



Submission to the Victorian Law Reform Commission - The infiltration of organised crime groups into lawful occupations and industries

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1 Introduction

Job Watch Inc. (JobWatch) is pleased to contribute to the Victorian Law Reform Commission's review of regulatory regimes to prevent organised crime infiltrating lawful occupations and industries. Although the broad and complex problem of organised crime is, generally speaking, beyond the ordinary purview of JobWatch, we are able to make recommendations regarding the employment law context. In this submission, we therefore focus on the impact of potential increases to employment regulation, with a specific focus on the labour hire and lawful sex work context. JobWatch submits that targeted regulation of these industries may not only decrease the spread of organised crime, but also have positive consequences for the recognition and protection of employee rights.

2 About JobWatch

JobWatch is an employment rights community legal centre which is committed to improving the lives of workers, particularly the most vulnerable and disadvantaged. It is an independent, not-for-profit organisation which is a member of the Federation of Community Legal Centres (Victoria).

JobWatch was established in 1980 and is the only service of its type in Victoria. The centre is funded by State and Federal funding bodies to do the following:

- a) provide information and referrals to Victorian workers via a free and confidential telephone information service (**TIS**);
- b) engage in community legal education through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other appropriate organisations;
- c) represent and advise vulnerable and disadvantaged workers; and
- d) conduct law reform work with a view to promoting workplace justice and equity for all Victorian workers.

Since 1999, JobWatch has maintained a comprehensive database of the callers who contact our telephone information service. To date we have collected approximately 170,000 caller records with each record usually canvassing multiple workplace problems including, for example, contract negotiation, discrimination, bullying and unfair dismissal. Our database allows us to follow trends and report on our callers' experiences, including the workplace problems they face and what remedies, if any, they may have available at any given time. JobWatch currently responds to approximately 8000 calls per year.

3 Definition of organised crime

The Australian Crime Commission Act 2002 (Cth) section 4(1) defines 'serious and organised crime' as an offence:

- (a) that involves 2 or more offenders and substantial planning and organisation; and

- (b) that involves, or is of a kind that ordinarily involves, the use of sophisticated methods and techniques; and
- (c) that is committed, or is of a kind that is ordinarily committed, in conjunction with other offences of a like kind; and
- (d) that is a serious offence, an offence against Subdivision B or C of Division 471, or D or F of Division 474, of the Criminal Code, an offence of a kind prescribed by the regulations or an offence that involves any of the following:
 - (i) theft;
 - (ii) fraud;
 - (iii) tax evasion;
 - (iv) money laundering;
 - (v) currency violations;
 - (vi) illegal drug dealings;
 - (vii) illegal gambling;
 - (viii) obtaining financial benefit by vice engaged in by others;
 - (ix) extortion;
 - (x) violence;
 - (xi) bribery or corruption of, or by, an officer of the Commonwealth, an officer of a State or an officer of a Territory;
 - (xii) perverting the course of justice;
 - (xiii) bankruptcy and company violations;
 - (xiv) harbouring of criminals;
 - (xv) forging of passports;
 - (xvi) firearms;
 - (xvii) armament dealings;
 - (xviii) illegal importation or exportation of fauna into or out of Australia;
 - (xix) cybercrime;
 - (xx) matters of the same general nature as one or more of the matters listed above; and

that is:

- (i) punishable by imprisonment for a period of 3 years or more;
- or
- (ii) a serious offence;

but:

- (e) does not include an offence committed in the course of a genuine dispute as to matters pertaining to the relations of employees and employers by a party to the dispute, unless the offence is committed in connection with, or as part of, a course of activity involving the

commission of a serious and organised crime other than an offence so committed; and

- (f) does not include an offence the time for the commencement of a prosecution for which has expired.

4 General comments on the infiltration of organised crime into certain industries

The clandestine nature of organised criminal activities makes it difficult for JobWatch to comment on the extent of infiltration in particular industries.

The Commonwealth identified the following challenges in overcoming organised criminal networks:¹

- They are flexible, dynamic, innovative and resilient in nature;
- They are driven by a profit motive;
- They engage in criminal infiltration, corruption and the use of facilitators;
- They are clandestine, operating in the black market economy;
- They maintain a multi-jurisdictional and transnational presence; and
- They exploit technology and sophisticated methods.

The Australian Crime Commission Report on Organised Crime in Australia 2015 identified six activities which enable the spread of organised crime being: money laundering; cybercrime and technology enabled crime; identity crime; criminal exploitation of business structures; public sector corruption and violence.² The recommendations proposed by JobWatch are targeted at diffusing these enablers.

5 The labour hire and lawful sex work industries as targets for organised crime

As stated in the consultation paper, there is evidence to suggest that labour hire agencies may be a particular target for infiltration by organised crime.³ Labour hire markets may be exploited by organised criminal networks for various reasons, including that they may provide a legitimate front to conduct human trafficking and labor exploitation.

Further, organised crime groups may utilise unlawful labour hire practices, such as non-compliance with employment and occupational health and safety laws in order

¹ Attorney-General's Department, *Commonwealth Organised Crime Strategic Framework: Overview* (2009) 7.

² Australian Crime Commission, *Organised Crime in Australia*, Report ((2015) 11.

³ Victorian Law Reform Commission, *Use of Regulatory Regimes in Preventing Infiltration of Organised Crime into Lawful Occupations and Industries*, Consultation Paper (2015) 20.

to gain a competitive advantage over compliant businesses. Low or semi-skilled workers on short-term visas, international students, and migrant workers in the agricultural, domestic services, and maritime sectors may be particularly vulnerable to labour exploitation. Labour hire workers who speak limited English with complex visa arrangements are likely to be hesitant to come forward to law enforcement agencies.

JobWatch therefore submits that increased regulation may not only prevent the spread of organised crime but provide protection for labour hire workers' employment rights.

As recognised by the Victorian Law Reform Commission, the sex work industry may also provide a site for the operation of organized crime groups.⁴ These groups are likely to use sex work industry as an avenue for human trafficking, labour exploitation, money laundering, extortion and corruption. These activities not only infringe Australia's employment laws but also a number of Human Rights including:

- protection from torture and cruel, inhuman or degrading treatment;⁵
- freedom from forced work;⁶
- freedom of movement;⁷ and
- right to liberty and security of the person.⁸

6 Recommendations for regulatory reform to the labor hire and lawful sex work industries

JobWatch submits the following reforms are necessary to protect sex workers, labour hire workers and the general public:

Recommendation 1: Whistleblower protection

Whistleblowers are '*those who sound the alert on scandal, danger, malpractice, or corruption.*'⁹ In Victoria, the Protected Disclosure Act 2012 protects disclosures of improper conduct by public bodies and public officials. JobWatch submits that the Protected Disclosure Act should be amended to include a whistleblower protection/immunity for labour hire workers and sex workers where they approach law enforcement agencies. This is due to the fact that workers may be disinclined to report their employer's unlawful conduct out of fear of losing their job, being prosecuted for their involvement in the conduct or drawing attention to their unlawful visa arrangements.

⁴ Victorian Law Reform Commission, *Use of Regulatory Regimes in Preventing Infiltration of Organised Crime into Lawful Occupations and Industries*, Consultation Paper (2015) 19.

⁵ Charter of Human Rights and Responsibilities Act 2006, s 10.

⁶ Ibid, s 11.

⁷ Ibid, s 12.

⁸ Ibid, s 21.

⁹ Stuart Dawson, *Whistleblowing: A Broad Definition and Some Issues for Australia* (Victoria University of Technology, 2000).

If foreign workers (on '457' visas) do lose their job they are required to find other employment within 90 days or leave the country. This exacerbates their vulnerable position and further discourages the reporting of organised crime. If not properly addressed, unscrupulous operators will be able to continue to exploit this vulnerable section of the community.

By making the criminal conduct 'visible', whistleblower protection would encourage reporting and assist law enforcement agencies to identify and act quickly against members of organised criminal networks.

Recommendation 2: Licensing – Owners and operators – 'Fit and proper person' test

JobWatch submits that the introduction of a licensing system with a 'fit and proper person' test for owners (e.g. directors) and operators (e.g. managers) could help prevent organised crime and criminal organisations entering into or operating through labour hire businesses. Tax practitioners, lawyers, Certified Practising Accountants, firearms owners and pilots amongst others are subject to a "fit and proper person" test as a requirement for professional licensing. The rationale for introducing the test to these industries is to protect the public¹⁰ from exploitation and recognizes the position of trust and power that owners and operators of certain businesses hold.

It should be noted that JobWatch is mindful of the necessity of protecting vulnerable members of the community¹¹ and of therefore preventing discrimination on the basis of an irrelevant criminal record. Currently, Victoria does not have anti-discrimination legislation that prohibits discrimination on the basis of a criminal record in any sphere of life. To counterbalance this risk, JobWatch recommends that "irrelevant criminal record" be added as a protected attribute in section 6 of the Equal Opportunity Act Vic 2010 and that persons with a criminal record should be given an opportunity to provide an explanation for the circumstances surrounding the record.

This would reflect the argument, noted by Naylor, Patterson and Pittard, that discrimination on the basis of criminal record may contravene the right to privacy,¹² a human right which is protected under the Victorian Charter of Human Rights.¹³

¹⁰ *Jackson (previously known as Subramaniam) v Legal Practitioners Admission Board* [2006] NSWSC 1338 at [23] per Johnson J.

¹¹ See, eg, *Working with Children Act 2005* (Vic).

¹² Bronwyn Naylor, Moira Paterson and Marilyn Pittard citing Lord Lester of Herne Hill and David Pannick (eds), *Human Rights Law and Practice* (1st ed, 1999) ch 4.8.

¹³ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13(a).

Recommendation 3: Monitoring regimes and codes of conduct

JobWatch recommends that a Code of Conduct and correlative monitoring regime be introduced in the labour hire and lawful sex work industries. We note that the Recruitment & Consulting Services Association's code of conduct¹⁴ provides that members must "comply with relevant legal, government and statutory requirements" and "avoid unlawful collusion" and to "avoid actions that would unlawfully or unfairly harm work relationships" and to "act lawfully and fairly in transaction dealings". With respect, these statements are too vague and do not go far enough.

JobWatch submits that any code of conduct should:

- provide that workers' entitlements must be met; and
- explain the industry's stance against discrimination, bullying and illegal conduct.

The Association of Corporate Counsel (Formerly ACLA) explained that drafting a code of conduct is an

*"opportunity to make it clear to your company's employees and stakeholders how the organization intends to do business"*¹⁵

The establishment of Codes of Conduct would bring the labour hire and lawful sex work industries into line with other professional bodies in Victoria and many private sector companies.

Recommendation 4: Privacy

JobWatch submits that the public interest in providing vulnerable workers an anonymous avenue to enforce their employment rights can outweigh the public interest in an open court. Bucknall notes that the stigma of engaging in sex work is a threshold issue which prevents sex workers from approaching legal authorities.¹⁶

The Victorian court system has mechanisms to protect vulnerable participants in the court system including proceeding suppression orders, interim orders, closed court orders and pseudonym orders.¹⁷ JobWatch recognises the importance of an open justice system for transparency and fairness to the

¹⁴ Recruitment & Consulting Services Association's Code of Conduct, http://www.rcsa.com.au/imis15/RCSAweb/RCSA_Code/Introduction_to_the_Code/RCSAweb/wc-RCSACode/Introduction_to_Code.aspx?hkey=1d9b53f5-8955-41e4-9777-41bbf1fee1d5, items 2 and 3.

¹⁵ Association of Corporate Counsel, *Drafting and Implementing a Global Code of Conduct*, Australia, 2010, 1.

¹⁶ Fiona Bucknall, *A strategic approach to enabling sex workers' legal rights in Queensland and federal jurisdictions: Opportunities for sex worker organisations*, (School of Political Science and International Studies, University of Queensland, 2010) 3-4.

¹⁷ Judicial College of Victoria, *Open Courts Bench Book*, Melbourne, 2013, part 6.1.

accused and the need for deterrence. Therefore, JobWatch submits that the degree of privacy should be assessed on a case by case basis.

Recommendation 5: Amendment of *Fair Work Act 2009* (Cth)

Although in the Commonwealth jurisdiction, JobWatch nevertheless recommends that the *Fair Work Act 2009* be amended to render labour hire companies vicariously liable for breaches of the *Fair Work Act 2009* by host employers and/or deem the labour hire worker an employee of the host company for the purposes of unfair dismissal and general protections applications. The problem labour hire litigants face in taking action for unfair dismissal and general protections matters is that they are not considered an employee of the host company. In the recent unfair dismissal case *FP Group Pty Ltd v Tooheys Pty Ltd* [2013] FWCFB 9605, the Fair Work Commission said:

“The starting point for the consideration of the position here is that the mere existence of an arrangement under which a first company provides labour to a second company does not point to the second company being the employer of the labour so provided.”

The main problems experienced by labour hire workers who have called the JobWatch TIS have been in regards to unfair dismissal and underpayment of wages. Typically, the unfair or unlawful treatment was performed by the host company. This amendment is therefore needed to ensure that host companies are held accountable for their treatment of their workers.

6. Conclusion

JobWatch believes that the introduction of the above measures would not impose an unreasonable regulatory burden on labour hire businesses or the sex work industry. JobWatch recognises that there are labour hire and sex work organisations who carry out legitimate businesses. These recommendations will support these businesses by deterring organised criminal networks from engaging in these industries and undermining compliant employers.

Further, the passing of laws to regulate labour hire would bring Victoria into line with other OECD countries including Canada, South Korea, Japan and many European countries including the United Kingdom. In conclusion, JobWatch believes that the above reforms are required to ensure that the rights and safety of employees are not jeopardised by the spread of organised crime in their industry which is also obviously in the public interest.

Thank you for considering our submission. We would welcome the opportunity to discuss any aspect of this submission further. Please contact Ian Scott on (03) 8643 1118 if you have any queries.

Yours sincerely,

Per:
Job Watch Inc