Ai GROUP SUBMISSION

Inquiry into Corporate Avoidance of the Fair Work Act 2009

Senate Standing Committee – Education and Employment References Committee

January 2017

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**) welcomes the opportunity to make this submission to the Education and Employment References Committee's (**Committee**) inquiry into the *incidence of, and trends in, corporate avoidance of the Fair Work Act 2009* (**FW Act**).

This inquiry focusses on the incidence of, and trends in, corporate avoidance of the FW Act with particular reference to the use of labour hire, contracting arrangements and workers on visas.

The inquiry also considers employers' use of redundancy, enterprise agreement making, and transfer of business provisions of the FW Act as a means of avoiding FW Act obligations. We emphatically disagree with this notion.

In summary, this submission argues that it is vital that Australia maintains a flexible labour market. The FW Act needs to be amended to increase flexibility, and to boost productivity and competitiveness; not amended to impose even more barriers to productivity and competitiveness.

The terms of reference for this inquiry are framed in a one-sided manner. They focus only on employers and do not address avoidance of the FW Act by unions. For example, the CFMEU has demonstrated widespread disregard for the unlawful industrial action, unlawful coercion and right of entry provisions of the FW Act.

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 further improve Australian living standards.

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 and, particularly in the face of demographic factors, 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 Australia's workplace relations arrangements enable Australian employers to remain agile and in a position to readily adapt to technological changes.

Demographic developments present other challenges. 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.

There are a number of other major economic challenges which Australia is experiencing at this time:

- The strength and extent of the mining investment boom and the now-reversing surge in commodity prices that were such dominant forces over the past decade have changed our economy much more significantly than is often credited. The associated lift in the value of our currency substantially weakened significant parts of the domestic economy. It reduced industry's capacity to invest and innovate and it meant that segments of industry were simply unable to compete. As a result we have lost or are losing some industries (e.g. automotive assembly). Others industries are much weaker. For some supply chains there are now lost capabilities; some of these are irreversible.

- Non-mining sources of growth are thin on the ground.

- Australian industry has quite of bit of recovery to do and many industry sectors remain cash strapped.

- In addition to lost capabilities, our cost structures have also shifted. While wages growth has been relatively low in the past couple of years, for most of the past decade our wages were growing faster than those in other countries. This has left Australian businesses in an uncompetitive cost position. Increased productivity is the key to restoring competitiveness.

- Energy costs have also risen substantially over recent years. What was once a source of comparative advantage has now been negated.

The World Economic Forum's (WEF) Global Competitiveness Index and other data sources indicate that Australia's global competitiveness has slipped in recent years, falling to 22nd in 2014-15 before rising slightly to 21st in 2015-16, from an all-time national best ranking of 15th place in 2009-10. These numbers are the statistical expression of the commonly heard comment from business leaders that "Australia has become a very expensive country in which to make things or to do business" (see **Table 2.1**).

Table 2.1: WEF Global Competitiveness Indexes: Australia's ranking

Year	Overall competitiveness	Flexibility of wages
2007-	19	87
2008-	18	90
2009-	15	75
2010-	16	110
2011-	20	116
2012-	20	123
2013-	21	135
2014-	**22**	**132**
2015-	**21**	**117**

Source: WEF Global Competitiveness Reports

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."

Australian productivity growth rates have been trending lower, in a similar pattern to real GDP growth and other key indicators. At a national level, Australian multifactor productivity has flatlined at best since the turn of this century. And compared to our global competitors, Australia has performed especially poorly, with national multifactor productivity falling by an average of 1.2% p.a. from 2007 to 2011 and by 1.3% in 2012 and 2013, compared with global estimates of an improvement of 0.6% p.a. from 2007 to 2011, 0.2% in 2012 and -0.1% in 2013.[1]

These global and domestic factors mean that Australian businesses need to lift their competitiveness and, in particular, they need to raise productivity.

Maintaining or imposing barriers to competitiveness and productivity adversely impact employers and employees. Employees are of course amongst those worst affected when their employers decide to close plants, relocate, downsize or offshore because the operating environment in Australia imposes too many inflexibilities and other hurdles.

More flexible workplace relations arrangements are essential.

[1] Productivity Commission estimates calculated from the Conference Board Total Economy Database, in PC 2014.

3. Labour hire

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 this inquiry keeps 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.

The labour hire industry has been the subject of inquiries undertaken by the Victorian, Queensland and South Australian Governments. The broad position that Ai Group has expressed in its submissions to the inquiries is:

- 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.
- Changes are needed to the FW Act and to the *Competition and Consumer Act 2010* (**CC Act**) to prevent restrictions being imposed on the engagement of labour hire and other contractors through enterprise agreements or awards.
- Ai Group is not convinced of the need to establish a licensing scheme for 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; and

- 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

Labour hire is a significant form of employment and a longstanding feature of the Australian labour environment, making up about 1-2.5% of the Australian labour market.[2]

The temporary staff services industry in Australia generates annual revenue of about $20 billon, comprising of 6,482 businesses, employing 328,400 workers.[3] 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 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.[4]

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.

In fact, 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.[5]

The Australian Bureau of Statistics (**ABS**), in August 2014[6] 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%).

[2] Victorian Government, *Victorian Inquiry into the Labour Hire Industry and Insecure Work – Final Report*, 31 August 2016, page 67.

[3] IBIS World, *Temporary Staff Services in Australia: Market Research Report*, September 2016.

[4] Shomos, Turner, Will, *Forms of Work in Australia – Productivity Commission Staff Working Paper* (Australian Government, Productivity Commission, April 2013)

[5] Background Paper, *Victorian Inquiry in the Labour Hire Industry and Insecure Work*, October 2015, p.9

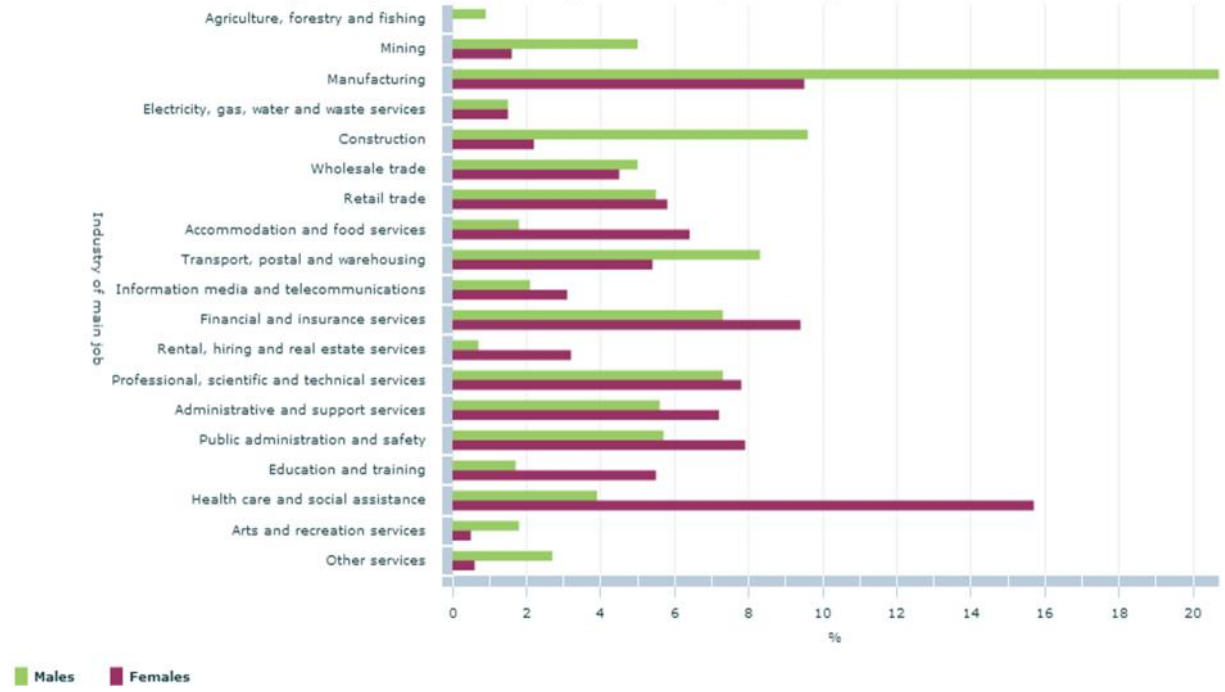
[6] ABS, 6333.0 *Characteristics of Employment,* August 2014

- 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%).

Chart 3.1: 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[7] 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).

[7] Brennan, Valos and Hindle cited in "The Growth of Labour Hire Employment in Australia" Productivity Commission Staff Working Paper, February 2005.

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[8] found that the most common reasons cited by employees using a labour hire firm were:

- ease of obtaining work (71%);
- 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*

[8] ABS, 6105.0 *Australian Labour Market Statistics,* January 2010.

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 *Workplace Relations Act 1996* (**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 2015, the Productivity Commission undertook a review of Australia's Workplace Relations Framework. It Final Report (**PC Final Report**) recommended that the FW Act be amended so that enterprise agreement terms that restrict the engagement of independent contractors and labour hire workers, or regulate the terms of their engagement, become unlawful.[9]

[9] Productivity Commission 2015, *Workplace Relations Framework,* Final Report, Canberra, recommendation 25.2.

The Productivity Commission also recommended that the FW Act be amended to specify that enterprise agreement terms could not restrict an employer's prerogative to choose an employment mix suited to their business — for example by deterring or discouraging the use of casual workers by restricting their hours of work. [10]

Ai Group strongly supports each of these recommendations.

Ai Group has also expressed strong support for the Harper Competition Review recommendation (Rec. 37) that trading restrictions in enterprise agreements be outlawed. The Harper Review Final Report emphasises that 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 Redundancy and the labour hire industry

Many businesses engage labour hire providers to provide workers for a variety of reasons (see above). Corporate restructuring is a legitimate reason for using labour hire services.

Labour hire employers are like any other employer. That is, in the event of redundancy, if entitlements fall due to employees, a labour hire employer is obliged to fulfil those entitlements.

In the event of the liquidation of a labour hire company, its employees (like the employees of any other company facing the same fate) are able to access the Fair Entitlements Guarantee.

Likewise, labour hire employees are protected from unfair dismissal in the same way employees employed in other industries are.

If a labour hire employee is employed for the purpose of a specific period of time or a specific task, the cessation of the period of time or task may result in the worker not becoming entitled to access unfair dismissal or redundancy. This arises merely from the nature of the employee's engagement with his or her employer and not as a result of the employer being a labour hire company. These exemptions have been in place for many years – long before the FW Act came into operation.

3.8 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.

[10] Productivity Commission 2015, *Workplace Relations Framework,* Final Report, Canberra, recommendation 25.2.

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

There is no evidence that the labour hire industry in general exhibits a higher incidence of non-compliance than other industry sectors; and there is nothing inherent in the nature of the industry which makes it more likely that such a higher incidence is inevitable or more likely to emerge if not subject to special regulation.

If there is reliable evidence that some particular operator in the labour hire industry is not complying with statutory obligations, then the relevant law should be enforced, but the same principle applies to any employer, regardless of the industry in which it operates.

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:

- Complexities associated with Federal and State laws and Constitutional powers;

- The problems associated with applying State-based licensing systems to labour hire providers operating in more than one State;

- Managed services (e.g. maintenance services, IT management services, construction project management services or facilities management) often involve the provision of labour. These services are specialised and regularly performed by businesses both inside and outside the labour hire industry.

- Labour hire services are often vertically integrated into other company business services that do not involve the supply of labour to third parties.

- Whether any licensing scheme would be effective in targeting the 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.

- 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.

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

4. Independent contractors

4.1 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 below).

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.

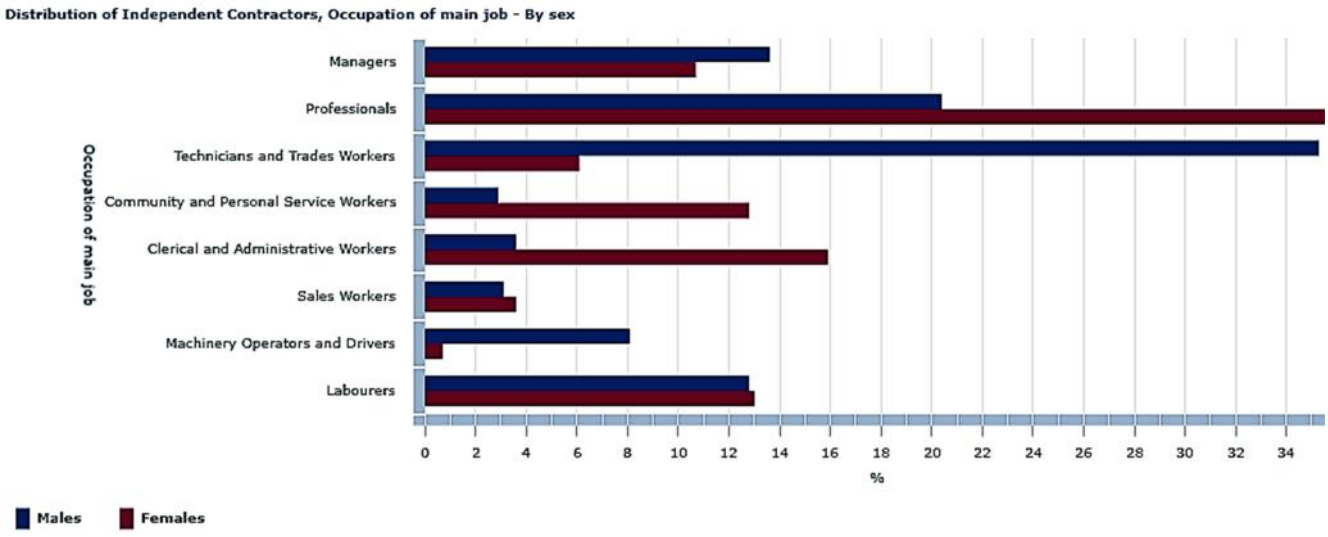
[11] *ABCC Sham Contracting Inquiry Report*, 2011, pp24-25

4.2 The prevalence of independent contracting in Australia

According to the ABS Characteristics of Employment survey reveals that in August 2015, the proportion of workers who are self-employed independent contractors was around 11.3%.[12]

According to the same ABS survey, independent contractors are concentrated in construction (30% of workers) and professional, scientific and technical services industry (17%). Numerically, the single largest groups of independent contractors are male construction workers followed male workers in the professional, scientific and technical services industry. Among women, the largest concentrations of independent contractors are in professional, scientific and technical services and health care and social assistance.[13]

Chart 4.1: Distribution of independent contractors, occupation of main job – by sex



Source(s): Australian Bureau of Statistics, Characteristics of Employment, August 2015

4.3 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

[12] ABS, 6333.0, *Characteristics of Employment,* August 2015.

[13] Ibid.

- 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.

4.4 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).

4.5 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. Enterprise agreements

The terms of reference for the inquiry refer to a few specific issues relating to enterprise agreements, including those discussed in the following sections.

5.1 Enterprise agreements that continue to operate beyond their nominal expiry date

The FW Act allows an enterprise agreement to continue to operate after its nominal expiry date has passed, and until the enterprise agreement is replaced or terminated.

This does not mean that the nominal expiry date is void of any purpose. The nominal expiry date is a time trigger for when the negotiating parties can engage in protected industrial action for a new enterprise agreement.

This allows for the continuation of employment terms and conditions until a new enterprise agreement is made and approved by the FWC and ensures some continuity for the employer and employees covered by the enterprise agreement.

Employers and/or employees may seek to have an enterprise agreement terminated rather than have it continue until a new enterprise agreement is made and approved by the FWC. In cases where both parties agree to the termination of the enterprise agreement, the termination of the enterprise agreement has generally been approved by the FWC without controversy.

However, in circumstances where there has not been agreement between the employer and employees with respect to the termination of an enterprise agreement, the FWC has been less likely to grant the termination request.

In a few cases, the FWC has been prepared to grant applications by employers to terminate enterprise agreements. In each of these cases, the application has had significant merit and termination was appropriate. For example, see the joint judgment of Jessup, Tracey and Reeves JJ of the Federal Court of Australia in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Aurizon Operations Ltd* [2015] FCAFC 126 in upholding a decision of a Full Bench of the FWC to terminate enterprise agreements applicable to Aurizon after their nominal expiry date.

5.2 Voting cohorts to approve agreements

A 'voting cohort' for an enterprise agreement can be characterised as those employees who participated in the vote for the enterprise agreement.

It is uncontroversial that enterprise agreements typically cover persons employed after the approval of the enterprise agreement who fall within the coverage of the agreement.

The FW Act requires that the FWC is satisfied that the group of employees covered by an enterprise agreement at the 'test time' is "fairly chosen" (see section 186(3). In deciding whether the group is fairly chosen, the FWC must take into account whether the group is geographically, operationally or organisationally distinct (see section 186(3A)).

The purpose of section 186(3) of the FW Act is to protect against "unfair" groups being chosen, as discussed in the following extract from the Explanatory Memorandum (**EM**) to the *Fair Work Bill 2008*:

> *"777. It is intended that in assessing whether the group of employees covered by the agreement is fairly chosen, FWA might have regard to matters such as:*
>
> - *the way in which the employer has chosen to organise its enterprise; and*

- *whether it is reasonable for the excluded employees to be covered by the agreement having regard to the nature of the work they perform and the organisational and operational relationship between them and the employees who will be covered by the agreement.*

778. This subclause allows an agreement to cover a group of employees that is constituted in any fair and appropriate way (e.g., all the electricians employed by the employer or employers).

Illustrative example

A single employer operates five organisationally distinct units within its enterprise. The employer makes an agreement with all of the employees in two organisationally distinct units, as well as ten employees who are the only non-union members within from another organisational unit that has a total of 30 employees. FWA is required to decide whether the group of employees covered by the agreement is fairly chosen.

In this example, the group of employees covered by the agreement is likely to be unfair, particularly as the employees were unfairly chosen."

The above extract in the EM is consistent with the decision of the Full Bench of the Commission in *CFMEU v ResCo Training and Labour [2012] FWAFB 8461* (**ResCo**) said:

*"**[33]** In our view the scope of the Agreement is primarily a matter for the parties in the negotiation for an agreement. Enterprise agreements commonly cover sub-groups of employees in the workforce. Indeed it is very rare in our experience that all employees of a private sector employer would be covered by a single enterprise agreement. A common basis for differentiation is employees of a particular occupation or group of occupations that are considered to be sufficiently similar to warrant coverage under one agreement. We caution against the assumption that because an agreement does not cover all employees there are therefore grounds for challenging approval of the agreement on the basis that the coverage is unfair. It is likely that cases involving unfair coverage will not be common. The coverage clauses considered in Cimeco are not present in many agreements with respect to which approval is sought.*

***[34]** Nevertheless as part of the approval process the tribunal needs to be satisfied that the group of employees covered by the agreement is fairly chosen by reference to the other classes of employee who might have been included in the agreement and the various classes who are included. In determining this question the tribunal is required to consider whether the group of employees is geographically, operationally or organisationally distinct. The inclusion or exclusion of a particular group may operate unfairly in one way or another and this will depend on a consideration of all the circumstances.*

***[35]** In most enterprises there is unlikely to be only one fair manner of selecting the class of employees to be covered by an enterprise agreement. Different scope provisions may be*

> *equally described as fair in the sense that no manifest unfairness arises from their application. That is not to say that the parties may have a particular preference or view about the scope and favour a different formulation. The tribunal's task however is not to determine the scope clause. Its task is to guard against unfairness by being satisfied that the group can be described, in all the circumstances, as fairly chosen."*

Further, in *Cimeco Pty Ltd v CFMEU and Others [2012] FWAFB 2206* (**Cimeco**), the Full Bench of the Commission stated:

> *"**[19]** Given the context and the legislative history it can reasonably be assumed that if the group of employees covered by the agreement are geographically, operationally or organisationally distinct then that would be a factor telling in favour of a finding that the group of employees was fairly chosen. Conversely, if the group of employees covered by the agreement was not geographically, operationally or organisationally distinct then that would be a factor telling against a finding that the group was fairly chosen.*
>
> ***[20]** It is important to appreciate that whether or not the group of employees covered by the agreement is geographically, operationally or organisationally distinct is not decisive, rather it is a matter to be given due weight, having regard to all other relevant considerations.*
>
> ***[21]** It is not appropriate to seek to exhaustively identify what might be the other relevant considerations. They will vary from case to case and will need to be demonstrated to the satisfaction of the tribunal. The word 'fairly' suggests that the selection of the group was not arbitrary or discriminatory. For example, selection based upon employee characteristics such as date of employment, age or gender would be unlikely to be fair. Similarly, selection based on criteria which would have the effect of undermining collective bargaining or other legislative objectives would also be unlikely to be fair. It is also appropriate to have regard to the interests of the employer, such as enhancing productivity, and the interests of employees in determining whether the group of employees was fairly chosen ..."*

The 'fairly chosen group test' is a point in time examination. That is, the FWC must be satisfied when approving the enterprise agreement that the employees covered by the agreement at that point in time was fairly chosen. This is appropriate and was the subject of a decision by the Full Federal Court in *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd [2015] FCAFC 16* (**John Holland**). In this case, Buchanan J, with whom Besanko and Barker JJ agreed, stated (at paragraph [64]) that it is not relevant for the purposes of assessing the approval of an enterprise agreement that the FWC know how many employees would, or might, in future be covered or excluded by the enterprise agreement. "*The possibility that the agreement not apply to unknown future employee or unknown future sites did not alter the coverage of agreement …*".

Principles that can be drawn from ResCo, Cimeco and John Holland are:

- The coverage of an enterprise agreement is primarily a matter for the parties to the agreement.

- In most enterprises there is unlikely to be only one fair manner of selecting the class of employees to be covered by an enterprise agreement.
- Different coverage provisions may be equally described as fair in the sense that no manifest unfairness arises from their application.
- It can reasonably be assumed that if the group of employees covered by the agreement is geographically, operationally or organisationally distinct then that would be a factor telling in favour of a finding that the group of employees was fairly chosen but this is not decisive. Rather it is a matter to be given due weight, having regard to all other relevant considerations.
- The word "fairly" suggests that the selection of the group must not be arbitrary or discriminatory.
- The FWC must have regard to the three criteria in s.186(3A) of the FW Act or some other legitimate business related characteristic.
- The FWC must not have regard to extraneous characteristics like whether or not the coverage of the agreement would undermine collective bargaining.

The fact the FW Act enables an enterprise agreement to apply to a broader number of employees than those employees covered by the enterprise agreement at the 'test time' is not a problem.

6. Transfer of business laws and outsourcing

Since the introduction of the FW Act, Ai Group has expressed major concern about the transfer of business provisions in the Act, seeking both substantive changes and important technical amendments. Ai Group has made countless representations on behalf of member companies concerning the transfer of business laws in the FW Act, including lengthy submissions to the FW Act Review Panel in 2012 and the Productivity Commission Inquiry into the Workplace Relations System in 2015. Unfortunately, no positive changes to the laws have yet occurred.

Whilst the stated purpose of the relevant provisions is to ensure employees' wages and conditions are not diminished in circumstances where a business changes hands or restructures its operations, [14] it is our view that the current provisions' emphasis on protecting employee entitlements in fact results in the provisions having the opposite effect because they lead to decreased employment opportunities and increased redundancies for transferring employees as businesses are reluctant to employ them.

These issues are not theoretical; our member companies are expressing continual, strong concerns about the adverse impact of the transfer of business laws on their businesses.

[14] Australian Government 2008, Explanatory Memorandum, Fair Work Bill 2008, p.xxxvii

6.1 The operation of the current transfer of business provisions

Under the FW Act, a 'transfer of business' 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:

- 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.

The transfer of business provisions under the FW Act focus on the similarity of the work being performed by the employees. This is in contrast to the WR Act which focused on the character of the business. As discussed below, the laws need to be amended to reinstate the "character of the business" test.

Subject to any order of the FWC, if there is a transfer of business, the new employer must observe and comply with any "transferable instrument" (typically an enterprise agreement) that covered the work performed by transferring employees. The transferable instrument will cover a transferring employee while they are performing the transferring work until it is terminated, or until a new workplace instrument commences that covers the transferring employee. In addition, the instrument may apply to new employees if there is no existing modern award or enterprise agreement that covers them.

The FWC can, on application, make orders relating to the application of transferable instruments including the following:

- An order that a transferable instrument will or will not cover the new employer and its employees;
- An order that an enterprise agreement or other transferable instrument that covers the new employer will or will not cover transferring and non-transferring employees who perform or are likely to perform the transferring work; and
- An order varying a transferable instrument to remove or amend terms that will not be capable of meaningful operation in the new employer's business or to remove ambiguity or uncertainty as so how a term in the instrument applies.

6.2 Problems with the current transfer of business provisions

The transfer of business laws are operating against the interests of both employers and employees. The laws result in a lose-lose-lose scenario when operations are outsourced. Client companies lose because they need to make employees redundant when outsourcing occurs. Companies who take on outsourced work lose because they cannot access the valuable skills possessed by their clients' employees. Employees lose because their jobs disappear along with their continuity of service for long service leave and other entitlements.

The transfer of business laws expose companies involved in outsourcing to transferable instruments becoming binding upon their operations for both transferring employees and non-transferring employees. Accordingly, the laws often result in outsourced service providers making every effort to avoid employing any employees of their clients.

Industrial instruments are typically focused on the industry and the type of business for which they were specifically developed. Consequently, the notion that an employer in one industry can easily adopt an industrial instrument from another industry is flawed. This notion, however, is the default position in the FW Act in relation to transfer of business.

The current transfer of business laws are:

- Impeding the restructuring of Australian businesses and hence impeding productivity and competitiveness;
- Increasing redundancies and removing employment opportunities for many Australian workers;
- Discouraging organisations which win outsourcing contracts from employing any of their clients' workers and, hence, many of these workers are made redundant by the client;
- Constraining opportunities for companies in the business of providing outsourced services (e.g. ICT companies);
- Deterring companies that wish to outsource functions from doing so and consequently opportunities for productivity improvement are lost;
- Driving work and jobs offshore;
- Restricting employee career progression and redeployment opportunities within corporate groups; and
- Imposing multiple and inconsistent employment conditions on employers resulting in higher costs, more red tape and reduced productivity, efficiency and staff morale.

The PC's Final Report from its inquiry into the Workplace Relations Framework considered some of these issues. Noting that existing employees facing a potential transfer will generally be better off (or at least not worse off) if they are able to retain their employment than in the absence of the transfer of business provisions, the Report stated:

> "*The transfer of business provisions create several potentially high frictions for labour mobility (and associated with that, the mobility of physical capital, since the two are often interdependent).*
>
> *A new employer may face significant costs even if it agrees to employ some or all of the transferring employees. For instance:*
>
> - *unit labour costs may be higher*
> - *an employer may have to operate multiple payroll systems*
> - *the period of service of an employee is carried over from the previous employer, with effects on entitlements and the application of unfair dismissal provisions*
> - *productivity may be lower if the employment arrangements for the transferring employees are only partly compatible with the operating environment of the new enterprise. For example, the incompatibilities may impose restrictions on the nature of, and way in which tasks can be performed, scheduling, rostering and leave*
> - *differences in the conditions of employees undertaking the same work may create conflict*
> - *differences in the nominal expiry date of the agreements can also lead to multiple agreement negotiations which will add to costs."*[15]

The PC Report went on to note that the transfer of business provisions may discourage "*the reallocation of employees within an entity*"[16] and "*new employers from recuperating a failing business or even more generally, business acquisitions*."[17]

Ultimately, the Report noted that these factors can "*lead to higher unemployment, inefficient utilization of capital, and adverse outcomes for creditors and for customers. In the worst of circumstances, a well-intentioned regulation may create losers all around*."[18]

These problems have arisen due to the flawed design of the transfer of business laws.

A number of specific 'transfer of business problems' are set out below.

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[15] Productivity Commission Inquiry into Workplace Relations Framework Report, 2015, Volume 2, pp.832-833

[16] Ibid at p. 833

[17] Ibid

[18] Ibid at p.834

a) Similarity of work test v the former character of the business test

The current "similarity of work" concept under the FW Act is unworkable, impracticable and unfair on employers and employees as it gives no weight to whether a business which takes over outsourced work has the same character as the one which outsourced the work. Industrial instruments are very much focused on the industry and the type of business for which they were specifically developed. Consequently, the notion that an employer in one industry can easily adopt an industrial instrument from another industry is flawed.

The transfer of business laws in the FW Act reinstated the concepts which caused so many difficulties for industry in the late 1990s and early 2000s, prior to the following High Court and Full Federal Court decisions which resulted in settled, fair and productive laws:

- In *PP Consultants Pty Ltd v FSU* [2000] HCA 59 the High Court devised a 'character of the business test' to determine whether a transmission of business had occurred. The High Court said that it was necessary to characterise the business (or relevant part of the business) of the outgoing employer, and to then identify the character of the business as carried on by the new employer. Only if the two are the same was there a transmission of business.

- In *Stellar Call Centres v CPSU* [2001] 103 IR 220, the Full Federal Court had to decide whether a group of call centres which were outsourced by Telstra were subject to Telstra's certified agreements by virtue of there being a transmission of business. The Court found that Telstra's business and Stellar's business were not of the same character and hence the certified agreements did not transmit.

- The High Court's decision in *Gribbles Radiation v HSU* [2005] HCA 9 established some further principles which applied when a business was transmitted, including the requirement that tangible assets or intangible assets (e.g. goodwill) needed to transfer from the old employer to the new employer for the transmission of business provisions to apply.

The transfer of business provisions in the FW Act were undoubtedly designed to extinguish the previous settled, fair and productive law, and impose the ill-conceived 'similarity of work' approach which was rejected by the High Court and Full Federal Court.

b) Transfers between associated entities

The transfer of business laws operate as a major disincentive to transferring employees between associated entities.

Many companies are part of a broader corporate group and these groups often have a variety of employing entities. Employees often seek redeployment to different parts of their employer's business to, for example, obtain the opportunity for a promotion or an assignment overseas, to gain skills, or to work with different technologies. Australia's workforce is increasingly mobile both locally and globally. Under the transfer of business laws, employees who seek redeployment to another entity within the group risk having the opportunity stymied because any enterprise agreement

applicable to the employee's employment with the original entity would become binding upon the other entity creating potentially widespread consequences for the business.

This problem would be addressed if the transfer of business laws did not apply when employees on their own initiative seek to transfer to a related entity of their current employer. Amending the laws in this manner was recommended during the 2012 post-implementation review of the FW Act and was the subject of the *Fair Work Amendment Bill 2014,* although this proposed legislative amendment failed to pass both Houses of Parliament.

The PC Report recommends that the FW Act be amended such that when employees, on their own initiative, seek to transfer to a related entity of their current employer, they will be subject to the terms and conditions of employment provided by the new employer.[19]

c) FWC orders regarding the application of transferable instruments

The FWC has the power under section 318 of the FW Act to make an order that the transferable instrument not cover the new employer. The Commission also has the power under section 320 to vary transferable instruments to ensure that they operate in an appropriate way for the new employer.

However, despite these mechanisms being available, the process is cumbersome and not aligned with the nature of business transfers where confidentiality issues arise. Furthermore, in many instances these orders are not being sought by employers because of the costs, uncertainties and risks involved. Given this, the easier approach for a new employer is often not to employ any employees of the old employer.

Where these orders are being sought, in most cases they are only being granted where the new employer, the employees and the relevant union(s) have supported the order being issued. Where there has been union opposition, applications for orders have often been rejected.

In this regard, the PC Report noted that whilst there are a range of factors that the FWC is required to consider under the FW Act in deciding on the merits of an application regarding whether or how a transferable instrument should apply, in practice the views on the affected employees and whether they would be disadvantaged in any way seem to be given the most weight.[20]

The Report went on to say:

> *"Protecting the terms and conditions of employment of transferring employees can be important, but it should not occur in all circumstances, given the previously discussed risks for employment, efficient structural adjustment and productivity. Prima facie, the FWC should more frequently order changes to, or relaxation of, transfer of business arrangements,*

[19] Productivity Commission Inquiry into Workplace Relations Framework Report, 2015, Volume 2, pp. 841-843, recommendation 26.4

[20] Ibid at pp. 837-838

where the cost to the employee of exempting them or varying a transferable instrument yields greater (yet possibly more diffuse) benefits to the broader community.[21]

There is also the problem of 'conditional employment offers.' Given the adverse consequences for many businesses of transferable instruments becoming binding on them in respect of transferring employees and other employees, it is in everyone's interests to allow applications to be made and orders granted in circumstances where an employer's decision to employ the transferring employees is conditional on an order being granted under s.318. However, FWC decisions by single members in recent times suggest that a new employer cannot make an offer of employment conditional on the FWC granting a s.318 order providing that a transferable instrument does not cover the new employer and transferring employees.[22]

To solve the above problem, the PC Report recommended that part 2-8 of the FW Act be amended to make it clear that a new employer can make an offer of employment to an employee of the old employer conditional on the FWC granting an order under s.318 that the employee's employment arrangement would not transfer to the new employer."[23]

d) Application of transferable instruments to new, non-transferring employees of the old employer

If a transferrable instrument starts to cover the new employer and the new employer employs new employee/s to perform the transferring work, and no other enterprise agreement or modern award covers the employer in relation to that work, then the transferable instrument covers the new employee/s (s.314 of the FW Act).

Section 314 operates very unfairly to new employers and needs to be repealed. This provision is particularly problematic for professional services providers and other businesses which employ award-free staff under common law employment contracts.

e) Transfers of business between state and national system employers

There is a particularly high threat of job losses when transfers of business occur between State Government entities and national system employers in the private sector. This is because the industrial instruments that apply to State Government entities are often more generous and less flexible than the conditions of employment offered by private sector employers.

The FW Act provisions dealing with transfer of business from State Government entities to national system employers were introduced in 2012 via the *Fair Work Amendment (Transfer of Business) Act 2012*. In 2014, Ai Group made a detailed submission to the Federal Government's Post-Implementation Review of the *Fair Work Amendment (Transfer of Business) Act 2012* which urged

[21] Ibid at p.838

[22] See for example *Lend Lease Engineering Pty Ltd and others* [2014] FWC 5499 (15 August 2015)

[23] Productivity Commission Inquiry into Workplace Relations Framework Report, 2015, Volume 2, p.840, recommendation 26.2

the Government to repeal the legislation given its damaging effects. To date, however, the legislation has not been repealed.

The PC Report also considered this issue in some detail.[24]

6.3 Improving the transfer of business provisions

The transfer of business provisions need to strike a better balance between the provisions' stated object of providing a balance between protecting employees' terms and conditions of employment under enterprise agreements, certain modern awards and certain other instruments; and the interests of employers in running their businesses efficiently.[25]

As the PC Report found,[26] the current provisions seek to protect businesses from structuring their affairs to avoid their prior contractual obligations to employees at the expense of protecting the frustration of legitimate business restructuring and employment opportunities. The result is that many transferring employees are ultimately not offered employment with the new employer upon a transfer of business which is ultimately not in the public interest and not in the interests of the employees affected.

As well as some of the recommendations already mentioned, the PC Report recommended that the object of Part 2-8 of the FW Act should be amended to give greater weight to opportunities for continuing employment in transfer of business cases.[27]

7. Workers on visas

The debate regarding the alleged abuse of the rights of workers in Australia under the migration program has focused unfairly on the relatively few employers who do not meet their obligations.

In our 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. Increased monitoring of compliance has not shown any evidence that there is a greater level of non-compliance than the low levels we have assumed.

Employers engage workers on visas to fill skill shortages in Australia, thereby enabling Australian employers to improve productivity. Many businesses rely on the ability to respond to increase in demand by sourcing otherwise scarce skilled labour through the temporary skilled worker program.

Workers on visas are protected by the *fair work system* and have access to the FWO. Furthermore, it is necessary to note that overseas workers engaged on 457 visas are generally paid more than their industry average earnings and can cost employers more than local employees.

[24] Ibid at pp. 844-845

[25] Section 309 *Fair Work Act 2009*

[26] Productivity Commission Inquiry into Workplace Relations Framework Report, 2015, Volume 2, p.827

[27] Ibid at p. 93, recommendation 26.1

Australia has a rigorous enforcement regime for employers who abuse workers under the migration regime with the FWO tasked with protecting the working rights of such employees. The FWO actively and successfully ensures that any companies who deliberately underpay migrant workers are sanctioned appropriately.

7.1 The need to engage workers on visas

Skill shortages in key growth industries including mining services, engineering, education and health services are being exacerbated by structural changes across the Australian economy, as well as the deepening demographic impacts of our ageing population and workforce. Around 10% of all Australian employees are now aged 60 or over and 18% are aged 55 or over. And the current population 'bulge' in these age brackets means there are fewer young people ready for these professional roles as the baby boomers retire.

Skills shortages are visible across the major growth sectors of the economy and especially in the construction sector. During the six months to September 2016, 40.0% of construction businesses in Ai Group's half-yearly Construction Outlook survey reported major or moderate difficulty in recruiting skilled labour. Sourcing sub-contractors was also a major or moderate difficulty for 44.4% of construction businesses in the survey.

The skills shortages situation is even more serious in relation to occupations requiring science, technology, engineering and mathematics (**STEM**) skills. Ai Group's 2015 Report 'Lifting our Science, Technology, Engineering and Mathematics (STEM) Skills' reveals a shortage of technicians and trade workers (41%), professional (26.6%) and managers (26.3%). This is deeply concerning, particularly given that the Office of the Chief Scientist has reported that 75% of the fastest growing occupations require STEM skills and knowledge.

The Australian Workforce and Productivity Agency (AWPA) has estimated that Australia will be 2.8 million short of the number of higher-skilled qualifications that industry will need by 2025. To be able to meet this need domestically, Australia will need to increase the provision of STEM-related higher skilled qualifications by 3% every year until 2025.

Given the above, it is evident that companies in Australia need to engage workers on visas to fill skill shortages. We simply do not have the right people, with the right skills in the right places to do the jobs that our industries need and we will need to rely on the immigration program and various working visa categories to help underpin our economic performance for the foreseeable future.

Companies also need to engage overseas workers to improve productivity. To remain viable and competitive, companies need to be able to respond rapidly to new technologies and innovations that improve their productivity and flexibility in the workplace is crucial to this process. By giving companies the flexibility to respond to economic needs through the ability to source otherwise scarce skilled labour, the temporary skilled worker program provides enormous benefits across the economy.

A strong migration program is also necessary in order to support positive growth in our population and especially in our adult workforce, due to relatively low rates of natural population growth and our ageing population, which is pushing long-term trend rates in workforce participation lower. This is especially so, given that the Department of Employment (Industry Employment Projections, March 2016) estimates that by November 2020, Australia will need 989,700 (or 8.3%) additional workers than were employed in 2015.

7.2 Temporary Work (Skilled) visa (subclass 457)

The Temporary Work (Skilled) visa (subclass 457) enables an employer to 'sponsor' a skilled worker to enter and work within Australia for a temporary period of up to four years. Strict eligibility criteria apply to both the employee and the employer (the sponsor).

Department of Immigration data shows that the number of primary subclass 457 visas granted annual has declined every year since 2012-2013. In 2015-2016, 45,395 primary subclass 457 visas were granted. In addition, 40,216 'secondary' subclass 457 visas were granted to accompanying dependents who met the relevant eligibility criteria. As dependents, many of this group would not have been working.

Across all industries, primary 457 visas granted in 2015-2016 made up less than 0.4% of the total workforce. They comprised a sizeable share of the workforce only in the ICT sector (3.5% of all ICT industry workers).

Recent Department of Immigration data indicates that primary 457 visa holders are working in the industries and occupations that report the highest incidences of skill shortages and special needs. In 2015-2016, 55% of primary 457 visas were for professional occupations (in IT, business, health, engineering and education), 23% were for technicians or trades (mainly chefs and cooks plus smaller numbers of mechanical, electrical, engineering and construction trades) and 17% for managerial roles. These three high-skill occupational levels accounted for 95% of primary 457 visas granted in 2015-2016, indicating that the 457 visas are being used to fill high-skill jobs and specialist positions, as intended.

In terms of remuneration, a comparison between average full-time adult earnings across the economy (using the ABS' AWOTE data series) and the remuneration of 457 visa holders reported to the Department of Immigration indicates that on average 457 visa holders are paid more than their industry average earnings. On average, the average salary for all 457 visas granted for in 2015-2016 ($88,500) was well above the average for all Australian workers ($77,132). The average base salary paid to 457 visa holders was above the industry's average weekly earnings for all industries except ICT. (See Table 7.1).

This data confirms that 457 visa employment is not a cheap option for employers and can cost more than employing a local. It confirms that on average, 457 visa holders are paid MORE, not less than, their local counterparts. On this basis, it is difficult to justify any proposition that companies are employing workers on visas to avoid their workplace relations obligations. In the vast majority of cases, employers will only go down the 457 path when they have exhausted local options.

Table 7.1: primary 457 visas granted in 2015-2016, top industries and occupations categories

Top industries and occupation levels	Total industry employment (May 2016)		Primary 457 visas granted, 2015-16		
	Number '000	AWOTE $ per year*	number	% of industry	Average base salary, $ per year
ICT, Media & Telecomms.	198.7	$93,938	6,880	3.46	$81,100
Professional services	1,009.8	$90,802	6,490	0.64	$95,100
Hospitality (food & accomm)	843.5	$55,630	5,510	0.65	$58,000
Health Care	1,534.3	$74,927	4,810	0.31	$91,500
Construction	1,075.1	$78,151	3,000	0.28	$90,800
Education & Training	929.3	$85,311	2,333	0.25	$88,600
Manufacturing	883.5	$70,918	2,070	0.23	$90,900
Financial & Insurance	435.6	$94,791	1,690	0.39	$122,300
Retail trade	1,251.1	$57,975	1,650	0.13	$82,800
Mining	221.7	$135,060	1,090	0.49	$171,400
Managers	1,534.9	-	7,790	0.51	$120,000
Professionals	2,739.0	-	25,080	0.92	$89,500
Technicians and trades	1,661.6	-	10,400	0.63	$66,700
ALL INDUSTRIES	**11,939.3**	**$77,132**	**45,395**	**0.38**	**$88,500**

* Average weekly ordinary time earnings (AWOTE) per week in private sector industries, multiplied by 52 weeks. May 2016.

7.3 Working holiday (417 and 462) visa holders

Australia's Working Holiday Maker program comprises the Working Holiday (subclass 417) and the Work and Holiday (subclass 462) visas. The 417 visa, which is uncapped, currently enables people aged 18-31 years of age from 19 eligible nations and regions an opportunity to holiday and work in Australia for one year, with the option to extend their stay for a second year by undertaking 88 days of 'specified work' in regional Australia. The 462 visa has a cap on the number of visas granted annually and is available to 20 nations and regions.

Department of Immigration data shows that the number of working holiday visas peaked at 178,982 people in 2013. As at 30 September 2016 there were 138,030 Working Holiday Maker visa holders in Australia, representing a decrease of 4.4 per cent when compared with 144,450 on 30 September 2016.[28]

No detail is published about the employment locations and experiences of this group of temporary visitors and Ai Group does not have additional information about employment trends or characteristics for this group of temporary visitors. We understand that working holiday-makers are not commonly utilized to fill professional or skilled vacancies, due to the conditions of their visas and to the age and skill base of this group. However, we note that the 'second year' option was introduced a decade ago in part to address identified labour shortages in regional areas of Australia.

It is important to note that regardless of the much broader entry requirements which apply to this visa category, these overseas workers still maintain the same strong protections of Australian workplace law (discussed below). Employers who do not provide the legally required pay and conditions to which these workers are entitled should and do face appropriate legal penalties.

Furthermore, in recent years, a number of changes have been made to the working holiday visa program to ensure visa holders who take up employment are paid appropriately and are not exploited. Significantly, since 1 December 2015 there has been an obligation for 417 visa holders to be paid for the performance of any specified work. This includes a requirement for visa holders to provide the Department of Immigration and Border Protection with evidence that the specified work undertaken was paid, including by providing pay slips disclosing that the pay meets minimum entitlements employees in Australia are entitled to receive.

In 2016, the Government announced changes to the taxation arrangements for the 417 program to take effect from 2017. These changes set the tax rate applying to working holiday makers at 19 per cent on earnings up to $37,000 and require employers of 417 visa holders to undertake a 'once off' registration with the Australian Taxation Office with an increased tax rate for employers who fail to do so.[29]

[28] Department of Immigration and Border Protection, *Temporary entrants and New Zealand citizens in Australia Report*, as at 30 September 2016, p.10. Available at: https://www.border.gov.au/ReportsandPublications/Documents/statistics/br0169-30-sept-2016.pdf

[29] See: http://sjm.ministers.treasury.gov.au/media-release/104-2016/

In October 2016, the Minster for Employment, the Hon Michaelia Cash, also announced the formation of a new Migrant Worker Taskforce which will seek to identify proposals for improvements in law, law enforcement or other practical measures to prevent and deal with migrant worker exploitation.

The above measures will further ensure that companies are not engaging workers on visas to avoid their obligations under the FW Act.

7.4 Sanctions for abuse of employed visa holders

The FW Act and awards apply to overseas workers working in Australia in the same way that they apply to Australian workers. 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 receive pay 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.

The FWO is tasked with protecting the working rights of working visa holders and it actively does. Further, legislative changes in 2013 expanded the FWO's role with respect to the monitoring of the working terms and conditions of 457 visa holders. As a result of these changes all Fair Work Inspectors were also appointed as Migration Inspectors under the Migration Act.

Using these powers, the FWO assessed 463 entities employing 752 temporary skilled work visa holders in the year 2015-2016 and referred 107 entities to the Department of Immigration and Boarder Protection with respect to concerns that these entities were not meeting their wage or position obligations to 138 workers.[30] Further, in 2015-2016, the FWO received 1,894 requests for assistance from visa holders (13% of the total requests received) and was responsible for recovering $3,087,133 in underpayments for this group.[31]

This recent activity by the FWO with respect to the enforcement of the terms and conditions of working visa holders suggests that the system is working. The relevant enforcement bodies, such as the FWO and the Department of Immigration and Boarder Protection are effective with enforcing the law and taking action against those employers breaching the law.

In addition to this recent activity by enforcement agencies the Migration Act was further amended in 2013 by the *Migration Amendment (Reform of Employer Sanctions) Act 2013* which increased the sanctions, including implementing no-fault civil penalties and increasing criminal penalties, against employers who allow unlawful non-citizens to work or lawful non-citizens to work in breach of a visa condition that restricts or prohibits work.

[30] See: https://www.fairwork.gov.au/ArticleDocuments/710/fair-work-ombudsman-annual-report-2015-16.pdf.aspx.

[31] Ibid

It is clear that Australia has a vigorous enforcement regime for employers that breach the Migration Act and the relevant Fair Work laws with respect to the employment of visa holders, including 457 visa holders.

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.