

Inquiry into the practices of the labour hire industry in Queensland

Report No. 25, 55th Parliament

Finance and Administration Committee

June 2016

Finance and Administration Committee

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Acknowledgements

The Committee acknowledges the assistance provided by the Queensland Treasury, the Department of Employment and Industrial Relations and the Queensland Parliamentary Library and Research Service.

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Abbreviations

ABC	Australian Broadcasting Corporation
ABN	Australian Business Number
ABS	Australian Bureau of Statistics
ACCC	Australian Competition and Consumer Commission
ACTU	Australian Council of Trade Unions
ADCQ	Anti-Discrimination Commission Queensland
AIG	Australian Industry Group
AIMPE	Australian Institute of Marine and Power Engineers
AMIEU	Australian Meat Industry Employees Union
AMMA	Australian Mines and Metals Association
AMWU	Australian Manufacturing Workers' Union
ATO	Australian Taxation Office
AWU	Australian Workers' Union
BSCAA	Building Service Contractors' Association of Australia
COAG	Council of Australian Governments
CCIQ	Chamber of Commerce and Industry Queensland
CFMEU	Construction, Forestry, Mining and Energy Industrial Union of Employees, Queensland
COAG	Council of Australian Governments
Committee	Finance and Administration Committee
Department	Department of Employment and Industrial Relations
EBA	Enterprise Bargaining Agreement
ES	<i>Electrical Safety Act 2002 (Qld)</i>
ESIC	Employment Services Industry Code
ETU	Electrical Trades Union
FWA	<i>Fair Work Act 2009 (Cth)</i>

FWO	Fair Work Ombudsman
GLA	Gangmasters Licensing Authority (UK)
HIA	Housing Industry Association
IEUA-QNT	Independent Education Union Australia, Queensland and Northern Territory Branch (IEUA-QNT)
Inquiry	Inquiry into the practices of the labour hire industry in Queensland
IFA	Individual Flexibility Arrangement
ILO	International Labour Organisation
IT	Information technology
ITCRA	Information Technology Contract and Recruitment Association Ltd
MUA	Maritime Union of Australia
NES	National Employment Standards
NUW	National Union of Workers
OHS	occupational health and safety
OIR	Office of Industrial Relations (Queensland)
QBCC	Queensland Building and Construction Commission
QCU	Queensland Council of Unions
QNU	Queensland Nurses Union
QPS	Queensland Police Service
QRC	Queensland Resources Council
RCSA	Recruitment and Consulting Services Association
WHS Act	<i>Work Health and Safety Act 2011 (Qld)</i>
WHSQ	Workplace Health and Safety Queensland

Chair's foreword

This Report presents a summary of the Finance and Administration Committee's Inquiry into the practices of the labour hire industry in Queensland.

The Inquiry was conducted at a time of increasing discussion and debate on the nature of Australian work arrangements and employment conditions, as governments and policymakers across the nation are seeking to establish an appropriately balanced regulatory and policy environment to best support both a flexible labour market, and consistently fair and safe employment conditions for workers.

The Committee recognised that labour hire employment plays a significant and important role in many of our key industries and will continue to do so into the future, as businesses look to cost-effectively meet seasonal labour demand, streamline recruitment and hiring practices, address skills shortages, and boost productivity.

The majority of labour hire operators appear to be acting in keeping with their legislative requirements as responsible employers.

However, evidence received by the Committee also highlighted concerning incidents of phoenixing, sham contracting, the exploitation and mistreatment of workers, the undercutting of employment conditions, and a range of other illegal or questionable practices.

Such practices are undermining the operation of the sector and resulting in a range of adverse impacts on employers, businesses, families and communities across the State.

The Committee considered a range of possible solutions to the issues identified, including various statutory and non-legislative measures engaged in other national and international jurisdictions, together with other ancillary improvements to the current regulatory regime.

Opinions on both the issues and proposals identified during the Inquiry were diverse and wide ranging, with the Committee receiving detailed evidence and heartfelt testimony from stakeholders representing a broad cross section of different views from businesses and the community.

On behalf of the Committee, I wish to extend my sincere thanks to the many individuals and organisations who lodged written submissions and participated in the Committee's briefings and public and private hearings, both in Brisbane and across regional locations in Queensland.

I also thank the Committee's secretariat, the Queensland Treasury's Office of Industrial Relations, the Department of Employment and Industrial Relations and the Parliamentary Library and Research Service for their assistance to the Committee.

I commend this Report to the House.



Peter Russo MP

Chair

Recommendation

Recommendation 1

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The Committee recommends that the Minister progress this issue through COAG meetings to work together with the Federal Government to address the issuance of ABNs to employees as a way for labour hire companies to avoid their employer obligations.

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1. Introduction

1.1 Role of the Committee

The Finance and Administration Committee (Committee) is a portfolio committee of the Legislative Assembly which commenced on 27 March 2015 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.¹

The committee's primary areas of responsibility include:

- Premier, Cabinet and the Arts
- Treasury, Aboriginal and Torres Strait Islander Partnerships and Sport, and
- Employment, Industrial Relations, Racing and Multicultural Affairs.

Section 93(1) of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles, and
- for subordinate legislation – its lawfulness.

1.2 The Inquiry referral

On 2 December 2015 the Queensland Legislative Assembly agreed to a motion that the Finance and Administration Committee inquire into and report on the practices of the labour hire industry in Queensland (Inquiry).²

In undertaking the Inquiry, the Committee was required to consider:

- a) The extent, nature and consequence of labour hire employment in industries and/or regions, including within industry supply chains and the responsibilities of entities involved
- b) Phoenixing, under-capitalisation and undercutting of conditions by labour hire companies ("companies") and their impact on the labour market and business
- c) The social and economic impacts, including on regional communities, of replacing permanent employees, apprentices and trainees with labour hire workers
- d) Allegations that labour hire and sham contracting are being used to avoid workplace laws and other statutory obligations, such as:
 - i. Underpayment of wages and entitlements, including superannuation, and
 - ii. Avoidance of payroll tax and WorkCover premiums
- e) The effectiveness of enforcing current industrial relations laws and instruments, occupational health and safety laws and workers' compensation laws in the labour hire industry
- f) Allegations of exploitation, harassment and other mistreatment of workers employed by companies
- g) Whether tendering and employment practices create an uneven playing field for competing businesses, and
- h) The regulation of labour hire in Australian jurisdictions and internationally and effective enforcement mechanisms, including bonds, licensing, registration and other forms of compliance.

¹ *Parliament of Queensland Act 2001*, section 88 and Standing Order 194.

² Queensland Parliament, *Record of Proceedings*, 2 December 2015, pp. 3061-3062

The committee is required to report to the Legislative Assembly by 30 June 2016.

1.3 Inquiry process

The Committee announced the Inquiry by advertising the terms of reference on its website.³ The Committee also wrote to stakeholders and to subscribers to inform them of the Inquiry and invite written submissions.

On 29 January 2016, the Committee sought assistance in relation to the Inquiry from Queensland Treasury and from the Department of Employment and Industrial Relations. On 18 February 2016, the Queensland Treasury provided the Committee with a volume of background information on the labour hire industry and in response to the Inquiry's Terms of Reference. On 24 February 2016, officials from Queensland Treasury's Office of Industrial Relations (OIR), including representatives from Workplace Health and Safety Queensland (WHSQ), participated in a public briefing for the Inquiry.

The closing date for submissions was 7 April 2016. The committee received a total of 41 submissions, a number of which were provided confidentially. A list of submitters is provided at **Appendix A**.

The Chair of the Committee attended a Horticulture Workers Interagency Group (HWIG) forum in Bundaberg on 27 April 2016.

The Committee held public hearings in Brisbane on 11 May and 15 June 2016 and in regional locations across Queensland as follows:

- 6 June 2016 – Gatton
- 7 June 2016 – Emerald
- 8 June 2016 – Mackay
- 9 June 2016 – Cairns
- 15 June 2016 – Bundaberg videoconference
- 20 June 2016 – Moranbah.

A list of all public hearings and witnesses is available at **Appendix B**.

The Committee also received evidence from witnesses in private hearings on a number of occasions.

Copies of material published in relation to the Inquiry, including written advice, transcripts of the Committee's public briefing and public hearings, and all published submissions, are available on the Committee's website.

1.4 Structure of the report

Chapters 1 to 2 of this report describe the background and policy context for the Committee's inquiry into the labour hire industry and its practices.

Chapter 3 considers the extent and nature of labour hire employment across industries and regions of the State, including within industry supply chains.

Chapter 4 considers the social and economic impacts of labour hire industries and employment practices, including on regional communities and business competition.

Chapter 5 considers the poor conduct of some labour hire companies, including allegations and evidence regarding the use of phoenix activity, sham contracting, how tendering practices impact on a level playing field, and the exploitation, harassment and mistreatment of workers employed through labour hire arrangements.

³ See: www.parliament.qld.gov.au/FAC

Chapter 6 considers the current regulatory framework and options for improving the regulation and standards of the labour hire industry, including statutory and other compliance mechanisms and various proactive actions employed in Australian and international jurisdictions and proposed by stakeholders.

2. Inquiry overview

Work organisation and labour markets in Australia have changed markedly over the last thirty years. One of the defining features of these changes has been an increasing trend towards “individualised and decollectivized employment models”, which are characterised by the downsizing or outsourcing of firm activities, and the rise of more flexible or less secure forms of work.⁴ This includes, for example:

- increased use of on-call, temporary and fixed-term workers
- the conversion of employees into independent contractors
- the expansion of business format franchise arrangements, and
- temporary movements of workers to meet short-term labour demand, such as guest workers.⁵

These developments, which mirror similar trends experienced in most industrialised nations, fuelled a rapid expansion in the temporary staff services or labour hire industry throughout much of the 1990s and 2000s.⁶

Industry growth has stabilised since the onset of the global financial crisis, and profit margins have declined. However, the labour hire industry is now a well-established feature of the Australian labour market and a significant player in employment arrangements across the country.⁷ Currently, it is estimated that there are approximately 5,800 labour hire businesses in Australia, generating revenue to the tune of \$18.5 billion and distributing approximately \$12.7 billion in wages.⁸

These businesses perform a number of functions in the labour market, including maintaining a pool of potential employees, matching a person with an appropriate employer, and assisting employers to recruit suitable staff.⁹ Under typical arrangements, a labour hire agency will “on-hire” the services of an agency worker to a “host business” for a service fee, whilst remaining the employer of the worker, and bearing responsibility for their wages and other on-costs.¹⁰

⁴ J Burgess and J Connell, *Temporary agency work and the evolving employment model in Australia*, Employment Studies Centre, University of Newcastle, Australia, 2006, p.1; A Allday, *Needs a helping hand: Industry profit falls due to increased competition*, IBISWorld Industry Report N7212: Temporary Staff Services in Australia, January 2016, pp.5-6; R Johnstone, *Dismantling Worker Categories: The Primary Duty of Care and Worker Consultation, Participation and Representation in the Model Work Health and Safety Bill 2009*, National Research Centre for Occupational Health and Safety Regulation, ANU Working Paper no. 82, October 2011, p. 3

⁵ Johnstone, *Dismantling Worker Categories*, October 2011, p. 3

⁶ E Underhill and M Quinlan, *How Precarious Employment Affects Health and Safety at Work: The Case of Temporary Agency Workers*, *Relations Industrielles*, vol. 66, no. 3, 2011, p. 398; Johnstone, *Dismantling Worker Categories*, October 2011, p. 3; House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, *Making it work: Inquiry into independent contracting and labour hire arrangements*, Canberra, August 2005, pp. 41-42; A Shomos, E Turner and L Will, *Forms of Work in Australia*, Productivity Commission Staff Working Paper, April 2013, p.xii

⁷ Shomos et al, *Forms of Work in Australia*, April 2013, p.1; A Allday, *Industry profit falls due to increased competition*, January 2016, p.4

⁸ Allday, *Industry profit falls due to increased competition*, January 2016, p.3

⁹ Australian Bureau of Statistics, *Labour Hire Workers*, Feature Article (online), 6105.0 – Australian Labour Market Statistics, January 2010 (accessed April 2016), available at: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/6105.0Feature%20Article1Jan%202010>

¹⁰ House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, *Making it work: Inquiry into independent contracting and labour hire arrangements*, Canberra, August 2005, p.32; Fair Work Ombudsman, *Understanding on-hire employee services: A guide for on-hire businesses and host organisations*, webpage, December 2013 (accessed May 2016), available

Initially, the industry specialised primarily in supplying temporary clerical staff to workplaces to fill gaps caused by staff absences or short-term peaks. However, it has evolved to operate across a broad spectrum of industries, with IT and telecommunications, mining, manufacturing, construction, health, financing and insurance, and some agricultural businesses all reporting significant reliance on labour hire usage.¹¹

The development of the industry has been attributed to employers' preferences for an agile and flexible workforce which can respond to changing work demands and support simplified and cost-effective management practices.¹² Studies have identified that the labour hire industry can support businesses by:

- providing enhanced numerical flexibility to cope with peaks and troughs in demand, staff absences, or to manage specific work (e.g. programmed maintenance)
- simplifying recruitment and selection processes and meeting interim or immediate staff needs at short notice
- facilitating access to specialist skills from time to time as required
- reducing in-house staff and outsourcing non-core business areas, including the management of areas of expertise (e.g. human resources, occupational health and safety)
- reducing costs associated with staff overheads and entitlements,
- simplifying tax planning, and
- outsourcing risk management and administrative burdens associated with regulatory compliance, including unfair dismissal claims and workers' compensation.¹³

For workers, it has been suggested that supplying labour on a temporary basis may also afford certain benefits in terms of maximising their independence in determining work options, and supporting more flexible and varied work than would be readily accessible or achievable through more rigid or traditional employment options.¹⁴

However, it is also recognised that while agency workers in Australia are a diverse group spanning all occupational levels and industries; they tend, on average, to be engaged in low-skilled and labour-intensive positions and exhibit the characteristics of "marginal, peripheral workers".¹⁵

at:<https://www.fairwork.gov.au/ArticleDocuments/723/On-hire-employees-services-workplace-obligations.pdf.aspx>

¹¹ House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, *Making it work: Inquiry into independent contracting and labour hire arrangements*, Canberra, August 2005, p.1

¹² K Wheelwright, *Case Note: Roosters, Ducks and labour Hire Arrangements: Damevski v Giudice (2003) 202 ALR 494 (FCA Full Court)*, Southern Cross University Review, vol. 8, 2004, pp.190-191

¹³ A Knox, *Lost in translation: an analysis of temporary work agency employment in hotels*, Work, Employment and Society, vol. 24, no. 3, 2010, p.452; R Hall, *Labour Hire in Australia: Motivation, Dynamics and Prospects*, University of Sydney, Working Paper 76, 2002, p.8; House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, *Making it work: Inquiry into independent contracting and labour hire arrangements*, Canberra, August 2005, pp.36-37; Allday, *Industry profit falls due to increased competition*, January 2016, pp.12-13; Shomos et al, *Forms of Work in Australia*, April 2013, pp.3-4

¹⁴ Knox, *Lost in translation: an analysis of temporary work agency employment in hotels*, 2010, p.452

¹⁵ R Hall, *Temporary Agency Work and HRM in Australia: Cooperation, Specialization and Satisfaction for the Good of All?*, Personnel Review, vol. 25, no. 2, 2006, p. 171. 35(2); Underhill and Quinlan, *How Precarious Employment Affects Health and Safety at Work*, 2011, p. 398

A wide range of studies have reported that labour hire workers tend to have poorer employment conditions than their direct hire counterparts, including:

- lower rates of pay than comparable direct hire workers
- fewer opportunities for training and career development
- higher rates of occupational injury attributed to factors such as lower familiarity with tasks, limited training and supervision, or potentially, inappropriate placements, and
- a lower likelihood of being offered employment post-injury.¹⁶

Implicit in concerns about these discrepancies is a view that the industry's growth is partly a response to increased regulation of the employment relationship, with some firms seeing labour hire as a way of cost-cutting by minimising certain responsibilities towards their workforce; thus undermining workers' pay and entitlements.¹⁷ Such trends, it is argued, have led to the situation of a primary core market of employees and a secondary market of labour hire employees, with fewer privileges.¹⁸

In addition, claims of the exploitation of labour hire workers (including underpayments, discrimination and harassment), and of the use of illegal business practices which deny employees access to key entitlements and protections, are not uncommon.¹⁹

Concerns about the incidence of such practices previously prompted a number of evaluative studies and inquiries at the peak of the industry's growth, in the mid-2000s. This included a Productivity Commission review paper, together with Federal Senate Committee and Victorian Parliamentary Committee inquiries, which generated recommendations for reform.²⁰ These evaluative efforts informed a range of minor legislative reforms and educative measures, often with engagement at the national level (including through the Council of Australian Governments) or across different state agencies.

However, questions about the adequacy of the regulatory regime were reawakened in May 2015, when the ABC's *Four Corners* aired allegations of the exploitation of workers in the agricultural and food processing industries supplying major supermarkets, in its report "Slaving Away".²¹ Among the reported findings was a revelation that cucumber pickers in Bundaberg were being paid as little as

¹⁶ K Wheelwright, *Case Note: Roosters, Ducks and labour Hire Arrangements: Damevski v Giudice (2003) 202 ALR 494 (FCA Full Court)*, Southern Cross University Review, vol. 8, 2004, pp.190-191; Underhill and Quinlan, *Beyond statutory enforcement – alternative approaches to improving OSH in the temporary agency sector*, Policy and practice in health and society, vol. 9, no. 2, 2011, p.109; Knox, *Lost in translation: an analysis of temporary work agency employment in hotels*, 2010, p.452; S Houseman, *Temporary agency work: temporary agency work is not generally a stepping-stone to regular employment*, IZA World of Labour, article no. 27, May 2014; J Fudge and K Strauss, eds., *Temporary Work, Agencies and Unfree Labour – Insecurity in the New World of Work*, New York: Routledge, 2014.

¹⁷ Shomos et al, *Forms of Work in Australia*, April 2013, p.1. See also D Graham, *Regulation of Labour Hire Arrangements: A Study of Queensland Labour Hire Agencies*, PhD Thesis, TC Beirne School of Law, University of Queensland, 2007, p.2

¹⁸ Graham, *Regulation of Labour Hire Arrangements: A Study of Queensland Labour Hire Agencies*, 2007, p.2

¹⁹ Office of Industrial Relations, Queensland Treasury, Correspondence, 18 February 2016.

²⁰ Patrick Laplagne, Maurice Glover and Tim Fry, *The Growth of Labour Hire Employment in Australia*, Staff Working Paper, Productivity Commission, February 2005; House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, *Making it work: Inquiry into independent contracting and labour hire arrangements*, Canberra, August 2005; Parliament of Victoria, Economic Development Committee, *Final Report: Inquiry into Labour Hire Employment in Victoria*, June 2005.

²¹ Office of Industrial Relations, Queensland Treasury, Correspondence, 18 February 2016.

\$12 an hour.²² This followed on from the publication of a number of investigative and inquiry reports produced by the Fair Work Ombudsman (FWO) and various other statutory agencies and sector actors which have highlighted instances of illegal activity and exploitation within labour hire arrangements and procurement practices.²³

In light of the allegations and reports, Queensland Treasurer, Minister for Employment and Industrial Relations and Minister for Aboriginal and Torres Strait Islander Partnerships, the Hon. Curtis Pitt MP, announced that an inquiry was necessary “to get to the bottom of these complaints” and ensure that “employers are complying with Queensland’s workplace laws and that workers aren’t unfairly exploited”.²⁴

The establishment and referral of the Inquiry, on 2 December 2015, came after the June 2015 and September 2015 establishment of inquiries into labour hire in South Australia and Victoria respectively.²⁵ During the Committee’s consideration of this Inquiry, the Productivity Commission also published the final report of its inquiry into the Workplace Relations Framework (21 December 2015); and Federal Senate Education and Employment References Committee reported on its related Inquiry into the impact of Australia’s temporary work visa programs on the Australian labour market and on the temporary work visa holders (17 March 2016); and the Federal Joint Standing Committee on Migration reported on its inquiry into the seasonal worker program.²⁶

²² Office of Industrial Relations, Queensland Treasury, Correspondence, 18 February 2016.

²³ See, for example: Office of the Australian Building and Construction Commissioner, *Sham Contracting Inquiry Report*, Australian Government, 2011; TNS Consultants, *Working arrangements in the building and construction industry further research resulting from the 2011 Sham Contracting Inquiry*, report prepared for Fair Work Building & Construction, December 2012; Pricewaterhouse Coopers, *Phoenix Activity – Sizing the problem and matching solutions*, report for the Fair Work Ombudsman, Australian Government, June 2012; Fair Work Ombudsman, *Inquiry into the Victorian Department of State Development and Business Innovation – labour hire and independent contractor arrangements, Inquiry Findings*, Australian Government, February 2015; Fair Work Ombudsman, *A report on the Fair Work Ombudsman’s Inquiry into the labour procurement arrangements of the Baiada Group in New south Wales*, Australian Government, June 2015.

²⁴ Treasurer, Minister for Employment and Industrial Relations and Minister for Aboriginal and Torres Strait Islander Partnerships the Hon. Curtis Pitt MP, *Parliamentary inquiry to investigate rogue labour hire operators*, Media release, December 3 2015.

²⁵ *SA announces parliamentary inquiry into labour hire industry following Four Corners report*, ABC News (online), 6 May 2015 (accessed May 2016), available at: <http://www.abc.net.au/news/2015-05-06/parliamentary-inquiry-into-labour-hire-industry/6449714>; State Government of Victoria, Department of Economic Development, Jobs, Transport and Resources, *Inquiry into the Labour Hire Industry and Insecure Work*, webpage, updated 23 March 2016 (accessed May 2016), available at: <http://economicdevelopment.vic.gov.au/about-us/strategies-and-initiatives/inquiry-into-the-labour-hire-industry-and-insecure-work>

²⁶ Productivity Commission, *Workplace Relations Framework*, Productivity Commission Inquiry Report no. 76, 30 November 2015 (published in December); Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, Parliament of Australia, March 2016; Joint Standing Committee on Migration, *Seasonal change: Inquiry into the Seasonal Worker Programme*, May 2016.

3. The nature, extent and consequence of the labour hire industry in Queensland

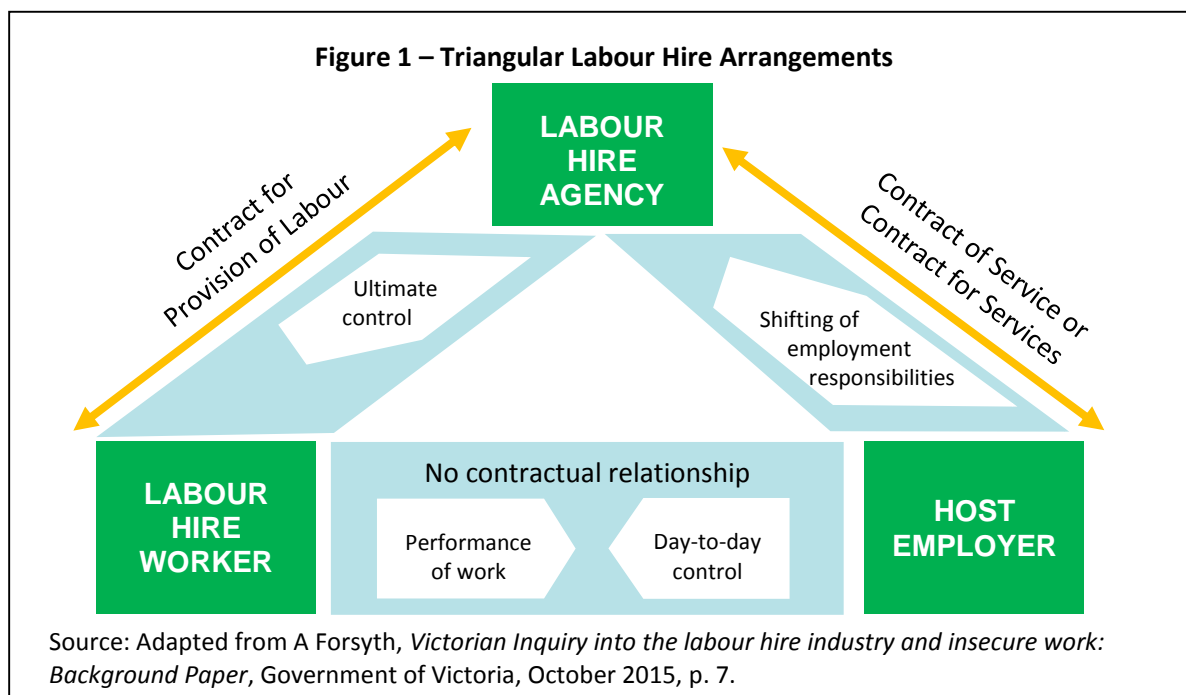
3.1 Defining labour hire employment

Inquiry stakeholders identified that labour hire arrangements can be difficult to define, taking in a diverse array of arrangements.²⁷ However, labour hire arrangements typically involve a ‘triangular relationship’ in which a labour hire business supplies the labour of a worker to a third party (the host employer), for an agreed fee.²⁸

The essential quality of these arrangements is the splitting of contractual and control relationships, whereby:

- the worker is under the direction or control of the host employer in relation to the performance of work, but is not engaged in any contractual or employment relationship with the host employer
- the worker is paid by the labour hire agency and has a direct contractual or employment relationship with them, and
- the host firm pays the labour hire agency for the labour provided by the worker and also has a direct contractual relationship with the labour hire agency.²⁹

This arrangement is illustrated in Figure 1.



As the employer of the worker, the labour hire agency is responsible for their entitlements and also has a range of associated employer responsibilities and liabilities, including legal requirements associated with workplace health and safety and with accident insurance (WorkCover).³⁰

²⁷ United Voice, submission no. 16, p.2; CFMEU, submission no.20, p.7; confidential submission no. 22

²⁸ Hall, *Labour Hire in Australia: Motivation, Dynamics and Prospects*, 2002, p.4

²⁹ Queensland Nurses Union, submission no. 4, p. 4; Housing Industry Association, submission no. 7, p.12; confidential submission no. 22

³⁰ Hall, *Labour Hire in Australia: Motivation, Dynamics and Prospects*, 2002, pp.4-5; Housing Industry Association, submission no. 7, p.12

However, variations on this standard “triangular” employment model can also be engaged, which can serve to complicate these contractual or control relationships and therefore also the distribution of employer responsibilities and liabilities.³¹ This includes, for example:

- The use of contractor services or “Odco” arrangements, in which a labour hire agency acts as an intermediary to engage and manage independent contractors to work for the host employer for a specified time period, or as necessary to complete a defined scope of work. As independent contractors, these workers are considered to be neither employees of the labour hire agency nor the host business, but effectively self-employed.³²
- The employment of apprentice workers via Group Training Organisations or Group Apprentice Schemes, which then on-hire workers to various host trainers. These host trainers have a more significant control relationship with their workers than is typical, including engaging in activities for which an employer is usually responsible, such as providing on-the-job training to the apprentice.³³

Submitters particularly noted the use of such variations within the mining, building and ICT industries. This might include a labour hire company being contracted to perform the daily running of a mining operation on behalf of a mining leaseholder, or being contracted to carry out an IT maintenance project on behalf of a host employer, for which the labour hire agency may engage any mix of long-term or short term (task-specific) workers or independent contractors, to meet these operational requirements.³⁴

Some contracting arrangements may be distinguished from labour hire arrangements through the use of a fixed cost amount based on the provision of labour and equipment to complete defined tasks, as opposed to a cost rate based on time (e.g. an hourly labour price).³⁵ However, such distinctions are not always clear cut.

In keeping with this, submitters highlighted that while labour hire has previously been characterised foremost as involving the use of short term, supplementary or “top up” labour engaged to meet short-term work peaks or staff absences and specific skill shortages,³⁶ it increasingly takes in a variety of work arrangements which may extend through to longer-term supplementation of the workforce or substitution of permanent workers.³⁷

Labour hire agencies may engage workers for host employers:

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

³¹ CFMEU, submission no.20, p.7

³² Housing Industry Association, submission no. 7, p.12; United Voice, submission no. 16, p.2; ITCRA, submission no. 23, p.4

³³ United Voice, submission no. 16, p.2

³⁴ CFMEU, submission no. 20, pp.6-9

³⁵ Confidential, submission no. 22

³⁶ CFMEU, submission no. 20, pp.6-7

³⁷ Electrical Trades Union, submission no. 10, p. 4; NUW, submission no. 32, p. 3; United Voice, submission no. 16, p.4

- to entirely replace an ongoing workforce.³⁸

Importantly, many labour hire agencies also carry out a range of other recruitment (search and selection), employment placement and other human resources activities.³⁹ These activities were considered by the Committee to fall outside the scope of its Inquiry.

3.2 The extent and nature of labour hire employment in Queensland

Of the approximately 5,800 businesses involved in the labour hire industry across Australia, around a quarter of those (24.5%) are based in Queensland.⁴⁰

According to the Australian Bureau of Statistics (ABS), in September 2014 approximately 103,900 people in Queensland found their job through a labour hire company or agency.⁴¹ This figure includes both placement services and labour hire arrangements. More specific estimates of the number of labour hire workers within the employment population are limited,⁴² and tend to vary somewhat according to the methodologies, data sources and time periods used.⁴³

For example, the Housing Industry Association (HIA) has cited disaggregated 2010 ABS figures, which indicate that workers contracted to labour hire firms who are then on-hired to a host employer represent around 1% of employed persons.⁴⁴ An analysis published by staff at the Productivity Commission indicates that labour hire workers made up between 1.2% and 2.6% of Australian workers between 2007 and 2011.⁴⁵ Further, figures calculated by the Independent Inquiry into Insecure Work in Australia, commissioned by the Australian Council of Trade Unions (ACTU), put the number of labour hire workers at 2% and 4% of the workforce.⁴⁶ This is in keeping with data from the Queensland Workers' Compensation Scheme, which indicated that labour hire agency claims as a proportion of all workers' compensation claims for 2014-15 was 3.8%.⁴⁷

Applying these percentages to the current number of employed persons State-wide equates to somewhere between 94,000 and 189,000 persons in total (indicative only).⁴⁸ Regardless of the precise

³⁸ State Government of Victoria, Department of Economic Development, Jobs, Transport and Resources, *Victorian Inquiry into the Labour Hire Industry and Insecure Work: Background Paper*, October 2015 (accessed June 2016), available at: http://economicdevelopment.vic.gov.au/data/assets/pdf_file/0015/1215411/9390-IRV-Inquiry-in-the-Labour-Hire-Industry-and-Insecure-Work-Brochure.pdf; Queensland Nurses Union, Submission no. 4, p. 6

³⁹ Parliamentary Library, *Labour hire: issues and responses*, Research Note, No. 43, Department of Parliamentary Services, 8 March 2004, p. 1; Knox, *Lost in translation: an analysis of temporary work agency employment in hotels*, 2010, p.458

⁴⁰ Allday, *Industry profit falls due to increased competition*, IBISWorld, January 2016, p.3

⁴¹ ABS data as provided by the Office of Industrial Relations, Correspondence, 18 February 2016, Paper 2, page 1, available at: <http://www.parliament.qld.gov.au/documents/committees/FAC/2015/I5-LabourHire/I5-bp-25Feb2016.pdf>

⁴² Queensland Resources Council, submission no. 9, p.12

⁴³ Queensland Nurses Union, submission no. 4, p. 5

⁴⁴ Housing Industry Association, submission no. 7, pp. 11

⁴⁵ Shomos et al, *Forms of Work in Australia*, April 2013, p.83

⁴⁶ Queensland Nurses Union, submission no. 4, p. 5

⁴⁷ ABS data as provided by the Office of Industrial Relations, Correspondence, 18 February 2016, Paper 2, page 2, available here: <http://www.parliament.qld.gov.au/documents/committees/FAC/2015/I5-LabourHire/I5-bp-25Feb2016.pdf>

⁴⁸ General estimates based on estimated resident population figures reported by the ABS (September 2014) and the Queensland Government Statistician's Office (2014-15).

figure, it is clear that labour hire has become a significant feature of working arrangements in Queensland.

Submitters also highlighted that levels of engagement of labour hire employment vary significantly across industries and regions. According to a recent IBISWorld report, the major industries using labour hire services nationally are information technology and telecommunications; construction and trades; and the health care and medical sectors; with Government, defence, and the mining, energy and utilities sectors also playing a part.⁴⁹

The Australian Mines and Metals Association (AMMA), Queensland Resources Council (QRC) and the HIA submitted that labour hire arrangements are a longstanding feature of their sectors,⁵⁰ with usage at different mine and construction sites ranging from just some parts to virtually all parts of their operations.⁵¹ Independent Education Union of Australia – Queensland and Northern Territory Branch (IEUA-QNT) and United Voice submitted that labour hire arrangements are the predominant method of employee engagement for contract cleaning and security services, as well as featuring significantly in property maintenance, hospitality-related areas and food and beverage manufacturing.⁵² Further, Growcom emphasised that the majority of the horticulture workforce is by necessity made up of casual, transient harvest workers – especially working holiday makers – engaged through labour hire arrangements.⁵³

The Local Government Association of Queensland (LGAQ) also confirmed the significant reliance on labour hire by many councils, often through ‘preferred supplier’ contract arrangements.⁵⁴ However, others also noted that labour hire is not a significant feature of their sectors, though changing industry trends and developments may increase its use in the future.⁵⁵

Within these industries, September 2014 ABS figures for workers who found their job through a labour hire or employment agency (labour hire and employment placements), reported that those workers identified their field of work as:

- clerical and administrative (19%)
- technicians and trade (19%)
- professionals (18%)
- machinery operators and drivers (15%)
- labourers (14%).⁵⁶

The Recruitment and Consulting Services Association (RCSA) stated that on-hire workers are employed in work across a broad spectrum of occupations and skill levels, despite typical characterisations of labour hire work as primarily low-skilled or unskilled employment.⁵⁷ Such industry diversity has been widely acknowledged in academic literature, though it is also reported that on average, agency

⁴⁹ Queensland Nurses Union, submission no. 4, p. 5

⁵⁰ Queensland Resources Council, submission no. 9, p.12; Housing Industry Association, submission no. 7, pp. 11; AMMA, submission no.18, p.1

⁵¹ Queensland Resources Council, submission no. 9, p.12; Housing Industry Association, submission no. 7, pp. 11

⁵² IEUA-QNT, submission no. 11, p.3 United Voice, submission no. 16, p.2

⁵³ Growcom, submission no. 28, p. 2

⁵⁴ Local Government Association of Queensland, submission no. 24, p.2

⁵⁵ Queensland Nurses Union, submission no. 4, pp. 6-7; AIMPE, submission no. 21, p.1

⁵⁶ ABS data as provided by the Office of Industrial Relations, Correspondence, 18 February 2016, Paper 2, page 1, available here: <http://www.parliament.qld.gov.au/documents/committees/FAC/2015/I5-LabourHire/I5-bp-25Feb2016.pdf>

⁵⁷ RCSA, submission no. 39, p.p. 4-5.

workers tend to be lower paid, less skilled workers.⁵⁸ Dr Elsa Underhill submitted that for the most part labour hire agencies tend to supply workers with more common skills – especially trades and lower-level skilled workers – with exceptions only arising when agencies are supplying unique, specialised skills.⁵⁹

Geographically speaking, much of the regional concentration of these workers largely reflects concentrations of economic activity in relation to the major employing industries – including agricultural and mining hot spots, or major cities. For example, the Lockyer Valley Regional Council highlighted that the Lockyer Valley region produces over 70% of Queensland’s cauliflower and broccoli, 48% of lettuce production and more than 20% of Queensland’s pumpkins, onions and carrots – all of which require hand harvesting, and hence a seasonal labour force comprised mostly of labour hire workers.⁶⁰ Without the engagement of labour hire workers, growers and processors would struggle to secure the required workforce to pick and process fruit and vegetables.⁶¹

Similarly, many mining operators have moved to predominantly labour hire workforces in recent years with the stated aim of reducing overheads and increasing workforce flexibility – especially in major Bowen Basin operations stretching from Biloela to Blackwater and Moranbah.⁶²

3.3 The consequence of labour hire employment

Labour hire’s perspective

Labour hire employment serves an established and important part of employment strategies across a number of sectors,⁶³ helping firms to address a range of economic and business challenges and outsource key tasks to streamline their services and boost productivity.⁶⁴ The availability of casual employment through labour hire may also be valued by some employees who prefer the flexible arrangements such employment offers, or who are seeking a greater variety in terms of the types of roles they are engaged to perform.⁶⁵ Further, labour hire workers can help to provide a boost to regional economies as a result of the flow-on effects of spending and engagement in the broader local community.

Key benefits of labour hire arrangements for workers, businesses, the community and the economy include:

- Labour hire provides businesses with fast and flexible access to a casual employment workforce for industries characterised by volatility in demand and outputs, including seasonal patterns. For example, the horticultural industry’s demand for labour is tied inextricably to its harvesting cycles,

⁵⁸ Hall, *Labour Hire in Australia: Motivation, Dynamics and Prospects*, Working paper 76, university of Sydney April 2002, pp.5-6

⁵⁹ Dr Elsa Underhill, submission no. 36, p.2

⁶⁰ Lockyer Valley Regional Council, submission no. 8, p.2

⁶¹ See for example Growcom, Transcript 11 May 2016.

⁶² A Edwards, *Blackwater Mine: More Queensland towns will suffer if BHP Billiton Mitsubishi Alliance cuts jobs, protestors warn*, ABC News Online, webpage, 2 September 2015. Downloaded May 2016 from: <http://www.abc.net.au/news/2015-09-02/blackwater-mine-residents-vote-fight-bma-job-cuts/6742896>; P Robinson, *Some Queensland coal mine workers facing \$60K pay cuts amid resources downturn says union*, ABC News Online, webpage, 4 March 2016. Downloaded April 2016 from: <http://www.abc.net.au/news/2016-03-04/coal-mine-workers-facing-pay-cuts-amid-resources-downturn/7220262>

⁶³ Confidential submission no. 2.

⁶⁴ Confidential submission no. 30

⁶⁵ Confidential submission no. 30

such that the number of workers required at any one time can vary significantly.⁶⁶ Submitters also highlighted that the home building industry is prone to volatility in output, with activity in home building (including renovations in real terms changing from over \$19 billion in 2007-08 to less than \$14 billion in 2012-13 and then increasing to more than \$18 billion in the current financial year.⁶⁷ In such circumstances, labour hire workers can be used to meet industry labour demand and protect employers against the adverse labour market impacts of industry or economy-wide shocks.

- Employers can outsource the time-consuming recruitment process of assessment, selection and engagement to human resources specialists, for more cost-effective and efficient hiring processes and potentially, access to higher quality candidates.⁶⁸
- Labour hire agencies can facilitate job matching and labour hire specialisation, which improves labour market functioning.⁶⁹ For example, submitters noted that many small businesses may not generate sufficient work to carry specialised skilled workers as permanent employees, but may engage labour hire workers for specialist projects as a sensible business response to the environment in which they operate. Labour hire organisations act as aggregators of the employment opportunities created by these fluctuations, providing an efficient market mechanism to match supply and demand for labour.⁷⁰
- For some workers, labour hire arrangements may be preferred because they provide greater flexibility in hours of work or work contract duration; provide a path to other employment, and/or ongoing employment; or provide access to a greater variety of work and thereby an opportunity to gain skills and experience in an industry where they may not otherwise have been able to secure employment.⁷¹ HIA and CCIQ noted that non-permanent work arrangements are often negatively cast as “insecure” in a way that fails to appreciate the heterogeneity of personal employment preferences.⁷² One labour hire operator also stated in a confidential submission to the inquiry that it estimates that approximately 20 to 30% of its employees go on to gain full-time employment over a twelve-month period,⁷³ while Master Electricians Australia emphasised the important role of labour hire arrangements in supporting apprentices to obtain a greater breadth of experience while working to meet their requirements.⁷⁴
- Labour hire arrangements can allow host employers to reduce some operating costs, such as payroll tax, costs of compliance with labour regulations and internal human resources costs. This can help to deliver important cost savings that can improve business productivity and sustainability, and prolong prospects for competitive operations. Resources industry stakeholders advised, for example, that the engagement of labour hire operations has helped to reduce the unit costs of the coal sector by an average of 28%.⁷⁵ The QRC submitted that where managing such productivity improvements under an enterprise bargaining agreement would have been a difficult and lengthy challenge, the use of labour hire has delivered these benefits in a highly responsive manner, without compromising on safety.⁷⁶

⁶⁶ Confidential submission no. 2.

⁶⁷ Housing Industry Association, submission no. 7, pp. 4-5

⁶⁸ Master Electricians Australia, submission no. 26, p.2

⁶⁹ M Tranfaglia, *Australian dream a nightmare for many labour hire employees*, The Conversation, webpage, 18 February 2015. Downloaded May 2016 from: <http://theconversation.com/australian-dream-a-nightmare-for-many-labour-hire-employees-37479>

⁷⁰ Confidential submission no. 22.

⁷¹ Queensland Nurses Union, submission no. 4, pp. 7-8; confidential submission no. 30

⁷² Housing Industry Association, submission no. 7, p. 9; CCIQ, submission no. 25, p.5

⁷³ Confidential, submission no. 22.

⁷⁴ Master Electricians Australia, submission no. 26, p.3

⁷⁵ Queensland Resources Council, submission no. 9, p.4

⁷⁶ Queensland Resources Council, submission no. 9, pp. 13-14

- In helping to sustain business operations, labour hire-related productivity improvements can also have significant flow-on effects on employment in regional communities and across related industry supply chains, including supporting existing direct hire jobs. The QRC and Master Electricians Australia emphasised that in the midst of a downturn in mining, labour hire arrangements may enable companies to continue to operate in regional areas where they may otherwise have had to close down, arrangements emphasised that a closed mine has no employment opportunities for directly, helping to sustain employment opportunities and continue to contribute to regional economic growth.⁷⁷
- Labour hire can also ease the management of risks associated with employment related expenses and liabilities and reduce administrative burdens.⁷⁸

Negative impacts of labour hire employment

A wide range of adverse consequences and risks are also associated with the use of labour hire employment. It has been identified that:

- Labour hire is underpinned by cutting labour costs and can be used to substitute an existing workforce with a cheaper workforce with lesser pay and conditions, and which is also more likely to be compliant due to the uncertain nature of their employment arrangements.⁷⁹
- While businesses may benefit from the reduced costs associated with labour hire employment, workers ultimately tend to receive lower hourly rates of pay and are unable to access entitlements available to permanent workers.⁸⁰ Inquiry submissions particularly pointed to increased use of enterprise bargaining agreements which fall outside typical award rates and may offer different standards of conditions. For example, labour hire workers at a particular site may be paid under a specific enterprise bargaining agreement, while their directly employed colleagues at the same site may be paid under a more recent, higher award or higher enterprise bargaining rate.⁸¹
- The increasing use of labour hire arrangements with poorer conditions on average is widening the gap between standard and non-standard workers (cast as insiders versus outsiders), at a time when insecure work arrangements are becoming more common. The heavy reliance on casual rather than permanent workers – often over the long term – largely negates the protection of unfair dismissal afforded to other employees.⁸² Further, this may have the effect of displacing other legitimate sources of labour and eroding employment rights and conditions.⁸³ The Anti-Discrimination Commission Queensland (ADCQ) has reported that some local people or other permanent residents in regional areas have raised concerns that local people would not be considered for employment by many labour hire operators, and that often it was extremely difficult or impossible for local people or other permanent residents of Australia to obtain temporary work in horticultural areas. One reason for this put forward to the ADCQ was that permanent residents had a better awareness of their employment rights, and would not tolerate

⁷⁷ Queensland Resources Council, submission no. 9, p.13; Master Electricians Australia, Submission no.26, pp.2-3.

⁷⁸ Knox, *Lost in translation: an analysis of temporary work agency employment in hotels*, 2010, p.452

⁷⁹ Queensland Nurses Union, submission no. 4, p. 9

⁸⁰ Dr Elsa Underhill, submission no. 36, p. 2

⁸¹ Queensland Nurses Union, submission no. 4, pp. 8-9

⁸² M Tranfaglia, *Australian dream a nightmare for many labour hire employees*, The Conversation, webpage, 18 February 2015. Downloaded May 2016 from: <http://theconversation.com/australian-dream-a-nightmare-for-many-labour-hire-employees-37479>; Queensland Nurses Union, submission no. 4, p. 9. See also AWU, submission no. 13, p.3; Queensland Council of Unions, submission no. 29, p.3

⁸³ Anti-Discrimination Commission Queensland, submission no. 3, p.5

the working conditions that were being offered by labour hire contractors, and therefore they were being excluded from the opportunity to work.⁸⁴

- The growth of unstable, non-regular patterns of work that characterise labour hire has implications for the living standards of these workers and their families, including limiting their ability to access loans and credit or plan for their futures.⁸⁵
- Ambiguities in the employment relationship pose a potential threat to occupational health and safety standards, with a lack of clarity over parties' specific responsibilities potentially serving to degrade workplace conditions and reduce protections for employees. Studies have particularly identified that labour hire workers are more likely to be injured at work than direct hire workers, and their workplace injuries underreported, with the obligation and ability to rehabilitate injured workers often limited (labour hire workers are less likely to have a specific work site to which to return for rehabilitation and return-to-work duties).⁸⁶
- Labour hire firms are less likely to invest in the training and development of staff, with opportunities for career advancement often limited within labour hire arrangements.⁸⁷
- Labour hire workers may have less of a "workplace voice" in the host's workplace than directly employed workers, may find it harder to join a union and may be excluded from collective bargaining about the conditions which apply to their work.⁸⁸
- Employees of labour hire companies have considerably less bargaining power and may be disinclined to speak out about their conditions largely out of fear for their employment.⁸⁹
- Low barriers to entry into the labour hire sector allow opportunistic operators to easily enter and work in an industry. Some labour hire suppliers are driven by price considerations to the detriment of compliance with workplace laws, with labour hire structures linked to instances of "phoenix" activity – namely, the transfer of assets of an indebted company into a new company (such as an associated labour hire entity operated by the same director/s), to evade tax, employment and other legal obligations.⁹⁰
- Submissions to the inquiry highlighted the scope for sham independent contracting arrangements to be engaged in labour hire arrangements, whereby the labour hire contractor claims that a worker is an independent contractor when they are in fact an employee, usually in an effort to avoid the responsibilities associated with having employees.⁹¹
- Anti-poaching agreements engaged by many labour hire companies mean that host employers are not able to transition a worker from temporary to permanent employment, limiting their opportunities for professional development or greater employment security.⁹²

⁸⁴ Anti-Discrimination Commission Queensland, submission no. 3, p.5

⁸⁵ Ms Julie-Ann Campbell, Industrial Officer, Australian Manufacturing Workers' Union, Transcript 11 May 2016, p. 25

⁸⁶ Queensland Nurses Union, submission no. 4, p. 9; Dr Elsa Underhill, submission no. 36, p.3

⁸⁷ Knox, *Lost in translation: an analysis of temporary work agency employment in hotels*, 2010, p.459; Queensland Nurses Union, submission no. 4, p. 9; Australian Manufacturing Workers' Union, submission no. 12, p.7

⁸⁸ Queensland Nurses Union, submission no. 4, p. 9

⁸⁹ Queensland Nurses Union, submission no. 4, p. 9

⁹⁰ Queensland Nurses Union, submission no. 4, p. 9

⁹¹ Queensland Nurses Union, submission no. 4, p. 9

⁹² Knox, *Lost in translation: an analysis of temporary work agency employment in hotels*, 2010, p.461

4. Social and economic impacts of labour hire

This chapter discusses the term of reference regarding consideration of the social and economic impacts, including on regional communities, of replacing permanent employees, apprentices and trainees with labour hire workers.

4.1 Economic impacts

The Committee heard evidence that, particularly in mining towns, the loss of permanent jobs for local workers has had a devastating impact on those towns and their once thriving communities.

The Committee was unable to obtain figures or statistics on the economic impacts of labour hire on regional communities. The Committee did, however, receive evidence with respect to how some towns consider that labour hire and the increased casualisation of the workforce has impacted their communities.

It is clear that the downturn in the mining industry has clearly had an impact and cannot be avoided when discussing employment in regional towns. However, the Committee has heard that some companies in the mining industry do not contribute to or integrate with the local communities and that some do not allow their workers to find accommodation in, or even shop in the local towns. Instead, those fly-in, fly-out or drive-in, drive-out workers are restricted to the camps run and serviced by the mining company which can house up to 1000 workers in some camps.⁹³

While the particular issue regarding the use of mining camps is outside the Committee's Terms of Reference as it does not relate to labour hire, it is clearly part of the wider discussion around how our regional towns are faring and the way in which mining companies can better contribute to their local communities. The Committee heard that amendments to the town planning processes in regional areas may go some way to addressing the issue of mining camps. This, however, is a matter for local governments to address.⁹⁴

This increased casualisation, the Committee heard, means that there is a loss of permanent jobs in regional towns. With fewer opportunities for permanent work in regional towns, locals cannot obtain secure, permanent employment and young people in the towns often move away to secure work, traineeships or apprenticeships in other regions. The Committee heard that locals in regional areas who secure work with mining companies, for example, are more often than not employed on a labour hire basis. The Committee heard that labour hire companies offer labour at a lower cost than that of permanent employees and this can lead to loss of permanent jobs, with those workers replaced by labour hire fly-in, fly-out workers.

⁹³ Much of the evidence received by the Committee around this matter was provided in private submissions and hearings. However, see Transcript 7 June 2016, pp. 2-7.

⁹⁴ With respect to this issue, the Committee also notes the Government response to recommendations of the Infrastructure, Planning and Natural Resources Committee in its Report no. 9, Inquiry into fly-in, fly-out and other long distance commuting work practices in regional Queensland, available at: <http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2016/5516T381.pdf>

Labour hire employees fearful of speaking out

The Committee heard that some workers are employed on a labour hire basis for several years in the same role. Due to the casual nature of their employment, many of the workers are afraid to complain about safety issues at work and are afraid to take sick leave for fear of losing their jobs. Some workers advised the Committee that they consider the labour hire industry to equate to a trade in humans to the convenience of the employers.

The Committee heard that there is less opportunity for the labour hire workers to engage in the negotiation of enterprise bargaining agreements. The Committee held private hearings in order to allow labour hire employees to discuss their concerns in this regard. At the hearings, the Committee heard that the Fair Work Commission approved a negotiated enterprise bargaining agreement in circumstances where the negotiation was hindered by the (unusual and unscheduled) movement without prior notice, of the relevant workers from one work site where the negotiation was scheduled to take place to another site where it was not. Another negotiation was scheduled to take place at the second work site and the workers were returned to the original work site prior to that negotiation commencing. They contend that these unscheduled movements were undertaken to deny those workers the ability to vote on their enterprise bargaining agreement. These workers felt that they are not effectively represented by the unions.

Previously, new permanent employees would often relocate to the local town, whereas now, labour hire employees consider they cannot risk moving to the town when the work is insecure.

Those that stay and accept the casual, labour hire work told the Committee that they cannot secure finance and loans for low value items such as household furniture, through to mid-range items such as cars, and up to mortgages. They are unable to buy a home as they are considered as a high risk borrower by banks and lenders.⁹⁵

Conversely, the Committee heard that in the horticulture industry in regional areas, the use of labour hire is vital and this industry would not survive without the ability to hire seasonal, short term workers on an as-needed basis. Additionally, the workers usually reside in farming communities and often contribute their tourism dollars to those economies.

However, the rogue operators in the horticulture industry, in particular, may have a detrimental impact on the reputation and potentially tourism in regional areas, due to the negative reviews and information provided through social media by workers who were exploited.

I think it is important to say up-front that the labour hire companies are very important to many of our growers. They are actually really useful in that there is a high administrative burden in terms of the turnover. We have some farms that employ up to 400 backpackers in a season on fairly short turnaround times. Having a labour hire company to handle all the administration is obviously a huge benefit in terms of efficiency. It means that the farmer can get on with farming, but we do understand that there are significant problems.

Growers have responsibilities in this area to do the due diligence around rogue labour hire companies. We are acutely aware of the unfortunate reputation that our industry is getting as a consequence of perhaps the activities of less than honourable labour hire companies.⁹⁶

⁹⁵ Much of the evidence received by the Committee around this matter was provided in private submissions and hearings. However, see Transcript 11 May 2016, p. 25; Transcript 7 June 2016 p. 2-7; and Transcript 8 June 2016, p. 11.

⁹⁶ Ms Rachel Mackenzie, Chief Advocate, Growcom, Transcript 11 May 2016, p. 6.

4.2 Social impacts

With fewer people in regional towns, there are fewer children in local schools, resulting in less funding available for the schools and they often close. As a result, children in affected towns must either board at schools in other areas or commute long distances to the nearest schools.

Fewer people in the towns also means that there is less money to keep the economy going. The Committee heard that in Blackwater many shops have closed as the businesses could not survive the lack of patronage, despite thriving in previous years. This has resulted in fewer jobs in industries other than that of the main employer in the town.

Fewer people buying properties and homes in the towns means that locals struggle to sell their homes and may have negative equity in their home if they bought it during the mining boom, when property was in demand.

The Committee heard that social impacts include less participation in local community associations, such as sporting clubs. Labour hire workers told the Committee that they cannot afford to take sick days as they fear they will lose their insecure work with no notice. Due to this job insecurity, they cannot afford to risk injury and no longer participate in their local sporting clubs. The Committee heard that this has resulted in the closure of adult sporting clubs in some towns.

Witnesses considered that some of the social and economic impacts of the reduction in permanent workers in their mining towns could be offset if the mining companies contributed more to the towns where their mines are based. They could allow their workers to integrate in the towns, thereby contributing to the local economy.

The Committee heard that the impacts extend to children's sporting and other community groups too, as there are fewer adults in the town to manage and run these groups.

5. Allegations of poor conduct of some labour hire companies

This chapter considers the evidence received by the Committee regarding allegations of the poor conduct of some companies. It is clear that some labour hire companies comply with the law and provide dedicated and professional employment opportunities for their employees, with appropriate entitlements and conditions.

However, the Committee has received evidence including allegations of poor conduct by a proportion of the companies employing and supplying labour hire workers.

This chapter covers the following terms of reference:

- phoenixing, under-capitalisation and undercutting of conditions by labour hire companies and their impact on the labour market and business
- allegations that labour hire and sham contracting are being used to avoid workplace laws and other statutory obligations, such as:
 - underpayment of wages and entitlements, including superannuation, and
 - avoidance of payroll tax and Workcover premiums
- whether tendering and employment practices create an uneven playing field for competing businesses, and
- allegations of exploitation, harassment and other mistreatment of workers employed by companies.

5.1 Phoenixing, under-capitalisation and undercutting of conditions by labour hire companies and their impact on the labour market and business

Phoenixing

Phoenixing is the term used to describe the deliberate and systematic liquidation of a corporate trading entity which occurs with the fraudulent or illegal intention to:

- avoid tax and other liabilities, such as employee entitlements
- continue the operation and profit taking of the business through another trading entity.⁹⁷

It is essentially a business that ceases to exist in order to avoid certain responsibilities, such as worker payments and entitlements, often being “re-born” as a new company with the same directors but a new trading name and under a new Australian Business Number (ABN).

A 2012 report on phoenixing activity commissioned by the Fair Work Ombudsman (FWO) found that phoenix activity has a range of impacts on the Australian economy including employees losing entitlements including superannuation, businesses pay for goods and services they will not receive, or have outstanding debts owed by the phoenix company. It also found impacts on government revenue from those companies failure to pay tax debts.⁹⁸

The 2012 report noted the difficulty in quantifying the impacts of phoenix activity and estimated that it costs between \$1.78 and \$3.19 billion per year.⁹⁹

The Committee received evidence that phoenixing is a common issue within the horticulture industry. Labour hire companies can be established with little capital and begin trading immediately using social media to attract employees and can vanish just as quickly leaving employees out of pocket regarding wages, superannuation etc.¹⁰⁰

The report found that, as the Australian Securities and Investment Commission (ASIC), Australian Taxation Office (ATO) and FWO have responsibilities in investigating and monitoring elements of phoenix activity, a whole of government approach is necessary to ensure coordination and information sharing between the relevant agencies. The report noted that in suggesting cross agency actions it is essential that:

- the different responsibilities of the agencies are recognised
- the different levels of resources available to combat phoenix activity of each agency are recognised.

With respect to identifying phoenix activity, the OIR advised the Committee that:

WorkCover has quite sophisticated data-matching techniques. It also liaises with the Australian tax office and so on, so we are able to compile quite a good picture of companies. In Queensland our definition of ‘worker’ is the PAYG test, so it is much easier to pick up a very broad range of people for workers compensation policies. What I am saying is that they have good intelligence to monitor the performance of these companies and they do have the power, where they believe a phoenixing arrangement has occurred, to impose a higher rate of premium rather than the labour hire industry average rate.

⁹⁷ Fair Work Ombudsman, Phoenix Activity, Sizing the problem and matching solutions, (PriceWaterhouseCooper commissioned report), June 2012, at p. 7.

⁹⁸ Fair Work Ombudsman, Phoenix Activity, Sizing the problem and matching solutions, (PriceWaterhouseCooper commissioned report), June 2012, at pp. 27-28.

⁹⁹ Fair Work Ombudsman, Phoenix Activity, Sizing the problem and matching solutions, (PriceWaterhouseCooper commissioned report), June 2012, at p. 15

¹⁰⁰ See for example Transcript 11 May 2016, p. 14 and p. 35; Transcript 6 June 2016, p. 10.

...the average premium rate paid by labour hire employers at the moment is \$1.39 per \$100 of wages paid, compared to the scheme average of \$1.20 per \$100 of wages paid. For me, that someone is at the average rate or below it in their industry sector indicates that their injury rate is reasonably good compared to others in comparable sectors. In that sense, if they are having fewer injuries then they would be a good performer from a workers compensation perspective.¹⁰¹

Dr Elsa Underhill noted the difficulties in enforcing obligations when companies can simply cease to exist.

I also think it is almost impossible to enforce obligations if companies can simply disappear, which is often a characteristic when you have phoenix companies. I think realistically it is impossible to eliminate them altogether, but if you at least impose some system that requires them to be registered and the contractor that is using them or the host that is using them to also be obliged and to be penalised if they do not use registered companies then you go some way to get stability and to create a bit of a barrier to the phoenix operations. I suspect there is an issue around having the directors of one operation being able to close down and then set up another, but you would expect that to be picked up through testing of the suitability of people to run labour hire companies.¹⁰²

Committee Comment

The Committee condemns rogue operators who cease their operations in order to avoid their obligations as employers. It is often the workers who lose out on payment of their wages and associated entitlements, such as WorkCover, etc.

Undercapitalisation and undercutting conditions

The Committee heard that a good labour hire company will visit the proposed work site and ensure that the conditions are safe and appropriate for their workers; will pay them award rates of pay or above (with pay-slips); will comply with their obligations regarding WorkCover and tax, etc.; and provide information on the employer's obligations and the rights for the worker and will provide contact details for complaints and other support as needed.

A 2002 report on labour hire in Australia found that, in many cases, labour hire workers appear to be lowly paid, or paid less than prevailing award or EBA standards or less than permanent workers performing the same work in the same company. They are also more likely to have poorer conditions than permanent workers.¹⁰³

However, the Committee has heard that some companies have insufficient capital to provide the basic entitlements to their workers. This often leads to undercutting costs and submitting tenders below to clients to maintain a profit. The undercutting of costs usually leads to lesser conditions for their employees.

The Committee has heard that undercutting conditions of labour hire workers can include:

- pay rates lower than the award rate
- unsafe working conditions including:
 - long hours with little breaks

¹⁰¹ P Goldborough, Executive Director, Workers' Compensation and Policy Services, Workplace Health and Safety Queensland, Office of Industrial Relations, Queensland Treasury, Transcript 24 February 2016, p. 4

¹⁰² Dr E. Underhill, Transcript 11 May 2016, p. 35

¹⁰³ Hall, R. *Labour hire in Australia: Motivation, Dynamics and Prospects, Working Paper 76*, University of Sydney, April 2002, p.11.

- requiring work in wet / hot conditions where normally work would be halted
- unsafe conditions which can lead to injury
- non-payment of superannuation
- non-payment of tax
- non-payment of workers' compensation premiums

The Committee has heard that some host companies, the clients of labour hire companies, are not blameless and are aware that the amount they pay for the contract they enter into with such labour hire companies cannot possibly mean that the workers are getting the award rate of pay and must be aware of the other undercutting of conditions.¹⁰⁴

The ADCQ noted that people often don't look for the information they need until they run into trouble. The ADCQ advised that a coordinated approach is necessary to collate the relevant information to make it easier for workers to understand their rights:

*I think the issue that does not require legislation but does require cooperation between the state government agencies and the Commonwealth agencies is that simple compilation of the material. The people who are working on the ground out in the growing areas with the young people have great difficulty, even being well-educated Australians, trying to find the relevant information in all the different areas that are applicable to this area of employment and industry. Even when we have coordinated committees together trying to get a grip on all the different legislation, all the different overlap and all the different issues, it has taken public servants quite a deal of challenge to get it together.*¹⁰⁵

Some submitters consider that the host client should take responsibility for the conditions of the labour hire workers through a requirement that the labour hire company they contract with is fit and proper.¹⁰⁶

5.2 Sham contracting

As noted elsewhere in this report, a labour hire worker is defined as an employee who is employed by a labour hire company and is placed with, and is under the direction and control of, a host company.

Independent contractors are defined as people who operate their own business and who are contracted to provide labour type services for others without having the legal status of an employee, i.e. people who are engaged by a client, rather than an employer to undertake the work. Independent contractors are engaged under a contract for services (a commercial contract), whereas employees are engaged under a contract of service (an employment contract). Independent contractors' employment may take a variety of forms, for example, they may have a direct relationship with a client or they may work through an intermediary. Independent contractors may have employees, however they spend most of their time directly engaged with clients or on client tasks, rather than managing their staff.¹⁰⁷

A report on sham contracting noted a call for the creation of a new category of worker which would identify those workers who sit somewhere between the traditional employment and independent contractor: "It has been suggested that this category, sometimes termed 'dependent contractor',

¹⁰⁴ See for example Luke Casey, Agrilabour, Transcript 9 June 2016, p. 10.

¹⁰⁵ Neroli Holmes, Deputy Anti-Discrimination Commissioner, ADCQ, Transcript 11 May 2016 at p. 2.

¹⁰⁶ This was often recommended in evidence calling for the introduction of a licencing system. See for example NUW, submission no. 32 and Dr Elsa Underhill, submission no 36.

¹⁰⁷ Australian Bureau of Statistics, ABS 6359.0 – Forms of Employment, Australia, November 2013

attempts to reflect the relation of dependency between the person providing the service and the person acquiring the service (CFMEU, 2011:55)".¹⁰⁸

Sham contracting is defined in that report as:

At the core of all approaches to 'sham contracting' is the basic idea that legal forms are manipulated to create situations where parties substantively engaged in an employer-employee relationship have their situation contrived so as to take on the formal appearance of 'contractor' selling a service to a 'purchaser', who can be either a builder, head contractor, or sub-contractor. In some instances, 'sham contracting' is done to disguise, evade, or shift the legal obligations and responsibilities associated with workers who would otherwise have 'employee' status. 'Sham contracting' is particularly egregious where the cost of the transfer of risk and entitlements are not compensated.¹⁰⁹

The OIR advised the Committee that:

In relation to an industrial relations employment arrangement, sham contracting is traditionally one where the proper employer-employee relationship—which has obligations and rights attached to it—is somehow disguised or purported to be something other than that, and that is normally one of independent contractor. In terms of the employment relationship, it attempts to strip away many of the worker's rights and obligations...

The FWO is the responsible authority for investigating allegations of underpayment, including allegations of sham contracts.

In March 2016 a fruit and vegetable farming operation was penalised \$60,000 for underpaying workers to the tune of \$19,000 by creating a labour hire scheme which traded workers between contractors when they reached 40 hours of work, to avoid overtime payments. This followed legal action taken by the FWO in January 2016 in relation to a Queensland man and his company for the alleged exploitation of 22 workers recruited from Vanuatu under Australia's Seasonal Worker Program, including underpayment of \$77,649 in wages and denial of leave entitlements, among other breaches.¹¹⁰

As is clear from the terms of reference, sham contracting is used by some employers to avoid workplace laws and other statutory obligations, including obligations around wages and entitlements, including superannuation and to avoid their obligations around payroll tax and WorkCover premiums.

The ATO provides an ABN for people who want to operate a business. The ATO website states that to be entitled to an ABN a person must:

- be able to demonstrate that your business structure is in place or
- be carrying on an enterprise in Australia or
- in the course of carrying on an enterprise make supplies connected with the indirect tax zone or
- have undertaken sufficient activities to commence an enterprise or
- be a company under the *Corporations Act 2001* (Cth).

¹⁰⁸ Rafferty, M., Wright, S., Chan, S., Fattore, T., and Schutz, H, *Contracting Arrangements on the Qld construction industry, Exploring factors that may give rise to 'sham contracting*, University of Sydney business school, Workplace Research Centre, August 2011, at p. 15.

¹⁰⁹ Ibid, at p. 4.

¹¹⁰ Fair Work Ombudsman, '[Queensland labour hire operator allegedly underpaid overseas workers \\$77,000](#)', Media release, 13 January 2016 (accessed April 2016).

Importantly, the ATO advises that apprentices, trade assistants, labourers and other types of employees are not entitled to an ABN.¹¹¹

The Committee received evidence that sham contracting is being used regularly by some labour hire companies in order to avoid obligations. The Committee heard that this includes labour hire companies requiring workers to have an ABN before they will employ them. Those workers will then be taken on as contractors, rather than employees of the labour hire company. The Committee heard that overseas visitors on working holiday visas are often able to obtain an ABN in order to secure work with some companies. This is despite the ATO's advice that in order to obtain an ABN a person must show that they have a business structure in place.¹¹² The ATO also provides information on how you can determine whether a person is an employee or a contractor.¹¹³

An employee, incorrectly defined as a contractor, is responsible for their own superannuation payments and tax payments, and do not receive entitlements such as annual leave, sick leave etc from the labour hire company.

Conversely, the Committee also heard that in some industries, independent contractors do use labour hire companies to secure work, for example the building industry where qualified trades people move from different building projects as they are required.¹¹⁴

Some submitters stated that in order to remove sham contracting, the clients of the companies need to take responsibility to ensure that the labour hire company they contract with to provide the labour hire workers is acting appropriately.¹¹⁵

Recommendation 1

The Committee recommends that the Minister progress this issue through COAG meetings to work together with the Federal Government to address the issuance of ABNs to employees as a way for labour hire companies to avoid their employer obligations.

Partnerships – sham contracting?

The Maritime Union of Australia (MUA) and the Australian Institute of Marine and Power Engineers (AIMPE) consider that increasing practices in the maritime industry of using partnerships in lieu of the traditional employer/employee arrangements amount to sham contracting. The AIMPE considers that the use of the partnerships is an attempt to reduce conditions of employment in that industry and to avoid employer obligations.¹¹⁶

The AIMPE advised that the partners have no control over the service provided and contribute no capital or assets to the partnership. These are provided by the principal; the partner's only responsibility is the provision of labour.

The MUA and the AIMPE call for an amendment of the *Partnerships Act 1891* to ensure that employers cannot require their employees to enter into a partnership with the employer in order to avoid enterprise bargaining agreements, modern awards, and taxation, superannuation and safety liabilities.¹¹⁷

¹¹¹ See <https://abr.gov.au/For-Business,-Super-funds---Charities/Applying-for-an-ABN/ABN-entitlement/>

¹¹² See for example Transcript 11 May 2016, p. 7.

¹¹³ See <https://www.ato.gov.au/Business/Employee-or-contractor/How-to-determine-if-workers-are-employees-or-contractors/Difference-between-employees-and-contractors/>

¹¹⁴ HIA, submission no 7, pp. 3-7; Transcript 11 May 2016, p. 6.

¹¹⁵ Mr Craig Pollard, Executive Director, Building Service Contractors Association of Australia, Queensland Division, Transcript 11 May 2016, p. 6

¹¹⁶ AIMPE, submission no. 21, p. 5

¹¹⁷ AIMPE, submission 21, p. 5 and Transcript 8 June 2016 at pp. 7-8; MUA Transcript 9 June 2016 pp. 6-8.

The AIMPE considers that s. 5 of the *Partnerships Act 1891* could be amended to expressly prohibit partnerships which are formed with the purpose to avoid or circumvent any obligations or duties imposed on an employer by the *Fair Work Act 2009* (Cth) or other Queensland legislation. The AIMPE also considers that an express new provision in that Act (a new section 65A) is required to create an offence (with penalties for contravention) for the creation of sham partnerships – defined as a partnership which has as a purpose, whether stated or not, to avoid or circumvent obligations or duties of employers in Commonwealth or State employment legislation. The effect of the proposed new section would be to void the partnership.

5.3 Whether tendering and employment practices create an uneven playing field for competing businesses

The Committee heard that labour hire companies who comply with their obligations as employers and who want to provide a good working environment for their employees find it increasingly difficult to compete with businesses who undercut conditions of workers in order to provide their workers at lower cost.

The Committee heard that companies regularly face undercutting of their tender for a contract, particularly in the horticulture industry, from companies who are happy to pay their workers under-award rates in order to secure contracts with farmers. As noted above, this undercutting of costs results in lesser pay and conditions for the labour hire workers. Companies who are compliant and want to provide appropriate conditions for their employees have advised that they cannot meet these tenders as to do so would not allow them to provide the workers and meet the minimum standards set by the Modern Awards.

The Committee heard that this practice is not isolated to lower paid industries such as the horticulture industry and is even occurring in different levels of government in Australia. The RCSA advised:

We continually see procurement organisations coming in and actually doing a cost down-pressure upon the third-party workforce service providers, without any recognition of the impact it actually ultimately has and how that risk could ultimately be transferred onto the worker themselves. It is all good to reduce costs for government—local, state, federal—and enterprise more generally, but at some point in time we need to accept that that downward price pressure gets at some point passed down to the compliance levels within organisations and those who are not big enough and sophisticated enough to say, ‘We cannot’—and I think it goes back to your point, Mr Pegg—‘provide services at \$20. One, we cannot meet our legal obligations and, two, you will then also be an accessory to that noncompliance piece.’ We have seen that with Coles and the shopping trolley collectors and we support that.¹¹⁸

Several submitters suggested, as noted above, that the host employer should hold some responsibility to ensure that the labour hire company they engage is providing workers who enjoy the minimum standards.¹¹⁹ Conversely, the Committee heard that to make host employers responsible for this would negate the purpose of outsourcing the recruitment etc. to a labour hire company in the first place and would place an unnecessary burden on small businesses.¹²⁰

¹¹⁸ RCSA, Transcript 11 May 2016 at p. 16.

¹¹⁹ See for example Transcript 11 May 2016 – Growcom, p. 6; Building Service Contractors Association of Australia, Queensland Division, at pp. 7, 10; Dr Elsa Underhill, at p. 35.

¹²⁰ See for example Growcom evidence that some labour hire engagements are short term and employ many workers for a short time, and that in some instances, while the growers do comply and pay reasonable rates for labour hire employees, sometimes the labour hire company does not pass on the proper wages – Transcript 11 May 2016 p. 9-11.

5.4 Allegations of exploitation, harassment and other mistreatment of workers employed by companies

The Committee received evidence during the Inquiry of serious mistreatment and exploitation of workers. While allegations of this kind are not widespread throughout all industries, the evidence presented to the Committee suggests action is required in the horticulture and other low paid industries such as meat processing and cleaning. It appears from the information received by the Committee that vulnerable workers, overseas workers in particular, are employed in these areas and can be manipulated and mistreated by unscrupulous companies.

The Committee received evidence regarding mistreatment of workers including:

- sexual harassment and behaviour including requesting or requiring sexual favours in order to obtain or maintain work
- poor treatment of vulnerable workers who don't want to complain for a variety of reasons, including needing to have the employer sign off on the requirements to obtain a second year working holiday visa, or for cultural reasons may not be likely to complain
- requiring workers to reside in, often overcrowded and substandard, accommodation at a price much higher than would be achieved on the rental market (e.g. the worker is required to pay \$150 per week for a shared room in a house with numerous other workers, where rental income could be as much as \$600 per week for a rental property that would normally achieve around \$300 per week on the rental market)
- employers requiring labour hire workers to use the employer's transport, at a cost which is deducted from their pay, often without complying with the relevant transport legislation¹²¹
- employers holding workers' passports, effectively trapping them
- a lack of provision of safety equipment and appropriate training
- failure to provide pay slips and pay tax, allowing workers to work outside the tax system and therefore "off the books"
- paying lower than a minimum wage, not paying workers, holding payment for spurious reasons e.g. alleged damage to the accommodation.¹²²

The Committee received evidence that it is often difficult for these abuses to be properly investigated due to the transient nature of workers. Often, where a complaint is made to an appropriate body such as the police or the FWO, the matter cannot be progressed due to a lack of evidence or due to the fact that the complainant has moved on.

At the HWIG meeting in Bundaberg on 27 April 2016, the Queensland Police Service (QPS) highlighted that foreign labour hire workers can be overrepresented as both victims and offenders due to a lack of education about laws, requirements and rights. This correlates with evidence received by the Committee to the effect that vulnerable overseas workers are often exploited by labour hire companies.

The QPS' Project Valise commenced in August 2015 to target the wellbeing of working holiday and tourist visa holders. It promotes personal safety measures (lock up valuables, etc.), road safety awareness (including education on restrictions on the operation of any vehicles or machinery while

¹²¹ Current transport legislation requires that community or courtesy transport operations comply with particular requirements, including criminal history checks, monitoring of operator accreditation and six-monthly vehicle inspections. The purpose of a vehicle's use must also be correctly stated on its registration. Compliance checks and activities are conducted by Translink.

¹²² See for example ADCQ, submission no 3, Margaret Cole, submission no. 5, AMWU, submission no. 12, and NUW, submission no. 32

under the influence of alcohol or drugs), and encouraging reporting of crimes (including sexual harassment and abuse of workers, etc.). Language and cultural barriers present significant obstacles to the recognition and reporting of a crime, with levels of distrust of police high among many groups. Project Valise has six cultural liaison officers speaking a variety of languages and has produced awareness materials in a wide range of foreign languages.

The QPS is also working with the FWO to provide one-stop shops for workers and accommodation providers where particular regional vulnerabilities have been identified (including in Caboolture, Warwick, Gatton, Stanthorpe and the Tablelands Regional Council area). A working holiday victim support group is also in operation, and the QPS is operating a Facebook page where workers can report crimes or informally discuss options with cultural support staff. Social media has been identified as the preferred medium of communication for these workers, as they do not necessarily wish to talk to officers in person. Officers have identified these mediums as offering a more approachable avenue for communication or reporting as opposed to more traditional avenues, which can have connotations of a very serious and imposing authority.

The Committee also heard from individuals who provide support in regional towns. In Gatton, the Committee heard from Margaret Cole who advised the Committee that, in that region, it is widely known which operators will provide employment called “black work” which is off the books and cash in hand to avoid visa conditions, together with below minimum working conditions including pay, tax, superannuation, health and safety, etc.¹²³

The ADCQ works to provide information, in several languages, to labour hire workers on their rights and entitlements and on where they can seek help when they need it. The ADCQ calls for an application (app) that can pull together the relevant information for migrant workers on working rights and entitlements including consular contact details so they can seek assistance when they need to.¹²⁴

The Committee heard that while such mistreatment is acknowledged, it is not widespread in all industries. A large proportion of labour hire workers are skilled professionals and are able to negotiate good working conditions with their employer. As such, those workers are not vulnerable to the behaviour outlined above. Some submitters consider that a response to the issues outlined above will not be necessary for a wide range of employers and employees in the labour hire industries.¹²⁵

6. The current regulatory landscape

This chapter covers the terms of reference:

- consideration of the effectiveness of enforcing current industrial relations laws and instruments, occupational health and safety laws and workers’ compensation laws in the labour hire industry, and
- the regulation of labour hire in Australian jurisdictions and internationally and effective enforcement mechanisms, including bonds, licensing, registration and other forms of compliance.

¹²³ Margaret Cole, submission no 5, and Transcript 6 June 2016, pp. 14-16.

¹²⁴ ADCQ, Transcript 11 May 2016, p. 2

¹²⁵ See for example RCSA, Transcript 11 May 2016, at p. 15, RCSA submission no. 36, at p. 14. See also Brennan, L. Valos, M. and Hindle, K. (2003) *On-hired Workers in Australia: Motivations and Outcomes RMIT Occasional Research Report. School of Applied Communication, RMIT University, Design and Social Context Portfolio Melbourne Australia* which found that around 61% of RCSA on-hire employees are skilled or professional workers.

The regulatory landscape regarding labour hire employers and employees is spread across Commonwealth, State and Local Government jurisdictions. It is administered through separate and diverse regulatory agencies within each tier of Government.¹²⁶

This issue is complex and covers a range of matters including different levels of regulation, differing responsibilities between employers and host companies, migration issues and business needs. Labour hire agencies are not regulated by any specific piece of legislation regarding employment. As employers they are regulated by the Commonwealth's *Fair Work Act 2009* and by other laws that place obligations on employers.¹²⁷

The Commonwealth regulates private sector employment (including through the Fair Work Commission and FWO, taxation (Australian Tax Office), migration (Department of Immigration, Australian Federal Police) and border protection (Border Patrol).

The State is engaged through workplace health and safety, workers' compensation, police, fire and emergency services, and electrical safety (workplace training requirements and procedures etc.).

At a local government level, councils are engaged through regional planning laws around dwelling standards and policies to facilitate community cohesion.

6.1 Industrial relations laws - Commonwealth

The *Fair Work Act 2009* (Cth) (the FWA) covers most employees across both the public and private sector. The main features of the FWA are detailed below.

National Employment Standards

The National Employment Standards (NES), set out in the FWA, provide minimum entitlements:¹²⁸

- 38 hour maximum working week, plus reasonable additional hours (ss. 62 – 64)
- Entitlement to request flexible working arrangements (ss. 65 – 66)
- Parental leave and entitlements (ss. 67 – 85) (s. 67 – must be long term casual employee)
- Annual leave of four weeks per year plus an additional week for some shift workers (ss. 86 – 94) (does not apply to casual employees – s. 86)
- Personal/carer's leave and compassionate leave (ss. 95 – 107) (does not apply to casual employees – s. 95)
- Community service leave (ss. 108 – 112)
- Long service leave (ss. 113 – 113A)
- Public holidays (ss. 114 – 116)
- Notice of termination and redundancy pay (ss. 117 – 123) (does not apply to casual employees)
- A requirement that a Fair Work Information Statement be provided to all new employees which contains information about the NES and other matters under the FWA (ss. 124 – 125).

The NES do not apply to all casual employees. Some of the NES only apply to long term casual employees, defined in the FWA as:

¹²⁶ Queensland Treasury, Office of Industrial Relations, Briefing to the Finance and Administration Committee, February 2016, <http://www.parliament.qld.gov.au/documents/committees/FAC/2015/I5-LabourHire/I5-bp-25Feb2016.pdf>

¹²⁷ Mr Tony James, Executive Director, Industrial Relations Policy and Regulation, Office of Industrial Relations, Queensland Treasury, Public Briefing Transcript 24 February 2016, p. 6

¹²⁸ See *Fair Work Act 2009* (Cth) Part 2-2, ss. 59 - 131

Long term casual employee: a national system employee of a national system employer is a long term casual employee at a particular time if, at that time:

- a) the employee is a casual employee; and*
- b) the employee has been employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months.¹²⁹*

The FWO advises that, with respect to casual workers:

However, only certain NES entitlements apply to casual employees, which are:

- two days unpaid carer's leave and two days compassionate leave per occasion*
- maximum weekly hours*
- community service leave (except paid jury service)*
- to reasonably seek a day off on a public holiday*
- provision of the Fair Work Information Statement.*

In addition, casual employees who have been employed for at least 12 months by an employer on a regular and systematic basis and with an expectation of ongoing employment are entitled to:

- make requests for flexible working arrangements*
- parental leave.¹³⁰*

Modern awards

Modern awards cover industries or occupations. The Fair Work Commission states that modern awards “provide a safety net of minimum pay rates and employment conditions. Awards are used as the benchmark for assessing enterprise agreements before approval. The Fair Work Commission is responsible for making and varying awards in the national workplace relations system”.¹³¹

Following the commencement of the FWA, the Australian Industrial Relations Commission consolidated most awards into industry or occupation categories. The modern awards set minimum entitlements, incorporating the NES. Transitional arrangements allowed 5 years for affected employers and employees to move into the new award system. In its background paper, the Victorian Inquiry into the Labour Hire Industry and Secure Work states:

Modern awards do not apply to independent contractors (again, except for TCF outworkers). Further, many award entitlements do not extend to casual employees. However, some modern awards provide a right for casual employees to request to become ongoing employees after a specified period. There is no specific modern award applying to labour hire employment. Rather, a labour hire employee will be covered by the award relevant to the type of work they are performing for the host organisation (e.g. if working in the construction industry, the Building and Construction General On-Site Award 2010 will apply).

¹²⁹ Fair Work Act 2009 (Cth), s. 12.

¹³⁰ Fair Work Ombudsman, Introduction to the National Employment Standards, available: <https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/minimum-workplace-entitlements/introduction-to-the-national-employment-standards>

¹³¹ See <https://www.fwc.gov.au/awards-and-agreements/awards>

Enterprise Agreements

An enterprise agreement is an agreement between an employer and employees detailing matters such as wages and conditions of employment. Employees must be better off under an enterprise agreement than they would be under the relevant modern award.

Enterprise agreements must include agreements on:

- terms about the relationship between each employer and the employees covered by the agreement
- terms about the relationship between each employer and any employee organisations (e.g. a trade union) who will be covered by the agreement
- deductions from wages for any purpose authorised by an employee covered by the agreement
- how the agreement will operate.¹³²

Labour hire employees, when placed with a host employer, are not generally covered by the enterprise agreement between the host employer and its direct employees. Some enterprise agreements however may contain clauses which extend the agreement to independent contractors or labour hire workers who work for the host employer.

Some enterprise agreements also contain agreements regarding the use of labour hire and the job security of direct employees. The Productivity Commission recently stated that “There are grounds for changes to the *FW Act* to limit the capacity of agreements to regulate the use of contractors and labour hire (which are in any case, in spirit, contrary to the *Competition and Consumer Act 2010 (Cth)*)”.¹³³

Fair Work Commission

The Fair Work Commission is an independent body with power to carry out a range of functions including:

- providing a safety net of minimum conditions, including minimum wages, in awards
- facilitating good faith bargaining and the making of enterprise agreements
- granting remedies for unfair dismissal
- regulating the taking of industrial action
- resolving a range of collective and individual workplace disputes through conciliation, mediation and in some cases arbitration, and

¹³² An enterprise agreement must contain terms regarding:

- a nominal expiry date for the agreement (this must be no longer than four years from the date the Fair Work Commission approves the agreement)
- an independent dispute settlement procedure
- individual flexibility arrangements (IFA) which allow a variation to the enterprise agreement to meet the genuine needs of the employer and employees consultation by the employer with employees about any major workplace changes (in the absence of a consultation term, the model consultation term will apply).

See Fair Work Ombudsman website, <https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/rights-and-obligations/enterprise-bargaining#enterpriseagreement>

¹³³ Productivity Commission, *Workplace Relations Framework, Productivity Commission Inquiry Report*, November 2015, vol. 2, p. 685, available at: <http://www.pc.gov.au/inquiries/completed/workplace-relations/report>

- functions in connection with workplace determinations, equal remuneration, transfer of business, general workplace protections, right of entry and stand down.¹³⁴

The Commission's key objectives and functions are set out in s. 577 of the FWA. The work of the Commission is carried out by Commission Members with the support of administrative staff.¹³⁵

The FWA provides that the Commission must perform its functions and exercise its powers in a manner that:

- a) is fair and just, and
- b) is quick, informal and avoids unnecessary technicalities, and
- c) is open and transparent, and
- d) promotes harmonious and cooperative workplace relations.¹³⁶

Fair Work Ombudsman

The Fair Work Ombudsman (FWO) is an independent statutory office. Its jurisdiction is set out in the FWA and it provides free services to workers and employers in Australia. Its main role is to:

- promote harmonious, productive and cooperative workplace relations
- ensure compliance with Australian workplace laws
- monitor certain 457 subclass visa arrangements.¹³⁷

With respect to labour hire, the Workplace Ombudsman initiated a three-year "National Harvest Trail Project" to explore the reasons for continued non-compliance with Federal workplace laws within the horticulture industry, by investigating the factors and causes at both a national and local level.

Other Federal legislation

Other federal legislation that applies to the labour hire industry includes:

- The *Independent Contractors Act 2006* (Cth) limits the ability of the States to legislate for minimum rights etc covered by this federal legislation
- The *Migration Act 1958* (Cth) deals with migrants and temporary workers under the visa system and contains penalties for employers, including labour hire employers, where they employ people in breach of the visa conditions
- The *Superannuation Guarantee (Administration) Act 1992* (Cth) requires employers to provide a minimum of 9.5% Superannuation contribution to employees
- The *Tax Administration Act 1953* (Cth) deals with taxation of employees' income by employers, and taxation arrangements for contractors.

6.2 Industrial relations laws – Queensland

Under the *Industrial Relations Act 1999* (Qld), "employer" is specifically defined to include labour hire agencies.¹³⁸

¹³⁴ See *Fair Work Act 2009* (Cth), s. 576 and <https://www.fwc.gov.au/at-the-commission/overview>

¹³⁵ See <https://www.fwc.gov.au/at-the-commission/overview>

¹³⁶ *Fair Work Act 2009* (Cth), s. 577

¹³⁷ See <https://www.fairwork.gov.au/about-us/our-role>

¹³⁸ *Industrial Relations Act 1999* (Qld), s. 6(2)(d).

The *Private Employment Agents Act 2005* (Qld) provides for a code of conduct as the main way of regulating the conduct of private employment agents in their relationships with people looking for work or for workers. The relevant code of conduct is set out in the Private Employment Agents (Code of Conduct) Regulation 2015 (Qld), which commenced on 1 September 2015.¹³⁹

Labour hire companies are excluded from the application of the *Private Employment Agents Act 2005*, and the code of conduct, on the basis that the labour hire company is responsible for performing the obligations owed by a person to the worker, including paying the worker for the work.

6.3 Queensland work health and safety laws

The *Work Health and Safety Act 2011* (Qld) (WHS Act) requires a person conducting a business or undertaking to ensure, so far as is reasonably practicable, the health and safety of their workers while at work in the business or undertaking. The WHS Act defines “worker” to mean a person who carries out work in any capacity for a person conducting a business or undertaking, including work as an employee of a labour hire company who has been assigned to work in the person’s business or undertaking. Obligations under the WHS Act relating to the safety of a workplace extend to both the labour hire agency and their client, as the host employer. A labour hire agency cannot ‘pass on’ its legal duty, regardless of whether the host employer may agree to this.

Workplace Health and Safety Queensland (WHSQ) provides a guide, *Labour hire agencies: Managing the safety of on-hired workers*, which outlines the workplace health and safety duties of labour hire agencies.¹⁴⁰ Although labour hire agencies generally do not have direct control or management of the workplaces their employees are assigned to, their duty remains as an employer to their on-hired workers. Accordingly, they have a duty to take action to establish that the workplace and its operations are safe before workers are placed with a client, and to continue to monitor workers’ safety for the duration of their placement.

The *Queensland Building and Construction Commission Act 1991* (Qld) and the Queensland Building and Construction Commission Regulation 2003 (Qld) require all persons carrying out building work to be appropriately licensed. This requirement can apply to labour hire businesses when they carry out building work.

The Queensland Building and Construction Commission (QBCC) provides a licensing information statement, which discusses the licensing requirements relating to labour hire businesses.¹⁴¹ A labour hire business that fails to comply with these requirements may not be entitled to payment, and may be prosecuted by the QBCC.

The *Electrical Safety Act 2002* (Qld) (the ES Act), the Electrical Safety Regulation 2013 (Qld) and four electrical safety codes of practice,¹⁴² provide a framework for preventing persons from being killed or injured, and property being destroyed or damaged, by electricity. The framework includes the imposition of duties on those who may affect the electrical safety of others, and a system of licensing for electrical workers and contractors. In 2014, amendments to the ES Act came into effect to specifically include in the definition of “worker” employees of labour hire companies assigned to work in a person’s business or undertaking.

¹³⁹ See <https://www.treasury.qld.gov.au/publications-resources/industrial-relations/information-statement-for-work-seekers-other-than-models-performers.pdf>

¹⁴⁰ See https://www.worksafe.qld.gov.au/_data/assets/pdf_file/0019/83080/labour-hire-agency-guide.pdf

¹⁴¹ See http://www.qbcc.qld.gov.au/sites/default/files/LIS-017_Labour_Hire_Businesses.pdf

¹⁴² See <https://www.worksafe.qld.gov.au/laws-and-compliance/electrical-safety-codes-of-practice>

6.4 Workers' compensation

The *Workers' Compensation and Rehabilitation Act 2003* (Qld) and the *Workers' Compensation and Rehabilitation Regulation 2014* (Qld) establish a framework for managing workers' compensation and rehabilitation in Queensland.

The OIR advised the Committee that labour hire companies pay for workers' compensation insurance policies through WorkCover Queensland.

The current average premium rate paid by labour hire employers is \$1.39 per \$100 of wages paid, compared to the scheme average of \$1.20 per \$100 of wages paid (e.g. for all industries).¹⁴³ The Committee understands that the better an employer's safety performance, the lower the premium that is charged to the employer. Employers with a poor safety performance are generally required to pay higher premiums.

WHSQ, the Electrical Safety Office, and the Workers' Compensation Regulator form part of the OIR.

6.5 Is enforcement effective?

The Committee has heard that enforcement of the current regulation is under-resourced and ineffective.¹⁴⁴ This is often due to the triangular nature of the relationship between the labour hire employee, their employer (the labour hire company) and the labour hire's client (the host company).

The RCSA describes the responsibilities in its submission:

In an on-hire arrangement the client, or service recipient, is commonly described as the 'host' because the client takes responsibility for supervising and directing the on-hire employee much as they would their own directly hired employees. The use of the term 'host', rather than 'principal', as commonly used in typical contracting services, provides a key insight into the difference between an "on-hire" arrangement and typical forms of "contracting".

In an on-hire arrangement the client takes on significantly more responsibility for an on-hire worker given the worker is, in effect, on loan to the client and is not presented in a way where the contractor is responsible for supervising, instructing and directing the performance of the labour and the contracted outcomes. In an on-hire arrangement a worker is on-hired without additional integrated services, property or special know-how. Additional services may be provided to a client however; those services do not fall within the scope of on-hire services, are not integrated with the on-hire services and are effectively ancillary in nature.¹⁴⁵

A 2002 report on labour hire in Australia notes the difficulty in enforcing legislation, particularly around liability for injury to the worker:

The complicated legal character of labour hire arrangements in practice is therefore problematic for ascertaining liability in a number of instances – where there has been a breach of OH&S regulations, where a labour hire worker is injured and neither client company nor labour hire company is prepared to assume responsibility for rehabilitation and return to work, and, in unfair dismissal cases where both client and labour hire firm might seek to deny that the aggrieved worker is their employee.¹⁴⁶

¹⁴³ Transcript, 24 February 2016, at page 4.

¹⁴⁴ See for example Ms Elizabeth Jones, Lockyer Valley Regional Council, Transcript 6 June 2016, p. 2; Mr A Mahoney, Bundaberg Fruit and Vegetable Growers, Transcript 15 June 2016, p. 2,

¹⁴⁵ RCSA, submission no. 39

¹⁴⁶ Hall, *Labour Hire in Australia: Motivation, Dynamics and Prospects, Working paper 76*, University of Sydney April 2002, p. 5

6.6 Other Australian jurisdictions

The issues pertaining to labour hire are currently being considered in two other Australian jurisdictions; in Victoria and in South Australia.

Victoria – Inquiry into the Labour Hire Industry and Insecure Work

The Victorian inquiry was announced in September 2015 and is chaired by Professor Anthony Forsyth of the RMIT University Graduate School of Business and Law. It is investigating the practices of labour hire companies, insecure work, sham contracting and the abuse of visas to avoid workplace laws and undermine minimum employment standards.¹⁴⁷

The inquiry's terms of reference include examination of the social impact of insecure work and assessment of whether the current legal framework meets the needs of Victorian employers and labour hire workers.¹⁴⁸

The inquiry released a background paper on 16 October 2015.¹⁴⁹ Submissions to the inquiry are available on its website.¹⁵⁰ The inquiry is due to deliver its final report by 31 July 2016.

South Australia – Parliamentary Committee inquiry

On 11 June 2015, the South Australian Economic and Finance Committee commenced an inquiry into the practices in the labour hire industry in South Australia, including:

- exploitation, harassment and other forms of mistreatment of workers
- non-payment or underpayment of wages and superannuation entitlements
- non-payment or underpayment of Return To Work SA premiums
- avoidance of taxation liabilities
- recommendations to ensure a fairer, safer and more secure industry
- support for a coordinated national approach to the issue
- registration of labour hire businesses and longevity of such
- the responsibility of host employment company owners to ensure exploitation is prevented, and
- any other relevant matter.

The South Australian Committee has called for submissions by Monday 27 July 2016. Further information on this inquiry can be found on its website.¹⁵¹

The Committee is due to report before both of these two inquiries.

6.7 International jurisdictions

Japan

Labour hire workers in Japan are referred to as 'dispatch workers' and are employed under one of two arrangements:

¹⁴⁷ See <http://economicdevelopment.vic.gov.au/about-us/strategies-and-initiatives/inquiry-into-the-labour-hire-industry-and-insecure-work>

¹⁴⁸ See <http://economicdevelopment.vic.gov.au/about-us/strategies-and-initiatives/inquiry-into-the-labour-hire-industry-and-insecure-work/terms-of-reference>

¹⁴⁹ See http://economicdevelopment.vic.gov.au/_data/assets/pdf_file/0015/1215411/9390-IRV-Inquiry-in-the-Labour-Hire-Industry-and-Insecure-Work-Brochure.pdf

¹⁵⁰ See <http://economicdevelopment.vic.gov.au/about-us/strategies-and-initiatives/inquiry-into-the-labour-hire-industry-and-insecure-work/inquiry-into-the-labour-hire-industry-and-insecure-work-submissions>

¹⁵¹ See <https://www.parliament.sa.gov.au/Committees/Pages/Committees.aspx?CTId=5&CId=292>

- where the employer remains employed with the agency and dispatched to several placements with clients (specified worker dispatching)
- where the employee is employed only for the duration of the contract with the client and is terminated at the end of that placement (general worker dispatching).

Japan has a legislated licensing system which requires an agency to:

- provide standard business details
- provide a business plan which includes the number of dispatched workers, the fee for worker dispatching, and any other matters pertaining to worker dispatching as prescribed by Ministry of Health, Labour & Welfare Ordinance, and
- be able to sufficiently properly manage the employment of dispatched workers, including managing confidential personnel files.¹⁵²

The licensing scheme allows an initial licence for three years with five-yearly renewals thereafter.

Disqualification from holding a licence includes bankrupts and minors and people with a conviction within the prior five years, including for:

- breaches of labour law
- organised crime
- violence
- immigration
- insurance or workers' compensation breaches.

The agency must keep detailed records of the placement of the dispatch workers including the number for workers dispatched, the location of the placements, the working hours, health and safety arrangements, and a responsible person at each work site.

There are maximum terms for placement of dispatch workers (three years for most placements though some conditions apply in specified industries).

Dr Elsa Underhill states that the three-year maximum placement requirement is largely evaded by changing the job title of the employee or moving the worker to another division of the company.¹⁵³

Dr Underhill states of the Japanese system:

The Japanese licensing system illustrates the integration of regulating agency placement practices with the licensing system – such as limits on the duration and location of placements. However, it also illustrates how very weak enforcement (in the form of guidance rather than penalties) does not deter illegal practices. The introduction of the new penalties in 2012, whereby the host becomes the employer of the agency worker when it knowingly accepts an illegally dispatched worker, may provide a stronger incentive for hosts to comply with the laws, thereby discouraging illegal agency employers. The enforcement of this process has yet to be evaluated. There is no evidence to date of agency firms being disqualified from holding a licence following breaches of the 1985 Act; such disqualification would seem

¹⁵² Law Concerning Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers, Law No. 88 of July 5, 1985 (Japan)

¹⁵³ Dr Elsa Underhill Submission 36, Paper titled *A Review of Licensing Arrangements for Labour Hire Firms, report prepared for the National Union of Workers*, December 2013, p. 15.

*unlikely given the evidence concerning government responses to violations alleged before the ILO.*¹⁵⁴

UK

The *Gangmasters (Licensing) Act 2005* (UK) provides a licensing scheme for employers of labour hire type employees. This legislation was introduced after the highly publicised deaths of cockle pickers working in poor conditions in Morecombe Bay.

This Act established the Gangmasters Licensing Authority (GLA) which regulates the shellfish, agriculture and fishing industries. Penalties apply for employers who are licensed and for those who are not licensed under this Act. Compliance and inspections are undertaken with those employers who are considered high risk.

USA

The USA primarily relies on market forces to regulate the labour markets as opposed to regulation imposed by governments. Dr Underhill notes that the ability in most American states for employers to dismiss their permanent workers without notice may have reduced the need for labour hire type employment arrangements.¹⁵⁵

Payroll arrangements are similar to those for labour hire in Australia. This is, where the employer leases the worker to a company, the employer maintains responsibility for paying the worker.

*In the main, there are no licensing requirements for temporary agency employers, and no specific regulations tailored to the temporary agency industry. Instead, those regulations which exist tend to specify the rights (or lack of rights) of agency workers across a range of employment issues, such as collective bargaining and voting in elections undertaken to determine whether a workplace will have union representation (Goldman, 2013). Temporary agency workers are not distinguished in OHS laws, however a number of states exclude casual employees (thereby also temporary agency workers) from access to workers' compensation benefits. In states where such an exclusion does not apply, responsibility for workers' compensation insurance varies between lying with the agency, the host employer and in some cases, is shared (Goldman, 2013).*¹⁵⁶

6.8 Issues raised during the Inquiry

During this Inquiry, the Committee received evidence from submitters and witnesses that fell into five broad categories:

1. nothing is required as the current system works well¹⁵⁷
2. better enforcement of the current regime is necessary and sufficient¹⁵⁸
3. a self-regulated code of conduct is required¹⁵⁹

¹⁵⁴ Dr Elsa Underhill Submission 36, Paper titled *A Review of Licensing Arrangements for Labour Hire Firms, report prepared for the National Union of Workers*, December 2013, p. 16.

¹⁵⁵ Dr Elsa Underhill Submission 36, Paper titled *A Review of Licensing Arrangements for Labour Hire Firms, report prepared for the National Union of Workers*, December 2013, p. 27.

¹⁵⁶ Dr Elsa Underhill Submission 36, Paper titled *A Review of Licensing Arrangements for Labour Hire Firms, report prepared for the National Union of Workers*, December 2013, p. 27.

¹⁵⁷ See for example Queensland Resources Council, submission no. 9, Chamber of Commerce and Industry, submission no. 25, Master Electricians of Australia, submission no. 26, and Australian Industry group, submission no. 35.

¹⁵⁸ See for Transcripts of 11 May 2016 at p. 10; and of 6 June 2016 at pp. 2, 5, 8, 12, and 13.

¹⁵⁹ See for example RCSA submission no 39.

4. a licensing regime for labour hire companies is required,¹⁶⁰ and
5. a requirement that labour-hire workers be made direct employees after working for a host employer for six months should be established.¹⁶¹

A number of unions also recommend the reintroduction of a power for unions to inspect workplaces and investigate suspected or alleged workplace breaches of minimum protections.¹⁶²

Better enforcement

Some submitters suggested that, rather than bringing in a suite of new measures, a more effective approach would be to better enforce the current regulatory regime.

A number of submitters consider that this can be achieved through better resourcing of the FWO. The Committee heard that while the work of the FWO is supported, it is clear to many submitters that there is a lack of resources to effectively enforce the legislation.

At its public hearings in Gatton and Bundaberg in particular, the Committee also heard that the FWO often advertises when it will hold inspections, which allows rogue operators to evade detection. Additionally, at its hearing in Cairns, the Committee heard that the FWO may undertake an inspection of a farm where there are no concerns regarding working conditions while the farm next door, which may be notorious both locally and on social media for poor conditions, is not subject to an inspection. It was also noted that inspections tend to be carried out only between 9am and 5pm, which may be outside the peak work hours for many farming operations.

Several submitters considered that better resourcing of FWO inspectors would lead to better enforcement of the current regulatory framework.

The Committee considered it is important to include this evidence and discussion in the report as it illustrates the issues arising at the differing levels of government. Recommendations as to the operation of a federal body are, however, outside the jurisdiction of the Committee, the Queensland Parliament and Queensland Government. This highlights the need for a multi-level approach to address the problems associated with labour hire.

The Committee received submissions from some unions that Queensland use its voice in COAG to seek to have the federal government make the necessary amendments to legislation to the FWA to address the problems associated with labour hire, and further, to lobby for increased funding to the FWO so as to ramp up policing and compliance.¹⁶³

¹⁶⁰ See for example ADCQ, submission no. 3, Queensland Nurses Union, submission no. 4, Lockyer Valley Regional Council, submission no. 8, Electrical Trades Union of Employees Queensland, submission no. 10, AMWU, submission no. 12, Australian Workers' Union, submission no. 13, Australian Council of Trades, submission no. 15, United Voice, submission no. 16, Maurice Blackburn Lawyers, submission no. 17, CFMEU, submission no. 20, Growcom, submission no. 28, Queensland Council of Unions, submission no. 29, National Union of Workers, submission no. 32, Dr Elsa Underhill, submission no. 36, Lesleigh Murphy, submission no. 37, Australasian Meat Industry Employees' Union, submission no 40, and MADEC, submission no. 41.

¹⁶¹ See for example Queensland Nurses' Union, submission no. 4.

¹⁶² See for example Queensland Nurses' Union, submission no. 4 at pp. 3 and 9; Queensland Council of Unions, submission no. 29 at p. 13; and Queensland Council of Unions and AMWU, Transcript 11 May 2016 pp. 24, 30, 31.

¹⁶³ See for example Electrical Trades Union of Employees Queensland, submission no. 10 at p. 28; AMWU, submission no. 12 at p. 15; United Voice submission no. 16 at p 17; CFMEU submission no. 20 at p. 27; Queensland Council of Unions, submission no. 29 at p. 13; NUW submission no. 32 at p. 33.

RCSA code of conduct and proposed Employment Services Industry Code

The Recruitment and Consulting Services Australia (RCSA) has developed a Code for Professional Conduct which has been authorised by the Australian Competition and Consumer Commission (ACCC) and in operation for RCSA members since 2003.

The RCSA advised:

In conjunction with the RCSA Constitution and By-Laws, the Code sets the standards for relationships between Members, best practice with clients and candidates and general good order with respect to business management, including compliance. Acceptance of, and adherence to, the Code is a pre-requisite of Membership. The Code is supported by a comprehensive resource and education program and the process is overseen by the Professional Practice Council appointed by the RCSA Board. The Ethics Registrar manages the complaint process and procedures with the support of a volunteer Ethics panel mentored by RCSA's Professional Practice Adviser, Barrister Andrew Wood.

RCSA's objective is to promote the utilisation of the Code and our proposed Employment Services Industry Code to achieve self-regulation of the on-hire worker services sector, wherever possible and effective, rather than see the introduction of additional legislative regulation. The Employment Services Industry Code (ESIC) would, if approved, become a prescribed industry code under Australian competition law.¹⁶⁴

A number of witnesses spoke of how they support the RCSA code of conduct and consider that their compliance with the code demonstrates to their client base that they are a reputable business and will treat their employees appropriately.¹⁶⁵

Other witnesses had no issue with the RCSA code of conduct being voluntary, but consider that should it be enforceable, there is nothing to prevent unscrupulous businesses from just disregarding this code along with their disregard of the federal and state legislation. In other words, the reputable business will comply and those not reputable businesses who exploit workers will not.¹⁶⁶

The RCSA recently released a proposed Employment Services Industry Code (ESIC), to provide a single national framework for the regulation of a wide range of employment services including "on hire/labour hire" employment and contractual services.¹⁶⁷ The proposed ESIC would regulate the conduct of employment services and employers who use employment services at all points of the labour supply chain in order to eradicate unfair practices.

It is proposed that the ESIC would operate under the *Commonwealth Competition and Consumer Act 2010* (Cth) (subject to its approval as a regulation by the Commonwealth Government). At the request of the Commonwealth Government the RCSA has conducted public consultation on the proposed ESIC.

The proposed ESIC would operate in addition to any law of the Commonwealth, a State or a Territory that applies to an employment services provider and would require compliance with applicable laws where necessary.

The RCSA advised the proposed ESIC would:

- create an Employment Agents Advisory Council with Ministerial appointed members including an independent chair, a person who is a member of the Australian Competition and Consumer Commission, three persons representing employment services providers and one person representing employee organisations

¹⁶⁴ RCSA, submission no 39, p. 3

¹⁶⁵ Rebecca Bolton, Precruitment, Transcript 9 June 2016

¹⁶⁶ See for example comment generally on self-regulation by the Australian Meat Industry Employees Union submission no. 40 at p. 5.

¹⁶⁷ The RCSA ESIC is not proposed to apply to models and performers.

- regulate conduct of employment service providers and agents engaged by them in dealings outside Australia
- provide for an independent dispute resolution procedure, which may be escalated to arbitration
- provide for written employment agreements to meet prescribed content standards
- include vulnerable worker protections (e.g. preventing exploitation and child employment protection).¹⁶⁸

Some consider the self-regulation of the industry a benefit in that it does not impose too much red tape on businesses. Opponents of such a system consider it does not go far enough to address the issues in the industry. Dr Elsa Underhill stated:

*It is really not clear to me how the code, which is convoluted and requires employees to complain in the first instance to their employer that the code is being breached, improves on any arrangements that are currently in place, particularly when the code is enforced by a worker having to complain about a breach to the compliance manager at the agency where they are employed. We know that if labour hire employees—80 per cent of them are casual workers—complain about employment conditions invariably they lose their job. You really do need an independent agency with very clear rights to enforce consistent standards across the industry. I really do not think their code meets that at all.*¹⁶⁹

Introduction of a licensing system for labour hire companies

Licensing schemes were raised during the inquiry as a potential solution to the issues raised. A number of submitters consider that a new licensing regime for labour hire companies is required.¹⁷⁰ There are some variations in what submitters consider is necessary but essentially the suggested licensing system should include:

- a state-based licensing scheme
- a licence requirement for labour-hire companies to operate in Queensland
- a requirement for bonds and annual licensing fees
- a compliance unit within the State Government
- minimum requirements for businesses to meet in order to obtain a licence regarding:
 - fit and proper person requirements for licence holders and senior officers
 - threshold capital requirements to show the business is funded sufficiently to meet the needs of a properly operating business
 - requirements for mandatory training re workplace rights, entitlements and training.

Proponents of a licensing scheme consider it would contribute significantly to the improvement of conditions for workers who may otherwise be employed by sham contractors. It would also assist in

¹⁶⁸ RCSA, submission no. 39.

¹⁶⁹ Dr Elsa Underhill, Transcript 11 May 2016, p. 36.

¹⁷⁰ See for example ADCQ, submission no. 3, Queensland Nurses Union, submission no. 4, Lockyer Valley Regional Council, submission no. 8, Electrical Trades Union of Employees Queensland, submission no. 10, AMWU, submission no. 12, Australian Workers' Union, submission no. 13, Australian Council of Trades, submission no. 15, United Voice, submission no. 16, Maurice Blackburn Lawyers, submission no. 17, CFMEU, submission no. 20, Growcom, submission no. 28, Queensland Council of Unions, submission no. 29, National Union of Workers, submission no. 32, Dr Elsa Underhill, submission no. 36, Lesleigh Murphy, submission no. 37, Australasian Meat Industry Employees' Union, submission no. 40, and MADEC, submission no. 41.

the elimination of phoenixing by companies as they would need to obtain and pay for a licence to operate, show that they have sufficient capital to run the business and submit to compliance audits. It would also allow better capture of statistics around the use of labour hire in Queensland.¹⁷¹

Opponents of a licensing system consider it would introduce more red tape for businesses, and would have a significant impact on small businesses in particular. It would not reduce the poor conditions and sham work arrangements for vulnerable workers as the people who run those companies do so outside of the law currently – they disregard the current legislation and regularly evade detection now so a licensing system will not stop them.¹⁷²

The Government members of the Committee support a Queensland based licensing system to regulate any labour hire companies operating in Queensland. Those members consider that there should be some form of chain of responsibility legislation, possibly under the *Work Health and Safety Act 2011* (Qld) for regulation of issues regarding labour hire workers over which the host company has control e.g. discrimination, harassment, workplace health and safety and WorkCover. The rationale for a licensing system under this legislation is due to the fact that there are already compliance inspectors within this Department.

The Government members of the Committee consider that a licensing scheme should be established with the aim of regulating labour hire employers. The licensing system should require compliance with fundamental issues such as

- wages and conditions
- insolvency and bankruptcy
- fit and proper persons
- WorkCover
- workplace health and safety, and
- standards of transport and accommodation where these are part of the labour hire arrangements.

Non-government members of the Committee consider that a Queensland based licensing scheme would not address the issues regarding labour hire companies. The non-government members consider that such a scheme would instead increase red-tape and bureaucracy in managing the industry. Further, as advised by the majority of witnesses to the Committee, it will subvert existing attempts to address issues and non-compliance regarding current legislative and regulatory requirements.

Committee Comment

The Committee was unable to reach agreement on whether a licensing system should be introduced. The Government members of the Committee supported the introduction of a licensing system while the non-government members consider that the current regulatory framework is sufficient and could be more effective if it is better resourced.

¹⁷¹ See for example submission nos. ADCQ, submission no. 3, Queensland Nurses Union, submission no. 4, Maurice Blackburn Lawyers, submission no. 17, Queensland Council of Unions, submission no. 29 and Dr Elsa Underhill, submission no. 36.

¹⁷² See e.g. Ms Rebecca Bolton, Manager, North Queensland Precruitment, Finance and Administration Committee Transcript 9 June 2016, pp. 2, 5, 6; Mr Tom Reardon, Chief Executive Officer, Mobilise, Finance and Administration Committee Transcript 9 June 2016, p.1.

Appendix A – List of submissions

Submission no.	Submitter
001	Confidential
002	Confidential
003	Anti-Discrimination Commission Queensland
004	Queensland Nurses Union
005	Margaret Cole
006	Anonymous
007	Housing Industry Association
008	Lockyer Valley Regional Council
009	Queensland Resources Council
010	Electrical Trades Union of Employees Queensland (ETU)
011	Independent Education Union Queensland and Northern Territory Branch (IEUA-QNT)
012	Australian Manufacturing Workers' Union (AMWU)
013	Australian Workers' Union
014	Building Service Contractors Association of Australia – Queensland Division (BSCAA-Qld)
015	Australian Council of Trade Unions
016	United Voice
017	Maurice Blackburn Lawyers
018	AMMA, Australian Mines and Metals Association
019	Queensland Law Society
20	Construction, Forestry, Mining and Energy Industrial Union of Employees, Queensland (CFMEU)
21	Australian Institute of Marine and Power Engineers (AIMPE)
22	Confidential
23	Information Technology Contract & Recruitment Association Ltd (ITCRA)

24	Local Government Association of Queensland
25	Chamber of Commerce and Industry Queensland (CCIQ)
26	Master Electricians Australia
27	Jane O’Sullivan
28	Growcom
29	Queensland Council of Unions
30	Confidential
31	Confidential
32	National Union of Workers
33	Isaac Regional Council
34	Confidential
35	Australian Industry Group
36	Elsa Underhill
37	Lesleigh Murphy
38	Broadspectrum Qld
39	Recruitment and Consulting Services Australia
40	Australasian Meat Industry Employees’ Union
41	MADEC

Appendix B – List of witnesses

Departmental Briefing

Date	Location	Witnesses from the Office of Industrial Relations, Queensland Treasury
24 February 2016	Brisbane	<p>Mr Tony James, Executive Director, Industrial Relations Policy and Regulation</p> <p>Mr Paul Goldsbrough, Executive Director, Workers' Compensation and Policy Services, Workplace Health and Safety Queensland,</p> <p>Ms Julie Neilson, Executive Director, Compliance and Business Engagement, Workplace Health and Safety Queensland</p> <p>Ms Victoria Thompson, Director, Industry Strategy, Workplace Health and Safety Queensland</p>

Public hearings

Date	Location	Witnesses
11 May 2016	Brisbane	<p><u>Anti-Discrimination Commission Queensland</u></p> <ul style="list-style-type: none"> • Mr Kevin Cocks, Anti-Discrimination Commissioner • Ms Neroli Holmes, Deputy anti-Discrimination Commissioner <p><u>Housing Industry Association of Queensland</u></p> <ul style="list-style-type: none"> • Mr Michael Roberts, Acting Executive Director • Ms Annica Cloette, Workplace Advisor <p><u>GrowCom</u></p> <ul style="list-style-type: none"> • Ms Annabel Hutch, Workplace Relations Officer, Growcom • Ms Rachel MacKenzie, Chief Advocate, Growcom <p><u>Building Service Contractors Association of Australia, Queensland Division</u></p> <ul style="list-style-type: none"> • Mr Craig Pollard, Executive Director <p><u>Recruitment and Consulting Services Association</u></p> <ul style="list-style-type: none"> • Mr Charles Cameron, Chief Executive Officer • Ms Sinead Hourigan, Director, Brisbane, Robert Walters; Vice-President, Recruitment and Consulting Services Association • Mr Chris Turner, Group Manager, Employee Relations and HR Compliance, Adecco; Recruitment and Consulting Services Association <p><u>Maurice Blackburn Lawyers</u></p>

		<ul style="list-style-type: none"> • Mr Rod Hodgson, Principal, Maurice Blackburn Lawyers • Mr Giri Sivaraman, Principal, Maurice Blackburn Lawyers <p><u>Queensland Council of Unions</u></p> <ul style="list-style-type: none"> • Mr Michael Clifford, Assistant General Secretary, • Mr John Martin, Research and Policy Officer <p><u>Australian Manufacturing Workers' Union</u></p> <ul style="list-style-type: none"> • Ms Julie-Ann Campbell, Industrial Officer <p><u>Australian Meat Industry Employees Union</u></p> <ul style="list-style-type: none"> • Mr Matthew Journeaux, Assistant Branch Secretary, Queensland Branch • Mr Warren Earle, Branch Organiser, Queensland Branch • Mr Gursher Sandhu, Member <p><u>National Union of Workers</u></p> <ul style="list-style-type: none"> • Ms Imogen Beynon, Queensland State Lead <p><u>Queensland Nurses Union</u></p> <ul style="list-style-type: none"> • Ms Beth Mohle, State Secretary • Dr Liz Todhunter, Research and Policy Officer • Ms Kate Veach, Professional Research Officer <p><u>Seasonal Workers Australia</u></p> <ul style="list-style-type: none"> • Mr Michael Fryszter, Managing Director, Seasonal Workers Australia <p><u>Private capacity</u></p> <ul style="list-style-type: none"> • Dr Elsa Underhill
6 June 2016	Gatton	<p><u>Lockyer Valley Regional Council</u></p> <ul style="list-style-type: none"> • Ms Elizabeth Jones, Community Development and Engagement Officer <p><u>Lockyer Valley Growers Inc</u></p> <ul style="list-style-type: none"> • Mr Anthony Staatz, President • Ms Sharon Windolf, Treasurer <p><u>National Union of Workers</u></p> <ul style="list-style-type: none"> • Ms Imogen Beynon, Queensland State Lead <p><u>Private capacity</u></p> <ul style="list-style-type: none"> • Ms Margaret Cole • Mr Maurice Henessey • Ms Jane Dipple
7 June 2016	Emerald	<p><u>Blackwater Community Group</u></p>

		<ul style="list-style-type: none"> • Sallee Collins • Zoe Hodkin <p><u>CFMEU – Callide Valley Lodge</u></p> <ul style="list-style-type: none"> • Mr Rick Hibble, President • Mr Darren Blackwood
8 June 2016	Mackay	<p><u>Mobilise</u></p> <ul style="list-style-type: none"> • Mr Tom Reardon, Chief Executive Officer <p><u>Australian Institute of Marine and Power Engineers</u></p> <ul style="list-style-type: none"> • Mr Greg Yates, Senior National Organiser <p><u>CFMEU – Queensland Division</u></p> <ul style="list-style-type: none"> • Mr Mitch Hughes, District Executive Vice President <p><u>Private capacity</u></p> <ul style="list-style-type: none"> • Mr Stephen Howland
9 June 2016	Cairns	<p><u>Precruitment</u></p> <ul style="list-style-type: none"> • Ms Rebecca Bolton, Manager-North Queensland <p><u>Agrilabour</u></p> <ul style="list-style-type: none"> • Mr Luke Brown, Managing Director <p><u>Maritime Union of Australia</u></p> <ul style="list-style-type: none"> • Mr Ian Bray, Assistant National Secretary
15 June 2016	Brisbane (videoconference with Bundaberg)	<p><u>Bundaberg Fruit and Vegetable Growers</u></p> <ul style="list-style-type: none"> • Ms Bree Grima, Managing Director • Mr Anthony Mahoney, Chairman <p><u>Snapfresh Australia - Bundaberg</u></p> <ul style="list-style-type: none"> • Ms Sue Zaina <p><u>Marcon Family Farms</u></p> <ul style="list-style-type: none"> • Mr Gino Marcon <p><u>East Bundy Backpackers</u></p> <ul style="list-style-type: none"> • Mr Brian Sparkes • Ms Christine Sparkes <p><u>Tomato Backpackers</u></p> <ul style="list-style-type: none"> • Mr James Lee, Owner <p><u>YHA Australia</u></p> <ul style="list-style-type: none"> • Mr Julian Ledger, Chief Executive Officer

<p>20 June 2016</p>	<p>Moranbah</p>	<p><u>RCSA</u></p> <ul style="list-style-type: none"> • Mr Simon Schweigert, Manager, Media and Government Relations • Mr Andrew Wood, Solicitor <p><u>Isaac Regional Council</u></p> <ul style="list-style-type: none"> • Ms Kelly Vea Vea, Councillor – Division 5 • Mr Nick Wheeler, Councillor – Division 2 • Mr Rod Ferguson, Chief Executive Officer <p><u>Peabody Energy Australia</u></p> <ul style="list-style-type: none"> • Mr Ferdie Kruger, Acting Vice President, Human Resources <p><u>Moranbah Community Health Partnership</u></p> <ul style="list-style-type: none"> • Ms Cherie Miller <p><u>CFMEU – Hail Creek Lodge</u></p> <ul style="list-style-type: none"> • Mr Ian Park <p><u>AMWU</u></p> <ul style="list-style-type: none"> • Mr Mark Johnstone, Convenor
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Statement of reservation

GOVERNMENT MEMBERS' STATEMENT OF RESERVATION

Peter Russo MP, Jo-Ann Miller MP and Duncan Pegg MP

Opening Comments

It is disappointing, but the three Government Members on the Committee have been left with no other choice but to provide a Statement of Reservation to the Report on the Inquiry into the practices of the labour hire industry in Queensland.

Our inquiry heard some shocking evidence about practices engaged by some in the labour hire industry. While we are sure the majority of employers do not participate in these practices, the Committee heard evidence of:

- a failure to comply with basic award wages and conditions, health and safety and accommodation requirements
- systematic avoidance of income tax, payroll tax and superannuation obligations
- sham contract arrangements, where a relationship of employment in all but name is used to avoid tax and employment requirements, and
- workers left without recourse when their employer company closes down, only to then recommence operations under another company name (phoenix companies).

Opposition members of the Committee, despite this evidence, were simply not prepared to consider the measures required to provide even basic mandatory standards of compliance in this sector.

The three Government Members of the Committee are not prepared to let this report proceed without recommendations to intervene on behalf of many vulnerable and exploited Queensland workers.

There are many participants in the industry who do not undertake the conduct referred to above. The contribution of these participants to the Queensland economy should be recognised and supported.

The Evidence Provided to the Committee

The Committee Report provides much of the background to the development and current state of the labour hire industry in Queensland.

The industry has grown rapidly in recent decades, but especially in Queensland, where around a quarter of the country's labour hire workers are employed. These on-hire workers are a key resource in the State's significant horticulture and resources industries.

Workers engaged in labour hire are a diverse group, with skills levels and types across a broad spectrum of occupations and with varying degrees of professional experience or expertise. Similarly, the labour hire industry is a very diverse sector. There are many genuine on-hire firms which demonstrate high levels of compliance, particularly those providing staff in high demand and high skills occupations.

However, it is also clear that there is a subset of labour hire firms acting illegally and unethically and exploiting vulnerable workers including: migrant workers, young people, women, and workers from communities with high unemployment.

The illegal and improper practices of these operators have significant impacts and costs for workers, families, communities and businesses. These practices are unfolding in different ways and with distinct impacts and across the State's different industries.

Workplace Health and Safety

Much of Queensland's workplace health and safety legislation presumes that an employer will provide workplace supervision and direction for their employee. In the case of labour hire arrangements, the employer – that is, the labour hire operator – relies on the host to direct employees and supervise their work. In most cases, the employer is not physically located on the workplace.

While primary legal responsibility lies with the labour hire operator as the legal employer, practical supervision of employment lies with the host. The blurring of legal obligations and responsibilities in this area appears to have manifested in a deterioration of safe work practices and training of some considerable significance.

Written submissions and private testimony provided by a number of labour hire employees and employee representatives highlighted considerable barriers to appropriate reporting of questionable or unsafe on-site practices where labour hire employees are concerned.

More specifically, a lack of job security in their employment arrangements appears to be contributing to a situation in which workers are fearful for their jobs and significantly less likely to report workplace injuries or issues which may be impacting workplace conditions and wellbeing.

Examples of submissions and testimony received by the Committee in this regard included the following:

With regard to having friends of mine driving equipment that I myself would tag out as unsafe and report, those particular people, being labour hire, were unable to do that for fear of being called a troublemaker and losing their job, either at the end of that shift or very shortly after. I would have to make an excuse to park my truck up and go to the toilet. I would at that stage be able to let them know via my mobile, 'Park your truck up.' I would get on their truck and then tag it out, call up control and make it known that it was unable to be driven. That was the only way that we could get around making sure our equipment was safe for everyone to drive.¹⁷³

- *Over time we have seen Labour Hire employees who have reported a safety incident and speak up; just to be shown the front door and their services no longer required practically if they also report a minor injury.*
- *Should they have a safety concern many raise it to the attention of a permanent employee to raise the issue on their behalf and keeping the Labour Hire person confidential.*
- *This is the unfortunate culture that is now embedded into Labour Hire, because of fear of losing their job they are reluctant speak up. All is ok until something goes wrong and then they are at the mercy of the employer.*
- *Even of more concern to us, we now find ... management are more willing to utilise the Labour Hire employees on day to day Risk Assessments, Safety reviews, etc. to achieve the required outcomes.*
- *As pre mentioned many Labour Hire employees are reluctant to speak up on safety concerns and some will not refuse to do a job if requested by management, even if it is unsafe because of their fear of losing work, due to their the insecure employment.¹⁷⁴*

¹⁷³ Confidential, *Private Hearing Transcript*, Mackay, 8 June 2016.

¹⁷⁴ Confidential, Submission no. 29.

The ADCQ has been informed that many labour hire contractors were not meeting their occupational health and safety obligations. Frequently there was no training for workers, no first aid, not enough water in the field for workers to drink, and there was no WorkCover or proper injuries process. The ADCQ was told of instances of where seriously injured workers without their own transport, would have to find their own way into the local town for hospital/medical treatment for injuries sustained at work... In 2009, German backpacker Jessica Perra died of dehydration on her second day of picking tomatoes in Queensland.¹⁷⁵

In the meat industry, the AMIEU has encountered casual labour hire workers who, once injured, were simply told to go home and seek treatment (receiving no paid leave because they were casual employees) and return to work when they had recovered. In some cases, this may be due to ignorance of their rights; in other cases, workers knew of their entitlements but were concerned that if they made a claim they would jeopardise their employment.¹⁷⁶

In addition, the AMIEU submitted that "...the disregard of workplace health and safety obligations, including instances of failing to ensure workers are vaccinated against Q Fever (which, if contracted, can become a chronic, debilitating condition)", is a "commonplace" feature of many labour hire operations.¹⁷⁷

Labour Hire and the Resources Sector Downturn

In the resources industry, there has been a legal "casualization" of the labour force by way of the replacement of permanent employees with casual labour hire workers. In a small number of workplaces with high wage levels under awards or industrial agreements, employers appear to have introduced labour hire workforces to avoid their existing obligations to the existing permanent workforce.

The use of labour hire workers is a pragmatic approach to the mining downturn.

Key industry operators emphasised that casual labour hire employees typically receive higher hourly rates of pay to compensate for their lack of access to various leave or accommodation-related entitlements.

However, submissions indicated that labour hire employees are largely contracted to work under separate enterprise bargaining agreements which may in fact provide lower rates of pay without any additional entitlements.

For example, witnesses made the following confidential submissions:

Many labour hire companies are now having their own enterprise agreements being drawn up and drafted and supposedly negotiated. I have obviously spoken to many people and ...they were never approached by these employers. They were never given consultation on any clauses. They simply turned up to work one day and there was a document slapped down, 'This is your new agreement. This is your new contract of employment...'. 178

In February 2013 [we] were individually questioned and told you can stay and you can go... we were then offered employment with a labour hire firm...on a \$55-an-hour rate. From then it has been reduced three times and there has been no consultation with us at all about this pay decrease. We are down now to \$41.50 an hour.¹⁷⁹

¹⁷⁵ ADCQ, Submission no. 3, pp.6-7

¹⁷⁶ AMIEU, Submission no. 40, pp. 8-9

¹⁷⁷ AMIEU, Submission no. 40, pp. 3-4

¹⁷⁸ Confidential, *Private Hearing Transcript*, Mackay, 8 June 2016.

¹⁷⁹ Confidential, *Private Hearing Transcript*, Moranbah, 20 June 2016.

*... it is evident when working alongside the permanent workforce doing the same hours on the same roster that we are being paid less... I can confirm it is nearly half for sure.*¹⁸⁰

*Was made redundant from xxx, started back at the same mine site a week later, with a \$35K pay cut.*¹⁸¹

Exploitation of Vulnerable Workers

The most distressing evidence came from vulnerable workers, generally employees who are:

- engaged in lower skilled occupations;
- migrant workers and international students;
- young people;
- women; and
- workers from communities with high unemployment.

These stories tended to be relayed by workers or employers in horticultural, meat processing, security, cleaning and hospitality roles. While much of the evidence did not extend as far as the footage obtained by Four Corners in its “*Slaving Away*” program aired on 4 May 2015, it is clear that the patterns of exploitation are consistent.

The Committee was provided evidence of backpackers working in the horticulture industry being trapped by having to pay exorbitant rents, not getting enough work, and then being unable to leave, because they owe more money than what they are being paid.

The Committee also heard evidence of unscrupulous labour hire companies expecting sexual favours to be provided so that workers would be placed in a job. In particular, one labour hire operator reportedly only wanted to hire young Japanese backpackers, where language difficulties made workers vulnerable to exploitation.¹⁸²

Some of the troubling testimony and submissions received by the Committee included:

*We hear examples of people being paid \$11 an hour or \$14 an hour cash in hand, not getting any penalty rates for weekend work, no shift loadings, no other allowances, no casual allowances, no superannuation, no workers compensation payments, no pay slips and no records of any kind.*¹⁸³

*Submission No. 61 details, for farm work in Gatton, the worker was paid \$35 for six hours work, which is approximately \$5.80 an hour. This worker notes that their contractor would only pay in cash and only notes, so even it was \$36 for the day they would get paid only \$35, et cetera. That submission also details immense safety issues due to the competitive nature of the work. Because the workers get paid by how much they pick on this particular farm, there would be a rush in the morning for crates, which would often involve trampling of the workers over one another.*¹⁸⁴

¹⁸⁰ Confidential, *Private Hearing Transcript*, Moranbah, 9 June 2016.

¹⁸¹ AMWU, Submission no. 12, p. 11

¹⁸² Ms Margaret Cole, *Public hearing transcript*, Gatton, 6 June 2016, pp. 15-16

¹⁸³ Mr Michael Clifford, Assistant General Secretary, Queensland Council of Unions, *Public Hearing Transcript*, Brisbane, 11 May 2016, p.23

¹⁸⁴ Ms Imogen Beynon, Queensland State Lead, National Union of Workers, *Public Hearing Transcript*, Gatton, 6 June 2016.

We have also uncovered workers paying membership fees to labour hire companies; labour hire workers being housed in atrocious conditions that are overcrowded and unsuitable and also paying exorbitant rents for that accommodation...¹⁸⁵

... Numerous phoenix style labour hire operators, especially ones targeting foreign workers on working holiday or student study visa's, and the like, as well as Centrelink recipients, suddenly appear with no prior history or experience in the employment sector, canvassing the horticulture sector to supply labour because of the potential volume of workers needed in the sector.¹⁸⁶

...forums hosted in the Lockyer ... heard first hand accounts of working holiday visa holders receiving demands for sex at the threat of visa extensions not being signed off by employers, or passports not being returned...¹⁸⁷

... probably one of my first interactions with a backpacker was a girl who had been raped by her contractor. She did not want to go to the police because this contractor had said, 'I won't sign your friend off for her second visa if you go any further with this.'¹⁸⁸

The Toll on Families and Communities

The reported incidents of sham contracting, phoenixing, exploitation, harassment and other various illegal practices, have all resulted in significant adverse human and financial consequences.

The Committee heard stories of mothers at the head of a supermarket line faced with being unable to pay for groceries. The uncertainty of work meant parents having to walk out of the supermarket with the kids in tow, leaving the groceries at the checkout.

The Committee also heard evidence that the pressure and the uncertainty of labour hire employment has led to an increase in the abuse of alcohol and drugs of dependence, leading to many other pressures on family life, families separating, divorce and increase in domestic violence.

Examples of some of the evidence provided included:

The overall effect on the Cleaning and Security Industries of the growth of sham contracting arrangements can only be described as catastrophic... The demands by clients for ever lower cost which are willingly met by sham operators have devastated those legitimate operators seeking to operate in Queensland with consequent financial damage caused to workers in the industry.¹⁸⁹

People are being downtrodden on. Their social life, their family life, everything is just going to pieces in front of their own eyes. We have a domestic violence rate in Mackay, also a suicide rate in Mackay, which is second to none outside the major cities. I will go back to two weeks ago, one Thursday night ..., where 100 employees from [company name redacted] were texted while having their evening meal, 'Don't come back. You're finished.' Those guys, that was it—the end of the line for them....¹⁹⁰

¹⁸⁵ Mr Matthew Journeaux, Assistant Branch Secretary, Queensland Meat Industry Employees Union, Public Hearing Transcript, Brisbane, 11 May 2016, p. 26

¹⁸⁶ Confidential Submission.

¹⁸⁷ Lockyer Valley Regional Council, Submission no. 8, p.3

¹⁸⁸ Ms Margaret Cole, Public Hearing Transcript, Gatton, 6 June 2016, p. 16

¹⁸⁹ BSCAA-Qld, Submission no. 14, p.4

¹⁹⁰ Confidential, *Private Hearing Transcript*, Mackay, 8 June 2016.

*At Biloela we have clubs struggling for numbers because of the casualisation and the threat of losing your job should you get injured if you want to play footy or any other sport. If you get injured, you cannot afford to have a sick leave day, because then you will be targeted.*¹⁹¹

*You go to a bank and you try and get a loan in the Mackay, Rockhampton, Emerald, Moranbah areas. You're a high-risk client to a financial institution. They will not lend you money. There is anything up to three houses a week being handed back to banks in the Mackay area alone because people have just got no money. I have personally stood in supermarket lines where I have seen women and kids stand there and just have to walk out with no groceries...*¹⁹²

*Through bankruptcies and financial problems the suicide rate has increased by 32 per cent. I found that out through the Mackay Coroner's Court...*¹⁹³

The Exploitation of the Legal Myth of Labour Hire

Labour hire, when engaged ethically and legally, is a legitimate way to effectively manage skills shortages, recruitment and peaks in workload demand. Small employers that may have limited human resources knowledge and expertise can benefit significantly from the use of labour hire to ensure appropriate compliance with employment obligations.

However, labour hire also offers the opportunity for the undermining of the legal requirements of employment.

The wages and conditions of employment for the contract of employment, between employer and employee, are regulated by the *Fair Work Act 2009* (Cth). However, labour hire effectively separates the legal responsibility of employment from the organisation that has the direct control of the employee's work.

Unscrupulous labour hire employers can use both the ambiguity surrounding this separation of responsibilities, together with gaps in other legal protections, to avoid their statutory requirements as employers.

For example, the law of contract, from Queensland legislation and the common law, which governs the relationship between the labour hire employer and the host, also provides no protection for employees with respect to their relationship with the host employer.

In addition, in the case of tug boat operators at Abbott Point, the Committee heard that the law of partnership is being used, perversely, to avoid employment obligations.¹⁹⁴

Accordingly, while labour hire has a legitimate and important role in the Queensland economy, it also provides an opportunity for exploitation. Labour hire can be a victory of form over substance, where labour hire employers provide, and profit from, a failure to comply with the ordinary requirements of the employment relationship.

To let this unscrupulous behaviour continue also puts many good and reputable labour hire employers at a competitive disadvantage. The current unregulated operation of labour hire provides a significant incentive for employers to undercut reputable operators by cutting the wages and conditions of employees – costs that make up 90% and more of the cost base of a labour hire employer.

The Government Members do not think that the recommendations of the Report go far enough to address these serious problems. Where such widespread issues and impacts have been identified, doing nothing is obviously not an option.

¹⁹¹ Confidential, *Private Hearing Transcript*, Emerald, 7 June 2016.

¹⁹² Confidential, *Private Hearing Transcript*, Mackay, 8 June 2016.

¹⁹³ Confidential, *Private Hearing Transcript*, Moranbah, 9 June 2016.

¹⁹⁴ Mr Greg Yates, Senior National Organiser, Australia Institute of Marine and Power Engineers (AIMPE), *Public hearing transcript*, Mackay, 7 June 2016, pp. 5-7

Options for Reform

The Committee heard evidence about a range of options for reform, and the benefits and disadvantages of each.

The Government Members believe that there are options for reform that ensure that the impact on business is not disproportionate to the risk of lack of compliance in the labour hire industry.

Federal Reform – the Fair Work Act 2009

A number of submissions to the inquiry highlighted that the provisions of the *Fair Work Act 2009* do not sufficiently safeguard employment conditions for employees in non-standard employment arrangements. Enforcement of award conditions is difficult for many workers in standard employment, but for labour hire workers, enforcing compliance with workplace conditions is almost impossible.

The Government Members noted that submitters highlighted a range of possible amendments which could serve to boost protections and promote greater equity of conditions for labour hire workers.

For example, Maurice Blackburn Lawyers highlighted scope for broadening existing models of labour law compliance shifting which are applicable to the textile, clothing and footwear industry:

There is already a model of regulation for insecure work that has been devised to regulate labour law compliance shifting. The textile, clothing and footwear (TCF) industry has, for an extended period of time, had an award regime of protections in place for outworkers working as part of a supply chain. In 2011, this regime was also given statutory effect by the enactment of Part 6-4A of the Fair Work Act 2009 (Cth). The regime includes a mechanism to enable TCF outworkers to recover unpaid amounts owed to them by shifting compliance up the supply chain. The mechanism also allows TCF outworkers to recover what they are owed from an indirectly responsible entity further up the supply chain in circumstances where those responsible for doing so have not fulfilled their obligations to the outworker. As long as the TCF outworker has the requisite connection to the entity up the supply chain, the entity will be an indirectly responsible entity. There can be more than one indirectly responsible entity in relation to a particular unpaid amount. In that circumstance, the entities are jointly liable to pay the unpaid amount.

However, the primary liability to pay the TCF outworker remains with the person who employed or engaged them. If the TCF outworker has taken reasonable steps to recover the unpaid amount from that person without success, they may then initiate proceedings in reliance on this regime.¹⁹⁵

If the indirectly responsible entity pays the unpaid amount, that entity will be able to recover an equivalent amount – plus interest – from the responsible person, whether by way of offset or proceedings in the Federal Court, Federal Circuit Court, or eligible state or territory court.

This method of shifting compliance responsibilities to an ultimate beneficiary could be used in supply chain industries and franchising industries where the risk of exploitation of vulnerable workers is high. It would also create an incentive for the ultimate beneficiary (e.g. the franchisor or a Baida-style enterprise) to ensure that there is compliance with industrial laws by the direct employers of vulnerable workers.¹⁹⁶

In addition, the Queensland Council of Unions (QCU) recommended amendments to ensure that industrial instruments cover all employees at a worksite, so that labour hire cannot be used to avoid obligations.

¹⁹⁵ Maurice Blackburn Lawyers, Submission no. 17, p. 6

¹⁹⁶ Maurice Blackburn Lawyers, Submission no. 17, p. 8

The QCU submitted:

Labour hire employees must be able to bargain together with employees of the host employer and good faith bargaining provisions and the right to take protected action must be available to labour hire workers in this situation. Recommendation should be made regarding the above to the Federal Government and the inquiry should reject the recent findings of the Productivity Commission that agreements should not be allowed to include provisions that extend their application to labour hire employees.¹⁹⁷

Such amendments were identified as having the potential to address the existing problem outlined at the Brisbane public hearing on 11 May 2016:

The problem is this: just to give you one example, I know that that has happened within the mining industry. Those employers engaged in mining—and that is how it is described—are covered by the Black Coal Award. That award is deemed to apply to employees engaged in mining. A labour hire company might then contract with the mining company to provide labour. The labour hire company might be paying at a lower rate. The situation that you have described arises: you have two people standing side by side and one is getting paid less than the other. The labour hire company will say, ‘We are not caught by the scope of the mining award, because it applies to parties engaged in mining and we do not engage in mining. We engage in labour hire, so by virtue of the actual scope or the application provision of the award, we are not bound by that award.’ That argument may be tested, but it certainly is an argument that they could run with and it is an argument that may be sustainable at law. That means the end result is that there is no industrial remedy for the person or the people who are getting paid less.¹⁹⁸

The Government Members were receptive to exploring these and a number of other various suggestions made in relation to the Federal industrial relations provisions. However, the *Fair Work Act 2009* is a matter for the Commonwealth Parliament.

While beyond the scope of the Queensland Parliament, it is clear that addressing the issues of labour hire will require significant intra-governmental cooperation.

Licensing & Regulation in Queensland

The Government Members considered that the evidence received by the Committee clearly indicated that an assumption of self-regulation is an insufficient response to illegal industry practices, particularly when it is clear that the investigation and enforcement of various breaches and offences is woefully under-resourced.

Further, non-mandatory codes of practice or other non-legislative options may be adopted by that sector of the of the labour hire industry which is already largely compliant and will continue to be ignored by the lower end of the industry, to the detriment of workers and compliant and honest businesses.

The Government Members note that a significant proportion of stakeholder and submitter testimony received during the course of the inquiry supported the introduction of an appropriate licensing regime to combat identified issues – including an academic expert, local governments, the legal fraternity, workers, employers and even some labour hire operators. Submitters also identified that while much of what needs to be done is a responsibility of the Commonwealth Government, and that national

¹⁹⁷ Queensland Council of Unions, Submission no. 29, p.13

¹⁹⁸ Mr Giri Sivaraman, Principal, Maurice Blackburn Lawyers, *Public hearing transcript*, Brisbane, 11 May 2016, p. 19

consistency in licensing would be ideal, the State is the appropriate agent for the regulation and administration of such scheme.¹⁹⁹

The Government Members note that licensing schemes are already in operation in South Australia and the Australian Capital Territory and a wide range of international jurisdictions, including Austria, Belgium, Canada, France, Germany, Japan, the Netherlands, Singapore, South Korea, Sweden, the UK and the United States.²⁰⁰ In fact, Australia is one of the few countries in the world with no regulation or licensing arrangements for labour hire companies, in the face of growing calls for the implementation of licensing globally by the International Labor Organisation (ILO).²⁰¹

Dr Elsa Underhill submitted that the ILO has identified benefits of licensing including:

- *to mitigate the risk of “malpractice and abuse of clients” (ILO, 2007, 14)*
- *to maintain records of agency businesses to enable targeting for training and information distribution. Requiring agencies to continually inform the licencing agency of changes in ownership structures, businesses addresses, the opening of new branches and the like are commonly implemented to ensure effective monitoring of agencies (ILO, 2007, 22).*
- *to maintain a public record of licensed agencies so that users(workers and hosts) can be assured they are using a legitimate agency to enable pre-screening of applicants for the relevant skills and capabilities, and their experience in the job placement field (ILO, 2007, 14). Under some licensing arrangements, this extends to ensuring operators are of good character and without criminal records, thereby addressing the emerging issue of violence associated with labour supply in the horticulture sector.²⁰²*

In March 2016 and May 2016 this year, two separate bi-partisan Federal Senate Committees respectively handed down recommendations for the establishment of licensing of labour hire contractors, including:

- *a public register of all labour hire contractors. Labour hire contractors must meet and be able to demonstrate compliance with all workplace, employment, tax, and superannuation laws in order to gain a license*
- *a requirement that labour hire contractors that use other labour hire contractors, including those located overseas, be obliged to ensure that those subcontractors also hold a licence.²⁰³*

¹⁹⁹ ADCQ, Submission no. 3, p.10; Lesleigh Murphy, Submission no. 37, p.4; Ms Lesleigh Murphy, Submission no. 37, p.3; AMIEU, Submission no. 40, pp. 4-5; Ms Imogen Beynon, Queensland State Lead, National Union of Workers, *Public hearing transcript*, Brisbane, 11 May 2016, p. 29; Ms Elizabeth Jones, Community Development and Engagement Officer, Lockyer Valley Regional Council, *Public hearing transcript*, Gatton, 6 June 2016, p. 3; Mr Julian Ledger, CEO, YHA, *Public hearing transcript*, Brisbane, 15 June 2016, p. 15; Mr Giri Sivaraman, Principal, Maurice Blackburn Lawyers, *Public hearing transcript*, Brisbane, 11 May 2016, p. 19

²⁰⁰ Maurice Blackburn Lawyers, Submission no. 17, p. 5; NUW, Submission no. 32, p. 4

²⁰¹ NUW, Submission no. 32, p. 4

²⁰² Elsa Underhill, Submission no. 36, p. 6

²⁰³ See: Federal Senate Education and Employment References Committee, Report on the inquiry into the impact of Australia’s temporary work visa programs on the Australian labour market and on the temporary work visa holder, March 2016; Federal Joint Standing Committee on Migration, Report on the inquiry into the seasonal worker program, May 2016.

A significant proportion of stakeholder and submitter testimony received during the course of the inquiry supported the introduction of an appropriate licensing regime to combat identified issues – including an academic expert, local governments, the legal fraternity, workers, employers and even some labour hire operators. Submitters also identified that while much of what needs to be done is a responsibility of the Commonwealth Government, and that national consistency in licensing would be ideal, the State is the appropriate agent for the regulation and administration of such scheme.²⁰⁴

The Government Members noted that in relation to the resources sector primarily, but also in relation to IT, construction and electrical contracting, some operators and peak employer groups considered either that they were not convinced of the need for a licensing scheme, or that a scheme may be of limited assistance in addressing issues identified within their industries.²⁰⁵ ITCRA submitted that:

*There is a clear distinction between labour hire/contracting professionals and workers who are vulnerable to exploitation, and the Inquiry is asked to bear this in mind when making its recommendations. In the event the Inquiry recommends such a system of additional regulation, it should be with the exception of white collar industries.*²⁰⁶

However, Broadspectrum, a large-scale operator working across a diverse range of industries including resources, construction and business support services, submitted that “provided that regulation does not add unreasonable compliance costs”, the introduction of licensing could help to level the playing field amongst labour hire operators and “provide a degree of assurance to users of labour hire services that they are engaging with legitimate providers”.²⁰⁷ Broadspectrum further submitted:

*Such regulation would not replace our due diligence processes but could potentially assist in reducing the risk of engaging unscrupulous providers and improving compliance with regulatory requirements... Competition on the basis of legitimate practices should be encouraged by government because of the efficiencies it creates.*²⁰⁸

Academic expert Dr Elsa Underhill also submitted:

*For those labour hire employers who currently comply with their legal obligations, the introduction of a licensing system would protect them from unfair competition. It would reduce the likelihood of them being undercut, losing clients, to those labour hire employers who disregard their legal obligations. A licensing system would support those labour hire employers who are willing to comply with their legal obligations.*²⁰⁹

Further, Mr Rod Hodgson from Maurice Blackburn Lawyers stated:

Employers who do the right thing have nothing to fear from a licensing regime; in fact, they have much to gain. Applying legislative insecticide to the cockroaches who skew the playing

²⁰⁴ ADCQ, submission no. 3, p.10; Lesleigh Murphy, submission no. 37, p.4; Ms Lesleigh Murphy, submission no. 37, p.3; AMIEU, submission no. 40, pp. 4-5; Ms Imogen Beynon, Queensland State Lead, National Union of Workers, *Public hearing transcript*, Brisbane, 11 May 2016, p. 29; Ms Elizabeth Jones, Community Development and Engagement Officer, Lockyer Valley Regional Council, *Public hearing transcript*, Gatton, 6 June 2016, p. 3; Mr Julian Ledger, CEO, YHA, *Public hearing transcript*, Brisbane, 15 June 2016, p. 15; Mr Giri Sivaraman, Principal, Maurice Blackburn Lawyers, *Public hearing transcript*, Brisbane, 11 May 2016, p. 19

²⁰⁵ RCSA, Submission no. 39; ITCRA, Submission no. 23; CCIQ, Submission no. 25; Master Electricians, Submission no. 26; Confidential Submission no. 30; Australian Industry Group, Submission no. 35

²⁰⁶ ITCRA, Submission no. 23, p. 3

²⁰⁷ Broadspectrum, Submission no. 38, p. 7

²⁰⁸ Broadspectrum, Submission no. 38, p. 7

²⁰⁹ Elsa Underhill, Submission no. 36, p. 6

*field for responsible employers and damage lives is to the advantage of employers, workers and government.*²¹⁰

In total, around two-thirds of the written submissions expressing a view on licensing were supportive of the introduction of some form of licensing and an associated register of accredited operators or similar, with strong support particularly coming from horticultural industry operators and employers. Notably, with labour hire issues identified by peak body Growcom as the horticultural industry's biggest source of concern,²¹¹ it was consistently communicated that "regulation or registration of any labour hire contractor has to be at the forefront of everyone's thinking".²¹²

For example, non-profit community-based business MADEC, which provides labour hire services under the Seasonal Worker Program, stated:

*"A mandatory certification process for labour hire would be really useful... The labour hire firm should be responsible for getting the certification and paying for it, like an ISO or HACCP accreditation run by the industry and vetted by government... Certification will make it easier for clients to assess how genuine a labour hire company is. Clients may still use non-certified agencies but it will definitely reduce how common it is...Mandatory certification would help to significantly reduce the issues if growers were compelled by companies purchasing their product to use a certified labour hire supplier".*²¹³

Mr Anthony Staatz, President, Lockyer Valley Growers, stated:

*From our perspective, it is really hard to do our due diligence. If you were running a seasonal farm and you have 50-odd people who want to come in for two weeks to pick a crop, bang, it is in, and it is out. When do you do the audit on this guy? He could have done the wrong thing and be gone and it is all over. You really need the ability to ensure that that person is accredited before they come...*²¹⁴

Ms Sue Zaina from Snapfresh Australia – Bundaberg stated:

I do not feel that it is fair to put it on to the farmer to have to regulate the contracting companies that are popping up all over Australia at the moment in our industry. This week alone I have had four different people come to me who want to contract on my farm. They have no documentation with them. All they have is an ABN. As part of our requirements when we have a contracting company with us, they have to have an ABN, they have to have their WorkCover documents in place; we have to have photographic evidence of who they are.

*One of the things that I would like to suggest—and I did suggest this at another forum which we all attended a few weeks ago—is that rather than put another responsibility onto primary producers, why can we not have a system in place where these contracting companies have to be licensed so they meet your requirements? We have to meet certain standards; they have to meet standards.*²¹⁵

²¹⁰ Mr Rod Hodgson, Principal, Maurice Blackburn Lawyers, *Public hearing transcript*, Brisbane, 11 May 2016, p.18

²¹¹ Mr Pat Hannan, CEO, Growcom, Presentation to the Horticulture Workers Interagency Forum, 27 April 2016.

²¹² Mr Allan Mahoney, Bundaberg Fruit and Vegetable Growers, *Public hearing (via videoconference) transcript*, 15 June 2016, p. 13

²¹³ MADEC, Submission no. 41, pp. 3-4.

²¹⁴ Mr Anthony Staatz, President, Lockyer Valley Growers Inc, *Public hearing transcript*, Gatton, 6 June 2016 p.5

²¹⁵ Ms Sue Zaina, Snapfresh Australia – Bundaberg, *Public hearing (via videoconference) transcript*, Brisbane, 15 June 2016, p.3

The Anti-Discrimination Commission Queensland (ADCQ) submitted:

41. The benefits of licensing are that worker receives fair treatment, the pay, benefits and conditions they are entitled to. Labour providers are not undercut by those who pay less than the minimum wage or avoid tax. Industry standards are raised. Labour users can check their workers come from a legitimate provider and are informed if their labour provider's licence is revoked. Consumers can be assured that their food has been picked and packed in an ethical environment. Illegal activities which lead to a loss of public revenue – income and payroll tax are reduced.²¹⁶

Further, Mr Julian Ledger, CEO, YHA, stated:

In 2009 a major research project was published by the National Institute of Labour Studies at Flinders University and included surveys of both working holiday-makers and employers. ...One finding of the study was that for each 100 working holiday-makers coming to Australia, six full-time jobs are created for Australians, this being due to the multiplier effect of the money that is spent. ...

We believe we have a responsibility to look after the interests of the young people who come here just as we would like young Australians to be treated overseas. If we do so then, firstly, the program can again grow; secondly, young people who participate can gain valuable new experiences; thirdly, the farmers can get their harvests in; and, fourthly, Australian jobs can be created through the multiplier expenditure effect.²¹⁷

Recommendation 1

The Parliament should legislate to:

- Establish a register of labour hire employers in Queensland
- Provide that only registered labour hire employers shall be permitted to contract for the provision of labour hire; and
- Require that continued registration is conditional upon compliance with:
 - Fair Work legislation and associated employment conditions, including time and wage records
 - WorkCover insurance obligations
 - Workplace health and safety legislation
 - *Anti-Discrimination Act 1991* and similar federal legislation
 - Accommodation standards for employees
 - Taxation and Superannuation Guarantee legislation
 - *Criminal Code Act 1889*
- Provide a “fit and proper person” test for the disqualification of persons for eligibility to be a labour hire employer
- Minimise the impact on employers by have providing a simple application and renewal process, with exclusion from the register on application to QCAT.

²¹⁶ ADCQ, Submission no. 3, p. 9

²¹⁷ Mr Julian Ledger, Chief Executive Officer, Growers, *Public hearing (via videoconference) transcript*, Brisbane, 15 June 2016, YHA, pp. 13-14

Compliance Bonds

Providing a compliance regime is an important preventative step and would help to achieve the objective of competitive neutrality amongst compliant employers.

However, where labour hire employers do not meet their obligations, often employees are left out of pocket with little recourse. Labour hire employers often have little or no fixed asset or address. Employers often go into liquidation before wages claims can be resolved.

Some submitters suggested a system of bonds to ensure compliance. While assisting in ensuring recourse for short changed workers, we believe that this would also have negative effects on cash flow for labour hire employers, many of whom are complying with existing legislation.

In our view, this proposal should not be adopted at this time. Should other options for regulation not work, this position could be reconsidered.

Regulating the Contractual Employment Relationship

The employment relationship between labour hire employers and workers is significantly regulated by the *Fair Work Act 2009*, workers' compensation, workplace health and safety and anti-discrimination legislation. However, there is very little regulation of:

- the relationship between Labour Hire Employer and Host
- the relationship between Host and Labour Hire Employee.

These are relationships which fall within the purview of the Queensland Parliament. Both are contracts regulated by Queensland law.

The Government Members are mindful that the challenging of reforming labour hire is primarily about ensuring compliance with existing laws, rather than creating new rights. Focusing on better enforcement of existing obligations ensures only a minimum of inconvenience for those labour hire employers who are meeting their obligations.

However, the Government Members also considered that an ancillary amendment to established recognised contractual links between host employers and labour hire workers could serve to both encourage increased levels of responsibility among host employers, and greater scope for financial recompense where workers have lost wages due to phoenixing.

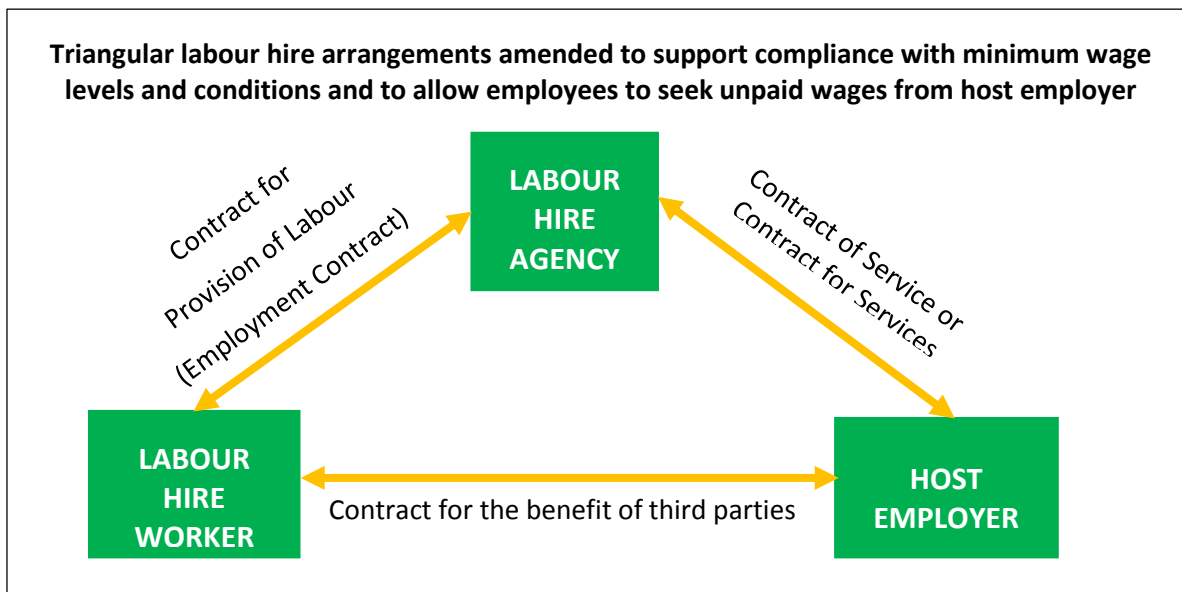
Vicarious Liability

At the heart of the labour hire contract between employer and host is the requirement that the labour hire employer arrange for an employee to work at the direction of the host. The obligation to fulfil the legal requirements of the employment relationship falls upon the labour hire employer, not the beneficiary of the employee's labour.

However, this relationship ensures that the risk that a labour hire employer fails to meet its obligation falls entirely on the employee, and not on the beneficiary of the contract, the host. At present, the incentive for labour hire employers is to provide the lowest wage rates. A failure to pay award wages is a competitive advantage, and significantly advantages labour hire hosts.

To address this perverse incentive and to provide protections to employees, the Government Members support the legislative creation of direct contractual obligations between the labour hire client and labour hire employee, which would require compliance with wages and conditions and provide the labour hire employee with a right to sue upon the contract.

This would amend the current triangular nature of labour hire arrangements in Queensland to that depicted below.



Similar third party enforceability provisions already operate, such as section 55 of the *Property Law Act 1974*. This regime would provide better functioning for the labour hire market, support reputable operators and share the risk between host and employee for the failure of a labour hire employer.

The Government Members note that the establishment of such a third party contractual relationship was supported by both the Queensland Law Society and Maurice Blackburn Lawyers in their submissions to the inquiry.²¹⁸ Other submitters also proposed the introduction of the concept of dual employment into Australian labour law, with the aim of delivering similar outcomes.²¹⁹

Recommendation 2

The Parliament should legislate to provide that labour hire contracts used by registered labour hire employers must provide:

- Payment of wages and conditions in accordance with the Fair Work Act 2009 is a requirement of the contract; and
- Where the employee is unable to seek recovery of unpaid wages from the labour hire employer due to administration, liquidation or an inability to locate the labour hire employer, the employee may recover unpaid wages from the host; and
- The employee shall be able to sue upon the terms of the contract.

Economic Opportunities

In the view of the Government Members supporting this Statement of Reservation, better regulation of labour hire employment arrangements is not only fair, but provides significant economic opportunities.

²¹⁸ Queensland Law Society, Submission, no. 19, p.3; Maurice Blackburn Lawyers, Submission no. 17, p.7

²¹⁹ See, for example, Queensland Council of Unions, Submission no. 29, p.12

Better compliance with basic employment conditions ensures competitive neutrality, with competition between labour hire employers based on strong recruitment, better employee management and skill creation. Better regulation will create a fair market for labour hire employers here in Queensland.



Peter Russo MP
Chair of the Committee
Member for Sunnybank



Jo-Ann Miller MP
Member for Bundamba



Duncan Pegg MP
Member for Stretton

Statement of reservation

Non-Government Members' Statement of Reservation

Mr Ray Stevens MP, Mr Lachlan Millar MP and Mr Pat Weir MP

Opening comments

The labour hire inquiry revealed that the vast majority of labour hire firms operate in compliance with legislative requirements and guidelines and provide an invaluable service to industry. Evidence submitted by a number of key stakeholders suggested that estimates of the number of rouge traders operating are in the low single percentages.

For example, the Australian Industry Group submitted:

There is no evidence that the labour hire industry in general exhibits a higher incidence of non-compliance than other industry sectors; and there is nothing inherent in the nature of the industry which makes it more likely that such a higher incidence is inevitable or more likely to emerge if not subject to special regulation...

There are, in fact, factors operating in relation to the labour hire industry which make most labour hire companies more transparent to regulators. The most significant labour hire companies, representing a major portion of the industry, have larger numbers of employees than most companies who are their customers or potential customers. Because of their employee numbers, and because of already existing registration and reporting requirements, such labour hire companies are more transparent to regulatory authorities than many of the customers to whom they provide their services. This makes them more obvious and likely targets for checking processes by existing regulatory agencies applying existing regulatory processes.²²⁰

The Recruitment and Consulting Services Association, similarly, highlighted that a 2010-11 FWO compliance campaign which focussed on accountancy and recruitment associated businesses – “the only compliance campaign that intersects with the on-hire industry in any great way” – found:

...that the labour supply services sector recorded the highest compliance rate with just over 88% of employers found to be compliant, which was higher than accounting services and office administrative services.²²¹

In addition, the Housing Industry Association, the Information Technology Contract and Recruitment Association (ITCRA), Master Electricians Australia, and a key horticultural processing body also reported that levels of labour hire operator compliance in their industries are high, with many firms demonstrated a strong commitment to employer due diligence and being reputable for their employment practices.²²² Master Electricians Australia, further, noted that where non-compliance has been identified, it may point to noncompliance across industries at large, including across the direct employment sector more broadly.²²³

The main industries identified as having the most reported cases of bad practices were in the mining and seasonal fruit and vegetable industries.

The rise in labour hire employees in the mining industry was seen as a reaction to the downturn in the price of mineral commodities on the world market. While the change to labour hire has caused some

220 Australian Industry Group, Submission no. 35, pp.23-24

221 RCSA, Submission no. 39, p.

222 Housing Industry Association, Submission no. 7; ITCRA, Submission no. 23, p. 8; Master Electricians, Submission no. 26; Confidential, Submission no. 30.

223 Master Electricians Australia, Submission no. 26, p. 8

angst in the sector between full time and labour hire workers on the same site, it appears that the agreements between the mining companies and the labour hire companies are legally binding and not unlawful.

The fruit and vegetable industries rely on seasonal workers in large numbers over a relatively short timeframe and many growers prefer to use labour hire companies to manage the logistics of engaging a workforce during this period.

Many of the problems in the seasonal crop picking industry are as a consequence of federal legislation and federal work permits, and as such, are matters that would be best addressed on a national front, with taxation issues, work permits, immigration issues, and temporary housing issues all in need of rigorous enforceable federal legislation.

The vast majority – around 90% of labour hire companies²²⁴ – are acting in good faith, paying and recording all their employee financial duties and in general providing an invaluable service to an industry that would otherwise struggle to source a local workforce.

Some key points

The labour hire industry is a large industry and covers many areas from mining to agriculture, construction and professional services. The labour hire industry provides a fluid and flexible workforce for industry in times of sometimes swift economic downturns in commodity prices.

Phoenixing and other unacceptable labour hire practises such as entitlement abuse were known to nearly all presenters. Labour hire companies and labour hire company employees and hosts all agreed there is absolutely no place for this type of unscrupulous behaviour. As mentioned earlier, nearly all estimates of labour hire companies behaving in this fashion were in the single digit percentages.

The social and economic impact on employees and regional communities was raised by many submitters. However, in general, there was an acceptance that in the mining industry the fly-in fly-out (FIFO) nature of the industry is not likely to be overcome in the current economic climate for resources. In agriculture, there was an understanding that because of the seasonal nature of the industry, a permanent, local community based workforce could not be maintained.

There was a general knowledge and condemnation of unscrupulous and sham operators and many submitters called for better compliance checks and policing of current regulations.

There were several complaints in relation to the efficacy of Fair Work Officers and the lack of transparent action and access to the Work Ombudsman.

Many complaints were in relation to the differentiation between full time company employee entitlements and lesser entitlements under labour hire contract agreements. Again, this would be a matter to address on a national basis under Federal legislation.

Tendering and employment practices under labour hire companies were supported by employers and hosts and many employees wished they were not part of that process but rather had full time employment with a single employer. Unfortunately, the current workplace regime and the changing pattern and competitive nature of business makes the labour hire industry attractive to industry.

The Committee engaged in many discussions with stakeholders as to whether a licensing regime for labour hire companies would improve the conditions of workers, alleviate the phoenixing and other disreputable practises and provide a stronger voice for worker entitlements. The general consensus from presenters was that licensing would not affect the operations of sham contractors or better

²²⁴ At the public hearing in Brisbane (via video conference) on 15 June 2015, the Chairman of Bundaberg Fruit and Vegetable Growers, Mr Allan Mahoney, estimated the proportion of illegal operators at around 10%. See: Mr Allan Mahoney, Chairman, Bundaberg Fruit and Vegetable Growers, *Public hearing transcript*, Brisbane, 15 June 2016, p. 10

ensure the provision of due entitlements by the small number of disreputable operators. From the host employer's point of view, this would simply add another layer of cost and bureaucracy to a system that needs to be fluid and supportive of business needs and economic sustainability.

The following key comments highlight this consensus view:

Growcom:

*... we need to think about enforcing the legislation that we have. Creating new legislation with no compliance regime underneath it is not very valid.*²²⁵

Mr Luke Brown, Managing Director, Agrilabour:

I feel like companies like us are going to go through and do the licence, and the companies that are not doing it are not going to do it. I have examples where the immigration department or Fair Work will go on to a farm right beside a farm that everyone knows is not doing the right thing but they will not even go to that farm. There is an example of the too-hard basket and not exercising current legislation or wanting to really dig into the problem ...

*...If we had another set of licensing, what is the end goal of that? If the end goal is to try to get rid of the dodgies, I think it is a waste of time. For me, there does not seem to be any real action against what is out there because it is quite easy to find. It is all there. Everyone knows where it is, but we are not doing it...*²²⁶

The Building Service Contractors' Association of Australia (BSCAA) – Queensland Division:

... the BSCAA does not support the introduction of new legislation. We do not believe it is necessary. Quite frankly, if someone is willing to break laws that are there at the moment, they are just going to break more if you introduce them. It achieves nothing. What we would like to see is some of the current laws to be enforced. That would be nice. That is the real problem that we have...

*...the sham contractor provisions in the Fair Work Act offer very strong protections as long as the Fair Work Ombudsman can enforce them... there are just not enough inspectors to enforce them. They do not have the resources. We also have the workers compensation legislation, which offers quite strong penalties for people who breach that legislation. All of these sham operators are breaching it every day. Without a shadow of a doubt, there are quite significant fines involved for doing the wrong thing that could cripple any sham operator. It is just a matter of getting the resources into the organisations so that they can enforce it.*²²⁷

ITCRA:

ITCRA is not convinced of the need for a state based or nationwide licensing system or industry code, as this would only serve to increase costs for already compliant labour hire/contracting providers and do little to deter unscrupulous providers...

*National and international best practice indicates that streamlined regulation, together with industry association standards and education programs, are much more effective in ensuring legislative compliance. Adding another layer of regulation would only exacerbate confusion and potentially lead to higher incidents of non-compliance.*²²⁸

²²⁵ Ms Rachel Mackenzie, Chief Advocate, Growcom, *Public hearing transcript*, Brisbane, 11 May 2016, p.8

²²⁶ Mr Luke Brown, Managing Director, Agrilabour, *Public hearing transcript*, Cairns, 9 June 2016, p. 10

²²⁷ Mr Craig Pollard, Executive Director, Building Service Contractors' Association of Australia – Queensland Division, *Public hearing transcript*, Brisbane, 11 May 2016, p.6; 10

²²⁸ ITCRA, Submission no. 23, p.3

Master Electricians Australia:

Currently State and Federal legislation provides significant audit, investigation, reporting and prosecution powers to enable effective enforcement if so desired by the relevant agencies.²²⁹

The Queensland Resources Council:

Operations surviving because of the productivity of labour hire for example show the potential sensitivity to any regulatory impositions by Governments... In short, apparently small regulatory impacts could have major effects on company productivity and viability in the current and foreseeable environment...

The consequence for any blunt regulatory imposts on labour hire practices that inhibit its productivity and flexibility benefits within the resources sector would trigger increased pressure on all operations, with marginal operations further likely to increase in number and to come under even greater cost pressures, with employment consequences. In the worst case, there are few jobs in a mine forced to close.²³⁰

The Australian Industry Group:

The cost of a licensing scheme is likely to be considerable. The imposition of higher costs on labour hire companies and their clients would reduce competitiveness and lead to reduced employment.²³¹

The Chamber of Commerce and Industry Queensland (CCIQ):

... CCIQ believes any additional regulatory scheme as an outcome of this inquiry would add to an already significant compliance burden for businesses using labour hire and labour hire companies, undermine job growth, and create an unnecessary layer of legal requirements to which a sufficient safety net for temporary forms of employment already exists. Furthermore, this would be directly at odds with the State Government's referral of industrial relations powers for private sector employers to the Commonwealth.²³²

The Recruitment and Consulting Services Association (RCSA):

RCSA is concerned that higher levels of regulation will only increase business costs for businesses which are demonstrating high degrees of compliance, as evidenced earlier in our submission, and will only justify further client use of 'cheaper' options offered by noncompliant labour contractors.²³³

In summary

The non-government members believe the relatively small number, from an industry perspective, of problems and issues being experienced by labour hire employees, host employers and labour hire company operators, would be best served by engaging a holistic approach to the issues, as identified, responded to by legislation and coordinated by the Federal Government. To that end, the Queensland Government could raise the matter through the COAG association at its earliest opportunity, which could support a multi-pronged attack on the misuses of the labour hire company system.

The non-government members support the bi-partisan view from many employers, employees and labour hire companies that better policing and a compliance unit to enforce the current penalties and

²²⁹ Master Electricians Australia, Submission no. 26, p. 8

²³⁰ QRC, Submission no. 9, p. 13

²³¹ Australian Industry Group, Submission no. 35, p. 25

²³² CCIQ, Submission no. 25, p.3; 8

²³³ RCSA, Submission no. 39, p. 24

legislation by the state government in many cases would address employees concerns and would make it harder for sham operators to exist in the industry.

The non-government members support the often expressed views of the presenters that a state licensing regime of labour hire companies in Queensland will not address any of the problems and issues of the current work environment.

A handwritten signature in black ink, appearing to read 'Pat Weir', with a stylized, cursive script.

Pat Weir MP
Member for Condamine