The need for a new and fairer Victorian framework

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CFMEU
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1. Executive Summary

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

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. Labour hire agencies 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 tax through phoenix activities.

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

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. Workers’ stories told of the negative personal, financial and health impacts of a lack of predictability at work.

“If you spoke up they move on to the next bloke.”

“You worry everyday if you can pay rent.”

“If it wasn’t for them [the CFMEU] my children wouldn’t have even received Xmas presents and we wouldn’t have been able to even eat.”

“ Casual work might suit SOME people, but 99% it doesn’t... [you have] extremely high stress levels due to the unknown for you and your family, which in turn creates low self-esteem, depression, anxiety and feelings of not being good enough to provide for your family.”

“[I have] no idea if I’m getting money at all week to week... It is not a privilege to have a job! I want to work, I want secure pay and conditions, why must I feel lucky if I can get that!!!!”

“If you even question health and safety, the builder you are on-site for will call you a trouble maker, phone your employer, and demand not to send you back to that job.”

“[I’m] always stressed because safety was ignored and men with my experience are told to shut up or get sacked.”
In addition to the stories of workers, research demonstrates 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 Victoria are inadequate and exploitative. To improve these conditions, regulation needs to be implemented and adequately enforced by the Victorian Government. To reduce the exploitation of workers, the CFMEU recommends the Victorian Government:

- Introduce a licensing system which creates barriers to entry to reduce the number of unscrupulous operators operating in Victoria. 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.
2. Submission introduction

The Minister for Industrial Relations, the Hon. Natalie Hutchins MP announced in September an inquiry into the labour hire industry and insecure work in Victoria in order to investigate the practices of labour hire companies, insecure work, sham contracting and the abuse of visas to avoid workplace laws and undermine minimum employment standards.

As part of the inquiry, on October 16, the Inquiry released a background paper calling for submissions from interested parties.

The Construction, Forestry, Mining and Energy Union (CFMEU) is Australia’s main trade union in construction, forestry and furnishing products, mining and energy production. We welcome the opportunity to submit our concerns to the Victorian Department of Economic Development, Jobs, Transport and Resources inquiry into the Labour Hire Industry and Insecure Work.

The CFMEU supports the submission of the Victorian Trades Hall Council and refers the inquiry to the additional individual worker stories submitted by the council on behalf of the CFMEU and its members.
3. What is labour hire?

Labour hire arrangements are a triangular relationship where workers are hired as either an employee or independent contractor by an agency which supplies 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. Whilst the host typically has an employer’s capacity to direct the work of labour hire workers, other general employment obligations are removed from the host who simply pays a fee to the labour hire agency.

There are two types of labour hire arrangements:
1) where the worker is an employee of the labour hire agency; or
2) where the worker is hired under a contract by the labour hire agency where no employment relationship exists with either the agency or the host.

3.1 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. This is consistent with the findings of the 2004 Inquiry into Labour Hire Employment in Victoria interim report that found that a recurrent theme in the evidence was the level of ambiguity in the relationship between agency, host 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.

Even the triangular relationship itself is sometimes a simplistic relationship of the employment structures that exist in reality. In some instances, labour hire agencies themselves may further outsource or contract out their labour needs, creating a multi-tier relationship.

3.2 EMPLOYMENT STATUS: LABOUR HIRE, CASUALISATION AND SHAM CONTRACTING

In a traditional employer employee scenario, workers can be hired either as permanent employees or as casuals. Labour hire has resulted in a more complex set of employment arrangements, where workers are employed by the labour hire agency as either an employee (casual or permanent) or an independent contractor. As such, there is an overlap between labour hire and other non-standard and precarious forms of employment such as casual work, and contracting.

Watson [2005] notes concern not only for the increased use of casual workers in the workforce and the alarming growth of casualisation among the full-time workforce but the process of casualisation and the conversion of non-casual work into precarious and casual work. He states this process is linked with the ‘spread of outsourcing and recruitment of workers through labour hire firms.’ This was consistent with the findings of the 2004 Inquiry into Labour Hire Employment in Victoria interim report that found that a recurrent theme in the evidence was concern regarding the high levels of casual employment in the labour hire industry and its contribution to the casualisation of the workforce.

Wooden and Warren [2004] state that casual employment is common among labour hire companies and temporary worker agencies with such agencies employing approximately 9% of all casual employees – Buchanan et al. [2004], and casual workers accounting for over 60% of all labour hire workers. This is consistent with a survey conducted by Brennan et al. [2003] which found 75% of on-hire employees receive casual loadings. The House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation Inquiry into Labour Hire Arrangements and Independent Contracting dissenting report found that the rate of casual employment in the labour hire industry was anywhere between 75-95 percent.
The ABS uses worker entitlements, particularly entitlement to forms of leave, as a proxy for casual status. Based on this methodology, the ABS suggests that almost 80% of labour hire workers are employed on a casual basis. This is considerably more than employees generally (labour hire workers were considerably more likely to be without paid holiday or sick leave entitlements 79% compared with 23%). A greater proportion of labour hire workers were on a fixed-term contract basis (15% compared with 3%).

Buchanan (2004) states that although the ABS methodology was initially adopted for pragmatic reasons, it reveals the nature of casual employment: ‘it appears that much of the growth in these forms of labour are being driven by efforts to redefine workers’ entitlements to labour standards rather than to changes in the way by which labour is engaged in production on a day to day basis.’ Consequently, much of the precarious nature of casual work applies to workers hired under labour hire arrangements. As such, this submission also considers the implications of casual work arrangements as it relates to labour hire arrangements.

In addition to the use of casual labour, concern has also been raised about labour hire agencies use of independent contractors and sham contracting arrangements. Sham contracting occurs where the employer (e.g. the labour hire agency) disguises an employment relationship as an independent contracting arrangement in order to avoid their obligations as an employer.

In a submission to the Standing Committee on Employment, Workforce Relations and Workforce Participation’s 2005 inquiry into independent contracting and labour hire arrangements, the Queensland Department of Industrial Relations stated that the use of contract workers in labour hire arrangements is a complicating factor into any investigation of labour hire and that it had ‘grave concerns’ for the use of sham contract arrangements to hide a genuine employment relationship. They stated that in the 1980s a number of companies began to engage workers as contractors rather than employees with the aim of avoiding responsibility for employee entitlements such as leave, superannuation, workers compensation, etc. The Department estimates that around 20% to 25% of all labour hire workers are engaged as contractors.

Successive inquiries have shown that sham contracting, including through labour hire agencies, is a widespread problem throughout Australia and Victoria. Only a few months ago, a Melbourne labour hire operator Franco Cardamone faced court for allegedly breaching sham contracting laws. Last month, retail icon Myer was also accused of being involved with sham contracting. It is particularly prevalent in the construction industry, as outlined by CFMEU’s report ‘Race to the Bottom’, which found that although it accounts for only 9% of total Australian employment, the construction industry comprises 33% of all persons working as independent contractors. Thirty six percent of all persons working in the construction industry were working as independent contractors. While legitimate contracting arrangements occur, the CFMEU uncovered widespread sham contracting arrangements with the number of sham contracting arrangements in the construction industry at between 92,000 and 168,000 as at November 2010.

### 3.3 Phoenix Activity in the Labour Hire Industry

Phoenix activity is the avoidance of paying outstanding debts including employee entitlements, taxes, etc. by a business through the deliberate liquidation of corporate entities. The Australian Government defines phoenix activity in its most basic form as involving ‘one corporate entity carrying on a business, accumulating debts without any intention of repaying those debts [for the purpose of wealth creation or to boost the cash flow of the business] and liquidating to avoid repayment of the debt. The business then continues in another corporate entity, controlled by the same person or group of individuals.’

It is costly on employees as they lose income and superannuation that is owing to them. In 2012, PricewaterhouseCoopers (PwC) estimated the total impact of phoenix activity is up to $3.19 billion each year, including up to $655 million in costs to employees. Phoenix activity has been highlighted as a significant issue in the labour hire industry [PWC, 2012]. Typically, the fraudulent labour hire phoenix arrangement will be structured as follows:

- a private group is set up consisting of several entities including a labour hire entity;
- the labour hire entity typically has a single director who is not the ultimate ‘controller’ of the group;
• the labour hire entity has few, if any, assets and minimal share capital;
• the labour hire entity fails to meet its liabilities and is placed into administration or liquidation;
• a new labour hire entity is set up and the labour is moved across to this entity;
• the process is repeated with the financial benefits from the unpaid liabilities shared amongst the group [Australian Government, 2009].

RECOMMENDATION
In order to minimise the prevalence of phoenix activity in the labour hire industry CFMEU recommends the Victorian Government establish a licensing system which requires 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. As phoenix activity primarily occurs through the liquidation of a business with little or no assets, a capital requirement would prevent a business structuring its operations to hold all of its assets in other business entities [see Recommendation 1.1].

In addition, the CFMEU recommends as part of the licensing system, labour hire firms be required to pay a bond, put up as security, to discourage violation of regulation. The bond can 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 license provisions and regulation [see Recommendation 3].

3.4 LABOUR HIRE AND TEMPORARY WORK VISAS
Unscrupulous labour hire companies are exploiting foreign workers under temporary work visa programs including 417 and 462 working holiday visas and 457 temporary work (skilled) visas, undercutting existing conditions and worker rights. Temporary work visa holders are particularly vulnerable to exploitation as often their ability to stay in Australia is linked to continued employment with their employer. As a result, they will often tolerate terrible working conditions.
The issue of exploitation by temporary work visa holders is so prominent that in January this year, the Fair Work Ombudsman issued a warning to labour hire contractors that it will not tolerate the deliberate exploitation of foreign workers, such as backpackers and seasonal workers. It revealed it had received complaints against working holiday visa holders being ‘lured to regional centres by dodgy labour hire operators allegedly treating them poorly, bullying and sexually harassing them and ripping them off to the tune of hundreds of dollars’. (Fair Work Ombudsman, 2015).

Anecdotal evidence suggests the exploitation of foreign workers by black market labour gangs who contract labour to companies or larger labour hire companies. Major companies then use these labour hire companies to avoid obligations to employees. An investigation by Four Corners this year uncovered ‘gangs of black market workers run by unscrupulous labour hire contractors’ who preyed on vulnerable foreign workers, many with limited English, particularly in farm and food factories [Meldrum-Hanna, C. and Russell, A, 2015]. In October, Baiada labour hire companies were found to be using labour hire companies who were allegedly exploiting foreign workers, paying them considerably below the minimum wage for long shifts.

Joanna Howe, an expert in migration and labour law at the University of Adelaide stated that “where the situation gets particularly difficult is when a third party gets involved like a labour hire company... they fly under the radar and the Department of Immigration doesn’t know who are these labour hire companies that send 417 visa holders to different locations.” [Meldrum-Hanna, C. and Russell, A, 2015]. In its submission to the inquiry on temporary work visa holders, the Law Council of Australia stated that the Law Council was aware of repeated and serious breaches of statutory protections and entitlements, particularly by labour hire firms.

As with the underpayment of labour hire workers generally, the exploitation of temporary work visa holders by labour hire agencies, particularly the low rates of pay they are forced to accept, undermines the pay and working conditions of workers in Australia who are forced to compete with the lower pay and conditions of temporary workers.

**RECOMMENDATION**

The CFMEU advises the Victorian Government recommend to the Federal Government that labour hire firms be excluded from engaging workers on 417 and 462 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’ [see Recommendation 3].
4. Consequences of labour hire and insecure work

4.1 AVOIDING EMPLOYEE ENTITLESMENTS:
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.”

Ben M, a carpenter employed through a labour hire agency in Melbourne, says that he didn’t feel he could discuss his pay and conditions without risking his job ‘If you spoke up they move on to the next bloke.’

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.

The background paper to the Victorian Inquiry into the Labour Hire Industry and Insecure Work states that ‘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 percent claim they only require this sometimes.
Patrick O, a casual rigger/dogman hired through a labour hire firm in the construction industry in Melbourne says that he can’t pay his bills and buy food each week; that he can’t pay his rent when it’s due; and does not feel confident about the future of his job and income. ‘The company just closed its doors a few days before Xmas. No warning was given, and yet I was still expected to be available right over the Xmas period, sustaining their business, but only found out there would be NO PAY coming until January 21. I had to covertly call the CFMEU, who acted for me and others too scared to speak up, and try to ensure we were to be paid over the most important and stressful period of the year. If it wasn’t for them, my children wouldn’t have even received Xmas presents and we wouldn’t have been able to even eat. As a casual, money is extremely tight anyway due to lack of hours of work and being unable to plan financially. An incredibly stressful time for all of my family, at a time we should’ve been able to relax and enjoy. I never wish to experience that again. PS: Thanks to my union organiser, we were eventually paid, although this didn’t happen until the first week of January…

No financial institution will loan money to casual employees, so to get a mortgage and your own home is IMPOSSIBLE… you worry everyday if you can pay rent, get a good food shop that’s healthy and pay for your children’s needs. I’m now on anti-depressants and use Panadol like it’s going out of fashion- luckily you can buy them for less than a dollar for no-name brands.’

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.

4.2 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 used 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 is problematic because ‘it exerts 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 [FairWork 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].

4.3 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 non-standard 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 evidence finds 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 Victorian employees in general. [ABS, 2010].

Patrick O, a casual rigger/dogman hired through a labour hire firm in the construction industry in Melbourne says ‘Casual work might suit SOME people, but 99% it doesn’t. It caused many arguments with my wife regarding finances, picking up children from school and school holidays. … Mentally, the ramifications of casual work can be endlessly negative. Extremely high stress levels due to the unknown for you and your family, which in turn creates low self-esteem, depression, anxiety and feelings of not being good enough to provide for your family. Marriage problems begin which never existed before. Tensions between spouses, arguments, sex life issues and happiness is replaced by constant tension. Everyone in the family feels it, including the children as they also feel the tension and are affected by the financial constraints you now suffer. Physically, your health declines due to the mental issues that arise, not eating well because I’ve gone without so my wife and children can eat well, my stomach constantly feels like it’s in a tight knot, and if I don’t end up with an ulcer I will [be] stunned. Headaches for someone who never got them before, are now common.’

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. 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). 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.

A construction worker employed through a labour hire firm in Melbourne, who wishes to remain anonymous stated that he has ‘no idea if I’m getting money at all week to week, last week I worked 5 days this week I haven’t worked one!!! I am online all day searching for decent paying full time work the only calls I get are from agencies offering low paying casual work without guaranteed hours, the banks won’t give me money. I can’t even get a phone on a plan because I need full time work!!! … It is not a privilege to have a job! I want to work, I want secure pay and conditions, why must I feel lucky if I can get that!!!!’

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.’

Justin M, a construction worker employed through a labour hire agency in Melbourne says he wasn’t paid fairly and correctly for the hours he worked and didn’t feel he could discuss his pay and conditions without risking his job. ‘I was employed through a labour hire agency less than 3 months ago. You can’t ask for more, not when you’re constantly reminded how good you have it... People who complain too much don’t keep jobs. I asked for a week off to undergo surgery, and lost my job because of it... I was constantly stressing about my future, where I was going to be in a month’s time, how I was going to pay the bills after that job finished.’

1. 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.

2. According to ABS Labour Force Statistics, as of Sep 2015 2,935,800 people were employed of which 1,952,800 were employed fulltime.
4.4 NO OPPORTUNITIES: PRECARIOUS WORK
DOES NOT PROVIDE AN OPPORTUNITY FOR
MORE SECURE WORK

“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.

4.5 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].
A traffic controller employed casually in the construction industry in Melbourne who wishes to remain anonymous stated ‘Client expectations often ignore safety of workers. My employer has no HSR on the payroll. Due to the irregularity of the work, one has to keep one’s personal life on hold to ensure adequate earnings to pay the bills. Quality time with my family is in short supply due to the unpredictability of work. Luxuries like holidays are unaffordable due to the inability to predict earnings. When the money is earnt it stays in the bank to ensure costs of living can be met... Remove casualised work force for all work performed on a daily and permanent basis. Casuals should only be used in top up situations. Labour hire should not be used except when exceptional circumstances exist that require short term top ups of the workforce.’

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 is not conducive to productivity growth through skills development, rather it reduces business’ 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’.

4.6 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 industry 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 Victoria, 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.

Patrick O, a casual rigger/dogman hired through a labour hire firm in the construction industry in Melbourne says that his workplace is not always safe, he was not told about WorkCover and what to do if he was injured and does not feel he can discuss health and safety without risking his job.

'I work in the construction industry as a rigger/dogman, which is very dangerous at the best of times. As a casual, you have absolutely no secure ground to stand on, and if you even question health and safety, the builder you are on-site for will call you a trouble maker, phone your employer, and demand not to send you back to that job. So your employer gets angry and blames you, and before you know it you don’t get any more phone calls for work and are hung out to dry. So you are constantly putting your safety at risk due to intimidation and fear of losing your livelihood.'

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

3. 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.
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.”

Richard M, a casual Crane Driver in Melbourne said he was not paid fairly and correctly for the hours he worked, and did not believe his employer was complying with the law. He also said his workplace was not always safe, he was not told about WorkCover but felt he could not discuss his pay and conditions or health and safety without risking his job. ‘Cranes had no load charts!!! Riggers were too inexperienced. We were expected to lift dangerous deliveries [reo in bags]. Rubble and rubbish in bags instead of rated bins. No street protection for the public and dogmen. Reo bars not capped. Balconies overloaded.’ He stated that he ‘carried an injury because I was afraid to report it. [was] constantly stressed because of lack of job security and belligerent angry bosses. [he was] Always stressed because safety was ignored and men with my experience are told to shut up or get sacked. NO DECENT OH&S REPS ON MOST SITES.’

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 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.’

Alistair P, hired through a labour hire agency in the mining industry stated ‘I’m a Boilermaker by trade, and because of my height [195cm] they put me in a position where I was forced to weld in overhead position for 7-8 hours with my neck in hypertension. After about 5 hours of welding in that ridiculous position, the cervical disc prolapsed in the blink of an eye. It was a grindy kind of clicking sensation in my neck that lasted under a second, followed by a nervous tingle down my right arm that went for about 15-20 seconds. That was the annulus of the cervical disc failing and the jelly inside the disc squeezing out. The headshield had overloaded the cervical disc. Anyway I was stuck in the mine site like that for nearly a week, and had to wait another 2 weeks for spinal surgery in Perth. They didn’t send me to hospital, they bailed me up in a hotel instead. And on the day of surgery, while on the table with a hole in my throat the size of a lemon, [the company] terminated me. Yep. Fired on the table with a hole in my throat the size of a lemon. [the company] terminated me. Yep. Fired on the table. Now I have 25.4% of permanent overall body impairment, and 62.5% of permanent calculated injury to my cervical spine. For life. Show me an employer who will employ a Boilermaker with a prosthesis in their spine. You’re joking. They won’t go anywhere near me. That mining company destroyed my life and career. Personally I think that I’m better off as ash. I wasn’t even compensated adequately.... I was on permanent labour hire. Meaning I could go any day. Even if I did nothing wrong or out of line. Even if injured. Working under labour hire is inappropriate for tradies when you consider what can happen to us. Labour hire is casual essentially....and in our line of work this can mean being casually injured or casually killed. Those T&Cs are inadequate and totally inappropriate.’
Underhill [2002] concluded that “the characteristics of claims for Victorian 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.

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.

Sarah, a contractor in the construction industry in Geelong states that her workplace was not always safe, she was not informed about WorkCover and she did not feel she could discuss health and safety without losing her job. She said ‘I was contracting with an ABN but to one employer only. I know this is illegal and I know myself and other workers are being paid incorrectly through ABN but to speak up is to lose your job. If WorkCover is mentioned it’s a big issue. Employers cringe at the words so to keep your job you don't mention it. If leave is taken then that puts your job at risk. The threat of being put off is always lingering if time is taken off. Being paid ABN means redundancy is not paid and money is tight if you are put off. Bring in safe secure working conditions. We deserve to be paid honestly and reliably for the job we are qualified to do.’
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 Victorian 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, Victoria 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 support the inquiry stating “This inquiry is an opportunity to significantly improve the protections available to vulnerable workers... 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 ‘mindful 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 believes 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.
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: INTRODUCTION

OF A 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 Victorian Government. CFMEU believes 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 indicate 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.

Before adopting any licensing regulations and provisions, it is appropriate that the Victorian governments consult the most representative organisations of employers and workers as the inclusion of social partners gives useful references to the ‘precise need in the labour market for the operation of private employment agencies’ and brings forward specific concerns e.g. ‘referring to certain groups of workers that are particularly vulnerable to exploitation and abuse’ [ILO, 2007]. 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 Victorian labour hire licensing scheme.

RECOMMENDATION 1.1:_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. As such, the threshold requirement acts as a barrier to entry for firms with insufficient capital to operate in the industry.
This requirement would help minimise the problems associated with phoenix activity mentioned in Section 2. 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 1.2: 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 $20,000 to $560,000 (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 ‘The 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 1.3: 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).
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 Victorian Government in relation to the current environment of the labour hire industry operating in Victoria, including information on particular labour hire agencies as needed. The IFO 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 2: ESTABLISH A STATUTORY MAXIMUM PERIOD FOR LABOUR HIRE ASSIGNMENTS WITH A HOST ORGANISATION.**

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.

**RECOMMENDATION 3: LABOUR HIRE FIRMS SHOULD BE EXCLUDED 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 Victorian Government should make a
recommendation to the Federal Government that
labour hire firms should be excluded from engaging
workers on temporary work visas.

**RECOMMENDATION 4: 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 Victorian 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.


McGrath, P. [2015], ‘One of Australia’s biggest retailers faces claims of cheating its workers’, 7.30 Report, transcript, accessible at: http://www.abc.net.au/7.30/content/2015/s4337912.htm

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