

Victorian Government Inquiry into the Labour Hire Industry & Insecure Work

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December 2015

1. The establishment by the Victorian Government of an inquiry into the practices of labour hire companies and the incidence and effects of insecure work and related practices is an important and timely initiative. While much public debate (and attention of policy makers) is devoted to the *quantity* of jobs available in our economy, this inquiry brings a welcome focus on the *quality* of jobs available to Victorians.
2. Per Capita is a leading independent think tank dedicated to fairness, prosperity, community and social justice. Issues associated with employment are therefore central to our work. The availability of quality jobs, with decent incomes and security is a central precondition of fairness, shared prosperity and the wellbeing of households. The author would welcome any opportunity to expand on these points if required.
3. The inquiry's terms of reference are relatively wide. We are aware that a range of union submissions to the inquiry canvass these issues at large and include statistical evidence. We do not repeat that material here.
4. Instead, this submission provides some context to the issues of insecure work and the workplace relations system (particularly labour hire) and then focuses on:
 - The case for a Victorian regulatory intervention in relation to labour hire; and
 - The potential features of a labour hire licensing regime in Victoria.

GENERAL OBSERVATIONS

5. Australia has, in comparison to other developed economies, a very high incidence of non-standard work. This takes a range of forms including temporary and fixed term, casual, "flexible" part-time and dependent contracting. A number of characteristics of these forms of work (and labour hire in particular) are relevant to the inquiry's deliberations.
6. **RISK TRANSFER.** What distinguishes these forms of employment from "traditional" full time permanent employment in an economic sense is the transfer of risk from an employer to the individual worker (and by extension to their household). An employer who engages workers permanently manages the risks associated with there being insufficient work to be performed via workforce planning and business management. Where insecure work is used, a large part of this risk is transferred to the worker: if there is not work, then the worker receives no work and the employer has no (or vastly reduced) wage costs. This "outsourcing" in risk is significant, permanent and deliberate. It is a change to the traditional "social contract" associated with work.

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7. **VOICE.** A worker without security does not have to be directly threatened to understand that agitation in relation to their wages, working conditions or safety is problematic: the power imbalance between worker and employer is even greater and more obvious to all involved than in a “traditional” permanent employment relationship. In a workplace relations system focused on enterprise bargaining as the principal means for setting wages and conditions of employment, this is deeply problematic.
 8. **INCIDENCE.** Vulnerability is both cause and a consequence of insecure work. What might be called the burden of these forms of work does not fall evenly across the community. While insecure work is widespread, its worst forms are more common at the bottom of the income distribution, amongst those with lower skills, the young and new migrants / residents. It is also concentrated in certain industries: particularly those with high net labour costs, where the incentive for employers to cut wages or avoid minimum standards is significant. Labour hire and agency workers are predominantly hired on a casual basis, magnifying the effects of insecurity. There is also a continuum of poor quality insecure work: in some cases absolute legal minimums are paid, but underpayments, wage theft, sham contracting and other unlawful activity also occurs.
 9. **WHO’S THE BOSS?** For many workers engaged via a labour hire agency, the legal identity of their employer is often unrelated to who actually controls their wages, hours and work system – the corporation that engages the agency. A labour hire agency is often more correctly described as a financial intermediary than a conventional employer. Despite this, the workplace relations system (in respect of enterprise bargaining, termination of employment etc.) is focused around the agency, not the entity which determines if there is work and how and when it is performed. While WH&S law has some elements which recognise these realities, Australia’s system of minimum labour standards, workplace rights and collective bargaining effectively does not.
 10. **GAMING.** Clearly, not all insecure work is inappropriate. Some employers use insecure workers to cover seasonal or other peaks in demand for labour, or for short periods for other legitimate reasons. However, the incidence and pervasiveness of insecure work suggests that a significant proportion of insecure work (and labour hire in particular) is a function of employers seeking to avoid what would otherwise be their responsibilities to workers: wages and conditions payable under an enterprise agreement, paid leave in various forms and issues arising from a termination of employment and the right to organise. This can correctly be described as gaming the Fair Work system to avoid its intended effects. The use of insecure work to reduce wages and conditions or avoid statutory standards is particularly pernicious.
 11. **AGENCY.** An important point arises from the nature of a labour hire agency itself. There are essentially no barriers to market entry: a shelf company, a bank account, a workers’ compensation policy and internet access are all that is required to begin employing people on behalf of, or to perform work for, others. No physical premises are needed and there are no requirements in relation to skill, experience, systems or finance (unless they imposed by a client). The business model relies on a (often small) margin between the amount paid by the client and the wages and entitlements paid to workers. Small and micro businesses can commence in other markets of course, but labour hire is unique: the product sold is the workers’ themselves. A labour hire agency can acquire enormous responsibility for employees and their entitlements without the skills or capacity to deal with its obligations properly,

and where there are a structural incentives in the business model to cut corners (or worse) at the expense of employees.

THE CASE FOR VICTORIAN ACTION ON LABOUR HIRE.

12. The inquiry has been, and will continue to be, presented with significant evidence across a range of industries and occupations of serious regulatory failures in the State of Victoria associated with the operation of some labour hire agencies. It is an industry in which “cowboy” operators are common, and which ethical well-run businesses suffer, and employees pay the price. It undermines the objects of the Fair Work system. In our submission, regulatory intervention by the Victorian Government is necessary and appropriate to protect the interests of Victorian workers - and businesses who do not engage in unlawful and/or inappropriate behavior.
13. We note that the Commonwealth has clear primacy in workplace relations given the use of the corporations power to legislate in the area and because of previous referrals of power by Victorian Governments. However in our submission the operation of Sections 26 and 27 of the Fair Work Act, which provide for the exclusive operation of that Act in respect of certain subject matter and exclusions to that exclusivity, would not prevent a properly designed licencing system for labour hire agencies. Specifically, while some care in design and drafting would be required, such a regime would not be a “State or Territory Industrial Law” within the meaning of the Fair Work Act.
14. We submit that a regulatory intervention is justified on a number of grounds.
15. First, evidence concerning the operation of some labour hire firms suggest that mere enforcement of traditional workplace relations regulation (eg. the NES, Modern Awards etc.) will be an inadequate response. This is so because the pernicious outcomes are a function of the particular structures of labour hire arrangements and often not of the employment relationships per se. As noted above, the agency functions as an intermediary, and in doing so can effectively avoid or render inadequate, important elements of the Federal workplace relations framework.
16. Second, a carefully constructed regulatory intervention by the State of Victoria - by the creation of a licensing system for labour hire agencies – would function as a complementary mechanism to support the objects of the Fair Work system and the enforcement of standards.
17. Third, properly regarded such a system would be about regulating the market for labour hire agencies in the state, rather than employment relationships themselves.
18. Fourth, we note that the State currently regulates, via licencing and other mechanisms, the operation of businesses in a significant number of industries where a public interest in such regulation has been identified: liquor, security and prostitution are only the most obvious. It has done so for a very wide variety of reasons, including consumer protection, public safety, community amenity, workforce standards, environmental protection and to prevent unfair competition through the enforcement of minimum standards of conduct or behavior. Although much of the operation of businesses covered by a state licencing scheme of course remain a function of Commonwealth legislation, the State law functions as an oversight mechanism to deal with identified public policy problems.
19. Fifth, we note that such a regime would promote fair competition on a level playing field amongst agencies by eliminating businesses prepared to compete on the basis on unethical, inappropriate or unlawful conduct. We note that such a regime would provide for competition based on price margin,

service, systems, and human capital. Nothing in a properly designed regime would prevent an agency operating, or a Victorian business requiring access to agency labour from accessing that service.

20. Finally, we note that features of Victoria's economy (specifically the significance of industries like manufacturing and logistics in which labour hire is a common feature) and the state's significance as a destination for new migrants to Australia (who are disproportionately likely to experience insecure work) weigh in favor of regulation.
21. A finding by the inquiry that there are significant negative consequences to the Victorian community of allowing such businesses to operate without restriction or oversight would justify a regulatory intervention.
22. Based on our understanding of the material before the inquiry, we submit that there is good evidence for the inquiry to adopt this approach in respect of labour hire agencies. The public interest arises from: a need to ameliorate the negative effects of some practices in the industry identified in evidence to the inquiry, a need to protect the interests of those businesses operating legitimately and with due regard to appropriate standards, and the need to provide practical mechanism to deal with these issues at their source.
23. While there is undoubtedly an in-principle case for uniform national laws to deal with labour hire agencies, in the current circumstances this does not undermine case for action by Victoria.
24. There is no reasonable prospect that the current Commonwealth Government would seek to legislate in respect of labour hire issues in a manner consistent with stated policy concerns of the Victorian Labor Government. In fact, the reverse is true: the stated policy intentions of the current Commonwealth Government are to wind back employee protections. If such action was successful, this would leave the Victorian workers currently the subject of this inquiry even more vulnerable.
25. In any event, as noted above, regulation of such markets is often a function of States, and national standards have often developed from state-based examples and leadership.
26. There is a strong case for amendments to the Fair Work Act to deal with some of the issues concerning labour hire (particularly extension of collective bargaining arrangements and the introduction of the "joint employment" notion that applies to agency work in some North American jurisdictions and has some approximate precedent in Australian WHS law). Nevertheless, these issues are not a basis for Victoria to decline to Act. Not only are such amendments highly unlikely in the current environment, but as noted above they do not deal with the aspects of the problem which are a function of the market for labour hire agencies itself.

FEATURES OF A POTENTIAL LICENSING SYSTEM

27. We submit that a licencing system should have the following broad features.
28. The system should be given a statutory basis, and be administered by an independent officer. An advisory board, consisting of representatives of relevant unions, agencies and users of labour hire arrangements should be established to oversight the system and provide advice to the officer.
29. The operation of a labour hire business (the provision of labour to a third party) in or into the state of Victoria (that is where the labour is provided in the State), should be conditional on obtaining and

maintaining a licence. Failure to obtain or maintain a licence while operating such a business should be subject to a very significant civil penalty.

30. The system should not be limited in relation to operation in some industries or occupations. The problems identified are of general relevance, and targeted licencing risks simply moving the problem around.
31. Grant of a licence should attract a fee, on a scale based on the scale of the business concerned, and require the initial payment of a bond. The purpose of the fee and bond is to provide for the ongoing work of the administration of the scheme, and possibly the payment of entitlements that cannot be recovered. It ought be “user-pays” system.
32. The granting and maintenance of the of the licence should be subject to the corporate entity, its Directors, and key management personnel meeting tests as to capacity and character. The corporate tests should focus on solvency, capital adequacy and compliance systems. The test for individual should be if they are “fit and proper”.
33. The licence should be contingent upon observing relevant laws including in relation to WH&S and workers’ compensation, superannuation and the Fair Work Act. Breach of such laws should have consequences in relation to the suspension and termination of the licence. The licence should require the filing of an annual return detailing the operations of the business to provide information to the regulator. Consideration should be given to a tiered annual “rating” of a licensee as provided in other regulatory regimes: for example normal, oversight, required improvement.
34. Failing to report and breaching licence conditions should be the subject of significant civil penalty. Applications for a licence and annual reporting as to compliance with the law should be via a declaration, with the usual sanctions to apply if the information is false.
35. A dedicated compliance and audit capacity should be established.
36. The licence should require the mandatory provision of information to employees on their rights, and provision for access by a relevant union to conduct an information session reading rights.
37. Consideration should be given to the creation, under the statute of, a trust for workers engaged by labour hire entities to hold and distribute entitlements and administer and any distribution payments from bond and licence fees workers. Such a scheme could be modeled on that provided for in the Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010 (NSW).