THE AUSTRALASIAN MEAT INDUSTRY EMPLOYEES' UNION
(Queensland Branch)

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Branch Secretary
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25 November 2016

The Committee Secretary
Senate Standing Committee on Education and Employment
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Dear Committee Secretary

Re: Submissions of the AMIEU Qld Branch to the Inquiry into Corporate Avoidance of the Fair Work Act 2009

The Australasian Meat Industry Employees' Union (Queensland Branch) seeks to make the following submissions in relation to the Senate Education and Employment Committee's inquiry into issues of corporate avoidance of the *Fair Work Act 2009*.

1. The AMIEU notes that the terms of reference of the inquiry are as follows:

   The incidence of, and trends in, corporate avoidance of the Fair Work Act 2009 with particular reference to:

   (a) the use of labour hire and/or contracting arrangements that affect workers' pay and conditions;

   (b) voting cohorts to approve agreements with a broad scope that affect workers' pay and conditions;

   (c) the use of agreement termination that affect workers' pay and conditions;

(d) the effectiveness of transfer of business provisions in protecting workers' pay and conditions;

(e) the avoidance of redundancy entitlements by labour hire companies;

(f) the effectiveness of any protections afforded to labour hire employees from unfair dismissal;

(g) the approval of enterprise agreements by workers not yet residing in Australia that affect workers' pay and conditions;

(h) the extent to which companies avoid their obligations under the Fair Work Act 2009 by engaging workers on visas;

(i) whether the National Employment Standards and modern awards act as an effective 'floor' for wages and conditions and the extent to which companies enter into arrangements that avoid these obligations;

(j) legacy issues relating to Work Choices and Australian Workplace Agreements;

(k) the economic and fiscal impact of reducing wages and conditions across the economy; and

(l) any other related matters.

2. The Australasian Meat Industry Employees' Union is a trade union which represents employees in the meat industry. The Queensland branch of the union represents employees in the beef, pork, and poultry processing sectors, meat manufacturing (such as smallgoods), and meat retailing (which includes both butcher shops and employees working in supermarket meat departments. References in this document to the AMIEU should be considered a reference to the Queensland Branch of the Union.

3. The AMIEU's general experience has been that issues of employer non-compliance with legal obligations (including obligations under the *Fair Work Act*) have been increasing in the meat industry in recent years. Such increase has been closely associated with the increasing use of labour hire arrangements in the industry, together with the widespread employment of temporary visa workers.

(a) the use of labour hire and/or contracting arrangements that affect workers' pay and conditions

4. There has been significant increase in the use of labour hire in the meat industry over the past ten years. However, there has also been a change in the way in which labour hire is used.

5. The AMIEU's experience is that the use of labour hire in the meat industry had two primary motivations. Firstly, labour hire agencies were utilised to perform the functions of sourcing and recruiting labour. Secondly, meat processing employers found it to be advantageous to employ some or all of their workforce through labour hire companies in terms of minimising their workers' compensation insurance premiums. A secondary motivation may have been the capacity to avoid the consequences of unfair dismissal legislation afforded by labour hire arrangements – this is discussed further in relation to Item (f) of the terms of reference below.

6. During this period, meat processors were more concerned with utilising labour hire to reduce insurance and recruitment costs, rather than the cost of wages. For that reason, it was common for meat processors, labour hire agencies, and the AMIEU to agree that workers supplied by labour hire agencies would be paid the same wages, and afforded the same conditions, as employees directly employed by a meat processor. Sometimes these arrangements were informal, and at other times were formalised by deeds of arrangement, or even collective agreements entered into by the union and the labour hire agency.

7. In the course of the last five to ten years, however, labour hire has been used by meat industry employers primarily as a means of avoiding paying workers the wages and conditions provided for by an enterprise bargaining agreement.

8. This form of usage of labour hire raises two considerations, from the AMIEU's perspective.

9. The first consideration is that, even where there is no contravention of the law, the use of labour hire arrangements has the effect of undermining wages and other enterprise bargaining outcomes. Since the mid-1990s, enterprise bargaining has become the focus of collective bargaining activity by the trade union movement, with a broad tripartite

(government-employer-union) consensus that improvement to wages and conditions should be achieved by pursuing improved productivity at the enterprise level.

10. Such usage of labour hire arrangements effectively allows employers to obtain productivity benefits from enterprise bargaining, but permits them to avoid paying employees the wages and conditions they agreed in exchange for those benefits.

11. In such circumstances, it seems difficult to understand why trade unions should continue to accept that collective bargaining should be confined to enterprise-level arrangements. The AMIEU considers that the trade union movement should reconsider its commitment to enterprise bargaining and advocate a major revision of the legislative framework for industrial relations.

12. The second consideration, and of more immediate relevance to the Senate committee, is the widespread avoidance of legal obligations which is facilitated by combining the use of temporary visa workers and labour hire arrangements. AMIEU officials, including officials from Queensland, have previously provided evidence about the exploitation and mistreatment of temporary visa workers in the meat industry to an earlier Australian Senate Education and Employment References Committee. [1]

13. The AMIEU again notes that there is widespread use of temporary visa workers in the meat industry in Queensland, and in almost all cases, this is effected through labour hire arrangements. Such arrangements allow 'backpacker visa' workers to be employed at award rates, rather than the higher enterprise agreement rates which apply to direct employees of the establishment. Despite the advantage which accrue to employers in engaging visa workers on inferior award rates, non-compliance with even minimum safety net entitlements is rampant.

[1] *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, 17 March 2016. http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/Report

14. These arrangements commonly feature the following:

    a. Underpayment of basic award conditions, often due to blatant disregard of award entitlements;

    b. Attempts by the union to ensure award compliance are hindered by inadequate record keeping by the employers, and intimidation of visa workers;

    c. Many of the labour hire companies operating in this sector are "$2 companies" with no significant assets or capital, allowing them to go into liquidation if attempts to enforce entitlements are successful;

    d. Inappropriate deductions from workers' wages;

    e. Disregard of workplace health and safety obligations, including instances of failing to ensure workers are vaccinated against Q Fever (which, if contracted, can become a chronic, debilitating condition);

    f. When exploitative practices by labour suppliers are brought to the attention of meat industry employers, the invariable reaction has been a refusal to investigate or take remedial action. Employers invariably (and often, implausibly) purport to have no knowledge of unlawful activity on the part of the labour hire company, and wilfully ignore any indication to the contrary.

15. Some labour hire companies purport to operate on the basis that the visa workers are self-employed 'contractors.' Whilst the AMIEU has encountered this in other states, it has not been detected to any significant extent in Queensland. In determining whether a worker is properly characterised as an employee or a contractor, the law applies an objective test which examines whether various indicia of "employment" or "self-employment" are present. Applying any of the various legal formulations of this test to unskilled workers in a factory environment, it is difficult to conceive that such arrangements can be anything other than 'sham contracting' arrangements.

16. The AMIEU also notes that the issues raised here (and in our earlier submissions to the Senate Education and Employment Committee inquiry into temporary migrant labour) would appear to be borne out by the findings of many reported investigations being conducted by the office of the Fair Work Ombudsman into employers who employ temporary visa workers (not just in the meat industry).

(b) voting cohorts to approve agreements with a broad scope that affect workers' pay and conditions

17. The AMIEU has noted that it is becoming common, particularly for labour hire agencies, to manipulate entities and employees it controls in order to make enterprise bargaining agreements that suit its competitive interests. That is, a labour hire company will establish a subordinate entity and either employ a small number of employees, or alternatively transfer the employment of a small number of employees from an existing entity to the new entity. The employees chosen are then asked to vote to approve an enterprise agreement. Once the agreement survives the approval process overseen by the Fair Work Commission, the entity will begin to employ large numbers of employees on wages and conditions that have been acceded to by a small number of compliant employees.

18. An example of a labour hire company in the meat industry adopting this practice can be found in *MP Resources Pty Ltd* [2015] FWC 6820 (2 October 2015). The decision in *Mondex Group Pty Ltd* [2015] FWC 1148 (17 February 2015) provides an example of an unsuccessful attempt by a labour hire agency to register such an agreement.

(c) the use of agreement termination that affect workers' pay and conditions

19. The AMIEU has not experienced this practice in recent years. In the course of bargaining for an enterprise agreement, meat industry employers occasionally threaten to apply to termination a previous agreement. However, there is no recent example of any attempt to do so in Queensland.

20. The AMIEU's experience is that employers are more likely to try and prolong the life of expired enterprise agreements, by refusing to bargain for a new agreement, or by drawing

out the bargaining process for as long as possible. This practice is connected with the inadequacies of the Fair Work Act /National Employment Standards/Modern Awards in setting an effective floor of minimum conditions, and is discussed in more detail in relation to Item (i) of the Terms of Reference, below.

(d) the effectiveness of transfer of business provisions in protecting workers' pay and conditions

21. The AMIEU has not experienced any particular problem with the operation of transfer of business provisions. Of greater concern is the potential use of transfer of business provisions to frustrate attempts to terminate an expired enterprise agreement. Another branch of the AMIEU is currently engaged in litigation which will examine the issue of whether transferring a small number of employees to a new entity effectively creates a new enterprise agreement (by virtue of the transfer of business provisions) that survives after an order is obtained terminating the enterprise agreement with the original entity.

(e) the avoidance of redundancy entitlements by labour hire companies

22. The AMIEU in Queensland has not encountered situations where labour hire companies have avoided payment of redundancy entitlements. In the meat industry, labour hire employees are almost invariably engaged as casual employees, and the issue of redundancy does not arise.

(f) the effectiveness of any protections afforded to labour hire employees from unfair dismissal

23. There is no effective protection for labour hire employees from unfair dismissal.

24. The typical "labour hire" arrangement in the meat industry sees the labour hire company makes its employees available to the "meat processor" company which operates the abattoir or other establishment. The employee of the labour hire company is directed by the labour hire company that it must follow the instructions and work directions of the "meat processor" company's supervisory staff. The labour hire company will normally often have its own supervisor or other representatives at the meat processing establishment to deal with administrative (as opposed to work/production) issues.

25. Whenever the meat processor or labour hire agency wish to "dismiss" a particular employee, the meat processor will inform the labour hire agency that it does not want that particular (labour hire agency) employee working on the site any longer. This in invariably what occurs, even if it is the labour hire company that wishes to dispense with a particular worker – the result is simply contrived by informal arrangement between the labour hire company and meat processing company.

26. The labour hire employee has no unfair dismissal remedy against the meat processor, of course, because the meat processor is not the employer. Nor does the labour hire employee have any capacity to make an unfair dismissal claim against the labour hire agency. The labour hire agency denies that the employee has been dismissed (by it) at all, and that its employment relationship with the employee has not been terminated. As far as the labour hire company is concerned, the employee is still a casual employee of the labour hire agency, but the agency is no longer able to place them at the meat processing establishment (because of the decision taken by the meat processor). The labour hire agency claims that it does not have any other suitable establishment at which it can place the employee, but is prepared to place the employee at another site should the opportunity become available (it never does).

27. Efforts have been made by some litigants to make unfair dismissal claims by invoking a doctrine of "joint employment" that views the "host company" as being a "joint employer" of a labour hire worker in conjunction with the labour hire agency. Such efforts have not been successful, with the Fair Work Commission (and its predecessors) effectively deciding that the doctrine is not part of Australian law.

28. There seems no reason why the decision of a "host company" that effectively terminates the labour hire worker from their position should not be subjected to the same scrutiny as a decision which terminates an employment relationship of one of its direct employees. However, in the absence of legislative intervention, employees of labour hire agencies will have no effective protection against unfair dismissal.

(g) the approval of enterprise agreements by workers not yet residing in Australia that affect workers' pay and conditions

29. The AMIEU has not encountered a situation in which workers not yet residing in Australia have voted upon an enterprise agreement.

(h) the extent to which companies avoid their obligations under the Fair Work Act 2009 by engaging workers on visas

30. There is widespread use of temporary visa workers in the meat industry throughout Australia. They are almost invariably employed through labour hire arrangements (or, to a lesser extent, at least in Queensland, sham contracting arrangements), and most of the submissions made in respect of Item (a) of the Terms of Reference, above, are equally applicable here.

31. The employment of temporary visa workers on such a large scale has important consequences, including:

    a. There is no effective capacity to bargain collectively with labour hire companies, even where significant numbers of visa workers enrol in the union. This is due to a combination of factors, including language difficulties, the limited period of time (26 weeks) that visa workers spend working for an employer, and consequent lack of interest in longer term working conditions in Australia.

    b. Labour hire companies make use of individual flexibility arrangements (IFAs) to vary the terms of an enterprise agreement or award. Such IFAs often undermine minimum conditions and would not comply with legislative requirements that the employee be "better off" than the relevant award or agreement. However, such IFAs are never subjected to scrutiny, because visa workers are either unaware of their rights, or if made aware, are reluctant to dispute the terms of the IFA because of the precarious nature of their employment.

    c. Where non-compliance with legal obligations is identified, the capacity to remedy it is hampered by the fact that visa workers often have to return to their country of origin before an issue is likely to be resolved. Of course, when non-compliance is

identified, it often applies to most of the temporary visa workforce in an establishment. The non-compliance often extends to significant numbers of visa workers who have already returned to their country of origin before the non-compliance has even been identified. The consequence is that even where an employer is identified as having avoided their legal obligations, the scale of the illegality is never wholly apparent.

(i) whether the National Employment Standards and modern awards act as an effective 'floor' for wages and conditions and the extent to which companies enter into arrangements that avoid these obligations

32. The National Employment Standards and modern awards do not provide an effective floor for wages and conditions. These supposedly minimum standards are undermined by two weaknesses in the Fair Work Act: the system of individual flexibility arrangements, and the relationship between modern award conditions and enterprise agreements (essentially, flaws in the BOOT system).

33. Flexibility terms are included in all modern awards (pursuant to Section 144 of the Act) and all enterprise agreements (pursuant to Section 202 of the Act). Individual flexibility arrangements can modify the operation of a modern award or agreement. There is a requirement that an employee must be better off under such an arrangement than if no such flexibility arrangement had been entered into.

34. In practice, however, the AMIEU understands that such flexibility arrangements place an employee in circumstances that are inferior to the award or enterprise agreement conditions that would otherwise apply. In the meat industry, such arrangements rarely fall under scrutiny, for a variety of reasons, including:

    a. the engagement of non-English temporary visa workers with no understanding of the legal requirements involved,

    b. a reluctance on the part of employees to raise these issues due to the precarious nature of labour hire arrangements, or in some cases, deliberate intimidation

    c. the failure of employers to provide employees with a copy of the signed individual flexibility arrangement

35. It has been reported to the AMIEU that there are labour hire employees in the meat industry who have been required by their employer to sign individual flexibility agreements which provide for working additional hours at ordinary rates (i.e. no overtime). The supposed rationale given for this has been that the employer will not offer them additional hours if they do not agree to work them at ordinary rates, and therefore they are "better off" because they will get additional hours and income by signing the agreement. The AMIEU has no doubt that such a rationale fails to meet the legislative requirements that an employee is genuinely "better off" under the flexibility arrangement. Despite this, none of the employees subject to such arrangements were prepared to pursue the matter, because they understood that they would not receive any more work (and would be without remedy against such a dismissal due to the labour hire arrangements under which they were employed; see the discussion under Item (f) of the Terms of Reference, above.

36. The second weakness of the system of supposed minimum award entitlements flows from the operation of the Better Off Overall Test, and the relationship between minimum award conditions and the terms of modern awards.

37. In order for an enterprise agreement to be approved by the Fair Work Commission, it must be satisfied that employees subject to the agreement will be better off overall under the terms of that agreement than if they were employed under the applicable modern award. It is not unusual for such agreements to adopt higher base rates of pay than the relevant modern award, but to include penalty rates, loadings, or allowances that are significantly lower than the modern award (or dispense with such penalties and loadings altogether). Such agreements pass the "better off overall test" because the base rates of pay in the agreement are sufficiently high that an employee working overtime, or on weekends, or shiftwork, would still receive an amount greater than the modern award.

38. As an aside, it is important to note that, where an enterprise agreement passes the "better off overall test" it is often the case that it *barely* passes the better off overall test. In fact, it seems to be an increasingly common strategy by employers to propose enterprise agreements to employees that simply do not satisfy the better off overall test at all. If employees approve the agreement, an application for approval is submitted. The employer is aware that deficiencies in the agreement will be identified in the course of the approval

process (either by the union, or by the analysis conducted independently by the Commission) and will simply provide an undertaking as to the bare minimum it is required to do in order to satisfy the test (and of course, if the other bargaining representatives or the Commission miss one of the deficiencies, so much the better).

39. However, once made and approved, the terms of the enterprise agreement continue to apply until it is replaced or terminated. This extends beyond the nominal expiry date of the agreement. [Indeed, the "nominal expiry date" does not actually represent the expiry of the agreement at all, only the expiry of the period in which it is not possible to pursue protected industrial action.] An employer can allow the enterprise agreement to continue, unreplaced, well beyond (often for several years) its nominal expiry date. This occurs particularly in respect of labour hire companies with large numbers of temporary visa workers (where enforcing collective bargaining is largely impossible) but it also occurs with retail supermarkets. It is not unusual in these situations for the rates of pay to which employees are entitled under the enterprise agreement to fall below the minimum rates in the award.

40. Section 206 of the Fair Work Act provides that, where the *base rate of pay* in an enterprise agreement is below that of an applicable modern award, the enterprise agreement applies as if the award base rate of pay were the base rate of pay in the agreement. However, even where the modern award base rate of pay is adopted, employees still receive significantly less than if they were employed under the award – because the enterprise agreement contains inferior penalty rates, allowances, loadings, or "hours of work" provisions than those in the award.

(j) legacy issues relating to Work Choices and Australian Workplace Agreements

41. The AMIEU no longer encounters significant legacy issues relating to AWAs or WorkChoices agreements in Queensland. This was an issue to a limited extent during the early period of the Fair Work Act, in relation to surviving WorkChoices agreements. The AMIEU is not currently aware of any employer in Queensland still operating on transitional instruments, although it is conceivable that they may not have completely disappeared from some small establishments in the retail sector.

(k) the economic and fiscal impact of reducing wages and conditions across the economy

42. Naturally, the AMIEU is concerned with the impact upon its membership of the prospect of reducing wages, as well as the broader impact on the economy that results when working people have less disposable income.

43. However, the AMIEU is particularly concerned with the impact upon regional communities in Australia. The AMIEU has no doubt that the current impetus for the use of labour hire arrangements arises from a desire to reduce wages. Equally, the widespread use of temporary visa workers by the meat industry, and particularly by labour hire operators in the industry, arises not because of labour shortages but because it is easier to exploit a workforce with limited English language, limited or no knowledge of the local system of industrial relations or legal protections, and only a temporary presence in the country.

44. In regional areas, the AMIEU frequently encounters complaints in regional areas that temporary visa workers are employed virtually to the exclusion of locals. This has important consequences in regional towns, where the local abattoir is often the largest single employer. In meat processing establishments, temporary visa workers are utilized to perform unskilled work such as laboring and packing tasks. Hoewever, meat processing establishments have traditionally obtained new skilled workers by training people from their pool of unskilled labour. Employers do not train 'backpacker visa' workers for skilled roles because of the limited time that the visa worker can remain with any individual employer. The current incentive to exploit temporary visa workers has the potential to exacerbate both unemployment and skill shortages in these regional areas.

(l) any other related matters

45. Any related matters have been raised in the body of the submissions above.

Yours faithfully,

Matthew Journeaux
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Queensland Branch