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Blackburn
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Since 1919

Submission to the Australian
Capital Territory Legislative
Assembly Standing Committee on
Education, Employment and
Youth Affairs

INQUIRY INTO THE EXTENT,
NATURE AND CONSEQUENCE OF
INSECURE WORK IN THE ACT

June 2017

About Maurice Blackburn

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

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

The need for reform

Maurice Blackburn Lawyers has advocated for Australian Capital Territory (ACT) workers' employment rights, workplace safety and workers' compensation entitlements for approximately a decade. It is in this context that we welcome the opportunity to make a submission to the Standing Committee on Education, Employment and Youth Affairs Inquiry into the Extent, Nature and Consequence of Insecure Work in the ACT (the Inquiry).

During our time advocating for local workers, the economic, social and legal context of work in the ACT has evolved significantly. Traditional industrial relations and workplace safety legislative frameworks have proven inadequate in the face of rising labour hire and insecure employment arrangements, particularly over the past two decades. The evolution of work, combined with a failure to update policies, has led to working people employed under labour hire and other arrangements being treated unfairly, paid improperly or made to work in unsafe conditions. In this context it is clear that the legislative frameworks are in need of reform.

Our submission highlights the changing nature of employment arrangements that Australian workers are experiencing, including changes to the industrial landscape, workplace health and safety standards and the ability of workers to access workers compensation.

Maurice Blackburn Lawyers has considerable experience representing workers employed through insecure arrangements such as labour hire and franchising. This has revealed that many workers are being exposed to substantial wage theft and unlawful working conditions through cost and risk-shifting models. We are currently representing multiple 7-Eleven workers who have experienced this form of unlawful treatment in the workplace.

At Maurice Blackburn we strongly believe the establishment of a licence scheme for the ACT labour hire industry is an appropriate policy response to such problems. Similar schemes have been successfully implemented overseas, including in several OECD nations, and in the continuing absence of an Australian national scheme to protect workers, a number of states are also acting to implement such schemes, including Queensland and Victoria. Such a scheme would ensure that labour hire providers are financially stable and that occupational health and safety obligations are being met.

The scheme would require all labour hire providers to be licensed. Furthermore, there would be a legal obligation for those enterprises sourcing workers via labour hire companies to only use licensed providers. These end-user enterprises would also have to guarantee the payment of any entitlements owed by the labour hire provider to its workers which would also ensure that costs and risks were not inappropriately shifted.

Maurice Blackburn applauds the ACT Legislative Assembly for initiating this inquiry and welcomes the opportunity to enhance protections for the most vulnerable workers in the community.

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INSECURE WORK

There is a high degree of public concern regarding the impact of insecure work. This concern arises from the increasing prevalence of insecure working arrangements, the inherently detrimental features of those arrangements, and the disproportionate impact of insecure work on the most vulnerable members of the workforce. Insecure work strikes at the fundamental features that ACT citizens associate with work – regular pay, ongoing employment, protection and fair conditions, and the opportunity for advancement.

Vulnerable workers are the most likely to be affected by the increasing prevalence of insecure work. These workers do not have a level of bargaining power in the labour market, and may include unskilled workers, international students, migrant workers, young people and women returning to the workforce after having children.

Insecure work arrangements can be identified in most sectors of the job market, including supply chain industries (for example, the food industry), labour hire and franchising industries. These industries appear to be marked by labour law compliance shifting. This occurs when compliance obligations are shifted to the immediate employer of labour from what might properly be regarded as the ultimate beneficiary exercising substantial or effective control (for example, from a restaurant chain owner to the labour hire company providing the waiter/waitress). A significant driver of this compliance shifting is to:

- i. evade the obligation to comply with industrial laws (including basic entitlements such as award rates of pay); and/or,
- ii. shift that obligation to conveniently 'arm's length' employing entities who have a greater propensity to engage in the direct mechanics of exploiting vulnerable workers.

Invariably this results in vulnerable workers being exposed to substantial underpayments and unlawful working conditions. It is both a cost and risk shifting model.

Maurice Blackburn Lawyers advocates on behalf of clients working in insecure work arrangements in a number of different contexts, including labour hire and franchising. We are presently representing a number of workers in claims against 7-Eleven after it was revealed that:

- a) franchisees were the legal employers, hence took on the obligation of compliance with labour laws;
- b) many employees were systematically underpaid using a number of unlawful mechanisms including false records and payslips;
- c) exploited and underpaid employees were from a vulnerable sector of the community being overseas students; and,
- d) the franchisor failed to properly regulate the conduct of franchisees and has only latterly responded to systemic exploitation after it became a public issue through reporting by Fairfax Media and ABC's Four Corners.

This exploitation of vulnerable workers is not an isolated example. The Fair Work Ombudsman's Inquiry into the practices of poultry producer Baiada Group identified an operating model where the end-user enterprise had ceased to engage its labour directly. The Baiada Group, who supply Woolworths, Coles, IGA, McDonald's and KFC, was found to have financially benefited from a complex supply chain of up to four tiers of labour hire providers which were seriously contravening basic labour laws.

LICENCE SCHEME FOR THE ACT LABOUR HIRE INDUSTRY

A licencing scheme for the labour hire industry is an appropriate policy response to the issues identified above.

The purpose and benefit of a licencing scheme is to ensure:

- a) labour hire providers are financially stable and able to meet their obligations in respect of their workforce; and,
- b) labour hire providers have the capacity to meet their occupational health and safety obligations.

A licencing scheme will create a greater degree of certainty that labour hire providers have capacity to meet employment obligations. This will minimise circumstances where workers incur a financial loss due to the labour hire provider's incapacity to pay or non-compliance with industrial laws. This will also be of great benefit to vulnerable workers.

Licensing schemes have been successfully implemented in other OECD countries such as Canada, Korea, Japan, Germany, Austria, Spain, Luxembourg, the Netherlands, Sweden, Belgium, France, South Africa, Portugal, and to a limited extent, in the UK. They were introduced to protect the rights and entitlements of workers and provide transparency and stability in the labour hire industry¹. Queensland and Victoria have also recently announced steps to look at the introduction of state-based licensing schemes.

An appropriate licencing scheme should: :

- a) require a labour hire provider² to hold a licence to operate in the ACT;
- b) prohibit an end-user enterprise³ from engaging the services of an unlicensed labour hire provider; and,
- c) require an end-user enterprise to make reasonable enquiries into whether or not the labour hire provider holds a current licence.
- d) where an end-user enterprise has:
 - i. engaged the services of an unlicensed labour hire provider; or
 - ii. has knowingly or recklessly engaged the services of a licenced labour hire provider that is not complying with the conditions of their licence;the end-user enterprise would be liable to guarantee the payment of any entitlements owed by the labour hire provider to its workers, to the extent that those entitlements arose from the work done for that end-user enterprise; and,
- e) a contravention of the scheme may be enforced by way of civil penalties.

¹ Australian Council of Trade Unions, Report of the Independent Inquiry into Insecure Work in Australia, Lives on Hold – Unlocking the potential of Australia's Workforce, 2012.

² *Labour hire provider* is a person or company who is wholly or substantially in the business of providing labour to an end-user enterprise.

³ *End-user enterprise* refers to the person or company that is the principal beneficiary of the labour provided by the labour hire provider

A licencing body

The scheme would require the ACT Government to create a regulatory body to oversee the operation of a licencing scheme for the labour hire industry. The licencing body would be responsible for:

- 1) approving and revoking licence registration;
- 2) enforcing licence conditions; and,
- 3) prosecuting contraventions of the scheme.

The licencing body would also have a research and public policy purpose and be responsible for:

- conducting research on the impact of insecure work on vulnerable groups in the ACT workforce;
- proposing regulatory reform to protect the rights of vulnerable workers in insecure work in the ACT; and,
- engaging with stakeholders such as employers, employees, unions, lawyers and academics.

Licence applications

Applications for a licence would be made to the licencing body. When considering whether to grant a licence, the licencing body would have to take into account the following:

- a) the identities of those persons who are, or would be, if a licence was allocated to the applicant, in a position to influence or control the licence;
- b) the business record of the labour hire provider;
- c) the business record of each person who is, or would be, if a licence was allocated to the applicant, in a position to influence or control the licence;
- d) the nature and manner in which work is performed in the industry or sector in which the licence applicant is expected to operate in;
- e) the capacity of the applicant to meet its occupational health and safety obligations;
- f) the financial security of the licence applicant and its capacity to meet its financial obligations to its workers;
- g) whether the licence applicant, or a person who is, or would be, if a licence was allocated to the applicant, in a position to influence or control the licence:
 - i. has ever been convicted of an offence against an industrial law;
 - ii. has ever been ordered to pay a civil penalty under the licencing scheme or any other industrial law;

h) whether a licence issued to the labour hire provider has been revoked or suspended previously; or

i) any other matters that the licencing body considers relevant.

The licencing body may or may not grant an application for a licence for a specified period not exceeding three years.

Licence conditions

In granting a licence to a labour hire provider, the licencing body may impose conditions upon the licence in accordance with how the licencing body sees fit. The matters that may be dealt with as conditions on a licence could include:

i) limitations upon the industry, industry sector or types of businesses in which the registered labour hire provider may operate, where operating in those environments involves, or is likely to involve the exploitation of workers;

ii) any additional measures to be taken by the registered labour hire provider to protect the health and safety of its workers;

iii) the amount of any security and where such security should be lodged or held for the purpose of securing the payment of potential claims by workers of the registered labour hire provider; and,

iv) any requirement for the registered labour hire provider to take out adequate and appropriate insurance.

It would be a condition of every licence that the labour hire provider not charge, or pass on, directly or indirectly, fees or costs to its workers.

Variation and revocation

The licencing body may, on its own motion or on the application of any interested person, vary or revoke the licence, or any condition upon a licence of a licenced labour hire provider, if it appears to the licencing body that a condition of a licence, or any requirement under law (including compliance with industrial awards or enterprise agreements), has not or is not being complied with.

AMENDMENT TO INDUSTRIAL LAWS

A proper response to the issue of insecure work requires amendment to industrial laws. Existing legislative instruments do not adequately deal with the challenges posed by labour hire arrangements.

Critically, the delineation of powers between the ACT and the Commonwealth in respect of industrial laws creates a limitation on the capacity of the ACT to properly respond to the detrimental impact of insecure work. Consequently, we submit that the ACT Government should advocate strongly for changes to Commonwealth industrial laws through the Council of Australian Government (COAG).

There is already a model of regulation for insecure work that has been devised to regulate labour law compliance shifting. For some time, the textile, clothing and footwear (TCF) industry has had an award regime of protections in place for outworkers working as part of a supply chain. In 2011 this regime was given statutory effect by the enactment of Part 6-4A of the *Fair Work Act 2009* (Cth). The regime includes a mechanism to enable TCF outworkers to recover unpaid amounts owed to them by shifting compliance up the supply chain. The mechanism also allows TCF outworkers to recover what they are owed from an indirectly responsible entity further up the supply chain in circumstances where those responsible for doing so have not fulfilled their obligations to the outworker. As long as the TCF outworker has the requisite connection to the entity up the supply chain, the entity will be an indirectly responsible entity. There can be more than one indirectly responsible entity in relation to a particular unpaid amount. In that circumstance, the entities are jointly liable to pay the unpaid amount.

However, the primary liability to pay the TCF outworker remains with the person who employed or engaged them. If the TCF outworker has taken reasonable steps to recover the unpaid amount from that person without success, they may then initiate proceedings in reliance on this regime.

If the indirectly responsible entity pays the unpaid amount, that entity will be able to recover an equivalent amount – plus interest – from the responsible person, whether by way of offset or proceedings in the Federal Court, Federal Circuit Court, or eligible state or territory court.

This method of shifting compliance responsibilities to an ultimate beneficiary could be used in supply chain industries and franchising industries where the risk of exploitation of vulnerable workers is high. It would also create an incentive for the ultimate beneficiary (for example, the franchisor or a Baida-style enterprise) to ensure that there is compliance with industrial laws by the direct employers of vulnerable workers.

WORKERS' COMPENSATION AND LABOUR HIRE EMPLOYEES

If there is an injury caused to a worker arising out of or in the course of any employment, the worker is entitled to compensation in accordance with the *Workers Compensation Act 1951* (WCA)⁴.

If a worker's incapacity for work results from, or is materially contributed to by, an injury which entitles the worker to compensation, compensation must be paid in the form of weekly payments subject to and in accordance with the WCA⁵.

An injured worker's weekly entitlements are calculated with reference to their average weekly earnings (AWE) from employment (be it continuous or intermittent) in the 12 months immediately before the day the worker sustained an injury.⁶ Where there was a regular and established pattern of earnings, other employment and overtime payments are included in the calculation of normal weekly earnings.⁷

If it is not possible to work out fair average pre-incapacity weekly earnings for a worker because they have only been employed for a short time, average pre-incapacity weekly earnings are calculated by reference to the average weekly amount earned by others in the same employment who perform similar work at the same grade as the worker deemed to be the normal weekly earnings of the worker from the employment (continuous or intermittent) had by the worker in the period in which the worker has sustained the employment.⁸

As a result, workers who have fluctuating periods of income can find themselves disadvantaged as compared to workers who have continuous periods of income with respect to the once-only calculation of their AWE. This will depend upon whether they were earning higher-than-average or lower-than-average earnings at the time of their injury, which is a matter of happenstance.

As referenced in the inquiry background paper, labour hire workers are more likely to be engaged in insecure work, working irregular hours⁹. Consequently, if labour hire workers sustain an injury in compensable circumstances they are likely to be disadvantaged with respect to the calculation of their AWE as compared to other workers.

Workers who are covered by a union-negotiated enterprise agreement (EA) are likely to also be entitled to accident make-up pay for a period of time. This usually covers the shortfall between the worker's pre-injury wage and their entitlement to weekly payments under the WCA.

In our experience, labour hire workers are less likely to be covered by an EA that entitles them to accident make-up pay, whether with their employer or the host employer. As a consequence, labour hire workers who sustain an injury are likely to be disadvantaged than other workers with respect to their accident make-up pay entitlements.

⁴ Part 4.2, *Workers' Compensation Act 1951* (ACT)

⁵ Section 38 *Workers' Compensation Act 1951* (ACT)

⁶ Sections 21 and 22 *Workers' Compensation Act 1951* (ACT)

⁷ Sections 21 and 25 *Workers' Compensation Act 1951* (ACT)

⁸ Section 21(2) *Workers' Compensation Act 1951* (ACT)

⁹ Australian Capital Territory Legislative Assembly Standing Committee on Education, Employment and Youth Affairs, *Inquiry into Insecure Employment in the ACT Discussion Paper* (May 2017), p 6.

Return to work and labour hire

Part 5.4A of the WCA requires employers to provide injured workers with suitable alternative duties following a workplace injury.

These obligations in a labour hire context are difficult to manage. Such difficulties were outlined (albeit within the context of Victoria's legislative regime) in the 2008 review of the *Accident Compensation Act 1985* (Vic) authored by Peter Hanks QC¹⁰.

The WCA specifies that an individual is taken to be a worker employed by a labour hirer if the labour hirer engages them to perform work for a third party to fulfil the labour hirer's contract (regardless of whether the contract is a contract of service) with the third party. The agency continues to be the worker's employer while the worker does this work.¹¹

Under the Act, the host employer (as opposed to the labour hire agency) is not required to support an injured worker's return to work. Nor is a host employer obliged to keep an injured worker's position open while they recover. Furthermore, it is unlikely the labour hire agency will have suitable alternative duties available to the worker.

As a result, labour hire workers are less likely to be offered a return to work program that sees them returning to their job with the host employer. If anything, they might be offered a position with the host in a role and an environment that is unfamiliar to them. Thus a labour hire worker is disadvantaged as compared to other workers with respect to the suitable employment options that may be presented to them (if at all). Consequently, the prospects of a successful return to work for a labour hire worker are significantly reduced which is inconsistent with the objects of the WCA.¹²

The Inquiry might also wish to consider labour hire workers' and employers' return to work obligations, in particular:

- I. the obligations of host employers to offer suitable employment to injured labour hire workers, and to otherwise assist them with their return to work; and
- II. the obligations of labour hire companies and host employers to cooperate and assist injured labour hire workers return to work.

Current obligations

ACT employers are compelled, by virtue of the *Work Health and Safety Act 2011* (WH&S Act) to provide their employees with a safe system of work.

There is uncertainty as to who must discharge this obligation in respect of categories of insecure workers. The High Court decision of *Baiada Poultry v R* demonstrates this ambiguity.¹³

Section 1 of the WH&S Act sets out the objectives of the legislation. They are:

- (a) protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work or from specified types of substances or plant; and

¹⁰ Peter Hanks, *Accident Compensation Act Review* (2008), p 152.

¹¹ Section 12 *Workers' Compensation Act 1951* (ACT)

¹² Section 85 *Workers' Compensation Act 1951* (ACT)

¹³ *Baiada Poultry Pty Ltd v The Queen* [2012] HCA 14

- (b) providing for fair and effective workplace representation, consultation, cooperation and issue resolution in relation to work health and safety; and
- (c) encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting persons conducting businesses or undertakings and workers to achieve a healthier and safer working environment; and
- (d) promoting the provision of advice, information, education and training in relation to work health and safety; and
- (e) securing compliance with this Act through effective and appropriate compliance and enforcement measures; and
- (f) ensuring appropriate scrutiny and review of actions taken by persons exercising powers and performing functions under this Act; and
- (g) providing a framework for continuous improvement and progressively higher standards of work health and safety; and
- (h) maintaining and strengthening the national harmonisation of laws relating to work health and safety and to facilitate a consistent national approach to work health and safety in the ACT.

The WH&S Act sets out the obligation to provide a safe working environment:

- The WH&S Act seeks to serve its stated objectives by imposing obligations on employers and employees.
- The most substantial obligation the WH&S Act places on employers is that “must ensure, so far as is reasonably practicable, the health and safety of—
 - (a) workers engaged, or caused to be engaged, by the person; and
 - (b) workers whose activities in carrying out work are influenced or directed by the person,
 while the workers are at work in the business or undertaking.”¹⁴
- The definition of “worker” includes independent contractors, employees of independent contractors and employees of labour hire companies who has been assigned to work in the person’s business or undertaking¹⁵
- The effect of the definition of worker is that independent contractors have the same obligations as employers for matters over which the independent contractor has control.

The obligations of an employer and an employee under the WH&S Act are clear when the relationship between the employer and the employee are clear. However, there is ambiguity regarding the obligations of an employer/host in the three-way relationship between labour hire workers, contractors and their employees and sub-contractors and their employees.

Areas of ambiguity include:

- I. Who has the duty to provide a safe system of work?
- II. What is ‘reasonably practicable’ with regard to providing and maintaining a safe system of work?
- III. Can employers rely on contractors and sub-contractors to discharge their WH&S Act obligations?

The High Court decision of *Baiada Poultry v R* highlights the ambiguity in this area of the law and demonstrates how the obligations to provide a safe workplace can become complex

¹⁴ Section 19 *Work Health and Safety Act 2011* (ACT)

¹⁵ Section 7 *Work Health and Safety Act 2011* (ACT)

when dealing with contractors, sub-contractors and employees.

The facts of *Baiada Poultry v R* were as follows:

- Baiada Poultry carried on a business of processing poultry meat at their plant in Laverton North, Melbourne. As part of their business, Baiada provided chicken growers with chickens, feed and assistance, and in return, chicken growers agreed to raise the chickens.
- Baiada Poultry engaged independent contractors to round up and pack the chickens, and different independent contractors to transport the chickens from the various farms to its processing plant.
- Andrea and John Houben were contract growers for Baiada Poultry. DMP Poultech Pty Ltd (DMP) was a contractor engaged by Baiada Poultry to catch and pack the chickens at the Houben farm. Azzopardi Haulage Pty Ltd (Azzopardi Haulage) was a trucking/logistics company engaged by Baiada Poultry to transport the chickens from the Houben farm to the Baiada Poultry processing plant.
- A DMP employee was assisting the principal of Azzopardi Haulage, Mr Azzopardi to secure a load on a semi-trailer. Another DMP employee was operating a forklift, despite being unlicensed to operate the forklift. In the process of rearranging the load, a steel pallet fell on Mr Azzopardi and he was killed.
- Baiada Poultry was charged for breaching section 22 of the *Occupational Health and Safety Act Victoria (1994)* (the direct equivalent of the ACT WH&S Act) and at trial, was found guilty. Baiada Poultry appealed to the Victorian Supreme Court and then the High Court over directions given to the jury at trial.

There were several key aspects of the High Court's decision about statutory obligations in *Baiada Poultry v R*:

- The decision is primarily concerned with issues around directions to the jury at trial. However, the High Court also considered the nature of Baiada Poultry's statutory duty and then made comment on the obligations more broadly.
- The majority judgment of French CJ, Gummow, Hayne, Heydon and Crennan JJ stated that simply demonstrating that an employer can take a step to make a workplace safer, does not necessarily mean that they are obliged to.
- Heydon J opined that where a contractor has specialist skills with regard to safety, it is reasonably practicable for an employer to rely on that contractor's specialist skills with regard to safety.

As a result, there are consequences of the Baiada decision for the Inquiry to consider.

Given the objectives of the WH&S Act (as stated above), the decision highlights the difficulties associated with applying these objectives and the WH&S Act in practice. The inquiry may wish to consider the following questions:

- I. Is there ambiguity regarding when an employer owes a statutory duty under the WH&S Act to one or more particular categories of worker, i.e. a labour hire worker, a contractor, a sub-contractor, an employee?

- II. Is there ambiguity around the steps an employer must take to discharge their obligations, if any, under the WH&S Act to one or more particular categories of worker?
- III. When is it reasonably practicable for a principal to give directions to a contractor or other categories of worker with regard to a safe system of work?
- IV. When is it reasonably practicable for a principal to monitor a system of work controlled by a contractor or other categories of worker with regard to safety?
- V. Should an employer be able to rely on contractors and sub-contractors to discharge their obligations under the WH&S Act?

Labour hire workers and the common law

An important question to ask is who is owed a duty of care and what is the scope of that duty of care?

A labour hire company is an employer and has a non-delegable duty to take reasonable care for the safety of their employees. However, there is also a concurrent duty owed to the worker by the host.

A worker employed by a labour hire company who sustains an injury that has arisen out of, or in the course of, their employment in negligent circumstances while contracted to the host is likely to pursue a common law claim against both the labour hire employer and the host.

The extent of liability between the two possible defendants will be determined on an individual basis with the circumstances of the event causing injury being central to the determination of liability.

One of the factors to be taken into account when determining the liability between the employer and the host is the level of control over the operations and workplace exhibited by the host.

Despite the above 'control' considerations, the labour hire employer still has a duty to take reasonable care to ensure that:

1. the host workplace is safe;
2. the host workplace has appropriate safety systems;
3. the task for which the labour hire employee is being supplied is clearly defined; and,
4. the labour hire employee is properly trained for that task.¹⁶

Uncertainty regarding the extent to which it is "reasonably practicable" for a labour hire employer to monitor and supervise the acts/omissions in the host workplace while the employee is working there are often the subject of disputation between the labour hire employer and the host workplace.

In our experience, where common law claims have eventuated, the reality of the situation is usually that the labour hire employer has never attended the site at which the worker was injured, let alone considered the adequacy of the system of work.

Problems with the application of the WCA with respect to proceeding with a common law claim for damages include:

- Claims are less likely to resolve pre-litigation because of the number of issues that are in dispute between the parties.
- When there are multiple defendant parties, there are higher chances of disputes over indemnity, which often involve contract law. This increases costs in a jurisdiction where costs are not contributed to by the labour hire employer (as Insured) and causes delays for claimants.
- It is our experience that most host employers will not engage in meaningful settlement discussions and/or the provision of documents until such time as

¹⁶ *TNT Australia Pty Ltd v Christie* [2003] NSWCA 47

proceedings have been issued against them. Thus the labour hire worker can incur protracted delay to the resolution of their claim.

The inquiry may wish to examine if some legislative amendment to the WCA could resolve these issues.

There are also two crucial questions for the inquiry regarding labour hire workers and the common law:

- I. Is there any evidence of labour hire arrangements being used to dilute their responsibilities under workplace laws and other legal obligations?
- II. Should a labour hire worker be disadvantaged as compared to other workers with respect to pursuing a claim for common law damages?

Proving economic loss with a history of insecure employment

The effects of insecure employment on ACT workers cover a broad spectrum of personal, financial, community and family consequences. The challenges that can arise for an insecure worker when seeking to claim damages in the common law as a result of their economic loss is one of those effects.

In cases where the worker's residual work capacity is not clear, the court is required to consider a variety of scenarios to determine which of those scenarios most fairly reflects the worker's earning capacity. To determine the value of the relevant comparator (the worker's "without injury earnings"), the court must first determine the gross income of a worker by expressing, as an annual rate, the income that the worker:

- was earning from personal exertion; or
- was capable of earning from personal exertion; or
- would have earned from personal exertion; or
- would have been capable of earning from personal exertion during that part of the period within three years before and three years after the injury, as most fairly reflects the workers earning capacity had the injury not occurred.

It is our experience that when a worker who has a history of under-employment or insecure employment makes a claim for economic loss, the defendant is less likely to grant such an application because ascertaining the value of that loss can be more complicated than for other workers. Despite the above authority, the sporadic nature of income and/or reduced hours of employment makes the determination of the comparator more complicated than in other cases.

CONCLUSION

The establishment of a licence scheme for the ACT labour hire industry is an appropriate policy response to addressing many of the problems associated with insecure work arrangements. As this submission has outlined, similar schemes have been successfully implemented overseas and are proposed in other Australian states, all of which seek to ensure that labour hire providers are financially stable and that occupational health and safety obligations to workers are being met.

Maurice Blackburn thanks the ACT Legislative Assembly for looking at these important issues through the inquiry into the extent, nature and consequence of insecure work in the Act

