

Changing Hiring Arrangements: Independent Contractors and Labour Hire Employment

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1. Introduction

Independent contracting and labour hire employment are a longstanding feature of the Australian labour market. However their presence has increased and their role is substantially changing. Independent contractors were once regarded as independent ‘business persons’, offering their services to multiple businesses. Now they are increasingly ‘dependent’ contractors or ‘false self-employed’. Labour hire employers were once suppliers of ‘temps’, filling short-term employee absences. Now they supply long and short-term employees. Some suggest these changes should be supported and encouraged. Workers should have the freedom to contract their labour in the form they choose, and businesses should have the freedom to engage their workforce through labour hire arrangements. It is argued that employers can increase productivity and competitiveness whilst matching the needs of the changing workforce, and both workers and employers will benefit (DEWR, 2005). But how realistic are these claims? Is the growth in independent contracting and labour hire employment a response to the changing needs of the workforce, or are employers’ choices being imposed upon employees to their disadvantage?

This paper considers these questions. The paper begins by defining the changing hiring arrangements in Australia, and describing the protections attached to each. Patterns of growth are then explored. Employers can benefit from these arrangements, but there are also costs. These are outlined in the following section. If the growth in alternate forms of hiring is a reflection of worker choice, the benefits to employees of switching away from a direct employment relationship should outweigh the costs. These benefits and costs are assessed firstly for independent contractors, and secondly for labour hire employees. The paper concludes with a consideration of the federal Government’s proposals for weakening regulatory protection for these workers.

2. Defining Changing Hiring Arrangements: Independent & Dependent Contractors, and Labour Hire Employment

Hiring arrangements between labour and businesses can take various forms. First, workers may be directly hired as employees by the employer for whom they produce goods and services. Such employees receive a range of statutory protections. They have the protection of awards and enterprise agreements registered with Federal and State industrial tribunals covering minimum wages, leave arrangements, and employment conditions. Employees have a right to join a union, to collectively bargain, and may have access to compulsory arbitration when negotiations with employer reach a stalemate. State legislation offers additional protections such as workers' compensation, equal opportunity and long service leave. Consistent with international labour standards, these protections seek to redress the inherent imbalance of power between employers and employees.

Second, workers may be employed by a labour hire company under a contract of employment, and then on-hired to another company (the 'host' employer). Labour hire employees are also entitled to the protections of awards, enterprise agreements, and other legislative protections for employees. But these are more difficult to access and enforce than under a direct employment relationship. Hired mostly as casual employees, many of the protections available to permanent employees such as leave entitlements are not available. When coupled with the large number of small labour hire companies and the dispersed geographic location of workplaces, their capacity to collectively bargain is substantially diminished. Instead, their entitlements are more commonly tied to bare minimum awards than enterprise agreements. A minority of labour hire companies do not hire employees but only supply independent contractors. These arrangements further compound the vulnerabilities identified for labour hire employees.

Third, workers can also supply labour by acting as an independent business. These are independent contractors. The distinction between the supply of this kind of labour and the conventional employment relationship hinges primarily upon the concept of 'control'.

Independent contractors have autonomy from the businesses they offer services to. They take a risk on the capital they invest, and will usually offer more than just their labour. This may include the tools of the trade, but usually extends to more substantial investments in machinery and equipment. In recognition of the 'small business' character of their operations, independent contractors do not receive the protections provided to employees. They are not, for example, entitled to a minimum wage because they trade as a business to make a profit (or loss).

Dependent contractors differ from independent contractors. They do not offer labour through autonomous small businesses, but are economically dependent upon another business for their compensation. They are 'in fact' employees yet not entitled to the protections of an employment relationship. Australian state parliaments have recognised the reality of the economically vulnerable position of dependent contractors, and implemented protections through 'deeming' provisions and unfair contract legislation. Critically, however, dependent contractors are not protected by minimum award or enterprise agreement provisions. They are not entitled to collectively bargain because they are defined as small businesses operating under commercial contracts. Their bargaining power is no more, and often less, than that of employees.

Both labour hire and dependent contracting can be extremely attractive to cost-driven businesses. They can continue to control the production process, but not bear the risks of directly hiring employees. Businesses are not obliged to maintain an employment relationship in slow or non-peak times, have no obligation to invest in their workforces' skills, or to resolve the inherent problems which arise in an employment relationship. They still bear the risks of occupational health and safety (OHS) problems, as they would for any member of the public entering their workplace, but not the consequences of injuries when they occur.

In the case of labour hire employees, the labour hire company too does not bear many of these risks. They employ workers primarily as casual employees, so they need only employ workers when a placement with a client is available. They recruit skilled

employees (for placements requiring skilled workers) rather than train employees, and they resolve problems in the employment relationship by terminating the employment relationship. They do, however, bear the risks of ensuring safe and healthy host workplaces for their employees, and this is problematic.

If these risks are no longer borne by employers and labour hire companies, who bears them? Mostly, labour hire employees and dependent contractors do. But workers in close proximity also find their employment at risk. Unions have acted to protect the threat to employment conditions posed by labour hire employment and dependent contracting. They have collectively negotiated minimum terms upon which these alternate forms of hiring can be used to prevent them undercutting employment conditions. Requiring labour hire employees to be paid the equivalent of direct hire host employees is one such mechanism. These agreements provide a means of protecting the integrity of awards and enterprise agreements. Unions have also, to a lesser extent, negotiated terms and conditions for dependent contractors to ensure a living wage and a safer working environment.

But the capacity of unions to achieve these protections for labour hire employees and dependent contractors is severely constrained. The acute vulnerability of casual labour hire employees undermines collective bargaining. The failure to recognise dependent contractors as 'false self-employed' leaves collective bargaining vulnerable to accusations of unlawful interference in commercial contracts. Most importantly, collective bargains require the agreement of employers. The more these alternate hiring arrangements extend, the greater the relative cost imposition upon employers who prefer a direct employment relationship. Those employers who choose to recognise collective agreements and minimum wages, and invest in the intangibles of the employment relationship – the long-term skills, and the mutual commitment and trust which flows from the fair treatment of their workforce – increasingly find their choices constrained by undercutting from competitors who opt for labour hire and dependent contracting.

3. The Growth in Alternate Hiring Arrangements

3.1 Growth in Independent Contractors

A simple statistical measure has yet to be devised which can gauge the extent of 'dependent contractors' in Australia. How do you define a worker who is in fact an employee, yet hired under paper arrangements tailored to avoid such a label? The Australian Bureau of Statistics (ABS) has experimented with different measures to capture changing hiring practices. In the second half of the 1990s, many employers actively encouraged employees to incorporate to avoid employee status. In 1998 the ABS (1998) reconfigured labour force measures to separate employee-owners of incorporated businesses from employees. By adding 'dependence upon a client' as a measure, they estimated 'dependent' contractors to make up around 15.2% of owner-managers, representing 3% of the total workforce. Including the number of contracts in the definition produced an estimate of 17.7% of owner-managers as 'dependent contractors', or 3.5% of the total workforce. The most recent ABS (2005a) data excludes 'dependence upon a client' as a category, but continues with a new, highly specific definition of 'works on a contract basis'. This includes 'Employed persons who were engaged by an organisation to provide a particular service or undertake a particular task at an agreed price or rate, and generally for a specific period'. The drawback in using this definition to measure 'dependent contractors' is that the hiring contract may not be for a specified time. The closer the contracting arrangement is to a sham, the less likely it is to contain a specified contractual period.

An alternate definition now provided by the ABS is whether the owner manager employs other employees. This test will include genuine self-employed businesses. But it will also identify dependent contractors because, unless they are employing a family member to manage paper work and benefit from income-splitting, they will by definition not be employing others. The importance of this last qualification should not be understated. It is highly probable that the full scope of taxation advantages is well-explained to employees in the process of persuading or coercing employees to become contractors.

Taking account of the development of these measures by the ABS, how many independent contractors exist and are they growing? Table 1 shows the changes from 1978 to 2004.

Table 1 Workforce distribution, Australia, 1978-2004

Workforce status	1978 Aug.	1988 Aug.	1998 Aug.	2001 Nov.	2004 Nov.
Employees (1)	84.6%	84.6%	81.0%	80.6%	80.5%
Owner-managers with employees (2)	5.5%	5.2%	7.6%	8.3%	7.5%
Owner-managers without employees (3)	9.9%	10.2%	11.5%	11.1%	12.0%
Total	100%	100%	100%	100%	100%

Source: Adapted from ABS (1989) for 1978 and 1988; ABS (2005a) for 1998-2004.

(1) 1978 & 1988: Employees includes owner-managers of incorporated enterprises; from 1998 owner-managers are excluded.

(2) The 1978 & 1988 data is the ABS 'employer' category; from 1998 onwards, all employers who hire more than one employee are included irrespective of whether incorporated or unincorporated enterprises.

(3) The 1978 & 1988 data is the ABS 'self-employed' category; from 1998 onwards, owner-managers without employees irrespective of whether incorporated or unincorporated enterprises.

The growth in the proportion of self-employed workers without employees is from less than 10% to 12% of the workforce (or 1.146 million workers) between 1978 and 2004. This aggregate data conceals more dramatic trends in specific industries, such as building and transport, dating back ten years earlier (Bray & Taylor, 1991). Not all owner-managers without employees identified in Table 1 are dependent contractors. The exact proportion is unknown. What is known, however, is that employees continue to be 'offered' (in)dependent contractor status under seemingly sham arrangements. Just as employers encouraged employees to incorporate to create sham 'independent contractor' status in the 1990s, anecdotal evidence suggests the introduction of the Australian Business Number system has opened another, administratively easier, channel for employers to disguise employees as businesses. Such a simplistic approach to reclassifying employees as independent contractors is extremely unlikely to withstand a legal challenge. But the practical consequences for employees are significant whilst such shams continue.

The growth of independent contracting has traditionally been associated with production processes where discrete tasks could be identified and priced individually. Subcontractors in the housing sector, owner-drivers in the transport industry, outworkers in the clothing industry, and sales representatives were well suited to (in)dependent contracting. The absence of 'independence' or opportunity for these workers to profit from their status as contractors has, over time, been the subject of litigation and their equivalence with employees been recognised through 'deeming' provisions and diverse regulatory mechanisms, such as supply-chain regulation and unfair contract protections. Of critical importance now, however, is the extension of independent contracting into a range of industries and occupations where employment relationships were previously to be found. Some of these practices, such as pyramid contracting of tasks in the telecommunications industry (CEPU, 2005) are reminiscent of nineteenth century 'jobbing' arrangements. Other practices, such as hiring factory process workers as independent contractors through a labour hire agency, defy any common sense view of what constitutes an independent contracting relationship. Whether these practices collapse because of their inefficiency, or under legal challenge remains to be seen. But their growth remains alarming.

3.2 Growth in Labour Hire Employment

Labour hire employment shot to prominence in the early 1980s following the Troubleshooters dispute (Underhill & Kelly, 1993). Starting from a relatively low base primarily providing white collar temporary workers, employment in the labour hire industry has grown at 15.7% per annum since 1990. The number of workers employed under labour hire increased five-fold between 1990 and 2002 (Laplagne, Glover, & Fry, 2005). By mid 2002, about 2700 labour hire organisations employed 290,115 employees in temporary or contract placements across Australia (ABS, 2003).

Many labour hire operations are very small (59.4% have four or less employees), but some are extremely large (ABS, 2003). Manpower, for example, engages over 6,500 workers weekly (Manpower, 2005), whilst Skilled Group Limited have over 6,000 clients

(Skilled Group, 2005). Labour hire workers come from a broad range of occupations, but are increasingly located in semi- and unskilled work, especially intermediate production and services worker, and labourers and related workers (Table 2). The industries using the most labour hire workers are communication services (primarily call centres) and manufacturing (especially process work and maintenance functions) (Laplagne et al., 2005).

Table 2 Occupational distribution of labour hire and direct hire employment

Occupation	Distribution of Labour Hire Employees (%)	Distribution of Direct Hire Employees (%)
Managers and administrators	3.2%	5.8%
Professionals	18.0%	22.0%
Associate professionals	10.7%	12.6%
Tradespersons & related workers	14.4%	10.7%
Advanced clerical & service workers	2.1%	3.0%
Intermed. clerical, sales & service workers	18.0%	18.3%
Intermed. production & service workers	11.9%	8.5%
Elemen. clerical, sales & service workers	5.1%	11.1%
Labourers & related workers	16.7%	8.0%
Total	100%	100%

Source: Laplagne et al., 2005.

The growth of labour hire in low and unskilled occupations is important. First, these workers have little bargaining power. An estimated 37% of labourers and related workers, for example, are fully dependent upon an award for their wages and employment conditions. Only elementary clerical, sales and services workers are more likely to be so dependent upon award minimum standards (ABS, 2004). Second, these are low paid workers. Male labourers have the lowest weekly earnings of all male full-time employees. Their female counterparts have the second lowest rate of female employees (ABS, 2005b). Third, the occupations where labour hire are over-represented are also the occupations most exposed to health and safety risk in the workplace. Labour hire employment has grown in sectors where employees are least able to protect themselves, and are most likely to be dependent upon statutory protections.

4. The Gains and Losses to Employers From Alternate Hiring Arrangements

Hiring independent contractors and labour hire employees offers employers both financial benefits as well as greater scope to apply managerial prerogative. First, all legal obligations associated with direct employment no longer apply. Minimum wages, leave payments, redundancy pay and the like are replaced with a commercial contract. Workers' compensation premiums need no longer be paid, nor payroll tax. Second, the administrative function associated with managing human resources can be substantially downsized and replaced by contract management. Managing PAYE and superannuation payments, maintaining personnel records and fair procedures for disciplining and dismissing employees become a relic of the past. Third, for independent contractors, employment dismissal is replaced by contract terminations. Litigation over the breach of a contract is too costly for (in)dependent contractors to pursue. In effect employers are freed from unfair dismissal claims. Unsuitable labour hire employees can be moved to another host, or have their employment terminated by the labour hire company. In neither case does the host bear responsibility for 'terminating' the placement of the employee. Fourth, time-consuming negotiations over pay and conditions can be replaced by offering a uniform contract price to all, or calling in a new labour hire company when existing arrangements become too costly. Fifth, time-consuming grievance procedures can be abandoned. (In)dependent contractors are responsible for their own practices and conditions, just as labour hire companies are responsible for their own employees' grievances. Lastly, there is no longer a need to deal with a union. The rate of unionisation among both independent contractors and labour hire employees is very low. It is clear that independent contracting and labour hire services offer employers both financial benefits and greater freedom in unilateral decision-making. Bargaining power shifts substantially in the employer's favour, leaving little protection to workers.

Alternate hiring arrangements are also costly for employers. First is the risk that in times of labour market shortages, pockets of skilled independent contractors may place upward pressure on their contract prices. Second, employment relationships are oiled by mutual commitment which commercial contracts are not. These intangible, but financially

beneficial outcomes of cooperation and commitment in the employment relationship can be lost. Third, employers remain responsible for OHS outcomes for independent contractors and labour hire employees at their workplace. Because such workers have an increased risk of injury, employers are more likely to breach the requirements of a safe system of work. The findings of the Western Australian Ministerial Inquiry into BHP Billiton's OHS health and safety systems and practices, following three workplace fatalities in May 2003, illustrate well the risks which evolve in workplaces reliant upon contractors (Ritter Report, 2004). Fourth, diminished control over quality is problematic in contracts which prioritise cost over quality. Fifth, responsibility for investment in the maintenance and development of skills rests with contractors, not employers. Time and cost factors reduce the propensity of independent contractors to invest in skills (Underhill, Worland, & Fitzpatrick, 1997). This causes the future skills base to be eroded as employers limit or discontinue apprentice hiring, while independent contractors and labour hire employers fail to take up the slack. Serious though these costs are, many firms will consider these costs to be borne by the community, not themselves. They are no disincentive to offset the short term labour cost savings of independent contracting and labour hire employment.

5. The Gains and Losses To Employees From Alternate Hiring Arrangements.

This section reviews the gains and losses to employees from alternate hiring arrangements. Whilst there are common losses to both groups, more detailed information is available on the employment experience of labour hire employee and this is presented separately. The discussion commences with an examination of independent contractors.

5.1 Gains and Losses For Independent Contractors

The work experiences of independent contractors vary greatly. Some employees choose to become independent contractors, and successfully grow their business into a profitable going concern. They are attracted to the freedom of being their own boss, choosing for whom and when they work, and the taxation benefits associated with being self-

employed. Many find such work to be economically and psychologically rewarding (Underhill et al., 1997). But others tell a different story. Their choice is to become an independent contractor or lose their job. They are offered a job as an 'independent contractor', but not as an employee (see for example, CEPU, 2005; McCarthy & Smiljanic, 2005).

Many of the losses employees encounter from independent contracting mirror the employers gains discussed above. Without the benefits of awards and enterprise agreements, they are no longer entitled to a minimum rate of pay, penalty rates for extended or unsocial hours, redundancy pay, nor leave entitlements such as sick leave, annual leave, long service leave, maternity and parental leave and the like. They may have the opportunity to negotiate a contract rate, but are more commonly offered a price on a take it or leave it basis. Research on the working lives of (in)dependent contractors suggests they are characterised by income insecurity, work intensity, extended working hours (but potentially shorter working hours in recessionary periods), and increased OHS risks. These factors are interrelated.

Income security results from the uncertainty of when work will be available and at what price. Unrealistically low contract prices are accepted to sustain an income. Non payment of contracts is a further, albeit less severe, problem (McCarthy & Smiljanic, 2005; Underhill et al., 1997). With tight deadlines and low contract prices, work intensification is inevitable both for on time contract delivery, and for securing sufficient future contracts to maintain a sustainable income.

One outcome of work intensification is longer working hours. ABS (2005a) data gives its incidence for the 'owner-manager' category of workers. Only 12% of employees worked 49 or more hours per week compared with more than twice that proportion of owner-managers working on contracts (29%) and three times that proportion for owner-managers not working on a contract (37%) (ABS 2005a). Similar outcomes have been documented for independent contractors in the Victorian building industry (Underhill et al., 1997). A higher proportion of self-employed workers than employees consistently

worked more than 50 hours per week over the ten year period to 1996. Yet the proportion of self-employed working less than 21 hours per week was also much greater than for employees in the recession of 1990-91. Their hours are longer but also more volatile; their income matches these swings. Excessive working hours impact negatively on OHS outcomes for workers and those working in close proximity, as well as upon the quality of their lives, and relationships with others (Heiler, 2002; Mauno & Kinnunen, 1999).

Several studies have drawn a link between subcontracting and higher workplace injury. Quinlan et al.'s comprehensive research review identified three groups of factors contributing to this risk (Quinlan, Mayhew, & Bohle, 2001). First were economic reward factors, such as competition for work and underbidding on tenders; payment by results; and outsourcing higher risk activities to subcontractors. Second was disorganisation at the workplace, evident in changes and ambiguities in rules and work practices; the fracturing of OHS knowledge and management systems, and inadequate skills, training and experience. Third was the likelihood of regulatory failure, such as problems in identifying responsible parties in multi-employer/contractor worksites; weakening of conventional reporting mechanisms and systems; and problematic coverage and knowledge of statutory requirements to accommodate the diversity of hiring forms.

Two recent government enquiries into workplaces and industries with high levels of subcontracting in Australia illustrate these findings. The Ritter Report (2004) found that communication problems with subcontractors exacerbated OHS risks in a major mining operation. The Quinlan inquiry into safety in the long-haul trucking industry (Quinlan, 2001) found that "a combination of commercial/industry practices and structural features of the road transport industry constitute a significant underlying reason for unsafe practices" (p.30). Contributing factors included "intense competition amongst transport operators exacerbated by the ongoing relatively easy entry of new and often heavily indebted operators who in their desperation to survive will accept almost any rate for work and the use of pyramid subcontracting by larger firms to capture work at reduced

rates” (p.21). Similar outcomes are to be expected across a wider range of industries and occupations as independent contracting spreads.

Given the greater risk of injury, what happens to independent contractors once they are injured at the workplace? They are less likely to be covered by workers’ compensation, and their medical costs are externalised onto the public health system (Quinlan & Mayhew, 1999). Without income support during injury recovery, independent contractors face significant financial loss and hardship. They are more likely to return to work before they have sufficiently recovered, potentially compounding their injury (Underhill et al., 1997).

These outcomes point to the problems independent contractors confront without regulatory support for a floor of minimum standards. Small independent businesses can operate autonomously. Dependent contractors have few choices and are exposed to the weaknesses of a labour market where their ‘employers’ can exercise unfettered control.

5.2 Gains and Losses For Labour Hire Employees

This discussion of gains and losses for labour hire employees draws primarily from two data sources. The first is a survey and focus group study of labour hire employees conducted in Victoria in late 2003, referred to as the ‘Victorian labour hire study’. Respondents in the study came from a range of industries and occupations. The most common industries were manufacturing, construction, and health; the most common occupations were tradespersons, nurses and labourers. Most respondents to the survey and focus group members were union members. This is relatively unusual for labour hire employees who generally have a low level of union membership. It could be said that because they are union members, and unions have been resistant to labour hire employment, these workers will also be opposed to labour hire. But it is equally likely that the data reported here will be skewed towards the ‘better’ regulated end of labour hire where workers enjoy superior employment conditions and outcomes, compared to those working for smaller, non-unionised labour hire companies, of which there are

many. The second source of data is a study commissioned by the Recruitment and Consulting Services Association of Australia, the major employer association representing the labour hire industry. This study surveyed labour hire employers, their hosts, and their employees, and is referred to as the 'RCSA study'.

These sources offer more thorough evidence on the employment experience of labour hire employees than is available for independent contractors. The discussion considers whether labour hire employees are choosing this form of hiring, and then describes the consequences for income insecurity, work insecurity, protection from unfair dismissal, and OHS risks. An account of training and skill development for labour hire employees follows, capped by their experience in relation to union membership and representation.

5.2 (a) Do Employees Choose To Work for Labour Hire Companies?

Does labour hire employment succeed in meeting the changing needs of workers in the 21st century? Do workers choose labour hire employment to match flexible working hours with their non-work preferences? Whilst employee preferences in general are changing, there is little evidence that labour hire employment is meeting these changing needs. Table 3 tells why respondents in the Victorian labour hire study worked through a labour hire firm.

Table 3 Reasons for working in labour hire

Reason	Proportion of responses
	%
Labour hire non-nurses (n=124)	
Lack of direct employment options	64%
Previous position outsourced	23%
Prefer flexible arrangements	13%
Suits current needs (eg. Child care, study)	10%
More money in hand	9%
Labour hire nurses (n=17)	
Prefer flexible arrangements	76%
Suits current needs (eg. Child care, study)	47%
More money in hand	41%

(Multiple responses allowed)

Nurses are clearly drawn to labour hire employment for the flexibility it offers. Their skills are in short supply, and their wage rates significantly higher than those of permanent direct hire nurses. They have more control over when they work, enabling them to work fewer hours for an equivalent full-time wage (Underhill, 2004). But the occupations where labour hire employment is growing most do not possess these characteristics, and the employment outcomes are quite different. Two-thirds of the other labour hire workers were working in labour hire because they could not obtain direct employment. This lack of choice was especially strong in jobs such as maintenance, local government and meat processing, where outsourcing has increasingly replaced permanent, direct hire employment. One focus group attendee explained the limited choices he faced:

“A lot of the jobs now, the better jobs you used to go for, are now being taken on by labour hire companies, so you’ve got no choice but to work for a labour hire company, there’s nothing else out there” (labour hire tradesperson)

In rural areas, where job opportunities are particularly scarce, workers find that once their employer outsources their work function, they are employed by a series of agencies every time their former employer - now their host - decides to switch contracts to a different labour hire agency. They have little say over whom they work for once the outsourcing treadmill begins.

“My situation is that I’ve been in the same position for the last nine years. I’m in the same job but have had three different employers, all at the discretion of the host employer, including wages and conditions. Stress, worry and lack of control in your future is common...” (34 year old tradesperson)

The RCSA claim that labour hire has become a “function of a society where flexibility, adaptability and diversity are actually sought by individuals rather than imposed by government and business” (RCSA, 2005:5). In support, they cite the 67% of their survey

respondents (of whom approximately half appear to have registered but not yet received a placement with an agency) who had a choice in working for a labour hire agency. But a closer examination of the RSCA study reveals a different picture. Sixty-six percent (66%) of their respondents would prefer to work directly with a company, and only 34% said they preferred temporary hire. The two most important factors relating to on-hire work for their respondents were their capacity to screen employers (67% agreed, 20% disagreed); and the avoidance of unpaid overtime (65% agreed; 44% disagreed) (Brennan, Valos, & Hindle, 2003). For these respondents, dissatisfaction with past employment is the strongest motivation for seeking labour hire employment. Any policy based on these findings, which seeks to satisfy the needs of the workforce, would be best directed to improving employment outcomes for direct hire employees.

Turning to specific ways in which labour hire employment is said to enable employee's preferences to be met, Victorian labour hire survey respondents were asked about a range of personal activities, and whether problems fulfilling these activities arose from working under labour hire arrangements. Table 4 provides their responses.

Table 4 Fulfilling personal activities: how often do problems arise from working under labour hire arrangements?

Personal activities	How often problems arise (%)			
	Never/ Rarely	Some- times	Often/ Always	NA
Labour hire excl. nurses				
Taking holidays (n=126)	29%	17%	46%	8%
Hobbies/sporting interests (n=124)	35%	21%	29%	15%
Obtaining childcare (n=119)	32%	3%	9%	56%
Personal benefits from flexible hours (n=130)	58%	32%	10%	-
Labour hire nurses (n=17)				
Taking holidays	53%	29%	18%	-
Hobbies/sporting interests	59%	18%	12%	12%
Obtaining childcare	35%	6%	12%	47%
Personal benefits from flexible hours	24%	18%	59%	-

NA = Not applicable

The starkest difficulty concerns the scheduling of annual leave, with almost half (46%) the respondents (excluding nurses) experiencing problems. A number of factors are at

play here. First, casual labour hire employees receive no entitlement to annual leave. Taking holidays means taking unpaid leave, and this is costly. Second, there is no guarantee of a placement when they return from holidays. They may not return to the same client nor continue to work with the same workmates. Taking leave is more akin to resigning than simply taking a break. Third, in some instances, permanent labour hire employees with an entitlement to annual leave can only take that leave when their employer *and* the client approves. In other words, both their employer and a third party can veto their leave arrangements.

According to one focus group participant:

“The difficulty is that you never know when work is going to stop. It’s difficult to take holidays because people fill your spot and you don’t get back in. You struggle to plan for the future because firstly you don’t know if you will be working and secondly what the rate of pay will be...”

Spending time with family and friends is integral to a balanced life and a cohesive society, yet according to a focus group participant who had worked at the same host workplace for more than 12 months:

“We’re supposed to get 2 sets of 2 consecutive days off each month...but I never have 2 consecutive days off. Having consecutive days off would be really good, because to spend time with your family and friends and loved ones is important to me. I’d like to see that...” (female call centre worker, aged in mid-20s).

Are these labour hire employees gaining personal benefits from the flexible hours associated with labour hire employment? Some nurses are, but other workers are clearly not. Fifty-eight per cent (58%) said they never or rarely gained personal benefits from flexible hours. Only 10% of non-nurses said they often or always gained a personal benefit. The rhetoric that labour hire employment enables employees to better fulfil their personal choices is true for only a small number of labour hire employees in a narrow

range of jobs. For others, labour hire employment constrains rather than enables greater personal choice.

5.2 (b) Income Insecurity: “You miss out on a day, you can’t really make it up...”

Around 80% of labour hire employees are employed on a casual basis. They are paid only for the time they have a placement with a host, and are not entitled to leave benefits. Unless they have been employed regularly for more than 12 months, they are also not protected from harsh, unjust and unreasonable dismissal. Without a secure, regular income casual employees face difficulties budgeting for everyday living expenses, and especially making longer term financial commitments such as personal loans for cars, and home mortgages. For labour hire employees, income insecurity arises not only from both irregular placements, but also from variable rates of pay between placements. Only one-third of the (non-nursing) Victorian labour hire survey respondents always received the same rate of pay, irrespective of the host they were placed with. Instead, the hourly rate of pay varied and was unpredictable. Almost one in three non-nursing labour hire employees surveyed (31%) had experienced difficulty securing a personal loan, and 26% had experienced difficulty securing a mortgage (another 37% stated the question was not applicable).

5.2 (c) Work Insecurity: “The biggest problem is the uncertainty of what tomorrow brings...”

Are labour hire employees ‘on-call’ or do they have regular ‘pseudo-permanency’? If they are “on-call”, it could be argued that labour hire employment simply continues the past practice of filling temporary gaps, potentially contributing to more efficient use of resources. If placements are regular and long-term, then arguably labour hire employment is just displacing permanent direct hire employment.

Little is known about the average length of placements of labour hire employees. The RCSA claims that labour hire placements are predominantly of six months or less

duration and are therefore ‘truly temporary’. But they also claim that the linking of casual placements provides for permanent employment (RCSA, 2005:35). Survey respondents to the Victorian labour hire survey had a mixed experience, differing according to why they became labour hire employees. Table 5 shows the survey responses.

Table 5 Average time of placement in the past 12 months, and reason for becoming a labour hire worker

Average time of placement	All responses (n=147)	Lack of direct employment (n=53)	Position outsourced (n=25)	Prefer flexibility (n=24)
Less than 1 week	17%	6%	4%	54%
1 week < 1 month	6%	6%	-	8%
1 month < 6 months	35%	43%	36%	21%
6 months < 12 months	14%	17%	8%	13%
12 months or more	28%	28%	52%	4%
Total	100%	100%	100%	100%

Those whose permanent position has been outsourced are most likely to have experienced a single placement for at least the previous 12 months, with more than half working for the same client for 12 months or more. A number of focus group participants who were shifted to a labour hire company following outsourcing were still working at the same workplace more than five years later. Their permanent jobs have been replaced by agency work. Those employed in labour hire because of the lack of direct employment options appear most likely to experience ‘churning’, although more than a quarter of these workers still had long term placements of 12 months or more. The RCSA survey of labour hire employers found that 13% - 18% of placements were for more than 12 months (Brennan et al., 2003). This also points to the replacement of some permanent jobs by temporary jobs.

Nevertheless, a high proportion of placements are short. Those preferring the flexibility of agency work (primarily nurses) were more likely to have very short placements, sometimes several placements each week. The RCSA employer survey found that 61% of their member placements and 37% of non-members placements were for three months

or less (Brennan et al., 2003). What do short placements mean for labour hire employees? On the one hand, it may mean greater variety in tasks, and the opportunity to gain broader job experience, sometimes improving the likelihood of gaining regular employment with a client. On the other hand, however, it contributes to intense insecurity, and a need to be available all the time, irrespective of the impact on other aspects of their life. A survey respondent described what this lifestyle offers:

“The biggest problem is the uncertainty of what tomorrow brings...living by the mobile phone. Walking into a new situation or having to go back to one I don’t like. No work routine. Having someone else determine whether I work or not and for how long.”
(male, 44 year old labourer, employed 14 months in labour hire)

The insecurity of not knowing when a placement will be offered is not just associated with short placements. Even ‘on-going’ placements at a single host’s workplace can be arranged to maximise flexibility for the host and minimise security for the labour hire employee. A focus group member who had worked at the same workplace for more than 6 months described the rostering arrangements:

“I can’t understand why I may have only 5 hours that I know of for the next day, and not know what I’m doing the day after, and I get a phone call late to say can you come in at 6 in the morning. I don’t know why the company has to leave it so long to get in touch with the hire company...” (male, mid-40s)

Another labour hire employee, who had been placed with same host for more than 12 months, described his situation:

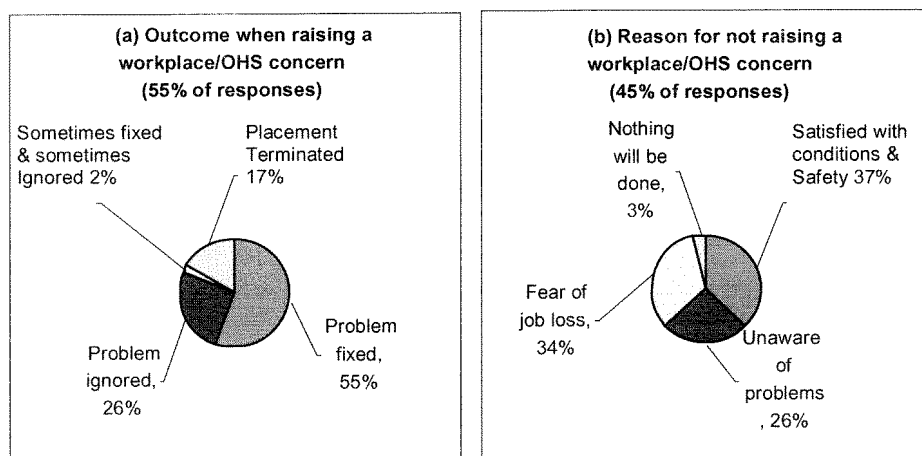
“I only know my schedule 1 week in advance. If I wanted to plan something for the week after next, I would have no idea what days I’ll be working, what days I’ve got on and what days I’ve got off. I only know what I’m doing this week and next week...there’s no regularity...” (male, mid-20s)

Does continuity in placements enable ‘pseudo’ permanent employment for these casual workers, as the RCSA claims? If so, this begs the question of why these employees are hired as casuals and not permanent. Even when continuity exists, their working lives are riddled with insecurities. In fact, 45% of the labour hire employees surveyed in Victoria rarely or never had continuity of placements. Only one quarter often or always experienced continuity.

5.2 (d) Protection from unfair dismissals: “I raised issues about being under paid for shift work ... the placement was terminated”

Coupled with income insecurity is the risk of arbitrary dismissal. Should a labour hire employee report a grievance over working conditions or OHS concerns, the outcomes can be terminal. As casuals, they will not be legally dismissed; they are simply not offered another placement. The Victorian labour hire survey provides a bleak picture of what happens to labour hire employees when they voice a concern about their working conditions or OHS.

Chart 1: Raising concerns about workplace/OHS issues



Just over half the Victorian survey respondents had raised a concern about their working conditions or OHS. Whilst 55% of these had their concerns addressed, the problem was ignored for one quarter – often while the buck was passed between the labour hire

company and the host employer – and 17% has their placements terminated. The risk of losing a job for raising a grievance is well understood by labour hire employees. Of that half of respondents who had not raised a workplace problem, 34% were gagged by fear of losing their job. As one labour hire employee described it:

“You’re not about to whack your hand up in a hurry because you get targeted”

(tradesperson, mid 30s)

The implications of this threat to employment extend beyond the absence of basic democratic rights at the workplace. Labour hire employees unable to voice concerns were significantly more likely to feel like outsiders at the host’s workplace, less likely to be given the same level of support as direct hire employees’ at the host’s workplace, less likely to receive OHS information from both the host and the labour hire company, and importantly, felt unable to refuse unsafe tasks (Underhill, 2005a).

Termination at will is not just associated with raising workplace grievances. Whilst performance management might be viewed as good practice for companies pursuing competitive advantage, in labour hire, much more rudimentary approaches occur. Two focus group participants explained the nature of performance management and job allocations:

“It’s bit of a chook raffle because you don’t know if you’re in favour with the (host), or you’re in favour with them (the agency). You don’t really know...it’s a grab bag, it’s a conspiracy of silence, no one really tells you.”

“I’ve seen a couple of people walked off the floor, midway through the day. They’ve actually been marched out of the building. When you’re a temp and your sitting on a floor with 400 people and you see someone marched out, you’re just paranoid. I was paranoid for the first few months, ’cos so many people started with us and every time I’m like “am I doing something that I don’t know, are they going to do that to me?”

Other research has also identified termination at will as a critical problem in labour hire employment. Job Watch, the major worker complaints advice bureau in Victoria, reported that 25% of enquiries from labour hire employees (1999-2004) concerned 'unfair and unlawful' dismissals, and a further 9% related to discrimination and equal opportunity problems (McCarthy & Smiljanic, 2005).

5.2 (e) OHS outcomes: 'No OHS rep because they don't get a job when the contract is renewed'

The most well documented outcome of labour hire employment is the increased OHS risks they face. International studies consistently affirm a higher injury rate for labour hire employees, and a study of workers' compensation claims over a seven year period in Victoria found a higher incidence of workers' compensation claims, and more severe injuries to labour hire employees (Underhill, 2002). Several factors contribute to this higher injury rate. More frequent exposure to new workplaces means less familiarity with risks and hazards at the workplace; labour hire employees are more likely to be injured early in a placement. Inadequate provision of safety induction by the labour hire employer and the host further compounds the risk of lack of familiarity with a workplace. The RCSA survey found that only just over half of labour hire employers, and host workplaces always provided safety inductions (Brennan et al., 2003).

Inadequate training is not limited to OHS specific training. Forty per cent (40%) of Victorian labour hire survey respondents never or rarely received training prior to using unfamiliar equipment; 43% did not receive training prior to performing unfamiliar tasks. The assumption that labour hire employees can be placed in any workplace with neither task nor equipment training reveals much about the attitudes of hosts, and many labour hire employers, towards labour hire employees. They view their workers as simply a commodity to be purchased – with insufficient regard for their needs as employees.

Finally, similar to independent contractors, labour hire employees are constantly under pressure to perform at a high level or risk termination of employment. In sectors where

the level of output is measured and assessed on a daily basis, work intensification is particularly pronounced. Two comments from focus group participants explain the links between work intensification, job insecurity and OHS for labour hire employees:

“We’ve had labour hire guys pass out, working hard. It was stifling hot up there. They were under the impression they wouldn’t get hours, so they went flogging themselves, then they passed out”

“When there’s clocks on you and you’re timed on a lot of things, you always run the risk of accidents happening more so than if you didn’t have the clock on. The clock is on the agency people even more, you can just see the permanents work slower, because they know they’ve got a job”

If injured at work, labour hire employees are at a further disadvantage with only a small chance of returning to work with the same employer, compared to injured direct hire employees (Quinlan, 2004). Whilst this is especially the case for severely injured workers, similar treatment is experienced by those capable of returning to lighter duties as well as those who are fully recovered (Underhill, 2005b). It might be thought that, given their variety of host clients, labour hire companies have access to a much wider choice of tasks in which light or modified duties can be found to rehabilitate workers. Too often, however, labour hire companies discontinue employing workers who have made a workers’ compensation claim. The unwillingness of hosts to accept labour hire workers on lighter or modified duties compounds the problem. As one injured labour hire employee explained:

“He [the labour hire employer] said he could find some stores work for me but really I should be doing white collar work. He said that such a position was unavailable. He then said that I should put my name down with other agencies. He offered to give me a reference.” (tradesperson, late 30s, injured through a cut and septicaemia).

Hosts are also reluctant to take back injured workers, a legal obligation they would incur if they had employed the worker directly. According to the RCSA survey, only 19% of labour hire employers' clients always assisted in finding alternative duties for workers injured at their workplace, whilst 45% said their clients never or rarely assisted with placements for such workers (Brennan et al., 2003). This leaves injured labour hire employees with few options. They can remain on workers' compensation until they are fully recovered, and hope their next potential employer will not discriminate against them because of their claim history. Or, if they are severely injured, they can eventually move on to a disability support pension. But in neither case will they have an employer to support their efforts to return to work prior to full recovery from injury.

5. 2 (f) Training and skill development: “Lack of career development, lack of training, lack of supervision”

The reluctance of labour hire employers to invest in the skills of their employees, and the reliance of host employers upon labour hire tradespersons rather than investing in their own workforce, has major long-term implications. Whilst one major labour hire company now employs a substantial number of apprentices, they appear unique (Skilled Group, 2005). The KPMG (1998) survey of labour hire companies, conducted back in 1998 found that 3 out of 4 companies surveyed preferred to recruit trained staff. They concluded that “labour hire firms primarily rely upon the pool of skilled people available in the labour market, and are not large providers of formalised training of the types involved in the traditional apprenticeship” (p.1). The RCSA survey indicates that little has changed since (Chart 2). Only 3% of labour hire companies who placed tradespersons always hired apprentices, whilst a staggering 88% never or rarely hire apprentices (Brennan et al., 2003). The more such firms capture skilled maintenance work, the more ominous this is for Australia's future supply of skills.

Chart 2



Adapting and investing in technological innovations is critical to productivity growth and future competitive advantage. Meeting this challenge requires both basic trade training, and short course training and skills development. Again, there is little evidence to suggest that labour hire employees or hosts invest in such skill development. A labour hire employee, who continued to work at the same workplace following the outsourcing of work to a labour hire company, described his experience:

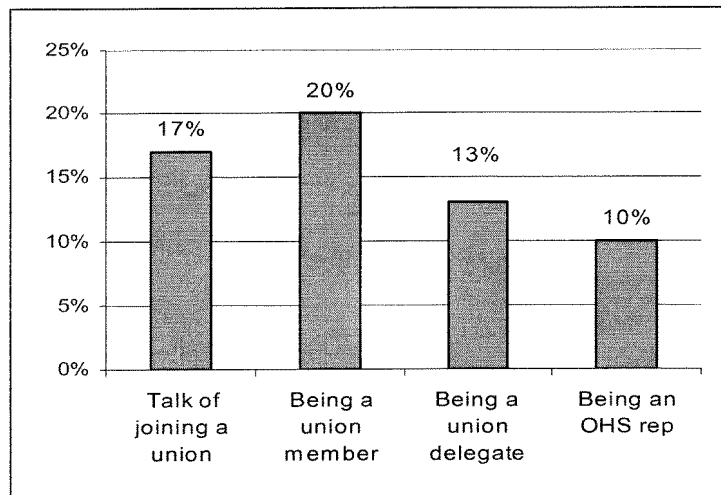
“Before my job was outsourced I regularly participated in training...since then I’ve had one short training course, in seven years” (tradesperson, late 30s)

Clients are only interested in fully productive workers, not trainees. As a result, labour hire companies face difficulties placing apprentices and trainees. They also fear that the skilled employees they train will be poached by other labour hire companies. Labour hire employees have little incentive to invest in their own further training as additional skills are not reflected in higher wage rates. The margin between what the client is willing to pay and the hourly wage paid to the worker appears insufficient to allow for skill differentials to be reflected in wage rates.

5.2 (g) Union membership and representation “...not game to join a union...”

A significant minority of labour hire employees also face discrimination and harassment in relation to union membership and union representation. Most survey respondents (82%) in the Victorian labour hire survey were union members, and just over half were employed under union negotiated enterprise agreements. At first glance, this might suggest acceptance of union representation by labour hire employers. Yet a minority of respondents indicated they had been discriminated against or harassed for joining a union or being a union or OHS representative. The results are given in Chart 3.

Chart 3 Reason for discrimination and/or harassment



Focus group participants highlighted discrimination and lack of voice as a major impediment to improving employment conditions. Discrimination typically took the form of no further placements offered (pseudo dismissal), or being moved overnight to another host too geographically removed for the placement to be practical. A typical description of the pattern was provided by a survey respondent:

“We haven’t got many OHS reps, just as we haven’t got many union stewards – the minute you raise an issue, they move you out.”

A union organiser commented on the difficulties of representing labour hire workers:

“They want to remain anonymous, actually afraid even to talk to me. We get our phone calls from labour hire employees after hours, it’s not during work hours. A lot use direct debit for union dues because they don’t even want the company to know. When you go out there they specifically say to you “don’t mention my name”

While termination of employment for union activity is unlawful, in practice labour hire firms bypass unionists’ rights by not re-engaging them. This undermines legal rights created by statute and supported by ILO conventions. De-unionisation is perceived by 30% of labour hire workers to be a reason why their host introduced labour hire employment in the first place.

6. Conclusion

Professionals and some other skilled workers possessing highly demanded expertise and skills may thrive under independent contracting and labour hire arrangements. They have little need for protective legislation. The growth in independent contracting and labour hire employment, however, has been greatest amongst workers who have insufficient bargaining power to protect themselves. The outcomes identified in this paper illustrate the disadvantages they experience, and reinforce the need for greater protective legislation, not less.

The federal Government’s Discussion Paper *Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements* (DEWR, 2005) recommends weakening regulatory protection for independent contractors and labour hire employees. For independent contractors, this includes reviewing the definitional distinctions between employees and independent contractors. How broadly will the federal government define independent contractors, and will their definition support the protection of dependent contractors? Significant here is the government proposal to override State ‘deeming’ arrangements because the States have defined dependent contractors too broadly,

“dragging contractors into being regulated by workplace relations laws against their will” (DEWR, 2005:15). In 2003 the ILO proposed that national governments should be encouraged to develop frameworks to combat disguised employment which has the effect of depriving dependent workers of proper legal protections (ILO, 2003). At that ILO meeting, the Australian government expressed opposition to an international labour instrument for dependent contractors, claiming “it would restrict business growth and employment and create confusion rather than dispelling it” (ILO, 2003:27). Whilst the federal government also states it will not support ‘sham’ arrangements, there can be little doubt their intention is to define independent contractors in such a way as to prioritise the interests of business over the protection of dependent contractors. The employment disadvantages for dependent contractors identified in this paper will continue, and most likely be compounded as more and more businesses are attracted to unregulated independent and dependent contractors.

For labour hire employment, the federal Government’s discussion paper asks whether the labour hire industry should be regulated to ensure high standards are met by all, whilst also asking whether independent contractors hired by agencies (‘Odco’ arrangements) should be recognised in the Independent Contractors Act. For the government to ensure high standards are met by all, the answer to the second question must be in the negative. Odco arrangements combine the disadvantage of independent contractors with the disadvantages of labour hire employment. Recognising Odco arrangements will encourage a form of hiring with no floor to employment standards. All labour hire employers are likely to be forced to resort to the lowest standards of their competitors. The government also proposes to amend the Workplace Relations Act to provide that awards and agreements cannot contain clauses which restrict engaging labour hire workers or imposing conditions or limitations on their engagement. Safeguards established by direct hire employees to protect their legal entitlements being undercut by labour hire companies and independent contractors will be removed. The right to join a union and collectively bargain to improve pay and conditions will be eroded, existing in form but not substance.

These federal government proposals to deregulate independent contractors and labour hire employment are contrary to the direction the ILO and other developed economies are taking (ILO, 2003). If existing trends are maintained, it is also likely that this deregulation will seriously disadvantage employees with weak market strength.

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