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Committee Secretary
Senate Education and Employment Committees
PO Box 6100
Parliament House
Canberra ACT 2600

By email eec.sen@aph.gov.au

Dear Secretary

We welcome the opportunity to provide a submission to the Committee's Inquiry in to Corporate Avoidance of the Fair Work Act.

Please do not hesitate to contact me and my colleagues if we can further assist with the Committee's important work.

Yours sincerely,

Giri Sivaraman
Principal
Employment & Industrial Law Section
MAURICE BLACKBURN

SUBMISSION TO THE EDUCATION AND EMPLOYMENT REFERENCES COMMITTEE

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Introduction

Maurice Blackburn Pty Ltd is a plaintiff law firm with 32 permanent offices and 29 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions.

Maurice Blackburn employs over 1000 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. The advice services are often provided free of charge as it is firm policy in many areas to give the first consultation for free. The firm also has a substantial social justice practice.

Our Submission

Maurice Blackburn Lawyers (Maurice Blackburn) contends that labour hire and/or contracting arrangements are being used to exploit vulnerable workers.

The current legislative framework offers limited protection to such workers, who experience inferior remuneration and conditions compared with their directly employed colleagues. Legislative reform must be enacted to ensure that such workers are adequately protected.

Maurice Blackburn also contends that current arrangements under the Fair Work Act 2009 (Cth) (The Act), which permit small cohorts to pass Enterprise Bargaining Agreements (EBAs) potentially affecting a much larger group, is a deliberate manipulation of the legislation. Significant increases in staff are often envisaged by employers, who use existing legislation to deliberately deprive employees of their right to bargain.

Overview

There has been an increasing trend towards using labour hire within Australia. Under a labour hire agreement, a triangular relationship exists between the labour hire provider, the labour hire worker and the host client.

As the labour hire worker is essentially 'rented out' to the host client, no direct employment relationship exists between the labour hire worker and the host client.

The relationship between the labour hire provider and the labour hire worker can be an employment relationship (labour hire employee) or that of an independent contractor. Such arrangements place labour hire workers in a vulnerable position, particularly given the insecure nature of the work. The lack of bargaining power held by labour hire workers emphasises the detriment faced by such individuals in the market.

Various state and federal inquiries have considered the position of labour hire employees. These include:

a. Senate Education and Employment References Committee, Parliament of Australia, An Inquiry into the Impact of Australia's Temporary Work Visa Program on the Australian Labour Market and on the Temporary Work Visa Holders (Temporary Visa Holder Inquiry).[1]

b. Joint Standing Committee on Migration, Parliament of Australia, *Seasonal Change: Inquiry into the Seasonal Worker Program* (Seasonal Change Worker Program Inquiry).[2]

c. Economic Development Committee, Parliament of Victoria, *Victorian Inquiry into the Labour Hire Industry and Insecure Work* (Victorian Inquiry).[3]

d. Finance and Administration Committee, Parliament of Queensland, *Inquiry into the Practices of the Labour Hire Industry in Queensland* (Queensland Inquiry).[4]

e. Economic and Finance Committee, Parliament of South Australia, *Inquiry into the Labour Hire Industry* (South Australian Inquiry).[5]

Unfavorable Pay and Conditions

Under labour hire arrangements, labour hire workers are often denied access to the EBA which operates at the workplace of the host client. Consequently, labour hire workers are paid at lower rates and on lower conditions than those provided to their colleagues who are covered by the workplace EBA. This is despite the fact that they are often performing the same duties and functions.

[1] Senate Education and Employment References Committee, Parliament of Australia, A National Disgrace: The Exploitation of Temporary Work Visa Holders, (March 2016).
[2] Joint Standing Committee on Migration, Parliament of Australia, *Seasonal Change: Inquiry into the Seasonal Worker Program*, (May 2016).
[3] Economic Development Committee, Parliament of Victoria, *Victorian Inquiry into the Labour Hire Industry and Insecure Work,* (August 2016).
[4] Finance and Administration Committee, Parliament of Queensland, *Inquiry into the Practices of the Labour Hire Industry in Queensland* (June 2016).
[5] Economic and Finance Committee, Parliament of South Australia, *Inquiry into the Labour Hire Industry,* (18 October 2016).

The exploitation of labour hire workers is supported by the findings of various state and federal inquiries, with the consensus being that labour hire is used to establish cheaper workforces.[6]

The detriment encountered by labour hire workers is substantial, particularly where the worker has worked for the host client for a continuous period and in conditions analogues to full time, direct, employment.

Given that most labour hire workers are employed as contractors or casual workers, such workers are also not entitled to the majority of the minimum entitlements provided for by the National Employment Standards. Notwithstanding applicable loadings, casual labour hire workers are often worse off, as they do not receive many of the award conditions.[7]

The poor wages and conditions offered to labour hire workers significantly undermine the living standards of workers and their families.[8]

The unfavorable pay and conditions of labour hire workers can have wider effects on the industry. The lower wages and conditions available for labour hire workers can be used to drive down employment conditions existing under workplace EBAs.

In the Temporary Visa Holder Inquiry, the Senate Committee concluded that labour hire companies were using vulnerable workers to gain access to cheaper labour.[9] The Committee was concerned that labour hire was being deliberately used to cut costs and place downward pressure on wages negotiated in EBAs.[10]

The increasing use of labour hire workers also has the potential to significantly affect the existing employment market. The availability of lower paid workers may undermine the permanent employment workforce, increasing the use of unstable and insecure employment. The findings of the Queensland Inquiry support this conclusion.[11]

Unfair Dismissal and Labour Hire

Under section 385 of The Act, an employee has the right to remedies when their dismissal is harsh, unjust or unreasonable.

The absence of a direct employment relationship between the labour hire worker and the host client, places significant restrictions on the availability of unfair dismissal provisions to labour hire workers.

As a result of the contractual relationship existing between the labour hire provider and the host client, if the host client directs the labour hire provider not to place the labour hire worker at the workplace, the labour hire provider is often contractually required to abide. Accordingly, the labour hire worker is effectively removed from working at the host clients premises without recourse to unfair dismissal laws. Though the reasons for exclusion may

[6] Senate Education and Employment References Committee, Parliament of Australia, above n 2, [4.94], [9.222]; Economic Development Committee, Parliament of Victoria, above n 4, [3.7]; Finance and Administration Committee, Parliament of Queensland, above n 5, 14.
[7] Economic Development Committee, Parliament of Victoria, above n 4, [3.2]; Finance and Administration Committee, Parliament of Queensland, above n 5, 14.
[8] Finance and Administration Committee, Parliament of Queensland, above n 5, 14.
[9] Senate Education and Employment References Committee, Parliament of Australia, above n 2, [4.89].
[10] Ibid, [4.93], [4.95]; Economic Development Committee, Parliament of Victoria, above n 4, [3.6].
[11] Finance and Administration Committee, Parliament of Queensland, above n 5, 14.

include misconduct or unsatisfactory performance, the worker is afforded no procedural fairness in his or her dealings with the host client.

It is also difficult for a labour hire worker to bring a claim against the labour hire provider. The majority of labour hire workers are employed on a casual basis (i.e. for a specified period of time, task or the duration of a specified season) and are therefore excluded from bringing a claim.[12]

If a casual labour hire worker can prove they had employment on a regular and systematic basis and a reasonable expectation of continuing employment on a regular and systematic basis, labour hire providers can often avoid liability by providing alternative work.[13] As the labour hire employee remains employed in the strict sense, there are often no grounds to justify an unfair dismissal.

Given that the host client has functional control over the workplace and rights of entry, the labour hire provider may also be able to hide behind the commercial relationship as a means of avoiding liability.[14] In *Kool v Adecco Industries (*Kool*)*[15] the Fair Work Commission (FWC) noted:

> *"These arrangements can be a minefield for all concerned both in practical terms and in terms of rights and obligations arising under legislation, industrial instruments and contracts of employment."*

Though successful cases have been brought, the courts have stressed that unfair dismissal cases concerning labour hire arrangements are heavily facts specific.[16]

In Kool the FWC held that the:

> *"Relationship between a labour hire company and a host employer cannot be used to defeat the rights of a dismissed employee seeking a remedy for unfair dismissal."*[17]

Nevertheless, in *Pettifer v MODEC Management Services*[18] removal by a host client after a 'near miss' was not sufficient to establish an unfair dismissal claim against the labour hire provider (MODEC). Though MODEC did not agree with the host clients views that Pettifer's conduct justified dismissal, Pettifer was removed from the host clients business pursuant to MODEC's contract with the host client. As Pettifer could no longer perform the inherent functions of his role (with the host client) and no alternative employment could be found, Pettifer's dismissal by MODEC was found to be justified. This evidences the lack of job security available for labour hire employees who have limited legal recourse.

The difficulties encountered by labour hire workers in the event of unfair dismissals have been noted by state enquiries. Specifically, the Victorian Inquiry concluded that the restrictiveness of current unfair dismissal provisions significantly reduces the protection afforded to labour hire workers.[19] This creates incentives for the use of labour hire over direct employment.[20]

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[12] *Fair Work Act 2009* (Cth) s 386.
[13] *Fair Work Act 2009* (Cth) s 384.
[14] Economic Development Committee, Parliament of Victoria, above n 4, [3.10].
[15] [2016] FWC 925 [46].
[16] *Kool v Adecco Industries* [2016] FWC 925 [46]; *Damevski v Giudice* (2003) 133 FCR 438.
[17] *Kool v Adecco Industries* [2016] FWC 925 [48].
[18] Pettifer v MODEC Management Services Pty Ltd [2016] FWCFB 5243.
[19] Economic Development Committee, Parliament of Victoria, above n 4, [3.7].
[20] Ibid [3.11]; Finance and Administration Committee, Parliament of Queensland, above n 5, 14.

General Protections and Labour Hire

Part 3.1 of the Act provides, among other things, that an employer must not take adverse action against an employee where the employee has or proposes to, exercise a workplace right. A workplace right includes complaints about health and safety, complaints about management and sexual harassment.

While Part 3.1 clearly applies between the labour hire provider and the labour hire worker, its application to host clients is unclear.

In the majority of cases concerning unfair treatment, the labour hire worker has attempted to claim they are employees of the host client.[21] Though a number of cases suggest that a labour hire employee can take action under the general protections provisions against the host client, the matter has not been conclusively decided.[22]

Such legislative uncertainty has adverse repercussions on labour hire workers who are fearful of bringing an action to enforce their rights, including their rights to a safe workplace. The circumstance of labour hire workers emphasises and increases the vulnerability and inequality existing between labour hire workers and employees of the host client.

The differential conditions existing between labour hire workers and employees of the host client was emphasised in both the Victorian and Queensland Inquiries. The Queensland Inquiry identified that employees were disinclined from challenging working conditions, and had less of a voice then their colleagues.[23] Similarly, in Victoria it was found that labour hire workers frequently refrain from reporting workplace issues and exercising their workplace rights for fear of jeopardising future employment.[24]

Labour hire workers should be accorded the security of knowing that they are permitted to bring a general protections claim against the host client.

Sham Contracting

Sham contracting is a prevalent practice which occurs where an employer deliberately disguises an employment relationship by labelling the employee an independent contractor.[25] Sham contracting allows labour hire employers to evade industrial laws and the requirement to pay employees their legitimate entitlements. Such entitlements include tax, superannuation and leave.

Section 357 of the Act was interpreted narrowly by the Full Federal Court in *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*.[26] The Court held that the provision applies when a contract between an employer and an employee is represented to be a

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[21] *FP Group Pty Ltd v Tooheys Pty Ltd* [2013] FWCFB 9605; *Vij v Cordina Chicken Farms Pty Ltd* [2012] FMCA 483; *Fair Work Ombudsman v Grouped Property Services* [2016] FCA 1034.
[22] *Kia Wah Pang v Kerry Ingredients Australia* [2015] FCCA 824; *NUW* v Caterpillar *of Australia Pty Ltd; NUW* v *Hoban Recruitment Pty Ltd & Caterpillar of Australia Pty Ltd* [2014] FWC 4133.
[23] Finance and Administration Committee, Parliament of Queensland, above n 5, 15;
[24] Economic Development Committee, Parliament of Victoria, above n 4, [3.18].
[25] *Fair Work Act 2009* (Cth) s357; see Fair Work Ombudsman, 'Statement on outcome of Housekeeping services of 4 and 5 star hotels,' (Media Release, 20 May 2016) <https://www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/may-2016/20160520-hotel-housekeepers-inquiry>; Fair Work Ombudsman, 'Record penalty against a businessman who refused to clean up his act,' (Media Release, 16 November 2016) <https://www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/november-2016/20161116-bijal-sheth-penalty>
[26] [2015] FCAFC 37

contract for service made between those parties.[27] The provisions thus had little effect where third parties were involved.

The High Court in *Fair Work Ombudsman v Quest South Perth Holdings*[28] overturned the Full Courts narrow interpretation, instead holding that:

> *"To confine the prohibition to a representation that a contract under which the employee performs or would perform work as an independent contractor is a contract for service with the employer would result in section 357(1) doing little to achieve its evident purpose within the scheme of Pt 3-1. That purpose is to protect an individual who is in truth an employee from being misled by his or her employer about his or her employment status"*[29]

While this indicates a willingness to consider the substance of the relationship rather than its label, section 357 can be avoided if the employer proves that they did not know and were not reckless as to the representation.[30]

Further, no definitive test exists at Common Law to differentiate an employee from an independent contractor. Consequently, employees with legitimate entitlements under WorkCover or Common Law may fail to seek legal advice due to the assumption that they are not entitled to such benefits.[31]

Employees who may have been misclassified as independent contractors for a number of years may have also been deprived their right to redundancy pay where a redundancy has occurred within the labour hire providers' organisation.

Recommendations

Licensing System

Maurice Blackburn strongly supports the introduction of a license scheme for the labour hire industry. This proposal is supported by recommendations made at both state and federal level concerning the labour hire industry.[32]

A labour hire scheme would have the following benefits:

- That labour hire workers are financially stable and able to meet their obligations in respect of the workplace, and
- That labour hire providers have the capacity to meet their occupational health and safety obligations.

A licensing scheme would create a greater degree of certainty that labour hire providers would have capacity to meet employment obligations. This would minimise circumstances

[27] *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37, [75].
[28] *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] HCA 45.
[29] *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] HCA 45 [15].
[30] *Director of the Fair Work Building Industry Inspectorate v Bavco Pty Ltd (No 2)* [2014 FCCA 2712.
[31] Maurice Blackburn, to Parliament of Victoria, *Submission to the Victorian Inquiry into the Labour Hire Industry and Insecure Work,* December 2015, 15.
[32] Senate Education and Employment References Committee, Parliament of Australia, above n 2, [9.309]; Economic Development Committee, Parliament of Victoria, above n 4, 13-18; Economic and Finance Committee, Parliament of South Australia, above n 6, 62; Joint Standing Committee on Migration, Parliament of Australia, above n 3, Recommendation 9.

where workers would incur financial loss due to incapacity to pay or non-compliance with industrial laws.

Licensing agreements have been successfully implemented in other OECD countries such as Canada, Korea, Japan Germany, Australia, Spain, Luxembourg, the Netherlands, Sweden, Belgium, France, South Africa, Portugal, and to a limited extent, in the UK. They have been introduced to protect the rights and entitlements of workers and provide transparency and stability in the labour hire industry.[33]

Labour Hire Workers to be covered under Enterprise Agreements

As recommended by various parliamentary inquiries, labour hire employees should be covered by enterprise agreements where they apply in a host client's workplace. This may occur de facto where a labour hire employee decides to observe the host clients enterprise agreement or because of the application of a parity clause.[34]

Legislative Amendments

The framework provided by the Act should be as robust as possible to ensure that the interests of labour hire workers and contractors are adequately protected.

The difficulties of bringing an unfair dismissal claim may be mitigated through the adoption of the concept of joint employment recognised in the United States. While Australia has generally rejected the application of dual employment, obiter from *Morgan v Kittochside Nominees Pty Ltd* (2002) suggests that there is no substantial barrier preventing Australia from recognising this principle.[35] Recognising joint employment would allow labour hire employees to avoid the difficulty of identifying the 'real employer.'[36] Among the benefits of dual employment include a clear legislative framework and strengthened unfair dismissal provisions for labour hire employees. [37]

The scope of general protections should be clearly articulated in the Act to allow labour hire employees to bring a general protections claim against host clients.

As recommended by the Temporary Visa Holder Inquiry, and the Victorian Inquiry, the sham contracting provisions contained in section 357 should be extended to cover situations where employers could be reasonably expected to know that the arrangement is a sham.[38]

A statutory definition of employee and contractor should be inserted into the Act. This would enable individuals to determine the nature of their employment without recourse to the Common Law test, thus providing greater clarity.

[33] Maurice Blackburn, to Queensland Parliament Finance and Administration Committee, *Inquiry into the practices of the Labour Hire Industry in Queensland*, April 2016, 4.
[34] Economic Development Committee, Parliament of Victoria, above n 4, Recommendation 2; Senate Education and Employment References Committee, Parliament of Australia, above n 2, [4.96].
[35] 117 IR 152, [71]-[75] see also *Fair Work Ombudsman v Eastern Colour Pty Ltd* [2011] FCA 803, [78].
[36] *Costello v Allstaff Industrial Personnel (SA) Pty Ltd* (2004) 71 SAIR 249 [125].
[37] Pauline Thai, 'Unfair Dismissal Protection for Labour Hire Workers? Implementing the Doctrine of Joint Employment in Australia' (2012) 25 *Australian Journal of Labour Law* 152, 176.
[38] Senate Education and Employment References Committee, Parliament of Australia, above n 2, [9.239]; Economic Development Committee, Parliament of Victoria, above n 4, Recommendation 28.

The Use of Unrepresentative Voting Cohorts to Approve Agreements with Broad Scope Affecting Workers' Pay and Conditions

Employees can be disadvantaged in their dealings under EBA's. Under current enterprise provisions, small cohorts are permitted to approve agreements with the potential to impact on the pay and conditions of a much larger cohort. This is a significant shortcoming in the legislation.

Under section 181 of the Act before an EBA can be voted on employees must be provided with a copy of the agreement and information as to the time, place and method of voting.[39] The employer must provide appropriate explanation as to the terms of the agreement and the effects of those terms on the relevant employees.[40] Further, employees must be informed of their right to be represented during the bargaining process.[41]

Sections 186-192 of the Act govern approval of the EBA by the FWC. Among other things, section 186(2) requires that enterprise agreements be fairly agreed to by the employees of a respective agreement and that they pass the better off overall test. Under section 186(3) the group of employees covered by an enterprise agreement must also be 'fairly chosen.'

Significant issues exist within the agreement making process as agreements which cover significant numbers of people are being passed by a small number of employees.

In *Construction, Forestry, Mining and Energy Union v John Holland* (**John Holland**),[42] Fair Work Australia approved an enterprise agreement made by just three people. This is despite the fact it was stated to apply to ten different classification bands and all employees throughout Western Australia, unless such employees were covered by a site specific agreement. The union challenged the approval of the agreement on the basis that such employees were not fairly chosen. On appeal the Full Bench endorsed the view of the primary judge that:

> *"It was not relevant to an assessment of the question posed by section 186(3) that the Full Bench did not know how many employees would, or might, in future be covered by site specific agreements and hence excluded from the operation of the enterprise agreement. The possibility that the agreement might not apply to unknown future employees on unknown future sites did not alter the 'coverage' of the agreement even though it might have an effect on whether the agreement 'applied' to particular employees at particular sites."*[43]

Similarly in *Maritime Union of Australia v Toll Energy Logistics*[44] an enterprise agreement was passed by seven employees without the union's knowledge. The union challenged the approval on the basis that this was an attempt to manipulate the agreement making process as employees were not fairly chosen and the agreement was not genuinely agreed to. Rejecting the appeal, the Full Bench held that in the absence of a suggestion that employees were not employed for bona fide business reasons, there is nothing improper about the use of a small voting cohort to approve broader enterprise agreements.[45]

[39] *Fair Work Act 2009* (Cth), s 180.
[40] Ibid s180(5).
[41] *Fair Work Act 2009* (Cth) s 173.
[42] [2015] 228 FCR 297
[43] *Construction, Forestry, Mining and Energy Union v John Holland* [2015] 228 FCR 297 [36], [64].
[44] *Maritime Union of Australia v Toll Energy Logistics Pty Ltd* [2015] FWCFB 7272.
[45] *Maritime Union of Australia v Toll Energy Logistics Pty Ltd* [2015] FWCFB 7272 [73].

The potential for manipulation in such circumstances is significant. This was recognised in John Holland where the Court held:

> "*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 interest of future employees. The potential for manipulation of the agreement-making procedure is a real one."*[46]

Where a small number of employees have the capacity to make decisions affecting a much wider cohort other employees are denied the ability to collectively bargain. This has the effect of essentially elevating an individual contract into a collective instrument.

Concern also exists over the moral authenticity of these arrangements under section 186(3). Where a small cohort approves an agreement covering a wide range of industries the genuineness of such provisions is questionable as such employees may have no stake in the ultimate arrangement.[47]

The recent Carlton United Breweries dispute evidences the deficiencies existing under the current legislation. A new EBA which substantially affected the employment terms and conditions of a large number of workers was passed by just three employees.[48] One of those individuals was purportedly a casual employee who had worked with the company for just six days. The authenticity of such an approval is questionable.

Recommendations

The genuine agreement provisions contained in section 188 of the Act should be amended to provide a robust framework which preserves the moral authenticity of the bargaining process. Section 188(c) should be amended to require the FWC when considering whether agreement was genuinely reached to consider:

i. The number of employees who voted.

ii. The number of employees likely to be covered by the agreement during its nominal life.

iii. Whether the people who voted are representative of the function, geographical location and classification of employees to be covered by the agreement.

iv. Whether the number of individuals who voted for the agreement are at least 50% of those who would be covered by the agreement. This would effectively make it impossible for a small cohort to approve arrangements affecting thousands of employees.

A new provision should be inserted into the Act providing that if the number of employees covered by an agreement significantly exceeds the number of employees which the

[46] *Construction, Forestry, Mining and Energy Union v John Holland* (2015) FCR 297 [33]; *Communications, Electrical, Electronic, Energy, information, Postal, Plumbing and Allied Service Union v Main People* (2015) 252 IR 340 [32].
[47] See *KCL Industries* [2016] FWCFB 3048.
[48] Jeremy Story Carter, 'Carlton and United Breweries Worker Agreement was Voted on by Three Casuals' ABC (online), 30 August 2016 http://www.abc.net.au/news/2016-08-26/carlton-united-breweries-worker-dispute-exclusive-details/7785170

agreement was anticipated to cover, this should trigger the commencement of the agreement making process. This would ultimately result in the implementation of a new EBA which was collectively agreed.

Industrial organisations should also have greater capacity to intervene in the EBA process from the beginning. Specifically they should be provided with:

- Notice of the commencement of negotiations, and
- Have the capacity to intervene as of right to raise objections on discretionary grounds.

Conclusion

Maurice Blackburn believes that employers are deliberately manipulating provisions of the Act designed to protect vulnerable individuals.

Reform of the Act is necessary to ensure that workers are treated fairly and protected against exploitation.