

Labour hire in NSW - an issues paper

Prepared for the

NSW DIR

by

Ian Watson

ACIRRT

**Australian Centre for Industrial
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Contents

| | |
|--|-----------|
| Executive summary..... | i |
| 1.Introduction..... | 1 |
| 2.Developing categories for understanding labour hire..... | 3 |
| 3.The extent of labour hire..... | 8 |
| Introduction..... | 8 |
| Nature of the data..... | 8 |
| Section 1: labour hire workers—the national profile..... | 11 |
| Section 2: Labour hire workers—the NSW picture..... | 13 |
| Section 3: Host workplaces-the NSW picture..... | 16 |
| <i>Section 3a: Worker estimates.....</i> | <i>17</i> |
| <i>Section 3b: Workplace estimates.....</i> | <i>19</i> |
| 4.Core issues arising from the use of labour hire..... | 22 |
| Impact on the host company..... | 22 |
| Conditions of employment and ambiguity in the status of the agency worker..... | 26 |
| <i>The employment contract and ‘dependent contractors’.....</i> | <i>27</i> |
| <i>Impact on labour hire workers.....</i> | <i>29</i> |
| <i>Labour hire and labour market apartheid.....</i> | <i>29</i> |
| <i>Some positive developments: labour pooling which offers security.....</i> | <i>32</i> |
| Wider ramifications of the reconfiguration of the employment relationship | 34 |
| <i>The 1998 waterfront dispute.....</i> | <i>34</i> |
| <i>The employment contract—again.....</i> | <i>36</i> |
| <i>‘Parallel’ versus ‘supplementary’ employment: labour hire in the building industry.....</i> | <i>37</i> |
| 5.Inter-state and international developments..... | 38 |
| Inter-state developments..... | 38 |
| International developments..... | 39 |
| References..... | 40 |

List of tables

| | |
|--|----|
| Table 3.1: Labour hire firms in three Australian states- firm size estimates..... | 9 |
| Table 3.2: Labour hire workers by gender, NSW 1996..... | 14 |
| Table 3.3: Labour hire workers by educational qualifications, NSW 1996..... | 14 |
| Table 3.4: Labour hire workers by trade occupations, NSW 1996..... | 15 |
| Table 3.5: Labour hire workers by employment status, NSW 1996..... | 16 |
| Table 3.6: Incidence of agency workers by industry, NSW 1995..... | 17 |
| Table 3.7: Incidence of agency workers by workplace size, NSW 1995..... | 18 |
| Table 3.8: Incidence of agency workers by union characteristics, NSW 1995..... | 18 |
| Table 3.9: Incidence of workplaces with agency workers by industry, NSW 1995..... | 19 |
| Table 3.10: Incidence of workplaces with agency workers by workplace size, NSW 1995..... | 20 |
| Table 3.11: Incidence of workplaces with agency workers by union characteristics, NSW 1995..... | 20 |

List of figures

| | |
|--|----|
| Figure 2.1 Categories for understanding non-standard employment..... | 3 |
| Figure 2.2 Categories for understanding contracted labour..... | 5 |
| Figure 2.3 Service firm arrangements..... | 7 |
| Figure 2.4 Labour hire arrangements..... | 7 |
| Figure 2.5 Employment agency arrangements..... | 7 |
| Figure 3.1: Age profile of agency workers..... | 11 |
| Figure 3.2: Industry background of agency workers..... | 12 |
| Figure 3.3: Occupational background of agency workers..... | 13 |

Executive summary

- ◆ *The most likely number of labour hire workers in NSW in the year 2000 is about 42,000.* This may appear to be a small figure, but the significance of labour hire firms on the industrial landscape is not captured in the numbers working for them *but in the number of firms engaging their services—the host companies.* In NSW in 1995, over 20 per cent of workplaces (with 20 or more employees) were making use of labour hire workers. In some industries, such as finance and insurance, over 50 per cent of workplaces made use of labour hire workers.
- ◆ The incidence of labour hire workers in NSW is lower than that in other states and there appears to be a link between non-unionised workplaces and a greater incidence of labour hire. In NSW, unionised workplaces appear to have been more successful in keeping a lid on labour hire, compared with the other states.
- ◆ Most labour hire workers are in three industry groups: manufacturing, finance and insurance; and property and business services. There are two broad divisions within labour hire:
 1. a white-collar division, mainly drawn from secretarial occupations and professionals, which is based in business and property services, and in finance and insurance. This gives the labour hire industry a much more feminised and younger profile.
 2. a blue-collar division, mainly drawn from labourers, machine operators and tradespersons. These workers are more likely to be male and older in age than those working in the white collar division. While these workers are predominantly located in manufacturing, they are also likely to be spread across a range of industries.
- ◆ Much of the current research highlights the adverse consequences of the growth of labour hire. Labour hire has an impact on host companies, on the labour hire workers themselves and on the wider labour market.
- ◆ The impact on the host companies includes:
 - downward pressure on wages and working conditions;
 - increased job insecurity for the host company's employees;
 - undermining of OH&S standards;
 - deterioration in shop-floor morale;
 - undermining of trade union membership in workplaces and of union rights amongst workers;
 - victimisation of workers who object to management practices (labour hire workers don't need to be 'sacked', they just get sent back);

- undermining the provision of training within the host company, and ultimately within the wider economy.
- ◆ When it comes to the impact on labour hire workers themselves, the main issues concern their earnings and working conditions, their job insecurity, and their lack of access to training and entitlements. In particular, labour hire workers become second class citizens in the labour market and the spread of labour hire threatens to create a kind of labour market apartheid.
 - ◆ The impact of labour hire on the labour market more generally could be profound, particularly if the industry grows significantly. There are many blurred edges in this industry, particularly:
 - the employment status of the labour hire worker—are they contractors or employees?
 - the obligations of the labour hire firm and of the host company towards the labour hire worker—at present few parties want to take responsibility for these obligations
 - ◆ *This paper finds that it is the triangular employment relationship (between labour hire firms, workers, and host companies) which is the core issue. The real problem lies in the way in which the 'labour hire formula' changes long-established patterns of employment. Once labour hire is no longer a 'temporary' or 'supplementary' form of labour, but becomes a parallel system of employment, major legal and industrial relations problems become evident.*
 - ◆ Inter-state and international development are briefly overviewed. These show that Queensland appears to be making useful progress on these issues and that developments in the United States should be monitored carefully.

1. Introduction

This issues paper has reviewed some of the current research on labour hire, assembled some of the relevant statistics for NSW, and sought to pinpoint the key issues raised by the growth in labour hire. Labour hire has been around for a very long time, but its growth over the last decade has been dramatic and this poses major dilemmas in the areas of labour law and industrial relations. In focussing on some of these dilemmas, this issues paper attempts to go beyond the simplistic notion of a few bad apples in the barrel.

The problems of labour hire are not the product of ‘cowboys’ in the industry, but are rooted in the ‘triangular’ nature of labour hire arrangements: the fact that workers are paid by one ‘employer’ but work for another. Confusion over lines of responsibility in exercising the ‘employer’ role are evident, with serious consequences for workers’ conditions and entitlements. In the words of George Gonos, labour hire provides firms with ‘access to labour without obligation’ (1997, p.90). However, in a modern, democratic society we should question whether anyone has the right to conduct business affairs without obligations to their workforce?

It seems clear that the dramatic growth of the labour hire industry is based on the attractiveness of this ‘triangular’ arrangement for many businesses. In some cases, it appears to be short-term cost cutting which appeals to some companies. More generally, however, changes in the way work is being organised are involved. According to two American researchers, labour hire can be seen as a form of ‘externalisation’ of part of a firm’s workforce. A core of workers are retained who are needed for organisational control and stability; the rest are obtained from other external sources like labour hire. This is seen as increasing the firm’s organisational flexibility, particularly its ability to adjust to changes in market conditions. Firms aim for a balance in their workforce between internalisation (the core) and externalisation (labour hire etc): ‘when used together, these two arrangements give a firm a mechanism for developing stable yet adaptable work arrangements’ (Davis-Blake and Uzzi 1993, p. 198).

Whether this is an accurate account of the reasons for the growth of labour hire remains an open question. What is more certain is the impact of labour hire. Much of this issues paper documents this impact—which has largely been adverse—on the host companies and on the labour hire workers themselves. Some of these adverse consequences can be reversed if the industry is made ‘civilised’: if labour hire firms are made to take greater responsibility for things like working conditions, safety, training and job security. However, as this issues paper will emphasise, the problems go deeper. Labour hire is no longer just ‘temporary’ or ‘supplementary’ labour. It is increasingly emerging as a parallel system of employment and is threatening to create a form of labour market apartheid in Australia. What are the prospects for containing the growth of labour hire, and should this even be attempted?

It is questions like these which are posed throughout this paper. To emphasise the provisional nature of the discussion, many issues are raised in ‘issues boxes’

(the greyed text boxes). They are intended to highlight the main purpose of this paper: to focus attention of the issues raised by labour hire.

This issues paper has been written in considerable haste and has inevitably skimmed over certain areas and neglected others altogether. The discussion on international developments is very thin and discussion on the dynamics of the labour hire industry is largely absent. These issues boxes are therefore also used to suggest where the gaps in information lie, and how these gaps might be filled.

Issues raised:

How great is the growth in labour hire in Australia? Is the industry likely to become as extensive as in the United States?

What are the dynamics driving labour hire in Australia, and how does this differ by industry?

Does it make economic sense for employers to use labour hire, given the premium they often pay for the 'flexibility' offered by labour hire? Have any proper 'cost-benefit' analyses been done which take into account long-term considerations?

How relevant are analyses like those of Davis-Blake and Uzzi for understanding the growth of labour hire in Australia?

2. Developing categories for understanding labour hire

In their 1999 report for the AMWU, Watson et. al. developed a framework for understanding non-standard employment. They observed that considerable confusion prevailed in everyday usage concerning categories like ‘casuals’, ‘contractors’ and ‘agency workers’ and they sought to clarify these categories by distinguishing the ‘time’ component from the employment relationship. Figure 2.1 summarises their framework and demonstrates that most forms of non-standard employment are spread across a spectrum of arrangements (with only cell 1 representing ‘standard’ employment).

Figure 2.1 Categories for understanding non-standard employment

| | | Employment relationship | | | | | |
|------|---------------------------------|--|--------|--|-------------------------------------|---|----------------------|
| | | Producing company is employing company | | Producing company is not employing company | | | |
| | | Permanent | Casual | Labour hire / employment agencies | | Independent contractors ('Sole traders' or 'own account workers') | Outsourced suppliers |
| | | | | Workers are employees | Workers are 'dependent contractors' | | |
| Time | Full-time | 1 | 3 | 6 | 8 | 10 | 12 |
| | Part-time | 2 | 4 | | | | 13 |
| | Seasonal/temporary/intermittent | | 5 | 7 | 9 | 11 | 14 |

Source: Watson et. al. 1999

Note that greyed-out areas are boxes which are either meaningless or extremely uncommon.

As Figure 2.1 shows, labour hire arrangements are part of the category of non-standard employment (cells 6 to 9). In common parlance, however, confusion in terminology abounds. Are contractors and agency workers the same? When companies outsource their functions, is that the same as using labour hire? Is a labour hire worker an agency worker?

To distinguish these categories more carefully, Figure 2.1 provides a framework for understanding ‘contracted labour’, the term we will use to capture all of the cells from 6 to 14 in Figure 2.1. Figure 2.1 shows that the time component is no longer one of the critical issues for understanding contracted labour. Rather, the *real* employment status of the worker and their relationship to the host company and to the labour-supplying company become the critical axes.

Moving down the rows we pass through three kinds of employment status. The category of **employee** appears to be straightforward (for example, PAYE tax is deducted from earnings). Similarly, the category of **independent contractor** also appears straightforward (working as a sole trader and invoicing for services provided). However, the blurred boundaries between these categories, which has occasioned numerous legal wrangles, become evident when we examine the category of **dependent contractor**. This status is one in which a worker is a defacto employee, but appears to be working as a contractor. The term ‘dependent’ arises because often such contractors are dependent on a single employer for all of their work, whereas an independent contractor is generally not dependent on any one employer but works for a number of customers. In summary, the first row in Figure 2.2 refers to ‘genuine employees’ and the third row to ‘genuine independent contractors’. All of the ‘messy’ arrangements that fall in-between are subsumed into the second row. This issue will be discussed a length later in this paper.

Turning now to the columns in Figure 2.2, there are basically three kinds of working situation represented. The worker’s situation with regard to the host company and the labour-supplying company is captured in these columns. A worker can be working directly for the host company, with no other companies involved (cells 1 to 3). The most common situation is ‘standard’ employees (cell 1) who do not form part of the framework of ‘contracted labour’ (but is included in Figure 1.2 as a reference cell). Another common situation is the sole independent contractor, such as the tradesperson who comes onto the site for specific tasks (cell 3). Dependent contractors working for a host company (cell 2) are not common, but are not unknown.

Sometimes when the term ‘outsourcing’ is used, cell 3 can be relevant, such as a self-employed computer professional taking over the IT function from a company’s IT staff. More commonly, though, the term ‘outsourcing’ refers to cells 7 to 9, where a host company outsources the function to another company (eg. a cleaning company or an IT company). The employment status of the worker within this company can range from employee through dependent contractor to independent contractor.

Figure 2.2 Categories for understanding contracted labour

| Employment status of worker | Worker's situation vis a vis host company and labour-supplying company | | |
|-----------------------------|--|--|---|
| | Working directly for the host company | Working for host company with labour supplying company as the intermediary | Working for a company with an outsourced contract with the host company |
| Employee | 1 | 4 | 7 |
| Dependent contractor | 2 | 5 | 8 |
| Independent contractor | 3 | 6 | 9 |

The issue of labour hire—the subject for this issues paper—is captured in cells 4 to 6, where a worker is working for a host company but is supplied by another company (an intermediary). *What distinguishes a labour hire company from the company with the outsourced contract (cells 7 to 9) is that its ‘product’ is the supply of labour, not the provision of goods or services to the host company* (eg. seat belts or catering). The labour hire company’s sole reason for existence is to serve as an intermediary in the employment relationship between the host company and the worker. The employment status of the worker within the labour hire company can range from employee through dependent contractor to independent contractor. Cells 4 and 6 are in grey to indicate their relevance to this issues paper, and cell 5 is in black to highlight its problematic status. It is dependent contractors working for labour hire companies which have caused much of the concern in legal and industrial relations circles (such as the notorious Troubleshooters case, which is discussed later).

Is a labour hire firm the same as an employment agency? In the eyes of the taxation department they are *not* the same. An employment agency is seen as a placement agency which alerts job seekers to the existence of a vacancy, screens potential recruits for the employer, accepts a fee for its service, and then quietly withdraws from the scene. By contrast, a labour hire firm enters two contracts: one with a host company to supply labour services and another contract with the workers for the use of their labour. The labour hire firm remains in an ongoing relationship with both parties (ATO, IT 2576, 3/4). It is, in essence, a triangular relationship. The following set of Figures (from ATO, SGR 93/2) demonstrate this. Figure 2.3 shows a service firm, such a security firm, which I have categorised as an outsourcing company (column 3 in Figure 2.2). Figure 2.4 shows the labour hire arrangement, such as typists supplied for peak periods of work at the host company. Figure 2.5 show two variations in the employment agency arrangement, such as actors on the books of a film agent.

While this terminology might be clear in the tax office’s mind, those people collecting data have seen it differently. The team who designed the Australian

Workplace Industrial Relations Survey (AWIRS95) used the term ‘agency worker’ when referring to labour hire. They defined it as follows:

Agency workers are used to fill temporary staff shortages when they arise. Although agency workers would usually work at the workplace, their salary is paid by the placement or employment agency with which the workplace contracts for their services. (Morehead, et. al. 1997, p. 46).

As we shall see later, the temporary element is not a key definer of the category, since labour hire workers may be placed with their host companies for indefinite periods of time. Indeed, one of the threats posed by labour hire is that it takes a traditional temporary solution—and an acceptable one—and turns it into a permanent problem. Leaving aside this issue, the AWIRS definition makes it clear that the agency pays the worker.

The Australian Bureau of Statistics (ABS) in its recent ‘Forms of Employment’ survey took a similar approach. Labour hire workers show up in this survey as ‘persons paid by an employment agency’ (ABS 2000, Table 12). The ABS Census data also provides indirect information on labour hire through two of its industry categories Employment Placement Services and Contract Staff Services. In other words, the most common terminology amongst the data collectors is ‘employment agency’ not labour hire. *It is very clear, however, that a labour hire arrangement is in place, because in each data collection the ‘agency’ is paying the wages of the worker, not just accepting a fee and passing that worker onto the host company.* For this reason, we can view the data on the extent of ‘agency workers’, despite its various shortcomings, as the appropriate data for this topic. The use of the term ‘employment agency’ does not imply the ATO framework. However, to be consistent with the data collection categories I will continue to use the term agency worker when presenting this data. For this reason, throughout this discussion paper, the terms labour hire and agency worker should be regarded as interchangeable (unless it is indicated otherwise).

Figure 2.3 Service firm arrangements

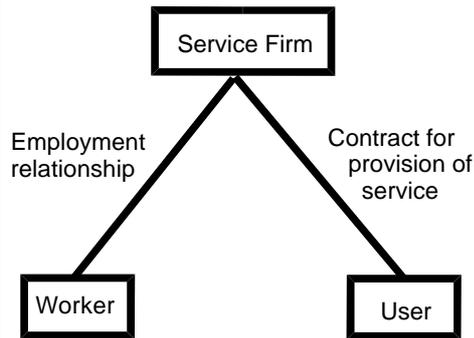


Figure 2.4 Labour hire arrangements

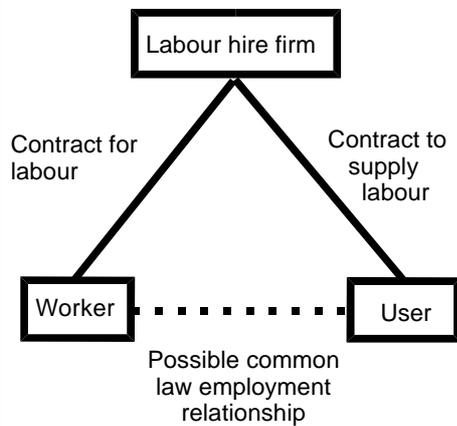
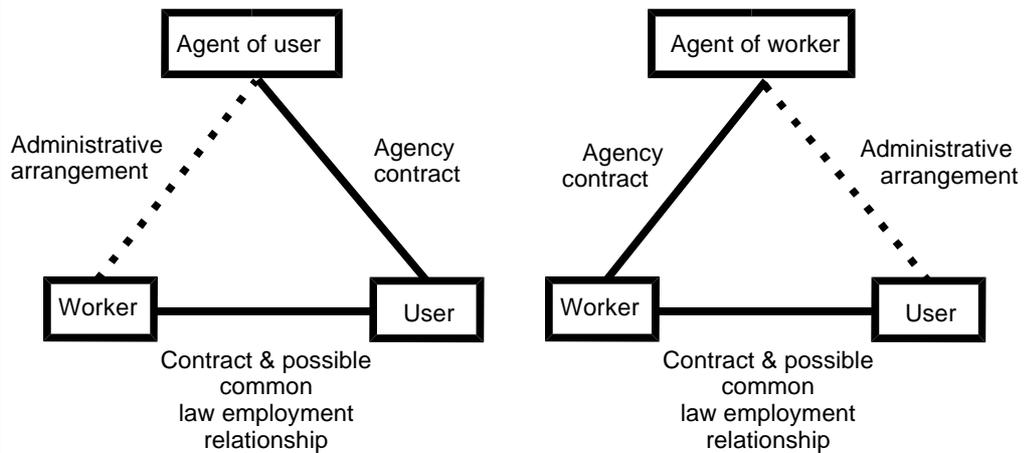


Figure 2.5 Employment agency arrangements



Source for all figures: ATO, SGR 93/2

3. The extent of labour hire

Introduction

How many labour hire workers are there in NSW? The figures range from 14,440 (using the 1996 Census) to 30,000 (using the 1998 Labour Force Survey). The second figure is more reliable and also more recent. AWIRS data for 1990 and 1995 showed a doubling in the number of labour hire workers in this five year period. So, if we assume a similar rate of growth for the latter part of the 1990s (a conservative assumption) then *the most likely figure for the year 2000 is about 42,000 labour hire workers in NSW.*

This may appear to be a small figure, but the significance of labour hire firms on the industrial landscape is not captured in the numbers working for them *but in the number of firms engaging their services—the host companies.* In NSW in 1995, over 20 per cent of workplaces (with 20 or more employees) were making use of labour hire workers. We shall see later that some of the issues raised by the growth in the labour hire industry revolve around their impact on host companies rather than just their own employment standards. More importantly, it is the growth in labour hire as an industry—and the consequent expansion in this mode of employment—which is the issue which most critically needs to be addressed.

Before looking more closely at the characteristics of labour hire workers and host companies we need to briefly examine the nature of the data used for this analysis. As mentioned in the introduction, good statistical data on the labour hire industry is not readily available and constitutes one of the major gaps in our knowledge.

Nature of the data

The estimate of 42,000 labour hire workers is based on a recent ABS Labour Force Survey, Forms of Employment (ABS 2000), in which the ABS specifically undertook a study of non-standard employment in the labour market. This survey showed a national figure of 84,300 workers who reported that they were paid by an employment agency. No NSW data was released because the figures were too small for useful cross tabulations, but the NSW state total was 30,000. If we then update this 1998 figure by 20 per cent per year (the AWIRS rate of growth) we arrive at a figure of 42,000.

The ABS Forms of Employment survey specifically asked respondents if they were paid by an employment agency. Because of this targeted questioning, the survey is very precise. By contrast the Census is a self-completion exercise and respondents are only asked for the name of their employer and the nature of his/her business. The number of agency workers shown by the Census is likely to be a severe under-estimation because respondents may not be coded to the correct industry code if their employment agency is not listed on the ABS Business Register. Rather, they are coded to the industry appropriate to the kind of work

which they are undertaking (eg. metal fabrication), which may mean that they are slotted into a category like manufacturing rather than employment agencies. This is more likely to happen with the small labour hire firms because they are less likely to be on the ABS Business Register.

Unfortunately, the more precise source of data—the Forms of Employment Survey—does not provide NSW data. Nevertheless, we can make use of the national data to get a general picture of some of the characteristics of labour hire workers and these are likely to be similar in NSW. This analysis is presented in Section 1 and provides information on the composition of labour hire workers according to various characteristics.

Despite the problem of undercounting, the Census data is still useful because it is specific to NSW and it contains some important data items (particularly employment status). As a 1996 data source, it is unfortunately somewhat dated. The analysis based on the Census is presented in Section 2 and again presents information on the composition of labour hire workers.

Information on host companies is readily available in the data generated from the Main Survey in AWIRS95 (the 1995 Australian Workplace Industrial Relations Survey). Again this data is somewhat dated but is the only credible data available for host companies which is available for NSW. Surveys done by consulting firms (such as KPMG) are not reliable nor useful because of the poor response rates (which can be as low as 25 per cent and even 5 per cent), the very small number of observations and the absence of NSW data.

The AWIRS95 data is presented in Section 3 in the form of employee estimates and workplace estimates. In the case of the former, we look at the incidence of agency workers across various kinds of workplaces (industry, size etc). In the case of the latter, we examine the characteristics of those workplaces where agency workers are to be found.

Reliable statistical information on the employment agencies themselves is one of the main gaps in our knowledge of this industry. At one end of the market are the large well known multinational firms—such as the US-based Manpower and the European-based Adeco—and some large local firms, such as Skilled Engineering. At the other end of the market are found the small ‘mum and dad’ operators. Table 3.1 summarises one of the few reliable sets of statistics on the scale of the industry for the three main Australian states.

Table 3.1: Labour hire firms in three Australian states- firm size estimates

| State | Under 10 | 10 to 49 | 50 to 199 | 200 plus | Total |
|------------|----------|----------|-----------|----------|-------|
| NSW | 270 | 95 | 40 | 8 | 413 |
| Victoria | 202 | 86 | 26 | 10 | 324 |
| Queensland | 149 | 81 | 27 | 8 | 265 |
| Total | 621 | 262 | 93 | 26 | 1,002 |

Source: Hargraves (1999), based on ABS data.

These firm size bands are the conventional ABS categories, but how relevant are they for measuring labour hire firms? Many workers work for more than one labour hire firm, and many workers are 'dormant' on the books of labour hire companies. Because of the absence of further reliable statistical data on labour hire firms, the following sections will not deal with the demographics of labour hire firms.

Issues raised:

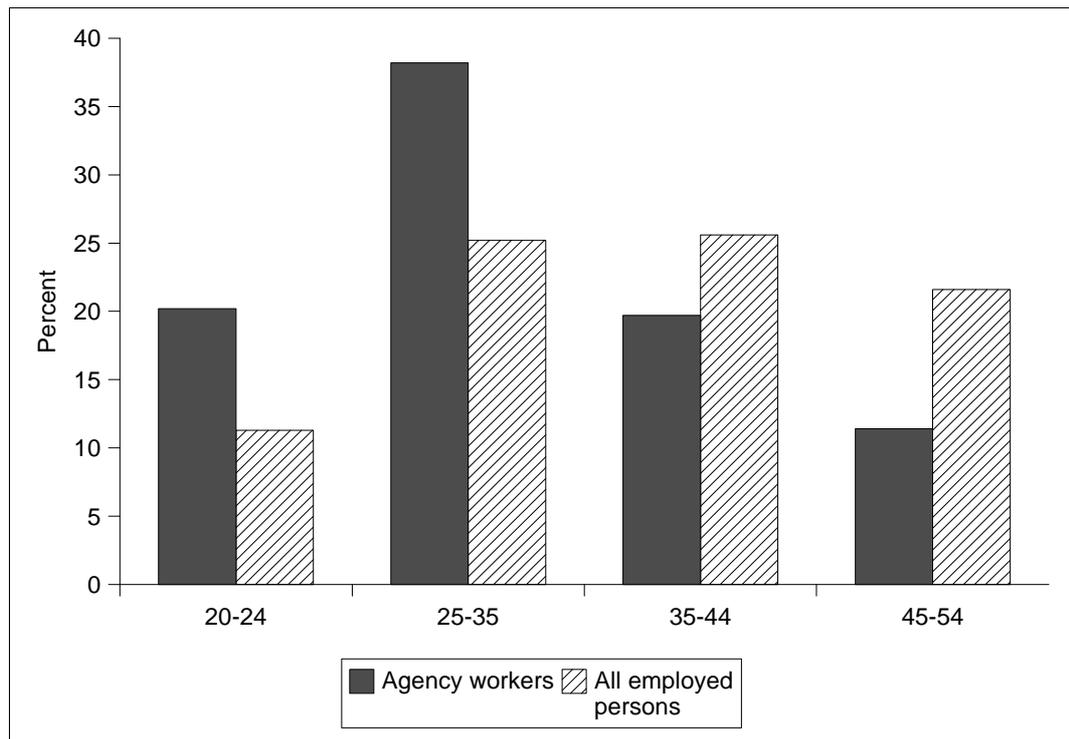
Particular issues raised are:

- 1. how many labour hire workers are working at any one point in time (labour market stocks)?**
- 2. how many workers pass through the labour hire industry over a period of time (labour market flows)?**
- 3. how accurate are the firm size estimates?**
- 4. how many people are 'dormant' on the books of labour hire firms?**
- 5. what is the average amount of work which a labour hire worker gains through a labour hire firm, and does this differ for different categories of worker?**
- 6. what are the characteristics of the labour hire firms and how does this differ by firm size?**

Section 1: labour hire workers—the national profile

The profile of labour hire workers provided by the Forms of Employment survey are shown in a number of charts (they will be termed ‘agency workers’ for this discussion). This profile shows that they are quite a distinctive group of workers, in terms of both age and gender. Women make up 53 per cent of labour hire workers, whereas they only constitute 44 per cent of employed persons. They are also more likely to be younger than are employed persons generally, as shown in Figure 3.1.

Figure 3.1: Age profile of agency workers



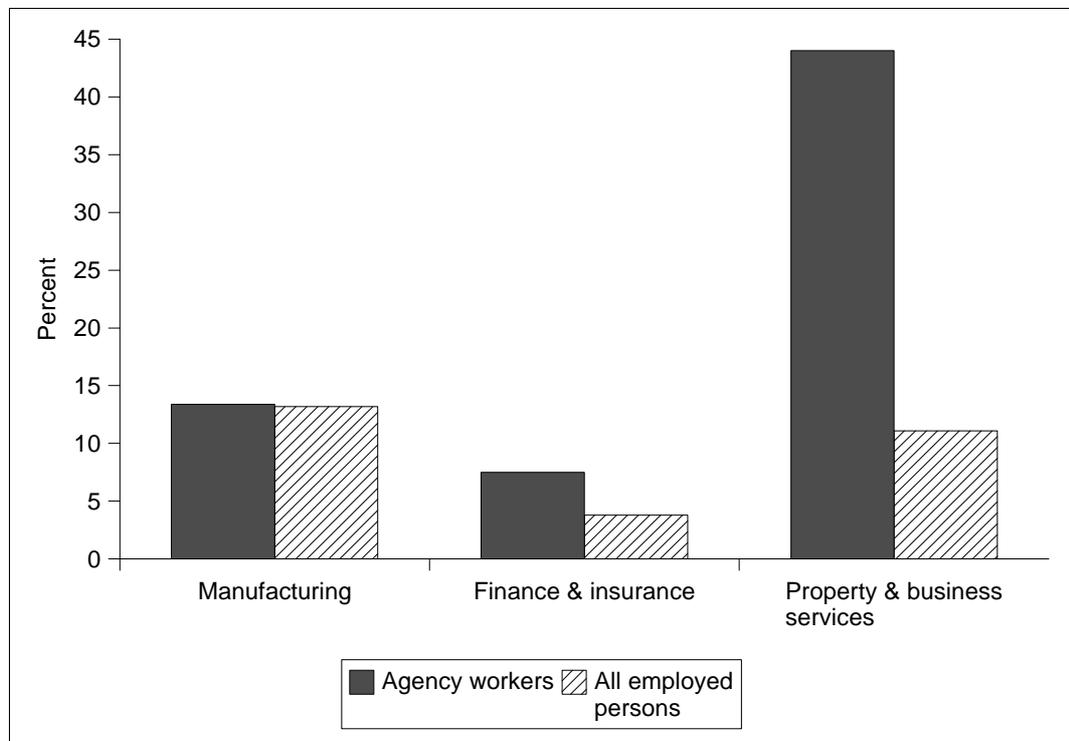
Source: ABS Forms of Employment, Table 12 (Cat. No. 6359.0)

Agency workers predominantly work in three industries: manufacturing, finance and insurance; and property and business services (Figure 3.2). This last industry—property and business services—constitutes their major area of employment, with 44 per cent of all agency workers employed there. They are, moreover, massively over-represented in this industry, since only 11 per cent of all employed persons are to be found in that industry. This industry profile suggests that the traditional domain of labour hire—the provision of temporary secretarial workers—is still predominant. There is, nevertheless a distinct subset which is reflected in the manufacturing category and in the blue-collar occupations shown in Figure 3.3.

Figure 3.3 also shows the dominance of the traditional temporary secretarial occupations. Nearly 40 per cent of all agency workers are in those occupations, with the next largest grouping coming from professional occupations (computer professionals are particularly common). Only about 21 per cent of all persons are to be found in these clerical groupings, so the over-representation of these

occupations in the labour hire industry is very pronounced. Despite the white-collar dominance amongst agency workers, it is noteworthy that labourers constitute a significant proportion of agency workers and they are also over-represented in the labour hire industry.

Figure 3.2: Industry background of agency workers

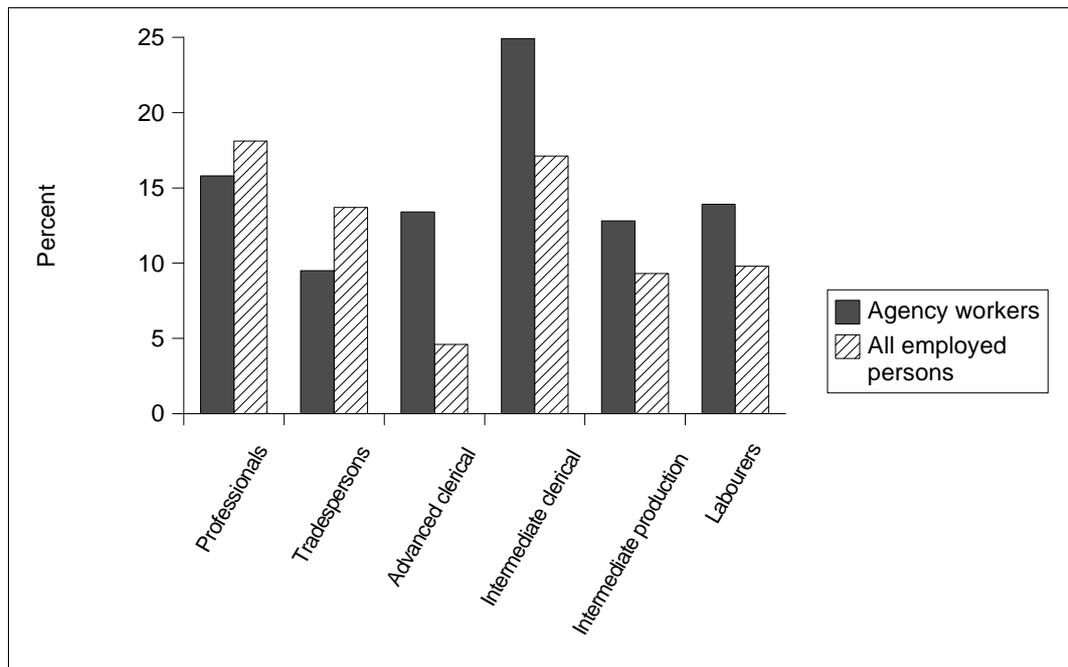


Source: ABS Forms of Employment, Table 12 (Cat. No. 6359.0)

In summary, this national profile of labour hire workers shows two significant divisions:

3. a white-collar division, mainly drawn from secretarial occupations and professionals, which is based in business and property services, and in finance and insurance. This gives the labour hire industry a much more feminised and younger profile.
4. a blue-collar division, mainly drawn from labourers, machine operators and tradespersons. These workers are more likely to be male and older in age than those working in the white collar division. While these workers are predominantly located in manufacturing, they are also likely to be spread across a range of industries (since the total proportion of blue-collar agency workers is 36 per cent and the proportion in manufacturing is only 13 per cent).

Figure 3.3: Occupational background of agency workers



Source: ABS Forms of Employment, Table 12 (Cat. No. 6359.0)

Section 2: Labour hire workers—the NSW picture

In this section I present the data in tables. While the picture is less clearcut than in charts, it allows for simultaneous comparisons with other states and with other industries. It is worth noting that the Census data has come from an earlier project which ACIRRT carried out on non-standard employment in manufacturing and the educational and occupational categories reflect this leaning.¹

Table 3.2 shows that the national gender balance towards women in the labour hire industry carries over to NSW. Table 3.3 suggests that skilled vocational qualifications amongst labour hire workers are less common in NSW than in other states (and much less common than in other industries). This pattern is also borne out in the occupational picture (Table 3.4) where trades occupations amongst labour hire workers are less common in NSW than in other states.

¹ The Census data also contains the administrative employees of the labour hire companies, and the administrative employees of fee-charging placement agencies. Thus actual labour hire workers are only a subset of the totals shown in all the tables.

Table 3.2: Labour hire workers by gender, NSW 1996

| Gender | Labour Hire Industry | | | | | |
|--------|----------------------|-------|--------------|-------|-----------|-------|
| | NSW | | Other States | | Total | |
| | No. | % | No. | % | No. | % |
| Male | 6,711 | 43.5 | 14,324 | 46.1 | 21,035 | 45.2 |
| Female | 8,729 | 56.5 | 16,740 | 53.9 | 25,469 | 54.8 |
| Total | 15,440 | 100.0 | 31,064 | 100.0 | 46,504 | 100.0 |
| Gender | Other Industries | | | | | |
| | NSW | | Other States | | Total ` | |
| | No. | % | No. | % | 0 | % |
| Male | 1,601,467 | 56.8 | 3,192,443 | 57.0 | 4,793,910 | 57.0 |
| Female | 1,216,600 | 43.2 | 2,405,381 | 43.0 | 3,621,981 | 43.0 |
| Total | 2,818,067 | 100.0 | 5,597,824 | 100.0 | 8,415,891 | 100.0 |

Source: unpublished data from ABS Census 1996.

Table 3.3: Labour hire workers by educational qualifications, NSW 1996

| Education | Labour Hire Industry | | | | | |
|---------------------|----------------------|-------|--------------|-------|-----------|-------|
| | NSW | | Other States | | Total | |
| | No. | % | No. | % | No. | % |
| Skilled vocational | 1,423 | 9.2 | 3,593 | 11.6 | 5,016 | 10.8 |
| Other qualification | 14,017 | 90.8 | 27,471 | 88.4 | 41,488 | 89.2 |
| Total | 15,440 | 100.0 | 31,064 | 100.0 | 46,504 | 100.0 |
| Education | Other Industries | | | | | |
| | NSW | | Other States | | Total ` | |
| | No. | % | No. | % | 0 | % |
| Skilled vocational | 427,045 | 15.2 | 825,029 | 14.7 | 1,252,074 | 14.9 |
| Other qualification | 2,391,022 | 84.8 | 4,772,795 | 85.3 | 7,163,817 | 85.1 |
| Total | 2,818,067 | 100.0 | 5,597,824 | 100.0 | 8,415,891 | 100.0 |

Source: unpublished data from ABS Census 1996.

Table 3.4: Labour hire workers by trade occupations, NSW 1996

| Occupation | Labour Hire Industry | | | | | |
|-----------------------|----------------------|-------|--------------|-------|-----------|-------|
| | NSW | | Other States | | Total | |
| | No. | % | No. | % | No. | % |
| Metal & mech trades | 526 | 3.4 | 1,703 | 5.5 | 2,229 | 4.8 |
| Construction trades | 284 | 1.8 | 1,036 | 3.3 | 1,320 | 2.8 |
| All other trades | 247 | 1.6 | 840 | 2.7 | 1,087 | 2.3 |
| Plant operators | 260 | 1.7 | 664 | 2.1 | 924 | 2.0 |
| All other occupations | 14,123 | 91.5 | 26,821 | 86.3 | 40,944 | 88.0 |
| Total | 15,440 | 100.0 | 31,064 | 100.0 | 46,504 | 100.0 |
| Occupation | Other Industries | | | | | |
| | NSW | | Other States | | Total | |
| | No. | % | No. | % | No. | % |
| Metal & mech trades | 98,596 | 3.5 | 225,444 | 4.0 | 324,040 | 3.9 |
| Construction trades | 88,711 | 3.1 | 168,225 | 3.0 | 256,936 | 3.1 |
| All other trades | 189,430 | 6.7 | 389,935 | 7.0 | 579,365 | 6.9 |
| Plant operators | 105,119 | 3.7 | 229,915 | 4.1 | 335,034 | 4.0 |
| All other occupations | 2,336,211 | 82.9 | 4,584,305 | 81.9 | 6,920,516 | 82.2 |
| Total | 2,818,067 | 100.0 | 5,597,824 | 100.0 | 8,415,891 | 100.0 |

Source: unpublished data from ABS Census 1996.

Table 3.5 allows us to examine the question of ‘contractors’ within labour hire. As mentioned earlier, when discussing Figure 2.2, the employment status of workers within the labour hire industry has been one of the main areas of concern, particularly its legal ramifications. Table 3.5 is one of the few sources of data which cross tabulates employment status with the labour hire industry. It appears to show that ‘own account workers’ constitute a tiny proportion of the industry (just over one per cent). These are likely to be the ‘independent contractors’ shown in Figure 2.2. The ‘dependent contractors’, on the other hand, are likely to be rolled into the employee category since many of these workers would regard themselves as employees when filling in their Census form. Data on ‘dependent contractors’ in the Forms of Employment Survey suggests that this group constitutes about 15 per cent of all ‘contractors’. On this basis, the group of labour hire workers who are likely to be ‘dependent contractors’ is very tiny. Even if we double these estimates to bring the data up to date, categories like dependent and independent contractors remain very small proportions of the overall labour hire workforce. They are, however, likely to be a much larger proportion within some industry sectors (particularly construction and manufacturing).

Table 3.5: Labour hire workers by employment status, NSW 1996

| Employment status | Labour Hire Industry | | | | | |
|-----------------------|----------------------|-------|--------------|-------|-----------|-------|
| | NSW | | Other States | | Total | |
| | No. | % | No. | % | No. | % |
| Employee | 15,193 | 98.4 | 30,372 | 97.8 | 45,565 | 98.0 |
| Employer | 49 | 0.3 | 172 | 0.6 | 221 | 0.5 |
| Own account worker | 169 | 1.1 | 445 | 1.4 | 614 | 1.3 |
| Contrib family worker | 29 | 0.2 | 75 | 0.2 | 104 | 0.2 |
| Total | 15,440 | 100.0 | 31,064 | 100.0 | 46,504 | 100.0 |
| Employment status | Other Industries | | | | | |
| | NSW | | Other States | | Total | |
| | No. | % | No. | % | No. | % |
| Employee | 2,576,083 | 91.4 | 5,081,778 | 90.8 | 7,657,861 | 91.0 |
| Employer | 66,731 | 2.4 | 139,150 | 2.5 | 205,881 | 2.4 |
| Own account worker | 148,417 | 5.3 | 322,215 | 5.8 | 470,632 | 5.6 |
| Contrib family worker | 26,836 | 1.0 | 54,681 | 1.0 | 81,517 | 1.0 |
| Total | 2,818,067 | 100.0 | 5,597,824 | 100.0 | 8,415,891 | 100.0 |

Source: unpublished data from ABS Census 1996.

Section 3: Host workplaces-the NSW picture

Information on host workplaces for labour hire workers is quite extensive. The data provided by AWIRS95 is available for NSW and provides insights into the kinds of workplaces where agency workers (as AWIRS terms them) are to be found. The one major restriction in the scope of the population in AWIRS95—workplaces with 20 or more employees—is not a major problem in this analysis because most agency workers are to be found in larger workplaces.

There are two kinds of estimates available with AWIRS95:

1. ‘worker estimates’ which provide the incidence of agency workers according to various characteristics. These estimates are presented as a ‘percentage of all employees’, which is a rather strange ratio because the data on agency workers is not included in the total count of employees for that workplace. Generally, percentages express the proportion of a subset to the total, but that practice has not been followed by the AWIRS team (they use the phrase ‘percentage of regular employees’ {Morehead, et al. 1997, p. 408}). I have followed their procedure for consistency. This ratio is a useful one for measuring the incidence of agency workers since the employee total is the most meaningful reference point. These estimates are discussed in Section 3a. It is important to keep in mind that Section 3a reports on the *incidence* of agency workers, that is, what proportion of some characteristic (eg. industry) is represented by agency workers. Sections 1 and 2, on the other hand, reported on the *composition* of agency workers, that is, how agency workers were distributed

across some characteristic (eg. industry, occupation).

2. ‘workplace estimates’ which provide an indication of how many workplaces engage agency workers. These estimates are discussed in Section 3b. (Again, the proportions discussed refer to the incidence of workplaces with agency workers).

Section 3a: Worker estimates

Agency workers make up 2.2 per cent of all employees (in workplaces with 20 or more employees). The incidence in NSW is, however, much lower—just 1.1 per cent—and considerably below that for other states (2.9 per cent).

Table 3.6 shows that mining has the highest incidence of agency workers (at 4.2 per cent) followed by finance and insurance and property and business services. One of the state comparisons which is particularly dramatic is the very high incidence of agency workers in health and community services in states other than NSW (10 per cent). Victoria contributes strongly to this high incidence.

Table 3.6: Incidence of agency workers by industry, NSW 1995

| Industry | NSW % | Other states % | Total % |
|----------------------------------|--------------|-----------------------|----------------|
| Mining | 4.2 | 3.3 | 3.5 |
| Manufacturing | 1.2 | 2.7 | 2.2 |
| Electricity, water, gas | 0.9 | 3.1 | 2.2 |
| Construction | 0.7 | 3.4 | 1.9 |
| Wholesale trade | 1.7 | 1.9 | 1.8 |
| Retail trade | 0.2 | 0.3 | 0.3 |
| Accommodation, cafes | 0.5 | 0.7 | 0.6 |
| Transport & storage | 1.8 | 2.8 | 2.4 |
| Communication | 1.4 | 1.6 | 1.5 |
| Finance & insurance | 3.2 | 4.9 | 4.2 |
| Property & business services | 2.3 | 4.6 | 3.8 |
| Government | 0.5 | 1.6 | 1.2 |
| Education | 0.3 | 1.0 | 0.8 |
| Health & community services | 0.7 | 10.0 | 5.8 |
| Cultural & recreational services | 1.0 | 0.6 | 0.8 |
| Personal services | 0.3 | 0.5 | 0.4 |
| Total | 1.1 | 2.9 | 2.2 |

Source: AWIRS95, Main Survey, Workplace Characteristics

Table 3.7: Incidence of agency workers by workplace size, NSW 1995

| Workplace size | NSW % | Other states % | Total % |
|----------------|-------|----------------|---------|
| 20-49 | 1.2 | 2.2 | 1.9 |
| 50-99 | 0.9 | 2.4 | 1.8 |
| 100-199 | 1.0 | 2.7 | 2.0 |
| 200-499 | 1.6 | 4.1 | 3.1 |
| 500+ | 0.8 | 3.1 | 2.2 |
| Total | 1.1 | 2.9 | 2.2 |

Source: AWIRS95, Main Survey, Workplace Characteristics

The distinctiveness of NSW is quite evident in Table 6. Whereas in other states the larger workplaces (200 upwards) tend to have the highest incidence of agency workers, in NSW this pattern is much weaker. In NSW the 200-499 size band has the highest incidence, but the 500 plus size band has a much smaller incidence (relative to other states) and the smallest size band has a higher relative incidence. When it comes to the public sector / private sector distinction (not shown) there is little difference between NSW and the other states (in terms of relative incidence).

Turning to the union characteristics of workplaces, there is something very distinctive about NSW. Table 7 shows that workplaces which have both unions and delegates in NSW have an incidence of agency workers which is below the NSW average, whereas in other states these kinds of workplaces have an incidence which is above their average. Even more striking is the difference in non-unionised workplaces. In other states, the incidence of agency workers in these kinds of workplaces is slightly below their average, but in NSW the incidence of agency workers in non-unionised workplaces is double the average incidence. *Clearly, there is something about the unionised sector in NSW which appears to have kept a lid on the incidence of agency workers, and this has not been the case in other states.*

Table 3.8: Incidence of agency workers by union characteristics, NSW 1995

| Union characteristics | NSW % | Other states % | Total % |
|-----------------------|-------|----------------|---------|
| No union | 2.2 | 2.5 | 2.4 |
| Union - no delegate | 1.0 | 2.3 | 1.8 |
| Union - delegate | 0.8 | 3.1 | 2.3 |
| Total | 1.1 | 2.9 | 2.2 |

Source: AWIRS95, Main Survey, Workplace Characteristics

Section 3b: Workplace estimates

When we take a workplace perspective on the question of agency workers we find many of the same patterns as observed in Section 3a. There are, however, additional insights which become apparent. *The most important of these is the observation that NSW is almost comparable with the other states when it comes to the proportion of workplaces which have agency workers—just over 20 per cent (compared to 22 per cent in other states).* By contrast, we have just seen in Section 3a that NSW is only about one third as likely to have agency workers as are the other states. *In other words, there may not be as many agency workers in NSW compared to the other states (relatively speaking) but they are just as pervasive across workplaces.* (Though it needs to be kept in mind that in some workplaces there may be only 1 or 2 agency workers. This measure of workplace incidence does not distinguish how extensive the agency worker presence is in any one workplace.)

Table 3.9: Incidence of workplaces with agency workers by industry, NSW 1995

| Industry | NSW % | Other states % | Total % |
|----------------------------------|-------|----------------|---------|
| Mining | 49.3 | 42.3 | 44.4 |
| Manufacturing | 21.0 | 24.3 | 23.0 |
| Electricity, water, gas | 21.3 | 29.0 | 25.7 |
| Construction | 15.1 | 35.8 | 25.8 |
| Wholesale trade | 44.5 | 22.7 | 31.7 |
| Retail trade | 3.4 | 3.5 | 3.5 |
| Accommodation, cafes | 8.3 | 12.6 | 11.1 |
| Transport & storage | 25.9 | 24.8 | 25.3 |
| Communication | 5.8 | 24.1 | 17.1 |
| Finance & insurance | 53.9 | 36.4 | 43.6 |
| Property & business services | 35.5 | 31.0 | 32.6 |
| Government | 16.5 | 38.4 | 30.9 |
| Education | 16.2 | 17.4 | 17.1 |
| Health & community services | 16.8 | 42.0 | 31.5 |
| Cultural & recreational services | 30.7 | 6.1 | 14.3 |
| Personal services | 4.2 | 16.5 | 12.2 |
| Total | 20.4 | 22.0 | 21.4 |

Source: AWIRS95, Main Survey, Workplace Characteristics

The industry picture in Table 3.9 is similar to the pattern we found in Table 3.6, with mining and finance and insurance being very heavy users of agency workers. In these industries about one half of all workplaces make use of agency workers. The finance and insurance industry is particularly noteworthy because

the figure is nearly 54 per cent, whereas in other states it is only 36 per cent. Wholesale trade in NSW is also notable for its use of agency workers (at 45 per cent, compared to a figure of 23 per cent in other states).

When it comes to workplace size, the larger workplaces are much more likely to have agency workers. Nearly half of all NSW workplaces in the 500 plus size band have engaged agency workers and in other states the figure is nearly 60 per cent. The distinctiveness of NSW which we saw in Table 3.7 is missing in Table 3.10. When it comes to workplaces (as opposed to workers) the pattern between NSW and the other states is roughly similar.

Table 3.10: Incidence of workplaces with agency workers by workplace size, NSW 1995

| Workplace size | NSW % | Other states % | Total % |
|----------------|-------|----------------|---------|
| 20-49 | 13.4 | 14.2 | 13.9 |
| 50-99 | 18.2 | 22.3 | 20.8 |
| 100-199 | 34.3 | 35.9 | 35.3 |
| 200-499 | 38.2 | 43.6 | 41.5 |
| 500+ | 49.5 | 58.5 | 55.3 |
| Total | 20.4 | 22.0 | 21.4 |

Source: AWIRS95, Main Survey, Workplace Characteristics

The major insight into the connection between non-unionised workplaces and agency workers which we saw in Table 3.8 is reinforced in the workplace picture (Table 3.11). We have seen that NSW and the other states are comparable when it comes to the incidence of workplaces with agency workers (the 20 per cent / 22 per cent averages), but in non-unionised workplaces there is a very large difference. In NSW one quarter of all non-unionised have agency workers, whereas in other states, the figure is nearly half this (just 13 per cent).

Table 3.11: Incidence of workplaces with agency workers by union characteristics, NSW 1995

| Union characteristics | NSW % | Other states % | Total % |
|-----------------------|-------|----------------|---------|
| No union | 24.7 | 13.1 | 17.3 |
| Union - no delegate | 15.9 | 22.3 | 20.1 |
| Union - delegate | 20.1 | 26.4 | 24.1 |
| Total | 20.4 | 22.0 | 21.4 |

Source: AWIRS95, Main Survey, Workplace Characteristics

Issues raised:

The AWIRS data raises important questions around whether the pattern unearthed in 1995 is still in place, particularly:

1. does NSW still have a lower incidence of labour hire workers than the other states?

is the connection between non-union workplaces and the spread of labour hire a robust one, and is it still the case in the year 2000?

4. Core issues arising from the use of labour hire

What are the core issues which arise from the growth of labour hire? In much of the literature there are a number of concerns which researchers express: issues like lack of training, poor OH&S, and downward pressure on wages and conditions. These are often, however, the result of the growth of non-standard employment more generally, particularly the increased use of ‘casuals’ and contracting out. It is therefore important in this section to delineate which issues are general problems which arise when firms depart from modes of ‘standard employment’, and which are problems which are rooted in the *form* which that non-standard employment takes, specifically the use of labour hire.

Figures 2.1 and 2.2 are helpful in this regard. When firms make use of in-house casuals (Figure 2.1, cell 3) or choose to outsource some function like cleaning, or the canteen (Figure 2.2 cell 7), they may indeed be placing downward pressure on both wages and conditions within their workplaces. For there to be issues originating in the use of labour hire, the forms of employment and mode of engagement must encompass cells 4, 5 or 6 of Figure 2.2. This means that there are three kinds of issues which the growth in labour hire brings up:

1. the impact on the host company of the presence of labour hire workers (and these issues overlap with many of the more general issues mentioned above with regard to non-standard employment);
2. the ambiguity in the status of the labour hire worker, particularly when forms of employment like ‘dependent contractor’ are involved;
3. the wider ramifications of the growth in the actual category of labour hire. These include the concern that standard employment is being slowly eroded by a form of employment in which the worker-employer relationship has been radically reconfigured through the presence of a labour supplying company. In essence, one works on the premises and under the control of a person who is not one’s employer. The rights and obligations of each party within the traditional employment contract become nebulous when this kind of arrangement comes into place. There is also a serious long-term impact on equity within the labour market which arises from the potential spread of labour hire.

Impact on the host company

A number of recent research reports have highlighted the adverse impact which the presence of labour hire workers have on host workplaces (Watson et. al.1999, Hall and Bretherton 1999; Gryst 2000). These include:

- ◆ downward pressure on wages and working conditions;
- ◆ increased job insecurity for the host company’s employees;

- ◆ undermining of OH&S standards;
- ◆ deterioration in shop-floor morale;
- ◆ undermining of trade union membership in workplaces and of union rights amongst workers;
- ◆ victimisation of workers who object to management practices (labour hire workers don't need to be 'sacked', they just get sent back);
- ◆ undermining the provision of training within the host company, and ultimately within the wider economy;

Two recent reports by ACIRRT researchers provide useful summaries of these issues. One was specific to non-standard employment within manufacturing, the other looked at training issues more broadly.

As part of their research on non-standard employment in manufacturing, ACIRRT researchers spoke with union delegates from the AMWU about the impact of 'casuals' on workplaces (Watson et al 1999). While the comments they collected reflected the larger issue of non-standard employment, many of these concerns apply just as sharply to the presence of labour hire workers in host companies. Two areas were particularly important: the impact on training and OH&S and the impact on shopfloor morale.

Amongst delegates it was common to hear of inadequate training for casuals. In many cases there was no induction for casuals or contractors and no specific training for the particular job ('deep end stuff' as one delegate put it). Casuals were just put straight to work on the machinery, sometimes after only a brief introduction to its workings. This situation appeared to be common in both Sydney and Melbourne, and other ACIRRT research into the mining industry also shows similar patterns occurring there. The implications for OH&S are severe: stories of accidents and breaches of OH&S guidelines were common amongst delegates.

For various reasons permanent workers feared the presence of non-standard employees like casuals and contractors. They saw their jobs being at risk from the growing trend towards casualisation. Even in the short-term, their conditions were under attack. Quality control suffered from the presence of untrained workers and this made their own jobs that much harder to do. Often casuals could not work as fast as the permanents and this increased the workload and stress of the permanents.

For these reasons, a kind of 'guerilla war' was being conducted on the shop floor between the permanent workforce and the casuals. Sometimes it took the form of restricting their training, sometimes it involved banning them from certain machinery, most often it took the form of cold-shouldering them. The result was poor shop floor morale for everyone. This guerilla war also had serious implications for shop-floor solidarity and unionisation.

The impact on training and skills formation was also examined at length by ACIRRT researchers, Hall and Bretherton (1999), in their report for the NCVER (National Centre for Vocational Education Research). The organisations they examined reported a range of adverse effects from using labour hire or outsourcing arrangements. These included (to quote Hall and Bretherton 1999, p.1):

- ◆ De-skilling of the existing employee profile;
- ◆ Loss of institutional memory;
- ◆ Loss of research and development capacity and loss of problem solving ability;
- ◆ Loss of in-house capacity for functional flexibility;
- ◆ Loss of quality and control over quality which may be compromising any cost savings associated with the use of labour hire/outsourcing.

Hall and Bretherton were particularly concerned with the larger impact of non-standard work on VET (vocational education and training) more generally. They found that the growth in non-standard work not only diminished the extent of training, but it also meant that ‘the balance of the types of training provided has shifted with negative consequences for Australian workers and for Australia’s skills base’ (Hall and Bretherton 1999, p. 1). They argue that:

As casual employment, outsourced arrangements and labour hire have become more common so too have employers increasingly restricted their training provision to highly task-specific and job-specific training. This implies that there may be a serious training deficit emerging with respect to comprehensive trade and vocational training and more generalist training (Hall and Bretherton 1999, p. 1).

In looking at the labour hire firms themselves, Hall and Bretherton noted that these firms were not well placed to invest in training because of the tight margins they operated under the highly competitive nature of their industry (Hall and Bretherton 1999, p. 2).

High levels of competition also give rise to ‘rogue’ operators in any industry and labour hire has been no different. Both union delegates and spokespersons for the large labour hire firms have argued that one of the key issues in regulating labour hire is cleaning up ‘shonky practices’ and ‘getting rid of the cowboys’. They regard the downward pressure on wages and conditions to be a product of too much competition and the resulting practice of cutting corners to win contracts.

The large labour hire firms have been particularly keen to see improved standards in the industry, since this allows them to put in place longer-term strategies, such as investing in training and ensuring employment standards are maintained. An example of this was the agreement reached in November 1997 between Manpower Australia and the ACTU. The ACTU won acceptance for full-

time, in-house employment by recruiters, but conceded the reality of non-permanent employment. The deal committed Manpower to training and skills development of employees at all levels. The ACTU's spokesperson, Max Ogden, commented that 'The agreement committing Manpower to significant training of their employees—which has traditionally not been the case with labour hire companies—will see a system that enables people to access skills no matter where they start'. In turn, Manpower's spokesperson, Chris McKay, commented, 'The age of the tradesman is returning. Trades nowadays are becoming technology driven. We as a company have a commitment to maintaining and upgrading employees' skills'. Our agreement with the ACTU and also our internal training programs offer good protection to the blue-collar worker' (Crossweller 1997).

'Cleaning up' or 'civilising' the industry may be a worthwhile goal, but the labour market problems caused by labour hire are not simply the product of 'rogue operators' or too much competition. As the next two sections show, there are inherent problems in the nature of the industry, problems concerning the status of the agency worker, and problems in the reconfiguration of the employment relationship which the spread of labour hire induces.

Conditions of employment and ambiguity in the status of the agency worker

Much ink has been spilt over the question: what is an employee? In terms of Figure 2.2, this entails asking what is distinctive about the first row, regardless of the particular column. The growth of 'dependent contractors' during the 1990s (Vandenhoevel, A. & Wooden, M., 1995) has given this perennial question a new urgency. The use of 'dependent contractors' *within the labour hire industry* is clearly a subset of this wider issue. It is, nevertheless, an important subset, as the Troubleshooters case in the Victorian building industry showed. Before proceeding to this larger question of 'what is an employee' it is worth briefly examining the Troubleshooters case, making use of an excellent analysis by Fenwick (1992).

In the late 1980s a labour hire firm, Odco Pty Ltd, trading as 'Troubleshooters Available' (TSA) found itself in conflict with building industry unions over the threat posed by TSA to industry standards and to the award system. This led to a lengthy legal battle in the Federal Court in which Odco won its case. The court ruled that the labour hire workers were neither employed by Odco nor by the host company, because an insufficient degree of control had been exercised.

Two issues were at stake in this battle:

1. 'the means by which work relations may be so structured contractually as to remain beyond the centralised arbitration systems';
2. difficulties which arise (in this case because of another dispute over accident compensation) when the distinction at common law between employees and independent contractors becomes blurred (Fenwick 1992, p. 239).

For the building industry unions the immediate problem was that TSA supplied its workers under the guise of independent contractors and undermined various payment practices established under the Victorian Building Industry Agreement (Fenwick 1992, p.242). In the union's eyes, the TSA workers were *employees* and therefore subject to the provisions of this Agreement. More importantly, in the long term,

a proliferation of contract labour-hire of this nature could rapidly weaken the industrial power of unions, reducing the bargaining strength of workers and leading to an erosion of pay and conditions (Fenwick 1992, p.242).

More broadly, the potential spread of contract labour-hire along the lines of TSA threatened the Commonwealth arbitration system, which had only limited power when it came to non-employees. The Odco victory 'confirmed the legality of contractual arrangements designed to bypass arbitral and award mechanisms of industrial regulation' (Fenwick 1992, p. 243). This broader issue is one which I deal with more fully in the next section, where I examine the challenge posed to the industrial relations system by the growth of labour hire. As we shall see, it is an issue which resurfaced in a dramatic fashion during the 1998 waterfront

dispute. For the remainder of this section I deal with the ‘dependent contractor’ issue which the Odco case highlighted.

The employment contract and ‘dependent contractors’

When is a worker an employee and when is he/she an independent contractor? This is a question which the Taxation authorities have been forced to clarify for the purposes of collecting PAYE tax, as well as for other taxes which come under the Superannuation Guarantee Act. Relying on common law, the Australian Taxation Office (ATO) views the relationship between employer and employee as a *contract of service* (originally based on the master/servant relationship) whereas it regards the relationship between an employer and an independent contractor as a *contract for services*.

In its rulings on PAYE tax obligations the ATO discussed at length this distinction between a ‘contract of service’ and a ‘contract for services’. They noted the common law tests which have been applied by the courts in adjudicating this distinction. While no one test by itself proves the case conclusively, when taken together all of the tests assist in the decision. Two of the most important tests are the *control test* and the *integration test*:

1. The control test asks whether the employer has the *right* to control how, when and where the work is done (even if control is not actually exercised)
2. The integration test examines whether the individual’s services are an integral part of the employer’s business or merely ancillary to it. Some of the factors to be taken into account in deciding whether the integration test is satisfied include:
 - (a) whether the relationship between the worker and the master is a continuing one; and
 - (b) whether the worker's activities are effectively restricted to providing services to only one master; and
 - (c) whether the worker generally profits commercially from sound management in the performance of his tasks (Section taken from ATO, SGR 93/1, 21-22.)

Other tests include:

- ◆ results contracts: where the substance of the contract is to achieve a specific results, this implies the contract is one for services;
- ◆ power to delegate: the unlimited power to delegate work suggests that the service provider is an independent contractor;
- ◆ risk: if the worker bears little commercial risk in carrying out the work, then he/she is more likely to be an employee;
- ◆ conditions of engagement: certain conditions are closely bound up with being an employee (benefits like annual and sick leave, long service leave;

superannuation contributions; award benefits). (Taken from ATO, TR 1999/13).

These various considerations about whether a worker is an employee or an independent contractor have been around for a long time. The category of dependent contractor—which blurs the boundaries considerably—is a relatively new development during the 1980s and 1990s and is part of a wider development in forms of employment. In some cases, the emergence of this category in industries like construction has been viewed as a deliberate sham, a device to avoid obligations and responsibilities (on the part of the employer) and to evade tax (on the part of the worker). In other cases, such as bicycle couriers, there has been little benefit to the worker but clearcut advantages to the employer (including cost savings). Whatever the case, the category of ‘dependent contractor’ challenges industrial relations conventions because it threatens long held assumptions about the respective roles of employers and employees. The issue of labour hire takes this challenge one step further. It manages to sever the connection between the employer and the work performed by the employee. Even if cases like *Odco* has decided that the TSA workers were employees, the challenge posed to the industrial relations system by the proliferation of labour hire companies would still remain. It is not just the ambiguity in the status of the labour hire worker which matters, it is the very existence of the ‘labour hire formula’ which poses the challenge.

Issues raised:

- 1. what other legal judgements have been handed down which clarify the relationship between employers and employees which have relevance to the issue of labour hire?**
- 2. what position have industrial tribunals and labour law specialists taken with regards to these issues?**
- 3. what is the status of labour hire workers as codified in enterprise agreements (both registered and unregistered)?**

It would also be worthwhile examining the concept of ‘dual employment’, whereby the labour hire firm and the host company both have employment obligations.

Impact on labour hire workers

The debate around employment status also has practical implications on the ground. Many of the issues raised in the last section—job security, safety and training—are major issues for workers within the labour hire industry. It clearly matters whether workers are engaged by labour hire firms as permanents or as casuals; whether the labour hire firm provides structured training to its workers, or just derisory ‘orientation’; and whether there are prospects for labour hire workers becoming permanent employees within the host company.

Problems with labour hire have been particularly noticeable in the construction industry during the last few years. The CFMEU has launched a campaign to restrict the growth of labour hire within their industry because the union sees this form of labour as detrimental to job security and to safety. They have also been concerned about non-compliance by labour hire firms with their enterprise agreements, particularly those issues relating to workers’ entitlements such as workers compensation payments (Pratley 1999, p. 20).

Much of the material covering the impact of labour hire on the workers deals with industries like construction and manufacturing. It is less clear what the impact of labour hire is in other non-blue collar industries, particularly areas which have traditionally used agency workers (like nursing and office administration).

Hall and Bretherton (1999) captured the essence of the problem succinctly in the sub-title of their report: ‘it’s not my problem’. They found that labour hire firms were reluctant to take responsibility for all of these issues (training, safety, job security etc), as were the host employers.

Labour hire and labour market apartheid

Why does the unrestrained growth of labour hire in certain sectors of the labour market matter? There are two main reasons:

1. standards elsewhere are undermined by ‘poor quality’ sectors since they exert downward pressure on wages and conditions (as the example of clothing outworkers demonstrates);
2. within workplaces a kind of labour market apartheid emerges. There is a kind of *structural* apartheid operating which is based on differing conditions (between permanents and agency workers) and this undermines *fairness* in the operations of the labour market. In addition, this structural apartheid invariably becomes a *demographic* apartheid as well. Certain groups (women, ethnic minorities, etc) usually become over-represented in those poor quality sectors and this undermines principles of EEO within the labour market.

To appreciate the connection between labour hire and these kinds of labour market outcomes it is worth examining the US temporary help industry (THI), which has grown enormously during the 1980s and 1990s. It is worth briefly looking at the connections between this growth and the issue of deregulated

sectors because *the US experience is a pointer to what the growth of labour hire in Australia may lead to in a few years time*. I will draw on an illuminating study by Ryan and Schmit (1996) which explored the links between EEO and the temporary help industry.

Ryan and Schmit began by noting research which showed the emergence of what I have termed ‘demographic apartheid’: ‘temporary assignments are heavily segregated by sex and race, with women holding more of the clerical jobs and African-Americans being assigned the “dirty” jobs’ (1996, p. 167). They further noted (though did not name) the extent of under-employment prevalent within the THI. Only about one-fifth of those working for a temporary help firm are on assignment on any given day. In addition, ‘applicants’ may pass through the THF’s process, yet still not be ‘employed’ because they are only the books of the agency, not on placement with a host company.

The implications of these last two observations are quite profound and takes us back to the enduring question: what is an employee? What labour hire gives rise to is the situation where someone is nominally ‘employed’, but not actually working and *therefore not being paid*. From the perspective of labour demand, the labour hire formula fosters a just-in-time approach to labour deployment. From the perspective of labour supply—the experience of the ‘worker’—we find a situation where people sit by the phone waiting to see if they will get an income for that day. Are they employed or not? If they seek other work, and of necessity refuse assignments from the labour hire firm, they usually lose further offers of work and are possibly even taken off the books. They are not ‘sacked’ as such, but that is only because they weren’t employed in the first place. In practice, however, it amounts to the same thing—a loss of livelihood—but without any of the due processes which normally attach to employment relations. This demonstrates that Gonos’s insight—‘Access to labour without obligation’—works to the benefit of the labour hire company, as well as the benefit of the host company.

Problems with due process are spread right through the operation of the ‘labour hire formula’. Ryan and Schmit examined one labour hire firm and found that it kept ‘dead files’, records of those applicants who failed at the interview and were regarded as unemployable. Other research suggested that this situation was not unique:

Parker (1994) noted that the screening used by many temporary help firms creates a pool of workers who are not given assignments; although they are viewed as either marginally skilled or as troublemakers, they are never told they are unemployable (Ryan and Schmit 1996, p.169).

Similarly, workers who performed ‘poorly’ on assignments were not given further assignments. They remained on the books, expecting further work but possibly marked ‘inactive’ because of their earlier performance (Ryan and Schmit 1996, p.170). This kind of ‘employment limbo’ would not be countenanced in a conventional employment relationship. Either the person would be sacked (hopefully with due process) or counselled with a view to improving their performance. In the labour hire context, neither of these things happens.

There is one further observation which Ryan and Schmit offer which demonstrates how profoundly unjust are the outcomes produced by the labour hire formula. Despite industry advocates (such as Manpower) emphasising the 'flexibility' which the THI provides to workers seeking 'temporary' work (students and retirees, for example), the reality is that 'a majority of temporary workers reported that they became temporary workers as a means of getting a full-time job' (Ryan and Schmit 1996, p. 170). Yet the conversion from 'temp-to-perm' is not guaranteed. Indeed, as the labour hire industry grows, and as 'mainstream' firms increasingly move away from carrying large numbers of permanents, the prospects of using labour hire as a bridge into permanent work steadily shrinks. Research in Australia examining whether 'casual' jobs provide avenues into permanent work shows that this is a very tenuous journey for most workers (Burgess and Campbell 1998). In other words, the structural apartheid which labour hire initially unleashes, is further consolidated once labour hire arrangements become more extensive.

Issues raised:

As with the impact on host companies, similar issues are raised when it comes to assessing the impact of labour hire on the workers themselves. Again, case-study and anecdotal material is common, sound statistical evidence is scarce. The following questions could be raised for consideration:

- 1. do the earnings of labour hire workers differ significantly from those of 'standard' workers (controlling for other likely influences)?**
- 2. how much work do labour hire workers actually get from labour hire firms and is there a problem of 'under-employment' in this sector?**
- 3. how do the conditions and the situation of labour hire workers who are engaged casually by labour hire firms differ from those who are given permanent employment by labour hire companies?**
- 4. how does training provision and job security differ between different categories of labour hire worker?**
- 5. what industry differences are important in assessing the impact of labour hire on workers. In particular, are the issues the same amongst different groups of workers, taking occupational and gender differences into account (for example, nurses compared with building workers; IT professionals compared with typists)?**

Some positive developments: labour pooling which offers security

As is evident, much of the scholarly literature produced by those outside the labour hire industry is critical of the concept of labour hire and is generally focussed on the adverse impact of the industry. An important exception to this is a study by Buchanan et. al. (1999), *Beyond the fragments: the experiences of a community based labour hire firm in achieving flexibility with fairness for low paid casual workers*. This study examined Career WorkKeys, a community based labour hire company which aimed to improve the quality of part-time and casual work, to achieve good training outcomes, and to provide security of employment. Buchanan et. al. placed their study within the broader context of labour pooling arrangements which are not designed to undermine standards in the labour market, arrangements like group apprenticeship training schemes. They pinpoint the key issue as being the management of 'labour flows', of finding ways to grasp 'the nature of the vacancies being serviced and how these relate to the type of labour being mobilised to fill them' (1999, p. 10).

Issues raised:

Given that most research suggests that achieving flexibility is one of the key reasons why host companies engage labour hire workers, we need more insights into:

- 1. how companies can achieve flexibility without compromising labour market standards, or making workers pay for most of the costs of flexibility.**
- 2. how pooling arrangements can be structured to suit host companies and to facilitate good outcomes for workers in terms of job security, training and career paths.**

It would also appear that further research is needed into positive developments with labour pooling arrangements. In particular, the nature and operation of group training companies should be investigated. However, this is not considered a high priority at this point in time.

Issues raised:

Little is known on why workers chose to work through labour hire firms. Is it:

1. a deliberate choice because they see advantages in this arrangement?
2. an attempt to find a bridge into permanent employment?
3. the only option they have to gain work because of limited choices in the labour market?

On a policy level, the issues raised by the themes in this section include:

1. should the application of unfair dismissal procedures be applied to labour hire workers to protect them from falling into labour market 'limbos'?
2. should conditions be applied to the engagement of labour hire workers which specify acceptable minimum standards (duration of placement, expectations of ongoing placements)?
3. should labour hire workers be paid for their downtime as a way of regulating the growth of the labour hire industry?
4. what rights should labour hire workers have to protect them from victimisation, and how are these best enforced?
5. how can the benefits and entitlements which normally attach to standard work be made available to labour hire workers?

Wider ramifications of the reconfiguration of the employment relationship

What does labour hire mean for future developments in the labour market more generally? A useful way to answer this question lies in examining a seminal article by George Gonos ('The Contest over "Employer" Status in the Postwar United States: The Case of Temporary Help Firms'). Gonos shows how the large American 'temporary help firms' (THF), particularly Manpower, mobilised considerable legal and political pressure during the 1950s and 1960s to 'deregulate' their industry. They succeeded in moving their industry away from state regulations which governed fee-charging employment agencies into a particular niche whereby they were deemed to be the *employers* of their labour. The significance of this campaign of deregulation was considerable. In practice, there was still a triangular employment relationship—the worker was on the payroll of the THF but working for the host company—but in legal and administrative terms this triangular relationship was obscured. The 'temporary help formula' (in Gonos's words) disguised their role as labour market intermediaries by conferring employer status on them. The implications were profound:

[this arrangement] effectively severs the employer-employee relationship between workers and those user firms on whose premises they work and for whom they provide needed labor inputs. That is, this arrangement allows THF clients to utilize labor while avoiding many of the specific social, legal and contractual obligations that have increasingly been attached to employer status since the [1930s] (Gonos 1997, pp.85-86).

In the United States these kinds of obligations are quite extensive: medical insurance, social security insurance, incentive payment schemes and so forth. In Australia there is less at stake in the use of the 'labour hire formula' when it comes to benefits, but a great deal at stake in terms of employment security and workplace industrial relations. This was demonstrated graphically during the 1998 waterfront dispute when the 'labour hire formula' was used in efforts to sack an entire workforce and de-unionise the workplace. It is worth reviewing that episode in the light of Gonos's discussion.

The 1998 waterfront dispute

In April 1998 Patrick Stevedores 'dismissed' its entire workforce in an effort to free its operations from the influence of the Maritime Union of Australia (MUA). These mass sackings were carried out using an elaborate company restructure in which labour hire arrangements were central.

Prior to September 1997, the workforce was employed by four Patrick companies, who owned the assets and conducted the stevedoring business. In September, Patrick restructured its companies so that an 'operational' company took over the business side of stevedoring, and four 'employer' companies took over the provision of labour to the operational company. In effect, after September the workers (without their knowledge) were working for labour hire companies.

Moreover, these labour hire companies had virtually no assets—and in the event of the cash flow drying up—no prospects of keeping the workforce employed.

The labour supply agreements between the Patrick employer company and the Patrick operational company specified that these agreements could be terminated without notice if there was any interference or disruption in the supply of labour. Between January and April 1998, a number of industrial disputes erupted between Patrick and the MUA, largely over Patrick's involvement in the Webb Dock scheme (an attempt by the National Farmers Federation (NFF) to create a non-union stevedoring workforce). As a result of this dispute, the Patrick operational company terminated its labour supply agreement with the Patrick employer companies and entered a new labour supply agreement with the NFF-backed company. Because the Patrick employer companies had no assets nor cash flow, their workforce found themselves without jobs.²

Issues raised:

While the waterfront dispute was somewhat exceptional, it does raise important legal issues around labour hire. At present the transmission of businesses and what this means for industrial relations coverage is a legal nightmare. Investigation of this issue should be carried out because the exceptional or extreme form of a practice often exposes weaknesses in existing arrangements.

Gonos's article emphasises the distinction between the THF and the traditional employment agency. In the case of the latter, the agency collects a one-off fee for placing a worker as a regular employee with a client company, and then steps out of the picture. By contrast, the THF

maintains a formal tie to this worker, as her "employer", whether her stint of employment with a particular client firm lasts a few hours, a week, or several months or years, thereby profiting from the arrangement every hour that work is being performed (Gonos 1997, p. 85).

Many of the large labour hire firms span both functions: they offer a recruitment service for those clients seeking new employees and they offer a labour hire service for those clients who do not want to assume an employer role. Sometimes clients are just seeking a 'screening' service from the agency (and this appears to be one of their key attractions for many clients), at other times they are looking at dispensing with their entire human resource function. The significance of the waterfront dispute was not the novelty of the labour hire arrangements, but the subterfuges involved. However, even without the more extreme flavour which these subterfuges entailed, it is clear that labour hire arrangements represent a profound transformation in the traditional operation of the employment contract. In Gonos's terms, *the growth in labour hire represents a growth in 'access to*

² Account based on Blake Dawson Waldron, *Industrial Relations Briefs*, May 1998.

labour without obligation' (1997, p.90) This is the real threat which labour hire poses: it opens a new space of deregulation within the labour market; a space which is, moreover, barely visible to most commentators.

The employment contract—again

In charting the transformation of employment agencies from fee-charging entities to fully-fledged 'employers', Gonos does not overlook the contested nature of these changes. The ultimate success of companies like Manpower did not mean that legislators and judges were blind to what was happening. At various stages in this campaign, particularly during the 1960s, adverse decisions were made against the temporary help industry (THI), decisions which revolved around the nature of the employment contract.

In the mid 1960s, *Business Week* summed up the state of play in this decision making when it referred to the

'right of control test' which holds that the company that controls an employee's hours, duties, and working conditions is the actual employer no matter who hands him his paycheck (cited in Gonos 1997, p. 94).

Labour lawyers were cited who regarded this view as the prevailing legal interpretation of the employment contract and THF were not employers just because they handled the paycheque. Throughout the 1960s and 1970s, the THI's campaign of deregulation chipped away at this interpretation. By the 1980s, it lay in tatters, with Federal government agencies contributing to the collapse when they themselves began hiring 'temps' under the formula promoted by the THI. This formula held that clients (like the Federal government) were:

'not hiring workers but purchasing services, and hence the practice would be treated according to guidelines covering purchases, not employment. Thus the new federal policy further helped to legitimate the idea of THF's as legal employers of employees, to whom users of labor had no obligation (Gonos 1997, p. 102)

This ultimate success of the THI in the United States saw the triangular employment relationship still intact, but with entirely new meanings attached:

- ◆ the employment agency had become the 'employer';
- ◆ the host company had become the 'customer';
- ◆ the work performed had become a 'service';
- ◆ and the worker had become a 'consumer' of the services of the THF. (Gonos 1997, p. 105)

Returning to the discussion at the end of the last section, it is now clear why a resolution of the 'dependent contractor' question is not conclusive. In terms of Figure 2.2, the real problem does not lie with the middle row, but with the middle

column. *It is the triangular employment relationship which is the core issue and the real problem lies in the way in which the 'labour hire formula' changes long-established patterns of employment, particularly when it grows to become a significant part of the labour market.*

'Parallel' versus 'supplementary' employment: labour hire in the building industry

The American experience which Gonos has chartered has a particular resonance in the Australian building industry where labour hire has been growing rapidly. We saw earlier that a union campaign has been underway to deal with the adverse impact of this growth. In this section I will briefly discuss one of the main concerns expressed by the CFMEU, because it encapsulates the core problem in the 'labour hire formula'.

Traditionally labour hire was 'supplementary labour' brought in for particular peaks in a building project. In the eyes of the CFMEU this has begun to change and labour hire has become 'permanent, institutionalised replacement labour'. In other words, a parallel employment system has begun to emerge. This is the system which the growth in the THI in the US has fostered. In the US, 'temporary help' no longer means temporary; in the Australian building industry (according to the CFMEU) supplementary labour no longer means 'top up' labour but a permanent parallel system.

Because this parallel system is outside the 'mainstream' it has the potential to undermine labour market regulation. This has been evident in the ambiguity around 'dependent contractors' and in the more general problem of achieving compliance by labour hire firms with enterprise agreements and awards.

Issues raised:

The analysis offered by Gonos and the concerns expressed by unions like the CFMEU about the emergence of a parallel employment system should be further investigated. Two questions in particular are worth asking:

- 1. is the situation of the American temporary help industry relevant in Australia?**
- 2. are current developments in labour hire in the building industry likely to be relevant in other industries?**

5. Inter-state and international developments

Inter-state developments

It appears that Queensland has begun moving on the issue of labour hire. Two areas are relevant:

1. a National Competition Review of the Private Employment Agencies Act is currently underway;
2. the Industrial Relations Act 1999 has been used to deal with the thorny issue of 'dependent contractors'.

In the case of the National Competition Review, submissions closed on 21 April 2000. The Review is part of the process of National Competition Policy (NCP) whereby state governments undertake to review and, in necessary, reform, legislation which restricts competition. Because the Private Employment Agencies Act 1983 contains licensing provisions, it is subject to review under NCP. There are provisions in NCP which allow for restrictions on competition (such as licensing) if these are in the 'interests of the community'. While the NCP Review is underway, no action by the Queensland Government on labour hire has been pursued. (Further information on the NCP review is available from: www.detir.qld.gov.au/ir/pea.htm.)

In the case of the Queensland Industrial Relations Act 1999, Section 275 allows a Full Bench the power to declare a class of persons who perform work in an industry under a contract for services to be employees. In other words, dependent contractors can be deemed employees. A Transport Workers Union application with regard to a courier service was successful in having its drivers deemed employees. An application under Section 275 by the Australian Workers Union has also been lodged on behalf of shearers.

Issues raised:

Research into the industrial relations situation in each state of the Commonwealth should be undertaken to see if developments comparable to those in Queensland are underway elsewhere.

The outcomes of the Queensland NCP Review and of the Section 275 hearings should be carefully monitored.

The significance of National Competition Policy for any moves to regulate the labour hire industry should be investigated, particularly the criteria by which 'community interest' is assessed.

International developments

Preliminary research suggests that the growth of labour hire is greatest in the United States, but that countries in Asia and Europe are also seeing significant growth. According to Adeco growth in the world wide market for labour hire averages between 10 and 15 per cent per year. They also claim that there is a shift from 'high volume, low skilled workforces' to ... skilled, flexible workforces' (Adeco 1998, p. 21).

Much of the literature from labour hire proponents suggests that 'world wide trends' in their industry make the widespread use of labour hire in Australia inevitable. This is similar to the rhetoric about the inevitability of globalisation. However, there are unique aspects to most national labour markets which suggest this inevitability is not a foregone conclusion. In Europe, for example, the use of temporary workers ranges from an incidence of 2 per cent in the Netherlands to just 0.5 per cent in Germany (van de Krol, 1993, p. 44).

Developments in the United States are worth following closely because many of the key issues discussed in this paper have arisen there first. For example, the 'Microsoft case' of the early 1990s dealt with the issue of independent contractors and raised the perennial question of what is an employee. Between 1987 and 1990, Microsoft's international division made use of hundreds of long-term workers and classified them as independent contractors. This allowed Microsoft to evade many of its obligations towards them. The Internal Revenue Service (IRS), however, deemed them employees for tax purposes, and a series of court cases followed in which Microsoft and the IRS contested the matter (Meyer 1997, p. 34).

Similarly, the United States has also seen important research carried out into the temporary help industry (THI). A paper for the 2030 Center by Helene Jorgensen has shown how the THI has seriously affected the youth labour market and how its growth has undermined the social safety net. Amongst her policy recommendations, Jorgensen suggest making the host company a 'joint employer' (or dual employer) of the labour hire worker (Jorgensen 1999).

Issues raised:

Is labour hire growing at the rate which its industry proponents claim, or is this hype on the part of the industry?

What are the key international developments in labour hire, and what are their relevance to Australia?

Are there unique features of the Australian labour market which make it likely that developments in labour hire will follow a different trajectory to that seen elsewhere, particularly in the United States?

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