



Victorian Inquiry into the Labour Hire Industry and Insecure Work

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Introduction

Job Watch Inc. (JobWatch) is pleased to contribute to the Victorian Inquiry into the Labour Hire Industry and Insecure Work (the Inquiry). In this submission, we focus on the impact of potential increases to employment regulation in respect to the labour hire context. Whilst acknowledging that genuine labour hire arrangements are a legal and economically justifiable means by which businesses can engage workers, JobWatch submits that targeted regulation of this industry will have positive consequences for the recognition and protection of workers' rights.

The main purpose of labour hire workers is to allow organisations to access temporary injections of labour inputs in circumstances where they are not able to undertake the process of hiring workers at short notice. The arrangement was not intended as a long term labour solution which allows entities to circumvent traditional employment obligations. While it is important that the laws regulating labour hire arrangements must not undermine the flexibility of these arrangements, they must also ensure that important obligations of an employer also attach to the host organisation where they do not affect the flexibility of the arrangement. This is to deter host organisations from entering into a labour hire arrangements in circumstances where such arrangements are not appropriate or genuine because they are entered into in order to exploit opportunities to avoid traditional employment obligations.

JobWatch believes this could be best achieved via a two-pronged approach being a) to specifically regulate labour hire companies and those individuals involved in running labour hire businesses and b) to disincentivise the use of labour hire workers by Victorian employers where traditional employment is more appropriate. Throughout this submission, JobWatch makes a number of recommendations in response to the Inquiry's terms of reference not all of which are within the scope of the Victorian government's law making powers but are still nevertheless worthy of consideration.

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.

The contents of this submission is based on the experiences of callers to and clients of JobWatch and the knowledge and experience of JobWatch's legal practice. Case studies have been utilised to highlight particular issues where we have deemed it appropriate to do so. The case studies which we have used are those of actual but de-identified callers to JobWatch's TIS and/or legal practice clients. Some of our callers/clients may be willing to share their experiences with the Inquiry directly.

Statistical analysis

The following information provides an overview of the employment status, coverage and union membership of callers to JobWatch over the past 2 years. It shows the vulnerability of many of our callers and the precarious nature of their employment.

Table 1: Employment status of callers to JobWatch in the period of 1 July 2013 to 30 June 2015

Employment Status	Count	Percentage of total calls
Casual Part Time	1,052	7.54%
Casual Full Time	668	4.79%
Independent Contractor	383	2.75%
Fixed Term Contract	251	1.80%
Apprentice/Trainee	195	1.40%

1,720 callers identified as casual employees, 383 callers identified as independent contractors, 251 callers were on fixed term contracts and 195 callers were apprentices or trainees.

Casual employees, independent contractors, fixed term contract employees and apprentices/trainees are vulnerable workers because they lack certainty that they have ongoing employment. This fear of losing their job often results in them being hesitant to enforce their legal rights.

Table 2: Coverage of callers to JobWatch in the period of 1 July 2013 to 30 June 2015

Coverage	Count	Percentage of total calls
Caller does not know	3,587	25.7%
Modern Award	3,554	25.5%
Enterprise Agreement	1,634	11.7%

1,634 callers (approximately 11% of callers) were covered by an enterprise agreement.

Employees who are covered by an enterprise agreement generally have the benefit of more generous conditions than those who are only covered by the minimum statutory protections¹ and, more often than not, there is a strong trade union presence hence why there is an enterprise agreement in the first place.

3,554 callers (25.5% of callers) were covered by a modern award. The Modern Award is designed to work in conjunction with the National Employment Standards to provide statutory minimum standards.²

3,587 callers (25.7% of callers) in that period did not know whether they were covered by an industrial instrument. This is concerning because they set out minimum terms and conditions of employment.

Table 3: Union membership of callers to JobWatch in the period of 1 July 2013 to 30 June 2015

Union Membership	Count	Percentage of total calls
Yes	660	4.7%
No	5,904	42.3%
Unknown	7,381	52.9%

660 JobWatch callers (4.73% of callers) identified as union members. Union membership is not a mandatory field in the TIS form, however JobWatch believes that this figure is reasonably accurate because where the union is involved, it is usually raised in the context of the conversation with the TIS advisor.

¹ Section 193 of the Fair Work Act 2009 provides that the Fair Work Commission must be satisfied that employees covered by an enterprise agreement must be better off overall under the enterprise agreement than under the modern award

² Andrew Stewart, Stewart's Guide to Employment Law, Fifth Edition, 2015.

Workers who are not members of a union are vulnerable to exploitation as they do not have the benefit of advice on minimum wages, minimum terms and conditions of employment, legal representation and collective bargaining.

The Extent, Nature and Consequence of Labour Hire Employment in Victoria

The employment status of workers engaged by labour hire companies

In JobWatch's experience, labour hire workers are often engaged on a casual basis or under short fixed term contracts, have no security of employment and are regularly paid less than the relevant minimum wage rate.

Case study – Jake – casual labour hire worker

Jake worked in a factory under a labour hire arrangement as a casual full time tradesperson.

The Maintenance Manager of the host organisation told Jake to speak with a senior manager about an occupational health and safety issue concerning a large piece of machinery. Jake started following this direction until a Middle Manager of the host organisation entered into an argument with him about engaging senior management.

His team leader said *'fuck off and go home'*. Jake waited, and then said *'ok, I will go home'* and left. The labour hire company called Jake and said 'we no longer have employment for you' because he had abandoned his employment. Since then, he has not had any work from the labour hire company.

Case study – Edwina - casual labour hire worker on fixed term contract

Edwina was a casual Inbound Sales Consultant employed by a labour hire company and working at a host organisation. She took a couple days of sick leave because she had bronchitis.

When she returned to work, she was still unwell. Therefore she asked them not to spray disinfectant near her. Soon after, her services were no longer required by the host organisation.

Case study – Heather – labour hire worker

Heather was employed by an energy company. She was seconded to an agency on a 3 month contract basis. The energy company paid the agency and the agency paid Heather.

Heather is unsure which company employs her and her eligibility for maternity leave

if she became pregnant.

The use of labour hire in particular industries and/or regions

It has become increasingly apparent to JobWatch that labour hire workers make up a significant proportion of the labour market. Whilst our database doesn't specifically capture labour hire arrangements, a manual search for the search term 'agency' produced 4,606 results since 1999. Although this gives us an indication of the large number of calls we have received in relation to labour hire arrangements, it is likely that there would be a far greater number that the search was unable to capture. Indeed, labour hire workers have become an alternative form of employment to permanent full time, part time or even casual employment³ and our anecdotal experience is that the trend towards the use of labour hire arrangements is ever increasing across most industries including the manufacturing, agriculture, retail and transport industries.

Case study – Frances – agriculture

Frances was employed as a strawberry picker by a labour hire company working at a farm with approximately 100 workers.

At times, she was either not paid on time or not at all. Her colleagues told her that they continued to work despite being owed thousands of dollars each.

Frances and some other labour hire workers had a 'walk off' due to non-payment of wages.

Case study – Amy – sales

Amy was a labour hire worker working in sales. She does not know if she is a union member.

Onsite at the host organisation, a customer made sexually suggestive comments to Amy over the telephone. The host organisation terminated her services because she hung up on the customer.

³ Hall, R, *Labour Hire in Australia: Motivation, Dynamics and Prospects*, Working Paper 76 April 2002, University of Sydney p 7

The application of industrial relations laws and instruments to labour hire workers

Industrial Relations laws:

Although host organisations often control the relationship with the worker and reap the benefit of their labour, the host organisation can hide behind a labour hire arrangement and thereby avoid responsibility under the law.

For example, under the *Fair Work Act 2009* (Cth) (FW Act), a worker is unable to make an Unfair Dismissal claim against a host organisation because the labour hire company is deemed to be the employer.

Although labour hire workers are, in certain limited circumstances, protected from adverse action under the General Protections in the FW Act, they can only make a general protections *non termination* claim against a host organisation, not a general protections *termination* claim as the host organisation is not regarded as the employer (therefore under the Act there has been no termination of employment).

Labour hire workers in Victoria who are employees are covered by the National Employment Standards (NES) under the FW Act.

Modern Awards and Enterprise Agreements:

Labour hire workers in Victoria who are employees would also usually be covered by the relevant applicable modern award depending upon the industry in which they work. However labour hire workers are not covered by an enterprise agreement made between a host organisation and its own employees unless the labour hire worker is a party to the enterprise agreement. Some labour hire agencies have their own enterprise agreements which will protect a labour hire worker if it covers the work they are undertaking. These enterprise agreements must contain better off overall conditions compared to the relevant modern award and the NES.

However, due to the nature of the employment of labour hire workers, they are unlikely to be union members and therefore they do not usually have the benefit of collective bargaining and so are not usually covered by an enterprise agreement.

Equal Opportunity Act 2010 (Vic)

Reasonable Adjustments for Labour Hire Workers with a Disability

The *Equal Opportunity Act 2010* (Vic) (EO Act) prohibits discrimination on the grounds of a range of attributes by an employer or principal contractor against workers or independent contractors.

Section 20 of the EO Act provides that an employer must make reasonable adjustments for an employee, or someone offered employment, with a disability who requires those adjustments in order to perform the genuine and reasonable requirements of the employment unless the person or employee could not or cannot adequately perform the

genuine and reasonable requirements of the employment even after the adjustments are made.⁴ The definition of ‘employee’, ‘employer’ and ‘employment’ includes independent contracting arrangements.⁵

However, it is not explicitly clear under the EO Act whether ‘principals’ (host organisations) have to make ‘reasonable adjustments’ for ‘contract workers’ (labour hire workers) with a disability. JobWatch submits that the EO Act be amended to clarify the entitlements of workers engaged under labour hire arrangements in this respect and bring the entitlements of workers engaged under labour hire arrangements into line with the entitlements of other workers.

We therefore recommend that a provision be inserted that explicitly indicates a principal must make reasonable adjustments for contract workers with a disability. This would resolve uncertainty in the law as to whether principals are required to make reasonable adjustments for contract workers and applies the same legal standard in relation to making reasonable adjustments to both employers and principals. Although not explicitly stated in the *Disability Discrimination Act 1992* (Cth) (the DD Act), there is a greater implication in the DD Act that principals are required to make reasonable adjustments for contract workers, by way of section 21A and the Australian Human Rights Commission confirms this on its website⁶.

Case study – Tracey – failure to provide reasonable adjustments at host organisation

Tracey, our client and young mother, was employed by a labour hire company as a casual employee to work as a process worker at the host organisation. The host organisation required Tracey and its other workers to work on 5 different machines per day on a rotational basis.

Tracey suffered a back injury and was unable to work on one of the machines. She sought reasonable adjustments from the host company to accommodate her disability but the host refused on the basis that it would be too disruptive to the other workers and would interfere with their food processing system.

Tracey filed a claim at the Victorian Civil and Administrative Tribunal (VCAT) alleging indirect disability discrimination and failure to provide reasonable adjustments. We advised Tracey that her claim was a test case in relation to whether the host employer has to provide reasonable adjustments under the *Equal Opportunity Act 2010* (Vic). The matter settled at mediation at VCAT.

Employment Activity Discrimination – EO Act

Although the EO Act generally protects labour hire workers (what it calls “contract workers”) against unlawful discrimination by host organisations (what it calls “principals”), when it comes to the protected attribute of Employment Activity, these protections fall away. This is

⁴ *Equal Opportunity Act 2010* (Vic) s 20.

⁵ *Equal Opportunity Act 2010* (Vic) s 4.

⁶ This proposal was put forward in a joint submission made by the Human Rights Law Centre, JobWatch and other Victorian organisations on 3 September 2015 in relation to updating the *Equal Opportunity Act 2010* (Vic)

because Employment Activity discrimination only applies in relation to the employee's employer.

Under s 6(c) of the EO Act, employers are prohibited from discriminating against employees where the latter has engaged in 'employment activity.' S 4 defines Employment Activity as including making a reasonable request for information or complaint about employment entitlements to the employee's employer. The provision clearly covers an employee engaged under a labour hire arrangement *when dealing directly* with their labour hire agency, i.e. the employer. However, it does not seem to apply where the labour hire worker is making a complaint to or requesting information from the host organisation.

Such differences produce inequitable outcomes between labour hire workers. For example, a labour hire worker that is "returned" to the labour hire company by the host organisation because of their sex, age, race, religion etc can make a discrimination complaint against the host organisation under the EO Act but a labour hire worker who is "returned" to the labour hire company because they requested information or complained to the host organisation about work related matters, e.g., work health and safety, meal breaks, shift/roster changes etc has no grounds under the EO Act to make an Employment Activity discrimination complaint against the host company.

This is because the EO Act's definition of "employment entitlements" refers to the employee's rights and entitlements under e.g. their contract of service, modern award minimum wage order etc, all of which do not attach to the host organisation because, due to the very nature of labour hire arrangements, the host is not the employee's employer and so does not have any of these obligations.

In order to remove this inconsistency in the EO Act and to provide labour hire workers with better protection against unlawful discrimination, JobWatch submits that the definitions of 'employment activity' and 'employment entitlements' be expanded to include the host organisation, i.e "principal", and the obligations of the host organisation e.g. in relation to work health and safety etc. This amendment would mean, for example, if the labour hire worker complained to the host organisation about bullying and was "returned" to the labour hire company, he or she could make an Employment Activity discrimination complaint against the host employer. Not only would this amendment to the EO Act provide better protections to labour hire workers, it would also disincentivise the use of labour hire arrangements where traditional employment was more appropriate.

Workplace Injury Rehabilitation and Compensation Act 2013 (Vic) and Accident Compensation Act 1985 (Vic)

JobWatch believes that obligations to provide a return to work plan and contribute to the cost of workers compensation claims should attach to the host company because they do not undermine the flexibility of labour hire arrangements and mitigates against labour hire arrangements being used to deny workers their traditional employment rights.

Return to Work Obligations

Under the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic)⁷ ('WIRC Act') host companies must, to the extent that is reasonable, co-operate with the labour hire employer in respect of the labour hire employer's obligation to plan an injured worker's return to work and consult with the worker about their return to work.⁸ Similar obligations are imposed by the *Accident Compensation Act 1985* (Vic)⁹ ('AC Act').

However it is unclear the extent of cooperation that is required under these Acts to comply with this obligation, and whether the worker has standing to enforce this obligation on the part of the host.

JobWatch submits that protection for labour hire workers should be strengthened by introducing joint responsibility between the labour hire company and the host organisation for a worker's return to work plan and consultation. It is envisioned that this joint responsibility would be exercised through two steps. The host organisation would have an initial obligation to plan the return of the worker and to consult with the worker about appropriate return to work arrangements. Where it is inappropriate for genuine business reasons for the worker to continue working for the host organisation, the labour hire company would then have an obligation to consult with the worker and return him or her to work in an appropriate role.

Workers Compensation

Because the labour hire company is deemed to be the employer of a worker on hire to a host organisation, they are responsible for workers' injury compensation insurance regarding a worker who is injured in the course of their duties while on hire to a host organisation. While there is some scope for the labour hire company to compel the host organisation to indemnify it in part where the injury has been caused by the host's negligence,¹⁰ in the majority of cases, it is the labour hire company that bears the liability to pay the insurance excess and the subsequently increased insurance premiums.

JobWatch submits that the cumulative effect of the ability of the host organisation to avoid return to work obligations and workers' compensation costs acts as an incentive to engage labour hire workers when the nature of the work is more akin to traditional employment e.g. full-time and/or ongoing. JobWatch submits that deeming the host organisation as the employer for the purpose of workers compensation would apportion liability in a way that reflects the true nature of the relationship between the parties without undermining the ability of host organisations to access labour hire workers when and where required.

This could be done by including a deeming provision in the *Workers Compensation Act 1958* (Vic) (the 'WC Act') for labour hire workers similar to the one that deems certain contractors to be employees for the purposes of workers' injury compensation insurance. The rationale for deeming contractors as employees is that the extent of control exercised by the

⁷ *Injury Rehabilitation and Compensation Act 2013* (Vic).

⁸ *Injury Rehabilitation and Compensation Act 2013* (Vic) s 109(2).

⁹ *Accident Compensation Act 1985* (Vic) s 199 (2).

¹⁰ *Workers Compensation Act 1958* (Vic) 63A(2).

contracting entity over the contractor's day-to-day work justifies the attachment of workers compensation liability.¹¹

JobWatch submits that this sets the precedent that the true nature of the relationship between the parties should be considered in determining where liability falls. As the nature of the relationship between the host organisation and the labour hire worker is effectively akin to one of employment when the degree of control exercised by the host organisation over the labour hire worker is taken into account, this new deeming provision is justified and it does not affect the ease with which labour hire workers can be engaged and disengaged by the host organisation.

Case study – Stewart – return to work issues

Stewart was employed by a labour hire company to work as a factory hand at a chicken farm. After two days employment, Stewart contracted a serious bird virus - the symptoms of which included fever, vomiting, diarrhoea and severe stomach cramps. Stewart had put in a WorkCover claim to the labour hire agency, but they delayed putting it in by several weeks. WorkCover has advised Stewart that labour hire agency were going to be fined by WorkCover for delaying handing in the claim. Stewart was not involved directly in this investigation.

Two days before he was due to return to work, the labour hire agency had intimated that they were keen for Stewart to return to work. However, two days after Stewart's medical certificate for his virus expired, and one day after the agency had told Stewart that he had his job to return to, he was dismissed.

The labour hire agency advised Stewart that there was just no more work for him. At the start of employment, they had said there was three months guaranteed work and the likelihood of ongoing work with the chicken factory. Stewart has not worked for some time now, and is low on finances.

Case Study – Rosa – return to work issues

Rosa is on the books of a labour hire company. She was placed at a food wholesale company and was injured on the job when chemicals ate into her fingers. Rosa contacted the labour hire company who asked her to come down and fill in a WorkCover claim. She did that and ended up being off work for 3 weeks before she got the okay from her doctor to return to work. Rosa contacted the labour hire company to let them know that she was able to return to work. They told Rosa that there was no work for her. However, the wholesale company that she was placed at told Rosa, when she contacted them directly, that there is always work available.

¹¹ *Workers Compensation Act 1958 (Vic) s 6.*

Case study – Cathy – return to work issues

Cathy broke her wrist at the client where she was placed and six weeks later it still hadn't improved. The labour hire company that she works for told her to put in WorkCover claim form. Cathy sent it off to her host employer who rejected it on the basis that they were not classed as her employer. The agency insisted that it is the client who is liable. Cathy pays her own tax, is paid by the client and then has to pay a percentage of this to the agency. She has spoken to WorkCover who have told her that given the client pays her she is not an employee of the agency and therefore may not be covered. Cathy has a letter to say that she is not deemed as an employee and so no claim is possible.

The reluctance of labour hire workers to enforce their rights

Although labour hire workers have various legal protections under workplace laws, industrial awards and equal opportunity legislation, in JobWatch's experience they are often reluctant to complain about employers who breach their legal obligations due to the precarious nature of their employment. This has a detrimental impact on the enforceability of such protections.

The following case studies illustrate the reluctance of labour hire workers to speak out against their employers.

Case study – Mandy – sexual harassment at host organisation

Mandy was sexually harassed by a worker who worked at her host organisation. She made a complaint to the host organisation.

After the host organisation fired the perpetrator, they did not give Mandy work for 2 weeks. They offered her a new job with less hours in a different department. She felt she was being victimised for complaining.

Mandy does not want to be moved or to lose her job. Her contract with the labour hire company says she must discuss complaints with the labour hire company not the host organisation.

Case study – Nimasha – harassment and “termination” by host organisation

Nimasha was an Admissions Officer contracted out full time to a private college. The General Manager at the host organisation verbally harassed staff and students. At meetings he often told staff to '*shut the fuck up*' and told Nimasha to tell a student to '*fuck himself*' for requesting a consultation time. He regularly told staff members to '*get a nose job*'. He told her that if she ever broke up with her husband, she could be with him. When Nimasha spoke with other staff about the General Manager's behavior, they said that they knew about it but were too scared to speak up.

One day, the CEO of the host organisation told staff that they were moving offices and that all female employees must wear makeup in the new office. When Nimasha said she felt uncomfortable wearing makeup, the General Manager made her stand up in front of staff

and told her that she had to wear makeup. She was then called in to the CEO's office (at the host organisation) and said that either he will *'fire'* her or she gives her resignation for disrespecting the General Manager. The CEO said that he liked being scary and having his staff *'shit themselves'*.

Labour hire workers who are not expressly protected by the unfair dismissal laws:

JobWatch's Experience¹²

JobWatch receives many calls from workers who are either employed, or sometimes engaged as independent contractors, by labour hire agencies which then place them with host organisations for what often turns out to be a lengthy period of time.

In many instances, the only contact the workers have with the labour hire company is that the labour hire company issues pay slips, pays wages by electronic transfer, pays superannuation entitlements (if any) and furnishes the worker with a PAYG certificate at the end of the financial year.

That is, the agencies, who on the face of it are the employers, are often in reality no more than paymasters. On the other hand, the relationship that the workers have with the host organisations is more akin to that of worker/employer, in that the workers:

- Often undertake induction and training as to the host organisation's policies and procedures;
- Work exclusively for the host organisation;
- Have their work allocated and controlled by the host organisation, not the labour hire company;
- Report to management staff of the host organisation;
- Wear a uniform of the host organisation and use materials and facilities of the host organisation;
- Do not work during any period when the host organisation may shut down (eg over Christmas);
- Record their hours using the host organisation's time recording system; and
- Make applications for leave or absences from work directly to the host organisation without regard to the labour hire company.

When the host organisation suddenly decides it no longer wants to retain the worker, it simply notifies the labour hire company to stop sending the worker. The circumstances may be unfair but the worker is lead to believe that if s/he lodges an unfair dismissal claim against the host organisation, that company will respond by objecting to FWC's jurisdiction on the basis that it is not the employer. Alternatively, if the worker lodges an unfair dismissal claim against the labour hire company, it is likely to object on the basis that - if the worker is a worker of the labour hire company - it has not dismissed the worker as the worker is still on their books, or – if the worker is an independent contractor engaged by the labour hire company – it is not the worker's employer.

¹² This submission was made in JobWatch Submission to the Independent inquiry into insecure work in Australia, Item 4.3 (January 2012).

Workers in these situations are particularly vulnerable and are, in our view, in need of stronger labour law protections.

The notion of joint employment, which is recognised in the United States, has not yet been established in an Australian court and remains contentious. In *Morgan v. Kittochside Nominees Pty Ltd* (PR918793, Munro J., Coleman DP, Gay C, 13 June 2002), a Full Bench of the AIRC expressed a view (obiter dicta) at [75] that: “no substantial barrier should exist to accepting that a joint employment relationship might be found and given effect for certain purposes under the Act.” In the previous paragraph ([74]), the Full Bench had noted that the “doctrine of joint employment, or of joint employers, is well-established in labour law in the United States.” The Full Bench then cited a passage in which the standard of joint employment was put in the following way:

[W]here two or more employers exert significant control over the same workers - where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment - they constitute ‘joint employers’ within the meaning of the NLRA. [NLBR v. Browning-Ferris Indus., 691 F. 2d 1117 (wd Cir. 1982); see also, TIJ, Inc., 271 NLRB 798 (1984).

More recently, in 2009, in *Orlikowski v IPA Personnel P/L* [2009] AIRC 565, at [42] and [43], Lacy SDP said the following of joint employment in Australia:

[42] It is necessary to consider IPA and AQIS’ contentions that joint employment is unknown to Australian law. The facts in this case suggest the arrangement between IPA and AQIS may have been one of “payrolling”. IPA’s only contact with Mr. Orlikowski was through recruitment and payslips. The concept of joint employment is generally accepted in the United States of America. While labour hire services facilitate flexibility the process has the potential to undermine collective bargaining, occupational health and safety, vicarious liability, accountability, job security and workplace harmony. There is an increasing incidence in the use of labour hire providers in Australia and it presents significant issues in termination of employment matters. First and foremost the issue normally involves discernment of which of the putative or potential employers is the actual employer. The fundamental question is whether two, otherwise unrelated, legal entities share or co-determine those matters governing essential terms and conditions of employment which depend on the control one employer exercises, or potentially exercises, over the labour relations policy of another. If not, it is necessary to determine who the employer is and who is responsible for the termination of employment.

[43] In 2002 a Full Bench of the Commission noted that there had been no definitive ruling by a court on the doctrine of joint employment in Australia. This remains the case, although the doctrine has gained some acceptance in the Australian Industrial Relations Commission, and in the Western Australian and New South Wales Industrial Relations Commissions. Whether or not there is acceptance of the doctrine of joint employment in Australia provides no immediate relief however for either of the parties potentially liable in this case, in light of the conclusions I have reached.

At JobWatch, we are of the view that labour hire arrangements should not be permitted to undermine the protections otherwise afforded to workers under the FW Act. It should not be possible for the labour hire company to avoid any responsibility under the FW Act by disowning the actions of the host organisation. Equally, it should not be possible for the host,

who has controlled the relationship with the worker and has taken the benefit of the worker's labour, to hide behind a labour hire arrangement and thereby evade its responsibilities under the FW Act.

There should, therefore, be express recognition in the FW Act of the fact that, for the purposes of unfair dismissal, two separate entities may be deemed to be joint employers in circumstances where they share or co-determine matters governing employment. This should extend to situations where labour hire workers are engaged as independent contractors on sham arrangements (where they really ought to be workers) and are placed with host organisations that control their work.

As described above, however, it is often the case that the labour hire company merely plays the role of paymaster, not exercising any real control over their workers who are placed with host organisations. Hence, in these circumstances, the host should, for the purpose of unfair dismissal matters, be recognised as the true employer, regardless of whether the worker is employed by the labour hire company or is engaged as an independent contractor with the labour hire company on a sham arrangement.

It is not enough that FWC already has the power to look at the "inherent character" and "real substance of" the relationship as objectively determined (*Damevski v. Giudice* (2003) 202 ALR 494 (Merkel J), [144] and [172]) and that it will not be constrained by labels which the parties apply to the relationship. Most workers will not be familiar with the jurisprudence on this point and will assume that they cannot apply for an unfair dismissal remedy against a host organisation.

Accordingly, JobWatch recommends that the FW Act should be amended so as to expressly recognise the possibility that host organisations will, in certain circumstances, be deemed to be the true employers for unfair dismissal purposes.

Case studies from JobWatch's database highlighting the limitations faced by labour hire workers

Case study – Tamara – factory

Tamara was employed through a labour hire company. She worked for the same host organisation for 7 to 8 years on a full time basis as a picker & packer.

Tamara experienced bullying at the host organisation. After this occurred, she mistakenly filed a General Protections Termination form. She then discovered that this was the wrong form because she was still 'employed' by the labour hire company. The labour hire company subsequently found her work at another host organisation however it was only 2 days per week.

Case study – Amit – bank

Amit was employed by a recruitment agency. He worked at a technology consulting firm which contracted him to a bank.

Whilst working at the bank, Amit was not given access to the information technology system to perform his job. He told the technology consulting firm and the bank that he did not have access. Two days later, the technology consultancy firm dismissed Amit following a false allegation made by an employee of the bank.

The reason given for Amit's dismissal was performance. He was not consulted or given an opportunity to respond. When some of the workers from the bank heard about Amit's dismissal, they complained to the technology consulting firm that Amit's performance issues were due to the fact that he was not given proper access to the bank's information technology system.

Amit filed a General Protections non termination claim against the technology consultancy firm.

Case study – Terry - property

Terry worked for 6 years under a labour hire arrangement as a Property Services Attendant in the Melbourne CBD.

Recently the host organisation where he worked told him that they are going to replace him with a younger permanent worker.

Case study – Jono – TAFE

Jono worked at a TAFE for 1.5 years under a labour hire arrangement.

His employment contract with the labour hire company said that his pay rate could be decreased if government funding was reduced.

Jono was informed that his pay rate would be reduced. He has been asked to respond in writing as to whether he accepts the pay cut.

Case study – Akmal - abattoir

Akmal was employed by a large labour hire company. He and 64 other workers were told that they had secured work in an abattoir. The workers undertook training and had immunisation shots and many were relocated for work. They were then told that they had to undertake further interviews and only half of them succeeded.

The workers were asked to fly to Sydney to see the labour hire company doctor at their own expense. This money was not refunded. If a worker was found to be injured, the labour hire company terminated their employment.

After taking 2 days of sick leave, Akmal was told by the host organisation that his services were no longer required. 40 other workers were also dismissed.

The host company regularly brought in busloads of foreign workers. When a new bus load arrived, the host organisation dismissed the existing workers on mass.

Labour hire arrangements – Miscellaneous Recommendations

Licensing regime

JobWatch submits that a strict licensing system for labour hire companies could prevent disreputable operators from working in the labour hire industry. These operators are generally thought to be responsible for undercutting the wage rates of those labour hire companies that claim to be paying appropriate wages and conditions¹³. The licensing regime should require labour hire companies to meet minimum statutory requirements such as payroll tax, superannuation, workers compensation and insurance. The regime could attract a licensing fee which operators would be required to pay.

As part of this licensing arrangement, labour hire companies should be required to undertake not to engage independent contractors (that is, labour hire workers would need to be engaged as employees, not contractors). As part of this licensing regime, owners and operators could be made to undertake some level of basic employment rights education including in regards to sham contracting so that contraventions of the FW Act's sham contracting provisions will be easier for the Fair Work Ombudsman to prove. Currently, if an employer/principal did not knowingly or recklessly engage in sham contracting then that is a complete defence even where the worker who is ostensibly engaged as a contractor is found at law to be an employee¹⁴.

Additionally, JobWatch submits that the licensing system should encompass a 'fit and proper person' test for owners (e.g. directors) and operators (e.g. managers). This may prevent unscrupulous employers from 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 public¹⁵ from exploitation and recognises the position of trust and power that owners and operators of certain businesses hold¹⁶.

Monitoring regimes and codes of conduct

JobWatch recommends that a Code of Conduct and correlative monitoring regime be introduced in the labour hire industry. We note that the Recruitment & Consulting Services Association's code of conduct¹⁷ 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

¹³ Hall, R, *Labour Hire in Australia: Motivation, Dynamics and Prospects*, Working Paper 76 April 2002, University of Sydney p 14

¹⁴ *Fair Work Act 2009* (Cth) s. 357.

¹⁵ *Jackson (previously known as Subramaniam) v Legal Practitioners Admission Board* [2006] NSWSC 1338 at [23] per Johnson J.

¹⁶ This recommendation was made by JobWatch in its Submission to the Victorian Law Reform Commission – the infiltration of organised crime groups into lawful occupations and industries, Recommendation 2 (July 2015).

¹⁷ 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.

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 conduct¹⁸.

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 workers and stakeholders how the organisation intends to do business"¹⁹ The establishment of Codes of Conduct would bring the labour hire industry into line with other professional bodies in Victoria and many private sector companies. A breach of any Code of Conduct could mean that a labour hire company has its license revoked.

Whistleblower protection

Whistleblowers are '*those who sound the alert on scandal, danger, malpractice, or corruption.*'²⁰ In Victoria, the *Protected Disclosure Act 2012* (Cth) (PD Act) protects disclosures of improper conduct by public bodies and public officials.

JobWatch submits that the PD Act be amended to include a whistleblower protection/immunity for labour hire 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 arrangements such as in relation to working visas.

Labour Hire Tax

JobWatch recommends that host organisations should be required to pay a 'labour hire tax'. This could be a way to dissuade host organisations from entering into labour hire arrangements. This would be akin to pay roll tax that the host organisation is effectively avoiding by using labour hire workers.

Education program

JobWatch submits that the Victorian government should undertake an education campaign to increase awareness of host organisations and labour hire companies about their legal obligations and to improve knowledge and awareness of employment rights for their workers, such as under anti discrimination, occupational health and safety legislation, minimum employment entitlements and trade union membership. A community legal centre could be funded to carry out this education program.

¹⁸ This recommendation was made by JobWatch in its Submission to the Victorian Law Reform Commission – the infiltration of organized crime groups into lawful occupations and industries, Recommendation 3 (July 2015).

¹⁹ Association of Corporate Counsel, *Drafting and Implementing a Global Code of Conduct*, Australia, 2010, 1.

²⁰ Stuart Dawson, *Whistleblowing: A Broad Definition and Some Issues for Australia* (Victoria University of Technology, 2000).

The extent, nature and consequence of other forms of insecure work in Victoria

Temporary migrant work visas

Although not within the Victorian government's power, JobWatch makes the following comments and recommendations.

Temporary Work (skilled) (subclass 457) visas allow overseas workers to live and work for up to 4 years in Australia. The rationale of this visa subclass is to address skills shortages in Australia. In order to be eligible, overseas workers must be either sponsored by an Australian employer or covered by labour agreements between the Commonwealth and employers that allow employers to recruit overseas workers.

Approved employer sponsors are required to meet certain obligations designed to protect workers from exploitation and to ensure that the program is being used to meet genuine skills shortages. However, in JobWatch's experience, it is not uncommon for employers to act in breach of their obligations regarding worker protections.

JobWatch has found that temporary migrant visa schemes not only, by their very nature, have the potential to exacerbate the inherent power imbalance between employers and workers but do indeed have this effect. This is reflected through the way that temporary visa holders are treated by their employer sponsors²¹.

For this reason, as will be discussed further below, JobWatch believes that it is absolutely necessary for employer visa sponsors to be more vigilantly monitored and for there to be greater penalties made available to better deter potential offenders²².

The employment relationship

The relationship between workers and employers involves an inherent imbalance of power. This imbalance is a result of the employer's general ability to hire and dismiss workers and to determine employment conditions in circumstances where workers have a very limited ability to enforce statutory minimum entitlements and/or negotiate better conditions. Further, employers are, generally speaking, more economically well resourced than their workers.

Worker protections and entitlements in the FW Act (such as the National Employment Standards, Unfair Dismissal and General Protections divisions) recognise and aim to ameliorate the unequal nature of the employment relationship²³.

The impact of the temporary migrant workers visa schemes on the employment relationship

The temporary migrant workers scheme by its very nature exacerbates the power imbalance that exists in the employment relationship. This is because the worker's residency status is

²¹ JobWatch Submission to the Senate Education and Employment References Committee on the Impact of Australia's Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders, Item 4 (May 2015).

²² JobWatch Submission to the Senate Education and Employment References Committee on the Impact of Australia's Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders, Item 3.1 (May 2015).

²³ JobWatch Submission to the Senate Education and Employment References Committee on the Impact of Australia's Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders, Item 3.2 (May 2015).

tied to the ongoing sponsorship by the employer. It therefore adds a further level of domination that employers may and often do wield against workers. Further, the migrant workers who turn to JobWatch for assistance often have limited English language skills and little knowledge of their employment rights, which can further exacerbate their relative powerlessness²⁴.

Case studies of exploitation of temporary migrant workers by employers

JobWatch receives many calls from workers who are on working visas, particularly temporary working visas. These calls have increased significantly as temporary work visas have become more widely used. For example, a manual search of our database indicates that in 2005 only 2 people who called the TIS identified themselves as being on a 457 visa. In 2014, instead, 43 callers disclosed that they were 457 visa holders²⁵.

JobWatch's TIS database includes a large number of records which are principally about another problem, e.g. unfair dismissal, but which also involve migrant worker exploitation. Unfortunately, as we do not have 'visa issues' as a discrete problem description, it is not possible to retrieve the actual number of calls received by JobWatch relating to work visas. Nevertheless, what is clear from our manual TIS database search is that the number of calls relating to temporary work visas is increasing.²⁶

The following case studies highlight JobWatch's concerns.

Case study – Preeti – chef on visa

Preeti was employed as a chef at a bistro. She was on a 457 visa. Her employer frequently attended work intoxicated and sexually harassed her, such as touching her bottom.

One night, Preeti's employer arrived at her house in an intoxicated state and demanded to be let in. When she refused, he continued to send her text messages asking to come in. She was divorced and was worried that he would come back to her place when she was alone.

She was underpaid and overworked and was not allowed to take sick leave. Despite these conditions, Preeti was reluctant to speak up because she required 2 years of continuous service from her visa sponsor. She had 1 year to go. Her boss said that he would sign off her contract early if she slept with him.

²⁴ JobWatch Submission to the Senate Education and Employment References Committee on the Impact of Australia's Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders, Item 3.3 (May 2015).

²⁵ JobWatch Submission to the Senate Education and Employment References Committee on the Impact of Australia's Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders, Item 4.1 (May 2015).

²⁶ JobWatch Submission to the Senate Education and Employment References Committee on the Impact of Australia's Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders, Item 4.1 (May 2015).

Case study – Romeo – painter on visa

Romeo was on a 457 working visa painting factories for refurbishment. He was paid less than the minimum wage.

Three weeks after commencing with this employer, Romeo's boss asked him to get an ABN to become an independent contractor.

Case study – Penny – office worker on visa

Penny was an office worker on a 457 working visa. At the office Christmas party, her boss made sexual advances towards her and tried to kiss her. She pushed him away.

When she returned from the Christmas break, her boss started reprimanding her in front of colleagues and she was demoted.

Case study – cook on visa

Dinh worked as a cook at a pub under a 457 working visa.

He took 5 days off because he was sick. He notified his employer after seeing his doctor and produced medical certificates for the time he was unwell.

When Dinh returned to work, management notified him that his job was being made redundant. Dinh's colleagues said that they are rehiring. Dinh has 90 days to find another sponsor or he will need to leave the country.

Case study – Leon – visa

Leon was working under a 457 working visa. His employer underpaid him by \$17,000 plus commission in his first year of employment. When he questioned the underpayment, his employer threatened to terminate his employment.

He continued to work with the employer for another 6 months even though he knew that he was being underpaid. He was pressured to drive dangerous cars. He was forced to vary his contract to reduce his pay. His employer argued that his work car and phone was a component of his pay. His employer then made unauthorised deductions from his pay.

Trends arising out of the case studies

The above case studies show that the migrant workers covered by temporary working visa arrangements often experience employment issues with greater intensity by virtue of their precarious residency which they view as, and which in fact and law is, reliant on the retention of an employer sponsor.

The following trend areas have been identified:

- Underpayment and/or non-payment of entitlements;
- Unfair dismissal;
- Discrimination;
- Unreasonable requests of workers by employers;
- Work in contravention of visa conditions;
- Harassment of workers by employers;
- Threats of deportation;
- Employer requiring payment for sponsorship.

Temporary migrant workers will often experience a number of these issues simultaneously. However, as discussed further below, they may be hesitant to seek any form of legal recourse.

Additionally, JobWatch is concerned that, temporary visa workers who are dismissed only have 90 days to find a new sponsor or leave the country. This makes it very difficult, if not impossible, for a temporary visa worker to challenge their dismissal via e.g. an unfair dismissal or general protections claim.

JobWatch therefore recommends that temporary migrant workers who lose their sponsorship because they have been dismissed be entitled to an automatic bridging visa covering the period while they are challenging their dismissal (i.e. in an unfair dismissal, general protections or discrimination claim). If workers have to leave the country because of the loss of their visa status, then this causes an additional injustice in that they can't practically enforce their rights.

Further, the remedy of reinstatement of employment is available in both unfair dismissal and general protections but is effectively meaningless unless the employer's sponsorship obligations can also be ordered to be reinstated²⁷.

JobWatch also submits that Fair Work Commission and/or the Federal Court of Australia and the Federal Circuit Court of Australia have the power to order reinstatement of the employer's visa sponsorship obligations because, without this power, the remedy of reinstatement which is available in unfair dismissal and general protections claims is rendered meaningless.

²⁷ JobWatch Submission to the Senate Education and Employment References Committee on the Impact of Australia's Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders, Item 4.2 (May 2015).

Additionally JobWatch recommends that a specific taskforce or other arrangement be set up between the Fair Work Ombudsman and the Department of Immigration and Border Protection to better protect the work and residency rights of temporary migrant visa workers.

Whether temporary visa holders have access to the same benefits and entitlements available to Australian citizens and permanent residents

The temporary nature of the migrant worker visa scheme means that 457 visa workers are highly vulnerable. Rogue employers take advantage of the fact that they are unlikely to speak up and enforce their rights for fear of being thrown out of the country. Hence, whilst at first glance it appears that 457 visa holders have the same legal protections as other permanent workers - because they are covered by our workplace laws - access to justice remains a significant hurdle for workers on 457 visas.

In JobWatch's experience, the majority of temporary visa holders who contact the TIS are extremely reluctant to seek recourse under workplace laws for the apparent contravention by their employer of their employment rights. The prime reason behind this reluctance is their fear that if they make a complaint their employer will revoke their sponsorship. In some cases, employers have threatened the visa status of migrant workers to ensure these workers do not make a workplace complaint.

Because of this fear for their visa status, migrant workers suffer lower levels of access to the rights that they technically hold under law. As mentioned, migrant workers often have limited English language skills and knowledge of and access to the legal system which can make asserting their workplace rights even more difficult.

Additionally, migration law does not guarantee the residency status of a temporary migrant worker who is seeking to challenge their dismissal or make another workplace claim in the context of their employer's revocation of their sponsorship.

For these reasons, it is absolutely necessary for employer visa sponsors to be more vigilantly monitored and for greater penalties to be made available to better deter potential offenders²⁸.

Exploitation of other vulnerable classes of workers

JobWatch's experience: prevalence of insecure work across all occupations

One might expect that workers with little bargaining power in the worker / employer relationship (including young workers, older workers, low skilled workers, inexperienced workers, overseas students and workers from migrant backgrounds) would be those contacting JobWatch in respect of their insecure work arrangements. Whilst this is largely the case, we also receive many calls from workers in positions which would have once been relatively secure, including academic staff in universities, teachers, health professionals,

²⁸ JobWatch Submission to the Senate Education and Employment References Committee on the Impact of Australia's Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders, Item 45 (May 2015).

administrative staff in government departments, cooks in hospitals and canteen staff in state schools. Accordingly, in our experience, workers across all industries, all occupations and at all levels and are at risk of insecure work²⁹.

Case studies from JobWatch's database to highlight the prevalence of insecure work across all occupations

Case study – Anna – retail – fixed term contract

Anna worked for a fashion retailer for 7 years. Every six months, she was required to re-apply for her job. She progressed from a Retail Assistant to a job at Head Office.

When she told Management that she was pregnant, they informed her that they intended to employ a Buying Assistant to replace her role.

Case study – Loung – hospitality - seasonal

Loung worked at horse racing carnivals for 10 years. She was employed on a seasonal basis.

Last season she was unable to work because she had study commitments. Loung incurred a penalty from her employer in that she was not allowed to work in the first half of the year.

When Loung called her employer in the second half of the year, she discovered that without telling her, they had put her name on the roster despite there being a penalty in place. Her employer refused to give her any more shifts on the grounds that she did not attend the rostered shifts in February.

Case study – John – casual ambulance attendant

John worked on a casual full time basis as an Ambulance Attendant for 21 years.

When his employer lost a major contract, they asked John to resign. They offered to pay him long service leave however his entitlement to redundancy pay was unclear and would need to be proven in Court.

Apprentices and Trainees

The use of apprentices and trainees as labour hire workers is a growing problem. JobWatch regularly receives calls from apprentices or trainees who are working under labour hire arrangements. Not only are apprentices and trainees young and already at risk of exploitation due to their inherent vulnerability as a result of their employment status, adding

²⁹ JobWatch Submission to the Independent inquiry into insecure work in Australia, Item 3.1 (January 2012).

the further ingredient of labour hire arrangements unjustifiably increases the risk of exploitation of these vulnerable workers.

By enforcing their legal rights, apprentices and trainees risk termination of their apprenticeship or traineeship and they may find it difficult to find another certified workplace to undertake their training. The successful completion of a traineeship or apprenticeship is a mandatory step in achieving professional licensing in many professions.

The following JobWatch case studies demonstrate the ways unscrupulous host organisations can exploit apprentices' vulnerable position.

Case study – Fred – apprentice tradesperson

Fred was an Apprentice tradesperson employed by a labour hire company. He was placed in a small construction company to complete his apprenticeship.

His Site Manager threatened to kill him, verbally abused him and insisted that he perform dangerous tasks such as killing bees without a bee suit.

Despite his poor treatment, Fred continued working there for 1 year and 8 months.

Case study – Hamish – apprentice – electricity and gas

Hamish was an Apprentice in the Electricity & Gas industry.

He was repeatedly called a 'faggot' at work and another colleague twice exposed his genitalia to Hamish and injured him by throwing objects at him.

Hamish was too scared to speak up about his treatment and was unsure of his obligations relating to his apprenticeship and if he could find another job.

Case study – Vishal – apprentice motor mechanic

Vishal was an apprentice Motor Mechanic working under a labour hire arrangement.

Vishal was assaulted at work. When he indicated to the host organisation that he was scared to work with the person who assaulted him, Vishal was returned to the labour hire company. The perpetrator was dismissed. Vishal has not got any work from the labour hire company since.

JobWatch therefore recommends that the *Education and Training Reform Act 2006* (Vic) (ETR Act) be amended to make it unlawful for apprentices and trainees to be engaged as labour hire workers. That is, to prohibit a labour hire company from placing an apprentice or trainee with a host organisation under a labour hire arrangement.

Additionally, JobWatch believes that apprentices and trainees need to be closely supervised and receive on the job training. However if an apprentice or trainee is a labour hire worker, then their employer (the labour hire company) cannot possibly supervise or provide on the job training at the host organisation, meaning the very objectives of the apprentice or trainee regime under the ETR Act cannot possibly be met.

The following case illustrates this difficulty.

Insp Walker v Great Lakes Community Resources Inc t/as Workplace Services
[2010] NSWIRComm 182

Mr Minett was an apprentice employed by a labour hire company. He was placed at a factory to complete his apprenticeship.

At the factory, Mr Minett was crushed by a forklift which caused him injuries, shock and distress. This accident occurred because he received insufficient safety training and the workplace was unsafe.

His Honour noted that the labour hire organisation relied on a few conversations and site visits to ensure occupational health and safety requirements were met. There was no consideration of safe working procedures of particular tasks.

As the case above demonstrates, labour hire organisations are not in a position to supervise the tasks undertaken by trainees in the workplace. Unlike regular labour hire placements, apprenticeships and traineeships are designed to be a

*'...training contract between an employer and an employee in which the apprentice or trainee learns the skills needed for a particular occupation or trade.'*³⁰

Apprentices and trainees require greater supervision and protection than more experienced employees because they are yet to develop the practical skills from work experience in their chosen trade. JobWatch submits that the employer should be responsible for delivering the training of apprentices and trainees. Therefore, posting a trainee or apprentice to a host company under a labour hire arrangement should be made unlawful and sufficient penalties should apply in order to provide an effective deterrent.

JobWatch also submits that statutory guidelines be introduced in the ETR Act setting out a 'fit and proper person' test that must be met in order to supervise an apprentice or trainee.

This would establish the standard of conduct expected of registered employer supervisors. The benefit of guidelines is that they facilitate consistent decision making whilst allowing sufficient flexibility to consider the individual facts and circumstances of each case.³¹ In the

³⁰ <http://www.education.vic.gov.au/training/learners/apprentices/Pages/what.aspx>, 'What is an Apprenticeship or Traineeship?'

³¹ Cameron Macaulay, *Fit and proper person & duty of disclosure under the Legal Profession Act 2004*, CPD paper, The Victorian Bar Professional Standards Education Committee, http://www.vicbar.com.au/uploads/Fit_and_Proper_person_duty_of_disclosure_under_the_Legal_Profession_Act_2004.pdf accessed in November 2015, page 10.

assessment of fitness, JobWatch submits that honesty and integrity, capability to supervise and a consideration of past business practices should be paramount considerations.

Additionally, JobWatch believes that the introduction of guidelines containing a 'fit and proper person' test may protect trainees and apprentices and the general public from exploitation. It is generally accepted that fit and proper person tests are a way to ensure that the public has confidence that persons with registration have sufficient integrity to be entrusted with power and responsibility.³² The flow on effect for the community as a whole is public confidence that persons who have completed an apprenticeship or traineeship are suitably skilled to perform meaningful work in the future.

The introduction of guidelines also acknowledges that the completion of a practical apprenticeship is as important as the academic aspect of training. Currently, the Australian Skills Quality Authority is required to consider whether a training organisation complies with the Fit and Proper Person requirements to qualify as a registered training organisation³³ and proscribes the criteria for suitability for registration in the *Fit and Proper Person Requirements 2011*, Part 2. Introducing a statutory guideline brings the requirements for professional supervisors in line with the requirements for training organisations and heightens community awareness of the important role of vocational training.

Workers on rolling fixed term contracts: JobWatch's Experience³⁴

Each year we receive a significant number of calls from individuals who are employed on what we will refer to here as "fixed term contracts" (even though we understand that mostly they are really "hybrid" or "outer limit" contracts, which contain terms allowing for termination during the life of the contract). Many of our callers have been on a series of back-to-back fixed term contracts for over two years. Not infrequently, they have been employed in this way (on contiguous fixed term arrangements) for much longer than that. The categories on our database for length of employment are:

- 3 months or less;
- 3 - 6 months;
- 6 - 12 months;
- 12 months - 2 years;
- 2 - 5 years;
- 6 – 10 years;
- 11 – 15 years;
- 16+ years.

We note that, for the purposes of the unfair dismissal laws, s386 of the FW Act deals with the meaning of "*dismissed*". Section 386 states that:

³² Jeffrey Fitzpatrick, Vivienne Brand and Christopher Synmes, "Fit and Proper": An integrity requirement for liquidators in the Australian Corporate Legal Framework.

³³ *National Vocational Education and Training Regulator Act 2011*, s 186(1).

³⁴ The following submission was made in JobWatch Submission to the Independent inquiry into insecure work in Australia, Item 4.5 (January 2012).

“(2) ...a person has not been dismissed if:

“the person was employed under a contract of employment for a specified period of time...”

Section 386(3) goes on to state that:

“Subsection (2) does not apply to a person employed under a contract of a kind referred to in paragraph (2)(a) if a substantial purpose of the employment of the person under a contract of that kind is, or was at the time of the person’s employment, to avoid the employer’s obligations under this Part.”

Paragraph 1531 of the FW Act’s Explanatory Memorandum states:

“Subclause 386(2) sets out circumstances in which a person is taken not to have been dismissed. These are where:

the person was employed for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, task or season” (underlining added).

Paragraph 1532 of the Explanatory Memorandum further states:

“Paragraph 386(2)(a) reflects the common law position that termination in these circumstances would not be a dismissal. The fact that an employment contract may allow for earlier termination would not alter the application of this provision as the employment has terminated at the end of the period, task or season. However, if a person engaged on this sort of contract is terminated prior to the end time specified in the contract, they may seek an unfair dismissal remedy if they satisfy the other requirements.”

As noted by Commissioner Deegan in *Drummond v Canberra Institute of Technology* [2010] FWA 3534, at [51]:

“[t]he intention of the legislature appears to be to retain the common law position that a contract which ends with the effluxion of time does not terminate at the initiative of the employer. The only change to the operation of the relevant provisions that is intended is to provide that an worker employed under a contract for a specified period of time, whose employment is terminated other than at the expiration of that contract, may make an application under the unfair dismissal provisions of the legislation.”

Accordingly, even where a worker might have been employed on a series of back to back short fixed term contracts for years on end, if the contract reaches its expiry date and is no longer renewed or extended, the worker will not, it seems, be protected by the unfair dismissal laws.

Moreover, if the worker believes that the fixed term contract arrangement is a sham, it appears that s/he will find it very difficult to establish, as per s386(3) of the FW Act, that a substantial purpose of the contract was to avoid the employer’s obligations.

Whilst in *D’Lima v Princess Margaret Hospital* (1994) 64 IR 19, Marshall J recognised that an worker who had been on a series of short fixed term contracts had a legitimate expectation of ongoing employment and did in reality have a continuous employment relationship with her employer, it appears that no other workers have succeeded in

establishing that they were on fixed term contracts merely for avoidance purposes. For example, in *Drummond v Canberra Institute of Technology* (cited above), the worker relied heavily on *D’Lima*, but Commissioner Deegan dismissed the possibility of a sham and distinguished the facts of that case from the facts before him:

At [53] “...for the entire period of the applicant’s employment with the respondent from 2003 to 2009 there was always a written employment contract which governed that employment. In D’Lima the applicant had been employed by the respondent for periods when no written contract governed her employment. Clearly the applicant in the D’Lima case may have had a legitimate expectation of ongoing employment at the cessation of each contract. The applicant in the matter before me was well aware that his employment could end with the expiration of each contract. A number of statements made by the applicant during submissions by the applicant clearly indicated that he was aware his employment could end at the expiry of his contracts. Clearly in this case there is an absence of “strong countervailing factors” [indicating a continuous employment relationship].”

At JobWatch, we consider that the FW Act should be amended so that workers who are on fixed term contracts for longer than 24 months are automatically converted to permanent employment unless the employer refuses the conversion on reasonable grounds. Factors to be taken into account in deciding whether there are reasonable grounds for refusing the conversion would need to be outlined in the FW Act. This would need to be a civil penalty provision in order for it to have any real weight.

Such a provision would not only extend protections of the unfair dismissal laws to many long-serving workers who are currently excluded. It would also allow these workers to enjoy the minimum entitlements set out in the National Employment Standards (NES) such as notice of termination and redundancy entitlements. Such a provision would, in our view, minimise the disadvantage and insecurity that is associated with contiguous fixed term arrangements and accordingly, it would be one way of achieving greater social inclusion.

Case studies from JobWatch’s database highlighting the limitations faced by workers on a series of fixed term contracts (or on continuous renewals of a fixed term contract)

Case study – Immogen – project officer – fixed term contracts

Immogen worked as a Project Officer at a bio-tech research institute. She worked for 8 years on a series of fixed term contracts which were renewed yearly.

Immogen took a period of maternity leave. She was then told that her employment contract would not be extended because of 'funding cuts'.

Case study – Barry – doctor – fixed term contracts

Barry was employed by a health insurance company as a Doctor. He worked for 4 years on identical 1 year fixed term contracts.

He was informed that in the most recent budget, Management withdrew funding for his position. Barry was unsure whether he would be eligible for redundancy pay.

Workers who are protected by the Fair Work Act and/or anti-discrimination legislation but who are nevertheless reluctant to lodge a complaint: JobWatch’s Experience

It is true that the FW Act provides some important protections from unfair treatment to workers in precarious employment situations. For example, regular and systematic casual workers with a reasonable expectation of ongoing employment are protected from unfair dismissal. Furthermore, all workers (including independent contractors) are protected from adverse action and discrimination, and all workers are entitled to lodge a complaint with the Fair Work Ombudsman if they do not receive the correct pay or other entitlements.

In addition to the FW Act, there are also legislated state and federal anti-discrimination protections which are designed to protect all workers and independent contractors, including workers engaged in insecure forms of work.

However, the reality is that many abuses of the employment relationship still go unchecked. There is an enforcement gap, with many vulnerable people unaware of their rights. Even once they are informed about their rights, many workers are unwilling to enforce them, because of a range of factors, including, for example, a perception that:

- They will be at a disadvantage compared with the employer if they do not have private legal representation, which they cannot afford;
- They won’t have enough proof to succeed with an application for relief;
- Their former employer will fabricate allegations against them;
- They will be branded a “trouble maker” and will then find it difficult to secure alternative work;
- A formal complaint will impact negatively on other aspects of their lives (e.g. they will have problems with their Australian work or study visas, or their employment will be terminated, which they are not willing to risk).

Case studies from JobWatch’s database to highlight how workers in insecure employment arrangements may be reluctant about enforcing their rights

Case study – Julia – graphic designer on fixed term contract

Julia worked in the Construction industry as a Graphic Designer on a fixed term contract.

A colleague sent Julia sexually provocative text messages. Human Resources were annoyed with Julia that it took her 6 weeks to complain about the sexual harassment. Meanwhile, the offending colleague was dismissed and rehired.

Julia is too scared to take sick leave because she is worried about being dismissed.

Case study – Felix – casual restaurant manager

Felix worked on a casual full time basis as a Restaurant Manager for over one year.

His employer was not paying him superannuation and refused to provide him with a

written employment contract.

Case study – Timothy – priest on fixed term contract

Timothy was a local Priest. He worked for the Church for over 10 years on a series of fixed term contracts.

Timothy's contract was up for renewal and he was concerned that he could lose his job.

Sham contracting and the use of 'phoenix' corporate structures

In JobWatch's experience, unscrupulous employers use sham contracting and phoenix structures as a means to exploit vulnerable workers. Broadly speaking, sham contracts are used to disguise a working relationship which would otherwise be an employment relationship as an independent contractor arrangement for the purpose of avoiding legal obligations. It is used by employers to evade responsibilities for Workers' Compensation, occupational health and safety legislation, minimum employment terms and conditions and taxation obligations.

The use of phoenix structures involves the "*deliberate, systematic and sometimes cyclic liquidation of related corporate trading entities* for the purpose of evading legal responsibilities.³⁵ It also involves the intentional transfer of assets from an indebted company to a new company for the purpose of avoiding paying tax, creditors or employee entitlements.³⁶

Factors which allow these situations to go unchecked include the inequality of bargaining power and lack of knowledge about workers' legal rights. In JobWatch's experience, vulnerable workers are susceptible to exploitation by disreputable operators.

Case study – John – sham contracting

John responded to an online advertisement for a painting job. He received the job and worked his first day. The next day, he was told to remove his safety boot as it was making the tiles dirty. After doing this, he fell from a ladder and broke his toe. John wanted to make a WorkCover claim, but his employer refused to tell him the business's company name or their ABN. The employer also refused to pay John for the work he had already completed. The employer informed John that he was an independent contractor and therefore needed to provide his own insurance. The employer had asked for John's ABN, but only after he had had his accident.

The Fair Entitlements Guarantee

³⁵ Australian Government (Treasury) 2009, Action against Fraudulent Phoenix Activity: Proposals Paper, p1

³⁶ ASIC, <http://asic.gov.au/for-business/your-business/small-business/compliance-for-small-business/small-business-illegal-phoenix-activity/>

The Fair Entitlements Guarantee (FEG) is a scheme set up by the Australian government which provides financial assistance to eligible employees to cover some unpaid employment entitlements in the event they lose their job due to bankruptcy or liquidation of their employer. The scheme provides a legislation safety net. Financial assistance can be provided for up to 13 weeks unpaid wages, annual leave, long service leave, payment in lieu of notice (up to 5 weeks) and redundancy pay (up to 4 weeks per year of service).

However the limitation of the FEG scheme is that unpaid wages, payment in lieu of notice and redundancy pay is capped. Additionally, the scheme doesn't cover all employment entitlements such as unpaid superannuation.

JobWatch therefore recommends, that in order for the Fair Work Ombudsman etc to better prosecute sham contracting, there should be a statutory definition of the term "independent contractor" in the FW Act.

Case study – George – phoenix corporate structure

The company that George worked for went into liquidation. This was the third time this had happened. The director of the company had a cycle of setting up a company, liquidating it and then setting up another company.

George was also owed unpaid superannuation. George was unsure whether his past period of service would be taken into account for the purpose of the Fair Entitlements Guarantee scheme.

Case study – Mario – phoenix corporate structure

Mario worked as a Panel Beater. He was engaged as an independent contractor.

The company went into liquidation and owed Mario \$8,000. Mario knows that the business is trading as a different entity.

As an independent contractor, Mario is not eligible for the Fair Entitlements Guarantee. Therefore he will need to stand in line with other creditors to recover payment.

Additionally, JobWatch recommends that the Commonwealth government (or the State government where legally possible) consider or continue to consider legislation similar to the draft Corporations Amendment (Similar Names) Bill 2012 which proposed amendments to the *Corporations Act 2001* (Cth) that would, in certain circumstances, impose liability on company directors for debts incurred by 'phoenix' companies.

Recommendations

Please note that some of these recommendations require Federal law reform however they are worthy of consideration. We have indicated next to the each recommendation whether it falls within the (VIC) or (CWTH) jurisdiction.

Our recommendations are summarised below:

Recommendation 1: Amend *Equal Opportunity Act 2010 (Vic)* (VIC)

Amend the *Equal Opportunity Act 2010 (Vic)* so that it explicitly indicates that host companies, i.e. principals, must make reasonable adjustments for labour hire workers, i.e. contract workers, with a disability.

Amend the *Equal Opportunity Act 2010 (Vic)* so that host companies, i.e. principals, can be liable for Employment Activity discrimination.

Recommendation 2: Amend *Workplace Injury Rehabilitation and Compensation Act 2013 (Vic)* and *Accident Compensation Act 1985 (Vic)* (VIC)

The *Workplace Injury Rehabilitation and Compensation Act 2013 (Vic)* and *Accident Compensation Act 1985 (Vic)* be amended so that:

- return to work obligations in workers injury compensation claims attach to the host organisation; and
- labour hire workers be deemed employees of the host organisation for the purposes of workers injury compensation claims.

Recommendation 3: Amend the *Education and Training Reform Act 2006 (Vic)* (VIC)

The *Education and Training Reform Act 2006* be amended as follows:

- to make it unlawful for apprentices and trainees to be engaged or otherwise used as labour hire workers; and
- to introduce statutory guidelines setting out a 'fit and proper person' test required to be met to supervise an apprentice or trainee

Recommendation 4: Licensing regime (VIC)

The implementation of a strict licensing system for labour hire companies, which requires labour hire companies to meet minimum statutory requirements. The regime could attract a licensing fee which operators would be required to pay.

As part of this licensing arrangement, labour hire companies should be required to undertake not to engage independent contractors. It should also contain a 'fit and proper person' test for owners (e.g. directors) and operators (e.g. managers) of labour hire companies.

Recommendation 5: Monitoring regimes and codes of conduct (VIC)

The introduction of a Code of Conduct and correlative monitoring regime in the labour hire industry.

Recommendation 6: Whistleblower protection (CWTH & VIC)

The *Protected Disclosure Act 2012* (Cth) and/or relevant Victorian legislation be amended to include a whistleblower protection/immunity for labour hire workers where they approach law enforcement agencies.

Recommendation 7: Labour Hire Tax (VIC)

Host organisations be required to pay a 'labour hire tax'. This would be akin to pay roll tax that the host organisation is effectively avoiding by using labour hire workers.

Recommendation 8: Education program (VIC)

The Victorian government undertake an education campaign to increase awareness of host organisations and labour hire companies about their legal obligations and to improve knowledge and awareness of employment rights for their workers. A community legal centre could be funded to carry out this education program. This should reduce instances of sham contracting and increase the likelihood of successful prosecutions given it will be more difficult for an owner or operator who has undertaken an education program to argue that they did not knowingly or recklessly misrepresent employment as independent contracting.

Recommendation 9: Automatic bridging visa (CWTH)

Temporary migrant workers who find themselves in a position of losing their employer's sponsorship because they have been dismissed, be entitled to an automatic bridging visa covering the period while they are challenging their dismissal.

Recommendation 10: Power to reinstate visa sponsorship obligations (CWTH)

The Fair Work Commission and/or the Federal Court of Australia and the Federal Circuit Court of Australia have the power to order reinstatement of the employer's visa sponsorship obligations because, without this power, the remedy of reinstatement which is available in unfair dismissal and general protections claims is rendered meaningless.

Recommendation 11: Better vigilance of temporary work visa arrangements (CWTH)

A specific taskforce or other arrangement be set up between the Fair Work Ombudsman and the Department of Immigration and Border Protection to better protect the work and residency rights of temporary migrant visa workers.

Recommendation 12: Specific telephone hotline (VIC & CWTH)

A confidential hotline be set up within a community legal centre or the Fair Work Ombudsman to cater to the employment issues experienced by migrant workers.

Recommendation 13: Research and investigation (VIC & CWTH)

Further research be undertaken in order to determine the temporary work visa program's effect on local labour wages and conditions and the extent to which it addresses genuine skills shortages.

Recommendation 14: Increased penalties (CWTH)

Greater penalties to be made available to better deter potential offenders and accessories.

Recommendation 15: Amend the *Fair Work Act 2009* (Cth) (CWTH)

The *Fair Work Act 2009* (Cth) be amended as follows:

- so as to give express recognition of the fact that, for the purposes of unfair dismissal, two separate entities in a labour hire scenario may be deemed to be joint employers in circumstances where they share or co-determine matters governing employment. This should extend to situations where labour hire workers are engaged as independent contractors on sham arrangements (where they really are employees) and are placed with host organisations that control their work;
- to expressly recognise the possibility that in a labour hire scenario (where joint employment does not apply) a host organisation will, in certain circumstances, be deemed to be the true employer for the purposes of unfair dismissal; and
- so that workers who are on fixed term contracts for longer than 24 months are automatically converted to permanent employment unless the employer refuses the conversion on reasonable grounds. Factors to be taken into account in deciding whether there are reasonable grounds for refusing the conversion would need to be outlined. This would need to be a civil penalty provision.
- to provide a statutory definition of "independent contractor".

Conclusion

JobWatch believes that targeted regulation of the labour hire industry will have positive consequences for the recognition and protection of worker rights. JobWatch believes this could be best achieved via a two-pronged approach being a) to specifically regulate labour hire companies and those individuals involved in running labour hire businesses and b) to disincentivise the inappropriate or disingenuous use of labour hire workers by Victorian employers by attaching more traditional employment obligations to host organisations.

Thank you for considering our submission. We would welcome the opportunity to discuss any aspect of this submission further and to contact our case studies to see if they are willing to share their experiences directly with the Inquiry.

Please contact Ian Scott on 9662 9458 if you have any queries.

Yours sincerely,

Ian Scott
Per:
Job Watch Inc