ECONOMIC DEVELOPMENT COMMITTEE

FINAL REPORT

Inquiry 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.

Glossary

Apprenticeship	A training arrangement that combines on-the-job training with external training. Usually lasts around three to four years. A form of training that is usually linked to the skilled trades.
Casual employee	Traditionally defined by the Australian Bureau of Statistics as an employee without paid leave entitlements. Often engaged on a short-term (usually hourly or daily basis) with no continuity of service or expectation of permanent employment.
Contingent employment	Describes work arrangements which can be terminated at little cost to the employer and where workers are provided on a temporary or flexible basis. Typically includes labour hire workers, short-term contract workers, independent contractors and some home-based workers. (See also: 'Precarious employment'.)
Dependent contractor	A worker engaged on a commercial contract but with work arrangements consistent with them being an employee; i.e., is mostly dependent on work supplied by a single firm.
Direct hire employee	An employee of a firm who is not employed through a labour hire agency.

Employee	A person who works for a business for wages paid by that business. Pay-As-You-Go tax is deducted from their wages by their employer. There are many possible types of employee, including: permanent; casual; trainee, apprentice; full or part-time.
Fixed-term employment contract	An employment contract with a specified duration or a predetermined ending date.
Full-time work	Where a worker works 35 hours or more per week.
Group training arrangement	Where an apprentice or trainee is employed by a group training company and is rotated through a series of host workplaces to fulfil his or her training requirements.
Hold harmless clause	A contractual agreement between the labour hire agency and the host employer that the labour hire agency will assume financial responsibility for the costs of any OHS breaches by the host employer with respect to the agency's workers.
Host employer	Firm using labour supplied by a labour hire agency.
Independent contractors	Persons employed on a commercial contract and with work arrangements inconsistent with them being an employee.

Labour hire agency	A firm that receives a commission from a client firm in return for supplying labour to that client. It may arrange placements for employees, independent contractors, trainees and apprentices.
Labour hire arrangement	An arrangement where a firm engages workers on a temporary basis from a labour hire agency.
Labour hire contractor	A worker who enters into a commercial contract with a labour hire agency to provide his or her labour to a host employer. Generally invoices the labour hire agency for services rendered. (See: 'Independent Contract'.)
Labour hire employee	A worker who is employed by a labour hire agency to work for other businesses on a temporary basis. Also referred to as temps, on-hired workers and agency workers.
Labour hire workers	A generic term used to encompass both employees and contractors engaged by a labour hire agency to work for a host employer.
Non-standard employment	Employment where workers are not engaged on a permanent full-time basis. Examples include casual employment, fixed-term employment, contract arrangements and labour hire arrangements.

Outsourcing	Refers to the process of putting out or subcontracting a task originally undertaken within the organisation to a competitive external provider. Common examples include: cleaning, catering, maintenance, security or production/service delivery.
Outworker	A home-based worker. Outworkers are mostly based in the clothing and textiles industry.
Part-time work	Where a worker works for less than 35 hours per week. When a part-time worker is not casual (there is considerable overlap between the two categories), there is an expectation of ongoing work and leave entitlements accrue on a pro rata basis.
Permanent employment	Traditionally understood to refer to employment with leave entitlements, where there is an understanding that the work is ongoing. May also be referred to as ongoing employment.
Precarious employment	Used to describe flexible work arrangements marked by insecurity or limited tenure. (See also: 'Contingent work'.)
Seasonal work	Work that only takes place at certain times of the year (for example, at harvest time).
Temporary agency work	Another term for labour hire arrangements.

Temporary agency worker	Another term for labour hire workers.
Traineeship	Employment-based training arrangement that combines on-the-job training with training from external sources. Usually takes between nine months and two years to complete.
Workers	All persons supplying labour, including employees and contractors.

Acronyms

ABS	Australian Bureau of Statistics
ACMCA	Air Conditioning and Mechanical Contractors' Association of Victoria
ACTU	Australian Council of Trade Unions
AMIEU	Australasian Meat Industry Employees Union
AMWU	Australian Manufacturing Workers' Union
AWIRS	Australian Workplace Industrial Relations Survey
CBI	Confederation of British Industry
CEEP	European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest
CELRL	Centre for Employment and Labour Relations Law (University of Melbourne)
CIETT	International Confederation of Private Employment Agencies
DTI	Department of Trade and Industry (UK)
EASO	Employment Agency Standards Office (UK)
EC	European Commission
EOCV	Equal Opportunity Commission Victoria
ETSA	Electricity Trust of South Australia
ETUC	European Trade Union Confederation
EU	European Union
GLA	Gangmasters Licensing Authority (UK)
GTA	Group Training Australia
GTC	Group Training Company
HSC	Health and Safety Commission (UK)
HSE	Health and Safety Executive (UK)
HILDA	Household, Income and Labour Dynamics in Australia
HSWA	*Health and Safety at Work Act 1974* (UK)
ICOH	International Code on Occupational Health
ILO	International Labour Organisation
IRV	Industrial Relations Victoria
MHSWR	*Management of Health, Safety and Welfare Regulations 1999* (UK)
NOHSC	National Occupational Health and Safety Commission
OECD	Organisation for Economic Cooperation and Development
OHS	Occupational health and safety
PPE	Personal protective equipment
RCSA	Recruitment and Consulting Services Association
REC	Recruitment and Employment Confederation (UK)
RMIT	Royal Melbourne Institute of Technology
RTW	Return to work
SDA	Shop, Distributive and Allied Employees Association
SETT	Union of Temporary Work Agencies (France)
TUC	Trade Union Congress (UK)
UNICE	Union of Industrial and Employers' Confederation of Europe
VACC	Victorian Automobile Chamber of Commerce
VET	Vocational Education and Training
VTHC	Victorian Trades Hall Council

VWA	Victorian WorkCover Authority
WHO	World Health Organisation
WIC	WorkCover Industry Classification
WRA	*Workplace Relations Act 1996* (Cth)

Chairman's Foreword

Australia's workforce has undergone unprecedented levels of change over the past 25 years. One of the most significant changes is the growing use of flexible work arrangements, such as labour hire, by businesses seeking to achieve higher levels of flexibility and productivity.

This Final Report builds on the work undertaken by this Committee in the Interim Report, which was tabled in December 2004. The Interim Report included 16 recommendations, many of which were focussed on the occupational health and safety performance of the labour hire industry. In particular, the Committee recommended the establishment of an occupational health and safety registration system, to be located within the Victorian WorkCover Authority.

The Committee's Final Report broadens the investigations of the Interim Report and considers further implications of the growth of labour hire industry for Victoria and Australia. For example, in Chapter 3, the Committee considers the use of casual employment by the labour hire industry in the context of the broader growth of casual employment in Australia. In Chapter 4, the Committee builds on the Interim Report investigation into occupational health and safety standards for labour hire workers. In Chapter 5, the Committee considers the impact of the growth of labour hire arrangements on skills levels and raises questions about how to meet the ongoing need for skilled workers. Importantly, the Final Report also contains a discussion of the Committee's findings from its overseas investigations.

This Final Report contains 11 recommendations that add to the recommendations in the Interim Report. In particular, the Committee has made important recommendations for the amendment of the *Occupational Health and Safety Act 2004*, with respect to clarifying the obligations of labour hire agencies and host employers and providing better protection for labour hire workers who raise occupational health and safety issues in the workplace. The Committee has also made recommendations in relation to the need for further investigation of the prevalence of casual employment and the need to create better opportunities for casual employees to access bank loans.

The Committee warmly thanks all those who participated in the Inquiry. The Committee greatly appreciates the time and expertise that were imparted by all participants. The Committee thanks those parties who made written comments on the Interim Report, as well as those parties who gave oral submissions to the Committee in 2005.

I would also like to acknowledge the continuing support that the Committee receives from its staff, namely Russell Solomon, Executive Officer, Kirsten Newitt, Research Officer, Frances Essaber, Editor and Office Manager, Andrea Agosta.

Finally, I would like to thank the members of the Committee, who demonstrated enthusiasm and co-operation for a reference that at times presented challenges.

Tony Robinson, MP
Chair

Executive Summary

Chapter 1: Introduction

The use of labour hire arrangements in Victoria grew dramatically in the 1990s. It is estimated that up to a quarter of all Victorian workplaces now use labour hire and that labour hire employees represent up to 3 per cent of Australia's workforce. The Committee notes that the growth of labour hire is characteristic of the growing prevalence of flexible work arrangements.

The Economic Development Committee was given Terms of Reference to inquire into and report on labour hire employment in Victoria, including the extent and consequences of its use. The Committee was asked to consider the statutory rights and obligations of labour hire employees, labour hire agencies and host employers, whilst taking into account the referral of Victoria's industrial relations powers to the Federal Government.

Over the course of the inquiry, the Committee witnessed a lively debate on the consequences of the use of labour hire. The Committee was presented with strong arguments regarding the advantages and disadvantages of labour hire. Throughout the Inquiry, the Committee received 31 written submissions, as well as 17 written comments on the Interim Report. The Committee conducted a number of formal public hearings and informal meetings, as well as a regional site visit. The Committee also conducted a two week study tour to examine European policy approaches.

The Committee tabled an Interim Report on 20 December 2004, with 16 recommendations. Many of the Interim Report recommendations focussed on occupational health and safety issues. The *Occupational Health and Safety Act 2004* was passed by the Victorian Parliament shortly after the Interim Report was adopted. As two of the recommendations from the Interim Report refer to Codes of Practice rather than Compliance Codes, the Committee considers that it is appropriate to reword these recommendations as the new Act does not make reference to Codes of Practice.

Research on labour hire employment is still at a relatively early stage. However, the information gap is being addressed by State and Federal government inquiries, as well as a growing body of academic research and analysis.

Chapter 2: Overview of labour hire employment

A labour hire arrangement involves three parties: a host employer, a labour hire agency and a labour hire worker. The host employer contracts with and pays the agency for the services of the worker. The agency contracts with the worker and remunerates the worker. The host exerts day-to-day control over the worker, but has no contract with the worker: it is the agency that assumes legal responsibility for the worker.

Agencies may engage workers as independent contractors or employees, although most labour hire workers are engaged as casual employees. An agency's legal obligations vary significantly depending on whether the worker is an employee or an independent contractor. The Committee received evidence that the employment status of labour hire workers can be a matter of practical confusion for host employers, agencies and labour hire workers. This may result from the sometimes fragile distinction between independent contractors and employees, or from an employee's confusion over whether he or she is employed by the host employer or the agency. The Committee received evidence that many labour hire workers are unaware of their statutory rights and obligations. In this respect, the Committee recommends that there should be an information campaign for workers.

Labour hire agencies often provide outsourcing and recruitment services as well as labour hire. Labour hire and outsourcing are very similar, and some witnesses argued that distinctions between outsourcing and labour hire are often unclear. The line between recruitment services and labour hire is also blurring, as many host employers use labour hire as a method of recruitment.

Labour hire is not a new phenomenon. What is new is the increased uptake of labour hire arrangements: there are around 1,200 labour hire agencies in Victoria (many of which are small businesses) and about 27 per cent of Victorian businesses now use labour hire. The labour hire industry has grown rapidly in recent years, such that it accounted for a national turnover of $8.667 billion in 2002-03.

Between 1990 and 2002, the number of labour hire workers had an average annual growth rate of 15.7 per cent. The use of labour hire has grown across all industries and occupations, but its greatest use is in traditional blue collar industries. In Victoria, labour hire is most frequently used in mining/construction, manufacturing and

education, health & community services workplaces. Labour hire workers account for a larger proportion of the workers in less-skilled blue collar occupations, although there are still large numbers of labour hire workers in white collar occupations. It is also used intensively in health care and medical occupations.

Evidence suggested that employer behaviour is the most significant reason for the growth of labour hire. The Committee found that employers' reasons for using labour hire mostly related to cost and flexibility. For example, many businesses use labour hire workers to address seasonal fluctuations. Larger workplaces are more likely to use labour hire; however, when smaller workplaces use labour hire, they use it more intensively.

The Committee found that the use of labour hire *per se* is not controversial, as it has been used by business for many years. However, there are conflicting views on the consequences of the *proliferation* of labour hire arrangements and whether it represents a serious challenge to traditional concepts of the employment relationship. For example, the Committee heard concerns that businesses are replacing direct hire permanent employees with casual labour hire employees. The Committee also heard concerns about the job security of labour hire workers, many of whom are casual employees. In the rest of the report, the Committee considers some of the implications of labour hire arrangements.

Chapter 3: Casual employment and casualisation

The Committee's terms of reference required it to consider whether the use of labour hire has contributed to the casualisation of the workforce.

Casual employment in Australia has increased to the extent that up to 25 per cent of Australian workers are engaged on a casual basis. It is estimated that from 1988 to 1998, 69 per cent of the net growth in the total number of employees was in casual employment. Around 80 per cent of labour hire workers are engaged on a casual basis.

There is no fixed legal definition of casual employment. Casual employees are often defined as employees without paid leave entitlements (eg sick leave, annual leave). This is one of the only defining characteristics of casual employment, which encompasses a variety of work arrangements that may be regular or irregular, full-

time or part-time, ongoing or discontinuous. Casuals engaged under awards are entitled to a salary loading to compensate them for the lack of paid leave entitlements; however, the Committee received evidence that many casuals do not receive a loading.

The Committee heard evidence that employment insecurity and financial insecurity are serious issues for casual employees. For example, short-term casual employees are excluded from making unfair dismissal claims under the Federal *Workplace Relations Act 1996*. Casual employees also find it difficult to get bank loans due to the insecurity of their employment.

The Committee received evidence from employer groups that casual employment offers benefits to both business and employees, such as flexible work hours. Unions argued, however, that it was mostly business that benefited from increased flexibility. A 2004 survey by Pocock, Prosser and Bridges found that around half of casual employees surveyed were dissatisfied with casual employment, although around a quarter were very positive about casual employment.

The growth of labour hire arrangements appears to be linked to the more general growth of flexible work arrangements like casual employment. The Committee did not receive any conclusive evidence regarding the influence of labour hire on workforce casualisation; however, the Committee notes that the growth of labour hire may have had some influence on the growth of casual employment. The Committee is concerned by the current levels of casualisation in the Australian workforce, and considers that the growth of casual employment is an area that merits further attention by the Federal Government.

Chapter 4: Occupational health and safety and workers' compensation

The Committee notes that there are a number of labour hire agencies that are achieving excellent occupational health and safety (OHS) outcomes. However, evidence presented by the Victorian WorkCover Authority (VWA) indicates that the labour hire industry has a higher than average workplace injury rate and that the frequency of workers' compensation claims is particularly high for blue collar labour hire workers.

The Committee considered a number of factors that affect the workplace health and safety of labour hire workers, including economic pressures, fragmented lines of responsibility and the regulatory environment. Economic pressures can affect all parties to the labour hire arrangement. For example, job insecurity may make workers reluctant to raise OHS issues in the workplace. For this reason, the Committee recommended that the *Occupational Health and Safety Act 2004* should be amended to give greater protection to labour hire workers who raise OHS issues.

The Committee received evidence that labour hire workers may not take regular recreational leave as a result of economic pressures: casual employees are not entitled to paid leave and may consider that they cannot afford to take unpaid leave. The Committee considers that this is a serious OHS issue and recommended that guidance material for the labour hire industry should specify that agencies have a duty to ensure that workers take adequate breaks and periods of leave.

Agencies and hosts both have broad general duties to ensure the health and safety of labour hire workers under sections 21 to 23 of Victoria's *Occupational Health and Safety Act 2004*. The duties of agencies and hosts are not identical but they do overlap, and the fact that one party has a duty to protect a worker does not relieve the other party of its burden. The duties must be complied with to the extent that it is reasonably practicable to do so. Section 20(2) sets out the factors to be taken into account to determine what is reasonably practicable. Agencies and hosts must also comply with OHS regulations and compliance codes; however, there are currently none that apply specifically to labour hire arrangements.

Unions and employer groups submitted that it is unclear how the duties in sections 21 to 23 apply to labour hire arrangements. In particular, the general duties in sections 21 to 23 do not specify how much of the OHS burden is to be carried by agencies and host employers. It was submitted that agencies and hosts struggle to understand their OHS responsibilities, which leads to confusion and even non-compliance. The Committee believes that the 2004 Act should be amended to clarify the allocation of OHS responsibilities between agencies and host employers. Section 20(2) of the Act should be amended so that control of the workplace is one of the factors that is taken into account to determine whether a particular measure is reasonably practicable.

Employer responsibility for the compensation and rehabilitation of injured labour hire workers rests with labour hire agencies and not host employers. Agencies are required to obtain and keep in force a WorkCover insurance policy. Premiums are calculated by referring to the total remuneration paid to workers, the employer's WorkCover Industry Classification (WIC) Code (which designates the employer's predominant activity in a workplace), the employer's claims history and premium caps.

Referring to the employer's industry allows the VWA to levy employers according to the level of risk to which workers are exposed in the employer's industry. The Committee received evidence that the current allocation of only two WIC Codes to the labour hire industry ('blue collar' and 'white collar') means that premiums for labour hire agencies may not accurately reflect the risk of the industries in which labour hire workers are working.

The Committee notes that there are serious problems regarding rehabilitation and return to work opportunities for labour hire workers. Once a labour hire worker is injured, responsibility for rehabilitation lies solely with the agency. The Committee received evidence that this is problematic because many host employers are reluctant to help rehabilitate injured workers, and labour hire agencies are mostly unable to provide return to work opportunities without the cooperation of the host employer. The improvement of return to work prospects for injured labour hire workers is a matter that requires further policy attention.

Where a labour hire worker's injury has been caused by the negligence of the host, the VWA may pursue the host for costs under section 138 of the *Accident Compensation Act 1985*. The Committee received evidence that some host employers seek to avoid these costs by using 'hold harmless' clauses, where labour hire agencies agree to indemnify the host employer for the cost of any OHS breaches in relation to labour hire workers. The Committee believes that these clauses should be prohibited.

The VWA gave evidence that it has developed targeted programs for the labour hire industry. In particular, the VWA submitted that it will introduce changes in 2005-06 to the WorkCover insurance premium system, so that the premium for labour hire agencies will be based on the predominant activity of the host employer, rather than only two WIC Codes for the labour hire industry. The VWA is also preparing

comprehensive guidance material to outline the practical content of agency and host duties under the 2004 Act.

In conjunction with the OHS registration system and compliance code that the Committee recommended in the Interim Report, the Committee believes that the VWA should continue to use its existing powers to retrieve information from agencies about unsafe host workplaces.

Chapter 5: Skills and training

The Committee received evidence that the growth of labour hire arrangements may be impacting on skills levels in Victoria. The Committee notes that the shortage of skilled workers is a critical issue for business and that inadequate training levels are often an important contributing factor to skills shortages.

The Committee received mixed evidence regarding the provision of skills training by labour hire agencies. Some labour hire agencies are providing training opportunities for workers, but the temporary nature of labour hire positions makes it difficult for agencies to reap the long-term productivity benefits of training investment. Watson, Buchanan, Campbell and Briggs (2003) note that non-standard workers such as labour hire workers are less likely to receive training than their permanent counterparts. The available data indicates that there is scope for further training investment by the labour hire industry; however, the Committee notes that low levels of training a problem that is not confined to the labour hire industry. Employer expenditure on training is generally in decline.

Reliance on labour hire arrangements also affects host employers' investment in training. This is partly because labour hire allows host employers to draw on a pool of already skilled workers rather than training their own workers. If the use of labour hire is part of a strategy to reduce staffing levels and downtime, direct hire workers may also have less downtime to undertake training.

The Committee believes that there are many factors contributing to the decline in the rate of apprenticeships and that labour hire is only one of these factors. However, group training has had a positive effect on the provision of apprenticeships and traineeships, particularly in regional Victoria. Group training arrangements are similar to labour hire in their triangular nature: an apprentice or trainee is employed by a

group training company (GTC) and is then placed in a series of host workplaces to fulfil training requirements. Some GTCs provide labour hire services as well as group training. The Committee believes that any regulation of the labour hire sector should avoid any detrimental impact on group training arrangements. However, where GTCs carry out labour hire functions, these activities must be regulated accordingly.

The Committee notes that current skills shortages indicate that skills are not being regenerated across many industries – not just the labour hire industry. The Committee believes that the increased use of labour hire may contribute to skills shortages. However, the Committee believes that the responsibility for training belongs to both agencies and host employers and both parties must be encouraged to invest more in skills training.

Chapter 6: Developments in other Australian jurisdictions

There are very few pieces of legislation in Australia that refer specifically to labour hire arrangements. Two states (Queensland and Western Australia) have provisions in their industrial legislation that define labour hire and clearly state that labour hire agencies are the employers of labour hire employees. One state (Western Australia) makes direct reference to labour hire arrangements in its occupational health and safety legislation. There is no reference to labour hire in Federal industrial legislation, although this is currently under review. There are no licensing or registration systems for labour hire agencies in other Australian states.

A number of inquiries at State and the Federal level have investigated labour hire arrangements. For example, at Federal level, the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation is currently conducting a Parliamentary Inquiry into Independent Contractors and Labour Hire Arrangements. The Department of Employment and Workplace Relations has concurrently released a discussion paper outlining proposals for reforming the regulation of independent contracting and labour hire arrangements.

In New South Wales, the Labour Hire Task Force released its Final Report in 2001, which made a number of recommendations relating to the use of labour hire, including a recommendation for a licensing scheme. However, most of the recommendations were not implemented. The establishment of a Labour Hire Industry Council was subsequently announced to oversee industrial relations and

OHS compliance in the labour hire industry, but work on the Council has been suspended until the New South Wales Industrial Relations Commission makes its decision in a test case relating to job security for casuals and labour hire workers.

Chapter 7: International developments

The growth of labour hire employment – referred to in many jurisdictions, and in this chapter, as temporary agency work – is a global phenomenon. The Committee undertook a two week European study tour to investigative international developments and policy initiatives in relation to labour hire. The Committee's investigations focused on the growth and regulation of temporary agency work in Europe, with particular reference to occupational health and safety issues and skills development. The Committee met with representatives of the International Labour Organisation, the Organisation for Economic Cooperation and Development, the World Health Organisation and the European Union (EU). The Committee also met with government representatives in the United Kingdom (UK) and France.

There has been a steady increase in the use of temporary agency work across Europe during the 1990s, with the number of temporary agency workers increasing by an average 10 per cent each year from 1991 to 1998. Temporary agency work represents around 1.4 per cent of total employment in Europe. Many European employers use temporary agency work to cover staff absences or seasonal fluctuations.

There is no EU regulation of the terms and conditions of temporary agency work. Negotiations on a proposed Temporary Agency Workers Directive have been ongoing since the 1990s, but unions and employer groups have been unable to agree on the content of the Directive.

The regulation of temporary agency workers varies in each European country. However, temporary agency workers in Europe tend to be engaged on a fixed-term employment basis. They have similar entitlements to permanent workers, with the exception of the duration of their employment.

The UK system is most similar to the Australian situation. Apart from nursing and care agencies, there is no registration or licensing scheme for temporary work agencies. Where there is no licensing, agencies are required to comply with certain

minimum standards set out in legislation. For example, agencies may not charge workers fees for finding placements. There are some other restrictions on the use of temporary agency work: temporary agency workers may not be used to replace permanent workers on strike and agencies are required to ensure that temporary agency workers have the correct qualifications for the jobs for which they are hired.

In France, temporary agency workers are engaged on fixed-term contracts for a minimum duration of 18 months and enjoy the some of the leave entitlements as other workers. Temporary agency workers are also guaranteed the same salary as direct hire employees who are performing the same work.

There is an EU Directive that is aimed at regulating OHS standards for temporary workers, including temporary agency workers. European research indicates that temporary agency workers face greater health and safety risks than other workers.

In the UK, host employers and agencies share responsibility for the workplace health and safety of temporary agency workers. There is some uncertainty amongst agencies and host employers regarding the application of the duties. The UK's Health and Safety Executive is currently producing guidance material to clarify the content of the general duties.

Recommendations

Recommendation 1.1 ***(page 5)***

The Committee recommends that a Labour Hire Compliance Code be developed to assist in the delivery of improved occupational health and safety outcomes in the labour hire sector. The Compliance Code 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 1.2 ***(page 5)***

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 Labour Hire Compliance Code.

Recommendation 2.1 ***(page 25)***

The Committee recommends that the Government undertake an information campaign for labour hire workers with the objective of providing easily accessible information on the employment status and entitlements of labour hire workers.

Recommendation 3.1 ***(page 52)***

The Committee recommends that the Victorian Government, directly and in conjunction with the Federal Government, encourage the finance industry to develop improved opportunities for non-standard workers, such as labour hire workers and casual employees, to obtain finance for loans, especially home loans.

Recommendation 3.2 ***(page 54)***

The Committee recommends that the Victorian Government make representations to the Federal Government to conduct an inquiry into casual employment, with particular reference to the terms and conditions of casual employment.

Recommendation 4.1 ***(page 69)***

The Committee recommends that the Victorian WorkCover Authority's guidance material for labour hire agencies should include reference to the agency's obligation to ensure that workers:

- do not work for inappropriately long hours each day; and
- take appropriate daily breaks as well as periods of annual recreational leave.

Recommendation 4.2 ***(page 70)***

The Committee recommends that the Victorian Government, together with the labour hire industry, examine models that make it easier for non-standard workers to budget for unpaid leave.

Recommendation 4.3 ***(page 91)***

The Committee recommends that section 20(2) of the *Occupational Health and Safety Act 2004* (Vic) be amended to include reference to 'control' in the list of factors that is considered to determine what is 'reasonably practicable'. 'Control' should be understood to include 'capacity to control' and 'ability to influence decisions'.

Recommendation 4.4 ***(page 93)***

The Committee recommends that section 76 of the *Occupational Health and Safety Act 2004* (Vic) should be amended to provide greater protection for labour hire workers. In particular, the Committee recommends that section 76 should apply the extended definition of 'employee' provided in section 21(3) of the *Occupational Health and Safety Act 2004* (Vic).

Recommendation 4.5 ***(page 111)***

The Committee recommends that the Victorian WorkCover Authority continue to exercise its power to recover information from labour hire agencies regarding details of host workplaces where agencies have refused to place workers on the grounds of workplace health and safety concerns.

Recommendation 5.1 ***(page 135)***

The Committee recommends that where group training companies carry out labour hire activities, these activities should be regulated in the same way that labour hire agencies are regulated. However, any government response should recognise the important contribution that group training makes to vocational education and training and should aim to avoid any detrimental impact on the group training system.

Chapter 1

Introduction

1.1 Background to the inquiry

The use of labour hire arrangements in Victoria grew dramatically during the 1990s, to the extent that it is estimated that up to a quarter of Victorian workplaces now use labour hire.[1] It is difficult to pinpoint the exact number of labour hire workers in Victoria, but, on a national level, it has been estimated that they represent up to 3 per cent of the Australian workforce.[2] Labour hire offers a number of benefits to Victorian businesses and workers, but its growth has raised questions regarding certain aspects of its use.

Over the course of the Inquiry, the Committee witnessed an ongoing and lively debate over the use of labour hire arrangements. On the one hand, the Committee's attention was drawn to concerns that the increased use of labour hire arrangements may have negative implications for the terms and conditions of work of both labour hire and non labour hire workers. At the same time, this perspective has been vigorously refuted by others who believe that labour hire offers important opportunities to employers to increase the flexibility of their workforce.

The Committee notes that the growth of labour hire in Victoria is a result of profound patterns of workplace change, coinciding with national and international labour market trends that have generated widespread discussion and debate. The growth of labour hire is characteristic of perhaps one of the greatest changes: the growth of flexible work arrangements. The increasing prevalence of flexible work arrangements has heralded a marked deviation from traditional employment models towards other types of labour engagement, many of which are temporary and irregular. As noted in the Interim Report, the Committee considers that it is important to understand the growth of labour hire with reference to these broader changes and trends.

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1 This figure is based on research conducted in 2000 by Ian Watson for the Victorian Industrial Relations Taskforce. Ian Watson, 2000. *Earnings, Employment Benefits and Industrial Coverage in Victoria: A Report to the Victorian Industrial Relations Taskforce*. ACIRRT, University of Sydney, July, p.30.

2 P. Laplagne, M. Glover and T. Fry, 2005. *The Growth of Labour Hire Employment in Australia*. Staff Working Paper, Productivity Commission, Melbourne, February, p.7.

1.2 Terms of reference

On 3 June 2003, the Economic Development Committee received terms of reference by resolution of the Legislative Assembly to inquire into the extent and breadth of labour hire employment in Victoria, including:

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

The terms of reference required the Committee to consider the consequences of the use of labour hire employment, with reference to:

- 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, as well as any legislative ambiguities about these rights and obligations;
- the impact on industry skills levels;
- any contribution to the casualisation of the workforce; and
- the extent of any consequences.

The terms of reference then directed the Committee to make recommendations based on an assessment of these matters, and including consideration of:

- the jurisdictional limitations of Victoria's industrial relations powers;
- 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);
- regulation in other Australian jurisdictions;
- impact on business; and
- WorkSafe Victoria campaigns and activities.

The Committee was asked to report to the Victorian Parliament by 31 December 2004. The Victorian Parliament subsequently resolved to extend the reporting date to 31 May 2005.

1.3 Process followed by the Committee

The Final Report is based on evidence received throughout the Inquiry, including written submissions, a series of public hearings and private briefings and a site visit to regional Victoria. The report also draws on information gathered by the Committee regarding interstate and international initiatives.

The Committee's Terms of Reference were advertised in *The Age*, the *Herald Sun* and *The Australian Financial Review* in October 2003. The Committee also sought submissions from key stakeholders and experts. Thirty-one written submissions were received in response to invitations and advertisements. A list of the submissions is set out in Appendix 4. Following the tabling of the Interim Report, the Committee sought further written feedback from stakeholders. Seventeen further written comments were received, and are listed at Appendix 2.

The Committee held an extensive series of public hearings in Melbourne from July 2004 to March 2005 (see Appendix 5)**.** The Committee also conducted informal meetings in Melbourne, Sydney and Canberra as well as a site visit to Wodonga in October 2004. A list of the Committee's informal meetings and the site visit is contained in Appendix 6.

In March-April 2005, the Committee conducted a two week study tour in Europe to examine key international developments in relation to labour hire arrangements. The Committee met with major international organisations such as the International Labour Organisation, the Organisation for Economic Cooperation and Development, the World Health Organisation and the European Commission, as well as relevant government departments in the United Kingdom and France. The Committee also met with British and European employer groups and trade unions, and sought information from academic experts. The Committee conducted meetings on labour

hire arrangements in London, Brussels, Paris and Geneva.[3] A list of the Committee's overseas meetings in relation to labour hire arrangements is set out in Appendix 3. Chapter 7 discusses the outcomes of the Committee's overseas investigations.

1.4 Interim Report

The Committee tabled an Interim Report on 20 December 2004.[4] The Interim Report contained a brief overview of the labour hire industry, as well as a discussion of the evidence received by the Committee and key issues that the Committee considered were in need of urgent attention. Rather than including all recommendations in the Final Report, the Committee included a number of substantive recommendations in the Interim Report, as a reflection of the gravity of the issues addressed in the Interim Report. In particular, the Committee believed that it was important to make recommendations in relation to workplace health and safety in the labour hire industry at the earliest possible juncture. A list of recommendations contained in the Interim Report can be found in Appendix 1.

In accordance with section 36 of Victoria's *Parliamentary Committees Act 2003*, the Victorian Government is required to table a response to the Interim Report within six months of the report being tabled.

1.5 Recent developments

Shortly after the Committee adopted the Interim Report, the Victorian Parliament passed the *Occupational Health and Safety Act 2004* ('the 2004 Act') to supersede the *Occupational Health and Safety Act 1985* ('the 1985 Act'). In the Interim Report, the Committee made reference to the Occupational Health and Safety Bill 2004, but was not able to take full account of the provisions of the 2004 Act because the Bill had yet to be passed. The Committee believes that the legislative change does not affect most of the recommendations in the Interim Report.

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3 During the overseas study tour, the Committee also conducted meetings in Ireland, the United Kingdom and France to discuss international developments associated with the Inquiry into the Viability of the Victorian Thoroughbred/Standardbred Breeding Industries.

4 Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December.

However, the Committee notes that the 2004 Act does not make allowance for Codes of Practice as they existed under the 1985 Act. Instead, the 2004 Act provides for Compliance Codes, which will play a similar role to the Codes of Practice. When the majority of the 2004 Act's provisions come into operation on 1 July 2005, Codes of Practice will cease to have legal effect.[5] The Victorian WorkCover Authority will progressively review all Codes of Practice and replace them with guidance material and Compliance Codes.[6] In light of this change, the Committee believes that it is appropriate to re-word Interim Report Recommendations 5.2 and 5.3 with reference to Compliance Codes rather than Codes of Practice.[7]

Recommendation 1.1

The Committee recommends that a Labour Hire Compliance Code be developed to assist in the delivery of improved occupational health and safety outcomes in the labour hire sector. The Compliance Code 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 1.2

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 Labour Hire Compliance Code.

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5 Victorian WorkCover Authority. *Codes of Practice*, at <www.workcover.vic.gov.au/vwa/home.nsf/pages/Codes>.

6 Victorian WorkCover Authority. *Codes of Practice*, at <www.workcover.vic.gov.au/vwa/home.nsf/pages/Codes>.

7 Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December, p.78.

1.6 Scope of the Inquiry

As part of its terms of reference, the Committee was asked to take into account the jurisdictional limitations of Victoria's industrial relations powers when making recommendations with respect to the use of labour hire arrangements in Victoria.

In this context, the Committee notes that the Victorian Parliament has transferred a number of industrial relations matters to the Federal Government, following the *Commonwealth Powers (Industrial Relations) Act 1996* (Vic) and the *Federal Awards (Uniform System) Act 2003* (Vic). As a result of this referral of powers, the Federal Government has enacted specific industrial legislation for Victoria, which sets out terms and conditions for workers in Victoria.[8] Victoria is the only Australian state to have transferred its industrial relations powers to the Federal Government in this way.

The Victorian Parliament expressly excluded a number of areas from the referral of powers. In particular, the Victorian Parliament retains its power to make laws in relation to:

- workers' compensation;
- occupational health and safety;
- apprenticeships;
- long service leave;
- some public sector matters; and
- the terms and conditions of engagement of independent contractors and entrepreneurs, including the establishment of a mechanism to test the fairness of these arrangements.[9]

As a consequence of the referral of powers, the Committee's investigations dealt mostly, but not exclusively, with matters of occupational health and safety, workers' compensation and skills formation.

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8 This legislation can be found in Parts XV - XVI and Schedule 1A of the *Workplace Relations Act 1996* (Cth). Schedule 1A sets out the minimum terms and conditions for Victorian employees.

9 Victorian Industrial Relations Taskforce, 2000. *Independent Report of the Victorian Industrial Relations Taskforce*. Victorian Industrial Relations Taskforce, Melbourne, 31 August, p.3.

As a result of the breadth of issues considered in the Inquiry into Labour Hire Employment, the Committee noted in the Interim Report that it would be necessary to seek further comments from stakeholders on certain matters before making its final recommendations. The matters on which the Committee sought further comment included:

- the relationship between the growth of labour hire arrangements and casualisation of the workforce;
- whether the *Occupational Health and Safety Act 2004* should be amended to include further reference to 'control';
- whether labour hire workers should be given improved protection from discrimination where they raise workplace health and safety issues;
- the situation where labour hire agencies refuse to place their workers into host workplaces on the grounds of unsatisfactory workplace health and safety standards, and whether this information should be made available to the Victorian WorkCover Authority;
- the impact of labour hire arrangements on skills development and training in Victoria;
- the role of group training companies; and
- the Committee's proposed occupational health and safety registration system.

1.7 The need for information

Campbell, Watson and Buchanan observe that research into labour hire employment in Australia is 'still at an early stage'.[10] In this context, the Committee notes that the discussion of the benefits of labour hire in Victorian workplaces has been hampered

[10] Iain Campbell, Ian Watson and John Buchanan, 2004. 'Temporary agency work in Australia (Part I)' in John Burgess and Julia Connell (eds), 2004. *International Perspectives on Temporary Agency Work*, London, Routledge, pp.129-144 at p.130. This point has also been made by other commentators, such as: P. Laplagne, M. Glover and T. Fray, 2005. *The Growth of Labour Hire Employment in Australia*. Staff Working Paper, Productivity Commission, Melbourne, February at pp. 3, 12; Richard Hall, 2000. 'Outsourcing, Contracting-out and Labour Hire: Implications for Human Resource Development in Australian Organizations', *Asia Pacific Journal of Human Resources*, Vol. 38 No. 2, pp.23-41 at pp.23-24.

by a shortage of data and research specifically focussed on labour hire. This constraint was noted in the Committee's Interim Report.[11]

The scarcity of information may also be linked to difficulties associated with researching labour hire employment that arise from the temporary and itinerant nature of labour hire assignments.[12]

In addition, some researchers have noted that labour hire workers are often unsure about the nature of their employment status[13] or refuse to participate in research projects on the grounds that it would jeopardise their job.[14]

The information deficiency is not confined to Australia. Labour hire arrangements in Europe also grew rapidly in a similarly short timeframe over the 1990s. In a recent cross-national overview of labour hire, Bergström considered the implications of this trajectory:

> *… because researchers have had little time to study the implications of contingent employment, most discussions of how the use of contingent labour affects the function of labour markets are, at best, still speculative. Therefore, it is not easy to come to any clear conclusions about whether these employment relationships should be facilitated or inhibited.*[15]

The Committee found that the very recent growth of labour hire means that it can be difficult to make long-term projections about the use of labour hire in Victoria. For example, it is difficult to know, at this point in time, how different levels of regulation could affect labour hire arrangements, including how regulation may impact on

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11 Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December, pp.12-13.

12 Elsa Underhill, 2005. 'The importance of having a say: Labour hire employees' workplace voice', paper presented to the *Reworking work* conference, Association of Industrial Relations Academics of Australia and New Zealand, Sydney, February 9-11.

13 See, for example: Roma Gryst, 2000. *"Contracting Employment": A Case Study of how the use of agency workers in the SA Power Industry is reshaping the employment relationship*. Working Paper No. 59, ACIRRT, University of Sydney, March, p.36; Ian Watson, 2000. *Earnings, Employment Benefits and Industrial Coverage in Victoria: A Report to the Victorian Industrial Relations Taskforce*. ACIRRT, University of Sydney, 12 July, p.30.

14 See: D. Oliver, Australian Manufacturing Workers' Union, 2005. Minutes of Evidence, 13 September, p.156. Hall, Bretherton and Buchanan make this comment in relation to non-standard workers more generally: 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*. Report for the National Centre for Vocational Education Research, Adelaide, p.32.

15 Ola Bergström, 2003. 'Introduction' in Ola Bergström and Donald Storrie (eds). *Contingent Employment in Europe and the United States*. Cheltenham/Northampton, Edward Elgar, pp.1-13 at p.2.

business and workers. It is also difficult to make judgments as to whether labour hire is a management 'fad'[16] or how the rate of use of labour hire is affected by fluctuations of economic growth.[17]

1.7.1 Filling the gaps

The relatively low levels of empirical data are starting to be addressed by a recent surge in research into labour hire arrangements. At government level, there are Federal and State inquiries that have sought to address the issues involved. Equally, there is a growing body of analytical work that examines the consequences of labour hire employment.

1.7.1.1 Government investigations

In 2000, the New South Wales Government commissioned a report to consider the implications of the growth of labour hire agencies. The New South Wales Labour Hire Task Force was announced on 18 May 2000 and released its report on 19 December 2001, which included six recommendations.[18] The majority of the Task Force members expressed concern with respect to the lack of industry regulation and recommended that the New South Wales government give 'in principle' approval to the establishment of a licensing regime for labour hire companies.[19] The proposed licensing regime was not introduced, but a state Labour Hire Council was announced in the lead-up to the March 2003 New South Wales election. However, work on the Labour Hire Council has been suspended while the New South Wales Industrial Relations Commission hears evidence for the Secure Employment Test Case, which seeks, *inter alia*, to make award provisions with respect to the use of labour hire. (See Chapter 6.)

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16 In a recent Federal Court decision, Justice Whitlam commented that labour hire is currently a 'fashionable concept', to which 'hard-headed business men are … susceptible'. *Construction, Forestry, Mining and Energy Union v Coffs Harbour Hardwoods (Sales) Pty Ltd* [2005] FCA 465 (Unreported, Whitlam J, 22 April 2005) [21].

17 Research from the United States suggests that the use of labour hire may decline during periods of low or negative economic growth. P. Laplagne, M. Glover and T. Fry, 2005. *The Growth of Labour Hire Employment in Australia*. Staff Working Paper, Productivity Commission, Melbourne, February, p.9.

18 New South Wales Labour Hire Task Force, 2001. *Final Report*, New South Wales Labour Hire Task Force, Sydney, December, p.8.

19 New South Wales Labour Hire Task Force, 2001. *Final Report*, New South Wales Labour Hire Task Force, Sydney, December, p.53.

The Committee also notes the recommendations of the 2000 Victorian Industrial Relations Taskforce on labour hire and contracting arrangements. In the context of its report on Victoria's industrial relations framework, the Taskforce expressed particular concern regarding the position of labour hire contractors.[20]

At the Federal level, the Commonwealth Inquiry into Independent Contractors and Labour Hire Arrangements was announced by the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation in January 2005.[21] The Standing Committee is expected to table its report in mid-2005. Concurrent with the House of Representatives Inquiry, the Commonwealth Department of Employment and Workplace Relations released a discussion paper in March 2005 seeking comment on proposed changes to the regulation of independent contracting and labour hire arrangements.[22]

The Committee believes that the Federal Government could play a greater role in furthering the development of research on labour hire employment. In the Interim Report, the Committee noted that the Federal Government's non-continuation of the Australian Workplace and Industrial Relations Survey (AWIRS) has contributed to the gap in data on labour hire. Consequently, the Committee recommended that the Victorian Government lobby the Commonwealth Government with a view to continuing the AWIRS. The Committee believes that this would be an important step towards improving the statistical picture of labour hire in particular and the labour market in general.

In the absence of AWIRS data, the Committee notes that Industrial Relations Victoria (IRV) has recently commissioned a series of surveys on the state of industrial relations in Victoria: the *State of Working Victoria* surveys (2002)[23] and the Victorian Industrial Relations Environment Survey (yet to be released).[24] The *State of Working Victoria* surveys provide some information on the incidence of labour hire

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20 Victorian Industrial Relations Taskforce, 2000. *Independent Report of the Victorian Industrial Relations Taskforce*, Victorian Industrial Relations Taskforce, Melbourne, 31 August, p.157.

21 House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, 2005. *Independent Contracting and Labour Hire Arrangements – Are they working?* Media Release, Parliament House, Canberra, 24 January.

22 Department of Employment and Workplace Relations, 2005. *Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements*. Discussion Paper, Canberra, March.

23 There were two surveys in this series: the *State of Working Victoria: Household Survey* and the *State of Working Victoria: Employer Survey*.

24 Industrial Relations Victoria, Department of Innovation, Industry and Regional Development, 2005. Submission No. 31, 24 March, pp.14-18.

arrangements in Victoria, but the survey results need to be treated with caution as IRV advised that there were problems with the design of the questions related to labour hire.[25] In particular, the question on labour hire in the *State of Working Victoria: Employer Survey* referred to 'temporary agency workers', a term that is commonly used to describe temporary clerical office workers. The Committee believes that future studies commissioned by IRV should aim to clearly determine the pattern and incidence of labour hire.

1.7.1.2 Research

Although a number of gaps remain, the collective body of knowledge on labour hire has grown considerably over recent years. For example, the Australian Bureau of Statistics offers some valuable statistical data,[26] supplemented by recent data from the 2002 Household, Income and Labour Dynamics in Australia (HILDA) Survey[27] and older data from the 1990 and 1995 AWIRS.[28] The Productivity Commission's 2005 report, *The Growth of Labour Hire Employment in Australia*, offers a comprehensive overview of the growth of labour hire, particularly with respect to statistical analysis (see Appendix 7 for a summary of the key points of the report).[29] The National Council for Vocational Education and Research has commissioned research into the impact of non-standard employment arrangements such as labour hire on vocational training,[30] while the Victorian WorkCover Authority in 2002 commissioned a comprehensive review of occupational health and safety outcomes in the labour hire industry.[31]

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25 Industrial Relations Victoria, Department of Innovation, Industry and Regional Development, 2005. Submission No 31, 24 March, pp.14-15.

26 Of particular value is the relatively recent survey of employment services in Australia: Australian Bureau of Statistics, 2003. *Employment Services 2001-02*, Cat. no. 8558.0.

27 HILDA (Household, Income and Labour Dynamics in Australia), 2002. *HILDA Survey Annual Report 2002*. Melbourne Institute of Applied Economic and Social Research, The University of Melbourne.

28 A. Morehead, M. Steele, M. Alexander, K. Stephen and L. Duffin, 1997. *Changes at Work: The 1995 Australian Workplace Industrial Relations Survey*. Melbourne, Longman.

29 P. Laplagne, M. Glover and T. Fry, 2005. *The Growth of Labour Hire Employment in Australia*. Staff Working Paper, Productivity Commission, Melbourne, February.

30 KPMG Management Consulting, 1998. *Impact of the Growth of Labour Hire Companies on the Apprenticeship System*. Report for the Australian National Training Authority, Brisbane, November.

31 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.

While the Committee notes that labour hire provides a number of benefits to Victorian businesses and workers, there is a steadily growing body of analysis on labour hire in Australia that highlights some of the concerns regarding the increased use of labour hire. For example, Campbell, Watson and Buchanan argue that the most problematic aspect of labour hire is that its use can undermine permanent employment arrangements. They argue that labour hire represents a potential threat to standard forms of direct employment.[32]

Similarly, Richard Hall argues that labour hire has been used to drive down labour costs and minimise employer responsibilities. He asserts that the increased use of labour hire has created an urgent need for policy reform.[33] From a legal perspective, Andrew Stewart argues that while labour hire is a legitimate working arrangement, it should not be used to disguise direct employment relationships.[34] From a human resources management perspective, Burgess, Connell and Drinkwater argue that the use of labour hire is driven by managers who seek immediate cost benefits, without having regard to longer-term consequences. They argue that the use of labour hire is creating a need for government intervention.[35]

There are also a small number of case studies that consider the impact of labour hire arrangements on particular workplaces. For example, Gryst's 2000 study looks at how the labour hire model was used to structure working arrangements in the South Australian power industry.[36] A 1999 study by ACIRRT examines how the labour hire model was used by a not for profit organisation in New South Wales as an avenue for

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32 Iain Campbell, Ian Watson and John Buchanan, 2004. 'Temporary agency work in Australia (Part I)' in John Burgess and Julia Connell (eds), 2004. *International Perspectives on Temporary Agency Work*, London, Routledge, pp.129-144.

33 See: Richard Hall, 2002. *Labour Hire in Australia: Motivation, Dynamics and Prospects*. Working Paper 76, ACIRRT, University of Sydney, April; Richard Hall, 2000. 'Outsourcing, Contracting-out and Labour Hire: Implications for Human Resource Development in Australian Organizations', *Asia Pacific Journal of Human Resources*, Vol. 38 No. 2, pp.23-41.

34 Andrew Stewart, 2002. 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour', *Australian Journal of Labour Law*, Vol. 15 No. 3, p.235.

35 John Burgess, Julia Connell and Jayne Drinkwater, 2003. 'Temporary Work, Temporary Workers and the Human Resource Imperative' in John Burgess and Julia Connell, *Contemporary Research on Temporary Employment: The Inside View from Six Countries*. Monograph No. 1/2003, Employment Studies Centre, University of Newcastle, pp.128-147.

36 Roma Gryst, 2000. *"Contracting Employment": A Case Study of how the use of agency workers in the SA Power Industry is reshaping the employment relationship*. Working Paper No. 59, ACIRRT, University of Sydney, March.

local workers to gain a foothold into the employment market.[37] Elsa Underhill considers a rare but successful case of industrial action by manufacturing maintenance workers hired by labour hire agencies.[38]

1.8 Terminology

In the Interim Report, the Committee noted that a number of different terms are used to describe labour hire arrangements.[39] As a result, the Committee believes that it is very important to describe, at the outset, the basic terminology that it has used throughout the Final Report. This section sets out the basic meaning of some of the key terms that the Committee has used, although a detailed explanation of labour hire arrangements is contained in Chapter 2 and a number of other terms are defined in the Glossary.

Labour hire arrangement

An arrangement where a firm engages workers on a temporary basis from a labour hire agency. See Chapter 2 for further details on the nature of labour hire arrangements.

Labour hire employee

A worker who is employed by a labour hire agency to work for other employers, usually on a temporary basis.

Labour hire contractor

A worker who enters into a commercial contract with a labour hire agency to provide his or her labour to a host employer.

Labour hire agency

A firm that receives a commission from a client firm in return for supplying labour to that client, usually for a limited period. It may arrange placements for

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37 ACIRRT, 1999. *Beyond the fragments? The experiences of a community based labour hire firm in achieving flexibility with fairness for low paid casual workers.* Report prepared for the Dusseldorp Skills Forum, Sydney.

38 Elsa Underhill, 1999. 'The Victorian Labour Hire Maintenance Workers' Strike of 1997', *The Economic and Labour Relations Review*, Vol. 10 No. 1, pp.73-91.

39 Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*. Parliament House, Melbourne, December, pp.5-6.

employees or independent contractors. The labour hire agency is responsible for the payment of wages to labour hire workers.

Host employer

A firm that uses workers supplied by a labour hire agency.

Direct hire employee

An employee who is employed directly by the host employer and is not engaged through the intermediary of the labour hire agency.

Worker

This is a generic term that is used to describe both employees and independent contractors. The term 'labour hire worker' is used to describe both labour hire employees and labour hire contractors.

Chapter 2

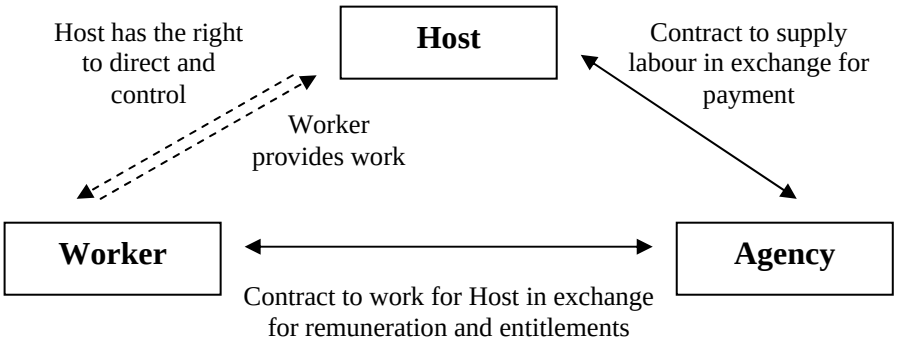
Current status of labour hire employment in Victoria

2.1 The employment status of labour hire workers

2.1.1 The basic labour hire structure

The defining feature of labour hire employment is its tripartite structure: at its essence, the term 'labour hire' designates a triangular work relationship between the worker, the labour hire agency and the host.[1]

Figure 2.1 Labour hire arrangement



According to the typical labour hire arrangement depicted at Figure 2.1, the host contracts with and pays a fee to the labour hire agency for the provision of labour hire workers. This fee covers the remuneration of the workers and any associated on-costs. Once the agency has supplied the workers to the host, the host has direct day-to-day control over the workers, but no contract with the workers. Instead, the workers contract with and are paid by the agency.[2] Even though the host utilises the workers' labour and controls the length of the assignment, the agency assumes responsibility for key legal obligations relating to the workers.

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1 Cf Laplagne, Glover and Fry who visualise the labour hire arrangement as a horizontal relationship, which represents a greater emphasis on the role of the agency as intermediary. P. Laplagne, M. Glover and T. Fry, 2005. *The Growth of Labour Hire Employment in Australia*. Staff Working Paper, Productivity Commission, Melbourne, February, p.2.

2 Economic Development Committee, 2003. *Interim Report: Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December.

It is usually agreed that the host may dispense with the workers' services whenever they wish, or in certain defined circumstances.[3] Creighton and Stewart note that this arrangement means that workers may be 'dismissed' by the host, although in formal terms, the action is taken by the agency at the host's request.[4] Usually, there is no ongoing contract between the agency and the worker, so there is no ongoing obligation on either side to give or accept work. The contract between the agency and the worker is usually formed only when the worker accepts an assignment.

The worker may be engaged by the agency as an employee or as an independent contractor. According to the Brennan, Valos and Hindle survey of labour hire agencies, around 70 per cent of labour hire workers are engaged as direct employees of the labour hire company.[5] Where the worker is engaged as an employee of the labour hire agency, the traditional functions of the employer are split between the agency and the host.[6] On the one hand, the host has day-to-day control over the worker and receives the benefit of the worker's labour, but on the other hand, the agency pays the worker's wages, takes responsibility for the key legal obligations associated with being an employer and retains overriding control of the employment relationship.

This reconfiguration of the employment relationship is considered radical by some. For example, Campbell, Watson and Buchanan consider that if the use of labour hire arrangements continues to grow, it represents a potent threat to the entire design of the employment relationship:

> *… temporary work agencies intercede in the employment relationship itself, dividing up and redistributing the varied managerial practices that were formerly unified within the bipartite employment relationship. Some practices remain with the user firm, which retains the responsibility for directing the labour; some are transferred to the agency, which now often*

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3 Breen Creighton and Andrew Stewart, 2005. *Labour Law* (4th ed). Sydney, The Federation Press, p.281.

4 Breen Creighton and Andrew Stewart, 2005. *Labour Law* (4th ed). Sydney, The Federation Press, pp.281-282.

5 Linda Brennan, Michael Valos and Kevin Hindle, 2003. *On-hired Workers in Australia: Motivations and Outcomes*. Occasional Research Report, Melbourne, RMIT University, School of Applied Communication, pp.50-51.

6 For a discussion of the significance of the traditional employment relationship and how this is affected by the tripartite structure of labour hire, see: Andrew Stewart, 2002. 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour', *Australian Journal of Labour Law,* Vol. 15 No. 3, pp.235-276.

> *claims the role of legal employer; and still others tend to disappear in the interstices of the triangular relationship.*[7]

This argument is rejected by others, such as the labour hire agencies themselves, who claim that the employment relationship is not undermined in labour hire arrangements but remains firmly intact. Labour hire agencies argue that they are the legitimate employer of the worker and as such take on the full gamut of legal responsibilities associated with that role.[8]

Where labour hire workers are engaged as employees, they are overwhelmingly engaged on a casual basis, even if their position is full-time. Australian Bureau of Statistics (ABS) statistics suggest that around 80 per cent of labour hire employees are casual employees.[9] Mr Charles Cameron of the Recruitment and Consulting Services Association (RCSA) submitted that around 30 per cent of labour hire workers are engaged on a non-casual basis;[10] however, there is no clear statistical data on the exact employment status of all labour hire workers.

Although Mr Nick Wakeling of the RCSA observed that there has been a swing away from the use of independent contractors in the labour hire industry,[11] the Brennan, Valos and Hindle labour hire survey indicated that independent contractors may still account for up to a quarter of all labour hire workers.[12] Independent contractors can be broadly defined as workers who operate their own business, do not engage employees and are engaged for a set, all-inclusive fee to provide a defined service

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7 Iain Campbell, Ian Watson and John Buchanan, 2004. 'Temporary agency work in Australia (Part I)' in John Burgess and Julia Connell (eds), 2004. *International Perspectives on Temporary Agency Work*. London, Routledge, pp.129-144 at p.130.

8 See, for example: N. Wakeling, Recruitment and Consulting Services Association, 2004. Minutes of Evidence, 27 July, p.14.

9 This is based on the number of employees without leave entitlements. The absence of leave entitlements is one indicator of casual employment. Australian Bureau of Statistics, 2000. *Australian Social Trends 2000*, Cat. No. 4102.0.

10 C. Cameron, Stratecom, for the Recruitment and Consulting Services Association, 2004. Minutes of Evidence, 27 July, p.14.

11 N. Wakeling, Recruitment and Consulting Services Association, 2004. Minutes of Evidence, 27 July, p.14. See also: C. Cameron, Stratecom, for the Recruitment and Consulting Services Association, 2004. Minutes of Evidence, 15 November, p.260.

12 Linda Brennan, Michael Valos and Kevin Hindle, 2003. *On-hired Workers in Australia: Motivations and Outcomes*. Occasional Research Report, Melbourne, RMIT University, School of Applied Communication, pp.49-50.

for a defined period.[13] By 1998, about 10 per cent of all workers in Australia were independent contractors.[14]

A new category of contracting called 'dependent contracting' has been proposed to describe work arrangements that are similar to independent contracting, but involve a dependence on one employer for work.[15] Dependent contracting is usually used to describe work relationships that are consistent with employment relationships but are not legally categorised as such.[16] Both the New South Wales Labour Hire Task Force and the Victorian Industrial Relations Taskforce noted the increasing popularity of dependent contracting arrangements: it was the fastest growing sector in the 1990s.[17]

The distinction between dependent contractors and employees can sometimes be fragile,[18] yet the legal obligations that attach to the relationship between the worker and the agency vary significantly according to the basis on which the worker is engaged. For example, contracting arrangements do not attract the same obligations as the employment relationship with respect to minimum rates of pay, paid leave entitlements, unfair dismissal rights or superannuation payments. Mr Colin Fenwick of the Centre for Employment and Labour Relations Law at the University of Melbourne submitted to the Committee that the distinction between employees and contractors is not uncommonly a source of industrial conflict in some industries.[19]

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13 This definition is proposed in Adriana VandenHeuvel and Mark Wooden, 1995. *Self Employed Contractors in Australia: what are the facts?*. Working Paper 136, National Institute of Labour Studies, Flinders University, Adelaide, pp. 4-5.

14 M. Waite and L. Will, 2001. *Self-employed Contractors in Australia: Incidence and Characteristics*. Productivity Commission Staff Research Paper, AusInfo, Canberra, p.32.

15 New South Wales Labour Hire Task Force, 2001. *Final Report*. New South Wales Labour Hire Task Force, Sydney, p.27.

16 Andrew Stewart, 2002. 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour', *Australian Journal of Labour Law*, Vol. 15 No. 3, pp.235-276 at p.238.

17 New South Wales Labour Hire Task Force, 2001. *Final Report*, New South Wales Labour Hire Task Force, Sydney, p.27; Victorian Industrial Relations Taskforce, 2000. *Independent Report of the Victorian Industrial Relations Taskforce*, Victorian Industrial Relations Taskforce Melbourne, August, p.52.

18 This observation has been made by a number of commentators, including: M. Waite and L. Will, 2001. *Self-Employed Contractors in Australia: Incidence and Characteristics*. Productivity Commission Staff Research Paper, AusInfo, Canberra. It was also discussed in the Interim Report: Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December, pp.30-34.

19 C. Fenwick, Centre for Employment and Labour Relations Law, University of Melbourne, 2005. Comment on Interim Report, No. 13, 7 March, p.3. For an example of an industrial dispute over the engagement of independent contractors instead of employees, see: Mark Skulley, 2005. 'Flashpoint in Contractor-Worker Debate', *The Australian Financial Review*, 27 May, p.59.

A considerable body of case law has arisen from situations where independent contractors have sought to be recognised as employees in the context of labour hire arrangements.[20] The courts have developed a list of factors that are indicative of an employment relationship;[21] however, each case will ultimately turn on its own facts. (The Committee considered some of these cases in the Interim Report.[22]) On the other hand, there may also be advantages for the worker to identify as a contractor, as the worker may be able to minimise tax and attract a higher base wage rate.[23]

Given that the Committee's Terms of Reference specifically focus on labour hire employment, the Committee considers that it is outside the scope of this Inquiry to give comprehensive consideration to all of the issues associated with independent contractors. The Committee believes that there are a number of concerns connected to the growing incidence of contracting arrangements. For example, Creighton and Stewart note that:

> *An extensive network of rules governs the conditions on which employees can be engaged and requires employers to assume various responsibilities in relation to such workers. By and large, these obligations do not apply in the case of "self-employed" workers, who are left instead to whatever terms they are able to negotiate with those who wish to utilise their skills.*[24]

The Committee has considered it appropriate to make some comments in relation to independent contracting arrangements where these issues relate specifically to labour hire arrangements.

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20 See, for example, *Building Workers Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104; *Advanced Australian Workplace Solutions Pty Ltd v Kangan-Batman TAFE* (Unreported, Australian Industrial Relations Commission, Giudice P, McIntyre VP, Commissioner Redmond, 25 October 1999, Print SO253); *Forstaff & Ors v The Chief Commissioner of State Revenue* [2004] NSWSC 573.

21 See, for example, the High Court's decision in *Hollis v Vabu Pty Ltd* for a discussion of these indicia: (2001) 207 CLR 21.

22 Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December, pp.30-34.

23 Iain Campbell, Ian Watson and John Buchanan, 2004. 'Temporary agency work in Australia (Part I)' in John Burgess and Julia Connell (eds), 2004. *International Perspectives on Temporary Agency Work*. London, Routledge, pp.129-144 at p.133.

24 Breen Creighton and Andrew Stewart, 2005. *Labour Law: An Introduction* (4th ed). Sydney, The Federation Press, p.4.

2.1.2 Variations on the basic labour hire structure

Labour hire agencies frequently offer other services to their clients that closely resemble labour hire arrangements. For example, it is common for labour hire agencies to offer both recruitment services and labour hire services.[25] The provision of these additional services by labour hire agencies sometimes acts to blur the boundaries of labour hire arrangements. Table 2.1 is a useful tool for visualising variations on work arrangements that are relevant to labour hire.

Table 2.1 Categories for understanding labour arrangements

Employment Status of Worker	**Worker's situation vis-a-vis host employer and labour-supplying company**		
	Working directly for the host employer	Working for host employer with labour hire agency as intermediary	Working for a company with an outsourced contract with the host employer
Employee	1	4	7
Dependent Contractor	2	5	8
Independent Contractor	3	6	9

Source: New South Wales Labour Hire Task Force, 2001. *Final Report*. New South Wales Labour Hire Task Force, Sydney, p.27.

In particular, the growth of labour hire is closely aligned to the growth of outsourcing, which is represented by categories 7, 8 and 9 in Table 2.1. Increasingly, labour hire companies are performing both labour hire and outsourcing functions. Labour hire and outsourcing may be distinguished on the grounds that in the case of labour hire, the agency is an intermediary, supplying only the labour hire workers, while the workers work under the direction of the host company. However, in the case of outsourcing, the agency provides a particular service and the workers typically work under the agency's direction.[26] Hall, Bretherton and Buchanan argue, though, that

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25 KPMG Management Consulting, 1998. *Impact of the Growth of Labour Hire Companies on the Apprenticeship System*. Report prepared for the Australian National Training Authority, Brisbane, November, p.10.

26 R. Hall, 2000. 'Outsourcing, Contracting-out and Labour Hire: Implications for Human Resource Development in Australian Organizations', *Asia Pacific Journal of Human Resources,* Vol. 38 No. 2, pp.23-41 at p.27.

distinctions between labour hire and outsourcing can be difficult to sustain. They conceptualise labour hire as a subcategory of outsourcing,[27] a view which is shared by Industrial Relations Victoria (IRV).[28]

The most important structural parallel between labour hire and outsourcing is that both involve the absence of a direct employment relationship between the worker and the host employer. A more general parallel is that both arrangements typify the popularity of new management approaches that seek more flexible workforces, often resulting in the minimisation of direct employment relationships. The fact that more labour hire companies are performing outsourcing functions is both potentially adding to the growth of labour hire companies and blurring the distinction between labour hire and outsourced service provider functions. Underhill notes the growth of hybrid outsourcing-labour hire arrangements, where the host retains a small core workforce, but the bulk of the workers are supplied by the agency.[29]

Witnesses from the labour hire industry gave evidence that distinctions between labour hire, contracting and outsourcing are often confusing and unsatisfactory. For example, Mr Rob Barber of Adecco gave evidence to the Committee that:

> *As a company, we certainly do not understand the way that everyone else refers to [labour hire]. Is it on-hiring employees; is it on-hiring independent contractors; is it some weird and wonderful contracting arrangement; or is it outsourcing a bundle of activities — say, maintenance and cleaning? It seems all these things have been called labour hire.*[30]

With a view to rectifying what it calls the 'absence of consistent and descriptive terminology' for labour hire arrangements, the RCSA proposed their own model of 'categories of service'. The RCSA model differentiates between 'on-hired employee services', where workers are employed directly by an agency and 'contracting

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27 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*. Report for the National Centre for Vocational Education Research, Adelaide, p.11.

28 Industrial Relations Victoria, Department of Innovation, Industry and Regional Development, 2005. Submission No. 31, 24 March, p.9.

29 Elsa Underhill, 2005. 'The importance of having a say: Labour hire employees' workplace voice', paper presented to the *Reworking work* conference, Association of Industrial Relations Academics of Australia and New Zealand, Sydney, February 9-11.

30 R. Barber, Adecco, 2004. Minutes of Evidence, 4 October, p.171.

services', where workers are either engaged as independent contractors or employees to undertake 'managed project' or outsourced functions.[31]

Some labour hire agencies also offer recruitment services, which also bear similarities to labour hire but appear at first to be easier to distinguish than outsourcing arrangements. Recruitment services involve notifying job seekers of a vacant position, screening potential candidates for the position and then accepting a fee for this service. The crucial difference between labour hire and recruitment services is that pure recruitment services involve placing workers for a fee and then withdrawing, while labour hire services require the maintenance of an ongoing relationship with both the worker and the host.[32] However, arguably the boundaries between recruitment services and labour hire are also blurring. The Committee received evidence that a growing number of companies are using labour hire as a new method of recruitment, whereby, over the course of the labour hire assignment, host employers can assess the suitability of labour hire workers for direct hire positions.[33]

2.1.3 Clarity of employment status

The employment status of labour hire workers can sometimes be a matter of great practical confusion for all parties involved in the relationship: hosts, agencies and workers. The Committee received evidence from some witnesses that there are no inherent legal ambiguities in the triangular relationship of labour hire, while others claimed that misunderstanding is rife.

A recent study of contract workers in South Australia, *"Contracting Employment": A Case Study of how the use of agency workers in the SA Power Industry is reshaping the employment relationship,* demonstrated the extent to which there can be a

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31 Recruitment and Consulting Services Association, 2004. Submission No. 15, 25 February, p.9.

32 Iain Campbell, Ian Watson and John Buchanan, 2004. 'Temporary agency work in Australia (Part I)' in John Burgess and Julia Connell (eds), 2004. *International Perspectives on Temporary Agency Work*. London, Routledge, pp.129-144 at p.129.

33 Economic Development Committee. 2004. *Interim Report: Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December, p.16.

fundamental mismatch in the understanding by agencies, host and workers as to the nature of the relationship between the parties (see Table 2.2).[34]

Table 2.2 Perceptions of employment status in labour hire arrangements

Suggested Employer	Workers	Agencies	Host (ETSA)	Barrister
Agency	58%	44%	90%	
ETSA (host)	32%		5%	
Self employed	5%	56%	5%	100%
Don't know	5%			

Source: Roma Gryst, 2000. *"Contracting Employment": A Case Study of how the use of agency workers in the SA Power Industry is reshaping the employment relationship*. Working Paper No. 49, ACIRRT, March, p.36.

The barrister who advised on this arrangement considered that all of the workers were independent contractors. On the other hand, the host considered that it employed 5 per cent of the workers directly and that 90 per cent of the workers were either independent contractors or employees of the agency. According to the agencies who supplied the workers, 44 per cent of the workers were employed by the agency, while 56 per cent were independent contractors. The survey of the workers themselves indicated that 58 per cent thought that they were employed by the agency, 32 per cent thought that they were employed by the host, 5 per cent thought they were self-employed and 5 per cent didn't know.

The Committee received evidence from Ms Louisa Dickinson of Job Watch that many of Job Watch's clients experience similar uncertainty:

> *… some of the people who contact us are not actually aware that they are labour hire employees because they have no ongoing relationship with the labour hire company. A payslip comes through with a name on it of a proprietary limited entity, but they understand themselves to be employed by a host employer and often are quite shocked when they realise they have been terminated and they have no recourse against the host*

[34] Roma Gryst, 2000. *"Contracting Employment": A Case Study of how the use of agency workers in the SA Power Industry is reshaping the employment relationship*. Working Paper No. 59, ACIRRT, University of Sydney, March, p.36.

> *employer. In their mind, to all intents and purposes … the host employer is their actual employer …* [35]

Job Watch noted in its submission that legal issues over employment status may become particularly acute in long-term assignments. This is partly as a result of the blurring of the recruitment and labour hire function and partly due to a divergence between the formal contractual arrangement and the practical reality of the working relationship:

> *… the nature of [the labour hire] relationship is tested by long-term engagement of labour hire workers and situations where a labour hire company is used more as a recruitment agency in order to assess a worker prior to recruiting them as a permanent employee. Over the course of long-term labour hire assignments, the line between a host employer's own employees and labour hire workers begins to blur, with both parties behaving as employer and employee. The latter having almost total control over the former, who has little or no contact with the labour hire company.*[36]

The Committee believes that, given the complex nature of labour hire working relationships, there is currently a marked lack of information available to labour hire workers who wish to find out more about the nature of their working arrangements. To address this lacuna, the Committee believes that the Victorian Government should provide funding for an information campaign for labour hire workers.

The Committee notes that an information campaign was conducted by IRV for outworkers following the Victorian Parliament's introduction of the *Outworkers (Improved Protection) Act 2003*. Basic brochures on worker entitlements are now available to outworkers and their employers on IRV's website in a number of languages, as well as contact numbers for organisations that can provide further advice. The Committee believes that similar information should be available for labour hire workers, labour hire agencies and host employers.

The Committee notes that the proposed information campaign could be coordinated by a government agency, such as IRV. However, to successfully reach the broadest possible audience, the proposed information campaign should be carried out in partnership with, but not restricted to, a community organisation such as Job Watch

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35 L. Dickinson, Job Watch, 2004. Minutes of Evidence, 11 October, pp.213-214.
36 Job Watch, 2003. Submission No. 9, 19 December, p.19.

and an employer organisation such as the Victorian Employers' Chamber of Commerce and Industry (which would be able to reach both host employers and labour hire agencies).

Recommendation 2.1

The Committee recommends that the Government undertake an information campaign for labour hire workers with the objective of providing easily accessible information on the employment status and entitlements of labour hire workers.

2.2 A brief profile of the labour hire industry

In the Interim Report, the Committee noted that labour hire is not a new phenomenon and has been used by Australian businesses for many years.[37] Hall has identified the key precursors to the modern labour hire industry as temping agencies for office work, recruitment agencies and the 'pure' labour hire agencies of the construction industry.[38] ACIRRT[39] has noted that there is also a long history of labour pooling on the Australian waterfront and that labour pooling arrangements have also been used successfully and innovatively in the apprenticeship system in the form of group training companies.[40]

The Committee also acknowledges the use of informal loan arrangements such as those referred to in the submission from the Air Conditioning and Mechanical

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37 Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December, p.7.

38 Richard Hall, 2003. *Labour Hire in Australia: Motivation, Dynamics and Prospects*. Working Paper 76, ACIRRT, University of Sydney, April, p.3. Similarly, Campbell, Watson and Buchanan note that labour hire probably began as a means to organise office workers either to cover staff absences or to fill occasional specialist labour needs: Iain Campbell, Ian Watson and John Buchanan, 2004. 'Temporary agency work in Australia (Part I)' in John Burgess and Julia Connell (eds), 2004. *International Perspectives on Temporary Agency Work.* London, Routledge, pp.129-144 at p.131. For another overview of some of the antecedents of the contemporary labour hire industry, see: Anthony O'Donnell and Richard Mitchell, 2001. 'The Regulation of Public and Private Employment Agencies in Australia: An Historical Perspective', *Comparative Labor Law & Policy Journal*, Vol. 23 No. 1, Fall, pp.7-43 at pp.30-31.

39 ACIRRT is a multi-disciplinary research and training organisation that analyses the changing nature of work. It is based at the University of Sydney.

40 ACIRRT, 1999. *Beyond the fragments? The experiences of a community based labour hire firm in achieving flexibility with fairness for low paid casual workers*. Report for the Dusseldorp Skills Forum, Sydney, pp.24-28.

Contractors' Association of Victoria (ACMCA).[41] The ACMCA submission explained that its members operate according to the cyclical workflows of the construction industry, which sometimes leads to members not having enough work for all of their employees. Rather than reducing staff numbers in a downturn, the ACMCA's members have developed their own arrangements to counter this situation, where employees are 'loaned' from one company (the 'original employer') that is experiencing a downturn, to another company that has more work than it can handle (the 'host company'). These loan arrangements strongly resemble labour hire arrangements: the workers remain the employees of the original employer for the purposes of wages, superannuation, long service leave and workers' compensation premium payments, while the host company pays an agreed weekly rate to the original employer to cover wages and on-costs. The employee returns to the original employer when the original employer's work load has returned to normal levels.[42]

Although labour hire is not new, what *is* new is the increased uptake of labour hire services by Australian business. Over the last 20 years, labour hire has become an increasingly prominent feature of Victorian workplaces. According to research conducted by Ian Watson for the Victorian Industrial Relations Taskforce, 27 per cent of Victorian workplaces now use labour hire.[43]

ABS data shows that labour hire employment grew significantly across Australia from 1999 to 2002, both in terms of income generated (30 per cent increase) and worker placements (37 per cent increase),[44] such that the labour hire industry accounts for an annual turnover of $8.667 billion.[45] Mr Greg Tweedly of the Victorian WorkCover Authority (VWA) gave an idea of the rapidity of the growth of the labour hire industry in Victoria by comparing its growth to the rest of the VWA scheme: between 1997-98 and 2003-04 labour hire remuneration grew by 130 per cent whilst the scheme grew by 28 per cent. Mr Tweedly told the Committee that this means that the proportion of

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41 Air Conditioning and Mechanical Contractors' Association of Victoria, 2004. Submission No. 25, 18 May, pp.2-3.

42 Air Conditioning and Mechanical Contractors' Association of Victoria, 2004. Submission No. 25, 18 May, pp.2-3.

43 Ian Watson, 2000. *Earnings, Employment Benefits and Industrial Coverage in Victoria: A Report to the Victorian Industrial Relations Taskforce* (Volume 1). ACIRRT, University of Sydney, July, p.30.

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

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

total remuneration in Victoria accounted for by the labour hire industry has grown from 1.5 per cent to nearly 3 per cent.[46]

Interestingly, the Productivity Commission report on labour hire employment notes that changes in the employment structure of the economy over the last 15 years may have actually slowed the rate of use of labour hire. The four industries found most likely to use labour hire employment – manufacturing, wholesale trade, transport and storage, finance and insurance – actually decreased their share of total employment between 1990 and 2002 from 40 per cent to 26 per cent.[47] Despite the rapid growth of labour hire arrangements over this period, the report suggests that the decline of these industries may have slowed the rate of use of labour hire.

According to the VWA, there are currently around 1200 labour hire agencies operating in Victoria.[48] In terms of the industry's composition, it appears that this number divides up into a 'large number of small operators' and a 'small number of large operators'.[49] The smaller operators tend to specialise, operating in niche labour markets, while larger agencies are more inclined to offer a number of services across a number of industries.

The Committee notes that a large number of labour hire agencies are small businesses. On a national basis, around 60 per cent of employment services agencies (including recruitment agencies)[50] are small employers, with fewer than five employees working in their office. However, although these micro organisations account for over a quarter of all labour hire placements, it is the large employment services agencies – with over 100 employees working in their office – which account for a significant portion of the financial turnover in the industry. (See Table 2.3.)

The labour hire industry is often associated with these larger, high profile companies, even though they account for only 18.4 per cent of all labour hire placements.[51] Many of these larger companies are multinational corporations, such as the US-based

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46 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, p.237.

47 P. Laplagne, M. Glover and T. Fry, 2005. *The Growth of Labour Hire Employment in Australia*. Staff Working Paper, Productivity Commission, Melbourne, February, p.28.

48 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, p.237.

49 R. Hall, 2000. 'Outsourcing, Contracting-out and Labour Hire: Implications for Human Resource Development in Australian Organizations', *Asia Pacific Journal of Human Resources*, Vol. 38 No. 2, pp.23-41 at p.27.

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

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

Manpower and the Europe-based Adecco, but there are a number of significant local companies as well, such as Skilled Engineering.

Table 2.3 Summary of Labour Hire Operations, by direct employment size of agency ([a])

Direct hire employees of the agency	0-4 persons	5-9 persons	10-19 persons	20-49 persons	50-99 persons	100 or more persons	Total
	%	%	%	%	%	%	%
Temporary / contract placements	26.9	13.1	23.3	15.4	2.8	18.4	100.0
Total Income	15.8	10.1	12.5	16.5	5.9	39.2	100.0
Operating profit - surplus before tax	18.7	9.5	13.7	18.0	7.4	32.7	100.0

(a) Direct employment size is based on the number of persons working directly for the organisation, and excludes any employees placed with other organisations.

Source: Adapted from: Australian Bureau of Statistics, 2003. *Employment Services 2001-02*, Cat. No. 8558.0.

2.3 Distribution of labour hire workers

It is clear that the number of labour hire workers has grown significantly over the last two decades. The Productivity Commission's 2005 report, *The Growth of Labour Hire Employment in Australia,* estimated that throughout Australia labour hire workers now number between 270,000 and 290,000 and represent around 3 per cent of all employed persons.[52] The report calculated that the total number of labour hire workers in Australia grew rapidly in the 1990s, averaging out at an annual growth rate of 15.7 per cent between 1990 and 2002.[53] However, it is much more difficult to get a clear picture of the distribution of labour hire workers according to industry, region, occupation, workplace and gender.

52 P. Laplagne, M. Glover and T. Fry, 2005. *The Growth of Labour Hire Employment in Australia*. Staff Working Paper, Productivity Commission, Melbourne, February, p.7.

53 P. Laplagne, M. Glover and T. Fry, 2005. *The Growth of Labour Hire Employment in Australia*. Staff Working Paper, Productivity Commission, Melbourne, February, p.8.

2.3.1 Distribution according to industry and sector

As noted by the New South Wales Labour Hire Task Force, the growth of labour hire has occurred across every industry and sector over the past 20 years.[54] However, the growth has not necessarily been uniform and the intensity of use differs according to each industry. For example, labour hire arrangements (and other non-standard employment arrangements) have been prevalent in the building and construction industry for quite some time.

Traditional blue collar industries tend to maximise the use of labour hire. In the Interim Report, the Committee noted that research carried out for the Victorian Industrial Relations Taskforce found that the most frequent use of labour hire in Victoria – measured by the percentage of workplaces in a given industry using labour hire – is made by the mining and construction industries (61.5 per cent).[55] This is followed by the manufacturing industry, another blue collar industry, where 30.6 per cent of workplaces use labour hire.[56] The education, health and community services sector is the third highest user of labour hire, with 30 per cent of workplaces using labour hire.

The distribution of labour hire workers according to industry was also considered in the 2005 Productivity Commission report *The Growth of Labour Hire Employment in Australia*, although this report considered Australia-wide data and used different industry classifications. This report considered 2002 HILDA survey data[57] that looked at labour hire workers as a proportion of the workforce in each particular industry and found that the workplaces most likely to use labour hire were located in manufacturing, wholesale trade, transport and storage and finance and insurance.[58]

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54 New South Wales Labour Hire Task Force, 2001. *Final Report*. New South Wales Labour Hire Task Force, Sydney, December, p.21.

55 Ian Watson, 2000. *Earnings, Employment Benefits and Industrial Coverage in Victoria: A Report to the Victorian Industrial Relations Taskforce* (Volume 1). ACIRRT, University of Sydney, 12 July, p.32.

56 Ian Watson, 2000. *Earnings, Employment Benefits and Industrial Coverage in Victoria: A Report to the Victorian Industrial Relations Taskforce* (Volume 1). ACIRRT, University of Sydney, 12 July, p.32.

57 HILDA (Household, Income and Labour Dynamics in Australia), 2002. *Hilda Survey Annual Report 2002*. Melbourne Institute of Applied Economic and Social Research, The University of Melbourne.

58 P. Laplagne, M. Glover and T. Fry, 2005. *The Growth of Labour Hire Employment in Australia*. Staff Working Paper, Productivity Commission, Melbourne, February, p.27.

2.3.2 Distribution according to occupation

According to the 2005 Productivity Commission report, *The Growth of Labour Hire Employment in Australia*, labour hire workers account for a larger proportion of the workers in less-skilled blue collar occupations. For example, labour hire workers represent 7 per cent of total employment in the category of labourers and related workers, and 4.8 and 4.6 per cent respectively in the categories of intermediate production and service workers and tradespersons and related workers (see Table 2.4).[59] However, in terms of the distribution of the total number of labour hire workers, a large number are located in white collar professional and clerical occupations (see Table 2.4).

Table 2.4 Rate of use and distribution of labour hire employment, by occupation, 2002[a]

Occupation	Representation of labour hire workers[b]	Distribution	
		Labour hire	Non labour hire
	%	%	%
Managers and administrators	1.9	3.2	5.8
Professionals	2.9	18.0	22.0
Associate professionals	3.0	10.7	12.6
Tradespersons and related workers	4.6	14.4	10.7
Advanced clerical and service workers	2.5	2.1	3.0
Intermediate clerical, sales and service workers	3.4	18.0	18.3
Intermediate production and service workers	4.8	11.9	8.5
Elementary clerical, sales and service workers	1.6	5.1	11.1
Labourers and related workers	7.0	16.7	8.0
Total[c]	**3.5**	**100.0**	**100.0**

[a] Population estimates. Reference population includes all employees, including labour hire employees, aged 15-64 (excludes employers and self-employed workers).

[b] In this table, the rate of use of labour hire is expressed as (number of labour hire employees)/(total number of employees including labour hire).

[c] May not add up to one hundred, due to rounding.

Source*:* P. Laplagne, M. Glover and T. Fry, 2005. *The Growth of Labour Hire Employment in Australia*. Staff Working Paper, Productivity Commission, Melbourne, February, p.22.

[59] P. Laplagne, M. Glover and T. Fry, 2005. *The Growth of Labour Hire Employment in Australia*. Staff Working Paper, Productivity Commission, Melbourne, February, p.22.

Mr Greg Tweedly of the VWA gave evidence to the Committee that there had been particular growth in blue collar occupations in the Victorian labour hire industry from 1997-98 to 2003-04. Mr Tweedly stated that the remuneration basis for blue collar labour hire workers grew by 160 per cent, while the remuneration basis of white collar labour hire workers grew by 47 per cent. In comparison, the scheme as a whole grew only 28 per cent.[60]

Although labour hire is used across more workplaces in blue collar industries which make use of trade, labour and related occupations, it is also used intensively in health care and medical occupations. Over a third (36.8 per cent) of all labour hire placements are made in health care and medical occupations, according to ABS statistics. (However, to an extent, this high number is moderated by the fact that placements are often made for a single shift in health care and medical occupations.)[61]

2.3.3 Distribution according to the size of the workplace

The use of labour hire varies according to the size of the workplace. According to modelling used in the Productivity Commission's 2005 report, the size of the workplace is positively related to the probability of the use of labour hire, and negatively related to the rate of use of labour hire (see Table 2.5). According to HILDA survey data, in 2002 the workplaces that relied most heavily on labour hire were those with between 20 to 49 employees and those with 500 or more employees.[62] This means that there is a greater probability that larger workplaces will use labour hire, but when smaller workplaces use it, they use it more intensively.

Research carried out by Ian Watson for the Victorian Industrial Relations Taskforce similarly found that the use of labour hire is closely related to the size of the workplace. Watson's research indicated that while 27 per cent of all Victorian

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60 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, pp.236-237.

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

62 P. Laplagne, M. Glover and T. Fry, 2005. *The Growth of Labour Hire Employment in Australia*. Staff Working Paper, Productivity Commission, Melbourne, February, p.22.

workplaces use labour hire, this percentage dramatically increases to over 50 per cent for workplaces with 100 or more employees.[63]

Table 2.5 Predicted probability and rate of use of labour hire, by workplace size, 1995

Workplace size	Probability of use	Rate of use[a]
No. of employees	%	%
24	18.7	4.4
49	19.2	4.2
65	19.6	4.1
88	20.1	3.9
98	20.3	3.9
107	20.5	3.8
195	22.5	3.3
488	29.9	2.0
700	35.8	1.4
1000	44.8	0.9

a Rate of use among workplaces that use labour hire.

Source*:* P. Laplagne, M. Glover and T. Fry, 2005. *The Growth of Labour Hire Employment in Australia*. Staff Working Paper, Productivity Commission, Melbourne, February, p.25.

2.3.4 Distribution according to regions

Labour hire agencies operate in both regional and metropolitan Victoria. However, the exact distribution of labour hire use across regional and rural Victoria is unclear. The Committee did not receive any empirical evidence relating to the distribution of labour hire arrangements according to regions in Victoria. However, the Committee did receive evidence that labour hire arrangements are commonly used across rural and regional Victoria. The Australian Workers' Union submitted that a very high percentage of all seasonal workers in the Sunraysia and Goulburn Valley areas are labour hire workers.[64]

63 Ian Watson, 2000. *Earnings, Employment Benefits and Industrial Coverage in Victoria: A Report to the Victorian Industrial Relations Taskforce* (Volume 1). ACIRRT, University of Sydney, 12 July, p.31.

64 Australian Workers' Union, 2005. Comment on Interim Report, No. 14, 9 March, p.1.

2.3.5 Distribution according to gender

Approximately 54 per cent of labour hire workers are women. The majority of female labour hire workers work in the business sector in advanced clerical positions such as secretaries and personal assistants.[65]

The Shop, Distributive and Allied Employees Association (SDA) submitted that, despite being classified as having 'advanced' positions, women dominate the lower paid and less secure positions within the labour hire industry. Given that the vast majority of labour hire workers do not have paid leave entitlements, the SDA expressed concern that female labour hire workers do not have access to parental leave or carer's leave.[66]

2.4 Reasons for the growth of labour hire

The 2005 Productivity Commission Report found that growth in the use of labour hire arrangements can be almost wholly attributed to changes in the behaviour of companies. Companies have become more likely to use labour hire employment, and, when they use it, they are likely to use more of it.[67]

Evidence from employers and employer groups that was examined in the Interim Report suggested that the major reasons for using labour hire are related to cost and flexibility. These motivations were confirmed by witnesses to the Inquiry. For example, Mr David Hargraves of the Australian Industry Group stated that:

> *The costs of recruitment are high in terms of management resources. It is far more convenient, by way of example, for a company when it needs additional staff to engage a labour hire company which can do such things as evaluate an application, short list the people, interview and competency test them, reference check them as well as induct them and issue them with protective safety equipment. All of those things take time, and labour hire companies are usually in a far better position to do that than a lot of client companies.*[68]

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65 Australian Bureau of Statistics, 2000. *Australian Social Trends 2000*, Catalogue No. 4102.0.
66 Shop, Distributive and Allied Employees Association, 2004. Submission No. 19, 15 March, p.28.
67 P. Laplagne, M. Glover and T. Fry, 2005. *The Growth of Labour Hire Employment in Australia*. Staff Working Paper, Productivity Commission, Melbourne, February, p.32.
68 D. Hargraves, Australian Industry Group, 2004. Minutes of Evidence, 23 August, p.121.

The relationship between cost reduction strategies and the use of labour hire was supported by the 2005 Productivity Commission Report, which found that, over a given period, workplaces that had decided to introduce measures to reduce costs were much more likely than others to be using labour hire arrangements.[69] Mr Hargraves stressed, however, that cost was not the sole motivating factor for businesses to make use of labour hire arrangements. This was supported by evidence given by Mr Greg Lucas of Montague Cold Storage, who cited seasonal peaks and troughs and staff absenteeism as the main reasons for his company's use of labour hire.[70]

Labour hire arrangements are inherently flexible: as noted above, the agency is under no obligation to provide ongoing work, nor is the worker obliged to commit to ongoing work. As a result, labour hire enables businesses to access a large and diverse supply of workers at short notice to address cyclical peaks and troughs, to replace permanent staff while they are on leave or to fulfil a need for specialist workers. Businesses may also use labour hire to minimise downtime, taking on labour hire workers only as required. It was suggested that labour hire can also offer flexibility to workers, and that a number of workers actively choose labour hire arrangements for this reason.

The Committee also received evidence that the popularity of the labour hire industry is due to the opportunity it offers businesses to gain the benefits of the employment relationship without having to deal with most of the responsibilities of the employment relationship. Gonos, an American commentator, describes labour hire (or 'temporary help' as it is referred to in America) as 'labour without obligation', which allows host employers to:

> *… utilize labour while avoiding many of the specific social, legal and contractual obligations that have increasingly been attached to employer status …*[71]

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69 P. Laplagne, M. Glover and T. Fry, 2005. *The Growth of Labour Hire Employment in Australia*. Staff Working Paper, Productivity Commission, Melbourne, February, p.20.

70 G. Lucas, Montague Cold Storage, 2004. Minutes of Evidence, 4 October, p.190.

71 G. Gonos, 1997. 'The Contest over "Employer" Status in the Postwar United States: The Case of Temporary Help Firms', *Law & Society Review* Vol. 31 No. 1, pp.81-110 at p.90.

A similar argument is advanced by Hall, who states that:

> *Clients outsource functions or use labour hire precisely because they do not want to be responsible for the management of those workers. The essential logic … is that the client organisation can divest itself of the responsibility for the longer-term development of those workers*.[72]

While some witnesses suggested that labour hire has grown due to the flexibility that it offers workers, others argued that, while some labour hire workers enjoy highly flexible working conditions, it is mostly the employer who benefits from the flexibility of having workers on call. Research indicates that although some employees enjoy the flexibility provided by casual employment – the predominant employment status of labour hire workers – the majority of workers would prefer permanent work.[73]

2.5 Consequences of the use of labour hire employment

The existence of labour hire employment is not, in itself, controversial.[74] After all, labour hire has existed in Australian workplaces for at least 50 years. Almost all parties who gave evidence to the Committee agreed that labour hire arrangements are a legitimate and necessary part of the labour market. However, there are conflicting views regarding the consequences of the *proliferation* of labour hire arrangements. With respect to the impact of the growth of labour hire, the Committee considered a vast amount of evidence, much of which presented opposing perspectives and complex arguments.

The growth of labour hire has introduced a new and relatively unknown dimension to the labour market: the increased use of triangular working arrangements. The tripartite employment relationship associated with labour hire arrangements adds complexity to and has the potential to modify the standard employment relationship,

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72 Richard Hall, 2000. 'Outsourcing, Contracting-out and Labour Hire: Implications for Human Resource Development in Australian Organizations'. *Asia Pacific Journal of Human Resources*, Vol. 38 No. 2, pp.23-41 at p.34.

73 In their recent survey of casual workers, Pocock, Prosser and Bridges found that around 65 per cent of the casual employees they interviewed were 'reluctant casuals'. About a quarter were positive about their casual employment status and the remaining 10 per cent were ambivalent. Barbara Pocock, Rosslyn Prosser and Ken Bridge, 2004. *"Only a casual…": How Casual Work Affects Employees, Households and Communities in Australia*. Labour Studies, School of Social Sciences, University of Adelaide, July, pp.5-6.

74 A number of commentators have made this observation. See, for example: Richard Hall, 2002. *Labour Hire in Australia: Motivation, Dynamics and Prospects*. Working Paper 76, ACIRRT, University of Sydney, April, p.7.

which is founded on a two party relationship between employer and employee. This bipartite relationship has been the cornerstone of labour law for many years, and informs both common law and statutory rights and duties. However, as noted by Mitchell and O'Donnell:

> *Concerns with the growth in temporary agency work do not solely spring from the fact that their operation confounds regulatory categories; rather, they are seen as often circumventing many of the worker protections that attach to "standard" employment relationships, such as job stability and security, and collective representation, and embodying a lack of clarity as to employer responsibility for health and safety issues.*[75]

The Committee received evidence that a number of regulatory ambiguities result from labour hire's uneasy fit with laws based on bipartite employment relationships. The Committee acknowledges that some labour hire agencies assume the full mantle of responsibility connected to the role of employer, but finds that the triangular relationship of labour hire does present some ambiguities that unscrupulous agencies and hosts may exploit to the detriment of workers. For example, the Committee received evidence with respect to ambiguities raised by labour hire arrangements in the application of Victoria's anti-discrimination legislation, the *Equal Opportunity Act 1995* (the 'EO Act').[76]

The Committee received evidence that, in a strict sense, the EO Act prohibits both labour hire agencies and host employers from discriminating against labour hire workers.[77] However, the Committee received evidence from the Equal Opportunity Commission of Victoria (EOCV) that the language of the EO Act does not adequately reflect this fact.[78] Mr Jamie Gardiner of the EOCV gave evidence to the Committee that:

> *The complicating issue with the whole question of labour hire in [the EO Act] is that both parties – the host employer … or the labour hire company … - are in fact liable under the [EO Act] for discrimination that occurs in the workplace… But it is far from easy for an employer or a*

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75 Anthony O'Donnell and Richard Mitchell, 2001. 'The Regulation of Public and Private Employment Agencies in Australia: An Historical Perspective', *Comparative Labor Law & Policy Journal*, Vol. 23 No. 1, pp.7-43, at note 3, p.8.

76 J. Gardiner, Equal Opportunity Commission of Victoria, 2004. Minutes of Evidence, 13 September, p.140.

77 Equal Opportunity Commission of Victoria, 2005. Comment on Interim Report, No. 8, 25 February, p.2.

78 Equal Opportunity Commission of Victoria, 2004. Submission No. 14, 12 February, p.1.

> *union for that matter to read through the [EO Act] and the associated law and see exactly how that all works*.[79]

Mr Gardiner submitted that the EO Act should be amended to clarify the obligations of labour hire agencies and host employers. The Committee notes Mr Gardiner's concerns that there is some ambiguity in the EO Act; however, the Committee believes that the EO Act does not require specific amendment, as it already provides sufficient protection for labour hire workers.

That there is legal ambiguity associated with labour hire arrangements is also indicated by the growing amount of case law that seeks to apply legislation or legal precedent to labour hire workers. A lot of this case law is concerned with identifying the nature of the relationship between the worker, the agency and the host.[80] This is an important threshold issue, as it can determine whether the worker has access to the rights associated with a direct employment relationship with the host,[81] such as the right to procedural fairness on the termination of an assignment.

The growth of labour hire not only tests traditional understandings of the structure of work relationships: it also challenges conventional notions of job security and worker entitlements. One of the recurrent concerns that was raised in evidence before the Committee was the labour hire industry's use of non-standard employment. As noted above, the labour hire industry makes extensive use of casual labour and, to a lesser extent, other non-standard arrangements such as dependent contracting. Campbell, Watson and Buchanan observe that:

> *In contrast to many other countries, only a small minority of temporary agency workers in Australia is protected by a standard employment contract. The vast majority lacks standard rights and benefits, either because they are casual employees or because they are classified as 'self-employed'.*[82]

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79 J. Gardiner, Equal Opportunity Commission of Victoria, 2004. Minutes of Evidence, 13 September, p.140.

80 Some of the case law relevant to this point was discussed in the Interim Report: Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*, Parliament of Victoria, Melbourne, December, pp.30-34.

81 *Oanh Nguyen v A-N-T Contract Packers Pty Ltd and Thiess Services Pty Ltd* (2003) 128 IR 241.

82 Iain Campbell, Ian Watson and John Buchanan, 2004. 'Temporary agency work in Australia (Part I)' in John Burgess and Julia Connell (eds), 2004. *International Perspectives on Temporary Agency Work*. London, Routledge, pp.129-144 at pp.135-136.

Many consider that the extent of casual employment in the labour hire industry means that the growth of labour hire has necessarily played at least a small role in the increase of casual employment and contracting arrangements. Campbell argues that the growth of precarious employment more generally has impacted on permanent direct hire employment such that:

> *… the notion of 'permanency' is being drained of much of its social content and social meaning – in the eyes of employers, many permanent employees are increasingly being viewed in the same way as casual employees, i.e. as convenient parcels of labour-power, whose contribution should be freely dispensed with once it is deemed to be no longer optimally useful.*[83]

The issues surrounding the labour hire industry's use of casual employment are examined further in Chapter 3.

A number of witnesses gave evidence to the Committee that many of the problems experienced by labour hire workers arise as a consequence of the particular combination of the atypical nature of the triangular labour hire arrangement and the temporary nature of their employment,[84] which makes their employment particularly precarious. For example, because there is no employment relationship between the host employer and the labour hire worker, the host is able to terminate the assignment of the worker without notice. After the assignment is terminated, the agency is under no legal obligation to offer further work where the workers are engaged as casual employees or independent contractors. In the Interim Report, the Committee examined the damaging effect that this precariousness can potentially have on workplace health and safety, where labour hire workers are unwilling to make complaints regarding hazards in the workplace, for fear of having their assignment terminated.[85]

Related to the concern regarding the rise of non-standard forms of employment and the blurring of legal responsibilities, is the concern that the use of labour hire represents a systematic choice on the part of employers to avoid direct employment

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83 Iain Campbell, 1997. 'Beyond unemployment: The Challenge of Increased Precariousness in Employment', *Just Policy*, No. 11, p.19.

84 Job Watch, 2003. Submission No. 9, 19 December, p.16.

85 Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December**,** pp.45-46.

relationships. As noted in the Productivity Commission's report, *The Growth of Labour Hire Employment in Australia*:

> *Implicit in [the concerns about labour hire] is the view that labour hire has grown rapidly because firms see it as a way of reneging on their responsibilities towards their workforce, thus undermining workers' pay and entitlements.*[86]

There is concern, for example, regarding evidence that businesses may seek to avoid unionised workforces by drawing on labour hire arrangements.[87]

The Committee received evidence that labour hire is being used more extensively by businesses as a substitute for the direct employment of workers and for longer periods of time. For example, Mr Martin Pakula of the National Union of Workers gave evidence to the Committee that labour hire is being increasingly used to meet ongoing permanent labour requirements:

> *… in a number of warehouses now there are no permanent employees any more. The entire work force is provided by labour hire companies, simply because the employer does not want to have a full-time work force of its own. On many occasions now they are asking the labour hire company to put the people on as permanents, but as permanents of the labour hire company rather than of the client. The problem with that is that there is still no job security because the client can just terminate the services of that labour hire company at any time and get another one.*[88]

Concern was expressed by other witnesses that labour hire arrangements are no longer confined to temporary assignments involving a small number of workers. Instead, in some workplaces, labour hire is being used by host employers for longer periods and constitutes a much larger proportion of the total workers.

In situations where the use of labour hire as a substitute for direct hire workers appears likely to become widespread, Campbell, Watson and Buchanan describe this as the threat of an 'evolution from supplementation to *substitution*'. However, they find that they are unable to conclude whether the process is already in train in

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86 P. Laplagne, M. Glover and T. Fry, 2005. *The Growth of Labour Hire Employment in Australia*. Staff Working Paper, Productivity Commission, Melbourne, February, p.1.

87 See, for example: Roma Gryst, 2000. *"Contracting Employment": A Case Study of how the use of agency workers in the SA Power Industry is reshaping the employment relationship*. Working Paper No. 59, ACIRRT, University of Sydney, March, p.24.

88 M. Pakula, National Union of Workers, 2004. Minutes of Evidence, 23 August, p.100.

Australia.[89] The early stages of this process occur when labour hire is increasingly used by hosts not only for peak periods, but as a buffer against uncertainty throughout the entire year. Campbell, Watson and Buchanan argue that this process could:

> *… dissolve the standard form of direct employment within individual firms, together with all the rights and benefits that have come to be associated with this form of employment. In short, it threatens to redesign the employment relationship.*[90]

Dr Iain Campbell of the Royal Melbourne Institute of Technology gave evidence to the Committee regarding this threat, explaining that he believed labour hire only became a problem where it was used for longer periods, as a substitute for direct employment. He advised the Committee how he, Ian Watson and John Buchanan saw labour hire as:[91]

> *… a reasonably healthy phenomenon when … it is doing what it traditionally does, which is covering absences, perhaps adjusting to peaks and fluctuations in demand and getting specialist skills into a firm. … We said it was more of a problem when it … was used as a direct alternative to permanent employment ... We were suggesting that insofar as there is a problem in Australia it is a problem not of labour hire in general but in a particular sense of spilling over into the provision of substitute labour.*[92]

Although this fear of labour hire as substitution was evident in some of the submissions to the Committee, there is no evidence to suggest that this process is taking place. Campbell, Watson and Buchanan point to some evidence that this change is occurring in isolated workplaces, but it is not possible to extrapolate the extent of this practice. The RCSA submitted that labour hire services remain 'truly temporary', as 61 per cent of its members' placements were of three months duration or less.[93] However, the Brennan, Valos and Hindle study revealed that there are still a

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89 Iain Campbell, Ian Watson and John Buchanan, 2004. 'Temporary agency work in Australia (Part I)' in John Burgess and Julia Connell (eds), 2004. *International Perspectives on Temporary Agency Work.* London, Routledge, pp.129-144 at p.137.

90 Iain Campbell, Ian Watson and John Buchanan, 2004. 'Temporary agency work in Australia (Part I)' in John Burgess and Julia Connell (eds), 2004. *International Perspectives on Temporary Agency Work*. London, Routledge, pp.129-144 at p.137.

91 Iain Campbell, Ian Watson and John Buchanan, 2004. 'Temporary agency work in Australia (Part I)' in John Burgess and Julia Connell (eds), 2004. *International Perspectives on Temporary Agency Work*. London, Routledge, pp.129-144.

92 I. Campbell, Royal Melbourne Institute of Technology, 2005. Minutes of Evidence, 21 February, p.267.

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

considerable number of labour hire workers who remain in the same placement for over 12 months: 13 per cent of RCSA members' workers and 18 per cent of non-RCSA members' workers.[94]

Given the relatively recent growth of the labour hire industry, it is inevitable that many questions will remain unanswered with respect to the long-term implications of the use of labour hire employment. The Committee believes that it is impossible to accurately foretell what the consequences of labour hire will be for the future of working arrangements in general. However, the Committee has identified some specific areas in which the use of labour hire arrangements appear to be having an immediate impact: the use of casual employment, occupational health and safety and workers' compensation and skills formation. These areas were discussed in the Interim Report and will be further discussed in Chapters 3, 4 and 5 of this report.

[94] Linda Brennan, Michael Valos and Kevin Hindle, 2003. *On-hired Workers in Australia: Motivations and Outcomes*. Occasional Research Report, Melbourne, RMIT University, School of Applied Communication, p.24.

Chapter 3

Casual employment and the labour hire industry

3.1 Introduction

Australia's workforce has been undergoing a steady process of casualisation over the past 20 years. It is estimated that the proportion of the Australian workforce engaged on a casual basis has increased dramatically over recent years, to the extent that around 25 per cent of Australian workers are now casual employees.[1]

The Committee was instructed by its terms of reference to consider whether labour hire arrangements have contributed to the casualisation of the work force. It is clear that the growth of labour hire arrangements is closely linked to the general growth of flexible, non-standard jobs and, as a result, any consideration of labour hire raises issues relating to the casualisation of the workforce. The Committee considered such issues briefly in its Interim Report and indicated that in the Final Report it would give these issues further consideration.[2]

Labour hire employment is not synonymous with casual employment: for example, many labour hire workers are engaged as independent contractors. However, labour hire companies predominantly use, and are major suppliers of, casual labour. According to recent figures from the Australian Bureau of Statistics (ABS), around 80 per cent of labour hire employees are engaged on a casual basis.[3]

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1 Australian Bureau of Statistics, 2000. *Australian Social Trends 2000*, Cat. No. 4102.0.

2 Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria.* Parliament of Victoria, Melbourne, December, p. vii.

3 Casual employees were defined as employees without paid leave entitlements for the purposes of these figures. Australian Bureau of Statistics, 2000. *Australian Social Trends 2000*. Cat. No. 4102.0.

3.2 What is casual employment?

There is no single, clear definition of casual employment, nor does it have a fixed common law meaning.[4] As noted by Tham, legal definitions of casual employment vary according to the regulatory instrument under consideration.[5] Creighton and Stewart observe that, the term 'casual' is a 'colloquial and ill-defined expression'.[6] Colloquially, a casual employee has often been defined as an employee who works on an ad hoc basis, without any regular or systematic pattern of working hours[7] and without any expectation of ongoing employment. However, O'Donnell points out that the term casual employment has been used to describe a diverse range of employment arrangements since the early 20th century.[8]

One of the most significant indicators of casual employment is often considered to be the absence of paid leave entitlements such as annual leave, sick leave, public holidays, bereavement leave or carer's leave.[9] Equally, casuals do not usually have any right to periods of notice in the event of a termination of employment or severance payments in the event of a redundancy.[10]

For the purposes of gathering statistical data on casual employees, the ABS has defined casual employees as employees without paid leave entitlements.[11] The advantage of this definition is that it makes allowance for the diversity of casual employment. As noted by O'Donnell:

> *… most entrants to the labour market in the past 25 years have an understanding of casual employment, drawn from experience, that*

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4 See for example: *Doyle v Sydney Steel Co Ltd* (1936) 56 CLR 545.

5 Joo-Cheong Tham, 2004. 'Employment Security of Casual Employees: A Legal Perspective', paper presented at New Economies: New Industrial Relations? Conference, Noosa, 3-6 February.

6 Breen Creighton and Andrew Stewart, 2005. *Labour Law* (4th ed). Sydney, The Federation Press, p.293.

7 See, for example: Greg Murtough and Matthew Waite, 2000. *The Growth of Non-Traditional Employment: Are Jobs Becoming More Precarious?*. Productivity Commission Staff Research Paper, AusInfo, Canberra, p.8.

8 Anthony O'Donnell, 2004. '"Non-standard" workers in Australia: Counts and Controversies'. *Australian Journal of Labour Law*, Vol. 17, pp.89-116 at p.101.

9 Iain Campbell, Ian Watson and John Buchanan, 2004. 'Temporary agency work in Australia (Part I)' in John Burgess and Julia Connell (eds), 2004. *International Perspectives on Temporary Agency Work*. London, Routledge, pp.129-144 at pp. 133-134.

10 The Australian Industrial Relations Commission reaffirmed, in the recent *Redundancy Case*, that casual employees are generally not entitled to severance pay on redundancy: (2004) 129 IR 155.

11 Anthony O'Donnell, 2004. '"Non-standard" workers in Australia: Counts and Controversies'. *Australian Journal of Labour Law*, Vol. 17, pp.89-116 at p.92.

> *encompasses both part-time and full-time work, both regular and irregular work, both ongoing and discontinuous work, yet work which doesn't entail paid sick leave or holiday leave …*[12]

Industrial awards and agreements often define casual employees as employees without paid leave entitlements, and as a result they are entitled to the payment of a loading. The loading aims to compensate casual workers for forgoing paid leave entitlements and job security and is usually in the range of 15 to 20 per cent on top of the base salary. Industrial awards and agreements may also simply define casual employees as those 'who are engaged and employed as such'. There has been a problem with casuals often being defined as 'any worker so defined'[13] – an unhelpful, circular definition which says more about the definitional problem than offering a way of resolving it.

In some instances, the payment of the casual loading means that casuals are paid more than permanent employees for the same work. However, the size of the loading varies according to industry, gender[14] and full-time or part-time status.[15] Even where casual employees do receive a loading, the Committee was told that permanent employees are more likely to receive above award payments and be employed in higher classifications. The Committee heard evidence from Dr Iain Campbell that some workers receive a casual loading calculated on a base rate which is significantly lower than what is paid to the permanent worker in the same workplace.[16] Ms Elsa Underhill told the Committee that casual employees who are not engaged under an award do not have a legal entitlement to a casual loading.[17]

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12 Anthony O'Donnell, 2004. "'Non-standard" workers in Australia: Counts and Controversies'. *Australian Journal of Labour Law*, Vol. 17, pp.89-116 at p.97.

13 Barbara Pocock, John Buchanan and Iain Campbell, 2004. *Securing Quality Employment: Policy Options for Casual and Part-time Workers in Australia*. Chifley Research Centre, April, p.20.

14 On average, women receive a loading of between 10 to 20 per cent, while men receive one of 20 to 30 per cent. John Buchanan, 2004. 'Paradoxes of significance: Australian casualisation and labour productivity'. Paper presented to the conference on *Work Interrupted: Casual and Insecure Employment in Australia*, Melbourne, p.16.

15 John Buchanan, 2004. 'Paradoxes of significance: Australian casualisation and labour productivity'. Paper presented to the conference on *Work Interrupted: Casual and Insecure Employment in Australia*, Melbourne, p.15.

16 I. Campbell, 2005. Minutes of Evidence, 21 February, p.270.

17 E. Underhill, 2004. Minutes of Evidence, 28 July, p.51.

As noted above, there is considerable variation in the number of hours worked by casual employees on a weekly basis. However, although the number of full-time casuals has risen over the past two decades, part-time hours are particularly prevalent amongst casuals.[18] Recently released ABS data indicates that just over 75 per cent of casual employees work less than 35 hours per week.[19]

As a result of its recent overseas investigations, the Committee came to realise that in Europe, by and large, there is no 'casual' form of employment. As discussed in Chapter 7, the predominant form of temporary employment in Europe is akin to the Australian form of fixed term employment. In fact, only two countries seem to have a category of 'casual employment' that resembles in any way the Australian category: the United Kingdom and New Zealand. This can be at least partly explained due to the similarity in the regulatory history of the three countries.[20]

3.3 Extent of casualisation

The ABS has estimated that 69 per cent of net growth in the number of employees between August 1988 and August 1998 was in casual employment.[21] The growth of the casual workforce in the 1990s to about 25 per cent of all workers reveals casualisation as an important part of a dualistic structure in Australia which distinguishes the permanent from the non-permanent waged work and is marked by the lesser working conditions of the casuals.[22] Levels of casual employment have grown in all demographic categories but particularly amongst males and younger workers aged 15 to 24 years.[23]

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18 John Buchanan, 2004. 'Paradoxes of significance: Australian casualisation and labour productivity'. Paper presented to the conference on *Work Interrupted: Casual and Insecure Employment in Australia*, Melbourne, p.16.

19 Australian Bureau of Statistics, 2005. *Forms of Employment 2004*, Cat. No. 6359.0.

20 Iain Campbell, 2004. 'Casual Work and Casualisation: How does Australia compare?' Revised version of paper presented to the conference on *Work Interrupted: Casual and Insecure Employment in Australia*, Melbourne, p.13.

21 Australian Bureau of Statistics, 1999. *Labour Force, Australia*, Cat. No. 6203.0, July.

22 Iain Campbell, 2004. 'Casual Work and Casualisation: How does Australia compare?' Revised version of paper presented to the conference on *Work Interrupted: Casual and Insecure Employment in Australia*, Melbourne, p.24.

23 For many young adults, casual work is now their only way into paid employment. Ian Watson, John Buchanan, Iain Campbell and Chris Briggs, 2003. *Fragmented Futures*. Sydney, The Federation Press, p.67.

While there are many reasons for the increased casualisation of the Australian workforce, the Committee considered two important elements to explain the growth. One relates to the changing Australian political economy of the 1980s and 1990s as it responded to the changes in the global economy: government policies were implemented which sought to improve international competitiveness and these policies in turn encouraged employers to seek greater labour market flexibility.[24] Another contributing reason was given by Mr Robert Barber of Adecco in a paper presented to a recent conference. Mr Barber argued that Australian governments have provided little option between permanent employment and casual employment and this has served to assist the growth of casualisation.[25]

The expansion in Australia's casual workforce has been anything but planned, in the sense that while the broader political-economic influences contributed to the growth, it was not itself the product of any particular regulatory changes by government.[26] As well as being an unplanned phenomenon, the distribution across industries cannot be attributed to any policy measures at any level of government in Australia.

If we assume the lack of leave entitlements as indicating casual employment, then a core of industries where casual employment is concentrated are the retail trade, hospitality, property and business services, and health and community services.[27] As Table 3.1 shows, the number of casual employees in these industry sectors far exceeds those in other industries.

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24 See, for a discussion: John Mangan and Christine Williams, 1999. 'Casual Employment in Australia: A Further Analysis', *Australian Economic Papers*, Vol. 38 No. 1, March, p.40.

25 Robert Barber, 2004. 'Casualisation, Labour Hire, and the Need for Regulation'. Paper presented to the *Workforce* National Conference, 23 August, p.7.

26 For a brief comparison with other countries' regulatory changes, see: Iain Campbell, 2004. 'Casual Work and Casualisation: How does Australia compare?' Paper presented to *Work Interrupted: Casual and Insecure Employment in Australia Conference*, Melbourne, p.18.

27 Ian Watson, John Buchanan, Iain Campbell and Chris Briggs, 2003. *Fragmented Futures*. Sydney, The Federation Press, p.69.

Table 3.1: Casual employment[28] in industry divisions, 1985-2002

Industry	2002 (No.)	1985 (%)	1994 (%)	2000 (%)	2002 (%)
Agric, forestry & fishing	85,200	38.0	47.6	56.7	54.0
Mining	7,600	2.0	9.3	9.2	9.5
Manufacturing	171,400	8.0	13.3	15.0	16.2
Electricity, gas & water	*4,500	1.0	*	*5.8	*6.7
Construction	135,400	18.0	30.2	31.1	32.0
Wholesale trade	84,700	10.0	14.5	17.8	21.6
Retail trade	547,900	33.0	44.4	45.2	44.8
Accomm, cafes & restaur	226,800	50.0	54.4	57.4	56.4
Transport & storage	83,200	10.0	16.9	23.9	24.9
Communication services	20,600	4.0	7.5	15.0	14.5
Finance & insurance	41,600	4.0	6.8	11.7	12.9
Property & bus services	249,600	19.0	26.9	31.8	27.5
Govt admin & defence	32,200	8.0	8.4	7.7	8.2
Education	122,700	15.0	15.9	17.1	18.5
Health & commun services	197,800	18.0	21.2	21.8	22.5
Cultural & recreat services	80,600	30.0	44.2	44.1	39.5
Personal & other services	68,400	21.0	21.4	22.6	24.6
Total Industries	2,160,300	16.0	23.7	27.3	27.3

Source: Ian Watson, John Buchanan, Iain Campbell and Chris Briggs, 2003. *Fragmented Futures.* Sydney, The Federation Press, p.69.

Note: *relative standard error greater than 25 per cent.

3.4 Issues associated with casualisation

3.4.1 Job Satisfaction

The Committee noted that some studies[29] have shown that a sizeable proportion of casuals express reasonably high levels of satisfaction with their jobs. This level of self-reported satisfaction amongst casual workers is largely the result of the flexibility offered by such work. However, while many casual workers are generally satisfied with their jobs, this does not mean they are satisfied with the fact that their jobs are

[28] For the purpose of this table, casual employees are defined as those employees without paid leave entitlements.

[29] See for example: M. Wooden and D. Warren, 2003. *The Characteristics of Casual and Fixed-Term Employment: Evidence from the HILDA Survey*. Working Paper No. 15/03, Melbourne Institute of Applied Economic and Social Research, University of Melbourne, June.

casual[30] in the sense that, while a casual may like her/his job, that does not mean that they like the casual terms that go with the job.[31] As is the case with any worker, satisfaction with a particular job does not, of itself, tell us anything about the quality of the job and for casual workers, one measure of satisfaction that elicits more negative responses across all categories of casuals is that relating to job security.[32] The lack of job security is a key characteristic of casual employment and will be discussed briefly in terms of federal labour laws.

The Committee notes that other factors which may affect job satisfaction for casual employees are the lack of paid leave entitlements (see Chapter 4 for a discussion of how this impacts on workplace health and safety) and the poor access to training and skill development opportunities that is associated with temporary work (see Chapter 5).

3.4.2 Unfair dismissal under the Workplace Relations Act 1996

With regard to the matter of employment protection for casual employees in Victoria, the most important issue is the extent to which the unfair dismissal procedures under the federal *Workplace Relations Act 1996* (WRA) apply to casuals. The WRA makes a distinction between long-term casuals and short-term casuals for the purposes of unfair dismissal. If a casual employee is engaged on a regular and systematic basis for at least 12 months and has a reasonable expectation of continuing employment, then that employee is not excluded from lodging an unfair dismissal claim with the Australian Industrial Relations Commission. Short-term casual employees – those engaged for less than 12 months – are excluded from the unfair dismissal jurisdiction under section 170CBA.[33]

The Australian Education Union, in its submission to the Committee, argued that employers were avoiding their award obligations through the use of casuals and were

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30 Ian Watson, 2004. *Contented Casuals in Inferior Jobs? Reassessing Casual Employment in Australia*. Working Paper No. 94, ACIRRT, University of Sydney, p.7

31 See for a discussion: Barbara Pocock, Ros Prosser and Ken Bridge, 2005. 'The return of "labour-as-commodity"? The experience of casual work in Australia.' Paper presented to the conference on *Reworking Work*, Association of Industrial Relations of Australia and New Zealand, Sydney, February 9-11.

32 Ian Watson, 2004. *Contented Casuals in Inferior Jobs? Reassessing Casual Employment in Australia*. Working paper No. 94, ACIRRT, University of Sydney, p.4.

33 *Nightingale v Little Legends Childcare* (2004) 134 IR 111.

doing this in such a way as to ensure there was no remedy under the unfair dismissal laws.[34]

The Federal Government has recently announced that it will introduce legislation by January 2006 that is likely to have an impact on the rights of some of those casual workers currently eligible to take an action for unfair dismissal. Under the foreshadowed legislation, all employees – including permanent employees – employed by a business with less than 100 employees will no longer be eligible to take such an action.[35]

3.4.3 Flexibility and cost advantage to employer

The Committee was presented with arguments by the Recruitment and Consulting Services Association (RCSA) that many labour hire workers valued the flexibility that their casual work gave them and that this also brought with it diversity, which could relate to the contemporary lifestyle of many workers.[36] In a submission from Labour Force Australia Pty Ltd, the Committee was advised that with changing worker lifestyles, different categories of employment offer different benefits over others and that labour hire companies were servants of workers who shopped around for jobs.[37] Skilled Engineering, in its submission to the Committee, argued that labour hire employment served to 'bridge the gap' for the temporary unemployed, enabling them to work between jobs, while it had advantages for businesses by providing both flexibility and increased productivity.[38]

On the other hand, the Committee also received submissions from the Australasian Meat Industry Employees' Union (AMIEU) who advised that for their casual members, there was no flexibility as they had to work when required or they would not be called back.[39] Dr Iain Campbell told the Committee that recent research by Pocock, Prosser and Bridges showed that most casual workers seeking continued work had to always make themselves available.[40] Pocock, Prosser and Bridges

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34 Australian Education Union, 2004. Submission No. 18, 4 March, p.5.
35 Misha Schubert, 2005. 'Howard's Workplace Revolution', *The Age*, May 27, p.1.
36 Recruitment and Consulting Services Association, 2004. Submission No. 15, 25 February, pp.43-44.
37 Labour Force Australia Pty Ltd, 2003. Submission No. 4, 19 December, pp. 2, 6.
38 Skilled Engineering, 2004. Submission No. 16, 26 February, pp. 7-8, 23.
39 Australasian Meat Industry Employees' Union, 2003. Submission No. 11, 23 December, p.2.
40 I. Campbell, 2005. Minutes of Evidence, 21 February, p.270.

interviewed casual employees of both sexes, across industry and occupation, three views became evident from the casuals interviewed about their experience as a casual: some positive (about a quarter of the group), some ambivalent (a smaller group) and some negative (a much larger group).[41] In this study, more than half felt that they had no real flexibility and that their working lives were often determined at short notice.

The Committee came to the view that there is little doubt that casual employment offers real economic advantages to employers. However the nature and extent of these advantages varies according to the industry and the workplace. In evidence before the Committee, Dr Iain Campbell said that the advantages for employers may include lower labour costs, greater ease in dismissing these workers, and the ability to use labour to match fluctuations in workload.[42] To this could be added the opportunity provided to employers to assess the suitability of workers prior to employing them permanently.

3.4.4 Lack of financial security

An important issue for casual workers, including those employed by labour hire agencies, is that of financial insecurity. As well as the uncertainty for many as to whether they will be offered continuing employment, the Committee received submissions and heard evidence of the difficulty casual workers have in securing bank loans, such as for the purchase of a home. Dr Iain Campbell, referring to interview-based data, told the Committee that casual employees often complained that when going to a bank to apply for a loan, they were required to show they had secure employment and without this found their applications were declined.[43]

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41 This telephone study of 55 interviewees was conducted by Barbara Pocock, Rosslyn Prosser and Ken Bridge in 2004: *"Only a casual…": How Casual Work Affects Employees, Households and Communities in Australia*. Labour Studies, School of Social Science, University of Adelaide, July, pp.25-26.

42 Iain Campbell, 2004. 'Casual Work and Casualisation: How does Australia compare?' Revised version of paper presented to *Work Interrupted: Casual and Insecure Employment in Australia Conference*, Melbourne, p.12.

43 I. Campbell, 2005. Minutes of Evidence, 21 February, p.272.

The AMIEU's submission[44] referred to the difficulty its casual members had in securing loans. Mr Graeme Wheeler of WV Management Limited acknowledged this problem and gave evidence to the Committee that his agency had taken positive steps to address the issue. Mr Wheeler told the Committee that where a casual employee from WV Management seeks a bank loan, WV Management provides them with a statement of their earnings and letter of support, which confirms the continuing (albeit casual) nature of the employment relationship.[45] The Committee also received evidence from Adecco regarding tailored financial services that are available to its employees.[46]

The problem of accessing loans by labour hire workers has been acted on recently by the peak body for the labour hire industry, the RCSA. The RCSA has entered into an arrangement with the Bank of Queensland whereby a temporary or labour hire worker with 6 months' continuous employment with an RCSA member will be considered eligible for home loans, as well as for other credit and financial services.[47] Whilst in the United Kingdom, the Committee was informed that one major temporary work agency had entered into arrangements with Abbey National Bank for temporary agency workers to access mortgages.[48] The Committee acknowledges that the lack of financial security is an issue of growing importance with the rising levels of casual employment and the increasing lack of affordability of housing.

Recommendation 3.1

The Committee recommends that the Victorian Government, directly and in conjunction with the Federal Government, encourage the finance industry to develop improved opportunities for non-standard workers, such as labour hire workers and casual employees, to obtain finance for loans, especially home loans.

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44 Australasian Meat Industry Employees' Union, 2003. Submission No. 11, 23 December, p.2.
45 G. Wheeler, WV Management, 2004. Minutes of Evidence, 27 July, p.28.
46 Adecco, 2004. Submission No. 30, 1 October, pp.22-25.
47 Recruitment and Consulting Services Association, 2005. *Home loans now a possibility for on-hired employees*. Media release, Melbourne, 9 May.
48 Committee discussions with Professor Janet Druker, Assistant Principal, Canterbury Christ Church University, London, 1 April 2005.

3.5 Influence of labour hire agencies on the growth of casual employment

From both the evidence and the submissions received, the Committee was presented with a mixed picture as to the influence of labour hire arrangements on the casualisation of the workforce. The Committee was made aware that while the great majority of labour hire workers are casuals, they are still only about 6 per cent of the total number of casuals. In other words, 94 per cent of casual workers are directly employed.[49] Therefore, the Committee was mindful that any attempt to regulate labour hire agencies in respect of their employment of casuals must not result in the creation of more directly employed casuals.[50]

In its evidence to the Inquiry, the ACTU argued that instead of promoting greater permanency for workers, labour hire agencies do the opposite by maintaining workers on a casual basis and, in their view, thereby undermine the terms and conditions of the rest of the workforce.[51] The AMIEU, in evidence before the Committee, disaggregated the labour hire industry and referred to those labour hire agencies which employed workers on a casual basis as being the worst aspect of the labour hire industry.[52] Similarly, in its submission to the Committee, the Australian Manufacturing Workers' Union was of the view that those labour hire agencies which employ workers as casuals are the main mechanism through which employers are no longer using casuals to supplement labour, but rather to replace the permanent workforce.[53] In its submission to the Inquiry, the Electrical Trades Union (Southern Branch) was equally strident and argued that the growth in labour hire employment has contributed to the development of the 'dual employment relationships' of permanent and temporary workers.[54]

Another witness before the Committee, Mr Luis Fleiszig of A.B. Oxford Cold Storage Co. Pty Ltd, advised the Committee that his firm seeks to only use the labour hire workers who are employed as casuals, as a preliminary (of about one year's duration) to permanent employment.[55] In a similar vein, the Master Builders

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49 I. Campbell, 2005. Minutes of Evidence, 21 February, p.269.
50 I. Campbell, 2005. Minutes of Evidence, 21 February, p.269.
51 R. Marles, ACTU, 2004. Minutes of Evidence, 13 September, p.132.
52 G. Bird, Australasian Meat Industry Employees' Union 2004. Minutes of Evidence, 28 July, p.69.
53 Australian Manufacturing Workers' Union, 2004. Submission No. 17, 27 February, p.6.
54 Electrical Trades Union (Southern Branch), 2003. Submission No. 8, 19 December, p.5.
55 L. Fleiszig, A.B. Oxford Cold Storage Co. Pty. Ltd., 2004. Minutes of Evidence, 4 October, p.183.

Association of Victoria referred to labour hire employment as providing an opportunity for these workers to get into full-time employment and provide employers with the opportunity to assess their performance before providing them with more secure employment.[56]

The Committee acknowledges that while labour hire employment constitutes only a small proportion of total casual employment in Australia, it is significant that the majority of labour hire workers are engaged as casual employees. Furthermore, the Committee considers that the nature of the labour hire industry and its employment relationships is such as to encourage casual employment and that this is a matter for ongoing concern.

The Committee believes that the labour hire industry is not solely responsible for the rise of casual employment in Australia, nor are issues associated with casual employment confined to the labour hire industry. During the course of the Inquiry, the Committee heard evidence about a number of issues faced by casual employees, such as financial and employment insecurity and the consequent difficulties in procuring a bank loan. The Committee is concerned by the current levels of casualisation in the Australian workforce, and considers that the growth and the implications of casual employment is an area that merits further consideration.

Recommendation 3.2

The Committee recommends that the Victorian Government make representations to the Federal Government to conduct an inquiry into casual employment, with particular reference to the terms and conditions of casual employment.

[56] Master Builders Association of Victoria, 2003. Submission No. 10, 22 December, p.5.

Chapter 4

Occupational health and safety and workers' compensation

4.1 Introduction

Changing work arrangements, including the growth of labour hire, are being increasingly recognised throughout the world as one of the most significant emerging issues in relation to the management of workplace health and safety.[1] As noted by Professor Richard Johnstone, workplace health and safety is a matter of great importance for the community:

> *Work-related illness and injury impose great costs on Australian society, both in terms of human suffering and a reduction in economic performance.*[2]

The National Occupational Health and Safety Commission estimates that poor occupational health and safety (OHS) performance results annually in a national economic cost of $31 billion dollars.[3]

In the Interim Report, the Committee considered how the use of labour hire arrangements affects OHS and workers' compensation.[4] The Committee notes that there are a number of labour hire companies that are highly conscientious with respect to OHS and are achieving excellent OHS outcomes.[5] Unfortunately, the evidence received by the Committee indicated that, overall, the labour hire industry has a higher than average workplace injury rate. Consequently, the Committee made a number of recommendations in the Interim Report aimed at improving health and safety outcomes in the labour hire industry.[6] In particular, the Committee

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1 Richard Johnstone, Michael Quinlan and David Walters, 2004. *Statutory OHS Workplace Arrangements for the Modern Labour Market*. Working Paper 22, National Research Centre for OHS regulation, Australian National University, January, p.2.

2 Richard Johnstone, 2004. *Occupational Health and Safety Law and Policy* (2nd ed). Sydney, Lawbook Company, p.20.

3 National Occupational Health and Safety Commission, 2005. *National OHS strategy*, at <www.nohsc.gov.au/AboutNohsc/Strategy>.

4 Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December, pp.35-51.

5 Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December, pp.49-51.

6 Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December, pp. 43-44, 55, 59.

recommended the establishment of an OHS registration system to enable tighter scrutiny of the labour hire industry.[7]

This chapter builds on the Interim Report's findings and recommendations on OHS and workers' compensation, making particular reference to written comments that the Committee sought and received following the tabling of the Interim Report. This chapter aims, as far as possible, to integrate its discussion of OHS and workers' compensation, in recognition of the interlocking goals of the regulatory regimes governing these two areas.

4.2 Evidence regarding the impact of labour hire on occupational health and safety and workers' compensation

4.2.1 The international context

There is now a considerable body of international work that indicates a strong correlation between the use of flexible forms of employment, such as labour hire, and diminished health and safety in the workplace.[8]

A comprehensive review of international studies by Quinlan, Mayhew and Bohle found that there are clear links between contingent employment and adverse OHS outcomes.[9] Quinlan notes that this body of international work is steadily growing and that more recent evidence continues to reinforce the view that certain types of contingent work lead to the deterioration of workplace health and safety.[10]

In terms of particular studies of labour hire employment, Quinlan, Mayhew and Bohle found that there were 19 studies that linked adverse OHS outcomes to labour hire, as

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7 Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December, p.78.

8 Michael Quinlan, 2004. 'Flexible Work and Organisational Arrangements' in Liz Bluff, Neil Gunningham and Richard Johnstone (eds). *OHS Regulation for a Changing World*. Sydney, The Federation Press, pp.120-145 at p.120.

9 Referred to in: Michael Quinlan, 2004. 'Flexible Work and Organisational Arrangements' in Liz Bluff, Neil Gunningham and Richard Johnstone (eds). *OHS Regulation for a Changing World*. Sydney, The Federation Press, pp.120-145 at p.123.

10 Michael Quinlan, 2004. *Flexible Work and Organisational Arrangements – Regulatory Problems and Responses*. Working Paper 16, National Research Centre for OHS Regulation, Australian National University, July, pp.3-5.

opposed to six studies that found either positive outcomes or no particular effect.[11] Similarly, in her review of international and local studies, Underhill commented that there is a 'remarkable amount of consistency', with almost all studies associating labour hire with poorer OHS outcomes for workers.[12]

During its overseas investigations on labour hire, the Committee was told by Mr José Ramon Biosca de Sagastuy of the Directorate-General for Employment and Social Affairs at the European Commission that temporary workers in Europe have a much higher rate of injury than permanent workers.[13] This view is supported by Storrie who, in his comprehensive 2002 review of labour hire in Europe, refers to French and Belgian surveys which found that agency workers are exposed to more serious health and safety risks than non-agency workers.[14] As a result of concerns regarding the workplace health and safety of temporary workers, such as labour hire workers, the European Commission introduced Directive 91/383/EEC to regulate health and safety conditions for temporary workers.[15]

4.2.2 Study of Victorian workers' compensation claim rates in the labour hire industry

In 2001, the Victorian WorkCover Authority (VWA) commissioned Ms Elsa Underhill of Victoria University to research the extent of OHS issues in the labour hire industry in Victoria. The resulting report, *Extending Knowledge on Occupational Health and Safety and Labour Hire Employment: A Literature Review and Analysis of Victorian Workers' Compensation Claims* (the 'Underhill Report'), was published in October

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11 A further 11 studies were considered but the results were deemed indeterminate as a result of a lack of control or benchmark or the results were too mixed or ambiguous to assign an outcome. Cited in Michael Quinlan, 2004. *Flexible Work and Organisational Arrangements – Regulatory Problems and Responses*. Working Paper 16, National Research Centre for OHS Regulation, Australian National University, July, p.4.

12 Elsa Underhill, 2002. *Extending Knowledge on Occupational Health and Safety and Labour Hire Employment: A Literature Review and Analysis of Victorian Workers' Compensation Claims.* Report for WorkSafe Victoria, Melbourne, October, p.19.

13 Committee discussion with Mr José Ramon Biosca de Sagastuy, Head, Health and Safety Unit, Directorate-General for Employment and Social Affairs, European Commission, Brussels, 4 April 2005.

14 For example, in Belgium, blue collar agency workers have been found to have significantly higher accident rates and more serious accidents than non agency workers. Agency workers in France are more likely to undertake manual handling of weights and also have a significantly higher occupational accident rate than non agency workers. Donald Storrie, 2002. *Temporary agency work in the European Union*. European Foundation for the Improvement of Living and Working Conditions, Dublin, p.51.

15 For a discussion of the directive, see: Donald Storrie, 2002. *Temporary agency work in the European Union*. European Foundation for the Improvement of Living and Working Conditions, Dublin. p.49.

2002.[16] The Underhill Report included a literature review of local and international research into labour hire employment, a review of local and international OHS guidance material on labour hire arrangements and a detailed analysis of workers' compensation claims of labour hire employees in Victoria between 1994 and 2001.

The specific implications of labour hire arrangements for Victoria are spelt out by Ms Underhill's analysis of WorkSafe Victoria's data base of workers' compensation claims. After analysing the claims made during the period 1994-95 to 2000-01, Ms Underhill concluded that the pattern of workers' compensation claims in Victoria conforms to the international pattern outlined above; that is, labour hire employees have more frequent and more severe injuries than direct hire employees.[17]

Ms Underhill used a range of measures to analyse the Victorian data. Firstly, the growth in claims was compared to the growth in employment levels (as measured by the total amount of remuneration). Over the period examined, Ms Underhill found that the number of workers' compensation claims for the labour hire industry grew at a faster rate than the total remuneration for the sector: total remuneration grew by 291 per cent while the number of claims increased by 365 per cent. This growth pattern contrasted dramatically with the rest of the VWA's workers' compensation scheme (the 'Scheme'), where total remuneration for non labour hire workers increased by 19 per cent in the same period, but the number of workers' compensation claims remained fairly static.[18]

Another measure used to assess the workers' compensation profile of the labour hire industry was the claims frequency ratio. This is calculated by dividing the number of claims by the amount of remuneration in the sector. Ms Underhill found that the frequency rate for the labour hire industry fluctuated considerably from 1994-95 to

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

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

18 Elsa Underhill, 2002. *Extending Knowledge on Occupational Health and Safety and Labour Hire Employment: A Literature Review and Analysis of Victorian Workers' Compensation Claims.* Report for WorkSafe Victoria, Melbourne, October, p.80.

2000-01, while the non labour hire rate showed a clear and consistent decline over the same period.[19]

Ms Underhill also examined patterns relating to the occupational distribution of claims by labour hire employees and non labour hire employees. Ms Underhill found that the occupational distribution of labour hire claims differed substantially from that of non labour hire employees, and changed over time. In 1994-95, injured labour hire employees were more likely to be tradespersons and related workers. However, by 2000-01, injured labour hire workers were more likely to be located in high risk semi-skilled or unskilled occupations, such as intermediate production and transport workers, and labourers and related workers. Over the same period, the occupational distribution of the rest of the Scheme has remained stable.[20]

Another important finding made by the Underhill Report was that younger people (excluding apprentices and trainees)[21] were disproportionately represented amongst injured labour hire workers. Since 1994-95, approximately 20 per cent of labour hire claims have come from young employees under the age of 25, compared to 11 per cent for non labour hire employees.[22]

In terms of the duration of labour hire workers' claims, Ms Underhill found that the labour hire industry was responsible for a higher level of claims requiring up to one year's compensation but for a lower level of claims requiring less than 10 days off.[23] Ms Underhill notes that this pattern may be the result of one or more of a number of factors. On the one hand, labour hire workers' compensation claims may involve more serious injuries that require a longer period of recuperation. Alternatively, the

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19 Elsa Underhill, 2002. *Extending Knowledge on Occupational Health and Safety and Labour Hire Employment: A Literature Review and Analysis of Victorian Workers' Compensation Claims.* Report for WorkSafe Victoria, Melbourne, October, p.43.

20 Elsa Underhill, 2002. *Extending Knowledge on Occupational Health and Safety and Labour Hire Employment: A Literature Review and Analysis of Victorian Workers' Compensation Claims.* Report for WorkSafe Victoria, Melbourne, October, p.44.

21 Ms Underhill considered the workers' compensation claims of apprentices and trainees in a separate study for the Victorian WorkCover Authority: Elsa Underhill, 2002. *An Analysis of Apprentice and Trainee Worker's Compensation Claims in Victoria, 1994/95-2000/01*. Report prepared for WorkSafe Victoria, Melbourne, August. This study is discussed in Chapter 5.

22 Elsa Underhill, 2002. *Extending Knowledge on Occupational Health and Safety and Labour Hire Employment: A Literature Review and Analysis of Victorian Workers' Compensation Claims.* Report for WorkSafe Victoria, Melbourne, October, pp.81-82.

23 Elsa Underhill, 2002. *Extending Knowledge on Occupational Health and Safety and Labour Hire Employment: A Literature Review and Analysis of Victorian Workers' Compensation Claims.* Report for WorkSafe Victoria, Melbourne, October, p.98.

duration of labour hire workers' claims may draw out because the labour hire agency is unable to provide lighter work duties for rehabilitation purposes.[24]

As noted by the Committee in the Interim Report, Ms Underhill's research for the VWA is the most comprehensive study of its kind on the impact of labour hire arrangements on OHS in Victoria and provides an important profile of the workers' compensation claims rate of labour hire employees. Following its recommendation in the Interim Report, the Committee believes that the VWA should continue to commission research – through Ms Underhill and others – that scrutinises the OHS performance of the labour hire industry.[25] The Committee notes Ms Underhill's suggestions for research on the long-term health effects of labour hire employment and the effect of management practices on the improvement of OHS practice.[26]

4.2.3 Recent evidence from the Victorian WorkCover Authority

Mr Greg Tweedly of the VWA provided the Committee with the most recently collected data on the workers' compensation claims rate of the Victorian labour hire industry, for the period 1997-98 to 2003-04. Mr Tweedly gave evidence to the Committee regarding two key indicators that the VWA had used to measure the rate of claims in the labour hire industry:

- the claims frequency ratio (where the number of workers' compensation claims is compared to total remuneration); and
- the claims cost ratio (where the total cost of workers' compensation claims is measured against the total remuneration).

According to both of these measures, the labour hire industry has a significantly higher rate of workers' compensation claims than the Scheme as a whole.

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24 Elsa Underhill, 2002. *Extending Knowledge on Occupational Health and Safety and Labour Hire Employment: A Literature Review and Analysis of Victorian Workers' Compensation Claims.* Report for WorkSafe Victoria, Melbourne, October, pp.98-99.

25 Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*. Melbourne, Parliament of Victoria, December, p.38.

26 For other areas that Ms Underhill considers worthy of further investigation, see: Elsa Underhill, 2002. *Extending Knowledge on Occupational Health and Safety and Labour Hire Employment: A Literature Review and Analysis of Victorian Workers' Compensation Claims*. Report for WorkSafe Victoria, Melbourne, October, p.5.

The claims frequency ratio for the labour hire industry – 0.57 claims per $1 million remuneration – is significantly higher than that of the rest of the Scheme – 0.38 claims per $1 million. This is mostly as a result of the much higher claims frequency ratio for blue collar labour hire workers at 1.03 claims per $1 million. In comparison, the non labour hire blue collar rate is 0.62 claims per $1 million. However, the claims frequency ratio for labour hire and non labour hire white collar workers is the same, at 0.3 claims for $1 million.[27]

Mr Tweedly also gave evidence to the Committee that the claims cost ratio is over 35 per cent higher for the labour hire industry than the rest of the Scheme as a whole.[28] This is consistent with the Underhill Report finding that labour hire workers are more likely to lodge claims of longer duration than non labour hire workers. Mr Tweedly submitted that labour hire agency employers have a claims cost ratio of 2.02, while the rest of the Scheme has a ratio of 1.28. The higher claims cost ratio for the labour hire industry is mostly a result of the high ratio of blue collar agencies, which have a claims cost ratio of 3.75, compared to the ratio of 2.21 for non labour hire blue collar employers. At 1.03, the claims cost ratio for labour hire white collar agencies is roughly similar to the ratio of 0.94 for non labour hire white collar employers.[29]

The Committee believes that it is important to note that, on the indicators presented by Mr Tweedly, there has recently been some improvement in the claims frequency ratio for the labour hire industry, particularly the blue collar labour hire sector. Indeed, Mr Tweedly noted that the claims frequency ratio for blue collar labour hire agencies has reduced by 27 per cent during the period 1997-98 to 2003-04, representing a faster rate of improvement than the rest of the Scheme, which improved at 17 per cent over the same period. However, Mr Tweedly cautioned that there is still considerable scope for further improvement, given that the claims frequency rate of the labour hire blue collar sector remains considerably higher than the Scheme's rate.[30]

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27 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, p.237.
28 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, p.238.
29 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, p.238.
30 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, p.238.

4.2.4 Evidence from the labour hire industry

The Committee considers that the high rate of workers' compensation claims for the labour hire industry suggests that the OHS conditions for labour hire employees are not equivalent to those enjoyed by non labour hire employees. However, the Committee acknowledges that a number of labour hire agencies are taking a positive and proactive approach to ensuring high standards of workplace health and safety.

Mr Charles Cameron, speaking on behalf of the Recruitment and Consulting Services Association (RCSA), acknowledged that the labour hire industry still has 'work to be done' on OHS compliance, but argued that there is a clear trend towards improvement.[31] The Committee received detailed evidence from a number of labour hire agencies regarding their OHS processes. This evidence was noted in the Interim Report.[32] For example, Mr Rob Sonogan of Ready Workforce gave the Committee a detailed overview of his agency's induction process, on-site risk assessment and hazard monitoring,[33] while Mr Ken Bieg of Skilled Engineering gave evidence that his company's goal is 'zero injuries'.[34] At a broader industry-wide level, the RCSA gave evidence to the Committee that it had developed a generic OHS induction CD-ROM for its members,[35] and was in the process of developing an OHS passport for labour hire workers to carry from one host employer to another.[36]

4.3 Factors affecting occupational health and safety and workers' compensation in the labour hire industry

4.3.1 Economic pressures

The Committee received evidence that economic pressures act on all parties to the labour hire arrangement – labour hire workers, labour hire agencies and host employers – to affect OHS and workers' compensation outcomes.

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31 C. Cameron, Stratecom, for the Recruitment and Consulting Services Association, 2004. Minutes of Evidence, 15 November, p.260.

32 Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December, pp.50-51.

33 R. Sonogan, Ready Workforce, 2004. Minutes of Evidence, 4 October, p.195.

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

35 C. Cameron, Stratecom, for the Recruitment and Consulting Services Association, 2004. Minutes of Evidence, 27 July, p.23.

36 C. Cameron, Stratecom, for the Recruitment and Consulting Services Association, 2004. Minutes of Evidence, 15 November, p.262.

The Committee received evidence that one of the most important economic pressures on labour hire workers is lack of job security. As noted in Chapter 2 and Chapter 3, the vast majority of labour hire workers are engaged in some form of precarious working arrangement, either as casual employees or independent contractors.

4.3.1.1 Reluctance to raise OHS issues in the workplace

It has been suggested that one of the OHS implications of job insecurity is that some labour hire workers are afraid to raise OHS issues in the workplace for fear that this will jeopardise current and future placements.[37] Mr Greg Tweedly of the VWA gave evidence to the Committee that the reluctance of workers to raise OHS matters is a particularly serious issue for the labour hire industry.[38]

Johnstone, Quinlan and Walters note that labour hire workers may feel too vulnerable to raise an OHS issue:

> *[Labour hire] workers are especially at risk because the host employer need not be given a reason for asking for a worker to be removed and the labour hire firm may be reluctant to pursue the issue (even if it becomes aware of the underlying reason) for fear of losing the client.*[39]

Indeed, Ms Elsa Underhill gave evidence to the Committee regarding her survey of labour hire workers, which showed that 16 per cent of labour hire workers were 'dismissed' after raising OHS issues or workplace concerns, in the sense that they were not offered any more work by the agency.[40] Similarly, Ms Louisa Dickinson of Job Watch told the Committee that:

> *We have certainly had calls from employees engaged by labour hire companies who have raised their own health and safety concerns … and have subsequently had their employment terminated for that very reason. We currently have a complaint that has been lodged with the Human Rights and Equal Opportunity Commission. It was on behalf of an older worker in the transport industry who had developed a form of asthma*

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37 Richard Johnstone, Michael Quinlan and David Walters, 2005. 'Statutory Occupational Health and Safety Workplace Arrangements for the Modern Labour Market'. *Journal of Industrial Relations*, Vol. 47 No. 1, March, pp.93-116 at p.106.

38 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, p.250.

39 Richard Johnstone, Michael Quinlan and David Walters, 2005. 'Statutory Occupational Health and Safety Workplace Arrangements for the Modern Labour Market'. *Journal of Industrial Relations*, Vol. 47 No. 1, March, pp.93-116 at p.106.

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

> *whilst based with the host employer, and when he complained about that his employment was terminated.*[41]

The Committee also received evidence from Mr Dave Oliver of the Australian Manufacturing Workers' Union (AMWU) that the fear of losing their jobs prevents many labour hire workers from raising OHS issues.[42]

4.3.1.2 Reluctance to lodge workers' compensation claims

The Committee was told that the economic insecurity of labour hire workers also makes them more reluctant to lodge workers' compensation claims.[43] Ms Elsa Underhill's research for the Victorian Trades Hall Council (VTHC) supports this proposition: 24 per cent of labour hire workers who participated in Ms Underhill's survey had experienced an injury in the preceding 12 months, but not even half of these – only 10 per cent of survey respondents – had made workers' compensation claims after experiencing a workplace injury.[44] Ms Underhill noted in her study for the VTHC that the reasons given by labour hire workers for not making a claim were mixed. Almost half (47 per cent) considered that their injury was too minor to warrant lodging a workers' compensation claim. However, others did not make claims for reasons of employment and financial insecurity: 18 per cent were concerned that making a claim would prejudice future job prospects and 6 per cent considered that they could not afford the time off work.[45]

Where labour hire workers are more reluctant to lodge workers' compensation claims than non labour hire workers, leading to the non-reporting or delayed reporting of injuries, this presents serious issues for Victoria's workers' compensation scheme. Firstly, it means that if injured workers are continuing to work with injuries, the injury could possibly be exacerbated. The worker's rehabilitation will then take longer once a claim is lodged, and the cost of the injury will be greater. Secondly, one of the

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

42 D. Oliver, Australian Manufacturing Workers' Union, 2004. Minutes of Evidence, 13 September, p.150.

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

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. Melbourne, January, p.15. Attached to: Victorian Trades Hall Council, 2004. Submission No. 23, 20 April, p.34.

45 Elsa Underhill, 2004. *Working under Labour Hire Arrangements: the experience and views of Victorian labour hire employees*. Report for the Victorian Trades Hall Council. Melbourne, January, p.15. Attached to: Victorian Trades Hall Council, 2004. Submission No. 23, 20 April, p.34.

general aims of workers' compensation schemes is to ensure that employers fund the cost of work-related injury:[46] if workers are not making claims in relation to work-related injuries, the cost of the injuries may be shifted from employers to the public health and social security system and to workers and their families.

4.3.1.3 Work intensification

The Committee received evidence that financial insecurity may also lead labour hire workers to intensify their working patterns to unsustainable levels. Work intensification occurs where people work harder within each hour of work.[47] Ms Elsa Underhill told the Committee that because labour hire agencies and host employers often have no structures in place to give feedback to labour hire workers on their work performance, labour hire workers do not know whether they are working well enough to avoid dismissal.[48] Ms Underhill told the Committee that this can lead to labour hire workers adopting unsustainable levels of work in order to reach an 'invisible barrier'.[49] Labour hire workers may also intensify their levels of work to demonstrate their suitability for a permanent direct hire position with the client.[50]

Work intensification can lead to injury in a number of different ways. For example, it may lead workers to rush their work, work extended hours, or accept higher risk tasks which directly hired employees may be unwilling to perform.[51] Alternatively, intensified working patterns may place increased emotional or physical demands on workers and may reduce the amount of 'slack' or downtime available for workers to unhealthy levels. Some level of downtime is healthy for workers, to allow time to adapt to internal and external pressures, including unexpected interruptions to work flows.

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46 Richard Johnstone, 2004. *Occupational Health and Safety Law and Policy* (2nd ed). Sydney, Lawbook Company, p.620.

47 Chris Maxwell, 2004. *Occupational Health and Safety Act Review*. State of Victoria, Melbourne, March, p.35.

48 E. Underhill, 2004. Minutes of Evidence, 28 July, p.53.

49 E. Underhill, 2004. Minutes of Evidence, 28 July, p.53.

50 Labour hire arrangements may also intensify work patterns for direct hire workers. A recent study in New South Wales found that a growing reliance on agency nurses in hospitals was a factor in increased levels of responsibility and intensified physical and mental demands on direct hire nurses. John Buchanan and Gillian Considine, 2002. *'Stop telling us to cope!' NSW nurses explain why they are leaving the profession*. Report for the New South Wales Nurses' Association, ACIRRT, University of Sydney, May, p.9.

51 Elsa Underhill, 2002. *Extending Knowledge on Occupational Health and Safety and Labour Hire Employment: A Literature Review and Analysis of Victorian Workers' Compensation Claims*. Report for WorkSafe Victoria, Melbourne, October, p.12.

The Underhill Report noted that work intensification issues may arise where labour hire companies try to produce cost savings in outsourcing arrangements by placing fewer labour hire employees with the client than were previously employed directly by the client.[52] This means that a smaller number of labour hire workers are expected to perform the same amount of work that was previously performed by a larger number of direct hire employees. It may also lead to labour hire workers doing the same tasks as previously undertaken by direct hire employees for more extended periods.

4.3.1.4 Reluctance to take leave

The Committee received evidence that economic pressures may also make labour hire workers reluctant to take unpaid sick leave to recover from illness or injury. For example, Ms Charmaine Chew of the AMWU told the Committee that an AMWU member, 'Employee A',[53] felt that she could not afford to take unpaid leave to recover from injury.[54] Labour hire workers in Gryst's study of the South Australian power industry also reported that they would not take sick leave when ill.[55] Ms Elsa Underhill told the Committee that this reluctance to make claims or take sick leave means that labour hire workers are more likely to keep working until their injury becomes more severe and prevents them from working.[56]

The same economic pressures that discourage labour hire workers from taking periods of time off work for sick leave also discourage workers from taking time off for recreational purposes. The majority of labour hire workers are not entitled to any form of paid leave, due to their status as casual employees or independent contractors. Ms Elsa Underhill gave evidence to the Committee that:

> *[Labour hire workers] are reluctant to take [unpaid] leave because if they do turn down an offer of a placement because they want to take leave*

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52 Elsa Underhill, 2002. *Extending Knowledge on Occupational Health and Safety and Labour Hire Employment: A Literature Review and Analysis of Victorian Workers' Compensation Claims.* Report for WorkSafe Victoria, Melbourne, October, p.12.

53 While the Australian Manufacturing Workers' Union (AMWU) originally supplied the names of two of their members whose experiences are detailed in the AMWU's oral evidence and supplementary submission, the Committee decided to protect their identities by referring to them as 'Employee A' and 'Employee B'.

54 C. Chew, Australian Manufacturing Workers' Union, 2004. Minutes of Evidence, 13 September, p.151.

55 Roma Gryst, 2000. *"Contracting Employment": A Case Study of how the use of agency workers in the SA Power Industry is reshaping the employment relationship.* Working Paper No. 59, ACIRRT, University of Sydney, March, p.38.

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

> *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. … They may return to the same labour hire company, but they do not return to the workplace they are familiar with, with the same work mates, where they know the job …* [57]

Although labour hire arrangements may offer some workers the flexibility to meet family commitments or take holidays, the Committee notes that this is not universally the case.[58] Ms Underhill gave evidence to the Committee that, in one of her surveys of labour hire workers, almost half of the survey participants often or always had trouble taking holidays, while 30 per cent often or always found it difficult to participate in family activities.[59]

In the context of the changing nature of the Australian workplace, including a growth in the number of casual employees, Pocock argues that a new approach to leave is urgently needed to meet the needs of the 'reshaped Australian workforce and household'. [60] The Committee considers that the issue of access to unpaid leave for labour hire workers will continue to grow in significance as large numbers of workers – such as casual employees or independent contractors – continue to hold jobs without leave entitlements.

The Committee considers that a serious OHS issue is posed where labour hire workers work without interruption for extended periods longer than a year. Occupational stress is a major cause of workplace illness and the utilisation of periods of leave is widely acknowledged as an important tool to reduce workplace stress.[61] Pocock notes that:

> *Annual holiday leave is an important means of personal regeneration and recovery from paid work and a vital opportunity for friends, families and communities to spend time together.*[62]

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

58 Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December, p.47.

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

60 Barbara Pocock, 2003. *The Work/Life Collision*. Sydney, The Federation Press, p.214.

61 Grant Cairncross and Iain Waller, 2004. 'Not Taking Annual Leave: What Could it Cost Australia?' *Journal of Economic and Social Policy*, Vol. 9 No. 1, pp.43-59 at p.44.

62 Barbara Pocock, 2003. *The Work/Life Collision*. Sydney, The Federation Press, p.217.

Cairncross and Waller refer to international studies that have shown that regular holidays lead to the improved well-being and productivity of workers.[63]

The Committee notes that working time has been approached as an important OHS issue in Europe. The European Union has adopted a working time directive (Directive 2003/88/EC), which aims to ensure that the health and safety of workers is not compromised as a result of excessively long hours, inadequate rest or disrupted work patterns. The working time directive provides, *inter alia*, that employees have the right to:

- a daily 11 hour continuous rest period;
- regular breaks;
- a weekly working time of no more than 48 hours; and
- a minimum annual holiday of four weeks.

Although there are significant differences between the regulation of work arrangements in Australia and Europe – most labour hire workers in Europe have paid leave entitlements[64] – the Committee believes that the European experience is instructive. The Committee believes that the Victorian Government should have regard to the minimum OHS standards for breaks and leave that have been adopted in Europe.

The Committee notes that the employers who do not provide adequate periods of rest for their workers may be in breach of their broad general duties under Victoria's *Occupational Health and Safety Act 2004* (the '2004 Act'). For example, the Committee considers that an employer's duty to monitor employees' health under section 22(1)(a) of the 2004 Act should be understood to extend to ensuring that workers – employees and contractors – are taking appropriate daily breaks and periods of leave from their job. In particular, casual employees and independent contractors should be encouraged to take periods of unpaid leave, and where workers choose to take leave, this should not prejudice their employment situation.

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63 Grant Cairncross and Iain Waller, 2004. 'Not Taking Annual Leave: What Could it Cost Australia?' *Journal of Economic and Social Policy*, Vol. 9 No. 1, pp.43-59 at p.44.

64 Campbell and Burgess note that temporary workers in Europe are mainly engaged on fixed-term employment contracts and consequently enjoy a range of benefits and entitlements while Australian casual workers have none. Iain Campbell and John Burgess, 2001. 'Casual Employment in Australia and Temporary Employment in Europe: Developing a Cross-National Comparison', *Work, Employment and Society*, Vol. 15 No. 1, pp.171-184 at p.182.

The Committee believes that the duty of labour hire agencies and host employers to ensure that labour hire workers are taking adequate breaks and periods of leave should be made explicit in the VWA's guidance material for labour hire agencies.

Recommendation 4.1

The Committee recommends that the Victorian WorkCover Authority's guidance material for labour hire agencies should include reference to the agency's obligation to ensure that workers:

- ***do not work for inappropriately long hours each day; and***
- ***take appropriate daily breaks as well as periods of annual recreational leave.***

The Committee notes that labour hire workers and other non-standard workers may feel that they cannot afford to take leave. Ms Charmaine Chew of the AMWU gave evidence to the Committee that financial insecurity often plays an important role in the decision of labour hire workers not to take leave.[65] Many casual employees are entitled to a casual loading to compensate for the absence of leave entitlements. However, in Gryst's study of the South Australian power industry, workers reported that they found it extremely difficult to budget for periods of leave, even though they were paid a 20 per cent loading to compensate them for the absence of paid leave entitlements.[66] In a 2004 study, Pocock, Prosser and Bridges interviewed a casual worker who had not had a holiday for ten years because of personal financial pressures:

> *… if I'm ever sick I've got to go to work absolutely dying because I know if I don't make it to work I'll lose a day's pay and when you've got commitments – as I say, I've got three children, a car on finance, a washing machine on finance, and a mortgage – you just can't afford to take time off. Hence no holidays for over ten years and no sick days if they are absolutely avoidable… (George, 40, technician).*[67]

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65 C. Chew, Australian Manufacturing Workers' Union, 2004. Minutes of Evidence, 13 September, p.151.

66 Roma Gryst, 2000. *"Contracting Employment": A Case Study of how the use of agency workers in the SA Power Industry is reshaping the employment relationship*. Working Paper No. 59, ACIRRT, University of Sydney, March, p.38.

67 Barbara Pocock, Rosslyn Prosser and Ken Bridge, 2004. *"Only a casual…": How Casual Work Affects Employees, Households and Communities in Australia*. Labour Studies, School of Social Sciences, University of Adelaide, July, p.31. Other casual workers in this survey made similar comments about the difficulties of taking unpaid leave.

Also, as noted in evidence to the Committee by both Ms Elsa Underhill and Dr Iain Campbell, not all casual employees receive a loading to compensate them for the absence of leave entitlements.[68]

The Committee commends the initiative taken by labour hire agency WV Management to encourage its workers to take periods of leave each year. Mr Graeme Wheeler of WV Management gave evidence to the Committee that his agency transfers the loading component of its casual employees' wages to a central fund. Employees are given a record of the savings that they have accumulated in the fund, and they can draw on this amount when they wish to take leave. Mr Wheeler gave evidence to the Committee that:

> *… we have money in a bank account which is half controlled by us and half controlled by our employees. It is a trust account and each week the money for annual leave goes into that account… It comes back out of there when an employee takes leave*.[69]

In this way, the central fund provides a type of savings mechanism for the agency's casual employees, who can draw on the fund when they choose to take leave.[70] The Committee believes that the arrangement adopted by WV Management is one way to make periods of leave more accessible for casual labour hire employees. The Committee believes that the Victorian Government should investigate how similar models might be developed and promoted, so that the taking of leave by labour hire workers might be facilitated in the interests of better workplace health and safety.

Recommendation 4.2

The Committee recommends that the Victorian Government, together with the labour hire industry, examine models that make it easier for non-standard workers to budget for unpaid leave.

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68 E. Underhill, 2004. Minutes of Evidence, 28 July, p.51; I. Campbell, 2005. Minutes of Evidence, 21 February, p.270.

69 G. Wheeler, WV Management, 2004. Minutes of Evidence, 27 July, p.29.

70 G. Wheeler, WV Management, 2004. Minutes of Evidence, 27 July, pp.27-28.

4.3.1.5 Cost pressures on labour hire agencies

OHS and workers' compensation outcomes are also affected by the economic pressures exerted on the labour hire agencies themselves. The Committee notes that the labour hire industry is very cost-sensitive: many agencies are small businesses, they often operate on small profit margins and they can be very competitive. Mr Leigh Hubbard of the VTHC submitted that OHS is one area in which labour hire agencies cut costs in order to make their prices more competitive.[71] Cost cutting by labour hire agencies may lead to compromises or even non compliance with OHS duties in relation to safety measures such as induction training or risk assessment.

4.3.1.6 Cost pressures on host employers

Economic pressures may lead host employers to 'outsource risk', offloading the most dangerous tasks to labour hire agencies in order to lower their own workers' compensation premiums. This inevitably leads to higher rates of workers' compensation claims by labour hire workers. (This issue is discussed in greater detail below.) The Committee was told by Mr Graeme Wheeler of WV Management that some host employers are 'driven by the bottom line' and are willing to use labour hire agencies that cut corners on OHS compliance in order to reduce their own costs.[72]

4.3.2 Disorganisation and fragmented lines of responsibility

The use of labour hire arrangements may impact on workplace organisation and lines of responsibility. For example, the involvement of different groups in the work arrangement – labour hire workers, agencies, host employers, direct employees – may complicate the coordination of work processes, including the implementation of OHS standards. Also, weakened lines of communication between labour hire workers, agencies, host employers and host employees can lead to the obfuscation of OHS responsibilities.

The Committee notes that OHS disorganisation may result from the unwillingness of host employers to cooperate with labour hire agencies, to the extent that hosts may even obstruct agencies from fulfilling their OHS duties. For example, the RCSA

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71 L. Hubbard, Victorian Trades Hall Council, 2004. Minutes of Evidence, 23 August, p.117.
72 G. Wheeler, WV Management, 2004. Minutes of Evidence, 27 July, p.32.

submitted that a large proportion of their members have difficulty carrying out OHS assessments prior to the placement of their workers due to the non-cooperation of host employers.[73] The RCSA also submitted that around one third of host employers believe that agencies should rarely or never be able to instruct hosts in how to manage the health and safety of agency workers.[74]

In a 2001 report prepared for National Occupational Health and Safety Commission (NOHSC), Gallagher, Underhill and Rimmer identified a number of ways in which labour hire arrangements can complicate the management of workplace health and safety. Firstly, they found that labour hire employees are often excluded or forgotten in the practical application of the host employer's OHS management systems. For example, labour hire workers may not participate in worker consultation processes in the host workplaces in the same way as the host employer's directly hired workers. Gallagher, Underhill and Rimmer note that attempts to exclude agency workers from OHS management systems may be deliberate – a bid to maintain distance from the labour hire workers to ensure that the host cannot be legally construed as the employees of the host.[75] Alternatively, the OHS management systems of the host employer may already be in disarray before labour hire workers arrive, as a result of rapid downsizing, plant closures, budget cuts, shifts in operations and other forms of organisational change.[76]

Gallagher, Underhill and Rimmer also found that few labour hire companies have OHS management systems, with the exception of major agencies. A number of representatives of OHS regulatory agencies who were interviewed for their study expressed concern as to whether or not the OHS management systems of many labour hire companies extended beyond pre-placement inspections.[77] In Gryst's study of the South Australian power industry, the agency's failure to provide OHS training was simply overlooked: although the host employer believed blue collar agency workers to have a high standard of OHS training before they were assigned

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

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

75 Clare Gallagher, Elsa Underhill and Malcolm Rimmer, 2001. *Review of the Effectiveness of OHS Management Systems in Securing Healthy & Safe Workplaces*. Report for the National Occupational Health and Safety Commission, p.46.

76 New South Wales Labour Hire Task Force, 2001. *Final Report*, New South Wales Labour Hire Task Force, Sydney, December, p.59.

77 Clare Gallagher, Elsa Underhill and Malcolm Rimmer, 2001. *Review of the Effectiveness of OHS Management Systems in Securing Healthy & Safe Workplaces*. Report for the National Occupational Health and Safety Commission, p.46.

to the host workplaces, the agency workers received only basic induction training from the agency.[78]

Gallagher, Underhill and Rimmer also found evidence that many host employers were unwilling to provide any training, including OHS training, for labour hire workers until workers had proven themselves suitable for a permanent position with the host employer. A direct hire employee in Gryst's study gave an example of how an agency worker was deliberately excluded from important OHS training:

> *Recently there was a refresher OH&S standards training course and the [agency] contractor was not considered part of the group and so didn't go. We thought it was critical to our safety for them to be there, but they weren't allowed to go.*[79]

Gallagher, Underhill and Rimmer affirm that this type of exclusion not only creates hazards for individual labour hire workers, but creates weaknesses in the overall management of OHS in the workplace for everyone.[80]

Workplace disorganisation may also stem from labour hire workers' lack of knowledge and experience with respect to the host workplace, due to the temporary nature of placements. Hazards that may be caused by lack of familiarity with work practices are often compounded by the fact that labour hire workers tend to be younger and less experienced than other workers.[81]

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78 Roma Gryst, 2000. *"Contracting Employment": A Case Study of how the use of agency workers in the SA Power Industry is reshaping the employment relationship*. Working Paper No. 59, ACIRRT, University of Sydney, March, p.46.

79 Roma Gryst, 2000. *"Contracting Employment": A Case Study of how the use of agency workers in the SA Power Industry is reshaping the employment relationship*. Working Paper No. 59, ACIRRT, University of Sydney, March, p.46.

80 Clare Gallagher, Elsa Underhill and Malcolm Rimmer, 2001. *Review of the Effectiveness of OHS Management Systems in Securing Healthy & Safe Workplaces*. Report prepared for the National Occupational Health and Safety Commission, p.46.

81 Elsa Underhill, 2002. *Extending Knowledge on Occupational Health and Safety and Labour Hire Employment: A Literature Review and Analysis of Victorian Workers' Compensation Claims*. Report for WorkSafe Victoria, Melbourne, October, pp.81-82.

4.3.3 Regulatory issues

The Committee considered evidence that labour hire arrangements present new challenges for the enforcement of Victoria's system of OHS regulation. For example, Quinlan notes that OHS enforcement is problematised where non-standard work arrangements, such as labour hire, introduce third parties into work relationships. He argues that this places heavier demands on the inspectorate:

> *For example, monitoring to see if there is an integrated OHS management system becomes more difficult on multi-employer sites or those making extensive use of subcontractors or home-based workers, and there is a commensurately greater risk of 'paper compliance' escaping undetected.*[82]

Quinlan further notes that conducting workplace inspections can be a 'logistical nightmare' where workers are placed in a large number of different workplaces and that the existence of third parties complicates prosecution proceedings.[83]

OHS compliance is also complicated by the large number of small businesses in the labour hire industry. Lamm and Walters note that the problems that surround running a company – including OHS compliance – are amplified in small businesses by virtue of their size.[84] Factors that influence OHS compliance and practice in the small business sector include: training and industry experience; influence of large businesses; influence of quality management systems; the regulatory environment and the relationship with the OHS regulatory agency; and small business advisors.[85]

The Committee also received a considerable amount of evidence that Victoria's OHS regulatory framework fails to expressly or effectively cater for modern working arrangements. This issue is considered in detail below.

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82 Michael Quinlan, 2004. 'Flexible Work and Organisational Arrangements' in Liz Bluff, Neil Gunningham and Richard Johnstone (eds). *OHS Regulation for a Changing World*. Sydney, The Federation Press, pp.120-145 at p.127.

83 Michael Quinlan, 2004. 'Flexible Work and Organisational Arrangements' in Liz Bluff, Neil Gunningham and Richard Johnstone (eds). *OHS Regulation for a Changing World*. Sydney, The Federation Press, pp.120-145 at p.127.

84 Felicity Lamm and David Walters, 2004. 'Regulating Occupational Health and Safety in Small Businesses' in Liz Bluff, Neil Gunningham and Richard Johnstone (eds). *OHS Regulation for a Changing World*. Sydney, The Federation Press, pp.94-119 at p.95. This issue was also raised in the Maxwell Report: Chris Maxwell, 2004. *Occupational Health and Safety Act Review*, State of Victoria, Melbourne, March, pp.237-238.

85 Felicity Lamm and David Walters, 2004. 'Regulating Occupational Health and Safety in Small Businesses' in Liz Bluff, Neil Gunningham and Richard Johnstone (eds). *OHS Regulation for a Changing World*. Sydney, The Federation Press, pp.94-119 at p.95.

4.4 Occupational health and safety: the legal obligations of labour hire agencies and host employers

4.4.1 Victoria's occupational health and safety legislation

On 16 December 2004, the Victorian Parliament passed the *Occupational Health and Safety Act 2004* (the '2004 Act') to repeal and replace the *Occupational Health and Safety Act 1985* (the '1985 Act'). At the time of writing this report, the primary legislative instrument for the regulation of OHS standards in Victorian workplaces is still the 1985 Act, but on 1 July 2005, most of the provisions of the 2004 Act will come into operation.[86] As a result of this imminent change, this chapter will make reference to legal obligations as they appear in the 2004 Act.

The 2004 Act was introduced by the Victorian Government following a comprehensive review of the 1985 Act, undertaken by Mr Chris Maxwell QC. The resulting report – the *Occupational Health and Safety Act Review* (the 'Maxwell Report') – was published in March 2004. The 2004 Act gave effect to most of the principal recommendations of the Maxwell Report.[87]

As noted in the Interim Report, the majority of the Committee's public hearings took place before the 2004 Act was passed and therefore evidence refers to the 1985 Act rather than the 2004 Act.[88] However, the relevance of the comments raised by witnesses and submissions is not affected by the passing of the 2004 Act. This is because there is considerable overlap between the 1985 Act and the 2004 Act: the 2004 Act retains the 'core provisions' of the 1985 Act and builds upon the framework of the 1985 Act.[89] Also, the 2004 Act was not designed to specifically target issues associated with labour hire arrangements.

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86 Section 3, *Occupational Health and Safety Act 2004* (Vic).

87 For a discussion of the aspects of the 2004 Act that depart significantly from the 1985 Act, with reference to the Maxwell Report, see: Peter Rozen, 2005. 'Significant Change or Merely Fine-Tuning? The *Occupational Health and Safety Act 2004* (Vic)', *Australian Journal of Labour Law*, Vol. 18 No. 1, pp.79-86.

88 Most of the evidence received by the Committee in relation to OHS and labour hire arrangements was confined to the *Occupational Health and Safety Act 2004* (Vic) and the *Occupational Health and Safety Act 1985* (Vic), although workplace health and safety is also governed by other legislation. For example, Mr Greg Tweedly of the Victorian WorkCover Authority drew attention to the *Dangerous Goods Act 1985* (Vic). G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, p.238.

89 Hon. R. Hulls, Minister for WorkCover, 2004. Second Reading Speech for the Occupational Health and Safety Bill, Victoria, Legislative Assembly, 18 November, p.1760.

The 2004 Act (and the 1985 Act preceding it) was modelled on the recommendations of the influential British *Report of the Committee on Safety and Health at Work 1970-1972* (the 'Robens Report'),[90] which recommended that OHS legislation should prescribe general duties only and that further supporting detail should be provided by regulations and guidance material.[91] In line with the recommendations of the Robens Report, the 2004 Act sets out broad general duties (also referred to as 'principle-based standards')[92] rather than prescriptive standards. There are general duties for a whole range of parties who have the ability to affect health and safety in the workplace, including employers, the self-employed, occupiers, manufacturers, suppliers and designers of plant and substances and employees.[93]

Significantly, one of the motivations for broad legislative statements of OHS duties is that broadly stated duties are more flexible than narrow prescriptive duties. By broadly specifying a range of dutyholders, the general duty provisions underline the need for responsible actions by all relevant parties in the workplace and, as such, can be readily adapted to new and shifting forms of working arrangements – such as labour hire – as they arise.[94]

4.4.2 The obligations of agencies and host employers under Victoria's Occupational Health and Safety Act 2004

4.4.2.1 The general duties

The general duties – which Maxwell describes as the 'fulcrum' of the 2004 Act[95] – of employers are set out in sections 21 to 23 of the 2004 Act. The aim of these duties is to ensure that workplaces are safe and without risk for everyone.[96] According to

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90 Lord Robens, 1972. *Report of the Committee on Safety and Health at Work, 1970 – 72*, London, HMSO.

91 Chris Maxwell, 2004. *Occupational Health and Safety Act Review*. State of Victoria, Melbourne, March, p.97.

92 Richard Johnstone, 2003. *Occupational Health and Safety, Courts and Crime: The Legal Construction of Occupational Health and Safety Offences in Victoria*. Sydney, The Federation Press, p.20.

93 Richard Johnstone, 2003. *Occupational Health and Safety, Courts and Crime: The Legal Construction of Occupational Health and Safety Offences in Victoria*. Sydney, The Federation Press, p.20.

94 Michael Quinlan and Richard Johnstone, Submission to the *Occupational Health and Safety Act Review*. Cited in: Chris Maxwell, 2004. *Occupational Health and Safety Act Review*. State of Victoria, Melbourne, March, p.119.

95 Chris Maxwell, 2004. *Occupational Health and Safety Act Review*. State of Victoria, Melbourne, March, p.105.

96 Victorian WorkCover Authority, 2004. Submission No. 22, 16 April, p.9.

these sections, both agencies and host employers have general duties towards labour hire workers. Case law shows that courts have taken a broad approach to interpreting the content of these duties.[97]

All employers are required to maintain safe and healthy workplaces. Section 21(1) of the 2004 Act outlines the primary general duty owed by all employers to their employees:

> *An employer must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health.*

Section 21(2) lists the specific actions that must be taken to fulfil the general duty in section 21(1), including:

> *(a) provide or maintain plant or systems of work that are, so far as is reasonably practicable, safe and without risks to health;*
>
> *(b) make arrangements for ensuring, so far as is reasonably practicable, safety and the absence of risks to health in connection with the use, handling, storage or transport of plant or substances;*
>
> *(c) maintain, so far as is reasonably practicable, each workplace under the employer's management and control in a condition that is safe and without risks to health;*
>
> *(d) provide, so far as is reasonably practicable, adequate facilities for the welfare of employees at any workplace under the management and control of the employer;*
>
> *(e) provide such information, instruction, training or supervision to employees of the employer as is necessary to enable those persons to perform their work in a way that is safe and without risks to health.*

For the purposes of the duties set out in sub-sections 21(1) and (2), the term 'employee' is deemed by sub-section 21(3)(a) to include:

> *… an independent contractor engaged by an employer and any employees of the independent contractor …*

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[97] Richard Johnstone, Michael Quinlan and David Walters, 2005. 'Statutory Occupational Health and Safety Workplace Arrangements for the Modern Labour Market'. *Journal of Industrial Relations*, Vol. 47 No. 1, March, pp.93-116 at pp.97-98.

Sub-section 21(3)(b) then states that the duties of an employer in sub-sections 21(1) and (2) extend to independent contractors and their employees:

> *… in relation to matters over which the employer has control or would have control if not for any agreement purporting to limit or remove that control.*

Therefore, as employers, labour hire agencies clearly owe the duty in section 21 to all of their workers, whether they are engaged as employees or independent contractors. Following the Victorian Supreme Court's recent decision in *R v ACR Roofing*,[98] host employers also owe this duty to all labour hire workers – both employees and independent contractors – but only in relation to matters over which they have control or would have control but for an agreement to the contrary.[99]

As employers, labour hire agencies have an additional obligation to their employees under section 22(1), which states that an employer must, so far as is 'reasonably practicable':

> *(a) monitor the health of employees of the employer; and*
>
> *(b) monitor conditions at any workplace under the employer's management and control; and*
>
> *(c) provide information to employees of the employer (in such languages as appropriate) concerning health and safety at the workplace, including the names of persons to whom an employee may make an enquiry or complaint about health and safety.*

Under section 22(2), employers must also keep information and records relating to OHS and must employ or engage suitably qualified people to give advice on the health and safety of employees. Unlike section 21(1), agencies are not required to fulfil these obligations to workers engaged as independent contractors. Section 22 does not impose a duty on host employers with respect to either labour hire employees or independent contractors.

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98 [2004] VSCA 215 (Unreported, Ormiston, Vincent and Nettle JJA, 1 December 2004).

99 *R v ACR Roofing* [2004] VSCA 215 (Unreported, Ormiston, Vincent and Nettle JJA, 1 December 2004), [51]-[55] (Nettle JA). For a discussion of the implications of this case, see: Caroline Scott, 2005. 'Extending employers' duties for the workplace safety of contractors'. *Australian Journal of Labour Law*, Vol. 18 No. 1, pp.87-96.

Host employers also have a general duty to all non-employees, including labour hire workers, under section 23(1), which states that:

> *An employer must ensure, so far as is reasonably practicable, that persons other than employees of the employer are not exposed to risks to their health and safety arising from the conduct of the undertaking of the employer.*

In summary, where labour hire arrangements are concerned, sections 21 to 23 of the 2004 Act impose broad general OHS duties on both labour hire agencies and host employers with respect to labour hire workers. The duties of agencies and hosts are not identical but do overlap, and the fact that one party has a duty to protect a worker does not relieve the other party of its burden.[100] Moreover, the general duties set out in sections 21 to 23 cannot be delegated and are personal to the agency and host employer as dutyholders.[101]

4.4.2.2 What is 'reasonably practicable'?

Although the duties in sections 21, 22 and 23 are expressed broadly, they are almost all qualified by the expression 'reasonably practicable'. Dutyholders must comply with their duties so far as it is reasonably practicable to do so.[102]

Section 20(2) states that the following matters must be considered to determine what is reasonably practicable:

> *(a) the likelihood of the hazard or risk concerned eventuating;*
>
> *(b) the degree of harm that would result if the hazard or risk eventuated;*
>
> *(c) what the person concerned knows, or ought reasonably to know, about the hazard or risk and any ways of eliminating or reducing the hazard or risk;*
>
> *(d) the availability and suitability of ways to eliminate or reduce the hazard or risk;*
>
> *(e) the cost of eliminating or reducing the hazard or risk.*

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100 Richard Johnstone, Michael Quinlan and David Walters, 2005. 'Statutory Occupational Health and Safety Workplace Arrangements for the Modern Labour Market'. *Journal of Industrial Relations*, Vol. 47 No. 1, March, pp.93-116 at p.101.

101 See Justice Mason's comments in *Kondis v Transport Authority* (1984) 154 CLR 642.

102 Under the 1985 Act, the general duties were qualified by the expression 'practicable' rather than 'reasonably practicable'.

What is reasonably practicable is determined objectively: typically, the determination of whether a particular action is reasonably practicable requires balancing the likelihood of the OHS risk involved against the cost, time and trouble necessary to avoid the risk.[103] If the risk of injury or disease is insignificant relative to the burden imposed by taking the necessary measure to address the risk, then that measure is not reasonably practicable. However, as noted in the Maxwell report, the content of the duties 'does not depend upon the particular financial circumstances of the dutyholder'.[104]

4.4.3 Regulations and compliance codes

In accordance with the Robens model, the general duties outlined in the 2004 Act will be supplemented by a number of detailed statutory regulations and compliance codes. Under section 152 of the 2004 Act, where a person complies with the regulations or a compliance code which is related to the general duties, the person is considered to have complied with the general duty provisions. However, unlike the regulations, it is not an offence in itself to contravene a compliance code.[105] A person may choose to fulfil their duties under the 2004 Act by taking measures other than those outlined in the compliance code, provided that the method adopted is sufficient to meet that person's duty.

Compliance codes made under the 2004 Act will offer practical guidance to duty holders on how to comply with their duties under the Act and the accompanying regulations.[106] Compliance codes will take the place of codes of practice made under the 1985 Act. [107] Compliance Codes will play a similar role to codes of practice made under the 1985 Act. The Committee notes that as of 1 July 2005, existing codes of practice will cease to have legal effect. Codes of practice made under the 1985 Act will be progressively reviewed by the VWA and replaced with compliance codes.

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103 See, for example, Justice Gaudron's comments in *Slivak v Lurgi (Australia) Pty Ltd* (2001) 205 CLR 304 at 323.

104 Chris Maxwell, 2004. *Occupational Health and Safety Act Review*. State of Victoria, Melbourne, March, p.120.

105 That is, a failure to comply with a compliance code does not give rise to any civil or criminal liability: section 150, *Occupational Health and Safety Act 2004* (Vic).

106 A list of the relevant codes can be found at: Victorian WorkCover Authority, 2005. *Codes of Practice*, at < www.workcover.vic.gov.au/vwa/home.nsf/pages/Codes>.

107 Victorian WorkCover Authority, 2005. *Codes of Practice*, at <www.workcover.vic.gov.au/vwa/home.nsf/pages/codes>.

There are no existing codes of practice that relate specifically to the use of labour hire.

A number of statutory regulations reinforce the general duties of the 2004 Act,[108] although none are specifically dedicated to the regulation of labour hire. Some of these regulations address particular hazards, such as asbestos exposure,[109] whereas others outline general procedural requirements, such as those relating to how to resolve OHS issues.[110]

4.4.4 Particular issues regarding the application of occupational health and safety laws: the general duties of the Act

4.4.4.1 Practical content of the general OHS duties

It is clear that labour hire arrangements are covered by the 2004 Act and that under the 2004 Act both labour hire agencies and host employers have broad obligations to ensure the health and safety of labour hire workers. However, the Committee received evidence from a number of witnesses that the application of the duties in sections 21 to 23 is unclear with respect to labour hire arrangements. In particular, the general duties expressed in sections 21 to 23 do not indicate how much or which part of the OHS burden is to be carried by labour hire agencies and which part by host employers.

The Committee notes that the VWA plans to release guidance material in 2005 to explain the practical content of the OHS duties as they apply to labour hire arrangements (see below for further discussion). However, the Committee notes with concern that, up to this point, very little guidance material on OHS and labour hire arrangements has been available for agencies and hosts.

Mr Greg Tweedly of the VWA gave evidence to the Committee that, in terms of the practical application of the 2004 Act, labour hire agencies have a duty to:

- understand their duties under Victoria's OHS legislation;

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108 A list of the relevant regulations can be found at: Victorian WorkCover Authority, *Regulations*, at <www.workcover.vic.gov.au/vwa/home.nsf/pages/so_regs>.

109 *Occupational Health and Safety (Asbestos) Regulations 2003*.

110 *Occupational Health and Safety (Issue Resolution) Regulations 1999* (Vic).

- determine the nature of the work to be carried out for the host employer, through discussion with the host employer;
- provide a worker who is appropriately trained for the task;
- enquire to determine that each individual worker is properly inducted at the host workplace;
- enquire about the suitability and progress of the worker once the worker has been placed;
- determine whether the occupier and controller of the workplace have appropriate operating procedures;
- determine whether the occupier and/or controller of the workplace conducts a hazard identification process;
- immediately notify the VWA of specific serious injuries or deaths; and
- make general and ongoing observations of the host workplace and the health of employees.[111]

Mr Tweedly emphasised that the agency's statutory responsibilities are not lessened even though they do not control the host workplace[112] and that agencies cannot discharge their OHS duties by taking a perfunctory 'tick the box' approach.[113]

Mr Tweedly told the Committee that the host employer's general duty to its employees also applies to labour hire employees in relation to matters over which the host employer has control. Mr Tweedly noted that the duty of host employers to provide a safe working environment is not abrogated by hiring labour hire workers.[114]

4.4.4.2 Problems regarding the application of the general duties to labour hire arrangements

Mr Tweedly acknowledged that the general duty provisions of the 2004 Act do not provide a precise allocation of responsibility to agencies and host employers, but submitted that they are not intended to do so. Rather, Mr Tweedly stated that:

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111 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, p.238.
112 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, p.238.
113 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, p.239.
114 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, p.239.

> *… I think the better way to describe [the complementary OHS duties of agencies and hosts] is [that they are] complementary in the sense that both have an obligation to do it and there is less chance of someone falling between the cracks.*[115]

Mr Tweedly submitted to the Committee that one of the reasons for this overlap is that:

> *When you have a black and white line often you have a gap or a chasm; by having an overlap it improves the probability of safety.*[116]

However, the Committee received evidence that misunderstandings regarding the overlapping responsibilities of labour hire agencies and host employers may not lead to the 'improved probability of safety' as described by Mr Tweedly.

Many witnesses argued that the workplace health and safety of labour hire workers actually decreases because of the overlap in the duties of agencies and hosts and that labour hire workers are in fact 'falling between the cracks'. In his review of the 1985 Act, Mr Maxwell observed that his consultations with stakeholders had revealed that:

> *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.*[117]

A number of witnesses gave evidence that many host employers and labour hire agencies are uncertain about their OHS obligations. The VWA noted in its submission that, even though host employers clearly have duties towards labour hire workers under the 2004 Act:

> *Many employers hold the view that there is a limit to their responsibility when they engage contractors, or when their employees are working for a "host" employer, in the case of labour hire companies.*[118]

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115 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, p.248.
116 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, p.248.
117 Chris Maxwell, 2004. *Occupational Health and Safety Act Review*. State of Victoria, Melbourne, March, p.111.
118 Victorian WorkCover Authority, 2004. Submission No. 22, 16 April, p.9.

Such misunderstandings may lead to 'passing the buck' for OHS, where each party claims that the other is responsible. For example, in her report for the VTHC, Ms Elsa Underhill found that, from the perspective of the labour hire workers whom she interviewed:

> *… hosts and labour hire employers pass the buck between each other [in relation to OHS issues], with neither taking responsibility and [both] contributing to a sense of powerlessness amongst labour hire employees.*[119]

A labour hire worker who participated in Ms Underhill's focus groups described the following response to OHS issues:

> *… the labour hire company says that it was the host's decision, the host says that it's got nothing to do with us …*[120]

Ms Underhill quoted another worker who likened this process to 'ping-pong', where both agency and host claim that a particular OHS issue is the responsibility of the other party and the agency worker is bounced back and forth between the agency and the host in his/her attempt to try to deal with the matter.[121]

In the Interim Report, the Committee noted the troubling situation of a Job Watch client, who requested the provision of personal protective equipment (PPE) for protection from asbestos exposure, only to be faced with repeated denials of responsibility by both the host employer and labour hire agency.[122] In the end, the PPE was not provided and the worker was advised that his services were no longer required.[123] The AMWU's submission described similar difficulties with respect to workers obtaining PPE from agencies and hosts.[124]

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119 Elsa Underhill, 2004. *Working under Labour Hire Arrangements: the experience and views of Victorian labour hire employees*. Report for the Victorian Trades Hall Council. Melbourne, January, p.15. Attached to: Victorian Trades Hall Council, 2004. Submission No. 23, 20 April.

120 Elsa Underhill, 2004. *Working under Labour Hire Arrangements: the experience and views of Victorian labour hire employees*. Report for the Victorian Trades Hall Council. Melbourne, January, p.15. Attached to: Victorian Trades Hall Council, 2004. Submission No. 23, 20 April.

121 Elsa Underhill, 2004. *Working under Labour Hire Arrangements: the experience and views of Victorian labour hire employees*. Report for the Victorian Trades Hall Council. Melbourne, January, p.15. Attached to: Victorian Trades Hall Council, 2004. Submission No. 23, 20 April.

122 Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December, p.42.

123 Job Watch, 2003. Submission No. 9, 19 December, p.24.

124 Australian Manufacturing Workers' Union, 2004. Submission No. 17, 27 February, pp.9-10.

The Committee received evidence that, while some host employers and agencies are well-informed regarding the nature of their OHS duties, others are urgently in need of more guidance. For example, Mr David Gregory of the Victorian Employers Chamber of Commerce and Industry told the Committee that his organisation represents both host employer and labour hire agencies and that:

> *Those two distinct groups struggle to understand what their responsibilities are in terms of occupational health and safety, and many of them tell me that it really means that in many cases they are duplicating or doubling up to ensure they are doing the right thing …*[125]

The RCSA echoed this argument, stating that the current provisions do not lead to the 'optimal utilisation of resources' to provide safe workplaces.[126]

In an attachment to the RCSA's submission, Dr David Neal submitted that the practical application of the general duties is problematic with respect to labour hire arrangements because:

- labour hire agencies often do not have a comprehensive knowledge of the host employer's premises, plant and work practices;
- labour hire agencies cannot exercise control over the host's premises, plant and equipment; and
- labour hire assignments are often short-term, which makes it a particularly onerous task to inspect all workplaces in which workers are placed.[127]

The Committee also received evidence that agencies could not predict all of the risks that workers might encounter in the host workplace, including changes to work processes and supervision.

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125 D. Gregory, Victorian Employers' Chamber of Commerce and Industry, 2004. Minutes of Evidence, 11 October, p.204.

126 C. Cameron, Stratecom, for the Recruitment and Consulting Services Association, 2004. Minutes of Evidence, 15 November, p.261.

127 David Neal, 'Defining the Duty of the On-Hirer Under the *OHS Act*'. See: Recruitment and Consulting Services Association, 2004. Submission No. 15, 25 February, Attachment A, p.54.

The Committee notes that courts have interpreted the general OHS duties of hosts and agencies on a number of occasions. For example, an important case on the issue of OHS and labour hire is *Drake Personnel Limited v WorkCover Authority of New South Wales*[128] (the *Drake* case). (See Appendix 8 for a brief outline of the facts of the *Drake* case.)

In the *Drake* case, the Full Bench found that labour hire agencies have a 'particular positive obligation' to ensure the health and safety of their workers:

> *… A labour hire company cannot escape liability merely because the client to whom an employee is hired out is also under a duty to ensure that persons working at their workplace are not exposed to risks to their health and safety or because of some alleged implied obligation to inform the labour hire company of the work to be performed. … This obligation would, in appropriate circumstances, require it to ensure that its employees are not instructed to, and do not, carry out work in a manner that is unsafe. In the present case, it seems to us that this would require, at the very least, that the appellant give an express instruction to the client and its employee that it be notified before the employee is instructed to work on a different machine.*[129]

The Full Bench's decision makes it clear that labour hire agencies are required to take positive, proactive steps to ensure that host workplaces are safe.

The Full Bench's comments in the *Drake* case confirm that courts are prepared to give a broad interpretation to the general duty provisions in case law.[130] However, notwithstanding the clarification offered by case law, the Committee finds that there are still significant levels of confusion and frustration amongst host employers and labour hire agencies regarding the practical application of their OHS responsibility for labour hire workers.

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128 *Drake Personnel Limited v WorkCover Authority of New South Wales (Inspector Ch'ng)* (1999) 90 IR 432.

129 *Drake Personnel Limited v WorkCover Authority of New South Wales (Inspector Ch'ng)* (1999) 90 IR 432 at pp.455-456.

130 A similarly broad interpretative approach has been taken by Victorian courts. See, for example: *R v ACR Roofing* [2004] VSCA 215 (Unreported, Ormiston, Vincent and Nettle JJA, 1 December 2004).

4.4.5 Should the general duty provisions of the 2004 Act be amended? The issue of 'control'

4.4.5.1 Discussion of 'control' in the Interim Report

The Committee received evidence that the confusion regarding the application of the general duties in the 2004 Act should be addressed by amending the 2004 Act to delineate more clearly the duties of host employers and labour hire companies. In particular, it was claimed that giving greater recognition to the concept of control in the 2004 Act would better reflect the reality of modern, multi-employer workplaces, where the capacity to control activities in the workplace varies between dutyholders.[131]

The 2004 Act (and the 1985 Act preceding it) gives some recognition to the concept of control. For example, under section 21(3), a host employer only owes the extended duty to labour hire workers in relation to matters over which the host employer has control or would have control but for an agreement to the contrary. Equally, under section 21(2)(d), employers must provide 'adequate facilities' for the welfare of employees at workplaces under its 'management and control'. Section 21(2)(c) also states that employers must maintain those workplaces that are under their management and control in a safe condition.

However, in the Maxwell report, Maxwell argued that the 1985 Act did not give sufficient recognition to the reality of the varying degrees of control that dutyholders exercise in the workplace:

> *One fundamental difficulty lies in the assumption which the Act makes, that each of the concurrent duty holders is equally able to exercise control over the activity which gives rise to the relevant risk.*[132]

He notes that the concept of control has been used by courts to determine 'reasonable practicability', but argues that the case law offers differing approaches.[133]

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131 See the discussion in: Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December, pp.40-42.

132 Chris Maxwell, 2004. *Occupational Health and Safety Act Review*. State of Victoria, Melbourne, March, p.111.

133 Chris Maxwell, 2004. *Occupational Health and Safety Act Review*. State of Victoria, Melbourne, March, pp.114-115.

To offer greater clarity to dutyholders, Mr Maxwell argued that the legislative definition of 'practicability'[134] – 'reasonable practicability' in the 2004 Act – should include reference to control:

> *In my view, 'control' should be added to the list of practicability factors. The definition of 'control' will need to include the capacity to control, even where control is not in fact being exercised. It will also need to be made clear that an ability to influence decisions is a species of control.*[135]

Mr Maxwell argued that this amendment would not only clarify the content of the general duties, but would also bring Victoria's OHS legislation into line with New South Wales and Queensland, where it is a defence for dutyholders to show that a contravention of the OHS legislation occurred due to matters beyond the dutyholder's control.[136]

Mr Maxwell's recommendation regarding control was not integrated into the 2004 Act and so the current list of factors in section 20(2) to be taken into account in determining what is 'reasonably practicable' does not include reference to control.

4.4.5.2 Further comments on the issue of control

In the Interim Report, the Committee stated that it would seek further comment from stakeholders on the issue of control before making its conclusions in the Final Report.[137]

The strongest advocate of amendment to the 2004 Act was the RCSA. In its comment on the issue of control, the RCSA argued that Mr Maxwell's recommendation regarding control should be adopted and the workability of the overlapping OHS duties should be reviewed.[138] The RCSA drew the Committee's attention to recent legislative reforms in Western Australia, where the *Occupational Safety and Health Act 1984* (WA) (the 'WA OSH Act') has been amended to make

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134 Maxwell's comments are made in reference to the definition of 'practicable' under section 4 of the 1985 Act.

135 Chris Maxwell, 2004. *Occupational Health and Safety Act Review*. State of Victoria, Melbourne, March, p.118.

136 Chris Maxwell, 2004. *Occupational Health and Safety Act Review*. State of Victoria, Melbourne, March, p.119.

137 Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December, p.42.

138 Recruitment and Consulting Services Association, 2005. Comment on Interim Report, No. 9, 24 February, pp.4-5.

specific reference to labour hire arrangements. Section 23F of the WA OSH Act expressly states that both the host and the agency have a general duty of care towards labour hire workers in relation to 'matters over which each has control'.

Group Training Australia (GTA) (Vic) also firmly argued in favour of the amendment of the 2004 Act to 'clearly deal with the issue of control'. GTA (Vic) stated that:

> *The current confusion about the duty of care for on-hire workers and the overlap which occurs between the agency and the host employer is a major concern for GTA Vic members.*[139]

The Electrical Trades Union supported the addition of 'control' to the list of factors in section 20(2), stating that the 2004 Act is 'inadequate' because it does not take into account the 'concept of control in the host workplace'.[140] Similarly, the Transport Workers' Union submitted that the issue of 'control' is currently ambiguous and that Victoria's regulatory framework is 'inadequate' to deal with OHS in the labour hire industry.[141]

Some witnesses argued that the current law is sufficiently clear with respect to the general duties of agencies and hosts, and that amendment to the 2004 Act would be superfluous. For example, Mr Colin Fenwick of the CELRL gave evidence to the Committee that:

> *The problem is not … in the range of duties that are there; it is in whether people understand the relationship of the overlapping duties and profit from that, and how it is enforced.*[142]

Rather than amending the 2004 Act to include reference to control, Mr Fenwick submitted that it was more important to consider whether specific regulation was needed to clarify the allocation of OHS responsibilities in situations such as labour hire arrangements, where the responsibilities overlap.[143]

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139 Group Training Australia (Vic), 2005. Comment on Interim Report, No. 11, 4 March, p.3.
140 Electrical Trades Union, 2005. Comment on Interim Report, No. 12, 7 March, pp.16-17.
141 Transport Workers' Union, 2005. Comment on Interim Report, No. 8, 23 February, p.6.
142 C. Fenwick, Centre for Employment and Labour Relations Law, University of Melbourne, 2005. Minutes of Evidence, 7 March, p.291.
143 C. Fenwick, Centre for Employment and Labour Relations Law, University of Melbourne, 2005. Comment on Interim Report, No. 13, pp.12-13.

The VTHC argued that 'there is little to be gained' by continuing to discuss whether the 2004 Act should limit the duties of hosts or agencies based on their ability to control the workplace. The VTHC submitted that the current legislative provisions are capable of giving sufficient protection to workers. The VTHC submitted that regulations and guidance material should be developed to improve understanding of the separate and overlapping duties of hosts and labour hire agencies.[144]

Mr Rob Sheers of the VWA gave evidence that the VWA preferred some overlap of the general duties. He drew the Committee's attention to guidance material being developed by the VWA to clarify 'responsibilities and levels of control'.[145]

4.4.5.3 The Committee's view on the issue of control

As noted in the Interim Report, the Committee believes that it is appropriate for labour hire agencies and host employers to share OHS duties.[146] However, on balance, the Committee believes that the 2004 Act should be amended to give greater clarification to the allocation of these duties. In particular, the Committee believes that the 2004 Act should be amended to include reference to 'control' in the list of factors in section 20(2). 'Control' should be understood to include 'capacity to control' and 'ability to influence decisions'.[147] In this way, 'control' will be one more factor to be taken into account to determine whether an OHS measure is 'reasonably practicable'. The Committee believes that it is important to emphasise that this amendment will not divest labour hire agencies of their obligations under the 2004 Act, but will provide some express recognition of the differing degrees of control exercised by agencies and hosts in the workplace.

The Committee has examined the recent amendments made to the WA OSH Act, which make express reference to labour hire arrangements and the concept of control. However, rather than making specific reference to labour hire arrangements, the Committee believes that it is more in keeping with the spirit of the 2004 Act and its expression of broad general duties to include reference to control in the list of factors which determine reasonable practicability.

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144 Victorian Trades Hall Council, 2005. Comment on Interim Report, No. 5, 24 February, p.7.

145 R. Sheers, Victorian WorkCover Authority, 2005. Minutes of Evidence, 21 March, p.298 and p.300.

146 Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December, p.44.

147 Chris Maxwell, 2004. *Occupational Health and Safety Act Review*. State of Victoria, Melbourne, March, p.118.

The Committee believes that it is important to emphasise that any amendment to the 2004 Act which includes reference to control would not be a panacea to address confusion amongst agencies and hosts regarding the overlapping duties. The Committee believes that amendment to the 2004 Act is only one step in the broader process of reform that needs to take place to improve OHS in the labour hire industry. The Committee believes that legislative amendment must take place alongside other measures such as the development of regulations and guidance material and the establishment of the Committee's proposed OHS registration system.[148]

Recommendation 4.3

The Committee recommends that section 20(2) of the* Occupational Health and Safety Act 2004 *(Vic) be amended to include reference to 'control' in the list of factors that is considered to determine what is 'reasonably practicable'. 'Control' should be understood to include 'capacity to control' and 'ability to influence decisions'.

4.4.6 Better protection for labour hire workers who raise OHS issues

As noted above, the Committee received evidence that Victoria's OHS legislation should be amended to give greater protection to all labour hire workers.[149] At the moment, labour hire employees who raise OHS issues are given some level of protection by the 2004 Act. Under section 76 of the Act, where a labour hire employee raises an OHS concern, labour hire agencies – as employers – are prohibited from dismissing an employee or detrimentally altering his or her employment.[150]

However, there are two main weaknesses in section 76 of the 2004 Act as it applies to labour hire arrangements. Firstly, labour hire workers are not protected where it is the act of a host employer that detrimentally affects the labour hire worker's

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148 Economic Development Committee, 2004, *Interim Report: Inquiry into Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December, pp.75-78.

149 Job Watch, 2003. Submission No. 9, 19 December, pp.24-25.

150 For an example of a prosecution brought under section 54 of the 1985 Act (the predecessor of section 76 of the 2004 Act), see: Richard Johnstone, Michael Quinlan and David Walters, 2005. 'Statutory Occupational Health and Safety Workplace Arrangements for the Modern Labour Market'. *Journal of Industrial Relations*, Vol. 47 No. 1, March, pp.93-116 at p.106.

employment. For example, a labour hire worker is not protected where a host employer chooses to terminate that worker's assignment because the labour hire worker has raised an OHS issue. Secondly, only employees are covered by section 76: independent contractors engaged by labour hire agencies are not protected.

The Committee discussed this issue in the Interim Report and found that labour hire workers who raise OHS concerns in the workplace should be given greater protection.[151] However, the Committee decided to seek further comment on this matter from stakeholders.

In its comment on the Interim Report, the VWA noted that there is no scope under the 2004 Act to protect labour hire workers from discrimination by the host employer.[152] Mr Colin Fenwick of the CELRL submitted that the inadequate protection for labour hire workers under section 76 of the 2004 Act is 'a weakness in the legislative scheme'.[153] Mr Fenwick submitted that one way to give better protection to labour hire employees would be to use the extended definition of 'employee' that appears in section 21(3) of the 2004 Act to apply to section 76.[154] In this way, the host employer would be prohibited from detrimentally affecting or altering the employment of a labour hire worker because that worker had raised an OHS issue.

Other comments on the Interim Report that were received by the Committee did not support the amendment of section 76. For example, the Victorian Automobile Chamber of Commerce submitted that section 76 currently provides sufficient protection to labour hire workers.[155] This view was also voiced by Group Training Australia (Vic).[156]

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151 Economic Development Committee, 2004. *Interim Report: Inquiry into Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December, pp.45-46.

152 Victorian WorkCover Authority, 2005. Comment on Interim Report, No. 17, 18 March, p.4.

153 C. Fenwick, Centre for Employment and Labour Relations Law, University of Melbourne, 2005. Comment on Interim Report, No. 13, 7 March, p.7.

154 C. Fenwick, Centre for Employment and Labour Relations Law, University of Melbourne, 2005. Comment on Interim Report, No. 13, 7 March, p.7

155 Victorian Automobile Chamber of Commerce, 2005. Comment on Interim Report, No. 9, 28 February, p.4.

156 Group Training Australia (Vic), 2005. Comment on Interim Report, No. 11, 4 March, p.2.

The Committee believes that workplace health and safety standards are enhanced where all workers feel secure enough to raise OHS issues. On balance, the Committee feels that the 2004 Act could offer better protection to labour hire workers if it were amended to use the extended definition of 'employee' that is provided in section 21(3) of the 2004 Act.

Recommendation 4.4

The Committee recommends that section 76 of the* Occupational Health and Safety Act 2004 *(Vic) should be amended to provide greater protection for labour hire workers. In particular, the Committee recommends that section 76 should apply the extended definition of 'employee' provided in section 21(3) of the* Occupational Health and Safety Act 2004 *(Vic).

4.5 Workers' compensation: the legal obligations of labour hire agencies

4.5.1 Workers' compensation legislation in Victoria

Workers' compensation and rehabilitation in Victoria is principally governed by the *Accident Compensation Act 1985* (the 'AC Act'). The AC Act is not based on broad general duties in the same way as OHS legislation; instead, it is a more prescriptive piece of legislation that fixes specific duties for employers.

Formal coverage of workers under the Scheme is largely restricted to employees. However, some categories of workers are deemed to be employees for the purposes of the AC Act. For example, independent contractors may be deemed workers for the purposes of the AC Act if they fulfil the criteria set out in section 9 of the AC Act. As noted in the VWA submission, section 9 aims to cover contractors who essentially work for one principal in the course of a financial year.[157] As a result, contractors who work predominantly for one agency are likely to be deemed workers for the purposes of the AC Act.

[157] Victorian WorkCover Authority, 2004. Submission No. 22, 16 April, p.16.

Employer responsibility for the compensation and rehabilitation of injured labour hire workers rests with labour hire agencies and not host employers. The VWA submitted that the major legislative obligations of labour hire agencies, as employers, are to:

- obtain and keep in place a workplace injury insurance policy;
- inform agents of changes which will affect the policy;
- provide a summary of information to workers;
- maintain a register of injuries;
- submit claims in a prescribed form and within set time frames;
- pay compensation to injured workers;
- re-employ injured workers and provide suitable work;
- develop occupational rehabilitation programs and risk management programs (depending on employer size and circumstances); and
- appoint return to work (RTW) co-ordinators, and prepare, monitor and review RTW plans for injured workers.[158]

Under section 7 of the *Accident Compensation (WorkCover Insurance) Act 1993*, labour hire agencies – as employers – are required to obtain and keep in force a WorkCover insurance policy.[159] Employer insurance premiums are calculated by referring to:

- the total remuneration paid to workers;
- the industry in which the employer operates, which is determined by reference to the predominant activity of the workplaces in which the employer places its workers;
- the employer's claims history; and
- premium caps, which ensure that premium rates do not fluctuate too dramatically from year to year.[160]

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158 Victorian WorkCover Authority, 2004. Submission No. 22, 16 April, pp.16-17.

159 Unless the employer has reasonable grounds for believing that the total rateable remuneration it will be liable to pay during the financial year will be less than $7,500. Victorian WorkCover Authority, 2004. Submission No. 22, 16 April, p.17.

160 Victorian WorkCover Authority, 2005. *Workplace Injury Insurance 2005-06: Calculation*, at <www.workcover.vic.gov.au/vwa/home.nsf/pages/premium_calc>.

Although host employers do not have to maintain workers' compensation policies for labour hire workers, host employers may still have to contribute towards the cost of a labour hire worker's claim if the host employer's negligence has contributed to the worker's injury. Under section 138 of the AC Act, where a labour hire worker's injury has been caused by the negligence of a third party, the VWA may pursue that third party for costs relating to workers' compensation claims.

When a claim has been made, agencies – as employers – have a duty under section 122 of the AC Act to offer suitable work to injured workers (where the worker has some work capacity) during the workers' compensation claim period and to re-employ the worker when he or she has recovered. The duties with respect to the management of rehabilitation and RTW programs for injured workers are set out in Part VI of the AC Act. Section 156(2) states the employer's basic obligation to prepare an RTW plan for an injured worker who has no capacity to work and who has been injured for more than 20 days.[161]

4.5.2 The consequences of the use of labour hire arrangements for workers' compensation

4.5.2.1 Premium ratings

The Committee received evidence that the use of labour hire arrangements poses a number of issues for the premium system in Victoria.

The Committee received evidence that the VWA's premium system provides a strong financial incentive to employers to have safer workplaces and improve their RTW practices. Mr Greg Tweedly of the VWA told the Committee that the premium system, which was revamped in 2004, is designed to have a strong relationship to the frequency and duration of claims, encouraging employers to both:

- reduce the number of claims; and
- better manage existing claims.

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[161] The RTW plan must include steps to be taken to facilitate the worker's RTW and an offer of suitable employment where the worker has some work capacity. If the worker has no work capacity three months after the RTW plan has been organised, the employer must establish and maintain a rehabilitation program and a risk management program. Large employers (whose total remuneration exceeds $1 million) must establish and maintain an ongoing occupational rehabilitation program. Section 156(1), *Accident Compensation Act 1985*.

This is because the cost of an employer's premium is sensitive to the frequency and cost of injuries sustained by its workers.[162]

An employer's premium is also affected by the industry in which it operates. For the purposes of calculating a premium, each employer's workplace is allocated a WorkCover Industry Classification (WIC) Code that most closely corresponds to the predominant activity of the employer at the workplace.[163] Referring to the employer's industry to determine the premium allows the VWA to levy employers according to the level of risk to which workers are exposed in the employer's industry.[164] Currently, there are 518 WIC codes used to classify the industries in which employers may operate, but only two for labour hire agencies: one for 'production' industries ('blue collar') and one for 'services' industries ('white collar').[165]

The Committee received evidence that the current allocation of only two WIC Codes for the labour hire industry diminishes the potential for premiums to act as an incentive to maintain safe and healthy workplaces for labour hire workers. Witnesses gave evidence to the Committee that, given that the labour hire industry supplies workers across a wide range of industries, the allocation of only two WIC codes is an unsatisfactory and inaccurate tool to identify the risk to which labour hire workers are exposed. For example, if Agency A predominantly supplies workers for low-risk clerical positions but also supplies a lesser number of workers to certain high risk blue collar industries, its premium will be calculated according to the services rate, as most of its workers are clerical staff. This means that Agency A's premium will not reflect the risk to which its blue collar workers are exposed. This reduces the incentive for Agency A to improve its OHS management and to reduce the cost of its workers' compensation claims.

The use of only two WIC codes may also create a price incentive for host employers to use labour hire arrangements rather than direct hire employment. For example, in some high risk industries, labour hire agencies may be able to pay lower premiums than host employers, based on the labour hire industry rate. This may lead to host employers increasing their use of labour hire arrangements in order to save costs on

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162 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, p.239.

163 Victorian WorkCover Authority, 2004. Submission No. 22, 16 April, p.19.

164 Richard Johnstone, 2004. *Occupational Health and Safety Law and Policy* (2nd ed). Sydney, Lawbook Company, p.669.

165 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, p.241; Victorian WorkCover Authority, 2004. Submission No. 22, 16 April, p.19.

premiums. For example, where Company B operates in a particularly high risk industry, and this results in high premium payments, it may be more cost effective to use the services of an agency who pay much lower premium rates because its WIC code does not accurately reflect the risk of the industry in which the agency workers are working. Mr Leigh Hubbard of the VTHC gave evidence to the Committee that this is the situation in the meat industry:

> *… companies have brought in labour hire because they know the labour hire company is paying a much lower WorkCover premium than they would if they directly hired employees.*[166]

The Committee received evidence from the VWA that the allocation of WIC codes to the labour hire industry has been reviewed and will be reformed in the 2005-06 financial year.[167] (See page 103 for discussion of the VWA's reforms.)

The use of labour hire arrangements may also affect Victoria's workers' compensation system if host employers are using labour hire arrangements for the most hazardous tasks in the workplace in order to reduce the exposure of their direct hire workers to tasks which may influence their premium. This shift in risk apportionment means that some host employers may be able to hide their own poor OHS performance by using labour hire arrangements. It may also lead to a distortion of the claims history and cost-profile of the host employer industries.

4.5.2.2 Hold harmless clauses

While the premium system offers labour hire agencies an incentive to improve the health and safety of their workers, section 138 of the AC Act provides an avenue to the VWA to pursue host employers for the cost of the workers' compensation claims of labour hire workers. These claims are commonly referred to as 'section 138 recoveries'. Mr Greg Tweedly of the VWA gave evidence to the Committee that the VWA has been pursuing a growing number of these cases over the last couple of years. In 2003-04, over $7 million was collected from host employers as a result of section 138 recoveries.[168]

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166 L. Hubbard, Victorian Trades Hall Council, 2004. Minutes of Evidence, 23 August, p.109.
167 Victorian WorkCover Authority, 2005. Comment on Interim Report, No. 17, 18 March, p.2.
168 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, p.239.

Several witnesses gave evidence to the Committee that some host employers are seeking to avoid the cost of section 138 recoveries by using 'hold harmless' clauses. In the context of OHS and labour hire arrangements, hold harmless clauses represent a contractual agreement between the agency and the host employer that the agency will assume financial responsibility for the costs of any OHS breaches by the host employer with respect to the agency's workers. This allows the host employer to shift the OHS costs and risks associated with the labour hire arrangement to the agency.

Hold harmless clauses as they apply to labour hire arrangements are largely untested in the courts, but it seems likely that courts would not look favourably on attempts of host employers to sidestep basic OHS responsibilities. It is questionable whether hold harmless clauses are legally enforceable, as common law cases have clearly indicated that duties under OHS legislation cannot be delegated.[169]

The Committee received evidence that hold harmless clauses are becoming increasingly prevalent and may even be insisted on by some host employers. The RCSA submitted, for example, that:

> *45 per cent of RCSA members and 47 per cent of non RCSA members have been asked to sign a hold harmless clause by a client and this is making it very difficult to ensure safety for [labour hire employees] because many clients believe that indemnity provided by such clauses minimises their OHS management obligations to [labour hire employees].*[170]

However, the use of hold harmless clauses does not appear to be widespread and systematic: some witnesses were totally unaware of the existence of hold harmless clauses.

Mr Greg Tweedly of the VWA gave evidence to the Committee that the VWA considers that the use of hold harmless clauses cannot be sustained over time. Mr Tweedly stated that where host employers are prosecuted, the cost to agencies of indemnifying the host employer will place greater cost pressure on agencies. Mr

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169 *Kondis v State Transport Authority* (1984) 154 CLR 672.

170 Recruitment and Consulting Services Association, 2004. Submission No 15, 25 February, p.38.

Tweedly argued that this cost will eventually be passed on to host employers when labour hire agencies increase their fees to account for their own increased costs.[171]

The Committee notes that both agencies and host employers clearly have a statutory responsibility to ensure the health and safety of labour hire workers and that this duty is non-delegable. The Committee believes that the use of hold harmless clauses obfuscates the responsibilities set out in the 2004 Act and encourages situations where workplace health and safety is put at risk. The Committee believes that the incentive for host employers to ensure the health and safety of labour hire workers is considerably lessened if they can transfer the financial responsibility of OHS breaches. Consequently, in the Interim Report, the Committee made a recommendation that Victoria's OHS legislation should be amended to expressly prohibit hold harmless clauses.[172] The Committee notes that this recommendation was broadly supported by employer and employee groups in written comments it received in relation to the Interim Report.

The Committee notes that hold harmless clauses and other agreements that attempt to modify liability for a breach of OHS duties are prohibited under OHS legislation in the Australian Capital Territory. Section 222 of the *Occupational Health and Safety Act 1989* (ACT) (the 'ACT OHS Act') states that:

> *A term of any agreement or contract that purports to exclude, limit or modify the operation of this Act is void.*

The VWA's original submission notes that section 222 of the ACT OHS Act would render hold harmless clauses void.[173] **In line with its Interim Report recommendation to prohibit hold harmless clauses,[174] the Committee believes that the Victorian Government should consider amending the 2004 Act to include a provision similar to section 222 of the ACT OHS Act.**

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171 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, pp.242-243.

172 Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December, p.55.

173 Victorian WorkCover Authority, 2004. Submission No. 22, 16 April, Appendix H, p.1.

174 Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*, Parliament of Victoria, Melbourne, December, p.55.

4.5.2.3 Worker rehabilitation and return to work

The Committee received evidence from a number of witnesses that there are serious problems regarding rehabilitation and return to work opportunities for injured labour hire workers.

Although labour hire agencies and host employers share responsibility for the workplace health and safety of labour hire workers, once a labour hire worker is injured, responsibility for rehabilitation and RTW lies solely with the labour hire agency. Host employers currently have no obligation to participate in the rehabilitation and return to work of injured labour hire workers.

Ms Elsa Underhill gave evidence to the Committee regarding her study of labour hire workers' compensation claims:

> *What I have found is that when the injured [labour hire] worker is capable of returning to work, he or she is not offered any further work. … [O]f the 200 [injured] labour hire workers I looked at, only one third of those were offered further work. They were not offered a return to work on lighter duties or on modified duties, instead the agencies simply offered no further work, which was effectively dismissing them, although not legally dismissing them.*[175]

Ms Underhill told the Committee that this problem was most acute amongst casual employees:

> *[Where] the labour hire workers were returned to the workplace they were much more likely to be permanent employees of the labour hire companies. It is the casual employees who do not get the return to work offer.*[176]

The Committee received evidence that it is difficult for labour hire agencies to offer suitable RTW programs to injured labour hire workers who have some work capacity, as many host employers are reluctant to have injured labour hire workers in their workplaces. The RCSA submitted that this reluctance is due to a perception on the part of host employers that the host is at increased risk of a section 138 recovery where an injured labour hire worker has a relapse in the host workplace.[177]

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[175] E. Underhill, 2004. Minutes of Evidence, 28 July, p.53.
[176] E. Underhill, 2004. Minutes of Evidence, 28 July, p.53.
[177] Recruitment and Consulting Services Association, 2004. Submission No. 15, p.37.

The RCSA gave evidence to the Committee that only 8 per cent of its members had clients who regularly made an attempt to provide suitable alternative duties for injured labour hire workers in their workplaces.[178] The RCSA argued that host employers should have a statutory obligation to participate in some way in the rehabilitation of injured labour hire workers.[179]

Some of the larger labour hire agencies that have a large client base and long-term relationships with host employers have put in place sophisticated strategies for rehabilitating their workers. For example, Skilled Engineering gave evidence to the Committee that not only do its clients frequently assist in the rehabilitation of workers,[180] but it had launched its own rehabilitation centre to provide more rehabilitation opportunities for its injured workers:

> *It is for injured workers to return to work. It is set up so that we actually have work that we perform and we take not only people who are Skilled [Engineering] employees but we actually agree with certain clients who are not able to provide a proper return to work strategy and who are looking for one of the same opportunities.*[181]

Mr Ken Bieg of Skilled Engineering noted that the size of his organisation is a particular advantage in terms of the opportunities it can provide for rehabilitation and RTW.[182]

Mr David Hargraves of the Australian Industry Group gave evidence to the Committee that he saw worker rehabilitation as a particularly key area for the labour hire industry:

> *The one area in OHS that does need examination is rehabilitation and return to work. It would be true to say that that is a problem, and we recognise that. It is a complex problem, and the solution to it is not immediately clear to us. It is certainly an area on which we would like to have some further work.*[183]

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178 Recruitment and Consulting Services Association, 2004. Submission No. 15, p.37.
179 Recruitment and Consulting Services Association, 2004. Submission No. 15, p.37.
180 K. Horne, Skilled Engineering, 2004. Minutes of Evidence, 28 July, p.84.
181 K. Bieg, Skilled Engineering, 2004. Minutes of Evidence, 28 July, p.87.
182 K. Bieg, Skilled Engineering, 2004. Minutes of Evidence, 28 July, p.79.
183 D. Hargraves, Australian Industry Group, 2004. Minutes of Evidence, 23 August, p.122.

The Committee believes that rehabilitation and RTW for labour hire workers is a critical issue that requires further attention. The Committee made two recommendations to this effect in the Interim Report.[184] The lack of rehabilitation opportunities for labour hire workers places greater pressure not only on the health of individual workers, but also on the costs of workers' compensation claims for agencies and the Scheme as a whole.

4.6 The Victorian WorkCover Authority: labour hire initiatives

4.6.1 Policy and enforcement activities

In its original submission to the Committee, the VWA noted that it has developed targeted programs for the labour hire industry as a result of the industry's total growth increase, as well as the growth in claims numbers, costs and frequency.[185] However, the Committee did not receive evidence regarding how effective these programs have been in reducing injury rates in the labour hire industry.

The Committee received evidence that the VWA has established an ongoing Labour Hire Program that is positioned within the Strategy and Programs Division of the VWA and overlays all WorkSafe Industry Programs.[186] The Committee received evidence that activities planned for the VWA's Labour Hire Program include:

- an integrated approach to field inspections, where OHS risks associated with labour hire arrangements will be integrated into current field inspector visits to host workplaces and labour hire agencies;
- labour hire specific guidance material;
- better targeting of both labour hire agencies and host employers; and
- an information and education campaign targeting the labour hire sector.[187]

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184 Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December, p.59.

185 Victorian WorkCover Authority, 2004. Submission No. 22, 16 April, p.15.

186 Victorian WorkCover Authority, 2005. 'Response to matters raised by the EDC at the public hearing presentation by the Victorian WorkCover Authority on Monday 21 March 2005', 24 March, p.3.

187 Victorian WorkCover Authority, 2005. 'Response to matters raised by the EDC at the public hearing presentation by the Victorian WorkCover Authority on Monday 21 March 2005', 24 March, p.3.

In addition, the On-hired Workers Stakeholder Forum (the 'Forum') was established for the labour hire industry in 2000, composed of representatives from employer associations and trade unions.[188] According to the VWA's original submission, the Forum has developed an industry strategy to be implemented over time, which prioritises legal rights and responsibilities, compliance and enforcement and communications.[189]

In terms of the VWA's prosecution activities in the labour hire industry, Mr Tweedly told the Committee that the VWA has brought 11 prosecutions against labour hire agencies and host employers since 1999. Nine of these were successful: in five of the cases, the agency and host were found jointly responsible for the OHS breach; in the other four, the host was assigned a greater degree of culpability.[190] Mr Tweedly noted that this number of cases may appear small, but that the prosecution activities of the VWA are underpinned by the activities of the WorkSafe inspectorate.[191]

4.6.2 Future activities

4.6.2.1 Premium system

The Committee received evidence that the VWA is planning a range of important reforms to the premium system as it applies to labour hire arrangements. The VWA submitted that:

> *The range of reforms currently under consideration … will allow [the VWA] to effectively record important information about labour hire companies and employers … and will ensure meaningful OHS obligations and enforcement mechanisms are established for the [labour hire] sector.*[192]

The changes are scheduled to be introduced in the financial year 2005-06.[193]

The VWA submitted that, under the proposed reforms, the premium for labour hire agencies will be based on the predominant activity of the host employer's workplaces, as opposed to the former blue collar/white collar WIC code system:

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188 Victorian WorkCover Authority, 2004. Submission No. 22, 16 April, p.15.
189 Victorian WorkCover Authority, 2004. Submission No. 22, 16 April, p.15.
190 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, p.240.
191 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, p.239.
192 Victorian WorkCover Authority, 2005. Comment on Interim Report, No. 17, 18 March, p.2.
193 Victorian WorkCover Authority, 2005. Comment on Interim Report, No. 17, 18 March, p.1.

> *The proposed reforms will require labour hire companies to report against the industry classification of the workplace where they place their employee. Therefore, their premium will be a function of the industries in which they are employed with their insurance rate based on being a "labour hire employee".*[194]

For example, where a labour hire agency supplies workers to the meat industry, the agency's premium will be calculated according to the meat industry rate, and not the blue collar labour hire rate. Mr Brian Cook of the VWA submitted that the reforms will ensure that the insurance rates of labour hire agencies will be more strongly linked to the level of workplace risk to which their workers are exposed.[195]

The VWA further submitted that the reforms will require labour hire agencies to report the host employer site where injured labour hire workers were working when they were injured. This means that the VWA will have better data for targeting unsafe host workplaces.[196]

The VWA's proposed reforms to the WIC code allocation for labour hire agencies mean that where risk is 'outsourced', the cost and risk profile of base industries cannot be distorted, as the injuries of labour hire agencies will be recorded against the industry of the host employer. However, host employers could still use labour hire workers to shift the risk of unsafe work practices to labour hire agencies by using labour hire for the most hazardous tasks in the workplace. In theory, however, if labour hire agencies are paying higher premiums to reflect a higher rate of injury, the host employer will eventually have to bear the cost by paying increased labour hire fees.

The VWA submitted that the new requirements for labour hire agencies will be mandated under the Premiums Order which is made each year under the *Accident Compensation Act 1985*. The requirements will apply to agencies that have a contract that defines them as having a labour hire operation. The VWA advised that the new system will not require any new costs for its administration, and no

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194 Victorian WorkCover Authority, 2005. Comment on Interim Report, No. 17, 18 March, p.1.
195 B. Cook, Victorian WorkCover Authority, 2005. Minutes of Evidence, 21 March, p.297.
196 Victorian WorkCover Authority, 2005. Comment on Interim Report, No. 17, 18 March, p.2.

legislative change will be required.[197] The new requirements will be enforced by the VWA's ongoing premium compliance activities.[198]

4.6.2.2 Further guidance material

Mr Greg Tweedly of the VWA gave evidence to the Committee that the law regarding the duties of labour hire agencies and host employers is clear, but conceded that there has been a shortfall in the information made available by the VWA to labour hire agencies and host employers.[199] At the time of writing this report, the Committee notes that the VWA has a page on its website dedicated to the labour hire industry,[200] but this page does not contain detailed guidance material for agencies or hosts.

However, the Committee notes that the VWA is currently developing comprehensive guidance material for the labour hire industry that is based on material developed by the South Australian WorkCover Corporation.[201] The guidance material has been developed in consultation with stakeholders and is due for release in July 2005[202] and will offer detailed assistance for labour hire agencies with respect to the fulfilment of their OHS duties. The guidance material will be circulated widely and its release will be accompanied by a number of open discussion forums for employers and employees. The material will be reviewed after six months, and the final re-draft will take place in January 2006.[203]

The Committee commends the VWA's initiative to develop further guidance material, as the Committee believes that the amount of guidance material available to agencies and host employers has been, to date, inadequate. As noted above, the Committee believes that the existence of adequate guidance material is a crucial tool for aiding labour hire agencies and host employers to understand the practical content of their statutory obligations for OHS. To this end, the Committee recommended in the Interim Report that the VWA continue to develop guidance

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197 Victorian WorkCover Authority, 2005. Comment on Interim Report, No. 17, 18 March, p.3.
198 B. Cook, Victorian WorkCover Authority, 2005. Minutes of Evidence, 21 March, p.297.
199 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, p.245.
200 Victorian WorkCover Authority. *Labour hire and on-hired workers*, at <www.workcover.vic.gov.au/Vwa/home.nsf/pages/so_labour_hire>.
201 WorkCover Corporation (SA). *On-hired employment services resources*, at <www.workcover.com/Industry/IndustriesLZ/LabourHire/labrResources.htm >.
202 Victorian WorkCover Authority, 2005. Comment on Interim Report, No. 17, 18 March, p.5.
203 Victorian WorkCover Authority, 2005. 'Labour Hire: Release, review and status of guidance material'. Attachment to correspondence received by email, 6 May 2005, pp.1-2.

material for the labour hire industry.[204] The Committee notes the development of similar OHS guidance material in the United Kingdom.[205]

The Committee notes that the general duties provisions of the 2004 Act will not give sufficient protection to labour hire workers unless both agencies and hosts are provided with adequate information to enable them to make informed decisions about the practical content of their duties. Consequently, the existence of sufficiently detailed supporting regulations and guidance material for both labour hire agencies and host employers is imperative.

4.6.3 Areas identified by the VWA as needing further work

4.6.3.1 Return to work

The Committee received evidence from Mr Greg Tweedly of the VWA that the rehabilitation and RTW of injured labour hire workers is:

> *… an area that is significantly crying out for improved policy to be made to in fact improve the return to work prospects of people in this industry.*[206]

Mr Brian Cook of the VWA noted that the VWA is currently reformulating its RTW strategy for labour hire workers.[207]

The VWA has a number of programs in place to encourage the quick and effective rehabilitation of injured workers, but none of these are specifically aimed at labour hire arrangements. For example, Mr Brian Cook of the VWA noted that the VWA is currently running some initiatives that apply to labour hire employers and other employers, including assistance with job seeking where a worker is unable to return to their employer following an injury.[208] In the past, the VWA has also pursued a

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204 Economic Development Committee, 2004. *Interim Report: Inquiry into Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December, p.44.

205 Health and Safety Executive, 2005. 'Proposed visit of the Victorian Economic Development Committee to HSE, March/April 2005'. Attachment to correspondence received by email, 18 February 2005, p.2.

206 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, p.244.

207 B. Cook, Victorian WorkCover Authority, 2005. Minutes of Evidence, 21 March, p.298.

208 B. Cook, Victorian WorkCover Authority, 2005. Minutes of Evidence, 21 March, p.298.

strategy of subsidising the wages of an injured worker to encourage employers to take on workers who are in the process of rehabilitation.[209]

As noted above, the Committee is concerned that existing structures do not appear to be adequately supporting the rehabilitation of labour hire workers, and made two recommendations to this effect in the Interim Report.[210]

4.7 OHS Registration system and compliance code

4.7.1 The Committee's proposed OHS registration scheme

In the Interim Report, the Committee expressed concern that the labour hire industry's OHS performance is currently considerably poorer than most other industries. With a view to improving this record, the Committee recommended that:

> *… the Victorian government establish a labour hire registration scheme, to be located within the Victorian WorkCover Authority, aimed at improving the occupational health and safety of the labour hire sector.*[211]

The Committee recommended that the proposed OHS registration system should be **exclusively devoted to the regulation of workplace health and safety**.

The Committee notes that the VWA has not considered the labour hire industry a priority until relatively recently.[212] In this context, the Committee strongly emphasises that, given the higher injury rates associated with the labour hire industry, the OHS standards of the labour hire industry should be more tightly scrutinised and in an ongoing way, with procedures for regular review. The Committee believes that the most effective way to achieve this is through the establishment of the proposed OHS registration system.

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209 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, p.244.

210 Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December, p.59.

211 Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, 20 December, p.78.

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

Under the OHS registration system that the Committee proposed in the Interim Report, all labour hire agencies will be required to register with the VWA in order to operate in Victoria. All agencies will be eligible for registration: no threshold entry requirements will apply. The Committee believes that labour hire agencies should pay a small annual registration fee, which would go some way to covering the costs of the proposed OHS registration system. The Committee believes that much of the work associated with the proposed OHS system could be carried out using existing resources within the VWA's existing framework. As set out in the Interim Report, the Committee believes that the proposed OHS registration system should be reviewed by the VWA after two years of operation.[213]

The Committee also recommended in the Interim Report that the proposed OHS registration system should be accompanied by a Code of Practice for labour hire arrangements. In Chapter 1 of this Report, the Committee has restated the relevant Interim Report recommendations to make reference to Compliance Codes instead of Codes of Practice. The Committee considers that all agencies registered under the proposed OHS registration system would be required to comply with the proposed Compliance Code. The proposed Compliance Code, set up under the 2004 Act, would be wholly restricted to matters of workplace health and safety. In particular, the aim of the Compliance Code would be to outline a minimum set of health and safety standards that would clarify how labour hire agencies and host employers should fulfil their OHS duties under the 2004 Act. The Committee believes that the proposed Compliance Code would diminish some of the confusion regarding the application of the general duties set out in Victoria's OHS legislation.

The Committee considers that one of the main functions of the registration scheme should be the ongoing collection of information about labour hire agencies, to assist in the VWA's monitoring and enforcement activities. The Committee notes that all employers are already obliged to keep records regarding the health and safety of its employees, pursuant to section 22(2)(a) of the 2004 Act. The Committee believes that labour hire agencies should be required to keep detailed OHS records. The Committee envisages that these records could include, for example:

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[213] Economic Development Committee, 2004. *Interim Report: Inquiry into Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December, p.78.

- records relating to workers, including:
    - the worker's experience and training or qualifications;
    - details of each worker's OHS induction training;
    - names of host employers with whom the worker has been placed;
    - periods of leave taken by the worker;
- records relating to host employers, including:
    - OHS assessments of the host workplace by the agency;
    - records that demonstrate ongoing monitoring of host workplaces;
    - records of discussions held between agency and host to coordinate policies and procedures for managing OHS;
    - information regarding unsafe host workplaces (see below);
    - a list of workers currently engaged by the host, and verification that these workers have the requisite levels of training and skills to safely perform their work; and
    - a history of the agency's workers engaged by the host.

However, as stated in the Interim Report, the Committee believes that the detail of the registration system should be determined by the VWA in consultation with the On-hired Workers Industry Stakeholder Forum.[214]

The written comments received by the Committee confirmed that, unsurprisingly, there is no consensus amongst stakeholders on the best way to strengthen OHS standards in the labour hire industry. However, the Committee believes that there is considerable support for the proposed OHS registration system and Compliance Code.[215]

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[214] Economic Development Committee, 2004. *Interim Report: Inquiry into Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December, p.78.

[215] See, for example the Australian Services Union comments, which referred to the recommendation for an OHS registration system as '… the most important recommendation contained in the Interim Report. It is essential that a [labour hire] registration system be established as soon as possible. It will lead to substantially improved outcomes in OHS and in particular accident prevention. It will also assist to 'weed out' the disreputable [labour hire] companies.' Australian Services Union, 2005. Comment on Interim Report, No. 2, 18 February, p.6.

4.7.2 Making information on unsafe host workplaces available to WorkSafe

As part of the proposed OHS registration system, the Committee believes that labour hire agencies should be obliged to keep records in relation to unsafe host workplaces, particularly where agencies have refused to place their workers due to health and safety concerns.

The Committee received evidence that a number of labour hire agencies have identified hazards in host employer workplaces, and have then refused to place workers into the workplaces of host employers because they believe that these workplaces are unsafe. The RCSA gave evidence to the Committee that:

> *55 per cent of RCSA members have identified hazards in client workplaces during OHS assessments … [and] 49 per cent of RCSA members have refused to supply [labour hire workers] to clients for OHS reasons.*[216]

Mr Chris Mazzotta of Troubleshooters Available gave evidence to the Committee that:

> *There have been quite a few sites that I have been out to where I have ordered the guy to go home for the day because of a particular client providing an unsafe work environment.*[217]

The Committee believes that it would be very useful for this type of information to be made available to WorkSafe Victoria for the purposes of their investigatory activities.

Mr Rob Sheers of the VWA gave evidence to the Committee that labour hire agencies already have the capacity to voluntarily report unsafe host workplaces to the VWA.[218] However, in its comment on the Interim Report, the VWA noted that there are few financial incentives for agencies to report unsafe host workplaces, as reporting may jeopardise current or future commercial arrangements.[219]

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216 Recruitment and Consulting Services Association, 2004. Submission No 15, 25 February, p.33.
217 C. Mazzotta, Troubleshooters Available, 2004. Minutes of Evidence, 4 October, p.168.
218 R. Sheers, Victorian WorkCover Authority, 2005. Minutes of Evidence, 21 March, p.297.
219 Victorian WorkCover Authority, 2005. Comment on Interim Report, No. 17, 18 March, p.3.

The VWA gave evidence to the Committee that, under section 39(1)(i) of the *Occupational Health and Safety Act 1985* (the '1985 Act'), VWA inspectors have the power to compel labour hire agencies to provide them with any document for the purposes of the exercise of the inspectors' functions.[220] The equivalent section in the 2004 Act is section 100. This power may be used to require agencies to produce information on unsafe host workplaces. The VWA gave evidence to the Committee that it had records of 57 instances where section 39(1)(i) of the 1985 Act had been relied on by VWA inspectors over the past five years to require labour hire agencies to produce documentation relating to OHS compliance.[221] Due to data collection limitations, the VWA was unable to specify how many times this power was used to compel the production of information on unsafe host workplaces.

Under the Committee's proposed OHS registration scheme, labour hire agencies would be required to keep detailed OHS records, including records of instances where they have refused to place workers into host workplaces on the grounds of unsatisfactory OHS. The VWA could exercise its power under section 9 of the 2004 Act to recover this material. The Committee considers that the VWA should continue to exercise this power to recover information regarding unsafe host workplaces from labour hire agencies.

Recommendation 4.5

The Committee recommends that the Victorian WorkCover Authority continue to exercise its power to recover information from labour hire agencies regarding details of host workplaces where agencies have refused to place workers on the grounds of workplace health and safety concerns.

220 Correspondence received from Victorian WorkCover Authority, 14 June 2005, p.1.
221 Correspondence received from Victorian WorkCover Authority, 14 June 2005, p.2.

Chapter 5

Skills and training

5.1 Introduction

The rapid growth of labour hire arrangements has raised a number of questions regarding the implications of labour hire for future skills development in Victoria. Education, vocational training and job skills are being increasingly recognised as key indicators of social and economic performance:[1] high skill levels are crucial for sustaining high levels of productivity in Victoria. This chapter will examine the effect of labour hire arrangements on the development and maintenance of skills levels in Victoria.

The Committee believes that avenues for skills development – also referred to as vocational education and training or continuous vocational training – can encompass a wide variety of activities. In general terms, vocational education and training can be considered as 'any activity which assists individuals to develop, learn and maintain skills related to job performance and competency'.[2] Vocational education and training can include informal, on-the-job training as well as formal training provided by public and private training bodies.[3] The Committee notes the importance of occupational health and safety (OHS) training and firm-specific training, such as induction training, but is more concerned in this chapter with the acquisition of more generic skills that have a broader application for the long-term careers of workers.

The Committee notes that the challenge of meeting current and future skills needs is currently a major priority for State and Federal Governments. The shortage of skilled workers[4] and its effect on Australian industry is becoming increasingly critical. For example, a 2004 survey by the Australian Chamber of Commerce and Industry

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1 Sue Richardson, 2004. *Employers' contribution to training*. Report for the National Centre for Vocational Education Research, Adelaide, p.8.

2 Adriana VandenHeuvel and Mark Wooden, 1999. *Casualisation and Outsourcing: Trends and Implications for Work-Related Training*. Report for the National Centre for Vocational Education Research, Adelaide, June, p.8.

3 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*. Report for the National Centre for Vocational Education Research, Adelaide, p.1.

4 To see the current occupations affected by skills shortages: Department of Employment and Workplace Relations, 2004. *National Skills Shortage List*, Canberra.

revealed that the availability of suitably qualified employees had become the primary constraint for businesses on future investment decisions.[5] Some Victorian employers have even flown in foreign workers in an attempt to address short-term skills shortages; for example, 'guest' welders have been flown in from both Hungary and China.[6]

In its 2003 report on skills shortages – *Bridging the Skills Divide* – the Commonwealth Senate Employment, Workplace Relations and Education References Committee noted that inadequate training levels are often an important contributing factor to skills shortages.[7] Consequently, the Committee believes that an assessment of the impact of labour hire arrangements on training and skills formation is particularly timely. In the context of labour hire arrangements, the Committee considers that it is important to consider questions regarding:

- the type and quantity of training that labour hire workers are receiving;
- where the responsibility for training falls; and
- whether the use of labour hire workers reduces the amount of training that host employers undertake for their own workers.

In the Interim Report, the Committee considered some of the issues associated with the impact of labour hire arrangements on industry skill levels, paying particular attention to the training opportunities that are available to labour hire workers to develop their skills.[8] Following the release of the Interim Report, the Committee received further written comments from stakeholders that highlighted the levels of community concern regarding current skills shortages.

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5 Australian Chamber of Commerce and Industry, 2004. *Skills shortages – a complex problem requiring a considered response.* Media Release, 27 July.

6 See, for example: Brad Norington, 2004. 'Dockyard flies in Hungarian welders', *The Australian*, 28 December, p.3, Paul Robinson, 2004, 'Growth fears as skills dry up', *The Age*, 23 December online; Tom Skotnicki, 2005. 'Gates open for skills', *Australian Financial Review*, 24 March, p.12.

7 Senate Employment, Workplace Relations and Education References Committee, 2003. *Bridging the skills divide*, Parliament House, Canberra, p.17.

8 Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December, pp.59-70.

5.2 Levels of skills training in the labour hire industry

5.2.1 Evidence received regarding skills training in the labour hire industry

The Committee believes that the evidence it received with regard to levels of skills training in the labour hire industry paints a mixed picture. On the one hand, the Committee received evidence that the increased use of labour hire arrangements has resulted in diminished levels of training by labour hire companies and host employers alike. For example, Mr Richard Marles of the ACTU stated that:

> *Our experience is that for people who are caught up in labour hire employment on a long-term basis, ongoing skills training just is not there. I am not saying you cannot find examples where it is there, but in general terms it is not nearly at the level it would be in the permanent work force, so there is a problem there.*[9]

However, the Committee also received evidence from the labour hire industry that some labour hire agencies provide significant levels of training to their workers that go well beyond basic induction or OHS training.[10] For example, Mr Ken Bieg of Skilled Engineering told the Committee that:

> *We currently have about 550 apprentices and recently completed traineeships, and we are looking to expand on that. We have launched a program called Operation TECH, specifically to address the issues associated with skill shortages.*[11]

Similarly, Mr Graeme Wheeler of WV Management advised the Committee that:

> *We actually hope that by the end of this year we will have every single person in the meatworks up to certificate II in meat processing — that is, every employee. That would be unheard of in this country. That is part of the process. Every new start is given the opportunity to take on a traineeship.*[12]

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9 R. Marles, ACTU, 2004. Minutes of Evidence, 13 September, p.133.

10 Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December, pp.59-61.

11 K. Bieg, Skilled Engineering, 2004. Minutes of Evidence, 28 July, p.81.

12 G. Wheeler, WV Management, 2004. Minutes of Evidence, 27 July, pp.30-31.

Mr Wheeler gave evidence that his agency tries to make positive use of the downtime associated with seasonal work by organising paid training for workers during this time.[13]

The Recruitment and Consulting Services Association (RCSA) gave evidence to the Committee that it is considering how to develop new approaches to skills training in order to successfully meet the training needs of labour hire workers. Mr Charles Cameron, speaking on behalf of the RCSA, told the Committee that:

> *Trying to put a square peg in a round hole in the delivery of training services to flexible workers is missing the point. We need to have a better understanding of the needs of flexible workers and how we can look towards having sustainability of training rather than simply seeking to adopt old school positions in training delivery.*[14]

The RCSA's submission emphasised that labour hire workers benefit from diverse on-the-job training experiences, to the extent that labour hire arrangements may even provide more satisfying opportunities for skill development than traditional employment arrangements.[15]

5.2.2 Available research on skills training in the labour hire industry

In the *Employment Outlook 2002* report, the Organisation for Economic Cooperation and Development noted European evidence that workers in temporary positions tend to receive considerably less employer-provided training than permanent workers.[16] However, the Committee notes that while there is a growing amount of research devoted to analysing the impact of temporary and non-standard employment on training levels, very few studies focus specifically on labour hire.

The 1998 report entitled *Impact of the Growth of Labour Hire Companies on the Apprenticeship System* (the 'KPMG Report') is one of the few studies that specifically investigates the links between labour hire arrangements and skills training in Australia. According to the survey conducted for the KPMG Report (the 'KPMG

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13 G. Wheeler, WV Management, 2004. Minutes of Evidence, 27 July, p.30.

14 C. Cameron, Stratecom, for the Recruitment and Consulting Services Association, 2004. Minutes of Evidence, 15 November, p.262.

15 Recruitment and Consulting Services Association, 2004. Submission No. 15, 25 February, p.39.

16 Organisation for Economic Cooperation and Development, 2002. *Employment Outlook 2002*. Paris, p.156.

Survey'), the training that was provided by labour hire firms was usually either induction training or was related to the fulfilment of regulatory responsibilities such as workplace health and safety training. The KPMG Survey found that labour hire firms were much less likely to fund skills maintenance or extension,[17] and only a small number of firms had engaged an apprentice.[18] The KPMG Report concluded that labour hire firms provided little in the way of formal training to their workers and tended to rely on recruiting already skilled workers.[19]

The KPMG Report found that, in general, the labour hire industry did not have a strong training ethic and that many employers had a short-term view of skills development:

> *… there is little evidence of a recognition that the longer-term development of the skills pool is a responsibility of individual labour hire firms, or an issue now – it is apparently regarded as a problem 'for the future and for someone else'.*[20]

However, although it did not find a practical commitment to training amongst the labour hire agencies surveyed, the KPMG Report still found that there was clear recognition of the value of skills training. Although three quarters of agencies indicated that they preferred to recruit staff who were already trained, nearly the same number again (73 per cent) indicated that they believe that training pays for itself.[21]

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17 KPMG Management Consulting, 1998. *Impact of the Growth of Labour Hire Companies on the Apprenticeship System*. Report for the Australian National Training Authority, Brisbane, November, pp.31-32.

18 KPMG Management Consulting, 1998. *Impact of the Growth of Labour Hire Companies on the Apprenticeship System*. Report for the Australian National Training Authority, Brisbane, November, Appendix 3, p.26.

19 KPMG Management Consulting, 1998. *Impact of the Growth of Labour Hire Companies on the Apprenticeship System*. Report for the Australian National Training Authority, Brisbane, November, p.37.

20 KPMG Management Consulting, 1998. *Impact of the Growth of Labour Hire Companies on the Apprenticeship System*. Report for the Australian National Training Authority, Brisbane, November, p.2.

21 KPMG Management Consulting, 1998. *Impact of the Growth of Labour Hire Companies on the Apprenticeship System*. Report for the Australian National Training Authority, Brisbane, November, p.33.

A 2003 survey of labour hire agencies, host employers and labour hire workers offers a small amount of further information on attitudes to skills training in the labour hire industry.[22] This survey by Brennan, Valos and Hindle found that only 50 per cent of labour hire companies provided training to their workers.[23] This figure is low given that it refers to training as a generic category, and may include basic induction or health and safety training.

The small amount of research available suggests that where labour hire agencies do provide training, they are likely to fund basic training only, and leave more general skill development to individual workers. According to the KPMG Report, labour hire agencies often assume responsibility for on-the-job induction and safety training, but shift the burden for more general skills formation to the worker. Just over half of the labour hire agencies in the KPMG Survey expected their employees to 'take private responsibility for skill development and maintenance'.[24]

Bretherton, Hall and Buchanan argue that not all situations involving non-standard employment result in workers bearing a greater burden of the costs and risks associated with employment.[25] However, their research found that training provided for workers in non-standard working arrangements usually focuses on induction and 'near fit' training,[26] rather than the acquisition of general skills.[27]

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22 Linda Brennan, Michael Valos and Kevin Hindle, 2003. *On-hired Workers in Australia: Motivations and Outcomes*. Occasional Research Report, Melbourne, RMIT University, School of Applied Communications, December, p.79.

23 Linda Brennan, Michael Valos and Kevin Hindle, 2003. *On-hired Workers in Australia: Motivations and Outcomes*. Occasional Research Report, Melbourne, RMIT University, School of Applied Communications, December, p.79.

24 KPMG Management Consulting, 1998. *Impact of the Growth of Labour Hire Companies on the Apprenticeship System*. Report for the Australian National Training Authority, Brisbane, November, p.32.

25 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*. Report for the National Centre for Vocational Education Research, Adelaide, p.43.

26 'Near fit' training is training that enables a 'nearly qualified' worker to become 'actually qualified'.

27 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*. Report for the National Centre for Vocational Education Research, Adelaide, p.35.

Gryst's study of the labour hire arrangements in the South Australian power industry found that labour hire workers received 'little or no training' from either the agency or the host[28] and that workers were:

> *… required to undertake and pay for skills training themselves to keep their skill level high to remain in the job market.*[29]

The blue collar workers interviewed by Gryst indicated that they had not undertaken skills development training while working for the agency as a contractor, because of the cost involved and the requirement to undertake it in their own time.[30] For example, one worker in Gryst's study stated that:

> *I do a lot of training to keep my skills up and I pay for it myself – I have done a lot of the courses at TAFE at night time or by correspondence and it interferes a lot with both family and social life. And then there's always some courses that are not available at night time or by correspondence and that is frustrating.*[31]

The only type of training these workers were offered by the agency was basic induction training.

The Committee notes that labour hire workers may benefit from high levels of diverse on-the-job training, given that they are often exposed to a range of different workplaces. While training opportunities can be provided by the formal education system (schools and higher education) and the vocational education system (TAFE and private providers), a large amount of vocational training is obtained through formal and informal learning on-the-job.[32]

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28 Roma Gryst, 2000. "*Contracting Employment": A Case Study of how the use of agency workers in the SA Power Industry is reshaping the employment relationship*. Working Paper No. 59, ACIRRT, University of Sydney, March, p.44.

29 Roma Gryst, 2000. "*Contracting Employment": A Case Study of how the use of agency workers in the SA Power Industry is reshaping the employment relationship*. Working Paper No. 59, ACIRRT, March, p.44.

30 Roma Gryst, 2000. "*Contracting Employment": A Case Study of how the use of agency workers in the SA Power Industry is reshaping the employment relationship*. Working Paper No. 59, ACIRRT, March, p.46.

31 Roma Gryst, 2000. "*Contracting Employment": A Case Study of how the use of agency workers in the SA Power Industry is reshaping the employment relationship*. Working Paper No. 59, ACIRRT, March, p.45.

32 Sue Richardson, 2004. *Employers' contribution to training*. Report for the National Centre for Vocational Education Research, Adelaide, p.8.

However, the value of on-the-job learning should not be over emphasised, particularly as this type of training can be poorly structured and ad hoc. Hall, Buchanan and Considine observe that on-the-job training is the main type of training provided to employees, but it usually takes the form of 'teaching self'.[33] They argue that this type of training can hardly be labelled 'employer-provided', given that workers are training themselves.

Levels of on-the-job training for labour hire workers may also fluctuate, depending on the good will of workers directly employed at the host site. For example, Ms Kim Windsor of Windsor & Associates submitted that, when she asked companies whether they were conscious of any divide between labour hire and direct hire employees:

> *A couple of people said, 'Not really, because people feel sorry for the labour hire people and help them'. They see them as new starts who are pretty disoriented and need help. That is another way of saying they may not have been trained properly and need assistance.*[34]

Ms Windsor gave evidence to the Committee that labour hire workers are often in greater need of more formal training than direct hire employees, given that labour hire workers are expected to rapidly adapt to new conditions in different workplaces on a regular basis.[35]

The Committee finds that the levels of training within the labour hire industry range greatly from the very poor to the very conscientious. Although research indicates that there may be some cause for concern with respect to the levels of training in the labour hire industry, the Committee finds that empirical data is limited and must be treated with some caution. The KPMG Survey was based on a limited sample size and focussed on blue collar industries. Equally, the Brennan, Valos and Hindle study cited earlier asked only one very broad question relating to training. To this end, the Committee believes that there is scope for further empirical research in this field. The Committee notes the concern voiced by the Australian Manufacturing Workers' Union

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33 Richard Hall, John Buchanan and Gillian Considine, 2002. *"You value what you pay for": Enhancing Employers' Contributions to Skill Formation and Use*. Discussion paper for the Dusseldorp Skills Forum, June, p.11.

34 K. Windsor, Windsor & Associates, 2005. Minutes of Evidence, March, p.276.

35 K. Windsor, Windsor & Associates, 2005. Minutes of Evidence, March, p.279.

that further research on skills must offer sustainable, innovative and effective measures for addressing any shortfall in skills training.[36]

On balance, the Committee finds that the available data suggests that there is scope for further improvement in the provision of skills training in the labour hire industry. However, the Committee believes that it is important to underline that, while the available research indicates that labour hire companies may not be providing adequate levels of training for its workers, this problem is not confined to the labour hire industry. Hall, Buchanan and Considine observe that general employer expenditure on training has been declining since the early 1990s.[37]

5.3 Factors influencing the provision of training in the labour hire industry

It has been suggested that one of the main factors that influences the investment in vocational education and training by the labour hire industry is the temporary nature of most labour hire arrangements. A number of commentators have noted that employers are most likely to invest money in training workers where they will be able to recoup the costs of the training by benefiting from increased productivity over a longer period of time.[38] General empirical evidence on training for non-standard employees in Australia supports this theory, indicating that casual workers are much less likely to receive training than their permanently employed counterparts (see Table 5.1).[39] Following this logic, labour hire agencies are likely to be less inclined to invest in training, as their workers are usually engaged on casual contracts with no

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36 Australian Manufacturing Workers' Union, 2005. Comment on Interim Report, No. 10, 3 March, p.4.

37 Richard Hall, John Buchanan and Gillian Considine, 2002. *"You value what you pay for": Enhancing Employers' Contributions to Skill Formation and Use*. Discussion paper for the Dusseldorp Skills Forum, June, pp.8-10. See also 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*. Report for the National Centre for Vocational Education Research, Adelaide, p.22.

38 See, for example: Adriana VandenHeuvel and Mark Wooden, 1999. *Casualisation and Outsourcing: Trends and Implications for Work-Related Training*. Report for the National Centre for Vocational Education Research, Adelaide, June, p.5; 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*. Report for the National Centre for Vocational Education Research, Adelaide, p.23.

39 Adriana VandenHeuvel and Mark Wooden, 1999. *Casualisation and Outsourcing: Trends and Implications for Work-Related Training*. Report for the National Centre for Vocational Education Research, Adelaide, June, p.24.

firm long-term commitment and agencies are therefore less likely to benefit from the long-term increased productivity that results from the training.

It has been suggested that labour hire agencies may also be reluctant to invest in training because skilled workers may be 'poached' by host employers, cutting short the work relationship and preventing the labour hire agency from recouping the costs of training. Hall, Bretherton and Buchanan explain that where:

> *… labour becomes more mobile (either through the actions of employers, employees or both), the reciprocal nature of training breaks down. Employers become increasingly concerned that they would lose their investment by the trained employee leaving for another employer ('poaching').*[40]

Hall, Bretherton and Buchanan argue that the trend towards poaching leads employers to become poachers themselves, seeking already trained employees in the workplace rather than training workers themselves.[41]

The vulnerability of labour hire agencies to 'poaching' is supported by the Committee's observation in the Interim Report that host employers are increasingly using labour hire arrangements as a recruitment tool.[42] Also, the Committee received evidence that 19 per cent of labour hire employees eventually become direct hire employees of the host employer.[43]

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40 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*. Report for the National Centre for Vocational Education Research, Adelaide, p.23.

41 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*. Report for the National Centre for Vocational Education Research, Adelaide, p.23

42 Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December, p.16.

43 C. Cameron, Stratecom, for the Recruitment and Consulting Services Association, 2005. Minutes of Evidence, 27 July, p.18.

Table 5.1: Training undertaken according to employee status Australia, 2000 (%)

Whether received training in last 12 months	Permanent	Fixed term contract	Casuals: self identified	Casuals: no leave entitlements	All employees
Undertook one or more of these types of training	69.9	81.8	49.5	50.7	65.2
Undertook a structured training course	31.3	40.5	11.5	12.6	26.6
Attended training seminar, workshop or conference	43.0	55.4	14.2	22.8	36.3
Undertook on-the-job training	36.9	44.1	35.4	30.0	36.7
Used self-learning package	11.7	13.1	3.5	7.3	9.8
Did not undertake any of these types of training	30.1	18.2	50.5	49.3	34.8
Total	100.0	100.0	100.0	100.0	100.0
Number ('000)	4,801.5	286	1,596.4	159.9	6,843.7
Percentage (of all employees)	70.2	4.2	23.3	2.3	100.0

Source: Ian Watson, John Buchanan, Iain Campbell and Chris Briggs, 2003. *Fragmented Futures*. Sydney, The Federation Press, p.79.

A large proportion of labour hire respondents in the KPMG Survey conceded that the main barriers to training were cost-related.[44] The KPMG Report noted that it is not surprising that labour hire companies are cost-sensitive in this area given that they

[44] KPMG Management Consulting, 1998. *Impact of the Growth of Labour Hire Companies on the Apprenticeship System*. Report for the Australian National Training Authority, Brisbane, November, p.35.

tend to operate on narrow profit margins. The companies surveyed indicated that the top four barriers to training were:

- return on investment;
- retention of trained staff;
- prohibitive cost; and
- the cost of downtime for workers.[45]

The ACTU's submission suggested that a further obstacle to the provision of training may be present where agencies are uncertain as to the type of skill development that would benefit their workers, especially where workers move between different assignments and workplaces relatively quickly.[46]

Recent fieldwork conducted by Hall, Bretherton and Buchanan suggests that the amount of vocational education and training provided to non-standard workers by employers is influenced by the skills involved and their relative abundance. The longevity of the work relationship also has an impact, as does the amount of institutional support provided for training.[47] Hall, Bretherton and Buchanan created a model, reproduced at Figure 5.1, to visually represent the links between non-standard employment and skills training.

According to Hall, Bretherton and Buchanan's model in Figure 5.1, labour hire workers are most likely to receive employer-funded training where:

- labour is skilled and in short supply; and
- relations between the parties are long-term and cost margins are fair or above average; or
- relations between the parties are short-term but there is an institutional mechanism such as group training to spread the risk.

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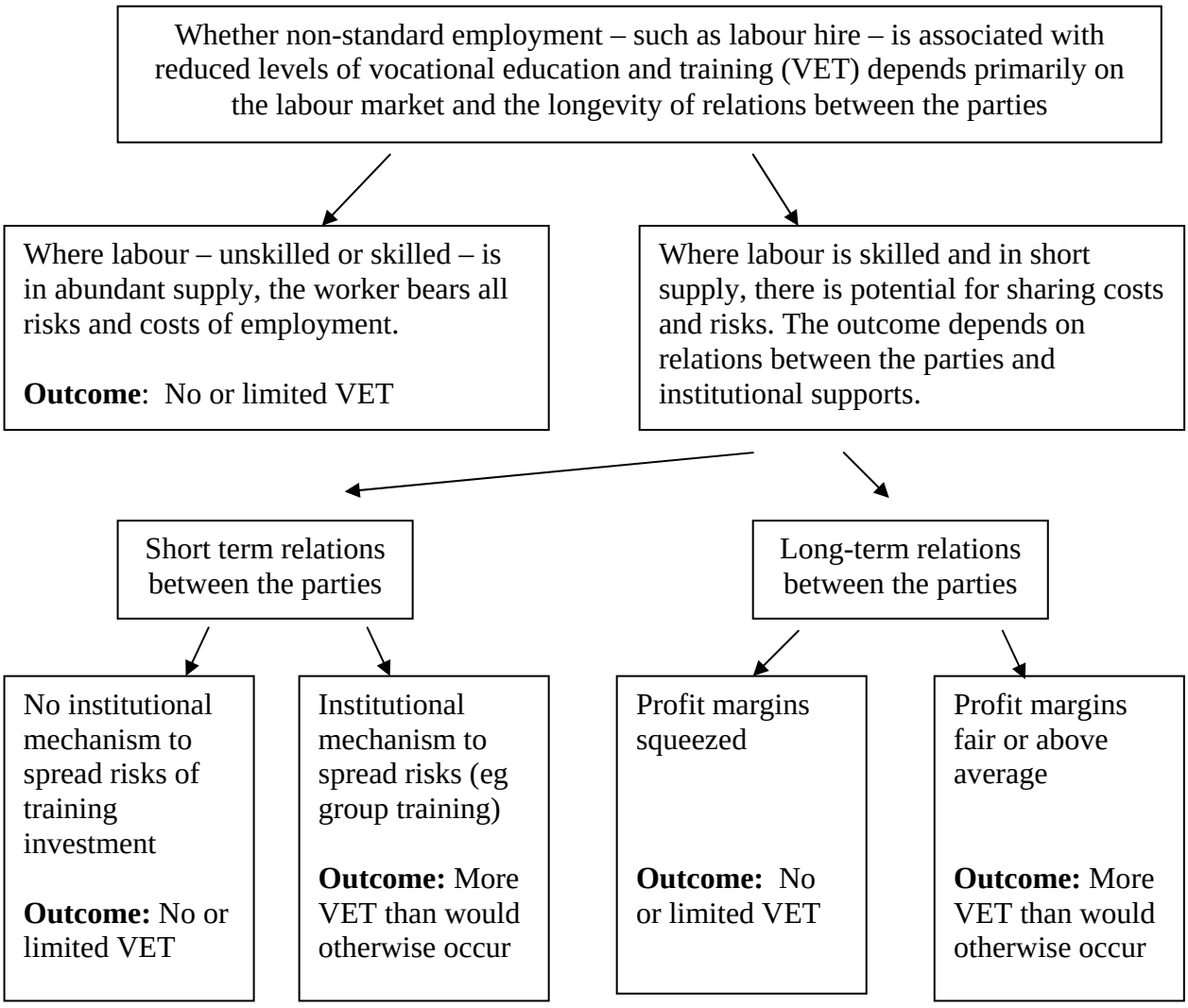
45 KPMG Management Consulting, 1998. *Impact of the Growth of Labour Hire Companies on the Apprenticeship System*. Report for the Australian National Training Authority, Brisbane, November, p.35.

46 ACTU, 2003. Submission No 5, 19 December, p.6.

47 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*. Report for the National Centre for Vocational Education Research, Adelaide, p.44.

Figure 5.1: A model for understanding the links between non-standard employment and skills training



Adapted from: 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*. Report for the National Centre for Vocational Education Research, Adelaide, p.44.

5.4 The implications of the use of labour hire for host employer commitment to training

As noted in the Interim Report, the labour hire agencies who gave evidence to the Committee clearly considered that the responsibility for training their workers was theirs alone and did not fall on host employers.[48] However, the Committee notes that the use of labour hire arrangements can have an influence on host employer attitudes towards training, and that host employer attitudes to training have significant consequences for the training of both labour hire workers and direct hire workers at the host workplace.

The capacity of labour hire companies to provide training for their workers is often highly dependent on the cooperation of host employers, particularly with respect to on-the-job learning and apprenticeships. Although there is little empirical data available, anecdotal evidence suggests that some host employers can be uncooperative or even hostile to the training of labour hire workers in their workplace. Buchanan, Evesson and Briggs note that some host employers prevent labour hire agencies from taking apprentices on to the host site because they are considered 'unproductive'.[49] They also cite the example of a workplace manager from a focus group who:

> *… argued that the logic of outsourcing was to invest as little as possible in training those contracted to do the service. He argued many managers would rather 'go down with the sinking ship' than help someone with no ongoing attachment to the workplace to gain extra skills.*[50]

Reliance on labour hire arrangements can result in a reduction of training levels within host employer workplaces. Instead of training their own workers in particular skills, labour hire allows employers to draw on a pool of already skilled workers. For example, Mr Dave Oliver of the Australian Manufacturing Workers' Union stated that:

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48 Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, Melbourne, December, p.61.

49 John Buchanan, Justine Evesson and Chris Briggs, 2002. *Renewing the Capacity for Skills Formation: the Challenge for Victorian Manufacturing*. Report for the Victorian Learning and Employment Skills Commission and the Victorian Manufacturing Industry Consultative Council, November, pp.24-25.

50 John Buchanan, Justine Evesson and Chris Briggs, 2002. *Renewing the Capacity for Skills Formation: the Challenge for Victorian Manufacturing*. Report for the Victorian Learning and Employment Skills Commission and the Victorian Manufacturing Industry Consultative Council, November, p.36.

> *… traditional large manufacturing employers who engaged a lot of apprentices and invested in training and put in accredited training programs [are] no longer doing that. They are opting for the short-term fix of engaging labour hire to provide skilled labour in their workplace. So in essence instead of investing in a four-year program to train apprentices in a workplace, an employer may consider it easier to pick up the phone and get a labour hire tradesman to come out.*[51]

Where structured training in host companies is neglected in favour of using already skilled labour hire workers, this can be likened to 'farmers eating their own seed';[52] that is, employers benefit from previous training efforts without contributing to the regeneration of skills for their future needs.

The focus on labour deployment at the expense of training provision is not solely attributable to the increased use of labour hire. These patterns arise, *inter alia*, from increasingly competitive pressures on workplaces that can lead to short-term cost reduction strategies such as budget cuts for training. Arguably, however, these strategies can lead to further costs in the longer term, when skills shortages become apparent. A number of witnesses emphasised that a trend has developed whereby companies who once trained their own tradespeople are no longer doing so.

Buchanan and Evesson cite the power industry in the Latrobe Valley as an example of an industry benefiting from existing industry skills:

> *Whereas a decade ago up to 230 apprentices were taken on every six months by the State Electricity Commission of Victoria, only a handful are now employed each year in the five privately owned power stations and the organisations maintaining their equipment. Instead, the power companies merely deploy large numbers (400-500) of skilled workers over a few weeks for intensive bursts of maintenance known as 'outages' several times a year. Companies in the region are essentially getting by with the skill set of the former State Electricity Commission of Victoria employees.*[53]

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

52 John Buchanan, Justine Evesson and Chris Briggs, 2002. *Renewing the Capacity for Skills Formation: the Challenge for Victorian Manufacturing*. Report for the Victorian Learning and Employment Skills Commission and the Victorian Manufacturing Industry Consultative Council, November, p.25.

53 John Buchanan and Justine Evesson, 2004. *Creating markets or decent jobs? Group training and the future of work*. Report for the National Centre for Vocational Education and Research, Adelaide, p.49.

Buchanan and Evesson's example also evokes the training issues created by the large scale privatisation of public companies that previously made considerable contributions to skills training. Once privatised, these companies may drastically scale back training initiatives.

The increased use of labour hire can lead to poorer training outcomes for direct hire employees where the employment of labour hire workers is part of a strategy to lower overhead costs by reducing staffing levels. This happens where the core permanent workforce is whittled down considerably and labour hire workers are brought in to manage the workload during peak demand times. This method of workload management can reduce the downtime of direct hire employees by intensifying their workload. This can then lead to less time for the direct hire employees to engage in either on-the-job learning or externally provided training.[54]

5.5 Apprenticeships and group training

5.5.1 Decline in apprenticeships

Traditionally, apprenticeships involve a person entering into a fixed-term agreement to work at a relatively low wage in return for the provision of training in a chosen trade.[55] The education provided usually involves a combination of on-the-job training and time release to attend classes at an educational institution.[56]

Apprenticeship training rates have been declining since the recession of the early 1990s,[57] contributing to current skills shortages.[58] Some witnesses before the Committee expressed concern that falling apprenticeship numbers are closely linked to the increased use of labour hire arrangements. Mr Leigh Hubbard of the Victorian

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54 For a discussion of patterns of longer working hours and work intensification in Australian workplaces, see: Ian Watson, John Buchanan, Iain Campbell and Chris Briggs, 2003. *Fragmented Futures.* Sydney, The Federation Press, Chapter 7.

55 Breen Creighton and Andrew Stewart, 2005. *Labour Law* (4th ed). Sydney, The Federation Press, p.300.

56 Breen Creighton and Andrew Stewart, 2005. *Labour Law* (4th ed). Sydney, The Federation Press, p.300.

57 Phillip Toner, 2003. 'Supply-side and Demand-side Explanations of Declining Apprentice Training Rates: A Critical Overview'. *Journal of Industrial Relations*, Vol. 45 No. 4, December, pp.457-484 at p.461.

58 Phillip Toner, 2003. 'Supply-side and Demand-side Explanations of Declining Apprentice Training Rates: A Critical Overview'. *Journal of Industrial Relations*, Vol. 45 No. 4, December, pp.457-484 at p.465.

Trades Hall Council submitted that when trade-based work is outsourced to labour hire agencies, the agencies attract or 'poach' labour from other companies rather than investing in skill development by engaging apprentices.[59]

The Committee believes that the increased use of labour hire arrangements may be only one contributing factor to the decline in apprenticeships. For example, the Committee notes that completion rates are a serious issue: recent figures indicate that for every three people who completed trades training courses in 2004, four more dropped out.[60] The Committee also notes the KPMG Report's finding that the decline in the apprenticeship rate is part of a wider and longer-term phenomenon and is caused by a number of factors, including:

- *the declining number of skilled tradespersons as a proportion of the labour force (also affecting the capacity for firms to provide appropriate supervision arrangements for apprentices);*
- *the outsourcing of many functions previously undertaken by skilled tradespeople;*
- *changing mix of skills in the workforce, including upskilling of production workers;*
- *an apparent decline in the number of suitable recruits presenting for apprenticeships;*
- *the corporatisation, privatisation and downsizing of the public sector which has traditionally been a significant employer of apprentices.*[61]

The Committee agrees with the findings of the KPMG Report in so far as it states that the decline in the rate of apprenticeships is the result of a number of influences.

5.5.2 The role of group training companies

In the Interim Report, the Committee observed that group training is similar to labour hire in its triangular employment arrangement: an apprentice or trainee is employed by a group training company (GTC) and is then placed in a series of host workplaces

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

60 Tim Colebatch, 2005. 'Drop-outs outnumber committed apprentices'. *The Age*, 2 June, p.4.

61 KPMG Management Consulting, 1998. *Impact of the Growth of Labour Hire Companies on the Apprenticeship System*. Report for the Australian National Training Authority, Brisbane, November, p.2.

to fulfil his or her training requirements.[62] This replication of the triangular work arrangement inevitably invites comparison with labour hire arrangements.

Watson, Buchanan, Campbell and Briggs describe the development of group training arrangements as 'one of Australia's greatest institutional innovations in the labour market'.[63] Indeed, the Committee received evidence that group training arrangements are a positive example of how a work arrangement that strongly resembles labour hire can provide very positive training outcomes.[64] However, the Committee also received evidence that group training arrangements are exploited by some host employers who use group training apprentices as a form of 'cheap labour'.[65]

There are currently around 30 GTCs in Victoria, most of which are not for profit organisations.[66] These GTCs provide a crucial contribution to vocational education and training in Victoria. Buchanan and Evesson argue that:

> *[GTCs] have been 'integral' to the survival of the trades (especially in construction) and the growth of traineeships.*[67]

Toner similarly observes that the decline in the apprenticeship rate during the 1990s would have been more severe if it were not for the increased activity of GTCs over the same period.[68] He notes that GTCs now employ over 20 per cent of all apprentices, compared to the early 1980s when they employed only 2 per cent.[69] In

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62 Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December, pp.66-70.

63 Ian Watson, John Buchanan, Iain Campbell and Chris Briggs, 2003. *Fragmented Futures*. Sydney, The Federation Press, p.79.

64 ACTU, 2003. Submission No. 5, 19 December, p.6.

65 See, for example: Electrical Trades Union, Southern States Branch, 2003. Submission No. 8, 19 December, p.11; L. Hubbard, Victorian Trades Hall Council, 2004. Minutes of Evidence, 23 August, p.117.

66 J. Glover, Group Training Australia (Vic), 2004. Minutes of Evidence, 27 July, p.2.

67 John Buchanan and Justine Evesson, 2004. *Creating markets or decent jobs? Group training and the future of work*. Report for the National Centre for Vocational Education and Research, Adelaide, p.12.

68 Phillip Toner, 2003. *Declining Apprenticeship Training Rates: Causes, Consequences and Solutions*. Australian Expert Group in Industry Studies, University of Western Sydney, July, p.23.

69 Phillip Toner, 2003. *Declining Apprenticeship Training Rates: Causes, Consequences and Solutions*. Australian Expert Group in Industry Studies, University of Western Sydney, July, p.23.

the Interim Report, the Committee noted the positive effect that GTCs have had on the provision of apprenticeships and traineeships in rural and regional Victoria.[70]

Just as the number of standard jobs has declined in favour of non-standard jobs, so has the number of apprenticeships and traineeships based on the standard model declined.[71] As noted by Creighton and Stewart, the traditional model of apprenticeship focuses on learning a single trade over a fixed period of time, which is out of step with the modern emphasis on 'flexible specialisation' and 'multi-skilling'.[72] Originally introduced to 'protect the blue collar trades',[73] group training has developed to offer an alternative model for employer participation in apprenticeships and traineeships.

Group training offers a number of advantages for businesses as well as apprentices and trainees. It allows business to participate in training apprentices or trainees for short periods rather than having to commit to the whole duration of the traineeship or apprenticeship, which may last for between one and four years.[74] It is a particularly popular arrangement for small to medium firms, which may not be able to bear the costs or administration associated with engaging their own apprentices or trainees.[75]

Group training apprenticeships are more likely to allow continuity of training during periods of economic downturn. Mr John Glover of Group Training Australia (Victoria) gave evidence to the Committee that:

> *Group training needs to be seen as an anti-cyclical mechanism which can try to smooth out ups and downs in the labour market … It has more and less success, but this is really well demonstrated in the areas of traditional*

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70 Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December, pp.67-68.

71 John Buchanan and Justine Evesson, 2004. *Creating markets or decent jobs? Group training and the future of work*. Report for the National Centre for Vocational Education and Research, Adelaide, p.64.

72 Breen Creighton and Andrew Stewart, 2005. *Labour Law* (4th ed). Sydney, The Federation Press, p.300.

73 John Buchanan and Justine Evesson, 2004. *Creating markets or decent jobs? Group training and the future of work*. Report for the National Centre for Vocational Education and Research, Adelaide, p.11.

74 Phillip Toner, Duncan Macdonald and Nic Croce, 2004. *Group training in Australia: A study of group training organisations and host employers*. Report for the National Centre for Vocational Education Research, Adelaide, p.10.

75 Breen Creighton and Andrew Stewart, 2005. *Labour Law*, (4th ed). Sydney, The Federation Press, p.301.

> *trades – group training has been able to have an anti-cyclical trend in this field.*[76]

Watson, Buchanan, Campbell and Briggs note that well-organised group training arrangements result in more training positions being available and allow for comprehensive skill development resulting from a variety of training experiences with different host employers.[77]

The Committee noted in the Interim Report that, despite its positive contribution to training levels in Victoria, there is evidence to show that the group training model leads to a higher rate of workplace injury than traditional two-party training models. Underhill's recent analysis of the workers' compensation claims of apprentices and trainees in Victoria found that group apprentices and trainees had a consistently higher level of claims than directly hired apprentices and trainees.[78] Underhill found that group apprentices and trainees accounted for 47 per cent of apprentice/trainee claims in 2000-01, even though they represented only 10 per cent of all apprentices and trainees.[79] Consequently, Mr Greg Tweedly of the Victorian WorkCover Authority gave evidence to the Committee that, in terms of workplace health and safety:

> *We see that whilst [group training organisations] have a different business relationship [with their workers], the issues for group training organisations are the same as the labour hire organisation.*[80]

Underhill identified three major factors that contribute to the higher rate of claims for group apprentices and trainees. Firstly, Underhill noted that group apprentices and trainees are more likely to belong to low skilled, higher risk occupations than non group apprentices and trainees. Secondly, group apprentices and trainees tend to be younger than their directly hired counterparts, which usually means that they possess lower levels of experience and OHS knowledge. Lastly, Underhill suggested that,

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

77 Ian Watson, John Buchanan, Iain Campbell and Chris Briggs, 2003. *Fragmented Futures.* Sydney, The Federation Press, p.81.

78 Elsa Underhill, 2002. *An Analysis of Apprentice and Trainee Worker's Compensation Claims in Victoria, 1994/95-2000/01*. Report prepared for WorkSafe Victoria, Melbourne, August, p.4.

79 Elsa Underhill, 2002. *An Analysis of Apprentice and Trainee Worker's Compensation Claims in Victoria, 1994/95-2000/01*. Report prepared for WorkSafe Victoria, Melbourne, August, p.39.

80 G. Tweedly, Victorian WorkCover Authority, 2004. Minutes of Evidence, 15 November, p.236.

similar to labour hire employees, group apprentices and trainees may be exposed to greater levels of risk due to their frequent rotation through host workplaces.[81]

The Committee notes with concern the higher rate of workers' compensation claims for group training organisations. However, the Committee acknowledges evidence from Mr John Glover of Group Training Australia (GTA) (Vic) that its members are 'very, very diligent' about their OHS responsibilities, and that (GTA) (Vic) has worked closely with WorkSafe Victoria to develop placement guidelines for their apprentices and trainees.[82] The Committee also notes evidence received from Mrs Leyla Yilmaz of the Victorian Automobile Chamber of Commerce (VACC) that the injury rate of the apprentices involved in the VACC group training scheme is particularly low.[83]

The Committee heard evidence that there can be some overlap between group training and labour hire in that a number of GTCs also operate labour hire businesses. Some witnesses even claimed that some GTCs operate as subsidised labour hire companies.[84] While the Committee believes that these claims are of concern, the Committee also believes that there are some key differences between labour hire and group training and that public interest demands that these differences receive special consideration.

One of the key differences lies in the underlying objectives: while GTCs exist for the purpose of supporting and developing apprenticeships and traineeships, labour hire agencies have a purely commercial motive. The majority of GTCs in Victoria are not for profit organisations[85] and, in their 2004 study of group training, Buchanan and Evesson found that the idea of 'community' was absolutely critical to understanding group training practice and policy.[86] The community service aspect of group training is also reflected in the emphasis placed on 'pastoral care' for apprentices and trainees.[87]

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81 Elsa Underhill, 2002. *An Analysis of Apprentice and Trainee Worker's Compensation Claims in Victoria, 1994/95-2000/01*. Report prepared for WorkSafe Victoria, Melbourne, August, p.40.

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

83 L. Yilmaz, Victorian Automobile Chamber of Commerce, 2004. Minutes of Evidence, 28 July, pp.61-62.

84 Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December, p.69.

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

86 John Buchanan and Justine Evesson, 2004. *Creating markets or decent jobs? Group training and the future of work*. Report for the National Centre for Vocational Education and Research, Adelaide, p.13.

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

However, GTCs have become increasingly dependent on non group training activities in order to sustain their group training operations. In a survey of GTCs carried out by Toner, Macdonald and Croce, all 131 GTCs in the survey indicated that they carried out other activities additional to their group training role. This extra business was mostly related to training activities, although one quarter carried out general labour hire activities.[88] Toner, Macdonald and Croce note that this diversification has occurred as a result of Federal Government changes in funding to encourage greater levels of self-sufficiency for GTCs, such that the bulk of group training income is now derived from non group training activities.[89]

The Committee received evidence from Mr John Glover of (GTA) (Vic) that a number of GTCs engage in non group training activities in order to keep their group training activities viable.[90] Mr Glover gave evidence to the Committee that:

> *Some [GTCs] have looked to labour hire as another source of income to help subsidise what is almost a non-viable industry – namely group training.*[91]

However, Mr Glover told the Committee that he was not aware of any Victorian GTCs that engaged in significant labour hire activities and he believed that group training always remained their core activity.[92] Mr Glover told the Committee that:

> *… cost pressures constantly encourage [GTCs] to look around for other sources of income to help them keep going. Indeed, in the 1990s, both federal and state governments took the attitude that if [GTCs] could not be viable they should close. There is direct encouragement to go out and find some other way of staying alive.*[93]

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88 Phillip Toner, Duncan Macdonald and Nic Croce, 2004. *Group training in Australia: A study of group training organisations and host employers*. Report for the National Centre for Vocational Education Research, Adelaide, p.26.

89 Phillip Toner, Duncan Macdonald and Nic Croce, 2004. *Group training in Australia: A study of group training organisations and host employers*. Report for the National Centre for Vocational Education Research, Adelaide, pp.11-12.

90 J. Glover, Group Training Australia (Vic), 2004. Minutes of Evidence, 27 July, p.7.

91 J. Glover, Group Training Australia (Vic), 2004. Minutes of Evidence, 27 July, p.7.

92 J. Glover, Group Training Australia (Vic), 2004. Minutes of Evidence, 27 July, p.7.

93 J. Glover, Group Training Australia (Vic), 2004. Minutes of Evidence, 27 July, p.7.

Mr Glover stated that, while they receive employment incentives like all other employers,[94] the amount of government funding received by GTCs only covers 1 to 4 per cent of their total operating costs. The rest of the cost of group training is funded by industry.[95]

GTCs further differ from labour hire companies in that they are geared to provide an ongoing stream of assignments for their workers in the interests of maintaining continuity in their training. This contrasts with labour hire, where there is no expectation of ongoing work. Buchanan and Evesson argue that GTCs share the risks associated with employment, while labour hire arrangements transfer the risks to the worker.[96]

The Committee believes that GTCs are to be commended for the valuable contribution that they make to training in Victoria. The Committee finds that there are key differences between GTCs and labour hire and, as such, the Committee believes that group training activities should not be identified as a labour hire function. However, where GTCs do carry out labour hire activities, those activities should be regulated accordingly.

Recommendation 5.1

The Committee recommends that where group training companies carry out labour hire activities, these activities should be regulated in the same way that labour hire agencies are regulated. However, any government response should recognise the important contribution that group training makes to vocational education and training and should aim to avoid any detrimental impact on the group training system.

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94 See, for example: Phillip Toner, Duncan Macdonald and Nic Croce, 2004. *Group training in Australia: A study of group training organisations and host employers.* Report for the National Centre for Vocational Education Research, Adelaide, p.11.

95 J. Glover, Group Training Australia (Vic), 2004. Minutes of Evidence, 27 July, p.7.

96 John Buchanan and Justine Evesson, 2004. *Creating markets or decent jobs? Group training and the future of work*. Report for the National Centre for Vocational Education and Research, Adelaide, p.12.

5.6 Encouraging skill development in the labour hire industry

Current national skill shortages suggest that existing mechanisms for regenerating skills are inadequate across many industries – not just the labour hire industry. The Committee considers that this is the result of the complex interaction of a number of different influences and not a direct consequence of the growth of labour hire arrangements alone. However, inadequate training levels and the increased use of labour hire and outsourcing arrangements are contributory factors.

The Committee believes that it is not within the scope of this Inquiry to comprehensively investigate these broader trends, and the Committee reiterates its recommendation in the Interim Report for a dedicated inquiry into skills training.[97] The proposed inquiry should consider the range of factors contributing to current skills shortages and how best to address these shortages. However, the Committee considers that it is pertinent, in the context of the Inquiry into Labour Hire Employment in Victoria, to make some general comments about policy options that have been suggested for boosting the levels of skills training for labour hire workers.

A series of options has been developed by Hall, Bretherton and Buchanan to encourage greater levels of training for labour hire workers. They suggest that one or more of the following policy directions could be taken:

- target labour hire agencies to invest in training;
- target host employers to contribute more to training; and/or
- target individual workers.

They emphasise, however, that these three approaches are not mutually exclusive.[98]

Hall, Bretherton and Buchanan suggest that labour hire agencies could be targeted through the introduction of financial training incentives specifically intended for labour hire agencies and/or the introduction of training quotas where agencies are required

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97 Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in* Victoria. Parliament of Victoria, Melbourne, December, p.65.

98 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*. Report for the National Centre for Vocational Education Research, Adelaide, p.56.

to take on a set number of group training apprentices or trainees.[99] The development of stronger relationships between labour hire agencies and GTCs was also supported by the KPMG Report,[100] which also suggested that government should sponsor and promote demonstration models for training in the labour hire industry.[101] Alternatively, Hall, Bretherton and Buchanan argue that the labour hire industry's commitment to training would be enhanced if agencies were required to offer their workers longer-term contracts with a greater degree of security, because this would allow agencies a longer period over which to recoup the amount spent on training.[102] A further proposal was that where public departments use labour hire agencies, contractual agreements could include requirements for a commitment by agencies to certain levels and forms of training.[103]

The Committee notes that there is currently no legislative requirement on employers to provide skills training. Hall, Bretherton and Buchanan suggest that both labour hire agencies and host employers could be compelled to make an investment in labour hire workers' training through the introduction of an industry training levy that applies to all labour hire contracts. The Committee received a considerable amount of evidence that argued in favour of a funding regime or training levy to ensure that both host employers and labour hire agencies assume greater financial responsibility for the cost of reproducing the skills on which they rely.[104] A number of European countries rely on training levy systems to ensure that labour hire workers receive training.[105]

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99 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*. Report for the National Centre for Vocational Education Research, Adelaide, p.57.

100 KPMG Management Consulting, 1998. *Impact of the Growth of Labour Hire Companies on the Apprenticeship System*. Report for the Australian National Training Authority, Brisbane, November, pp.56-57.

101 KPMG Management Consulting, 1998. *Impact of the Growth of Labour Hire Companies on the Apprenticeship System*. Report for the Australian National Training Authority, Brisbane, November, pp.54-56.

102 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*. Report for the National Centre for Vocational Education Research, Adelaide, p.57.

103 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*. Report for the National Centre for Vocational Education Research, Adelaide, p.57.

104 See, for example: L. Hubbard, Victorian Trades Hall Council, 2004. Minutes of Evidence, 23 August, p.117.

105 Donald Storrie, 2002. *Temporary agency work in the European Union*. European Foundation for the Improvement of Living and Working Conditions, Dublin, p.40.

Lastly, Hall, Bretherton and Buchanan propose that policy reforms could be introduced to facilitate training investment by individual labour hire workers. They suggest the introduction of 'tripartite training agreements' between the labour hire worker, the agency and the host employer. The aim of the tripartite training agreement would be to share the obligation to fund training equally between all of the parties, where the individual worker's contribution could be provided partially or wholly by government subsidy.[106] Hall, Bretherton and Buchanan note that one of the attractions of tripartite training agreements is that they would promote the understanding that:

> *… all parties have a responsibility with regard to training. In other words, 'it is everybody's responsibility' rather than 'it's not my problem'.*[107]

The Committee believes that this is an important point, which coincides with the Committee's own view that the responsibility for training should be distributed broadly across the community.[108]

The growth in labour hire arrangements means that a greater share of the training responsibility has been transferred to labour hire agencies. However, the Committee believes that it is important to recognise that the responsibility for training does not belong to labour hire agencies alone. The Committee's investigations reveal that there are some significant barriers and disincentives to increased investment in skills training by labour hire companies. As a result, it is increasingly important that both labour hire agencies and host employers are encouraged to invest in skills training.

The Committee considers that the manifestation, in this and earlier inquiries, of the issue of the adequate provision of skilled workers, is a key issue for the Victorian economy. Should the opportunity arise, the Committee may undertake further consideration of this issue in the coming months.

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106 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*. Report for the National Centre for Vocational Education Research, Adelaide, pp.57-58.

107 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*. Report for the National Centre for Vocational Education Research, Adelaide, p.58.

108 Economic Development Committee, 2004. *Interim Report: Labour Hire Employment in Victoria*. Parliament of Victoria, Melbourne, December, p.65.

Chapter 6

Developments in other Australian jurisdictions

6.1 Introduction

There is little regulation of labour hire arrangements in Australia and there are very few pieces of legislation that refer specifically to labour hire arrangements. Only two States have provisions in their industrial relations legislation that explicitly deal with labour hire (Queensland and Western Australia), while only one state (Western Australia) makes specific reference to labour hire arrangements in its workplace health and safety legislation. There is no reference to labour hire arrangements in Federal workplace relations legislation, although this is currently under review.

The Committee received a number of submissions suggesting that the labour hire industry in Victoria should be subject to a licensing or registration system.[1] The Committee's investigations revealed that there are no licensing or registration systems for labour hire agencies in other Australian states.[2]

The following sections refer to those other Australian jurisdictions that have particular regulations for labour hire arrangements, as well as those jurisdictions that have conducted recent reviews or inquiries that have made reference to labour hire arrangements.

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1 See, for example: Skilled Engineering, 2004. Submission No. 16, 26 February, p.22; Victorian Trades Hall Council, 2004. Submission No. 23, 20 April, p.16; G. Wheeler, WV Management, 2004. Minutes of Evidence, 27 July, p.35; R. Marles, ACTU, 2004. Minutes of Evidence, 13 September, p.137; Electrical Trades Union, 2004. Submission No. 8, 19 December, p.25.

2 However, a number of states have low level registration or licensing systems that apply to recruitment agencies. Where labour hire agencies are carrying out recruitment activities, they will be required to register or acquire a license with respect to these activities. See, for example: *Private Employment Agents Act 2005* (Qld).

6.2 Commonwealth

6.2.1 Parliamentary Inquiry into Independent Contractors and Labour Hire Arrangements

The House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation is currently conducting the Inquiry into Independent Contractors and Labour Hire Arrangements, which was referred by the Minister for Employment and Workplace Relations on 9 December 2004.[3]

Under the terms of reference, the Committee must inquire into and report on:

- the status and range of independent contracting and labour hire arrangements;
- the ways in which independent contracting can be pursued consistently across state and federal jurisdictions;
- the role of labour hire arrangements in the modern Australian economy; and
- strategies to ensure independent contract arrangements are legitimate.[4]

The Committee is expected to report by mid-2005.

6.2.2 Department of Employment and Workplace Relations: Discussion Paper

In March 2005, the Department of Employment and Workplace Relations released a discussion paper outlining proposals for reforming the regulation of independent contracting and labour hire arrangements.[5] The discussion paper was issued following the Federal Government's 2004 election promise to create a new

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3 House of Representatives Standing Committee on Employment and Workplace Relations and Workforce Participation, 2005. *Inquiry into Independent Contracting and Labour Hire Arrangements* at <www.aph.gov.au/house/committee/ewrwp/independentcontracting/index.htm>.

4 House of Representatives Standing Committee on Employment and Workplace Relations and Workforce Participation, 2005. *Terms of Reference* at < www.aph.gov.au/house/committee/ewrwp/independentcontracting/tor.htm>.

5 Department of Employment and Workplace Relations, 2005. *Discussion Paper: Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements*. Canberra, March.

Independent Contractors Act. The closing date for written submissions on the Discussion Paper was 11 May 2005.

Most of the proposals and issues raised in the Discussion Paper relate to independent contractors rather than labour hire workers, although there is some coverage of labour hire issues. The Discussion Paper states that:

> *… independent contractors should not be regulated by workplace relations law, but by commercial law. This is consistent with the true nature of independent contracting arrangements as commercial contractual arrangements, not employment arrangements.*[6]

In so far as it addresses issues relating to labour hire, the Discussion Paper mostly considers the 'constraints' placed on the engagement of labour hire employees. It also indicates that the Federal Government is opposed to any shift towards the concept of 'joint employment' (i.e. where the host and the agency are considered to be 'joint employers' of agency workers).[7]

The first labour hire issue raised by the Federal Government's Discussion Paper is:

> *Should the labour hire industry be regulated to ensure that high standards are met by all players?*[8]

This issue is raised in the context of sham independent contracting arrangements. It is suggested that regulation could take the form of external regulation or self-regulation and may involve the adoption of a Code of Practice. The Discussion Paper notes that some sectors of the labour hire industry support regulation, but that the disadvantage of further regulation would be the potential to add 'red tape' for business.

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6 Department of Employment and Workplace Relations, 2005. *Discussion Paper: Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements*. Canberra, March, p.5.

7 The concept of joint employment originates from the United States, but so far, the concept has not been taken up and applied in any major Australian case. It was discussed by the Australian Industrial Relations Commission in *Morgan v Kittochside Nominees Pty Ltd* (2002) 117 IR 152, but the employee in question was not found to be jointly employed.

8 Department of Employment and Workplace Relations, 2005. *Discussion Paper: Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements*. Canberra, March, p.23.

The Discussion Paper also proposes that:

> *The Workplace Relations Act 1996 (Cth) should be amended to provide that awards and agreements cannot contain clauses which restrict engaging labour hire workers or imposing conditions or limitations on their engagement.*[9]

This proposal refers to clauses in awards or agreements that seek to limit the use of labour hire by stating that an employer can only use labour hire where there are no suitable internal resources available. Alternatively, an award might seek to prevent employers from contracting out work except on condition that the work be performed on terms no less favourable than those in the award.

The Discussion Paper notes that there are few existing provisions in State workplace relations legislation that cover labour hire arrangements. In this context, the issue is whether:

> *… the Workplace Relations Act [should] be amended to include in the definition of 'employer' a labour hire agency that arranges for an employee (who is a party to a contract of service with the agency) to do work for someone else even though the employee is working for the other person under a labour hire arrangement.*[10]

If this amendment were introduced, it would essentially restate the common law; that is, that where a labour hire agency engages a worker as an employee, the worker will generally be held by courts to be the agency's employee in the absence of a sham arrangement.[11] However, the proposed amendment may give greater protection to host employers from being deemed the employer of labour hire workers.[12] The proposed amendment is very similar to existing legislative provisions in Western Australia and Queensland.

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9 Department of Employment and Workplace Relations, 2005. *Discussion Paper: Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements*. Canberra, March, p.30.

10 Department of Employment and Workplace Relations, 2005. *Discussion Paper: Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements*. Canberra, March, p.30.

11 See, for example: *Swift Placements Pty Ltd v WorkCover Authority of New South Wales (Louise May)* [2000] (2000) 96 1R 69; *Mason & Cox Pty Ltd v McCann* (1999) 74 SASR 438.

12 Even where there is explicit documentation setting up a labour hire arrangement, if the documentation is not consistent with the reality of the working arrangement, courts may find that an employment relationship exists between the host and the labour hire worker. See, for example: *Oanh Nguyen v A-N-T Contract Packers Pty Ltd and Thiess Services Pty Ltd* (2003) 128 IR 241.

The Discussion Paper states that the *Odco* case (also known as the Troubleshooters case) is the most important judgment on labour hire in recent years. The Federal Government supports the arrangement that was upheld by the Full Federal Court in the *Odco* case,[13] where labour hire agencies supply independent contractors to host employers without creating employment relationships. The Discussion Paper raises the issue:

> *Should Odco arrangements be statutorily recognised in the Independent Contractors Act?*[14]

If this amendment were introduced, it would essentially restate the common law, as this type of work arrangement has already been upheld by the courts. However, the proposed amendment may have the effect of lessening the likelihood that courts may deem a host employer to be the employer of a labour hire worker.

The Discussion Paper also includes a number of other proposals and issues that relate specifically to independent contracting arrangements.[15]

6.3 New South Wales

6.3.1 New South Wales Labour Hire Task Force

In May 2000, the New South Wales Government announced the Labour Hire Task Force. The Task Force was chaired by Ms Jennie George and was composed of senior representatives of a number of unions and employer associations. The Task Force released its report in December 2001.[16]

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13 *Building Workers Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104.

14 Department of Employment and Workplace Relations, 2005. *Discussion Paper: Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements*. Canberra, March, p.32.

15 For a full list of the issues and proposals, see: Department of Employment and Workplace Relations, 2005. *Discussion Paper: Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements*. Canberra, March, pp.5-6.

16 New South Wales Labour Hire Task Force, 2001. *Final Report*. New South Wales Labour Hire Task Force, Sydney, December.

The Task Force made six key recommendations regarding the regulation of labour hire arrangements. These were:

1. The *Industrial Relations Act 1996* (NSW) should be amended so that the definition of 'employer' expressly includes labour hire agencies and group training organisations.[17]

2. There should be a licensing system for labour hire agencies. A small Working Party should be established to determine the details of the licensing system.[18]

3. An education campaign should be conducted, in partnership with industry parties, on the rights and responsibilities of agencies, hosts and labour hire workers.[19]

4. The *Occupational Health and Safety Act 2000* (NSW) should be amended to clarify the responsibilities of agencies and hosts, by including reference to the 'joint responsibility' of hosts and agencies for workplace health and safety.[20]

5. An education campaign should be conducted to increase awareness and understanding of the occupational health and safety (OHS) obligations of hosts and agencies.[21]

6. The relevant workers' compensation legislation should be amended to mandate joint responsibility on hosts and agencies for the rehabilitation and return to work of labour hire workers.[22]

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17 New South Wales Labour Hire Task Force, 2001. *Final Report*. New South Wales Labour Hire Task Force, Sydney, December, p.52.

18 New South Wales Labour Hire Task Force, 2001. *Final Report*. New South Wales Labour Hire Task Force, Sydney, December, p.53.

19 New South Wales Labour Hire Task Force, 2001. *Final Report*. New South Wales Labour Hire Task Force, Sydney, December, p. 55.

20 New South Wales Labour Hire Task Force, 2001. *Final Report*. New South Wales Labour Hire Task Force, Sydney, December, p.65.

21 New South Wales Labour Hire Task Force, 2001. *Final Report*. New South Wales Labour Hire Task Force, Sydney, December, p.66.

22 New South Wales Labour Hire Task Force, 2001. *Final Report*. New South Wales Labour Hire Task Force, Sydney, December, p.67.

So far, only some of the recommendations made by the Task Force have been implemented. Shortly after the Task Force's Final Report was released, the New South Wales Government announced that it would conduct an education campaign on the rights and responsibilities of hosts, agencies and workers and establish a Working Party to consider whether the recommended licensing regime and other legislative reform proposals were necessary.[23]

The proposed licensing regime for labour hire agencies has not been implemented. However, a Working Party was convened in 2002 to consider the recommendations of the Task Force, and a Labour Hire Industry Council was announced in 2003 to oversee industrial relations and OHS compliance in the labour hire industry.[24]

6.3.2 Secure Employment Test Case

In August 2003, the New South Wales Labor Council (now known as Unions NSW) applied to the New South Wales Industrial Relations Commission to vary a number of state awards in relation to matters concerning job security for casuals and labour hire workers. This case has become known as the 'Secure Employment Test Case'.[25]

In so far as it applies to labour hire arrangements, the Secure Employment Test Case seeks the following changes to New South Wales state awards:

- the provision of permanent employment for regular casual labour hire employees after six months where there is ongoing work available;
- the requirement that labour hire workers receive the same wages and conditions of employment that are received by direct hire employees of the host employer;
- the establishment of a process for consultation and dispute resolution in relation to contracting out situations; and

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23 John Della Bosca, Minister for Industrial Relations (NSW), 2001. *Labour Hire Report*. Media Release, Sydney, 19 December.

24 New South Wales Government, 2005. *New South Wales Government Submission to the Standing Committee on Employment, Workplace Relations and Workforce participation: Inquiry into Independent Contracting and Labour Hire Arrangements*. Submission No. 35, 11 March, p.44.

25 New South Wales Government, 2005. *New South Wales Government Submission to the Standing Committee on Employment, Workplace Relations and Workforce participation: Inquiry into Independent Contracting and Labour Hire Arrangements*. Submission No. 35, 11 March, p.42.

- a number of provisions regarding consultation about OHS matters and rehabilitation of injured labour hire workers.[26]

The New South Wales Industrial Relations Commission is expected to deliver its judgment on the Secure Employment Test Case during 2005. While the judgment is pending, work on the New South Wales Government's Labour Hire Industry Council has been suspended.[27]

6.3.3 Proposed changes to workers' compensation legislation

WorkCover New South Wales is currently conducting a review of the definition of 'worker' in the *Workplace Injury Management and Workers Compensation Act 1998* (NSW). A Discussion Paper has been released by the New South Wales Government to seek feedback on proposed changes to the legislation. The closing date for submissions was 4 March 2005.

Currently, some people working as contractors may be deemed 'workers'. The redefinition of 'worker' that is proposed in the Discussion Paper would mean that all labour hire workers would be deemed to be employees for the purposes of the Act, regardless of whether they are engaged as independent contractors or not.[28]

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[26] New South Wales Government, 2005. *New South Wales Government Submission to the Standing Committee on Employment, Workplace Relations and Workforce participation: Inquiry into Independent Contracting and Labour Hire Arrangements*. Submission No. 35, 11 March, p.42.

[27] New South Wales Government, 2005. *New South Wales Government Submission to the Standing Committee on Employment, Workplace Relations and Workforce participation: Inquiry into Independent Contracting and Labour Hire Arrangements*. Submission No. 35, 11 March, p.44.

[28] WorkCover New South Wales, 2005. *Definition of a worker*. Sydney, WorkCover New South Wales.

6.4 Queensland

6.4.1 Industrial Relations Act 1999 (Qld)

Queensland's *Industrial Relations Act 1999* expressly recognises that a labour hire agency is the employer of a labour hire employee (who is a party to a contract of service with the agency), even though the employee is working for the host employer under a labour hire arrangement.[29] A labour hire agency is defined as 'an entity that conducts a business that includes the supply of services of employees to others'.

This provision essentially restates the common law position that a labour hire agency – rather than the host employer – will generally be found to be the employer of the labour hire worker, where the agency has engaged the worker as an employee.

6.5 South Australia

6.5.1 The Stevens Report

In October 2002, Greg Stevens completed a review of the South Australian industrial relations system (the 'Stevens Report') for the South Australian government.[30] The Stevens Report made 16 recommendations in relation to contractors, contract review and labour hire. The following recommendations were made specifically in relation to labour hire arrangements:

- that individuals employed by labour hire agencies should be prevented from receiving lower remuneration and working conditions than is provided under the relevant award to direct hire employees of the host employer;
- that the legislation require that an employer of a labour hire employee be identified;

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29 Section 6(2)(d), *Industrial Relations Act 1999* (Qld).

30 Greg Stevens, 2002. *Report of the Review of the South Australian Industrial Relations System*. Workplace Services, Adelaide, October.

- that labour hire employees be able to take action in the Industrial Court or Commission against the labour hire agency, host employer or both in certain circumstances (eg underpayment, unfair dismissal); and
- that the joint employment concept be incorporated into the relevant components of the South Australian legislation and that the Industrial Court or Commission be given the power to apply this concept on a discretionary basis.[31]

6.5.2 Industrial Law Reform (Fair Work) Bill 2004 (SA)

Many of the recommendations of the Stevens Report's were incorporated into the Industrial Law Reform (Fair Work) Bill 2004 (SA).[32] However, the recommendations relating to labour hire arrangements were removed from the Bill as a result of concerns from the business sector. The Bill has now been passed by the South Australian Parliament and was assented to on 31 March 2005.

6.5.3 Occupational health and safety guidance material

As noted in Chapter 4, detailed occupational health and safety guidance material has been developed in South Australia for the labour hire industry, which has influenced the material being developed in Victoria by the Victorian WorkCover Authority. As early as 1994, the labour hire industry was included in the South Australian WorkCover Corporation's *High Risk Industries Program*. This led to the early establishment of a labour hire industry working party in South Australia and the development of guidelines for the industry.[33] The latest set of guidance materials for the labour hire industry in South Australia covers both occupational health and safety[34] and injury management[35] and is targeted at both the agency and the host

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31 Greg Stevens, 2002. *Report of the Review of the South Australian Industrial Relations System*, Workplace Services, Adelaide, October, pp.13-14.

32 For a discussion of the draft *Industrial Law Reform (Fair Work) Bill 2004*, see: Andrew Stewart, 2004. '"Fair Work" in South Australia?', *CCH Industrial Law News*, Issue 2, 25 February, pp.1-4.

33 Workplace Services (SA). *Workplace Services Report on the Labour Hire/On-hire Industry Targeted Intervention Strategy*. Department for Administrative and Information Services, Adelaide, September, p.1.

34 Labour Hire Industry Occupational Health and Safety Working Party, 2004. *Safety management systems guide for Labour Hire Agencies: Placing workers in safe workplaces.* Adelaide, WorkCover Corporation SA, April.

35 Labour Hire Industry Occupational Health and Safety Working Party, 2001. *Injury management guide for labour hire agencies*. Adelaide, WorkCover Corporation SA.

employer. The material is available on the South Australian WorkCover Corporation's website.[36]

6.6 Western Australia

6.6.1 Industrial Relations Act 1979 (WA)

Along with Queensland, Western Australia is one of the only states in Australia to contain explicit reference to labour hire arrangements in its industrial relations legislation. According to section 7 of the *Industrial Relations Act 1979* (WA), 'employer' is defined to include a labour hire agency which arranges for a labour hire employee (who is a party to a contract of service with the agency) to work for a host employer, even though the employee is not working directly for the employer under the terms of the labour hire arrangement.

As with the Queensland legislation, this provision essentially restates the common law position that a labour hire agency – rather than the host employer – will generally be found to be the employer of the labour hire worker, where the agency has engaged the worker as an employee.

6.6.2 Occupational Safety and Health Act 1984 (WA)

Express reference is also made to labour hire arrangements in the *Occupational Safety and Health Act 1984* (WA). Section 23F of the Act expressly stipulates that labour hire agencies and host employers have duties in relation to labour hire workers (contractors and employees) as if they were the employees of both the agency and the host. The Act states that these duties apply to each party regarding matters over which the parties each have 'capacity to exercise control'. (The Committee received evidence that Victoria's *Occupational Health and Safety Act 2004* should be amended to include a similar reference to control. This issue is discussed in Chapter 4.)

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[36] WorkCover Corporation SA, 2005. *Onhire employment services industry* at <www.workcover.com/Industry/IndustriesLZ/LabourHire>.

Chapter 7

International developments

7.1 Introduction

In the course of its investigations, the Committee became aware that the rapid growth of labour hire employment – often referred to in international literature, and throughout this chapter, as temporary agency work – is very much a global phenomenon and reflects powerful international trends towards flexible employment. A number of witnesses gave evidence to the Committee regarding overseas policy initiatives relating to triangular employment arrangements.[1]

In order to better explore international developments in relation to temporary agency work, the Committee undertook a two week study tour of Western Europe from 30 March to 12 April 2005. A copy of the Committee's meeting program is set out in Appendix 3. The Committee spoke to government and agency officials in London and Paris; European Commission (EC) and EC agency officials in Brussels; union and employer bodies in London and Brussels; International Labour Organisation, World Health Organisation officials in Geneva; Organisation for Economic Cooperation and Development officials in Paris; and academics and Members of the European Parliament. The Committee had the opportunity to review the conditions of temporary agency workers, agencies and host employers in the European Union, particularly in France and the United Kingdom (UK). The review considered the growth, regulation and the health and safety issues relating to temporary agency work.

7.2 The International Labour Organisation

The Committee sought an international overview when it met with officials of the International Labour Organisation (ILO) in Geneva. The ILO is the United Nations body charged with dealing with employment and industrial relations issues.[2]

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1 See, for example: C. Cameron, Stratecom, for Recruitment and Consulting Services Association, 2004. Minutes of Evidence, 15 November, p.259; Victorian Trades Hall Council, 2004. Submission No. 23, 20 April, Appendix 3.

2 The International Labour Organisation is a tripartite organisation with representatives from 178 countries. The Governing Body is the executive council of the ILO and consists of 28 government, 14 employer and 14 employee representatives.

The ILO takes the position that temporary agency work relationships may or may not feature contractual relationships between any of the parties, and that, in the absence of contractual arrangements, there is likely to be greater ambiguity and uncertainty.[3] In discussions with Ms Ellen Hansen, Senior Employment Specialist with the ILO, the Committee was advised of her concerns about the 'sharing of responsibility' between host employers and temporary work agencies as referred to in the Committee's Interim Report. Ms Hansen argued that this allowed for the continuation of a certain degree of ambiguity.[4]

The ILO's 2003 report on the scope of the employment relationship raises questions about who is the employer, what are the workers' rights, and who is responsible for these. The ILO acknowledges that internationally, regulation of the employment relationship varies. While referring to the crucial role of the host employer, the ILO sees the major challenge in:

> *… ensuring that employees in such a [triangular] relationship enjoy the same level of protection traditionally provided by the law for employees in a bilateral employment relationship, without impeding legitimate private and public business initiatives.*[5]

There are a number of ILO Conventions relating to particular circumstances or industries. As well as the Private Employment Agencies Convention of 1997, there is, for example, the Labour Clauses (Public Contracts) Convention 1949 (No. 94) and the Safety and Health in Construction Convention 1988 (No. 167).

The Committee was made aware of the ILO's 1998 *Declaration on Fundamental Principles and Rights at Work*[6] which includes in its scope those workers who are not in an employment relationship or do not have an employer in the strict sense.[7] In

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3 While contractors and private employment agencies are the most common forms of such triangular relationships, there are other examples such as franchising. International Labour Organisation, 2003. *The scope of the employment relationship*. Report V, Geneva, International Labour Office, p.39.

4 Committee discussions with Ms Ellen Hansen, Senior Employment Specialist and Mr Lars Thomann, External Collaborator, International Labour Organisation, Geneva, 7 April 2005.

5 International Labour Organisation, 2003. *The scope of the employment relationship*. Report V, International Labour Office, p.51.

6 The Declaration covers four areas: freedom of association and the right to collective bargaining; the elimination of forced and compulsory labour; the abolition of child labour; and the elimination of discrimination in the workplace. See: <www.ilo.org/public/english/standards/decl/declaration/text/index/htm>.

7 International Labour Organisation, 2003. *The scope of the employment relationship*. Report V, Geneva, International Labour Office, Geneva, p.5.

relation to recruitment agencies, the ILO's 1997 adoption of a Private Employment Agencies Convention[8] was, as Ms Ellen Hansen advised the Committee, designed to legitimise private employment agencies and recognise their contribution while providing certain safeguards for workers.[9]

7.3 The Organisation for Economic Cooperation and Development

In its 2002 analysis of employment conditions, the Organisation for Economic Cooperation and Development (OECD) noted that all forms of temporary employment have grown across most OECD countries over the past two decades.[10] In discussions with Ms Glenda Quintini, an economist with the OECD, the Committee was advised that in looking at the impact of the growth of temporary agency work upon the respective member national economies, the OECD acknowledged that most reforms of the 1990s had produced increasing differences between permanent and temporary workers. This had occurred through the creation of more jobs which had no industrial protection,[11] rather than through reforming the nature of the permanent employment contract to make it more flexible.[12]

Mr David Grubb, a Principal Economist with the OECD, told the Committee that it would be preferable for governments to have transparent employment legislation (as to rights and responsibilities) rather than allowing for the creation of specific and different forms of employment contracts. Mr Grubb considered that across the membership of the OECD, the strict regulation of permanent employment was a major cause of the massive growth in temporary employment. Mr Grubb informed the Committee that, in specifying different forms of regulation, a clear balance of the costs and benefits of regulation should be taken into account. Taxation was

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8 International Labour Organisation, 1997. *Recommendation Concerning Private Employment Agencies*. Recommendation 188. Geneva, International Labour Organisation. This became Convention 181 and as at 7 April 2005, only 17 countries had ratified it.

9 Committee discussions with Ms Ellen Hansen, Senior Employment Specialist and Mr Lars Thomann, External Collaborator, International Labour Organisation, Geneva, 7 April 2005.

10 Organisation for Economic Cooperation and Development, 2002. *Employment Outlook 2002*. Paris, p.170.

11 For further discussion, see: Organisation for Economic Cooperation and Development, 2002. *Employment Outlook 2002*. Paris (especially Chapter 3: 'Taking the measure of temporary employment').

12 Committee discussions with Ms Glenda Quintini, Economist, and Mr David Grubb, Principal Economist, Directorate for Employment, Labour and Social Affairs, Organisation for Economic Cooperation and Development, Paris, 11 April 2005.

recommended as a useful and less rigid means of ensuring there were more benefits than costs to a national economy.[13]

7.4 Temporary Agency Work in the European Union: an overview

European temporary agency workers enjoy relatively greater security than their counterparts in Australia because they are usually engaged on an employment contract of fixed duration. In contrast to Australian temporary agency workers, who are mostly casual workers with very limited job security (see Chapter 3), the majority of European temporary agency workers enjoy the same entitlements as directly hired permanent workers with the exception of the duration of their employment.

Issues in Europe have not only been about temporary agency workers possibly having poorer working conditions. The Committee's discussions in Europe also touched on concerns about the potential for larger firms to utilise temporary agency work to circumvent pre-existing agreements on wages. The potential for circumvention is greater in some nations than others by virtue of the prevalence of wage premiums or loadings in nations such as Germany and Scandinavia.[14]

7.4.1 The European Employment Strategy

While in Europe, the Committee was made aware of the importance of the European Employment Strategy (EES), which was established at Lisbon in 2000 and which sought to give direction to, and ensure the cooperation of the employment policies of the Member States. The EES has three objectives:

- to promote full employment, being 70 per cent participation rate of the working population (and over 60 per cent for women by 2010);
- to improve the quality and productivity at work; and

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13 Committee discussions with Mr David Grubb, Principal Economist, Directorate for Employment, Labour and Social Affairs, Organisation for Economic Cooperation and Development, Paris, 11 April 2005.

14 Donald Storrie, 2002. *Temporary agency work in the European Union*. European Foundation for the Improvement of Living and Working Conditions, Dublin, p.54.

- to improve social cohesion.[15]

As Mr Antonis Kastrissianakis and Mr Johan Ten Geuzendam of the EC Directorate General for Employment and Social Affairs advised the Committee, the strategy's aim was that there would be movement towards a convergence of policies with greater homogeneity and less segmentation of the labour force across the EU. Mr Kastrissianakis and Mr Ten Geuzendam informed the Committee that the strategy sought a shift from job protection to an approach encouraging employment.[16]

7.4.2 The Growth of Temporary Agency Work in Europe

A 2000 study by the International Confederation of Private Employment Agencies (CIETT) found that the share of temporary agency work in Europe has been increasing steadily for ten years, with an average annual growth rate of 10 per cent between 1991 and 1998.[17] The share of temporary work agencies' overall employment remains at about 2.1 million (i.e. in full-time equivalent jobs) or 1.4 per cent of total employment in Europe in 1998.[18] In Australia, by comparison, there was estimated to be 290,115 persons either on-hired by a recruitment agency or a temporary work agency, which represents around 3 per cent of all employed persons.[19] In the three years to 2002, there was a 37 per cent increase in the number of temporary agency placements in Australia with a 29 per cent increase in the number of organisations providing labour hire employment over the same period.[20]

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15 The European Union's Stockholm European Council added two intermediate and one additional target: the employment rate should be raised by 67 per cent overall by 2005, 57 per cent for women by 2005 and 50 per cent for older workers by 2010. See: <europa.eu.int/comm/employment_social/employment_strategy/index_en.htm>

16 Committee discussions with Mr Antonis Kastrissianakis, Director, Employment and European Social Fund Policy Coordination Directorate and Mr Johan Ten Geuzendam, Head of Employment Services Unit, Directorate-General for Employment and Social Affairs, European Commission, Brussels, 5 April 2005.

17 International Confederation of Private Employment Agencies (CIETT), 2000. *Orchestrating the evolution of Private Employment Agencies towards a stronger society*. Brussels, CIETT, p.17.

18 Donald Storrie, 2002. *Temporary agency work in the European Union*. European Foundation for the Improvement of Living and Working Conditions, Dublin, p.28.

19 Australian Bureau of Statistics, 2003. *Employment Services 2001-2002*, Cat. no. 8558.0; P. Laplagne, M. Glover and T. Fry, 2005. *The Growth of Labour Hire Employment in Australia*. Staff Working Paper, Productivity Commission, Melbourne, February, p.7.

20 Australian Bureau of Statistics, 2003. *Employment Services 2001-2002*, Cat. no. 8558.0.

This increase is part of the general trend towards non-standard employment in Western industrialised countries, which in part reflects the deregulation of the temporary employment sector over recent years in a number of European countries. Even as recently as the early 1990s, temporary agency work was completely prohibited in some European jurisdictions, namely Spain and Greece.

The spread of temporary agency work has been uneven throughout the European Union. In 1999, 80 per cent of temporary agency workers were employed in just four Member States: the Netherlands, France, Germany and the UK.[21] The spread has also been uneven across different sectors within these individual countries; for example, temporary agency work is more prominent in industry in France[22] while being more prominent in the services sector in the UK.[23]

Reasons for the growth of temporary agency work in Europe appear to mirror the reasons for growth in Australia. A 2000 report by CIETT found that 27 per cent of firms using temporary agency work did so to replace 'permanent' employees, while 23 per cent did so to account for seasonal fluctuations.[24] In the UK, the main reason why 60 per cent of host employers used temporary agency workers was to replace absent staff.[25]

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21 As a percentage of the total workforce, these workers account for 2.7 per cent in France (623,000 workers) and 2.1 per cent in the UK being 557,000 workers (though another credible figure is 254,000 workers or 0.9 per cent). Donald Storrie, 2002. *Temporary agency work in the European Union*. European Foundation for the Improvement of Living and Working Conditions, Dublin, p.28.

22 The car industry is the biggest user of temporary agency workers in France. European Foundation for the Improvement of Living and Working Conditions, 2002. *Temporary agency work: national reports – France*. Dublin, pp.8-9.

23 Donald Storrie, 2002. *Temporary agency work in the European Union*. European Foundation for the Improvement of Living and Working Conditions, Dublin, p.31.

24 International Confederation of Private Employment Agencies (CIETT), 2000. *Orchestrating the evolution of Private Employment Agencies towards a stronger society*. Brussels, CIETT, p.21.

25 Donald Storrie, 2002. *Temporary agency work in the European Union*. European Foundation for the Improvement of Living and Working Conditions, Dublin, p.35.

7.5 Nature and Extent of Regulation in the European Union

While there are a number of national regulations covering temporary agency workers, there is currently no European Union (EU) regulation in place. The European Council can recommend that the EU seek to stimulate the creation of quality jobs, to diversify forms of employment and to reconcile flexibility and security. However, according to the principle of *subsidiarity*, the EU does not deal with such issues as Member States retain a core responsibility and can go further than the minimum standards set down by the EU.[26]

The EU seeks to regulate employment conditions, as it does for other policy measures, through the adoption of Directives. Such proposed Directives emanate from the ongoing dialogue of entities formally recognised as the Social Partners. The Partners are the European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP), the Union of Industrial and Employers' Confederations of Europe (UNICE) and the European Trade Union Confederation (ETUC).

As a result of such negotiations, the EU adopted a Directive in June 1989 which, by agreement of the Social Partners:

> *… applies to fixed-term workers with the exception of those placed by a temporary work agency at the disposition of a user enterprise [host employer].*

The parties left it open to reach a similar agreement on temporary agency work but for reasons detailed below, no such agreement has been reached.

With the triangular relationship between agency, host employer and temporary agency worker not providing an employment contract between the host employer and the temporary agency worker, a number of countries in Europe, such as the UK, have conferred labour law rights, not just on 'employees' but on the broader category of 'workers'. Another category, that of 'dependent self employed' or contractor, also raises issues of tax avoidance as well as of employment rights.

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[26] European Commission, Directorate-General for Education and Culture, 2000. *European employment and social policy: a policy for people*. European Communities, Brussels, p.3.

The negotiations on the proposed directive on temporary agency work, Working Conditions for Temporary Workers,[27] have been ongoing since the early 1990s. The objective of the proposed Directive was to offer these workers a fair degree of job security and enhanced occupational status while, at the same time, reconciling the needs of both the worker and the business. The negotiations reached an impasse on the matter of with whom 'equal treatment' of temporary agency workers would be compared: the direct hire employees of the host employer or other workers employed by the agency. Other provisions of the proposed Directive included a prohibition on temporary workers replacing striking workers in the host employer's workplace; that each country establish a new set of statutory flexibility arrangements for a fair degree of job security and enhanced occupational status for these workers; that workers' representation may be determined by collective agreements; and that the temporary work agency be recognised as the employer.

Ms Catelene Passchier, Confederal Secretary of the ETUC advised the Committee that the ETUC's position on the proposed Directive was that the comparison should be with direct hire employees with whom the temporary agency worker was working. Any derogation back to the agency for comparative purposes must only be with the consent of the individual temporary agency worker.[28]

Ms Therese de Liedekerke, the Director of Social Policy at the UNICE also spoke with the Committee and advised that UNICE saw that, in seeking a reference point for equal treatment, a balance of the agency and the host employer was preferable (meaning either could be used for a comparison).[29]

On the proposed Directive on temporary agency work, officials from the French Ministry for Employment, Labour and Social Cohesion advised the Committee that one of the major problems is that the Directive imposes an obligation on France to revise its laws to provide more flexibility. Another issue is the extent of the derogation

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27 Commission of the European Communities, 2002. *Amended Proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers*. 2002/0072 (COD), Brussels, November.

28 Committee discussions with Ms Catelene Passchier, Confederal Secretary, European Trade Union Confederation and Ms Elena Crasta, Trade Union Congress, Policy Officer, Brussels, 5 April 2005.

29 Committee discussions with Ms Therese de Liedekerke, Director, Social Affairs Department, Union of Industrial and Employers' Confederation of Europe, Brussels, 5 April 2005.

(back to the agency), for the verification of equality in wages and the full extent of working conditions.[30]

The Committee met with Mr Jansen and Mr Dimitriou of the Directorate-General for Employment and Social Affairs in Brussels and was advised that for all attempts at Directives in the area of employment policy, there has always been prior consultation with the Social Partners and while the EC takes the initiative, these Social Partners have the right at all times to enter into negotiations.[31]

Mr Jansen and Mr Dimitriou also informed the Committee that European legislation is focussed on setting minimum standards and is very much the product of bargaining with and between the Social Partners.[32] They advised that EC legislation does not cover licensing in the employment field, yet at the Member State level most states had some form of licensing of temporary work agencies with regard to issues of reputation and financial viability.

7.5.1 National approaches to temporary agency work

Across Europe, the basic common feature of temporary agency work is the triangular relationship between the host employer, the agency and the worker. However, the specific regulation of the relationship differs between Member States. According to the EU's proposed Directive on Temporary Agency Work, regulation in Member States can be broadly classified into three categories:

- Those countries in which national legislation does not define temporary agency work or in which there is very limited specific regulation. (Denmark, Finland, Ireland and the UK);
- Those countries which have legislation that defines and regulates temporary agency work, mainly covering the relationship between the

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30 Committee discussions with Ms Christine Lagarenne, Section Head, Ms Elaine Galleri, Head of Research and Mr Nicolas de Riccardis, Project Officer, Ministry for Employment, Labour and Social Cohesion, Paris, 12 April 2005.

31 Committee discussions with Mr Bernhard Jansen, Director, Adaptability, Social Dialogue and Social Rights Directorate and Mr Dimitrios Dimitriou, Head of Unit, Directorate-General for Employment and Social Affairs, European Commission, Brussels, 5 April 2005.

32 Committee discussions with Mr Bernhard Jansen, Director, Adaptability, Social Dialogue and Social Rights Directorate and Mr Dimitrios Dimitriou, Head of Unit, Directorate-General for Employment and Social Affairs, European Commission, Brussels, 5 April 2005.

agency, host and worker. (Germany, Austria, Spain, Luxembourg, the Netherlands and Sweden); and

- Those countries which have comprehensive legislative definitions and regulations for temporary agency work, which covers the relationship between the agency, host and the worker as well as the specific employment status of the temporary agency worker (Belgium, France, Italy and Portugal).[33]

There are a number of differences between European countries regarding the regulation of temporary agency work. However, according to the proposed Directive on Temporary Agency Work, some common features can be identified:

- The agency is usually considered to be the employer of the worker. (However, in the UK and Ireland, some temporary agency workers may be self-employed.)
- As the employer, the agency is bound to meet the legal obligations of an employee. However, due to the peculiar nature of the triangular work arrangement, some responsibilities may be shared between the agency and the host; for example, workplace health and safety.
- Temporary agency workers are recruited on the basis of a fixed-term contract.
- Temporary agency workers receive pay at least equal to that of a permanent worker of the host employer when carrying out identical or similar tasks.
- An employee of the host employer may not be replaced by a temporary agency worker.[34]

Many countries also have collective agreements or codes of conduct, if not legislation, which provides that a temporary agency worker may not replace an employee who is on strike and that temporary agency workers are entitled to access the social services of the undertaking where they are working.

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[33] Commission of the European Communities, 2002. *Amended Proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers*. 2002/0072 (COD), Brussels, November.

[34] Commission of the European Communities, 2002. *Amended Proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers*. 2002/0072 (COD), Brussels, November.

During its time in Europe, the Committee was also advised of the Working Time Directive[35] which referred to maximum working hours for all workers to be 48 hours per week referenced to a four month period and that all workers are entitled to paid leave. Mr Jansen of the Directorate-General for Employment and Social Affairs at the EC informed the Committee that all workers, including temporary agency workers, would be affected by this Directive, as long as they met the four month employment requirement.[36]

Another proposed Directive is a Services Directive which is currently before the European Parliament. Ms Catalene Passchier of the ETUC advised the Committee that France and Germany were pushing for this Directive so as to provide for some regulation of temporary agency work in the services industry, a sector which recently saw massive growth.[37]

7.5.2 Nature and Extent of Regulation in the United Kingdom

In the UK, temporary agency workers may be engaged by the agency as employees or contractors. As a result, the recent trend in regulations has been to award rights to 'workers' rather than 'employees'.

Temporary agency work in the UK is relatively unregulated in the European context: there are no limits on the length of temporary agency employment and only minimal restrictions on the circumstances under which temporary agency workers can be provided. The UK has no legal provisions for equal treatment relating to wages, paid holidays or even profit sharing (though some industrial agreements provide for it). There are no major national collective agreements in the UK on temporary agency work, other than a framework agreement in the broadcasting and film industry. Apart from nursing and care agencies, which must be licensed by the UK National Care Standards Commission, there are no obligations for agencies to register or be licensed. The only restrictions are, in fact, to prohibit temporary agency workers from

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35 European Parliament, Committee on Employment and Social Affairs, 2005. *Proposal for a directive concerning certain aspects of the organisation of working time*. 2004/0209 (COD), February.

36 Committee discussions with Mr Bernhard Jansen, Director, Adaptability, Social Dialogue and Social Rights Directorate, Directorate-General for Employment and Social Affairs, European Commission, Brussels, 5 April 2005.

37 Committee discussions with Ms Catelene Passchier, Confederal Secretary, European Trade Union Confederation, Brussels, 5 April 2005.

replacing workers on strike or involved in industrial action and ensuring that temporary agency workers have legally required qualifications for relevant work.[38] However, as Professor Janet Druker informed the Committee, UK legislation has, since 1997, included certain rights for all workers relating, for example, to recreation leave and the minimum wage.[39]

There is some regulation in the UK but it only establishes a framework of minimum standards for the general conduct of agencies. Temporary work agencies in the United Kingdom are regulated by the *Employment Agencies Act 1973* and the *Conduct of Employment Agencies and Employment Businesses Regulations 2003*. Recruitment agencies are also covered by the Act.

Under the Act, the Department of Trade and Industry (DTI) has responsibility for the maintenance and enforcement of the standards in the temporary agency work sector through the Employment Agency Standards Office (EASO) Inspectorate. While its licensing powers were removed in 1995, the Committee was advised by Mr Vic Patterson, Head of Policy and Mr Steve Keeler, Head of Operations, that the licensing power was ineffective and that instead, over the past decade, the Inspectorate had resorted to its prohibition power to have 12 operators banned.[40]

In addition to the powers of prohibition under the Act (which is imposed by an employment tribunal), the Inspectorate can seek a prosecution in a magistrates' court where a maximum fine of £5,000 can be imposed. It was submitted that the Inspectorate was under-resourced and the Committee was told that while the Inspectorate did some targeting where it thought a problem might exist, it typically relied on telephone complaints, which were usually about wages or where a complainant had been unable to find work. Importantly, the EASO has the right to inspect premises and records of agencies to ensure that they comply with the standards set by the regulations as well to investigate complaints. The Office has the power to prevent operators from running agency services in cases of gross

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38 European Foundation for the Improvement of Living and Working Conditions, 2002. *Temporary agency work: national reports – United Kingdom*. Dublin, p.2.

39 Committee discussions with Professor Janet Druker, Assistant Principal, Canterbury Christ Church University, London, 1 April 2005.

40 Committee discussions with Mr Vic Patterson, Head of Policy and Mr Steve Keeler, Head of Operations, Employment Agency Standards Inspectorate, Department of Trade and Industry, London, 31 March 2005.

misconduct, however, these regulations are not strict and the agency could engage in other activities of a similar nature.

Ms Chidi King, Employment Rights Officer with the UK Trade Union Congress (TUC) advised the Committee that the TUC saw the EASO Inspectorate doing a good job with its inadequate resources and that there was scope for more and tougher penalties for employers in the temporary agency work sector who breached the standards.[41] It was the TUC's view that an adequate system of registration and licensing would assist in giving the Inspectorate much greater scope for effective action through a variety of responses.[42]

The Recruiting and Employment Confederation (REC) is the industry body for temporary agencies in the United Kingdom and represents approximately 3,500 companies with 6,000 branches effectively covering 60 per cent of the industry. Mr Tom Hadley, Director of External Relations, advised the Committee that the REC sees one of its primary functions as maintaining and enhancing standards and to this end, has created a *Code of Good Recruitment Practice*.[43] This Code applies to both temporary agency functions and recruitment practices.[44] While Mr Hadley argued that the Code was mandatory, this applied only to REC members. As to the possible reintroduction of licensing, the REC was of the view that the *Conduct of Employment Agencies and Employment Businesses Regulations 2003* as well as its own Code of Conduct are sufficient to maintain industry standards. However, the Committee noted that not all employment agencies are members of the REC.

The DTI told the Committee that it considered that the REC Code of Conduct was not as comprehensive or as strict as it was purported to be. The DTI's Inspectorate advised that often a problem with larger agencies (even with an REC member) is that

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41 Committee discussions with Ms Chidi King, Employment Rights Officer, Trade Union Congress, London, 1 April 2005.

42 It was the Trade Union Congress's view that the Department of Trade and Industry tended to fall on the softer side because so much evidence was required to take an action to prohibit an agency from operating: Committee discussions with Ms Chidi King, Employment Rights Officer, Trade Union Congress, London, 1 April 2005.

43 The Code of Good Recruitment Practice seeks to "ensure that all members of the REC conduct their businesses ethically and to the highest standards and to promote good practice within REC membership": *REC Members' Code of Good Recruitment Practice 2005*. It sets out the duties of members to both hirers and work seekers and also includes a complaints and disciplinary procedure.

44 Committee discussions with Mr Tom Hadley, Director of External Relations, Recruitment and Employment Confederation, London, 31 March, 2005.

while the central agency meets specific requirements, local branches or affiliates may not meet the requirements.[45]

In the UK, there are no proposals for an industry-wide registration scheme, or for a code of practice for temporary work agencies. However, in response to a spate of very serious industrial accidents in rural UK, the Gangmasters Licensing Authority (GLA) has been introduced for temporary workers in the agricultural sector.[46] Committee members met with Mr Paul Whitehouse, Chairman, and Mr Michael Wilson, Chief Executive of the GLA together with Mr Ray Anderson, Head of Farm Focus Division, UK Department of Environment, Food and Rural Affairs in London.[47] Although a Bill to establish a licensing scheme for agricultural workers had already been proposed, a serious accident occurred in February 2004, the 'Morecambe Bay incident', which highlighted the need for some form of regulation. The GLA legislation includes severe penalties for breaches of the regulations.[48]

While the REC supported the GLA, it was argued that careful consideration should be given before it was adopted in other industries, as the temporary agency sector is a generalist one, not specific like that to which the GLA applied.[49] The Confederation of British Industry (CBI) also supported the GLA form of licensing but shared the REC's concern it could be applied to other sectors. The CBI does not oppose licensing, as long as it is introduced in an open and transparent way; its members could still access a flexible labour force; and costs are kept down.[50] On the other hand, the TUC was very much in favour of a form of registration and licensing which would mean that agencies could show that certain 'fit and proper' requirements been fulfilled prior to establishment.[51]

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45 Committee discussions with Mr Vic Patterson, Head of Policy and Mr Steve Keeler, Head of Operations, Employment Agency Standards Inspectorate, Department of Trade and Industry, London, 31 March 2005.

46 Gangmasters Licensing Authority has 40 inspectors to monitor the working conditions of agricultural workers.

47 Committee discussions with Mr Paul Whitehouse, Chairman, and Mr Michael Wilson, Chief Executive of Gangmasters Licensing Authority and Mr Ray Anderson, Head of Farm Focus Division, UK Department of Environment, Food and Rural Affairs, London, 30 March 2005.

48 Committee discussions with Mr Paul Whitehouse, Chairman, and Mr Michael Wilson, Chief Executive of Gangmasters Licensing Authority and Mr Ray Anderson, Head of Farm Focus Division, UK Department of Environment, Food and Rural Affairs, London, 30 March, 2005.

49 Committee discussions with Mr Tom Hadley, Director of External Relations, Recruitment and Employment Confederation, London, 31 March, 2005.

50 Committee discussions with Mr Anthony Thompson, Head, and Mr Neil Carberry, Senior Policy Advisor, Employment and Reward, Confederation of British Industry, London, 31 March 2005.

51 Committee discussions with Ms Chidi King, Employment Rights Officer, Trade Union Congress, London, 1 April 2005.

7.5.3 Nature and Extent of Regulation in France

In France, a temporary work agency must be authorised by the regional Labour Inspectorate. An annually renewable financial guarantee must be provided by the agency as well as monthly information on host employers and temporary agency workers and quarterly information on social security contributions.[52]

The employment status of the temporary agency worker in France is clear in that the agency is the employer and the employee has an employment contract. The minimum duration of the contract of employment is 18 months. As Ms Sophie Boissard of the Office of the French Minister of Employment, Labour and Social Cohesion advised the Committee, temporary agency workers act as a safety valve in the French system as they temporarily replace absent employees or assist in meeting surges in demand. At the same time, temporary agency work provides workers with an opportunity to gain training and a foothold in the job market.[53]

Ms Christine Lagarenne, Ms Elaine Galleri and Mr Nicolas de Riccardis of the Ministry for Employment, Labour and Social Cohesion discussed the regulation of temporary agency workers in France with the Committee. They advised that temporary agency workers in France enjoyed equal treatment in terms of the working conditions of other workers in the same industry. For example, temporary agency workers enjoy the same paid public holidays and the same amount of paid sick leave as permanent employees. If work for the temporary agency worker runs out at the host employer before the end of the agreed contractual period, the agency must provide another contract to replace the original contract with employment conditions as close as possible to those of the original contract.[54]

The French Ministry of Employment officials also informed the Committee that, in France, the host employer is responsible for the employment conditions of the temporary agency worker. This includes responsibility for OHS and training as well

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52 Donald Storrie, 2002. *Temporary agency work in the European Union*. European Foundation for the Improvement of Living and Working Conditions, Dublin, p.5.

53 Committee discussions with Ms Sophie Boissard, Chief of Staff, Office of the Minister for Employment, Labour and Social Cohesion and Ms Agnés Leclerc, Advisor, Ministry for Employment, Labour and Social Cohesion, Paris, 11 April 2005.

54 Committee discussions with Ms Catelene Passchier, Confederal Secretary, European Trade Union Confederation and Ms Elena Crasta, Policy Officer, Trade Union Congress, Brussels, 5 April 2005.

as medical examinations.[55] Importantly, the Committee was told that the agency's contract with the temporary agency worker cannot be terminated other than for fixed reasons (such as illegality) and that the salary of the temporary agency worker is equivalent to that of a direct hire worker doing the same work. They also advised that there is a 10 per cent loading[56] for annual leave and insecurity but this loading is not paid if the temporary agency worker ends the contract or is employed by the host employer after the contract ends.

Under French law, a temporary work agency is required to set up various representative bodies, such as staff committees and health and safety committees. If a temporary agency worker is employed for three months in a reference period of 12 months, then they could be covered by such representative bodies. A statutory body has been established for the implementation and interpretation of both legislation and collective agreements. At the same time, a Labour Code authorises temporary agency workers to submit individual or collective claims for salary and working conditions to the worker representative body at the host employer workplace.[57]

The French legislation which governs the regulation of temporary agency work has been significantly influenced by government consultation with employers and unions. Since the 1990s, a number of collective agreements have been signed regarding welfare protection, vocational training, occupational medicine, union rights and staff representation. There are funds (the Temporary Social Action Fund and the Temporary Work Training Insurance Fund) established with contributions from the temporary work agencies and which are used, for example, to give access to housing, consumer credit insurance, study grants and children's holidays.

Temporary work agencies have recently formed SETT – the Union of Temporary Work Agencies with over 400 members which accounts for 85 per cent of the sector's business. Most of the large unions, while calling for a ban on temporary agency work, have organised into sector-level federations and signed up to sectoral agreements which cover almost all aspects of industrial relations and provide a degree of social protection for temporary agency work.

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55 Committee discussions with Ms Christine Lagarenne, Section Head, Ms Elaine Galleri, Head of Research and Mr Nicolas de Riccardis, Project Officer, Ministry for Employment, Labour and Social Cohesion, Paris, 12 April 2005.

56 The loading is 10 per cent of the total salary for the duration of the contract.

57 Donald Storrie, 2002. *Temporary agency work in the European Union*. European Foundation for the Improvement of Living and Working Conditions, Dublin, p.14.

In France, one quarter of temporary agency workers surveyed saw temporary agency work as a 'permanent solution to work' while three quarters saw it only as a provisional solution. Half of respondents saw it bringing many of the same social benefits as for permanent workers.[58]

7.6 Health and Safety Issues

7.6.1 World Health Organisation

According to the World Health Organisation (WHO), the OHS needs of temporary agency workers change from country to country, depending upon both the regulatory regime in place as well as the climate. One example is in the provision of personal protective equipment for such workers.

Dr Ivan Ivanov of the European Office of the WHO advised the Committee that while the EU had around 50 Directives on OHS, the EC does not have jurisdictional competence in this field and thus the WHO deals directly with national governments in advising on the provision of OHS services.[59] Ms Kortum-Margot and Dr Eijkemans of the WHO considered that as long as a temporary agency worker had an identifiable employment contract, she/he could avail themselves of the OHS services that the WHO provided.[60]

The Committee was advised of the joint ILO/WHO five year work plan, established in 2002, to expand upon OHS issues and promote compliance with the minimum standards as set out in the International Code on Occupational Health (ICOH).[61]

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58 European Foundation for the Improvement of Living and Working Conditions, 2002. *Temporary agency work: national reports – France*, Dublin, p.15.

59 Committee discussions with Dr Ivan Ivanov, Project Manager, European Regional Office, World Health Organisation, Geneva, 7 April 2005.

60 One of the recent innovations of the WHO which could be of benefit to temporary agency workers was the 'control banding tools' which consists of risk management tools, each addressing a specific occupational hazard, which can be used by small enterprises which cannot afford their own inspectors: Discussions with Ms Evelyn Kortum-Margot, Scientist, Occupational and Environmental Health, Department of Protection and Human Environment and Dr Gerry Eijkemans, Scientist, Occupational and Environmental Health, Department of Protection and Human Environment, 7 April 2005; and WHO, The Global Occupational Health Network, *GOHNET Newsletter*, 2004. Issue No. 7, Summer, p.1.

61 Committee discussions with Ms Evelyn Kortum-Margot, Scientist, Occupational and Environmental Health, Department of Protection and Human Environment, Dr Gerry Eijkemans, Scientist, Occupational and Environmental Health, Department of Protection and Human Environment, Geneva, 7 April 2005.

7.6.2 Health and Safety Issues in the European Union

In most Member States of the EU, there is some form of dual host/agency responsibility for OHS matters in relation to temporary agency workers. To overcome any ambiguities regarding who is responsible for OHS, there is arguably a need for both legislation and a commitment to ensure the legislation is made relevant to the particular workplace.[62] The Committee was told by Professor Janet Druker that when governments consider the OHS implications of temporary agency work, then they must inevitably consider licensing options.[63]

A number of influences undermine the delivery of satisfactory health and safety outcomes for temporary agency workers. For example, host employers are likely to be more concerned for the OHS of their permanent workforce. In addition, informal social structures of the firm may not support the interests of the temporary agency workers who tend not to be represented due to their temporary, or at least perceived temporary, status at the firm.

The Committee was informed by officials of the EC's Directorate-General for Employment and Social Affairs that the EC has limited jurisdictional competence on employment issues and that some policy approaches to temporary workers were mainly possible through OHS directives.[64] While in Europe, the Committee also spoke with Mr José Ramon Biosca de Sagastuy of the Health and Safety Unit of the Directorate-General for Employment and Social Affairs.

Mr Biosca informed the Committee that the proposal for a Working Time Directive would soon be finalised, given that the European Court of Justice had decided in the late 1990s that the organisation of working time was an OHS matter, and therefore within the EC's limited competence.

Mr Biosca also told the Committee that accident rates for temporary agency workers in the EU were twice that of other workers. While Mr Biosca said guidelines had been

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62 Donald Storrie, 2002. *Temporary agency work in the European Union*. European Foundation for the Improvement of Living and Working Conditions, Dublin, p.48.

63 Committee discussions with Professor Janet Druker, Assistant Principal, Canterbury Christ Church University, London, 1 April, 2005.

64 Committee discussions with Mr Bernhard Jansen, Director, Adaptability, Social Dialogue and Social Rights Directorate and Mr Dimitrios Dimitriou, Head of Unit, Directorate-General for Employment and Social Affairs, European Commission, Brussels, 5 April 2005.

established to assist small enterprises, he also referred to the difficulty for the EC in creating financial incentives to improve OHS standards due to the differing insurance and social security systems in place across the EU.[65]

The regulation of OHS at the European level for workers on limited duration contracts or employed by temporary work agencies in the EU is found in a Council Directive of 1991[66] which provides that:

- there is a prohibition of unequal treatment and the provision of the same OHS protection as for other workers (all states have implemented this);
- temporary agency workers must be informed by the host employer of the risks involved in jobs for which they are applying;
- temporary agency workers must receive sufficient training according to the particular characteristics of the job, accounting for qualifications and experience;
- OHS authorities must be informed of the assignment of temporary agency workers to the particular enterprise;[67]
- prior to the assignment, the host employer must inform the agency of the occupational qualifications required and specific features of the job. The agency shall bring these to the attention of the worker concerned;[68]
- the host employer is responsible for the duration of the assignment for the conditions governing the performance of the work as regards safety, hygiene and health.[69]

Storrie argues that while there are good reasons for OHS responsibility to lie with the host employer, there are potential problems with the sole responsibility remaining with the host employer. The host employer may not adopt the same responsibility for temporary agency workers as for other workers; the host employer may have little

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65 Committee discussions with Mr José Ramon Biosca de Sagastuy, Head, Health and Safety Unit, Directorate-General for Employment and Social Affairs, European Commission, Brussels, 4 April 2005.

66 Formally, the Directive, 91/383/EEC, is 'supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed duration employment relationship or a temporary employment relationship.'

67 This has not been implemented by Denmark, France, Greece, Ireland, Italy, the Netherlands, Portugal and Sweden.

68 This has not been implemented by Sweden.

69 This has not been implemented by Ireland.

information on the temporary agency worker's previous experience in relation to the OHS requirements of the work; and the difficulty of resolving the lack of knowledge by the host employer of the temporary agency worker's training experience and the agency's lack of knowledge of what training is required by the host employer.[70]

In brief, Scandinavian countries provide the least detailed OHS coverage for temporary agency workers. There is detailed regulation of the shared responsibility in Austria, Belgium, France, Germany, the Netherlands, Spain and Italy, with day-to-day responsibility generally lying with the host employer, with the temporary work agency being required to provide relevant OHS information to the worker and, in some cases, training. However, the sharing of responsibility between agency and host is a significant problem in the UK.[71]

In Germany, the agencies are required to monitor the workplaces of host employers and inform temporary agency workers of risks. In Spain, a greater responsibility is placed on the agency to monitor workplaces and not to provide temporary agency workers for dangerous work. Belgium has a bipartite organisation dedicated to the monitoring and informing of OHS issues and Ireland, Portugal and Luxembourg each give sole responsibility over OHS issues to the host employer.[72] It is illegal in France to give dangerous work, such as working with hazardous chemicals, to temporary agency workers.

As to the conditions faced by temporary agency workers, European research suggests that temporary agency workers are exposed to more serious health and safety risks than other workers. Belgium has reported that there are significantly higher accident rates for blue collar temporary agency workers, more serious than for other workers, while in France, over 50 per cent of temporary agency workers are exposed to manual handling of weights compared to 41 per cent of limited term contracts and 37 per cent on open-ended contracts.[73] With respect to France, the European Foundation for Living and Working Conditions notes evidence that

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70 Donald Storrie, 2002. *Temporary agency work in the European Union*. European Foundation for the Improvement of Living and Working Conditions, Dublin, p.50.

71 Donald Storrie, 2002. *Temporary agency work in the European Union*. European Foundation for the Improvement of Living and Working Conditions, Dublin, p.50.

72 Donald Storrie, 2002. *Temporary agency work in the European Union*. European Foundation for the Improvement of Living and Working Conditions, Dublin, p.50.

73 Donald Storrie, 2002. *Temporary agency work in the European Union*. European Foundation for the Improvement of Living and Working Conditions, Dublin, p.51.

temporary agency workers are more likely to suffer from sound and thermal pollution.[74] In the UK, a problem has been found in that both host employers and agencies provide inadequate health and safety training.[75]

Overall, for the four countries with reasonable data, France and Belgium refer to temporary agency workers experiencing significantly poorer working conditions than other workers, while in the UK and the Netherlands, the difference has been minimal.[76]

7.6.3 Health and Safety Responsibilities in the United Kingdom

The UK's *Health and Safety at Work Act 1974* (HSWA) imposes broad general duties on employers, through which it seeks to ensure the health, safety and welfare of employees so far as 'reasonably practicable'.[77] Duties also extend to protect non-employees 'who may be affected by [the] undertaking' from risks arising from the conduct of that undertaking. Mr Jeremy Bevan and Ms Jane Lumb from the Health and Safety Executive (HSE) advised the Committee that reports to the HSE on major injuries or death of a temporary agency worker do not require a statement as to whether the temporary work agency or the host is the employer.[78]

The UK *Management of Health, Safety and Welfare Regulations 1999* (MHSWR) imposes overlapping responsibilities on agencies and host employers for workplace health and safety. The MHSWR set out specific duties for employers who have employees 'from an outside undertaking' working in their workplace, to provide them with comprehensible information on risks, on the measures taken to control them, and any instruction necessary for their health and safety. Additionally, there are requirements in respect of temporary workers, whereby the employer has to provide comprehensible information to workers, on special occupational qualifications or skills needed and any health surveillance requirements. The MHSWR duties are

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74 European Foundation for the Improvement of Living and Working Conditions, 2002. *Temporary agency work: national reports – France*, Dublin, p.20.

75 Donald Storrie, 2002. *Temporary agency work in the European Union*. European Foundation for the Improvement of Living and Working Conditions, Dublin, p.51.

76 Donald Storrie, 2002. *Temporary agency work in the European Union*. European Foundation for the Improvement of Living and Working Conditions, Dublin, p.51.

77 Victoria's *Occupational Health and Safety Act 2004*, which is based on the UK model, imposes similarly broad duties upon employers.

78 Committee discussions with Mr Jeremy Bevan and Ms Jane Lumb, Policy Advisors, Health and Safety Executive, UK, London, 1 April 2005.

mirrored in the Department of Trade and Industry's *Conduct of Employment Agencies and Employment Businesses Regulations 2003*. The Committee was advised by HSE officials that the impetus for the MHSWR comes from the EU's 1991 OHS Directive for temporary agency workers and contains important pre-start requirements.[79]

There remains, nonetheless, a degree of uncertainty, on the part of both employers and inspectors about who is actually responsible for particular aspects of health and safety. Mr Jeremy Bevan and Ms Jane Lumb of the HSE informed the Committee that 'control' is one of the tests applied in seeking to decide who is responsible. In particular, Mr Bevan and Ms Lumb considered that the degree of control exercised by the host employer was a critical factor and referred to certain regulations which place a duty (such as reporting an accident) either on the employer or the 'person in control of the premises'.[80]

Another issue is the extent to which the worker in question is 'integrated' into the workplace. In documentation supplied by the HSE, it is evident that there is some confusion over who, for example, is responsible for the provision of personal protective equipment (PPE). HSE is currently producing guidance material on, for example, responsibility for various aspects of 'agency worker' health and safety – who is responsible for: risk assessment; health surveillance; provision of PPE; and accident reporting.[81] Employer groups are being consulted on the development of the guidance material.[82] (The Victorian WorkCover Authority is similarly producing guidance material for Victorian employers to clarify the allocation of OHS responsibilities between host employer and agencies: see Chapter 4.)

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79 Committee discussions with Mr Jeremy Bevan and Ms Jane Lumb, Policy Advisors, Health and Safety Executive, UK, London, 1 April 2005.

80 An example of such a set of regulations are the Reporting of Injuries Diseases and Dangerous Occurrences Regulations 1995 (RIDDOR). Committee discussions with Mr Jeremy Bevan and Ms Jane Lumb, Policy Advisors, Health and Safety Executive, UK, London, 1 April 2005. Also: Health and Safety Executive, 2005. 'Proposed visit of the Victorian Economic Development Committee to HSE, March/April 2005'. Attachment to correspondence received by email, 18 February 2005, p.2.

81 Health and Safety Executive, 2005. 'Proposed visit of the Victorian Economic Development Committee to HSE, March/April 2005'. Attachment to correspondence received by email, 18 February 2005, p.2.

82 Committee discussions with Mr Jeremy Bevan and Ms Jane Lumb, Policy Advisors, Health and Safety Executive, UK, London, 1 April 2005.

In practice, it is mostly host employers who record accidents and carry out risk assessments (which must be 'suitable and sufficient') and generally the HSE consider there is a proper exchange of information between the parties.[83] The HSE was unable to say whether the injury rates for temporary agency workers are higher than the average for any particular sector as accident forms do not identify employment status. Also, local authorities rather than the HSE are the enforcing authority for many types of workplaces such as offices and warehouses. Added to this is the problem of under-reporting of accidents at host employer worksites despite the requirement for a host employer to notify the UK Department of Trade and Industry when an accident has occurred to a temporary agency worker.

There is no legal duty in the UK for an employer to assist in the return to work of an injured temporary agency worker, apart from duties arising from the disability, discrimination and employment laws. The Health and Safety Commission (HSC) and the HSE, which reports to the HSC, both advocate that employers work with employees to use both 'preventative' and 'sickness management' approaches to improve employee's health.

HSE officials advised the Committee that agencies are not required to report unsafe host workplaces to the HSE. However, the extension of the definition of 'worker' under the *Employment Rights Act 1996* to include temporary agency workers, means that temporary agency workers are protected from suffering detriment by their employer if they make a protected disclosure to a prescribed person (such as the HSE). [84]

7.7 Skills and training in the European Union

In most European countries, it may be the agency, the host employer or both which provide some training. In discussions with Ms Catalene Passchier, Confederal Secretary of ETUC and Ms Elena Crasta, Policy Officer of the TUC, in Brussels, the Committee was advised that the proposed temporary agency worker Directive would have the benefit of, in principle, specifying who would be responsible for the training

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83 Health and Safety Executive, 2005. 'Proposed visit of the Victorian Economic Development Committee to HSE, March/April 2005'. Attachment to correspondence received by email, 18 February 2005, p.2.

84 Committee discussions with Mr Jeremy Bevan and Ms Jane Lumb, Policy Advisors, Health and Safety Executive, UK, London, 1 April 2005.

of temporary agency workers.[85] However, the Third European Survey on Working Conditions of 2001 stated that temporary agency workers have less access to training and less opportunity to 'learn new things' in the workplace than any other category of worker.[86]

The European Foundation for the Improvement of Living and Working Conditions has identified a slightly increased tendency towards more skilled and qualified jobs for temporary workers.[87] While there is evidence that many agency workers replace other staff, it is obvious that many of these replacement workers have non-specific, rather general skills. With many indicators pointing to little formal training of temporary agency workers, they may well be unsuitable for activities demanding high skills levels. Professor Janet Druker of Canterbury Christ Church University told the Committee that in some sectors, such as information technology, people cannot be agency workers for too long as they lose skills and need to come back into a company where they can upgrade their skills again.[88]

In discussions with Mr Antonis Kastrissianakis and Mr Johan Ten Geuzendam of the EC's Directorate-General for Employment and Social Affairs, the Committee was informed of how the EC deals with the consequences of skills shortages, namely through mobility, migration, qualifications recognition and tax discrimination between states. The EU's Social Fund[89] is also being used to support efforts to increase enterprise training from the current 8 per cent to 12½ per cent of the EU's total Social Fund by 2010.[90]

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85 Committee discussions with Ms Catelene Passchier, Confederal Secretary, European Trade Union Confederation and Ms Elena Crasta, Policy Officer, Trade Union Congress, Brussels, 5 April 2005. They considered a training right might be one of the benefits of the proposed Directive given that temporary agency workers may not receive other benefits due to the shorter employment periods.

86 P. Paoli and D. Merllie, 2001. *Third European Survey on Working Conditions, 2000*. European Foundation for the Improvement of Living and Working Conditions. Luxembourg. Office for Official Publications of the European Communities.

87 Donald Storrie, 2002. *Temporary agency work in the European Union*. European Foundation for the Improvement of Living and Working Conditions, Dublin, p.30.

88 Committee discussions with Professor Janet Druker, Assistant Principal, Canterbury Christ Church University, London, 1 April, 2005.

89 The European Social Fund (ESF) is the main financial tool through which the European Union translates its strategic employment policy aims into action. Established by the Treaty of Rome, it is the longest established Structural Fund which has invested, in partnership with the Member States, in programmes to develop people's skills and their potential for work.

90 Committee discussions with Mr Antonis Kastrissianakis, Director, Employment and European Social Fund Policy Coordination Directorate and Mr Johan Ten Geuzendam, Head of Unit, Directorate-General for Employment and Social Affairs, European Commission, Brussels, 5 April 2005.

Mr Colin McCullogh of the EC's training body, Cedefop,[91] informed the Committee that a major problem for the EU in promoting greater up-skilling and training of all workers, including temporary agency workers, was that the EC lacked educational jurisdictional competency and was therefore unable to legislate on educational and training issues.[92] As a consequence, Cedefop could only make recommendations and hope to promote the transfer of good practice. Likewise, the minimal levels of private investment in training could only be improved through legislation or other measures in Member States. For example, while France requires individual employers to set money aside in employee training accounts,[93] and provides a legislated minimum number of days of training each year, the EC could not require that this become a new minimum standard across the EU.

Mr McCullogh of Cedefop also expressed concern that there had not been a study of the economic cost of inadequate skilling: one estimate was that for one less year of training or education across an economy, about 2 per cent of Gross Domestic Product would be affected.[94]

In its 2004 edition of *Employment in Europe*[95] the EC argues that education and training are an integral part of labour market transitions. One of the most interesting findings was that educational qualifications, and to a lesser extent training courses, are especially important for a move into employment from unemployment. Once in work, on-the-job training seems to be the most important determinant for workers to move from temporary to permanent employment and for workers to move out of low pay jobs after one year.[96]

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91 The European Centre for the Development of Vocational Training – Cedefop – was established in 1975.

92 Committee discussions with Mr Colin McCullogh, Assistant to Director, Cedefop, Brussels, 6 April 2005.

93 Ms Sophie Boissard, Chief of Staff, Office of the French Minister for Employment, Labour and Social Cohesion and Ms Agnes Leclerc, Advisor, for the French Ministry for Employment, Labour and Social Cohesion advised the Committee that there were 3 systems of training accounts: the national system including trade training schools; apprenticeships, mainly for the young; and work experience within the firms themselves. The accounts amounted to 1.4 per cent of the wage bill: Discussions at the Offices of the French Minister for Employment, Labour and Social Cohesion, Paris, 11 April 2005.

94 Committee discussions with Mr Colin McCullogh, Assistant to Director, Cedefop, Brussels, 6 April 2005.

95 European Commission, 2004. *Employment in Europe 2004: Recent Trends and Prospects*. European Commission Directorate General for Employment and Social Affairs, August.

96 European Commission, 2004. *Employment in Europe 2004: Recent Trends and Prospects*. Brussels, pp.177-179 and 182.

EC officials advised the Committee that the 'Lifelong Learning' proposal[97] agreed by the Social Partners was considered an essential response to technological and structural changes in the economy. Given that temporary agency workers are more directly affected by such changes and may not receive the same level of training as more directly employed workers, the proposal was seen as being of particular benefit to these workers.[98]

Mr Thompson, Head of Employment and Reward and Mr Carberry, Senior Policy Advisor at the UK Confederation of British Industry (CBI) told the Committee that the CBI was against the 'Lifelong Learning' proposal as it represented new obligations upon employers for longer-term training. According to the CBI, employers were already paying a premium for previous training, such as in the information technology sector, with temporary agency workers filling the vacancies in skilled workers.[99]

With respect to the UK, studies on non-permanent workers have found access to training and development to be the main grievance. In a 1999 survey, only 21 per cent of temporary agency workers had received training within the preceding 13 weeks compared to 28 per cent for permanent workers while those on fixed term contracts had a higher likelihood of receiving training at 39 per cent.[100]

The Committee was advised that under the UK *Conduct of Employment Agencies Regulations 2003*, the host employer and employer (agency) must agree on the skills required for the job and while the temporary agency worker was required to be trained in relevant OHS issues, sector-specific training was the only other training requirement.[101]

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97 ETUC, UNICE and CEEP, 2005. *Framework of Actions for the Lifelong Development of Competencies and Qualifications*. Third follow-up report. Brussels, March 22. This report describes the Social Partners' activities on developing competences and qualifications at cross-industry, sectoral and company levels.

98 European Commission, 2004. *Employment in Europe 2004: Recent Trends and Prospects*. Brussels, p.160.

99 Committee discussions with Mr Anthony Thompson, Head and Mr Neil Carberry, Senior Policy Advisor, Employment and Reward, Confederation of British Industry, London, 31 March 2005.

100 European Foundation for the Improvement of Living and Working Conditions, 2002. *Temporary agency work: national reports – United Kingdom*. Dublin, p.8.

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Appendix 1

List of Recommendations contained in Interim Report on Labour Hire Employment in Victoria

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.

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.

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.

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.

Appendix 1 - continued

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.

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.

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.

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.

Appendix 1 - continued

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.

Appendix 1 - continued

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.

Appendix 2

List of individuals and organisations providing comments on the Interim Report

Response Number	Name of Individual/Organisation	Date Received
1	Labour Force Australia	8 February 2005
2	Australian Services Union	18 February 2005
3	WV Management Limited	22 February 2005
4	Department of Employment and Workplace Relations	23 February 2005
5	Victorian Trades Hall Council	24 February 2005
6	Transport Workers' Union of Australia, Victorian/Tasmanian Branch	23 February 2005
7	Recruitment and Consulting Services Association Ltd	24 February 2005
8	Equal Opportunity Commission Victoria	25 February 2005
9	Victorian Automobile Chamber of Commerce	28 February 2005
10	Australian Manufacturing Workers' Union	3 March 2005
11	Group Training Association (Victoria)	4 March 2005
12	Electrical Trades Union – Southern States Branch	7 March 2005
13	Mr. Colin Fenwick, Director, Centre for Employment and Labour Relations Law, University of Melbourne	7 March 2005
14	The Australian Workers' Union	9 March 2005
15	Victorian Learning and Employment Skills Commission	15 March 2005
16	ACTU	15 March 2005
17	Victorian WorkCover Authority	18 March 2005

Appendix 3

Overseas Investigations

30 March to 12 April 2005

30 March 2005 – London

UK Department of Health
Mr. Bob Ricketts, Senior Officer

Gangmasters Licensing Authority
Mr. Paul Whitehouse, Chairman
Mr. Michael Wilson, Chief Executive

Department of Environment, Food and Rural Affairs
Mr. Ray Anderson, Head of Farm Focus Division

31 March 2005 – London

Recruitment and Employment Confederation
Mr. Tom Hadley
Director of External Relations

Confederation of British Industry
Mr. Anthony Thompson, Head
Employment and Reward

Mr. Neil Carberry
Senior Policy Advisor
Employment and Reward

Department of Trade and Industry
Mr. Vic Patterson
Head of Policy, Employment Agency Standards Inspectorate

Mr. Steve Keeler, Head of Operations
Employment Agency Standards Inspectorate

1 April 2005 – London

Health and Safety Executive, UK
Mr. Jeremy Bevan
Policy Advisor on Agency Workers

Ms Jane Lumb
Policy Advisor on Agency Workers

Trade Union Congress
Ms Chidi King, Employment Rights Officer
Equality and Employment Rights Department

Appendix 3 - continued

Canterbury Christ Church University
Professor Janet Druker, Assistant Principal

Victorian Agent General
Mr. David Buckingham

4 April 2005 – Brussels

European Commission, Directorate-General for External Relations
Mr. Michael Pulch, Deputy Head of Unit

Teleconference –
European Commission, Directorate-General for Employment and Social Affairs
Mr José Ramon Biosca de Sagastuy, Head of Health and Safety Unit

5 April 2005 – Brussels

Australian Ambassador to the European Union
Mr. Peter Grey

European Commission, Directorate-General for Employment and Social Affairs

- Mr. Antonis Kastrissianakis, Director, Employment and European Social Fund Policy Coordination Directorate
- Mr. Dimitrios Dimitriou, Head of Unit
- Mr. Bernhard Jansen, Director, Adaptability, Social Dialogue and Social Rights Directorate
- Mr. Johan Ten Geuzendam, Head of Employment Services Unit

Union of Industrial and Employers' Confederation of Europe (UNICE)
Ms Therese de Liedekerke, Director, Social Affairs Department

European Trade Union Confederation
Ms Catelene Passchier, Confederal Secretary

Trade Union Congress, Brussels Office
Ms Elena Crasta, Policy Officer

6 April 2005 – Brussels

Cedefop
Mr. Colin McCullogh, Assistant to Director

European Parliament
EP Committee on Employment and Social Affairs
Mr. Proinsias De Rossa, MEP, Current Member

European Parliament
Mr. Terence Wynne, MEP
Mr. Paulo Casaca, MEP
Mr. Miroslaw Piotrowski, MEP
Mr. Robert Zile, MEP
Mr. Michael Cramer, MEP

Appendix 3 - continued

Mr. Jim Nicholson, MEP
Mr. Marinus van Greuningen, Protocol

7 April 2005 – Geneva

International Labour Organisation
Ms Ellen Hansen
Senior Employment Services Specialist
Skills and Employability Department
Employment Sector

Mr. Lars Thomann,
External Collaborator

World Health Organisation
Ms Evelyn Kortum-Margot, Scientist
Occupational and Environmental Health
Department of Protection and Human Environment

Dr Gerry Eijkemans, Scientist
Occupational and Environmental Health
Department of Protection and Human Environment

Dr. Ivan Dimov Ivanov, Project Manager
European Regional Office

8 April 2005 – Geneva

Australian Ambassador to the United Nations in Geneva
Mr. Mike Smith

11 April 2005 – Paris

Organisation for Economic Cooperation and Development
Mr. David Grubb, Principal Economist, Directorate for Employment, Labour and Social Affairs
Ms Glenda Quintini, Economist, Directorate for Employment, Labour and Social Affairs

12 April 2005 – Paris

National Assembly
Mr. Bertrand Marcinal
Conseiller
Chef de la division des publications et des scrutins

Office of Minister for Employment, Labour and Social Cohesion
Ms Sophie Boissard
Chief of Staff

Ministry for Employment, Labour and Social Cohesion
Ms Christine Lagarenne
Section Head

Appendix 3 - continued

Ms Agnès Leclerc
Advisor
European and International Affairs

Mr. Pierre Sardou
Chef de service
Adjoint á la Directrice

Mr. Nicolas de Riccardis
Project Officer

Ms Eliane Galleri
Head of Research
Directorate for Work Relations

Dr. Roberte Manigat
Head of Mission, Office of International Cooperation
Delegation for European and International Affairs

Appendix 4

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 4 - 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
31	Industrial Relations Victoria	24 March 2005

Appendix 5

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 5 - 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, Commission 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 5 - 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

21 February 2005 – Melbourne

- **RMIT University**
  Dr. Iain Campbell, Senior Research Fellow
  Centre for Applied Social Research

7 March 2005 – Melbourne

- **Windsor & Associates**
  Ms Kim Windsor, Director / Principal Consultant

Appendix 5 - continued

- **Centre for Employment and Labour Relations Law, University of Melbourne**
  Mr. Colin Fenwick, Director

- **Osgoode Hall Law School, York University, Toronto**
  Professor H. Glasbeek, Professor Emeritus and Senior Scholar

21 March 2005 – Melbourne

- **Victorian WorkCover Authority**
  Mr. Rob Sheers, Director, Operations Division
  Mr. Brian Cook, Director, Premium Division

Appendix 6

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 6 - 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

21 March 2005

- **Industrial Relations Victoria**
  Mr. Brian Corney, Director, Private Sector
  Mr. Matt O'Connor, Senior Policy Officer

25 March 2005

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

Appendix 7

Key Points of the Productivity Commission Report

P. Laplagne, M. Glover and T. Fry, 2005. *The Growth of Labour Hire Employment in Australia*. Staff Working Paper, Productivity Commission, Melbourne, February.

- Labour hire employees numbered around 270,000 in 2002, equivalent to about 2.9 per cent of all employed persons.

- Labour hire employment grew strongly between 1990 and 2002. In workplaces with 20 or more employees:

    - the number of labour hire workers grew from 33,000 in 1990 to 190,000 in 2002, an increase of 15.7 per cent a year; and

    - the proportion of labour hire workers among all employees grew almost fivefold, from 0.8 per cent in 1990 to 3.9 per cent in 2002.

- The rapid growth of labour hire employment over the period can be attributed to how firms manage their workforce, rather than to changes in the economy's structure (that is, its composition in terms of industry and firm size).

- The following changes in operating environment contributed to firms' altering their employment strategy in favour of labour hire workers:

    - Changing industrial relations context: in the period: there was a decline in the proportion of firms with 'closed union shops', a rise in enterprise bargaining, and an increase in the use of human resources managers. All three changes are likely to have contributed to an increase in the propensity of firms to use labour hire.

    - Rising competitive pressures: trade liberalisation and globalisation put increasing pressure on firms to be competitive. One way for firms to increase competitiveness is to optimise their use of labour. Labour hire employment helped some firms to achieve that objective.

- In contrast, two changes occurring between 1990 and 2002 are likely to have slowed the growth of labour hire employment:

    - The introduction of new technology: contrary to expectations, new technology is associated with a lower likelihood of using labour hire.

    - Changes in the economy's structure: the slower growth of manufacturing and other intensive users of labour hire employment, relative to other sectors of the economy, slowed the growth of labour hire employment.

Appendix 8

The *Drake* Case

Drake Personnel Limited v WorkCover Authority of New South Wales (Inspector Ch'ng) (1999) 90 IR 432.

In *Drake Personnel Limited v WorkCover Authority of New South Wales*, a labour hire employee was injured whilst working on an unguarded machine at the host employer's worksite. The agency, Drake Personnel Limited ('Drake'), was prosecuted on the grounds that it had breached section 15 of the *Occupational Health and Safety Act 1983* (NSW).[1] (The content of this section is similar to subsections 21(1) and (2) of the Occupational Health and Safety Act 2004.)

Drake argued that it had not contravened its duty towards its employee as it had shown the employee a training video and given her an instructional booklet. It had also sent a field staff consultant to inspect the machine on which the employee was supposed to be working. However, the injury arose after the worker had been asked by the host to work on another machine which was unguarded. Drake argued that it could not have been reasonably expected to know that its employee would be requested to work on another machine. Moreover, Drake argued that it had no knowledge of the existence of the machine upon which the injury had occurred. The court found at first instance that Drake had contravened its general duty to its worker. Drake appealed this decision.

Drake's appeal was dismissed by a Full Bench of the New South Wales Industrial Relations Commission. It is important to note that the Full Bench did not hold Drake liable for its inability to control whether the machine was guarded. Rather, Drake's failure to fulfil its OHS responsibility related to a matter over which it did have control: its ability to properly instruct its worker and its client to notify it in the event that the worker was transferred to another machine. The Full Bench found that Drake had breached its duty by failing to instruct the client or the employee to contact Drake in the event that the employee was transferred to another machine.

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[1] The *Occupational Health and Safety Act 1983* (NSW) has now been repealed and replaced by the *Occupational Health and Safety Act 2000* (NSW).