**ECONOMIC DEVELOPMENT COMMITTEE**

**INTERIM REPORT**

# Inquiry into Labour Hire Employment in Victoria

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Report into Labour Hire Employment in Victoria

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# ECONOMIC DEVELOPMENT COMMITTEE

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# ECONOMIC DEVELOPMENT COMMITTEE

## *FUNCTIONS OF THE ECONOMIC DEVELOPMENT COMMITTEE*

The Economic Development Committee is an all-party, Joint Investigatory Committee of the Parliament of Victoria established under section 5(b) of the *Parliamentary Committees Act 2003*.

The Committee consists of seven Members of Parliament, three from the Legislative Council and four from the Legislative Assembly. The Committee carries out investigations and reports to Parliament on matters associated with economic development or industrial affairs.

Section 8 of the *Parliamentary Committees Act 2003* prescribes the Committee's functions as follows: to inquire into, consider and report to the Parliament on any proposal, matter or thing connected with economic development or industrial affairs, if the Committee is required or permitted so to do by or under the Act.

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**Parliamentary Committees Act 1968***

## TERMS OF REFERENCE FOR THE ECONOMIC DEVELOPMENT COMMITTEE

### Labour Hire Employment in Victoria

Pursuant to section 4F of the **Parliamentary Committees Act 1968**, the Economic Development Committee is required to inquire into, consider and report on:

a) The extent and breadth of labour hire employment in Victoria, including the:

   i. employment status of workers engaged by labour hire companies;
   ii. use of labour hire in particular industries and/or regions; and
   iii. application of industrial relations, occupational health and safety, and workers compensation legislation.

b) The consequences of the use of labour hire employment. Consideration should be given, but is not limited, to:

   i. the rights and obligations of labour hire employees, labour hire agencies and/or host employers under industrial relations, occupational health and safety, and workers' compensation legislation. Any ambiguity about the nature of rights and obligations between the three parties should also be considered;
   ii. the impact on industry skills levels;
   iii. contribution to the casualisation of the work force; and
   iv. the extent of any such consequences

c) Recommendations based on an assessment of the above matters and including consideration of:

   i. the jurisdictional limitations of Victoria's industrial relations powers;
   ii. the recommendations of the New South Wales labour hire task force and the responsibilities of the New South Wales labour hire industry council (if established);
   iii. regulation in other Australian jurisdictions;
   iv. impact on business; and
   v. Worksafe Victoria campaigns and activities.

The Committee is required to report to Parliament by 31 December 2004.**

By resolution of the Legislative Assembly
Dated: 3 June 2003

*The *Parliamentary Committees Act 1968* was repealed and replaced by the *Parliamentary Committees Act 2003* which came into operation in December 2003.

**On 9 December 2004, the Legislative Assembly resolved to extend the reporting deadline of these Terms of Reference to 31 May 2005.

## *Acronyms*

| | |
|---|---|
| ABS | Australian Bureau of Statistics |
| ACA | *Accident Compensation Act 1985* (Vic) |
| ACTU | Australian Council of Trade Unions |
| AiG | Australian Industry Group |
| AIRC | Australian Industrial Relations Commission |
| AMIEU | Australasian Meat Industry Employees' Union |
| AMWU | Australian Manufacturing Workers' Union |
| ASU | Australian Services Union |
| AWA | Australian Workplace Agreement |
| AWIRS | Australian Workplace Industrial Relations Survey |
| DEWR | Department of Employment and Workplace Relations |
| EBA | Enterprise Bargaining Agreement |
| EOA | *Equal Opportunity Act 1995* (Vic) |
| ETU | Electrical Trades Union |
| GTC | Group Training Company |
| ICA | Insurance Council of Australia |
| MBAV | Master Builders Association of Victoria |
| NUW | National Union of Workers |
| OHS | Occupational health and safety |
| OHSA | *Occupational Health and Safety Act 1985* (Vic) |
| RCSA | Recruitment and Consulting Services Association |
| RMIT | Royal Melbourne Institute of Technology |
| RTW | Return to work |
| SDA | Shop, Distributive and Allied Employees Association |
| TSA | Troubleshooters Available |
| TWU | Transport Workers' Union |
| VACC | Victorian Automobile Chamber of Commerce |
| VCAT | Victorian Civil and Administrative Tribunal |
| VECCI | Victorian Employers' Chamber of Commerce and Industry |
| VTHC | Victorian Trades Hall Council |
| VWA | Victorian WorkCover Authority |
| WIC | WorkCover Industry Classification |
| WRA | *Workplace Relations Act 1996* (Cth) |

## *Chairman's Foreword*

When considering the position of labour hire firms in a 1997 New South Wales case*, Justice Hungerford ruled that they had 'a special responsibility' due to the fact that the company's employees were removed from direct management and control and tended to be less familiar with their workplaces than other employees.

Justice Hungerford's opinion goes to the heart of labour hire employment. While this report has found that the flexibility of labour hire employment appeals to many, it brings with it particular challenges.

During the course of this inquiry the Economic Development Committee has been presented with a great deal of evidence. As a consequence of ensuring that as many people and organisations as possible were given the opportunity to make written submissions and attend the Committee's public hearings, it has not been possible to complete the Inquiry by the original reporting date of 31 December 2004. For that reason, the Committee sought and received an extension until 31 May 2005. This report therefore serves as an Interim Report.

Much of the Interim Report focuses on occupational health and safety issues as this is undoubtedly the most pressing issue confronting an industry with an unacceptably high injury rate. Other issues including worker entitlements, conversion options and workforce casualisation were also brought to the Committee's notice, and these will be considered at greater length ahead of the Committee's Final Report.

I would like to express my thanks to the Committee staff, including Executive Officer Dr. Russell Solomon, Researcher Kirsten Newitt and Office Manager Andrea Agosta, for their contribution to this report. Similarly, I appreciate the support of my Parliamentary colleagues in helping produce a report which we hope will go some way to improving aspects of labour hire employment.

Tony Robinson MP
Chairman

**Ankucic v Drake Personnel Ltd* (unreported, NSW Industrial Relations Commission, 25 November 1997)

## *Executive Summary*

### Chapter 1: Introduction

The Committee's Terms of Reference required an investigation of labour hire employment in Victoria and its consequences.

During the course of the Inquiry, the Committee received evidence through written submissions, public hearings in Melbourne, informal briefings in Canberra, Sydney and Melbourne as well as a site visit to Wodonga. The Report is based on this evidence together with research undertaken by the Committee.

The amount of evidence received and the complexity of the issues involved meant that the Committee has not covered all issues raised in the Terms of Reference in this Interim Report. The Committee will deal with a broader range of issues in its Final Report, due to be tabled by 31 May 2005. The main focus of the Interim Report is on occupational health and safety (OHS) and workers' compensation issues.

### Chapter 2: Overview of Labour Hire Employment

This chapter discusses what is meant by the term 'labour hire'. The Committee considered that labour hire is characterised by a triangular relationship between the worker, the labour hire agency and the host, where the worker has a contract with the labour hire agency but not the host, and day-to-day control is exerted by the host. There is no 'set' assignment for labour hire workers: they can be engaged on different types of contract, for different periods of time. The Committee's discussion of labour hire includes independent contractor arrangements.

Since the 1990s, labour hire has become an increasingly prominent feature of the Australian labour market. The Committee was informed that there are currently around 1200 labour hire agencies in Victoria. The Committee received evidence that the major reasons that employers use labour hire are flexibility and cost. For example, labour hire enables employers to take on staff for seasonal peaks, or to plan labour costs so as to minimise down-time.

There were a number of recurrent themes in the evidence received by the Committee. One of these was the level of ambiguity in the relationship between agency, host and worker. Another theme was the concern regarding the high levels of casual employment in the industry. Witnesses also consistently raised concerns regarding the lack of regulation of the industry: many believed that this allows disreputable practices to continue. Finally, the Committee received much evidence that labour hire can create a divisive culture within the workplace, where labour hire workers do not enjoy the same conditions as direct hire employees.

The Committee found that there was a need for more research in the area of labour hire and believes that a new Australian Workplace Industrial Relations Survey would help to remedy this.

**Chapter 3: Legislation and Regulation**

There is no legislation that specifically relates to the labour hire industry and the Committee received much evidence questioning whether labour hire workers were adequately covered by the existing regulatory framework.

Subsequent to Victoria's referral of industrial relations powers to the Commonwealth, Victorian employees are subject to federal industrial relations laws. Some labour hire employees are covered by federal industrial instruments, but others are covered only by Schedule 1A of the *Workplace Relations Act 1996* (Cth). With the introduction of common rule awards in 2005, more Victorian workers will be covered by awards, but there is speculation that more employees may be moved on to Australian Workplace Agreements or into contracting arrangements.

The Committee was made aware that the *Occupational Health and Safety Act 1985* (Vic) sets out a joint responsibility for labour hire agencies and host employers with regard to the workplace health and safety of labour hire workers. These obligations cannot be delegated.

Under the *Accident Compensation Act 1985* (Vic), the labour hire agency holds financial responsibility for workers' compensation premiums related to labour hire workers, whether they are independent contractors or employees. The labour hire agency also has an important responsibility to participate in the return to work of injured workers. Currently there are only two industry classifications for the purposes

of deciding on premiums: white collar and blue collar premiums. Costs for injury claims can also be recovered by the Victorian WorkCover Authority (VWA) where the host employer is found to be negligent.

Other relevant pieces of legislation include the *Fair Trading Act 1999* (Vic) which is relevant with respect to independent contractors, and the *Equal Opportunity Act 1995* (Vic) which prohibits discrimination in employment.

The Committee found that the common law is somewhat unclear regarding the legal position of labour hire workers. One of the principal issues that emerges from the case law is whether a direct employment relationship can be established between the host and the labour hire worker. Courts have emphasised that paperwork is not enough: the relationship must be consistent with that of a labour hire arrangement.

**Chapter 4: Issues**

**Occupational Health and Safety**

The Committee recognised that a number of labour hire operators achieve best practice standards in occupational health and safety. However, there is persuasive evidence to suggest that OHS outcomes in the labour hire industry are, on average, considerably poorer than in other industries, particularly in the higher risk area of blue-collar labour hire. The Committee has recommended that the VWA commission ongoing research to examine occupational health and safety outcomes in the labour hire industry.

The Committee was advised that there were a number of reasons for the higher injury rates of the labour hire industry, including the constant exposure to new workplaces, the increasingly unskilled type of work that labour hire workers are doing, and higher risk work practices that may result from insecurity of employment.

The Committee has noted Mr. Chris Maxwell QC's suggestion that the *Occupational Health and Safety Act 1985* (Vic) should contain reference to the notion of control in terms of what it is 'reasonably practicable' for duty holders to achieve with regard to OHS. The Committee will consider this issue further in its Final Report.

The Committee recommended that labour hire agencies and host employers continue to share joint responsibility for workplace health and safety standards.

The Committee found that the advertising of some labour hire agencies is misleading in relation to workplace health and safety issues and recommended that the VWA make reference to advertising standards in future guidance material for the labour hire industry as well as monitoring the advertising activities of labour hire agencies more closely.

The Committee has found that there should be increased protection for labour hire workers from discrimination, particularly with regard to the making of OHS complaints and the Committee will give further consideration to this issue in the Final Report.

The Committee received evidence that some labour hire operators are reducing costs by not adequately adhering to OHS standards. The Committee notes that where a labour hire agency finds the safety standards of a host workplace to be unsatisfactory, the labour hire agency is not obliged to relay information regarding unsafe conditions to the VWA. The Committee believes that this is an issue that requires further examination, and will consider this in its Final Report.

**Workers' Compensation**

Evidence was presented to the Committee that the current workers' compensation scheme strains to deal with labour hire arrangements.

Some witnesses voiced concern that labour hire workers may not report injuries, or may delay the reporting of an injury as a result of job insecurity, and that this could translate into working with an injury. The Committee also noted concerns that the cost incentive of the scheme is being undermined by the use of labour hire as host employers can transfer premium costs and responsibility to labour hire agencies.

The Committee was made aware that some host employers are trying to avoid the financial implications of section 138 recoveries by insisting on the insertion of 'hold harmless' clauses in their contracts with agencies. The Committee has recommended that these clauses are contrary to good OHS practice and should be prohibited by legislation.

The Committee was presented with evidence that the premium classification system for labour hire agencies may result in an artificially lower premium for some companies, particularly those in 'blue collar' and higher-risk industries.
The Committee noted that the return to work of injured workers presents particular problems for labour hire agencies, because agencies must rely on the cooperation of a host employer to allow injured workers on site. The Committee has recommended that the VWA conduct further work to examine existing return to work arrangements for labour hire workers with a view to developing improved return to work pathways.

**Skills Training**

The Committee was made aware of widespread community concern as to the shortage of skills across Australia and noted that training by labour hire companies should not be confined to OHS matters.

The Committee was presented with evidence as to the perceived shortfall in quality skills training by labour hire companies as well as evidence that labour hire encourages training and skill development. The Committee has recommended that the Victorian Government should commission an investigation into skills training.

The Committee recognised that group training companies (GTCs) are an important source of apprenticeships and traineeships for Victorian workers. However, the Committee was also made aware that, as with the labour hire industry, GTCs often have high levels of workers' compensation claims.

The Committee intends to further examine skills training, the role of GTCs, and the impact of labour hire on skills training in its Final Report.

**Chapter 5: Regulatory Options and Alternatives to Regulation**

The Committee received evidence that further regulation of the labour hire industry was warranted. As to the regulatory approaches it has outlined, the Committee seeks further comment from relevant stakeholders prior to the tabling of the Final Report.

The Committee considered a number of proposals, including an industry-wide scheme, amendments to existing laws, and an education scheme. Much of the

evidence before the Committee suggested some combination of all three of these approaches.

The Committee recommended that the most suitable approach is the establishment of an industry-wide registration system aimed specifically at improving the OHS performance of labour hire companies, to be located in and managed by the VWA. The Committee recommended that the Victorian Government investigate penalty and enforcement options as part of the labour hire registration system. The Committee also recommended that the new system should be reviewed after two years of operation.

The Committee believes that the key function of the scheme must be the development of minimum labour hire standards and procedures, which could be expressed in a Labour Hire Code of Practice.

The registration system and the Code of Practice should be developed in consultation with the VWA's On-hired Workers Industry Stakeholder Forum.

The Committee received evidence relating to the regulation of other aspects of the labour hire industry, including levels of casualisation, access to entitlements and skills and training. The Committee believes that these claims require further investigation and will address them in the Final Report.

The Committee has recommended that the VWA conduct an educational program to ensure all parties to labour hire arrangements are aware of their rights and responsibilities towards each other with regard to occupational health and safety.

## *Recommendations*

***Chapter 2***

***Recommendation 2.1*** ***(page 13)***

The Committee recommends that the Victorian Government lobby the Federal Department of Employment and Workplace Relations to commission a new Australian Workplace Industrial Relations Survey as a matter of urgency.

***Chapter 4***

***Recommendation 4.1*** ***(page 38)***

The Committee recommends that the Victorian WorkCover Authority commission ongoing research to examine occupational health and safety in the labour hire industry.

***Recommendation 4.2*** ***(page 43)***

The Committee recommends that future guidance material developed by the Victorian WorkCover Authority for the labour hire industry should include reference to advertising standards, and that the Victorian WorkCover Authority should monitor the advertising activities of labour hire agencies more closely.

***Recommendation 4.3*** ***(page 44)***

The Committee recommends that labour hire agencies and host employers continue to share joint responsibility for workplace health and safety standards.

***Recommendation 4.4*** ***(page 44)***

The Committee recommends that the Victorian WorkCover Authority continue to develop guidance material for the labour hire industry, with a view to helping agencies and host employers better understand the nature of their joint responsibility and how to fulfil it.

***Recommendation 4.5*** ***(page 55)***

The Committee finds that, to the extent that the Committee understands their operation in the labour hire industry, 'hold harmless' clauses are a direct contradiction of the objectives of the occupational health and safety and workers' compensation regulatory framework, and recommends that these clauses should be prohibited by legislation.

***Recommendation 4.6*** ***(page 59)***

The Committee recommends that the Victorian WorkCover Authority commission research into the efficacy of existing return to work arrangements for labour hire workers with a view to developing improved return to work pathways.

***Recommendation 4.7*** ***(page 59)***

The Committee recommends that the Victorian WorkCover Authority investigate options to encourage host employers to provide improved return to work pathways for injured labour hire workers.

***Recommendation 4.8*** ***(page 65)***

The Committee recommends that, in recognition of the broad community responsibility for long-term skills training, the Victorian Government should commission a dedicated inquiry into skills training as a means of addressing concerns about growing skills shortages.

***Chapter 5***

***Recommendation 5.1*** ***(page 78)***

The Committee recommends that the Victorian government establish a labour hire registration system, to be located within the Victorian WorkCover Authority, aimed at improving the occupational health and safety performance of the labour hire sector.

***Recommendation 5.2*** ***(page 78)***

The Committee recommends that a Labour Hire Code of Practice be developed to assist in the delivery of improved occupational health and safety outcomes in the labour hire sector. The Code of Practice will lay out minimum standards for aspects of workplace health and safety in the labour hire industry, including but not restricted to risk assessments, workplace induction, provision of personal protective equipment and OHS training.

***Recommendation 5.3*** ***(page 78)***

The Committee recommends that the On-hired Workers Industry Stakeholder Forum should be consulted with regard to both the establishment of the labour hire registration system and the content of the Labour Hire Code of Practice.

***Recommendation 5.4*** ***(page 78)***

The Committee recommends that the Victorian Government consider penalty options and enforcement mechanisms for non-complying labour hire companies.

***Recommendation 5.5*** ***(page 78)***

The Committee recommends that the cost of the labour hire registration system should be funded by the labour hire industry.

***Recommendation 5.6*** ***(page 78)***

The Committee recommends that the labour hire registration system should be reviewed by the Victorian WorkCover Authority after two years of operation.

***Recommendation 5.7*** ***(page 81)***

The Committee recommends that the Victorian WorkCover Authority conduct an educational program to ensure all parties to labour hire arrangements are aware of their rights and responsibilities towards each other with regard to occupational health and safety.

Chapter 1

# Introduction

## 1.1 Background to the Inquiry

On 3 June 2003, the Economic Development Committee received Terms of Reference by resolution of the Legislative Assembly, to inquire into:

a) The extent and breadth of labour hire employment in Victoria, including the:

   i. employment status of workers engaged by labour hire companies;
   ii. use of labour hire in particular industries and/or regions; and
   iii. application of industrial relations, occupational health and safety, and workers compensation legislation.

b) The consequences of the use of labour hire employment. Consideration should be given, but is not limited, to:

   i. the rights and obligations of labour hire employees, labour hire agencies and/or host employers under industrial relations, occupational health and safety, and workers' compensation legislation. Any ambiguity about the nature of rights and obligations between the three parties should also be considered;
   ii. the impact on industry skills levels;
   iii. contribution to the casualisation of the work force; and
   iv. the extent of any such consequences

c) Recommendations based on an assessment of the above matters and including consideration of:

   i. the jurisdictional limitations of Victoria's industrial relations powers;
   ii. the recommendations of the New South Wales labour hire task force and the responsibilities of the New South Wales labour hire industry council (if established);
   iii. regulation in other Australian jurisdictions;
   iv. impact on business; and
   v. Worksafe Victoria campaigns and activities.

The Committee was required to report to Parliament by 31 December 2004.

## 1.2 Process for Gathering Evidence

This Report is based on evidence received through written submissions, public hearings, informal briefings, interstate briefings as well as research undertaken by the Committee.

The Terms of Reference were advertised and submissions were called for in *The Age*, *Herald Sun* and *The Weekly Times* in October 2003. The Committee received 30 written submissions through to September 2004. Appendix 1 contains a list of these submissions.

The Committee held informal discussions in March 2004 with government officials and stakeholders and in June 2004, the Committee travelled to Sydney and Canberra and spoke with New South Wales and Federal government officials, academics and a federal Member of Parliament as well as stakeholders. In October 2004, the Committee had a site visit at an abattoir in Wodonga and met with company representatives. In October 2004, the Committee had informal meetings with Mr. Chris Maxwell QC as well as industry stakeholders. Appendix 2 contains a list of these informal meetings.

The Committee conducted eight days of public hearings from July to November 2004 with industry groups, unions, academics and interested parties. Appendix 3 contains a list of the public hearings.

## 1.3 Scope of the Inquiry

The Committee has been granted an extension to May 31, 2005 in reporting on the Inquiry and this Report will constitute an Interim Report.

The Committee acknowledges the fundamental importance of the issues that the Inquiry into Labour Hire Employment in Victoria has raised. The relationship between industry and workers is one of the most basic social relationships and has undergone considerable change over the last 15 to 20 years. The evidence brought before the Committee with respect to this Inquiry required the Committee to closely examine a number of aspects of this relationship and, in particular, how it has been changed or influenced by the growth of the labour hire industry.

The Terms of Reference proved to be broad and attracted evidence that related to a large number of complex issues, spanning industrial relations, occupational health and safety, workers' compensation, equal opportunity, training and skills shortages, and local business concerns and needs. Characteristics of the industry itself added to the intricacy of investigations: the different types of working arrangements, the number of industries to which workers are supplied, the various types and sizes of labour hire agencies and the diverse stakeholders. Given all of these factors, the Committee has not sought to cover all the issues in its Interim Report and will address a broader range of issues in its Final Report.

The Committee focussed the attention of the Interim Report on issues of occupational health and safety (OHS) and workers' compensation. Evidence brought before the Committee indicated that this is an area that requires urgent attention. As such, the Committee considered it appropriate to make some substantive recommendations in its Interim Report relating to OHS and workers' compensation.

The Committee also devoted some attention to skills training, given the levels of community and business concern that are currently mounting with regard to skills shortages.

Finally, the Committee believed that it was appropriate to make some comment on the proposals brought forward by evidence in relation to the future regulation of the industry.

The Final Report will enable the Committee to consider stakeholder responses to the findings and recommendations of this Report.

Chapter 2

# Overview of Labour Hire Employment

## 2.1 What is Labour Hire?

It is important to define, at the outset of this report, what is meant by the term labour hire. The Committee understands labour hire to be a work arrangement that is characterised by a triangular relationship between the worker, the labour hire agency and the host. The worker has a contractual agreement with the labour hire agency to work for the host, but no contract with the host. The host pays a fee to the labour hire agency for the provision of labour and so has a contractual relationship with the agency. The host has day-to-day control over the worker, but the worker contracts with and is paid by the agency.

It is equally important to set out the basic terminology that will be used in this report. The generic term 'worker' is used throughout this report to describe both employees and contractors; where greater precision is required, the terms 'employee' and 'independent contractor' will be used. The firm providing the workers will be referred to as the 'labour hire agency', 'labour hire firm', 'labour hire company' or 'labour hire operator'. The firm to which the workers are supplied will be referred to as the 'host', the 'host employer' or the 'client'.

There is some debate regarding what constitutes labour hire. This is partly caused by its numerous variations. For example, the basis on which labour hire agencies engage workers varies: workers may be engaged as independent contractors or employees. If workers are employees, the contract of employment may be ongoing, fixed-term, maximum-term or casual. The type of assignment may also differ: an agency may supply individual workers for short, long or even indefinite term assignments with a host. Workers may also be engaged to work for parts of a host employer that have been wholly or partly outsourced to a labour hire agency. Furthermore, many labour hire agencies not only on-hire employees, but also provide recruitment, placement and group training schemes. Further confusion may arise as a result of the number of terms that are used to describe labour hire arrangements, which vary across industries. For example, workers in blue-collar industries are

generally called labour hire workers, workers in clerical and administration roles are known as 'temps' and in the health industry the term 'agency nurses' is used.

The Committee received evidence that the threshold issue of terminology is a crucial one. In particular, the labour hire industry body, the Recruitment and Consulting Services Association (RCSA) submitted that:

> *…the continued utilisation of the term 'labour hire' to define and describe the provision of third party employment services in Australia and Victoria contributes to the confusion and misinformation surrounding this contemporary employment arrangement.*[1]

The RCSA submits that it is necessary to differentiate between the various types of worker engagement to which the blanket term 'labour hire' is applied, because the rights and responsibilities of an employer-employee relationship are quite different from those of a principal-contractor relationship.[2] The RCSA proposes a terminology which differentiates between 'on-hired employee services' on the one hand, where workers are employed directly by an agency and 'contracting services' on the other hand, where workers are either engaged as independent contractors or as workers (independent contractors or employees) to undertake 'managed project' or outsourced functions. Some employers and employer associations chose to adopt a terminology similar to that of the RCSA when giving evidence to the Committee.

The Committee considers that it is appropriate to adopt the terminology of its terms of reference, which instructs the Committee to consider 'labour hire employment in Victoria'. Additionally, the Committee considers that, although the term 'labour hire' may be an umbrella term for a number of different working arrangements, the confusion regarding its definition is minimal and not such that the term should be abandoned for the purposes of this Inquiry. 'Labour hire' is a term that is commonly used by researchers and government bodies, by businesses and workers, and even by operators within the industry. The common thread running through all variations of labour hire is the tripartite relationship between worker, agency and host, where the contractual and control relationships with the worker are split.

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1 Recruitment and Consulting Services Association, 2004. Submission No. 15, 25 February, p.8.
2 Recruitment and Consulting Services Association, 2004. Submission No. 15, 25 February, p.11.

The Committee considers that it is not counterproductive to use the term 'labour hire' as long as the term is understood to be a broad one that encompasses a number of circumstances. The Committee accepts that there is a need to distinguish between employees and independent contractors; however, the Committee also considers that both types of arrangements are a part of the labour hire industry and it is sometimes useful to consider the two together.

## 2.2 The growth and spread of the labour hire industry

Labour hire is not a recent innovation: agencies that supply workers to other companies have existed in Australia at least since the 1950s. Richard Hall[3] singles out three antecedents that have contributed to the development of the labour hire industry:

a) **The 'temping' agency**. These agencies were probably the genesis of the labour hire industry. They traditionally specialised in the supply of office workers to supplement the permanent labour force in times of fluctuation or staff absence. Many of these firms have expanded dramatically in recent years.

b) **The recruitment industry**. The popularity of recruitment agencies grew in the 1970s and 1980s as many firms outsourced aspects of their human resources functions. Agencies provided short-lists of candidates to clients, who could then employ the most suitable candidate. These agencies may also have provided a labour hire function, where they on-hired employees to clients for short-term placements, so that the client could 'road-test' their suitability.

c) **'Pure' labour hire agencies**. These agencies grew in the late 1980s, supplying independent contractors as an alternative to direct employees. The popularity of this type of working arrangement has been growing quickly through the 1990s.[4]

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3 Dr. Richard Hall, 2003. *Labour Hire in Australia: Motivation, Dynamics and Prospects*. Working Paper 76. Australian Centre for Industrial Relations Research and Training, University of Sydney, April, p.3.

4 Victorian Industrial Relations Taskforce, 2000. *Independent Report of the Victorian Industrial Relations Taskforce*. Melbourne, August, p.52.

Prior to the labour hire industry's growth spurt in the 1990s, these predecessors were niche industries. Since labour hire arrangements have flourished over the past 15 years, these forerunners have now merged into the broader labour hire industry.

The labour hire industry has now firmly established itself in the landscape of the Australian labour market. It has grown to the extent that Australian Bureau of Statistics (ABS) data suggest that temporary and contract placements generated over $8 billion Australia-wide in 2001-02.[5] The employment services industry (including recruitment services) generated a 30.8 per cent increase in total income over the three years 1998-99 to 2001-02.[6] The RCSA notes that:

> *Employment services, which incorporates placement services as well, contributes 1.3 per cent to the GDP of Australia. In isolation it is larger than legal services or accounting services*.[7]

In his evidence to the Committee, Mr. Greg Tweedly of the Victorian WorkCover Authority (VWA) highlighted the growth of labour hire and recruitment services and the rapidity of this growth relative to the total remuneration base of the VWA scheme:

> *…the labour hire industry in 1997-98 had a remuneration basis of approximately $1 billion and by 2003-04 it is nearing $2.5 billion, so it has grown at 130 per cent, whilst the whole of the scheme has grown by 28 per cent*.[8]

According to the VWA, there are currently around 1200 labour hire agencies in Victoria.[9] A number of labour hire operators acknowledged the growth that has taken place in the industry. Skilled Engineering, for example, observed that "labour hire has undergone significant growth over the last 5 – 10 years."[10]

The growth of the industry is also reflected in the results of individual companies. While 60 per cent of all employment services organisations are small employers (with fewer than 5 employees working in their office),[11] the contemporary labour hire

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5 Australian Bureau of Statistics, 2003. *Employment Services 2001-02*. Cat no. 8558.0, 5 August.
6 Australian Bureau of Statistics, 2003. *Employment Services 2001-02*. Cat no. 8558.0, 5 August.
7 C. Cameron, Stratecom, for the Recruitment and Consulting Services Association, 2004. Minutes of Evidence, 27 July, p.20.
8 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, p.236.
9 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, p.237.
10 Skilled Engineering, 2004. Submission No. 16, 26 February, p.5.
11 Australian Bureau of Statistics, 2003. *Employment Services 2001-02*. Cat no. 8558.0, 5 August.

landscape in Australia features a number of large high-profile labour hire operators that generate substantial turn-over. For example, the revenue for Skilled Engineering, an Australian owned company and one of Australia's largest labour hire employers, was $645 million over the financial year 2002-03.[12]

International firms have also capitalised on the popularity of labour hire arrangements in Australia. Prominent multinational corporations such as Manpower and Adecco have hugely successful operations throughout the world and also number amongst Australia's largest labour hire providers. According to its submission, on an international level, Adecco Worldwide finds jobs for 312 people every minute.[13] At one of the Committee's public hearings, Mr. Rob Barber from Adecco outlined Adecco's size and financial success both internationally and locally:

> *Adecco is a Fortune 500 company, registered on the Swiss and New York stock exchanges. In the 2003 financial year sales exceeded 16.3 billion euros. Globally Adecco has 28,000 internal employees and a daily work force of approximately 650,000 on hired employees. […] We approximately have about 14,000 employees on hired each day [in Australia] and in Victoria last week we had 3,400 employees who were employed by us and paid by us. We have 78 offices in Australia with 25 of those in Victoria*.[14]

With this type of success, labour hire firms are becoming an increasingly important feature of Australian business and industrial relations.

An ABS study estimated that at the end of 2002 there were 290,115 persons who were on-hired by a recruitment agency or a labour hire firm.[15] While the number of employees may seem small as a proportion of total workforce numbers, it is growing strongly, and its importance lies not so much in the number of employees, but in the number of placements and their wide distribution across workplaces and industry sectors.[16] The total number of placements made by employment agencies (including permanent placements by recruitment agencies) increased by 37 per cent in the three years to June 2002, from 2.7 million to 3.7 million.[17]

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12 Skilled Engineering, 2004. Submission No. 16, 26 February, p.3.
13 Adecco Group of Companies, 2004. Submission No. 30, 1 October, p.24.
14 R. Barber, Adecco Group of Companies, 2004. Minutes of Evidence, 4 October, p.170.
15 Australian Bureau of Statistics, 2003. *Employment Services 2001-02*. Cat no. 8558.0, 5 August.
16 Ian Watson, John Buchanan, Iain Campbell and Chris Briggs, 2003. *Fragmented Futures: New Challenges in* Working *Life*. Sydney, Federation Press, p.73.
17 Australian Bureau of Statistics, 2003. *Employment Services 2001-02*. Cat no. 8558.0, 5 August.

While labour hire may have its roots in temporary agency work in the clerical and administrative sector, it is now used by employers in industries from agriculture to mining to health and community services. The intensity of use of labour hire varies by industry, although a different picture emerges depending on how labour hire use is measured. If it is measured according to the number of workplaces using labour hire, then Victoria's heaviest use of labour hire occurs in mining and construction, followed by manufacturing and then education, health & community services.[18]

**Table 2.1 Use of Labour Hire by Industry and Coverage, percentage of Workplaces**

| Industry | Currently using labour hire % |
|---|---|
| Agriculture | 22.2 |
| Mining & Construction | 61.5 |
| Manufacturing | 30.6 |
| Wholesale & Retail | 16.8 |
| Hospitality, Recreation & Services | 17.5 |
| Infrastructure | 11.9 |
| Education, Health & Community Services | 30.0 |
| Other | 28.4 |
| Total | 26.9 |

Source: Ian Watson, 2000. *Earnings, employment benefits and industrial coverage in Victoria: A Report to the Victorian Industrial Relations Taskforce* (Volume 1). Sydney, Australian Centre for Industrial Relations Research and Training, 12 July, p.32.[19]

On the other hand, if labour hire use is measured according to the number of placements, the highest number of placements is in the health care and medical occupations field (36.8 per cent), followed by trade, labour and related occupations (26.6 per cent) and clerical (15.3 per cent).[20] (See Table 2.2). This high number of placements in the health care and medical occupations field reflects the high number of placements in the nursing industry, where placements are often made for a single shift, rather than the spread across the industry.[21] Arguably, Watson's figures are more helpful to understand the prevalence of labour hire use across industries.

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18 Ian Watson, 2000. *Earnings, employment benefits and industrial coverage in Victoria: A Report to the Victorian Industrial Relations Taskforce* (Volume 1). Sydney, Australian Centre for Industrial Relations Research and Training, 12 July, p.32.

19 This survey did not include workplaces with joint Federal and Schedule 1A coverage.

20 Australian Bureau of Statistics, 2003. *Employment Services 2001-02*. Cat no. 8558.0, 5 August.

21 Australian Bureau of Statistics, 2003. *Employment Services 2001-02*. Cat no. 8558.0, 5 August.

**Table 2.2 Number of Placements, By Occupation, 2001-02**

| Industry | Temporary/Contract Placements '000 | Percentage Of Placements |
|---|---|---|
| General Management/Executive | 10.6 | 0.3 |
| Clerical | 506.3 | 15.3 |
| IT and Telecommunications | 32.7 | 1.0 |
| Banking and Finance | 66.0 | 2.0 |
| Operational and Technical | 32.9 | 1.0 |
| Trade, Labour and Related Occupations | 881.7 | 26.6 |
| Health Care and Medical | 1219.0 | 36.8 |
| Hospitality, Travel and Tourism | 348.9 | 10.5 |
| Other | 216.3 | 6.5 |
| Total | 3314.5 | 100 |

Source: ABS, *Employment Services, 2001-02,* Cat no. 8558.0.

Another indicator of the popularity of labour hire is the increasing propensity of business to use labour hire, especially larger workplaces. The Adecco submission cites a recent survey of Australian businesses that found that 83 per cent were planning to maintain or expand temporary staff numbers.[22] According to the Australian Workplace Industrial Relations Survey (AWIRS), between 1989 and 1995 the proportion of workplaces engaging labour hire workers increased from 14 to 21 per cent.[23] However, this is a conservative estimate when applied to today's workplaces, given that AWIRS is now nearly 10 years out of date. More recent research commissioned by the Victorian Industrial Relations Task Force confirms that the use of labour hire is closely related to the size of the workplace, with larger workplaces more likely to use agency workers. In this study, Ian Watson found that nearly 40 per cent of firms which had between 20 and 99 employees used labour hire, as did over 50 per cent of firms with 100 or more employees.[24]

22 Adecco Group of Companies, 2004. Submission No. 30, 1 October, p.23.

23 Alison Morehead, Mairi Steele, Michael Alexander, Kerry Stephen and Linton Duffin, 1997. *Changes at Work: The 1995 Australian Workplace Industrial Relations Survey*. Sydney, Longman, p.46.

24 Ian Watson, 2000. *Earnings, employment benefits and industrial coverage in Victoria: A Report to the Victorian Industrial Relations Taskforce* (Volume 1). Sydney, Australian Centre for Industrial Relations Research and Training, 12 July, p.31.

There are some discrepancies in the data on the labour hire industry, and not all witnesses agreed on the growth of the industry. While the RCSA observes that the labour hire industry contributes $8.667 billion to the Australian economy,[25] it also claims that reports of the levels of growth in the industry are inaccurate.[26] A similar view is held by the Master Builders Association of Victoria.[27] According to a study conducted by RMIT in 2003, 40 per cent of businesses surveyed reported no change in their organisation's use of agency employees over the previous three years and 29 per cent reported a decrease.[28] Equally, Watson's study of Victorian employment patterns indicates that while 25.4 per cent of workplaces were increasing their use of labour hire, 27.6 per cent were decreasing their use.[29]

The Committee considers that some of the statistical uncertainties about labour hire[30] highlight the fact that there is a need for more statistical data regarding Australian employment patterns, including the growth of labour hire. In particular, the Committee considers that estimates of the changes in the numbers of labour hire workers and their spread across different types of workplaces and industries would be facilitated by the continuation of the AWIRS. The aim of the survey was:

> *…to provide a comprehensive and statistically reliable database on workplace relations in Australia.*[31]

The survey was conducted in 1990 and in 1995, and was originally intended to be repeated at five yearly intervals. The AWIRS conducted in 1995 provided a very valuable resource in analysing national employment patterns and is still widely cited in labour market research. However, the survey has not been repeated since 1995 and appears to have been discontinued by the Department of Employment and Workplace Relations (DEWR). No other study has been instituted by DEWR to

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25 Recruitment and Consulting Service Association, 2004. Submission No. 15, 25 February, p.18.
26 Recruitment and Consulting Service Association, 2004. Submission No. 15, 25 February, p.22.
27 Master Builders Association of Victoria, 2003. Submission No. 10, 22 December, p.4.
28 Dr. Linda Brennan, Dr. Michael Valos and Professor Kevin Hindle, 2003. *On-hired Workers in Australia: Motivations and Outcomes*. Occasional Research Report. Melbourne, RMIT University, School of Applied Communication, p.31.
29 Ian Watson, 2000. Earnings, employment benefits and industrial coverage in Victoria: A Report to the *Victorian Industrial Relations Taskforce* (Volume 1). Sydney, Australian Centre for Industrial Relations Research and Training, 12 July, p.32.
30 Department of Employment and Workplace Relations, 2004. Submission No. 24, 30 April, p.10.
31 Alison Morehead, Mairi Steele, Michael Alexander, Kerry Stephen and Linton Duffin, 1997. *Changes at Work: The 1995 Australian Workplace Industrial Relations Survey*. Sydney, Longman, p.1.

attempt to replace AWIRS and capture the breadth and scale of the information and statistical data that AWIRS provided to the Australian public.

The Committee considers that there is sufficient evidence to conclude that the labour hire industry has been in a growth phase over the past 15 years, and has become a permanent feature of the Australian labour market.

***Recommendation 2.1***

***The Committee recommends that the Victorian Government lobby the Federal Department of Employment and Workplace Relations to commission a new Australian Workplace Industrial Relations Survey as a matter of urgency.***

## 2.3 Reasons for the growth of the labour hire industry

Employer evidence suggested that the major reasons for using labour hire are related to flexibility and cost. Labour hire arrangements provide employers with an cost-effective mechanism to quickly access a large and diverse supply of workers to meet their needs.

There are a number of dimensions to the workplace flexibility provided by labour hire; for example, it enables employers to take on staff for cyclical, seasonal or sporadic peaks and troughs, to replace permanent staff while they are on leave or to bring in specialist workers as required. Mr. David Hargraves of the Australian Industry Group (AiG) explained his organisation's view of the trend towards flexibility and the growing use of labour hire:

> *…Why do clients use labour hire? In our written submission we addressed a number of factors from various pieces of research that we have done. They included such things as corporate restructuring, increased flexibility to meet fluctuations, greater competitive pressures as a result of globalisation, outsourcing in the private and public sectors, extended hours of operation, fast changing technology, a need to concentrate on core business activities and new industries*.[32]

[32] D. Hargraves, Australian Industry Group, 2004. Minutes of Evidence, 23 August, p.121.

Mr. Rob Sonogan of Ready Workforce explained the role of labour hire as a strategic tool for businesses that experience peaks and troughs in production:

> *We certainly fill gaps. That is really what the whole idea of labour hire is — to look at a company's peaks and troughs. An example of that is Tip Top Bakeries, which does an Easter bun run. It starts in January and finishes in March. We supply the 20 people to do that Easter bun run for that period of time. Straight away there is a need, and we supply for that need*.[33]

Mr. Robert Van Stokrom of the RCSA observed that the flexible workplace arrangements provided by labour hire may assist in attracting or retaining business in Victoria:

> *A specific example that I will quote is the Avalon project with Qantas with respect to refurbishment of their aircraft. It commenced about five years ago and started with 180 employees working on flexible working arrangements together with a particular union and state government and with Qantas. It has resulted in 800 jobs now, permanent, full time jobs there at Avalon, and without the flexible work arrangements that were originally constructed with Qantas some five years ago it is a fact that those jobs would have gone offshore*.[34]

The RMIT study supported the idea that employers are attracted to flexibility, finding that the main reasons for calling on labour hire arrangements are to cover additional staffing requirements (30 per cent) or to cover absences of employees (17 per cent).[35] Employers may also benefit from the flexibility that labour hire provides by outsourcing peripheral functions to labour hire agencies, allowing business to concentrate on core functions.

The flexibility of labour hire arrangements is related to its cost-effectiveness, where the engagement of labour is carefully planned to minimise down-time and other labour-related costs. Mr. David Hargraves of the AiG explained some of the cost and efficiency motivations for employers:

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33 R. Sonogan, Ready Workforce, 2004. Minutes of Evidence, 4 October, p.200.

34 R. Van Stokrom, Recruitment and Consulting Services Association, 2004. Minutes of Evidence, 27 July, p.21.

35 Dr. Linda Brennan, Dr. Michael Valos and Professor Kevin Hindle, 2003. *On-hired Workers in Australia: Motivations and Outcomes*. Occasional Research Report. Melbourne, RMIT University, School of Applied Communication, p.18.

> *As the pressures of international and domestic competitiveness impact on business in Australia, companies look for more time- and cost-effective solutions. There are a number of things that labour hire companies are able to offer in terms of solutions. Firstly they can offer better response times because they have access to a larger range of people. Secondly, they have the technological support and infrastructure which facilitates easier identification of people who have the requisite skills and experience. Thirdly, they have specialist staff who have more highly developed interview skills and better and more developed selection procedures and practices. Fourthly, they have knowledge of the local market and where to look for people who have the requisite skills and what you need to pay in terms of market rates to be able to attract them*.[36]

The cost incentive of labour hire is such that a number of witnesses gave evidence to the Committee that they are concerned that labour hire is acting as a disincentive to direct employment, in a business environment where there is a key focus on increasing flexibility, reducing costs and maximising profits. The Committee was told that labour hire may be used to avoid the cost of the obligations that attach to a direct employment relationship, such as the provision of leave entitlements, the payment of workers' compensation premiums and the risk of unfair dismissal. The Committee also received evidence that sometimes costs may be reduced where labour hire agencies are able to supply labour to host employers at rates lower than the cost of direct employment, as agencies may not be obliged to provide their workers with the same pay and conditions that the host employer's direct-hire employees enjoy. The union movement has some concern that labour hire arrangements may be used strategically by employers as a tool to minimise union presence in the workplace.

However, part of the success of the labour hire industry may be attributed to the benefits that it can sometimes provide for employees. For example, the Committee received evidence that a number of workers are choosing labour hire because of the flexibility and diversity of work experience that it provides. Others are choosing labour hire in the hope of securing direct employment. Direct employment opportunities may arise with a host employer during a temporary assignment, or the work experience acquired during labour hire assignments may assist in applying for permanent employment. In particular, labour hire may be providing a path to employment for the structurally unemployed. However, it should be noted that not all labour hire workers actively choose labour hire arrangements, and some workers perceive that their

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[36] D. Hargraves, Australian Industry Group, 2004. Minutes of Evidence, 23 August, p.121.

working relationship is flexible purely from the perspective of their employer and the host employer.

The Committee received evidence that labour hire is becoming an increasingly important avenue for workers to gain access to direct employment. It was suggested to the Committee on a number of occasions that employers are increasingly using labour hire as a new method of recruitment for positions of direct employment. Mr. Gabor Fleiszig of A.B. Oxford Cold Storage told the Committee that labour hire was an indispensable recruitment tool for his business:

> *…since 20 January this year we have had 129 labour hire employees who left. Twenty one of them left the job of their own volition within five days and others within varying time frames. But the turnover in labour is enormous. If you hired these people as permanents at the beginning of their service, you would have a banana [sic] case on your hands — you could not function as an industry. So it is really a boon to industry to have labour hire as a method of vetting staff and getting good people on board.*[37]

In the RMIT survey, 11 per cent of employers cited 'thorough recruitment' as their main reason for using labour hire.[38]

The Committee considers that the growth of the labour hire industry can be attributed to a number of factors. Labour hire arrangements can sometimes be mutually beneficial to employees and employers.

## 2.4 Concerns in relation to the labour hire industry

The Committee acknowledges that labour hire has a legitimate role to play in the provision of supplementary workers for business, and makes a significant contribution to the Victorian economy. The Committee also acknowledges that there are a large number of reputable operators in the labour hire industry, who strive to achieve best practice employment standards. However, a number of concerns regarding the labour hire industry were raised in evidence to the Committee. There is

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37 G. Fleiszig, A.B. Oxford Cold Storage Co. Pty. Ltd., 2004. Minutes of Evidence, 4 October, p.184.

38 Dr. Linda Brennan, Dr. Michael Valos and Professor Kevin Hindle, 2003. *On-hired Workers in Australia: Motivations and Outcomes*. Occasional Research Report. Melbourne, RMIT University, School of Applied Communication, p.18.

consensus on some issues across labour hire operators, unions and employer groups, but generally each group raised different concerns that often conflicted with the views of other groups. This section seeks to outline some of the wider issues and contentions that inform the current debate on labour hire and that underlie the practical issues outlined in Chapter 4.

### *2.4.1 Ambiguities in the tripartite relationship*

Labour hire arrangements are defined by the triangular relationship that exists between agency, worker and host. This three-way relationship constitutes a departure from the traditional work/employment relationship, and sits uneasily in a legal framework that has evolved over centuries to regulate a relationship between two parties: employer and employee. Labour hire remodels the bipartite relationship that forms the basis of case law on employment and work, as well as industrial and employment-related legislation.

The triangular labour hire relationship has implications for the worker, the agency and the host. Watson, Buchanan, Campbell and Briggs note that:

> *The problems of labour-hire are not just the product of cowboys in the industry, but are also rooted in the triangular nature of labour-hire arrangements: the fact that workers are paid by one employer but work for another. Confusion over lines of responsibility in exercising the employer are evident, with serious consequences for workers' conditions and entitlements.*[39]

Many employers and employer groups dispute the argument that the lines of responsibility in the labour hire arrangement are unclear, arguing that legislation and case law clearly sets out the obligations of each party. However, the ambiguities of the three-way relationship are a recurring theme in discussions about labour hire. While many workers, agencies and hosts may be firmly aware of their responsibilities in labour hire arrangements, evidence received by the Committee suggests that the relationship is the subject of misunderstanding for many others.

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[39] Ian Watson, John Buchanan, Iain Campbell and Chris Briggs, 2003. *Fragmented Futures: New Challenges in* W*orking Life*. Sydney, Federation Press, p.72.

### *2.4.2 Use of non-traditional employment forms and job insecurity*

The growth of labour hire needs to be viewed in the context of other changes to the Australian labour market. Part of the anxiety that labour hire generates amongst unions and the community is due to the way in which its growth is interwoven with wider changes to the Australian labour market. Although some workers consider that labour hire is beneficial on the grounds of increased flexibility and casual loadings, for others labour hire symbolises some of the biggest and most unsettling changes to patterns of work during the 1990s: the spread of casualisation, the growth in particular categories of non-employees and increasing job insecurity. Invariably then, for many people, these broader social factors form part of the lens through which labour hire is viewed.

Although non-standard jobs have proliferated since the early 1990s across the Australian workforce,[40] they are a particularly distinguishing feature of the labour hire industry. Labour hire arrangements are commonly referred to as 'non-standard', 'insecure', 'contingent' or 'precarious' work. This is because labour hire arrangements often do not have the same employee entitlements or protection that are attached to the 'standard' working relationship, which is usually associated with full-time, continuous and regular employment for an employer with leave entitlements.

Some labour hire workers are in permanent employment, but the vast majority are casual employees. The Committee received estimates of the number of casual employees in the labour hire industry that varied from 66 per cent to 86 per cent.[41] The absence of leave entitlements is one indicator of casual employment: according to ABS data from 2000, the number of labour hire employees without paid leave entitlements is nearly 80 per cent.[42] While there is no set legal definition of casual employment, it is usually understood to be employment where an employee is

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40 Ian Watson, John Buchanan, Iain Campbell and Chris Briggs, 2003. *Fragmented Futures: New Challenges in Working Life*. Sydney, Federation Press, p.72. ABS statistics from 2000 indicate that between 1988 and 1998, the total percentage of male employees in full-time jobs with leave entitlements decreased from 88 per cent to 75 per cent and similarly female employees in full-time jobs with leave entitlements decreased from 60 per cent to 50 per cent: Australian Bureau of Statistics, 2000. *Australian Social Trends 2000*, Catalogue No. 4102.0.

41 The Victorian Trades Hall Council submission estimated that around two thirds of labour hire workers are casual employees (Victorian Trades Hall Council, 2004. Minutes of Evidence, 23 August, p.108), while the Australian Industry Group submission estimated that the rate was around 86 per cent (Australian Industry Group, 2004. Submission No. 20, 29 March, p.2). Other estimates fell in between these two figures.

42 Australian Bureau of Statistics, 2000. *Australian Social Trends 2000*, Catalogue No. 4102.0.

engaged when and for as long as work is available, rather than on an ongoing basis. The underlying premise of casual employment – and the reason for its flexibility – is that there is no ongoing expectation of regular work. Employees are paid an additional 'loading' on top of their base hourly rate to compensate for foregoing leave entitlements and other benefits. Employee expectations are blurred somewhat in the anomalous situation of 'permanent casual employment', but on the whole, casual employment raises issues of job security, income security, working time security and insecure labour representation.

Many witnesses to this Inquiry submitted that labour hire arrangements combined with casual employment create particularly insecure employment. For example, the Victorian Trades Hall Council (VTHC) stated that:

> *The overarching problem encountered by labour hire employees is an acute vulnerability flowing from their lack of employment security. This underpins the many problems identified by labour hire employees in the report*.[43]

Research conducted by Ms Elsa Underhill for the VTHC confirmed that job insecurity was a major source of concern for a number of labour hire workers.[44]

Another defining feature of casual employment is the absence of certain entitlements: a notice period in the event of termination of employment, redundancy payments, annual leave, sick leave and parental leave. Awards typically require a loading to be paid to casuals to off-set the lack of these entitlements. However, where workers are long-term casual employees, the lack of access to leave entitlements may be detrimental to their long-term health and work/family balance, and the lack of notice provision and redundancy entitlements may have adverse financial and social effects.

A further non-standard working arrangement that is used by the labour hire industry is independent contracting. Independent contracting in a labour hire context means that the relationship between the agency is not one of employment and that the worker therefore has none of the protections or entitlements that are attached to

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43 Victorian Trades Hall Council, 2004. Submission No. 23, 20 April, p.13.

44 Elsa Underhill, 2004. *Working under Labour Hire Arrangements: the experience and views of Victorian labour hire employees*. Report for the Victorian Trades Hall Council. Attachment to Victorian Trades Hall Council, Submission No. 23, 20 April, p.11.

employment, including those that are provided through industrial instruments such as awards. Fixed-term employment contracts are also used in the industry.

The labour hire industry disputes that labour hire arrangements constitute precarious or insecure employment for its workers. The RCSA, for example, points out that a number of labour hire workers benefit from back-to-back assignments, which effectively provides them with full-time employment.[45] The RCSA also claims that the labour hire industry only employs a small proportion of the total number of casual employees in the Australian workforce, and that the labour hire industry is unfairly blamed for contributing to levels of casualisation within the wider labour market.[46]

The Committee notes that the levels of casual employment and other forms of non-standard working arrangements in the industry are high and that this has a number of implications for workers. The Committee received a number of submissions that made reference to casual employment. The implications of non-standard working arrangements for the labour hire industry are explored in greater detail in Chapters 3 and 4.

The Committee hopes to further examine the relationship between the growth of the labour hire industry and the casualisation of the Australian workforce. While the Committee accepts that the two are related, it is not clear what is driving the relationship, and further analysis is required.

### *2.4.3 Absence of industry-specific regulatory controls*

There is no regulation in Victoria that is specifically aimed at regulating the labour hire industry. The Committee's attention was regularly drawn by witnesses to the low barriers to entry for the labour hire industry, and the perception of consequent unethical practices, mostly from a handful of disreputable operators. Mr. Ken Bieg of Skilled Engineering submitted that part of the problem is the ease with which labour hire agencies can be set up:

> *Essentially all you need to do to enter this industry is have a little black book with some names in it and a phone. In these days of mobile phones*

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45 Recruitment and Consulting Services Association, 2004. Submission No. 15, 25 February, p.49.
46 Recruitment and Consulting Services Association, 2004. Submission No. 15, 25 February, p.49.

> *you do not even need to have an office; you can do it in your car. There are people out there running labour hire companies in that particular way. Because of their size and because they have an extremely low profile they tend to fly under the radar of the authorities.*[47]

There is a perception from employer groups and the labour hire industry itself that there is a small group of disreputable operators who are tarnishing the industry's image and detracting from the best practice standards of other companies.

In particular, the problem that is regularly raised is that of cost-cutting on labour, leading to regulatory non-compliance. As outlined above, the Committee received evidence that one of the major factors that motivates employer use of labour hire is its perceived cost-effectiveness. While the Committee received evidence that some labour hire agencies pay very favourable rates to their workers, anecdotal evidence suggests that there is a small section of the labour hire industry that responds to host employers' cost motivations by providing the lowest cost labour through cutting costs on regulatory compliance and paying under award wages. A number of witnesses gave evidence to the Committee that the absence of industry-specific regulatory controls did little to discourage labour hire operators who functioned in this manner.

Mr. Leigh Hubbard, of the VTHC, for example, commended the large labour hire companies who are operating with 'high standards and investment in their workforce' and noted that the unions' main concern is for the 'fly-by-night operators':

> *They are the ones that are not providing proper safety plans, proper hazard identification or coordination and induction of workers on sites. They are not providing for rehabilitation and return to work; they are not investing in training, let alone providing the same wages and conditions that the in-house workforce, with whom they are often working directly, is receiving.*[48]

This sentiment was echoed by a number of labour hire operators and employer associations.

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47 K. Bieg, Skilled Engineering, 2004. Minutes of Evidence, 28 July, p.79.

48 L. Hubbard, Victorian Trades Hall Council, 2004. Minutes of Evidence, 23 August, p.109.

### *2.4.4 Different conditions for workers within the same workplace*

A number of witnesses raised concerns that the heightened use of labour hire workers is creating a 'two-tier workplace', where labour hire workers do not enjoy the same rights and conditions as direct-hire employees. This is particularly the case where labour hire is used not as a supplement for, but as a substitute for sections of the permanent workforce, and are an ongoing presence in the workplace. For example, Ms Elsa Underhill gave the following example:

> *…one of the call centre workers that participated in a focus group indicated that she received no penalty rates for weekend work and at her workplace she was paid $16 an hour for weekend work and permanent host employees were paid $36 an hour and they were doing virtually the same work except the permanent workers had easier more mixed tasks.*[49]

There is a concern that this situation not only creates a divisive culture within the workplace, where direct-hire employees enjoy better conditions than labour hire workers, but also that the presence of labour hire workers on lower wages and conditions potentially erodes the conditions of direct-hire employees.

[49] E. Underhill, 2004. Minutes of Evidence, 28 July, p.51.

Chapter 3

# Legislation and Regulation

## 3.1 Introduction

The labour hire industry does not have the benefit of any stand alone legislation or regulation and the Committee was presented with substantial evidence questioning whether labour hire workers were adequately covered by the existing regulatory framework. Labour hire workers have different legal rights according to their mode of engagement. Most of these workers are casual employees and are employed on a *contract of service*. However, there are many who are independent contractors and who have entered into a *contract for services*. The Committee received evidence which referred to the need for industrial and related laws to be broadened to apply equally to labour hire and direct employees. In light of this evidence, the Committee saw it as being important that the legal framework within which the labour hire industry operates be outlined.

With the 1996 referral of Victorian industrial relations and employment powers to the Commonwealth, Victorian labour hire employees are in the unique position of being the only such employees in a state which is subject to federal industrial relations laws. Thus, the federal *Workplace Relations Act 1996* (the 'WRA') is the major piece of industrial relations legislation affecting Victorian workers.

As well as the WRA, there are several important Victorian statutes which govern the relationship between labour hire companies and their workers. They will be separately discussed later in this chapter and include the *Occupational Health and Safety Act 1985*, the *Accident Compensation Act 1985*, the *Equal Opportunity Act 1995*.

## 3.2 Industrial Relations in Victoria

### *3.2.1 Victoria's Referral of its Industrial Relations Powers*

The Victorian Government in 1996 referred almost all industrial relations powers to the Federal Government with the passage of the *Commonwealth Powers (Industrial Relations) Act 1996 (Vic)* (the 'Referring Act'). The Federal Government amended the WRA to take advantage of this Victorian decision to relinquish legislative authority over most aspects: *Workplace Relations and Other Legislation Amendment Act (No.2) 1996*. Victoria still retains some residual industrial relations powers; for example, those which relate to the Victorian public sector.

Schedule 1A of the WRA sets out the minimum terms and conditions for Victorian employees. This minimal set of employment conditions includes personal leave, bereavement leave, carer's leave, and minimum wage rates as set by the Australian Industrial Relations Commission (AIRC) including overtime rates, paid parental leave and notice of termination. These entitlements to leave, overtime rates and notice of termination do not apply to casual workers.

While some labour hire workers are only subject to Schedule 1A, many others are subject to federal awards or enterprise agreements. This depends on both the nature of their industry and the labour hire agency or host employer. However, in the absence of a specific labour hire award, award coverage for labour hire workers in Victoria is piecemeal.

### *3.2.2 Awards*

Under section 89A of the WRA, awards are limited to 20 allowable matters and this has been a major contributor to the lessening of importance of awards vis-à-vis enterprise agreements. However, awards remain important in that they set a minimum standard for an industry (the safety net) and for either an enterprise agreement or an Australian Workplace Agreement (AWA) to be certified by the AIRC, it must provide no less favourable terms and conditions of employment than those in the relevant award.

The Referring Act did not refer the power to the AIRC to make common rule awards to cover Victorian employees. As a result, a category of employees in Victoria (those not covered by a federal award or an enterprise bargaining agreement) were left to rely on the minimum standards provided by Schedule 1A of the WRA.

In February 2003, the Victorian Parliament passed the *Federal Awards (Uniform System) Act 2003* and this removed the impediment to the making of a common rule for an order or award for an industry. The Federal Parliament passed the necessary complementary legislation, the result being that common rule orders or awards can come into effect from January 1, 2005. The AIRC can thus determine the most appropriate and relevant award for employees who have not been covered by an award and thus more Victorian employees will be provided with access to an award safety net of the fair and enforceable minimum wages and conditions of employment of the AIRC.[50] This is a significant development for labour hire workers given that many of them in Victoria fall into the hitherto award-free category of employees relying on Schedule 1A of the WRA. However, it remains unclear how this will affect the Victorian industrial relations landscape though there is some speculation that Victoria may see a surge in AWAs or independent contractor arrangements as a result of this development.[51]

### *3.2.3 Certified Agreements*

Over the past 15 years, enterprise level bargaining has become the principal focus of the federal industrial laws. Enterprise bargaining agreements (EBAs) are made at the enterprise level between an employer and a union or an employer and its employees. While operative, an EBA prevails over an award that applies to the workplace in question. Thus, employees covered by EBAs will not be affected by the introduction of common rule awards. Some large labour hire firms, most notably in the construction industry, have entered into agreements with certain unions for a number of worksites.

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50 S. Zeitz and P.M. O'Grady, 2004. *Employee Rights: Transmissions and Common Rule Awards*. Occasional paper in Employment Law and Industrial Relations 2004, Melbourne, Leo Cussen Institute, p.2.11.

51 It has been recently reported that since August 2004, more than 10,000 Australian Workplace Agreements have been approved in Victoria, representing a rise of 50 percent on the same three months of 2003: "Hulls complains to Canberra about AWA push in Victoria", 2004, *Workplace Express* (www.workplaceexpress.com.au), 1 December.

### *3.2.4 Australian Workplace Agreements*

AWAs were introduced by the WRA in 1996 and are industrial agreements between an employer and an individual employee. These agreements do not displace the common law contract between the two parties and must be filed and approved by the Employment Advocate. For approval, they must pass the 'no disadvantage' test meaning that they must provide terms and conditions of employment that are on the whole no less favourable than those in the relevant award. While a pre-existing certified EBA will override an AWA, during its period of operation, the AWA will operate to the exclusion of any award that would otherwise apply.

## 3.3 *Occupational Health and Safety Act 1985*

Section 21 of the *Occupational Health and Safety Act 1985* (Vic) (the 'OHSA') sets out the duties of employers to provide and maintain a safe and healthy work environment for their workers. Some of the duties in section 21 apply to both labour hire agencies and host employers. These are:

- providing and maintaining safe plant and safe systems of work;
- implementing safe arrangements for the use, handling, storage and transport of plant and substances;
- maintaining the safe condition of the workplace;
- providing adequate facilities for the welfare of employees; and
- making sure that workers have the right information, training and supervision to perform work in a safe and healthy manner.

For the purposes of these duties, 'employee' is broadly defined to include an independent contractor engaged by an employer and any employees of the independent contractor (sub-section 21(3)). As a result, both labour hire agencies and host companies have obligations towards labour hire employees.

Section 21 prescribes further duties that only the labour hire agency must discharge in relation to its workers if they are employees and that host employers are only required to fulfil regarding their own employees. These duties include:

- monitoring the health of employees;

- keeping information and records relevant to employees' health and safety;
- employing or engaging suitably qualified people to advise on health and safety matters;
- nominating a senior management representative to deal with health and safety matters;
- generally monitoring conditions at the workplace; and
- providing employees with information in the appropriate languages about workplace health and safety arrangements, including the names of those to whom employees can make a complaint.

Section 22 places an additional duty on employers and self-employed persons to ensure that the conduct of their business does not expose non-employees – such as independent contractors or the public – to risks to their health or safety.

To determine whether an employer has discharged its general duties under sections 21 and 22, the OHSA applies the standard of what is 'reasonably practicable'. 'Practicable' is defined under section 4 of the OHSA, by reference to a number of factors, including, for example, the severity of the hazard involved or the cost of removing the hazard.

Obligations under the OHSA cannot be delegated,[52] and bringing labour hire workers into the workplace does not relieve a host employer of its workplace health and safety duties. Nor does the act of placing a worker into someone else's worksite relieve a labour hire agency of any of its obligations. Mr. Greg Tweedly of the Victorian WorkCover Authority (VWA) told the Committee:

> *All of these obligations are obligations of all employers at normal sites. The mere fact that they are putting a person into another site does not take away their responsibilities.*[53]

The Victorian Government recently commissioned Mr. Chris Maxwell QC to review the OHSA and in response to Mr. Maxwell's report, the Government has introduced the *Occupational Health and Safety Bill 2004* (the 'OHS Bill'). The OHS Bill retains the general obligations outlined in sections 21 and 22 of the OHSA.

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52 Victorian WorkCover Authority, 2004. Submission No. 22, April, p.3.
53 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, November 15, p.238.

## 3.4 Workers' Compensation

The Victorian Workers' Compensation Scheme (the 'Scheme') is administered by the Victorian WorkCover Authority and provided for under the *Accident Compensation Act 1985* (the 'ACA'). The matters provided for by the ACA and related legislation include workers' compensation and worker rehabilitation, as well as employer insurance and premium.

All employers, including labour hire companies, are required to take out WorkCover insurance policies in order to provide compensation to workers in the event that they are injured. The ACA also places obligations on employers to re-employ and provide suitable work for injured workers and to engage in their rehabilitation.

Under the ACA, 'worker' is defined to include those who work under a contract of service (employees), those who work under a contract of apprenticeship and those who are under contracts for services (independent contractors) but are deemed to be employees for the purposes of the ACA. This means that even if there is no contract of employment between the worker and the labour hire agency (i.e. where the worker is an independent contractor), the worker may still be deemed to be an employee of the labour hire agency for workers' compensation purposes.[54]

As employers, labour hire agencies are responsible for maintaining WorkCover insurance policies. Premium rates for policies are partly calculated by reference to the predominant activity of the employer at its workplaces.[55] Currently, there are only two industry classifications for the purposes of deciding on premiums: white collar and blue collar. As Mr. Greg Tweedly of the VWA pointed out, premiums are also calculated by reference to each employer's individual claims history:

> *The premium system has two components: one which deals with the industry which you are in, and your own claims experience. The larger you are the more your own claims experience dominates the price.*[56]

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54 Victorian WorkCover Authority, 2004. Submission No. 22, April, pp.16-17.
55 Victorian WorkCover Authority, 2004. Submission No. 22, April, p.19.
56 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, November 15, p.242.

The labour hire agency holds financial responsibility for the premiums related to the labour hire workers, whether they are independent contractors or employees.

While the premium system impacts directly only on the employer (i.e. the labour hire agency), the VWA may still hold the host company to account. Under section 138 of the ACA, the VWA may recover damages from the host employer where it can be shown that the injury or death was caused under circumstances which created a legal liability on the part of the host company even though it was not the worker's employer.

The return to work provisions of the ACA are also an important aspect of the rights and obligations of labour hire agencies and their workers. In particular, section 155A of the ACA imposes an obligation upon the employer to provide suitable work to an injured worker (where the worker has some work capacity) during the period of the claim and then to re-employ the worker and provide employment when the worker has recovered.

## 3.5 *Fair Trading Act 1999*

The *Fair Trading Act 1999* (Vic) is of greatest relevance in relation to those labour hire workers who are independent contractors. This Act provides a jurisdiction where disputes between the purchasers and suppliers of labour services, such as cases of negligence, could be dealt with by a tribunal (section 107). Settlement by the tribunal, the Victorian Civil and Administrative Tribunal (VCAT), could include varying a term of a contract, declaring a term of a contract to be void, specific performance of a contract, or rescission of a contract (section 108). In seeking to settle a dispute, VCAT has a broad discretion and can "make an order it considers fair including declaring void any unjust term of a contract or otherwise varying a contract to avoid injustice" (section 109 (1)).

This Act provides the only recourse available, apart from a limited action for breach of contract in the courts, for independent contractors who have entered into contracts for services with either a labour hire agency or a client company.

## 3.6 *Equal Opportunity Act 1995*

The *Equal Opportunity Act 1995* (Vic) (the 'EOA') gives labour hire workers protection against discrimination from both labour hire agencies and host employers.

Part III of the EOA provides for the prohibition of discrimination in employment on the basis of certain attributes set out in section 6.[57] Labour hire agencies must not discriminate against their workers whether they are engaged as employees or independent contractors. This is because, under section 14, an employer must not discriminate against its employees, and 'employee' is defined under section 4 to include those who work under a 'contract of service' and a 'contract for service'. Discrimination against employees may result, for example, from terminating the contract of employment or denying or limiting access to opportunities for promotion or training.

Equally, section 15 prohibits discrimination against labour hire workers by host employers. Under this section, 'principals' are prohibited from discriminating against 'contract workers'. For example, principals must not discriminate against contract workers by not allowing the contract worker to work or by denying or limiting access to any benefits connected with the work.

In the case of both employees and contract workers, both section 14 and 15 provide for a broad prohibition on discrimination whereby it is discriminatory to subject the worker to any other (unspecified) detriment.

It should also be noted that Victorian workplaces are subject to federal anti-discrimination legislation.

## 3.7 Common law cases

As well as statutory law and industrial instruments, the rights and obligations that apply to labour hire arrangements are also determined by the common law decisions of the courts. In particular, much of the legal debate surrounding labour hire arrangements concerns those cases where labour hire workers have sought to annul

[57] These include, for example: age, sex, carer status, industrial activity, race and physical features.

the labour hire arrangement by establishing a contract of direct employment between themselves and their host employers. As the cases explored in this section demonstrate, the common law has struggled to keep up with developments in the field of labour hire and the challenges that it poses to a legal framework where the main point of reference is the traditional employer/employee relationship. As a result, the case law arguably presents an uncertain picture of where a direct employment relationship will or won't be found to exist. This section largely deals with cases in which workers have sought to establish the existence of an employment relationship. Some of these cases involve labour hire workers. Others are cases which have become important precedents in determining whether or not an employment relationship exists.

In the 1986 case of *Stevens v Brodribb Sawmilling Co Pty Ltd*,[58] the High Court confirmed the importance of control in determining the existence of an employment relationship. Brennan J, however, noted that it was not the 'sole criterion',[59] while Justices Wilson and Dawson attempted to give some guidance in applying other indicia that would demonstrate the existence of an employment relationship. They observed, however, that it would be 'misleading' to make an exhaustive list of the determinative criteria, as each situation was different and the criteria could be no more than a guide.[60]

In *Building Workers' Industrial Union of Australia v Odco Pty Ltd*,[61] which was a key decision for the labour hire industry at the start of the 1990s, the Federal Court was asked to determine whether the relationship between an agency – Troubleshooters Available (TSA) – and its workers was one of employment. The Federal Court found the workers were not employees of the agency or the host, but were independent contractors. In making this decision, the Federal Court considered a number of matters. Firstly, the Federal Court gave weight to the fact that the workers had signed contracts that expressly declared them to be 'self-employed' rather than employed by TSA. The Court also considered factors such as that the payment of an agreed hourly rate could equally apply to sub-contractors; that the workers were not to receive annual or sick leave payments; and that TSA did not deduct income tax. The

58 (1986) 160 CLR 16.
59 (1986) 160 CLR 16, 24.
60 (1986) 160 CLR 16, pp.36-37.
61 (1991) 29 FCR 104.

Full Bench considered that these matters were consistent with the contractual documents between TSA and the worker.

In *Advanced Australian Workplace Solutions v Kangan-Batman TAFE*,[62] the relationship between host, agency and worker was further examined by the Full Bench of the AIRC. In this case, the Commission found that the worker was neither an employee of the TAFE nor of the labour hire agency, but an independent contractor. Importantly, neither party thought there was a contractual relationship and there was no evidence of an offer and acceptance, and no 'consideration' in the form of a direct payment by TAFE to the worker.

However, while agencies may enter into principal/contractor relationships, the courts have stressed that these must be legitimate, and that documentation alone will not be sufficient to prove that there is no employment relationship: the relationship must be consistent with the documentation. In *Damevski v Giudice*,[63] a Full Bench of the Federal Court found that a worker was the employee of the host company, despite explicit documentation to the contrary. In this case, the employer had attempted to outsource a section of its workforce by terminating the employment of some employees and then rehiring them through a labour hire company. The Court found that the documentation did not reflect the true relationship between the parties and that an employment relationship still existed. In particular, the original employer continued to exercise significant control over the worker and the labour hire agency's function was largely reduced to pay-roll. The Court found that, in view of all the circumstances and contrary to the documentation, the worker did not conduct his own business as an independent contractor.

In *Oanh Nguyen v A-N-T Contract Packers Pty Ltd and Thiess Services Pty Ltd*,[64] it was confirmed that, despite paperwork to the contrary, an employment relationship may still be established. In this case, there was a minimal relationship between the labour hire agency and the worker and a strong relationship between the host and the worker. The employment relationship between host and worker was established, in great part because the host exerted significant control over the worker's

62 (Unreported, AIRC, Full Bench, Print S0253, 25 October 1999).
63 (2003) 202 ALR 494.
64 (2003) 128 IR 241

recruitment, employment and termination of employment, and generally treated the worker as if she were an employee.

Again, in *Country Metropolitan Agency Contracting Services v Slater,*[65] the Full Bench of the South Australian Workers Compensation Tribunal disregarded the fact that the worker had signed a contract which stipulated she was an independent contractor and, in distinguishing the *Odco* Case, found her to be an employee for the purposes before it, referred to the fact she was not providing skilled labour, was not 'running her own enterprise', was treated like all other employees of the client company who supplied her equipment, and had no capacity to delegate. The Full Bench considered that it was open to look beyond the expressed intentions of the parties.

A key authority remains the 2001 High Court case of *Hollis v Vabu Pty Ltd*.[66] In this case, the Court reviewed the principles that are applied to determine whether an employment relationship can be established and placed particular emphasis on the issue of control. The case was concerned with ascertaining whether a bicycle courier was an employee of a courier company, or whether he was an independent contractor. In deciding that the worker in question was an employee rather than an independent contractor, the Court examined whether the courier was running his own business and whether he had any control over the performance of the work. Another important indicator of an employment relationship was the unskilled nature of the job and the obligation to perform the work without a right to refuse.

In the 2003 case of *Abdalla v Viewdaze Pty Ltd trading as Malta Travel*,[67] the Full Bench of the AIRC was again called on to consider the difference between an independent contractor and an employee and used an approach consistent with *Hollis v Vabu*. The Full Bench determined that the worker in question (who was not a labour hire worker) was not an employee by reference to a variety of factors, giving weight to whether or not the worker could genuinely be considered to be running his own business and the amount of control that the worker exerted over his own work. The Full Bench stressed that mere labelling of the relationship cannot alter its true nature.

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65 (2003) 124 IR 293.
66 (2001) 207 CLR 21.
67 (2003) 122 IR 215.

A recent case in the New South Wales Supreme Court in July 2004 has found that the issue of control is becoming less significant, particularly in triangular on-hire relationships. In this case, *Forstaff & Ors v The Chief Commissioner of State Revenue*,[68] Justice McDougall found that the employment relationship did exist between the labour hire agency and the workers once a worker had accepted an assignment.

Despite some of its uncertainties, there are a couple of notable features with regard to the case law as it applies to labour hire arrangements. Firstly, a significant aspect has been the unwillingness of courts and tribunals to take contracts between principal and contractor at face value. There are a number of cases where the courts have looked behind the formal documentation to consider the true nature of the employment relationship. Secondly, courts have moved away from using 'control' by the employer as the key test for employment, towards a greater emphasis on the 'multi-factor' test, where control is important, but a number of other factors are examined to determine whether an employment relationship exists. Lastly, even a brief exploration of the case law reveals that each case is determined according to its own set of facts, and the outcome will depend on how much weight is given to each aspect of the working relationship in each individual situation.

[68] [2004] NSWSC 573.

Chapter 4

# Issues

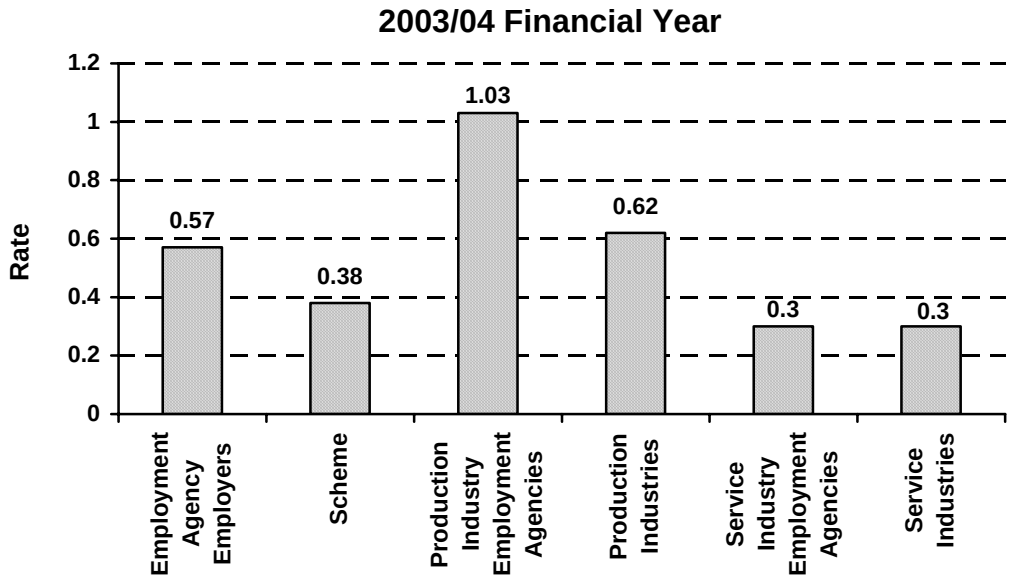
## 4.1 Occupational Health and Safety

Victoria's current occupational health and safety (OHS) regulatory framework was mainly designed with permanent employment in mind and, as a result, variations on the traditional model of work, such as labour hire, pose serious regulatory challenges. In recognition of the evolving nature of the workplace, the State Government recently commissioned Mr. Chris Maxwell QC to review Victoria's main piece of OHS legislation, the *Occupational Health and Safety Act 1985* (the 'OHS Act'), and in response to Maxwell's report, the State Government introduced the *Occupational Health and Safety Bill 2004* (the 'OHS Bill'). The OHS Bill retains most of the essential content and principles of the OHS Act, while updating some sections to better adapt the OHS Act to modern workplaces. Because the OHS Bill was introduced into Parliament after the Committee's public hearings had taken place, witnesses and submissions refer to the OHS Act rather than to the current OHS Bill. However, the OHS Bill was not concerned with a number of issues raised by witnesses to this Inquiry, and therefore the relevance of the comments made by witnesses is not altered by the introduction of the OHS Bill.

The Committee received considerable evidence from a number of stakeholders regarding the OHS performance of the labour hire industry. Some of the concerns expressed related to the current legislative regime and its application to labour hire arrangements, while others related to the practical consequences of labour hire arrangements for OHS. While it is clear that there are a number of labour hire operators striving to achieve best practice in this area, there is persuasive evidence to suggest that OHS practices and outcomes in the labour hire industry are, on average, considerably poorer than in other industries.

The Committee was told by Mr. Greg Tweedly of the Victorian WorkCover Authority (VWA) that the labour hire industry has a significantly higher claims frequency than the rest of the VWA's scheme. On a claims frequency analysis, where the number of claims is compared to the amount of remuneration, the labour hire industry has 0.57 claims per $1 million remuneration over 2003-04, whereas the figure for the scheme as a whole is 0.38 claims per $1 million remuneration (See Table 4.1). The comparison is particularly acute in the higher risk area of blue-collar labour hire which has 1.03 claims per $1 million as opposed to the general blue-collar figure of 0.62 claims. The claims frequency rate is roughly the same for the white-collar labour hire industry and the white-collar scheme in general (see Table 4.2).[69]

**Table 4.1: Claims Frequency Rate Comparison**

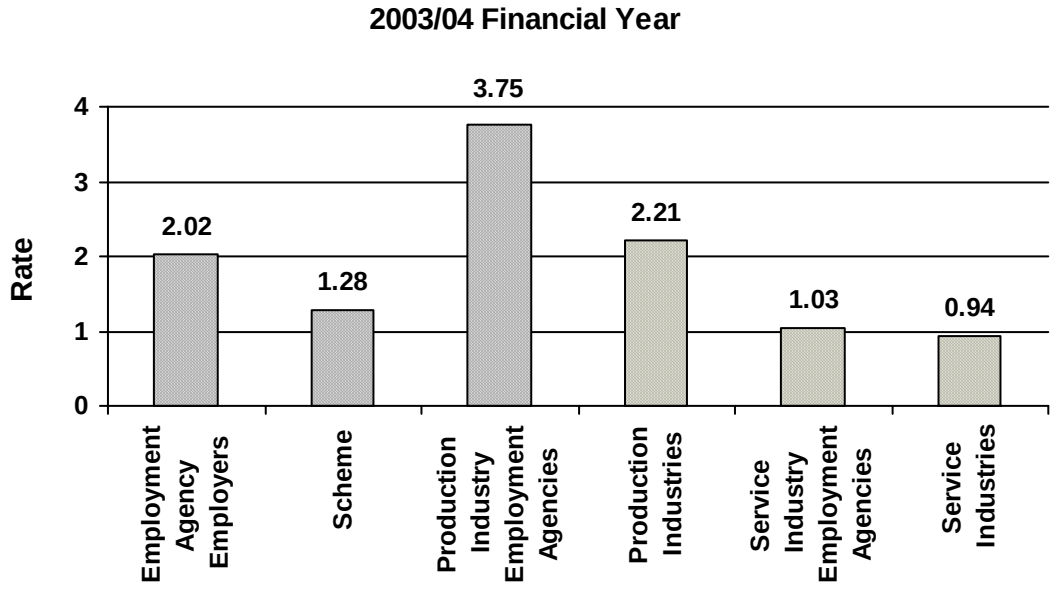



Source: Victorian WorkCover Authority presentation, 15 November 2004, p.5.

The contrast between the labour hire industry and the scheme was also demonstrated in terms of claims cost ratio, where the total cost of claims is measured against the total remuneration. Again, employment agencies are considerably higher than the scheme average, particularly in the blue-collar sector.

[69] G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, p.237.

**Table 4.2: Claims Cost Ratio Comparison**




Source: Victorian WorkCover Authority presentation, 15 November 2004, p.7.

In 2001, the VWA commissioned Ms Elsa Underhill to conduct a study of workers' compensation claims by employees in the labour hire industry in order to better understand the level of risk for labour hire workers. After a comprehensive examination of all workers' compensation claims in Victoria between 1994 and 2001, the study was released in 2002 and concluded that labour hire employees:

> *…are more likely to be injured than direct hire employees, and their injuries appear more severe. They are more concentrated in semi-/unskilled high risk occupations, and younger workers are disproportionately represented.*[70]

These findings are consistent with local and international studies that have found that contingent forms of employment, such as labour hire, pose particular problems for health and safety in the workplace.[71] There is a lack of directly comparable data in this field, however, and to date, Underhill's research is the most comprehensive

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[70] Elsa Underhill, 2002. *Extending Knowledge on Occupational Health and Safety and Labour Hire Employment: A Literature Review and Analysis of Victorian Worker's Compensation Claims.* Report for WorkSafe, Melbourne, October, p.5.

[71] Elsa Underhill reviews a number of these studies in her report. See Elsa Underhill, 2002. *Extending Knowledge on Occupational Health and Safety and Labour Hire Employment: A Literature Review and Analysis of Victorian Worker's Compensation Claims.* Report for WorkSafe, Melbourne, October, pp.7-19. A review of more than 180 studies found that there were links between contingent employment and poor OHS outcomes: Igor Nossar, Richard Johnstone and Michael Quinlan, 2004. "Regulating Supply-Chains to Address the Occupational Health and Safety Problems Associated with Precarious Employment: The Case of Home-Based Clothing Workers in Australia," *Australian Journal of Labour Law*, Vol 17, pp. 137-160, at p.138.

study of the impact of labour hire arrangements on OHS in Victoria. The Committee notes that this is a relatively new field of study.

***Recommendation 4.1***

***The Committee recommends that the Victorian WorkCover Authority commission ongoing research to examine occupational health and safety in the labour hire industry.***

Underhill's report for the VWA put forward a number of reasons for the higher injury rates of the labour hire industry. Some reasons are related to the itinerancy of assignments, the age and experience of labour hire workers, the types of work that they undertake and the requests of host employers. To start with, employees are more likely to suffer risk when exposed to new and unfamiliar workplaces, and the transient nature of labour hire means that many labour hire employees are constantly being placed with new clients. Furthermore, labour hire workers are now less likely to be tradespeople and more likely to be unskilled or semi-unskilled workers, who are generally at greater risk of injury in the workplace. Overall, labour hire workers are younger than the workforce as a whole, with less experience to help them counter workplace risks. Additionally, they may be exposed to greater risk when host employers request that they undertake tasks other than those which they were engaged to perform.[72]

Underhill identifies a number of broader factors that contribute to the higher rate of workers' compensation claims. These include the economic pressures on labour hire employees caused by the insecurity of their employment, resulting in higher risk work practices, such as: an inclination to work unsustainably long hours; the disorganisation that may arise as a result of blurred responsibility lines between host and agency; and the likelihood that labour hire workers will be less involved in OHS consultation processes in a host workplace.[73]

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72 Elsa Underhill, 2002. *Extending Knowledge on Occupational Health and Safety and Labour Hire Employment: A Literature Review and Analysis of Victorian Worker's Compensation Claims.* Report for WorkSafe Victoria, Melbourne, October, p.101.

73 Elsa Underhill, 2002. *Extending Knowledge on Occupational Health and Safety and Labour Hire Employment: A Literature Review and Analysis of Victorian Worker's Compensation Claims.* Report for WorkSafe Victoria, Melbourne, October, p.101.

Significantly, the increased proportion of workers' compensation claims does not only relate to labour hire as a form of working arrangement, but also to the transfer of risk from host employers to labour hire agencies. Underhill found that, over the seven year period that she investigated, claims data from labour hire workers started to skew towards higher-risk occupations, suggesting that businesses are 'outsourcing risk', by using temporary workers to perform more hazardous tasks.[74] This type of trend necessarily pushes up the workers' compensation claims for the labour hire industry. Inevitably, it is more difficult for the labour hire industry to improve workers' compensation claim rates when its workers are increasingly performing the most hazardous tasks in the workplace.

One of the key points of discussion regarding the increased injury rate of labour hire workers was the confusion or misunderstanding with respect to the joint responsibility of agency and host for workplace health and safety. As set out in Chapter 3, both labour hire companies and host employers have duties under section 21 of the OHS Act and the OHS Bill to ensure that labour hire workers are safe at the workplace. The host employer also has a wider duty to protect non-employees under section 22 of the OHS Act, which is replicated in section 23 of the OHS Bill. The duty to protect labour hire workers in the workplace therefore overlaps: the fact that one party has a duty to protect the worker does not relieve the other party of its burden.

Given that labour hire agencies place their workers into sites over which they do not have total control, they have a particular duty to ensure the adequacy of OHS training provided to workers and the safety of the sites on which their workers are placed. In *Ankucic v Drake Personnel Ltd*,[75] Justice Hungerford stated that labour hire agencies have a 'special responsibility' towards their workers:

> *In such a situation, my view is that an employer has a special responsibility to ensure the health, safety and welfare of its employees at the workplace for no other reason that that workplace is removed from the employer's direct management and control and would usually be at a location foreign, or at least unfamiliar, to the employees concerned.*[76]

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74 Elsa Underhill, 2002. *Extending Knowledge on Occupational Health and Safety and Labour Hire Employment: A Literature Review and Analysis of Victorian Worker's Compensation Claims.* Report for WorkSafe Victoria, Melbourne, October, p.101.

75 (Unreported, NSW Industrial Relations Commission, 25 November 1997).

76 (Unreported, NSW Industrial Relations Commission, 25 November 1997, p.14).

These sentiments were endorsed by a Full Bench of the New South Wales Industrial Relations Commission in *Drake Personnel Ltd t/as Drake Industrial v WorkCover Authority of New South Wales (Inspector James Swee Ch'ng)*.[77]

It is clear that host employers have a duty, as well as labour hire agencies, although the OHS Act does not offer any clear guidance as to how responsibilities between the agency and the host are to be allocated or discharged. In his recent review of the OHS Act, Maxwell explains the uncertainty that consequently emerges in relation to OHS duties:

> *The unstated assumption appears to be that this uncertainty is conducive to better health and safety outcomes, because each dutyholder will be striving to the maximum degree to ensure a safe working environment. The message from the consultations, however, is that the reality is quite different. Unions and employers alike have submitted that the existence of multiple overlapping duties breeds confusion and frustration, and leads ultimately to a failure of responsibility.*[78]

Maxwell suggests that there is scope to better define the duties of the parties, and that one of the key issues is control, especially with regard to the differing capacities of each party to control health and safety risks within the workplace.

Labour hire agencies are often not in a position to exert day-to-day control over health and safety risks in the workplace. There is currently some acknowledgment of the importance of control in the OHS Act and the OHS Bill, where section 21(2)(c) states that an employer must:

> *…maintain so far as is practicable any workplace under the control and management of the employer in a condition that is safe and without risks to health.*

Equally, under section 21(2)(d), an employer must provide adequate facilities for employees at workplaces under its 'control and management'.

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77 (1999) 90 IR 432.

78 Chris Maxwell, 2004. *Occupational Heath and Safety Act Review*. Melbourne, March, p.111.

Maxwell argues that the OHS Act should go further, and be amended to make the relevance of control more explicit.[79] In particular, when considering what is 'practicable' for an employer in managing workplace health and safety, Maxwell suggests that control of the workplace – including 'capacity to control' – should be included in the legislative definition of 'practicable'. In this way, the inability to control a worksite would not absolve labour hire operators of their obligations, but would instead be a factor to be considered amongst others when determining the content of those obligations. Maxwell also considers that the VWA should provide more guidance material to businesses to explain the concept of 'control' in modern workplaces.[80] Maxwell's suggestion regarding control was not incorporated into the OHS Bill.

A number of labour hire operators and employer associations expressed their support for legislative amendment to clarify the role that may be played by 'control'.[81] Mr. Geoff Cooper of Adecco expressed some of the current frustrations with the concept of control, and a feeling that the OHS Act does not embrace the reality of the modern workplace:

> *…obviously our view is that we feel ultimate control for OHS, without subrogating any of our duties under the Act, lies with the host. … At the moment the legislation is very black and white — you are an employer and the employer shall do this and that, which is wonderful, considering that most of them were written 18-odd years ago when labour hire was only a small concern.*[82]

This concern is also shared by the Electrical Trades Union (ETU), which considers that OHS legislation should be amended to reflect the inability of labour hire agencies to have any 'significant direct control' over the condition of the workplace or the day-to-day activities of labour hire employees.[83]

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79 Chris Maxwell, 2004. *Occupational Heath and Safety Act Review*. Melbourne, March, p.118.
80 Chris Maxwell, 2004. *Occupational Heath and Safety Act Review*. Melbourne, March, p.118.
81 Recruitment and Consulting Services Association, 2004. Submission No. 15, 25 February, p.34; D. Gregory, Victorian Employers' Chamber of Commerce and Industry, 2004. Minutes of Evidence, 11 October, p.207.
82 G. Cooper, Adecco Group of Companies, 2004. Minutes of Evidence, 4 October, pp.172-173.
83 Electrical Trades Union, 2003. Submission No. 8, 19 December, p.24.

The Committee notes Maxwell's arguments with regard to the inclusion of 'control' in Victoria's OHS legislation and will make further comment on this issue in its final report. The Committee will seek further comment from stakeholders before it submits its final report.

In practice, the joint nature of the OHS responsibility for labour hire workers appears to lead to a broadened scope for misunderstanding between stakeholders and, in the worst case scenario, non-fulfilment of duties. The Australian Manufacturing Workers' Union (AMWU) noted that:

> *A typical complaint raised by the members was that "the labour hire company tells the worker to get OHS gear off the client and the client says you don't work for us, get stuffed" again usually once the problem is raised the relevant employees are moved on without the issue being addressed.*[84]

The Job Watch submission included a similar case study where both host and agency claimed that the responsibility for providing protective equipment rested with the other. The labour hire employee repeatedly asked both host and agency for a facemask to protect himself from the risk of asbestos inhalation. The mask was not provided and instead he was advised by the agency that the host no longer required his services.[85] Other examples of attempts to shift responsibility were given in the focus groups of labour hire workers convened by Elsa Underhill for the Victorian Trades Hall Council (VTHC).[86]

Some employers acknowledged the difficulties that are sometimes experienced in trying to ascertain where responsibility lies. For example, Mr. Geoff Cooper of Adecco observed the uncertainty that exists in relation to workplace risk assessments:

> *From Trades Hall to WorkCover inspectors, our industry body and the courts, they all have a differing view over who should be doing risk assessments.*[87]

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84 Australian Manufacturing Workers' Union, 2004. Submission No. 17, 27 February, pp.9-10.
85 Job Watch, 2003. Submission No. 9, 19 December, p.24.
86 Elsa Underhill, 2004. *Working under Labour Hire Arrangements: the experience and views of Victorian labour hire employees*. Report for the Victorian Trades Hall Council. Attachment to Victorian Trades Hall Council, 2004, Submission No. 23, 20 April, pp.15 and 33.
87 G. Cooper, Adecco Group of Companies, 2004. Minutes of Evidence, 4 October, p.174.

Ascertaining the content of OHS duties and responsibilities may be a source of frustration for larger labour hire companies, but for smaller businesses with fewer resources, the task may be quite overwhelming.

Uncertainty regarding the allocation of OHS duties is perpetuated when labour hire agencies make representations that host employers can sign over workplace health and safety matters to the agency. The Committee received evidence that the advertising of some labour hire agencies suggests that by using their services, hosts can expect to solve all of their workplace health and safety issues. This type of advertising is misleading, as it ignores the joint responsibility of hosts and agencies that is set out in the OHS Act.

***Recommendation 4.2***

***The Committee recommends that future guidance material developed by the Victorian WorkCover Authority for the labour hire industry should include reference to advertising standards, and that the Victorian WorkCover Authority should monitor the advertising activities of labour hire agencies more closely.***

It is difficult to quantify the amount of uncertainty for hosts and labour hire agencies, although some research data suggest that duties may not be fulfilled, or that cooperation between agency and host may not be achieved. For example, labour hire agencies should conduct a risk assessment of a workplace before workers are assigned to that site in order to fulfil their obligations under the OHS Act. However, over 60 per cent of labour hire agencies surveyed by Brennan, Valos and Hindle reported that they had had difficulties with host employers in assessing workplace premises or obtaining OHS assessment documentation.[88] At the same time, nearly half of all host employers reported that employment agencies never conducted OHS assessments of the workplace before or shortly after assigning employees to work there.[89] And not all host employers believe that labour hire agencies should have a role in managing workplace health and safety on the host employer's site. Over one third of the host employers in the survey believed that labour hire agencies should

[88] Dr. Linda Brennan, Dr. Michael Valos and Professor Kevin Hindle, 2003. *On-hired Workers in Australia: Motivations and Outcomes*. Occasional Research Report. Melbourne, RMIT University, School of Applied Communication, p.81.

[89] Dr. Linda Brennan, Dr. Michael Valos and Professor Kevin Hindle, 2003. *On-hired Workers in Australia: Motivations and Outcomes*. Occasional Research Report. Melbourne, RMIT University, School of Applied Communication, p.29.

never or only rarely have the right to give instructions to a host employer regarding workplace health and safety.[90]

The Committee recognises that WorkSafe Victoria plays an important role in educating employers, particularly smaller businesses. Ms Jasmine Teao, who works for a smaller labour hire company, Westpower Resources, explained the positive effect that WorkSafe had had on its OHS compliance:

> *We work with someone in the WorkSafe office … He makes sure that we understand our obligations … He gave us a lot of information that we did not know about WorkSafe practices and things like that. We did not know how to do the work site inspections without his help. He helped us a lot.*[91]

The VWA has already developed some online materials that are specifically targeted at the labour hire industry.[92] In recognition of the rapid growth of the labour hire industry and some of its OHS performance issues, WorkSafe is planning to focus greater energy on the labour hire industry in the future.[93]

***Recommendation 4.3***

***The Committee recommends that labour hire agencies and host employers continue to share joint responsibility for workplace health and safety standards.***

***Recommendation 4.4***

***The Committee recommends that the Victorian WorkCover Authority continue to develop guidance material for the labour hire industry, with a view to helping agencies and host employers better understand the nature of their joint responsibility and how to fulfil it.***

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90 Dr. Linda Brennan, Dr. Michael Valos and Professor Kevin Hindle, 2003. *On-hired Workers in Australia: Motivations and Outcomes*. Occasional Research Report. Melbourne, RMIT University, School of Applied Communication, p.35.

91 J. Teao, Westpower Resources, 2004. Minutes of Evidence, 11 October, p.226.

92 Victorian WorkCover Authority. 'Labour hire and on-hired workers' at <www.workcover.vic.gov.au/Vwa/home.nsf/pages/so_labour_hire>.

93 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, p.240.

The impact of insecure employment on OHS has been commented on widely.[94] In his review of the OHS Act, Maxwell noted that there is considerable evidence that the growth in precarious employment – including labour hire – has resulted in poorer OHS outcomes.[95] The Committee received a large amount of evidence regarding the influence that insecurity of employment may have on the health and safety of labour hire workers. A number of unions told the Committee that their members were concerned that their assignments with the host employer would be discontinued if they complained about OHS risks. For example, Ms Charmaine Chew from the AMWU cited the experience of a union member:[96]

> *…"Employee B" is an occupational health and safety representative and has had training in 1987 and 1997, but he has felt that on the several occasions that he has raised concerns he has either been told, 'Look, we don't want you here any more; go and find other work' — and that was on his second day — or there has not been work forthcoming from that same company after he raises OHS concerns.*[97]

Similarly, Ms Louisa Dickinson of Job Watch told the Committee that Job Watch has lodged a complaint with the Human Rights and Equal Opportunity Commission for a labour hire worker whose employment was terminated when he complained of the asthma that he had developed while working for a host employer.[98]

Ms Elsa Underhill told the Committee that her research with focus groups for the VTHC suggested that the fear of dismissal for raising OHS matters is sometimes justified:

> *In the study of the survey and the focus groups conducted last year it was found that of the 50 per cent of labour hire employees who had raised a workplace concern or an occupational health and safety issue, 16 per cent were dismissed in the sense of being not offered another job.*[99]

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94 Nossar, Johnstone and Quinlan note that 80% of 180 individual studies carried out in 20 different countries link job insecurity and contingent work to adverse OHS outcomes. Igor Nossar, Richard Johnstone and Michael Quinlan, 2004. "Regulating Supply-Chains to Address the Occupational Health and Safety Problems Associated with Precarious Employment: The Case of Home-Based Clothing Workers in Australia," *Australian Journal of Labour Law*, Vol 17, pp. 137-160, at p.138.

95 Chris Maxwell, 2004. *Occupational Health and Safety Act Review*, Melbourne, March, p.29.

96 While the AMWU originally supplied the names of two of their members whose experiences are detailed in the AMWU's supplementary submission, the Committee decided to protect their identities by referring to them as "Employee A" and "Employee B".

97 C. Chew, Australian Manufacturing Workers' Union, 2004. Minutes of Evidence, 13 September, p.152.

98 L. Dickinson, Job Watch, 2004. Minutes of Evidence, 11 October, p.217.

99 E. Underhill, 2004. Minutes of Evidence, 28 July, p.52.

This figure (16 per cent) may be sufficiently high to discourage other workers from raising OHS concerns. The study also found that workers believed that making an OHS complaint would jeopardise their employment: of those workers who had not raised a concern regarding OHS, 33 per cent had not done so for fear of losing their job.[100] The rate of success in raising OHS concerns was, in any case, mixed: 41 per cent of workers in this study reported that the agency rarely or never fixed the problem, and 32 per cent of workers reported that the host company never or rarely fixed the problem.[101]

There is currently a protective mechanism in the OHS Act for employees who make complaints in relation to OHS matters, but this is fairly narrow in that it only applies to discrimination by the employer; that is, the labour hire agency. Section 54 of the OHS Act provides that an employer must not dismiss or discriminate an employee or a prospective employee for making an OHS complaint. This protection is repeated in section 76 of the OHS Bill. However, this provision does not prevent host employers from discriminating against or victimising labour hire workers by terminating their assignment for making an OHS complaint. Job Watch proposed to the Committee that this protection should be modified so that some legislative protection is given to labour hire workers from discrimination or victimisation by a host employer.[102]

The Committee finds that there should be increased protection for labour hire workers from discrimination and victimisation, particularly with regard to the making of OHS complaints. The Committee will give further consideration to this issue in the final report.

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100 Elsa Underhill, 2004. *Working under Labour Hire Arrangements: the experience and views of Victorian labour hire employees*, Report for the Victorian Trades Hall Council. Attachment to Victorian Trades Hall Council, 2004. Submission No. 23, 20 April, p.14.

101 Elsa Underhill, 2004. *Working under Labour Hire Arrangements: the experience and views of Victorian labour hire employees*, Report for the Victorian Trades Hall Council. Attachment to Victorian Trades Hall Council, 2004. Submission No. 23, 20 April, p.32.

102 Job Watch, 2003. Submission No. 9, 19 December, p.25.

Labour hire workers may also be reluctant to take any form of leave, for fear of this affecting their current or future assignments. Ms Elsa Underhill told the Committee that when speaking to focus groups of labour hire workers she found that:

> *They are reluctant to take leave because if they do turn down an offer of a placement because they want to take leave there is a fear that they will not receive any further placements, so that the taking of leave is effectively resigning from their job. They are also reluctant to take leave because they believe that when they return from their leave they will not return to the same host workplace. So even if they have been at the workplace for a number of years they will find when they return from leave their job has been taken by someone else.*[103]

Casual employees or contractors may also be less likely to take recreational or sick leave given that it is unpaid. Whether this unwillingness is caused by job insecurity or a lack of paid leave, the failure to take leave may not only impact on a worker's ability to achieve a healthy balance between work and leisure, but may also mean that a worker is more likely to work with an injury. This may potentially aggravate the injury, making it more serious and the length of recovery longer.

Avenues for worker participation, consultation and representation in the workplace are vital to ensure that OHS standards are met. The Committee received evidence that the ability of labour hire workers to have a voice in relation to workplace health and safety is often limited by the itinerancy of their assignments or their status as non-employees of the host.

There was a perception amongst a number of witnesses that some labour hire operators are reducing costs by cutting back on workplace health and safety compliance. Mr. Leigh Hubbard, of the VTHC gave evidence to the Committee that:

> *…at the medium and smaller end [of the labour hire industry] they not only compete on the price of the actual labour and what they pay the workers, but also on whatever other things they are doing. They will not necessarily employ a health and safety officer for the labour hire company that will be going around assessing risk in that workplace …*[104]

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[103] E. Underhill, 2004. Minutes of Evidence, 28 July, p.52.
[104] L. Hubbard, Victorian Trades Hall Council, 2004. Minutes of Evidence, 23 August, p.117.

There is a related concern that some host employers are not willing to invest in OHS. The RCSA reported that 49 per cent of their members had refused to supply workers to host employers for workplace health and safety reasons.[105] Mr. Geoff Cooper of Adecco confirmed that Adecco had previously withdrawn workers from host workplaces on the grounds of unacceptable risk to its workers.[106]

The Committee notes that where a labour hire agency finds the safety standards of a host workplace to be unsatisfactory, the labour hire agency is not obliged to relay information regarding the host workplace's unsafe conditions to the VWA. The Committee believes that this is an issue that requires further examination and will consider this in its final report.

Cost-cutting on the part of the agency may impact on the amount of safety training that is provided to workers before they are placed into a host workplace. According to section 21 of the OHS Act, both the labour hire agency and the host employer have a duty to provide information and training to workers so that they may perform their work safely. The Committee received evidence that there are serious gaps in the provision of safety induction procedures across labour hire companies and host employers. "Employee B",[107] of the AMWU, is a labour hire worker and observed that:

> *In my experience, the labour hire company usually gives me a general induction when I start a specific job on issues such as pay and their policies and procedures. They don't give OHS training. … The level of OHS training on the job depends on the company where I am placed. Some provide quite extensive information while others don't provide much at all*.[108]

Research by Quinlan and Mayhew suggests that workers in non-standard working arrangements, including temporary workers, have generally limited knowledge of OHS legislative responsibilities.[109] While other factors, such as the constant assignment into new workplaces, may contribute to this outcome, inconsistent OHS induction and training almost certainly plays some part.

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105 Recruitment and Consulting Services Association, 2004. Submission No. 15, 25 February, p.33.

106 G. Cooper, Adecco Group of Companies, 2004. Minutes of Evidence, 4 October, p.177.

107 While the AMWU originally supplied the names of two of their members whose experiences are detailed in the AMWU's supplementary submission, the Committee decided to protect their identities by referring to them as "Employee A" and "Employee B".

108 Australian Manufacturing Workers' Union, 2004. Submission No. 17, Supplementary Report, 27 February, p.5.

109 M. Quinlan and C. Mayhew, 1999. "Precarious Employment and Workers' Compensation," *International Journal of Law and Psychiatry*, Vol. 22, p.491.

There are some inconsistencies and gaps in the figures on OHS induction and information provision. On the one hand, Underhill's research for the VTHC found that 43 per cent of workers claimed that labour hire companies rarely or never provided OHS information, while 28 per cent of workers rarely or never received OHS information from host employers.[110] On the other hand, the Brennan, Valos and Hindle study found that around 55 per cent of all labour hire agencies claimed to always provide safety inductions prior to the placement of employees, while only 19 per cent of agencies rarely or never provided such training.[111] The same study found that 60 per cent of host employers claimed to always provide safety induction training, but over 20 per cent rarely or never provided such training.[112]

Regardless of the exact figures, after receiving evidence in relation to OHS induction and information provision, the Committee finds that there are no consistent OHS procedures for labour hire workers. Even if the Brennan, Hindle and Valos figures are considered in isolation, only just over half of all agencies and host employers are always providing OHS induction procedures.

Some employer associations and labour hire agencies that appeared before the Committee disputed the proposition that their industry is not meeting OHS standards. Indeed, it is clear that, despite the questionable standards of some labour hire agencies, other labour hire operators are excelling in the area of workplace health and safety. Also, as a whole, the labour hire industry has made some inroads into its high workers' compensation claim rate. Mr. Greg Tweedly of the VWA noted that, although there are a significantly higher proportion of workers' compensation claims from the labour hire industry, there has been a 27 per cent reduction in blue-collar labour hire claims over the past seven years.[113]

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110 Elsa Underhill, 2004. *Working under Labour Hire Arrangements: the experience and views of Victorian labour hire employees*. Report for the Victorian Trades Hall Council. Attachment to Victorian Trades Hall Council, 2004. Submission No. 23, 20 April, p.31.

111 Dr. Linda Brennan, Dr. Michael Valos and Professor Kevin Hindle, 2003. *On-hired Workers in Australia: Motivations and Outcomes*. Occasional Research Report. Melbourne, RMIT University, School of Applied Communication, p.80.

112 Dr. Linda Brennan, Dr. Michael Valos and Professor Kevin Hindle, 2003. *On-hired Workers in Australia: Motivations and Outcomes*. Occasional Research Report. Melbourne, RMIT University, School of Applied Communication, p.34.

113 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, p.238.

Mr. David Hargraves, of the Australian Industry Group (AiG), emphasised that many labour hire agencies have a very sophisticated understanding of OHS:

> *The focus on safety is so high that in at least one case that I am aware of a labour hire company uses its safety record as a marketing tool. As a consequence its good safety provides it with a commercial advantage. … It has gone through 150 days without any incident, which is much better than the industry standard.*[114]

In support of this proposition, a number of labour hire agencies demonstrated a great dedication to workplace health and safety. Mr. Graeme Wheeler of WV Management described his company's rigorous approach to OHS, and the results that have been achieved:

> *We have been approached by several other abattoirs to provide our model onto their site. … We have declined the opportunity mainly because they were not prepared to work to the sorts of rules that we believe are necessary to deliver a sustainable solution. … At the meat industry occupational health and safety conference last week, which was a national conference, commonly people were talking about real cost of OHS workers' compensation in the meat industry being 15 to 20 per cent. We are currently running at a real cost of 4.8 per cent*.[115]

Mr. Rob Sonogan from Ready Workforce gave the Committee a detailed explanation of the comprehensive procedures that his company has established to ensure that workers are adequately equipped to deal with workplace health and safety,[116] as did Mr. Chris Mazzotta of Troubleshooters Available. Mr. Mazzotta gave evidence to the Committee that:

> *Troubleshooters Available has always taken an exceptionally proactive approach to occupational health and safety. All our contractors have been accredited with the Red Card induction, which is conducted by the Master Builders Association of Victoria. All contractors are also taken through an in-house safety awareness induction and video. In addition, our client sites are visited by either me, one of our occupational health and safety representatives or an independent company to ensure that our clients are providing a safe working environment, for not only our contractors but all construction workers on the building site*.[117]

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114 D. Hargraves, Australian Industry Group, 2004. Minutes of Evidence, 23 August, p.122.
115 G. Wheeler, WV Management Limited, 2004. Minutes of Evidence, 27 July, p.31.
116 R. Sonogan, Ready Workforce, 2004. Minutes of Evidence, 4 October, p.195.
117 C. Mazzotta, Troubleshooters Available, 2004. Minutes of Evidence, 4 October, p.160.

Mr. Geoff Cooper of Adecco described how his company closely monitors host workplaces and proactively works with host employers to improve safety on site.[118] Mr. Ken Bieg of Skilled Engineering explained that his company is 'passionate' about OHS, and that their OHS objective is 'zero injuries'. To this end, Skilled Engineering has sought OHS accreditation under AS/NZS 4801.[119] On a broader industry level, the RCSA has produced a CD-ROM for all of its members that provides generic induction programs for blue- and white-collar workers,[120] and is working towards the development of an 'OHS passport' for workers that can be carried between labour hire agencies.[121]

At the same time, however, there was recognition from employer associations and within the industry itself that OHS standards can be wildly divergent, with compliance ranging from very poor to outstanding. Mr. David Hargraves of the AiG, for example, acknowledged that:

> *...I do think it is definitely the case that you have the people at the top who are really good corporate citizens and who are doing the right thing, and I think there are the companies at the bottom about which there would a high degree of doubt whether they are always doing the right thing.*[122]

Similar views were espoused by other employers and employer associations, as well as unions.

The Committee finds that while some labour hire operators are adhering to excellent OHS standards, there is persuasive evidence to suggest that the industry's record as a whole is poorer than average.

## 4.2 Workers' Compensation

The Committee received evidence that the current workers' compensation framework strains to deal with labour hire arrangements. As with OHS issues, concerns about

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118 G. Cooper, Adecco Group of Companies, 2004. Minutes of Evidence, 4 October, pp.171-172.
119 K. Bieg, Skilled Engineering, 2004. Minutes of Evidence, 28 July, p.79.
120 C. Cameron, Stratecom for Recruitment and Consulting Services Association, 2004. Minutes of Evidence, 27 July, p.23.
121 C. Cameron, Stratecom, for Recruitment and Consulting Services Association, 2004. Minutes of Evidence, 15 November, p.262.
122 D. Hargraves, Australian Industry Group, 2004. Minutes of Evidence, 23 August, p.123.

workers' compensation were voiced by unions and the labour hire industry alike and a number of witnesses called for legislative amendment.

As noted above, the VWA reports that labour hire workers have a higher incidence of workers' compensation claims than the workers distributed across the rest of the scheme. However, there is some concern that injuries may be under-reported, as job insecurity and financial insecurity may deter labour hire workers from making claims. This reticence to make claims may translate into working with an injury. Research conducted by Elsa Underhill for the VTHC found that there is some reluctance by labour hire workers to make workers' compensation claims, for fear of losing their job. Twenty-four per cent of respondents to the study had experienced a workplace injury over the preceding 12 months, but only 10 per cent of respondents had made a workers' compensation claim. Of those who did not make a claim, 18 per cent did not do so for fear of jeopardising future job prospects and 6 per cent said that they could not afford to take time off. [123] Evidence also suggests that labour hire workers may be more likely to claim only in relation to serious injuries rather than light injuries, as they are underrepresented in claims that involve less than 10 days off work.[124] If labour hire workers are reluctant to make claims, this has serious implications for the VWA scheme and the industry premiums. Where workers work with injuries instead of reporting them, the potential to exacerbate their injuries increases, leading to more severe injuries and causing a greater cost to the labour hire agency itself and the scheme as a whole.

Mr. Greg Tweedly of the VWA explained to the Committee that workers' compensation premiums are a strong cost incentive to employers to maintain best practice OHS standards, because an employer's premium rate is partly based on its individual history of workers' compensation claims:

> *The premium system, which was significantly revamped this year, is designed to have a much stronger relationship to the frequency of claims and the duration of claims that occur. The premium price reflects that. If you have more injuries and they are more costly, your premiums will go up more than they otherwise would. The premium system is part of the*

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123 Elsa Underhill, 2004. *Working under Labour Hire Arrangements: the experience and views of Victorian labour hire employees*. Report for the Victorian Trades Hall Council. Attachment to Victorian Trades Hall Council, 2004. Submission No. 23, 20 April, p.34.

124 E. Underhill, 2004. Minutes of Evidence, 28 July, p.54.

> *dynamic to provide an incentive to the players to have safer workplaces and improve their return-to-work practices.*[125]

Some stakeholders,[126] including the VWA, are concerned that this cost incentive is being undermined by the use of labour hire, because it means that host employers can transfer premium cost and responsibility to labour hire agencies. Consequently, the costs associated with injured workers do not impact on the host employer. The Australasian Meat Industry Employees' Union gave a vivid example of the significance of the cost incentive of premiums:

> *On one occasion, an organiser raised a safety issue with the owner of a meat works and the response was that an injury would not affect the owner's premiums so he would not fix the problem.*[127]

Section 138 of the *Accident Compensation Act 1985* (Vic) is a mechanism external to the premium system that provides a financial incentive for host employers to maintain workplace health and safety standards for labour hire workers. Section 138 enables the VWA to take legal action against host employers on the basis of third party negligence to recover the costs associated with an injured worker. The VWA has prosecuted both labour hire and host employer in 11 cases since December 1999. Nine of these cases were successful, and equal culpability was assigned to the labour hire employer and the host in almost half of these cases.[128]

### *4.2.1 Hold harmless clauses*

A number of witnesses gave evidence to the Committee that some host employers are trying to avoid the financial implications of section 138 recoveries by insisting on the insertion of 'hold harmless' clauses in their contracts with agencies. The VWA submission describes these clauses:

> *'Hold harmless clauses' are where an employer and a third party enter into a contract under which the employer agrees to indemnify the third party for any injuries suffered by the employee during the performance of*

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125 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, p.239.
126 See for example, Electrical Trades Union, 2003. Submission No. 8, 19 December, p.24.
127 Australasian Meat Industry Employees' Union, 2003. Submission No. 11, 23 December, p.7.
128 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, p.240.

> *the contract. The employer 'holds harmless' the third party from any liability ensuing from the death or injury of an employee.*[129]

Hold harmless clauses can also have a more limited scope, and may be used to indemnify the host employer against the costs of any litigation rather than the costs of the actual injury.[130]

The RCSA submission claims that the hold harmless motivation is insurance-related:

> *The taking of recovery actions against clients who have negligently contributed to the injury of on-hired employees has resulted in general insurers refusing to provide public liability cover to clients utilising on-hired employees given the increased risk. Of course when a successful recovery action is taken, the only protection a client has is to make a claim in accordance with their public liability policy. General insurers see this risk as too great and as a result either refuse to provide such cover to the whole of the business unless the client agrees not to use on-hired employee services or they get the on-hired employee service to sign an indemnity provision which is commonly known as a 'hold harmless' clause*.[131]

However, Mr. Peter Jamvold of the Insurance Council of Australia (ICA) refuted the idea that insurance companies are pushing host employers to request these clauses.[132]

The VWA believes that hold harmless clauses will gradually disappear, by virtue of market forces. Mr. Greg Tweedly of the VWA explained that:

> *…not only will the labour hire agency pay the premium on their workers, they will also be paying for the full cost of the claim that they would otherwise have been indemnified for. So whilst they might be okay for the short run, that will put cost pressure on the labour hire agency to put it up and that will decrease – not eliminate but decrease – the propensity to give hold harmless*.[133]

If this is the case, the popularity of hold harmless clauses may already be waning, as some witnesses suggested that hold harmless clauses already require a high

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129 Victorian WorkCover Authority, 2004. Submission No. 22, 16 April, p.19.
130 R. Sonogan, Ready Workforce, 2004. Minutes of Evidence, 4 October, p.199.
131 Recruitment and Consulting Services Association, 2004. Submission No. 15, 25 February, p.37.
132 P. Jamvold, Insurance Council of Australia, 2004. Minutes of Evidence, 15 November, p.254.
133 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, pp.242-243.

premium price.[134] Furthermore, Mr. Peter Jamvold of the ICA indicated that, from an insurer's point of view, hold harmless clauses are not particularly effective:

> *…they usually do not work; it depends entirely on the quality of their drafting. Even if they are well-drafted it is not clear that they will hold up in court because you cannot contract out of the duty of care… [I]f insurers want to avoid a risk or limit a risk, there are much better mechanisms available to them than a hold harmless clause.*[135]

It was suggested to the Committee that, regardless of their efficacy, their very existence is potentially detrimental to OHS standards. The labour hire industry believes that hold harmless clauses do not encourage host employers to follow best practice OHS standards. For example, the RCSA believes that these clauses are sufficiently prevalent to have a negative effect on host employer attitudes to injury prevention.[136]

It is unclear whether hold harmless clauses are legally enforceable: so far, they appear to be untested in the courts. The lack of case law highlights the difficulty in garnering information on the topic of hold harmless clauses. While some witnesses were acutely aware of the hold harmless issue, others were not aware that hold harmless clauses existed in the labour hire industry at all. Despite the paucity of evidence on the topic, the Committee considers that there is sufficient evidence to show that hold harmless clauses exist in the labour hire industry and are used by host employers to avoid costs associated with section 138 recoveries.

***Recommendation 4.5***

***The Committee finds that, to the extent that the Committee understands their operation in the labour hire industry, 'hold harmless' clauses are a direct contradiction of the objectives of the occupational health and safety and workers' compensation regulatory framework, and recommends that these clauses should be prohibited by legislation.***

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134 P. Jamvold, Insurance Council of Australia, 2004. Minutes of Evidence, 15 November, p.255; R. Sonogan, Ready Workforce, 2004. Minutes of Evidence, 4 October, p.199.

135 P. Jamvold, Insurance Council of Australia, 2004. Minutes of Evidence, 15 November, p.254.

136 Recruitment and Consulting Services Association, 2004. Submission No. 15, 25 February, p.37.

### *4.2.2 WorkCover Industry Classification Codes*

It was suggested to the Committee that the current workers' compensation regime not only lessens the OHS cost incentive for host employers, but also distorts the premium rates of labour hire companies. Under the present system, premium rates are partly determined by the claims history of an employer and partly by the relevant WorkCover Industry Classification (WIC) code. An employer's workplace is classified to the WIC that most closely corresponds to the predominant activity of the employer at the workplace. There are currently only two WIC codes allocated to the labour hire industry: one for 'production' industries (blue-collar)[137] and another for 'services' industries (white-collar).[138]

The dual classification system for labour hire agencies may result in an artificially lower premium for some companies, particularly those in higher-risk industries. For example, if an agency predominantly on-hires to the services sector but also on-hires some workers to the production sector, its premium will be calculated according to the white-collar WIC code. This gives the agency a competitive premium advantage over companies who on-hire solely to blue-collar industries. The two-code system may also give a cost advantage to labour hire employment over direct hire employment. For example, an agency that on-hires workers to a particular industry may have a different WIC code from an employer that directly hires its own workers.[139]

The VWA intends to make changes to the classification of labour hire agencies in 2005-06,[140] and, to this end, it has released a discussion paper seeking comment on changes to WIC codes for the labour hire industry. Mr. Greg Tweedly of the VWA described the VWA's intended model for change:

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137 WIC code K8496L – employment agency services to workplaces operating in agriculture, forestry, fishing, mining, manufacturing, electricity, gas, water, construction, transport and storage: Victorian WorkCover Authority, 2004. Submission No. 22, 16 April, p.20.

138 WIC code K8497R – employment agency services to workplaces operating in trade, communication, finance, property, business services, public administration, community services, recreation, personal and other services: Victorian WorkCover Authority, 2004. Submission No. 22, 16 April, p.20.

139 Victorian WorkCover Authority, 2004. Submission No. 22, 16 April, Appendix D ('WorkCover Industry Classifications – Employment Agencies'), pp.2-3.

140 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, p.241.

> *…they would record their payroll against where they put people and actually have to classify anything up to 518 classifications if they had such a span of business. They would have to declare the remuneration commensurate with the risk to which they are putting people in, as distinct from saying, 'I am a labour hire blue-collar organisation'. So if I am putting people into the meat industry, into the manufacturing industry, into shipbuilding or whatever, I will have to record, as the labour hire organisation, where I put those people and my premium will be calculated based on where I put them.*[141]

Recruitment agencies that only place employees, as opposed to on-hiring them, would be allocated a separate WIC code under the proposed model.

The Committee finds that the current allocation of only two WIC codes to the labour hire industry is inadequate. The Committee supports the VWA's proposed model for change.

### *4.2.3 Return to work*

The issue of return to work (RTW) represents a great practical difficulty for the labour hire industry, yet it is a crucial ingredient in the speedy rehabilitation of injured workers. Indeed, one of the objects of the *Accident Compensation Act 1985* (Vic) as stated in section 3 is:

> *…to increase the provision of suitable employment to workers who are injured to enable their early return to work.*

As the 'employer'[142] of labour hire workers, an agency has a responsibility to offer suitable employment to injured workers with the goal of getting them back to work as soon as possible. Larger employers are required to have significant structures in place to address RTW issues, but where an employer can demonstrate that it does not have suitable work for the injured worker to do, the duty to offer alternative duties during convalescence will not apply. However, it is considered to be in the best interests of injured workers that they be offered work where possible, in order to encourage timely rehabilitation. Quick and effective rehabilitation ensures that the cost of injury compensation is contained for the employer.

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141 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, pp.241-242.

142 Some agencies that are not classified as employers at common law are deemed to be employers for the purposes of the *Accident Compensation Act 1985* (Vic).

One of the issues for labour hire agencies is that without the cooperation of a host employer, there may be limited scope for providing a RTW program for injured workers, since the work sites in which workers are usually placed are those of host employers. Mr. Greg Tweedly of the VWA noted that the consequences of not managing workers back to work are considerable:

> *…the consequences of not doing it for the labour hire organisation are that those costs [of the workers' compensation claim] are more expensive, their premiums will be higher and therefore the price they will have to subsequently charge future clients will be higher*.[143]

However, at this point in time, agencies must rely on the willingness of the host employer to accommodate labour hire workers on RTW programs.

There is currently no legislative obligation for a host employer to participate in the rehabilitation of workers who have been injured in its workplace. The RCSA submission explained that:

> *…it is often difficult to obtain alternative duties for injured on-hired employees owing to perceptions of clients that they may be at greater risk of a recovery action where an injured on-hired employee has a relapse in their workplace. 33 per cent of RCSA members reported that clients rarely or never make an attempt to assist in the finding of suitable alternative duties for on-hired employees injured in their workplaces*.[144]

It was suggested to the Committee that host employers could have a greater involvement in the RTW program of labour hire workers who were injured on their site.[145] Potentially, this responsibility could be contingent on the labour hire worker having been present in the host employer's workplace for a set amount of time; for example, six months. So, if a labour hire worker had been working for a host for six months and was then injured, the labour hire agency would still take financial responsibility for the cost of the injured worker's claim, but the host employer would have responsibility for providing suitable alternative duties for the worker.

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143 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, p.243.
144 Recruitment and Consulting Services Association, 2004. Submission No. 15, 25 February, p.37.
145 Recruitment and Consulting Services Association, 2004. Submission No. 15, 25 February, p.38.

***Recommendation 4.6***

***The Committee recommends that the Victorian WorkCover Authority commission research into the efficacy of existing return to work arrangements for labour hire workers with a view to developing improved return to work pathways.***

***Recommendation 4.7***

***The Committee recommends that the Victorian WorkCover Authority investigate options to encourage host employers to provide improved return to work pathways for injured labour hire workers.***

## 4.3 Skills Training

The Committee is aware of widespread community concern as to the shortage of skills across Australia. This is, of course, not confined to the labour hire industry nor seen as exclusively caused by the growth of the labour hire industry or the growth of casual employment across many sectors of the Australian economy. The skills shortage is seen as a major problem across a wide range of industry sectors.

During the course of the Inquiry, the Committee was presented with evidence which revealed a wide variety of views on the impact of the growth of labour hire employment upon the acquisition of skills training.

### *4.3.1 Types of skills training provided for labour hire employees*

The Committee noted that training by labour hire companies (as with all employers) should not be confined to OHS matters, however important they are. Training on OHS issues is critical and is conducted both through induction processes and on an ongoing basis. Long term skills training is of a different nature and is no less important. Such training can ensure that the worker not only works safely but also effectively and efficiently. Mr. Hubbard of the VTHC, appearing before the Committee, referred to:

> *…the capacity of these [labour hire] companies to actually train people, not just induction training and health and safety, but the broader vocational education and skill formation needs of that industry.*[146]

There was evidence before the Committee that some of the larger labour hire companies provided for both apprenticeships and traineeships. For example, Mr. Ken Bieg of Skilled Engineering told the Committee that:

> *We currently have about 550 apprentices and recently completed traineeships, and are looking to expand on that. We have launched a program called Operation TECH, specifically to address the issues associated with skill shortages.*[147]

The RCSA, whose members comprise a large proportion of labour hire firms in Australia, stated in its submission to the Committee that 51 per cent of its members provide training to on-hired employees and went on to say that:

> *…there has been a significant increase in the number of members, large and small engaging on-hired employees in accordance with the New Apprenticeship Scheme in industries such as storage and logistics, call centres and administrative support.*[148]

Another labour hire company, Troubleshooters Available, gave evidence before the Committee regarding the establishment of a company called Apprentices Available as part of its commitment to apprenticeships and traineeships. Mr. Chris Mazzotta of Troubleshooters Available told the Committee that:

> *The reasons for…[setting up Apprentices Available] was that there were big shortages in certain trades – cabinet-makers and joiners are dying trades at the moment for some reasons. We have given our clients an indication that we want to get up there and running with Apprenticeships Available.*[149]

The other principal kind of training other than apprenticeships and traineeships about which evidence was presented to the Committee was that of induction and on the job (or longer term) training. The AiG, in its submission, noted that the labour hire

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146 L. Hubbard, Victorian Trades Hall Council, 2004. Minutes of Evidence, 23 August, p.110.
147 K. Bieg, Skilled Engineering, 2004. Minutes of Evidence, 28 July, p.81.
148 Recruitment and Consulting Services Association, 2004. Submission No. 15, 25 February, p.39.
149 C. Mazzotta, Troubleshooters Available, 2004. Minutes of Evidence, 4 October, p.163.

industry is not given sufficient credit for the training that it does offer.[150] Further, the AiG referred to an internal survey which revealed that formal training programs are offered to casual employees at half of the participating labour hire companies of the AiG.[151]

The Committee was provided with examples of the skills training that certain labour hire companies provide to their employees. Skilled Engineering is a prominent example with its Operation TECH, a scheme it has developed to address skill shortages.

### *4.3.2 Responsibility for the training of labour hire employees*

Interestingly, a 2000 study of non-standard employment and its impact on training argued that there is persuasive evidence that the growth of non-standard work has brought a shift in the balance of responsibility for vocational education and training, with employers using labour hire or outsourcing to shift the burden of training on to the labour hire firm or outsourced service provider. However, at the same time, these labour hire firms were seen to be minimising their investment in training.[152]

The labour hire agencies which gave evidence to the Committee clearly considered that the responsibility for training was theirs and that host employers are largely relying on labour hire companies to provide whatever training is made available to labour hire employees. This is obviously not a problem for the large labour hire companies such as Adecco which, in its submission to the Committee, referred to its responsibility as the employer:

> *…to ensure that the employee has the requisite training, qualifications skills and competence to perform the assignment.*[153]

Another labour hire company, WV Management, in its submission to the Committee, went one step further and while acknowledging its own training responsibility to its employees, also stated that both the labour hire agency and the host company were

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150 Australian Industry Group, 2004. Submission No. 20, 29 March, p.13.
151 Australian Industry Group, 2004. Submission No. 20, 29 March, p.13.
152 Richard Hall, Tanya Bretherton and John Buchanan, 2000. *It's not my problem. The growth of non-standard work and its impact on vocational education and training in Australia.* Leabrook, South Australia, National Centre for Vocational Education Research, p.viii.
153 Adecco Group of Companies, 2004. Submission No. 30, 30 September, Attachment 2, p.16.

responsible for training and that these respective obligations needed to be made unambiguously.[154]

Some witnesses, however, gave information to the Committee that labour hire employment means that the responsibility for training can be easily overlooked. In its submission to the Committee, the Australian Council of Trade Unions (ACTU) stated that, in its view:

> *…the potential for the employing partners [the labour hire agency and the host company] to shift the responsibility from one to the other is enormous.*[155]

Further, the ACTU in its submission saw that it was the labour hire agency which relied upon the host company for training and that this was the reason for what it saw as inadequate training:

> *As long as labour hire firms rely on their clients to provide training, labour hire employees will receive little training.*[156]

### *4.3.3 Quality and extent of training by labour hire companies*

The Committee received evidence from some witnesses who referred to the contribution made by labour hire agencies and their host companies to skills training while others, just as forcefully, pointed to what they saw as the inadequacy of the training that is provided for labour hire employees.

Unions are particularly concerned that the growth of labour hire has undermined both the extent and quality of training amongst their members. The ACTU, in its submission to the Committee, referred to both the high levels of casualisation amongst labour hire workers and the use of such workers to supplement the core workforce. In doing so, the ACTU stated that:

> *It is unlikely that that company [that uses a labour hire agency] is going to invest much money in the training of supplementary labour. Training is something that companies invest in their permanent workforce.*[157]

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154 WV Management Limited, 2003. Submission No. 2, 18 December 2003, p.15.
155 ACTU, 2003. Submission No. 5, 19 December, p.4.
156 ACTU, 2003. Submission No. 5, 19 December, p.5.

Mr. Martin Pakula of the National Union of Workers (NUW) in his evidence to the Committee on skills training in his industries, stated that:

> *…there is no doubt that companies that have a high level of casualisation do not put the same effort into training, particularly in skilling up their workforce simply because there is no long term.*[158]

In evidence before the Committee, the VTHC, in referring to a study on vocational education and training,[159] highlighted the problem of labour hire companies not providing time release workers to undergo training as contributing to skill shortages. Mr. Hubbard of the VTHC expressed concern:

> *…[that companies had] outsourced a lot of their trade-based requirements and more skilled work.*[160]

In evidence before the Committee, a number of proposals were presented to address the perceived shortfall in quality skills training by labour hire companies. Mr. Hubbard, in referring to what he saw as responsibilities upon both the labour hire agency and the host company, and in advocating a licensing scheme, said:

> *…there is an argument that the host employer ought to pay something towards that.*[161]

In its submission to the Committee, the Shop, Distributive and Allied Employees Association (SDA) referred to the erosion of skills and went further and recommended that:

> *Legislation should mandate the amount of training and/or apprenticeships a labour hire company is to provide based on their overall labour number and categories.*[162]

In referring to what it saw as a lack of investment in training, the VTHC recommended that the conditions of a registration scheme for labour hire companies include:

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157 ACTU, 2003. Submission No. 5, 19 December, p.5.

158 M. Pakula, National Union of Workers, 2004. Minutes of Evidence, 23 August, p.103.

159 John Buchanan, Justine Evesson and Chris Briggs, 2002. *Renewing the Capacity for Skills Formation – the Challenge for Victorian Manufacturers*, Sydney, ACIRRT.

160 L. Hubbard, Victorian Trades Hall Council, 2004. Minutes of Evidence, 23 August, p.118.

161 L. Hubbard, Victorian Trades Hall Council, 2004. Minutes of Evidence, 23 August, p.118.

162 Shop, Distributive and Allied Employees Association, 2004. Submission No. 19, 15 March, pp.34-35.

> *Payment of a training levy and/or a minimum hiring ratio of apprentices to tradespersons.*[163]

The AMWU, in evidence before the Committee, also supported a licensing scheme and submitted that such a scheme could:

> *…be utilised to provide revenue to go into a centralised fund which could be pooled for the purposes of providing accredited training back into the industry for labour hire workers.*[164]

Another form of training recommended by the VTHC in its submission to the Committee and also by the specialist community law centre, Job Watch in relation to apprentices,[165] is training on Equal Employment Opportunity and other legal obligations related to employment.[166]

In evidence before the Committee, the Transport Workers' Union called for the adoption of guidelines to govern labour hire companies and with respect to training stated that:

> *…there ought to be five days paid training in occupational and safety [sic] training each year, so you can maintain contact with the industry trends and competency standards.*[167]

On the other hand, the Committee also received evidence from a number of labour hire agencies and host employers arguing that the characteristics of the labour hire industry encouraged training and the development of skills. Another labour hire agency, Labour Force Australia, in its submission to the Committee, referred to what it saw as the valuable contribution of the labour hire industry to skills development in that:

> *...the labour hire company has the opportunity to identify skills shortages, negotiate and organize training through training providers and facilitate workers into training.*[168]

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163 Victorian Trades Hall Council, 2004. Submission No. 23, 20 April, p.16.
164 D. Oliver, Australian Manufacturing Workers' Union, 2004. Minutes of Evidence, 13 September, p.151.
165 Job Watch, 2003. Submission No. 9, 19 December, p.35.
166 Victorian Trades Hall Council, 2004. Submission No. 23, 20 April, p.17.
167 B. Noonan, Transport Workers' Union, 2004. Minutes of Evidence, 28 July, p.93.
168 Labour Force Australia, 2003. Submission No. 4, 19 December, p.5.

The Civil Contractors Federation, in its submission to the Committee, addressed the skills shortage. The Federation argued that labour hire is not responsible for the decline in apprenticeship numbers and, as to its own industry, stated that:

> *...the use of staff from labour hire operators is assisting in addressing one of the most serious challenges by the civil construction industry – a decrease in skilled trades people and young people entering the industry.*[169]

One of the largest labour hire agencies, Adecco, in evidence before the Committee, outlined three different aspects of training, being on the job training, formal training such as through an apprenticeship scheme, and a traineeship. Mr. Rob Barber for Adecco, in evidence before the Committee as to the value of on the job training, stated that:

> *…for an on-hired employee, if you work on multiple sites you are learning more than quite often the client's or company's own employees who work on the one machine or the one process all the time.*[170]

The Committee acknowledges the good work done in this area by many labour hire operators. However, the Committee believes that there has been an inadequate level of development of skills training. This problem is not confined to the labour hire industry and the Committee makes the general comment that the investment in skills training, in this industry as elsewhere, is something that requires urgent attention.

***Recommendation 4.8***

***The Committee recommends that, in recognition of the broad community responsibility for long-term skills training, the Victorian Government should commission a dedicated inquiry into skills training as a means of addressing concerns about growing skills shortages.***

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169 Civil Contractors Federation, 2004. Submission No. 28, 30 July, p.2.
170 R. Barber, Adecco Group of Companies, 2004. Minutes of Evidence, 4 October, p.174.

### *4.3.4 Group training companies*

Group training companies (GTCs) are training-focussed organisations that are an important source of apprenticeships and traineeships for Victorian workers. Under the group training model, a GTC employs apprentices and/or trainees, who are then rotated through a number of host workplaces for the duration of their apprenticeship or traineeship. John Glover of Group Training Australia explained how the group training model developed:

> *The idea with group training was to take the fractional bits of training that were available with smaller employers – or those people who did not want to train at all – and then add all the bits up, so that is where the group notion came. You took all those bits, put them into a group, and you were able to train one apprentice.*[171]

In this way, where small to medium-sized businesses are unable to support the training of an apprentice or trainee for the years it takes to gain qualifications, GTCs coordinate a number of short-term assignments with different hosts so that businesses can host apprentices or trainees over shorter periods.

While the aims and functions of most GTCs are quite dissimilar to those of labour hire companies, GTCs were brought to the attention of the Committee in this Inquiry because the manner in which they engage apprentices and trainees closely resembles the tripartite working relationship used by labour hire companies to engage their workers. That is, GTCs employ their apprentices but then on-hire them to work for host employers in the host's workplace. The apprentices complete a number of short-term assignments with host companies, being rotated around a number of businesses. Similarly to labour hire workers, the apprentice has a contract of employment with the GTC but not with the host, yet it is the host who has day-to-day control of the apprentice's work and the workplace. Although there are some differences between GTCs and labour hire, the triangular nature of the working arrangement replicates some of the issues that arise in the labour hire industry, particularly in the area of OHS.

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[171] J. Glover, Group Training Australia (Vic), 2004. Minutes of Evidence, 27 July, p.4.

One of the differences between labour hire and group training is that the majority of GTCs in Victoria are not for profit organisations.[172] These organisations provide a vital community service that supports and enhances training and skills formation. Indeed, Watson, Buchanan, Campbell and Briggs claim that:

> *One of Australia's greatest institutional innovations in the labour market has been the development of group training arrangements.*[173]

The VACC, which operates its own Group Apprenticeship Scheme, outlined the particular virtues of its scheme:

> *The scope to move apprentices and trainees amongst members enables exposure for the apprentice/trainee to the latest and varied technologies and sectors within the industry…Training opportunities through Group Apprenticeship Schemes ensure apprentices and trainees are actively engaged and trained without suspension for the duration of the contract of training.*[174]

Group training companies are often a vital part of the training network in rural and regional areas. Group Training Australia, referred to the regional character of its GTCs and stated that they had:

> *…a strong community and/or industry base and operate across a range of industry and occupational areas. They make a substantial contribution through adding to the number of entry level jobs across industry and in creating additional training opportunities, primarily for young people.*[175]

John Glover of Group Training Australia gave an example of the positive involvement that his organisation has had in rural and regional Victoria:

> *About five years ago, Donald had no apprentices or trainees at all. At great risk and with no long-term economic viability the group training company in that area went to Donald and put a part-time person in Donald to work from there. Donald now has nine apprentices and trainees, and has had for the past three or four years.*[176]

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172 J. Glover, Group Training Australia (Vic), 2004. Minutes of Evidence, 27 July, p.3.

173 Ian Watson, John Buchanan, Iain Campbell and Chris Briggs, 2003. *Fragmented Futures: New Challenges in Working Life*. Sydney, Federation Press, p.79.

174 Victorian Automobile Chamber of Commerce, 2004. Submission No. 12, 8 January, p.4.

175 Group Training Australia (Vic), 2003. Submission No. 3, 19 December, p.5.

176 J. Glover, Group Training Australia (Vic), 2004. Minutes of Evidence, 27 July, pp.4-5.

Watson, Buchanan, Campbell and Briggs note that up to 75 per cent of metal and engineering apprentices in Gippsland are based with the local group training scheme.[177]

Another difference between group training and labour hire is the express commitment that GTCs make to provide ongoing placements for their workers for the length of their traineeship or apprenticeship. Group Training Australia's Victorian chapter, which represents most GTCs in this state,[178] provided evidence to the Committee regarding the training obligations of the GTCs:

> *Group training companies are the employer, and they have the responsibility for completing the contract of training. If they cannot complete it with one employer they move the apprentice around and around until such time as that apprentice has completed their contract of training.*[179]

There is even further scope for GTCs to make a contribution to Victorian workplaces: in educating small businesses. Currently, the Victorian branch of Group Training Australia has a network of field officers that visit small businesses throughout Victoria to assess whether they are suitable for the placement of apprentices or trainees. In his review of Victoria's OHS regulation, Maxwell noted that Group Training Victoria has made several offers to the VWA to use its network of field officers to distribute basic OHS information to small businesses.[180] Maxwell remarked that:

> *For reasons which remain unclear, this invitation [to distribute basic OHS information] has not been taken up. It strikes me that this is an ideal opportunity for the Authority to gain access to the least-informed section of business.*[181]

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177 Ian Watson, John Buchanan, Iain Campbell and Chris Briggs, 2003. *Fragmented Futures: New Challenges in Working Life*. Sydney, Federation Press, p.81.

178 Group training schemes are also provided by organisations outside the Group Training Australia framework. For example, the Victorian Automobile Chamber of Commerce gave evidence in relation to its own group apprenticeship scheme. Victorian Automobile Chamber of Commerce, 2004. Submission No. 12, 8 January, p.3.

179 J. Glover, Group Training Australia (Vic), 2004. Minutes of Evidence, 27 July, p.4.

180 Chris Maxwell, 2004. *Occupational Health and Safety Act Review*, Melbourne, March, p.287.

181 Chris Maxwell, 2004. *Occupational Health and Safety Act Review*, Melbourne, March, p.278.

Maxwell observes that the State Revenue Office, on the other hand, has taken up the offer and is planning to develop a 'tool kit' on State taxes for distribution by the Group Training Officers.[182]

It is clear that GTCs play an important role in Victoria's training network. However, despite the benefits that GTCs provide to the community, the triangular relationship between GTC, apprentice and host brings certain problems that mirror some of the issues of the labour hire industry. In particular, the group training model suffers from a high level of workers' compensation claims. In her study of apprentice and trainee workers' compensation claims, Underhill noted that:

> *Group apprentices and trainees have consistently had a disproportionate level of workers' compensation claims. This is likely to be an outcome, in part, of their rotation amongst small employers. In this way, group apprentices and trainees are likely to face similar risks to those confronting labour hire employees who also move between hosts' workplaces.*[183]

Underhill notes that the claims by group apprentices and trainees doubled between 1999-00 and 2000-01, and comments that this is probably due not only to rotation through different workplaces, but a number of other factors, such as the increasing number of trainees to be found in low skill labouring. This pattern is similar to that which Underhill found in the labour hire industry, where labour hire workers are increasingly less likely to be tradespeople, and more likely to be unskilled or semi-skilled workers.[184]

Some witnesses argued that some GTCs are actually labour hire companies providing low-cost workers in the guise of apprentices or trainees. For example, according to the ETU, GTCs have actually contributed to a decline in the quality of apprenticeships:

> *It is the experience of the ETU that many host employers hire apprentices as cheap labour and do not provide the necessary training to progress the*

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182 Chris Maxwell, 2004. *Occupational Health and Safety Act Review*, Melbourne, March, p.278.

183 E. Underhill, 2002. *An Analysis of Apprentice and Trainee Worker's Compensation Claims in Victoria, 1994/95 – 2000/01*. Report for WorkSafe Victoria, Melbourne, August 15, p.4.

184 Elsa Underhill, 2002. *Extending Knowledge on Occupational Health and Safety and Labour Hire Employment: A Literature Review and Analysis of Victorian Worker's Compensation Claims*. Report for WorkSafe Victoria, Melbourne, October, p.101.

> *apprentices' working knowledge base – there is no upskilling and meaningful work in many cases.*[185]

Other witnesses also questioned the quality of training provided by some GTCs. The SDA, in its submission to the Committee, claimed that some of these companies:

> *…have limited control over the variety and completeness of 'on the job' training and the supervision of apprentices.*[186]

The Committee intends to further examine longer term skills training, the role of the GTCs, and the impact of the growth of the labour hire industry on skills training in the Final Report.

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185 Electrical Trade Union, 2003. Submission No. 8, 19 December, p.11.
186 Shop, Distributive and Allied Employees Association, 2004. Submission No. 19, 15 March, p.29.

Chapter 5

# Regulatory Options and Alternatives to Regulation

## 5.1 Considerations

The Committee received a large amount of evidence from witnesses regarding proposed future regulatory approaches towards the labour hire industry. This section of the Interim Report considers the range of proposals that were put to the Committee, and, in this context, recommends the changes that the Committee considers most appropriate. The Committee intends to seek further comment from relevant stakeholders in relation to the proposals put forward in this section of the report.

The Committee's starting point for considering possible changes to the regulation of the labour hire industry is the valuable input received from stakeholders. Some witnesses were strongly in favour of introducing stringent regulation of the labour hire industry, while others submitted that this was unnecessary. On balance, the majority of witnesses to the Inquiry submitted that the labour hire industry requires some form of further regulation. However, a significant number of witnesses argued that further regulation of the labour hire industry will not necessarily address the problem of non-compliance with existing legislation. According to this latter point of view, the present regulatory framework adequately sets out all the necessary rights and responsibilities.

As well as weighing up the evidence received over the course of the Inquiry, the Committee assessed a number of general practical concerns in examining whether further regulation of the labour hire industry is justified. The Committee gave particular consideration to the extent of the occupational health and safety (OHS) problems in the labour hire industry, and whether these problems could be addressed through existing regulation. The Committee considered a number of different approaches to address the issues, and factored in the cost and use of resources that would be required for each approach.

The proposals put to the Committee can be loosely divided into three groups: an industry-wide scheme, amendments to existing laws, and an education scheme. Most witnesses suggested some combination of all three of these approaches. The Committee notes that the amendment of existing laws is an important consideration in the context of formulating regulatory approaches and alternatives for the labour hire industry. A number of witnesses highlighted pieces of legislation that they believed are, on the whole, satisfactory, but could be strengthened by targeted amendments.[187] This section will not detail particular amendments to existing laws that were proposed in evidence to the Committee, as these suggestions have been dealt with in Chapter 4. Instead, this section will examine proposals regarding an industry-wide scheme and calls for an education scheme.

## 5.2 An industry-wide scheme

### *5.2.1 Evidence received by the Committee*

Proposals for an industry-wide scheme featured heavily in the evidence received by the Committee. However, there was little consensus regarding what the form or content of such a scheme would be. There were two main models put forward: on the one hand, some witnesses considered that a mandatory, wide-ranging regime would be the most appropriate, while on the other, some suggested that the scheme should be wide-ranging, but voluntary and/or self-regulatory. It should be noted that the terms 'licensing' and 'registration' were used interchangeably by a number of witnesses to designate an industry-wide regulatory framework. It was mostly used to describe a mandatory scheme with set conditions and obligations.

A number of witnesses, particularly from the union movement, strongly advocated the introduction of a mandatory licensing or registration scheme that would regulate a broad range of aspects of the labour hire industry's operation. Those witnesses who supported a mandatory regime noted that its efficacy would be ensured only by the incorporation of meaningful obligations and enforcement mechanisms.

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[187] For example, Job Watch proposed an amendment to section 54 of the *Occupational Health and Safety Act 1985* to give greater protection to labour hire workers: Job Watch, 2003. Submission No. 19, 19 December, p.25. See Chapter 4 of this report for a discussion of this proposal.

The Victorian Trades Hall Council (VTHC) emphasised that a mandatory licensing scheme would assist workers, but would not disadvantage reputable labour hire agencies:

> *Registration/licensing of labour hire companies is seen as a mechanism for enabling those labour hire companies which meet legal obligations to operate whilst excluding unfair competition from 'fly-by-night' companies. It can provide increased stability to the industry whilst overcoming the negative consequences for employees.*[188]

A licensing regime was also supported by the Australian Manufacturing Workers' Union (AMWU), as outlined by Mr. Dave Oliver:

> *We see the best solution as creating some kind of licensing regime where there would be enforceable standards to ensure that wages and conditions are provided to employees, to ensure that labour hire employees are afforded the same rights as any other worker in our industry, whether permanent or casual, in respect of workers' compensation, occupational health and safety and with access to unfair dismissal remedies.*[189]

Both the VTHC and the AMWU envisaged that a licensing scheme could include the payment of a training levy and thereby act as a vehicle for enhancing skills formation in the labour hire industry. Other unions to support the introduction of a wide-ranging regulatory scheme included the Australian Council of Trade Unions (ACTU), the Australasian Meat Industry Employees' Union (AMIEU), the National Union of Workers (NUW), the Electrical Trades Union (ETU), the Australian Services Union (ASU) and the Shop, Distributive and Allied Employees Association (SDA).

Some labour hire agencies voiced support for a mandatory scheme, as long as it was not overly cumbersome. Skilled Engineering, one of the only labour hire companies to promote the idea of licensing, affirmed that the scheme should comprise 'stringent criteria' in order to remove the industry's 'disreputable operators'.[190] Mr. Graeme Wheeler of WV Management told the Committee that he believed that the industry needed to adhere to a set of minimum standards in order to be 'cleaned up':

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188 Victorian Trades Hall Council, 2004. Submission No. 23, 20 April, p.16.

189 D. Oliver, Australian Manufacturing Workers' Union, 2004. Minutes of Evidence, 13 September, p.151.

190 Skilled Engineering, 2004. Submission No. 16, 26 February, p.22.

> *I would love to see something that was not overprescriptive but something that really put some key performance indicators down for the industry and had quite severe penalties for non-compliance, because I genuinely believe that it is a worthwhile form of employment if it is managed correctly.*[191]

Mr. Rob Sonogan of Ready Workforce indicated that he believed that some form of licensing for the labour hire industry would be a 'good way to move forward'.[192]

Other employer associations and labour hire agencies favoured an industry-wide scheme, but considered that it should be voluntary. There was particular concern to avoid a system that would present too much extra 'red tape' for business. For example, Mr. David Hargraves of the Australian Industry Group (AiG) proposed that a system where companies could voluntarily seek accreditation would be appropriate:

> *A system of accreditation means that companies have to satisfy a test. At the moment there is no real test for a labour hire company to go into the industry.*[193]

Under this model, labour hire companies would voluntarily seek accreditation and, once accredited, would be required to comply with a set of rules or guidelines in order to maintain accreditation. Mr. David Hargraves suggested that an accreditation system could incorporate an industry code and practice and noted the benefits for host employers:

> *If you have a system of accreditation, the code becomes a compulsory code, and it makes it far easier … for us to go back to the rest of our membership and say that when you are using labour hire companies you should only be using accredited labour hire companies.*[194]

He indicated that their support for such a system stemmed from:

> *...extensive consultation on this issue with the labour hire companies over a long time. Certainly it is their firm view that that would be beneficial to them and also to industry generally.*[195]

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191 G. Wheeler, WV Management Limited, 2004. Minutes of Evidence, 27 July, p.32.
192 R. Sonogan, Ready Workforce, 2004. Minutes of Evidence, 4 October, p.196.
193 D. Hargraves, Australian Industry Group, 2004. Minutes of Evidence, 23 August, p 123.
194 D. Hargraves, Australian Industry Group, 2004. Minutes of Evidence, 23 August, p.124.
195 D. Hargraves, Australian Industry Group, 2004. Minutes of Evidence, 23 August, p.127.

Mr. Hargraves indicated that an accreditation system would need to have government backing in order to be effective.[196] The Civil Contractors Federation similarly proposed an accreditation system.[197]

The Recruitment and Consulting Services Association (RCSA) submitted to the Committee that the most suitable approach to the labour hire industry is that of self-regulation. Mr. Charles Cameron of Stratecom, speaking on behalf of the RCSA, stated that:

> *We believe self-regulation has a far greater capacity to provide for the sustained improvement of standards of service delivery and compliance in contrast to regulatory models imposed through a government body.*[198]

Those labour hire companies which are members of the RCSA are already self-regulated by the RCSA Code for Professional Practice (the 'Code'). The Code contains a number of principles to which members are required to adhere: some of these are aimed at specific areas, such as safety, while others outline broad guidelines for professional conduct. For example, General Principle 2 states that:

> *Ethical behaviour is not simply compliance with legal requirements, it extends to honesty, equity, integrity and social responsibility in all dealings. It is behaviour that holds up to disclosure and to public scrutiny.*[199]

The RCSA also has a Disciplinary and Dispute Resolution Procedure to address issues, complaints or disciplinary matters that may arise under the Code.

### *5.2.2 The Committee's preferred model*

The Committee found that the evidence brought before it did not warrant the establishment of a wide-ranging mandatory licensing or registration scheme for the labour hire industry. In particular, the Committee was concerned that a wide-ranging licensing regime would require the establishment of significant infrastructure to support the issuing of licenses and the enforcement of licensing conditions.

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196 D. Hargraves, Australian Industry Group, 2004. Minutes of Evidence, 23 August, p.124.
197 Civil Contractors Federation, 2004. Submission No. 28, 5 August, p.2.
198 C. Cameron, Stratecom for the Recruitment and Consulting Services Association, 2004. Minutes of Evidence, 15 November, p.259.
199 Recruitment and Consulting Services Association, 2004. Submission No. 15, 25 February, p.58.

The Committee believes that, on the evidence received to date, there is merit to the establishment of an industry-wide registration system aimed specifically at improving the OHS performance of companies in the labour hire sector. The new system would be managed by the Victorian WorkCover Authority (VWA). Despite the exemplary OHS procedures of some labour hire operators, the Committee considers that the overall industry rate of injury is unacceptable, particularly in the blue-collar sector, and requires urgent attention. The Committee believes that a voluntary scheme would be ineffective to improve industry standards in this area.

The Committee believes that the VWA is ideally placed to oversee the establishment and operation of a registration system for the labour hire industry. Broadly speaking, the VWA is responsible for managing Victoria's workplace safety system, and therefore already has a detailed understanding of the regulation of OHS and the OHS issues that are pertinent to the labour hire industry. More particularly, WorkSafe Victoria ('WorkSafe') is the VWA's OHS arm, and its role is to promote and enforce health and safety standards in Victorian workplaces: this role could be extended to include a greater scrutiny of labour hire companies. The VWA has already prioritised the need to work more closely with the labour hire industry due to its relatively high injury rate. The Committee believes that the establishment of a registration system in the VWA avoids the need to set up a whole new infrastructure and is therefore the most efficient and appropriate means to improve the OHS performance of the labour hire industry.

The Committee believes that there are a number of essential elements that should be incorporated into an OHS registration system for the labour hire industry. To start with, labour hire companies should be required to register with the VWA, so that appropriate records may be kept and company activities may be better tracked. The key function of the new system should be to develop minimum OHS standards and procedures for the labour hire industry.

The minimum set of standards for the labour hire industry could be expressed in a Labour Hire Code of Practice. Pursuant to section 55 of the *Occupational Health and Safety Act 1985*, WorkSafe already has a number of Codes of Practice, which give practical guidance to employers in how to comply with their duties under OHS legislation. The failure to observe a relevant Code of Practice can be used as evidence in legal proceedings to show that a person or company has contravened the Act. The Labour Hire Code of Practice would set out standards for the labour hire

industry in OHS training, workplace inspection, risk assessment, provision of personal protective equipment and levels of worker supervision. The Code of Practice should be developed with reference to the VWA's existing On-hired Worker Industry Stakeholder Forum, which is a representative body comprised of key unions and employer associations.[200]

As noted by a number of witnesses, close monitoring and enforcement is necessary for the efficacy of any mandatory scheme. To ensure that the proposed registration and Labour Hire Code of Practice deliver improved OHS outcomes, there will need to be an enforcement strategy. WorkSafe already engages a network of field officers, inspectors and technical experts, and this network could be used to monitor the labour hire industry. The Committee considers that this new focus on safety in the labour hire industry would complement the existing role of the VWA.

The Committee believes that the introduction of a VWA-based registration system, accompanied by a Labour Hire Code of Practice, would not be heavy-handed, but would provide an increased focus on compliance with OHS legislation and greater guidance in how to do so. Given the crucial importance of workplace health and safety for Victorian workers, the Committee believes that, relative to the benefits of better OHS compliance in the labour hire industry, the establishment of a labour hire registration system is entirely justified. To the extent that the system would incur costs, the Committee believes that these should be borne by the labour hire industry through registration fees.

The Committee notes that a number of submissions to the Inquiry raised concerns about other aspects of the labour hire industry, including, for example, the levels of casualisation, access to entitlements and levels of skills and training. However, the Committee believes that these claims require further investigation and will address them in the Final Report.

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[200] The members of the On-Hired Industry Stakeholder Forum are: Australian Industry Group; Australian Liquor, Hospitality and Miscellaneous Workers' Union; Australian Manufacturing Workers' Union; Construction, Forestry, Mining and Energy Union; Electrical Trades Union of Australia; Master Builders Association of Victoria; National Union of Workers; Recruitment and Consulting Services Association; Victorian Employers' Chamber of Commerce and Industry; and Victorian Trades Hall Council: Victorian WorkCover Authority, 2004. Submission No. 22, 16 April, Appendix I.

***Recommendation 5.1***

***The Committee recommends that the Victorian government establish a labour hire registration system, to be located within the Victorian WorkCover Authority, aimed at improving the occupational health and safety performance of the labour hire sector.***

***Recommendation 5.2***

***The Committee recommends that a Labour Hire Code of Practice be developed to assist in the delivery of improved occupational health and safety outcomes in the labour hire sector. The Code of Practice will lay out minimum standards for aspects of workplace health and safety in the labour hire industry, including but not restricted to risk assessments, workplace induction, provision of personal protective equipment and OHS training.***

***Recommendation 5.3***

***The Committee recommends that the On-hired Workers Industry Stakeholder Forum should be consulted with regard to both the establishment of the labour hire registration system and the content of the Labour Hire Code of Practice.***

***Recommendation 5.4***

***The Committee recommends that the Victorian Government consider penalty options and enforcement mechanisms for non-complying labour hire companies.***

***Recommendation 5.5***

***The Committee recommends that the cost of the labour hire registration system should be funded by the labour hire industry.***

***Recommendation 5.6***

***The Committee recommends that the labour hire registration system should be reviewed by the Victorian WorkCover Authority after two years of operation.***

## 5.3 Education scheme

The Committee received evidence that, rather than introducing new regulation, there is a need for an education scheme for labour hire operators, host employers and labour hire workers. Such a scheme would provide an opportunity for those in the labour hire industry to become better educated about their current legal rights and responsibilities. Some witnesses saw such an education scheme as merely supplementing a new regulatory framework, while others considered that an education scheme was all that was needed and a new regulatory regime would constitute an unnecessary additional piece of 'red tape' for businesses.

In evidence before the Committee, Mr. Peter Bosa of Troubleshooters Available, in calling for 'education rather than legislation', argued that the current legislation is adequate and that introducing new legislation would only be another 'layer of bureaucracy' that 'shams' would avoid anyway.[201] The Master Builders Association of Victoria (MBAV), asserted that it was the responsibility of the labour hire industry itself to develop solutions and standards appropriate for that industry and argued against a licensing regime. The MBAV saw an education program as being internal to the labour hire industry. It called for:

> *…the introduction of an education campaign on the rights and responsibilities of each party in the three-way relationship between host organisation, labour hire company and worker.*[202]

Likewise, Mr. David Gregory of the Victorian Employers' Chamber of Commerce and Industry, argued against a licensing regime and instead promoted the idea of an education scheme:

> *I would have thought that education, information, briefings and consultancy are going to be far better ways of spreading the word when you are only talking about one particular specific industry sector.*[203]

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201 P. Bosa, Troubleshooters Available, 2004. Minutes of Evidence, 4 October, p.165.

202 Master Builders Association of Victoria, 2003. Submission No. 10, 22 December, p.9.

203 D. Gregory, Victorian Employers' Chamber of Commerce and Industry, 2004. Minutes of Evidence, 11 October, p.210.

Mr. Luis Fleiszig of A.B. Oxford Cold Storage, a host company which uses labour hire employees, argued that industry licensing will not solve any problems associated with the labour hire industry.[204] Mr. Fleiszig considered that the appropriate course in resolving problems in the labour hire industry is rather "…to ensure that existing laws are properly enforced."[205]

While some witnesses considered that greater education was alone sufficient to address issues associated with the labour hire industry, the Committee received evidence that a program of further education should sit alongside some other form of regulation tailored to the industry. Mr. David Hargraves of the AiG stated that:

> *…firstly, on-hire labour should be regulated by a system of accreditation which relies on the observance of a code of practice.... Secondly, education campaigns should be conducted for companies that provide on-hire services and for the users of those services.*[206]

Likewise, the Civil Contractors Federation, in its submission to the Committee, recommended an accreditation process and advocated alongside this, a government-run education program to address the skills shortage, in its industry in particular.[207] The RCSA submitted to the Committee that self-regulation is the best approach to regulating the industry, accompanied by the guidelines and code of professional conduct it has developed to educate and assist its members.[208]

The Committee also heard evidence from witnesses who, while arguing for a form of stringent regulation, considered that an education campaign on the rights and responsibilities of the parties to a labour hire arrangement is also an important part of the process. The ETU, for instance, while recommending a licensing scheme with companies meeting certain requirements as well as a code of practice as to certain industrial rights, advocated an educational campaign on the rights and responsibilities of the parties. The ETU specified that the campaign should include specific information on the benefits and entitlements available to labour hire workers.[209]

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204 L. Fleiszig, A.B. Oxford Storage, 2004. Minutes of Evidence, 4 October, p.184.
205 L. Fleiszig, A.B. Oxford Storage, 2004. Minutes of Evidence, 4 October, p.184.
206 D. Hargraves, Australian Industry Group, 2004. Minutes of Evidence, p.122.
207 Civil Contractors Federation, 2004. Submission No. 28, 30 July.
208 Recruitment and Consulting Services Association, 2004. Submission No. 15, p.49.
209 Electrical Trades Union, 2003. Submission No. 8, 19 December, pp.25-27.

Similarly, the Transport Workers' Union (TWU), in evidence before the Committee, considered it important that there be a program of education of rights and responsibilities, especially for workers starting at a new workplace:

> *I think some of these things cannot be handled through regulation. I think there is a fair bit of education and encouragement required…but one thing the committee could do for us would be to develop an ethic in our industry where employers across the board had a role to encourage and educate workers in their first couple of days in the workplace.*[210]

The Committee agrees that an educational campaign should be conducted in the labour hire industry to ensure that all parties – labour hire companies, host companies or workers – are aware of their rights and responsibilities towards each other. In the context of the OHS focus of this report, the Committee considers that it is pertinent to note Mr. Chris Maxwell QC's comments with regard to the importance of education and information dissemination:

> *It is axiomatic that the extent of compliance with the OHSA is dependent on the degree of awareness in Victorian workplaces of what the Act requires.*[211]

***Recommendation 5.7***

***The Committee recommends that the Victorian WorkCover Authority conduct an educational program to ensure all parties to labour hire arrangements are aware of their rights and responsibilities towards each other with regard to occupational health and safety.***

Committee Room

[210] B. Noonan, Transport Workers' Union, 2004. Minutes of Evidence, 28 July, p.95.
[211] Chris Maxwell, 2004. *Occupational Health and Safety Act Review*. Melbourne, March, p.272.

## Appendix 1

## List of Submissions Received

| Submission Number | Name of Individual/Organisation | Date Received |
|---|---|---|
| 1 | Gannawarra Shire Council | 2 December 2003 |
| 2 | WV Management Limited | 18 December 2003 |
| 3 | Group Training Australia Victoria Inc | 19 December 2003 |
| 4 | Labour Force Australia Pty Ltd | 19 December 2003 |
| 5 | ACTU | 19 December 2003 |
| 6 | Troubleshooters Available | 19 December 2003 |
| 7 | Catalyst Recruitment Systems Ltd | 19 December 2003 |
| 8 | Electrical Trades Union – Southern Branch | 19 December 2003 |
| 9 | Job Watch | 19 December 2003 |
| 10 | Master Builders Association of Victoria | 22 December 2003 |
| 11 | Australasian Meat Industry Employees' Union | 23 December 2003 |
| 12 | Victorian Automobile Chamber of Commerce | 8 January 2004 |
| 13 | Victorian Learning and Employment Skills Commission | 20 January 2004 |
| 14 | Equal Opportunity Commission Victoria | 12 February 2004 |
| 15 | The Recruitment and Consulting Services Association | 25 February 2004 |
| 16 | Skilled Engineering Limited | 26 February 2004 |
| 17 | Australian Manufacturing Workers' Union | 27 February 2004 |
| 18 | Australian Education Union | 4 March 2004 |
| 19 | Shop, Distributive and Allied Employees Association – Victorian Branch | 15 March 2004 |

**Appendix 2 - continued**

| | | |
|---|---|---|
| 20 | Australian Industry Group | 29 March 2004 |
| 21 | Mr. Brian Payne | 29 March 2004 |
| 22 | Victorian WorkCover Authority | 16 April 2004 |
| 23 | Victorian Trades Hall Council | 20 April 2004 |
| 24 | Commonwealth Department of Employment and Workplace Relations | 30 April 2004 |
| 25 | Air Conditioning and Mechanical Contractors' Association of Victoria Limited | 18 May 2004 |
| 26 | Transport Workers' Union (Victorian/Tasmanian Branch) | 12 July 2004 |
| 27 | Mrs. S. Davies | 3 August 2004 |
| 28 | Civil Contractors Federation | 5 August 2004 |
| 29 | National Union of Workers | 23 August 2004 |
| 30 | Adecco Group of Companies | 1 October 2004 |

**Appendix 2**

# List of Informal Meetings

**1 March 2004 – Melbourne**

- **Victorian WorkCover Authority**
  Mr. Greg Tweedly, Chief Executive Officer

- **Australian Taxation Office**
  Mr. Tony Sullivan, Assistant Tax Commissioner
  Mr. Mick Lyons, Executive Officer, Small Business
  Mr. Stuart Dunlop, Executive Officer, Small Business

**26 March 2004 – Milawa**

- **WV Management Limited – Wangaratta**
  Mr. Graeme Wheeler, Managing Director

**21 June 2004 – Sydney**

- **NSW Office of Industrial Relations**
  Ms Pat Manser, Deputy Director General
  Mr. George Petrovic, Project Officer

- **University of Sydney**
  Ms Joellen Riley, Faculty of Law

- **School of Organisational Behaviour and Industrial Relations, University of NSW**
  Professor Michael Quinlan

- **Australian Centre for Industrial Relations Research and Teaching, Sydney University**
  Professor John Buchanan

- **Group Training Australia Limited (National Association)**
  Mr. Jim Barron, Chief Executive Officer
  Mr. Jeff Priday, National Development Officer
  Mr. John Martin, Executive Officer

**22 June 2004 – Canberra**

- **Department of Employment and Workplace Relations**
  Mr. Rex Hoy, Group Manager, Workplace Relations Policy Group
  Ms Sandra Parker, Assistant Secretary, Strategic Policy Branch
  Mr. David Hughes, Assistant Director, Working Arrangements Section, Strategic Policy Branch

**Appendix 2 - continued**

- **Economics, Commerce and Industrial Relations Group – Commonwealth Parliamentary Library**
  Mr. Steve O'Neill

**23 June 2004**

- **Member for Throsby**
  Ms Jennie George MP

**8 October 2004 (Site Visit)**

- **Norvic Food Processing Pty. Ltd.**
  Mr. Jon Hayes, Managing Director
  Mr. Brendan Pearce, Site Safety Officer
  Mr. Wayne Pendergast, Production Supervisor, Small Stock Line Day Shift

- **WV Management Limited**
  Mr. Graeme Wheeler, Managing Director
  Mr. Vance Wheeler, Operations Manager
  Mr. Ross Williams, Personnel Officer

**18 October 2004**

- **Mr. Chris Maxwell QC**
  Author, *Occupational Health and Safety Act Review*

- **National Union of Workers**
  Ms Nina McCarthy, WorkCover Officer

- **Skilled Engineering**
  Mr. Ken Bieg, Company Secretary
  Ms Julie McBeth, Corporate Affairs Manager

**Appendix 3**

# List of Public Hearing Witnesses

**27 July 2004 – Melbourne**

- **Group Training Australia (Vic)**
  Mr. John Glover, Executive Director
  Ms Pam Jonas, Manager, Policy and Research

- **Recruitment and Consulting Services Association**
  Mr. Robert Van Stokrom, President
  Mr. Brian Morison, Executive Officer
  Mr. Nick Wakeling, Industrial Relations Manager, Adecco
  Mr. Charles Cameron, Consultant, Stratecom
  Mr. John Wilson, Bayside Group of Companies

- **WV Management Limited**
  Mr. Graeme Wheeler, Managing Director

- **Master Builders Association of Victoria**
  Mr. Lawrie Cross, Industrial Relations and OHS Manager

**28 July 2004 – Melbourne**

- **Deakin Business School**
  Ms Elsa Underhill, Senior Lecturer

- **Victorian Automobile Chamber of Commerce**
  Mrs. Leyla Yilmaz, Manager, Industrial and Employee Relations
  Ms Natascha Boehm, Industrial Officer

- **Australasian Meat Industry Employees' Union (Vic Branch)**
  Mr. Graham Bird, Secretary

- **Skilled Engineering**
  Mr. Ken Bieg, Company Secretary
  Mr. Ray Fitzgerald, National and Industrial Relations Manager
  Ms Julie McBeth, Corporate Affairs Manager
  Ms. Karen Horne, National Manager, Occupational Health and Safety

- **Transport Workers' Union**
  Mr. Bill Noonan, Secretary, Vic/Tas Branch
  Ms Maria Abate, Researcher

**Appendix 3 – continued**

**23 August 2004 – Melbourne**

- **National Union of Workers**
  Mr. Martin Pakula, Victorian Branch Secretary
  Mr. Antony Thow, Assistant Secretary
  Ms Diana Lloyd, Communications Officer

- **Victorian Trades Hall Council**
  Mr. Leigh Hubbard, Secretary
  Mr. Jarrod Moran, WorkCover Liaison Officer
  Ms Cathy Butcher, Occupational Health and Safety Unit Co-Ordinator

- **Australian Industry Group**
  Mr. Tim Piper, Director, Victoria
  Mr. David Hargraves, Executive Officer, Labour Hire Sector

**13 September 2004 – Melbourne**

- **Australian Council of Trade Unions**
  Mr. Richard Marles, Assistant Secretary

- **Equal Opportunity Commission of Victoria**
  Mr. Jamie Gardiner, Commissioner Member
  Ms Margaret Noall, Manager, Access & Complaints Services
  Ms Melanie Eagle, Systemic Initiatives Officer

- **Australian Manufacturing Workers' Union (Vic Branch)**
  Mr. Dave Oliver, State Secretary
  Ms Charmaine Chew, Assistant Research Officer

**4 October 2004 – Melbourne**

- **Troubleshooters Available**
  Mr. Chris Mazzotta, Director
  Mr. Peter Bosa, Chief Executive Officer

- **Labour Force - Australia**
  Ms Judy Meinen, Director

- **Adecco Group of Companies**
  Mr. Rob Barber, Director, Employee Relations
  Mr. Geoff Cooper, National Risk Manager
  Mr. Naomi Gilders, National Training Manager
  Mr. Nick Wakeling, Senior Employee Relations Advisor

- **A.B. Oxford Cold Storage Co. Pty. Ltd.**
  Mr. Luis Fleiszig, Director
  Mr. Gabor Fleiszig, Director
  Ms Janina Fleiszig, Company Psychologist

**Appendix 3 – continued**

- **Montague Cold Storage Pty. Ltd.**
  Mr. Greg Lucas, Marketing and Logistics Manager

- **Ready Workforce – Chandler Macleod Group**
  Mr. Rob Sonogan, Victorian Manager

**11 October 2004 – Melbourne**

- **Victorian Employers' Chamber of Commerce and Industry**
  Mr. David Gregory, General Manager, Workplace Relations

- **Job Watch Inc.**
  Ms Zana Bytheway, Executive Director
  Ms Louisa Dickinson, Senior Solicitor

- **Westpower Resources**
  Ms Jasmine Teao, Director/Head of Administration
  Mr. Tai David, Managing Director
  Ms Rachel Edwards, Human Resources

- **Australian Services Union**
  Ms Ingrid Stitt, Branch Secretary (Victorian Private Sector Branch)
  Ms Jo Katsoulas, Organiser

**15 November 2004 – Melbourne**

- **Victorian WorkCover Authority**
  Mr. Greg Tweedly, Chief Executive Officer

- **Insurance Council of Australia**
  Mr. Peter Jamvold, Regional Manager, Victoria and Tasmania

- **Recruitment and Consulting Services Association**
  Mr. Charles Cameron, Consultant, Stratecom
  Mr. Reg Shields, Principal, RCS & Associates