

## **Submission to ABCC inquiry into Sham Arrangements and the use of Labour Hire in the Building and Construction Industry.**

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I am a Senior Lecturer in the Deakin Graduate School of Business, Deakin University with expertise in labour hire employment. I have researched labour hire employment, and industrial relations in the building and construction industry, over many years. I co-authored a widely cited publication on Odco-type arrangements in the Australian building industry back in the early 1990s, and have completed a doctorate on the occupational health and safety and return to work implications of labour hire employment (in 2008). I have published many articles and book chapters in Australia and overseas on labour hire employment as well as industrial relations in the building industry (refer list of related publications).

My doctorate included an analysis of injuries experienced by labour hire employees in Victoria based upon WorkSafe Victoria's workers' compensation claims data base, a sample of comparable labour hire and direct hire workers' compensation claims which had been subject to investigation by claims agents, and a survey and focus groups of labour hire workers. Although my research covered labour hire workers from a variety of industries, building and construction workers made up 20% of both my sample of investigated workers' compensation claims, and focus group and survey respondents. Last year I conducted research (with Prof. Michael Quinlan, University of New South Wales) for the Queensland Government on developing strategies to improve the safe placement of labour hire workers. That research involved focus groups throughout Queensland which were attended by 62 labour hire and host employers. Participants supplied labour to a range of industries, including building and construction.

I have addressed a number of the questions raised in the *Discussion Paper on Sham Arrangements and the use of Labour Hire in the Building and Construction Industry* based upon my research findings. I do not provide detailed answers to these questions; rather I have noted some key points which are detailed further in my research publications.

## **'Employee' vs 'contractor'**

### **Should economically dependent contractors be treated differently to independent contractors? If so, how?**

This question has been discussed before the ILO,<sup>1</sup> and the Senate enquiry into independent contracting and labour hire employment.<sup>2</sup> To the extent that economically dependent contractors are in reality employees without employment protections, yes, they should be treated differently from independent contractors. The ABCC Discussion paper refers to the recommendations of the report of the Senate enquiry but appears to have overlooked the dissenting report of that enquiry. The definition recommended by the dissenting report offers an alternative approach which would close some of the gap in protections experienced by economically dependent contractors.

## **Labour hire arrangements**

### **To what extent are labour hire arrangements essential to the efficient functioning of the building and construction industry?**

The Discussion Paper (pp.28-29) lists the benefits of labour hire employment in the building and construction industry as including accessing a large supply of suitable labour to meet peaks and troughs and short-term business needs, having greater control over the amount of time employers choose to employ workers, and the like.

Many of the benefits identified in the discussion paper accrue predominantly from labour hire employers' practices of hiring workers on a casual basis, and being able to hire and dismiss according to the demands of the host employers. This approach offers short-term efficiencies to employers, but there are long term costs to the industry, and on-going costs to employees.

Few labour hire employers invest in the skills of the industry; most hire already qualified tradespersons and do not invest in apprenticeship or post-apprenticeship training. The long term efficiency of the industry requires an on-going investment in apprentices and skill development.

### **To what extent are the general concerns about some aspects of labour hire practices evident in the context of the building and construction industry? How can such concerns be addressed?**

Labour hire employees are more at risk of injury than direct hire employees, and appear to be more severely injured. A number of factors contribute to their greater risk of injury, including a lack of and/or poor training in basic OHS by labour employers and hosts; a lack of and/or poor workplace specific OHS training by host employers; inadequate supervision by

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<sup>1</sup> ILO (2006). *Report of the Committee on the Employment Relationship*. Geneva, International Labour Office, International Labour Conference 95<sup>th</sup> Session, Report V (1).

<sup>2</sup> Parliament of the Commonwealth of Australia. 2005. *Making it work: Inquiry into independent contracting and labour hire arrangements* House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation. Canberra: Commonwealth of Australia.

host employers; and a mismatch between the qualifications, skills, experience and physical capabilities of the worker and the tasks which they are placed to perform. Consequently, labour hire workers are more likely to be injured early in a placement compared to comparable new direct hire employees. The risks associated with poorly matched and untrained placements spill over to direct hire workers when labour hire workers have insufficient knowledge or skills to perform tasks safely. Whilst short-term efficiencies may flow from meeting the changing demand for workers at short notice, the other side of the coin are risks associated with fast response rates. Labour hire employers are under pressure to place workers quickly or lose the host client to another labour hire employer. Consequently training needs and the like are overlooked and workers are placed with a greater risk of injury.<sup>3</sup>

Labour hire workers' injuries are more severe, in part, because they are reluctant to report minor injuries for fear of job loss. They work with injuries, often until they are unable to work at all. Once they have lodged a workers' compensation claim, they are more likely to be dismissed than direct hire employees. Hosts are unwilling to take back labour hire workers on light or modified duties; and labour hire employers advise workers that no placements are available, effectively dismissing them because they have or have been injured.

In addition, hold harmless clauses, where hosts require labour hire employers to bear the hosts' costs for breaches of OHS obligations, distort the punitive intent of OHS legislation and enable hosts to pay less regard to OHS. These clauses are prohibited in Victoria, but are said to be proliferating in Queensland and are increasingly a requirement of preferred contractor status.<sup>4</sup>

My research has shown that labour hire workers in Victoria are predominantly located in high risk industries, of which construction is one. The factors contributing to their higher injury rate noted above would be expected to be more pronounced in the building industry because it is inherently a higher risk industry. Otherwise, academic research into labour hire in the building industry is scant, with only one study in Australia by Iaccone<sup>5</sup> having looked specifically at building and construction. Iaccone published a case analysis which detailed the ways in which labour hire workers are especially at risk in the building and construction industry. Amongst his findings were that hosts in the Victorian construction industry drew upon agency workers to perform "dirty, arduous and dangerous" (p. 65) tasks because they "do not feel comfortable offering it to their own personnel. Instead, they call in temporary labourers to do this work – men who they have no affinity with and who can be asked to leave on completion of the work" (p. 65).

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<sup>3</sup> Underhill, E. (2008) *Double Jeopardy: Occupational injury and rehabilitation of temporary agency workers*, PhD thesis, University of New South Wales, Sydney; Underhill, E. and Quinlan, M. (2011) 'Developing an explanation of how precarious employment affects occupational health and safety: Evidence from a study of temporary agency workers', paper submitted to *Relations Industrielle*, journal published by Department of Industrial Relations, Faculty of Social Sciences, Laval University, Québec, Canada.

<sup>4</sup> Underhill, E. and Quinlan, M. (2010) *Strategies for improving the safe placement of labour hire workers*, Report prepared for the Queensland Division of Workplace Health and Safety, Deakin University, Melbourne.

<sup>5</sup> Iaccone, D. (2006). Power and labour hire in the Victorian construction industry. *Journal of Occupational Health and Safety Australia and New Zealand*, 22(1), 61-72.

Other on-going concerns arise from impediments to labour hire employees' workplace voice with respect to occupational health and safety and workplace grievances; from the barriers to union membership and collective negotiations; and lower wages paid to labour hire workers. My survey and focus group analysis shows that problems go unresolved and labour hire workers risk their employment by raising concerns. Under these circumstances, the development of preventative OHS actions is undermined, and the likelihood of evasion of other employment entitlements in the industry is enhanced.

**How can these concerns be addressed? How could the ABCC assist all stakeholders in the building and construction industry to ensure that labour hire practices are both fair and efficient?**

Many of the concerns noted above, particularly the propensity for labour hire employers to ignore statutory obligations, stem from the highly competitive and unregulated nature of the labour hire industry. Those labour hire companies which comply with statutory obligations are continually exposed to unfair competition from those who do not comply. The Victorian enquiry into labour hire employment, the dissenting report of the Senate enquiry into independent contracting and labour hire employment, and the ILO convention on temporary agency employment all recommend the introduction of a licensing system to support minimum commercial standards and facilitate and enhance the enforcement activities of agencies concerned with labour hire employment. Registration/licensing can also facilitate the distribution of information and education amongst labour hire employers. The research conducted by Professor Quinlan and I of labour hire and host employers in Queensland in 2010 also found strong support for such an approach.

Quinlan and I also found that labour hire employers who developed longer term relationships with host employers were better positioned to ensure their employees were placed safely with hosts. Longer term relationships contribute to labour hire employers developing an indepth knowledge of the needs of hosts, and of the parties jointly developing more effective approaches to preventative OHS.

The ABCC could assist stakeholders by advocating the licensing or registration of labour hire employers operating in the Australian building and construction industry as a requirement under the National Code of Practice for the Construction Industry.

The Code could prohibit the use of hold harmless clauses. The Code could also support longer term relationships between labour hire employers and hosts, such as requiring contractors to develop preferred supplier relationships with those labour hire employers that comply with minimum OHS and employment statutory requirements. As many of the OHS risks and vulnerabilities of labour hire employees are underpinned by casual employment, the Code could also be used to require labour hire employers to maintain a substantial core of permanent employees.

These actions would improve labour hire practices without unduly removing flexible access to temporary agency workers by host employers.

**Is the concept of joint employment worthy of further exploration in the context of the building and construction industry?**

There are strong grounds for considering the concept of joint employment in the building and construction industry. My research has found that host employers have substantial influence over the terms and conditions of employment of labour hire workers, especially in relation to rates of pay and dismissals, without bearing legal responsibility for these practices. This is discussed more fully in my article 'Should host employers have greater responsibility for temporary agency workers' employment rights?' *Asia-Pacific Journal of Human Resources* (2010: 48, 3). and will not be expanded further here.

**Do businesses use their bargaining power to induce the other party to enter into independent contracting and labour hire arrangements instead of traditional employer-employee relationships? If so, to what extent does this occur in the building and construction industry?**

My research found that the majority of labour hire employees, both surveyed and who participated in focus groups, were employed in labour hire because they had no choice. It was not their preferred mode of engagement because of the lack of employment security; unpredictable earnings; lack of control over when and where they worked; lack of workplace voice; having to accept unsafe placements; hostilities experienced from direct hire employees; and a lack of investment in their skills by their employer and the host.

The perception by workers that they have no choice but to work under labour hire arrangements is not only a function of broader labour market conditions. It is an outcome of jobs which have traditionally being available through direct hire employment now only being available through labour hire employment. It is a function of the expansion of the labour hire sector.

As noted above, my research included but was not limited to the building and construction industry.

**Are there any factors other those discussed in 7.2 and 7.3 above, that influence decisions to enter into contracting or labour hire arrangements in preference to the traditional employer- employee relationship?**

Sections 7.2 and 7.3 understate the importance of reductions in workers' compensation premiums and the potential savings from hold harmless clauses which provide a further incentive to hosts entering into labour hire arrangements.

**Concerns about sham contracting and labour hire arrangements: evasion by employers of responsibilities owed to employees and others:**

**Do businesses enter into contracting and labour hire arrangements to avoid obligations to employees?**

Reasons for entering into contracting and labour hire arrangements are diverse. However, smaller labour hire companies appear more likely to offer such a benefit to host employers. An exception to this is small niche labour hire companies who offer specialised skills.

**If so, what responsibilities do businesses seek to evade?**

**To the worker?**

My research has shown that there is a strong perception amongst labour hire employees that hosts use labour hire arrangements to avoid minimum pay and conditions applicable to their own direct hire workers, and to avoid unionisation. Hosts also avoid the application of unfair dismissal legislation and return to work post-injury requirements. Hosts continue to share OHS responsibilities (ie. they cannot evade them), but have shown a propensity to not comply with their OHS statutory obligations.

**What is the effect of evasion by employers in the building and construction industry?**

Non-compliance with statutory obligations results in OHS problems continuing without resolution; there is also a spillover of risks onto direct hire employees. In this way, the overall standard of OHS is reduced at host workplaces.

Research has not been undertaken on the effects of evasion by employers specifically in the building and construction industry, however the evasion of OHS and minimum employment obligations more generally contributes to a lowering of standards and the development of a culture of non-compliance.

**How do the pay and conditions workers receive under labour hire arrangements compare with those received by direct employees?**

Whilst some labour hire employers in Australia offer the same rates of pay as that paid to host employees, they do not offer similar conditions such as access to training and development. Also, as a premium is paid by the host to the labour hire employer for all hours worked, it is unlikely that wage levels would be matched. A range of international studies have found labour hire workers are paid less than comparable direct hire employees, and receive substantially fewer employment benefits.<sup>6</sup> In Australia, Watson<sup>7</sup>, analysing HILDA data, found that either the base rate of pay for labour hire workers was less than that which applied to comparable direct hire workers, or labour hire employees were

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<sup>6</sup> Organisation for Economic Co-operation and Development [OECD]. (2002). *OECD Employment Outlook*. Paris: Organisation for Economic Co-operation and Development.

<sup>7</sup> Watson, I. (2004) *Contented casuals in inferior jobs? Reassessing casual employment in Australia*. Sydney: University of Sydney, Australian Centre for Industrial Relations Research and Teaching, ACIRRT Working Paper 94.

not receiving their full casual loading. In 2004, a decision of the Australian Industrial Relations Commission that labour hire employees receive the same rate as host employees resulted in pay increases of 20-30% for labour hire workers,<sup>8</sup> demonstrating the disparities that arise in pay between labour hire and comparable direct hire workers. Furthermore, in my research, focus group participants with trade qualifications spoke of being paid the base rate for tradepersons, irrespective of additional qualifications which they had obtained.

No research has been undertaken specifically in the building and construction industry on wage levels of labour hire employees vis-à-vis comparable direct hire workers.

### **Do workers enter into contracting and labour hire arrangements to obtain tax benefits?**

There is no evidence that employees become labour hire employees to obtain tax benefits. Such benefits only arise when labour hire workers become independent contractors of the labour hire agency. As noted above, the majority of labour hire employees whom I have accessed through my research do not enter labour hire arrangements by choice and tax benefits are not a consideration.

### **To conclude**

Whilst some labour hire companies take their employment responsibilities seriously, there are aspects of labour hire employment which pose serious risks to the employment rights and well-being of workers (both labour hire and their direct hire co-workers). They also pose risks to the long term efficiency of an industry in which trade qualified work is important. The ABCC could take positive steps to alleviate these risks by working towards amending the National Code of Practice for Construction to require the registration of labour hire companies, to require evidence that labour hire companies and hosts have met all of their legal obligations with respect to employment and OHS (including OHS representation and union membership), to encourage longer term more stable relations between labour hire employers and hosts, to encourage labour hire employers to hire workers on a permanent basis, and to prohibit the use of hold harmless clauses.

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<sup>8</sup> Australian Air Express Pty Ltd v Transport Workers' Union of Australia PR954467 2004 AIRC 1303, 20 December 2004, Transcript, 7 December 2004: 175-176.

## Related Publications

### A. Refereed Journal Articles

Underhill, E. (2010) 'Should host employers have greater responsibility for temporary agency workers' employment rights?' *Asia-Pacific Journal of Human Resources* 48 (3):338-355.

Underhill, E and Rimmer M. (2009) 'State protection for temporary agency workers: Australian Developments', *Modernization of labour law and industrial relations in a comparative perspective*, Kluwer Law International, Alphen aan den Rijn, The Netherlands, pp.173-192.

Underhill, E. (2006) 'Labour hire employment and independent contracting in Australia: Two inquiries, how much change?' *Australian Journal of Labour Law*, 19: 306-314.

Underhill, E. (2005) 'Winners or losers? Work/life Balance and Temporary Agency Workers', *Labour and Industry*, 16 (2): 29-59.

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Underhill, E., and Kelly, D., (1993) 'Eliminating Traditional Employment: Troubleshooters Available's Activities in the Building and Meat Industries' *Journal of Industrial Relations*, 35 (3): 398-423.

### B. Book Chapters

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### **C. Refereed Conference Proceedings**

Underhill, E. (2007) 'Temporary agency workers and the contribution of workplace unfamiliarity to workplace injuries' in Rasmussen, E. (Ed.) *Proceedings of the 21st AIRAANZ Conference*, University of Auckland & Association of Industrial Relations Academics of Australia and New Zealand, Auckland.

Underhill, E. (2006) "We only supply fully fit workers to suit our clients' need' - Injured labour hire workers and their return to work experience' In Pocock, B., Provis, C. and Willis, E. (Eds.) *21st Century Work: High Road or Low Road?* Proceedings of the 20th Conference of AIRAANZ (Vol.1, pp. 533-542), Adelaide: Association of Industrial Relations Academics of Australia and New Zealand.

Underhill, E. (2005) 'The importance of having a say: Labour hire employees' workplace voice' In M. Baird, R. Cooper & M. Westcott (Eds.), *Reworking Work AIRAANZ 05* (Vol. 1, pp. 527-536). University of Sydney: Association of Industrial Relations Academics of Australia and New Zealand.

Underhill, E. (2003) 'New Employment, new risks: An Exploratory Study of Workplace Injuries Amongst Victorian Group Apprentices', in Department of Management (eds.) *Reflections and New Directions*, Proceedings of the 2003 AIRAANZ Conference, Monash University, Melbourne.

### **D. Commissioned Reports**

Underhill, E. and Quinlan, M. (2010) *Strategies for improving the safe placement of labour hire workers*, Department of Justice and Attorney General, Queensland Government.

Underhill, E. (2002) *Extending Knowledge on Occupational Health & Safety and Labour Hire Employment: A Literature Review and Analysis of Victorian Worker's Compensation Claims*. WorkSafe Victoria, <http://www.workcover.vic.gov.au>

Underhill, E., Worland, D., and Fitzpatrick (1997) *Self-Employment in the Victorian Building and Construction Industry*, Report commissioned by Incolink, the Victorian Building Industry Redundancy Fund, Melbourne.

Underhill, E., Worland, D., and Morris, A. (1996) *Assessing Sick-leave Patterns in the Victorian Building and Construction Industry*, Report commissioned by Incolink, the Victorian Building Industry Redundancy Fund, Melbourne.