

In response to the Workplace Relations Framework Draft Report, I wish to make the following submission with respect to **Draft Recommendation 20 Alternate Forms of Employment: Terms that restrict the engagement of independent contractors, labour hire and casual workers, or regulate the terms of their engagement, should constitute unlawful terms under the Fair Work Act 2009 (Cth).**

I have conducted substantial research into labour hire employment, commencing with my doctoral thesis (UNSW) which focused upon the employment and occupational health and safety implications of labour hire employment. My research has been published and cited in international and Australian academic journals. I have been recognised as an Expert Witness in prosecutions by WorkSafe Victoria following injuries and fatalities amongst labour hire employees. Through my research I have surveyed and conducted focus groups of labour hire employees; I have examined worker's compensation claims of labour hire and comparable direct hire workers; and I have conducted focus groups with labour hire employers and employers that use labour hire workers (with Prof. Michael Quinlan, UNSW). My expertise in labour hire employment is drawn upon in this submission.

(1) The Draft Report states (p.100) that "There is little evidence that the prevalence of non-traditional forms of labour is an adequate prediction of low quality jobs (PC 2006; Wooden and Warren 2004). People in non-standard jobs are highly heterogeneous. Such jobs can suit people's circumstances well and can act as stepping stones for more secure employment. Moreover, many people in non-standard forms of work have positive views about their jobs, although prime working age male casual workers with dependents appear to be an exception".

The Draft Report has overlooked the Australian and international evidence that shows labour hire employment offers poorer quality jobs, with the potential for long term disadvantage, relative to permanent, direct hire employment. This is an important omission because it underpins the Draft Report's later comments regarding labour hire employment, and the formation of the Draft Recommendation. The evidence on the key characteristics of labour hire employment, and their disadvantaged position relative to directly hired permanent employment, is summarised below:

All studies of wage outcomes for labour hire workers, in Australia and overseas, have found they receive a lower hourly rate of pay than comparable direct hire workers (Underhill, 2008; Underhill and Rimmer, 2009; Vosko, 2010; Houseman 2014; Fudge and Strauss 2014). In Australia, Watson's analysis of the HILDA data confirmed that after controlling for the penalty loadings intended to compensate for the absence of a range of leave and other entitlements to which they are not entitled, the average hourly rate of pay for labour hire employees was lower than for permanent employees (Watson, 2005).

The ILO Private Employment Agencies Convention (C. 181) was introduced to overcome this wage disparity. Likewise, the European Union Directive on Temporary Employment Agencies was agreed in order to provide temporary agency workers with pay equality relative to host employees (Vosko 2010). Finally, temporary agency licensing arrangements in a number of countries include provisions for penalties when agency employees' wages are less than those paid to direct hire workers (Underhill 2014).

All studies of the employment preferences of labour hire have found labour hire workers overwhelmingly would prefer to be employed directly rather than work for a labour hire employer (for Australia, see Brennan et al 2003; Underhill 2008). 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.

The view that non-standard employment can create a stepping stone to 'more secure employment' is not informed by rigorous labour market analysis in Australia. As Prof. Susan Houseman, the international expert on labour market transitions of non-standard employment, and chair of the Technical Advisory

Committee to the U.S. Bureau of Labor Statistics has observed “simple comparisons of the employment paths of different groups cannot shed light on whether temporary help employment is a stepping-stone to regular jobs”. In particular, the counterfactual question of whether transition rates would be higher had workers not been employed under labour hire arrangements, has not been addressed. International evidence has found no stepping-stone effect from agency work in the USA nor Germany, and in Denmark the effect has only been evident for minority groups during times of economic expansion. Instead, temporary agency work is more likely to harm employees’ potential for long-term higher paid employment because they become locked into low-paid jobs which do not offer opportunities for training and skill development (Houseman 2014). In Australia, using labour hire employees as a form of probationary employment may contribute to a stepping stone effect, but there is no evidence that this is a common reason for organisations using labour hire employees (Underhill 2008).

Australian and international research shows that the main reasons organisations use labour hire workers is to reduce labour costs and increase flexibility. In so doing, they displace permanent, direct hire employees. In addition, labour hire workers do not receive the same level of training and investment in skills as direct hire workers. A minority of organisations have been found to use labour hire workers to access specialised skills (Houseman, 2014; Fudge and Strauss 2014; Underhill and Rimmer 2009).

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 (for Australia, see: Underhill 2008; 2011; Oxenbridge & Moensted, 2011; for international, see for example Benach et al. 2014; Sakurai et al 2013). This outcome is associated with the nature of labour hire employment: unfamiliarity with tasks and workplaces; placements in inappropriate positions as labour hire employers compete to fill hosts’ orders; poor or non-existent training and supervision; and communication barriers created by the triangular relationship. The OHS risks experienced by labour hire employees are far greater than those experienced by permanent employees.

All studies of injured labour hire and other forms of temporary employment, in Australia and overseas, have found that those injured at work are less likely to be offered employment post-injury than permanent employees (Underhill 2007, 2008; MacEachen et al. 2011). In Victoria, this significant disadvantage was recognised in the Maxwell Review of the Occupational Health and Safety Act Accident. That report recommended that the responsibility for returning injured labour hire workers to work should be shared between labour hire employers and host employers. The recommendation was enacted however anecdotal evidence suggests that competitive pressures upon labour hire agencies have discouraged them from requiring hosts to meet their share of return to work obligations.

The evidence on wage inequality, the locking in of agency worker rather than a stepping stone to more secure and better paid employment, health and safety risks, and the absence of rehabilitation of injured labour hire workers combine to show that labour hire employment offers a lower standard of employment than direct hire employment. These factors, coupled with the extreme insecurity faced by labour hire workers, contribute to an understanding of why labour hire workers overwhelmingly prefer permanent direct hire employment over labour hire employment. They also underpin the reasons why our workplace relations system should not treat the supply of agency workers as comparable to the supply of other non-labour production inputs.

(2) The Draft Report states (at page 566) that “restrictions on labour hire and subcontractors can be likened to restrictions on choices of suppliers to a business more generally. For example, few would accept that it would be reasonable for an EA to include provisions that prohibit the use of imported inputs produced in another state or territory, despite this weakening the capacity of employees to bargain.”

Suppliers of labour cannot be compared to suppliers of other production inputs. Propositions such as this were soundly defeated in the passing of the ILO have Private Employment Agencies Convention (C. 181, 1997) which reaffirmed the basic tenet that labour is not a commodity. The research noted above also evidences that when labour hire workers are used to reduce labour costs by displacing permanent host workers, they undermine the wages, conditions and job security of the host employees.

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.

(3) The Draft Report states that allowing complete freedom to employers to choose “the mix of employment forms that minimise costs or maximise productivity... is unlikely to undermine employee bargaining power to any great extent”.

The research noted above, and the recognition by the ILO and European Union of the need for specific legislation to provide equal wages to agency workers confirms that labour hire employment can undermine employee bargaining power. Whilst Australian statistics show a relatively low level of labour hire usage, it is well known that statisticians have difficulty measuring labour hire employment. Also, the threat effect of labour hire employment upon employee bargaining power cannot be measured through official workforce composition statistics.

To summarise, I submit that Recommendation 20 will encourage more extensive use of a form of employment that that offers lower wages and no job security; that offers extremely limited opportunities for future employment security or enhanced earnings; and places employees at greater risk of injury and poorer health. Four out of five labour hire employees would prefer to be directly employed; they do not prefer this form of employment and only accept this form of employment because they feel they have no choice. The report does not consider labour hire workers’ lack of bargaining power to improve their employment standards; nor does it not make recommendations to improve processes which may reduce the disadvantage faced by these workers. The need for a system which produces fair and equitable outcomes for employees appears to not extend to labour hire workers.

In proposing changes to allow employers a free choice to use labour hire workers, the report is recommending changes which will undermine the bargaining power of permanent employees. In allowing employers complete freedom to employers to choose the mix of employees that minimises costs, the report is recommending changes that will encourage a downward spiral in the quality of labour hire services, and

employment standards more broadly. Requiring employers to justify and plan the use of labour hire employment through consultative processes offers the best prospect for employment strategies which support the safe placement of labour hire workers under fair and equitable employment conditions, whilst minimising exposure to risks, and the erosion of employment standards of permanent employees (Underhill and Quinlan 2011).

The terms of reference for this review include “to consider the impact of the WR framework on a range of matters, including.... Fair and equitable pay and conditions for employees, including the maintenance of a relevant safety net... and productivity, competitiveness and business investments”. The objectives of the Fair Work Act include that it “is intended to deliver outcomes that are fair, flexible, cooperative, productive, relevant, enforceable, non-discriminatory, accessible, simple and clear (s. 3).

Recommendation 20 in relation to labour hire employees should be withdrawn. If adopted it will not contribute to fair and equitable pay and conditions; it will promote the wider use of low wage workers over investment in the skills and knowledge of the workforce which underpins productivity and competitiveness.

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