Ai GROUP SUBMISSION

Victorian Inquiry into the Labour Hire Industry and Insecure Work

27 November 2015

About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health, community services and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

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1. Introduction

The Australian Industry Group (**Ai Group**) makes this submission to the Victorian Inquiry into Labour Hire Industry and Insecure Work (**Inquiry**).

Ai Group is the main industry group which represents the labour hire industry in respect of industrial relations matters. Ai Group has a large number of labour hire companies as members – small and large. We have represented the industry in numerous Federal and State Industrial Commission cases, inquiries and other forums over many years.

Ai Group also has a large membership in industries which use labour hire and it is important that the Inquiry keep the interests of both labour hire companies and users of labour hire foremost in mind during the Inquiry. The interests of both groups, as well as the interests of the broader community, are best protected by ensuring that a competitive market is maintained for the provision of labour hire services, and that impediments to competition are removed.

Some of the key views expressed in this submission include:

- It is vital that a flexible labour market is maintained in Australia, including the flexibility for employers to employ and engage the types of labour that they need.
- With regard to **labour hire**:
    - The use of labour hire is an established and essential mechanism to address economic and business challenges faced by employers.
    - Labour hire employees enjoy the same level of award and legislative protection as other employees. Modern awards and the National Employment Standards (**NES**) apply equally to labour hire employees as they do to other employees.
    - In Ai Group's experience, the vast majority of labour hire companies are reputable in their employment practices and comply with relevant laws and regulations. Many established labour hire companies have developed progressive and sophisticated employment practices, and often provide superior wages and conditions.
    - Ai Group is not convinced of the need for a licensing system in the labour hire industry.
    - Ai Group is not convinced of the need for an Employment Services Industry Code under the *Competition and Consumer Act 2010* (**CC Act**).
    - Changes are needed to the *Fair Work Act 2009* (**FW Act**) and to the CC Act to prevent restrictions being imposed on the engagement of labour hire and other contractors through enterprise agreements or awards.

- Ai Group strongly opposes the concept of 'joint employment' being established within Australian employment law.

- There have been some problematic recent Fair Work Commission (**FWC**) decisions which have applied the transfer of business provisions to labour hire 'temp to perm' arrangements. In Ai Group's view, these decisions are incorrect. The uncertainty needs to be addressed through legislative changes.

- With regard to **casual employment**:

  - The level of casual employment in Australia today is about the same as it was 5 years ago and 10 years ago – about 20 per cent of the workforce. There is no casualisation problem in Australia; the problem is the ongoing attempts by unions and others to limit flexibility for employers and employees.

  - Flexibility to engage casuals is critical for businesses as it assists them to better balance the supply of labour with demand for products and services.

  - The availability of casual employment is also critical for many employees who need or want the flexibility that casual employment offers. The ageing of our population will put a premium on workplace flexibility. Many people prefer casual work, and are not available or willing to work on a full-time basis.

- With regard to **independent contractors**:

  - The common law is far better equipped to assess the substance of particular relationships than any statutory definition of an 'independent contractor' could. Any 'one size fits all' definition of an 'independent contractor' would prevent the facts and circumstances of individual cases being fully considered, and would disrupt a very large number of existing contractual arrangements which are legitimate under common law, to the detriment of all parties to these contracts.

  - The vast majority of independent contractors have absolutely no desire to be employees. Some of them predominantly work for one client but it suits them to do so as they receive a regular flow of contracting work.

  - Tough sham contracting laws are in place within the general protections in the FW Act. These laws are operating effectively.

  - Just like their campaigns against casual employment, the unions are attempting to demonise independent contracting arrangements that provide flexibility for the principals and the contractors, and which are valued by both parties. There are few union members in these categories of workers (perhaps the reason why the unions are so focussed upon imposing restrictions upon them).

2. The importance of maintaining a flexible labour market

Flexible workplace relations arrangements are fundamental to the improved productivity that is so important to Australia's national competitiveness and our capacity to improve Australian living standards. Employers need more flexibility to employ and engage the types of labour that they need.

In recent years, the emphasis on improving Australia's productivity performance has lifted as productivity outcomes across a wide range of industries have trended down. In the face of demographic challenges, the relative importance of improved productivity as a source of growth has risen.

The Australian economy is facing a number of important challenges. The global economy is undergoing a seismic shift as the populous economies of China, India and Indonesia among others have embarked or are embarking on their processes of industrialisation. This is profoundly disruptive and is throwing down major competitive challenges to Australian companies.

The pace of technological development is similarly creating far-reaching challenges. It is essential that employment and workplace relations arrangements enable Australian employers to remain agile and in a position to readily adapt to technological changes. This includes ensuing that employers have a high degree of flexibility to engage the types of labour they need.

Australia is set on a course of demographic change that is seeing a steady increase in the proportion of older people. The ageing of our population will put a premium on workplace flexibility. An increase in the ratio of dependents to workers will require increased productivity to maintain prosperity; retaining older Australians in the workforce for longer, with arrangements that suit their changing capabilities and needs, will be essential. Many people prefer casual and part-time work, and are not available or willing to work on a full-time basis.

The Australian Treasury's latest Intergenerational Report (March 2015) highlights the urgency of implementing policy that fosters business flexibility and sustainability. The Report calls for a:

> *"policy agenda [that] will support productivity growth by helping to position Australian businesses to be flexible, competitive and robust in the face of dynamic global conditions."*

Against this background, it is of the utmost importance that businesses retain the ability to utilise the most efficient organisational structures and methods of organising work. To remain efficient and globally competitive, businesses need to have the flexibility to engage the forms of labour they need. The following forms of labour (amongst others) are all legitimately deployed by organisations:

- Full-time employees;
- Casual employees;

- Part-time employees;
- Fixed term employees;
- Fixed task employees;
- Seasonal employees;
- Trainees and apprentices;
- Labour hire; and
- Independent contractors.

Flexibility to engage the most appropriate form of labour is essential for companies striving to increase productivity in a competitive global environment. Flexibility is also sought by workers, who form part of an increasingly diverse workforce, and who seek to reach agreement with their employer on arrangements to suit their lifestyle and income preferences.

3. Labour hire

3.1 Defining 'labour hire'

Defining the labour hire industry with precision is difficult. The term 'labour hire' is used in Australia but other terms such as 'contract labour', and 'temporary help' are used overseas.

The International Labour Organization (ILO) describes three categories of contract labour:

- Job contracting (contracting out of work);
- Labour only contracting; and
- Direct contracting (ie. independent contractors).

Many people fail to recognise the different categories and types of work performed in the labour hire industry. Companies operating in the labour hire industry, typically supply labour in a variety of ways, including:

- **Short-term labour hire**: the on-hire of employees to a client on an hour by hour basis, who work under the general direction of the client. These workers are often referred to as 'temps'.
- **Ongoing labour hire:** the on-hire of employees to a client on an ongoing basis, who work under the general direction of the client. For example, a manufacturer may complement and/or supplement its permanent workforce with a team of employees employed by a labour hire company.

- **Outsourced workforce solutions:** the performance of outsourced operations (e.g. maintenance, logistics) for a client in accordance with a contractual arrangement. For example, a labour hire firm may be contracted to perform all mechanical maintenance services for a manufacturer for a two year period. The labour hire firm would typically employ a team of maintenance employees who work on a full-time basis at the client's premises and work under the direction of a supervisor or manager employed by the labour hire firm.

- **Project–based workforce solutions:** the performance of shut-down, installation or relocation work for a client within a defined performance-based contract scope. The labour hire firm would typically employ a team of skilled employees who work on the project under the direction of a supervisor or manager employed by the labour hire firm.

The typical labour hire arrangement involves the following elements:

- The worker performing his/her work at the client company's site;

- The worker is paid by the labour hire company and has a direct employment or contractual relationship with the labour hire company;

- The client company pays a contract fee to the labour hire company for the provision of the worker's labour and, accordingly, the client company has a contractual relationship with the labour hire company.

3.2 The prevalence of labour hire in Australia

As identified in the Background Paper,[1] the temporary staff services industry in Australia generates annual revenue of $18.5 billon, with a quarter of the labour hire sector's revenue attributable to Victoria. This is an obvious benefit to the national economy.

The labour hire industry, however, is also susceptible to economic downturns as employers find that the need for temporary labour lessens when business demand slows. A recent Productivity Paper from 2013 confirmed that despite the rapid growth in labour hire in the 1990s, casual and fixed term employees were no more prevalent at the end of the decade than at the start, and that labour hire workers probably became less prevalent.[2]

The idea that labour hire is growing because it offers a vehicle for the exploitation of workers is simply not supported by any objective data.

[1] Background Paper, Victorian Inquiry in the Labour Hire Industry and Insecure Work, October 2015, p.7
[2] Shomos, Turner, Will, *Forms of Work in Australia – Productivity Commission Staff Working Paper* (Australian Government, Productivity Commission, April 2013)

In fact, and as acknowledged by the Background Paper for this Inquiry, labour hire provides a number of benefits to the community in enabling businesses to operate more efficiently and by providing pathways to employment for job-seekers.[3]

The Australian Bureau of Statistics (**ABS**), in August 2014[4] reported that 5% of all employed persons (599,800) had found their job through a labour hire firm/employment agency.

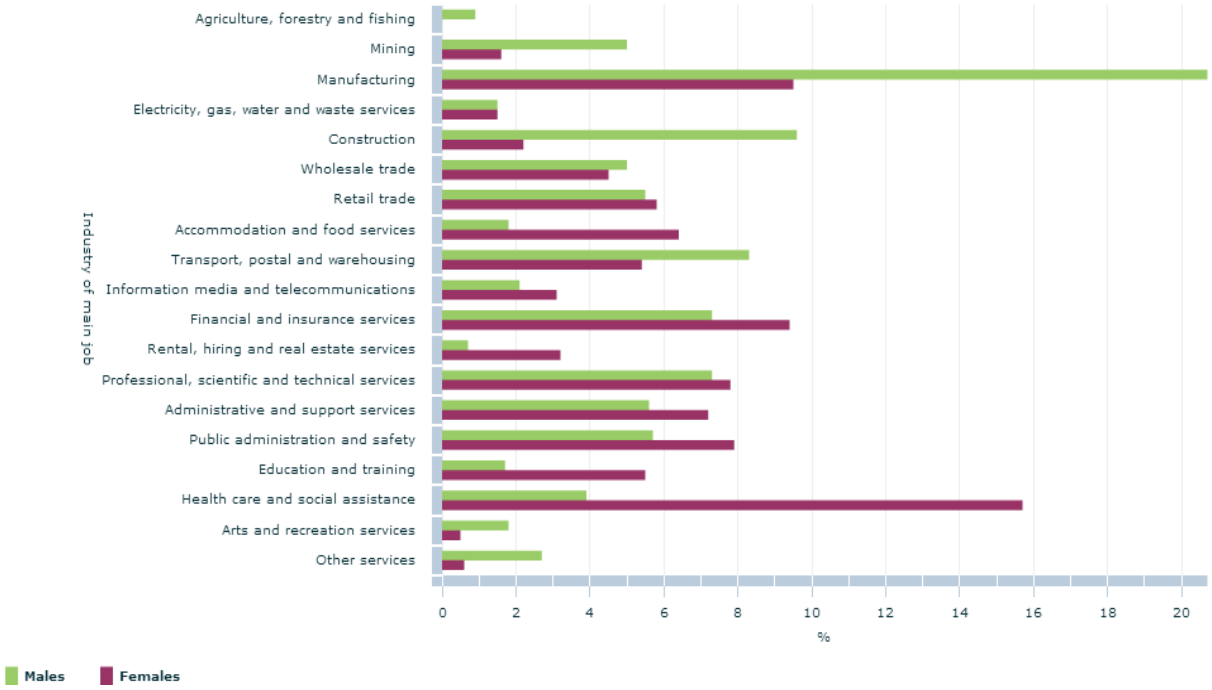
Approximately 124,400 persons, or 21% of those who had found their job through a labour hire firm/employment agency, were paid by a labour hire firm/employment agency. Labour hire workers were most prevalent in the manufacturing industry (19%) and in administrative and support services (16%). Labourers (21%) and Technicians and trades workers (19%) were the most common occupational groups for labour hire workers.

Other characteristics of employees who had found their job through a labour hire firm/agency were:

- 28% were in the 35-44 year age groups and 27% were in the 25-34 year age groups, representing the highest proportion in all age groups.
- 59% were males, with the highest proportion of males working in manufacturing (21%) and construction (10%).
- The most common occupational groups for males were machinery operators, drivers, professionals, technicians and trade workers (19%).
- Females were most common in health and social assistance (16%) followed by manufacturing and financial insurance services (both 9%).
- The most common occupational groups for females were clerical and administrative workers (35%) and professionals (22%).

[3] Background Paper, Victorian Inquiry in the Labour Hire Industry and Insecure Work, October 2015, p.9
[4] ABS, 6333.0 *Characteristics of Employment,* August 2014

Chart 1: Persons who found their job through a labour hire firm or employment agency – By industry of main job – By sex



Source(s): Australian Bureau of Statistics, Characteristics of Employment, August 2014

Of the persons who had secured their job through a labour hire or employment agency:

- 161,900 persons had registered with an employment agency in the last 12 months, while 86,000 had registered with a labour hire firm.
- 506,500 persons expected to be with their current business/employer for the next 12 months.
- 169,700 persons had less than 12 months' service with their current business/employer, but followed by 136,000 persons who had between 3-5 years' service with their current business/employer.
- Importantly, the highest proportion (181,700 persons) worked between 35-39 hours per week.
- The highest proportion (434,000 persons) had paid leave entitlements, while 168,000 did not.
- A majority (488,900 persons) were guaranteed a minimum number of hours.
- A majority (448,900 persons) had weekly incomes that did not vary from week to week.

The ABS statistics highlight that the labour hire industry is extremely important for employers, employees and the Australian economy. The statistics also show that labour hire arrangements often involve work with paid leave, income stability and regular hours.

3.3 The importance of maintaining flexibility regarding labour hire

It is vital that flexibility is maintained for industry to utilise labour hire.

The following driving factors have had an important influence on labour hire usage:

- Corporate restructuring;
- The need for increased flexibility to meet work fluctuations;
- Greater competitive pressures as a result of globalisation;
- Outsourcing in both the private and public sectors;
- Extended hours of operation;
- Fast changing technology;
- The trend for companies to concentrate on their core business; and
- Growth in new industries.

A 2005 Productivity Commission Staff Working Paper[5] cites a survey of Australian firms which found that the main reasons why companies use labour hire were:

- To source additional staff (30 per cent);
- To replace temporarily absent employees (17 per cent);
- To outsource the administrative burden of employment (11 per cent);
- To improve recruitment (11 per cent); and
- To overcome skill shortages (9 per cent).

The use of labour hire is an established and essential mechanism to address economic and business challenges faced by employers.

3.4 Experiences and views of labour hire workers

An ABS *Characteristics of Employment* study in November 2008[6] found that the most common reasons cited by employees using a labour hire firm were:

- ease of obtaining work (71%);

[5] Brennan, Valos and Hindle cited in "The Growth of Labour Hire Employment in Australia" Productivity Commission Staff Working Paper, February 2005.
[6] ABS, 6359.0 *Forms of Employment Australia,* November 2008.

- a condition of working in the job or industry (9%);
- flexibility (7%);
- the inability to find work in their line of business (7%);
- a preference for short-term work (3%);
- to gain more experience (3%); and
- a lack of experience prevents finding permanent job (2%).

In 2001, Ai Group commissioned ANOP Research Services to conduct research into the changing nature of employment in five industries – one of which was labour hire. As part of the research, focus groups of labour hire employees were conducted. Some of the many benefits of working in the labour hire industry cited by employees are outlined in the following extract from the ANOP report:

- *"Working as a labour hire employee means you can be exposed to a variety of companies, tasks, environments and people. And this variety is often viewed as a key benefit of working in the industry.*

  > *"There's a good variety of work, especially in my game. Up in Newcastle it was good 'cause they'd send you to all these great jobs and you'd run into the same guys you worked with six months ago." (employee)*
  >
  > *"The benefit was the variety of work and the skills that you obtained or gained from one place to another doing different work. I used to love it." (employer)*
  >
  > *"You've got the flexibility of going different places and meeting different people." (employee)"*

- *"As labour hire employees are a mostly casual workforce, they get an hourly pay loading. Many also say they are offered the overtime that is often denied to full-time workers. For some, this means the money makes it more attractive to remain a "temp", rather than moving into fulltime employment."*

  > *"They offered me a full-time job as an employee of Foxtel in the call centres with the customers, but why should I take a drop in pay? I make more money temping." (employee)*
  >
  > *"When I started working, I was in a situation where I preferred money over holidays. You find yourself in that situation where money is more important than taking time off. If you are a fulltime employee, they make you take your holidays. If you work through Easter and Christmas, at the end of the year you end up with a lot more." (employee)*

"25% pay loading, casual loading. Yeah, casual loading's good." (employee)"

- *"Working in the labour hire industry also means you can "try out" employment situations. There is the opportunity to experience different industries, and companies, while not feeling committed to having to stay if it doesn't work out. The labour hire industry also allows employees to build up experience on their CVs, which can help them if and when they try to find full-time employment.*

  "If you don't fit somewhere, it's not like being in a permanent job, where you get in there and feel terrible. You just put your hand up and say "Hey, I don't like this situation, it doesn't suit me", or " I'm having a personality conflict with the boss or something" – and they'll move you without having a horrible big black mark jammed against your name." (employee)

  "You're not trapped in a career … You can give it a time period where it's manageable, and you can say to yourself 'well in 6 months time, I won't be doing this, so I can deal with how boring it is'." (employee)"

- *"Being in the position of a casual worker with no real obligation to the company you are working within, often means reduced responsibility. Some labour hire employees say they like the fact they can leave at the end of their shift, and not worry about it, or 'take their work home'. There are no obligations to stay back, or to "corporately socialise". Some employees report that attitudes among the 'temps' are often much more positive than among the 'permanents' – in part due to feelings of less responsibility.*

  "One of the advantages of temping I find is that with the perms - there's a lot of pressure to socialise after hours and to go to functions etc. But a temp you can say see you later." (employee)

  "There's not a lot of responsibility put on you. You can have the benefit of saying that I can do this to a certain extent, but I can get up and leave if I don't like it." (employee)"

- *"Some labour hire employees state that the flexible hours are a benefit of working in the sector – that as casual employees, they have the ability to choose to take days or weeks off when required. Also, often being the first to be offered overtime, means working hours can be increased when required.*

  "We put our hand up for all the overtime that's there. It's flexible but we were doing 60 hours a week." (employee) "

The attitudes of labour hire employees are unlikely to have changed since the ANOP report was released.

3.5 The coverage of labour hire under awards and enterprise agreements

Labour hire employees enjoy the same level of award protection as other employees. Modern awards apply equally to labour hire companies as they do to other companies. This was recognised by the Australian Industrial Relations Commission (**AIRC**) during the 2008-09 award modernisation process. Ai Group represented the labour hire industry during the proceedings.

During Stage 4 of the award modernisation process, the AIRC inserted a clause into nearly all modern awards clarifying that the awards cover on-hire employees. The following extract from the Full Bench's Stage 4 Award Modernisation Decision is relevant:

> ***"[105]*** *In our statement of 17 November 2009, we set out, for comment, draft model provisions for insertion into each modern award, where relevant, in relation to employees of labour hire (on-hire) companies and employees of group training organisations. In each case variations of the model clause were published and an indication given as to which model clauses would be inserted into each modern award (including the Stage 4 awards then in exposure draft form). We also noted that some modern awards already contain relevant provisions with respect to on-hire employees and may not require a model clause. This decision should be read in conjunction with our statement of 17 November 2009. We now deal with a number of issues which have arisen from the comments we have received. We indicate at this point that the final version of the model provisions is Attachment B to this decision.*
>
> ***[106]*** *Dealing first with the terms of the draft model provisions, Ai Group and Recruitment and Consulting Services Association (RCSA) and others submitted that it was necessary to include the words "This sub-clause operates subject to the exclusions from coverage in this award" in each of the model provisions, in respect of both on-hire and group training employers, to ensure that the coverage of the award in respect to such employers, and their employees, does not extend beyond the general coverage of an award. We agree and have amended the model clauses accordingly."*

As such, labour hire employers are subject to the same modern award obligations as any other employer covered by a modern award. Hefty financial penalties of up to $54,000 per breach apply for breaches of modern awards.

Enterprise agreements are common in the labour hire industry. Ai Group has seen no evidence that the coverage of labour hire employees under enterprise agreements is lower than the coverage of employees under agreements generally. In fact, given the large number of enterprise agreements which exist in the labour hire industry and the fact that virtually all of the large labour hire companies have enterprise agreements, it is likely that a higher proportion of employees in the labour hire industry are covered by an enterprise agreement compared to employees across other industries.

3.6 Enterprise agreements and awards should not be permitted to restrict labour hire

Changes are needed to the FW Act and to the CC Act to prevent restrictions being imposed on the engagement of labour hire and other contractors through enterprise agreements or awards.

Prior to the FW Act, the WR Act and *Regulations* prohibited terms being included in an enterprise agreement or award which imposed:

> *'restrictions on the engagement of independent contractors and requirements relating to the conditions of their engagement'*; or
>
> *'restrictions on the engagement of labour hire workers, and requirements relating to the conditions of their engagement, imposed on an entity or person for whom the labour hire worker performs work under a contract with a labour hire agency'*.

The above legislative provisions had a very positive effect in preventing the unions from insisting upon highly restrictive enterprise agreement clauses which inhibited effective management and the organising of work in a productive and efficient manner.

As soon as the FW Act came into operation the unions began vigorously pursuing the imposition of clauses which restrict the engagement of on-hire and other contractors.

In the Productivity Commission's Draft Report on Australia's Workplace Relations Framework,[7] the Productivity Commission has recommended the prohibition of terms in enterprise agreements which restrict the engagement of independent contractors and labour hire, or regulate the terms of their engagement. Ai Group has expressed strong support for the recommendation.

Ai Group has also expressed strong support for the Harper Competition Review recommendation (Rec. 37) that trading restrictions in enterprise agreements be outlawed. As the Harper Review Final Report states, competition should be favoured over restrictions and employers should be free to supply and acquire goods and services, including contract labour, should they choose to do so.

3.7 The concept of 'joint employment' must not become part of Australian law

Ai Group strongly opposes the doctrine of 'joint employment' being adopted within Australian employment law. The concept of joint employment has not gained acceptance in Australian employment law despite many attempts by unions and applicants in unfair dismissal cases to establish the concept. An adoption of the concept of joint employment in Australia would create uncertainty about whether the employer (i.e. the labour hire firm) or the client company is

[7] Productivity Commission 2015, *Workplace Relations Framework,* Draft Report, Canberra, p.729

responsible for the employment relationship and subsequent employee entitlements and obligations.

The concept of joint employment has been considered in numerous decisions in the Fair Work Commission (**FWC**) and Courts.

In *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd*, [2011] FCA 1176 Justice Buchanan of the Federal Court set out the general principles in relation to labour hire arrangements, stating:

> *[60]… arrangements whereby labour is provided by one company to another, without the recipient becoming thereby an employer, are longstanding and unremarkable. There appears no place for an assumption of illegality or illegitimate purpose from the mere fact that a "labour hire" arrangement has been put in place. The Australian cases recognise that, provided the arrangement meets certain objective criteria.*
>
> *[61] Utilisation in Australia of labour hire arrangements has increased significantly in past decades. There is no doubt that sometimes such arrangements reflect a desire by the proprietors of a business to avoid liability for employment related obligations. That is not illegal as an objective.*

Similar observations were made by Justice Merkel of the Federal Court in *Damevski v Guidice* (2003) 202 ALR 494 stating:

> *[173] In general, the courts have held that the interposition of a labour hiring agency between its clients and the workers it hires out to them does not result in an employee-employer relationship between the client and the worker: see Mason & Cox Pty Ltd v McCann (1999) 74 SASR 438; Skilled Engineering Pty Ltd v Gill (unreported, Full Court of the South Australian Supreme Court, King CJ, Cox and Bollen JJ, 11 July 1991).*

In *FP Group Pty Ltd v Tooheys Pty Ltd* [2013] FWCFB 9605 (affirmed in *Grant Stewart v Amcor Excavations Pty Ltd* [2014] FWC 1031), a Full Bench of the FWC considered whether host employer, Tooheys Pty Ltd should be a named respondent in an unfair dismissal application that was made against it by an FP Group labour hire employee. The Full Bench concluded that:

> *"The application of a concept of joint employment to labour hire arrangements would involve a very considerable development of the common law. The cases in which Australian courts have analysed labour hire arrangements have invariably involved the identification of which one of two putative employers is in fact the employer. In no case has an Australian court approached the analysis on the basis that the exercise of control over the worker by the hirer of labour in a labour hire arrangement may render the hirer, together with the labour hire company, a joint employer of the worker.*"

The *FP Group* decision has been relied upon in numerous recent decisions including *Daniel Bunt v ITW Proline* [2014] FWC 750 where Commissioner Simpson stated:

> *"The 'Doctrine of Joint Employment' has yet to receive firm recognition as forming a part of the law of Australia. The Applicant referred to a single authority of a first instance decision of the Federal Court of Australia. That case however did not make a definitive finding on the existence of the doctrine within Australia but recognised "scope" for it in Australian law. It is noted that a recent Full Bench decision of FWC stated that the Commission had no role in developing matters of common law."*

On appeal, the Full Bench of the FWC in *Daniel Bunt v ITW Proline* [2014] FWCFB 2328, confirmed Commissioner Spencer's view that the doctrine of joint employment did not exist in Australian employment law.

It is important that the case law developments regarding joint employment are not disturbed as they accurately reflect how the employment relationship is ordinarily construed by the common law. That is, there is an intention on the part of the employer and employee to enter into an employment relationship, not an intention to be bound by a tripartite relationship between client, labour hire company and employee.

The concept of joint employment was considered by the Australian Building and Construction Commissioner (**ABCC**) during the 2011 Sham Contracting Inquiry.[8] In the Final Report, the ABCC recommended that the concept of joint employment not be pursued.

3.8 Transfer of business problems re. labour hire

Since the introduction of the FW Act, Ai Group has expressed major concern about the transfer of business provisions, seeking both substantive and technical amendments. Ai Group has made countless representations concerning the transfer of business laws in the FW Act including lengthy submissions to the current Productivity Commission Inquiry into the Workplace Relations System and to the FW Act Review in 2012. Unfortunately no positive changes to the laws have yet occurred.

Amongst numerous problems with the transfer of business laws, there have been some problematic recent decisions which have applied the laws to labour hire 'temp to perm' arrangements.

A 'transfer of business' under the FW Act occurs when an employee ceases employment with the old employer and within three months becomes employed by a new employer in circumstances where there is a business 'connection' between the two employers and the employee performs the same or substantially similar work for the two employers. The types of 'connection' between the old and new employer that can give rise to a transfer of business are:

[8] *ABCC Sham Contracting Inquiry Report*, 2011, pp24-25

- A transfer of assets between the old employer and the new employer, in accordance with an arrangement between the employers, where the new employer owns or has the beneficial use of tangible or intangible assets owned or used by the old employer;
- Where the old employer outsources work to a new employer;
- Where the new employer ceases to outsource work to the old employer; and
- Where the new employer is an associated entity of the old employer.

Subject to any order of the FWC, if there is a transfer of business, the new employer must observe and comply with any transferring industrial instrument (such as an enterprise agreement) that covered the work performed by transferring employees. Also, generally the new employer must recognise the past service of the employees of the old employer for various entitlements.

Even though a new employer may seek an order from the FWC that the transferring instrument does not apply to the new employer, this process is cumbersome and not aligned with the nature of business transfers which are often commercially sensitive and confidential.

In Ai Group's view, 'temp to perm' arrangements where a worker transitions from on-hire employment to direct employment are not caught by the transfer of business laws. However, there have been a number of inconstant FWC decisions on this issue.

In *Whitehaven Coal Mining Limited* [2010] FWA 1142, Deputy President Sams considered an application by Whitehaven Coal to prevent the transfer of the collective agreement of labour hire firm TESA. Whitehaven decided to directly employ 16 on-hire employees of TESA who had been working within its operations. Whitehaven made the application due to perceived doubt about whether this 'temp to perm' scenario would constitute a transfer of business for the purposes of the FW Act.

In his decision, Sams DP unequivocally held that the arrangement constituted a 'transfer of business':

> *'[12] I have no doubt that the specific requirements referred to above have been satisfied. In particular, there can be no doubt that the employees' employment will be terminated by TESA; they will commence employment with the new employer, Whitehaven, within three months of their terminations; the employees will be performing the same work at the mine they have been working at as they were performing before termination; and, there remains a connection between the old and new employer by virtue of their outsourcing arrangements, which are to continue: see s 311(2) to (6).'*

Similar issues have arisen in at least two other FWC cases.

In *Gausden v Silvan Pty Ltd* [2014] FWC 4337, Commissioner Spencer was required to determine whether a labour hire employee of Davidson Recruitment who was placed with Silvan Pty Ltd, and later directly employed by Silvan, met the minimum period of employment under the unfair dismissal laws. Commissioner Spencer found that there was no connection between Davidson Recruitment and Silvan other than via the labour hire arrangement, and as such, there was no transfer of business.

Despite the decision of Commissioner Spencer in the *Silvan* case, a conflicting decision was handed down by Deputy President Gooley in *Burdziejko v ERGT Australia Pty Ltd* [2015] FWC 2308. In this case, a labour hire employee of Hays was placed with Hays' client ERGT, before being directly employed by ERGT. Gooley DP decided that a transfer of business had occurred and the employee's service with Hays should be included for the purposes of the minimum employment period under the unfair dismissal laws.

After the *Whitehaven* decision was handed down by Sams DP, Ai Group wrote to the then Department of Education, Employment and Workplace Relations (**DEEWR**) (now Department of Employment) seeking its view on whether 'temp to perm' scenarios were intended to be covered by the transfer of business laws. Ai Group's letter included the following typical scenario:

> *'We would appreciate your confirmation that, in the view of DEEWR, a transfer of business would not occur in the following scenario:*
>
> 1. *A labour hire company supplies a group of 10 temporary production workers to a food company;*
>
> 2. *During the placement, the workers are integrated into the production workforce of the food company and they use the food company's tools and equipment;*
>
> 3. *After 3 months the food company decides to hire the 10 workers;*
>
> 4. *The labour hire company is happy to accommodate the client, but consistent with the terms of the standard contract which labour hire companies ask clients to sign, the client is required to pay a recruitment fee to the labour hire company;*
>
> 5. *The fee is paid and the 10 workers resign from, or are terminated by, the labour hire company and employed by the food company.'*

While of course stating that the factual scenario of individual cases would need to be considered, the view expressed by DEEWR on the above typical 'temp to perm' scenario was that such a scenario would not fall within the transfer of business provisions of the Act. The following extract from DEEWR's reply is relevant:

> *'Section 311(3) of the Act provides that the 'asset transfer' connection will be satisfied where there is an arrangement between the old employer and the new employer (or their associated entities) that the new employer owns or has beneficial use of some or all of the tangible or intangible assets that the employer owned or had the beneficial*

use of and that relate to the transferring work.

In this instance, if there is no arrangement between the labour hire company and the client company under which some assets of the labour hire company transfer to the client company, then the section will not apply. Equally, the section will not apply if there is no asset transfer or no employees transfer.

This means that, in your example, the section would not apply if the transferring employees were only using assets of the client company; it requires the client company to own or have the beneficial use of assets which were owned or beneficially used by the labour hire company and there must be an arrangement between the two employers for that asset transfer to occur.

In relation to whether the scenario would give rise to an outsourcing or insourcing arrangement within the meaning of ss.311(4) and (5), our view is that on the information provided to us, the requirements set out under those provisions would not be satisfied. The scenario you describe does not fall within the ordinary and accepted meaning of these words. Specific examples on how these provisions are intended to operate is provided at paragraphs 1224 and 1226 of the Explanatory Memorandum of the Act"

Despite the views expressed by DEEWR, the transfer of business laws should be amended to address this issue and the inconsistent FWC decisions.

It is essential that 'temp to perm' scenarios are not caught by the transfer of business provisions of the FW Act, either as a result of an on-hire firm and client using the same assets (s.311(3)) or due to the concepts of outsourcing or insourcing (ss.311(4) and (5)).

Thousands of companies engage on-hire workers for the purpose of assessing whether or not the workers are suitable for direct employment with the company – particularly where the work is of a specialised nature. Moreover, if an employer is looking to engage more staff due to a change or expansion in its business, on-hire workers are often engaged first until the company has determined its ongoing labour requirements.

The following amendments should be made to s.311(3), (4) and (5) of the FW Act to address the 'temp to perm' issues:

'Transfer of assets from old employer to new employer

(3) There is a connection between the old employer and the new employer if, in accordance with an arrangement between:

(a) the old employer or an associated entity of the old employer; and

(b) the new employer or an associated entity of the new employer;

the new employer, or the associated entity of the new employer, owns ~~or has the beneficial use of~~ some or all of the assets (whether tangible or intangible):

(c) that the old employer, or the associated entity of the old employer, owned ~~or had the beneficial use of~~; and

(d) that relate to, or are used in connection with, the ~~transferring work~~ business or part of the business which has transferred.'

'Old employer outsources ~~work~~ part of its business to new employer

(4) There is a connection between the old employer and the new employer if the ~~transferring work is performed by one or more transferring employees, as employees of the new employer~~, transfer of business has occurred because the old employer, or an associated entity of the old employer, has outsourced ~~the transferring work~~ part of its business to the new employer or an associated entity of the new employer.

New employer ceases to outsource ~~work~~ part of its business to old employer

(5) There is a connection between the old employer and the new employer if:

(a) ~~the transferring~~ work had been performed by one or more transferring employees, as employees of the old employer, because the new employer, or an associated entity of the new employer, had outsourced ~~the transferring work~~ part of its business to the old employer or an associated entity of the old employer; and

(b) the ~~transferring~~ work is performed by those transferring employees, as employees of the new employer, because the new employer, or the associated entity of the new employer, has ceased to outsource ~~the work~~ part of its business to the old employer or the associated entity of the old employer.'

3.9 Work health and safety issues

As outlined in the Background Paper, the *Occupational Health and Safety Act 2004* (Vic) imposes obligations on employers in respect of their employees and contractors, as well as other persons relating to the workplace or the employer's undertaking. The obligations are not as clearly defined as those in the model Work Health and Safety Act (which has been adopted in most Australian jurisdictions), which includes specific obligations for duty holders with overlapping obligations to consult, cooperate and coordinate in relation to health and safety duties.

Guidance developed by WorkSafe Victoria outlines the relevant obligations of host and labour hire agencies, and provides information about how to comply with those obligations.[9] This information has been available, and widely promulgated, since 2006.

Labour hire arrangements should not, in themselves, reduce the safety of workers. In a well-managed labour hire scenario, where both parties understand and meet their obligations, workers will have two organisations focusing on their safety. This should result in an approach where discussions are occurring between the labour hire company and host employer about how best to provide a healthy and safe workplace.

Sophisticated labour hire companies are well-placed to provide support and assistance to smaller organisations into which they place their workers. Many labour hire companies provide training and system support to their hosts, thus increasing the safety of their own workers and, potentially, the permanent employees of the host employer.

The best cooperative systems effectively work together to ensure that all issues are addressed, with responsibility for each clearly allocated to either the labour hire or host organisation, e.g. induction responsibilities that identify what the labour hire company will cover and provide and what the host employer will cover and provide.

Furthermore, significant changes introduced by the model WHS laws over the past few years (since 2011) have assisted in better reflecting the arrangements common to the labour hire industry. With the introduction of the term 'person conducting a business or undertaking' (PCBU), which replaced the term 'employer', suggestions that on-hire workers were the sole responsibility of the labour hire firm have been strongly dispelled. The introduction of the term 'worker' replacing the term 'employee' also recognised and captured a broader scope of employment and contracting relationships.

There is a misguided view that labour hire workers are more vulnerable to safety risks. The client company and labour hire firm are considered to be PCBU's and are therefore both responsible for the safety of labour hire workers.

A series of cases have clarified the legal responsibilities of labour hire companies and client companies. These authorities demonstrate that labour hire companies and host firms have a joint responsibility under WHS legislation to ensure the safety and health of labour hire workers:

[9] Information for labour hire companies:
http://www.worksafe.vic.gov.au/data/assets/pdf_file/0012/10083/labour_hire_managing.pdf
http://www.worksafe.vic.gov.au/data/assets/pdf_file/0011/10082/placing_labour_hire.pdf
http://www.worksafe.vic.gov.au/data/assets/pdf_file/0020/91109/labour_hire_case_study.pdf
Information for host companies:
http://www.worksafe.vic.gov.au/data/assets/pdf_file/0014/10085/managing_labour_hire.pdf

- In *Kelly v Humanis Group Limited* [2014] WADC 43, the Court found that the safety of a worker at a mine site was beyond the labour hire firm's responsibility and extended to the client company.

- In *Inspector McGrath v DMP Container Labour Pty Ltd* [2012] NSWIRComm 40, the Industrial Relations Commission found that the on-hire firm and the host employer had the same obligations to the on-hire workers, whilst the workers were under their management and control. Either party could not delegate their duties or rely solely on the other party to provide a safe working environment. Both the labour hire firm and client company were required to develop, implement and monitor systems of work to meet their obligations.

- In *B v Rand Transport* (1986) Pty Ltd [2013] QDC 172, a truck driver successfully claimed damages from a storage and distribution company for a head injury caused by the a forklift operator whilst unloading a truck, even though the forklift operator was not an employee of the company where the uploading took place.

These WHS legislative changes and cases have already had a significant, positive impact on the labour hire industry.

The focus now should be on educational programs which assist parties to understand their rights and obligations rather than introducing additional regulation in an already heavily regulated area.

3.10 Workers' compensation issues

In relation to labour hire arrangements, the primary workers' compensation obligations are clearly articulated and understood. When an injury occurs, the *Workplace Injury Rehabilitation and Compensation Act 2013(Vic)* (**WIRC Act**) establishes that host employers must cooperate, to the extent that is reasonable, with the activities of a host employer in relation to return to work. Many labour hire companies have arrangements in place to achieve these outcomes.

In relation to independent contractors, WorkSafe Victoria provides clear guidance, and a set of online tests, that can assist employers and contractors to understand whether they are a deemed worker, or not.

An area of ongoing concern in the workers' compensation scheme is the application, by WorkSafe Victoria, of 'third party recoveries'. Section 369 of the WIRC Act (previously s.138 of the Accident Compensation Act) allows WorkSafe Victoria to commence recovery action against a third party that it believes may have contributed to an injury through negligence. It has become common practice for WorkSafe to apply these provisions in relation to labour hire / host employer relationships.

It is Ai Group's view that this has the potential to create 'double dipping' within the scheme. It is recognised that the labour hire company may ultimately receive a reduction in premium due to the recovery, but the host employer will have already paid for that premium through the on-costs paid as part of the commercial arrangement with the labour hire company.

More importantly, it also creates a potential risk that labour hire companies and host employers will be reluctant to openly share information once an incident exists, in fear that it will be used against the host during a third party recovery action. This can reduce the effectiveness of corrective actions that may be agreed between the host employer and labour hire company.

3.11 Labour hire licensing schemes

Ai Group opposes unlawful labour hire practices. In Ai Group's experience, however, the vast majority of labour hire companies are reputable in their employment practices and comply with relevant laws and regulations.

Many established labour hire companies have developed progressive and sophisticated employment practices, and often provide superior wages and conditions. Labour hire companies are subject to the same industrial instruments and employment obligations as other employers.

Given the employment regulations described above, that equally apply to labour hire providers, Ai Group is not convinced of the need for a licensing system to operate in the industry.

Rather, Ai Group supports:

- Greater resources for the Fair Work Ombudsman (**FWO**) to investigate and prosecute illegitimate labour hire businesses that are breaking the law.

- Greater educative resources for labour hire companies, businesses which use labour hire, and labour hire employees. For example, information could be developed to assist businesses which use labour hire to exercise due diligence in their choice of labour hire provider; for instance, information on what questions to ask and what information to obtain from labour hire providers.

In any licensing scheme, the following issues could be particularly problematic:

- The application of a Victorian-based licensing system to labour hire providers operating in more than one State;

- The appropriateness of licensing the provision of managed services; such as maintenance services, IT management services, construction project management services or facilities management, where the provision of such services including labour, is specialised and regularly performed by businesses both inside and outside the labour hire industry (as traditionally understood).

- The appropriateness of a scheme imposed on established and legitimate labour hire services vertically integrated into other company business services that do not involve the supply of labour to third parties.

- Whether the licensing scheme would in fact be effective at targeting a small minority of unscrupulous labour hire providers; or whether the scheme would be further regulation ignored by such providers.

- It would be difficult to achieve any consensus on the criteria for a licensing scheme.

- Unions are likely to press for inappropriate licensing conditions aimed at bolstering union membership and influence.

- The cost of a licensing scheme is likely to be considerable. The imposition of higher costs on labour hire companies and their clients would reduce competitiveness and lead to reduced employment.

3.12 Labour hire industry codes

The Background Paper refers to two industry codes.

The Recruitment and Consulting Services Association's (RCSA's) Code for Professional Conduct has been in place for many years and appears to be playing a constructive role in the labour hire industry.

At this stage, Ai Group is not convinced of the merits of a formal Employment Services Industry Code under the CC Act, as proposed by the RCSA. Our concerns go both to the concept of a formal Code under the CC Act, which would impose onerous obligations on labour hire companies and their clients, and the content of various clauses in the Draft Code that has been released by the RCSA for public consultation. Discussions between Ai Group and the RCSA are continuing regarding this issue.

4. Casual employment

The bogus scourge of 'job insecurity' is being used by the union movement and an array of misguided interest groups to pursue further workplace restrictions on businesses, particularly in relation to casuals. In reality, there is no such problem.

The flexibility to engage casuals is critical for businesses as it assists them to better balance the supply of labour with demand for the businesses' products or services. The availability of casual employment is also critical for many employees who need or want the flexibility that casual employment offers.

The level of casual employment in Australia today is about the same as it was 5 years ago and 10 years ago – about 20 per cent of the workforce. There is no casualisation problem in Australia. The problem is the ongoing attempts by unions and others to limit flexibility for employers and employees.

Casual employees receive a casual loading (typically 25 per cent) to compensate for various entitlements of full-time and part-time employees which they do not receive such as annual leave, personal / carer's leave, etc. Many employees prefer casual employment. It is not a 'second-class' form of employment as the unions allege.

Nowadays it is widely recognised that many casuals work on a long-term, regular and systematic basis and most have no desire to convert to permanent employment. This principle underpins the NES entitlements relating to the right to request and unpaid parental leave, as well as the unfair dismissal laws, which apply to long term casuals who are employed on a regular and systematic basis. This principle also underpins the casual conversion clauses which are found in numerous awards which give employees the right to request to convert to permanent employment with only reasonable refusal allowed by the employer. Despite casual conversion clauses being included in awards since 2000, employer after employer has reported that whenever they give their employees the option to convert to permanent employment almost none (less than one per cent) want to. Casuals do not want to lose their flexibility and/or their casual loading.

Unions often erroneously claim that it is employers who are somehow forcing their employees to become casuals. While it is true that many employers need a mix of casual and permanent employees to provide necessary flexibility, in a large proportion of cases it is the employees who want to be casuals because they like the flexibility and the 25 per cent loading. Many people prefer casual employment as it allows them to participate in the workforce when they would otherwise be unable to, and to better balance work with family responsibilities or study commitments.

There is no 'insecure work' problem in Australia. The problem is the campaign by unions to convince the public that there is a problem so that they can impose a raft of new restrictions on employers.

Ai Group agrees with the following important findings in Chapter 2 of the Productivity Commission's Draft Report on Australia's Workplace Relations Framework:

- The unions' views on non-standard work are overly negative;
- Many people like casual work because it suits their personal circumstances and/or can act as a stepping stone to more secure employment;
- Casual work is now a critical part of the labour market; and
- The increase in employment share of non-standard forms of employment has abated, and to some extent even reversed.

4.1 Defining a 'casual'

Over the years there has been some debate about the definition of a 'casual employee'. A very widely accepted definition is the one inserted into the *Metal, Engineering and Associated Industries Award 1998* in 2001 by a Full Bench of the Australian Industrial Relations Commission (AIRC) in the *Metal Industry Casual Employment Case,*[10] i.e. '[a] casual employee is one engaged and paid as such'. This definition has flowed into numerous other pre-modern and modern awards.

There is no definition of 'casual employee' in the FW Act and the issue of whether an employee is 'casual' may ultimately be determined by a Court.

A broad meaning needs to be given to the term 'casual employee' as held by the Courts in *Bluesuits Pty Ltd t/as Toongabbie Hotel v Graham* (1999) 101 IR 28 and *Community and Public Sector Union v State of Victoria* [2000] FCA 759. In these cases, it was held to be significant that the relevant employee was described as a 'casual employee' and paid a casual loading in lieu of annual leave, personal/carer's leave, public holidays and other benefits associated with permanent employment. In the latter case, the Federal Court noted that 'it is not inconsistent with a casual employment relationship for employees to be engaged on a regular basis pursuant to a roster'.

In *Williams v MacMahon Mining Services Pty Ltd* [2010] FCA 1321 (30 November 2010) Barker J decided that a worker engaged and paid as a casual was entitled to annual leave under the *Workplace Relations Act 1996* (**WR Act**) However, it appears that the relevant mining industry worker was not engaged under an award, enterprise agreement or contract of employment which defined casual employment and had working arrangements which were relatively unusual. The attempts by some unions and others to portray this decision as having wide relevance do not stand up to scrutiny and need to be rejected.

4.2 Casual employment trends

The latest relevant ABS data on 'Forms of Employment' (Nov 2013) show that within the total paid workforce (see **Table 1**):

- The proportion who are permanent employees (employees with paid leave entitlements, regardless of the number of hours they work) has been drifting up slowly over many years. 63.3% of the paid workforce were permanent employees in November 2013, up from 59.6% in 2004 and 60.8% in 1998.

[10] 29 December 2000, Print T4991, Munro J, Polites SDP and Lawson C. In any analysis of the outcomes of this case it is necessary to consider the decision of December 2000 as well as the orders made by the Full Bench in February 2001 as a result of the decision (AW789529, PR901028). After the initial decision was handed down, there were negotiations between Ai Group and the AMWU and a vigorously contested 'settlement of orders' process before the Full Bench which led to some significant changes to the final outcome.

- The proportion who are working on a casual basis (employees with no entitlement to paid leave, regardless of the number of hours they work) has been reasonably stable since 1998 at 19% to 20% of all workers. Indeed, it may have fallen a touch, with an average of 19.3% of workers in casual employment from 2008-2013, versus an average of 20.3% for the period from 1998 to 2007 (albeit with incomplete annual data in these earlier years). The proportion of employees with no leave entitlements peaked at 20.9% in 2007, roughly coinciding with the commencement of GFC-related disruptions in the Australian economy. Casual work then fell to 19.0% in 2012.

There are significant differences in the distribution of employment arrangements across gender and age brackets. As a broad generalisation, ABS data confirm that in 2013, casual workers (that is, employees with no paid leave entitlements) were more likely to be female and aged 15 to 24 years old, while independent contractors and business operators were more likely to be male and in the older age brackets (see **Chart 2**). This distribution is unlikely to have changed since 2013.

Age appears to be more significant than gender in this distribution, although within each age bracket, a higher proportion of women than men are casuals (employees without paid leave) and a higher proportion of men than women are independent contractors or business operators.

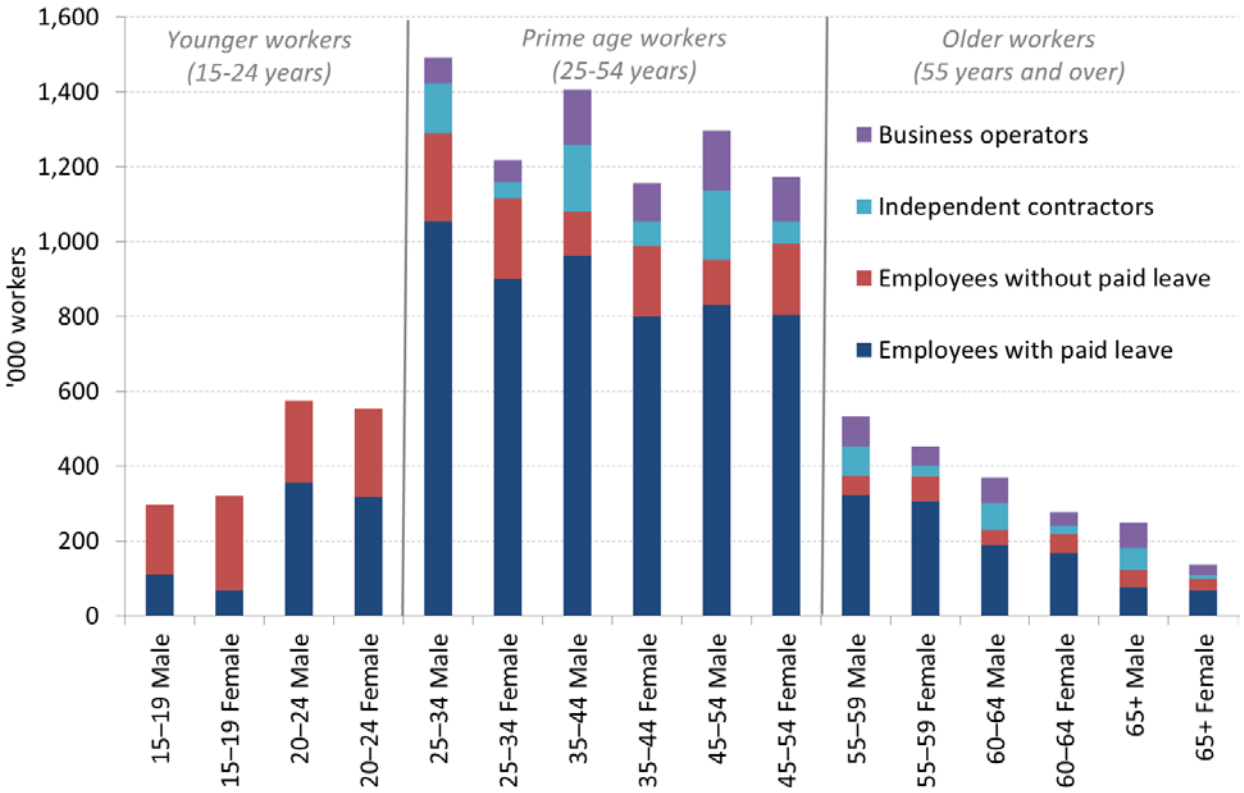
These differences in the demographic distribution of forms of employment reflect the normal progression of individual career paths over a typical life cycle, as well as the gender and age distribution of workers across the economy. For example, more women work in health and retail, which typically employ more part-time and casual workers, while more men work in construction and ICT, which typically employ more independent contractors.

Table 1: Forms of employment in Australia, 1998 to 2013

% of all employed, status in main job	Employees		Non-employee workers			
	With paid leave	Without paid leave	Owner-managers of unincorporated businesses		Owner-managers of incorporated businesses	
			With employees	*Without employees*	*With employees*	*Without employees*
Aug 1998	60.8	20.1	3.5	9.3	4.0	2.2
Nov 2001	60.6	19.9	3.7	8.7	4.6	2.4
Nov 2004	59.6	20.6	3.1	9.6	4.5	2.6
Nov 2006	60.8	20.4	3.0	9.1	4.3	2.3
Nov 2007	60.9	20.9	2.9	8.9	4.1	2.4
			Independent contractors		Business operators	
Nov 2008	61.8	19.1	9.1		10.0	
Nov 2009	61.4	19.8	9.6		9.1	
Nov 2010	61.6	19.3	9.8		9.2	
Nov 2011	62.2	19.3	9.0		9.2	
Nov 2012	63.4	19.0	8.5		9.0	
Nov 2013	63.3	19.4	8.5		8.8	

Source: ABS, Forms of Employment, to Nov 2013

Chart 2: Forms of employment: age and gender distribution (2013)



Source: ABS, *Forms of Employment,* Oct 2013.

Across the major industry groups, there are concentrations of employees, casual workers, contractors and self-employed business operators (see **Table 2**) that clearly reflect the typical operational requirements of each industry.

- Permanent employment (with paid leave entitlements) accounts for very high proportions of employment in mining (88%), utilities (84%), finance and insurance (84%) and public administration (89%). These industries tend to be extremely capital-intensive and concentrated into a small number of very large corporations. Both of these characteristics are likely to limit the opportunities for people to establish themselves as self-employed contractors or business operators. These industries also tend to have relatively low proportions of part-time employees, which might reduce their need to offer the casual work arrangements common to some other industries.

- Casual employment (without paid leave entitlements) is the dominant form of employment in accommodation and food services, with 58% of workers (440,000 people) in the hospitality industry in this form of employment. For women in this industry, 61% are in casual employment (265,000 women). Of these female casuals, 85% (227,000 women) work part-time. This single group – part-time women in hospitality work – account for 18% of all female casual workers and 10% of all casual workers in the Australian workforce. Other industries that have relatively high proportions (and numeric concentrations) of casual workers include retail trade (36%), arts and recreational services (33%) and administrative services (22%).

The occupational profile of people working in various forms of employment largely reflects their occupations (**Chart 3**):

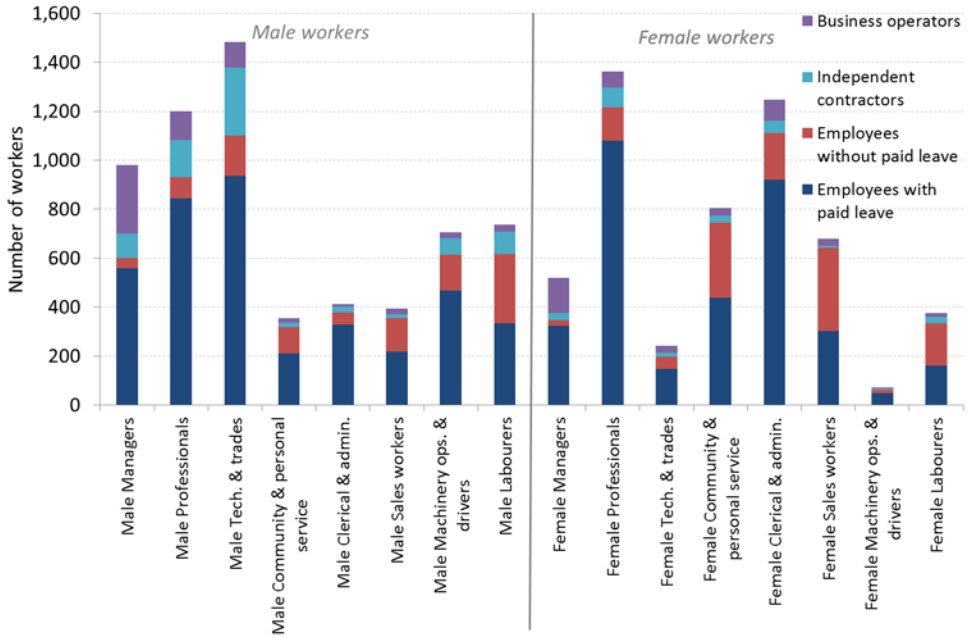
- A higher proportion of casual workers are employed in sales occupations (44% of this occupation and 50% of women in this occupation), labouring (41% of this occupation and 46% of women in this occupation) and community and personal service occupations (35% of this occupation and 38% of women in this occupation).

Table 2: Forms of employment, major industries (2013 & 2014)

Industry (ANZSIC groups)	All employees (May 2014)			Forms of employment (Nov 2013)			
	People	Part-time	Female	Paid leave	No paid leave	Independent contractors	Business operators
	'000	%	%	%	%	%	%
Agriculture	321.4	27.4	28.4	24.3	21.7	7.6	46.3
Mining	264.6	3.5	15.5	87.8	9.3	2.5	0.4
Manufacturing	921.5	14.1	26.7	72.3	14.6	4.4	8.7
Utilities	144.2	9.0	21.3	84.2	11.8	2.7	1.3
Construction	1,029.2	15.5	11.4	48.1	12.7	29.7	9.5
Wholesale trade	385.6	17.1	32.4	73.8	10.5	3.1	12.6
Retail trade	1,228.9	49.1	55.9	53.5	35.9	2.0	8.6
Accomm. & food services	765.2	58.9	54.2	31.6	57.7	1.1	9.6
Transport & post	590.0	19.6	21.9	62.9	18.8	12.9	5.4
IT & telecomms	195.6	21.8	40.5	75.0	12.5	9.2	3.4
Financial & insurance	404.0	17.5	50.3	84.4	5.1	4.8	5.8
Real estate services	229.5	24.3	48.1	62.0	13.9	7.9	16.3
Professional services	937.6	20.6	43.2	61.9	8.7	17.0	12.5
Administrative services	397.1	41.4	52.1	45.4	22.1	21.8	10.6
Public admin. & safety	730.2	17.1	46.5	88.8	9.1	1.4	0.8
Education	902.5	38.1	70.6	75.5	17.2	4.2	3.2
Healthcare & social services	1,392.9	43.9	78.2	73.8	16.9	4.4	4.9
Arts & recreation services	183.5	48.2	46.6	45.9	32.7	14.0	7.4
Personal and other services	506.6	29.7	42.9	58.3	12.1	11.7	17.9
All industries	**11,529.9**	**30.4**	**45.7**	**63.3**	**19.4**	**8.5**	**8.8**

Source: ABS, Forms of Employment, to Nov 2013

Chart 3: Forms of employment, major occupation groups (2013)



Source: ABS, Forms of Employment, to Nov 2013

4.3 Damaging union claims

As part of the FWC's 4 Yearly Review of Awards, the ACTU and its affiliates are pursuing changes to modern awards to impose major restrictions on casual and part-time employment. The case is being heard by a five Member Full Bench of the Commission.

The unions are seeking to:

- Roll-out new mandatory casual conversion provisions in awards;
- Remove an employer's right to reasonably refuse the request of a casual employee to convert to permanent employment;
- Prevent employers from increasing the number of casual or part-time employees without first allowing existing casual or part-time employees to work more hours;
- Increase the minimum engagement period for casual and part-time employees to four hours in modern awards providing for less.

Ai Group is strongly opposing the unions' claims and is playing a leading role in the case to represent the interests of employers.

The patterns of engagement of casual and part-time employees are highly diverse across different industries. Accordingly, a common award standard for such employment is not appropriate.

5. Independent contractors

5.1 Defining an 'independent contractor'

An 'independent contractor' is an individual who performs work under a contract *for* service, rather than under a contract *of* service. That is, an independent contractor is not an employee, but an individual providing services pursuant to a commercial rather than employment relationship.

This distinction is not always clear-cut and can be subject to judicial scrutiny. Despite the uncertainties which sometimes arise, Ai Group strongly supports the retention of the common law approach to defining an independent contractor.

Ai Group was heavily involved in the development of the *Independent Contractors Act 2006* (**IC Act**). The Australian Government accepted Ai Group's submissions that the meaning of 'independent contractor' must be left to the common law to determine.

The common law is far better equipped to assess the substance of particular relationships than any statutory definition of an 'independent contractor' could. Any 'one size fits all' definition of an 'independent contractor' would prevent the facts and circumstances of individual cases being fully considered, and would disrupt a very large number of existing contractual arrangements which are legitimate under common law, to the detriment of all parties to these contracts.

The High Court's decision in *Hollis v Vabu (2001) 207 CLR 21* is relevant when assessing whether an independent contractor relationship exists. This case involved a bicycle courier. The High Court considered whether the courier was an employee or contractor. The Court gave weight to the following factors in concluding that the courier was in fact an employee. The Courier:

- Did not supply skilled labour;
- Had little control over the manner of performance of their work;
- Was required to be at work at a certain time and to work in accordance with a roster;
- Was presented to the public as a representatives of the company;
- Was required to wear a uniform bearing the company's logo;
- Was subject to dress and appearance requirements imposed by the company; and
- There was no scope to bargain with the company with respect to the rate of remuneration.

The above factors lead the Court to conclude that the courier was an employee despite the existence of a written contract headed 'contract for service'. The case of *Hollis v Vabu* demonstrates that irrespective of the contractual intentions of the parties, a relationship of 'independent contractor' must meet the tests set down by the Courts.

The case of *Personnel Contracting Pty Ltd t/a Tricord Personnel v CFMEU* [2004] WASCA 312 handed down by the Western Australian Supreme Court of Appeal emphasised that in analysing the purported contractual relationship, it is necessary to look at the 'totality of its incidence' rather than focusing on one particular test to the exclusion of another.

The definitions used within income tax and superannuation legislation are workable for the purposes to which they are directed, but they would not be workable for the purposes of defining an 'independent contractor' under the IC Act or the FW Act. The vast majority of contractors who are required to be treated in a similar manner to employees for taxation and/or superannuation purposes due to the pattern and type of engagement, are genuine independent contractors.

The vast majority of independent contractors have absolutely no desire to be employees. Some of them predominantly work for one client but it suits them to do so as they receive a regular flow of contracting work.

Tough sham contracting laws are included within the general protections in the FW Act to deal with any arrangements that are not genuine (see section 5.3 below).

Just like their campaigns against casual employment, the unions are attempting to demonise independent contracting arrangements that provide flexibility for the principals and the contractors, and which are valued by both parties. There are few union members in these categories of workers (perhaps the reason why the unions are so focussed upon imposing restrictions upon them).

Ai Group was heavily involved in the Australian Building and Construction Commissioner's (ABCC's) 2011 Sham Contracting Inquiry.[11] In addition to expanded compliance activities, the ABCC relevantly recommended:

- That the ABCC undertake education activities (including in partnership with key industry stakeholders and the ATO) to specifically inform employers and employees in the building and construction industry regarding the appropriate use of ABNs.

- That, in consultation with key industry stakeholders, the ABCC develops a Fair Work Contractor Statement for voluntary distribution to independent contractors prior to engagement. The Contractor Statement would provide contractors with information regarding the common law test for employment as well as the consequences of engagement as a contractor, rather than an employee.

5.2 The prevalence of independent contracting in Australia

The proportion of workers who are self-employed independent contractors declined from 9.1% in 2008 to 8.5% in 2013. The proportion who are business owners declined from 10% in 2008 to 8.8% in 2013. (See **Table 1** in section 4.2 of this submission).

[11] *ABCC Sham Contracting Inquiry Report*, 2011, pp24-25

Independent contractors are concentrated in construction (30% of workers), administrative services (22%) and professional services (17%). Numerically, the single largest groups of independent contractors are male construction workers (293,000 men and 30% of all independent contractors in 2013) and male professional service workers (100,000 men and 10% of all independent contractors). Among women, the largest concentrations of independent contractors are in professional services (49,000 women) and health services (38,000 women). Industries with very low rates of independent contracting include mining, wholesale trade, retail, hospitality, finance, education and healthcare (see **Table 1** in section 4.2 of this submission).

Business operators are most common in agriculture, where they make up 46% of a relatively small national workforce. This reflects the typical ownership structure of small to medium sized farms across Australia. Outside of the agricultural sector, business operators make up a relatively higher proportion of the workforce in real estate services, professional services, administrative services, wholesale trade and 'personal and other services' (which includes for example, hairdressers, car mechanics and other consumer service businesses). Numerically, the largest groups of business operators can be found in professional services (110,000 people) and retail trade (107,000 people). These industries typically have relatively low barriers to entry and low capital requirements.

As set out in **Table 2** in section 4.2 of this submission, a higher proportion of independent contractors are employed in technicians or trades (17% of this occupation), labouring (10%), machinery operators/drivers (10%) and professional occupations (9%).

5.3 Sham contracting laws

Sham contracting provisions were incorporated into the WR Act from 11 December 2006 as a result of the *Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006*. A new Part 22 was inserted into the WR Act prohibiting the following conduct:

- Misrepresenting an employment relationship as an independent contracting arrangement;
- Making false statements to a worker with the intention of persuading or influencing that worker to become an independent contractor, where that person knows the statement to be false or misleading; and
- Dismissing or threatening to dismiss a person where the sole or dominant purpose is to engage the person as an independent contractor to perform the same work.

A very substantial $33,000 maximum penalty applied for breaches of the sham contracting provisions of the WR Act. Importantly, the legislation left the meaning of 'independent contractor' to be determined through the application of the common law tests.

Ai Group supported the legislation in a detailed written submission to the Senate Committee which inquired into the Bill, and in oral submissions at the public hearing.

From 1 July 2009, the sham contracting provisions were incorporated within the General Protections in Part 3-1 of the FW Act. Some changes were made to the provisions in the WR Act to increase protections for workers, including the removal of the 'sole and dominant purpose' test.

The FW Act continued to leave the definition of 'independent contractor' to be determined through the application of the common law tests, and retained the substantial $33,000 maximum penalty for breaches of the sham contracting provisions. This penalty has since increased to $54,000 as a result of an increase in the value of a penalty unit.

In Ai Group's view, the existing sham contracting laws are appropriate and effective, and do not need to be amended.

5.4 Other provisions of the FW Act that protect employees faced with sham contracting arrangements

Apart from the sham contracting provisions, there are various other provisions of the FW Act that provide protection to employees who are faced with sham contracting arrangements and protection to independent contractors.

In addition to the sham contracting provisions, the following provisions of the FW Act protect employees who are faced with sham contracting arrangements:

- Underpayment orders and penalties for breaches of:
    - the NES; and
    - modern awards;
- The unfair dismissal laws;
- A prohibition on coercion in relation to workplace rights (s.343); and
- A prohibition on misrepresentations in relation to workplace rights (s.345).

5.5 Provisions of the FW Act that protect independent contractors

The General Protections in Part 3-1 of the FW Act provide a high level of protection to genuine independent contractors.

A person must not take adverse action against an independent contractor because the contractor: has a workplace right, has or has not exercised a workplace right, or proposes to exercise a workplace right (s.340). A 'workplace right' includes a right given to independent contractors under the FW Act or the IC Act.

The FW Act expressly prohibits the following parties taking adverse action against an independent contractor:

- A principal who has entered into a contract for services with an independent contractor (s.342(1), Item 3);
- A principal proposing to enter into a contract for services with an independent contractor (s.342(1), Item 4); and
- An industrial association (s.342(1), Item 7).

Adverse action includes:

- Terminating a contract;
- Injuring the independent contractor in relation to the terms and conditions of the contract;
- Refusing to engage an independent contractor;
- Discriminating against an independent contractor; and
- Refusing to supply goods to an independent contractor.

5.6 Failed laws must not be reinstated

In considering the appropriateness of the existing laws dealing with independent contractors and sham contracting, it is extremely important that oxygen is not given to failed previous legislative approaches, including:

- The provisions of State industrial relations legislation (e.g. in NSW) which deem certain independent contractors to be employees for various industrial purposes;
- The unfair contracts jurisdiction in NSW which became a *de facto* unfair dismissal jurisdiction for senior managers.

The above State laws no longer apply to most employers as a result of the implementation of the national workplace relations system and IC Act. It is vital that such failed legislative approaches are not reinstated.

5.7 Road Safety Remuneration Act and Tribunal

One specific area where minimum payments and working conditions for independent contractors are the subject of current debate is the proceedings in the Road Safety Remuneration Tribunal (**RSRT**) relating to minimum payments for certain contractor drivers.

The RSRT has published a *Draft Contractor Driver Minimum Payments Road Safety Remuneration Order 2016* (**Draft Minimum Payments RSRO**) and accompanying Statement on minimum payments for contractor drivers. The draft order has an operative date of 1 January 2016 and proceedings in the RSRT are continuing regarding the draft order.

The coverage of the Draft Minimum Payments RSRO is the same as the coverage of the *Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2014* which the Tribunal made in December 2013. The Draft Minimum Payments RSRO would apply to contractor drivers in relation to items destined for sale or hire by a supermarket chain and to long distance operations.

The Draft Minimum Payments RSRO contains separate schedules with minimum payments for contractor drivers engaged in: (1) distribution operations (not including long distance operations); and (2) long distance operations. The Order would effectively require the payment of an hourly rate as well as a 'per kilometer' rate, which would be determined by various factors including the employee's classification, the type of trailer, the class of vehicle and whether it is supplied by the driver.

In addition to the obligations imposed on hirers of contractor drivers, the Draft Minimum Payments RSRO would impose very onerous obligations on supply chain participants regarding the terms of their contractual arrangements, including auditing of other parties in the supply chain.

The *Road Safety Remuneration Act 2012* (**RSR Act**) and the RSRT are imposing anti-competitive arrangements on industry and are distracting Government and industry attention and resources away from the measures which are widely recognised as improving road safety such as: risk identification and control, improved roads, fatigue management, education and training, drug and alcohol policies, use of technology, and strong compliance mechanisms.

The RSR Act and the RSRT should be disbanded without delay.

6. Migrant workers

The FW Act and awards apply to overseas workers working in Australia. In addition, the work rights of working visa holders are protected by the *Migration Act 1958* (**Migration Act**). For example, a 457 visa holder must be paid no less than that of any Australian employee who is performing the same role as the visa holder in the workplace and must not be required to reimburse the work sponsor for the costs relating to being the approved work sponsor, including recruitment and migration agent costs.

Ai Group agrees with the proposition that migrant workers are more vulnerable to breaches of the FW Act than other workers. We also agree that tough penalties should apply to employers who deliberately underpay migrant workers. However, in Ai Group's experience only a small number of employers deliberately underpay migrant workers. The majority of employers are complying with their obligations under the various visa categories and under the FW Act.

Australia has a vigorous enforcement regime for employers that breach the Migration Act or the FW Act. The FWO is tasked with protecting the working rights of visa holders and it actively does.

Given that the vast majority of employers do not underpay migrant workers, it would not be appropriate to impose a more onerous compliance burden on all employers. Any changes should be directed at those employers who deliberately underpay migrant workers.

If the Inquiry concludes that there is a compliance problem in this area, the FWO should be given additional resources for investigation and audits of employers suspected of underpaying migrant workers.

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