About United Voice

United Voice is a union of workers organising to win better jobs, stronger communities, a fairer society and a sustainable future. Our members work in a diverse range of industries including aged care, early childhood education and care, cleaning, hospitality, healthcare, security, emergency services and manufacturing.

United Voice members works in industries characterised by insecure and low paid work, and are frequently employed by labour hire companies or sham contractors. Our members are disproportionately impacted by employer avoidance the Fair Work Act 2009 (‘the Act’) and the practices addresses by this inquiry’s terms of reference.
Introduction

This inquiry comes at important time for Australia’s lowest paid workers, as more and more cases come to light demonstrating how our industrial relations laws are failing Australian workers. United Voice believes an inquiry into some of the most serious problems in our industrial relations and labour market regulations is long overdue.

United Voice has sought to comment on a number of the terms of reference outlined for this inquiry, with a focus on the issues surrounding labour hire, in addition to some of the wider issues around precarious employment, worker exploitation and the undermining by employers of worker rights.

We recognise there are broader policy issues that relate to the effectiveness of the Act that are beyond the scope of this inquiry. Elsewhere, United Voice has advocated for an improved safety net, and has over many years drawn attention to the limitations of bargaining to address the position of the low paid.

We remain committed to working constructively with government, employers and stakeholders to advance the matters concerning this Inquiry, and more broadly, to address stronger protection and a fairer safety net for Australian workers.

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Jo-anne Schofield
National Secretary
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Executive Summary

This submission addresses a number of the inquiry’s terms of reference relating to the use of labour hire and other contracting workforce issues and the flaws in the industrial system that allow for the exploitation of workers engaged under these sort of arrangements.

While the primary focus of this submission is on labour hire, we emphasise that the experience of workers engaged under labour hire, contracting and sub-contracting arrangements is often interchangeable. The growth of employment in these markets has resulted in an increase in the exploitation of vulnerable workers, where legal obligations are often unmet and attempts at compliance are ignored or evaded. As a result workers are left insecure and exploited. In many industries, particularly in contracting sectors, this results in a race to the bottom as businesses are forced to compete for work at lower and lower standards.

Contracting and labour hire is no longer used as a temporary supplement to permanent work and is now often used as the permanent workforce, replacing permanent directly engaged employees. The cost competitiveness of these models in comparison with more conventional forms of employment relates to their ability to avoid the usual costs of employment.

The manner in which labour hire firms operate is problematic and there is widespread corporate avoidance of the Act by labour hire. United Voice does not suggest that all labour hire or contracting operators are unscrupulous, but it is clear there are systemic issues which warrant this inquiry. There is also an urgent need for reform. It should not be cheaper to contract out a workforce including via labour hire than to directly employ a worker to perform the same job. At the very least, there should be a ‘level playing field’.

Our experience has seen employers exhibit behaviours on a spectrum that can be characterised as ranging from compliant with the Act, questionable, illegal and in some cases criminal. All these behaviours are generally in aid of avoiding or reducing the legal and industrial costs associated with employment so as to make the provision of labour by labour hire companies more competitive. Questionable legal and industrial behaviour becomes acceptable due to competitive pressures.

Furthermore, there are a number of weaknesses in the Australian industrial relations system that unscrupulous employers use to exploit vulnerable workers, especially those on temporary work visas. Addressing many of these weaknesses would have the broader effect of protecting workers from forms of corporate avoidance of the Act not covered by the terms of reference to this Inquiry.

As we outline in this submission, there are a number of discrete practical reforms that are needed. These go to clearer rights and protections for workers to collectively bargain and to take collective action as part of agreement making.

United Voice has made 11 recommendations for reform. These reforms are based on the following principles:

- equality of treatment of all workers doing similar work irrespective of the legal basis of their employment;
- a level playing field across all forms of employment that ensures all employers comply with the industrial system and that one type of employer is not able to avoid costs associated with employment that others cannot; and
- the right of employees to take collective action must be protected and recognised.

These reforms would have the effect of strengthening protections against unfair and exploitative practices.

Rising inequality is a clear consequence of the Government’s failure to address growing exploitation associated with labour hire, sham contracting and similar deregulated employment arrangements. Corporate avoidance of our industrial legislation exacerbates that inequality. For this reason, action along the lines proposed in this submission is vital to ensuring a fair, just and equal society.
Summary of Recommendations

Recommendation 1

The Government should create a national licensing scheme covering labour hire and subcontracting operators. Such a scheme should include the capacity to undertake audits regarding compliance with employment standards, taxation and superannuation payments; and to investigate allegations of breaches and impose penalties. It should also include a ‘fit and proper’ persons test for all operators and directors.

Recommendation 2

An agreement should not be approved if approval of the agreement would undermine the capacity of workers to engage in collective bargaining. In considering whether approval of an agreement would undermine collective bargaining, the Fair Work Commission should be asked to consider the size of the cohort that made the agreement, whether or not the employees who made the agreement are representative of the workforce, whether they were represented by an employee organisation during bargaining and whether or not the employees who voted and approved the agreement were paid in accordance with the minimum terms and conditions of the agreement.

Recommendation 3

The minimum voting cohort required to make an enterprise agreement should be increased to 10 employees.

Recommendation 4

The Committee should review the transfer of business provisions in the United Kingdom and New Zealand with a view to the expanding the Act’s provisions based on these standards applying wherever there is change of contract, contracting out, or a business is sold.

Recommendation 5

The words ‘except where this is due to the ordinary and customary turnover of labour’ should be deleted from section 119 of the Act to provide a universal entitlement to redundancy payments for all employees, including employees of labour hire firms.

Recommendation 6

Consideration should be given to the creation of a civil penalty provision of being involved in an unfair dismissal in terms of section 550 of the Act. The offence should deal with the situation where a finding has been made that an employee has been unfairly dismissed and there is substantial involvement in the termination by a third party.

Recommendation 7

There should be greater scrutiny on the use of Australian Business Numbers (ABNs) in industries where sham contracting is prevalent, including the contract cleaning industry. Employers should be prohibited from engaging visa holders under ABNs in sectors where their use has been found to contribute to avoidance of legal employment obligations and exploitation.
Recommendation 8

The Independent Contractors Act 2006 (Cth) should be amended to include a statutory definition that would make it easier for parties to identify the genuine status of employment and that includes a statutory presumption in favour of an employment relationship.

In determining employment status, the Act should ensure a person is a worker within a business that takes the benefit of the worker’s labour (“the employer”) if the person meets two or more of the following indicators:

- the person is subject to the control of the employer in relation to how the work is performed;
- the person usually works for the one employer and only that employer;
- the person is treated as, or portrayed to others as, part of the employer’s organization;
- the person performs work that is the same as or similar to that performed by others who are treated as regular employees by the employer;
- the person has regularly worked for the employer over a three month period; and
- the person uses equipment or other facilities needed to perform the work provided by the employer (other than the usual tools of trade) and the person does not engage in entrepreneurial activities characteristic of the conduct of a business in relation to the work provided to the employer. Typically, those characteristics will include exposure to financial risk, the provision of a commercial service (and not merely labour) to a range of customers, the capacity to sell the business including its goodwill and the capacity to delegate the performance of the work to others.

Recommendation 9

The Government should work with unions, migrant and community organisations and employers in a tripartite way to address growing exploitation of migrant workers. This should extend to:

- recognising the role of unions in providing protection and advice to workers;
- bolstering freedom of association provisions and ensuring that all workers are informed of their industrial rights; and
- severing the nexus between a migrant worker’s visa status and their employer.

Recommendation 10

The Government should enact a protective rather than a punitive approach to regulating migrant labour. This should include the fundamental principle and expectation that exploitation should not result in deportation. In suspected cases of exploitation:

- a rights-based approach should be taken by government – one that recognises the vulnerabilities of migrant workers to exploitation and puts in place mechanisms for protection against and rectification of exploitation;
- workers on temporary work visas should be granted the right to remain and work in Australia pending the resolution of their claims for underpayment and/or other instances of exploitation regardless of a visa condition breach having occurred in the context of the exploitation alleged to have occurred;
- a communication firewall should be enacted in such a way that the FWO is not required to report visa breaches to the DIBP that could result in the unduly precipitated departure of a visa worker;
- migrant workers should be eligible for all the same worker protections as residents and citizens when an employer defaults on their obligations, namely access to the Fair Entitlements Guarantee (FEG) scheme.

Recommendation 11

Section 226 should be amended to require the Commission to expedite the consideration of any agreement that would at the time of application not pass the better off overall test under section 193. If an employee covered by the agreement would be better off overall if the relevant modern award applied to the employee rather than the agreement, the agreement should be terminated.
Labour Hire

The Fair Work Act 2009 (‘the Act’) does not differentiate between labour hire and direct employment. The Act maintains the paradigm that construes the employment relationship as one defined by a closed bilateral relationship between the employee and the employer and does not acknowledge practical differences between labour hire-type employment relationships and the more conventional direct engagement of an employee by an employer.

The Act’s failure to acknowledge that labour hire represents a departure from the traditional employer/employee relationship permits a user of labour hire to effectively insulate themselves from many of the responsibilities that normally attach to running a workplace.

In labour hire employment arrangements there is a triangular relationship. The labour hire firm has an employment relationship with the employee and a contractual relationship with the host (also referred to in this submission as the ‘employer’, or ‘enterprise’) to provide the employee that performs work for the host’s benefit. The employee will have no direct legal relationship with the host despite the fact that the employee is performing work for their benefit in the host’s workplace and is often under the direct control of the host.

All employees are intended to be covered by the Act’s National Employment Standards (‘NES’) and the law generally. The NES makes no allowance for the different status of an employee engaged via a labour hire arrangement as opposed to an employee that is directly engaged.

For example, a large retailer may be cleaned regularly by cleaners, engaged by a labour hire firm, who are being underpaid or exploited, but ultimately the retailer bears no responsibility for those employees – or that exploitation. In the pursuit of profits and with little to no accountability under the legislation, the retailer can continue to engage low cost firms that engage in dubious behavior – as there are limited or no consequences to the decision to contract with a labour hire provider that will almost certainly be contravening industrial law.

Some real life examples of such behavior are outlined in response to the terms of reference, below. These case studies are generally not exceptional or unusual. A common feature of the conduct of labour hire is that in the absence of competent representation by a union, there is no incentive for the employer or beneficiary of the worker’s labour (‘the host’) to seek to comply with the letter or spirit of the law.

There are no specific provisions in federal industrial law that are directed to labour hire and the system can be properly characterised as unregulated. There are a number of steps the Government could take steps to limit the growing incidence of exploitative work practices arising from the use of labour hire and subcontracting. A national labour hire licensing scheme would be a good starting point to address some of the more unscrupulous behaviours.

The adoption of a licensing scheme would require any company supplying labour hire or subcontracting to another party to register for a license and meet set requirements to achieve and maintain this license. Requirements could include the following, which United Voice recommended in the establishment of the Victorian labour hire registration scheme:

a. Payment of a bond and annual license fee to the Australian Government to operate a labour hire or subcontracting company, as occurs in Victoria.
b. Threshold capital requirement to operate a labour hire or subcontracting company in Australia.
c. Core requirements for license holders and related parties that include:
   i. set requirements for the nature of the license;
   ii. a fit and proper persons test for persons operating in the industry;
   iii. on-going minimum capital requirements;
   iv. requirements for the compliance with workplace laws: and
   v. requirements for the provision of annual reports.
d. A dedicated compliance unit.
e. Mandatory OHS, workplace rights and entitlements training.
Such a scheme would ensure those operating labour hire and subcontracting companies have the capacity, and incentive, to meet their legal requirements. A national licensing system would provide a way to maintain basic standards, deter and identify rogue operators and a way for hosts that want to use reputable operators an ability to easily identify labour hire firms that are doing the right thing.

**Recommendation 1**

The Government should create a national licensing scheme covering labour hire and subcontracting operators. Such a scheme should include the capacity to undertake audits regarding compliance with employment standards, taxation and superannuation payments; and to investigate allegations of breaches and impose penalties. It should also include a ‘fit and proper’ persons test for all operators and directors.

Other reforms need to be made to the system to ensure that labour hire operators meet their legal obligations. These will be touched on throughout this submission in relation to the relevant term of reference.

**The use of labour hire and/or contracting arrangements that affect workers’ pay and conditions**

We address term of reference (a) of the Committee’s terms of reference here.

Contracting out of labour has the general effect of reducing workers’ pay and conditions. This reduces the pay and conditions of those engaged through these arrangements and also the pay and conditions generally in sectors where there is significant use of a contracted or labour hire workforce. This is done through a variety of mechanisms.

Many of the avoidance behaviours noted in this submission would not occur where there is an ongoing relationship between the employer and employee. By distorting the legal relationship of employment, labour hire is able to profit from the avoidance of industrial standards.

In the industries which employ United Voice members contracting and labour hire is used precisely because it is prepared to avoid loadings and penalties in contravention of the award and also avoids costs associated with redundancy, and by not ‘owning’ employees avoids more systemic costs associated with service such as long service leave and the health costs associated with an established permanent workforce.
Case study 1: Academy Services

Academy Services Pty Ltd is a company supplying cleaning services to premises mainly in the Adelaide Central Business District. Academy Services is based in Adelaide but operates interstate.

Academy Services has made a collective agreement with United Voice: the Academy Services and LHMU Cleanstart Union Collective Agreement 2008 (‘the Cleanstart Agreement’).

Academy Services has a long history of non-compliance and questionable practices, evidenced by numerous interventions by United Voice’s South Australian branch. The company’s business model involves both the direct employment of employees, and the engagement of entities it regards as “franchisees”.

These franchisees are paid a flat rate per hour of about $28 per hour. They are required to have Australian Business Numbers (‘ABNs’) and engage other persons to perform the work allocated to them, or to part perform that work. The franchisees typically do not provide holiday pay, sick leave or any other employment related entitlements. They are required to provide their own insurance. The franchisees sign contracts identifying them as franchisees with a series of formal terms consistent with a franchise arrangement. The hourly rate is above the base rate of the Cleanstart Agreement and the Cleaning Services Award 2010, but the work the franchisees typically undertake is at times when loadings or penalty rate would be required to be paid.

Despite the pretence that the cleaning work is being performed by an independent contractor, the hours of work, and their work duties, are dictated by Academy Services. Franchisees are required to perform work exclusively for Academy Services. Academy Services provides all the equipment and materials required for the work. Payments are made periodically in a similar pattern as wages and not on invoices submitted per job.

The franchisees do not engage with building owners or occupiers. This is done exclusively by Academy Services. Academy Services controls all records pertaining to the work done by the franchisees. While franchisees engage employees, Academy Services retained the right to terminate the individual workers ‘employment’ with the franchisee.

The success of Academy Services’ business model is that it has its own employees working during non-penalty periods, and the franchisees work during penalty periods. The flat fee it pays franchisees is above the base rate that should apply but well below the more significant penalty rates at which the work should be paid.

To date, the Fair Work Ombudsman has failed to intervene. United Voice has taken cases against Academy Services and has ongoing litigation against Academy Services in the Federal Court.

Academy Services' conduct highlights several key issues in relation to labour hire in the cleaning industry. First, cleaning is an industry where labour hire predominates, very few cleaners are directly engaged by the owners of the workplaces that they clean and maintain. Change of contract and turnover of the work force is a regular feature of the sector. The Cleanstart Agreements are an attempt to provide some security of employment in an industry where contracts change frequently; however, these provisions are often ignored.
This is just one example where the intense competitive pressures have created powerful incentives to minimise labour costs by any means.

Critically, contracting and labour hire makes collective bargaining difficult, bargained outcomes harder to maintain and in the majority of cases labour hire is used to undercut the bargained rate in a workplace or sector due to the ability to regularly replace a cohort of workers effectively collapses standards and bargained outcomes.

Contracting, sub-contracting and labour hire operate as a significant feature of the labour market whose effect is to reduce standards to the award safety net and, frequently, to a standard effectively below the award. This creates a competitive logic that dictates that anything more than the minimum is excessive and decreased labour costs are a reasonable expectation of a user of labour.

United Voice has observed that this has been an important factor in the collapse of pay and conditions in areas such as cleaning, hospitality and security. Our second case study concerns privately managed correctional facilities. In this sector, currently a number of contracting or facility management companies, are adopting tendering practices which involve the manipulation of agreement making which may in the short term ‘win’ these companies work but will destroy long established bargained standards in this sector.

The potential destruction of bargained standards in private correctional facilities will also have an effect on the quality of services. When the pay and conditions of workers in any sector collapses, this inevitably has an effect on other standards within the sector. It is therefore wrong to see labour hire’s impact as narrowly drawn to wages and conditions. While we acknowledge this goes beyond this term of reference, the Committee should nonetheless be cognisant of these broader implications.

**Voting cohorts to approve agreements with a broad scope that affect workers’ pay and conditions**

We address term of reference (b) of the Committee’s terms of reference here.

The principal object of the Act is to ‘provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians’.

Specific objectives note that this object will be achieved by:

- enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and
- achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action.

Part 2-4 of the Act deals with enterprise agreements and how they are made. Enterprise agreements are intended to be the outcome of collective bargaining between employees at an enterprise level and one or more employers. The role of ‘employee organisations’ is clearly recognised in the Part as it is elsewhere in the Act but the critical role of unions is not provided with adequate protection.
According to the Act’s modern awards objective, modern awards and the NES are intended to provide a ‘fair and relevant safety net of terms and conditions.’ A clear distinction between modern awards and earlier awards is that modern awards are a safety net instrument.\(^2\) Modern awards are not bargained in any sense and provide a fixed safety net determined by the Fair Work Commission (‘the Commission’).

Enterprise agreements made under the Act must place the employees covered by the agreement in a position where they are better off overall than if the relevant modern award applied to the employees by the requirement that agreements must pass the so called ‘BOOT’ test.\(^3\)

The Act’s agreement making provisions therefore assume that any flexibility or departure from modern awards or the NES standards comes with some uplift in the terms and conditions of the employees covered by the agreement and that this uplift is achieved by collective bargaining. Agreements are intended to be instruments that provide for superior condition as a result of bargaining. It is assumed that the interest of both the employer and the employees will be accommodated within the bargain but agreements are not intended to be entirely captive of the employer and completely divorced from bargaining.

The most significant demonstration of the bargained nature of agreements is the ability of employees and industrial associations to lawfully engage in protected industrial action in bargaining for enterprises agreements. The Act has very clear restrictions that industrial action cannot lawfully take place before the nominal expiry date of an agreement.\(^4\)

Subsection 172(6) of the Act notes that an enterprise agreement cannot be made by a single employee. This provision was inserted into the current Act by the Fair Work Amendment Act 2012 and commenced operation on 1 January 2013. Currently, an enterprise agreement which is not a greenfields agreement can be made by 2 or more employees ‘who will be covered it’.

Most current concerns about voting cohorts for enterprise agreements arise from the 2015 judgment of the Full Federal Court in Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd [2015] FCAFC 16 (24 February 2015) (‘John Holland’). John Holland essentially clarified that it is permissible for agreements to be made under the Act by a small group of employees chosen by the employer and for the group to be ‘fairly chosen’ irrespective of whether the group that approves the agreement is in any sense representative of the larger group of employees that will be able to be covered by the agreement. These small cohort agreements typically have coverage clauses that allow the agreement to cover a range of classifications nationally and do not specify particular enterprises or workplace. They are designed to be ‘rolled out’ to unidentified workplaces in the future.

In a practical sense, John Holland, contrary to the object of the Act and commonly held assumptions about agreement making, appears to provide authority for the proposition that agreement making under the Act does not need to involve collective bargaining. Justice Besanko observed that the role of collective bargaining ‘is quite a limited one’ in determining whether the group of employees covered by an agreement is fairly chosen.\(^5\) The decision has allowed employers to ‘capture’ bargaining by determining small groups of its employees as the cohort. This loophole is being utilised increasingly and particularly by labour hire.

Presciently, Justice Buchannan in John Holland noted [33]:

> There is no requirement that employees who vote to make an agreement must have been in employment for any length of time, and there is no requirement that they remain in employment after the agreement is made. Presumably, the presently employed members of such a group will act from self-interest, rather than from any particular concern for the interests of future employees. The potential for manipulation of the agreement-making procedures is, accordingly, a real one.

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\(^3\) Section 193.
\(^4\) Section 417.
\(^5\) John Holland, paragraph 3.
The now established practice of making agreements with a very small number of employees is fundamentally about excluding unions from the agreement making process and utilising the fact that for the duration of an agreement no bargaining can take place. Agreement making is increasingly becoming a way that employers unilaterally and privately determine the industrial relations within a workplace.

In United Voice’s view, many of these types of agreements are being made to assist labour hire competitively tender for work. This obviously undermines the basis of collective agreement making envisaged under the Act while also providing labour hire with the ability to represent to potential users of its services that it can provide terms and conditions that cannot be disturbed by any form of collective action.

United Voice’s experience is that when we become aware of these agreements prior to the agreement’s approval by the Commission, we have no capacity to be classified as a bargaining representative under the Act as we will not have a member covered. The cohort is being chosen by employers for among other reasons because it contains no union members. Also even in small cohort agreements, the employees often appoint bargaining representatives and this appears designed to close the door to any union claiming default bargaining representative status. ‘Confected’ is an accurate description of the agreement making process of many of these agreements. There is technical compliance with bargaining rules but no bargaining.

Any attempt to be involved in the pre-approval process is at the discretion of the member of the Commission responsible for approving the agreement. The approach of different members of the Commission varies widely. Despite clear statements in the Act requiring the Commission to perform its function in a manner that is ‘just and fair’ and ‘open and transparent,’ United Voice has been denied basic information about these agreement often contrary to the privacy policy of the Commission.

A recent Full Bench decision of the Commission has clarified that basic information about agreements should be generally made available as of right to any person. The need for a Full Bench of the Commission in Mining and Energy Union v Ron Southon Pty Ltd to essentially say that the Commission should apply it long held published privacy policy is because of the intense pressure for secrecy that has been placed on the Commission by employers.

These agreements almost always have a maximum term of 4 years. These agreements allow labour hire firms to take on a contract which is a discrete new enterprise and deny the employees engaged to do this work any opportunity to bargain for their terms and conditions. This is the ‘innovation’ of the John Holland style coverage clause.

Notwithstanding this, the Commission and the Federal Court has clearly stated that the employees who make the agreement need to have some ‘stake’ in the agreement being made and if their remuneration is disconnected with the rates within the agreement, the agreement is not genuinely agreed.

The recent judgment of the Full Federal Court in Shop, Distributive & Allied Employees Association v ALD Foods Pty Ltd (‘ALDI Foods’) has provided some limitations on employer manipulation of agreement making. The majority judgment of Justice White in ALDI Foods clearly indicates that the cohort making the agreement must be notionally covered by the agreement during bargaining. On 13 January 2016, Justice Jessup of the Federal Court in Melbourne stayed the orders of the Federal Court in ALDI Foods on the basis that the employer indicted it was seeking leave from the High Court to appeal the decision.

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6 Section 590 of the Act provides the Commission with the discretion to allows persons who may not be a party to participate in proceedings before it: Construction, Forestry, Mining and Energy Union v Collinsville Coal Operations Pty Ltd [2014] FWCFB 7940.
7 Section 577 of the Act.
8 Mining and Energy Union v Ron Southon Pty Ltd [2016] FWCFB 8413.
9 KCL Industries Pty Ltd [2016] FWCFB 3048.
11 As above, see paragraphs [133] to [135]
Currently, the effective test appears to be that a union, like United Voice, needs to be able to demonstrate that an agreement (which is supposed to be a product of enterprise bargaining) was made by some sort of fraud or manipulation by an employer in order to show that it is not a proper agreement under the Act although decisions such as ALDI Food do appear to place some boundaries around agreement making and abuses by employers.

The John Holland litigation exposed general problems with reconciling the objects of the Act and Part 2-4 and specific provisions in Part 2-4. The Full Federal Court in John Holland accepted that if an agreement undermined collective bargaining this was not an impediment to the Commission approving the agreement.12 Similar issues arise in the context of the termination of expired enterprise agreements and the role of collective bargaining in the Aurizon litigation.13 The recent jurisprudence of the Federal Court and the Commission concerning agreements has been to read down any reference in the Act to collective bargaining.

The Federal Court has clearly stated that the Commission must narrowly apply the statutory criteria contained in the Act in approving agreements.14 Subsection 187(2) of the Act that ostensibly requires that approval of an agreement not to be inconsistent with good faith bargaining has very limited application and only applies where a scope order is in operation.15 The Federal Court has said regard cannot be had to the effect that approval of any agreement will have on collective bargaining because the statutory provisions that the Commission must apply do not expressly mention it.16

Accordingly, the criteria for the approval of agreements should clearly indicate that a reason for refusing to approve an agreement is that approval of the agreement would undermine collective bargaining. There is nothing unusual about asking an administrative tribunal to make discretionary decisions of this type and there are a number of considerations that the Commission could be asked to consider when determining whether the approval of an agreement would undermine collective bargaining. Relevant considerations should include: the size of the cohort that made the agreement, whether or not the employees who made the agreement were represented by an employee organisation during bargaining and whether or not the employees who voted and approved the agreement were paid in terms of the minimum pay and conditions contained within the agreement.

We make a further recommendation concerning the lifting of the minimum cohort required to make an agreement to 10 employees. This is an arbitrary number but we say would assist in ensuring that there is a critical mass of employees that would be in a position to in fact bargain and also avoid concerns about manipulation by an employer of the group of employees. Having a larger cohort would still not fundamentally take away from employers their ability to choose the group.

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12 See the judgment Besanko generally and the judgment of Buchannan at paragraph 67 to 84.
14 John Holland paragraph 71.
16 John Holland, paragraphs 82 and 83.
Case study 2: Private Corrections

Some recent agreements encountered by United Voice dealing with work covered by the Corrections and Detention (Private Sector) Award 2010 (‘the Corrections Award’) illustrate some of the behaviours of labour hire discussed above and what we say are abuses of agreement making under the Act to achieve competitive advantages.

United Voice has coverage of employees in private correctional facilities and is the largest union in this sector. Some of the labour hire firms that perform and seek work in private corrections are GEO Group Australia Pty Ltd, G4S, Serco Pty Ltd, Broadpectrum (Australia) Pty Ltd (previously ‘Transfield’), Sodexo Pty Ltd and Wilsons Security Pty Ltd. These firms would style themselves as facilities management firms rather than as labour hire. These firms are large and sophisticated transnational corporations.

Private correctional facilities in Australia are almost 100% bargained agreements with pay and conditions that are consistently 30-40% above the Corrections Award. Many of these jobs are in rural or regional areas and provide secure long term work for local communities.

Recently United Voice has encountered two agreements where firms have sought to have the Commission approve instruments designed to cover correctional workplaces that are clearly not the product of bargaining. Both agreements are made by small cohorts, have John Holland style coverage clauses and both can be fairly described as confected. The principal purpose of both of these agreements appears to be to provide the employer that ‘made’ the agreement with a set of wages and conditions to use in tenders for work at established correctional facilities that undercut the bargained rate being paid and that guarantee no industrial action from the moment they take over management.

JBU Enterprise Agreement 2016 – Broadpectrum Pty Ltd

On 12 July 2016, Broadpectrum Australia Pty Ltd (‘Broadpectrum’) submitted the JBU Enterprise Agreement 2016 (‘the JBU Agreement’) to the Commission for approval. The JBU Agreement will cover correctional employees employed by Broadpectrum and engaged within their ‘Justice Business Unit … in the Commonwealth of Australia.’ The JBU Agreement specifies no particular workplace to which it will apply and is clearly intended to be ‘rolled out’ nationally in line with Broadpectrum’s success in obtaining contracts from governments to manage correctional facilities.

The JBU Agreement has a four year duration. Its rates are above the Corrections Award but about 20% below the established bargained rate. There are extraordinary provisions in the agreement for the employer to pay at its sole discretion above agreement payments. Broadpectrum calls the agreement a ‘safety net agreement’ and admits it will pay a higher market rate if it has to.

At the time the JBU Agreement was made, Broadpectrum had no private correctional work on mainland Australia.
United Voice sought to gain information concerning the making of the JBU Agreement from both the company and the Commission. Initially, all our requests for information about the JBU Agreement were refused on the basis we were on a ‘fishing expedition’.

On 15 November 2016, Commissioner Riordan approved the JBU Agreement. United Voice did participate in a private conference and was permitted to make a submission. We were informed at the conference that the JBU Agreement covered 4 employees and 3 of these employees voted to approve the agreement. At the time of approval of the agreement by the Commission, there were only 3 employees ‘employed under common law contracts underpinned’ by the Corrections Award. The decision describes the remaining 3 employees as falling within the agreement’s corrections classifications as a prison escort transport officer, 2 correctional officers and a correctional supervisor level 2. These are employees working in the head office of Broadspectrum in North Sydney preparing tenders and related documents when the company had no corrections work but labelled as correctional workers to be eligible to vote up a corrections agreement.

The affected workers are members of the Transport Workers Union of Australia (‘TWU’). On the face of it, these workers will have to take a drop of over 20% in their remuneration.

On 13 December 2016, during a stay application for the appeal Broadspectrum noted that the WA Department of Corrective Services required Broadspectrum as a term of the contract to have ‘an in-term enterprise agreement’ and failure to have such an instrument would jeopardise the contract. The Western Australian Government clearly made the contract with Broadspectrum on the basis it sought a change in provider of this service with no possibility of any collective action by the workforce and that pay and conditions would decline.

SXO Custodial Enterprise Agreement 2016 – Sodexo Australia Pty Ltd

On 31 October 2016, the Commission approved the SXO Custodial Enterprise Agreement 2016 (‘the SXO Agreement’). United Voice only became aware of the SXO Agreement after its approval. The SXO Agreement covers employees of Sodexo Australia Pty Ltd engaged in all classifications under the agreement. The SXO Agreement has a 4 year term. This agreement can cover any correctional facility in Australia.
On 29 July 2016, Sodexo was awarded a 5 year contract by the Western Australian Government to manage and operate Melaleuca Remand and Re-integration Facility in Perth.

The SXO Agreement has clear issues with the BOOT test. The pay points for its base rates of pay correspond to minimum rates within the Corrections Award but two of the higher classifications contained within the award are missing from the agreement. A number of the SXO Agreement’s terms and conditions are also clearly less beneficial than the Corrections Award.

At the time the SXO Agreement was made it covered 8 employees all of whom voted to approve the agreement. Sodexo, in its statutory declaration lodged with the agreement, notes that the SXO Agreement contains terms that are less beneficial than the Corrections Award but that this short fall will be compensated by the existence of an ability to pay employees a special site allowance. The special site allowance is an entirely discretionary payment. According to the SXO Agreement an employee’s ‘eligibility to receive the special site allowance will be determined by the Company on an individual case by case basis’ and the Company can withdraw the allowance ‘at any time and without cause’ and ‘may increase or decrease (it) at any time’ at its ‘discretion’.

None of the 8 employees who voted on the SXO Agreement are members of any union. The Western Australian Prison Officers Union (‘WAPOU’) is the principal union with coverage of the Melaleuca Remand and Re-integration Facility in Perth and most of the employees who made the agreement have joined the WAPOU and are dissatisfied with the conduct of their employer. The WAPOU raised concerns about the SXO Agreement prior to its approval and the Commission ignored this correspondence completely and admitted that it did.

United Voice and WAPOU both lodged appeals against the approval of the SXO Agreement on the basis that it failed the BOOT. On 29 November 2016, a Full Bench of the Commission by consent upheld our appeals, quashed the agreement and remitted it to Deputy President Kovacic to hear and determine whether the agreement can in some form be approved. This process is ongoing. United Voice’s view is that the SXO Agreement falls so far below the award that it cannot be approved no matter what undertakings are made by the employer.

The combined effect of these agreements, if they are maintained, will be to collapse wages and conditions for workers in private corrections generally. There will be obvious consequences for employees in state run facilities as privatisation becomes a more cost effective option. Families in regional areas that depend on this work for a reasonable standard of living with have a 20-30% decline in income.
**Recommendation 2**

An agreement should not be approved if approval of the agreement would undermine the capacity of workers to engage in collective bargaining. In considering whether approval of an agreement would undermine collective bargaining, the Fair Work Commission should be asked to consider the size of the cohort that made the agreement, whether or not the employees who made the agreement are representative of the workforce, whether they were represented by an employee organisation during bargaining and whether or not the employees who voted and approved the agreement were paid in accordance with the minimum terms and conditions of the agreement.

**Recommendation 3**

The minimum voting cohort required to make an enterprise agreement should be increased to 10 employees.

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**The effectiveness of transfer of business provisions in protecting workers’ pay and conditions**

We address term of reference (d) of the Committee’s terms of reference here.

In United Voice’s experience, the transfers of business provisions in the Act are not effective at protecting worker’s pay and conditions. The critical issue is that the provisions have no application to historically out-sourced service industries.

United Voice represents a wide range of employees in the industries dominated by outsourced contracting arrangements, such as cleaning, catering, housekeeping, laundries and security. These industries are labour intensive and require little investment in assets beyond uniforms and light equipment. It is usual for outgoing contractors to take all assets with them when they lose a contract. Incoming contractors will provide substantially similar services as the outgoing contractor. Employees of the old contractor who accept work with the incoming contractor will often perform an identical function for the same enterprise. It is not uncommon for cleaners or security guards to work in the same location, doing the same job, sometimes for decades and have multiple changes of employer. A 60 year old security guard may have worked at an art gallery or a court for 30 years but on contract change or transfer returns to being a probationary employee. The transfers of business provisions do not protect these employees from losing their entitlements, nor do they provide any means to recognise their service.

The current transfer of business rules are provided for by Part 2-8 of the Act. Section 311 describes the situations where a ‘transfer of business’ occurs for the purposes of the Act. In summary, a transfer of business occurs where an employee’s employment with one employer (‘the old employer’) has been terminated, the employee is employed by the new employer within three months of being terminated by the old employer and there is a ‘connection’ between the old employer and new employer.

The Act requires the transfer of ‘assets (whether tangible or intangible)’ between the old and the new employer. The requirement for such a connection is typically what disentitles employees in a labour hire workplace from any recognition of their past service when the contract changes.

There are a number of other impediments to the transfer of business provisions applying in contract change situations when the contract is transferring from one labour hire provider to another.

First, an employee must be employed by the incoming contractor if they are to have possible recognition of their service. There is no obligation in the Act for an incoming contractor to accept transferring employees. In reality, incoming contractors typically hire the existing workforce as the skill and experience of these workers is critical to the labour hire (or contracting) firm being able to fulfil its contractual obligations. Current regulation allows incoming labour firms to pick and choose from the existing workforce relatively risk free.
Second, as already noted it is unlikely that the transfer of business provisions will apply to employees in the service industries as typically it will be difficult to identify a sufficient connection between the old and the new employer. This is because the Act requires a ‘transfer of assets from the old employer to a new employer’. A business that is focused on the labour of the worker can easily sit outside this requirement. While it was once common for cleaning contractors to apply stringent rules in terms of not leaving any ‘assets’ when contracts changed so as to avoid any suggestion of a transfer of business, there is a widespread understanding that the transfer of business rule is ineffectual in contract change so there is less concern about whether old cleaning equipment remains ‘on site’.

It is noted the Act transfer provisions do attempt to cover outsourcing (at ss 311(4)-(6)) where the old employer outsources work to a new employer, where an employer ceases to outsource work to the old employer and takes the work in-house, or where the new employer is an associated entity of the old employer.

Thirdly, even if the transfer of business provisions applied to an employee, important documentation will often be lost where there are multiple changes of employer, making it difficult to prove that entitlements are owed. The onus is on the employee to find proof of their entitlement.

Finally, the transfer of business rules in the Act are too focused on the maintenance of above award terms and conditions. The majority of employees in the contracting industries described in this section are award dependent. The vital issue for employees is the recognition of service and the preservation of accrued entitlements.

Where employees have negotiated enterprise agreements, incoming employers will often seek to avoid the transfer of existing industrial instruments. It is common for employers to seek orders under s 318 that a transferrable instrument will not cover the new employer or the transferring employee. There are also large employers with enterprise agreements that have exploited the transfer of business provisions to avoid entitlements in enterprise agreements. At Crown Casino in Perth, hospitality and catering work previously performed under an enterprise agreement has been outsourced to a number of contract service providers.

Where work is outsourced and an agreement follows transferring employees, it is common for the new employer to find a way to avoid the application of the transferring instrument. In United Voice’s experience, contractors often take on transferring employees with their agreement but then replace them with award-reliant employees as soon as possible. In industries with high rates of turnover in employment, such as hospitality, security and cleaning, this will quickly happen by natural attrition.

Protections during transfer of business in similar jurisdictions

The Australian legislation contrasts with the position in New Zealand and the United Kingdom, which have strong protections for workers in the case of contract change.

In New Zealand, there is a legislative scheme to ensure that pay, conditions, recognition of service and accrued entitlements are protected during transfers of business and out sourcing events. Under Part 6A of the Employment Relations Act 2000 (NZ), every employment agreement must contain an employee protection provision to protect the employment of an affected employee in the case of restructuring (where the business is sold, contracted or transferred out). There are additional rules for vulnerable workers such as orderlies in health and aged care, cleaning, catering, laundry and caretaking.

These rules apply where a contractor loses a contract to perform services and the contract is granted to another business, where services are contracted out, or are contracted in. Employees have the right to transfer to the new employer if they will no longer be required to do all or part of their work for their existing employer because of the restructuring and the new employer will perform the same, or substantially similar, types of work. In that case employers must notify the employees whose work will

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20 S 311 (4).
21 S 311 (5).
22 S 311 (6).
23 See Employment Relations Act 2000 (NZ) (‘ER Act’), s 69F, Schedule 1A.
24 ER Act, s 69C, 69E.
be affected, inform them of their choice to accept work with the new employer and the date by which they must make that choice.\textsuperscript{25} The employers must also provide the employees with relevant information about the restructuring so that they can make an informed decision.

The employees may then choose to transfer to the new employer on their existing terms and conditions with full recognition of prior service.\textsuperscript{26} The employees may choose not to transfer, but may become redundant. Employers, employees and unions can negotiate alternatives to the transfer.\textsuperscript{27} There are also rules regarding the apportionment of liability for the costs of service-related entitlements of the transferring employee between the old employer and the new employer.\textsuperscript{28}

In the United Kingdom, all employees are protected during transfer of business by the \textit{Transfer of Undertakings (Protection of Employment) Regulations 2006} (UK) (‘TUPE’). This is the United Kingdom’s implementation of the \textit{European Union Business Transfers Directive}.\textsuperscript{29} The TUPE applies where an undertaking or business is transferred or there is a change in the provision of a service (such as outsourcing or a change of contractor).\textsuperscript{30} Where such a transfer occurs, the affected employee’s employment is not terminated but, subject to certain conditions, is transferred to the new employer, who takes on all the old employer’s rights, duties and liabilities.\textsuperscript{31} Employees are entitled to notice and information regarding the transfer and their entitlements in the situation.

Where employees are represented by a union, the union must be informed and consulted before the transfer occurs.\textsuperscript{32}

The practical consequence of the ineffectiveness of the Act’s transfer of business rules is that workers who have long effective periods of service in the same job and workplace but happen to work in an outsourced workplace will repeatedly lose accumulated sick leave, long service leave and unfair dismissal entitlements at each change of contract. Entitlements such as sick leave, which do not accrue, are particularly critical to low paid workers and these are precisely the entitlements lost at contract change. In the case of long service leave, the entitlement is effectively put beyond the reach of low paid workers in contracting service industries as frequent contracts will deny the employee the necessary service.

United Voice has been the main innovator in relation to portable long service leave but more structural change is necessary to avoid what is the unsatisfactory situation where long effective service does not equate with any accumulation of the benefits normally associated with service. The example of portable long service leave schemes demonstrate that there is a role for the Parliament in remedying these deficiencies.

Australia’s industrial relations system should move into line with the transfer of business provisions in comparable developed economies. The situation where low paid workers who work in the same workplace doing the same job for decades but have no sick leave or recognition of their ‘service’ should be remedied.

**Recommendation 4**

The Committee should review the transfer of business provisions in the United Kingdom and New Zealand with a view to the Act’s provisions applying wherever there is change of contract, a contracting out, a contracting in or a business is sold.

\textsuperscript{25} \textit{ER Act}, s 69G.

\textsuperscript{26} \textit{ER Act}, ss 69I, 69J, 69K.

\textsuperscript{27} \textit{ER Act}, s 69H.

\textsuperscript{28} \textit{ER Act}, s 69LA.


\textsuperscript{30} TUPE, cl 3.

\textsuperscript{31} TUPE, cl 4.

\textsuperscript{32} TUPE, cl 13.
The avoidance of redundancy entitlements by labour hire companies

We address term of reference (e) of the Committee’s terms of reference here.

The avoidance of redundancy entitlements is common and widespread in labour hire and in contracting industries covered by United Voice. Indeed, the key competitive advantage of these forms of employment is the ability to ‘turn over’ the workforce and avoid the costs normally associated with change.

Redundancy and transfer of business rules are interrelated as their effectiveness determines critical parts of the cost structure of labour hire.

This issue frequently arises in contract change situations. Namely, when a labour hire contract ends and a different labour hire firm is awarded the contract. The outgoing contractor usually terminates the entire existing workforce. It is common for many of the existing workforce to be engaged by the new contractor, but contract changes generally result in the employee losing continuity of service and non-accruing entitlements such as sick leave or long service leave.

United Voice has established industry-based portable long service leave schemes in contract cleaning and security in some states. These schemes have been developed partly in response to the problems of entrenched labour hire in these sectors and the competitive pressures in contracting industries to compete on contract price by not paying employees their proper entitlements.33

In United Voice’s experience, the established practice during contract changes is that employees do not receive redundancy when their employment is terminated. Anecdotally, United Voice has been informed on several occasions that it is standard practice for firms to exclude the cost of redundancy in its labour costsings when bids are made for work.

United Voice contents a termination as a result of a loss of a contract generally qualifies as a redundancy event in terms of the definition applied in the Act’s NES and industrial law generally.

One of the innovations of the Act was the creation of a universal right to redundancy pay for all permanent employees covered by the Act. The right to redundancy pay is contained in section 119 of the Act. Prior to the commencement of the Act, any right to redundancy was derived from a specific award, agreement or contractual entitlement. There was no general obligation to pay severance in the absence of a specific entitlement in an applicable industrial instrument.

On 1 January 2010, section 119 and related provisions commenced and after this date all terminations were covered by the applicable NES provisions. There was no transitional regime in relation to employment that commenced prior to the commencement of section 119.34 There were many employees engaged through labour hire or contracting arrangements on the commencement of the NES. The intention of the Parliament was the NES would apply to these employees prospectively irrespective of whether the employer engaged them on the basis that they had an entitlement to redundancy pay.

Many of these workers are low paid and work in sectors such as cleaning and security. Some had extensive continuous periods of service. In relation to this group, where they have been terminated after 1 January 2010 in the context of contract change the denial of redundancy pay by their labour hire employer is particularly problematic.

33 Portable long service leave schemes are legislated in contract cleaning, security and building and construction in many Australian states and territories. These schemes require legislation, for example, Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010 (Cth).
After 1 January 2010, the more sophisticated labour hire firms have engaged permanent staff for site specific work on the basis that they are hired to work at a particular facility and that their employment will come to an end if their employer loses the contract to provide the service at the particular facility. Such clauses in contracts of employment are designed to defeat the employee’s claim to redundancy pay under the NES and clearly demonstrate that labour hire is conscious that redundancy pay is relevant to change of contract situations.

United Voice had a member terminated after 30 years of continuous service and denied redundancy pay.

The ability to avoid its NES obligations concerning redundancy pay is a critical matter and has allowed some employers to gain a competitive advantage in the labour market that is completely unjustified. This issue requires the urgent attention of the Committee.

There are two main legal devices that are employed by labour hire to avoid its NES responsibilities concerning redundancy pay. The manner in which labour hire uses these exceptions demonstrates a culture of avoidance in terms of the recognition of basic employment entitlements.

‘Obtains other acceptable employment’

Traditionally, if an employer is able to ‘obtain acceptable’ or ‘suitable alternative work’ for an employee, the obligation to pay severance was reduced or avoidance. The Act reflects this exception. The justification behind the exemption was that if the terminating employer was able to guarantee the employee’s service and the employee’s non-transferrable entitlements with the new employer, severance (which is in essence compensation for dislocation occasioned by change) was not justified.

Section 120 of the Act allows an employer, after making an application to the Commission, to pay no redundancy pay or a reduced amount as determined by the Commission where it ‘obtains other acceptable employment for the employee’. In contract change situations, this exception is intended to apply when the outgoing contractor obtains employment for the employee with the incoming employer. In theory, the arrangement would involve the new employer recognising the service of the employee and non-transferrable entitlements such as sick leave.

The critical element is that the employer ‘obtains’ the employment – and the case law did place some emphasis on the fact that the employer had to obtain something for the employee from the new employer.

United Voice has observed a common practice that if the employee obtains a position with the incoming contract that this is taken as avoiding any liability for redundancy pay. This is irrespective of whether the employer has done anything, or, more significantly, whether the employer has obtained for the employee recognition of their service or non-transferrable entitlements with the new employer.

Employees are not infrequently pressured to take work with the incoming contractor even if the work is manifestly inferior because any refusal of a position with the incoming contractor is stated by the labour hire employer as automatically disentitling the employee to redundancy pay. The fact that the exception can only be used subject to an application to the Commission and an order being made is frequently overlooked.

The use by firms of the ‘obtaining other acceptable employment’ exception to redundancy provides a typical example of the manner in which labour hire abuses legal and industrial standards to avoid paying a cost that is otherwise associated with their conduct.
In circumstances where a firm actually makes an application under section 120, the case law until recently was unclear. That Act clearly stated that the employer had to ‘obtain’ something for the transferring employee from the new employer. Recognition of the employee’s prior service and non-transferrable entitlements such as sick leave were critical and clearly the types of matters that one would assume would be guaranteed. Such arrangements between the outgoing and incoming contractor for the recognition of service generally required payment by the outgoing employer to the new employer in consideration of the entitlements recognised.

Previously, firms commonly relied on the case of Australian Chamber of Manufactures v Derole Nominees Pty Ltd (1990) 140 IR 123, (‘Derole Nominees’), which expressed a very loose concept of what the terminating employer needed to do to ‘obtain’ employment for their soon to be redundant employees.35

Employers, with and sometimes without the sanction of the Commission, frequently considered the mere fact that the ex-employee was successful in securing work with the incoming contractor as satisfying the exclusion concerning obtaining work. Some labour hire firms consider allowing the incoming contractor on the premises to conduct interviews or placing an advertisement in the tea room as evidence the employer obtained work for their employees. This is in the context that many modern awards and agreements provide time off for employees to search for work in their notice period.

The recent judgment of the Full Federal Court in FBIS International Protective Services v Maritime Union of Australia and Anor [2015] FCAFC 90 (‘FBIS’) has usefully clarified that facilitation of an opportunity does not constitute obtaining employment in terms of section 120.36 The Full Federal Court in FBIS clearly stated that ‘obtain’ means that the employer must acquire or get something for the employee from its new employer.37

While this clearer statement in FBIS that ‘obtain’ means obtain is a positive development, the position of employees in contract change is still precarious as labour hire generally applies the broader exception concerning the ‘ordinary and customary turnover of labour’ (see below) to disentitle an employee terminated as a result of contract change to redundancy pay.

The following formulation is typical and was used in a termination letter to a member of United Voice employed in a catering position at Perth International Airport with over 10 years continuous permanent service:

Should no acceptable alternative employment options be identified with either Spotless or the incoming contractor your employment will be terminated as a consequence of the ordinary and customary turnover of labour on 25 June 2015.38

This brings us to the second legal device by which labour hire avoids its NES responsibilities concerning redundancy pay.

‘The ordinary and customary turnover of labour’

Section 119 of the Act provides for a universal entitlement to redundancy pay. Redundancy is defined as when the employer ‘no longer requires the job done by the employee’ and explicitly notes that this definition does not apply to terminations ‘due to the ordinary and customary turnover of labour.’

The ordinary and customary turnover of labour exemption is definitional. Accordingly, the Act leaves the matter for the employer to decide. This is a fundamental problem and enables contracting and labour hire firms to effectively avoid the payment of redundancy in contract change situation.

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35 As cited, at 128.
36 FBIS, paragraph 22.
37 As above, paragraphs 19 to 20.
38 A copy of the correspondence is available on request.
Once an employer determines that the termination is not a redundancy, the onus is the employee or class of employees to challenge the decision of the employer in a court. The Act effectively gives labour hire a ‘head start’. The usual way to challenge such non-payment of redundancy pay is by civil penalty proceedings in the Federal Court. These are complex legal proceedings that without the assistance of a union are beyond the reach of almost all workers.

The phrase, ‘ordinary and customary turnover of labour’, has a long history as an exemption to the obligation to pay severance in redundancy situations. It appeared in many industrial instruments prior to its incorporation in the definition of redundancy within the National Employment Standards (‘NES’). The exemption used apply to work that is of a seasonal or fixed duration (e.g. picking fruit or building a ship), where there was some intermittency in the activity. However the Act now clearly excludes these categories of work and the exemption is increasingly used in change of contract situations where there is a structural change in the provider of the labour without any change in the activity.

The fact that a hire firm loses a contract and has to terminate employees does not automatically bring the termination within the ordinary and customary turnover of labour exception.

There have been numerous recent, authoritative cases where courts and industrial tribunals have clearly stated that firms are liable in certain circumstances to pay redundancy pay when a long standing permanent employee is terminated as a result of contract change. Where the employee has a reasonably held and settled expectation of continuing employment that employee is entitled to redundancy continues to be the applicable law, and there is no general exclusion for change of contract situations. Despite this, employers habitually adopts a completely dishonest approach to the law and indiscriminately characterises all terminations in contract change situations as due to the ordinary and customary turnover of labour.

United Voice frequently pursues labour firms for the non-payment of redundancy entitlements on behalf of our members. These cases are typically settled ‘without admission’ with all or a proportion of the redundancy pay paid under a deed of settlement.

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39 The following cases are reported instance where it was found notwithstanding that the termination occurred in the context of a change of contract, the employee was entitled to and should be paid redundancy pay and the ordinary and customary turnover of labour exemption did not apply: CFMEU v Quality Coatings and Consultants Pty Ltd [2004] QIRC 125; Garcia & Ors v Limro Pty Ltd [2003] AIRC 726; Tempo Services Limited v TM Klooger & Ors [2004] AIRC 1150; and Transport Workers’ Union v Veolia Environmental Service (Australia) Pty Ltd [2013] NSWIRComm 22.
Case study 3: United Voice v ISS Security Pty Ltd

ISS Security Pty Ltd (‘ISS’) is a part of multinational facilities management group. There are various ISS corporate entities in Australia and ISS Australia is a part of the ISS A/S which is headquartered in Copenhagen, Denmark, and one of the largest facilities management companies in the world.

On 1 August 2007, ISS obtained the contract to provide cleaning services at Darwin International Airport. On 16 December 2015, ISS was informed it was unsuccessful in obtaining a further contract for the cleaning work at Darwin Airport and that its contract to provide cleaning services formally ended on 29 February 2016. It was unclear how many times its initial contract had been rolled over although almost certainly ISS would have received further contracts to clean Darwin Airport after initially obtaining the work in 2007.

ISS engaged cleaners as permanent employees from the commencement of its contact and throughout the contract. These workers were engaged as permanent employees and their letters of appointments initially made no reference to their employment being terminated in the event that ISS lost the contract to clean the airport. A number of the employees’ contracts of employment indicated that ISS could direct them to work at other ISS sites in Darwin.

On 29 February 2016, ISS terminated the entire cleaning workforce by writing to each employee and indicating that their employment would ‘cease at 2359 hours on Monday 29 February 2016’. The final payments made to all employees included only payments for unpaid work and unused accrued leave. ISS made no payment in lieu of notice, no redundancy pay and in relation to a number of the employees no accrued or pro rata long service leave as required under the Northern Territory Long Service Leave Act. The termination letters of 29 February 2016 noted that ‘your termination will not involve a severance payment, as this situation relates to the ordinary and customary turnover of labour’.

Among the cleaners, there were 7 United Voice members. Our members were predominately members of the Darwin Filipino community, had limited English and had lengthy periods of permanent service with ISS. A number had over 8 years’ service and the average period of continuous permanent service was 5 years and 3 months. ISS relied on the Cleaning Services Award 2010 and did not pay any premium above the award. In effect our members and the rest of the workforce were summarily terminated.

We made a number of written demands to ISS that our members’ termination entitlements be paid. We received no reply indicating that ISS was contemplating doing anything. While the payment of redundancy pay was theoretically contentious, the payment of a payment in lieu of notice and long service leave entitlements was unexceptional.

On 1 June 2016, United Voice commenced civil penalty proceedings against ISS in the Federal Court of Australia alleging contraventions of the Act in relation to the not providing proper notice, not paying redundancy pay and failing to follow the consultation provisions of the Cleaning Services Award. We also sought payment of the owed long services leave. The proceedings concerned the non-payment of about $100,000.00 of entitlements to 7 award reliant low paid workers living in one of the more expensive places to live in Australia.
After the statement of claim was served on ISS, we received notification that it had made some payments to our members as a result of our letters of demands sent but due to an alleged problem with their email system not informed United Voice or their ex-employees that the payments had been made. In correspondence, ISS admitted that pro rata long service leave had not been paid ‘due to an administrative error’ and in the interest of resolving the dispute paid an amount in lieu of notice to all 7 of our members. The rest of the workforce also terminated was not paid.

After the parties filed evidence, there was a mediation conducted by a registrar of the Federal Court in Darwin. On request from the Committee, United Voice is able to provide particulars the final disposition of these proceedings.

ISS maintained that the termination of an entire longstanding workforce due to its loss of a contract was the result of the ordinary and customary turnover of labour. The company’s Director of People and Culture, ISS, in his affidavit, sworn 21 October 2016, for the proceedings noted:

In the situation of a loss of contract, where employees engaged for the delivery of services on that contract cannot be redeployed to another client, their employment is terminated. The Respondent’s position that termination s due to the end of a client contract is part of the ordinary and customary turnover of labour in our business. This position is generally accepted by our employees who understand that we can only provide work while we hold the client contract.

ISS is a major and ostensibly sophisticated labour hire firm. ISS paid our members notice and their long service leave entitlements because we threatened and commenced an industrial prosecution in the Federal Court. The statement of ISS is fairly typical: redundancy pay is not paid when the employer loses a contract and this is irrespective of whether or not the employees have been employed for decades or 12 months.

ISS did more than not pay redundancy pay; it did not pay other entitlements that should have been paid when permanent employees are terminated. Despite ISS paying these amounts to our members, we understand that no additional amounts were paid to the other cleaners who were terminated and not union members. ISS appears to consider it appropriate corporate conduct to essentially deny low paid workers basic entitlements and only pay when forced by the possibility of a finding against it in a court.
If the ordinary and customary turn over exception were not available there would be greater motivation for employers to obtain work for their employees with incoming contractors or engage employees on a basis that accurately reflected their expectation of the continuation of the employment. The argument that this exception should be maintained because contract change in an ordinary part of their business is not consistent with the entitlement to redundancy envisaged in the Act. The exception is anachronistic, provides to labour hire an undeserved cost advantage and should be removed.

**Recommendation 5**

The words ‘except where this is due to the ordinary and customary turnover of labour’ should be deleted from section 119 of the Act to provide a universal entitlement to redundancy payments for all employees, including employees of labour hire firms.

**The effectiveness of any protections afforded to labour hire employees from unfair dismissal**

We address term of reference (f) of the Committee’s terms of reference here.

Protection against unfair dismissal is a longstanding feature of Australian industrial law. The Act (Part 3-2) defines unfair dismissal in terms of a dismissal that is *‘harsh, unjust or unreasonable’* and directly references in the object of the Part the legal precedent that the Commission should provide to employers and employees *‘a fair go all round’*4041.

Rightly or wrongly, many employers perceive the risk of unfair dismissal applications as a significant cost of directly employing labour. This is what makes the use of labour hire so attractive – it effectively insulates users of labour hire from unfair dismissal.

Part 3-2 is intended to, and for many employees does, provide, a *‘quick, flexible and informal’* process to deal with the termination of employment. The application is a relatively simple one and can be made by an individual without legal assistance. The Commission provides compulsory conciliation and arbitration and is more *‘user friendly’* than a court.

The maximum amount of compensation that can be awarded where there is a finding that a termination is unfair is 6 months’ salary, although consistent with Australian jurisprudence, reinstatement is the principal remedy under the Act.42 In reality, reinstatement is the exceptional remedy. In the 2015-16 financial years, the Commission received 14,694 unfair dismissal applications.43 Less than 2% of these applications were arbitrated resulting in only 30 orders that an employee be reinstated.44

Part 3-2 makes no reference to labour hire as a distinct category of employment. Unlike the general civil contravention provisions of the Act, there is no possibility for any third party liability in relation to a host being knowingly concerned in a dismissal.45 Accordingly, the Act allows a user of labour hire to direct a labour hire employer to withdraw its employee from a workplace for any reason, including for no reason. The host bears no responsibility to the employee for its decision.

The labour hire employer must then deal with the consequences of having an employee that is not able to perform the work for which they were engaged. In such situations, the employee is usually terminated and the termination is usually justified by the labour hire employer on the basis that the employment relationship has been frustrated.

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40 Re Loty and Holloway v Australian Workers’ Union [1971] AR NSW 95, Section 381.
41 Section 381.
42 According to subsection 390(3), the Commission must first consider reinstatement if there is a finding that a dismissal is unfair. This is consistent with the long tradition in Australian industrial law of reinstatement as the primary remedy.
44 As above p.44.
45 See section 550.
The triangular nature of the employment relationship deprives the employee of rights that are intended to be available to all employees under the Act in relation to unfair dismissal. Labour hire employees are often deprived of the possibility of the remedy of reinstatement as an option when their termination is found to be unfair in the common situation where the host refuses to take the worker back.

In cases where the host is in effect entirely responsible for a termination that is subsequently found to be unfair, there should be some capacity under the Act for the host to be responsible and the preferred order of the Commission to have effect.

Section 550 of the Act deems a person involved in a contravention of the Act as taken to have contravened the Act. It applies common law principles of accessorial liability.

Section 550 applies to civil penalty contraventions and is the means by which individuals are made liable for contraventions involving employment when the employer is a company. The person who owns the company or the chief executive officer can personally be liable in circumstances where they are knowingly concerned in the contravention. This provision makes it possible for additional persons, including other companies, to be liable for contraventions of industrial law and prevents the real perpetrator hiding behind the corporate veil.

Section 550 does not apply to unfair dismissals as an unfair dismissal is not a civil contravention of the Act. Some consideration should be given to the creation of a distinct civil penalty contravention of being knowingly concerned in an employee’s unfair dismissal. Such an offence would only apply in limited circumstances where there has been a finding that an employee was unfairly dismissed and there is some frustration of the appropriate remedy. The very wide power that the Act gives a court in making order when a contravention has been established would allow for an order of reinstatement to be made and for further compensation to be awarded. There is currently the capacity for a host to completely disassociate themselves from the industrial consequences of their decisions to terminate a workers employment.

**Recommendation 6**

Consideration should be given to the creation of a civil penalty provision of being involved in an unfair dismissal in terms of section 550 of the Act. The offence should deal with the situation where a finding has been made that an employee has been unfairly dismissed and there is substantial involvement in the termination by a third party.

**The extent to which companies avoid their obligations under the Fair Work Act 2009 by engaging workers on visas**

We address term of reference (h) of the Committee’s terms of reference here.

It is becoming increasing common for employers to avoid both the spirit and the law of the Act by engaging workers on temporary visas. A string of inquiries into various aspects of Australia’s visa system has failed to initiate any real legislative change in this area. This inquiry is an opportunity for reform of our industrial system that protects all classes of workers from exploitation and makes it more difficult for employers to avoid their responsibilities under the Act.

It is widely recognised that workers on visas are more vulnerable to workplace exploitation than their local counterparts. They also face higher barriers to accessing remedies. The power asymmetry that exists in any employer/employee relationship is exacerbated in the case of temporary migrant workers,
because their right to remain in the country is contingent on them not being found to be in breach of the work conditions on their visa. Any legal irregularity in the employee-employer relationship, whether the fault of the employee or not, can trigger a chain of events that leads to a grievous result for the worker (detention and deportation) that is disproportionate to any negative outcome potentially faced by the employer (a fine).

Temporary migrants face strong incentives to stay silent about contraventions of the Act. Any complaint about working conditions to a Fair Work Ombudsman (‘FWO’) inspector will always be accompanied by the risk that the matter may be also be reported to the Department of Immigration and Border Protection (‘DIBP’).

Under the laws as they presently stand, the barriers to exploited temporary migrant workers receiving any sort of protection on a whistle-blower basis are significant: visa-holders must rely on either ministerial discretion or the high evidentiary hurdle presented by the statutory criteria for human trafficking or slavery. In practice, neither of these mechanisms are used with any regularity.

The systemic vulnerabilities that arise from our linked immigration and industrial relations regime are compounded by the range of other impediments commonly faced by temporary migrants in accessing justice, including: language and cultural barriers; economic vulnerability; geographical isolation; young age; lack of access to unions and/or legal services; lack of decent work opportunities; and the threat of more egregious levels of abuse in their home country. Further, the long timeframes for investigation of breaches of the Act mean that visa holders have often left the country before they are in a position to receive back pay or compensation for the losses they have suffered as a result of breaches of the Act.

Despite the powerful structural disincentives for migrant workers to report contraventions of the Act, visa-holders are still statistically over-represented in the matters that are litigated by the FWO. Temporary migrants comprise around 5% of the Australian population, and yet they account for 13% of requests received by the FWO, and 76% of litigations filed. More than one third of all of the FWO’s enforcement involves a visa holder.47 For the reasons described above, as well as the inadequate resourcing of the FWO (which has just 300 inspectors for over 11 million workers in over 2 million workplaces48), reported cases of contravention of the Act must be understood as representing only a small fraction of the number of violations that in fact occur.

The industries where the exploitation of visa holders are most prominent are cleaning, horticulture, retail, meat and poultry processing, hospitality and accommodation services.49 These are also the industries where labour hire, subcontracting and sham contracting are most common, and where union density is low. Detailed academic research into the extent and nature of migrant labour exploitation is, as an inevitable consequence of the subject matter, sparse. Discrete surveys carried out by academics and journalists nonetheless point to the existence of a parallel labour market where migrant workers are compelled to work for rates of pay that are significantly lower than the national legal minimum. For instance, a Sydney Morning Herald and Monash University study in 2015 revealed that 80% of foreign language advertisements offered wages to temporary migrant workers below legal rates, in some cases offering positions blatantly advertised as ‘black jobs’.50

The migrant workers who are most vulnerable to abuse live a ‘grey zone’ of undocumented, cash-in-hand labour. Recruitment frequently occurs in the home country, triggering a debt bond that taints the work experience they will have in Australia on arrival. Vulnerability is compounded when migrants do not have work rights and are part labouring illegally on a visitor visa or a bridging visa with no work rights. Migrants undertaking such informal and occasionally unauthorised work are unlikely to come into contact with a union, let alone be in a position to be interviewed by an academic researcher.

47 Fair Work Ombudsman (2016) Inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program, October 2016.
Nevertheless, some of the major contours of migrant worker exploitation in Australia are indicated in the range of academic, union and journalistic publications in recent years, including:

**Hospitality and retail**
- A 2016 academic study found that international students working in Melbourne’s café, restaurant and takeaway food services sector were routinely underpaid or indeed in some instances not paid at all.\(^5^1\)
- In 2015, a survey of international students found that 60% of all those undertaking work were earning less than the then legal minimum wage of $17.29 per hour.\(^5^2\) 80% of those working in Sydney’s restaurants were being underpaid, with 35% being paid merely $12 per hour.\(^5^3\)
- In 2016, the FWO uncovered so-called “going rates” of $11 per hour for Korean workers on student and working holiday maker visas.\(^5^4\)
- In 2016, Fairfax journalist Adele Ferguson exposed a wage fraud scheme concerning the service station franchise network Caltex that ran through to the top of the supply chain.\(^5^5\) Caltex head office allegedly tipped off its franchisees to the impending FWO raids, and was well aware that Pakistani and Indian workers on student visas in its service stations and shops were being paid as little as $12 per hour.\(^5^6\)

**Cleaning and security (property services)**
- Studies conducted in 2012 and 2013 by United Voice found that international students, who make up half of the cleaning workforce in Melbourne CBD offices, were routinely subject to poor working conditions, sham contracting, and cash-in-hand payments below the rates set in collective agreements and awards.\(^5^7\) Wage theft of up to $15,000 per year in earnings per worker was found to have occurred, with underpayment estimated to exist in at least one quarter of city office buildings.\(^5^8\)
- A 2012-13 FWO audit of 578 cleaning businesses found that only one in four were paying wages lawfully. International student workers regularly worked through scheduled breaks and after the completion of shifts in order to complete their allocated tasks, which could not be feasibly or safely completed within the paid time that was allocated.\(^5^9\)
- In 2016, the FWO found that 1,500 migrants working as housekeepers in the Oaks Hotels and Resorts chain were being robbed of about $2 million in one year. This wage theft has been facilitated by the Oaks’ systematic outsourcing of cleaning services to contractors such as Housekeepers Pty Ltd, perpetrating sham contracting, piece rates, and unlawful deductions for such things as “public liability insurance,” “payroll tax”, chemicals and equipment, administration fees and uniforms.\(^6^0\)
- In 2015, United Voice documented numerous cases of security workers suffering underpayment, excessive working hours, inadequate training, and insecure employment following a change in contract or the use of labour hire companies at the National Gallery of Victoria, Coca Cola Amatil and Tullamarine Airport.\(^6^1\) The shift away from direct employment and to multiple levels of subcontracting puts workers themselves and members of the public at risk.

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\(^{53}\) Bagshaw, E. (2016)


\(^{56}\) Ferguson (2016)

\(^{57}\) Victorian TAFE International and United Voice (2012) Taken to the cleaners: Experiences of international students working in the Australian retail cleaning industry, Melbourne, United Voice; United Voice (2013) A Dirty Business: The exploitation of international students in Melbourne’s office cleaning industry, Melbourne, United Voice.

\(^{58}\) United Voice (2013)


Agriculture and meatworks

- In 2015, an ABC Four Corners report revealed the extent to which the exploitation of migrant workers was a core part of the business model for many labour hire agencies in agriculture. Migrant workers on Working Holiday Maker visas were recruited to pick the harvest, at illegal rates, and provided with inadequate housing and transport services by the labour hire company. Temporary migrants subcontracted to Baiada chicken processing plants were required to work up to 18 hours a day, 6 days a week, without overtime or penalties, in sub-zero temperatures without appropriate protective clothing, conditions that would leave their fingers freezing in pain.

- A submission from and inquiry appearance by the Australasian Meat Industry Employees Union to the 2015 Senate Inquiry into temporary migrant workers described high levels of exploitation of South Korean and Taiwanese working holidaymakers, employed by labour-hire companies, who would deduct $500 ‘membership fees’ and fees of $300 for ‘training courses’ and a variety of other fraudulent charges, in addition to chronic underpayment of wages and entitlements.

Remedies to migrant worker exploitation

There are a number of weaknesses in the Australian industrial relations system that unscrupulous employers use to exploit vulnerable workers on temporary work visas. Addressing many of these weaknesses would have the broader effect of protecting workers from forms of corporate avoidance of the Act not covered by the Terms of Reference to this Inquiry. As previously mentioned, the current system allows employers to cut costs by pushing risk down the supply chain so that it is borne by the employee when it should be borne by the employer.

The Government must address the longstanding issue of sham contracting – the wrongful classification of employees as independent contractors in order for employers to avoid paying the legal minimum wage and entitlements. Over one million workers in Australia are employed as independent contractors, but approximately 40% of these admit that, in reality, they are dependent on their employers, with no real authority or control over their own work. Although the Fair Work Act makes it unlawful for employers to knowingly misrepresent an employment relationship as a contracting relationship, the existing provisions are not adequate to stop the practice.

There are a number of measures that would significantly reduce the incidence of sham contracting.

There should be greater scrutiny on the use of Australian Business Numbers (ABNs) in industries where high levels of sham contracting occur, such as the contract cleaning and security industries. In particular, more scrutiny should be given to holders of international student and holiday-making visas applying for ABNs. The purpose of these visas, to facilitate education and extended holiday-making, is not compatible with the establishment of an Australian business, and there are rarely legitimate reasons why holders of these visas should need to seek an ABN. More tightly regulating ABNs as a possibility for international students and Working Holiday Makers is a simple measure that will make it far harder for employers to coerce these migrant workers into sham contracting arrangements.

Recommendation 7

There should be greater scrutiny on the use of Australian Business Numbers (ABNs) in industries where sham contracting is prevalent, including the contract cleaning industry. Employers should be prohibited from engaging visa holders under ABNs in sectors where their use has been found to contribute to avoidance of legal employment obligations and exploitation.

There are also amendments to the Independent Contractors Act 2006 (Cth) relating to the definition of a contractor that would make it easier for parties to identify the genuine status of employment arrangements and a better basis for enforcement. At present there are a variety of common law tests for sham contracting.
Recommendation 8

The Independent Contractors Act 2006 (Cth) should be amended to include a statutory definition that would make it easier for parties to identify the genuine status of employment and that includes a statutory presumption in favour of an employment relationship.

In determining employment status, the Act should ensure: a person is a worker within a business that takes the benefit of the worker’s labour (“the employer”) if the person meets two or more of the following indicators:

- the person is subject to the control of the employer in relation to how the work is performed
- the person usually works for the one employer and only that employer
- the person is treated as, or portrayed to others as, part of the employer’s organization
- the person performs work that is the same as or similar to that performed by others who are treated as regular employees by the employer
- the person has regularly worked for the employer over a three month period
- the person uses equipment or other facilities needed to perform the work provided by the employer (other than the usual tools of trade)

and the person does not engage in entrepreneurial activities characteristic of the conduct of a business in relation to the work provided to the employer. Typically, those characteristics will include exposure to financial risk, the provision of a commercial service (and not merely labour) to a range of customers, the capacity to sell the business including its goodwill and the capacity to delegate the performance of the work to others.

The government should enact greater regulation of supply chains including sub-contracting and labour-hire arrangements which all too frequently result in the exploitation of workers. For several years now, unions, NGOs and academics have called for a national labour hire licensing scheme to prevent rogue recruitment syndicates from continuing to exploit vulnerable workers. It is time the federal government take heed of these calls to mandate ethical recruitment practices, as well as those made by the 2016 Senate report into Australia’s temporary work visas (A National Disgrace).

We refer the Committee to our Recommendation 1, above, and reiterate the importance of a national licensing system as a means to curtail the continued exploitation of visa holders.

Greater monitoring and compliance by government authorities is required, and this compliance needs to target employers, including first-tier owners, rather than going after individual workers at the bottom of the chain.

In addition, freedom of association rights in Australian industrial relations law need to be bolstered to ensure that workers are freely able to join their union.

The role of unions in improving migrant workers’ rights

The federal government should work with unions and employers in a truly tripartite manner to establish and maintain ethical supply chains where migrant workers’ right to lawful wages and conditions are upheld and enforced.

Unions play a key role in monitoring and enforcing workers’ rights, including the rights of migrant workers. Unions are embedded in Australian industries, they have a deep understanding of the problems faced by migrant workers, and they are working productively with other stakeholders to ensure that all workers, regardless of their citizenship, are treated lawfully and fairly in our industries. It is disappointing that the Federal government has recently announced a Migrant Workers Taskforce charged with examining protections for overseas workers which excludes unions and workers.65 It is hard to see how such a body can effectively carry out its task without involving the workers affected by exploitation and their representatives.

Ongoing governmental efforts to stymie the capacity of unions to access workplaces should be stopped, and government should engage in constructive, genuine consultation with unions on matters pertaining to the human rights of migrants at work.

Unions should be supported in their efforts to undertake initiatives to improve conditions in the workplace and effect change throughout the supply chain. One such initiative that United Voice is partnering with industry on is the Cleaning Accountability Framework (CAF) - a multi-stakeholder labour standards accreditation scheme in the cleaning industry that promotes the adoption of best practice procurement approaches and supply chain management, and supports quality-focused cleaning services, fair wages and decent labour standards. United Voice is working with property owners, tenants, contractors, cleaners and other stakeholders in the cleaning industry to shift the operating model that has led to the exploitation of some of our most vulnerable workers.

Recommendation 9

The Government should work with unions, migrant and community organisations and employers in a tripartite way to address growing exploitation of migrant workers.

This should extend to

- recognising the role of unions in providing protection and advice to workers;
- bolstering freedom of association provisions and ensuring that all workers are informed of their industrial rights; and
- severing the nexus between a migrant worker’s visa status and their employer.

Approaches to regulating migrant labour

Too often, migrants' rights in the workplace are subordinated by their immigration status. Temporary work visas are regulated in a way that places disproportionate restrictions on the visa holder, rather than on the employer. In turn, the penalties for breaching a visa condition disproportionately affect the worker rather than the employer in a manner that is insensitive to the power dynamics between these two actors. The punitive, rather than protective impetus of visa regulation in regard to workers themselves leads to situations in which exploited workers who have been compelled to breach a condition of their visa can lose the right to remain and work in Australia. A common instance of this is when student visa holders work more than 40 hours per fortnight on the orders of their employer, and are afraid to come forward out of fear that their visa will be terminated. Effectively, temporary migrant workers are punished for the illegal acts of their employers.

Exploitation should not result in deportation. Uphold temporary migrant workers’ right to seek justice without fear of deportation by instituting one-way reporting requirements between the Department of Immigration and Border Protection and the Fair Work Ombudsman. A worker on a temporary visa should feel confident that coming forward to report a claim of underpayment or other breach of the Fair Work Act will not result in their having to leave the country or be deported. That workers from overseas are granted the right to remain in the community until civil and/or criminal claims are resolved is especially important when indicators of modern slavery are found.

Recommendation 10

The Government should enact a protective rather than a punitive approach to regulating migrant labour. This should include the fundamental principle and expectation that exploitation should not result in deportation. In suspected cases of exploitation:

- a rights-based approach should be taken by government – one that recognises the vulnerabilities of migrant workers to exploitation and puts in place mechanisms for protection against and rectification of exploitation;
- workers on temporary work visas should be granted the right to remain and work in Australia pending the resolution of their claims for underpayment and/or other instances of exploitation regardless of a visa condition breach having occurred in the context of the exploitation alleged...
to have occurred;

- a communication firewall should be enacted in such a way that the FWO is not required to report visa breaches to the DIBP that could result in the unduly precipitated departure of a visa worker;
- migrant workers should be eligible for all the same worker protections as residents and citizens when an employer defaults on their obligations, namely access to the Fair Entitlements Guarantee (FEG) scheme.

### Legacy issues relation to Work Choices and Australian Workplace Agreements

We address term of reference (j) of the Committee’s terms of reference here.

A feature of the Act and related legislation passed in 2009 was that a variety of transitional instruments consisting mainly of old ‘Work Choices’ collective agreements and Australian Workplace Agreements (‘AWAs’) continued to have legal effect.\(^\text{66}\) Many of these instruments are grossly non-compliant with the Act and would not pass the better off overall test applied to agreements made today.

The continuing operation of these transitional instruments is a significant problem. These old collective agreements are colloquially referred to as ‘zombie’ agreements and are maintained and used by employers because they provide a means to avoid award penalties, loadings and allowances.

In many cases, there are few substantive provisions in the agreement which have any practical effect other than to lock out award entitlements. The interaction of these transitional instruments with the broader Fair Work system is complex. When an old collective agreement applies, the relevant modern award does not apply.\(^\text{67}\) Many of these agreements have compendious lists of old state and federal awards that they override.

The main reason these ‘zombie’ agreements are maintained is that they provide an employer with the ability to pay reduced or no penalty rates and loadings for work at unsocial times.

The base rate of pay for any employee is notionally the base rate in the relevant modern award. The Fair Work (Transitional Provisions and Consequential Amendments) Act 2009\(^\text{68}\) (‘the Transitional Act’) provides for a base rate guarantee in relation to employees covered by these transitional instruments in identical terms to section 206 of the Act. In theory, the modern award system sets the base rate of pay for all employees including those covered by ‘zombies’.

One of the broader problems with the Act is that section 206 only guarantees that an employee covered by any agreement (including a ‘zombie’) is paid at or above the base rate of pay within the applicable modern award. It does not extend this guarantee to penalties and loadings.\(^\text{69}\)

For many low paid workers and members of United Voice, working unsociable hours in areas such as cleaning, security and hospitality; penalties and loadings make up a substantial part of their overall remuneration. These additions to the base rate of pay have also been determined by the Commission as part of the ‘fair and relevant minimum safety net of terms and conditions’.

The main way that these ‘zombie’ instruments deliver adverse remuneration outcomes is by containing penalties and loadings that are significantly inferior to the modern award standard. The ‘usefulness’ of


\(^{67}\) As above, Division 2, Item 28.

\(^{68}\) As above Schedule 4, Part 4, rule 13.

\(^{69}\) The Act defines ‘base rate of pay’ at section 16:

1. The base rate of pay of a national system employee is the rate of pay payable to the employee for his or her ordinary hours of work, but not including any of the following:
   a. incentive-based payments and bonuses;
   b. loadings;
   c. monetary allowances;
   d. overtime or penalty rates;
   e. any other separately identifiable amounts.
these legacy agreements in avoiding penalties, loadings and overtime is illustrated by a comparison of the Brisbane Executive Security Teams Pty Ltd Agreement 2007 (‘the Brisbane Security Agreement’) and the Security Services Industry Award 2010 (‘the Security Award’). The base rates paid under both are deemed to be the base rates in the Security Award by section 206 of the Act.

Where the Brisbane Security Agreement provides a real advantage to the employer is when penalties, loadings and allowances are compared.

<table>
<thead>
<tr>
<th>Penalty rates and overtime</th>
<th>Security Award</th>
<th>Brisbane Security Agreement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Night span- week days 12am to 6am and 6pm to 12pm</td>
<td>21.7% in addition to the base rate 30% - for permanent night work</td>
<td>Absent</td>
</tr>
<tr>
<td>Saturday</td>
<td>50% in addition to the base rate of pay</td>
<td>The agreement provides for a composite rate for a rostered permanent employee that is alleged to ‘include penalties that would otherwise be applicable for work at night and weekend penalties’. The highest rate in the agreement is $22.79. An award covered employee would be paid at a minimum $30 per hour and $50 per hour for a public holiday.</td>
</tr>
<tr>
<td>Sunday</td>
<td>100% in addition to the base rate of pay.</td>
<td>As above</td>
</tr>
<tr>
<td>Public Holidays</td>
<td>150% in addition to the base rate of pay.</td>
<td>As above</td>
</tr>
<tr>
<td>Overtime determined by permitted shift length of between 4 and 10 hours and by agreement 12 hour shifts can be permissible</td>
<td>Monday to Friday – first 2 hours 50% and thereafter 100%. Saturday 50% and thereafter 100% All overtime on Sunday is paid at 100% and Public holidays 150%</td>
<td>The Agreement allows for 12 hour shift paid at ordinary hours. Overtime is paid in blocks of 15 minutes at a uniform rate of 25% above the base rate</td>
</tr>
</tbody>
</table>

In security, where much of the work is in the evenings and on weekends, avoiding penalties and loadings provides a competitive advantage to firms and undermines the award safety net.

While one might expect the Commission to expedite the termination of long expired transitional agreements which clearly undercut minimum standards, in practice the proceedings and processes can be quite time consuming and difficult.

The difficulties arise from employer resistance and the manner in which the Commission is required to deals with these applications and the different approaches taken by individual members of the Commission to termination applications.

The Transitional Act applies the same provisions to ‘zombies’ that applies to expired agreements made under the Act in relation to their termination.70 These transitional instruments continue to have legal effect until a complex application is made to the Commission, requiring evidence and the Commission to make specific findings and then formally terminate the agreement.

70 Items 15 and 16 of Schedule 5, Transitional Act.
United Voice’s experience is that these instruments are difficult to terminate for a variety of reasons, outlined below.

Applications to terminate these agreements by consent will require a vote of the employees covered by the agreement. This is not usually a problem. The main difficulty will be obtaining the consent of the employer. Employers who are benefitting from a ‘zombie’ will not consent to its termination.

Section 225 of the Act allows for employee organisations, employees and employers to apply to terminate expired agreements. Section 226 sets out the criteria to be applied by the Commission when determining whether or not to terminate an agreement that has passed its nominal expiry date.71

Sections 226(a) and (b) requires that the Commission must make specific concerning the public interest and) concerning ‘all the circumstances’ and the views of the employees, the employer or employers and any industrial organisation covered by the agreement. There is no discretion as the section is phrased in mandatory terms and both subsections are jurisdictional facts that must be established before the Commission can terminate any agreement. Section 226 makes no direct reference to whether or not the instrument is providing remuneration that is superior too or manifestly below the relevant award safety net.

A person covered by the agreement can make an application to terminate the agreement. If a union was covered by the agreement, the union could make an application. Most of these agreements do not cover unions and are referred to as non-union ‘zombie’ agreements. This adds an additional layer of difficulty as a current employee need to make the application to terminate the agreement usually in the context where their employer will oppose the application.

The Commission does not adopt a standard approach in dealing with these applications. Some applications are subject to more complex directions, with the onus placed on an applicant employee to prepare and place material before the tribunal. Some applications are dealt with by requiring the employer to contact employees or provide contact information for employees, and to file material about the effects on employees. This type of approach is more suitable because it acknowledges that the employer holds the information necessary to assist the Commission take into account the views of employee concerning the effect of the termination on them.

The process of terminating agreements that are providing remuneration below the award safety net should be expedited. Where an agreement cannot be shown to pass the BOOT, in United Voice’s view, this is a reason where termination of the agreement should almost always result. Accordingly, section 226 should be amended to reflect that different criteria apply in terminating agreements that are providing remuneration outcomes below the relevant award safety net should apply.

Recommendation 11

Section 226 should be amended to require the Commission to expedite the consideration of any agreement that would at the time of application not pass the better off overall test under section 193. If an employee covered by the agreement would be better off overall if the relevant modern award applied to the employee rather than the agreement, the agreement should be terminated.

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71 These are the same criteria that an employer will have to satisfy when applying to terminate an agreement during bargaining that pays a significant premium above the relevant award and where the effect of termination will be to reduce the workforces’ remuneration to the award safety net as permitted by the Commission in Aurizon Operations Limited and Ors [2015] FWCFB 540. The effect of the termination of a ‘zombie’ is to increase employees’ remuneration to the award safety net.
Case study 4: Brisbane Executive Security Teams Pty Ltd (‘BEST Security’)

BEST Security operates under the Brisbane Executive Security Teams Pty Ltd Agreement 2007 (‘BEST Agreement’) which is noted above and is manifestly inferior to the Security Award and like many of these ‘zombies’ pays a base rate and no penalty or loadings.

Mitchell Laidley was a casual security guard who worked for BEST Security and is a United Voice member.

The remuneration being paid to our member and others was significantly below the modern award rate for identical work. For example, a casual security guard working a typical roster would earn approximately $800.00 less per fortnight compared with what the worker would be paid if the Security Award applied.

On 12 October 2016, Mr Laidley made an application to terminate the BEST Agreement. Mr Laidley has been assisted and represented by United Voice. On 27 October 2016, Mr Laidley’s employment was terminated with BEST Security.

United Voice made application on behalf of Mr Laidley under the general protections provisions of the Act alleging inter alia that the employer terminated Mr Laidley because he had made an application to terminate the BEST Agreement. The employer denies the allegations.

On 30 January 2017, United Voice filed an application in the Federal Circuit of Australia concerning the termination.

The employer is disputing the termination of the agreement and has raised a jurisdictional argument before the Commission that Mr Laidley’s application to terminate the agreement cannot proceed because he is no longer an employee of the Company.

The other significant issue in this case study is the extent that the onus rests on Mr Laidley to provide evidence to support the agreement’s termination. Amongst other things, Mr Laidley has been directed to provide a range of evidence (such as an explanation of the likely impact of each employee of the termination, notice to all employees, and evidence of the views of employees.

These matters are ongoing and have resulted in separate jurisdictional over many months.

Significantly, Commissioner Spencer has noted in the context of other termination applications for similar agreement that the process can take more than 12 months. This is for agreements that would not pass the BOOT if they were sought to be approved today and are providing demonstrably inferior remuneration below what the Commission has determined as the appropriate award safety net.
The economic and fiscal impact of reducing wages and conditions across the economy

We address term of reference (k) of the Committee’s terms of reference here.

There is a strong body of evidence that indicates that rising inequality is a significant threat to the future growth and stability of advanced democratic economies. This finding has been advanced by the Bank of England, the IMF and Nobel laureate Joseph Stiglitz among others. In the words of Andy Haldane, Chief Economist at the Bank of England, excessive ‘inequality retards the development of the human, social and physical capital necessary for raising living standards and improving well-being.’

A major 2015 IMF study identified a clear inverse relationship between excessive concentration of wealth and growth. Income increases for the bottom 20% of earners are associated with higher GDP growth, while income increases for the top 20% with lower overall growth: specifically a reduction of 0.08 percentage points in GDP for every 1 per cent increase in the income share that goes to the top 20 per cent. These findings are consistent with numerous other studies that indicate that it is crucial to raise the income share of the lower and middle classes in order for there to be sustained economic growth, including:

- A 2011 IMF study that found that ‘growth spells’ in highly unequal countries were likely to end earlier than they did in their more egalitarian counterparts. ‘A rising tide is still critical to lifting all boats. The implication of our analysis is that helping to raise the lowest boats may actually help keep the tide rising.’
- A 2010 study by IMF economists which analysed two periods of financial crisis (1920-1929 and 1983-2008) and found that both were preceded by sharp increases in income and wealth inequality, increases in debt for the poorest and reductions in their relative bargaining power over income.
- A 1994 study that demonstrated that inequality in land, as well as income share, was negatively correlated with subsequent economic growth.
- A 1998 study which found that policies that increase the acquisition of assets by the poorest section of the community were likely to be doubly beneficial in terms of growth and poverty reduction.

Australia has, to date, been fortunate to have avoided the cyclical downturns that have afflicted most developed economies in the last quarter-century. Australia has recently slipped, though, into the bottom half of OECD countries in terms of its levels of inequality, and now exhibits higher levels of inequality than Ireland, Korea and New Zealand. The structural changes on the horizon brought by automation and digital technologies are likely to widen the gap further, hollowing out routine-middle skill and middle-income jobs. We must also brace our economy for a range of resource shocks and increased health costs that are likely attend climate change.

If Australia is to continue to enjoy its fortunate record of atypical growth into the middle years of the 21st century, it is crucial that we introduce policies that ensure that the income share of the poorest quintile rises rather than falls in proportion to the top. That cannot occur without urgently addressing the legislative loopholes and regulatory failures that are enabling corporations to avoid their obligations under the Fair Work Act.

The recommendations made in this submission will help move improve Australia’s industrial relations system and lead to fairer wages, more job security and a more prosperous economy.

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78 http://www.oecd.org/social/inequality.htm