

Chapter 5

Labour hire

The use of labour hire, 'on hire', or 'agency' workers has primarily become an avoidance strategy where the legal fiction of a distinct and separate workforce is used to mask gross exploitation and the shifting of legal liability that would otherwise reside with the host employer under the *Fair Work Act 2009*.¹

5.1 The term 'labour hire' describes an indirect employment relationship in which an employer, a 'host' company, instead of employing workers, contracts an agency to provide workers in return for a fee. There is thus no direct employment relationship between the host and employee, allowing in some situations the company to avoid certain employment conditions and responsibilities, and denying workers the entitlements and protections associated with direct employment.

5.2 This chapter looks at the use of labour hire through evidence presented by workers, employers and unions. The chapter focuses specifically on the ways in which labour hire is used to avoid responsibilities under the *Fair Work Act 2009* (FWA, the Act), examined through case studies presented by witnesses and submitters.

The growth of labour hire

5.3 Labour hire arrangements have been a feature of the labour market for decades, however their use has grown steadily across industries in recent years.² Today Australia is near the top of Organisation for Economic Co-operation and Development (OECD) country rankings for the use of agency work.³

5.4 The Australian Chamber of Commerce and Industry (ACCI) submits that the use of labour hire is not in itself a deliberate non-compliance with the FWA, and is instead one of many diverse forms of engagement. ACCI points to a rapidly and perpetually changing employment environment which requires flexibility and adaptability from employers, workers and unions:

In today's society people will undertake multiple types of work under a variety of arrangements across their working life. There is no 'one size fits all' employment model that will suit the circumstances of all employees or all employers and no single 'right method' of labour engagement.⁴

5.5 The Productivity Commission (PC) looked at reasons for the prevalence of employment forms which differ from traditional ongoing employment arrangements:

1 Construction, Forestry, Mining and Energy Union, *Submission 200*, p. 3.

2 Australasian Meat Industry Employees' Union, *Submission 158*, p. 3.

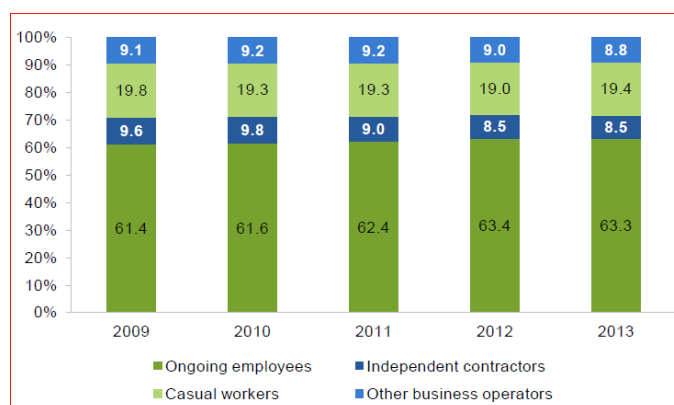
3 Australian Council of Trade Unions, *Submission 182*, p. 4.

4 Australian Chamber of Commerce and Industry, *Submission 148*, p. 7.

The prevalence of alternative forms of employment depends on the degree to which they meet the needs of employers, match the preferences and circumstances of workers and are affected by institutional factors. Whether or not an employer seeks to use a certain form of work depends on their assessment of how productive and how costly the workers might be.⁵

5.6 The following figure from the PC indicates that casual workers and other forms of non-ongoing employment accounted for almost 40 per cent of employment in recent years:

Figure 5.1—Stability in the forms of employment, 2009–2013, per cent of total workforce



Source: *Workplace Relations Framework*, Productivity Commission, Final Report, 2015, p. 800.

5.7 Details on the incidence of labour hire use are limited. ACCI submitted that labour hire represents a relatively small percentage of the overall Australian workforce, approximately 1.2 per cent.⁶ The Australian Council of Trade Unions (ACTU) reports that there are currently between 2000 and 3500 temporary agencies operating in Australia, but fewer than 2 per cent of these employ more than 100 workers.⁷

5.8 ACCI cites the PC's view that alternative employment arrangements can boost productivity and lower costs, and that the benefits of this ultimately flow to the community as a whole. Furthermore, ACCI quotes the PC's conclusion that arrangements such as labour hire are 'unlikely to undermine employee bargaining power to any great extent.'⁸

5.9 The committee received a considerable volume of evidence challenging this assertion. Although it is indisputable that labour hire arrangements benefit employers

5 Productivity Commission, *Workplace Relations Framework*, Final Report, 2015, p. 801.

6 ACCI, *Submission 148*, p. 8.

7 ACTU, *Submission 182*, p. 8.

8 ACCI, *Submission 148*, p. 8.

and to a certain extent permit flexibility which might be attractive to some workers, case studies the committee looked at suggest that labour hire:

- has a pronounced and disruptive effect on enterprise bargaining; and
- is being used by some employers to minimise costs by undermining the industrial system.

5.10 The critical distinction which must be made is that it is not labour hire *per se* that has the above effects, but rather how employers use labour hire workforces strategically to achieve these outcomes.

5.11 These points are outlined in the following sections.

Disposable workers

5.12 Labour hire was initially envisaged as a way of supplementing existing workforces. Its continued exemption from mainstream industrial regulation means labour hire is now also being used to replace existing workforces.⁹ This section looks at what labour hire employment entails.

5.13 Host companies which use labour hire often already have employed workers performing those jobs, but under the protections of the FWA. Labour hire involves the provision of labour only, not additional expertise beyond that held by the company's existing employees. Workers have their services effectively 'rented out' to clients of the labour hire business.¹⁰

5.14 Host companies which save on staffing costs by using labour hire workforces have very few obligations to those workers, who in turn have very few rights or means to influence their relationship with the host company:

Employers are successfully shielding their profits from the demands of workers by making a third party employ the workers which shields them from having to take any responsibility...and having any concern or care for the welfare of those workers.¹¹

5.15 The ACTU describes the use of labour hire as a rejection of the fundamental policy intent of the FWA, and submits that this manifests in a number of ways:

- a) The common law does not see an employment relationship between the host employer that directs the work and the worker. Further, it has generally rejected the idea that there could be more than one employer;
- b) Labour hire workers cannot bargain for a collective agreement with the host employer, or participate in bargaining for such an agreement. Whilst labour hire workers can make a collective agreement with the labour hire agency (subject to the practical barriers which attach to

9 ACTU, *Submission 182*, p. 9.

10 CFMEU, *Submission 200*, p. 4.

11 Mr Michael Nguyen, National Research Officer, Australian Manufacturing Workers' Union, *Proof Committee Hansard*, 15 March 2017, p. 6.

their predominantly casual form of engagement), the agency is not the entity that on a day to day basis controls the work that they perform and the conditions under which and location where it will be performed;

- c) Labour hire workers cannot make an unfair dismissal claim against a host employer, even where the host employer is the decision maker as to whether the worker will have a continuing job at the workplace or not;
- d) The “General Protections” contained in the *Fair Work Act 2009* (Cth) adapt poorly to the work situations of labour hire workers because in the main they protect the labour hire agency itself from “adverse action” rather than the workers the agency employs and makes available to workplaces; and
- e) Workers in labour hire arrangements are less inclined to speak up about matters of concern to them as they understand that the decision to request that they no longer be supplied to the workplace can be made by the host employer at any time, and may mean they have an uncertain period of time before another host engagement becomes available.¹²

5.16 Research from the University of Melbourne, cited by the ACTU, finds that labour hire workers are believed to experience the most volatile weekly hours of work.¹³ Some workers report being required to be available on the worksite for a full week, but receiving daily text message notifications telling them whether they would be required the following working day. Such jobs deny workers the ability to bargain for better conditions and lack basic security, including the security of employment needed to obtain a home or car loan.¹⁴ Labour hire workers, the ACTU submits, 'come closest to the "disposable worker" model at the heart of the "just-in-time" workforce that has cemented itself in the Australian labour market over the last twenty-five years.'¹⁵

Labour hire is overwhelmingly used as an avoidance strategy and its continued operation in the present regulatory setting is untenable unless one accepts that the workers who are engaged by labour hire agencies are second class citizens.¹⁶

5.17 In some circumstances, labour hire companies establish opaque corporate and employment structures. While the leading temporary work agencies operating in Australia are Skilled, Manpower, Spotless, Programmed Maintenance Services (Programmed) and Chandler Macleod, these companies often engage subcontractors

12 ACTU, *Submission 182*, p. 8.

13 ACTU, *Submission 182*, p. 5.

14 ACTU, *Submission 182*, p. 11.

15 ACTU, *Submission 182*, p. 8.

16 ACTU, *Submission 182*, p. 10.

through complex and sometimes opaque corporate arrangements which can make it difficult to ascertain which company a particular worker is actually employed by:

[A] labour hire employee may be legally situated deep within complex layers of inter-corporate subcontracting arrangements as well as the commercial arrangements between the labour hire and host. The case reported in *Matthew Reid v Broadspectrum Australia Pty Ltd* identifies some of the practical difficulties that this can present; namely, complying with the practice and procedure at one's workplace can lead to one being terminated by one's employer – who is *not at one's workplace*.¹⁷

5.18 The federal government has done little to address concerns regarding labour hire. By contrast, the ACTU reports, some state governments have been more receptive. In Victoria, for example, the state government has considered the findings of an extensive inquiry and agreed to establish a system for licencing labour hire agencies operating in the horticultural, cleaning and meat industries.¹⁸ The ACTU reported that a consultation process is currently underway on labour hire regulation in Queensland and in South Australia, following similar parliamentary inquiries in those states.¹⁹ Since that time the committee understands that a bill has been introduced into the Queensland Parliament to create a labour hire licensing regime in that state.

Loss of conditions

5.19 Legal Aid NSW submits that using labour hire allows host companies to avoid paying redundancy entitlements when they no longer require workers. Even where the worker has spent years performing identical work to an employee of the host company, that worker is not entitled to a redundancy payment.²⁰

5.20 This is particularly problematic where the decision that a worker's service is no longer required is seemingly unconnected to the worker's performance or conduct. The CFMEU explains that labour hire workers face jurisdictional impediments and considerable difficulty in making an application for an unfair dismissal remedy:

Our members have had their employment terminated after having worked on a full time basis for one host employer for a considerable time, often several years. They are often simply told by the labour hire agency that the host employer no longer desires their presence on site. Because of the current prohibitions under the unfair dismissal regime in the FW Act, these labour hire employees do not have any recourse to challenge their dismissals.²¹

17 ACTU, *Submission 182*, p. 8.

18 ACTU, *Submission 182*, p. 10; Inquiry into the Labour Hire Industry and Insecure Work, final report and government response available at <http://economicdevelopment.vic.gov.au/inquiry-into-the-labour-hire-industry>

19 ACTU, *Submission 182*, p. 11.

20 Legal Aid NSW, *Submission 167*, p. 4.

21 CFMEU, *Submission 200*, pp. 5–6.

5.21 Similarly, even where labour hire workers are dismissed for reasons relating to performance, this may occur without the worker being accorded procedural fairness.²²

5.22 The Act provides certain provisions requiring labour hire companies to consult with their employees if they are no longer required by the host company. The labour hire company has, for example, an obligation to consider redeploying their employee elsewhere; however, this is subject to redeployment options being available. Legal Aid NSW submits, however, that a large portion of labour hire employees are engaged on a casual basis, and as such they are not entitled to redundancy payouts under the FWA.²³

5.23 The Australasian Meat Industry Employees' Union (AMIEU) reports that labour hire arrangements help employers minimise their workers' compensation insurance premiums.²⁴ Reduction of corporate responsibility for injuries and deaths at work is of grave concern, particularly given media reporting around deaths at work in the building and construction industry, where the use of labour hire is rife and some construction sites are known for their concentrations of young, inexperienced workers—unsupervised apprentices, inexperienced backpackers. The committee notes a recent example, the October 2016 death at a Finbar construction site in Perth of a young German backpacker, recruited through a labour hire firm, whose death on site did not prompt the host company to pause work on site or even contact the police promptly.²⁵

5.24 The Queensland Council of Unions (QCU) cites research suggesting that labour hire is also used as 'a coercive discipline over the workforce by the threat of unemployment.'²⁶ The primary reason employers seek to use labour hire, however, is to reduce staffing costs.

5.25 The case study below illustrates this point.

Carlton & United Breweries

5.26 Carlton & United Breweries (CUB) produces some of Australia's best-known beer, including VB, Carlton Draught, Crown Lager and Cascade. The company has around 1500 workers nation-wide; 420 of these are operational employees working in breweries. CUB reports significant investment in training and development, and seeks to position itself as an 'employer of choice' by providing pay and employment conditions which exceed the National Employment Standards (NES) and relevant awards.²⁷

22 CFMEU, *Submission 200*, p. 6. The FWA provides access to procedural fairness for employees.

23 Legal Aid NSW, *Submission 167*, p. 4.

24 Australasian Meat Industry Employees' Union, *Submission 158*, p. 3.

25 Needless death of young girl on Finbar site, CFMEU, <https://wa.cfmeu.org.au/news/needless-death-young-girl-finbar-site> (accessed 1 August 2017).

26 Queensland Council of Unions, *Submission 206*, p. 3.

27 Carlton & United Breweries, *Submission 156*, [p. 3].

5.27 CUB has been taking gradual steps to outsource its workforce since 2009. In 2009, the company outsourced its Abbotsford site in-house maintenance employees to a labour hire company, ABB. At the time, those workers secured an enterprise agreement with ABB which 'substantially maintained the majority of their existing terms and conditions.'²⁸

5.28 The labour hire contract was awarded to a new agency, Quant, in 2014, again with substantially preserved terms and conditions for the maintenance workers. In late 2015 Quant entered into bargaining with the maintenance workforce and an Enterprise Agreement, still substantially preserving their terms and conditions, was voted on in early January 2016, and was still in effect.²⁹ However, seven weeks before that contract expired, 55 maintenance workers were called to an off-site meeting and told that their employment had been terminated.³⁰ These workers, who became known as the 'CUB55' during the protracted dispute which followed, had over 900 years of combined service at CUB between them.³¹

5.29 This was not a last-minute decision by CUB; it was part of a careful, strategic plan for reducing its expenditure on labour without necessarily changing its workforce. CUB had a pre-arranged, temporary, replacement workforce ready and in place on the next working day—labour hire workers flown in from other breweries, their accommodation paid for—and these workers were brought in on buses in front of long-serving ex-employees protesting outside.³²

5.30 The CUB55 workers were told they could re-apply for their jobs, but through CUB's new labour hire agency, Catalyst Recruitment, a subsidiary of Programmed, which CUB had entered into a new contract with for the provision of labour hire.³³ Predictably, the contracts on offer through Catalyst entailed considerable reductions in pay and conditions. The ETU explained that the Catalyst enterprise agreement have reduced wages by 65 per cent. It was also a pre-existing agreement which had lain dormant for five years. Its harsh terms and conditions had in fact been put in place years earlier, when Catalyst used three casual employees to secure a non-union enterprise agreement which was in no way connected to CUB.³⁴

5.31 Without warning for the workers, Programmed/Catalyst terminated their contract with CUB around September 2016. The ETU reports that 'CUB refused to tell

28 Electrical Trades Union of Australia, *Submission 197*, [p. 16].

29 Mr Alan Dinon, Member, Victorian Branch, Electrical Trades Union, *Proof Committee Hansard*, 15 March 2017, p. 8.

30 See discussion with CUB, *Proof Committee Hansard*, 18 May 2017, pp. 3–4.

31 ETU (Victorian Branch), *Submission 184*, p. 6.

32 See discussion with CUB, *Proof Committee Hansard*, 18 May 2017, p. 4.

33 ETU, *Submission 197*, [p. 16].

34 ETU, *Submission 197*, [p. 16]. The use of small, unrepresentative voting cohorts to secure enterprise agreements is discussed in Chapter 3.

the union the terms and conditions upon which the new employees [were] engaged' at the time.³⁵

5.32 Far from being an isolated incident, the AMWU submits that the CUB example reflects a serious consequence of the nature of the labour hire industry more broadly:

This unfairness is compounded by the influence of the 'labour hire' market, where labour hire employers are under competitive pressure to reduce the amount for which they are prepared to provide the labour, even though they may not have the labour which they are purporting to be providing. This particular example at CUB is the norm in many long term labour hire arrangements, where the incoming labour hire employer attempts to hire all or a significant proportion of the outgoing labour hire employer's employees.³⁶

From the workers' perspective

5.33 The committee received a submission from the CUB55 outlining events at the Abbotsford brewery. Excerpts from individual workers are provided below, and tell of the workers' shock at being treated so poorly after years of loyal service.

35 ETU, *Submission 197*, [p. 16].

36 AMWU, *Submission 196*, p. 15.

CUB55 in their own words³⁷

So they sacked us on the Friday, on the Monday there was already an alternative workforce doing our job. That takes time.

Chris

I've worked at the Brewery for 40 years...I'm hardly labour hire.

Allen

I worked on Thursday 6pm to 6am and I get a phone call, from a mate actually, not even from the company... I had to go straight after work, after doing a 12-hour nightshift. So I went to the hotel, and we were told we were all sacked. They wouldn't tell us who the contractor was or what the conditions were, but we were told we could apply for our jobs.

Chris B

We all have a unique set of skills, not the skills you can just import. Skills that were learned by us over a number of years, that are unique to this industry. So the injustice of throwing us out, trying to import skills from all walks of Australia. It clearly hasn't worked. It would never work. That is the injustice we all feel.

Paul

The cost on their personal lives is much bigger. You can't read it, you can't see it but everyone is suffering in some way. I am suffering myself too.

Andy

With this new Agreement there is no provision for us apprentices anymore...After 4½ years of a 5 year apprenticeship we are now left, we can't get our trade certificates...At the end of this year we would have been qualified in dual trades, electrical and instrumentation, we can't get that anymore.

Apprentices

I know I work with the most talented guys in Australia. We work really hard to get the machinery up to a world class maintainable standard.

And for that to be thrown away through substandard practices just breaks my heart. A question a lot of people ask us is, how can this happen in our country?

I can't really answer that. I honestly do not know.

Chris

CUB manager's diary entry

5.34 Evidence in the form of a diary belonging to Mr Sebastian Siccita, part of the CUB management team during the industrial dispute, came to light during the inquiry. The contents of the diary, which Mr Siccita and CUB's new management team

37 ETU (Victorian Branch), *Submission 184*, pp. 3–4.

distanced themselves from when questioned by the committee; appear to suggest CUB was prepared to stop at nothing to crush its embattled workers.³⁸

5.35 Under the title 'Winning a War', the diary excerpt lists a number of tactical suggestions, quoted below:

- Shoot the shit out of them.
- Play by rules they're not prepared to play by.
- Cut their supply lines and starve them out.³⁹

5.36 The excerpt also includes arrows pointing to the words 'lawyer fees' and 'defamation'. The committee sought clarity on whether CUB had a legal strategy in place during the dispute, which CUB management confirmed but did not wish to elaborate on:

At the time, yes, we had lawyers involved. We would certainly be interested in any attorney-client privilege that would be attached to that.⁴⁰

5.37 The committee notes that Mr Siccita had difficulty recalling whether he was familiar with the diary or its contents despite leafing through its pages during a public hearing. Minutes later Mr Siccita contradicted this position by attempting to retain possession of the diary on the grounds that it was his. The committee thanked Mr Siccita for confirming that the diary was his.⁴¹

The resolution

5.38 The committee notes that six months after having their employment terminated without warning, following large-scale community picket and campaign and a damaging national boycott of CUB products, the company abandoned its industrial strategy and all workers were reinstated on agreed pay and conditions based on those that applied prior to the dispute.

5.39 It is noteworthy that CUB came under new management in late 2016. Unlike their predecessors, the new management team engaged with workers and the union for an effective resolution to the dispute, and has committed to a more open, consultative and positive relationship with its workers and their representative unions in future:

One of the first acts of our new management team in October last year was to review the industrial dispute at our Abbotsford brewery and reach an expeditious resolution. We were pleased that the dispute at the Abbotsford brewery was successfully resolved within two months of CUB's new

38 Diary excerpt, p. 1, tabled 18 May 2017. See discussion, *Proof Committee Hansard*, 18 May 2018, pp. 5–6.

39 See discussion with Mr Sebastian Siccita, Abbotsford Plant Manager, Carlton & United Breweries, *Proof Committee Hansard*, 18 May 2017, p. 5.

40 Mr Craig Katerberg, Vice President, Legal and Corporate Affairs, Carlton & United Breweries, *Proof Committee Hansard*, 18 May 2017, p. 5.

41 See discussion with Mr Sebastian Siccita, Abbotsford Plant Manager, Carlton & United Breweries, *Proof Committee Hansard*, 18 May 2017, pp. 5–6.

management taking up their new roles Returning operations to normal and reaching an amicable outcome with the unions and workers was important for our business in Australia and a statement of how we intend to do business here.⁴²

Committee view

5.40 The committee recognises the lack of legal recourse for the CUB55 under the FWA and therefore the critical role the community campaign and national boycott played in resolving the CUB dispute. The committee notes that this is not the only instance of financial pressure coming to bear on a company's actions.

5.41 The committee wishes to acknowledge that CUB's new management team engaged with the inquiry process and took responsibility for the company's actions. The committee particularly applauds CUB's commitment to learning from the experience and taking proactive steps to ensure that its workers are treated fairly, with dignity and respect, in future.

Oxford Cold Storage

5.42 The committee was also provided with an example of a company alleged to have established a number of labour hire companies, as shelf companies, in an elaborate attempt to avoid negotiating enterprise agreements with its employees.

5.43 Oxford Cold Storage is one of the largest cold storage warehouses in the southern hemisphere. The National Union of Workers (NUW) estimates that only 21 workers, out of an approximately 400-strong workforce, are employed directly by the company. The rest, the union states, are employed through eight different employing entities—a mix of legitimate labour hire agencies and labour hire agencies whose workers are employed exclusively at Oxford Cold Storage. It is a complex arrangement:

In addition, further complicating matters is that four of those entities at Oxford have enterprise agreements registered to them, including Daniel's. Daniel is employed by a labour hire agency, you could say, which has an enterprise agreement which provides for lower pay and conditions than he is currently working on. So it is a very tenuous and precarious position that hundreds of the workers at Oxford are in, because technically their employer is not Oxford; it is a shelf company, more or less, which does not have office space and does not supply workers to any other worksite but nonetheless is the entity which technically has control over their pay and conditions.⁴³

5.44 Mr Daniel Draicchio, a worker employed on the site, explained that he was originally employed by a labour hire agency as a casual, at a lower rate of pay than full-time workers on site. Mr Draicchio's employment was transferred through a

42 Mr Craig Katerberg, Vice President, Legal and Corporate Affairs, Carlton & United Breweries, *Proof Committee Hansard*, 18 May 2017, p. 2.

43 Ms Claire Lewis, Organiser, National Union of Workers, *Proof Committee Hansard*, 15 March 2017, p. 17.

number of different agencies, and he was eventually placed as a permanent employee, with better rates of pay and improved conditions. When the enterprise agreement he was employed under was due to expire, the company asked Mr Draicchio and fellow employees to sign on with a new agency:

I asked them about the EBA and if we had to negotiate with that. They said, 'No, an EBA has already been filed with Fair Work; you just have to sign over once it's been approved.' So we were called back in and signed over, and that was done; we were on to a new agency. When the EBA expired for Oxford under the 21 people that were doing negotiations, we were sent out a letter to say, 'If you don't sign the new common-law contract by a certain date, your pay will drop.' We did not know what the drop was, because we had never seen our actual EBA; we had never been told about it. We found out it was about \$7 less an hour than what we are getting now. There are people that have been there for over 10 years and have never, ever bargained for an EBA—not once.⁴⁴

5.45 Once workers are made permanent, the company allegedly transfers them from shelf company to shelf company, always just before a collective agreement is set to expire, in order to avoid having to negotiate a new enterprise agreement.

To be clear: the purpose of the transfers—whether it is the sole purpose or not is difficult for us to say, but it is clearly the main purpose, in our view—is to deny workers the ability to collectively bargain. So the transfers occur some months before a collective agreement is set to expire, and people are transferred to an entity that already has a collective agreement in place that will run for probably four years. That cycle has occurred a number of times in relation to a number of different entities at this workplace.⁴⁵

5.46 Despite being moved from employer to employer, the workers continue to perform the same work, on the same site, throughout.

5.47 The committee contacted Oxford Cold Storage for a response. The company submitted that it was proud to employ many long-term workers and offered some of the highest hourly rates of pay in the Victorian cold storage industry. The allegations above were not addressed.⁴⁶

Industry perspectives

5.48 The Australian Industry Group (Ai Group) advocated for flexible workplace arrangements, describing them as fundamental to improved productivity, important for national competitiveness and continuing to raise Australian living standards.⁴⁷

5.49 The Australian economy, Ai Group submits, faces multiple challenges, including seismic shifts in the global economy due to continued industrialisation in populous countries such as China, India and Indonesia, and a rapid pace of

44 Mr Daniel Draicchio, Member, NUW, *Proof Committee Hansard*, 15 March 2017, p. 18.

45 Mr Dario Mujkic, Industrial Officer, NUW, *Proof Committee Hansard*, 15 March 2017, p. 19.

46 See Oxford Cold Storage, additional information, 7 April 2017.

47 Australian Industry Group, *Submission 179*, p. 4.

technological development. It is essential, Ai Group holds, that workplace arrangements in Australia 'remain agile and in a position to readily adapt to technological changes.'⁴⁸

5.50 In light of this, the committee sought to better understand whether industry groups acknowledge that there are problems in the labour hire sector, and what their views are on the challenges insecure work presents for workers.

5.51 The Recruitment and Consulting Services Association (RCSA), Australia's peak industry body representing employment services, informed the committee that the association takes steps to monitor and address member organisations' behaviour:

We do not support, as the RCSA supports, on-hire contractor or independent contractor services in unskilled, semi-skilled, or even most trade relationships. We say that it should be the reserve of those who have the bargaining power, the professional insight and the know-how and the back-end capacity to manage what is essentially meant to be a business-to-business relationship. So, if any circumstances arise where we see workers with low bargaining power—especially unskilled and semi-skilled—being engaged as independent contractors, we will call out that behaviour with our members under our code, and we are also prepared to pull them into line to the extent that we have the power to do so.⁴⁹

5.52 The association has developed an employment certification program which is designed to address key failures in the sector:

Very simply, it deals with issues of fit and proper people to run these businesses...The second one is worker status and remuneration, which goes to the Fair Work entitlements, ensuring that individuals are paid in accordance with those minimum entitlements; work health and safety; migration—we are very mindful of vulnerable workers around migration, and we are working with the foreign worker task force and are about to present to them on our certification program—and financial assurances as well, making sure that there is evidence of them having a sustainable and proven record of reporting and otherwise, so that you do not simply get a mobile phone and say, 'Hey, here's Jimmy the Afghan's labour hire,' as it was recently referred to in the media, 'and I can find you a whole heap of people.' The final one relates to suitable accommodation to try and address the issue of foreign workers being housed in inappropriate conditions.⁵⁰

48 Ai Group, *Submission 179*, p. 4.

49 Mr Andrew Cameron, Chief Executive Officer, Recruitment and Consulting Services Association, *Proof Committee Hansard*, 15 March 2017, p. 40.

50 Mr Andrew Cameron, Chief Executive Officer, Recruitment and Consulting Services Association, *Proof Committee Hansard*, 15 March 2017, p. 41.

5.53 However, the RCSA explained that many complaints around poor conduct made to its ethics registrar relate to the practices of non-members, and as such the association is powerless to compel these companies to be bound by a code.⁵¹

5.54 Noting that Programmed—the largest labour hire company in the Australian market and a key player in the CUB case—is in fact a member organisation of the RCSA, the committee asked whether, in RCSA's view, Programmed had sought to undermine workers' pay and conditions by seeking to use Catalyst to re-hire the CUB workforce. In response, RCSA informed the committee that its interest was limited to ensuring that members comply with legislation:

Our interest there is to ensure that any of our members are complying with the legislation that applies in the circumstances. I am sure you and I understand that the Fair Work Act does not prohibit the engagement of individuals for the purpose of making an enterprise agreement.⁵²

Committee view

5.55 The committee notes steps the RCSA is taking to ensure that minimum standards are adhered to in the labour hire sector. However, this does not appear to address the key issue around labour hire—the minimum standards do not set a very high bar, which is precisely the reason that employers are supplementing, and in some cases replacing, their workforces through labour hire arrangements.

5.56 The committee is disappointed to learn that CUB and Programmed were not held accountable for their actions during this high-profile dispute, and that the test for appropriate conduct in the sector is whether employers adhere to the letter of the law. The committee is firmly of the view that CUB and Programmed applied an interpretation of the law which suited their financial interests, with little regard for the spirit of the FWA. Considering that CUB and Programmed are alleged to have gamed the system by exploiting loopholes in the FWA—not necessarily contravened the Act—in the committee's view the question of whether the two companies adhered to the legislation is moot.

5.57 Furthermore, the committee is unconvinced by arguments heard from industry groups concerning the challenges facing Australia's economy. There is a propensity to use words such as 'agile' to describe workforces, ignoring the fact that 'agile' often translates to 'casual' or insecure work. There is a large body of evidence, on record as part of this inquiry, indicating that employers are using labour hire specifically to drive down wages and reduce workers' conditions and entitlements. As explained by the AMWU, by giving primacy to enterprise bargaining, the FWA in fact ties productivity to wages at the enterprise level. Labour hire is becoming a vehicle companies are using to break this connection between productivity and wage increases:

51 Mr Andrew Cameron, Chief Executive Officer, Recruitment and Consulting Services Association, *Proof Committee Hansard*, 15 March 2017, p. 41.

52 Mr Andrew Cameron, Chief Executive Officer, Recruitment and Consulting Services Association, *Proof Committee Hansard*, 15 March 2017, p. 42.

Within this silo of 'labour hire' the work they perform and the productivity increases they achieve for the business are no longer connected to their wage increases. Their 'host employer' is insulated by the 'labour hire employer' from any pressure to increase wages.⁵³

5.58 In this context, it is worth noting that economists, the governor of the Reserve Bank of Australia, and the OECD have warned against further stagnation in wage growth and its deleterious effect on the national economy. Calls for increasing the use of labour hire and other forms of insecure work are, in the committee's view, deeply counterproductive and against the national interest. It is short-sighted to think that allowing wages to fall will have any effect on the economy beyond redistributing wealth in favour of profits for the private sector, as shown in Chapter 9 of this report.

Recommendation 2

5.59 **The committee recommends that federal and state governments work together to establish labour hire licensing authorities in each state and territory, and that licensed labour hire operators be required to provide data on the numbers of workers engaged.**

Recommendation 3

5.60 **The committee recommends that the government legislate to require that a person or organisation supplying a worker to another person or organisation must:**

- a) **be a licenced labour hire operator; and**
- b) **only engage in such activity through a registered business.**

Recommendation 4

5.61 **The committee recommends that, upon establishment of labour hire licensing schemes (Recommendation 2), the government impose a legal obligation for hosts to use only licensed labour hire providers.**

Recommendation 5

5.62 **The committee recommends that the National Employment Standards be amended to provide casual employees, whether directly or indirectly engaged, the right to elect to become a permanent employee after twelve months regular and systematic service with the same employer.**

Recommendation 6

5.63 **The committee recommends that labour hire workers be covered by, be able to participate in and negotiate collective agreements directly with the host employer.**

53 AMWU, *Submission 196*, p. 14.

Recommendation 7

5.64 Consistent with Recommendation 6, the committee recommends that host employers have responsibility for ensuring all labour standards provided in the *Fair Work Act* are afforded to labour hire workers. Such provisions could draw on the concept of the Person in Control of a Business or Undertaking (PCBU) definition found in the Model OHSWHS laws.