Ai GROUP SUBMISSION

STANDING COMMITTEE ON EDUCATION, EMPLOYMENT AND YOUTH AFFAIRS

Inquiry into Insecure Employment in the ACT

July 2017

Ai GROUP

About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health, community services and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

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1. Introduction

The Australian Industry Group (**Ai Group**) makes this submission to the Standing Committee on Education, Employment and Youth Affairs' (**Committee**) Inquiry into Insecure Employment in the ACT (**Inquiry**).

Ai Group is the peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health, community services and other industries.

We are the main industry group which represents the labour hire industry in respect of industrial relations matters. Ai Group has a large number of labour hire companies as members – small and large. We have represented the industry in numerous Federal and State Industrial Commission cases, inquiries and other forums over many years.

Ai Group also has a large membership in industries which use labour hire and it is important that the Inquiry keep the interests of both labour hire companies and users of labour hire foremost in mind during the Inquiry. The interests of both groups, as well as the interests of the broader community, are best protected by ensuring that a competitive market is maintained for the provision of labour hire services, and that impediments to competition are removed.

We also operate Australian Industry Group Training Services (AiGTS), which coordinates the training of over 25,000 apprentices and trainees Australia-wide. Ai Group's group apprentice and trainee scheme has been providing apprentices and trainees to businesses in the manufacturing and other industries for many decades. Our apprentices and trainees have won many awards. Group training companies like AiGTS fulfil a vital role in the community.

Some of the key views expressed in this submission include:

- It is vital that a flexible labour market is maintained in Australia, including the flexibility for employers to employ and engage the types of labour that they need.
- With regard to **labour hire**:
    - The use of labour hire is an established and essential mechanism to address economic and business challenges faced by employers.
    - Labour hire employees enjoy the same level of award and legislative protection as other employees. Modern awards and the National Employment Standards (**NES**) apply equally to labour hire employees as they do to other employees.

- In Ai Group's experience, the vast majority of labour hire companies are reputable in their employment practices and comply with relevant laws and regulations. Many established labour hire companies have developed progressive and sophisticated employment practices, and often provide superior wages and conditions.

- Ai Group is not convinced of the need for a licensing system in the labour hire industry.

- Changes are needed to the *Fair Work Act 2009* (**FW Act**) and to the *Competition and Consumer Act 2010* (**CC Act**) to prevent restrictions being imposed on the engagement of labour hire and other contractors through enterprise agreements or awards.

- With regard to **casual employment**:

  - The level of casual employment in Australia today is about the same as it was 5 years ago, 10 years ago and 19 years ago – about 20 per cent of the workforce. There is no casualisation problem in Australia; the problem is the ongoing attempts by unions and others to limit flexibility for employers and employees.

  - Flexibility to engage casuals is critical for businesses as it assists them to better balance the supply of labour with demand for products and services.

  - The availability of casual employment is also critical for many employees who need or want the flexibility that casual employment offers. The ageing of our population will put a premium on workplace flexibility. Many people prefer casual work, and are not available or willing to work on a full-time basis.

- With regard to **group training**:

  - Not-for-profit group training arrangements are not 'labour hire'.

  - Any additional regulation of group training providers would lead to higher costs for host employers and consequently increase barriers to the employment of apprentices, trainees and graduates.

  - Imposing barriers to the employment of apprentices, trainees and graduates would, exacerbate the current youth unemployment problems in Australia; reduce the career opportunities for many thousands of young Australians; and lead to skill shortages in numerous industries.

- With regard to **independent contractors**:

  - The common law is far better equipped to assess the substance of particular relationships than any statutory definition of an 'independent contractor' could.

Any 'one size fits all' definition of an 'independent contractor' would prevent the facts and circumstances of individual cases being fully considered, and would disrupt a very large number of existing contractual arrangements which are legitimate under common law, to the detriment of all parties to these contracts.

- The vast majority of independent contractors have absolutely no desire to be employees. Some of them predominantly work for one client but it suits them to do so as they receive a regular flow of contracting work.

- Tough sham contracting laws are in place within the general protections in the FW Act. These laws are operating effectively.

- Just like their campaigns against casual employment, the unions are attempting to demonise independent contracting arrangements that provide flexibility for the principals and the contractors, and which are valued by both parties. There are few union members in these categories of workers (perhaps the reason why the unions are so focussed upon imposing restrictions upon them).

This Inquiry follows similar inquiries by some State Governments since 2015 including inquiries by the Victorian and Queensland Governments to which Ai Group has provided numerous responses. Our submissions to these inquires and subsequent work by these governments is set out below:

Submissions to the Victorian Government

- Ai Group Submission to the Victorian Inquiry into the Labour Hire Industry and Insecure Work (27 November 2015);

- Ai Group Supplementary Submission to the Victorian Inquiry into the Labour Hire Industry and Insecure Work (22 March 2016);

- Ai Group Submission to the Victorian Government regarding its proposal to establish a Labour Hire Industry Licensing System (30 June 2017).

Submissions to Queensland Government and Queensland Parliament:

- Ai Group's submission to the Queensland Parliament inquiry into the Practices of the Labour Hire Industry in Queensland (7 April 2016); and

- Ai Group's response to the Queensland Government's Issues Paper, 'Regulation of the Labour Hire Industry 2016 (February 2017); and

- Ai Group's submission to the Queensland Parliament Finance and Administration Committee's inquiry into the Labour Hire Licensing Bill 2017 (QLD) (21 June 2017).

2. The importance of maintaining a flexible labour market

Flexible workplace relations arrangements are fundamental to the improved productivity that is so important to Australia's national competitiveness and our capacity to improve Australian living standards. Employers need more flexibility to employ and engage the types of labour that they need.

In recent years, the emphasis on improving Australia's productivity performance has lifted as productivity outcomes across a wide range of industries have trended down. In the face of demographic challenges, the relative importance of improved productivity as a source of growth has risen.

The Australian economy is facing a number of important challenges. The global economy is undergoing a seismic shift as the populous economies of China, India and Indonesia among others have embarked or are embarking on their processes of industrialisation. This is profoundly disruptive and is throwing down major competitive challenges to Australian companies.

The pace of technological development is similarly creating far-reaching challenges. It is essential that employment and workplace relations arrangements enable Australian employers to remain agile and in a position to readily adapt to technological changes. This includes ensuing that employers have a high degree of flexibility to engage the types of labour they need.

Australia is set on a course of demographic change that is seeing a steady increase in the proportion of older people. The ageing of our population will put a premium on workplace flexibility. An increase in the ratio of dependents to workers will require increased productivity to maintain prosperity; retaining older Australians in the workforce for longer, with arrangements that suit their changing capabilities and needs, will be essential. Many people prefer casual and part-time work, and are not available or willing to work on a full-time basis.

The Australian Treasury's latest Intergenerational Report (March 2015) highlights the urgency of implementing policy that fosters business flexibility and sustainability. The Report calls for a:

> *"policy agenda [that] will support productivity growth by helping to position Australian businesses to be flexible, competitive and robust in the face of dynamic global conditions."*

Against this background, it is of the utmost importance that businesses retain the ability to utilise the most efficient organisational structures and methods of organising work. To remain efficient and globally competitive, businesses need to have the flexibility to engage the forms of labour they need. The following forms of labour (amongst others) are all legitimately deployed by organisations:

- Full-time employees;
- Casual employees;

- Part-time employees;
- Fixed term employees;
- Fixed task employees;
- Seasonal employees;
- Trainees and apprentices;
- Labour hire; and
- Independent contractors.

Flexibility to engage the most appropriate form of labour is essential for companies striving to increase productivity in a competitive global environment. Flexibility is also sought by workers, who form part of an increasingly diverse workforce, and who seek to reach agreement with their employer on arrangements to suit their lifestyle and income preferences.

3. Labour hire

3.1 Defining 'labour hire'

Defining the labour hire industry with precision is difficult. The term 'labour hire' is used in Australia but other terms such as 'contract labour', and 'temporary help' are used overseas.

The International Labour Organization (ILO) describes three categories of contract labour:

- Job contracting (contracting out of work);
- Labour only contracting; and
- Direct contracting (ie. independent contractors).

Many people fail to recognise the different categories and types of work performed in the labour hire industry. Companies operating in the labour hire industry, typically supply labour in a variety of ways, including:

- **Short-term labour hire**: the on-hire of employees to a client on an hour by hour basis, who work under the general direction of the client. These workers are often referred to as 'temps'.
- **Ongoing labour hire:** the on-hire of employees to a client on an ongoing basis, who work under the general direction of the client. For example, a manufacturer may complement and/or supplement its permanent workforce with a team of employees employed by a labour hire company.

- **Outsourced workforce solutions:** the performance of outsourced operations (e.g. maintenance, logistics) for a client in accordance with a contractual arrangement. For example, a labour hire firm may be contracted to perform all mechanical maintenance services for a manufacturer for a two year period. The labour hire firm would typically employ a team of maintenance employees who work on a full-time basis at the client's premises and work under the direction of a supervisor or manager employed by the labour hire firm.

- **Project–based workforce solutions:** the performance of shut-down, installation or relocation work for a client within a defined performance-based contract scope. The labour hire firm would typically employ a team of skilled employees who work on the project under the direction of a supervisor or manager employed by the labour hire firm.

The typical labour hire arrangement involves the following elements:

- The worker performing his/her work at the client company's site;

- The worker is paid by the labour hire company and has a direct employment or contractual relationship with the labour hire company;

- The client company pays a contract fee to the labour hire company for the provision of the worker's labour and, accordingly, the client company has a contractual relationship with the labour hire company.

3.2 The prevalence of labour hire in Australia

According to IBISWorld Industry Report N7212 *Temporary Staff Services in Australia* (February 2017) the labour hire industry's contribution to Australia's GDP is $14,819.3 million and represents 0.86% of the Australian economy.

The labour hire industry employs about 328,400 people within Australia across 6,729 enterprises. The average labour hire provider employs about 45 people.[1] The industry is labour reliant with wage costs accounting for approximately 69% of total revenue.[2] This is significant in an industry characterised by low industry profit margins. IBIS World suggests that in more recent times wages within the labour hire industry have been increasing as a share of revenue and that "*higher wages within the industry and across the economy have been due to a tight labour market, with low unemployment by historical standards*".[3] It is projected that the growth within the labour hire industry is expected to slow with expected growth in the industry below the average for prior years. Profit margins are expected to decrease to 5.8% over the current year.[4]

[1] IBISWorld Industry Report N7212 *Temporary Staff Services in Australia* (February 2017)

[2] IBISWorld Industry Report N7212 *Temporary Staff Services in Australia* (February 2017)

[3] IBISWorld Industry Report N7212 *Temporary Staff Services in Australia* (February 2017)

[4] IBISWorld Industry Report N7212 *Temporary Staff Services in Australia* (February 2017)

Any further regulation or red tape on labour hire providers will most likely further reduce profit margins and squeeze smaller to average (medium) sized labour hire businesses out of the industry. This would dilute competition within the industry, squeeze the capacity for labour hire providers to provide labour, and increase the costs of engaging labour hire; all impacting the ACT and Australian economies.

The labour hire industry is particularly susceptible to economic downturns as employers find that the need for temporary labour lessens when business demand slows, and labour hire workers are typically amongst the first to be laid off. A recent Productivity Paper from 2013 confirmed that despite the rapid growth in labour hire in the 1990s, casual and fixed term employees were no more prevalent at the end of the decade than at the start, and that labour hire workers probably became less prevalent.[5]

The idea that labour hire is growing because it offers a vehicle for the exploitation of workers is simply not supported by any objective data.

Labour hire provides a number of benefits to the community in enabling businesses to operate more efficiently and by providing pathways to employment for job-seekers.[6]

The Australian Bureau of Statistics (**ABS**), in August 2016[7] reported that 5% of all employed persons (600,800) had found their job through a labour hire firm/employment agency. Of those persons who had found their main job through a labour hire firm/employment agency, 22% were paid by a labour hire firm/employment agency (64% males).

The ABS reported that other characteristics of employees who had found their job through a labour hire firm/agency were:

- Of all persons who had found their job through a labour hire firm/employment agency 59% were males.
- The industry division with the most males who found their job through a labour hire firm/employment agency was Manufacturing (21%) followed by Construction (10%). For females, the most common industry divisions were Health care and social assistance (16%) followed by Public administration and safety (11%).
- Of those persons who found their job through a labour hire firm/employment agency, the age groups with the highest proportion were in the 35–44 and 25–34 year age groups (29% and 26% respectively).
- The most common occupation groups for males who had found their job through a labour

[5] Shomos, Turner, Will, *Forms of Work in Australia – Productivity Commission Staff Working Paper* (Australian Government, Productivity Commission, April 2013)

[6] Background Paper, Victorian Inquiry in the Labour Hire Industry and Insecure Work, October 2015, p.9

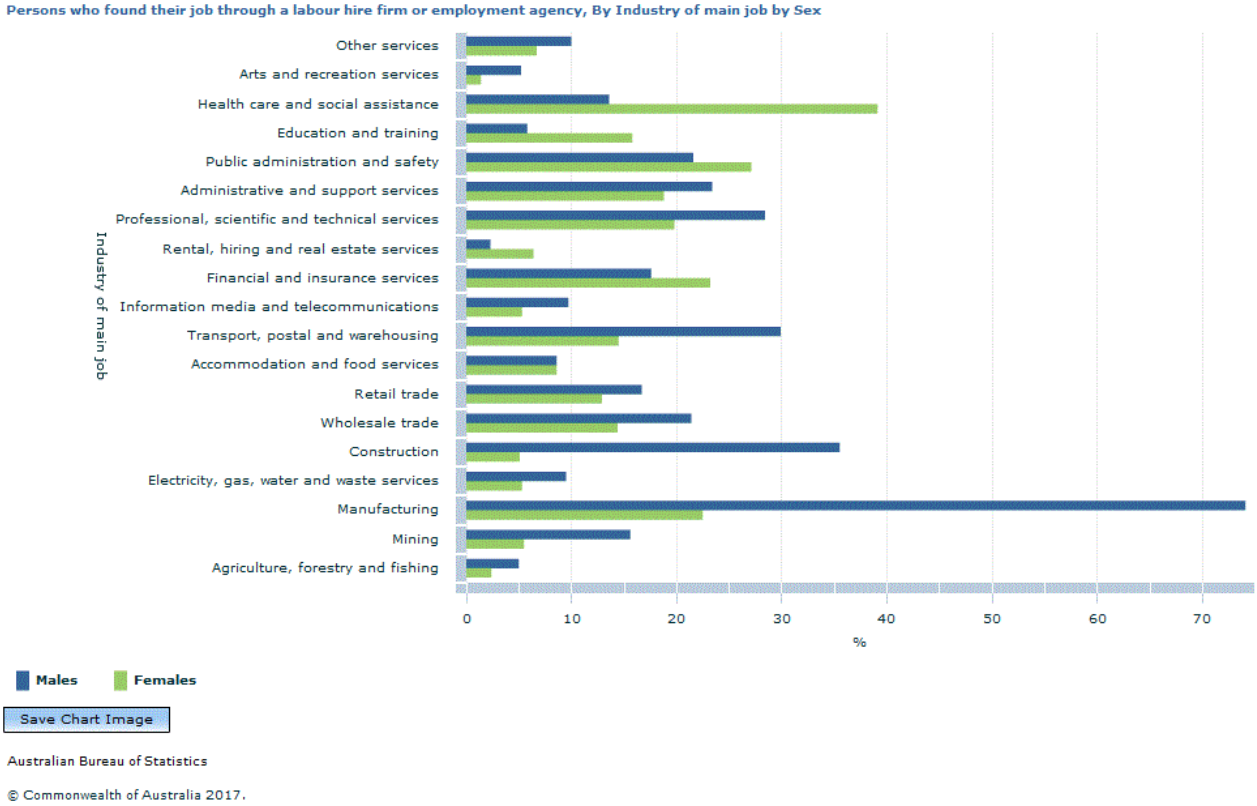
[7] ABS, 6333.0 Characteristics of Employment, August 2016

hire firm/employment agency were Machinery operators and drivers (21%), Technicians and Trades workers (19%) and Labourers (18%). For females, the most common occupation groups were Clerical and administrative workers (38%) and Professionals (22%).

- The mean weekly earnings for persons who found their job through a labour hire firm/employment agency was $1,334. For full-time workers the mean weekly earnings was $1,522, and for part-time workers it was $622. For males who found their job through a labour hire firm/employment agency the mean weekly earnings was $1,470 compared to $1,140 for females.

- The median weekly earnings for persons who found their job through a labour hire firm/employment agency was $1,110.[8]

Chart 1: Persons who found their job through a labour hire firm or employment agency – By industry of main job – By sex



Source(s): Australian Bureau of Statistics, Characteristics of Employment, August 2014

The ABS 6333.0, *Characteristics of Employment*, August 2014 report revealed that of the persons who had secured their job through a labour hire or employment agency:

- 161,900 persons had registered with an employment agency in the last 12 months,

[8] Compare with ABS 6302.0 - Average Weekly Earnings, Australia, Nov 2016, which reports the Average Weekly Earnings for all Australians in November 2016 is approximately $1,164.60. This amount differs only slightly to the median weekly earnings for a person who has found their job through a labour hire firm reported in ABS 6333.0 – Characteristic of Employment, August 2016.

while 86,000 had registered with a labour hire firm.

- 506,500 persons expected to be with their current business/employer for the next 12 months.
- 169,700 persons had less than 12 months' service with their current business/employer, followed by 136,000 persons who had between 3-5 years' service with their current business/employer.
- The highest proportion (181,700 persons) worked between 35-39 hours per week.
- The highest proportion (434,000 persons) had paid leave entitlements, while 168,000 did not.
- A majority (488,900 persons) were guaranteed a minimum number of hours.
- A majority (448,900 persons) had weekly incomes that did not vary from week to week.

The ABS statistics highlight that the labour hire industry is extremely important for employers, employees and the Australian economy. The statistics also show that labour hire arrangements often involve work with paid leave, income stability and regular hours.

3.3 The importance of maintaining flexibility regarding labour hire

It is vital that flexibility is maintained for industry to utilise labour hire.

The following driving factors have had an important influence on labour hire usage:

- Corporate restructuring;
- The need for increased flexibility to meet work fluctuations;
- Greater competitive pressures as a result of globalisation;
- Outsourcing in both the private and public sectors;
- Extended hours of operation;
- Fast changing technology;
- The trend for companies to concentrate on their core business; and
- Growth in new industries.

A 2005 Productivity Commission Staff Working Paper[9] cites a survey of Australian firms which found that the main reasons why companies use labour hire were:

- To source additional staff (30 per cent);
- To replace temporarily absent employees (17 per cent);
- To outsource the administrative burden of employment (11 per cent);
- To improve recruitment (11 per cent); and
- To overcome skill shortages (9 per cent).

The use of labour hire is an established and essential mechanism to address economic and business challenges faced by employers.

3.4 Experiences and views of labour hire workers

An ABS *Characteristics of Employment* study in November 2008[10] found that the most common reasons cited by employees using a labour hire firm were:

- ease of obtaining work (71%);
- a condition of working in the job or industry (9%);
- flexibility (7%);
- the inability to find work in their line of business (7%);
- a preference for short-term work (3%);
- to gain more experience (3%); and
- a lack of experience prevents finding permanent job (2%).

In 2001, Ai Group commissioned ANOP Research Services to conduct research into the changing nature of employment in five industries – one of which was labour hire. As part of the research, focus groups of labour hire employees were conducted. Some of the many benefits of working in the labour hire industry cited by employees are outlined in the following extract from the ANOP report:

- *"Working as a labour hire employee means you can be exposed to a variety of companies, tasks, environments and people. And this variety is often viewed as a key benefit of working*

[9] Brennan, Valos and Hindle cited in "The Growth of Labour Hire Employment in Australia" Productivity Commission Staff Working Paper, February 2005.
[10] ABS, 6359.0 *Forms of Employment Australia,* November 2008.

in the industry.

> *"There's a good variety of work, especially in my game. Up in Newcastle it was good 'cause they'd send you to all these great jobs and you'd run into the same guys you worked with six months ago." (employee)*
>
> *"The benefit was the variety of work and the skills that you obtained or gained from one place to another doing different work. I used to love it." (employer)*
>
> *"You've got the flexibility of going different places and meeting different people." (employee)"*

- *"As labour hire employees are a mostly casual workforce, they get an hourly pay loading. Many also say they are offered the overtime that is often denied to full-time workers. For some, this means the money makes it more attractive to remain a "temp", rather than moving into fulltime employment."*

> *"They offered me a full-time job as an employee of Foxtel in the call centres with the customers, but why should I take a drop in pay? I make more money temping." (employee)*
>
> *"When I started working, I was in a situation where I preferred money over holidays. You find yourself in that situation where money is more important than taking time off. If you are a fulltime employee, they make you take your holidays. If you work through Easter and Christmas, at the end of the year you end up with a lot more." (employee)*
>
> *"25% pay loading, casual loading. Yeah, casual loading's good." (employee)"*

- *"Working in the labour hire industry also means you can "try out" employment situations. There is the opportunity to experience different industries, and companies, while not feeling committed to having to stay if it doesn't work out. The labour hire industry also allows employees to build up experience on their CVs, which can help them if and when they try to find full-time employment.*

> *"If you don't fit somewhere, it's not like being in a permanent job, where you get in there and feel terrible. You just put your hand up and say "Hey, I don't like this situation, it doesn't suit me", or " I'm having a personality conflict with the boss or something" – and they'll move you without having a horrible big black mark jammed against your name." (employee)*
>
> *"You're not trapped in a career … You can give it a time period where it's manageable, and you can say to yourself 'well in 6 months time, I won't be doing this, so I can deal with how boring it is'." (employee)"*

- *"Being in the position of a casual worker with no real obligation to the company you are*

working within, often means reduced responsibility. Some labour hire employees say they like the fact they can leave at the end of their shift, and not worry about it, or 'take their work home'. There are no obligations to stay back, or to "corporately socialise". Some employees report that attitudes among the 'temps' are often much more positive than among the 'permanents' – in part due to feelings of less responsibility.

> *"One of the advantages of temping I find is that with the perms - there's a lot of pressure to socialise after hours and to go to functions etc. But a temp you can say see you later." (employee)*
>
> *"There's not a lot of responsibility put on you. You can have the benefit of saying that I can do this to a certain extent, but I can get up and leave if I don't like it." (employee)"*

- *"Some labour hire employees state that the flexible hours are a benefit of working in the sector – that as casual employees, they have the ability to choose to take days or weeks off when required. Also, often being the first to be offered overtime, means working hours can be increased when required.*

> *"We put our hand up for all the overtime that's there. It's flexible but we were doing 60 hours a week." (employee) "*

The attitudes of labour hire employees are unlikely to have changed since the ANOP report was released.

3.5 The coverage of labour hire under awards and enterprise agreements

Labour hire employees enjoy the same level of award protection as other employees. Modern awards apply equally to labour hire companies as they do to other companies. This was recognised by the Australian Industrial Relations Commission (**AIRC**) during the 2008-09 award modernisation process. Ai Group represented the labour hire industry during the proceedings.

During Stage 4 of the award modernisation process, the AIRC inserted a clause into nearly all modern awards clarifying that the awards cover on-hire employees. The following extract from the Full Bench's Stage 4 Award Modernisation Decision is relevant:

> ***"[105]** In our statement of 17 November 2009, we set out, for comment, draft model provisions for insertion into each modern award, where relevant, in relation to employees of labour hire (on-hire) companies and employees of group training organisations. In each case variations of the model clause were published and an indication given as to which model clauses would be inserted into each modern award (including the Stage 4 awards then in exposure draft form). We also noted that some modern awards already contain relevant provisions with respect to on-hire employees and may not require a model clause. This decision should be read in conjunction with our statement of 17 November 2009. We*

> *now deal with a number of issues which have arisen from the comments we have received. We indicate at this point that the final version of the model provisions is Attachment B to this decision.*
>
> ***[106]** Dealing first with the terms of the draft model provisions, Ai Group and Recruitment and Consulting Services Association (RCSA) and others submitted that it was necessary to include the words "This sub-clause operates subject to the exclusions from coverage in this award" in each of the model provisions, in respect of both on-hire and group training employers, to ensure that the coverage of the award in respect to such employers, and their employees, does not extend beyond the general coverage of an award. We agree and have amended the model clauses accordingly."*

As such, labour hire employers are subject to the same modern award obligations as any other employer covered by a modern award. Hefty financial penalties of up to $54,000 per breach apply for breaches of modern awards.

Enterprise agreements are common in the labour hire industry. Ai Group has seen no evidence that the coverage of labour hire employees under enterprise agreements is lower than the coverage of employees under agreements generally. In fact, given the large number of enterprise agreements which exist in the labour hire industry and the fact that virtually all of the large labour hire companies have enterprise agreements, it is likely that a higher proportion of employees in the labour hire industry are covered by an enterprise agreement compared to employees across other industries.

3.6 Enterprise agreements and awards should not be permitted to restrict labour hire

Changes are needed to the FW Act and to the CC Act to prevent restrictions being imposed on the engagement of labour hire and other contractors through enterprise agreements or awards.

Prior to the FW Act, the WR Act and *Regulations* prohibited terms being included in an enterprise agreement or award which imposed:

> *'restrictions on the engagement of independent contractors and requirements relating to the conditions of their engagement'*; or
>
> *'restrictions on the engagement of labour hire workers, and requirements relating to the conditions of their engagement, imposed on an entity or person for whom the labour hire worker performs work under a contract with a labour hire agency'*.

The above legislative provisions had a very positive effect in preventing the unions from insisting upon highly restrictive enterprise agreement clauses which inhibited effective management and the organising of work in a productive and efficient manner.

As soon as the FW Act came into operation the unions began vigorously pursuing the imposition of

clauses which restrict the engagement of on-hire and other contractors.

In the Productivity Commission's Draft Report on Australia's Workplace Relations Framework,[11] the Productivity Commission recommended the prohibition of terms in enterprise agreements which restrict the engagement of independent contractors and labour hire, or regulate the terms of their engagement. Ai Group has expressed strong support for the recommendation.

Ai Group has also expressed strong support for the Harper Competition Review recommendation (Rec. 37) that trading restrictions in enterprise agreements be outlawed. As the Harper Review Final Report states, competition should be favoured over restrictions and employers should be free to supply and acquire goods and services, including contract labour, should they choose to do so.

The Heydon Royal Commission into Trade Union Governance and Corruption also recommended an amendment to the CC Act that would outlaw enterprise agreement clauses that impose restrictions on contractors.

3.7 Labour hire licensing schemes

Ai Group opposes unlawful labour hire practices. In Ai Group's experience, however, the vast majority of labour hire companies are reputable in their employment practices and comply with relevant laws and regulations.

Many established labour hire companies have developed progressive and sophisticated employment practices, and often provide superior wages and conditions. Labour hire companies are subject to the same industrial instruments and employment obligations as other employers.

Given the employment regulations described above, that equally apply to labour hire providers, Ai Group is not convinced of the need for a licensing system to operate in the industry.

Rather, Ai Group supports:

- Greater resources for the Fair Work Ombudsman (FWO) to investigate and prosecute illegitimate labour hire businesses that are breaking the law.
- Greater educative resources for labour hire companies, businesses which use labour hire, and labour hire employees. For example, information could be developed to assist businesses which use labour hire to exercise due diligence in their choice of labour hire provider; for instance, information on what questions to ask and what information to obtain from labour hire providers.

In any licensing scheme, the following issues could be particularly problematic:

- The application of an ACT-based licensing system to labour hire providers operating in more than one State;

[11] Productivity Commission 2015, *Workplace Relations Framework,* Draft Report, Canberra, p.729

- The appropriateness of licensing the provision of managed services; such as maintenance services, IT management services, construction project management services or facilities management, where the provision of such services including labour, is specialised and regularly performed by businesses both inside and outside the labour hire industry (as traditionally understood).

- The appropriateness of a scheme imposed on established and legitimate labour hire services vertically integrated into other company business services that do not involve the supply of labour to third parties.

- Whether the licensing scheme would in fact be effective at targeting a small minority of unscrupulous labour hire providers; or whether the scheme would be further regulation ignored by such providers.

- It would be difficult to achieve any consensus on the criteria for a licensing scheme.

- Unions are likely to press for inappropriate licensing conditions aimed at bolstering union membership and influence.

- The cost of a licensing scheme is likely to be considerable. The imposition of higher costs on labour hire companies and their clients would reduce competitiveness and lead to reduced employment.

In particular, we urge the Committee to consider Ai Group's submission to the Queensland Parliament Finance and Administration Committee's inquiry into the Labour Hire Licensing Bill 2017 (QLD) (21 June 2017).

3.8 Constitutional and statutory issues arising from a Labour Hire Licensing Scheme in the ACT

Workplace relations law in the ACT is governed by the FW Act.

Section 26 of the FW Act seeks to exclude all State and Territory industrial laws insofar as they would otherwise apply in relation to a national system employee or employer. Section 27 sets out the exclusions to this general proposition, listing various State and Territory laws which are not excluded and specifying various "non-excluded matters" such as workers' compensation, child labour and long service leave.

Any State or Territory law imposing a labour hire licensing system that seeks to regulate or enforce employment terms and conditions would be excluded under s.26 of the FW Act.

Further, the ACT Government must be mindful that any labour hire licensing scheme must not offend provisions of the CC Act.

4. Group training

Group training schemes operated by not-for-profit bodies like Australian Industry Group Training Services (AiGTS) coordinate the training of over 25,000 apprentices and trainees Australia-wide. They fulfil a vital role in the community.

Not-for-profit group training arrangements are not 'labour hire'.

Ai Group's group apprentice and trainee scheme has been providing apprentices and trainees to businesses in the manufacturing and other industries for many decades. Our apprentices and trainees have won many awards.

In addition to the group apprenticeship and traineeship scheme operated by AiGTS, in 2016 Ai Group established a graduate employment service to assist graduates to transition to professional employment. The graduates are employed by Ai Group but placed with businesses for periods of between three months and two years. During this period, mentoring is provided to each graduate and there is close interaction with the host employers to ensure a successful outcome for both parties.

Any additional regulation of group training providers like AiGTS would lead to higher costs for host employers and consequently increase barriers to the employment of apprentices, trainees and graduates.

Imposing barriers to the employment of apprentices, trainees and graduates would:

- Exacerbate the current youth unemployment problems in Australia;
- Reduce the career opportunities for many thousands of young Australians; and
- Lead to skill shortages in numerous industries.

5. Casual employment

Notions of alleged 'job insecurity' and increased 'casualisation' are being used by the union movement and an array of interest groups to pursue further workplace restrictions on businesses, particularly in relation to casuals.

The flexibility to engage casuals is critical for businesses as it assists them to better balance the supply of labour with demand for the businesses' products or services. The availability of casual employment is also critical for many employees who need or want the flexibility that casual employment offers.

The level of casual employment in Australia today is about the same as it was 5 years ago, 10 years ago and 19 years ago – about 20 per cent of the workforce. There is no casualisation problem in Australia. The problem is the ongoing attempts by unions and others to limit flexibility for employers and employees.

Casual employees receive a casual loading (typically 25 per cent) to compensate for various entitlements of full-time and part-time employees which they do not receive such as annual leave, personal / carer's leave, etc. Many employees prefer casual employment. It is not a 'second-class' form of employment as the unions allege.

Nowadays it is widely recognised that many casuals work on a long-term, regular and systematic basis and most have no desire to convert to permanent employment. This principle underpins the NES entitlements relating to the right to request and unpaid parental leave, as well as the unfair dismissal laws, which apply to long term casuals who are employed on a regular and systematic basis. This principle also underpins the casual conversion clauses which are found in numerous awards which give employees the right to request to convert to permanent employment with only reasonable refusal allowed by the employer. Despite casual conversion clauses being included in awards since 2000, employer after employer has reported that whenever they give their employees the option to convert to permanent employment almost none (less than one per cent) want to. Casuals do not want to lose their flexibility and/or their casual loading.

Unions often erroneously claim that it is employers who are somehow forcing their employees to become casuals. While it is true that many employers need a mix of casual and permanent employees to provide necessary flexibility, in a large proportion of cases it is the employees who want to be casuals because they like the flexibility and the 25 per cent loading. Many people prefer casual employment as it allows them to participate in the workforce when they would otherwise be unable to, and to better balance work with family responsibilities or study commitments.

Ai Group agrees with the following important findings in the Productivity Commission's Report on Australia's Workplace Relations Framework:

- The unions' views on non-standard work are overly negative;
- Many people like casual work because it suits their personal circumstances and/or can act as a stepping stone to more secure employment;
- Casual work is now a critical part of the labour market; and
- The increase in employment share of non-standard forms of employment has abated, and to some extent even reversed.

5.1 Defining a 'casual'

Over the years there has been some debate about the definition of a 'casual employee'.

A very widely accepted definition is the one inserted into the *Metal, Engineering and Associated Industries Award 1998* in 2001 by a Full Bench of the Australian Industrial Relations Commission (AIRC) in the *Metal Industry Casual Employment Case,*[12] i.e. '[a] casual employee is one engaged and paid as such'.

The above definition has flowed into numerous other pre-modern and modern awards. It remains by far the most widely recognised definition.

5.2 Casual employment trends

In May 2017 (latest data available) there were 12,205,900 people working in Australia. Of these:

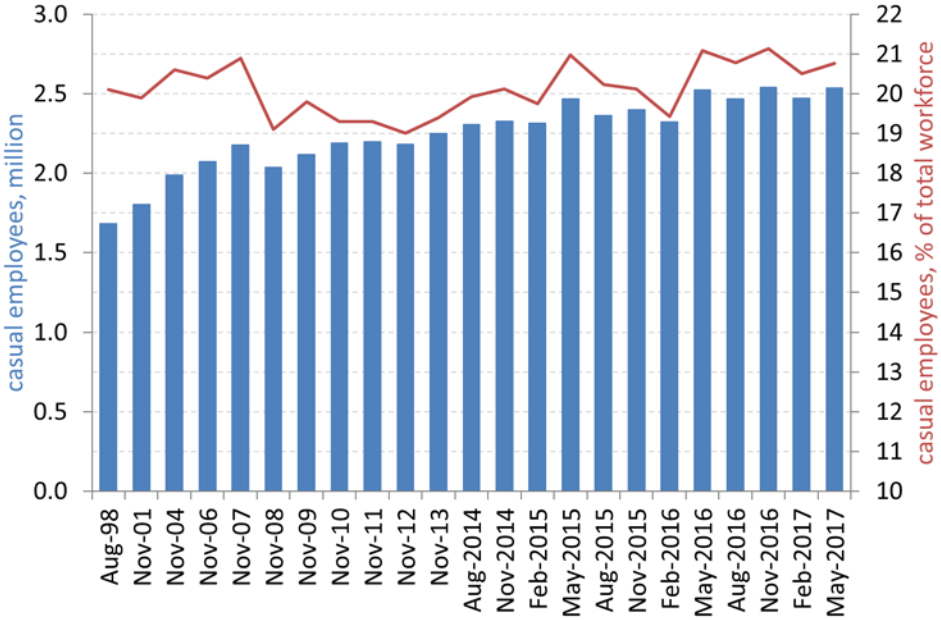
- 10,118,500 were employees (82.9% of the total)
- 2,533,600 were employees without paid leave entitlements, which is approximately equivalent to being employed on a 'casual' basis (20.8% of the total or 25.0% of employees)

The number of casual workers estimated by the ABS in May 2017 is below the peak recorded in Nov 2016 (2,540,100).

The proportion of the workforce who were casual in May 2017 (20.8%) is below the recent peak recorded by the ABS in Nov 2016 and May 2016 (21.1%).

[12] 29 December 2000, Print T4991.

Chart 2: Casual workers in Australia, number and share of the total workforce



Source: ABS 6333.0 Characteristics of Employment, Australia, August 2016 (released May 2017)
Table 3.1 EMPLOYED PERSONS: Status of employment in main job – Timeseries

The ABS publication 'Characteristics of Employment, Australia, August 2016' estimates there were 2,460,900 people working as employees without paid leave entitlements in August 2016 (20.8% of the total workforce).

Both of these ABS data sources indicate that the proportion of the workforce who are employed without leave entitlements (i.e. on a casual basis) has stayed between 19% and 21% of the total workforce since at least 2008.

Table 1: Employees employed as casual between Nov 2013 and Aug 2016 by demographic characteristics and industry

	Nov 2013	Nov 2013	Aug 2016	Aug 2016
Demographic characteristics	**'000**	**% of all employed persons of this type**	**'000**	**% of all employed persons of this type**
Male	1,017.3	16.2	1,166.8	18.4
Female	1,232.4	23.2	1,294.5	23.6
15-19 years	441.1	70.0	469.2	74.1
20-24 years	453.7	38.0	450.1	39.7
25-34 years	451.2	17.0	507.3	18.2
35-59 years	737.3	12.3	829.6	13.5
60-64 years	89.7	13.8	114.9	16.5
65 years +	76.6	19.8	90.1	19.9
Industry of employment (ranked by size of casual workforce)				
Food and accommodation services (hospitality)	440.0	57.7	491.2	58.0
Retail trade	451.0	35.9	380.0	31.8

Healthcare and welfare services	239.0	16.9	287.5	19.1
Education	155.8	17.2	168.7	17.1
Manufacturing	138.2	14.6	145.8	17.0
Construction	130.1	12.7	162.8	15.5
Transport	112.4	18.8	124.1	21.1
Administrative services	87.9	22.1	109.2	24.3
Agriculture	70.2	21.7	59.8	21.4
Arts & recreation	65.2	32.7	74.8	33.3
TOTAL CASUAL WORKFORCE	**2,249.7**	**19.4**	**2,460.9**	**20.8**

Sources: ABS 6359.0, Forms of Employment, Australia, November 2013 (released 7 May 2014) ABS 6333.0 Characteristics of Employment, Australia, August 2016 (released May 2017)

This stability in the casual work rate, compared to the mobility in the part-time work rate, suggests the two categories are not being affected by the same influences. That is, the influences that are contributing to rising part-time work are not leading to a 'casualisation' of the workforce.

Professor Mark Wooden of the Melbourne Institute of Applied Economic and Social Research of the University of Melbourne recently wrote an article for *The Conversation* which assessed the accuracy of Ai Group's assertions in this regard. The article is reproduced below with the Permission of Professor Wooden.

Fact Check: Is the Level of Casual Employment No Higher Today than in 1998

The AiG claim that statistics from the Australian Bureau of Statistics (ABS) show that casual employees currently represent about 20% of the total workforce; a level that is no different than in 1998. Is this claim correct?

The ABS statistics the AiG are referring to come from the *Forms of Employment Survey* (ABS cat. no. 6359.0) which was conducted at roughly three-year intervals between 1998 and 2013. Further, casual employment status is inferred from the receipt of paid annual leave and sick leave entitlements. The lack of such entitlements has long been regarded as a reasonable proxy for casual employment given that most industry awards include provisions that explicitly exclude casual employees from having access to them.

On my reading of this data source, employees without leave entitlements represented 21.3% of all employed persons in August 1998, almost two percentage points higher than the 19.4% share recorded in November 2013. So on this source the AiG's claim is not quite right; the casual employment share was noticeably lower in 2013 than in 1998.

An alternative, and arguably preferred, ABS data source is the annual August supplements to the monthly Labour Force Survey. The most recent data come from numbers from its newly badged *Characteristics of Employment Survey* (ABS cat. no. 6333.0). According to this source, in August 2014 there were 2,305,600 employees in Australia without paid leave entitlements. This group represents 19.9% of all employed persons, so entirely consistent with the AiG's claim that casual employees represent around 20% of the workforce.

Numbers from August 1998 appear in the publication, *Employee Earnings, Benefits and Trade Union Membership* (ABS cat. no. 6310.0). There is, however, a problem with this source (and most likely the reason the AiG did not rely on it). Unlike the most recent data, owner managers of

incorporated enterprises were treated as employees (even though they are clearly self-employed), and hence many would have been classified as casual employees given they would report not receiving paid leave. We thus need to remove these "employees" from the numerator to ensure comparability. Information provided by the ABS as a supplement to the October 2004 issue of *Labour Force Market Statistics* (cat. no. 6105.0) does exactly that, reporting that employees without paid leave entitlements represented 19.8% of all employed persons in 1998. This level is almost identical to the level recorded 16 years later.

In summary, the AiG's claim that the casual employment is currently about 20% of all workers, which is much the same as it was in 1998, is entirely consistent with the data source most often used.

This finding that the casual employment share has not exhibited any trend increase over the last decade or so is also found in other data sets employing different definitions. The HILDA Survey, for example, which commenced in 2001, asks respondents not only about whether they receive paid sick leave and paid annual leave, but also whether they would describe their employment arrangements in their main job as casual (as distinct from either permanent / ongoing or fixed-term). On both measures the share of casual employment in total employment, despite rising in the most recent years (2010 to 2014), is no higher in 2014 than it was in 2001. Indeed, the casual employment shares are both about half a percentage point lower than in 2001.

But surely casual employment is much more pervasive than in the past? This is true, but all of the growth occurred prior to the late 1990s. Unfortunately, the earliest data we have only goes back to 1984. But the data we do have show that between 1984 and 1998 the casual employment share grew by a whopping 70%; since that time it has fluctuated at around the 20% mark.

Mark Wooden is Professorial Research Fellow, Melbourne Institute of Applied Economic and Social Research, Faculty of Business and Economics at the University of Melbourne, and Director of the HILDA Survey.

5.3 FWC's Casual and Part-time Employment Decision

For the past two years a major *Casual and Part-time Employment Case* has been continuing in the FWC as part of the 4 Yearly Review of Modern Awards. Ai Group played a leading role in the case on behalf of employers

In the case, the unions pursued various "common claims" across all or most awards as well as various award-specific claims.

On 5 July, a five-Member Full Bench of the FWC handed down its decision in the case.

Most of the unions' common claims have been rejected. The FWC's decision will reduce flexibility for some employers in some industries and this is a concern given the tough operating environment that many businesses are experiencing. However, importantly, the unions' main common claims have been rejected.

In the case, the unions were seeking an absolute right for casuals to be converted to permanent employment after six months of regular work, in nearly all awards.

Under the Australian Council of Trade Union's (**ACTU's**) proposed clause, casual employees would have had an absolute right to convert to permanent employment, should they wish to convert. The Australian Manufacturing Workers' Union (**AMWU**) pursued a more extreme claim than the ACTU. The AMWU argued that casual employees under the *Manufacturing and Associated Industries and Occupations Award 2010* and various other awards should be automatically *deemed* to be permanent employees after six months of regular service.

The ACTU and AMWU claims have been rejected by the FWC.

Casual conversion provisions are common in awards and the FWC has decided to extend these provisions across most awards. Under the proposed model clause for awards that do not currently contain a casual conversion clause, employees will be able to remain casual indefinitely should they wish to do so. Casual employees who work regular hours will have the right to apply for permanent employment after 12 months of regular service, but employers will have the right to refuse such requests if refusal is reasonable in the circumstances.

The FWC has published a model clause for inclusion in awards that do not currently contain a casual conversion clause. Parties have been invited by the FWC to make submissions on the model clause by 2 August 2017.

In the case, the unions also sought a standard four hour minimum engagement period for casual and part-time employees (except where a specific award currently has an even longer minimum engagement period). The unions' claim would have harmed many businesses and casual employees. Many casuals cannot or do not want to work for four hours, e.g. school students who work in the fast food industry after school. Fortunately, the unions' claim for a standard minimum engagement period of four hours has been rejected by the FWC. The Commission has proposed a two hour minimum engagement period for casuals under awards which do not currently contain any minimum period.

The FWC has further rejected a number of other common claims made by the unions, including their claim for a prohibition on businesses employing any additional casual or part-time employees until existing employees are offered more hours.

6. Independent contractors

6.1 Defining an 'independent contractor'

An 'independent contractor' is an individual who performs work under a contract *for* service, rather than under a contract *of* service. That is, an independent contractor is not an employee, but an individual providing services pursuant to a commercial rather than employment relationship.

This distinction is not always clear-cut and can be subject to judicial scrutiny. Despite the uncertainties which sometimes arise, Ai Group strongly supports the retention of the common law approach to defining an independent contractor.

Ai Group was heavily involved in the development of the *Independent Contractors Act 2006* (**IC Act**). The Australian Government accepted Ai Group's submissions that the meaning of 'independent contractor' must be left to the common law to determine.

The common law is far better equipped to assess the substance of particular relationships than any statutory definition of an 'independent contractor' could. Any 'one size fits all' definition of an 'independent contractor' would prevent the facts and circumstances of individual cases being fully considered, and would disrupt a very large number of existing contractual arrangements which are legitimate under common law, to the detriment of all parties to these contracts.

The High Court's decision in *Hollis v Vabu (2001) 207 CLR 21* is relevant when assessing whether an independent contractor relationship exists. This case involved a bicycle courier. The High Court considered whether the courier was an employee or contractor. The Court gave weight to the following factors in concluding that the courier was in fact an employee. The Courier:

- Did not supply skilled labour;
- Had little control over the manner of performance of their work;
- Was required to be at work at a certain time and to work in accordance with a roster;
- Was presented to the public as a representatives of the company;
- Was required to wear a uniform bearing the company's logo;
- Was subject to dress and appearance requirements imposed by the company; and
- There was no scope to bargain with the company with respect to the rate of remuneration.

The above factors lead the Court to conclude that the courier was an employee despite the existence of a written contract headed 'contract for service'. The case of *Hollis v Vabu* demonstrates that irrespective of the contractual intentions of the parties, a relationship of 'independent contractor' must meet the tests set down by the Courts.

The case of *Personnel Contracting Pty Ltd t/a Tricord Personnel v CFMEU* [2004] WASCA 312 handed down by the Western Australian Supreme Court of Appeal emphasised that in analysing the purported contractual relationship, it is necessary to look at the 'totality of its incidence' rather than focusing on one particular test to the exclusion of another.

The definitions used within income tax and superannuation legislation are workable for the purposes to which they are directed, but they would not be workable for the purposes of defining an 'independent contractor' under the IC Act or the FW Act. The vast majority of contractors who

are required to be treated in a similar manner to employees for taxation and/or superannuation purposes due to the pattern and type of engagement, are genuine independent contractors.

The vast majority of independent contractors have absolutely no desire to be employees. Some of them predominantly work for one client but it suits them to do so as they receive a regular flow of contracting work.

Tough sham contracting laws are included within the general protections in the FW Act to deal with any arrangements that are not genuine (see section 6.3 below).

Just like their campaigns against casual employment, the unions are attempting to demonise independent contracting arrangements that provide flexibility for the principals and the contractors, and which are valued by both parties. There are few union members in these categories of workers (perhaps the reason why the unions are so focussed upon imposing restrictions upon them).

Ai Group was heavily involved in the Australian Building and Construction Commissioner's (ABCC's) 2011 Sham Contracting Inquiry.[13] In addition to expanded compliance activities, the ABCC relevantly recommended:

- That the ABCC undertake education activities (including in partnership with key industry stakeholders and the ATO) to specifically inform employers and employees in the building and construction industry regarding the appropriate use of ABNs.

- That, in consultation with key industry stakeholders, the ABCC develops a Fair Work Contractor Statement for voluntary distribution to independent contractors prior to engagement. The Contractor Statement would provide contractors with information regarding the common law test for employment as well as the consequences of engagement as a contractor, rather than an employee.

6.2 The prevalence of independent contracting in Australia

The number of Australians who are self-employed independent is at about 8.5% of all employed people, this equates to a raw number of about 1 million. This number has remained steady since 2014. We note that this figure represents a slight decline from 9.1%.[14]

Independent contractors are concentrated in construction (30% of workers) and professional services (16%).[15]

[13] *ABCC Sham Contracting Inquiry Report*, 2011, pp24-25

[14] See ABS Catalogue 6333.0 - Characteristics of Employment, Australia and ABS Catalogue 6359.0 - Forms of (final release in November 2013)

[15] See ABS Catalogue 6333.0 - Characteristics of Employment, Australia

6.3 Sham contracting laws

Sham contracting provisions were incorporated into the *Workplace Relations Act 1996* (**WR Act**) from 11 December 2006 as a result of the *Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006*. A new Part 22 was inserted into the WR Act prohibiting the following conduct:

- Misrepresenting an employment relationship as an independent contracting arrangement;
- Making false statements to a worker with the intention of persuading or influencing that worker to become an independent contractor, where that person knows the statement to be false or misleading; and
- Dismissing or threatening to dismiss a person where the sole or dominant purpose is to engage the person as an independent contractor to perform the same work.

A very substantial $33,000 maximum penalty applied for breaches of the sham contracting provisions of the WR Act. Importantly, the legislation left the meaning of 'independent contractor' to be determined through the application of the common law tests.

Ai Group supported the legislation in a detailed written submission to the Senate Committee which inquired into the Bill, and in oral submissions at the public hearing.

From 1 July 2009, the sham contracting provisions were incorporated within the General Protections in Part 3-1 of the FW Act. Some changes were made to the provisions in the WR Act to increase protections for workers, including the removal of the 'sole and dominant purpose' test.

The FW Act continued to leave the definition of 'independent contractor' to be determined through the application of the common law tests, and retained the substantial $33,000 maximum penalty for breaches of the sham contracting provisions. This penalty has since increased to $54,000 as a result of an increase in the value of a penalty unit.

In Ai Group's view, the existing sham contracting laws are appropriate and effective, and do not need to be amended.

6.4 Other provisions of the FW Act that protect employees faced with sham contracting arrangements

Apart from the sham contracting provisions, there are various other provisions of the FW Act that provide protection to employees who are faced with sham contracting arrangements and protection to independent contractors.

In addition to the sham contracting provisions, the following provisions of the FW Act protect employees who are faced with sham contracting arrangements:

- Underpayment orders and penalties for breaches of:
    - the NES; and
    - modern awards;
- The unfair dismissal laws;
- A prohibition on coercion in relation to workplace rights (s.343); and
- A prohibition on misrepresentations in relation to workplace rights (s.345).

6.5 Provisions of the FW Act that protect independent contractors

The General Protections in Part 3-1 of the FW Act provide a high level of protection to genuine independent contractors.

A person must not take adverse action against an independent contractor because the contractor: has a workplace right, has or has not exercised a workplace right, or proposes to exercise a workplace right (s.340). A 'workplace right' includes a right given to independent contractors under the FW Act or the IC Act.

The FW Act expressly prohibits the following parties taking adverse action against an independent contractor:

- A principal who has entered into a contract for services with an independent contractor (s.342(1), Item 3);
- A principal proposing to enter into a contract for services with an independent contractor (s.342(1), Item 4); and
- An industrial association (s.342(1), Item 7).

Adverse action includes:

- Terminating a contract;
- Injuring the independent contractor in relation to the terms and conditions of the contract;
- Refusing to engage an independent contractor;
- Discriminating against an independent contractor; and
- Refusing to supply goods to an independent contractor.

7. Migrant workers

The FW Act and awards apply to overseas workers working in Australia. In addition, the work rights of working visa holders are protected by the *Migration Act 1958* (**Migration Act**). For example, a 457 visa holder must be paid no less than that of any Australian employee who is performing the same role as the visa holder in the workplace and must not be required to reimburse the work sponsor for the costs relating to being the approved work sponsor, including recruitment and migration agent costs.

In Ai Group's experience only a small number of employers deliberately underpay migrant workers. The majority of employers are complying with their obligations under the various visa categories and under the FW Act.

Australia has a vigorous enforcement regime for employers that breach the Migration Act or the FW Act. The FWO is tasked with protecting the working rights of visa holders and it actively does.

Given that the vast majority of employers do not underpay migrant workers, it would not be appropriate to impose a more onerous compliance burden on all employers. Any changes should be directed at those employers who deliberately underpay migrant workers.

If the Inquiry concludes that there is a compliance problem in this area, the FWO should be given additional resources for investigation and audits of employers suspected of underpaying migrant workers.

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