 2014.[29]

21. Both part-time and full-time casual employment have grown from at least the 1980s to the early 2000s, along with permanent part-time employment, with permanent full-time employment dropping from 77.8 per cent in 1988 to 63.4 per cent in 2008 after a low of 61 per cent in 2002.[30] Casual density has risen during both periods of employment growth and contraction and in all major industrial and occupational groups and in both the private and public sector and in workplaces both large and small.[31] Nearly 54 per cent of all part-time jobs are casual and approximately 10 per cent of full-time jobs.[32]

22. The evidence shows the following about the current nature and extent of casual employment in Australia:

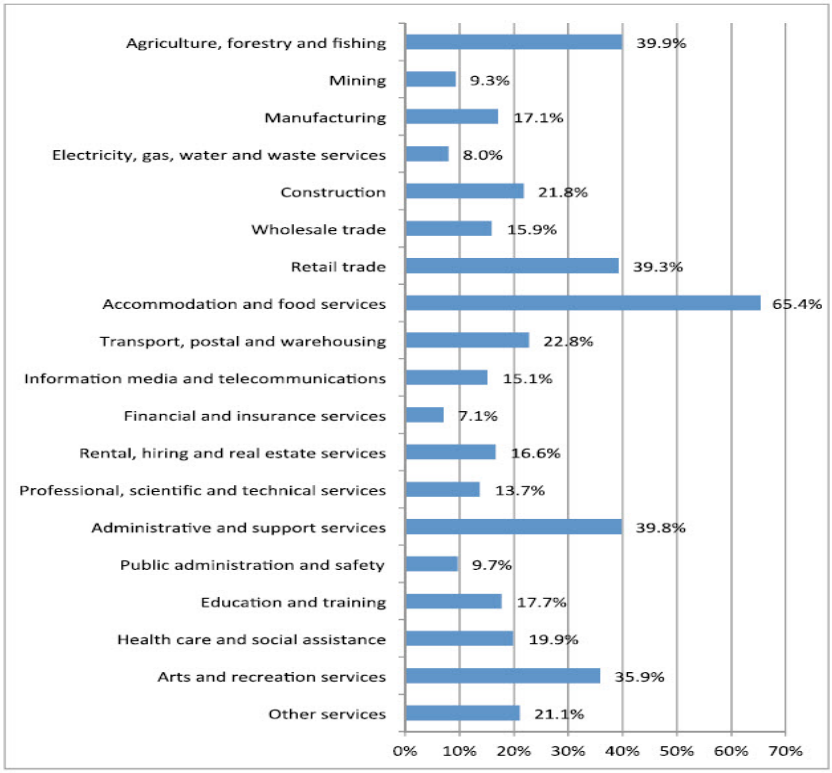
    a. Most part-time jobs are casual (54%) and 10% of full time jobs.[33]

    b. Most casual employees work part-time hours. Seventy-one percent of casuals are part-time compared to 19 percent of permanent workers[34] and 85 per cent of all award-reliant casual employees are part-time.[35]

    c. Casualisation is present in all industries and disproportionately represented among award-reliant employees (55 per cent of award-reliant employees are casual) and in low paid industries, being particularly concentrated in Accommodation and Food Services (20 per cent), Retail Trade (19 per cent) and Health Care and Social Assistance (11 per cent).[36] The Accommodation and food sector contains the highest density of casual employment with 65.4 per cent of all casual employees.[37]

28 See *Part-Time and Casual Employment (Feature Article)*, Australian Labour Market Statistics, cat 6105.0, July 2013 available at < http://www.abs.gov.au/ausstats/abs@.nsf/products/08B16CB4B2E7F152CA2575E70019CA3B?OpenDocument>.
29 See ABS Cat 6333, November 2015.
30 Research and analysis by the Centre for Workforce Futures, Macquarie University, commissioned by ACTU 2015 based on ABS, *Weekly Earnings of Employees (Distribution)*, cat. no.6310.0, 1988-1997; ABS, *Employee Earnings, Benefits and Trade Union Membership*, cat. no. 6310.0, 1998-2013; ABS *Trade Union Members*, Australia, cat. no. 6325.0, 1996.
31 Burgess et al (2008) above n 21 at p175.
32 See ABS (2014) *Employee Earnings, Benefits and Trade Union Membership, Australia, August 2013,* (cat no. 6310.0).
33 Ibid.
34 Ibid.
35 Ibid.
36 Ibid.
37 Ibid.

Fig 1.0 Casual employment density by industry (proportion of employment in each industry that is casual) 2013



Source: ABS, *Employee Earnings, Benefits and Trade Union Membership*, cat 6310, 2014.[38]

d. Females make up the majority of casual employees (54.4 per cent of all casual workers and 64.1 per cent of part-time casual workers).39 A clear majority (69.4 per cent) of all full-time casuals are male.

e. 59 per cent of all casual workers are aged between 25 and 64. The 15-19 year-old age group has the highest casual density (70.7% of employees in that group are casual employees) and the 55-59 year-old age group have the lowest density (15.1%).[40]

f. Remarkably, the mean employment tenure for casual employees is now 4.1 years, including 4.9 years for full-time casuals and 4.0 years for part-time casuals.[41] In

38 Data and graphic supplied by the Centre for Workforce Futures, Macquarie University as part of research commissioned by the ACTU, 2015.
39 Ibid.
40 Ibid.
41See Australian Workplace Relations Study 2013-2014.

manufacturing, the mean employment tenure for casuals is 5.6 years and 7.7 years in wholesale trade.[42]

g. The mean weekly earnings of casual employees are lower than permanent workers ($1,181 per week versus $1,412 per week). Just over one third of part-time casual employees earn less than $200 per week. Women consistently earn less than men, in casual full-time, casual part-time, permanent part-time and permanent fulltime employment.[43]

h. Labour hire employees are more likely to be casual (76% of labour hire employees) and make up at least 2 percent of the workforce, with some reason to believe the true figure may be higher.[44]

23. The rise in casual employment has been at the expense of permanent full-time jobs: permanent full-time employment has fallen from 77.8 per cent of employees in 1988 to 61.6 percent in 2013,[45] whilst at the same time both casual full-time and casual part-time employment have risen more significantly than permanent part-time employment.[46]

24. Proponents of increased labour market flexibility often argue that casual employment is better than unemployment and is a bridge to permanent employment, but the large proportion of jobs that are now casual suggests otherwise. Watson argues that the characteristics of casual jobs "in themselves, are a major factor in perpetuating this kind of work. It seems reasonable to conclude that casual jobs do indeed operate as labour market traps, and they are actually crafted to do so."[47] Hence, casual employment often operates to block the unemployed from gaining permanent work rather than assisting them in achieving it. As figures 2.0 and 3.0 below show, the levels of unemployment and casual employment in each State correspond very closely as do the level of unemployment and casual employment in each age group. Hence, high levels of casual employment are found to correspond to high unemployment and not the reverse.[48]

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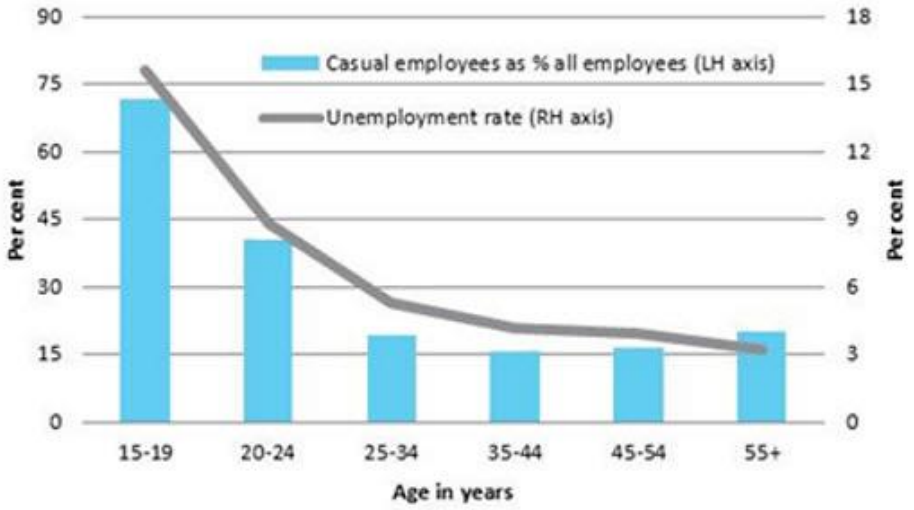
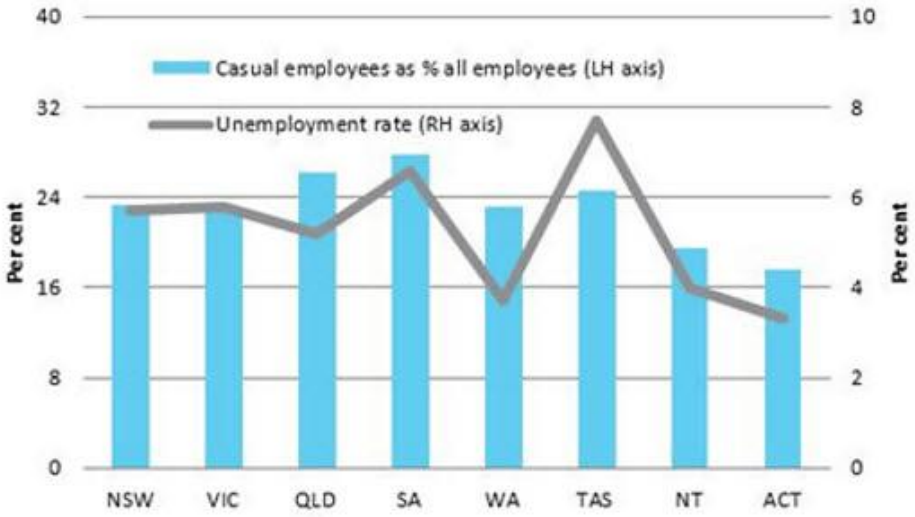
42 Ibid.
43 Burgess et al above n 31.
44 See wave 13 of the Household Income and Labour Dynamics in Australia Survey. The Howe Inquiry suggests the true number of labour hire employees may higher: See *Lives on Hold* p16.
45 Research by the Centre for Workforce Futures, Macquarie University, commissioned by ACTU, 2015, based on ABS, *Weekly Earnings of Employees (Distribution),* cat. no. 6310.0, April 2014.
1988-1997; ABS, *Employee Earnings, Benefits and Trade Union Membership*,
cat. no. 6310.0, 1998-2013; ABS *Trade Union Members, Australia*, cat. no.
6325.0, 1996; see also *Lives on Hold*, p17.
46 Above note 29.
47 Ian Watson, 'Bridges or traps? Casualisation and labour market transitions in Australia' in *Journal of Industrial Relations* Vol.55 No.1 2013, pp6-37 at p23. See also Welters, R. and Mitchell, W. (2009) "Locked-in casual employment", (Working Paper. 09-03), Centre for Full Employment and Equity, University of Newcastle, Callaghan; Pocock, B., Prosser, R. and Bridge, K. (2004) 'Only a Casual…': How Casual Work Affects Employees, Households and Communities in Australia, Report, University of Adelaide, Adelaide.
48 See Anthony Kryger, Australian Parliamentary Research Paper – Casual Employment in Australia: A Quick Guide, January 2015, available at <
http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/Quick_Guides/Casu

Fig 2.0 Casual employment and unemployment rate by age, Nov 2013



Graphic courtesy of Anthony Kryger, *Casual Employment in Australia: a quick Guide*, Australian Parliamentary Library, January 2015. Data source: ABS *Labour market statistics*, Cat no.6105.0, July 2014.

Fig 3.0 Casual employment and unemployment rate by state, Nov 2013



Graphic courtesy of Anthony Kryger, *Casual Employment in Australia: a quick Guide*, Australian Parliamentary Library, January 2015. Data source: ABS *Labour market statistics*, Cat no.6105.0, July 2014.

25. Further contradicting the idea that casual employment is an intermediary step towards permanent employment, the fastest rate of growth in casualisation has been among long-

alEmploy> except for the mining states of Western Australia and Queensland which the paper's author excluded as potential aberrations.

term rather than short-term casual employees.[49] The average job tenure for casual employees is now 3 years.[50] 16.7% of male casual employees and 19.7% of female casual employees have worked for their current employer for 5 years or more.[51] Some 28% of casual workers, or over 600,000 workers, have both worked for their employer for at least 3 years and on a regular basis.[52]

26. The rise in casual employment is often erroneously conflated with the demand from students and women with caring responsibilities for part-time work. However, the rise in casual employment and short term engagements has failed to adequately address the ongoing needs of women and workers with family and carer responsibilities.[53] The mode of engagement is usually dictated by employers so workers wanting part-time hours are often asked to trade security for part-time hours, with the 'flexibility' that casual employment purportedly offers, in practice being unilateral - meaning that employers dictate hours and days of work and duration of employment.

27. Female preferences for part-time hours are strongly linked to caring and family responsibilities. According to the Household Income and Labour Dynamics in Australia ('HILDA') survey, 37 per cent of permanent part-time and 17 per cent of casual part-time female employees cited "caring for children" as the main reason for working part-time hours (compared to 5 per cent and 2 per cent of male part-time employees respectively). Women's lower workforce participation is partly due to barriers to effective labour market transitions for women in connection with childbirth, leading to a distinct 'motherhood gap' in participation in the workforce.[54]

28. Hence, women are more likely to experience insecure work because of the need for flexible work arrangements due to caring responsibilities and the lack of flexible working arrangements and social support for working parents.[55] Whilst an issue for both genders, in reality women still perform more than two thirds of domestic and caring work and are far more likely to take extended leave to care for dependants.[56] The lack of flexible work arrangements can prevent women gaining secure employment and force them to accept

49 See John Burgess, Ian Campbell & Robyn May, 'Pathways from Casual Employment to Economic Security: the Australian Experience', *Social Indicators Research* (2008) 88:161–178 at p175; ABS 2002 cat 6254.0.
50 According to the Household Income and Labour Dynamics Survey, Wave 13, 2013 as analysed by the Centre for Workforce Futures, Maquarie University for ACTU.
51 Ibid.
52 According to the Household Income and Labour Dynamics Survey 2013 as analysed by the Centre for Workforce Futures, Macquarie University for ACTU.
53 See Burgess et al at 173.
54 Australian Institute for Family Studies, Jennifer Baxter, *Australian mothers' participation in Employment* (September 2013).
55 Workplace Gender Equality Agency, *Parenting, Work and the Gender Pay Gap* (2013) 3;
56 *Lives on Hold*, p21; Australian Institute of Health and Welfare, *The Future Supply of Informal Care* 2003-2013, (2003).

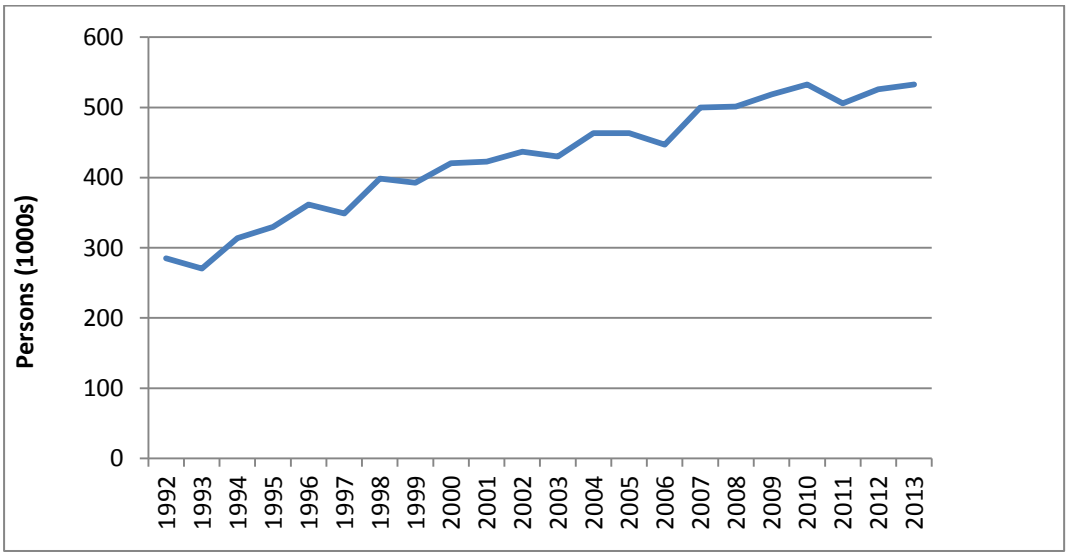
casual and intermittent work and its adverse consequences.[57] The cost and time of childcare arrangements also makes short engagements particularly unviable for women.[58]

29. Whereas many women desire flexibility to accommodate family and caring responsibilities, this desire appears to a large degree driven by a preference for permanent part-time rather than casual employment,[59] but the growth of insecure casual employment has replaced many part-time jobs[60] and may be the only option for these women as an alternative to full-time employment. Often, a woman with caring responsibilities is forced to choose between a casual job and unemployment.[61]

Insecure work in Victoria

30. The total number of casual employees in Victoria almost doubled between 1993 and 2013, rising from (270,500) to over half a million (532,800).[62]

Figure 4.0 – Casual employees in Victoria (1000s) 1992-2013

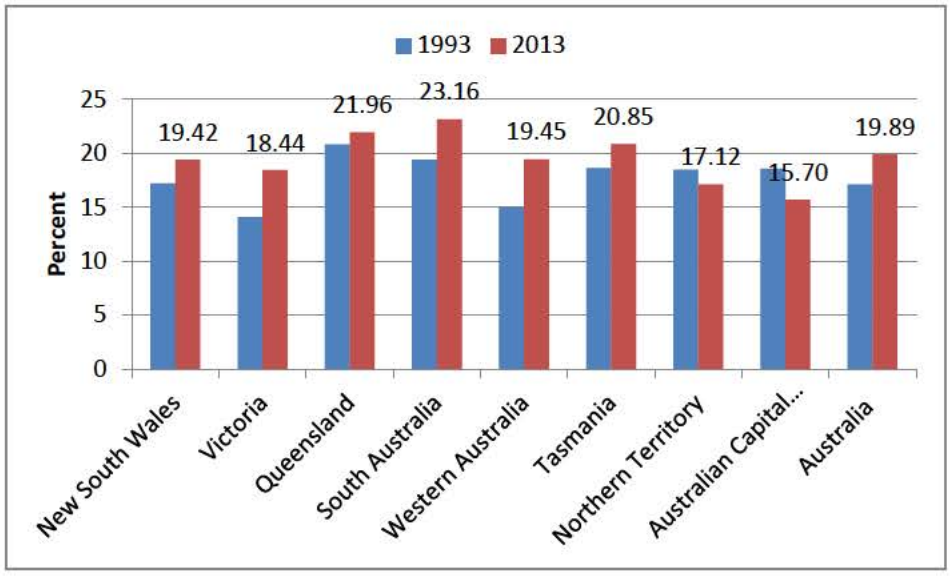


Source: ABS Cat 6105.0 *Australian Labour Market Statistics*, released 8 July 2014.

57 *Lives on Hold* p21; Australian Institute for Family Studies, Jennifer Baxter, *Australian mothers' participation in Employment* (September 2013) 3; Sarah Charlesworth, ' Women, work and Industrial Relations in Australia in 2013' *The Journal of Industrial Relations* (2014), 56 (3) 72.
58 Sarah Charlesworth, ' Women, work and Industrial Relations in Australia in 2013' *The Journal of Industrial Relations* (2014), 56 (3) 75.
59 See Charlesworth, S., Strasdins, L., O'Brien, L. and Simms, S. (2011) "Parents' Jobs in Australia: Work Hours Polarisation and the Consequences for Job Quality and Gender Equity", *Australian Journal of Labour Economics,* 14(1): 35-57.
60 See *Lives on Hold*, p20.
61 See *Lives on Hold*, p43.
62 See ABS Cat 6105.0 Australian Labour Market Statistics, released 8 July 2014.

31. As the second most populous state, Victoria has the highest number of casual employees in Australia after New South Wales but a slightly lower casual density than the Australian average – 18.44% of employees compared to 19.89% Australia-wide in 2013.[63] As Figure 5.0 shows, casual employment increased in all states between 1993 and 2013[64].

Figure 5.0 – Casual employee density by State 1993 and 2013



Source: ABS Cat 6105.0 *Australian Labour Market Statistics*, released 8 July 2014.

The adverse impacts of insecure work

32. The adverse consequences of casual employment are many and varied, including lower pay compared to permanent employment. According to classical economic assumptions, employees would be prepared to pay a premium for security of employment. However, as the OECD notes, temporary workers receive less than permanent workers even when controlling for job differences.[65] The overall mean weekly earnings of casual employees in Australia working full-time hours are $1,181 per week compared to $1,412 per week for permanent employees.[66] Median weekly earnings of casual employees overall are $425,

63 Ibid.
64 Casual employment density decreased in the same period in the territories; however, the combined population of the territories represented less than 2.7% of the population as at March 2015: ABS, *Australian Demographic Statistics*, cat 3101.0, March 2015, March Key Figures.
65 OECD, *OECD Employment Outlook* (July 2002) pp166 and 141; see also an international study with similar findings in Comi, S. & Grasseni, M. (2009, September, 24–25). *Temporary jobs wage differential in Europe*. Paper presented at the XXIV National Conference of Labour Economics University of Sassari, p1.
66 See Australian Bureau of Statistics (2014) *Employee Earnings, Benefits and Trade Union Membership, Australia, August 2013,* (cat no. 6310.0).

much lower than the $1052 for permanent employees.[67] Approximately 70 per cent of casual employees earn less than $700 per week.[68] Casual employees' average weekly earnings are less than permanent employees in all relevant categories: female full-time ($931 versus $1,224), male full-time ($1,292 versus $1,530), female part-time ($351 versus $685), male part time ($373 versus $707) and in terms of both mean and median earnings.[69]

33. Other adverse consequences of casual employment include:

    a. Lower security of employment and higher risk of underemployment and unemployment: casual employees have double the risk of periods of unemployment compared to permanent employees;[70]

    b. Lower security of income, hours, overall earnings and reduced predictability and reliability and increased intermittency of pay,[71] including reduced employee-oriented flexibility such as control over hours and days of work and control over quantum of hours (that is, casual employees often receive more or less hours of work than desired).[72] Fluctuating pay is caused by working time insecurity and income insecurity.[73] Casual employees do not have the guaranteed hours and times of work of permanent employees. Some 25% of employees have variable pay from one pay period to the next;[74]

    c. The variability and insecurity of income that attends casual employment makes financial planning for the medium and long-term very difficult;[75] and leads to lower overall wealth accumulation over time;[76]

    d. Exclusion from leave rights under the National Employment Standards ('NES'), including annual leave[77], personal/carer's leave and compassionate leave[78], and paid public holidays[79], as well as notice of termination and redundancy pay.[80] The entitlement to be absent from work during public holidays is weaker for casual

67 Ibid.
68 Ibid.
69 Ibid. Quoted figures are from mean average earnings.
70 Green, C.P. and Leeves, G.D. (2013) 'Job Security, Financial Security and Worker Well-Being: New Evidence on the Effects of Flexible Employment', *Scottish Journal of Political Economy,* 60(2): 121-138.
71 Ibid; See also ABS (2014) *Employee Earnings, Benefits and Trade Union Membership, Australia, August 2013,* (cat no. 6310.0).
72 See *Lives on Hold* p17.
73 Ibid.
74 See ABS data cited in *Lives on Hold*, p17.
75 See McGann, M., Moss, J. and White, K. (2012) "Health, freedom and work in rural Victoria: The impact of labour market casualisation on health and wellbeing", *Health Sociology Review,* 21(1): 99-115.
76 See Green, C.P. and Leeves, G.D. (2013) "Job Security, Financial Security and Worker Well-Being: New Evidence on the Effects of Flexible Employment", *Scottish Journal of Political Economy,* 60(2): 121-138
77 Casual employees are excluded by s86 of the FW Act.
78 Casual employees are excluded by s95 of the FW Act.
79 See note to s116 of the FW Act.
80 Notice of termination and redundancy pay entitlements under the NES are excluded by s123(1)(c) of the Act.

employees.[81] The lack of access to paid leave might encourage workers to attend to work when they are not sufficiently rested, or sufficiently well;

e. Short-term and irregular casual employees are excluded from parental leave[82], the right to request flexible working arrangements[83] and unfair dismissal protection;[84]

f. Lack of paid jury service leave entitlements;[85]

g. Casual loadings have limited capacity to compensate for loss of leave rights, which in many cases includes the loss of the right to take leave as well as the right to be paid whilst on leave: the size of the loading may not be equivalent to the loss forgone and an equivalent permanent comparator may be near non-existent in some occupations, suggesting casual loading is "at best a rather tattered fig leaf, which fails to conceal the true nature of relations between employers and employees."[86]

h. In practice, lower access to overtime;

i. As well as the lack of redundancy entitlements, casual workers are more likely to be retrenched than permanent workers and have greater risk of transitioning into periods of unemployment;[87]

j. Lower workplace participation. Casual employees tend to be less integrated into the workplace and may be marginalised by management and other permanent employees;[88]

k. Casual employment has been linked to feelings of powerlessness and fear and a lack of voice in the workplace and reluctance to speak up about concerns for fear of reprisals and a lower position of power vis-à-vis employers.[89] The negotiation of working hours is commonly a fraught process with workers reluctant to refuse shifts even at short notice or inconvenient times for fear of jeopardising future offers;[90]

81 An employer may request that an employee work on a public holiday if reasonable (s114(2)) and casual employment is a factor that may be taken into account in determining if reasonable: (s114(4)).
82 FW Act s67(2).
83 FW Act s65(2)(b).
84 FW Act s384(2)(a) which states that a period of service of a casual employee (for the purpose of qualifying for unfair dismissal) must be regular and systematic with a reasonable expectation of continuing employment with the employer.
85 See FW Act s. 111
86Campbell, I. (2004) "Casual Work and Casualisation: How Does Australia Compare?", *Labour and Industry,* 15(2): 85-111 at p93.
87 Green, C.P. and Leeves, G.D. (2013) 'Job Security, Financial Security and Worker Well-Being: New Evidence on the Effects of Flexible Employment', *Scottish Journal of Political Economy,* 60(2): 121-138.
88 See Pocock, B., Prosser, R. and Bridge, K. (2004) 'Only a Casual…': How Casual Work Affects Employees, Households and Communities in Australia, Report, University of Adelaide, Adelaide; McGann, M., Moss, J. and White, K. (2012) "Health, freedom and work in rural Victoria: The impact of labour market casualisation on health and wellbeing", *Health Sociology Review,* 21(1): 99-115.
89 See both references above note 89.
90 Iain Campbell, Gillian Whitehouse and Janeen Baxter, 'Casual Employment, Part-time Employment and the Resilience of the Male-Breadwinner Model in Leah F. Vosko (ed), *Gender and the Contours of Precarious Employment* (Taylor and Francis 2009) 68.

l. Lack of, or lower opportunities for, a career path, training and skill development.[91] Employers invest less and less often in training and development of casual employees (and of the casual employees who receive training, they are significantly more likely than permanent workers to have to pay for it themselves).[92] This has the potential to lead to a long-term degradation of the skills base in the Australian economy and undermines innovation, organisational commitment and productivity[93] The Howe Inquiry report notes that, "Insecure work represents a commoditisation of workers that uses people in an instrumental and short-term manner as opposed to investing in their capabilities".[94] Hence, as mentioned above, for many, casual employment is a trap rather than a bridge to more secure employment later, especially in low-paid industries and especially for intermittent casual workers. [95] In particular, casual employees are more likely to stay casual or become jobless as they get older and part-time casual employees are much less likely to become permanent than their full-time casual counterparts.[96] Long-term casual employment can deplete the confidence of those seeking permanent employment elsewhere;[97]

m. Various adverse health consequences of insecure work and attendant psychological and financial stress on casual workers and their families. Casual employment has been closely linked to intensified stress, anxiety and frustration in the workplace and reduced physical health including anxiety about gaining more hours or the need to

91 See Pocock, B., Prosser, R. and Bridge, K. (2004) 'Only a Casual…': How Casual Work Affects Employees, Households and Communities in Australia, Report, University of Adelaide, Adelaide; Zeytinoglu, I. U., and Cooke, G. B. (2008) "Non-standard employment and promotions: a within genders analysis", *Journal of Industrial Relations*, 50(2): 319-337;
92 See the Australian Workplace Relations Study 2013 (analysis by the Centre for Workforce Futures, Macquarie University as part of research commissioned by ACTU, 2015).
93 See p7 of *Lives on Hold*; Whilst labour productivity has been linked to organisational commitment (Hodgkinson, A. (2003) "The impact of different HRM regimes on labour productivity: national results and a regional perspective", *International Employment Relations Review*, 9(1): 1-21) and innovative behaviour (Xerri, M.J. and Brunetto, Y. (2013) "Fostering innovative behaviour: the importance of employee commitment and organisational citizenship behaviour", *International Journal of Human Resource Management,* 24(16): 3163-3177), insecure and casual employment lowers organisational commitment (see Day, M. and Buultjens, J. (2007) "Casual employment and commitment: a case study in the hospitality industry", in *Diverging employment relations patterns in Australia and New Zealand: Proceedings of the 21st Association of Industrial Relations Academics of Australia and New Zealand (AIRAANZ) Conference*, Auckland, New Zealand, 7-9 February, University of Auckland, Auckland, New Zealand; De Cuyper, N., Notelaers, G. and De Witte, H. (2009) "Job Insecurity and Employability in Fixed-Term Contractors, Agency Workers and Permanent Workers: Associations With Job Satisfaction and Affective Organizational Commitment", *Journal of Occupational Health Psychology,* 14(2): 193-205; Van Zyl, L., Van Eeden, C. and Rothmann, S. (2013) "Job insecurity and the emotional and behavioural consequences thereof", *South African Journal of Business Management,* 44(1): 75-86.
94 See *Lives on Hold*, p6.
95 See Watson, I. (2013) "Bridges or traps? Casualisation and labour market transitions in Australia", *Journal of Industrial Relations*, 55(1): 6-37; Welters, R. and Mitchell, W. (2009) "Locked-in casual employment", (Working Paper. 09-03), Centre for Full Employment and Equity, University of Newcastle.
96 Watson, I. (2013) "Bridges or traps? Casualisation and labour market transitions in Australia", *Journal of Industrial Relations*, 55(1).
97 See Pocock, B., Prosser, R. and Bridge, K. (2004) '*Only a Casual…': How Casual Work Affects Employees, Households and Communities in Australia*, Report, University of Adelaide; McGann, M., Moss, J. and White, K. (2012) "Health, freedom and work in rural Victoria: The impact of labour market casualisation on health and wellbeing", *Health Sociology Review,* 21(1): 99-115.

find secure employment.[98] Casual employment is also linked to unwanted sexual advances in the workplace and suicide;[99]

n. Lower work/life balance and negative impacts on casual workers' ability to plan their lives;

o. Reduced access to finance due to lenders reluctance to extend credit and loans to casual workers, for example, due to perceived or actual intermittent work and doubts about their ability to make consistent payments;[100]

p. Lower accrued superannuation. Only 72% of casual workers, which may be working part time or full time hours, are covered by superannuation by their current employer and/or personal contributions, compared with 98% of ongoing workers. Hence, 28% of casual workers remain uncovered by superannuation.[101] Casuals workers may be vulnerable to membership of high fee personal retail superannuation funds and accrue significantly less superannuation overall.[102] Compared to the superannuation accrued by the 'policy benchmark', a male on average/median earnings, contributing continuously for 40 years, it is estimated that casual full-time males receive 98% of that amount, casual full-time females receive 77%, and casual part-time males and females receive 29%. This is further diminished for intermittent casual employees and by the fact that casual employees are less likely to make additional employee contributions.[103] This poses serious issues and broader social problems concerning casual workers' ability to support themselves in retirement;

q. Casual employment is being used as a form of indefinite probation. Evidence was heard by the Howe Inquiry of a worker working several extended casual jobs through a labour hire company in the hope of it turning into permanent employment. The worker said, "Trying to find a job today that is permanent is like trying to get blood out

98 See Clarke, M., Lewchuk, W., de Wolff, A. and King, A. (2007) "'This just isn't sustainable': Precarious employment, stress and workers' health", *International Journal of Law and Psychiatry,* 30: 311-236; Lewchuk, W., Clarke, M. and de Wolff, A. (2008) "Working without commitments: precarious employment and health", *Work, employment and society,* 22(3): 387-406; McGann, M., Moss, J. and White, K. (2012) "Health, freedom and work in rural Victoria: The impact of labour market casualisation on health and wellbeing", *Health Sociology Review,* 21(1): 99-115.
99 See LaMontagne, A. D., Smith, P. M., Louie, A. M., Quinlan, M., Shoveller, J., and Ostry, A. S. (2009) "Unwanted sexual advances at work: variations by employment arrangement in a sample of working Australians", *Australian and New Zealand Journal of Public Health,* 33(2): 173-9; Page, A., Milner, A., Morrell, S. and Taylor, R. (2013) "The role of under-employment and unemployment in recent birth cohort effects in Australian suicide", *Social Science and Medicine*, 93: 155-162 at p160.
100 See Gray, D. (2015) "The influence of insecure work and personal financial capability as barriers to accessing consumer finance", Unpublished manuscript, Macquarie University. ; Buchler, S., Haynes, M. and Baxter, J. (2009) "Casual employment in Australia: The influence of employment contract on financial well-being", *Journal of Sociology,* 45(3): 271-289; *Lives on Hold,* p20.
101 Hazel Bateman *Labour Market Uncertainty and the Adequacy of the Superannuation* Guarantee Discussion paper (2006) 5.
102 Ibid.
103 Ibid pp 6-7.

of a stone... I feel now that the only way to get a traditional permanent full-time job is to go via casual or labour hire types of employment".[104]

r. Various forms of socio-economic disadvantage as more precariously employed workers; and,

s. Lower rates of unionisation and industrial representation leading to little scope or ability of workers to improve their circumstances through bargaining. Casual workers are more vulnerable, less organised and more likely to depend on award and minimum entitlements.

Gender equity

34. The adverse impacts of casual employment disproportionately affect women and for a number of reasons. Firstly, the increased casualisation of employment has disadvantaged women with respect to men by contributing to the gender pay gap. Women are more likely to be casuals and casuals earn less take home pay due to fluctuating hours, intermittency of work, lack of support for training, skill development and career progression and other barriers to workforce participation.[105] Most jobs with less than 35 hours in Australia are casual[106] and 43.2% of all women worked less than full time in 2013.[107] Approximately 54% of all casual employees are women[108] and twenty-seven per cent of all female employees are employed on a casual basis.[109]

35. Women are also more likely to be regular long-term casual employees than men. Around 63% of women in casual positions have worked regular shifts with their current employer for longer than six months, as opposed to 54% for men.[110]

36. When a higher proportion of men have access to secure employment, it serves to increase pay inequity between the genders.[111] In 2013, the gender pay gap was 17.5%, an increase

104 *Lives on Hold*, p8. See also the findings of the Full Bench of the Industrial Relations Commission of NSW in the *Secure Employment Test Case* [2006] NSWIRComm 38 that casual employment was being used as a form of indefinite probationary employment (at paragraph 26).
105 Glenda Strachan, 'Still Working for the Man? Women's Employment Experiences in Australia since 1950', *Australian Journal of Social Issues*, (2010) 45 (1) 124-125.
106 54% of all part-time jobs are casual: see Australian Bureau of Statistics (2014a) *Employee Earnings, Benefits and Trade Union Membership, Australia, August 2013,* (cat no. 6310.0).
107 ABS cat. 4125.0 *Gender Indicators, Australia* (2013) 1.
108 See ABS (2014) *Employee Earnings, Benefits and Trade Union Membership, Australia, August 2013,* (cat no. 6310.0),; *Lives on Hold*, p21.
109 ABS (2014) above n 116.
110 See HILDA data wave 13.
111 See *Lives on Hold*, p21

from 15.5% in 2005. It rose again to 18.8% as at November 2014.[112] Australia was one of only two developed countries where the gender pay gap increased in 2013-2014.[113] The most recent statistics show the gender gap rose again to 19.1% as at November 2015.[114] Men on average earn $284.20 more per week[115] and less superannuation over their lifetime compared to women.[116] Among casual employees, women earn a median of $350 per week compared to $600 for males.[117] This difference is not wholly explained by the overrepresentation of women amongst part-time casuals but also by lower representation at higher earnings levels.[118]

37. The gender pay gap is a particular problem in the private sector – 20.8% vs 13.1% for the public sector. It varies significantly by industry, with a gap of over 30% in financial and insurance services, health and social assistance and professional, scientific and technical services.[119]

38. Women are more likely than men to be under-employed (8.7 percent of women vs 4.2 percent of men)[120] and to be in employed in poor quality, irregular, insecure or unsociable jobs.[121] Women are also more likely to be unemployed (59% female employment vs 71% male).[122]

39. The regulatory facilitation of insecure employment has acted to entrench a male-bread winner or 'one and a half earner' model, where fathers work full-time and mothers work part-time and this excludes women's participation in the workforce by excluding casuals from basic leave entitlements (annual leave and holiday leave) and by not accommodating the needs of employees, such as women with carer responsibilities who seek reduced hours and working time security.[123] As a result, over a quarter of women employees do not have access to paid leave compared to a fifth of men.[124]

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112 See the calculations accepted in the Fair Work Commission's *Annual Wage Review 2014-2015* [2015] FWCFB 3500 at para [474] – [481].
113 Workplace Gender Equality Agency, Media Release, *National gender pay gap rises to 18.2%* (2014) 1; World Economic Forum *Global Gender Gap Report* 2014.
114 Workplace Gender Equality Agency, *Australia's Gender Equality Scorecard: Key finding from the Workplace Gender Equality Agency's 2014-15 Reporting Data*, November 2015.
115 Workplace Gender Equality Agency, *Gender Pay Gap Statistics* (September 2015) .
116 *Lives on Hold*, p43.
117 See ABS (2014) *Employee Earnings, Benefits and Trade Union Membership, Australia, August 2013,* (cat no. 6310.0).
118 Ibid.
119 WGEA report May 2014 p3. Workplace Gender and Equity Agency, *What is the Gender Pay Gap?* (May 2015) viewed 26 September 2015 https://www.wgea.gov.au/addressing-pay-equity/what-gender-pay-gap
120 Iain Campbell, Gillian Whitehouse and Janeen Baxter, 'Casual Employment, Part-time Employment and the Resilience of the Male-Breadwinner Model in Leah F. Vosko (ed), *Gender and the Contours of Precarious Employment* (Taylor and Francis 2009) 68.
121 See *Lives on Hold*, p14.
122 ABS cat 6202.0 (2015), *Labour force, Australia*, Aug 2015, viewed 26 September 2015, http://www.abs.gov.au/ausstats/abs@.nsf/mf/6202.0/.
123 See *Lives on Hold*, p32; Iain Campbell, Gillian Whitehouse and Janeen Baxter, 'Casual Employment, Part-time Employment and the Resilience of the Male-Breadwinner Model in Leah F. Vosko (ed), Gender and the Contours of Precarious Employment (Taylor and Francis 2009) 72; Charlesworth, S., Strasdins, L., O'Brien, L. and Simms, S. (2011) "Parents' Jobs in Australia: Work Hours Polarisation and the Consequences for Job Quality and Gender Equity", *Australian Journal of Labour Economics,* 14(1): 35-57.
124 See *Lives on Hold*, p21.

40. Casual employment is also more likely for women than men to be a trap rather than a pathway to more secure employment and *unemployed* women may be more likely to find permanent full-time work than casually-employed women and longer job tenure for women as a casual employee is associated with reduced chances of becoming a permanent employee.[125]

41. Casual employment entrenches vertical gender segregation more broadly in the workforce as casual employees are less likely to be senior, high skilled or managerial employees (or have the career opportunities to become so)[126] and entrenches gender segregation between industries as industries that predominately employ casual and insecure workers such as health care, social assistance and retail are female-dominated.[127]

42. The lack of permanent work that is less than full time hours represents a failure to meet women's needs, leading to a vicious cycle whereby most managers are men and organisational cultures are often male-oriented and insufficiently unsupportive of practices that assist with managing both paid work and family care leading to the perpetuation of exclusions to female workforce participation and managerial representation.[128] Casual employment has also been linked to unwanted sexual advances in the workplace, particularly for women, with female casual employees ten times more likely to be subject to such advances than women employed on a permanent basis.[129]

43. There has been little in-depth consideration of equal remuneration in either the modern award or annual wage reviews despite the cost of the gender pay gap to the Australian economy being estimated at $93 billion per year (equivalent to 8.5% of Gross Domestic Product).[130]

44. Casual and precarious employment are also linked to lower birth rates as time in casual employment affects the likelihood a woman will have a child by age 35.[131]

125 See Buddelmeyer, H. and Wooden, M. (2011) "Transitions Out of Casual Employment: The Australian Experience", *Industrial Relations,* 50(1): 109-130.
126 See *Lives on Hold,* p21; Sarah Charlesworth, ' Women, work and Industrial Relations in Australia in 2013' *The Journal of Industrial Relations* (2014), 56 (3) 66.
127 See *Lives on Hold,* p21; Workplace Gender Equality Agency, *Parenting, Work and the Gender Pay Gap* (2013) 4.
128 Sarah Charlesworth, ' Women, work and Industrial Relations in Australia in 2013' *The Journal of Industrial Relations* (2014), 56 (3) 75.
129 See LaMontagne, A. D., Smith, P. M., Louie, A. M., Quinlan, M., Shoveller, J., and Ostry, A. S. (2009) "Unwanted sexual advances at work: variations by employment arrangement in a sample of working Australians", *Australian and New Zealand Journal of Public Health,* 33(2): 173-9.
130 Workplace Gender and Equity Agency, *Parenting, Work and the Gender Pay Gap* (2014) 1.
131 Steele1,2, L.C. Giles, M.J. Davies, and V.M. Moore, 'Is precarious employment associated with women remaining childless until age 35 years? Results from an Australian birth cohort study' E.J. in *Human Reproduction*, Vol.29, No.1 (2014) pp. 155–160.

Labour hire

45. Labour hire workers come closest to the 'disposable worker' model at the heart of the 'just-in-time' workforce that has cemented itself in the Australian workforce over the last twenty-five years. For example, labour hire workers experience the most volatile weekly hours of work[132] and are unable to participate in collective bargaining at their worksite. Labour hire workers work alongside employees doing the same work but with inferior conditions.

46. An enterprise that chooses to engage some or all of its workers through labour hire has very few obligations to those workers and, accordingly, those workers have very few rights to influence their relationship with that enterprise. This occurs notwithstanding that those workers are under a contractual obligation to abide by the direction of their 'host employer'.

47. Unlike outsourcing, where accusations of avoidance behaviour are often met with denials by business referring to the external service offerings and industry expertise that outsourcing is claimed to provide, labour hire involves the provision by a third party of labour only, generally without provision of any particular kind of expertise beyond that already held by employees of the host organisation. Hence, the raison d'etre of labour hire is purely and simply to permit industry to avoid industrial relations laws and consequently shift risk to workers, so business can take the benefit of labour without the burden of complying with laws that are premised on workers being protected in the labour market and given a fair share of the profits generated. This manifests in a number of ways as follows:

    a. The common law does not see an employment relationship between the host employer that directs the work and the worker. Further, it has generally rejected the idea that there could be more than one employer;[133]

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

132 based on HILDA Wave 13 data.
133 Because there can be only one employer, in exceptional cases, the common law is able to treat the imposition of a labour hire agency as sham, and look through that sham in order to treat the host employer as the actual employer. See *Nguyen v. A-N-T & Thiess* (2003) 128 IR 241.

c. Labour hire workers cannot make an unfair dismissal claim against a host employer, even where the host employer is the decision maker as to whether the worker will have a continuing job at the workplace or not;

d. The "General Protections" contained in the *Fair Work Act 2009* (Cth) adapt poorly to the work situations of labour hire workers because in the main they protect the labour hire agency itself from "adverse action" rather than the workers the agency employs and makes available to workplaces;

e. Workers in labour hire arrangements are less inclined to speak up about matters of concern to them as they understand that the decision to request that they no longer be supplied to the workplace can be made by the host employer at any time, and may mean they have an uncertain period of time before another host engagement becomes available; and,

f. The majority of the labour hire industry is dominated by large organisations such as Skilled, Manpower, Spotless, Programmed Maintenance Services and Chandler Macleod. The dominant organisations also subcontract to preferred panels of labour-hire subcontractors[134] and a multitude of smaller players. Hence, a labour hire employee may be negotiating through various layers of inter-corporate subcontracting arrangements as well as the commercial arrangements between the labour hire and host. The case reported in *Matthew Reid v Broadspectrum Australia Pty Ltd*[135] identifies some of the practical difficulties that this can present: namely complying with the practice and procedure *at* one's workplace can lead to one being terminated by one's employer – who is *not* at one's workplace.

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

> *"The weight of evidence we heard about the effects this has on workers was overwhelming. We heard of cases of:*
>
> - *Workplaces where the entire workforce was employed as casuals through a labour hire firm. Employees were expected to be available for a full-working week, and were notified by text message around 4pm each day of whether and when they were required to turn up the next day – but without any information about how long their shift would be;*

134 See, for example, the advertisement placed by Spotless seeking expressions of interest for "Security Labour Hire Subcontractor s"; Sydney Morning Herald, March 2015.
135 [2014] FWC 7108, [2015] FWCFB 519.

- *Employers using labour hire in the workplace to foster divisions among their ongoing staff and temporary workers, weakening workers' bargaining power and leading to lower rates of pay and lesser entitlements;*
- *Indirect discrimination on the basis of union activity, age and other grounds being tacitly applied by simply not offering certain workers any more shifts;*
- *Labour hire workers feeling unable to report bullying, injuries suffered in the workplace, or occupational health and safety risks for the fear that exercising their rights would lead to censure, the loss of shifts or the loss of a job altogether; and*
- *Labour hire workers finding themselves unable to secure a home loan or a car loan because of their lack of job security."*[136]

49. Labour hire is not a new phenomenon in Australia. What is exceptional about it is that has been allowed to continue so untouched by mainstream regulation. It has surpassed its initial object of supplementing existing workforces and is now used also to replace them. At the extreme end, some labour hire agencies in fact recruit workers from overseas to perform work in Australian as labour hire workers on "working holiday" visas under exploitative conditions.[137]

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

136 See *Lives on Hold*, at p34.
137 For example, see evidence given by temporary migrant workers to the public hearings on 26 June 2015 to the Senate Inquiry into the Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders. An investigation by the Australian Broadcasting Corporation's program Four Corners on 4 May 2015 that revealed the exploitation of migrant workers in the meat processing and horticultural industries where unscrupulous labour hire contractors were often implicated: see the Inquiry's Interim report, *Interim Report: Australia's Temporary Migrant Visa Programs*, June 2015, p4.

Addressing the problem of insecure work and labour hire arrangements – options for reform

51. The erosion of the various forms of employee security have been unnecessary in order to meet the needs of business and in fact counterproductive to productivity and economic growth. As experts have noted, business' demands for increased flexibility can be met using functional rather than numerical flexibility measures which are better not only for workers but for innovation, productivity and economic growth, partly because retaining permanent staff instead of replacing them with temporary labour increases investment in skills and training.[138]

52. Measures to address the problems of labour hire and other insecure work should take into account the major labour market issues of the 21st century, including:

    a. better accommodating women in the workforce, including providing for employee-oriented flexibility and employee security;

    b. accommodating life cycle transitions, including addressing youth unemployment, structural and long-term unemployment, and accommodating workers with family and caring responsibilities;

    c. ensuring automation and disruptive technologies result in better quality jobs and decent work, and not the reverse;

    d. better supporting workers transitioning from declining jobs and industries into growing ones particularly in the face of the likely increased use of automation and the disruptive effect of emerging technologies;

    e. ensuring that temporary migrant workers are treated well and receive their full and proper entitlements, and that temporary migrant labour is not used to undermine Australian standards and create an underclass of workers on inferior wages and conditions;

138 See De Spiegelaere, S., Van Gyes, G. and Van Hootegem, G. (2014) "Labour flexibility and innovation, complementary or concurrent strategies? A review of the literature", *Economic and Industrial Democracy,* 35(4): 653-666; Van der Meer, P.H. and Ringdal, K. (2009) "Flexibility practices, wages and productivity: evidence from Norway", *Personnel Review,* 38(5): 526-543; Kleinknecht, A., Van Shaik, F.N. and Zhou, H. (2014) "Is flexible labour good for innovation? Evidence from firm-level data", *Cambridge Journal of Economics,* 38: 1207-1219.

f. providing pathways into permanent full-time employment for skilled youth as growth in fulltime employment stalls and older, highly educated workers stay longer in the workforce. This means ensuring that increased higher education rates flow into increased productivity and suitable jobs exist to address the current trend of overqualified workers, including large numbers of highly educated workers in their twenties who are underutilised as casual workers in retail or hospitality or performing unpaid internships;

g. providing pathways into education or permanent full-time employment for unskilled youth (such employment pathways all but disappeared in the 1980s and 1990s);

h. encouraging real productivity improvements and innovation by circumscribing measures that allow employers to shift costs and risks onto employees, thereby incentivising more productive measures to increase business profitability;

i. addressing inequality, including inequality at the bottom end as the national minimum wage falls behind average wages, and inequality of pay at the top end as senior executives, many without significant levels of higher education or specialised skills, draw ever more exorbitant salaries with no relation to business performance or beneficial workplace outcomes;

j. ensuring regulatory protections remain relevant to and are not circumvented by increasingly complex corporate structures including multinational corporations, related entities, agencies and supply chains; and

k. addressing the impact of automation and emerging digital, electronic, bio-technological and internet-based technologies and their impact on workers and their disruption to existing vocations and industries, through better training and skill provision, industry policies, employment insurance provision and entitlement portability.

53. Hence, properly addressing insecure work in the context of other current and future workforce challenges, requires a range of measures. One of the dangers in our Federal system is that responsibility for reform can be shifted between State and Federal governments and the one can be loath to move without the participation of the other. There is much that the Victorian Government can do independently and the ACTU calls on the Victorian Government to show national leadership on these issues.

Labour hire licensing system

54. It ought to come as no surprise that the difficulties that the inquiry is grappling with concerning labour hire are not unique. We understand that throughout the OECD, many countries such as the UK, Canada, Korea, Japan, Germany, Austria, Spain, Luxembourg, the Netherlands, Sweden, Belgium, France, Italy and Portugal have licensing systems or codes of conduct that protect the rights and entitlements of labour hire employees.

55. The Background Paper released by the present inquiry demonstrates that the inquiry is well aware of ILO Convention 181, which relates to labour hire among other issues. The inquiry has no doubt noted that Article 3 of the Convention almost presupposes that a licensing system is at least one appropriate regulatory response to the labour hire industry. We would also point out for completeness that references to the protections of agency workers' rights to freedom of association and collective bargaining ought to be interpreted in line with the ILO supervisory body's own jurisprudence as to what those concepts encompass. Seen in this light, there seems little room for any argument that giving full force to that Convention would involve permitting workers to bargain with the employers who they might be (for practical purposes) in the service of, and take action in support of demands made upon those employers.

56. One omission from the Background Paper, and a significant one, is a discussion of the relatively recent and difficult process of reform which took place in Namibia. Whilst a discussion of the particular cultural and historical overlay to labour hire arrangements in Namibia is beyond the scope of this submission, it is sufficient to note that, in 2007, after a failed attempt to pass laws to regulate the industry[139], the Namibian National Assembly was moved to introduce a complete prohibition on labour hire. A constitutional challenge ensued which ultimately saw the laws overturned by the Supreme Court of Namibia on the grounds of a constitutional protection to the right to carry on trade or business.[140] However, this was not before an intermediate court had made the observation that:

> *"the hiring or renting of one's employee to another person, for reward, in order for such employee to render personal service to that other person is not only not part of our law of contract of employment but it also smacks of the hiring of a*

139 The laws then proposed are extracted at footnote 31 of *Africa Personnel Services v. Republic of Namibia & Ors,* Supreme Court of Namibia*, SA51/2008*, and seem progressive by mainstream Australian standards.
140 See *Africa Personnel Services v. Republic of Namibia & Ors*, Supreme Court of Namibia, SA51/2008.

slave by his slave-master to another person under locatio conductio rei in Roman Law".[141]

57. The National Assembly did not abandon its desire to regulate the labour hire industry in response to the decision of the Supreme Court. We understand that, as a signatory to Convention 181, Namibia instead sought the technical advice of the ILO to develop a model of labour hire regulation that was in conformity with ILO principles.[142] The resultant legislative scheme, embodied by the *Labour Amendment Act 2* of 2012[143] and Part 4 of the *Employment Services Act 8* of 2011(as amended)[144], has the following key features:

    a. Clients of labour hire firms are effectively deemed to be the employers of labour hire workers;

    b. An exemption is available from the above provision on application to the Minister provided the application is by consent of the worker, the agency and the client and provided that the Minister is satisfied that the rights of the employee will be satisfactorily protected;

    c. Where such an exemption is granted, the agency and the client are jointly and severally liable for breaches of the Labour Act;

    d. Labour hire workers have the same rights as any other employee, including the right to join a union and collectively bargain with their (deemed) employer;

    e. There is a statutory prohibition on agency clients employing labour hire workers or terms and conditions that are less favourable than those applicable to their own direct employees. A corresponding obligation is placed on labour hire agencies to obtain undertakings from the client to this effect prior to placing workers with them;

    f. There is a statutory prohibition on agency clients differentiating in their employment policies and practices between labour hire workers and their own direct employees;

    g. There is a statutory prohibition on agency clients employing labour hire workers during or in contemplation of a strike or lockout. A corresponding obligation is placed on labour hire agencies to obtain undertakings from the client to this effect prior to placing workers with them;

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141 See *African Personnel Services v Government of Namibia and Others* A4/2208, High Court of Namibia, per Parker J at para [27].
142 See Botes, A, "The history of labour hire in Namibia: Lessons for South Africa", *Potchefstroom Electronic Law Journal* 2013(16(1) p506, at Note 81. http://www.saflii.org/za/journals/PER/2013/16.html.
143 Available at: <http://www.parliament.gov.na/index.php?option=com_phocadownload&view=category&download=423:labour-amendment-act&id=92:acts-of-2012&Itemid=1269>.
144The version we have found available online (http://www.lac.org.na/laws/2011/4764.pdf) predates the amendments made by the *Labour Amendment Act 2* of 2012. It is necessary to read sections 8-10 of the *Labour Amendment Act 2* of 2012 alongside this version.

h. There is a statutory prohibition on agency clients employing labour hire workers to do work the work of employees who were dismissed in the last 6 months. A corresponding obligation is placed on labour hire agencies to obtain undertakings from the client to this effect prior to placing workers with them;

i. Each of the statutory prohibitions upon clients above is subject to an enforcement regime as well as a dispute resolution mechanism;

j. Labour hire agencies are required to be licensed, and may have their license cancelled for non-compliance; and

k. Labour hire agencies are prohibited from supplying workers to employers who have certain enforcement actions outstanding against them.

58. We suspect that the process of developing these contemporary reforms is of as much potential interest to the inquiry as the outcome. We became aware of this process through an exchange with representatives from the Namibian Ministry of Labour and Social Welfare, at an international engagement hosted by the Fair Work Commission on 30 July 2015. We have sought to make contact with the delegation for the purposes of this inquiry but have not been successful. We would encourage the inquiry to make an approach to the ILO and Namibian authorities through official channels should it consider that further information on the policy reform process undertaken in Namibia might assist in its deliberations.

59. Drawing upon ILO principles and affiliates' experiences, the ACTU adopted a policy that there should be system of labour hire licensing that has the following features, which we recommend to the Inquiry. The labour hire licensing system should:

a. Impose minimum capital requirements for any person or company seeking to register a labour hire agency;

b. Stop legislative and regulatory rorts such as the non-payment or underpayment of Return to Work premiums and avoidance of taxation liabilities;

c. Contain measures to adequately address and respond to exploitation, harassment and other forms of mistreatment of workers;

d. Consider the pursuit of agencies for non-payment or underpayment of wages and superannuation entitlements; and

e. Contain multiple avenues for enforcement and penalizing companies in breach of licensing conditions, including pursuing legal action and revoking licenses.

60. We ultimately envisage a national labour hire scheme but recognise that this might take the form of complementary State schemes rather a unitary one. Such a process has to start somewhere and we urge the Inquiry to recommend Victoria provide one of the first foundation stones by establishing a comprehensive State scheme. We are aware that a number of affiliates have done more detailed work on the structure of a scheme serving those particular principles and we commend those proposals to the inquiry.

61. We see the Federal government having an important complementary role in ensuring that collective bargaining can operate across labour supply chains, adapting unfair dismissal protections and ensuring that legal restraints[145] and practical barriers on workers transitioning from labour hire to direct and secure employment by host companies are eliminated. Such transitions are, in our view, something that the policy settings at all levels of government should be encouraging.[146] These in our view would be the beginning rather than the end of reforms in this area and we note that proposals such as secure employment orders, recognising joint employment, redefining employment itself and prescribing more universal conditions for "workers" should continue to be longer term goals of national reform. We also anticipate that such longer term national reform targets may ultimately lead to some convergence between the policy responses to labour hire versus other forms of insecure work.

62. The above should not be taken to suggest that the issue of fair treatment as between labour hire workers and direct employees should be ignored in the context of a State licensing scheme. Schedule 1 below contains our analysis of the technical and constitutional issues involved in implementing such a State-based scheme and some methods by which it could be enacted. Whilst there is no foolproof method for avoiding legal challenge, we are strongly of the view that a properly designed scheme could rest on secure constitutional grounds.

63. We also note that labour hire workers ought to be among the group of employees whose interests and circumstances are taken into account in the design and implementation of portable leave schemes.

145 We understand that some labour hire providers insist on a restraint of trade clause which prohibits workers from applying for or accepting work with business with whom they have been placed with.
146 We mention here also the proposal for *secure employment orders* which was contained in the *Lives on Hold* report and was later put forward in a Private Members Bill.

Secure work principles

64. The most obvious, immediate and direct contribution that the Victorian Government can make to the prevalence and impacts of secure work is in relation to its own workforce. The Victorian Government and the agencies it funds employ a significant proportion of the workforce and are influential market players in their own right. They have power to set standards and conditions of employment directly and indirectly. As the Inquiry will hear, substantial numbers of insecure workers are employed by government or engaged in providing government and community services, for example, teachers, nurses, drivers, and disability care workers.

65. A set of mandatory secure work principles binding government and connected agencies could providing pathways out of insecure work for government and government-related employees, including providing for conversion rights for casual workers and direct engagement opportunities for longstanding labour hire workers, helping implement a workforce strategy that reduces reliance on insecure non-standard employment and provides equitable pay and conditions and access to representation and to training and development opportunities to all workers who are engaged in the delivery of the State's services.

66. An important pre-condition to developing such a set of principles is to have it guided by stakeholders and policy experts rather than lawyers. The Victorian Government has in the past had a tendency to hide behind interpretations of the *Re AEU* doctrine that strain credibility[147] and adopt a position by default that certain matters are simply not negotiable, in order to obscure what are in fact policy choices with legal jargon. The *Re AEU* doctrine, which concerns State Governments' implied constitutional immunity from Commonwealth legislative action that would impair their capacity to function as State Governments, is in truth largely irrelevant to modern public sector industrial relations due to the reduced role of centralised arbitration in modern the framework – and this has been true for nearly a decade. We accept that there is presently legal distinction between referred and non-referred entities in this respect (which is amendable to amendment), but this does not prevent the Government from making a policy choice about certain matters independently of the question of what can and cannot be included in a Federal Agreement. The policy choice is what needs to come first, the framework for its expression can be a second order issue.

147 See *UFU v. CFA* [2015] FCAFC 1 at [189], [207]-[214].

67. Government has further power to influence working conditions through setting secure employment standards as a requirement or consideration in government procurement. The secure work principles could commit government agencies and government-funded entities to avoiding insecure work arrangements wherever possible and to consider employment security arrangements in tendering, procurement, contracting and in decisions whether or not to outsource government services. Further, the State might consider standard form purchasing contracts that requiring regular and detailed disclosure of the entirety of the labour supply chain, to all parties to that supply chain (including the State) as somewhat of a "market based" policy against some abuses, noting the modern approach by the Fair Work Ombudsman in interpreting the link between such detailed knowledge and being "involved" in the breach of workplace laws.

Promotion of best practice

68. Beyond developing a labour hire licensing scheme and reforming the government's own workforce and commercial relationships, there is scope for the Victorian Government to educate the private sector and to advocate that businesses take a bigger picture view. The reality is that most businesses stand to benefit from the indirect benefits of greater income equality among their consumers, and they also stand to benefit from the types of functional flexibility that come with a well-trained, secure and engaged workforce. Information about these benefits and the negative personal and social consequences of insecure work should be made available to business and offered to them in the course of their usual interactions with Government Agencies (e.g. WorkCover, State Revenue Office etc).

69. The Victorian Government could additionally collect information from entities registered to pay workers compensation premiums in Victoria about their employing arrangements, in order to provide more data about the nature and extent of insecure work arrangements, or as a basis for targeting education materials, should this be desired.

Recommendations

70. There is much that the Victorian Government can do to address the problems associated with labour hire and insecure work in Victoria. The ACTU urges the Inquiry to consider the range of recommendations in the Howe Inquiry report. The ACTU further suggests that the Inquiry:

    a. Recommend a licensing system for labour hire agencies operating in Victoria;

    b. Design a set of Secure Work Principles binding Victorian Government. Government agencies are to commit to avoiding insecure work arrangements and providing pathways out of insecure work wherever possible, including considering employment security arrangements in tendering, procurement, contracting and in decisions whether or not to outsource government services.

    c. Recommend encouraging employers to invest in the training and skill development of its workers. This could include incentives on labour hire agencies (perhaps in the form of licensing fee offsets) to invest in training and upskilling staff during times they are not working as well as more general education and awareness strategies.

SCHEDULE 1

THE SCOPE TO REGULATE LABOUR HIRE VIA STATE LAW – A LEGAL PERSPECTIVE

I. Introduction

1. Should the Government be persuaded to engage in reform in the area of labour hire, a major technical issue that arises for consideration is the scope and design of the reform, given the potential for conflict with Commonwealth Laws.

2. Whilst the labour movement has for decades lamented the narrow minded focus of the Federal Workplace Relations laws on employment relationships rather than the sizeably bigger field of labour relations, this blinkered approach does leave some opportunity for a well targeted and multi-faceted system for the regulation of labour hire.

3. None of the options discussed in this submission are future proof. High Court challenges in relation to the validity or operation of State or Federal industrial laws are almost as regular as changes in governments. Furthermore, a legislative step taken by Victoria could be neutered by a reactive legislative action by the Commonwealth (which might also trigger a legal challenge). However, in our view, neither of these are good reasons not to act.

4. As the material before the Inquiry demonstrates, there are serious inequities in the labour market around insecure work and labour hire in particular. Regulators have had more than enough time to sit back, watch and make a sober assessment of the effectiveness of the invisible hand of the market to deliver an equilibrium that is socially acceptable. The evidence of its failure is indisputable. A good government must intervene. Neither the spectre of a legal challenge nor the risk of defeat are real negatives if one views the task as commencing the process of national reform. There is much to be said for putting this issue on the policy agenda even it a results in a squabble between the Victorian Government and its Federal counterpart in the first instance. Labour relations is inherently political because it is about people. A political contest on inequality is essential and almost inevitable in this country. The Federal Government, for its part, has launched the first salvo by inviting its Productivity Commission to dissect and reconstruct the entirety of the Federal Workplace Relations system. Action by the Victorian

Government would build strong national momentum for a reform package which plugs the gaping holes that successive Federal Governments have been content to ignore.

II. The field covered by the Commonwealth law is narrower than it appears

5. Sections 26 and 27 of the *Fair Work Act 2009 (Cth)* 'FW Act' rely on section 109 of the Constitution to mark out a field and the exclusions from it.

6. Section 26 is merely an express statement of an intention to cover a field, of the type approved more than half a century ago by the High Court in *Wenn v. Attorney General Victoria*[148]. It relieves a Court of the need to search for some operative indirect inconsistency or discern an intention of the extent of the field sought to be covered from other provisions of the Commonwealth law in question. By expressly describing the Commonwealth law as exclusive in some respect (in this case, in respect of "State or Territory industrial laws" in so far as they would otherwise apply to national system employees or national system employers), section 109 of the Constitution is engaged even where no inconsistency would otherwise exist.

7. Section 27 sets out the exceptions to the field of exclusivity set out in section 26. The manner in which the two sections work together is far from novel. The general framework of such legislative provisions was described by Mason J in the 1977 matter of *R v. Credit. Tribunal; Ex parte General Motors Acceptance Corporation*[149] as follows (after referring to *Wenn*):

> *"The judgements to which I have referred make the point that although a provision in a Commonwealth statute which attempts to deny operational validity to a State law cannot of its own force achieve that object, it may nevertheless validly evince an intention on the part of the statute to make exhaustive or exclusive provision on the subject with which it deals, thereby bringing s. 109 into play.*
>
> *Equally, a Commonwealth law may provide that it is not intended to make exhaustive or exclusive provision on the subject with which it deals, thereby enabling State laws, not inconsistent with Commonwealth*

148 [1948] HCA 13.
149 [1977] HCA 34.

law, to have an operation. Here again the Commonwealth law does not of its own force give State law a valid operation. All that it does is to make it clear that the Commonwealth law is not intended to cover the field, thereby leaving room for the operation of such State laws as do not conflict with Commonwealth law.

It is of course now well established a provision in a Commonwealth statute evincing an intention that the statute is not intended to cover the field cannot avoid or eliminate a case of direct inconsistency or collision, of the kind which arises, for example, when Commonwealth and State laws make contradictory provision upon the same topic, making it impossible for both laws to be obeyed. In Reg. v. Loewenthal; Ex parte Blacklock (1974) 131 CLR 338, at pp 346-347, I pointed out that such a provision in a Commonwealth law cannot displace the operation of s. 109 in rendering the State law inoperative. But where there is no direct inconsistency, where inconsistency can only arise if the Commonwealth law is intended to be an exhaustive and exclusive law, a provision of the kind under consideration will be effective to avoid inconsistency by making it clear that the law is not intended to be exhaustive or exclusive."

8. It is to be noted from the above that there is a middle ground between the Commonwealth covering the field exclusively, and vacating the field in favour of the exclusivity of State law - which is allowing section 109 do its work where a direct inconsistency arises. In the areas of exclusion identified by section 27, that is precisely the position.

9. Sections 26 and 27 have much in common with sections 16 and 17 of the predecessor legislation. These provisions were unsurprisingly among those that attracted commentary in *NSW v. Commonwealth* [2006] HCA 52[150]. The High Court there accepted that the Commonwealth could exclude State and Territory laws so far as they would otherwise apply to an employee or employer, defined by reference to heads of constitutional power referred to in the definition of "employer". It rejected submissions to the effect that section 16 was an impermissible bare attempt to exclude the operation of State law. These conclusions must be assumed to be applicable to section 26 and the definitions of "national system employee" and "national system employer" in the *Fair Work* Act. They must also be assumed to be

150 See paragraphs [346]-[377] per Gleeson CJ, Gummow, Hayne, Heydon And Crennan JJ.

unchallengeable. None of this of course is of significance if the field identified by section 26 is wide enough to accommodate a scheme of labour hire regulation, however our submission is that it is not.

10. Rather, the laws that are excluded by section 26 are "all State or Territory industrial laws so far as they would otherwise apply in relation to a national system employee or national system employer". Whilst broad on its face, "State or Territory Industrial law" is a defined term that incorporates a cascade of defined terms within it, as follows:

> *"26 Act excludes State or Territory Industrial Laws*
>
> *(1) The Act is intended to apply to the exclusion of all State or Territory industrial laws so far as they would otherwise apply in relation to a national system employee or a national system employer.*
>
> *(2) A **State or Territory industrial law** is:*
>
> *(a) a general State industrial law; or*
>
> *(b) an Act of a State or Territory that applies to employment generally and has one or more of the following as its main purpose or one or more of its main purposes:*
>
> *(i) regulating workplace relations (including industrial matters, industrial activity, collective bargaining, industrial disputes and industrial action);*
>
> *(ii) providing for the establishment or enforcement of terms and conditions of employment;*
>
> *(iii) providing for the making and enforcement of agreements (including individual agreements and collective agreements), and other industrial instruments or orders, determining terms and conditions of employment;*
>
> *(iv) prohibiting conduct relating to a person's membership or non-membership of an industrial association;*

(v) providing for rights and remedies connected with the termination of employment;

(vi) providing for rights and remedies connected with conduct that adversely affects an employee in his or her employment; or

(c) a law of a State or Territory that applies to employment generally and deals with leave (other than long service leave or leave for victims of crime); or

(d) a law of a State or Territory providing for a court or tribunal constituted by a law of the State or Territory to make an order in relation to equal remuneration for work of equal or comparable value; or

(e) a law of a State or Territory providing for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair; or

(f) a law of a State or Territory that entitles a representative of a trade union to enter premises; or

(g) an instrument made under a law described in paragraph (a), (b), (c), (d), (e) or (f), so far as the instrument is of a legislative character; or

(h) either of the following:

(i) a law that is a law of a State or Territory;

(ii) an instrument of a legislative character made under such a law;

that is prescribed by the regulations.

(3) Each of the following is a ***general State industrial law*** *:*

(a) the Industrial Relations Act 1996 of New South Wales;

(b) the Industrial Relations Act 1999 of Queensland;

(c) the Industrial Relations Act 1979 of Western Australia;

(d) the Fair Work Act 1994 of South Australia;

(e) the Industrial Relations Act 1984 of Tasmania.

*(4) A law or an Act of a State or Territory **applies to employment generally** if it applies (subject to constitutional limitations) to:*

(a) all employers and employees in the State or Territory; or

(b) all employers and employees in the State or Territory

except those identified (by reference to a class or otherwise) by a law of the State or Territory.

For this purpose, it does not matter whether or not the law also applies to other persons, or whether or not an exercise of a power under the law affects all the persons to whom the law applies."

11. There are presently no Victorian laws that are captured in the definition of "general State industrial law". Accordingly, paragraph (2)(a) of section 26 is not a concern.

12. Paragraphs (2)(b) and (2)(c) are concerned only with a law that "applies to employment generally", a term defined in subsection (4). It is to be noted that such a law must apply to employers **and** employees. A law that was crafted to apply only to employers would not be captured.

13. Paragraphs (2)(d)-(f) do not deal with subject matters that would likely be engaged by a law designed to provide for the licensing and regulation of labour hire entities.

14. Paragraph (2)(g) relates to legislative instruments made under laws that would be excluded by virtue of the preceding paragraphs of subsection (2).

15. Paragraph (2)(h) permits further laws to be prescribed. However, as with any authorising provision, it is not limitless and would need to be construed harmoniously with its context. We submit that the High Court's characterisation of the former Act as one which was about the *relationship between* corporations and their employees in *NSW v. Commonwealth* could be called into aid in construing the authorising provision, given the

similarities of object and purpose as well the as schematic similarities between the Act there considered and the *Fair Work Act*. Examples of that characterisation in the High Court's reasoning in *NSW v. Commonwealth* include the following:

> "*The constitutional basis upon which the "framework for cooperative workplace relations" is constructed is revealed by the definitions of "employee" and "employer" in ss 5 and 6 of the new Act. Those definitions are central to the operation of much of the new Act.*"[151]
>
> "*Constitutional corporations are juristic persons recognised by the law as separate from their corporators. Such juristic persons are able to act only through human actors. The Amending Act deals with the relationship between those juristic persons which are constitutional corporations and one particular class of actors through whom those corporations may act - the corporation's employees.*"[152] (emphasis added)
>
> "*Once it is recognised that the Amending Act prescribes norms which regulate or affect the relationship between constitutional corporations and a class of those through whom those corporations may act, it may be seen that the plaintiffs' submissions require consideration of what is meant by a law "with respect to" the subject-matter of constitutional corporations, rather than identification of the metes and bounds of the subject-matter of the relevant head of power.*"[153] (emphasis added)
>
> "*At once it should be said that the Amending Act does not depend for validity upon the federal Parliament having "a general industrial relations power". It is necessary always to bear steadily in mind that the Amending Act is directed to the relationships between constitutional corporations and their employees, not industrial relations generally. As the Explanatory Memorandum for the Amending Act says, there is an expectation (or at least the hope) that regulating the relationships between constitutional corporations and their employees will "deliver a unified national system [of workplace relations] for most employers"[158] and that the changes will "move towards a national*

151 NSW v. Commonwealth [2006] HCA 52 per Gleeson CJ, Gummow, Hayne, Heydon And Crennan JJ at [8].
152 Ibid at [59].
153 Ibid at [60].

workplace relations system for the first time"[[159]]. But those consequences of the Amending Act (assuming that they are consequences that will come about) do not alter the need to focus upon the ambit of the corporations power."[154](emphasis in original)

"*As noted earlier, because the new Act prescribes norms which regulate or affect the relationship between constitutional corporations and their employees, the limits proffered by the plaintiffs must be seen as contentions about what is meant by a law being "with respect to" constitutional corporations.*"[155] (emphasis added)

"*To the extent to which Pt 9 prescribes norms governing what industrial action constitutional corporations may take against their employees, it is valid for the same reasons that other provisions of the new Act prescribing what a constitutional corporation may or may not do in relations with their employees are valid. And in so far as Pt 9 prescribes norms governing what industrial action the employees of constitutional corporations may take against their employer, it is properly characterised as a law with respect to constitutional corporations; the norms it creates give constitutional corporations rights or immunities. If, as was held in Fontana Films, and as the plaintiffs accept, a law forbidding any person from engaging in certain conduct, in trade or commerce, that will, or would, be likely to have substantially adverse effects on a constitutional corporation is a law with respect to constitutional corporations, then a law which regulates the relationship between constitutional corporations and their employees is no less of that character.*"[156] (emphasis in original)

"*The Commonwealth submitted that it was open to the Parliament to identify the rights and obligations arising out of those relationships of employees and employers as a field, and to indicate an intention to cover that field (or, as here, part of it, because of the limitations to s 16(1) and the operation of s 16(2) and (3)). On the construction of s 16(1) accepted above[372], the Commonwealth chose to exclude State law only in respect of the relations of employees and employers as*

154 Ibid at [126].
155 Ibid at [184].
156 Ibid at [258].

defined in ss 5(1) and 6(1). … The Commonwealth's submissions are to be preferred."[157] (emphasis added)

16. On that basis, we contend that it is reasonably likely that a court would find that the regulation making power in section 26(2)(h) is insufficient to authorise prescribing a law that did not regulate the relationships between employees and employers. Further, we submit that this characterisation of the implied limitations in the authorising provision at section 26(2)(h) is also applicable to the more broadly expressed authorising provision at section 28, which provides as follows:

> *"28. Act excludes prescribed State and Territory laws*
>
> *(1) This Act is intended to apply to the exclusion of a law of a State or Territory that is prescribed by the regulations.*
>
> *(2) However, subsection (1) applies only in so far as the law of the State or Territory would otherwise apply in relation to a national system employee or national system employer.*
>
> *(3) To avoid doubt, subsection (1) has effect even if the law is covered by section 27 (so that section 26 does not apply to the law). This section does not limit subsection (1)."*

17. The reason we hold the view that section 28 would effectively be read down is because the near identical provisions in the predecessor legislation were the subject of a discussion in *NSW v. The Commonwealth,* which strongly suggested that this was the case. Those predecessor provisions appeared in subsections 16(4) and 16(5) of the predecessor act. Section 16 of the predecessor Act is clearly the forebear of sections 26 to 28 of the FW Act. Section 16 of the predecessor Act was as follows:

> "***16. Act excludes some State and Territory laws***
>
> *(1) This Act is intended to apply to the exclusion of all the following laws of a State or Territory so far as they would otherwise apply in relation to an employee or employer:*
>
> *(a) a State or Territory industrial law;*

157 Ibid at [369]-[370].

(b) a law that applies to employment generally and deals with leave other than long service leave;

(c) a law providing for a court or tribunal constituted by a law of the State or Territory to make an order in relation to equal remuneration for work of equal value (as defined in section 623);

(d) a law providing for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair;

(e) a law that entitles a representative of a trade union to enter premises.

Note: Subsection 4(1) defines applies to employment generally.

State and Territory laws that are not excluded

(2) However, subsection (1) does not apply to a law of a State or Territory so far as:

(a) the law deals with the prevention of discrimination, the promotion of EEO or both, and is neither a State or Territory industrial law nor contained in such a law; or

(b) the law is prescribed by the regulations as a law to which subsection (1) does not apply; or

(c) the law deals with any of the matters (the non-excluded matters) described in subsection (3).

(3) The non-excluded matters are as follows:

(a) superannuation;

(b) workers compensation;

(c) occupational health and safety (including entry of a representative of a trade union to premises for a purpose connected with occupational health and safety);

(d) matters relating to outworkers (including entry of a representative of a trade union to premises for a purpose connected with outworkers);

(e) child labour;

(f) long service leave;

(g) the observance of a public holiday, except the rate of payment of an employee for the public holiday;

(h) the method of payment of wages or salaries;

(i) the frequency of payment of wages or salaries;

(j) deductions from wages or salaries;

(k) industrial action (within the ordinary meaning of the expression) affecting essential services;

(l) attendance for service on a jury;

(m) regulation of any of the following:

(i) associations of employees;

(ii) associations of employers;

(iii) members of associations of employees or of associations of employers.

Note: Part 15 (Right of entry) sets prerequisites for a trade union representative to enter certain premises under a right given by a prescribed law of a State or Territory. The prerequisites apply even though the law deals with such entry for a purpose connected with occupational health and safety and paragraph (2)(c) says this Act is not to apply to the exclusion of a law dealing with that.

This Act excludes prescribed State and Territory laws

(4) This Act is intended to apply to the exclusion of a law of a State or Territory that is prescribed by the regulations for the purposes of this subsection.

(5) To avoid doubt, subsection (4) has effect even if the law is covered by subsection (2) (so that subsection (1) does not apply to the law). This subsection does not limit subsection (4).

Definition

(6) In this section:

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it."

18. In *NSW v. The Commonwealth [2006] HCA 52*, the High Court's attention was drawn to subsection 16(4) due to a challenge mounted to the predecessor legislation by the Governments of Western Australia and Victoria and by the Australian Workers Union. It was said by the State Governments that subsection 16(4) constituted a bare attempt to limit or exclude future State laws which may be excluded by regulations made under the Act, rather than a genuine attempt to comprehensively regulate a particular field of activity to the exclusion of any State laws which also regulate that field of activity. It was also submitted that subsection 16(4) was invalid because it was unrestricted as to the terms of the State laws which could be excluded in their operation. The Court dealt with those contentions as follows:

> *"Preliminary question of construction: s 16(4). Western Australia also contended, as a preliminary question of construction, that even if (contrary to its arguments just rejected) s 16(1) were confined to excluding State and Territory laws so far as they would otherwise apply in relation to employees and employers as defined in ss 5(1) and 6(1), s 16(4) was not so confined. It submitted that s 16(4), on its true construction, enabled a State law to be excluded by regulation regardless of whether it was an industrial law, and regardless of whether it operated in relation to an employee and an employer as defined in ss 5(1) and 6(1).*
>
> *The construction advocated is unsound. First, so far as different constructions of s 16(4) are available, a construction is to be selected which would avoid, rather*

than result in, a conclusion that the sub-section was invalid as being outside Commonwealth legislative power. If s 16(4) bore the construction alleged by Western Australia, it might well be invalid. If it is construed harmoniously with s 16(1), then (subject to other arguments) it is not. Secondly, s 16(4) must be construed in context. The general context is that the new Act deals with the rights and obligations of "employees" and "employers" - generally, but not always, in the sense defined in ss 5(1) and 6(1). The particular context is that s 16(1) (subject to the matters listed in s 16(2) and (3)) applies the new Act to the exclusion of certain kinds of State and Territory laws so far as they would otherwise apply to employees and employers as defined in ss 5(1) and 6(1). In these contexts, s 16(4) is to be construed as supplementing s 16(1) and as operating in the same fashion. Section 16(4) permits the making of regulations excluding certain State or Territory laws which are described in pars (a)-(e) of s 16(1) and which relate to the dealings of employees and employers as defined, even though they would otherwise fall within the exceptions to s 16(1) set out in s 16(2). That flows from s 16(5), which makes it clear that a regulation made under s 16(4) can cause the new Act to apply to the exclusion of a State or Territory law otherwise caught by s 16(2). If s 16(4) were not to be construed harmoniously with s 16(1), it would have been pointless to have inserted into s 16(1) the limiting words "so far as they would otherwise apply in relation to an employee or employer".

.....

Victoria pleaded that s 16(1) and (4) are invalid because "they are in their terms unrestricted as to the laws of the States which can be excluded in their operation". The allegation was not elaborated. It must be rejected for the reasons given above" [158] (emphasis added)

19. The Court dealt with the matters raised by the Australian Workers Union as follows:

"Is s 16(4) an invalid attempt to delegate legislative power? The AWU submitted, and South Australia alleged in its pleading, that s 16(4) invalidly attempts to delegate the expression by Parliament of its intention as to the extent to which the new Act would apply to the exclusion of State and Territory laws. This point fails. It rested on the supposed absence of any legislative criteria by reference to

158 *NSW v. The Commonwealth* [2006] HCA 52 at paragraphs [360]-[361] and [376].

which the regulation-making power was to be exercised. For the reasons given below, there are sufficient criteria."[159]

20. The reference to the "reasons given below" pointed to reasons given in relation to a challenge by the AWU to another regulation making power in the legislation, the relevant parts of which were as follows:

> *"…Section 356 provides that the regulations* may *specify matters that are prohibited content. Regulations of that kind would be regulations "prescribing … matters … permitted by this Act to be prescribed", and hence would fall within s 846(1)(a). In the absence of express language precisely defining the ambit of the permitted prescription beyond the four matters just mentioned, that ambit would be identical with the ambit of the prescription contemplated by s 846(1)(b), namely that the regulations prescribe all matters "necessary or convenient to be prescribed for carrying out or giving effect to this Act" (emphasis added). It would be absurd if regulations could be made under s 846(1)(b) by reference to wider criteria than those applying to s 846(1)(a). In a case considering a formula to the effect of s 846(1)(b), but in language relevant to s 846(1)(a), Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ said[408][160]: "The ambit of the power must be ascertained by the character of the statute and the nature of the provisions it contains." Here the character of the statute is one which, inter alia, makes provision for workplace agreements in Pt 8 and attaches significant consequences to the existence of those agreements. Their Honours continued[409]:*
>
> > *"An important consideration is the degree to which the legislature has disclosed an intention of dealing with the subject with which the statute is concerned.*
> >
> > *In an Act of Parliament which lays down only the main outlines of policy and indicates an intention of leaving it to the Governor-General to work out that policy by specific regulation, a power to make regulations may have a wide ambit. Its ambit may be very different in an Act of Parliament which deals specifically and in detail with the subject matter to which the statute is addressed."*

159 Ibid at paragraph [375].
160 NB see *Morton v. Union Steamship Co of New Zealand Ltd* [1951] HCA 42; (1951) 83 CLR 402 at paragraph [410].

While the provisions about workplace agreements in Pt 8 are in many respects detailed, the main outlines of the policy it lays down as to what workplace agreements are to contain and are not to contain is not specific or detailed. It provides for some things workplace agreements must contain, but, apart from the matters already mentioned, it does not state what they may not contain save through the use of regulations made under s 356. The new Act has laid down the main outlines of policy in relation to workplace agreements but has indicated an intention of leaving it to the Executive to work out that policy in relation to what workplace agreements may not contain by specific regulation. Section 356 thus has a wide ambit. Its ambit must be construed conformably with the scope and purposes of the new Act as a whole, and with the provisions of Pt 8 in relation to workplace agreements in particular. The extent of the power is marked out by inquiring whether any particular regulation about the prohibited content of workplace agreements can be said to have a rational connection with the regime established by the new Act for workplace agreements."[161] (emphasis by underline added)

21. On the basis of the above discussion, we are of the view that, whatever the outer points of the field marked out by the Commonwealth in sections 26-28 might be, the field there marked out does not encompass the regulation of labour hire businesses in matters other than their relationships with their employees. Specifically:

    (a) It does not encompass the regulation of relationships between labour hire workers and the customers of labour hire agencies; and

    (b) It does not encompass the regulation of relationships between labour hire agencies and their customers.

III. Other risks of indirect or direct inconsistency- looking beyond sections 26-28

22. It emerges from the above that the greatest threats arising from section 26 of the FW Act to the validity of a Victorian based scheme for the licensing and regulation of the labour hire industry arise if the scheme takes the form of a law that regulates both employers and employees, particularly the relations between them. The absence of any provision

161 *NSW v. The Commonwealth* [2006] HCA 52 at paragraph [415]-[416].

which regulates the relationship between employer and employee is probably also critical to immunising a State law from a future exercise of the regulation making power contained in section 28 of the FW Act.

23. This suggests that the non-industrial conditions which the State might wish to impose on labour hire agencies as a condition of licencing (for example minimal capital reserves, fees and financial reporting requirements) could readily be imposed on those agencies without engaging the field marked out by sections 26-28. The more complicated issues relate to the imposition of industrial conditions and the creation of a requirement that only agencies that are so licensed may operate in Victoria.

24. These issues arise because of the reach of the general protections provisions. The content of these provisions necessarily provide further definition to the field of regulation that the Commonwealth has chosen to embark upon, which might create risk of "covering the field inconsistency" outside of the matters specifically dealt with in sections 26-28. Further, there might exist a potential for direct conflict between the terms of the general protections provisions and the terms of any law that the Victorian Government might be considering. The concern is that if the Victorian laws purported to require a customer of a labour hire company to engage in conduct that breached the general protections provisions, somehow diminished their enjoyment of those provisions of if the two were incapable of simultaneous obedience, the Victorian law may be struck down. We deal with this issue of the potential for direct inconsistency first.

25. The provisions that are most obvious candidates for difficulty in this regard are sections 340, 343, 354 and 355 of the FW Act. The discussion which follows is premised on the State of Victoria being unable to rely on any crown immunities. The provisions we highlight relevantly raise a number of considerations if the State of Victoria attempted to:

    (a) require customers of labour hire companies to only use labour hire agencies that were licenced (as a back-stop provision to complement a licencing requirement in a separate law that applied to labour hire agencies and required them to be licensed as a condition of operating in Victoria); and

    (b) require those customers to satisfy themselves of particular matters about the conditions of employment of those labour hire workers before engaging the labour hire firm.

IV. Are there any "Workplace Rights" at play and, if so, whose rights are they?

26. This is an important consideration as the application of sections 340 and 343 of the FW Act depends upon it. The concept of a workplace right is broad and is dealt with in section 341 of the Act:

> "Meaning of **workplace right**
>
> *(1) A person has a **workplace right** if the person:*
>
> *(a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or*
>
> *(b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or*
>
> *(c) is able to make a complaint or inquiry:*
>
> *(i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or*
>
> *(ii) if the person is an employee--in relation to his or her employment."*

> *Meaning of **process or proceedings under a workplace law or workplace instrument***
>
> *(2) Each of the following is a **process or proceedings under a workplace law or workplace instrument**:*
>
> *(a) a conference conducted or hearing held by the FWC;*

(b) court proceedings under a workplace law or workplace instrument;

(c) protected industrial action;

(d) a protected action ballot;

(e) making, varying or terminating an enterprise agreement;

(f) appointing, or terminating the appointment of, a bargaining representative;

(g) making or terminating an individual flexibility arrangement under a modern award or enterprise agreement;

(h) agreeing to cash out paid annual leave or paid personal/carer's leave;

(i) making a request under Division 4 of Part 2-2 (which deals with requests for flexible working arrangements);

(j) dispute settlement for which provision is made by, or under, a workplace law or workplace instrument;

(k) any other process or proceedings under a workplace law or workplace instrument.

Prospective employees taken to have workplace rights

(3) A prospective employee is taken to have the workplace rights he or she would have if he or she were employed in the prospective employment by the prospective employer.

Note: Among other things, the effect of this subsection would be to prevent a prospective employer making an offer of employment conditional on entering an individual flexibility arrangement.

Exceptions relating to prospective employees

(4) Despite subsection (3), a prospective employer does not contravene subsection 340(1) if the prospective employer makes an offer of employment conditional on the prospective employee accepting a guarantee of annual earnings.

(5) Despite paragraph (1)(a), a prospective employer does not contravene subsection 340(1) if the prospective employer refuses to employ a prospective employee because the prospective employee would be entitled to the benefit of Part 2-8 or 6-3A (which deal with transfer of business)."

27. It is also important to recall that the prohibition in section 340 of the FW Act extends not only to the existence (or not) of a workplace right, but on the manner in which a workplace right is, or could be, exercised:

"***Protection***

(1) A person must not take adverse action against another person:

(a) because the other person:

(i) has a workplace right; or

(ii) has, or has not, exercised a workplace right; or

(iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or

(b) to prevent the exercise of a workplace right by the other person.

*(2) A person must not take adverse action against another person (the **second person**) because a third person has exercised, or proposes or has at any time proposed to exercise, a workplace right for the second person's benefit, or for the benefit of a class of persons to which the second person belongs."*

28. It is therefore the taking of *adverse action because* of a particular *reason* in connection with workplace right which is proscribed. Adverse action is also a defined term. In so far as the relationship between a labour hire supplier and a customer thereof, section 342 of the FW Act relevantly provides:

> *"Adverse action is taken by a person (the principal) who has entered into a contract for services with an independent contractor against the independent contractor, or a person employed or engaged by the independent contractor if the principal:*
>
> *(a) terminates the contract; or*
>
> *(b) injures the independent contractor in relation to the terms and conditions of the contract; or*
>
> *(c) alters the position of the independent contractor to the independent contractor's prejudice; or*
>
> *(d) refuses to make use of, or agree to make use of, services offered by the independent contractor; or*
>
> *(e) refuses to supply, or agree to supply, goods or services to the independent contractor.*
>
> *Adverse action is taken by a person (the principal) proposing to enter into a contract for services with an independent contractor against the independent contractor, or a person employed or engaged by the independent contractor if the principal:*
>
> *(a) refuses to engage the independent contractor;*
>
> *(b) discriminates against the independent contractor in the terms or conditions on which the principal offers to engage the independent contractor; or*
>
> *(c) refuses to make use, or agree to make use of, services offered by the independent contractor; or*
>
> (d) *refuses to supply, or agree to supply, goods or services to the independent contractor."*

The above provisions, which relate to adverse action taken against an independent contractor, are considered relevant on the assumption that the term "independent contractor" is applicable to a labour hire agency. The term is defined permissively – "Independent Contractor is not confined to an individual."[162]

The other relevant concepts are a "workplace law" and a "workplace instrument". These are defined as followed:

> ***"workplace instrument "*** *means an instrument that:*
>
> *(a) is made under, or recognised by, a workplace law; and*
>
> *(b) concerns the relationships between employers and employees.*
>
> ***"workplace law "*** *means:*
>
> *(a) this Act; or*
>
> *(b) the Registered Organisations Act; or*
>
> *(c) the Independent Contractors Act 2006 ; or*
>
> *(d) any other law of the Commonwealth, a State or a Territory that regulates the relationships between employers and employees (including by dealing with occupational health and safety matters)."*

V. Are there any *workplace laws* or *workplace instruments* that regulate the relationships between labour hire agencies and their customers?

29. This is an important question because if there are no workplace laws or workplace instruments that regulate these relationships, there can be no workplace rights that could be associated with a reason for taking adverse action.

30. The *Fair Work Act* does not regulate these relationships other than within the general protections provisions themselves, an issue we discuss below. Modern Awards made under the *Fair Work Act* do not regulate these relationships, although it is plausible that

162 at s. 12 of the FW Act. It might, however, be argued that the intent of the permissive definition is merely to accommodate the corporate structure adopted by some business that are "independent contractors" of the type that industrial relations laws are generally concerned with distinguishing from employees.

they could do so to a very limited extent. Enterprise Agreements made under the *Fair Work Act* do permit these relationships to be regulated to a limited extent and will be the focus for much of our discussion. For completeness:

- The *Fair Work (Registered Organisations) Act* does not regulate these relationships;

- The *Independent Contractors Act* is not concerned with employees at all and in any event is purely remedial – there is no right to a fair contract but a fair contract might be consequence of the exercise of a court asked to review a contract;

- The laws of the Commonwealth or of States or Territories that are called in by the last limb of the definition of "workplace law" are limited to anti-discrimination laws, health and safety laws and presumably some State and Federal laws relevant to taxation and the Superannuation Guarantee system. Such laws do not deal with the types of requirements that are presumably under consideration.

31. Enterprise agreements may be made about "permitted matters"[163], being matters which include "matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement."[164] The concept of "matters pertaining to the employment relationship" has been a longstanding feature of federal industrial laws and has been examined by Courts and the Fair Work Commission (and its predecessors) on a number of occasions, including in relation to terms of agreements that are concerned with the use of labour hire agencies. There is unquestionably an overlap to some degree between "matters pertaining to the employment relationship" between a business and its employees on the one hand, and, on the other, the relationship between that business and a labour hire company that it utilises. Most notably, it has been recognised that the interest that employees have in the security of their own jobs can be sufficient to render the issue of the cost of replacing them a "matter pertaining to the employment relationship." A Full Bench of the Australian Industrial Relations Commission put the relationship in these terms, when considering the terms of an agreement that had been put to it for certification:

163 *Fair Work Act* s. 172
164 *Fair Work Act* s. 172(1)(a)

> *"…The intent of cl.17.6 is that employees of labour hire agencies working at Schefenacker should receive the same increase as the Schefenacker employees will receive under the agreement. This is sought to be achieved by obliging Schenefacker to give that directive to the agencies. Whether that means will be effective or not, the intent is that the relationship between the cost of labour supplied by the agencies and the cost of the labour of Schefenacker's employees will be relevantly the same after the agreement as it was before. For that reason we think that the sub-clause pertains to the relationship between Schefenacker and its employees. It directly concerns the security of employment of the employees covered by the agreement."*[165]

32. The clause in question was as follows:

> *"The company will instruct the labour hire agencies to increase the wage rate of their employees working at Schefenacker Vision Systems Australia by the same percentage that is listed in this Agreement."*[166]

33. It is important to pause for a moment to note that the reason such restrictions are thought to pertain is because they advance employee's interests in relation to their own job security. A clause that provided, for example, that "The employer will engage labour hire workers through agencies as required and will not require the agency to afford any particular wages or conditions to its employees" lacks that connection. A clause which provided "The employer will engage labour hire workers through agencies as required and will require the agency *to pay less* to its own employees than they would be required to pay if the employer had employed those persons under this agreement" may also lack that connection, but it would in any event be an outcome almost entirely beyond the realms of possibility in modern enterprise bargaining.

34. More commonly, terms that regulation the relationship between an employer and a labour hire business take form of a "jump up clause", which requires that employees of labour hire firms (or other contractors) receive pay and conditions that are no less favourable than those available to the employees directly employed by the business which is covered by the agreement. A clause in this more usual form was the subject of proceedings in the Full Court of the Federal Court in *Australian Industry Group v. Fair Work Australia* [2012] FCAFC 108. The clause relevantly provided:

165 *Schefenacker Vision Systems Australia Pty Ltd & Ors* [2005] AIRC 233 at [83] (Print PR956575).
166 Ibid at paragraph [71].

"[the employer] *shall only engage contractors and employees of contractors, to do work that would be covered by this Agreement if it was performed by the Employees, who apply wages and conditions that are no less favourable than that provided for in this Agreement. This will not apply where [the employer] is contractually obliged by the head contractor/client to engage a specific nominated contractor to do specialist work*".

35. The *Australian Industry Group* matter came before the Full Federal Court as a consequence of an application for review of a decision of Full Bench of Fair Work Australia, which had approved an enterprise agreement. The clause had been objected to by the Ai Group on the basis that it was an "unlawful term" by reason of it being an "objectionable term". The presence of an unlawful term is a barrier the Fair Work Commission approving an agreement.[167] An unlawful term is defined to include an objectionable term[168]. Objectionable terms are defined as follows:

> "*objectionable term " means a term that:*
>
> *(a) requires, has the effect of requiring, or purports to require or have the effect of requiring; or*
>
> *(b) permits, has the effect of permitting, or purports to permit or have the effect of permitting;*
>
> *either of the following:*
>
> *(c) a contravention of Part 3-1 (which deals with general protections);*
>
> *(d) the payment of a bargaining services fee.*"

36. The Ai Group argued that contractors that supply labour to an employer are entitled to the benefit of the industrial instruments that apply to them and their own employees (this was said to be the contractor's workplace right). The jump up clause, so it was argued, was objectionable and thus unlawful because it had the effect of requiring or permitting the employer to take adverse action against those contractors because those contractors had or proposed to exercise a workplace right to pay wages and conditions under its own workplace instruments, of which it was entitled to benefit. In particular, the Ai Group

167 See *Fair Work Act* s. 186(4).
168 S. 194(b).

argued that the clause required the employer, in the case of existing contractors, to take adverse action by doing the following:

(a) To alter the contractor's position to its prejudice by requiring a contractor to increase its wages beyond the minimum level at which they are set by a workplace instrument to fix them by reference to the terms of the employer's agreement with the union;

(b) To threaten to alter the position of the contractor to the contractor's prejudice by requiring that the contractor increase its wage rates below the minimum level at which wages are set;

(c) To refuse to make use of the contractor's services where the contractor insists on applying wages pursuant to its applicable workplace instrument;

(d) To threaten or refuse to make use of the contractors services in those terms;

(e) To terminate the contract with the contractor where the contractor insists on according wages and conditions under its workplace instrument; and/or

(f) To threaten to terminate the contract with the contractor where the contractor insists on according wages and conditions under its workplace instrument.

37. The Ai Group also argued that the clause required the employer, in the case of proposed (rather than existing) contractors, to take adverse action by doing the following:

(a) Refusing to engage the contractor where the contractor insists on paying wages under its workplace instrument;

(b) Imposing a threat in that regard;

(c) Refusing to make use of the services of the contractor in those circumstances; and

(d) Imposing a threat of a refusal.

38. The Ai Group were unsuccessful at the Fair Work Commission and on Review in the Full Court. The case is highly relevant because the analysis of whether a "jump up clause" constitutes an objectionable term necessarily involves an assessment of whether

compliance with such a clause by an employer could involve a breach of the general protections provisions. The Full Court relevantly said:

> *"..there is nothing in the [jump up clause] which 'requires' [the employer] to take any action against a contractor 'because' the contractor is entitled to the benefit of any industrial instrument. The clause concerned is with the rates of pay and conditions, not the source of the obligation in respect of the rates of pay. [The employer's] concern is directed only towards the rates of pay which the contractor is paying. Nothing else is relevant in order to comply with the clause. Significantly, the clause would operate in the same way whether the contractor paid its employees under an industrial instrument or a common law contract or some other causal arrangement not caught by the FW Act.*
>
> *AMMA adds to the AIG arguments an argument that the clause 'permits' contravention of s 354. The Full Bench did address the 'permits' argument. It relied upon two previous Full Bench decisions indicating that the word means 'authorises'. Taken in context, 'permits' should be read in that manner. It thus calls for the positive operation of the clause in question rather than a passive one: Pearce, DC and Geddes, RS Statutory Interpretation in Australia, (7th ed, LexisNexis, 2011) (at [4.23]-[4.24]). The Full Bench was correct in this approach for the reasons stated by it."*[169]

39. Another notable feature of the *Ai Group* matter, both in the Full Court and before the Full Bench, was that neither were persuaded that a labour hire contractor possessed any *workplace right* at all[170]. For completeness, and in relation to an important issue that did not arise for consideration in the *Ai Group* matter, we also point out that the Federal Court has separately confirmed that contracts of employment (as a class and not confined to the facts of a contract in issue in the proceeding) do not fall within the definition of workplace instrument contained in the *Fair Work Act*[171].

40. On the strength of the preceding discussion, we suggest that a Victorian law *could* regulate the relationship between a labour hire company and its customer by reference to the rates of pay afforded to the labour hire agency's employees, without bringing about a

169 *Australian Industry Group v. Fair Work Australia* [2012] FCAFC 108 at [65]-[66].
170 At [54], [62].
171 *Barnett v. Territory Insurance Office* [2011] FCA 968.

direct conflict with section 340 of the *Fair Work Act.* It would, however, be necessary to do so other than by reference to any particular workplace instruments. For example, a Victorian law that applied to customers of labour hire agencies might require those customers to:

- Be satisfied (by receipt of a copy of a certificate or the like) that the agency was licensed under the licensing Act; and

- Be satisfied that the workers supplied by the agency who performed work for the customer will receive payment that is no less than that which an employee of the customer would be expected to receive for performing the same work. The law might spell out that one of the ways the customer could reach that level of satisfaction would be by requesting information about rates of pay from the agency, by negotiating the rates to be paid to the agency, by paying a supplement directly to the workers concerned or by a combination of these means.

41. It is to be noted that by concentrating on the customer reaching a certain level of satisfaction about these matters, rather than directly creating a right to equal pay on the part of the workers concerned from their employer, one avoids an argument that these provisions themselves constitute a workplace law that the relevant workers (or anybody else) is entitled to benefit from.

42. Section 343 of the general protections provisions, which we identified as a potential concern above, also seem amenable to an approach of this nature. In particular, section 343 is similarly bound up in the notion of a workplace right, an issue which does not arise on our analysis. It also requires an intent to coerce, which the Full Court of the Federal Court has recently affirmed in *Victoria v. CFMEU* [2013] FCAFC 160 as requiring the proof of two elements:

- An intent to apply pressure which will, in a practical sense, negate choice; and

- Intent to exert that pressure by conduct that is unlawful, illegitimate or unconscionable[172].

43. In *Victoria v. CFMEU*, the Court was concerned with a policy promulgated by the Victorian government concerning the construction projects it funded. The policy relevantly provided that if a construction company entered into enterprise agreements with its

172 at [75]-[100] per Buchanan and Griffiths JJ.

employees, and included certain provisions in those enterprise agreements that were lawful under the *Fair Work Act*, the State of Victoria could choose to exclude those companies from participating in government funded construction projects. It had been found at first instance that the second element of the intent to coerce under section 343 had been present. In overturning that finding, the majority said:

> "*It is well accepted that even overwhelming economic pressure is not, without more, illegitimate. A party is not required to forego its advantages, or compromise its position, merely because it can negotiate from an unassailable position. It is also important, in our view, that for the purpose of the analysis of this issue it must be accepted that the conduct of the State was lawful, that the adoption and implementation of the Code and Guidelines was within power and that no breach of the FW Act was thereby involved. In that context, it is necessary to closely examine the significance of, and foundation for, the findings of the primary judge that the State was attempting to interfere with free bargaining or undermine the purpose of the FW Act.*
>
> *Conclusions of this kind appear to us, with respect, to reflect value judgments rather than legal conclusions, although we readily accept that judgments of this kind are sometimes made where questions of statutory construction arise. It is often necessary, and completely in accord with principle, to identify the purpose of a statutory scheme in order to decide which, of competing statutory constructions of a provision, should be accepted. However, the purposes of a statutory scheme do not provide a criterion against which to assert a freestanding or general restraint on otherwise lawful conduct. Particular conduct is either in breach of a statutory restriction or prohibition, or it is not. It is not, in our respectful view, appropriate to stigmatise otherwise lawful conduct as "illegitimate" because it does not conform to a perceived legislative "policy". That is particularly so in the case of a separate polity which may not embrace the perceived legislative policy and may wish to give effect, so far as it may lawfully do so, to its own legislative and commercial objectives*."[173]

44. We accordingly do not perceive section 343 to be a threat in so far as the potential for direct inconsistency is concerned.

---

173 at [95]-[96].

VI. Beyond Workplace Rights: Sections 354 and 355

45. Sections 354 and 355 were also identified by us as potential risks. Neither are limited to workplace rights or adverse action as elsewhere defined. Section 354 is as follows:

> "*Coverage by particular instruments*
>
> *(1) A person must not discriminate against an employer because:*
>
> *(a) employees of the employer are covered, or not covered, by:*
>
> *(i) provisions of the National Employment Standards; or*
>
> *(ii) a particular type of workplace instrument (including a particular kind of workplace instrument within a type of workplace instrument); or*
>
> *(iii) an enterprise agreement that does, or does not, cover an employee organisation, or a particular employee organisation; or*
>
> *(b) it is proposed that employees of the employer be covered, or not be covered, by:*
>
> *(i) a particular type of workplace instrument (including a particular kind of workplace instrument within a type of workplace instrument); or*
>
> *(ii) an enterprise agreement that does, or does not, cover an employee organisation, or a particular employee organisation.*
>
> *(2) Subsection (1) does not apply to protected industrial action.*"

46. It is apparent that section 354 concerns itself with discrimination on the basis of an employer being covered (or not covered) by *particular* workplace instruments, and

possibly their content. Laws of the type that we propose (either those that introduce the licensing system and apply to labour hire agencies or those that complement the licensing system and apply to their customers) are not workplace instruments as defined. Recalling the discussion in the *Ai Group* litigation, there is an important distinction to be drawn between the conditions under which persons work and the content of any instruments that apply to them. We therefore submit that no issue of direct inconsistency could arise with section 354.

47. Section 355 provides as follows:

> "*Coercion--allocation of duties etc. to particular person*
>
> *A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to:*
>
> *(a) employ, or not employ, a particular person; or*
>
> *(b) engage, or not engage, a particular independent contractor; or*
>
> *(c) allocate, or not allocate, particular duties or responsibilities to a particular employee or independent contractor; or*
>
> (d) *designate a particular employee or independent contractor as having, or not having, particular duties or responsibilities*."

48. We submit that the only relevant provision is sub-paragraph (b). It might be thought to arise in situations where the State of Victoria, through its legislative action, precludes businesses from engaging unlicensed labour hire providers and effectively requires that equitable levels of remuneration be paid to the labour hire workers of licensed agencies as compared to direct employees. There are two valid responses to this concern. Firstly, the word "particular" must be given some work to do. So far as any legislative action by the State might be concerned, it has no "particular" independent contractor in its sights. Moreover, the discussion above as to the elements of the intent to coerce is apposite. It may well be correct to ascribe to the State of Victoria the intent to negate the choice of an employer in Victoria from engaging labour hire services from Victorian based labour hire agencies unless they are licensed (although at a practical level this might not amount to a prohibition on the use of unlicensed labour hire agencies). It would, however, be a quite remarkable step for a court to declare that the means by which the intent was given

effect to, i.e. a state law, to be unlawful, illegitimate or unconscionable. On the authority of *State of Victoria v. CFMEU* we submit that a court would not do so.

VII. Indirect inconsistency arising from the general protections provisions

49. Whether an issue of indirect inconsistency arises between future State laws and the general protections provisions of the *Fair Work Act* is to be determined by a characterisation of the field of regulation intended by those future State laws and the provisions in the *Fair Work Act.* As such, a fulsome analysis at this juncture is somewhat premature. Nonetheless, some observations as to the trends in identifying "covering the field inconsistency" are instructive.

50. Firstly, it is true to say that although the test for covering the field has been reasonably consistent, the attitude of the Courts has been somewhat haphazard over the years in identifying overlapping fields and identifying inconsistency. The test for covering the field inconsistency (in instances where provisions of the type of sections 26-28 do not provide a complete answer, as section 30 confirms is the case here) is that used by Dixon J in *Victoria v. The Commonwealth*[174] and adopted by a unanimous High Court in at *Telstra v. Worthing* [1999] HCA 12 (at paragraph [28]):

> "..if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as detraction from the full operation of the Commonwealth law and so inconsistent".

51. There appear to be 3 criteria by which such an indirect inconsistency might be discovered:

    (a) Identify or characterise the field, or subject matter, that the Commonwealth law deals with and regulates;

    (b) Ascertain whether the State law attempts to regulate a field which the Commonwealth intends to cover. If there is no overlap of fields then no indirect inconsistency will arise.

174 [1937] HCA 82.

(c) If the two laws do overlap, ascertain if the Commonwealth intended to cover the field – did the Commonwealth Parliament intend its law to be the only law on the subject matter in question?[175]

52. We also point out that the "covering the field" test, and indeed the expression, was relatively recently criticised by Gummow J, in *Momcilovic v. The Queen* [2011] HCA 34 in terms which suggest that the last element above, concerning an intention as to exclusivity, is perhaps the most important feature where the question of indirect inconsistency arises:

> "*It is significant that in none of the classical formulations by Dixon J of the operation of s 109, those in Ex parte McLean[422], Stock Motor Ploughs[423] and The Kakariki[424], does the phrase "covering the field" appear. The passage in The Kakariki is set out below. That in Ex parte McLean reads:*
>
> > *'When the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject and prescribe what the rule of conduct shall be, they make laws which are inconsistent, notwithstanding that the rule of conduct is identical which each prescribes, and sec 109 applies. That this is so is settled, at least when the sanctions they impose are diverse (Hume v Palmer[425]). But the reason is that, by prescribing the rule to be observed, the Federal statute shows an intention to cover the subject matter and provide what the law upon it shall be. If it appeared that the Federal law was intended to be supplementary to or cumulative upon State law, then no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties. The inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter.'*

175 See *Clyde Engineering v. Cowburn* [1926] HCA 6, Per Issacs J.

The passage in Stock Motor Ploughs states:

> *'In this Court an interpretation of sec 109 of the Constitution has been adopted which invalidates a law of a State in so far as it would vary, detract from, or impair the operation of a law of the Commonwealth. Further, when the Parliament appears to have intended that the Federal law shall be a complete statement of the law governing a particular relation or thing, it is considered that the operation of the Federal law would be impaired if the State law were allowed to affect the matter at all (Clyde Engineering Co v Cowburn[426]; H V McKay Pty Ltd v Hunt[427]; Hume v Palmer[428]; Ex parte McLean[429]). Such an interpretation requires the consequence that, except in so far as the law of the Commonwealth appears otherwise to intend, enjoyment of a right arising under it may not be directly impaired by State law."*

The use by Isaacs J in Clyde Engineering[430] of the metaphor "cover the whole field" to identify the consequence of an imputed legislative intention has served only to confuse what is a matter of statutory interpretation. Isaacs J had previously used the expression "occupy the field" in Whybrow[431]. Neither, to adapt what Dixon CJ said[432] of the use by Isaacs J of the phrase "corpuscular wealth", was a happy choice to convey his meaning.

This is because the metaphors used by Isaacs J are apt to distract attention from the task of constitutional interpretation by reference to the text and structure of the Constitution and for that reason are to be discouraged. In Stock Motor Ploughs[433], Evatt J said of the expression "cover the field":

> *'This is a very ambiguous phrase, because subject matters of legislation bear little resemblance to geographical areas. It is no more than a cliché for expressing the fact that, by reason of the subject matter dealt with, and the method of dealing with it, and the nature and multiplicity of the regulations prescribed, the Federal authority has adopted a plan or scheme which will be hindered and obstructed if any additional regulations whatever are prescribed upon the subject by any other authority; if, in other words, the subject is either touched or trenched upon by State authority.'*

His Honour added, in The Kakariki[434], that little assistance was to be derived from an analogy between the picture of a two-dimensional field and "legislation with its infinite complexities and varieties". In the same case, more obliquely, Dixon J made the same point when he said[435]:

> *'When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid. Moreover, if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent." (emphasis added)*

As noted above[436], there has developed in the United States, from the Supremacy Clause, a doctrine of "field pre-emption". This expression is associated with remarks of Brandeis J in his dissenting reasons in New York Central Railroad Co v Winfield[437]. Comprehensive federal regulation may be so pervasive as to support a reasonable inference that Congress left no room for the States to supplement it[438]. So stated, this doctrine may be thought to describe the operation of s 109 as described by Dixon J in Ex parte McLean and The Kakariki. However, as Professor Tribe notes[439], the field pre-emption doctrine may be criticised with justification as being "at times divorced from fair statutory interpretation".[176]

53. There is no advance on the High Court's exposition of the field of regulation of federal industrial relations laws beyond that contained in *NSW v. the Commonwealth*. As is evident from the extracts appearing earlier in that discussion, the High Court was clearly of the view that the legislation as it then was predominantly concerned with the regulation of the relationships between employers and employees. The general protections provisions however did not appear in the predecessor legislation with which the High Court was concerned. This raises the question of whether this feature of the laws might extend the characterisation somewhat. In our view, it is likely that it would, but not in manner that would detract from the Court's previous characterisation of the regulation powers now appearing in sections 26(2)(h) or 28 (which it effectively held needed to be read harmoniously with the *Wenn*-type provisions that preceded them).

176 at [262]-[265].

54. A telling feature in the characterisation of the general protection provisions however are the Objects of the Part, as expressed in section 336:

> "*(1) The objects of this Part are as follows:*
>
> *(a) to protect workplace rights;*
>
> *(b) to protect freedom of association by ensuring that persons are:*
>
> *(i) free to become, or not become, members of industrial associations; and*
>
> *(ii) free to be represented, or not represented, by industrial associations; and*
>
> *(iii) free to participate, or not participate, in lawful industrial activities;*
>
> *(c) to provide protection from workplace discrimination;*
>
> *(d) to provide effective relief for persons who have been discriminated against, victimised or otherwise adversely affected as a result of contraventions of this Part.*
>
> *(2) The protections referred to in subsection (1) are provided to a person (whether an employee, an employer or otherwise).*"

55. The object of *protection* clearly is the dominant feature of these provisions and the detail of the provisions concerning freedom of association are perhaps the best illustration of that protective purpose, but are clearly not engaged in any way for present purposes. The *protection* of *workplace rights* however does give some relevant content by which the laws may be characterised, as do the terms of sub-paragraph (1)(d). This suggests the provisions are objectively about enforcing and remedying particular conduct which infringes particular rights which have a protective purpose, being rights which exist under the *Fair Work Act, the Registered Organisations Act,* the *Independent Contractors Act* or a law which regulates the relationships between employers and employees. The only provisions that are in any way applicable to labour hire arrangements generally (rather than in connection with a particular right or instrument) may be similarly characterised as

mere elements of a scheme which is about enforcing protective rights and remedying contraventions.[177]

56. It does not seem likely that State laws designed to constitute a scheme to regulate the labour hire industry in the manner discussed thus far would be characterised as laws about enforcing protective rights and remedying contraventions. Whilst it is true to say that labour hire workers are intended to benefit from the scheme of regulation, and thus benefit from some level of protection, it is not necessary to give those workers any particular *sui iuris* or personal legal right of action or remedy in order to erect that scheme or as a central or defining feature of that scheme (indeed such rights would in any event be largely superfluous). The engagement of a labour hire entity contrary to the scheme's provisions might result in nothing more than an injunction or perhaps an acquisition by the State of the monies paid by the customer to the agency under the labour hire contract. The point is that a conceptual distinction may still be drawn even where there are similar objectives at the highest level – an example would be the federal law mandating long service leave which was found to occupy a separate field than a state law that provided for a scheme for the payment of portable long service leave.[178]

57. Even if there was found to be an overlap, it is clear that the general protections provisions are not intended to be exclusive beyond the exclusive areas nominated in section 26. The mere definition of workplace law, in so far as it refers to "any other law.. of a State or Territory that regulates the relationships between employers and employees (including by dealing with occupational health and safety matters)" is an explicit admission of the concurrent operation of State and Federal laws (and their evolution). Furthermore, the provisions of Part 6-1 of the *Fair Work Act* contain detailed provisions as to procedural consequences when, *inter alia*, a person has a right to pursue an action under both the General Protections provisions and a State law. These provisions are clearly incompatible with any intention that the General Protections provisions be exclusive.

58. On the basis of the above, we submit that the possibility that a State law of the type under discussion is unlikely to be found to be indirectly inconsistent (and exceedingly unlikely to be found indirectly inconsistent if the views of Gummow J extracted above are endorsed).

177 And only then when the conduct complained rises to the level of coercion, which had an accepted meaning at the time provisions were introduced.
178 *Jemena Asset Management (3) Pty Ltd v. Coinvest Limited* [2011] HCA 33.

VIII. Conclusion

59. The Victorian Government has ample space to introduce laws that regulate labour hire agencies and their customers in Victoria, and should do so. We point out, for completeness, that neither the terms of the Victorian referral law or the extent of its utilisation are considered by us to be an obstacle in this regard.

60. The above analysis tends to suggest that the optimal structure of a legislative scheme would involve more than one statute:

    - One applying to labour hire agencies dealing with licensing, capitalisation, reports etc; and

    - Another applying to customers of labour hire agencies requiring that they use only licensed labour hire agencies in Victoria, and dealing with industrial matters in the form discussed proposed.

61. Another option, involving two or more laws, could involve housing the industrial matters within the *Equal Opportunity Act,* for reasons that would be reasonably apparent given a close reading of the provisions of the *Fair Work Act* referenced in this submission.

62. We readily concede that there is no foolproof mechanism to avoid a High Court challenge let alone a judicial or legislative defeat. However, we reiterate that this ought not dissuade a good government from trying to make a difference (or beginning to make a difference) in accordance with what its community expects of it.

ADDRESS
ACTU
365 Queen Street
Melbourne VIC 3000

PHONE
1300 486 466

WEB
actu.org.au

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