

**Construction, Forestry, Mining and Energy Industrial
Union of Employees, Queensland
(CFMEU)**

**Submission to the Finance and Administration
Committee of the Queensland Parliament**

**Inquiry into the practices of the Labour Hire Industry
in Queensland**

7 April 2016

Contents

1. Introduction.....	4
Case Study: “Raymond”	6
Case Study: “Desmond”	6
3. What is labour hire?	6
Identifying responsibilities	7
Contract run mining operations	7
Case study: Collinsville	8
Long term contractors.....	9
Short term contractors.....	9
Casual and temporary supplementary labour.....	9
Case Study: “Shane”	10
4. Consequences of labour hire and insecure work	10
Avoiding employee entitlements: labour hire workers receive a lower hourly rate of pay than comparable direct hire workers	10
Case study: Blackwater.....	12
Undermining work: labour hire weakens the pay and working conditions of direct hire workers..	13
Case Study: BMA Mines	14
The flexibility myth: labour hire workers overwhelmingly would prefer to be employed directly rather than work for a labour hire employer	14
No opportunities: precarious work does not provide an opportunity for more secure work	15
The productivity myth: labour hire workers are least satisfied with their jobs	16
Poor OHS outcomes: labour hire employees are more likely to be injured at work.....	18
Table 1: Injury Statistics for the Construction Industry versus Labour Hire Industry 2011-2016.....	19
5. Current state of regulation in Australia.....	20
Case Study: Compliant Contractors in the Building and Construction Industry	22
6. Recommendations	22
Recommendation 1: Licensing System.....	23
Recommendation 2: Threshold Capital Requirement.....	24
Recommendation 3: Licensing Bond and Annual Licence Fee	24
Recommendation 4: Compliance Unit	24
Recommendation 5: Increased Transparency.....	25
Recommendation 6: Informing Workers of their Entitlements or Rights	25
Recommendation 7: Statutory Maximum Period for Labour Hire Assignments.....	26
Recommendation 8: Exclusion from Engaging Workers on 417 and 462 visas.....	26

Recommendation 9: Requirement to Pay employees the Market Wage Rate27
APPENDIX 128

1. Introduction

On 2 December 2015, the Leader of the House of the Queensland Legislative Assembly, the Hon. Stirling Hinchcliffe MP, introduced a motion to the Legislative Assembly that the Finance and Administration Committee inquire into and report on the practices of the Labour Hire Industry in Queensland, which was agreed by the Legislative Assembly.

As part of the inquiry, the Committee called for submissions from all interested parties, and on 18 February 2016 released a Departmental Briefing Paper from the Queensland Treasury Office of Industrial Relations.

The Construction, Forestry, Mining and Energy Union (“CFMEU”) is one of Australia’s largest trade unions and is the principal trade union in construction, forestry and furnishing products, mining and energy production. The CFMEU welcomes the opportunity to make this submission to the Finance and Administration Committee, outlining some of our main concerns in relation to labour hire as a form of insecure work, and which affects workers, their families and communities across Queensland.

As highlighted by the briefing papers provided to the enquiry, the members of the CFMEU work in the industries that are most affected by labour hire in Queensland, with the mining industry in particular having the highest percentage of labour hire employees at 10.3%¹. This is nearly double the percentage of labour hire employees than any other industry.

The CFMEU supports the submissions of the Queensland Council of Unions (“QCU”) and refers the inquiry to the additional individual worker case studies submitted by the QCU on behalf of the CFMEU and its members.

Recent media exposés of the exploitation of working people in Queensland’s labour hire industry have highlighted the insufficiency of current regulation and its inability to provide protection for workers in Queensland.²

The existing regulation, which predominately relates to the direct relationship between employers and employees, is inadequate for regulating the complicated triangular structure of labour hire.

Appalling stories of exploitation from people working under labour hire agencies in Queensland show that the negative consequences of labour hire and insecure work are real, disturbing and intolerably common.

¹ See Paper 2 – Workplace Health and Safety Queensland Labour Hire Industry Trends - Table 10

² See for example the media story in Appendix 1 of this submission.

Submissions from people who are faced with precarious work to the CFMEU, including through labour hire agencies, have consistently shown that they do not believe they are paid fairly, their workplaces are not always safe and that they cannot discuss pay or safety without risking their jobs.

The collective experience of the CFMEU, which has been confirmed by numerous research studies in recent years, is that:

- labour hire and casual workers are used in order to avoid paying employee entitlements;
- people who work under labour hire arrangements receive lower wages than the comparable permanent people they work alongside;
- the use of labour hire workers undermines the pay and working conditions of direct hire working people;
- the idea that labour hire arrangements provide 'flexibility' for people is inherently false;
- people who work under labour hire arrangements would overwhelmingly prefer to be directly employed;
- precarious work does not provide opportunities for secure work;
- the use of labour hire workers does not necessarily increase workplace productivity, particularly as it undermines long-term skill development and is detrimental to the worker's motivation; and
- Occupational Health and Safety outcomes are considerably worse for people who work for a labour hire agency.

Current conditions experienced by people working in the labour hire industry in Queensland are inadequate and exploitative.

Further, labour hire companies are undermining Australian working conditions through the increased use of precarious work arrangements such as casualisation and engaging workers under sham independent contract arrangements, as well as exploiting vulnerable temporary foreign workers.

There is also a proliferation of labour hire firms avoiding paying employee entitlements and taxation obligations, such as payroll tax, through fraudulent phoenix activities.

In the private sector, such practices are rife.

With regard to the public sector, the growth of contracting out to the labour hire industry has been alarming in recent years.

Labour hire workforces are replacing traditionally permanent public sector employees within State and Local Government.

This has had a ruinous effect on communities across Queensland – especially in regional Queensland, where State and Local Government authorities have otherwise been major direct employers.

Further, contracting out to labour hire firms by State and Local Government authorities has, on occasion, occurred in circumstances where there has been a complete lack of transparency and public accountability.

Case Study: “Raymond”*

Raymond worked for the Queensland Department of Transport and Main Roads in infrastructure maintenance out of a depot on the Gold Coast Hinterland. As a consequence of the Newman Government’s policy of cutting public sector employment, he was made redundant in 2014. Within a fortnight, Raymond was re-engaged to perform the same work, but through a labour hire firm contracted by the then State Government. Raymond has been engaged on a casual basis by the labour hire firm on an ongoing basis for the last two years. The circumstances in which the labour hire firm was awarded the contract by the then State Government are unclear.

Case Study: “Desmond”

Desmond has been an employee of a labour hire firm for eight years. For that entire period, his host employer has been Brisbane City Council. His duties have been primarily digging and filling graves at council cemeteries. Whilst his role requires him to use a variety of mobile plant, his labour hire employer has misclassified his employment as that of a gardener without proper scrutiny from the council. It is unclear why the council have contracted Desmond’s employment out given the length of time he has been performing work exclusively for the council.

In view of these problems, regulation needs to be implemented and adequately enforced by the Queensland Government.

The CFMEU recommends the Queensland Government:

- Introduce a licensing system which creates barriers to entry to reduce the number of unscrupulous operators operating in Queensland. This regulation should include (but not be limited to):
 - A threshold capital requirement;
 - A licensing bond and annual fee;
 - A compliance unit;
- Establish a statutory maximum period for labour hire assignments with a host organisation;
- Exclude labour hire firms from engaging workers on working holiday visas/student visas.

3. What is labour hire?

Labour hire, as a form of supplementary labour, is defined as temporary “top up” labour designed to meet short situations such as absences due to sick leave, annual leave, and short time work peaks.

Labour hire arrangements are a triangular relationship where workers are hired as an employee by a company which is contracted to supply the worker’s labour to a third party client (the host) for a fee.

In this arrangement, there is no direct employment contract between the host and the employee, and whilst the host typically has an employer’s capacity to direct the work of labour hire workers,

* Individuals’ names have been changed to preserve privacy and confidentiality.

other general employment obligations are removed from the host who simply pays a fee to the labour hire company.

Identifying responsibilities

'The problems of labour hire are not just the product of cowboys in the industry, but are also rooted in the triangular nature of labour hire arrangements: the fact that workers are paid by one employer but work for another. Confusion over lines of responsibility ... are evident, with serious consequences for workers' conditions and entitlements.' – Watson et al., *Fragmented Futures: New Challenges in Working Life*

Brennan et al (2003) state that much of the concern surrounding labour hire arrangements stems from the difficulty in defining relationships and responsibilities. A recurrent theme in the evidence on the labour hire industry is the level of ambiguity in the relationship between the labour hire company, the host 'employer' and worker.

It found debate regarding what constitutes labour hire as there is so much variation in the bases by which workers are engaged: workers may be hired as employees or independent contractors, employees may then be casual, fixed term or ongoing. Workers may work for parts of a host employer that have been partly or entirely outsourced to a labour hire company. The report states that while many employers and employer groups dispute the argument that responsibilities are unclear and that legislation and case law clearly sets out obligations, it is apparent that this is not the case with the relationship and responsibilities misunderstood by many.

The CFMEU contends that these misunderstandings stem from the fact that there can be a broad range of relationships, which should be considered "labour hire" even though on the surface they can look like permanent employment. The key similarities is that in all these relationships the employees employment will be subject to various degrees of control exerted by both labour hire company or the third party. This range or spectrum of control in the triangular relationship is best illustrated in the Mining Industry where there can be seen four different types of labour hire relationships, which include:

- Contract run mining operations;
- Long term contractors;
- Short term contractors;
- Casual and temporary supplementary labour;

Contract run mining operations

In this scenario, a labour hire company is contracted to perform the daily running of mining operations on behalf of the lease holder. The employment offered in this scenario is usually full time with an overall appearance of permanency. These employees will generally have an enterprise agreement fixing their terms and conditions of employment.

This situation, although the employer of the worker will maintain a large degree of control over the employee, that employee's employment is still subject to the requirements of the owner/leaseholder of the mine and their employment is contingent on the operator of the mine/employer maintaining the contract to operate the mine for the lease holder.

If the leaseholder chooses to cancel the contract and/or contract another operator, the employee's employment can be terminated, transferred to another mine site or be transferred to another operator. Depending on the specific legal arrangement, an employee's terms and conditions can be reduced without their agreement. It is not unusual in these situations for the contracting company to also engage casual labour as well.

Case study: Collinsville

In late 2013, the lease holder of the Collinsville open cut mine, Glencore Pty Ltd, cancelled their contract with the mine's operator, Thiess Pty Ltd, and elected to operate the mine themselves. At the time the mine was the largest employer in the local Collinsville/Bowen area with a majority of the workforce living and working in and around the mine.

After taking over operations, Glencore chose to shut down operations at the mine for three months before recommencing operations at the mine in early 2014. Due to the closure of the mine, the employees at the mine were either made redundant or were offered further employment at another mine operated by Thiess, up to 4 hour's drive away.

When the mine recommenced operations, it did so with a new workforce sourced from outside the local area and increased their operations with casual and temporary labour hire employees.

This decision by Glencore to shut the mine down, terminating the local workforce and restaffing it with employees from outside the local area decimated the local community.

As one resident of Collinsville told us:

"Before Glencore took over there was at least 160 local jobs at the mine. Collinsville was a thriving town where there would always be families out to dinner and the weekend was filled with families watching their children playing in the local sporting events. However, after they took over there were no more local jobs. Local people born and bred in Collinsville who had over 20 years experience working at the mine and had known nothing else, were told that they were 'encouraged' to re-apply for their old job, but now it was only a casual position on less money. Despite a number of local applying for positions anyway only about 20 locals currently work at the mine and the majority of full time positions at the mine are staff positions.

Now the people who work at the mine are casuals who mostly drive in and out from other areas. In between shifts they stay in camp and do not come to town. Once their shift is over they drive out of town.

Their decision destroyed the local economy and divided the town. Almost all the local business shut

down as there was no longer any money coming in from the mine and people who did not own homes in the area moved away to find permanent work. Those who did own homes cannot afford to sell and are forced to stay drive to other mines and stay in camps during their shifts. Their families have now been split up for much of the time.”

Long term contractors

Employees considered to be “long term” contractors are generally considered to be full time employees working for a labour hire company that have contracts of 6 months or more with lease holders/operators to supply specific or specialised services to the mine, both underground and open cut. These employees will generally have specific skills and training that permanent employees at the mine do not and are valued for this skill and training.

Whilst these employees also enjoy a degree of permanency and will generally have an enterprise agreement underpinning their terms and conditions of employment, their employment is still subject to the control of both their employer and the mine operator and their ongoing employment is highly contingent on the contractual relationship between the operator and the labour hire employer being maintained. Employees working in this model are subject to the entry requirements of the mine’s operator and can be removed by them without notice at any time.

Short term contractors

These employees are generally employed for a short-term specific task. For example the refurbishment of a washplant/dragline and an open-cut mine or a belt repair/longwall move in underground coal mining.

Employment in these circumstances is generally full time contractual in nature, lasting the length of the task. Like the long term contractor the degree of control exerted over these employees is a mix between the employer and the mine operator with employee’s ability to enter site subject to the mine operator.

Casual and temporary supplementary labour

This form of “labour hire” is the most prevalent in the industry and the one most likely to encompass the statistics provided. It is this area where the CFMEU believes the day to day use and abuse of the labour hire system occurs.

The typical form of employment in this area will usually come with no guarantee of permanent work and the ability for the labour hire employer to terminate the employee’s employment with little to no notice, usually at the sole discretion of the operator of the mine site that they are contracted to work. Further, despite there being no provision for this type of employment in the Black Coal Award, most labour hire employees will be employed on a casual basis and paid a premium (usually 20%) on their wage in lieu of the ability to accrue paid leave, such as annual and sick leave and notice period/redundancy if their employment is terminated.

A labour hire employer who have a contract to supply an owner/operator with labour to a certain area(s) of the mine for a fixed price. These employees will typically not have the benefit of an

enterprise agreement but have their terms and conditions fixed in a “common law” employment contract underpinned by the *Black Coal Mining Industry Award 2010*.

Employees employed under this model will be paid an all inclusive flat hourly rate of pay that is designed to compensate employees for all hours worked and exclude the payment of penalties, loadings that would otherwise be paid to them for working typical mining rosters, for example shifts of 12 hours during the day or night, over a 7on/7off rotating roster during the course of the year.

Finally, whilst these workers are classified as “casual and temporary” supplemental labour, the CFMEU is finding that workers hired under this model are not being used in a casual or temporary manner and now remaining in these positions for extended or even permanent periods of time.

Case Study: “Shane”

Shane is a young carpenter-joiner from Logan. Whilst looking for work two years ago, he directly approached a factory in Beenleigh. Upon becoming employed at the factory, he was advised that he would be hired through a labour hire company operating out of an office at Salisbury, but would perform work at the factory in Beenleigh. He was made to sign a contract to the effect that he would be engaged by the labour hire firm, but on the proviso that he would be a “contractor” and under an ABN arrangement. Shane would nonetheless perform his substantive duties under the direct control of the host employer. In late 2015, the host employer went into administration. The labour hire firm asserts that any outstanding wages are owed to him by his former host employer. Shane has been underpaid thousands of dollars and the labour hire firm has not accepted any responsibility.

4. Consequences of labour hire and insecure work

Avoiding employee entitlements: labour hire workers receive a lower hourly rate of pay than comparable direct hire workers

“All studies of wage outcomes for labour hire workers, in Australia and overseas, have found that they receive a lower hourly rate of pay than their direct hire counterparts.” – Dr Elsa Underhill, Deakin University

Supporters of labour hire argue that workers are generally happy with labour hire arrangements as labour hire allows workers to earn a considerably higher rate of pay.

The Fair Work Ombudsman states that casual employees (the large majority of labour hire employees may be considered casual) are ‘entitled to a higher hourly pay rate than equivalent full-time or part-time employees. This is called a ‘casual loading’ and is paid because they don’t get benefits such as sick or annual leave.’

May, Campbell and Burgess (2005) suggest that while many advocates of precarious work state that casual work is not so bad due to casual loadings, the argument is ‘not backed up by the facts’. Researchers find that the casual loading does not fully compensate for all the foregone benefits.

Maria Azzurra Tranfaglia, Research Fellow at the Centre for Employment and Labour Relations Law at the University of Melbourne states that unlike in many European countries, labour hire workers *“are not defined by the law as employees of the agency and there is no general legal principle of equal treatment.”*

Dr Elsa Underhill argues that all studies of wage outcomes for labour hire workers, in Australia and overseas, have found that they receive a lower hourly rate of pay than their direct hire counterparts (Underhill, 2015).

Houseman (2014) finds that temporary agency work is associated with lower earnings with workers in such arrangements earning considerably less than comparable direct hire workers.

In a survey of labour hire agencies, Brennan et al. (2003) found that, on average, less than half of blue collar non-Recruitment & Consulting Services Association (RCSA) member labour hire workers receive equivalent rates of pay to the host organisation’s pay rates. For RCSA members, around a third of workers do not receive equivalent rates of pay to the host organisation’s pay rates.

Using data from the Household, Income and Labour Dynamics in Australia (HILDA) dataset, Watson (2015) compares wages of casual and permanent workers. He finds that after accounting for casual loading, part-time casual workers are penalised for working as casuals with men earning 12% less and women 17% less. He concludes that from the point of view of earnings, casual jobs are inferior jobs.

The results are consistent with the findings of Brennan et al. (2003) who found that of Australian labour hire survey respondents who are aware of minimum award rates, 7.5% claim to have been paid less than the minimum award rate. Labour hire agencies surveyed state that over 50% of blue collar labour hire workers are only paid their minimum award entitlements. Almost two-thirds of all labour hire workers surveyed would exchange their casual loading in return for receiving paid leave entitlements such as annual leave and sick leave. This indicates that the majority of labour hire employees see casual loading as inadequate compensation for losing benefits such as leave entitlements.

Labour hire workers may not receive the same rates of pay and other beneficial conditions as direct employees of a host, for example because a collective agreement covering the enterprise does not extend to labour hire staff. This means that a labour hire worker may be paid less than a direct employee he or she works directly alongside. In fact, Brennan et al. (2003) found that 31% of host companies do not require employment agencies to provide the equivalent basic terms and conditions of employment they provide to their own employees. Nine per cent claim they only require this sometimes.

In terms of superannuation, where workers are engaged as independent contractors, employers are far less likely to make provision for superannuation. For workers engaged as employees, employers are required to make superannuation contributions. However, Buchanan (2004) finds that while less than one in twenty permanents did not have or were not contributing to superannuation, 40.5% of casuals were effectively not covered.

Case study: Blackwater

On the 20th August, 2015 BMA announced that they contracted with Downer EDI Mining Downer to perform work at the BMA Blackwater Mine. In particular it was announced that Downer would be overtaking all the work performed in the following areas of the mine:

- Pre-Strip;
- Drill and Blast;
- Mobile Maintenance and;
- Maintenance associated to the Pre-Strip areas as part of Field Maintenance.

This meant that BMA would have to remove a total of 237 permanent BMA employees from their roles in the above areas. In consultation with the Union over the change, BMA confirmed that these changes were designed to save the company an additional \$1.40 per tonne of coal in labour costs. Despite the downturn in the price of coal, the mine at Blackwater was still making a considerable profit with the BMA employees at the mine meeting every target set by BMA in relation to production.

After the work was taken over by the contracting company, 68 employees were made voluntarily redundant with another 69 employees transferred to another BMA site. These jobs were then subsequently replaced with contractors who were paid significantly less than the previous permanent workers.

This was the second time during the life of the 2012 BMA agreement that job losses at the Blackwater mine had occurred in order for BMA to maintain or increase profit. As residents informed the Union, each time that these job losses occurred ex-employees and their families were forced to move out of the town to find alternative employment. As one resident and business owner informed the Union:

“For the past two years things at Blackwater have slowly gone downhill. However, the decision by BMA to replace permanent workers with contractors has only made matters worse. Employees who were made redundant or were transferred to other mines could no longer travel to and from work in Blackwater and were forced to either move to another town or to the coast and became a Dido or FIFO from the mine that they worked at.

Since Christmas, every week we are having to say goodbye to another local family who are leaving Blackwater because there is no longer any local permanent employment at the mine. These families were lifelong residents born and raised in Blackwater and who were raising their children in the community but are now leaving because, as they tell me, there is ‘Nothing here.’

Before, the town used to have all the amenities you would expect from a small town but we have now lost or are losing basic public services such as the local library and post office. We are also losing social clubs such as the CWA and local sporting clubs because there is no longer enough locals to support them.

Since the move was announced, Downer has done nothing to promote local jobs and, despite several invitations, have never come to a community meeting to explain to the community what or how they intended to do to ensure that the change would not impact the town.

Even though some locals have managed to gain employment with Downer for less money, a number were unsuccessful and had to find employment elsewhere. We had heard that the reason for this was that any older employee who was made redundant was placed on a ‘black list’ and would not be offered employment with Downer.”

Undermining work: labour hire weakens the pay and working conditions of direct hire workers

The fact that labour hire employees receive a lower rate of pay than their direct hire counterparts is not only unfair to the workers themselves, but it also undermines the fair pay and working conditions of other permanent workers. In a CFMEU report into sham contracting in Australia's construction industry, we noted that the use of labour hire not only affects labour hire workers, but also those workers directly hired by the host employer. Labour hire workers are misused not to *supplement* but *replace* direct employees and as their pay is often less than direct employees, they can be used as a cost-cutting measure which undermines the working conditions of direct employees.

Labour hire and casualisation are problematic because they 'exert downward pressure on the wages and conditions even of those employees that continue to be viewed as permanent'. Processes such as labour hire, 'threaten the direct or indirect replacement of permanent workers by casual workers' (May et al, 2005).

The Fair Work Ombudsman has stated that on-hire workers are not covered by enterprise agreements made between the host organisation and its own direct workers, unless the on-hire business itself is a party to the agreement (Fair Work Ombudsman, 2015).

Underhill (2015) argues that labour hire employment can undermine employee bargaining power. She states:

"Unless collective agreements provide scope for provisions relating to the use of labour hire workers, those collective agreements are at risk of being undermined by the very same employer who has entered into the agreement. This is not consistent with the objective of a workplace relations system producing fair and equitable pay and conditions for employees, nor consistent with good faith bargaining. Prohibiting the inclusion of restrictions upon the use of labour hire employment from collective agreements provides employers with a free choice to side-step the terms and conditions of collective agreements which they have entered into."

The Department of Industrial Relations, Queensland (2005) found that while the development of enterprise bargaining since the 1980s has resulted in EBAs providing rates of pay and conditions of work that are superior to awards, in the labour hire sector 'very few employees are covered by EBAs. Most are covered by basic award conditions only'. Those who are covered by agreements are concentrated in highly specialised professional areas.

Even in the instances where labour hire employees are covered by EBAs, anecdotal evidence suggests labour hire workers may be working on an EBA, which pays lower rates than the agreement covering the permanent counterpart they are working directly alongside.

Labour hire not only undermines the pay and working conditions of direct hire workers, but research has also found that it undermines the trust and loyalty of permanent employees (Hall, 2000). A detailed study of the use of labour hire in the Electricity Trust of South Australia (ETSA) Corporation found that the use of labour hire workers as a supplement and substitute for permanent employees

had a very pronounced and negative effect on employee loyalty, commitment and trust with labour hire workers, employees and supervisors sharing the view that the use of labour hire had 'destroyed any loyalty in the organisation' (Gryst, 1999 in Hall, 2000).

Case Study: BMA Mines

The largest enterprise agreement covering employment in the mining industry in QLD is the *BMA Enterprise Agreement 2012*. This agreement covers production and engineering employees working in the following BHP Mitsubishi Alliance (BMA) mines:

- Saraji;
- Peak Downs;
- Goonyella Riverside;
- Blackwater No.1;
- Norwich Park; and
- Crinum/Gregory.

Since this agreement came into operation in the end of 2012, the CFMEU has seen several different attempts by BMA to use labour hire to undermine the terms and conditions of this agreement.

In relation to Norwich Park in particular, the CFMEU obtained a leaked document from a labour hire company indicating that BMA was seeking tenders from labour hire companies to enter into a contract run mining operation at the Norwich Park mine.

The tender document stated that BMA's reasoning for issuing tenders to labour hire companies were as follows:

"BMA has strongly indicated that success of the project will be dependent on being able to operate the mine efficiently while using labour that is paid significantly less than is currently the case at their surrounding existing operations. A strong desire has been expressed that labour should be sourced from lower paying areas outside of Queensland (Adelaide and Melbourne for example). They are likely to try and leverage off the labour model used at Norwich Park to generate lower cost labour models at their other operations."

Ultimately, the plan did not go ahead.

However, had this plan by BMA been implemented, not only would it have undermined the legal registered 2012 Enterprise Agreement, by undercutting the terms and conditions that were bargained for and won by the employees at the mine before it was placed into care and maintenance, it appears that BMA were intending to then use this labour hire arrangement to place pressure on other mines to reduce their terms and conditions of employment as agreed to in the 2012 Agreement.

Further, their intent to source labour from interstate would have meant that jobs that should rightly have gone to Queenslanders would instead go to interstate. Thus having the twin economic effect of (a) increasing unemployment in state generally but specifically in the traditional mining towns located in the Bowen Basin, and (b) reducing the economic benefits that the mining industry provides Queenslanders and transferring them interstate.

The flexibility myth: labour hire workers overwhelmingly would prefer to be employed directly rather than work for a labour hire employer

“It is not correct to say that many people in nonstandard employment have positive views about their jobs. Labour hire employees have particularly negative views about their employment.” – Dr Elsa Underhill, Deakin University

Advocates of labour hire argue that non-standard employment provides greater choice for workers within the labour market. Labour hire arrangements are supposedly beneficial as they provide flexibility for those wishing to work limited hours (Brennan et al, 2003). However, this is not the reality. ABS workforce data from Victoria suggests that only 7% of employees state flexibility as a reason for using a labour hire firm and the majority of workers who found their job through a Labour Hire Firm/Employment Agency were more likely to work full-time hours than other Victorian employees. (ABS, 2010).

The overwhelming majority of employees used a labour hire firm due to the ease of finding work or an inability to find work. This included: 71% who cited the ease of obtaining work; 9% who stated it was a condition of working in the job or industry; 7% who cited an inability to find work in their line of business; and 2% whose lack of experience prevented them from finding a permanent job. By contrast, only 3% of workers stated a preference for short-term work and 7% who stated flexibility as a reason.

Seventy six per cent of workers who found work through labour hire in Victoria, work full-time.³ This is a considerably higher proportion than the 66.5% ratio of full time employees to total employees in Victoria according to the Australian Bureau of Statistics (ABS, 2015b).⁴ This suggests that finding part-time employment under a labour hire arrangement may actually be more difficult than finding part-time employment as a direct hire.

The reality is that employees predominantly enter into labour hire arrangements due to a lack of secure employment opportunities. For growing numbers of blue collar workers, casual work is the ‘only form of employment available’ (Buchanan, 2004).

Monash University’s Veronica Sheen states that for many people, casual jobs, like many labour hire positions, are ‘the only jobs they can find and are neither transitional nor a lifestyle preference’. This is consistent with Brennan et al. (2003) who found that approximately one third of labour hire workers felt they had no choice but to be a labour hired, or on-hired worker, and two-thirds of workers would rather be hired directly.

In terms of casual labour, Buchanan (2004) found that while many casuals have predictability in their hours of work, many don’t – and would like it. He concluded that it is clear that growing numbers of workers are in a weaker position to enforce their rights or fulfil their working time preferences. Employer driven flexibility is not synonymous with casualisation. ‘Casualisation is part of a new regime of the management of labour. It is not one of unlimited choice and flexibility that is mutually advantageous to workers and employers. Rather, it is a regime which fits many workers into the needs of production and service provision by offering only very limited choices to workers.’

No opportunities: precarious work does not provide an opportunity for more secure work

³ ABS categorises full-time vs. part-time based on the number of hours worked, as casual employment is based on the employment contract an employee can be full-time and casual, or part-time and casual.

⁴ According to ABS Labour Force Statistics, as of Sep 2015 2,935,800 people were employed of which 1,952,800 were employed fulltime.

“Research finds little evidence that temporary agencies help workers gain regular employment; they may even impede it.” – Susan Houseman, W.E. Upjohn Institute for Employment Research

Brennan et al (2003) state that another perceived benefit of the on-hired, or labour hire, market is that it could be seen to be a stepping stone for those wishing to get into or return to the workforce. The ABS found that only 3% of employees responded with ‘gaining experience’ as a reason for using a labour hire firm. This is clearly not a significant motivation.

Houseman (2014) suggests that temporary agency workers can become trapped in unstable, low paying jobs that offer ‘few opportunities for career advancement and development’ and that rather than providing a foot into future more secure work, labour hire work can actually be ‘detrimental to a worker’s future employment and earnings if it crowds out productive job search and leaves little time to look for other employment. If it fails to enhance skills or provide contacts with other potential employers, a worker could be better off declining an offer from an agency and searching intensively for regular employment.’

She finds that several international studies have found no evidence of a stepping-stone effect. On average, taking a temporary agency job does not improve workers’ chances of finding more regular employment rather it may impede it and lead to more temporary jobs. This is consistent with the findings of the Brennan et al. (2003) survey which found only 19% to 25% of on-hire employees become permanents with their host organisation.

The productivity myth: labour hire workers are least satisfied with their jobs

It is commonly assumed that employment through labour hire is a more ‘efficient’ or ‘productive’ way of engaging labour. The idea is that labour costs can be reduced, and productivity increased, by having a more ‘flexible’ workforce to match fluctuations in workforce needs. It is an approach to labour which ‘boosts labour productivity by pushing many of the costs and risks of employment onto workers’ (Buchanan, 2004).

Underhill (2011) states that the benefits of labour hire, including in the building and construction industry, include the ability to access a large supply of suitable labour to meet peaks and troughs and short-term business needs, having greater control over the amount of time employers choose to employ workers, etc. However, she found that many of these benefits stem from the casual nature by which labour hire workers are hired; allowing agencies to hire and fire workers according to the demands of host organisations.

Productivity is an oft-used justification for cost cutting. However, productivity is a measure of efficiency not cost. Productivity implies optimal use, that resources are used in the best way to produce the greatest outputs. It means that simply cutting the resources available to services does not imply improved productivity. Productivity can also be achieved through increasing input costs where funding is used to improve output by an even greater amount.

Reducing wages and conditions may provide gains in the short run, but is likely to have negative effects in the long run due to an increasingly unskilled workforce and dissatisfied workers. Job insecurity and poor conditions can cause significant stress. Wooden and Warren (2004) used data from the Household, Income and Labour Dynamics in Australia (HILDA) Survey to find that fixed-term employees were the most satisfied with their jobs, while casuals were the least satisfied particularly

those employed through labour hire agencies. Research shows that insecure employment is linked to negative effects including demotivation, decreased job satisfaction, etc. (McNamara, 2006). Reduced wellbeing is associated with decreased productivity (Oswald et al. 2014).

Levels of productivity for labour hire and casual workers are likely to be lower as workers know they are not permanent; if there is no job security this is reciprocated with less concern for the outcomes of the business. Allan (1998) states that, in an attempt to reduce employment costs, many employers are opting for non-standard forms of employment as it allows employers to pay labour as and when required. However, he states that often the disadvantages of a 'flexible' workforce are overlooked.

'The workers have less time commitment and arguably less psychological commitment to the organisation which can lead to problems of motivation, communication, confidentiality and turnover. Further skill retention problems can develop as these workers may not be fully integrated in the human resource training systems in many companies... lack of training, less experience and poor motivation can also lead to a deterioration in quality standards of goods produced or services provided... the status division between atypical and full-time employees can also create animosity that undermines team work and cooperation '. Decreased labour costs do not lead to improved productivity if it results in a decrease in output. Allan states that these problems do not apply equally to all categories of non-standard employment and that it is likely the greatest problems will exist 'where there is a very loose employment relationship between the worker and the firm; for instance casual and agency labour...'

Hall (2000) states that while there are short-term cost benefits associated with labour hire, there are longer-term costs in terms of declining employer-funded training, skills losses, reduced employer commitment to human resources development generally, and declining employee loyalty, trust and commitment.

A worker employed in the coal industry, who wanted to remain anonymous stated '*I was employed through a labour hire agency in my current job. [I was paid a flat rate with] no annual leave, no sick leave... and no long service leave as the contract [was] renewed every 3 months. Threatening to sack you if you did not wear their work shirts. Making you take unpaid leave to attend training courses and pay for your own courses... More or less just shut up about safety or you will get sacked. Don't have any incidents or you will be sacked. [They] sack you by text with 3 hours' notice. [They] notify you by text, with 3 hours' notice, that there is no work or to leave work.... [I am] too scared to take any time off as you would lose your job. [You have to] come to work sick. Don't report incidents. Feelings of bullying, intimidation and harassment. Immense pressure on all [of my] family. I can't get a home loan as [I have] NO permanent job, NO money in bank, I can't socialise, can't spend money as [I am already] too far in credit card debt.'*

Buchanan states that even if there are short-run gains in productivity through the use of casual labour, the productivity gains are 'unsustainable in the longer term because they are undermining the reproduction of skills needed for future growth'. Casualisation and labour hire are not conducive to productivity growth through skills development, rather they reduce businesses' ability to maintain a high performing workplace. In a survey of labour hire agencies, Brennan et al (2003) found that 50% of agencies do not provide training to on-hired workers, 88% rarely or never engage

apprentices. In order to improve productivity, focus needs to be on innovation and training, including the development of workforce skills.

The findings are consistent with a survey of Australian host companies, which finds that 82% of hosts find that the use of agency employees only contribute slightly or not at all to the organisation's productivity and competitiveness – Brennan et al. [2003]. Seventy-three per cent of hosts say that the labour hire agency does not provide any services that enhance productivity other than 'basic recruitment services'.

Poor OHS outcomes: labour hire employees are more likely to be injured at work

"All studies of labour hire workers and occupational health and safety in Australia and overseas have found that labour hire employees are more likely to be injured at work, compared to direct hire workers in like occupations" – Dr Elsa Underhill, Deakin University

WorkSafe Australia found that in 2012-13, there were 1,865 serious injury claims for employees in the labour supply services industry⁵ and four fatalities. In 2014-15, the number of labour hire businesses registered for WorkCover premium services was 933.

Underhill (2002, 2011) has noted that international studies find that temporary agency or labour hire workers are more likely to be injured in the workplace than other types of employees. The same is true for Queensland, with labour hire workers being more likely to be injured and with injuries more severe. Using worker's compensation claim files, she found that precariousness contributes to labour hire workers' adverse health and safety outcomes and that the complexities associated with the triangular structure of the employment relationship heightens their vulnerability further.

In a report prepared for WorkSafe in 2002, Underhill found that the increased likelihood of injuries is explained by "the intensity of tasks in unfamiliar settings; insufficient experience, training and supervision for the tasks performed; insufficient information exchange between employer, client and employees; lack of discretion in the way tasks are performed; and the potential offloading of high risk tasks to labour hire employees."

McNamara (2006) found that characteristics of precarious work, including greater insecurity; economic and reward pressures; low levels of social support; imbalance of demands and control; disorganised work processes or settings and lack of induction and training; and regulatory failure contribute to adverse OHS outcomes. She states that:

'Job insecurity and especially the fear that absence from work or even refusal to do overtime might increase the likelihood of redundancy, means that some workers may avoid taking time off even when ill... Casual workers receive no paid sick leave, annual leave, carers leave or public holidays. Thus being sick is a real problem or hazard for the majority of casual workers.'

The findings were consistent with those of a Productivity Commission inquiry report which identified a review of 188 Australian and international studies conducted by Quinlan (1999) that found almost

⁵ A serious claim is an accepted workers' compensation claim that involves one or more weeks away from work and excludes all fatalities, and all injuries and diseases experienced while travelling to or from work or while on a break away from the workplace.

90% of studies discovered precarious employment resulted in inferior OHS outcomes like higher injury rates, hazard exposures, disease and stress.

The dissenting report of the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation’s inquiry into Labour Hire Arrangements and Independent Contracting found credible evidence of difficulties in identifying the responsibilities of parties under labour hire agreements: ‘the triangular relationship, involving the labour hire agency, the host firm and the labour hire worker has led to a blurring of legal obligations and entitlements in a number of areas, such as occupational health and safety and return to work policies.’

Underhill (2002) concluded that “the characteristics of claims for [...] labour hire employees... suggests these employees are overlooked with respect to injury prevention both by labour hire companies and host employers.” Brennan et al. found that approximately 40% to 50% of labour hire agencies do not consistently provide safety inductions for their employees and 34% to 39% of labour hire agencies do not even assess the host organisation’s OH&S systems and workplaces prior to assigning employees. Almost 50% of hosts state that labour hire agencies never conduct OHS assessments of their workplace, a further 19% say it occurs only sometimes.

With particular regard to Queensland, data from WorkCover Queensland disclose that the incidence of workplace injury in the labour hire industry is unacceptably high – even when compared to data for the building and construction industry (see Table 1: Injury Statistics for the Construction Industry versus Labour Hire Industry below). In particular, claims for workplace injury in the labour hire industry are substantially higher than for the construction industry in every injury category for the period 2011-2016.

Table 1: Injury Statistics for the Construction Industry versus Labour Hire Industry 2011-2016

		2011/12	2012/13	2013/14	2014/15	2015/16
Burns	Construction	25	13	9	5	5
	Labour Hire	123	95	74	83	56
Fractures	Construction	51	62	44	34	28
	Labour Hire	190	207	201	176	111
Intracranial injuries and injuries to nerves and spinal cord	Construction	4	0	2	0	3
	Labour Hire	18	11	15	21	13
Mental disorders	Construction	4	6	4	7	3
	Labour Hire	39	57	60	43	39
Musculoskeletal injuries and diseases	Construction	627	382	396	335	168
	Labour Hire	2,544	1,996	1,836	1,731	1,124
Nervous system and sense organ diseases	Construction	7	8	7	4	4
	Labour Hire	54	55	37	36	23
Other injuries and diseases	Construction	115	79	67	55	42
	Labour Hire	491	372	329	271	209
Respiratory system diseases	Construction	4	0	0	0	1
	Labour Hire	14	4	0	3	2
Skin and subcutaneous tissue diseases	Construction	21	8	10	8	1
	Labour Hire	50	37	31	31	15
Wounds, lacerations, amputations and internal organ damage	Construction	286	204	162	147	109
	Labour Hire	1,137	907	747	719	493

Source: WorkCover Queensland, 2016.

While regulation means both permanent and casual workers should be covered by workers' compensation, in practice it is not the case. Buchanan (2004) found that while less than three percent of permanent workers are not covered by workers' compensation arrangements, over one in five casuals (21.7%) were found not to be covered. Brennan et al. (2003) found this is particularly important for labour hire workers who are hired as contractors, with only 35% of these workers holding workers' compensation coverage.

5. Current state of regulation in Australia

Corrupt practices have become the norm in the recruitment industry, and those agencies that will not entertain them face a hard struggle to survive, as complicit end-users drive prices ever lower... The mass exploitation of hundreds of thousands of workers could easily be stopped by a government that had the will to do so. Recruitment agencies should be licensed, with the highest standards set, and loss of licences for those that fail to match them. It should not only be unacceptable for agencies to exploit the very workers who earn them money: it should be impossible.' – Adrian Gregory, Director, Extraman Recruitment UK.

The regulation of labour hire in Australia is complicated comprising both Federal legislation and State based laws which impact on different forms of working arrangements. The primary source of employment rights and conditions for Queensland employees is outlined by the federal Fair Work Act 2009, which applies to all workers and includes National Employment Standards, Modern Awards, Enterprise Agreements, protections from unfair dismissal and adverse action and protections against 'sham contracting'.

At the Federal Level, Maria Azzurra Tranfaglia, Research Fellow at the Centre for Employment and Labour Relations Law at the University of Melbourne states that in Australia, there are no regulatory mechanisms for labour hire (such as the joint liability regimes or joint-employment doctrines adopted by parts of Europe and the United States, which divide responsibilities between the agency and the host) or regulatory requirements, such as financial guarantees, limitation to activities or authorisation.

In terms of joint employment, where the agency and the host would both have responsibility and obligations towards the labour hire worker, the status of such joint employment in Australia is "unclear" (Pointon Partners, 2014). However, a 2014 decision by the Fair Work Commission rejected the concept of joint employment. The case involved Tooheys in NSW, who entered into a labour hire agreement with Feyman Pty Ltd (FP) for electrical tradesmen. The arrangement was implemented by Tooheys who terminated 19 electrical tradesmen (employees of Tooheys) who continued to work at the brewery employed by FP under the labour hire agreement. Tooheys later terminated its relationship with the FP group and replaced it with another labour hire company. The dismissed employees lodged two unfair dismissal applications, one against Tooheys as their employer and the other against FP. Both companies argued that the other was the actual employer of the employees.

The Fair Work Commission ruled that FP, not Tooheys, was the employer, and that FP did not act as an agent of Tooheys in employing the workers. The Fair Work Commission rejected the argument

that Tooheys and FP were joint employers, stating there were no Australian decisions which supported the existence of the joint employment doctrine in Australian Law (Ellery et al., 2014).

The Fair Work Ombudsman has stated that the on-hire (labour hire) business, *'as the employer, is responsible for meeting all of the employee entitlements of the employee'* (Fair Work Ombudsman, 2015).

As such, the laws that exist, primarily relate to the relationship between the employee and the labour hire firm. As stated in the background paper to this inquiry *"the central relationship these laws regulate is that of an employer and an employee. Moreover, many rights and conditions are afforded only to ongoing employees or long-serving casual employees. Fewer rights, conditions and protections are extended to independent contractors"*.

As mentioned in previous sections, as labour hire employees are often not covered by the collective agreement or EBA covering direct employees at a host organisation, their rates of pay and other working conditions can be, and often are, substantially worse. This doesn't even start to cover the proliferation of workers who are hired under sham contracting arrangements.

In terms of State based regulation, Queensland provides general rights entitlements for workers in relation to long service leave, Occupational Health and Safety (OHS), equal opportunity, workers' compensation, etc.

However, the current regulatory framework is visibly scarce when it comes to regulating the distinct triangular relationship that exists in the labour hire industry. Not only are joint employment doctrines lacking, but there is no sufficient regulation for the industry itself in terms of licensing, restrictions on scope of service, authorisation, monitoring and compliance, etc.

While labour hire agencies may argue they are regulated by federal and state laws in relation to minimum wage, workers' compensation insurance, etc., the large and growing number of dodgy operators exploiting workers, and the conditions mentioned in previous sections, has proven that this system alone simply isn't working. Labour hire workers are particularly vulnerable to exploitation due to the triangular work relationship and the precarious nature of their work.

The Recruitment and Consulting Services Association Australia and New Zealand (RCSA) has established a Code for Professional Conduct and a proposed RCSA Employment Services Industry Code as they have recognised and acknowledged the exploitation of vulnerable workers that exists in the labour hire industry.

They have supported inquiries into the labour hire industry, stating:

"The existing patchwork of state licensing schemes is failing to eradicate the poor conduct of a small number of illegal and unscrupulous operators. We believe an ESIC [Employment Services Industry Code] could provide a specific, coherent and nationally consistent regulatory framework that is relevant to the contemporary labour market" (RCSA, 2015).

The problem with industry self-regulation, as economists will agree, is that it doesn't work. It is obviously in the self-interest of some providers to act unscrupulously for their own benefit at the expense of their workers. Immoral providers are unlikely to voluntarily commit to an industry code.

Even if they do, they are unlikely to follow it when they have no incentive to do so. In fact, as there are costs associated with following the code (such as paying workers appropriately), those businesses who do choose to follow it will not likely survive the increased competition from those providers, with lower costs, who do not.

The International Labour Organization (2007) has stated:

'[M]indful of their negative image, in some quarters, leading private employment agencies have developed mechanisms of self-regulation to promote good business practice and receive recognition as legitimate places alongside public employment services. Self-regulation, however, cannot replace the role of national legislators and law enforcement agencies.'

As a consequence, the CFMEU submits that any effective regulation needs to be implemented at both the federal and state government levels. It cannot be voluntary and it needs to be enforceable. While there is still significant work to be done in relation to federal workplace laws, including in relation to EBAs, this is beyond the scope of this initial submission. The recommendations in this submission should be viewed as a starting point for state based regulation. It should not be viewed as an exhaustive list.

Case Study: Compliant Contractors in the Building and Construction Industry

Labour hire firms operating in the building and construction industry in Queensland, with a history of good compliance with industrial and work health and safety legislation, have complained to the CFMEU about non-compliant labour hire operators.

They have reported circumstances where labourers at other labour hire firms are paid flat rates as low as \$22/hour (even for overtime work), including by way of misclassifying the work performed by the labourers, having the labourers engaged on sham contracting arrangements through the misuse of ABNs, and cutting corners on work health and safety compliance. They have also reported fraudulent phoenix activity, and widespread misuse of subclass 417 (Working Holiday) and student visas to source acquiescent labour.

At those rates, compliant labour hire companies say they would struggle to break even.

In that vein, compliant labour hire companies have identified two kinds of labour hire firms that require greater scrutiny: very small operators that are often under-resourced and undercapitalised, as well as the large, often multinational labour hire operators which work on small margins but on greater volumes.

These sectors of the labour hire industry have largely avoided regulation through de-unionisation that is associated with insecure work.

Compliant labour hire companies have lamented a lack of accountability with regard to host employers, who would be well-positioned to detect non-compliance through 'race to the bottom' pricing.

6. Recommendations

“If current trends continue, we are likely to witness the further erosion of safety and training standards – as well as growing numbers of working arrangements that do not reflect workers’ preferences. While this may be sustainable in the short run – in the longer term it implies a profound drop in working life standards for many people. Inequality does not just concern wages and income – it goes to the whole experience of life and the character of jobs created.” – Professor John Buchanan, University of Sydney

Recommendation 1: Licensing System

Current conditions for workers in the Labour Hire industry are inadequate. To improve these conditions, regulation needs to be implemented and adequately enforced by the Queensland Government.

The CFMEU submits that this is best achieved through the use of a licensing system which creates barriers to entry to reduce the number of unscrupulous operators and includes a system of enforcement which results in adequate penalties and removal of licensing when licensing requirements are breached. Licensing requirements currently exist in Western Australia, South Australia and the Australian Capital Territory.

Underhill (2013) has stated that in the past decade, a number of countries have introduced licensing arrangements and strengthened existing schemes. Clearly, they recognise the necessity of doing so. Most EU countries have introduced licensing schemes alongside the implementation of the EU Directive on Temporary Agency Workers, which seeks to guarantee those who work through employment agencies receive equal pay and conditions with the employees they work alongside. Countries including Japan, Singapore and South Korea have strengthened their existing licensing arrangements as the current systems were viewed as ineffective.

The experience of these countries indicates that not only is a licensing system required to ensure adequate conditions for labour hire workers, but that ‘licensing is regarded only as a means to an end, not an end in itself. Its effectiveness is intricately related to the nature of the labour laws which the licensing system supports’ (Underhill, 2013).

The ILO (2007) suggested that the ‘starting point’ for all regulation on labour hire is the determination of the legal status and conditions governing their operation. ‘The legal status shall be determined according to national law and practice and its operation, according to a system of licensing or certification.’ It states that the advantage of compulsory licensing is that it allows for a pre-screening of applicants’ capabilities and professional experience in the job agency market. It also helps create transparency and can be used as a means to improve the functioning of the labour market.

The licensing system we propose should be viewed as a starting point for reducing the exploitation of labour hire workers by unfair employers and labour hire agencies. It should not be considered a complete solution. There is still significant work to be done in relation to federal workplace laws which are beyond the scope of this initial submission.

The CFMEU appreciates the opportunity to provide consultation on a licensing system as described below, and welcomes any further consultation into the specific details of a Queensland labour hire licensing scheme.

Recommendation 2: Threshold Capital Requirement

CFMEU recommends proof of the financial capabilities of an agency should be given in the form of a specified minimum start-up capital requirement/threshold capital requirement. A licence threshold for a minimum amount of required capital ensures that only agencies with sufficient assets and/or revenue would be able to obtain a licence.

The threshold requirement would act as a barrier to entry for firms with insufficient capital to operate in the industry. This requirement would help minimise the problems associated with fraudulent phoenix activity.

As phoenix activity primarily occurs through the liquidation of a business with little or no assets, a capital requirement coupled with the licensing requirement referred to above for the same entity, would prevent a business structuring its operations to hold all their assets in other business entities.

Recommendation 3: Licensing Bond and Annual Licence Fee

CFMEU recommends that firms be required to put up a licensing bond in order to be licensed as a labour hire agency to be used as security in the event of a labour hire firm failing to meet its obligations, particularly to workers, or for unpaid fines as a result of breaches of licence provisions and regulation.

The ILO has stated that a bond, put up as security, can 'serve as a safeguard to ensure that [the agency] complies with the provisions of the legislation... In addition, any loss or damage occasioned to any person, due to any failure to comply, can be repaid from the deposit'.

They found that such a policy seems to be effective in discouraging violations of regulations, if they are 'based on clear rules and regulations guarding the procedure of confiscating the deposit in cases of misconduct' including paying workers for amounts owing. In addition to the threshold capital requirement, bonds can also be used as proof of the financial capabilities of the agency.

For example, in Singapore employment agencies are required to pay a security deposit with the amount depending on their track record and volume of placements, ranging from S\$20,000 to S\$60,000 (Underhill, 2013).

In addition to the bond, an annual licence fee should also be charged. Underhill (2013) states that most licensing arrangements require the licence holder to pay an annual fee, which assists in covering the administrative costs of the licensing scheme. ILO (2004) has stated that it is common to collect a registration fee from agencies: '[t]he payment of a registration fee covers the administrative procedure of the licensing agency and can also be seen as a proof of the financial capacity of [the agency] wishing to enter the market.'

Recommendation 4: Compliance Unit

For a licensing scheme to be effective it needs to be properly enforced. Without enforcement, agencies can simply choose to ignore regulation. An effective compliance unit will approve licences, monitor licensees and conduct investigations of breach of licences and other laws with the ability to revoke or suspend licences.

Penalties need to be adequately imposed so they act as an effective deterrent for bad behaviour. These should include significant fines and imprisonment in the case of intentional breaches. The compliance unit can be funded with the support of the administration of a licence fee as mentioned above.

The ILO has stated that as part of their licence conditions, labour hire agencies should be made to comply with all relevant labour laws 'although this requirement seems to be self-evident, it is, for various reasons, of crucial importance.' The holding of the licence must be subject to ongoing compliance with state and federal laws and regulations. As demonstrated by recent examples, there are significant failures by agencies to ensure workers receive their legal entitlements. A licensing scheme must, in parallel to appropriate federal regulation, eliminate this exploitation.

In South Korea, penalties for operating without a licence or breaching regulation can be severe and are in addition to licence cancellation. A licence can be cancelled for reasons including gaining the licence under false conditions; failing to meet the licensing requirements; breaching the conditions on dispatching workers (such as duration and occupation of placements, etc.). Once a licence has been cancelled or suspended, public signage can be placed at the agency indicating the business is illegal (Underhill, 2013).

In addition to enforcing the compliance of labour hire agencies, the compliance unit would also investigate breaches by host organisations in relation to related offences. This would include breaches such as engaging an unlicensed labour hire agency. In Singapore, in 2011, penalties (fines and imprisonment) were introduced for hosts that knowingly engage unlicensed employment agencies with the penalty increasing based on whether it is a first offence or subsequent offence (Underhill, 2013).

Recommendation 5: Increased Transparency

The compliance unit should also have responsibility for establishing a public register of all licensed labour hire agencies. The ILO has stated that if a licensing system for the operation of labour hire is installed, a register of all licensed agencies can be made public. 'Such a public register (with information on licensed agencies, their addresses and possibly the expiration date of the licence) ensures that anyone can verify whether the [agency] they wish to consult is actually legitimate. Illegally operating [agencies] can be much more easily identified if it is known which agencies are licensed or not.' (ILO, 2007). They state that a high degree of transparency is advisable particularly in markets, like Australia, where many agencies are active.

The register would also facilitate the collection of information by the Queensland Government in relation to the current environment of the labour hire industry operating in Queensland, including information on particular labour hire agencies as needed.

The ILO has stated that requiring agencies to regularly inform (in this case, the compliance unit) on their activities provides a better picture of the industry. It states that some countries require agencies report on their activities monthly or quarterly while many others require agencies to keep records on recruited workers to be made available on request.

Recommendation 6: Informing Workers of their Entitlements or Rights

In the 2005 final report of the Inquiry into Labour Hire Employment in Victoria, the Economic Development Committee acknowledged the lack of understanding of labour hire workers in relation to their employment status and working conditions, recommending “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.”

Case studies have indicated that worker exploitation occurs in workplaces, and among labour hire agencies, where there is little union presence and where workers are deterred from interacting with the union. For example, in a recent high profile case of Myer and Spotless, it was reported that workers were hired under independent contracts and were completely unaware that they needed to be covered by their own WorkCover policy. The workers were fired after one week of work which they assert had something to do with the presence of a union organiser on site, asking about their working conditions: ‘put two and two together: the union come in and then I get the arse later on that day’ (McGrath, 2015).

As a requirement for a licence, CFMEU recommends licensees to be required to educate new labour hire workers about the nature of their employment as well as their entitlements and workplace rights. This would best be facilitated through an information sheet or approved training by a relevant trade union. It should include a union rights component which outlines the worker’s right to join a union.

Recommendation 7: Statutory Maximum Period for Labour Hire Assignments

The purported benefit of labour hire is to provide flexibility for firms to meet fluctuations in workforce needs. This is not how it is being used. Labour hire agencies are increasingly being used to replace a permanent workforce with a precarious one. In order to ensure labour hire is not used to undermine Australia’s working conditions, a statutory maximum period for labour hire assignments is required.

In Japan and South Korea, regulation places a limit on the maximum period of placement of a dispatched labour hire worker (Underhill, 2013). However, any regulation needs to be carefully examined for the ability for firms to sidestep. For example, in Japan, laws have been ignored or evaded by change of job title or moving the agency worker to another division of the organisation. Such regulatory measures which set limits on the duration and location of placements can be integrated within a licensing system.

The CFMEU submits that periods for labour hire assignments with a host organisation should be capped at six weeks, and that any departure from this maximum should require the authorisation of the compliance unit, and should follow consultation with stakeholders including relevant unions.

Recommendation 8: Exclusion from Engaging Workers on 417 and 462 visas

As stated in the CFMEU’s submission to the senate inquiry into temporary work visas, the current work rights attached to the 417 and 462 working holiday visas are not consistent with the stated purpose of the visa as an ‘extended holiday supplemented by short-term employment’.

Both visas permit work for the entire length of stay in Australia as either a direct employee, 'independent contractor' or ABN worker, with the restriction that the holder must not be employed by any 1 employer for more than 6 months.

The Department of Immigration and Border Protection (DIBP) allows an exception to the 6 month rule for those working as 'independent contractors' or with labour hire firms. These arrangements are not consistent with the short-term purpose of holiday visas and are easily abused – as has been shown recently through the numerous cases of labour hire exploitation of working holiday and 457 visa workers.

As such, the Queensland Government should make a recommendation to the Federal Government that labour hire firms should be excluded from engaging workers on temporary work visas.

Recommendation 9: Requirement to Pay employees the Market Wage Rate

All studies of wages for labour hire workers have found that they receive a lower hourly rate of pay than their direct hire counterparts. People who work for labour hire companies can be paid less than a permanent worker they are working alongside.

In order to prevent labour hire workers being underpaid, the Queensland Government should make a recommendation to the Federal Government that requires labour hire employers to pay the market rate for employees, where the market rate is determined by the EBA at that location.

APPENDIX 1



Queensland labour-hire company Maroochy Sunshine ripped off Vanuatu workers, court finds

By Simon Cullen

Posted Tue 15 Mar 2016, 12:15pm

A Queensland labour-hire company has been found guilty of ripping off seasonal workers from Vanuatu.

MAP: Maroochydore 4558

The Fair Work Ombudsman took legal action in the Federal Circuit Court against Emmanuel Bani and his company, Maroochy Sunshine, in November last year.

Mr Bani had recruited 22 workers from Vanuatu under the Federal Government's seasonal workers scheme but did not pay them a proper wage or give them enough work.

They worked picking fruit and vegetables in the Lockyer Valley, Sunshine Coast and Bundaberg.

According to the Ombudsman, more than half the workers were not paid at all and have since returned to Vanuatu.

Mr Bani has failed to turn up to multiple court appearances, and so was found to be in breach of employment laws by default.

The court has adjourned the matter until June, when it will decide what penalty to impose.

Fair Work Ombudsman Natalie Jones said government inspectors had met Mr Bani five days before the 22 workers arrived from Vanuatu to remind him of the need to pay employees' wages.

Topics: law-crime-and-justice, courts-and-trials, maroochydore-4558, bundaberg-4670, brisbane-4000, gatton-4343

Contact Simon Cullen