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Monday, 30 January 2017

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

Email: eec.sen@aph.gov.au

Australian Services Union

National Office
Melbourne & Sydney

All correspondence to:

Ground Floor
116 Queensberry St
Carlton South VIC 3053

T: (03) 9342 1400
F: (03) 9342 1499
E: info@asu.asn.au
W: www.asu.asn.au

National Secretary
David Smith

Assistant National Secretaries
Greg McLean
Linda White

Dear Committee Secretary,

Re: Inquiry into the incidence of, and trends in, corporate avoidance of the Fair Work Act 2009

The ASU refers to the inquiry referred to the Education and Employment References Committee into the incidence of, and trends in, corporate avoidance of the *Fair Work Act 2009*.

We appreciate the extension, until 30 January 2017, as granted by the Committee, on 23 November 2016. Accordingly, please find attached the ASU's submission to the Inquiry.

For further information in respect of this correspondence, please contact ASU National Industrial Officer Casey Young on 02 9265 8231 or cyoung@asu.asu.au

Yours faithfully,

Robert Potter
ACTING ASSISTANT NATIONAL SECRETARY

Submission to Senate Committee: Corporate Avoidance of the Fair Work Act

Introductory profile and background of the ASU

The Australian Services Union ('the ASU') is one of Australia's largest Unions, representing approximately 120,000 members.

The ASU was created in 1993. It joined together three large unions – the Federated Clerks Union, the Municipal Officers Association and the Municipal Employees Union, as well as a number of smaller organisations representing social welfare workers, information technology workers and transport employees.

Today, the ASU's members work in a wide variety of industries and occupations and especially in the following industries and occupations:

Local government (both blue collar and white collar workers); social and community services; Transport (including passenger air and rail transport, road, rail and air freight transport; clerical and administrative employees in commerce and industry generally; Call centres; Electricity generation, transmission and distribution; Water industry; Higher education (Queensland and SA only).

The ASU has members in every state and territory of Australia, as well as in most regional areas as well.

The ASU has, during its existence, established on behalf of its members an array of federal and state awards and agreements, providing terms and conditions of employment. Prior to the introduction of the *Fair Work Act 2009* (Cth), the ASU had established about 200 Federal Awards providing terms and conditions of employment for the Union's members, supplemented by hundreds of enterprise bargaining agreements. The same applied in the state IR systems.[1]

Following the introduction of the *Fair Work Act 2009* (Cth), the ASU has continued to be a significant participant in the Fair Work system both as a bargaining union and in relation to the establishment of minimum terms and conditions of employment through modern Awards. The Union's members are covered by a large number of the modern Awards (approximately 20) given the diversity of our membership. The ASU continues to actively bargain on behalf of members. In addition, as the lead bargaining union in local government, electricity, water, airlines, rail and business equipment, the ASU has worked within the terms of the *Fair Work Act 2009* (Cth) to continue its efforts in obtaining the best possible enterprise agreements for its members.[2]

The ASU makes these submissions based upon the experiences of the Union since the commencement of the *Fair Work Act 2009* (Cth) in July 2009.

The ASU notes that its peak body, the Australian Council of Trade Unions ('the ACTU'), will also be making a submission to this inquiry. To this end, the ASU has read, and supports the submission of, the ACTU.

[1] ASU submission to the Fair Work Act Review Panel, Review of the Fair Work Act 2009, 17 February 2012, 2.
[2] ASU submission to the Fair Work Act Review Panel, Review of the Fair Work Act 2009, 17 February 2012, 2, 3.

Terms of reference for inquiry

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

The ASU has historically held ongoing concerns in regard to the use of labour hire and contracting arrangements. It is the view of the ASU that the provisions of section 357 of the *Fair Work Act 2009* (Cth) take some steps towards highlighting the issue of sham contracting, however much more regulatory intervention is required to adequately address the practical realities of sham contracting in the workplace.

Notably, section 357 of the *Fair Work Act 2009* (Cth) states:

Part 3 Division 6 – sham arrangements

357 misrepresenting employment as independent contracting arrangement

1. A person (the employer) that employs, or proposes to employ, an individual must not represent to the individual that the contact of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.

   Note: this subsection is a civil remedy provision (see Part 4-1).

2. Subsection 1 does not apply if the employer proves that, when the representation was made, the employer:
   a. Did not know; and
   b. Was not reckless as to whether;

   The contract was a contract of employment rather than a contract for services.

The ASU is strongly opposed to the practice utilised by rogue employers of falsely classifying workers as independent contractors. Relatedly, the ASU views with concern circumstances where a worker is engaged as an employee, or else an independent contractor of a labour hire agency, particularly given an earlier decision of the Full Court of the Federal Court, which issued a narrow view on how it interpreted sham contracting provisions.[3] From the perspective of the ASU, this comparatively narrow view of sham contracting[4] may have had serious future implications for workplaces generally. The ASU considers that the subsequent decision of the High Court[5], in finding that an employer is prohibited from misrepresenting to an employee that it is an independent contractor, engaged to perform services to a third party, was fundamentally correct, and augured well for the condemnation of such practices by unscrupulous employers.

The ASU has also experienced call centres combining sham contacting with work from home arrangements to further reduce their liability to employees, such as WH&S and access to workers compensation. As 'independent contactors' the minimum wages in the *Contact Call Centre Award* do

[3] *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd [2015] FCAFC 37*.
[4] Dr Tess Hardy, Centre for Employment and Labour Relations Law, Melbourne Law School, submission to Senate Inquiry, 'The impact of Australia's temporary work visas on the Australian labour market and on temporary work visa holders', 11.
[5] *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd & Ors* [2015] HCA 45.

not apply, and contractors are exposed to low wages through a variety of insidious employment practices such as: cuts to per call rate when quality control standards are not met; no minimum number of calls guaranteed; no minimum length of shift; payment of their own superannuation and insurances; no minimum length of shift; operators have no way of checking if their pay has been calculated correctly; operators are responsible for nominating their own shifts they are available for – rosters are then drawn up (which can take up to three hours) with none of the operators being paid for their time doing this.[6]

The ASU has been made aware of several concerning examples of workplace whereby an organisation has used labour hire arrangements that have affected workers' conditions. Regrettably the affected members were reluctant to be publicly identified. The ASU has worked to provide advice and assistance to these members.

Other examples provided to the ASU include those where employers and organisations [whom traditionally did not utilise] labour hire arrangements have moved specifically towards this model. For instance, Towong Shire Council and Alpine Shire Council established a jointly owned company in 2015 called Momentum One Pty Ltd (ACN 108 892 968) ('the Company'). The Chief Executive Officers of those Councils are the directors of the Company. The Company directly employs workers for services that are provided by local councils in Victoria and provides them to the Councils as a labour hire arrangement. Hepburn Shire Council and Latrobe City Council are also clients of the Company. The Company employs the workers under the terms and conditions of the *Victorian Local Authorities Award 2015* ('the Modern Award').

Although the four councils all have enterprise agreements approved by the Fair Work Commission that sets minimum terms and conditions of employment that are significantly better than the National Employment Standards and the Modern Award, the movement towards labour hire arrangements is of concern, particularly if circumstances should change . The enterprise agreements cover all employees of the respective Council, except the Chief Executive Officer, and employees working in Children's Services (in the case of Towong and Alpine Shire Councils). The services that the Company provides labour hire arrangements for are not new services; they are services that have been run by the Councils approximately 100 years.

Another example provided to the ASU relates to the use of seasonal casuals. Towong Shire Council runs a swimming pool in the summer season from November to March each year. The Council used to employ the lifeguards directly on a seasonal basis as casuals.

In November 2015 the positions were advertised as Lifeguards at Towong Shire Council. However, when the successful candidates were given offers of employment, they were provided with contracts with the Company instead of contracts with the Council.

The Council used to employ the Lifeguards at Band 2 classification under the *Towong Shire Council Enterprise Agreement 2014* (**Towong EA 2014**) that has since been replaced with another enterprise agreement. The Company employed the Lifeguards under the Modern Award at Level 2.

[6] ASU submission to Productivity Commission, 15 March 2013, pp16, 17.

Jorja is employed as a seasonal Lifeguard by the Company. Jorja commenced work at one of the Towong Shire Council's swimming pools in November 2015. She had regular shifts between January and March 2016. When she applied for the role she thought she was getting a job with the Council. She was surprised when she found out she would be employed by the Company.

For the period between January and March 2016, the Company paid her only $15.52 per hour. This pay rate included the 25% casual loading. As Jorja was 17 years old, the pay rate was lower than the adult wage (21 years and over) as the Modern Award provides that 17 year olds can be paid at 65% of the adult wage.

If Jorja had been employed under the Towong EA 2014 as had been the case with seasonal Lifeguards of past years, she would have received between $29.71 and $30.61 per hour. These pay rates include the 25% casual loading. In contrast to the Modern Award, The Towong EA 2014 does not reduce the pay rate of junior Lifeguards, who are performing the same duties as adult Lifeguards, based on age.

In addition to the significant difference in rates of pay, Jorja does not benefit from other favourable conditions under the Towong EA. The following tables shows the differences between the Towong EA 2014 and Modern Award for some of those conditions (**Please note**: Clause 5 of the Towong EA 2014 provides that the Towong EA 2014 is to be read in conjunction with the Victorian Local Authorities Award 2001 (**VLAA**).

References to VLAA are made in the table below.):

Name of Condition	**Towong EA 2014 (read in conjunction with the Victorian Local Authorities Award 2001)**	**Modern Award**
Higher duties pay	A casual employee directed to perform duties of a higher level position will be paid at the higher rate where the employee is required to perform those duties for more than two hours. (VLAA Clause 24.1)	A casual employee directed to perform duties of a higher level position will only be paid at the higher rate where the employee is required to perform the substantive functions of the role for more than one day. (Modern Award Clause 16.1)
Accident Make-Up Pay	The employer will have to pay the difference between the workers' compensation paid to the employee and the employee's appropriate rate of pay for 26 weeks. (VLAA Clause 25)	There is no equivalent provision.
Super contributions for low paid casual workers	The employer will contribute 3% of ordinary time earnings to the superfund of casual employees who earn not less than $1200 per annum, even if they do not meet the super guarantee threshold of earning $450 or more per month. (VLAA Clause 26.2.4)	There is no equivalent provision.
Dispute resolution	Arbitration of disputes about the NES and Towong EA 2014 by the Fair	Arbitration of disputes about the NES and the Modern Award is only

Name of Condition	Towong EA 2014 (read in conjunction with the Victorian Local Authorities Award 2001)	Modern Award
	Work Commission is available to employees. (Towong EA 2014 Clause 9.13)	available to employees if the employer consents to arbitration. (Modern Award Clause 9)

The ASU's Victorian Private Sector branch has previously made a comprehensive submission to the Victorian Inquiry into the Labour Hire Industry and Insecure Work, in November 2015. This submission detailed the stark realities of workplace experiences of call centre employees who are engaged in labour hire arrangements. A copy of this submission is annexed.

These examples reinforce the ongoing concerns that the ASU holds with the use of labour hire arrangements.

The ASU also shares the views advanced by the ACTU in 2015; that there should be a public registry of labour hire companies and also there should be a 'rigorous' national licencing regime that governs labour hire companies.[7] The essence of this request is that the *Fair Work Act 2009* (Cth) should jointly recognise labour hire companies and the host employers, bear equal responsibility for providing, as well as upholding, workers' rights and entitlements.[8] Furthermore, the request seeks to ensure that ongoing, systemic issues, such as underpayment or non-payment of entitlements, as well as avoidance of taxation liabilities, is reduced and ultimately prevented. The ASU remains supportive of the advancement of this perspective.

It is the position of the ASU that in keeping with the increasing use of labour hire arrangements, (employees of which have been estimated at approximately 3% to 4% of the total workforce, and between 2000 and 3500 companies engaging approximately 350,000 workers)[9] the systemic issues plaguing the workplace will continue unabated unless urgent restorative initiatives are implemented.

Simply put, the ASU maintains its long held view that the continuing use of labour hire results in the likelihood of workers being unable to access the significant benefits conferred by collectively negotiated workplace agreements of the principal employer, and further, of more concern, is that the principal employer may decline to uphold basic standards for workers, particularly in terms of workplace health and safety issues.[10]
As far back as 2002, the former Labor Council NSW Secretary John Robertson commented that:

"Unions recognise that there is a legitimate role for labour hire in enterprises where labour demands may ebb and flow. But labour hire should not be used as a sly way of reducing wages and conditions that workers are entitled to receive".[11]

[7] Workplace Express, 'ACTU calls for licensing of labour suppliers', 14 July 2015, 1.
[8] Workplace Express, 'ACTU calls for licensing of labour suppliers', 14 July 2015, 1.
[9] Workplace Express, 'ACTU calls for licensing of labour suppliers', 14 July 2015, 1.
[10] S O'Neill, Research Paper no. 9, 2003-2004, 'Labour hire: issues and responses', 8 March 2004, 3.
[11] J Robertson, 'NSW Unions to run labour hire test case', *Workplace Info*, 30 April 2002, cited in S O'Neill, Research Paper no. 9, 2003-2004, 'Labour hire: issues and responses', 8 March 2004, 21.

Relatedly, the ASU notes that also in 2002, the ACTU published its submission to the NSW Labour Hire Task Force, and that within this paper, the ACTU outlined its view that adequate recognition and enforcement should be implemented to maintain commensurate rights and protections for labour hire workers, as those afforded to employees who are not engaged by labour hire companies.[12] The anecdotal experience of the ASU has been that little has changed since 2002 – namely that labour hire employees are often subject to inferior terms and conditions of employment, aided by unscrupulous practices engaged in by rogue employers.

After more than nearly two decades of industry experience with the largely negative impacts upon workers arising from the labour hire industry, the ASU remains concerned that insufficient action has been taken in order to ensure that workers pay and conditions has not been affected by the rise and rise of the labour hire arrangements in the modern workplace.

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

Although the ASU has not had any specific, direct experience [as reported by its membership] with the issue of use of voting cohorts to approve agreements with a broad scope that affect workers' pay and conditions raised by its membership, the ASU considers the matter of concern which requires addressing. To this end, the ASU has read, and supports the submission of, the ACTU to the Inquiry. It is the ASU's position that the relevant case law explored by the ACTU's position, including *CFMEU v Main People Pty Ltd* [2014] FWCFB 8429; *CFMEU v John Holland FAFC* 16; and the recent Carlton United Breweries dispute, provides compelling grounds to demonstrate the issues surrounding strategic voting cohorts in workplaces.

The use of enterprise agreement termination that affect workers' pay and conditions

The practice of Enterprise Agreement termination by employers ultimately resulting in workers' pay and conditions, including but not limited to forced redundancies, attracted widespread media coverage throughout 2016. One notable recent example from New South Wales, which caused widespread community outrage[13], is the decision issued by the Full Bench of the Fair Work Commission, to terminate the Essential Energy Enterprise Agreement.[14]

The ACTU has placed an immediate focus on this issue[15], given the impact that it has the potential to have upon employees' wages and conditions. Simply put, it is problematic that an application can be made to terminate an enterprise agreement after the nominal expiry date has passed.[16]

A wealth of commentary has been produced in respect of the issue of the use of enterprise agreement termination that affects workers' pay and conditions, and the subsequent case law. As such, the ASU remains deeply concerned with regard to the increasing utilisation of this practice by employers. To this end, the ASU has read, and supports the submission of, the ACTU to the Inquiry.

[12] ACTU submission to Labour Hire Task Force, September 2000, 14.
[13] D Vukovic, ABC News, 'Essential energy can now cut 600 jobs from regional NSW', 23 November 2016, http//www.abc.net.au/news/2016-11-23/essential-energy-job-cuts-fair-work-ruling/80.
[14] *Essential Energy Workplace determination [2016] FWCFB 7641*
[15] Workplace Express, 'ACTU seeking to halt rash of agreement-termination applications', 16 November 2016.
[16] Section 225 of the *Fair Work Act 2009* (Cth).

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

The operation of the Transfer of Business provisions in the *Fair Work Act 2009* (Cth) has been the subject of ongoing debate between unions and employer organisations over the past decade. It is the Union's position that a number of outstanding issues remain unresolved, and, as such, require urgent attention in order to achieve a satisfactory resolution.

By way of background, in 2008 the ASU welcomed some key elements of the new provisions of the *Fair Work Act 2009* (Cth) dealing with transfer of business, particularly the elimination of the 12 months life on transmitting agreements. However, the Union was, and remains, concerned that the new provisions did not deal with all situations whereby an employer can effectively transmit businesses or parts of their business to other entities without employees being able to have their terms and conditions of employment fully and appropriately protected.[17]

This is because the *Fair Work Act 2009* (Cth) retained a key element from the 'Workchoices' legislation, that is, industrial instruments do not transfer unless there are transferring employees.

The ASU maintains its view that this means the effectiveness of the Act in maintaining the integrity of the safety net of Awards and agreements, and protecting employees whose work is effectively transmitted is not comprehensive and effective in all circumstances.

The ASU has had considerable experience in situations where businesses [and employees] are effectively transmitted without the protections of the Act applying to employees. Two particular and distinct examples of this in the ASU's experience have been: Qantas Valet Parking and Qantas Holidays. These were previously outlined in the ASU's submission to the Fair Work Act Review Panel, Review of the Fair Work Act 2009, which was prepared in 2012.

In the case of Qantas Valet parking, the contract to run Qantas Valet parking was lost by one contactor, but gained by another. In brief, because the business did not transmit from the first contractor to the second, no transmission of business occurred. Employees of the first contractor were offered jobs with the second contractor but on lesser terms and conditions as "new" employees [at the time on AWAs]. The same business and work was carried out and went form one business to another but no legal transmission occurred and the employees of Qantas Valet parking were among the last victims of Workchoices.[18]

In the case of Qantas Holidays, Qantas sold a wholly-owned subsidiary [Qantas Holidays] to another company [Jetset TravelWorld Limited]. Qantas then purchased majority ownership of Jetset TravelWorld Ltd. Qantas Holidays Ltd became a wholly owned subsidiary of Jetset TravelWorld Ltd and another wholly-owned subsidiary – a new company – Qantas Business Travel Pty Ltd – was created to perform both holidays and corporate travel work.[19]

Existing Qantas Holidays Ltd employees were transferred with their company to the new operation and the applicable industrial instruments transmitted. The new subsidiary, Qantas Business Travel Pty Ltd was also expanded to perform work previously done by direct employees of Qantas Airways Limited in the Qantas Business Travel [QBT] Division of Qantas. Since no employees of the old QBT Division transferred into the new QBT company this no transmission of business occurred with

[17] ASU submission to the Productivity Commission, 15 March 2013, 16, 17.

[18] ASU supplementary submission to the Fair Work Act Review Panel, Review of the Fair Work Act 2009, 2 March 2012, 6.

[19] Ibid., 7,8,9

respect to this work. All new employees who would otherwise have been engaged by Qantas Holidays Ltd became employed by the new corporate entity – Qantas Business Travel Pty Ltd. As these employees were not transferring employees, they did not benefit from transmission of business arrangements including transmitted industrial instruments even though work has effectively been outsourced or transmitted from Qantas to the new Qantas related company.

Since the new entity did not have transferring employees, the Fair Work Act does not consider this to be a transfer of business. This is a serious flaw in the Act, in the submission of the ASU.[20]

In regard to transfer of business issues, a variety of employer organisations have criticised the operation of the Transfer of Business provisions of the Act. As far back as 2008, the ASU welcomed key elements of the new provisions of the [then] *Fair Work Bill* dealing with the transfer of business, particularly the elimination of the 12 months life on transmitting agreements. However, the Union remains concerned that the new provisions do not deal with all the situations where employers can effectively transmit businesses or parts of their business to other entities without employees being able to have their terms and conditions of employment fully and appropriately protected.[21]

This is because the *Fair Work Act 2009* (Cth) retained a key element from the *Workplace Relations Amendment (Work Choices) Act* 2005, that is, that industrial instruments do not transfer unless there are transferring employees.

The ASU submits that this means that the effectiveness of the Act in maintaining the integrity of the safety net of Awards and Agreements and protecting employees whose work is effectively transmitted is not comprehensive and effective in all circumstances.

The ASU considers that efforts by various states to inquire into labour hire issues, is welcome. In 2016, Queensland's Parliamentary committee launched an inquiry into labour hire, which was conducted by the Finance and Administration Committee. This Inquiry was titled the 'Inquiry into the practices of the labour hire industry in Queensland'. Peter Russo MP, Chair of the Committee noted the following:

> *"The majority of labour hire companies appear to be acting in keeping with their legislative requirements as responsible employers. However, evidence received by the Committee also highlighted concerning incidents of 'phoenixing', sham contracting, the exploitation and mistreatment of workers, the undercutting of employment conditions; and a range of other illegal or questionable practices"*.[22]

The ASU is aware of strong interest in the issue of, and need for, urgent attention to be paid to the practice of 'phoenix' activity. The impact of company collapses, including employees loss of accrued and long service entitlements, as well as wages and redundancy pay, and superannuation contributions,[23] is devastating, and even more so when the company then re-appears almost

[20] Ibid., 7, 8, 9.
[21] Ibid., 7, 8.9.
[22] Qld Parliamentary Committees, 'Inquiry into the practices of the labour hire industry in Queensland', Report No. 25, 55th Parliament, Finance and Administration Committee, June 2016, vi.
[23] Associate Professor Helen Anderson, Professor Ann O'Connell, Professor Ian Ramsay, Associate Professor Michelle Welsh, & Hannah Withers, 'Defining and Profiling Phoenix Activity', December 2014, Melbourne Law School, 40.

immediately in an alternate form. Often, this is characterised by the company re-appearing and being known by 'a pre-liquidated name of the failed company', 'or a similar name'.[24] Although difficult to precisely define, the 2004 Parliamentary Joint Committee on Corporations and Financial Services, noted that 'phoenix activity focused upon deliberate and systemic liquidation of a corporate trading entity [with] the deliberate intention of avoid tax and other liabilities, and continue to operate and take profits of the business through any trading entity'.[25] The ASU is aware that the practice remains prevalent to date. To this end, the ASU was very supportive of the announcement on 1 February 2016 by the Labour Party, of its workplace relations policy titled 'Protecting Rights at Work'. The ASU was further heartened when the policy was further developed in a private members bill titled the *Fair Work Amendment (Protecting Australian Workers) Bill* 2016, and was subsequently introduced into the Senate on 15 March 2016. Significantly, one of the objectives of the Bill is to address the negative impact of phoenix activity upon employees via labour law, as opposed to corporate law, and for the Fair Work Ombudsman (not the Australian Securities Commission) to become the responsible regulatory authority.[26]

Relatedly, the ASU views the inquiries undertaken by the Senate, including the Senate Standing Committee on Education and Employment, *The Impact of Australia's temporary work visa programs on the Australian Labour law market and the temporary work visa holders*, as well as the Senate Economics Reference Committee, *I Just Want to be Paid: Insolvency in the Australian Construction Industry*, as a necessary and relevant aspect of the process of long overdue reform within the industry.

The avoidance of redundancy entitlements by labour hire companies

The ASU has long held concerns regarding the issue of avoidance of payment of employee entitlements generally, by labour hire companies. As far back as 2005, the ASU made a submission to the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, 'Inquiry into Independent contractors and labour hire arrangements', which sought to outline its concerns with the practices among the labour hire industry in general terms. This submission was substantial in nature and sought to expand upon a number of key concerns that the ASU identified within the labour hire industry, some of which included examples of workplaces utilising labour hire agency staff in the belief that such staff were more expendable during times of economic downturn.[27] The ASU maintains this point of view is sustained by various unscrupulous employers, to this day.

Also, in respect of this issue, the ASU has read, and supports the submission of, the ACTU to the Inquiry.

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

With regard to the issue of the effectiveness of protections for labour hire employees from unfair dismissal, the ASU has read, and supports the submission of, the ACTU to the Inquiry.

The ASU also takes this opportunity to provide some very general comments in respect of labour hire company workers, and the limited opportunity to be afforded protection from unfair dismissal.

[24] Fair Work Ombudsman, 'Phoenix activity: Sizing the problem and matching solutions', June 2012, 1.
[25] Ibid., 7
[26] H Anderson, 'Labor's Policy to deal with phoenix activity affecting employees', (2016) 34 C & SLJ 316, 316.
[27] ASU submission 2005, House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, 'Inquiry into Independent contractors and labour hire arrangements', 13.

In essence, there is an underlying lack of protection, either at state or federal level, for labour hire employees who are dismissed.[28]

In the ASU's experience, quite a number of labour hire workers are engaged for periods of less than 12 months duration, often meaning that the worker may subsequently precluded from protection from unfair dismissal under the *Fair Work Act 2009* (Cth). Limited exceptions to this apply.[29]

Also problematic[30] is that fact that dismissed employees need to establish that there is an employer/employee relationship, which has been terminated at the employer's initiative,[31] and also that the dismissal was harsh, unjust or unreasonable.[32] Added to this complexity is that if a labour hire employee is still 'on the books', and yet not receiving any shifts, then the employees is not technically dismissed. In effect, the problematic scenario of the labour-hire employee is summarised by University of Melbourne academic Trina Malone, who has noted that "no explicit legislative attention [in this field] is given to labour hire workers". The only assistance that can be considered to be rendered to labour hire employees, is that there is a prohibition on sham arrangements in accordance with section 357 of the *Fair Work Act 2009* (Cth), and that dismissing an employee, then re-hiring them as an individual contractor, is prohibited within section 358 of the Act.

The approval of enterprise agreements by workers not yet residing in Australia that affect workers' pay and conditions

The ASU does not report any direct experience with this particular issue. In this regard, the ASU has read, and supports the submission of, the ACTU to the Inquiry.

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

Unscrupulous use of work visas by companies has been well documented, within government enquiries[33], and the wider media.[34]

The ASU remains deeply concerned about this practice. Furthermore, the ASU supports the submission from the ACTU to the Inquiry on this issue.

Whether the National Employment Standards and modern Awards as an effective 'floor' for wages and conditions and the extent to which companies enter into arrangements that avoid these obligations

[28] T Malone, 'Vulnerability in the Fair Workplace: Why unfair dismissal laws fail to adequately protect labour hire employees in Australia', May 2011, Centre for Employment and Labour Relations Law, University of Melbourne, 5.

[29] Section 384 (2) (a) of the *Fair Work Act 2009* (Cth).

[30] T Malone, 'Vulnerability in the Fair Workplace: Why unfair dismissal laws fail to adequately protect labour hire employees in Australia', May 2011, Centre for Employment and Labour Relations Law, University of Melbourne, 5.

[31] Section 386 (1), (a) – (b) of the *Fair Work Act 2009* (Cth).

[32] Section 385 of the *Fair Work Act 2009* (Cth).

[33] Senate Inquiry, 2015,'The Impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders'.

[34] Nick Toscano, 'One in five migrant workers on 457 visas could be underpaid or incorrectly employed', *Sydney Morning Herald*, 29 May 2015; Max Newham, 'companies forcing employees to become sham contractors beware', *Sydney Morning Herald*, 24 November 2015.

The ASU strongly supports legislated minimum entitlements that provide for a strong and secure safety net of working conditions and entitlements through minimum wage decisions, modern Awards and the National Employment Standards.

The ASU now takes this opportunity to make some general comments regarding NES matters, in this instance, minimum hour's issues. The first NES entitlement appears to provide a maximum working week for full time employees of 38 hours per week. However, this entitlement is poorly drafted and does not confer the entitlement it purports to provide. Section 62 of the *Fair Work Act* 2009 (Cth) governs the maximum weekly hours an employee may work.

Our concern is that the 'entitlement' to a maximum working week of 38 hours per week is immediately qualified by the rider 'unless the additional hours are reasonable', which largely renders the entitlement unenforceable. The terms of the NES as stated operate as a fundamental minimum entitlement: no Award or Agreement provision can provide a term of employment detrimental to the provisions of the NES.[35]

The ASU's concerns were revealed in an earlier bargaining period about this NES entitlement with TNT. In this regard, please see the TNT Express Customer Service Agreement 2011-2013.[36] This Agreement effectively set the minimum working week at 40 hours per week, contrary to the spirit and intent of the NES. The Agreement requires that all employees work a minimum of 40 hours per week being 38 ordinary hours and 2 more hours of overtime each and every week being 'reasonable additional hours', in the view of the employer.

The ASU objected to the approval of the Agreement on the grounds that it was unfavourable to employees compared to the provisions of the NES specifying a maximum working week of 38 hours. In response to the Union's concerns, the tribunal accepted an undertaking[37]

Legacy issues relating to WorkChoices and Australian Workplace Agreements

In the course of our organising and campaigning activities the ASU has come across many examples of nominally expired pre-reform collective agreements (commonly referred to within the industry as 'Zombie Agreements') still covering workers. For example in the private sector the contract call centre sector is an industry where pre-reform agreements prevail.

These Pre-reform agreements have the effect of denying workers important employment conditions such as penalty rates, overtime and public holiday rates in the relevant Modern Award. By never renewing these pre-reform agreements, employers are denying their workforce the higher safety net available under the Fair Work Act and unfairly undercutting their competitors.

Where the union is able to effectively organise workers to collectively bargain under the Fair Work Act, these pre-reform agreements have been replaced by superior collective agreements made under the current legislation. In some industries and workplaces where workers are unable to collectively replace such arrangements then pre-reform agreements have prevailed. A number of underlying reasons may exist for 'Zombie' agreements continuing on in this manner, including but not limited to:

[35] *Fair Work Act 2009* (Cth) sections 44 and 55.
[36] AG2010-24253.
[37] Decision of SDP Hamberger [2011] FWA 398

Employees being unaware of their rights;

- High staff turnover;
- High percentage of casual workers;
- Workforce particularly vulnerable to exploitation – eg: high percentage of young workers;
- Un-unionised workforce without access to union support

The ASU recommends that the legislation be amended to require employers to replace such agreements with Fair Work compliant collective agreements. In doing so employers must ensure that representational rights of employees are complied with when bargaining for replacement agreements.

The economic and fiscal impact of reducing wages and conditions across the economy

The ASU is well aware of the devastating economic and fiscal impact of reducing wages and conditions across the economy. In this regard, the ASU has read, and supports the submission of, the ACTU to the Inquiry.

Any other related matters

In regard to any other related matters, the ASU has read, and supports the submission of, the ACTU to the Inquiry.

The ASU remains committed to the establishment and maintenance of a fair and equitable set of minimum terms and conditions of employment for all workers (employees and independent contractors) through collectively bargained Awards and Agreements. Furthermore, this protection should be extended to all employees and workers, and that such protection should be maintained through independent workplace tribunals.[38]

Conclusion

The ASU was pleased to provide its comments to this Inquiry, and also welcomes the opportunity to provide further information to the Inquiry, should it so be required.

[38] Australian Municipal, Administrative, Clerical and Services Union, submission to the Standing Committee on Employment, Workplace Relations and Workforce participation, 'Inquiry into Independent contractors and labour hire arrangements', March 2005, 2.

Australian Services Union
Victorian Private Sector Branch

Victorian Inquiry into the Labour Hire Industry and Insecure Work

November 2015

Submitted by:
Ingrid Stitt
Branch Secretary
ASU Victorian Private Sector Branch
Email: istitt@asupsvic.org
(03) 9342 3300

1. Background

The Australian Municipal Administrative Clerical and Services Union (known as the Australian Services Union – ASU) – Victorian Private Sector Branch covers clerical, administrative and customer service employees in the private and not for profit sectors.

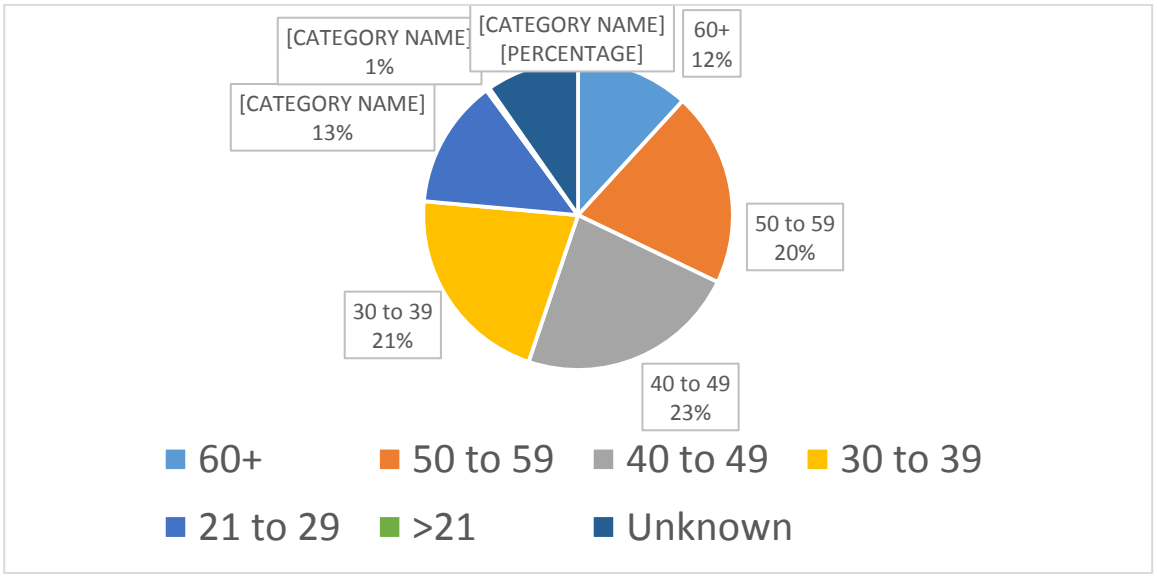
The ASU has members in a range of industries including but not limited to:

- Airlines and Related Industries;
- Call Centres;
- Armoured Transportation;
- Road Transport, Freight & Logistics;
- Manufacturing;
- Pharmaceutical;
- Gaming & Wagering;
- Non-profit Organisations;
- Retail;
- Legal Services;
- General Clerical & Administrative

The majority of ASU members employed in the above industries have their employment conditions regulated by Federal Awards and/or Certified Agreements in the Federal jurisdiction.

The union's gender break down is currently 68% women and 32% male.

The union's age demographic is currently:



Average age of ASU members: 39

There are a number of sectors within the union's membership that have a significantly younger age profile. These include Airlines, call centres, community organisations and the legal services industry.

The ASU had input into the VTHC submission to this Inquiry and supports the broad recommendations being made by the Victorian peak union body.

In addition we support the submissions of the ASU Victorian/Tasmanian Authorities and Services Branch.

2. Impact of Precarious and Insecure Employment on Workers

A secure, meaningful job is a fundamental source of self-respect and identity. A decent job provides dignity and fosters social inclusion.

However, inequality in Australia is growing and so is the prevalence of insecure forms of employment.

The impact of labour hire and precarious employment on workers has been well documented in research and submissions to this and other related Inquiries.

In particular the following issues are prevalent amongst the labour hire and temporary workers the ASU organises:

- Lack of job and income security;
- Fluctuation in earnings from one week to the next;
- Long periods with one host employer without access to annual, long service or sick leave entitlements;
- Being employed by the 'contract' or 'campaign' – particularly prevalent in the contract call centre industry;
- Fear of raising work and OHS concerns;
- Lack of training;
- Lack of career or training opportunities;
- Often poorer wages and conditions than the host employer;
- Adverse Superannuation outcomes and lack of retirement income particularly for women;
- Lack of compliance by some employers with industrial law;
- Use of sham contracting arrangements to avoid the rights that flow from an employer/employee relationship

3. Labour Hire & Other Forms of Insecure Work in ASU Industries

The ASU, as a white-collar union predominantly in the private sector, has been exposed to labour hire, casual, temporary and precarious work arrangements for many years.

As a union campaigning and organising in female dominated industries, predominantly in the private sector, our union has an insight into the negative impacts precarious forms of employment models can have on workers and their families.

In the traditional office environment the 'temp' has been an established method of hire by businesses for over 25 years.

Consistent with the employment data across industry the use of labour hire and agency temp arrangements in the past decade has increased significantly in the union's coverage area.

It has been the experience of the ASU that labour hire and temporary arrangements can undermine permanent employment, job security and employment conditions if there is no mechanism to limit and/or regulate their use.

The degree to which the sector is industrially organised and the relative industrial power of the workforce can also determine the extent to which labour hire and precarious forms of employment exist and are able to flourish.

In the ASU's experience it is common for labour hire or agency temps to be placed with host employers for protracted periods of time and remain employed 'by the hour' by the labour hire company despite their role being an ongoing requirement within the host employers' business.

It has been the practice of the ASU to seek provisions within collective agreements that may include:

- Consultation over the use of labour hire, noting that there are some restrictions to what can be included in a collective agreement – 'non-permitted' matters;
- Ensuring labour hire workers enjoy the same wages and conditions as employees of the host employer and that they are extended the provisions of the collective Agreement;
- Seeking to ensure that labour hire and or temporary employment arrangements have a specific purpose or life eg: a special project, seasonal requirement or to allow for flexible work arrangements and various forms of leave coverage – eg: maternity leave, backfilling flexible work arrangements.

Regulating the use of labour hire employment via collective agreements has been made more difficult over time as federal industrial legislation has become more restrictive and as a result of case law.[1]

There are also issues with enforceability of commitments with labour hire providers/employers contained in collective agreements with the host employer under such an approach that we detail further in this submission.

Further, this approach will only succeed in those areas of the workforce that are strongly unionised and where unions have the industrial strength to successfully pursue these claims through collective bargaining.

Notwithstanding this approach it is still very difficult to ensure that labour hire arrangements do not undermine permanent work and industry employment standards.

Even with Federal Modern Award and Collective Agreement regulation, all too often labour hire workers slip through the gaps and many employers argue that labour hire workers are employed by a separate company and therefore not their responsibility.

[1] Westfarmers Premier Coal Ltd v AMWU (no 2) [2004]

4. ASU Case Study - The Call Centre Sector

For over three decades the ASU has campaigned for the workplace rights and safety of workers in the call centre sector.

These efforts have resulted in a number of important achievements and initiatives being adopted.
These include:

- Adoption by the former Bracks/Brumby Victorian State Government of the Victorian Government Call Centre Code governing call centre employment within the state public sector and procurement for state government call centre contracts;
- Recommitment by the Andrews Labor Government to the Victorian Government Call Centre Code;
- Creation of the first federal award for call centre workers – The Contract Call Centre Award (now a Modern Award);
- In conjunction with Worksafe the development of the Good Practice Guide for Occupational Health & Safety in Call Centres;
- Development of an off-shoring protocol with other call centre sector unions – FSU, CEPU & CPSU;
- Two major national surveys of workers in the industry in 1998 and 2009; and,
- research into off-shoring in 2008 and 2012

Despite these efforts call centre workers still identify significant unfair employment practices. These issues range in nature but include:

- Health & safety concerns in the context of a call centre environment;
- Excessive monitoring of employees;
- Unreasonable sales targets and KPI's linked to job security;
- A lack of access to union representation and/or collective bargaining;
- Some evidence of a lack of compliance with minimum employment standards
- Inability to balance work & family – eg: access to leave
- Insufficient training and lack of management support
  And,
- **A significant use of casual labour, labour hire, temporary contracts and other precarious forms of employment;**

The results of the ASU 2009 call centre industry survey of workers indicates that stress related to job insecurity is a major factor impacting workers in call centres. 45% of respondents felt their job was not secure.[2]

In many of the industries where the ASU has membership and industrial regulation, the level of labour hire and casualisation is lower than in some of the less well unionised sectors that the union covers and organises within.

The Contract Call Centre sector is a stark example of this.

[2] It's Your Call – Improving Australian call centres for Workers – ASU survey 2009

In the experience of the ASU labour hire and temporary employment arrangements in this sector are far more prevalent and represent a much higher proportion of the workforce than in in-house call centres, and other sectors the union has coverage and organises within.

Another feature of the contract call centre industry is the high turnover of labour.

It is not uncommon for a contract call centre to employ 40% or more of its workforce on labour hire or other temporary or fixed term employment arrangements. More often that not labour hire workers are not covered by the industrial instruments in place at the host employer. This practice effectively creates two classes of workers within the same company.

It is increasingly common practice to employ call centre operators 'by the contract' despite the call centre skills being transferrable to other work contracted to the business. In these circumstances workers contracts can be terminated with the minimal notice period when the contract call centre loses a particular commercial contract, or if part or all of the work is off-shored.

Many employers in this sector will argue that the fixed term nature of commercial contracts necessitate flexible employment arrangements such as labour hire or fixed term contracts, or limited tenure contracts attached to the campaign they work on. This is hard to reconcile when labour hire and fixed term/temporary workers can remain for significant periods of time within one call centre and be subject to all the same performance and/or sales targets as permanent employees but have none of the benefits of permanent employment. This practice also serves to entrench the disadvantage experienced by those workers in insecure work, both financially and industrially.

In some instances these labour hire or temporary employees are subject to the host company's performance appraisal system and have reviews conducted on them by supervisory staff of the host employer. With these sorts of practices in place the line between directly and indirectly employed workers can become very blurred.

Difficulties can arise when a long-term labour hire placement ceases without explanation. The ASU has sought to help numerous labour hire workers who have been unable to get an explanation from either the host employer or the labour hire agency as to why their placement has been terminated. There is no access to proper dispute resolution procedures when a labour hire worker is in this situation and there are little to no legislative rights available to the worker other than to pursue a constructive dismissal case.

The extent of the use of labour hire arrangements in the contract call centre sector is a worrying trend in the view of the ASU. All of the problems associated with precarious employment are prevalent as a result.

The ASU is also seeing an increase in so called 'independent contractor' arrangements in call centres including an increase in home-based call centre work characterised by, in the union's view, sham contracting arrangements dressed up as flexibility.

Our union has spoken to home based call centre operators who are engaged as independent contractors and who work on campaigns for some of Australia's best known companies.

This is what they have told us[3]:

- Operators are paid as little as $1.98 per call. There is no protection for the operators as to how long a call can go on for.
- If the operators do not meet the 'Quality Assurance' and 'Adherence' targets the call rate is halved not just for that call, but for all of the calls that week.
- Operators are not allowed a transcript of their call or to ask why they failed when they fail the above targets.
- Operators pay for their own costs including superannuation and insurance
- Operators are located across regional & metro areas.
- Operators log onto to a portal every week to nominate the shifts they are available for. Drawing up the roster can take up to 3 hours and none of the operators are paid for their time doing this.
- We are advised that if an Operator cannot do a shift they must provide a Doctor's certificate – hardly consistent with an independent contractor arrangement.
- Operators must re-sign a contract on the portal every couple of weeks – presumably to give the appearance that they are genuine contractors as opposed to employees.

At the time the ASU formed the view that the arrangements were not a legitimate independent contractor arrangement. For a range of reasons the case was not tested in the courts.

In November 2011 the Fair Work Ombudsman released a report into sham contracting in the cleaning, hair and beauty and call centre industries.

The audit of 102 businesses was conducted in April and May of 2011. Of the call centres audited (that number is un-clear from the report) 7 instances of sham contracting were identified and 14 instances of 'misclassification of employees as independent contractors were discovered. Given the 102 businesses were across cleaning, hair & beauty AND call centres these are alarming statistics from a fairly small sample of employers.[4]

The ASU believes that this report represents the tip of the ice-berg in respect to sham contracting in the sector. Home based call centre workers are isolated and out of sight. Regulation and compliance for home based workers

[3] based on information provided at the time of the union receiving initial complaints in 2010

[4] Sham Contracting and Misclassification of Workers in the Cleaning Services, Hair & Beauty and Call Centre Industries – Fair Work Ombudsman Report November 2011

in a range of industries is an area that requires different resources and approaches from regulators if exploitation is to be uncovered and remedied.

Of the home based call centre workers the ASU has had contact from all of them reported fear about making a complaint. Overwhelmingly they felt that they would lose the income and ability to work from home if they sought to pursue any action.

We must not let the attraction of the flexibility associated with home based work mask exploitation of vulnerable and isolated workers.

One of the barriers to effectively stopping instances of sham contracting is the factors used to determine the difference between an employee and an independent contractor are not always clear cut.

Even if the common indicators point to a person being an employee the cost of legal action can be beyond the reach of many vulnerable workers.

A strengthening of the laws prohibiting sham contracting is required at the federal level, as well as ensuring that remedies to sham contracting are affordable and accessible to workers and their unions.

5. ASU Case Study – Aviation Services

The ASU has significant membership and a long history of campaigning for the rights and industrial interests of ground staff across the aviation sector.

In 2013 a new entrant in the aviation services sector, providing 'special needs' passengers with assistance on a contractual basis with certain ground handling companies in the sector, set up on the eastern seaboard.

The ASU has chosen not to name this company, the host company or any of the impacted employees in this submission for privacy considerations, however on a confidential basis we provide relevant documents supporting this case study at **Appendix 1** of this submission.

In Melbourne the ASU Victorian Private Sector Branch became involved when workers employed by the new entrant became aware that they were being paid significantly lower rates of pay and conditions compared with those workers directly employed by the host company.

The ASU had significant concerns about the wages and conditions that employees of the new entrant had been engaged under. The ASU also had concerns regarding the impact that lower industry terms and conditions would have across the sector.

These workers joined the ASU and the union started work on pursuing their rights.

Despite being shift workers, employees were receiving:

- A flat rate of $16 per hour – no penalty rates for shifts that would normally attract penalty rates in the industry;
- No public holiday rates of pay;
- Employees were required to pay for their own uniforms;
- Employees were required to pay for their own Aviation Security Identification Card.

In the course of representing our members concerns with regard to their employment arrangements, the company claimed that they have been issued with a 'ruling' from the Fair Work Ombudsman that the work performed by their employees was outside of any existing Modern Award. As a result the employees were being treated as 'award free' by their employer.

It later became apparent that the Fair Work Ombudsman had given no such 'ruling' and the employer was relying on a phone call made to the Fair Work Ombudsman information line where very little information was provided by the employer about the nature of the work being undertaken.

As was later confirmed by the Fair Work Ombudsman, employees were performing duties covered by the scope of an existing Modern Award - the Airline Operations – Ground Staff Award 2010. This Modern Award covers all other contractors, ground handlers and airlines not covered by an existing Enterprise Award in the industry of airline operations and specifically covers the duties these workers were performing.

Clause 4 – Coverage – of the Award, the Airline Operations – Ground Staff Award 2010, states:
4.1 This award covers employers throughout Australia in the airline operations industry with respect to all their employees throughout Australia in the classifications listed in Schedule B—Classification Definitions and to those employees. This award applies to the exclusion of any other modern award.

Further at clause 4.5 of the Airline Operations – Ground Staff Award 2010, states:

*4.5 This award covers any employer which **supplies labour on an on-hire basis** in the industry set out in clause 4.1 in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry. This subclause operates subject to the exclusions from coverage in this award.*

Under the Airline Operations – Ground Staff Award 2010 at clause 21.5 Aviation Security Identification Card (ASIC), the cost of the application fee, and other fees required by legislation for an ASIC, will be reimbursed by the employer.

Clause 21.13 of the Airline Operations – Ground Staff Award 2010 – Uniform and Protective Clothing Allowance, requires that where an employee is required to wear a uniform the employer must reimburse the employee for the reasonable cost of obtaining the uniform.

In addition the company was not paying the correct hourly rates of pay, penalty rates for shift work or public holiday loadings in accordance with the Airline Operations – Ground Staff Award 2010.

The ASU has collective agreements with the host employer in a number of states including Victoria, NSW and Queensland. These Agreements contain provisions requiring contractors to be paid the same rates of pay as those staff covered by the host company.

The host employer took steps to ensure that they were complying with the provisions of the collective agreement by insisting that the contractor pay the host company EBA rates of pay to their employees. This occurred in Melbourne some 6 weeks after the new entrant set up.

The host employer subsequently terminated the contract with the contractor in all states less than three months into the contract.

The ASU pursued the new entrant for the pack-pay owed to employees without success.

It became the strong view of the ASU that the entire business model of the new entrant was based on undercutting the industry rates and conditions.

The company went into liquidation less than six months into operation owing approximately 17 employees in Victoria over $34,000 in lost wages and unspecified amounts of accrued leave and unpaid Superannuation contributions.

This figure could have been significantly higher if not for the provisions contained in the host employers' collective agreement with the ASU, requiring contractors and labour hire workers to be paid the same rates of pay as the host employers' workforce.

No assets were realised through the liquidation so former employees were forced to make application through the Fair Entitlements Guarantee (FEG) for lost wages and entitlements.

Ultimately the workers were left out of pocket and most were left unemployed. A small number of the employees were engaged by the host employer as direct employees.

From the ASU's perspective this case highlighted a number of concerns, including:

- The current lack of regulation of labour hire companies means that any operation can set up regardless of whether they have the required capital available to operate adequately within the law, or ethically;

- There are inadequate enforcement options available in a timely manner for enforcement of even the most basic workplace rights;
- Lack of adequate protection of employee entitlements;

Confidential supporting material is available at **Appendix 1** of this submission.

6. Insecure Work and Leave Entitlements

One of the significant impacts of insecure, casual and temporary work is the lack of access to paid leave for such workers.

The ASU has membership in the racing and wagering industry where the nature of the work is both casual and seasonal. This has been a challenging model when it comes to negotiating leave provisions for these workers. The ASU has had some success in securing a combination of paid and unpaid leave for casuals working within the racing industry.

The ASU membership in the franchised Tab Agency network have a particularly unique issue in respect to long service leave that arises from the definition of 'employer' in the Victorian Long Service Leave Act.

We raise this issue in these submissions on the basis of the casual and insecure nature of the employment and the impact this has in a franchised business model on leave entitlements and continuity of employment.

There are other continuity of employment issues that arise from an employee in a franchised network moving between franchisees.

The following is an extract from the ASU submission to the 2015 Victorian Economic, Education, Jobs & Skills Committee Inquiry into Portability of Long Service Leave Entitlements:

> *The ASU was proud to win long service leave entitlements for Tabcorp casuals in the 1990's. This was significant given the seasonal and fluctuating nature of the racing industry and the casual tenure of the majority of the workforce.*
>
> *Despite the casual nature of employment at Tabcorp, the length of casual employment of individual employees was, and remains, long. The Long Service Leave provisions covered casual employees in telephone betting, on-course and in Tabcorp operated retail outlets.*
>
> *This is still the case today for Tabcorp casuals working On-Course.*
>
> *In the franchised Tabcorp retail outlets the long service leave arrangements are not ideal.*
>
> *Each Tabcorp Agent operating a retail outlet is treated as a separate employer. Because of the casual and low paid nature of this employment it is common for Tab Retail Operators to work for more than one Agent at a time, and/or over their employment history.*
>
> *Currently employees (whether casual or permanent) working for consecutive Agents do not qualify for continuity for the purposes of long service leave. An employee would have to be with the same Agent (or multiple Agents over the required years) in order to be eligible for pro-rata LSL.*
>
> *Up until 2008 Tabcorp facilitated all long service leave for Agency staff through a central arrangement.*
>
> *In 2008 a new contract was negotiated between the Agents Association and Tabcorp.*
>
> *The ASU understands that as part of the arrangements under the new contract, Tabcorp no longer administer the LSL for Agency staff.*

For any service up to 2008 the Tab Agents Association set up a designated Trust Fund overseen by Trustees from the Agents Association where all long service leave accruals up to 2008 were paid into.

There is a process whereby each Agent has to make an application to the Trust fund on behalf of their Agency staff for any LSL applications accrued prior to 2008.

Any LSL payments post 2008 are the responsibility of the individual Agent to administer and pay.

It is not un-common for ASU members employed in Tab Agencies to move between outlets. Under the provisions of the LSL Act each Tab Agent is considered a separate employer even though they are a franchised network.

Under the current provisions of the Victorian Long Service Leave Act each Agent is treated as a separate employer even though the Tabcorp brand and retail operations are generic.

This is a barrier for Agency staff to accrue enough continuous service to qualify for long service leave.

***The ASU recommends that the definition of separate employer be reviewed and amended for franchised businesses. In addition a portable scheme would mean such consecutive service would count towards an entitlement to long service leave**.*

7. Supporting Flexible Work Arrangements

The ASU membership is heavily feminised (currently 68%) and accordingly workplace provisions that support these workers seeking to balance their work and family responsibilities are a priority for the union.

In a range of collective agreements the ASU has negotiated across a number of industries, provisions for automatic access of up to two years (104 weeks) parental leave.

This provision has often been coupled with provision for the employer to back-fill the maternity/paternity leave vacancy on a fixed term basis for a period of up to 2 years.

These flexibilities have also been utilised to facilitate flexible work arrangements and return to work on a part time basis.

A typical provision will also provide the following safeguards:

- Consultation over the introduction of any fixed term employees;
- A commitment that the introduction of fixed term employment will not impact negatively on permanent employees or be used to replace attrition;
- Fixed term employees engaged under the same terms and conditions as permanent employees;
- Continuity of employment for all purposes should the fixed term employee be appointed as a permanent employee.

In such circumstances and with the required safeguards the ASU supports the use of temporary fixed term employees as a mechanism to support workers with family and other caring responsibilities.

8. Transparency in Contracting, Sub-contracting and the Supply Chain

The complexity of labour supply chains can add to a lack of transparency in contracting arrangements.

Recent examples of exploitation of workers in the contract cleaning and food processing industries demonstrate that complex supply chains and sub-contracting arrangements are undermining the existence of appropriate labour standards.

This business model also serves to remove the head contractor at the apex of the supply chain from any responsibility for the workforce of companies down the supply chain.

This needs to change and a light should be shone on supply chains that hide exploitation and unethical employment practices.

In the services sector industries the ASU operates in this type of business model can be further complicated by some parts of the supply chain being off-shore.

The ASU recommends that the state government move to require employers at the head of the supply chain to keep detailed records of supply chains within their business, and for that information to be available for inspection by a compliance unit funded via a labour hire registration fee.

In addition detailed supply chain records should be made available for inspection by unions with rules coverage of the work being undertaken.

This approach, including requiring employers to keep detailed records and allowing union access to records, has been an effective tool in the textile clothing and footwear industry in ensuring transparency in contracting and supply chains for vulnerable outworkers for many years.[5]

[5] TEXTILE, CLOTHING, FOOTWEAR AND ASSOCIATED INDUSTRIES AWARD 2010

9. Using Government Procurement and Investment to Promote Ethical and Secure Employment

Two thirds of jobs in the Victoria are in the service sector.

The ASU has worked closely with the Andrew's Labor government to develop the policy - 'Plan to Secure Local Jobs for Local Workers in the Services Sector'.[6]

The policy recognises the unacceptable level of job losses in Victoria in the services sector as a result of off-shoring trends, and the policy commits to using the purchasing power of government to ensure that wherever possible services are sourced locally.

The policy commits to establishing government procurement arrangements that:

- Preference companies that provide sustainable, secure employment opportunities for local workers;
- Pre-qualification procurement arrangements in respect to government procurement of services in the services and financial sectors;
- Ethical procurement based decisions;
- Companies tendering for government work need to demonstrate compliance with all applicable employment and occupational health and safety related legislation including applicable collective agreements across supply chains;
- Compliance with the Victorian Call centre code for any call centre related procurement.

As the biggest purchaser of services the state government has an important role to play in ensuring that procurement and investment decisions promote ethical employment.

Accordingly government procurement and investment decision, including government grants, should only go to those businesses and organisations that can demonstrate a commitment to secure, sustainable and local jobs.

In addition tax-payers money should not go to those employers who cannot demonstrate compliance with all applicable employment and occupational health and safety related legislation including applicable collective agreements across supply chains.

Businesses that profit through the exploitation of vulnerable workers through unethical or insecure forms of work, contracting out, supply chains or sham contracting should not be the recipients of any government procurement, investment or grant assistance.

The state government should also consider whether there are other tax incentives or tax credits, such as payroll tax, that could apply for businesses that increase their permanent workforce.

[6] Victorian Labor's Plan to Secure Local Jobs for Local Workers

10. The Views of ASU Members

In the lead up to this inquiry the ASU surveyed members about their experience with labour hire and/or other insecure forms of work.

Overwhelmingly the feedback we received from ASU members highlighted:

- ASU members experience with labour hire and/or insecure work was, in the vast majority of responses, negative;
- In the experience of ASU members the use of labour hire was to replace permanent work;
- The majority exposed to labour hire work did not have access to paid leave, shift penalties or overtime pay;
- Respondents strongly supported a licensing regime for labour hire companies and a requirement to comply with minimum employment standards.

When asked to suggest what remedies the state government should consider the most common and consistent response was:

- Deeming labour hire or temporary workers permanent after a period of time - most common response 12 months.

Other responses and suggestions received included[7]:

- Labour hire workers should be paid the same as direct employees of the host employer;
- The use of short term contracts should not be used by employers to avoid committing to an ongoing permanent role;
- Regulation of who is a 'fit and proper' person to operate in the labour hire industry;
- The ATO should keep records of those labour hire operators who have a history of phoenix activity or sham contracting;
- Compliance with minimum employment standards;
- Cap the number of labour hire workers in a particular workplace;
- Protections for casual and temporary workers in the NES;
- Tax incentives for those companies that provide secure jobs.

[7] ASU email survey of members – Inquiry into Labour Hire and Insecure Work Nov 2015

11. Proposed Solutions & ASU Recommendations

The ASU concurs with the recommendations put forward in the VTHC submission, specifically:

1. A threshold capital requirement before a company can get a license (in order to limit the number of operators and minimise the likelihood of phoenixing activities).

2. A bond or fee paid to the State of Victoria in order to be licensed (this fee would fund the compliance unit and allow for lost employee entitlements to be guaranteed by the State in certain circumstances (eg. liquidation).

3. A compliance unit that: approves licenses (subject to 'fit and proper person' tests); monitors licensees and their activities; and investigations breaches of industrial and other laws (with operators who have found to have breached laws being at risk of their license being revoked or suspended).

4. A requirement for licensees to educate/inform new employees about the nature of their employment and their entitlements and rights (eg. through an information sheet or approved training; this should have a 'union rights' component).

In addition the ASU recommends the following initiatives in Victoria:

1. The state government should consider setting an objective test and/or guidelines for determining whether a worker is a genuine casual or temporary / fixed term employee or whether they are more appropriately classified as a permanent employee.

2. Strengthening of the provision of information about workplace rights to, and support for Victorian Workers, in particular vulnerable workers. Such a body should have independent statutory powers to investigate cases of exploitation.

3. The state government explore mechanisms to eliminate sham contracting in the state jurisdiction such as deeming certain workers as employees.

4. The state government should initiate best practice guidelines, including OHS standards to regulate home based work.

5. The Victorian Long Service Leave Act - the ASU recommends that the definition of separate employer be reviewed and amended for franchised businesses. In addition a portable scheme would mean such consecutive service would count towards an entitlement to long service leave.[8]

[8] Recommendation also included in the ASU submission to 2015 Victorian Economic, Education, Jobs & Skills Committee Inquiry into Portability of Long Service Leave Entitlements

6. The state government should ensure that measures to assist workers balance their caring and work responsibilities, and other flexible work arrangements, are not facilitating unregulated and insecure forms of work.

7. The state government should move to require employers at the head of the supply chain to keep detailed records of supply chains within their business, and for that information to be available for inspection by a compliance unit funded via a labour hire registration fee. In addition detailed supply chain records should be made available for inspection by unions with rules coverage of the work being undertaken

8. State government procurement and investment decision, including government grants, should only go to those businesses and organisations that can demonstrate a commitment to secure, sustainable and local jobs.

9. Tax-payers money should not go to those employers who cannot demonstrate compliance with all applicable employment and occupational health and safety related legislation including applicable collective agreements across supply chains.

10. Businesses that profit through the exploitation of vulnerable workers through unethical or insecure forms of work, contracting out, supply chains or sham contracting should not be the recipients of any government procurement, investment or grant assistance.

11. The state government should also consider whether there are other tax incentives or tax credits, such as payroll tax, that could apply for businesses that increase their permanent workforce.

12. A 'fit and proper test' be required for operators and individual directors in the labour hire industry

The ASU recommends the Victorian Government to pursue the following initiatives with the Commonwealth Government:

1. A strengthening of the laws prohibiting sham contracting are required at the federal level, as well as ensuring that remedies to sham contracting are affordable and accessible to workers and their unions.

2. Provisions for deeming labour hire or temporary workers permanent after a specified period of time with a host employer in Modern Awards or the NES.

3. Provision of more resources to the ATO to stamp out phoenix activity.

4. Strengthen protections for casual and temporary workers in the NES

The ASU thanks the Committee for the opportunity to address these issues. We look forward to participating in the public hearing being conducted in Victoria.

Please contact the undersigned should you wish to discuss any aspect of the ASU submissions further.

Ingrid Stitt
Branch Secretary
ASU Victorian Private Sector Branch
Email: istitt@asupsvic.org
(03) 9342 3300