

Labour Hire in Australia: Motivation, Dynamics and Prospects

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While the term 'labour hire' is of relatively recent origin in Australia, the use of agencies or companies specialising in the supply and provision of workers to client companies and organisations dates back to at least the 1950s. The contemporary form of the labour hire industry in Australia can be comprehended as the result of at least three particular antecedents:

1. *The traditional agency employment industry.* 'Temping agencies' have long specialised in the provision of workers to help client companies cope with fluctuations in demand or the temporary absence of employees. Generally these agencies first emerged in order to provide clerical, administrative and other white collar support staff – staff who could normally walk into organisations with standard secretarial and administrative skills. Many of these firms have flourished in recent years and many have expanded the range of staff they can provide well beyond the original office temps that dominated 'labour hire' prior to the 1990s. Contemporary examples of these firms include Drake Personnel, Hays Metier and Kelly Services.
2. *The recruitment industry.* With the increasing propensity to outsource aspects of HR functions in the 1970s and 1980s, many firms looked to specialist recruitment companies to provide shortlists of suitable candidates. With the growth in the demand for labour hire, recruitment firms found it relatively easy to offer clients short term or longer term placements whereby the worker worked at the client's premises but their wage was paid by the recruitment firm. In this way, recruitment firms are able to offer their clients an alternative to a permanent placement. Client firms can effectively trial a prospective employee as a labour hire placement and decide subsequently to engage them as a direct employee for the payment of a one-off fee to the recruitment- labour hire company.
3. *The 'pure' labour hire industry.* In the late 1980s a number of small specialist firms began to offer contract labour as a replacement for or supplement to existing employees for companies in a number of highly unionised and dispute-prone industries such as building and construction and shearing. In the 1991 case, *Building Workers Industrial Union & Ors v Odco Pty Ltd*¹, the full court of the Federal Court upheld an earlier decision that the workers supplied by the labour hire company Troubleshooters Available were not employees of either the host company nor the labour hire firm but were, in fact, contractors (Fenwick 1992). This meant that neither Troubleshooters nor their contractors were bound by the prevailing building industry awards. The decision cleared the way for labour hire companies to provide contract staff to clients at highly competitive rates – paying the contractors below award rates and thereby being able to offer clients a competitive labour supply contract while still generating a profit.

The contemporary industry in Australia also features a number of very large, high profile international labour hire, or 'flexible labour' firms that have moved in over the top of the domestic operators, on occasion acquiring ownership and control of those companies. Adecco and Manpower are amongst the largest labour hire operators in Australia. Those operators have spread their supply of

labour across the entire labour market while other big established players such as Skilled Engineering retain more specialised operations. In 2000 it was estimated that Adecco had revenues in Australia of over \$700 million which were anticipated to top \$1 billion within two years. At that time, Asia Pacific CEO Ray Roe argued that the ‘explosion in the use of flexible workforce’ was set to continue (*Workplace Express* 19 July 2000). The peak industry body representing the labour hire industry, the Recruitment and Contract Services Association, conducted a 1999 survey indicating that the industry generates around \$10 billion in annual sales in Australia (DIR 2001: 18).

The growth in labour hire in Australia over the past decade has been one of the most dramatic aspects of the more general proliferation of non-standard employment. While considerable Australian and overseas research effort has been devoted to the explanation of the growth in non-standard employment relatively little is known about the reasons for the growth in the particular forms of labour hire that have come to prominence in Australia. Relying on anecdotal, case study and survey evidence this chapter attempts to explore some of the key stimulants of the labour hire industry in Australia by examining the range of employer motivations that appear to drive what is fundamentally a demand-side phenomenon. On the basis of this analysis and assessment, the chapter then considers the future prospects for the industry in terms of emerging policy responses.

What is Labour Hire and What is the Problem?

Labour hire can be defined as an arrangement whereby ‘a labour hire company or agency provides individual workers to a client or host with the labour hire company being ultimately responsible for the worker’s remuneration’ (ACTU 2000: 2; see also Hall 2000: 26). The essential quality of a labour hire arrangement is the splitting of contractual and control relationships: the worker works at the site and under the practical day-to-day direction of the host or client organisation; the worker is paid by the labour hire firm and has a direct (contractual or employment) relationship with them; the client firm pays a contract fee to the labour hire firm for the provision of that labour and thus also has a contractual relationship with the labour hire firm.

While these relationships might appear to be relatively straightforward in theory they can become complicated in practice. First, there is typically a *control* relationship but not a *contractual* relationship between the worker and the client or host company. In a labour law context predicated on the assumed existence of a bipartite employment relationship between employer and employee the law has struggled to establish where liabilities should rest in some labour hire cases. Second, the character of the legal relationship between the worker and the labour hire firm may not always be clear. For example, while some labour hire workers might be employees of the labour hire firm, labour hire firms often describe their workers as ‘associates’ or ‘contractors’ and seek to construct them as contractors rather than employees. Third, the extent to which the worker is working under the control and direction of the host company or the labour hire company might be disputed. The issue can be critical for ascribing responsibility for occupational health and safety. In some

cases, labour hire companies suggest that they assume at least partial responsibility for their worker's OH&S by claiming that they refuse to send staff to a site unless they have first established the safety of the site². Liability for OH&S has been attributed to labour hire companies in at least some cases (*WorkCover (Inspector James Swee Ch'Ng) v Drake Personnel*³; DIR 2001: 62)). In other cases the WorkCover authority of NSW has argued that the host employer bears OH&S responsibilities under the relevant Act (DIR 2001: 56).

The complicated legal character of labour hire arrangements in practice is therefore problematic for ascertaining liability in a number of instances – where there has been a breach of OH&S regulations, where a labour hire worker is injured and neither client company nor labour hire company is prepared to assume responsibility for rehabilitation and return to work, and, in unfair dismissal cases where both client and labour hire firm might seek to deny that the aggrieved worker is their employee.

However labour hire is also problematic for individual workers and labour markets more generally. The labour market problems associated with labour hire employment arrangements can be summarised under three inter-related themes:

1. Labour hire workers tend to be engaged as either casual employees or dependent contractors. The employment conditions tend to be characterised by insecurity, precariousness, the absence of career paths, low or below award pay and substandard conditions.

Amongst the ranks of labour hire employees (as distinct from contractors) casual rather than permanent employment is the overwhelming form of employment. For example, the AiG survey estimates that almost 97% of labour hire workers are engaged as 'casuals' (AiG 2000: 4). While some labour hire workers are on long term contracts, (for example the ACTU has estimated that over 10% of labour hire workers have been with the one client for over 2 years (ACTU 2000: 1)) the RCSA has estimated that the average length of labour hire assignment is six weeks. The essence of labour hire employment conditions is that continuity of engagement, let alone employment, is not guaranteed.

Low pay and under award pay appears to be common in the labour hire industry. Union submissions to the NSW Labour Hire Task Force document many instances of labour hire firms paying below site rates, below prevailing industry standards and, on some occasions, paying significantly below award base rates. For example, the FSU notes that casual labour hire staff in the operations sections and call centres of the banking industry are paid between \$1 and \$3 per hour less than permanent bank employees performing the same work (DIR 2001: 30). The secretary of the Queensland Council of Unions has also claimed that under-payment of labour hire workers is common in that state: she has estimated, for example, that only 10 of 90 labour hire companies operating in the construction industry in Queensland pay their employees at or above award rates (*Workplace Express* 25 April 2001).

The incentive to pay low is a structural feature of the labour hire industry. Where a labour hire employer can be compelled to pay award rates it appears that market forces ensure that they are soon undercut by a competing operator who is prepared to avoid paying the award rate. For example, the FCU notes a case involving data entry operators engaged by labour hire giant MPM Personnel. Under union pressure to pay the award rate, MPM adjusted their tender price for a major client only to lose the tender to a competitor agency which paid its workers an estimated \$4 per hour below the award rate (FCU 2000).

Qantas uses labour hire staff amongst its long haul international flight attendants based outside Australia. Adecco employs the flight attendants based in Auckland and Bangkok and these workers are not covered by the Enterprise Bargaining Agreement (EBA) that applies to Australian based Qantas flight attendants. Evidently Qantas is keen to extend the practice of employing more flight attendant staff off-shore through labour hire so as to avoid the EBA conditions enjoyed by its Australian based staff. Announcing the company's plans to launch a new budget international airline, Qantas Chief Executive, Geoff Dixon, appealed to unions to 'accept the realities' and noted that 94% of Qantas staff were employed in Australia under 'premium conditions' (*Workplace Express* 15 June 2001). Dixon argued that 'We need to get rid of very outmoded labour practices' and that 'we cannot compete if 94% of our people continue to be employed under these conditions. We need other opportunities to reduce our costs by employing more people overseas' (*Financial Times*, 15 June 2001).

2. Labour hire employment tends to be associated with limited training and skills development.

Arguments and evidence concerning the links between labour hire employment and training and human resource development have been documented and developed elsewhere (Hall 2000; Hall, Bretherton and Buchanan 2000). The overwhelming body of evidence suggests that labour hire workers receive less training and much less portable training and skills development than permanent employees (ACTU 2000: 6-7; DIR 2000: 26; Lafferty and Roan 1999). The labour hire training deficit is not only disadvantageous for individual workers who are either not receiving training or are forced to fully shoulder the burden of accessing, undertaking and paying for training themselves. The explosion of labour hire, particularly in highly skilled areas such as manufacturing maintenance, has also led to a serious depletion in the skills available in the labour market (Marshman 1998: 27; Hall et al 2000).

3. Labour hire employment is often associated with limited industrial protection afforded by awards, enterprise bargaining arrangements and union coverage.

Labour hire workers are inherently difficult for unions to organise for a number of reasons. First, labour workers often have relatively itinerant work histories and non-standard work patterns. This makes it difficult for unions to identify and approach potential members and to identify likely breaches of award or

other industrial conditions. Second, labour hire workers are rarely prepared to speak out against employer breaches of award or statutory conditions because of their general vulnerability and dependency on their labour hire employer for future assignments. These realities greatly affect the enforceability of any conditions and protections even where they have been won.

The case studies presented to the NSW Task Force by one of Australia's major unions, the Australian Manufacturing Workers' Union (AMWU), reveal a litany of breaches of award conditions: failure to pay site rates to labour hire workers where this is a condition of the EBA; failure to pay according to the appropriate award classification; and failing to pay casual loadings (DIR 2001: 33-34). The Finance Sector Union (FSU) reports similar cases in the banking and finance industries. That union has claimed that all but one of the major labour hire companies it deals with have failed to abide by the promises they have made to the ACTU to pay appropriate rates and respect negotiated conditions (FSU 2000).

Even where an award or registered industrial arrangement is in place, unions report persistent difficulties in ensuring that the instrument can be updated to ensure that labour hire workers' entitlements keep pace with prevailing standards. For example, the Federated Clerks' Union notes that the award covering labour hire workers in the clerical industry, the Clerical and Administrative Employees in Temporary Employment Services (State) Award, contains only four grades while the main clerical and administrative award contains five. The FCU (2000) claims that the RCSA has not consented to the inclusion of the extra grade and that it is unable to mount an arbitration hearing because no labour hire worker is prepared to come forward and give evidence before the Commission for fear of labour hire reprisal. The union has also claimed that the labour hire companies routinely pay their workers at the lowest grade possible, often significantly lower than that being received by permanent employees undertaking the same work alongside them (FCU 2000).

The operation of labour hire employment arrangements in Australia has become problematic for legal, industrial, skills development and employee protection reasons. Possible and proposed policy responses to the specific problems identified are considered in the final section. However, the more general desirability of labour hire employment arrangements should also be questioned.

The problem with labour hire in the contemporary Australian labour market is not its existence per se – it has, after all existed in one form or another for at least 50 years – but rather in its proliferation as an alternative form of employment. Depending on definition and data source the number of labour hire workers ranges between 84,300 (ABS *Forms of Employment Survey* reporting the number of employees paid by an employment agency in 1998) to about 280,000 (ABS *Employment Services Survey* reporting the number of people 'on-hired' by one business in the employment services industry to another business). Regardless of the exact number of labour hire workers, it is apparent that they constitute a large and growing proportion of the labour market.

As the examples of Qantas, the Commonwealth Bank and a large number of employers in a wide range of industries including transport, retail and manufacturing suggests the problematic aspect of labour hire is where it is seen as an alternative employment arrangement to permanent full-time or part-time or even regulated casual employment. As the above examples illustrate, labour hire has grown in Australia partly because it offers some employers the opportunity to lower labour costs by substituting labour hire workers for in-house, direct employees. If this is a prime motivation, and if the consequence is substandard pay and conditions and inadequate protections for workers, then quite dramatic policy action is probably in order. However, lower labour costs might not be the major motivation for employers using labour hire and the union evidence referred to above might be misrepresenting the real circumstance for most labour hire workers and clients. In order to investigate in greater depth the extent and character of the labour hire problem, the evidence concerning employer motivations for choosing labour hire is considered.

Employer Motivations for Labour Hire

It has previously been suggested (Hall 2000: 30) that the motivations for employers' choosing labour hire include:

- *Capacity outsourcing* – using labour hire to cope with peaks and troughs in demand.
- *Specialisation subcontracting* – using labour hire to provide the specialist skills from time to time.
- *Cost reduction* – using labour hire even at the premium contract price demanded by a labour hire company so as to save on on-costs, overheads and liabilities
- *Contract out industrial relations problems* – using labour hire workers as a substitute for an existing workforce that management might regard as problematic because of industrial disputation, poor performance or union presence.
- *Stimulate organisational change* – using or threatening to use labour hire staff as part of a fundamental change to work organisation and, potentially workplace culture.

On the basis of the submissions received from labour hire companies, unions and others the NSW Task Force (DIR 2001: 15-17) identified the following employer motivations:

Flexibility – identified as the biggest motivation, flexibility was consistently mentioned by labour hire operators as being the major motivation for clients using their services. This conception of flexibility corresponds with capacity outsourcing and specialisation subcontracting as defined above. Most of the examples of flexibility imperatives noted by the Task Force (DIR 2001: 15) suggested the short term engagement of a relatively small number of labour hire

workers to cover for absences, meet peaks in demand or access specialist skills that might be needed from time to time. Only one example – using the arrangement to assess a potential employee’s performance – suggested a longer term engagement.

Risk Management – many employers use labour hire as a way of minimising their risks. For example, businesses can use labour hire as a way of enhancing their capacity to ‘hire and fire’ without exposing themselves to the risk of an unfair dismissal claim (but see: *Misheva v Spicers Paper Ltd.*⁴). Typically, if the client does not like the worker sent to their workplace they can simply call the labour hire firm and request another worker, or simply try another labour hire company. Naturally many employers see this as more convenient than attempting a dismissal.

Cost Factors – the Task Force noted union claims and evidence that some businesses can avoid, or at least reduce, the obligations they have to workers through the use of labour hire and that some labour hire operators undercut prevailing standards in order to offer clients competitive prices.

The report also noted a number of other motivations including the reduction of on-costs or administrative costs and the motivation of using labour hire to reduce union presence, institute new forms of consultation and negotiation and substitute the existing workforce with a more compliant and more affordable workforce.

Some recent survey data assists in clarifying the relative intensity of various possible motivations amongst employers for seeking labour hire. In late 1999 approximately 400 employer members of Australian Business Limited were surveyed on a range of matters including their use of outsourcing and labour hire. The survey revealed that the use of labour hire was relatively common. Almost one-third (32.8%) of all companies surveyed used at least some labour hire staff. Moreover, the extent of usage was relatively large for a significant proportion of companies – Almost half (45.6%) of the firms using at least some labour hire reported that at least 10% of their total staff were labour hire workers.

Respondents to the survey were asked to consider their use of outsourcing, labour hire and the use of contractors. They were then asked about a range of possible advantages and disadvantages of outsourcing. While respondents were not asked to distinguish between outsourcing, labour hire and use of contractors it is known that labour hire and outsourcing are closely related and it is likely that the motivations for ‘outsourcing’ are similar to the motivations for ‘labour hire’. Table 1 shows the proportion of companies which regard particular features of outsourcing as an advantage and also shows respondent employer’s estimation of the most significant advantage of outsourcing.

Table 1: Employer Assessments of the Advantages of Outsourcing

	% nominating as an advantage	% nominating as the most significant advantage
Cost effectiveness	54.6	36.9
Flexibility in meeting fluctuations in demand	48.0	30.0
Increased range of skills	31.8	10.5
Quality of production/ service	24.2	6.4
Capacity to solve site specific problems	25.4	5.2
Capacity to change supplier	29.8	4.2
Control over labour	17.7	4.1
Lower union influence	8.3	0.6
Other	2.3	2.3
Total		100.0

Source: Australian Business Limited - ACIRRT Survey 1999.

It must be recalled that respondents were here encouraged to think about all the 'outsourcing' type strategies they use - strict outsourcing and 'turnkey project management' right through to the occasional use of individual labour hire workers. Therefore these results should be interpreted with some caution in reaching conclusions about the motivations for labour hire as distinct from outsourcing. Nevertheless, the data appear to confirm that cost effectiveness is a very important consideration and perceived advantage for many employers. While cost effectiveness was seen as the single most important advantage of those offered, flexibility in coping with peaks and troughs in demand and access to a greater range of skills might together be taken to constitute the flexibility motivation; and over 40% mentioned one or other of these advantages as the most significant. As might be expected control is not seen to be an advantage of outsourcing. Interestingly, very few respondents identified lessening of union influence as an advantage to outsourcing.

All the available evidence suggests that cost and flexibility are the two major motivations for employers' use of labour hire. The analysis and interpretation presented above suggests that both aspects of the use of labour hire presents potential difficulties for the labour market experiences of workers working in labour hire.

Employers' desire for flexible access to workers and their skills when they are needed is, of course, nothing new. Indeed flexibility has probably constituted the single most prominent imperative of labour market transformation in Australia (and the industrialised world) over the past fifteen years. While there is a case for minimising the proliferation of jobs that are flexible (at the call of the employer rather than the employee) it might be possible to achieve significant improvement to the vulnerability, exposure and disadvantage for many workers through regulation of flexible labour and protection of the conditions for those flexible labour hire workers.

The use of labour hire for largely cost reasons is likely to be more pernicious. It is likely that where employers are largely motivated by cost considerations, they will be determined to seek labour hire companies that can supply labour at the lowest cost. The predisposition of companies (as purchasers of labour from labour hire companies) to seek the lowest labour supply rates will encourage labour hire firms to undercut each other's rates. As the anecdotal examples brought to the attention of the NSW Task Force have indicated, this will often encourage at least the more opportunistic operators to pay workers at below award or below market rates, and seek to minimise the provision of adequate conditions of employment and appropriate protection of workers through workers compensation payments and the protection of entitlements.

To summarise, the dynamics of the labour hire industry in Australia appears to conceal a number of problems that warrant the attention of policy makers. First, the issue of where legal liabilities rest is not always clear in practice when questions of OH&S, rehabilitation and return to work after injury, and unfair dismissal arise. Second, in many cases labour hire workers appear to be lowly paid, or paid less than prevailing award or EBA standards or less than permanent workers performing the same work in the same firm. They are also more likely to have poorer conditions than permanent workers. Third, labour hire workers appear to have access to less employer funded training and the proliferation of labour hire may have had deleterious consequences for the skills profile of some industries and labour markets. Fourth, labour hire workers appear to have less secure industrial regulation and protection than other in-house workers.

In the course of this survey it has also been noted that at least some employers have sought to use labour hire as a mechanism for substituting existing permanent workers with less expensive, more flexible and more compliant labour hire workers. In other cases labour hire firms have been used in an attempt to either avoid legislative or industrial obligations or to make employees redundant by changing the legal identity of their employer to a labour hire firm that is either not party to an existing industrial instrument (the Tripac model⁵) or is bankrupt (the Patrick's model⁶).

The evidence on employer motivations would suggest that employers are often seeking improved flexibility in the use of labour hire labour. It has been argued that in the interests of the protection of the interests of workers the conditions of flexible employment need to be strongly regulated and effectively protected. The other major motivating force pushing the growth of labour hire appears to be cost reductions. It has been argued that low cost labour hire must be significantly curtailed so that the proliferation of low cost, low paid employment under the guise of labour hire is minimised.

Responses and Prospects

The regulation of temporary agency work in Europe

Since the early 1980s the European Commission has struggled to develop a Directive on the European equivalent of labour hire, temporary agency work

(TAW). After a couple of failed attempts, a lengthy period of consultation on a number of matters relating to TAW, part-time work and fixed-term contract work commenced in 1995 under the social policy agreement associated with the Maastricht Treaty. The social partners were able to agree on policies for part-time work and fixed term contracts, but no agreement was able to be reached on TAW. Talks on a TAW Directive broke down in May 2001. The major 'stumbling block' in the negotiations concerned the definition and conception of a 'comparable worker' for the purposes of trying to guarantee that TAW workers should be entitled to equal pay and conditions with 'comparable workers'. While the ETUC has argued that the benchmark should be comparable workers in the same (host) organisation, the employers have rejected this proposal on the basis that in some member states TAW workers continue to be paid even when they are between assignments and cannot, therefore, be compared to in-house workers (Euronline 2001a).

Despite the impasse, the Commission has continued to work towards draft EU legislation. In October 2001 the representatives of the social partners, Euro-CIETT (the European committee of the International Confederation of Temporary Work Businesses) and UNI-Europa (the European regional organisation of the Union Network International), reached agreement on a Joint Declaration on Temporary Agency Work. The Declaration specifies 13 objectives which the social partners believe should be addressed in the proposed EU Directive. Amongst other things the objectives include:

- The recognition that non-agency work and on-going contracts of employment should continue to be the most commonly used forms of employment, while recognising that agency work can still make a contribution to the EU's employment and economic objectives;
- Recognition of the principle of equal treatment both with respect to relationships between agencies and workers and host companies and workers;
- Acceptance that certain restrictions, prohibitions and regulations may be required to prevent potential abuses of the use of TAW so that the conditions of work of workers in non-agency employment are not undermined;
- Ensuring that TAW is not used to replace striking workers;
- Recognising that agencies have the legal obligations of an employer toward their TAW workers
- Ensuring that agency workers have access to appropriate training and development opportunities, both in the agency and in the host company;
- Developing innovative solutions to ensure that occupational benefits (such as pensions) continue to accrue for TAW workers. (Euronline 2001b)

Individual member states of the EU presently regulate TAW through a combination of legislative provisions and collective bargaining. Most countries have relatively extensive legislative regimes covering TAW directly or indirectly – Austria, Belgium, France, Germany, Italy, Luxembourg, the Netherlands, Norway, Portugal and Spain – while a minority have limited or no regulation – Denmark, Finland, Greece, Ireland, Sweden and the UK. For those ‘high regulation countries’, laws typically cover matters including: specifying the permissible length of TAW contracts; restricting the purposes for which TAW workers may be engaged; guaranteeing TAW workers parity with other comparable workers in terms of pay and conditions of employment; and, ensuring TAW worker’s rights to union membership and representation (Eiobserver 2000).

Where there are legislative restrictions on the use of TAW these typically identify permissible purposes as including: temporary replacement of absent employees or in the interim prior to a new permanent engagement, the performance of a special, fixed term task or role or for the performance of inherently temporary or seasonal work. Eight countries (Austria, Belgium, France, Italy, Luxembourg, the Netherlands, Portugal and Spain) have laws guaranteeing that TAW workers enjoy the same pay and conditions as similar permanent employees working in the same host organisation. In some other countries, such as Denmark, parity with comparable employees in the host organisation is secured through collective agreements in at least some sectors (Eiobserver 2000).

As the difficulties over negotiations between the social partners as to the definition of comparable workers attests, the detail of regulation at the EU-level is still the subject of dispute. Nevertheless, many states have adopted a relatively strong regulatory approach, seeking to restrict TAW to genuine cases of employer need for temporary workers as a supplement to, rather than a replacement for, the existing permanent workforce. The industry partners’ joint declaration of October 2001 also suggests a shared commitment to restrict TAW to temporary labour needs.

Collective bargaining has certainly been relevant to the regulation of TAW, both in the ‘high regulation’ states and the ‘low regulation’ states, however, on balance, legislation rather than collective bargaining has led the way.

The regulation of labour hire in Australia: the case of New South Wales

Compared to Europe most Australian jurisdictions have been slow to move toward comprehensive regulation of labour hire. Queensland and Victoria now have the most detailed set of legislative regulations. In Queensland and Victoria, the definitions of employer and employee in the relevant state industrial relations acts specifically include labour hire companies and labour hire workers. Contractors can be deemed ‘employees’ by the Industrial Relations Commission (in Queensland) or by the Fair Employment Tribunal (in Victoria). Most states also have systems requiring the licensing of ‘employment agents’, however, with the exception of the ACT, the definition of employment agents do not normally include labour hire companies. No Australian

jurisdiction currently has legislation that purports to regulate the length of labour hire contracts, the purposes for which labour hire may or may not be engaged, or establishes the parity of labour hire workers with other comparable workers in host organisations.

NSW Labour Hire Task Force

In May 2000 the NSW Attorney General and Minister for Industrial Relations established a Task Force to inquire into and make recommendations about the labour hire industry in NSW. The report (DIR 2000), completed early in 2001, was finally released in December 2001. The Report of the Task Force makes a number of recommendations concerning reforms to better regulate the labour hire industry in NSW. The principal recommendations can be summarised:

Expand the definition of employer to include labour hire companies.

This recommendation will assist in broadening the range of workers who will be afforded protection under the NSW Industrial Relations Act. Nevertheless, the definition of labour hire company is restricted to circumstances where the worker has a contract *of* service with the company – this would appear to exclude contractors who would be argued to have a contract *for* service with the labour hire company.

Establish a licensing regime for labour hire companies.

The licensing of labour hire operators provides an opportunity for the state to develop a regulatory approach to the industry. The Report recommends the establishment of a working party to work out the detail of the licensing process, however the report recommends that licensing be based on companies demonstrating that they meet statutory requirements regarding appropriate insurance, payment of workers compensation premiums, superannuation, payroll tax and entitlements under applicable industrial instruments. Such a regime would appear to go a long way toward raising the barriers of entry to the industry and reducing the number of low cost operators in the industry.

In its submission to the Task Force the AMWU referred to the introduction of training regulations in the labour hire industry in the food industry which led to the reduction in the total number of labour hire operators from twenty to thirty to just two or three. The Task Force report fell short of making any recommendation regarding the imposition of requirements for a certain amount of training to provided by labour hire operators however.

The Department of Industrial Relations to conduct an education campaign on the rights and responsibilities of all parties to a labour hire arrangement.

To the extent that labour hire operators or client organisations are actually ignorant of their responsibilities this recommendation may have some effect.

Amend the OH&S legislation such that both client organisations and labour hire companies are rendered jointly responsible for the OH&S of labour hire workers.

This recommendation reflects the leading NSW authority of *Ankucic v Drake Personnel t/as Drake Industrial*⁷ where both Drake and the host employer were fined for each failing to ensure the health and safety of the labour hire worker. This recommendation was also supported by a further recommendation for an education campaign to increase the awareness of labour hire and host companies regarding their OH&S responsibilities.

Amend the relevant legislation to mandate joint responsibility on both host organisation and labour hire company for rehabilitation and return to work of injured workers.

The mandating of joint responsibility and the inclusion of WorkCover as the authority to determine the details of the implementation should ensure that injured labour hire workers stand a better chance of accessing improved rehabilitation and return to work opportunities. However, the practical problem remains that few labour hire companies will have the capacity to provide anything other than routine office work for injured employees.

By and large the recommendations of the Task Force will assist in clarifying the legal liabilities and responsibilities of labour hire companies and client firms in the cases of OH&S regulatory and legislative breaches, and cases where rehabilitation and return to work becomes an issue. The first recommendation will also make it more difficult for labour hire companies to avoid the operation of relevant statutory obligations. Nevertheless, labour hire companies, seeking to avoid liability under the Industrial Relations Act will continue to argue that while they may be an employer the worker concerned was a contractor rather than an employee.

The most important recommendation is likely to be the establishment of a licensing regime for the industry. The development of reasonably stringent standards and requirements for licensing will be likely to drive out many of the smaller, low cost operators that are generally thought to be responsible for undercutting the rates of those labour hire firms that claim to be paying appropriate wages and providing appropriate conditions. Despite the potential significance of this recommendation, if cost effectiveness or the pursuit of cost reductions continues to be a major motivation for employers, then employers will continue to seek the most competitive rate for labour hire labour. There is no reason, on the face of the recommendation, that licensed labour hire operators will not, over time, come to compete on pay rates alone, given that they will have little room to compete on overheads and on-costs.

The Task Force also failed to make any recommendation that might address the employer-funded training deficit in labour hire and the limited industrial protection afforded labour hire workers. The Task Force report notes in passing some of the arguments concerning equity in the site rates paid to in-house

employees and labour hire workers, and transmission of business issues but it also failed to make any recommendations on these matters.

A strong public policy case remains for addressing each of these issues. The establishment of a licensing regime and licensing fees holds the prospect of generating a pool of funds which might be able to be used to subsidise or provide training for labour hire workers as a means of overcoming the current training shortfall in labour hire. Other issues associated with the inferior pay and conditions often encountered by labour hire workers demand more creative and radical responses however. Consideration still needs to be given to means of enforcing labour hire companies to pay at least the equivalent hourly or daily rate as casual workers performing the same work at the same site. The lack of a career path for long term labour hire workers also requires the consideration of arrangements that will ensure the portability of entitlements across engagements. Again, the licensing of labour hire firms suggests a possible institutional form for the 'banking' of entitlements such as long service leave.

Conclusion

The labour hire industry likes to portray its business as the provision of flexible labour that can conveniently be brought in to workplaces to help employers cope with fluctuations in demand, a short term need for specialist skills, or the covering of staff absences. The reality, however, is that over the past ten years the labour hire industry in Australia has grown beyond this benevolent 'temp employment agency' model. The deliberate use of labour hire to drive down labour costs and even to substitute existing workforces with lower cost, more compliant workers, and the attempts by client employers to avoid or minimise their responsibilities and liabilities, has created an urgent need for policy reform. The problematic aspects of the labour hire industry may be tempered by reforms such as those recommended by the NSW Task Force, but most of them will persist until the key issue of pay rate and working conditions equivalence on work sites is finally addressed.

References

ACTU (2000) *Submission to the Labour Hire Task Force, New South Wales Department of Industrial Relations*. Australian Council of Trade Unions, September.

AiG (2000) *Submission to the Labour Hire Task Force, New South Wales Department of Industrial Relations*. Australian Industry Group, September.

DIR (2001) *Labour Hire Task Force Final Report*. Report of the Task Force to the Department of Industrial Relations, New South Wales.

Eiobserver (2000) 'Comparative Supplement: Temporary Agency Work in Europe', *Eiobserver*, January, 2000.

Eironline (2001a) 'Temporary agency work talsk break down'. *European Industrial Relations Observatory on-line*, 28 June 2001.

<http://www.eiro.eurofound.ie/2001/06/InBrief/EU0106215N.html>

Eironline (2001b) 'Joint declaration agreed on temporary agency work'. *European Industrial Relations Observatory on-line*, 1 November 2001.

<http://www.eiro.eurofound.ie/2001/10/feature/EU0110208F.html>

FCU (2000) *Draft Submission to the Labor Council of NSW for the Labour Hire Task Force*. Federated Clerks Union, September.

Fenwick, C. (1992) 'Shooting for Trouble? Contract Labour-hire in the Victorian Building Industry' *Australian Journal of Labour Law*, 5 (3): 237-261.

FSU (2000) *Draft Submission to the Labor Council of NSW for the Labour Hire Task Force*. Finance Sector Union, September.

Hall, R. (2000) 'Outsourcing, Contracting-Out and Labour Hire: Implications for Human Resource Development in Australian Organisations', *Asia Pacific Journal of Human Resources*, 38 (2): 23-41.

Hall, R., Bretherton, T. and Buchanan, J. (2000) *'It's not my problem': The growth of non-standard work and its impact on vocational education and training in Australia*. Kensington: National Centre for Vocational Education Research.

Lafferty, G. and Roan, A. (1999) 'Public Sector Outsourcing: Implications for training and Skills' *Employee Relations Journal*, 22 (1)

Marshman, B. (1998) *On the Brink of Crisis?* Report to the Engineering Skills Training Board (Vic) Inc. MERSITAB.

¹ (1991) AILR 129.

² See comments of Adecco Asia Pacific CEO in *Workplace Express*, July 19 2000.

³ NSW Industrial Relations Commission No. 3064 of 1997.

⁴ (1998) 44 AILR 3-904. In this case both the labour hire company, Adia Centacom, and the host company, Spicers Paper, were held to be in an employment relationship with the worker, although only the labour hire company was ultimately held liable for unfair dismissal.

⁵ When Tripac International, a motor vehicle components manufacturer purchased an Australian company making air conditioning components for Ford, the employment of existing employees was transferred to labour hire firm, EL Blue. All employees were employed under Australian Workplace Agreements rather than the previous union negotiated award and EBA conditions.

⁶ The Patrick Group of companies transferred the employment of their waterside workers to four labour hire companies which subsequently were declared insolvent and dismissed the employees without paying out their entitlements.

⁷ NSW Industrial Relations Commission No. 6465 of 1996.