SUBMISSION OF THE

AUSTRALIAN NURSING and MIDWIFERY FEDERATION

(VICTORIAN BRANCH)

TO THE

INQUIRY INTO THE LABOUR HIRE INDUSTRY AND INSECURE WORK

DECEMBER 10, 2015

Content

Recommendations

1. That the Inquiry find that labour hire and insecure work, (including sham contracting, short-term contracting and casual work) has a range of negative effect on workers, including:

- a greater rate of exploitation and non-compliance with industrial standards;
- less access to paid leave and ability to take paid breaks from work;
- financial and housing stress (because workers can't get loans and/or because of inconsistent income);
- safety issues (because of less access to training and less focus on these employees by host employers);
- impact on quality and delivery of services because of lack of induction and familiarity with the workplace; and
- significant barriers for those in labour hire and insecure work (other than casual workers) to engage in bargaining either with their employment agency employer or their host employer.

and that eliminating or mitigating these effects is multi-faceted and the responsibility of a range of institutions and stakeholders, particularly the State and Commonwealth Governments, but also including industrial tribunals and employers.

2. Government

2.1 The Victorian Government has a particular responsibility to ensure its own public service and public sector workforce are employed in secure work. This responsibility also extends to those workplaces which are part of the broader public sector, such as workplaces established through state legislation (e.g. universities) and workplaces primarily and recurrently funded by the State Government (e.g. independent schools, neighbourhood houses, community services) In those workplaces, the Victorian Government must also strive to realise best practice and eliminate, to the extent possible, insecure forms of work.

2.2 The Victorian Government should, at every opportunity, support measures that will reduce and, where possible, eliminate the use of labour hire and/or forms of insecure work such as casual or contract labour, especially in the public sector or areas where public funding is provided to funded agencies. This includes establishing rigorous requirements in the public sector that labour hire or agency is a measure of last resort and that permanent employment is the priority.

2.3 The Victorian Government should, at every opportunity, support measures that will make the working lives of those who continue to be subject to labour hire or insecure forms of work, more secure and with the access to the same or similar entitlements as 'permanent' employees. This includes by:

a) ensuring that workers in labour hire/agency or other insecure work have access to portable or pooled leave arrangements (for long service, annual and personal leave) which are not dependent on service with an individual employer (whether on a statewide basis, industry basis or labour hire/employment agency basis); and

b) ensuring that under public sector enterprise agreements:

- casual work is limited to work of an ad hoc and/or seasonal nature and that casual workers are deemed to be permanent should they be regularly and systematically rostered to work over a sustained period;
- workers have a right of conversion from casual work to permanent work;
- workers have a right to regular review and update of contracted hours where regular additional ordinary hours are worked; and
- that fixed term employment is strictly limited to circumstances in which the worker is replacing a permanent employee on extended leave

c) Ensuring that public sector employers, particularly public health employers provide:

- adequate and regular workplace inductions
- have a reasonably consistent approach to ohs policies and procedures, including no-lift, codes etc.
- ensure that in their contracts with nursing agencies that they insist that the agency provides regular clinical and mandatory updates to agency staff
- ensure that the workload to be performed in any agency shift is appropriate to the time allocated.

2.4 The Victorian Government should advocate for changes to the Fair Work Act 2009 (Cwth) to ensure that:

a) the National Employment Standards incorporate the right for a casual worker to elect to become permanent after six months regular and systematic service with the same employer.

b) that all workers at a workplace, including regular agency or labour hire workers, be regarded under Part 2-4 of the Act as employees for the purposes of bargaining and are therefore covered by the enterprise agreements for each workplace.

c) there be a statutory presumption that a contractor is an employee of the labour hire company or employment agency. Where the status is disputed then it would be up to the employer to prove that the 'employee' is in fact an independent contractor, based on the usual control and entrepreneur tests established in the case law.

d) That is respect to disciplinary, unfair/unlawful dismissal matters, general protections matters and recovery of wages we would adopt the National Union of Workers submission that the concept of 'joint employment' (and therefore joint

responsibility/liability) be applied. This would mean that both the employment agency and the host employer would be required to abide by natural justice and procedural fairness as if each was the sole employer or that adverse action could be taken by the host or deemed employer rather than the actual employer (the labour hire company).

2.5 The Government should ensure that companies that act as labour hire or employment agents pay payroll tax in all circumstances where their receipts are above the threshold and abolish the current exemption for employment agents who receive an exemption statement for paying payroll tax from employers under Part 4 of the Payroll tax Act 2007.

3. Public Sector

3.1 The Victorian Government should review and update the Public Sector Industrial Relations Policies to reaffirm its commitment to maximizing permanent employment across the public sector and, where casual, fixed term or agency employment is necessary, that it is as fair and regular as possible. This includes mandatory adoption by public agencies of model clauses allowing reasonable movement from casual to permanent employment or review of part-time hours and the adoption of fair rostering practices.

3.2 The Victorian Government should maintain a limitation on the use of agency nurses through directions to public health networks, institutions and agencies and continued oversight of tender arrangements by Health Purchasing Victoria (with a cap on the amount that can be paid to agencies). This model should be implemented in other areas of the public sector and should be a feature of procurement policies and practices implemented by the State Government.

3.3 That all public health networks or hospitals continue to institute and maintain permanent pool arrangements and eliminate or reduce the use of casual bank labour. The Government should mandate permanent pools across other public sector areas such as education (for relief or specialist teachers) and the public service to eliminate or reduce casual or labour hire use.

4. Private Sector

4.1 That the State of Victoria will:

a) Ensure that it is compliant with ILO Convention 181 (Private Employment Agencies Convention, 1997) especially by implementing a licensing or certification system

b) Ensure that such a certification system required the agencies to do those things required by the Convention including ensure adequate protection of workers in relation to collective bargaining, wages , access to training and occupational health and safety

c) Ensure that the law related to licensing and certification of employment agencies clearly designates the responsibilities of the employment agency and the user firm or enterprises (whether solely or jointly responsible) in relation to the above matters

d) Lobby the Commonwealth and engage with ACCI, AIG and the ACTU to ensure that Australia ratifies Convention 181. This will require work within COAG and relevant Ministerial Councils to ensure state and territory compliance with Convention 181.

4.2 **Operation of Labour Hire Companies**

The ANMF supports the proposals of the National Union of Workers that Employment Agencies/Labour Hire Companies that a licensing or certification system by implemented by the State of Victoria, which would both set the rules for the operation private employment agencies but also clearly identify the responsibilities held by both the employment agency and the user enterprise towards workers. This would include the following features:

a) Licensing or registration as a precondition to on-hiring of labour in any industry but registration would only be approved where there is an objective reason for the labour hire which is temporary in nature (such as the need to replace an absent worker or to perform a role not ordinarily carried out in the business).

b) A requirement for licensees who place workers to deem those workers as employees of the licensee so that the rights of the worker are clear (especially in an insolvency event or in case of a workplace injury).

c) A requirement that labour hire workers must be treated at least equally with the workers within the host workplace in respect to pay and terms and conditions of employment.

d) Establishing a licensing Authority or Directorate which is adequately funded to administer the licensing certification system, audit compliance (including actual inspections rather than desk audits), investigate compliance and initiate enforcement proceedings.

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

f) Require a bond or fee to be paid to the State of Victoria in order to be licensed (this fee would fund the compliance unit and allow for lost employee entitlements (including superannuation arrears not covered by FEG or those employees with work eligibility who are not eligible under FEG) to be guaranteed by the State in certain circumstances (e.g. liquidation).

g) Establish, as part of the licensing Authority a compliance unit that: approves licences (subject to 'fit and proper person' tests); monitors licensees and their activities; and investigations breaches of industrial and other laws (with operators who have found to have breached laws being at risk of their licence being revoked or suspended). This should involve

a formal role for the relevant employer and union organisations in accordance with ILO Convention 181.

h) Require registered labour hire companies not to supply labour to replace workers who are taking lawful industrial action.

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

j) A requirement for licensees and/or user enterprises to ensure that all employees receive:

- occupational health and safety training and updates annually
- access to paid professional updates annually (in the case of nursing that they receive at least 2-3 paid days of mandatory clinical education at the expense of the agency)
- adequate induction into any new workplace (including a workplace the worker has not been placed in during the last three months) in respect to safety, technology and work systems.

1. The problem of insecure work

1.1. The Australian Nursing and Midwifery Federation (Victorian Branch), welcomes the opportunity to make this submission to the Inquiry into Labour Hire and Insecure Work in Victoria. This isn't the first inquiry initiated by a state government into labour hire or insecure work. For example the NSW Government initiated a Labour Hire Task Force in 2001 which could not agree on whether 'protection was necessary. The second in relation to labour hire agency workers, before the Victorian Parliament's Economic Development Committee, also in 2005, made a range of recommendations, none of which was implemented – including licensing and/or certification of labour hire companies. There have been other inquiries such as those listed in the Discussion Paper. There is a wealth of information about insecure work, including as recently as the Howe Inquiry conducted at the initiative of the ACTU in 2011. We hope that out of this inquiry, real and practical solutions will be developed which will go some way to mitigating the negative effects of insecure work – especially labour hire, casual and fixed term work.

1.2. We don't pretend that the Victorian Government can solve this issue on its own. The massive shift over the last 25 years towards a casualised and temporary workforce is a phenomenon seen all over the world for a range of reasons - economic, technological and ideological. Compounding the challenges facing the Victorian Government is that for understandable reasons it has handed responsibility for industrial relations to the federal system. That federal system currently has virtually zero capacity to run test cases or set new, universal standards (apart from limited improvements to modern awards).

However, Victoria can be a model employer in respect to casual, fixed term and insecure work. It can lobby at a national level for better regulation and standards in relation to insecure

work. Importantly, where insecure work occurs in the private sector the State of Victoria can introduce regulation and controls that ensure that those workers are employed by a reputable company and are safe wherever they work.

1.3. We note that up to 40% of the Australian workforce is employed in insecure or precarious work. In his landmark report, *Lives on Hold: Unlocking the Potential of Australia's Workforce* prepared as part of an inquiry into the impacts of insecure work for the Australian Council of Trade Unions, former Deputy Prime Minister, The Honourable Brian Howe AO, defined Insecure Work as:

> *"…poor quality work that provides workers with little economic security and little control over their working lives. The characteristics of these jobs can include unpredictable and fluctuating pay; inferior rights and entitlements; limited or no access to paid leave; irregular and unpredictable working hours; a lack of security and/or uncertainty over the length of the job; and a lack of any say at work over wages, conditions and work organisation. These challenges are most often associated with non-permanent forms of employment like casual work, fixed-term contracts, independent contracting and labour hire – all of which are growing."*[1]

Lives on Hold estimated that almost 4 million workers or more than 40% of the Australian workforce are locked in insecure work, namely casual work, short-term contracts, labour hire or as 'independent' contractors. The report called for a range of reforms, including portable entitlements schemes (especially for accrued entitlements such as annual, personal and long service leave) and training credits over a working lifetime.

This growth in the precarious and generally low paid work (which is not supported by traditional paid entitlements) has contributed to growing levels of inequality in Australia. The ACTU submission points out that since 2000 wage growth has fallen behind productivity growth. Consequently, the labour share of national income fell from 75% in 1975 to around 60% in 2013. The ACTU also points out that the national minimum wage as a proportion of AOTWE has fallen sharply since 1982 – from 67% to 43% in mid-2015. While there a range of factors that have been primarily responsible for these declining indicators – such as a weakened award system and incapacity in many sectors to bargain collectively – the growth in insecure work is another indicator of that increased inequality and a cause of it. Companies have increasing looked to boost profits either by:

- only employing workers at peak times i.e. when the business needs them, largely through casualization or labour hire
- pushing the costs of the business on to those who were formerly employees but who are now required to be contractors – the so-called 'financialisation' of employment by making employees assume the costs of incorporation, workers compensation and a range of other business overheads – although in many cases this simply amounts to sham contracting

[1] *Lives on Hold: Unlocking the Potential of Australia's Workforce* (ACTU, May 2012)

In many ways it is a vicious cycle. The inability of workers and their unions to bargain around security of work issues and the relative lack of legislative barriers (either through direct prohibition or cost disincentives) opens the way for employers to implement insecure forms of employment. Inevitably these practices mean that the employer pays less for that work to be done – either directly through casual work or indirectly through use of a contractors or labour hire. Profits are increased, but the workers take home less pay and have less secure jobs.

We have witnessed this process in many areas over the last 20 years. For example, the kitchen, cleaning, laundry and other support services in the 550 private residential aged care facilities in Victoria nominally employ approximately 13,000 staff[2]. However, our experience in bargaining across this sector with the Health Services Union (for over 180 enterprise agreements which cover 95% of those facilities in Victoria) is that support services in approximately 60-70% of these facilities are contracted out. This means that the employees are employed by a contractor and their once permanent employment is now usually casual. They are not covered by the relevant aged care enterprise agreement for the facility – indeed they are not usually covered by any industrial instrument, other than the Aged Care Award 2010 or another relevant modern award such as the Cleaning Services Award 2010.

This has major consequences as the usual health industry standards applying in enterprise agreements (and the pre-reform awards) – including up to 21 days personal leave a year and long service leave of 26 weeks after 15 years of service – are replaced by lower standards. If the contractor changes they are often likely to lose their service (thereby making it difficult to qualify for long service leave). In this way around 15% of the total aged care workforce has been carved out of secure employment covered by an enterprise agreement into, generally, lower paid and less secure employment with inferior conditions to the rest of the aged care workforce. This modus operandi to boost profits has been replicated in numerous industry sectors.

1.4. ABS data in Characteristics of Employment, Australia (ABS 6333.0 August 2014) revealed that of 11.584m employed persons, 9.6 million are employees, and almost 2 million are owner managers of either incorporated enterprises (806,000) or unincorporated enterprises (1.19m). The data also shows that:

- That of 7.3 million employees had paid leave entitlements, of which 53% were males.
- There were approximately 1 million persons who were independent contractors in their main job in August 2014.
- Independent contractors made up 9% of all employed persons, and almost three quarters (74%) of all independent contractors were males.
- In August 2014, there were 599,800 persons (5% of all employed persons) who had found their job through a labour hire firm/employment agency, of which 59% were males.
- The highest proportion of males who had found their job through a labour hire firm/employment agency were in the Manufacturing (21%) and Construction (10%)

[2] There are approximately 220,000 workers employed in residential aged care in Australia. Of these, Victoria's share is approximately 26% or 57,000 employees. Of these around 22.5% or 13,000 are engaged in kitchen, laundry, cleaning and other non-care support services

industry Divisions. For females, the most common industry Divisions were Health care and social assistance (16%) followed by Manufacturing and Financial and insurance services (both 9%).

These statistics are revealing in that it shows that around 20% of all employees do not receive paid leave and presumably these are casual employees (as 'permanent' employees would be entitled to paid annual and personal leave under agreements). This is confirmed by data in ABS Forms of Employment Australia (6359.0 November 2013) which indicated that just over 2.2 million employees out of 11.6 million employed persons were without paid leave entitlements (19%).

We also note that for the largest employer of women who find employment through labour hire, is the Health Care and Social Assistance industry. Many of these workers would be nurses and personal care workers. Some of the personal comments of these workers are included in the following sections.

In relation to casual employment it appears that while the percentage of casuals in the workforce peaked at about 27% of the workforce in 2003, it was stable at about 24% from 2005-2014. However the ACTU indicate that casual employment (71% part-time and compared to 19% of permanent staff) has again started to rise and posit that this is because employers are now engaged in other forms of risk shifting – such as labour hire, fixed term employment and independent contracting (often sham contracting).

Clearly, from the statistics it is clear that most forms of insecure work affect women disproportionately - over half of casuals are women. Because they bear a disproportionate burden in relation to domestic activities and child/elder care and permanent employment is not adequately flexible to meet many of these needs, women are often pushed into accepting part-time, casual or labour hire work. Certainly this is true of many nurses in this type of employment.

In respect to fixed term employment we often have experience of nurses being put into rolling contracts but this is not as prevalent in health as it appears to be in school and higher education. Comments in relation to this aspect are made below)

1.5. Industrial relations academic Dr John Buchanan in his *Australia at work: just managing?* (1999) and his co-authored *Fragmented Futures: New Challenges in Working Life (Federation Press 2003),* has discussed at length the demise of 'Harvester Man' and the implications of the challenges facing modern workers in a neo-liberal economy. 'Harvester Man' refers to the concept of a male breadwinner in a nuclear family, working in a permanent, full-time job and earning a 'fair and reasonable' wage which supports a family to live in 'frugal comfort' (a concept constructed by High Court Justice Higgins in the ground breaking Harvester judgement or *Ex parte HV McKay Harvester Case*[3]*).* Fifteen years ago Dr Buchanan posited that to meet the challenges of the new world of work we need new ways of addressing work and

[3] (1907) 2 CAR 1

working time fragmentation in order to reduce rising inequality. This includes enabling workers to accrue and access leave entitlements and access to training over a working life rather than by reference to service with each individual employer.

1.6. It was put another way by The Honourable Brian Howe, Chair of the ACTU-initiated Independent Inquiry into Insecure Work. In his introduction to the inquiry report, *Lives on Hold: Unlocking the Potential of Australia's Workforce* (May 2012) Howe wrote:

> The Harvester Judgement established the concept of a living wage that was enough for a worker to keep his family in frugal comfort. In the post war period most households were one income, and male breadwinners were offered the security of permanent employment generally at a living wage, including enough to service a mortgage. We now live in a society where the "Harvester man" model of social protection is no longer relevant, inequalities in wealth between households are larger, and social stratification is greater.
>
> Our approach, which in part reflects our backgrounds, may be described as holistic. We have not adopted a narrow focus on industrial regulation alone as a "cure" to insecure work, but believe the social consequences are just as important, and must be addressed through a range of policy actions that will encompass housing policy, the skills agenda, and the tax and transfer and welfare systems.
>
> Insecure work represents a commoditisation of workers that uses people in an instrumental and short-term manner as opposed to investing in their capabilities.
>
> Contrary to the views of some in the business lobby that workers are attracted to casual and temporary work because of the flexibility it offers, the evidence we heard confirms that there are huge number people engaged in insecure work who want more secure and stable working arrangements.

1.7. We note that this inquiry into insecure work intersects with another Legislative Council Inquiry which also focuses on labor hire and insecure work – the Economics, Education, Jobs and Skills Committee Inquiry into Portability of Long Service Leave (LSL) Entitlements in Victoria. In that case we note the 2014 paper by the McKell Institute (in conjunction with Macquarie University and the Centre for Workforce Futures), *The Case for a National Portable Long Service Leave Scheme in Australia*[4] and commend it to the Committee. That paper sets out the history of LSL in Australia, the reasons why changing work and employment patterns (including growth in labour hire and other forms of insecure work) should lead to a new approach to LSL accrual and portability, the background to current portable schemes and the administrative and actuarial options for future portable long service leave schemes. It is a comprehensive paper which provides cogent, credible arguments and design options in relation to portable LSL.

1.8. The ANMF is particularly concerned that many vulnerable workers, including those forced to work fixed term, as casual labour hire or as dependent contractors, may be working in the

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[4] *The Case for a National Portable Long Service Leave Scheme in Australia*, The McKell Institute, 2014, (with Macquarie University and the Centre for Workplace Futures), authored by Professor Ray Markey and eight others.

same location for many years but for a range of principal contractors who win the contract for that work every few years. Because these workers work for different employers they don't qualify for long service leave – nor do they qualify for other standard award or agreement benefits such as personal leave or study leave. This is not only common in areas like cleaning and security but also in areas such as research and community service. The revolving door of competitive contracting means that employees work for short to medium stints with one service provider and are then either working for a new provider who wins the competitive tender or for a new service altogether if that activity is defunded completely.

Indeed, this is becoming more common in nursing as many services, especially at the community level, are the subject of competitive tendering. For example, we note the recent demise of Medicare Locals and the proposed contracting out of all services within 12 months by the new Primary Health Networks or services targeted for bursts of activity which are then defunded (e.g. Health Promotion funding for community health centres or the Mental Health Nurse Incentive Program). Many of these workers will have less secure short term contracts and will never accrue long service leave for example.

1.9. Of course, aside from the lack of job security, and the lack of certainty about when they will work, there are many other problems that face casual workers and labour hire workers in particular. From the evidence presented to his inquiry, Brian Howe and his fellow members identified the issue of "those in the 'core' of the workforce and those on the 'periphery'."[5] These peripheral workers suffer more than just fragmentation of their working lives. Howe summarised it as follows:

> *Many do not know what hours they will work from week to week, and often juggle multiple jobs to attempt to earn what they need.*
>
> *If their skills are low, or outdated, they are not offered training through work. They shift between periods of unemployment and underemployment that destroy their ability to save money.*
>
> *Their work is not a "career"; it is a series of unrelated temporary positions that they need to pay rent, bills and food.*
>
> *For them, flexibility is not knowing when and where they will work, facing the risk of being laid off with no warning, and being required to fit family responsibilities around unpredictable periods of work.*

1.10. In addition to loss of skills and poor access to training, which comes through the testimony of nurses employed as casuals or via agency, there are also implications for occupational health and safety. Generally it is accepted that for a range of reasons precarious workers experience greater OHS risks and injury rates that directly employed permanent workers. Professor Elsa Underhill of Deakin University and Professor Michael Quinlan and other researchers have written extensively about the additional risks faced by both precarious workers, including

[5] *Lives on Hold* op cit, p 17

temporary and agency workers in terms of occupational health and safety. In a joint article Underhill and Quinlan concluded that the workers compensation data they analysed "suggest temporary agency workers experienced different and more acute risks than direct hire employees." [6]

The article quoted above uses Quinlan's earlier 2004 work (with Philip Bohle)[7]. That and other work by these authors established a framework of risk factors, the PDR (Pressures, Disorganisation & Regulatory Failure) Model, "to explain how precarious employment in its broadest sense affected OHS". The risk matrix of factors is worth reciting here, as it neatly summarises most of the issues and problems associated with contingent and precarious work:

Economic and Reward Pressures	Disorganisation	Regulatory Failure
Insecure jobs (fear of losing job)	**Short tenure**	**Poor knowledge of legal rights, obligations**
Contingent, irregular pay	**Poor induction, training and supervision**	**Limited access to OHS, workers compensation rights**
Long or irregular hours	**Ineffective procedures and communication**	**Fractured or disputed legal obligations**
Multiple jobholding	**Ineffective OHS management Systems/inability to organise**	**Non-compliance and regulatory oversight (stretched resources)**

In another article Quinlan and Bohle start by summarizing the research literature and conclude that for all five categories of contingent work (organisational restructuring/job insecurity, outsourcing/home based, temporary work and small business work) except part – time work, was associated with worse ohs outcomes ("such as higher injury rates or psychological strain").[8] In these articles the authors identify the many factors that make work less safe for contingent workers - such as fear of speaking up, economic pressure to get the job dine satisfactorily in limited time, workload or work intensity issues, not knowing when to violate unsafe rules correctly, failure of organisations to devote energy and resources to the training and induction of temporary workers and lack of communication with temporary workers within workplaces. The list goes on.

And it isn't just in the area of health and safety that temporary agency workers suffer a deficit compared with permanent employees. Elsa Underhill herself has a long history of researching the effects of contingent and precarious work. In a 2005 article *Winner sand Losers? Work/Life Balance and Temporary Agency Workers*[9] That article actually looks at the work-life balance of nurse temporary agency workers as against other temporary agency workers. While that research indicated that nurses were more likely to be able to control their hours and matching

[6] *How Precarious Employment Affects Health and Safety at Work: The Case of Temporary Agency Workers,* Industrial relations, vol. 66, no 3, 2011, pp. 397-421 at p. 415

[7] Quinlan, Michael and Philip Bohle. 2004 Contingent Work and Occupational Safety." In *The Psychology of Workplace Safety.* J Barling and M. R. Frone eds. Washington D.C: American Psychological Association, Chapter 5, pp. 81-106. This chapter also contains an excellent summary of the meanings of related, but slightly different terms such as contingent work, precarious work, nonstandard work and atypical employment.

[8] Ibid. p. 85

[9] Labour and Industry 16:2, 29-59

their work and non-work activities and family responsibilities, there was still sizeable dissatisfaction with many elements of the labour hire experience. It should also be recalled that the research was undertaken in 2005 at a time when, for the best part of a decade the system had relied on agency nurses to supplement the workforce after the Kennett Government had made around 20% of the permanent nursing workforce redundant (see below). In addition, as identified by Underhill, many nurses are part-time and "were more able to determine when they worked." However, in relation to financial problems associated with agency work, more than half of respondents in both agency nurses and non-nurse agency worker groups experienced problems with budgeting/paying bills on a regular basis.

The testimony of the casual and agency nurses included in this submission confirms many of the factors identified in this model. The testimony and the research make it very clear that workers subjected to casual and temporary work

1.11. The ANMF Victorian Branch supports the view that labour hire and insecure work have had a devastating effect on those forced to base their lives on these working arrangements.

1.12. This Inquiry can play an important role at a state level in beginning to address the many problems associated with labour hire and insecure work. While the Victorian Government's role in, and effect on, the industrial relations system is very limited it can nevertheless take some measures that raise the bar for standards in labour hire and make work slightly more secure. In turn this will start the conversation about the impact of labour hire and insecure forms of work.

2. Background to ANMF and Nursing and Midwifery Workforce

2.1. ANMF (Vic Branch) has approximately 73,000 members. As well as Registered Nurses (3 or 4 year degree or Masters) and Enrolled Nurses (18 month/2 year Diploma), the ANMF represents Assistants in Nursing and Personal Care Workers in industries such as residential and community aged care. Our members are employed in all sectors of the health and related industries, including public and private acute hospital sectors, public and private aged care, mental health, district nursing, pathology, prisons, local government, schools and day surgery, community health and medical centres. Of our 73,000 members, 68,392 are 'working members' (as opposed to non-working students or out of industry/ associate members) and 91.7% are women (8.3% are obviously men). A little over 65,000 of our members are either Registered Nurses or Midwives or Enrolled Nurses, with about 40,000 employed in the public sector. Around 3,000 are Assistants in Nursing or Personal Care Workers, mostly in private aged care.

2.2. As at the end of June 2015 there were 97,100 nurses and midwives registered in Victoria with the Nursing and Midwifery Board of Australia[10], comprising:

[10] Australian Health Practitioner Regulation Agency (AHPRA) via their website either through www.aphpra.gov.au or direct link at http://www.nursingmidwiferyboard.gov.au/About/Statistics.aspx which provides Nurse and Midwife Registrant data for March 20915 (published May 2015).

- 19,834 Enrolled Nurses only
- 65,496 Registered Nurses only
- 2,038 who are both Registered and Enrolled Nurses
- 7,804 who are both Midwives and Registered Nurses

This is about 26.3% of the national total or registered nurses and midwives (368,087). In addition there are 814 nurses and midwives registered who are not currently practicing.

2.3. In relation to where these nurses work there is a regular survey of registrants conducted by AHPRA which feeds into the Australian Institute of Health and Welfare (AIHW) annual Nursing and Midwifery Workforce Labour Force data sets.[11] The last available data (2013, published 2014) shows that as at 2013 nurses and midwives were employed as follows:

Workforce status/Principal role of main job	**Vic**
In the nursing and midwifery workforce	**86,340**
Employed in nursing or midwifery	80,070
Clinician	71,690
Administration	3,783
Teacher/educator	2,840
Researcher	807
Other	950
On extended leave	4,121
Looking for work in nursing or midwifery	2,149
Employed elsewhere	784
Not employed	1,365

In terms of which sectors of the health industry these nurses and midwives are employed in the AIHW material (Tables 9 and 10, overview tables) shows that nationally approximately 62% of nurses and midwives are employed in a hospital or out-patients setting, 12.5% of nurses are employed in residential aged care facilities, 7.8% are employed in community health care services and 5.7% in GP and other private practices. The other approximately 10% work in a wide range of roles ranging from public and private correctional facilities, defence bases, aboriginal health, schools and construction and manufacturing sites. The published material is not disaggregated by state/territory, nor does it specify how many nurses and midwives work in more than one role or in more than one sector of the health industry.

2.4. In terms of the public/private split, for registered nurses nationally it is about 64% working in the public sector and 36% in the private sector. For Enrolled Nurses the split is far more even, with around 52.5% of ENs working in the public sector and 47.5% in the private sector. There is no reason to believe that these national figures are not reflective of Victoria as well.[12]

[11] Australian Institute of health and Welfare 2013 National Nursing and Midwifery Workforce data sets at www.aihw.gov.au/workforce/nursing-and-midwifery/additional/

[12] AIHW, National Health Workforce data Set 2013, Tables 14 (Registered Nurses) and 15 (Enrolled Nurses)

2.5. Our own membership data reveals that in the main employment areas of our membership, covering 65,990 of our 68,000 plus working members, a little over 10% of members in most health settings work in at least one secondary workplace in addition to their primary workplace. Some of these would work on casual banks or in labour hire/agency nursing.

In around half these cases or around 4-5% of the total workforce they work across more than one sector i.e. public sector nurse also working in the private sector or vice versa.

2.6. According to AIHW figures in 2013 only 10.4% of the 269,029 nurses and midwives employed in Australia are male (Victoria 9.7%), although the proportion of males in the nursing and midwifery workforce has grown slowly but steadily over the last decade from 8.6% in 2003 (Victoria 8.1%) and 9.6% in 2009 (Victoria 9.1%). As seen from these figures, historically Victoria has had a slightly lower male nursing and midwifery workforce than the national average and certainly lower as a proportion of the workforce than NSW and Queensland.

2.7. The nursing workforce is by far the largest single profession within the health workforce. In terms of health professions as registered with AHPRA, nurses constitute approximately 60% according to the 2013 AIHW National Health Workforce Data Set. In 2013, there were 591,503 people registered as health practitioners. 59% (344,190) were nurses or midwives - more than 3 times the size of the next largest group, medical practitioners (95,000, but many of these would be self-employed).

2.8. ANMF has a total of 3403 members registered as working for a nursing agency (effectively a labour hire company).

- For 1091 of those, the agency is their only workplace.
- 380 of those members have the agency registered as their primary workplace but have at least one other workplace listed.
- That means that 1572 members have a primary workplace that is not an agency, but have at least one agency listed as their secondary workplace.

The 1091 with agency (labour hire) as their primary workplace is about 1.5% of our membership and about 1.1%- 1.3% of the registered nursing workforce in Victoria, depending on whether you rely on the 2013 workforce figures of the mid-2015 registration data from NMBA/AHPRA.

We have a total of 1246 members registered on Bank (either casual bank or permanent pool) at their primary workplace.

- For 850 of those, this is their only workplace.
- 396 of those members have at least one other workplace listed.

Those only engaged in bank work is about 1.2% of our membership and about 0.8% - 1% of the nursing workforce.

ANMF does not record whether a member is employed casually, part time or full time at their workplace - we only record the total number of hours that they work per

week. Unfortunately that means that ANMF cannot provide any detailed information regarding casual employment across our membership.

3. ANMF Approach to Insecure Forms of Work

3.1 Of the main categories of insecure work – casual work, labour hire and fixed term employment the experience of the ANMF in terms of practices in the public and private sector is outlined below.

We have not focused on permanent part-time work, which is the majority mode of employment in nursing across all sectors. In all public and private sector enterprise agreements (and those few thousand members who are covered by the Nurses Award 2010) part-time workers receive the same rights and entitlements as full-time workers, albeit on a pro rata basis in some instances (accrued leave, conference and professional development leave and CPD allowance etc.). A constant issue for nurses is the working of additional ordinary hours and the failure to review and update the contracts of employment to accurately to reflect the ordinary time worked. This has an impact on certain entitlements which are based on final contracted hours rather than average hours over the last 12 months). In the public sector this problem exists but can usually be overcome.

Part-time work is at its worst in private sector aged care where we have a form of zero hours contracts. In these instances employees are contracted for four or eight hours a week but expected to work additional hours at the behest of the employer, or the contract says they will work between 4 and 37 hours per week. In this way the employer can maintain ultimate flexibility and is not committed to paying the employee consistently for a higher number of hours each week. We have attempted to overcome this in bargaining but haven't succeeded universally in ensuring that letters of appointment clearly specify the exact number of contracted hours per week. The modern award provisions have been helpful. Clause 10 of both the Nurses and Aged Care Awards 2010, defines a part-time employee as a worker whose hours are "reasonably predictable" and requires (aged care award):

> *(b) Before commencing employment, the employer and employee will agree in writing on a regular pattern of work including the number of hours to be worked each week, the days of the week the employee will work and the starting and finishing times each day.*

This has enabled more leverage during bargaining when we have tried to obtain more certainty and predictability of shits for part-time workers. Clearly the amount of certainty and predictability depends on a combination of the form of the letter of appointment, rostering requirements, change of shift provisions and other obligations imposed on the employer within the enterprise agreement. Ultimately consideration should be given to including in the National Employment Standards specific protections for part time and casual workers.

The guidance for public sector agencies and departments in relation to industrial relations is the Victorian Government Public Sector Workplace Relations policies (last version being December 2012). It mostly includes information about Government enterprise bargaining processes and model clauses on public holidays, work/family, dispute resolution, termination

of employment and redundancy. It would be helpful if this document could now be reviewed and updated. Specifically, it would be useful if the policies included a section on insecure work and produced and contained model clauses (for such issues as review of regular additional hours or right to request conversion from casual to permanent work). Additionally, the policies should indicate both the expectation and the commitment of the government to limit insecure work, as well as the right of workers to the maximum full-time and permanent working hours as is possible within the relevant department or public sector agency.

3.2 Casual Workers

ANMF strongly discourages members from working casually. Casual workers are prevalent in all sectors of the health industry, including public and private acute health. The situation is different from sector to sector. Those suffering the worst conditions are those carers in community home care who receive jobs over the phone to provide packages of care for different clients (aged care, veterans, disability etc.). These workers suffer both this insecurity of not knowing very far in advance when they will work, but they may also be cancelled at short notice if the needs or circumstances of the client change. In these cases the worker is without a job or income for that day or part day. In some cases arrangements are put in place for the employee to be paid as if they did the job and make the work up later. But these arrangements are relatively rare, largely because of the absence of bargaining and enterprise agreements in this sector.

In the public and private acute sectors and to a lesser degree the aged care sector, employers established casual 'banks' of nurses willing to back-fill absent staff at relatively short notice. These banks do not provide guaranteed hours, although at some hospitals nurses can work regularly long and consistent hours, often in the same ward/unit. These operate with differing degrees of fairness.

Our enterprise agreements, which cover 100% of the public sector and around 90% of the private sector and these generally define a casual worker as:

> *one who is engaged in relieving work or work of a casual nature and whose engagement is terminable by an Employer in accordance with the Employer's requirements without the requirement of prior notice by either party, but does not include an Employee who could properly be classified as a full-time or part-time Employee..*

This clause and similar clauses are used as a disincentive to employing workers as 'regular casuals'. In aged care agreements the following is added to the usual prescription in the Modes of Employment clause:

> *As such casual employees are employed on an hourly basis. It is intended that casual employment will only be utilised as bank staff to assist with genuine peaks and troughs or shortages of labour where permanent staff are not available. It is not intended that casual employees will be employed on a regular or systematic basis. If this is the case then Clause XX [right to request conversion from casual to part-time] will apply.*

Virtually all ANMF enterprise agreements in the private sector have a right to request conversion from casual employment to permanent employment after six months as a casual. In aged care agreements this is put as a reciprocal right to request by either the employee or employer "and that request will not be unreasonably refused by either party". The reason is that it is not unknown for employees to want to remain as casuals because of the loading (especially where employees are personal care workers on relatively low pay). However, employers are aware of the possibility that they may be pursued for unpaid leave entitlements if the employee's work patterns are regular and systematic.

These casual staff suffer many of the same problems as labour hire workers – lack of training, lack of communication etc. However, in recent times most major public hospital networks have looked at the cost of casual bank labour and created 'permanent pools' to provide guaranteed hours to their replacement staff. For Monash and Northern Hospitals this has only been in the last year. These employees are provided with the conditions and roster guarantees under the enterprise agreement.

For example at the Austin Hospital (around 4000 nurses) the numbers at December 2015 are:

Employment Type	**Head count**	**EFT**
Austin Nurse Casual Bank	540	n/a
Austin Health Permanent Pool	69	48.5

The permanent Pool Rostering Practice is the same as that under the enterprise agreement and all other conditions apply:

- Rosters are published 6 weeks in advance
- Shift duration is 8 hours (day/evening) or 10 hours (night), unless covering a short shift (within limitations set by the agreement)

The graduates who have completed a graduate year at Austin (105-110 in any one year) and don't receive an offer of permanent employment are usually offered a position on casual bank as a stepping stone to future permanent employment.

This is the system that applies in most major health networks and hospitals. At Royal Children's Hospital the permanent pool is called the Resource Team and nurses are able to move into this Team from casual bank as vacancies arise. Medium-sized regional networks such as North Western health (Wangaratta Base) are also able to maintain permanent pools – in their case 15EFT. In a few hospitals (Monash Hospital for example) the permanent pool is a one year fixed contract which specifies the hours per week and applies all of the conditions of the public sector enterprise agreement. This is not a preferred option.

Clearly, this initiative is welcomed because across the larger and medium employers there is a sufficient capacity to employ a constant EFT of staff to perform a relieving role for those on annual, long term personal leave or long service leave. It is an initiative that could be replicated across the public sector e.g. in school education for relief teachers by region for example.

3.3 Agency or labour hire nurses (and to a lesser extent personal care workers in aged and community care) are on-hired to hospitals and other health agencies by a multitude of nursing agencies. These agencies were relied on heavily to staff public sector hospitals after the decimation of the nursing workforce in Victoria by the Kennett Government in the 1993-1998 period. During that period the registered nurse workforce declined from around 80,000 to below 50,000 as many nurses were made redundant and left the health industry (or left because as a result of cuts workloads became intolerable). The nursing workforce registered with the then Nursing Board of Victoria only surpassed the number of 1992 registrations in around 2007. In the period 1993 to 2002 employers at public hospitals, under severe funding restrictions and needing to keep the EFT shown 'on the books' to a minimum, would pay agencies exorbitant rates to supply nursing labour. This situation was resolved by several measures:

- The 2000 decision of then Australian Industrial Relations Commission by Commissioner Blair[13] which introduced nurse to patient ratios also determined that agency staff could only be used for unplanned vacancies, not to fill long term or permanent vacancies. In addition, agency staff could only be engaged after permanent and casual employees have been offered the work.

- The ANMF worked with the State Government and supported a new approach to the engagement of agencies and a limitation on the amount a hospital or health network could pay an agency for nursing services. In 2002 the Secretary of the Department of Health issued a Directive which said:

> **CONDITIONS OF ENGAGEMENT OF AGENCY NURSING SERVICES**
>
> Pursuant to the direction granted by the Secretary of the Department of Human Services on 1 March 2002 pursuant to section 42 of the Health Services Act 1988 you are required to engage the services of agency nurses only in accordance with the conditions set out below, unless the Chief Executive Officer obtains prior authorisation in writing from the Executive Director, Policy and Strategic Projects, DHS.
>
> *1. Conditions under which Agency staff can be used*
>
> Agency nursing staff may only be used for unexpected absences, for example sick leave, exceptional circumstances or compassionate leave.
>
> *2. Replacement Grade*
>
> Where an agency nurse is required to perform services that would otherwise be performed by a permanently employed nurse, the replacement nurse must be engaged and paid at the same grade as the permanently employed nurse.
> *3. Existing Staff working for Agency with employing health service*
>
> Nurses who are permanently employed by a Health Service Organisation must not be engaged to perform agency nursing services for the Health Service Organisation that permanently employs them.
>
> 4. Maximum Price

[13] Print S9958, 31 August 2000

> The amount that any Victorian public hospital pays to any employment agency for the services of a temporary nurse must not exceed:
>
> 80 % above the basic award rate for the replacement grade nurse; plus
>
> 15 % above the allowances provision included in the award.

This cap on the amount that nursing agencies could be paid and that they could in turn pay to nurses, combined with the nurse-patient ratios and the resultant requirement to recruit 2650 new permanent staff in 2001-2 significantly reduced the incidence of agency employment. At the same time part of the enterprise agreement outcomes was that each hospital and network would set up nurse banks and directly employ casual nurses as well as the new nurses needed to implement the ratios. Hundreds of millions of dollars was being wasted on agency labour, which lead to poorer health outcomes and at the expense of permanent jobs.

- Simultaneously the Government established a policy that only agencies which are chosen as suitable agencies through a regular public tender process conducted by Health Purchasing Victoria (the main health procurement agency established under the Health Services Act 1988) can be used by public hospitals and health networks. In December 2002 the Australian Competition and Consumer Commission approved a Government application under the Trade practices Act 1974 to be able to conduct the tender for supply of casual nurses to Melbourne metropolitan hospitals and Barwon Health. The ANMF strongly supported the public benefit attached to that application, although it was very controversial among agency nurses who had done very well out of the nursing shortage and the inflated agency prices. In its submission to the ACCC in support of the application ANMF summarised the many problems created by approximately 5% of the nursing workforce at that point , especially in specialist areas, being provided by agency:

  > *Common issues with employing agency nurses include: unsustainable hire costs at up to four times the cost to employ agency nurses compared to hospital nurses; unknown competence/skill level; unfamiliarity with local work environments; increased supervision and orientation by permanent staff; added responsibility for permanent staff; and, less continuity of care.*

- HPV continues to undertake that tender and apply the 2002 Directive. As part of the tender process they seek best value, including in relation to what training and other services the agency will provide. From the applicants they choose a list of nine preferred agencies that health services can then contract. Of course, individual health networks are then allowed to engage in bargaining with an approved agency provider to become a preferred provider for that health network. This might be on the basis that they will provide labour at only 40% above the enterprise agreement rate rather than 80% above. This means that where there is still minimal labour hire

they have a consistent relationship with that supplier and many of the nurses supplied work consistently at the facility.

The ANMF has rarely had reports in the public sector or private acute that nursing agencies pay less than the standard rates (which are the same or similar across the public and private acute sector. This may occur in the aged care sector where smaller nursing agencies, which are not covered by their own enterprise agreement, will supply nursing labour to aged care or other facilities at less than the host employer's in-house enterprise agreement rates. But in our estimation this happens relatively infrequently. It would be difficult to get nurses to work as agency nurses, in an environment where nursing employment is easy to get, if agencies paid below the market rate (in this case the enterprise agreement rates). That is clearly not the case in many other industries.

Fixed Term Employment

3.4 The ANMF faces the challenge of the inappropriate use of fixed term employment reasonably regularly. However, this is tempered by clauses in all enterprise agreements which limit the use of fixed term employment to:

> ***Fixed term employment will only be used for "true fixed term arrangements".***
>
> ***"True fixed term arrangements" include, but are not limited to, employment in graduate nurse positions, replacement of Employees on maternity leave, long term WorkCover, parental leave or long service leave, employment in special projects, and post-graduate training.***

While the clause could be stronger it makes it clear that fixed term employment is not to be used for work that is on-going and should be filled by permanent part-time or full-time employees. At least that is the understanding of the industrial parties. Unlike the higher education sector, the health sector does not have large number s of funding dependent positions. This occasionally happens in research areas or for specific project development and implementation.

We note that the ILO discussion paper prepared for the 2015 experts meeting on insecure work concludes that "A comparative overview of national labour laws shows that many countries have adopted approaches to prevent abusive recourse to fixed-term contracts. Three major dimensions of such provisions are: (1) the prohibition of fixed term contracts for permanent tasks; (2) a limitation in the number of successive fixed-term contracts; and (3) a limitation of the cumulative duration of fixed term contracts. ….a relatively common sanction for breaching legal requirement sis to convert the fixed-term contract to a contract of unlimited duration."[14] More than half of the 187 countries for whom information was available had prohibited fixed term contracts for permanent tasks and around half limit the cumulative duration of successive contracts to 3-5 years.

[14] Report for discussion Tripartite Meeting of Experts on Non-standard Forms of Employment (Geneva, 16–19 February 2015) wcms_336934 at page 40 at http://www.ilo.org/travail/whatwedo/eventsandmeetings/WCMS_310212/lang--en/index.htm

While ANMF enterprise agreements attempt to impose the restriction mentioned in (1) above, we have no limitation on successive fixed-term contracts or cumulative duration, let alone deeming provisions. The National Tertiary Education Union had done some ground breaking work in this regard, including access to permanent entitlements and redundancy payments for fixed-term employees after a certain time. The Victorian Government could apply such principles in the public sector (by for example insisting public sector agencies use model clauses around fixed-term arrangements) as well as advocate for amendments to the Fair Work Act to limit the use, number and duration of fixed-term contracts

Independent Contractors

3.5 The ANMF has little experience of independent or dependent contractors. We have some examples where nurses have entered a contract, usually to receive a base payment and then a proportion of the fees received under a Medicare schedule item for particular services. In these situations the nurses are really dependent contractors. While they might have signed a contract and even have an ABN, they aren't genuine entrepreneurs with a diverse client base and operating as a genuine business contracting to another business. They effectively operate within the business of the principal and are subject to direction and control about when and how they undertake the work. The ANMF discourages members from entering such arrangements. In the few cases we have had we have usually been asked to assist when the nurses try and re-negotiate very lop-sided or unclear contracts. Individual nurses usually find this very difficult.

There are other instances in health of nurses as independent contractors – midwives or nurse practitioners for example. However, these would number several hundred out of the almost 100,000 registered nurse in Victoria.

4. ANMF members experiences of casual and agency work

4.1 The ANMF sent out about 4000 emails with requests to participate in the VTHC initiated survey in respect to this inquiry into insecure work. These invitations were sent largely to those who identify in our membership database as 'bank' staff or as nurse agency staff. Around 60 responses have been received, formatted by Trades Hall staff and submitted separately to this inquiry on our behalf.

From the individual nurse's perspective there are some contradictory views expressed in those brief responses. Certainly there are some who appreciate the capacity to work more flexibly. This certainly applies to those who only want to work particular shifts (usually not night shift or only on weekends) which will usually not be possible in a public or private hospital where all staff are expected to take their turn on nights or weekends.

In terms of wages, there appear to be few complaints although one anonymous respondent said:

> *The pay rate remains the same when reached to grade year 10. There was no annual increase. The cost of life is increasing a lot but the pay rate has not been increased accordingly. The pay rate of agency nurse is even less than bank nurse of the hospital. Agency*

nurse is a seasonal job. No work, no pay. Tightly regulate the nurse agency. Make sure they have the ability to provide sufficient work to their worker. (Anonymous Labour Hire/Agency Nurse #5).

Of course, casual workers are covered by the relevant enterprise agreement and paid accordingly. Virtually all health service users of labour hire or agency workers are covered by an enterprise agreement and the terms and conditions of the relevant enterprise agreement are applied to those agency workers. Alternatively, the agency applies a rate which is based on the public sector enterprise agreement rate, which is mirrored in the private acute sector. So, while some respondents complain generally that nurses as an occupational group should be paid more, there doesn't appear to be a perception or complaints that agency staff are paid significantly less that permanent staff.

4.2 However, the responses also expose a range of concerns which are almost universally held, even where the respondent indicates they are satisfied with other aspects of the casual or labour hire arrangements. We have summarized these concerns and included indicative quotes from the on-line responses of members (most of whom wished to remain anonymous):

- **Lack of job security and inconsistency of income**

One week you may have a really good pay come in, then the next week struggle to get any work. If you don't set money aside, you may struggle to pay bills/ rent/ mortgage. Fortunately my fiancé is an accountant and so he helps me with arranging a budget. (Anonymous Labour Hire/Agency Nurse #1)

I was employed through a labour hire agency in my current job. Booked for AM shifts at 2130 then cancelled at 0530. Booked then cancelled and it goes on… No pay due to cancellations …Have had to apply for hardship with mortgage and bills, as my partner is on Centrelink benefits. (Anonymous Labour Hire/Agency Nurse #10)

- **Lack of proper induction and familiarisation with the host health facility policies and procedures**

It seems dangerous having a nurse work a shift where she has never worked, and hasn't received an orientation, doesn't know any other staff members, and doesn't know any procedures or protocols. Often patients express concern to me once I tell them I'm an agency nurse. I feel confident enough in my skills to reassure them, but many wouldn't. (Anonymous Labour Hire/Agency Nurse #1)

Some places you go to, it is so busy you have to ask to be shown around. It's not always the case but I have seen this happen a few times. (Anonymous casual nurse, #3 Reservoir)

I often find that the Agency Midwife is loaded up with the heaviest workload at most institutions, with no regard for the fact that as an Agency Midwife I'm the least likely to be familiar with the environment and the policies/procedures than permanent employees and this increases both the workload and stress for me. (V Flett, Labour Hire/Agency Nurse, Berwick)

Professional development is always undertaken on my own time and sometimes at my own cost … there is always little time to do a proper induction as there is the expectation to get down to work as soon as hand over is finished (Catherine, Melbourne).

- **Lack of proper rostering and adequate notice (either of upcoming shifts or cancellation of shifts) causing loss of time and income and problems organising childcare and daily living arrangements**

I felt that if I declined a shift i.e. because I didn't want to travel so far to a hospital then I wouldn't get offered other work. All compulsory CPD etc. had to be done on my own time, with no pay. Coming onto a shift, the other nurses/ nurse in charge/ NUM are always busy and often never get the time to show you around the ward, let alone tell you about protocols, procedures, safety etc.

I don't have kids myself, but other agency nurses I've talked to have found arranging childcare very difficult. I found not having a roster extremely stressful. I could never arrange to see my friends etc. and struggled to make time to spend with my partner. I always feel tired, because I never have a "planned day off". The days off that I do get are because I didn't end up getting a shift, and I wouldn't know that until after 3pm. I feel I can never relax. (Anonymous Labour Hire/Agency Nurse # 1)

As working with agency, most of the times shift get cancelled and sometime you don't get a shift, which affects finances and definitely waste of time, because you kept waiting for the shift to come and your whole day is a waste. You can't work somewhere else if you gave availability to one work place and not available at another. (Anonymous Labour Hire/Agency Nurse #2, Lyndhurst)

It's just so hard to plan anything. Waiting around for work to call you. Maybe not having enough rest during the day and then get called to work night or resting thinking you are working and then not get called…(Anonymous casual nurse, #3 Reservoir)

If called to do a shift they could cancel you with only approx. 2 hours' notice so as not being able to get another shift with an agency for example….Another thing they would book you for say an 8 hour shift and sent u [sic] home after a couple of hours. All this is stressful about not earning enough money to pay your bills etc. We were only told of our next shift the late afternoon prior for a morning shift and about 10 am to let us know about a PM shift. This is if you were lucky. Often you weren't told until an hour before and then you could be cancelled anyway. Due to what I have just said, you never knew how little or how much work you would ever get. This is also when you put your name down every day for am or pm shifts even… Often they wouldn't tell it was a short shift because no one wanted to do them, so they told you it was a full shift, then send u home after a few hours. Also they cut your shift hours after you have done all the hard initial work. This applies to being an agency worker too. If they book you for an 8 hour shift for example they should have to honour that and pay you. (Anonymous casual nurse, #4).

I am basically 'on-call' from when I wake up in the morning until 9pm every day I am available for shifts and often need to try to get an 'afternoon nap' just in case I get a Night Duty. I cannot plan ANYTHING whilst awaiting shifts. The first 6 weeks were OK with regards to income, then I had 3 whole weeks without one shift, this has placed a huge financial strain upon me and especially considering Christmas is only a month away etc. (V Flett, Labour Hire/Agency Nurse, Berwick)

I was employed through a labour hire agency in my current job. I'm expected to do shifts without min 10 hour break or to do continued shifts from 1 client to next example start 3pm - 10pm drive 1/2hr 10.30pm - 1pm next day but have to fill in time sheets as 3 shifts all up. No breaks, no sleep. Changes weekly and either shifts added or cancelled with only very short notice. Week to week changes all time, there was a time I had no work for 3 months without a true reason why. This happened in the Community care industry. That every employer should pay a min of 4 hrs a day

(5days) to all employees for days no work or on call instead of nothing at all. (Debbie, Community Care Nurse, Box Hill)

- **Short shifts of 5 to 6.5 hours, rather than a standard 7.6 to 8 hour shift**

Agency or bank nurses never get a full time shift as a regular staff... for e.g. they always get a 6 hour shift. But regular staff gets 8 hour shift. This puts too much stress on nurses to finish their work on time (Anonymous Labour Hire/Agency Nurse #2, Lyndhurst).

When booked to work a full shift and the shift is reduced to only few hours because the ward is not busy anymore I feel used and the hard work I have put in before that is not acknowledged. My income is consequently reduced and with the cost of parking and petrol it can be a frustrating and wasteful experience. (Catherine, Melbourne)

- **Excessive workloads with casual and agency workers often being given more demanding situations or expected to complete heavy workloads in part of a shift**

I was a directly employed casual in my current job. I would be asked to do psych specials but not always informed of the risk and current presentation of the patient being specialled. I was assaulted more than once on these occasions. I would accept a shift unaware of the ward acuity. I would be assaulted and not know if I would be supported if I asked for assistance with WorkCover. I would have shifts cancelled at the start of a shift and miss out on work. This happened at The Austin, The Alfred and Dandenong hospitals in Melbourne when I was employed by Swingshift. (Anonymous Mental Health Labour Hire/Agency Nurse #7)

I was employed through a labour hire agency in my current job. Working back is difficult, often I stay back to complete work and not get paid for it. To do so requires approval and acceptance from agency and management before allowing me to stay back and that's hard to get. Time management it's brought up in such times and I don't believe it is. Casuals are used because they are needed due to staff shortages and heavy workloads. Some shifts are mayhem due to the volume of patients and paperwork required to complete and I actually care about the quality of care I provide. There's never time to do a proper induction. It's often skimmed over or left for me to discover.(Andrea, Labour Hire/Agency Nurse #11)

- **Lack of access to employer supported continuing professional development (CPD) in paid work time**

If I want to undertake CPD this is done in my personal time. I'm not paid for it. (Anonymous casual nurse, #3 Reservoir)

- **Inability to complain about the situation for fear of losing shifts/job**

Agency also have no rights at all and often get treated extremely badly including getting blamed for things you don't do to pts [sic] you never looked after and then the agency doesn't send you back there so no work again!! You just have to assume that every place has the same standards of which they don't... and as agency you can't say anything at all. (Anonymous Labour Hire/Agency Nurse #6).

You can be so easily replaced it's never said but you know if you are relying on that work, you do not rock the boat; if you want more shifts. (Anonymous Labour Hire/Agency Nurse #7).

- **Lack of standard paid leave entitlements**

Financial stress Insecurity of job as working casual, if I get sick or injured I won't be able to get any income…. Casual nurses should get some sort of sick leaves, or annual leaves or they should be able to get some incentives if unfortunately they lose their job due to sickness or any injury. (Anonymous Casual Nurse #2, Lyndhurst)

You don't get paid more than what a facility pays for casual work either. For instance this week I'm sick I was unable to work. I don't get paid sick leave and although there is loading in the casual rate to make up for this, it's hardly enough. (Anonymous casual nurse, #3 Reservoir)

As there is no sick leave or annual leave in casual work I sometimes worry about the lack of income in case of sickness…. I would make sick leave entitlement compulsory otherwise offer free medical services. I would make it illegal to reduce the hours of work once booked. Offer all education related to work for free. (Catherine, Labour Hire/Agency Nurse, Melbourne)

- **Inability to obtain references**

Another stress is wanting to go on a casual bank and having to produce references from only managers when you've been doing agency forever and can't get a reference because you don't work consistently with the same people so it all just becomes too hard. (Anonymous Labour Hire/Agency Nurse #6).

One respondent summarised her complaints pithily as:

I was employed through a labour hire agency in my current job. Gradually out of touch with latest developments; unsafe stress levels due to understaffing; others suffered this; possibly ostracised because I discussed this openly; steady decline in income as services reduced. (Anonymous Labour Hire/Agency Nurse #9)

These are all issues which, while expected, are hard to resolve in any simple or quick way, especially without joint and concerted efforts and legislative changes by both state and federal governments and the Fair Work Commission. Some are a product of lack of proper practices and procedures within host employers, some relate to an incapacity to bargain and have a decent framework of conditions applied (apart the base wage rate which is usually determined by the market) and some relate to the lack of respect and communication they experience at work. However, the comments all confirm many of the known difficulties with insecure, contingent and precarious work.

5. ILO Recognition of the Issues and International Standards

5.1 As pointed out in the ACTU submission there is no specific international labour standard adopted by the International labour organisation (ILO) which deals with non-standard forms of employment or precarious work. While some Conventions and Recommendations deal with aspects of non-standard forms of work e.g. private employment agencies (Convention 181),

part-time work (Convention …) or Domestic Work, there is no comprehensive statement on the standards that should apply to precarious of non-standard forms of work.

5.2 The ILO web-site defines non-standard forms of work as:

> *Non-standard work refers to jobs that fall outside of the realm of standard work arrangements, including temporary or fixed-term contracts, temporary agency or dispatched work, dependent self-employment, as well as part-time work, including marginal part-time work, which is characterized by short, variable, and often unpredictable, hours. Over the past several decades, in both developed and developing countries, there has been an important increase in the number of persons who are employed under alternative contractual arrangements. In some instances, these new forms of contractual arrangement have led to a blurring of the employment relationship, making it difficult for workers to exercise their rights at work, or gain access to social security benefits.*

5.3 Indeed at the International Labour Conference Recurrent discussion on Fundamental Principles and Rights at Work (FPRW) in 2012 (to discuss progress on the 1998and 2008 Declarations on FPRW), there was disagreement between employers and workers representatives about the impact of non-standard forms of employment. For some employers and governments fixed term and other types of employment serve as useful entry points and a stepping stone for new entrants to the labour market. However, for unions the growth in non-standard forms of employment undermines the right to organise and collective bargaining among other deficits compared to standard employment.

5.4 The Resolution from the 2012 discussion said (paragraph 12), "Furthermore, the increase in non-standard forms of employment, in cases in which the national legislation does not adequately address them, raises questions concerning the full exercise of fundamental principles and rights at work. In this context, young workers and women workers are particularly affected." The Resolution then called on the ILO to organise a meeting of experts as well as undertake research on the "positive and negative impacts of non-standard forms of employment on fundamental principles and rights at work and identify and share best practices on their regulation." (Paragraph 13(b) of Committee Resolution, ILC 2012).[15]

5.5 That Conference of Experts took place in February 2015 and the Report for Discussion and the Conclusions are found on the ILO website.[16] The Report for Discussion looks at "Temporary employment, whereby workers are engaged for a specific period of time, includes fixed term, project or task-based contracts, as well as casual work"[17]

The Report for Discussion quotes ABS figures (p. 7) that in 2012 23% of the workforce in Australia were casuals of whom 69% worked part-time. Interestingly, Table 1 on page 6 shows only 5% of the Australian workforce engaged in temporary work. This must only reflect fixed term or agency/labour hire workers. When the casual labour force is added the Australian temporary workforce percentage is almost 30% (without counting own account workers or independent contractors). In the industrialised world this is second only to Spain and

[15] http://www.ilo.org/ilc/ILCSessions/101stSession/reports/provisional-records/WCMS_182951/lang--en/index.htm
[16] Report for discussion Tripartite Meeting of Experts on Non-standard Forms of Employment (Geneva, 16–19 February 2015) at http://www.ilo.org/travail/whatwedo/eventsandmeetings/WCMS_310212/lang--en/index.htm
[17] ibid. p4

internationally, only behind Spain Algeria, Ecuador, El Salvador, Ethiopia, Peru and Uganda of the 60 plus countries compared in the Report. Australia also has by far the biggest part-time workforce (as at 2009) as a proportion of all employees – at around 53% compared most other OECD countries with part-time workers being between 20-30% of the workforce, except for the Netherlands at 43%.[18]

5.6 However, the Report also makes clear that for a range of regulatory and policy reasons the nature and incidence of temporary work differs between countries and between industries within countries. Many countries have large temporary agency (labour hire) workforces. The US doubled its temporary agency workforce as percentage of the total workforce between 1990 and 2000. In China 60 million or 20% of the 300 million urban employed were agency workers compared to 27 million in 2007.[19] The Report summarises the different trends and identifies "casual employment in Australia" as an important development.[20]

Repercussions

5.7 The report identifies that:

> *Working arrangements can affect workers in a variety of ways, including their ability to access the labour market and transition between jobs, their earnings, access to social security benefits, access to training, occupational safety and health, and their ability to exercise their freedom of association and collective bargaining rights.*

The Report then goes on to show these repercussions in some detail including that:

- In countries with large temporary workforces non-standard workers are more likely to transition from temporary work into unemployment or inactivity (rather than permanent employment). Australia is said to be less susceptible to this 'churning' than many other countries with about a one percentage point differential between non-regular and permanent employees.[21]
- Wages, except, for some professions, including nurses where there is often a premium paid over standard employment rates, are generally lower for non-standard workers who tend to be lower skilled and predominantly either younger and/or women workers.[22]
- Training for non-standard worker is less accessible – for the OECD group (including Australia) they concluded that: "On average, being on a temporary contract reduces the probability of receiving employer sponsored training by 14%" and by greater percentages in some countries.[23]
- Health and safety outcomes are worse because non-standard or temporary workers are less likely to receive adequate training or induction, are unlikely to be represented on OHS Committees and they are less likely to complain about safety for fear of discrimination or retribution. The report concludes in respect to agency workers

[18] ibid. p.16
[19] ibid. p.13
[20] ibid. p.18
[21] ibid. p.22
[22] ibid. p.25
[23] ibid. p.28

"…because multiple parties are involved, with the contracting agency paying the wages but the user firm giving the instructions, there is greater potential for accidents, even if the responsibility for safety and health at the workplace lies with the user firm."[24]

- Workers in NSFE [non-standard forms or employment] may experience difficulty in joining trade unions or in being covered by collective bargaining agreements. In a few cases, this is a result of legal exclusions that prevent certain groups from organising and bargaining, but in most cases it is the result of the difficulties imposed by their status.[25]

5.8 All of these repercussions are found in one form or another in the Australian employment landscape and are echoed in the comments by ANMF members who are agency or casual workers. Our members find it:

- harder to obtain permanent employment after a considerable time as a casual or agency worker
- harder to get adequate occupational and OHS training or speak out about OHS and workload issues,
- they are often exposed to higher workloads and more difficult clients (and therefore increasingly dangerous situations)
- they find it harder to organise and collectively bargain. In fact, while the ANMF has enterprise agreements covering 95% of all of our 75,000 members (including casual workers who operate within the covered workplace) we do not have a single enterprise agreement with a nursing agency.

5.9 The ILO Report for Discussion at the meeting of experts also identified a range of impacts at the user firm level, especially:

- the hollowing out of skills in the firm because the firm becomes dependent on buying adequately skilled workers in the marketplace. However, the irony is that a key problem with temporary agency work is the lack of access to occupational training and updates.
- A poorer relationship between the firm and standard workers where there is a greater presence of non-standard workers
- A decline in innovation and competitiveness where there is a higher use of non-standard workers, presumably because non-standard workers are less loyal, less inclined to engage or be accepted in teams and are less prepared to put in a greater effort than standard workers.[26]

5.10 There is also a clear macro-economic effect as temporary and agency work tends to exacerbate market segmentation and casualization and in turn these exacerbate wage and

[24] ibid. p. 28
[25] Ibid. p. 29
[26] Ibid. p.31

income inequality. This has a flow on effect on spending patterns and growth. Economies with large non-standard employment workforces tends to have polarised wage outcomes – the permanent core with secure and relatively well paid jobs and the periphery with insecure and usually low paid employment as the Howe Inquiry described. This is further amplified by the lack of training opportunities and career advancement for non-standard workers.

International Standards

5.11 **Termination of Employment Convention 158, 1982 (regulates termination of employment at the initiative of the employer) and ratified by Australia in 1993:** excludes workers engaged under a contract for a specific period of time or a specific task or to workers engaged on a casual basis for a short period of time. However Recommendation 166 modifies the former exclusion in relation to fixed term employment from the protection from dismissal to limit the exclusion from protection to situations where the fixed term contract is one that cannot be of indeterminate duration. In cases where the fixed term contract is capable of indeterminate duration or is renewed on one or more occasions, then Recommendation 166 says that the contract should be deemed to be ongoing or indefinite.

The exclusion is reflected in Australian law, both in relation to redundancy pay (s. 123 of the FW Act) and unfair dismissal for fixed term workers, although 'regular and systematic casuals' (as opposed to short term casual workers) are able to claim compensation for unfair dismissal. However, there is no deeming provision within the FW Act as suggested by Recommendation 166. Rather, at least in relation to redundancy pay the FW Act says the exclusion doesn't operate if a 'substantial reason' for the excluded mode of employment "was to avoid the application of this Division." Of course, an applicant could rarely prove that was the substantial reason they were employed as a fixed term or casual worker and a deeming provision would be far preferable for fixed term workers and at least the extension of redundancy to regular and systematic casuals.

5.12 Private Employment Agencies Convention 181, 1997, not yet ratified by Australia.

The Preamble sets the background for the Convention which notes among other matters:

> *Recognizing the role which private employment agencies may play in a well-functioning labour market, and*
>
> *Recalling the need to protect workers against abuses, and*
>
> *Recognizing the need to guarantee the right to freedom of association and to promote collective bargaining and social dialogue as necessary components of a well-functioning industrial relations system,*

Article 3, paragraph 2, says "A member shall determine the conditions governing the operation of private employment agencies in accordance with a system of licensing or certification, except where they are otherwise regulated or determined by appropriate law and national practice." Article 10 provides that the State will ensure that "adequate machinery and procedures, involving as appropriate the most representative employers and workers

organisations, exist for the investigation of complaints, alleged abuses and fraudulent practices concerning the operations of private employment agencies"

Articles 11 and 12 are the key provisions in the Convention. Article 11 provides that a ratifying state should take adequate measures for the protection of workers in a number of specific areas such as wages, access to training, OHS, workers compensation and maternity/parental protection. Article 12 requires the member state to "determine and allocate …the respective responsibilities of private employment agencies providing the services ….and user enterprises" in relation to these matters. In other words there may be sole responsibility or joint responsibility in accordance with the law.

It is the ANMF view that the State of Victoria should lead the way in regulating, through a licensing or certification system, the agency or labour hire industry. In this regard we broadly support the proposals of the National Union of Workers and VTHC to introduce a licensing system, although we have modified and supplemented the suggestions they have made in their submissions.

5.13 **The Employment Relationship Recommendation, 2006** (No. 198) provides that member states should formulate and review and, if necessary, clarifying and adapting the scope of relevant laws and regulations, in order to guarantee effective protection for workers in an employment relationship. This includes review of the grey areas between employed and self-employed status, ensuring all workers are entitled to applicable standards no matter what their contractual arrangements and ensure that the respective obligations are clear in multi-party arrangements. The recommendation also sets out the usual list of indicators of the employment relationship (as a guide for development of national laws).

5.14 For all of these reasons – both the repercussions of insecure work as well as the international standards, patchy as they are in this area – ANMF supports bold action by both the State and Commonwealth Governments in this area.

6. The example of Code Blue, defining 'employee' and bargaining

6.1 In relation to labour hire we have had some experience, although not as much as many others, of a company liquidating and leaving nurses and other creditors in the lurch.

In 2011 Code Blue Nurses Melbourne Pty Ltd (CAN 099088281) entered administration and subsequently liquidation, along with a range of other related Code Blue corporate entities in Sydney, Adelaide and Brisbane, together with Australian Nurses Online.

The then GEER Scheme (now FEG) paid out around $150,000 to nurse claimants as a result of the insolvency event[27] with a round $110,000 being paid to approximately 100 employees in

[27] This was advised by email by the delegate from GEERS in the relevant federal department, DEEWR, in October 2013 who advised that at that point the following amounts had been paid to claimants: Australian Nurses Online - $8,789.51, Code Blue Adelaide - $2,7844.74, Code Blue Brisbane - $18,457.99 Code Blue Melbourne - $110,104.50 and Code Blue Sydney - $7,921.75 & pending approval by the Delegate $1996.00

Melbourne. While the amount isn't large it is the difficulty in recovering the amounts for employees that is worth recounting for the purposes of this inquiry.

6.2 Many nurses sign up to various nursing agencies and sign contracts like those offered by Code Blue. The contracts signed by nurses explicitly said that Code Blue was not the employer. To quote the chapeaux to the contract:

> ***Membership Agreement***
>
> ***Parties to the Agreement***
>
> ***The Agency – Acting as a go between for the Nurse/Midwife and the hospital.***
>
> ***The Nurse/Midwife – providing casual nursing services to hospitals***
>
> ***Nature of the Agreement***
>
> ***Code Blue Nurses acts as a go between for nurses and midwives wishing to secure work placements and hospitals requiring casual staff. Nurse and midwives are NOT employed by the agency, but are employed by the requesting hospital.***

Further, at clause 2.4 the "Membership Agreement" indicated that:

> *The Nurse of Midwife understands that the Hospital is the employer and the Hospital's Representative will provide directions on protocols, standard on patient care and how it is delivered, compliance with the Hospital's OH&S and Risk Management requirements in accordance with the highest professional standards of the nursing industry.*

6.3 The contract is attached as part of Attachment 1.

Of course in time the liquidator said that he did not regard the nurses as employees for the purpose of priority under the Corporations Act 2001, in terms of ranking of creditors. Ultimately GEERS itself, on advice from the liquidator or of its own accord, initially denied employees compensation for unpaid wages, because the nurses "were employed as [a] sub-contractor", not as an employee and therefore ineligible for GEERS assistance.

6.4 Clearly the law in regard to whether a worker is an employee or an independent contractor is long stranding and the outcome in each case depends on the circumstances. The usual course in the case law is to look at the totality of the relationship between the parties or as it was put in one case "a matter of obtaining the overall picture from the accumulation of detail."[28]

6.5 The cases assess whether the various indicia of employment are present.[29] These cases have looked at the degree of day to day control (the control test, or whether A is part of B's organisation - the 'organisation test') and a range of other factors, including wearing of uniforms, who has control of work standards etc. These matters were also discussed in Drake Personnel Ltd v Commissioner of State Revenue.[30] At first instance the trial judge found that the temporary Drake workers, including nurses, were not employees at common law but that

[28] Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue 97 ATC 5070
[29] See Hollis v Vabu (2001) 207 CLR 21 and Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16.
[30] [2000] 2 VR 625

Drake was still required to payroll tax under the Payroll tax Act 1971, because of a deeming provision. The trial judge viewed with favour the finding by the High Court in *BWIU v ODCO*[31] that ODCO did not have the requisite day to day control over the temporary worker. On appeal the Victorian Appeals Court found that the Drake temporary workers were employees. As Justice Philips put it:

54. *All of this is very helpful here, for it indicates that in a case like the present where A makes an agreement with B under which A supplies to B the services of C for the performance of work and A also makes a contract with C for C to perform the work for B, it can be said, readily enough, that in performing the work C not only benefits B but is also advancing the business of A, to the benefit of A. It is true that the High Court was considering a statutory definition serving to extend the concept of employment; but it seems to me to follow that a temporary, in accepting an engagement to perform work for Drake's clients, is doing the work as much for Drake as for the client. The temporary is, in a relevant sense, working for Drake while working for the client. In the one case he or she is working pursuant to a contract (with Drake) and in the other that is not so (the temporary making no contract with the client). But the contract between Drake and the temporary should not, I think, be denied the character of employment according to ordinary concepts of the common law simply because when the work is done it is done for the immediate benefit of a client of Drake.*

55. *Then there is the second question of day-to-day control. Mr. Shaw rested much of his argument on this factor, contending that with the day-to-day control vested in the client of Drake, rather than in Drake, there could be no employment between Drake and the temporary. The Solicitor-General took issue with this, pointing to the control which Drake still exercised in relation to the temporary's remaining on site, and its powers of discipline and the like, but I say nothing about those: they appeared to me to be inconclusive. Rather, in a case like this, it may be that control, day-to-day, is not as significant as it was in the cases cited to us. Those cases were Stevens v. Brodribb Sawmilling Co. Pty. Ltd.[26], The Roy Morgan Research Centre Pty. Ltd. v. Commissioner of State Revenue (Vic.)[27], Building Workers' Industrial Union of Australia v. Odco Pty. Ltd.[28] and Construction Industry Training Board v. Labour Force Ltd.[29] and in each of them the question was whether the worker was in truth an employee (in the master/servant sense) or an independent contractor. It was said in Labour Force[30] that, where A engages with B to supply to B the services of C, such a contract may be sui generis. Be that as it may, the question in a case like the present is not so much whether the temporary has an employer (in the master/servant sense), but who that employer is. In other words, while the test of day-to-day control may be significant to establish or to deny that the worker is an independent contractor, that is not in issue here. As the Commissioner pointed out in argument, the fact that the client exercises day-to-day control may be referred back to the contract made between Drake and the temporary; for it is under and by virtue of that contract that the temporary accepts direction from Drake's client, its "employer" for the time being. Why then should the exercise of that control on a day-to-day basis be taken to deny to the contract between Drake and the temporary the character of employment according to ordinary concepts of the common law?*

56. *In cases like these, we are often instructed to stand well back to assess the situation, after first having regard to the detailed facts. Standing back, it seems to me that in this case the subject matter of the contract between Drake and the temporary is casual employment. Once that step is taken, the rest falls into place. Drake can be seen, in a relevant sense, to be employing the temporaries to do casual work, albeit that the contract between the temporary and Drake arises only upon the temporary accepting the offer of work through Drake. The arrangement made with Drake is for casual work: the temporary is to go to the designated work-site and perform work according to the directions of the designated employer for the day; that all flows from the contract made by the temporary with Drake. Tomorrow - or next week or next month - it will be a different work-site and a different temporary employer, but again that will be the consequence of the temporary accepting an offer from Drake and a contract arising between Drake and the temporary. Under that contract, Drake is employing the temporary to do the very thing which the temporary is doing: that is to work for the client. I see no*

[31] 64 A.L.J.R. 606

reason, then, to withhold the conclusion that in those circumstances the temporary is working for Drake under a contract of employment, albeit a contract for casual employment. If we must generalise as the trial judge was asked to do, there is little in the evidence to gainsay the conclusion I have just expressed. That was not so in Odco (and no doubt it was on that basis that it was common ground there - at least by the time the case reached the Full Court[31] - that there was no contract of employment according to ordinary concepts). In his outline in reply, Mr. Shaw mentioned a number of factors which he said militated against the conclusion that the temporary was the employee of Drake: that the temporary could and did refuse assignments, that the location or hours of work were determined by the client, not Drake, and that the temporary could not compel Drake to find him or her work; and that the temporaries were free to seek other work, even being registered with other agencies. But these were all factors preceding the making of the contract by the temporary with Drake if, on the analysis I have suggested, that contract arises only upon the temporary's accepting an offer of work through Drake.

57. Accordingly, if one looks at the matter "from a distance" as it were, the conclusion that the temporaries are employees of Drake according to ordinary concepts of the common law is one which not only can be supported but is I think required: the temporaries are engaged by Drake to perform casual work and the difficulties inherent in this case arise, first, from the very nature of casual work as impermanent and, secondly, from the fact that the contract between Drake and the temporary involves the temporary's doing work for and at the direction of a third party, Drake's own client. But given the contract made by the client with Drake and the contract made by Drake with the temporary, it seems to me perfectly consistent to conclude that the temporary is the employee of Drake in the relevant sense at common law.

6.6 Of course in more recent cases like *On call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)*[32] while examining the various indicia of employment, Justice Bromberg (paragraph 208 at p 56) reduced the "ultimate question" to one of whether the worker was in effect running his or her own business and supplying services to another business (the 'entrepreneur test' of the English Courts). He said:

Simply expressed, the question of whether a person is an independent contractor in relation to the performance of particular work, may be posed and answered as follows:

Viewed as "practical matter":

(i) is the person performing the work an entrepreneur and operates a business; and

(ii) in performing the work, is that person working in and for that person's business as a representative of that business and not of the business receiving the work.

If the answer to that question is yes, in the performance of that particular work the person is likely to be an independent contractor. If no, then the person is likely to be an employee.

In all but two cases Justice Bromberg found that the on call interpreters were employees at common law.

6.7 Justice Bromberg quotes at paragraph 194 the preparatory report to the International Labour Conference 95th session 2006 in relation to the Employment Relationship (which gave rise to Recommendation 198 referred to elsewhere in this submission). He does so to highlight that what is important is not how the parties (e.g. the agency and the worker) describe their relationship, but the 'facts" of the relationship. The report at [26] said "The determination of

[32] [2011]FCA 366

an employment relationship should be guided by the *facts,* and not by the name or form given to it by the parties. That is why the existence of an employment relationship depends on certain objective conditions being met and not how either or both parties describe the relationship." Indeed in *On Call* many of the interpreters were told that they were, and regard themselves as 'self-employed'. However, previously they had been employees and nothing had changed in the relationship so Justice Bromberg discounted it as a valid indicator. Justice Bromberg said

> *The importance of courts focusing on the reality of the relationship and not merely its form arises in the context of the increasing world trend towards the prevalence of what the ILO calls 'disguised employment relationships'. As the ILO Report recounts, changes in the legal status attributed to workers are a sign of the times and are commonly observed. These changes may be real or artificial. [para. 196]*
>
> *and*
>
> *It is commonplace for such legislation [the Fair Work Act] to identify the recipients of such entitlements or protections by reference to the common law definition of "employee". In that context, it is particularly important that the common law look to the reality of the relationship in determining whether an employment relationship exists. A contrary approach would place many workers who are in truth employees, beyond the protective reach of labour law." [para. 200]*

6.8 In the case of Code Blue the ANMF had to request a review of the initial decision of GEERS/DEEWR to refuse to compensate staff of Code Blue for losses incurred as a result of the liquidation. It was apparent that the ultimate question posed above by Justice Bromberg, would be answered in the negative by most, if not all, of the nurses engaged by Code Blue. Indeed, almost every indicator set by the case-law pointed to a contract of employment. The ANMF had given each nurse a questionnaire based on the two questions above and the indicia found in the case law. The answers confirmed the degree of dependence and control that Code Blue exercised over the nurses they placed and that those nurses did not have their own businesses (which in turn had diverse sources of income or could negotiate rates). Ultimately GEERS agreed that they should receive compensation of lost wages (there were no accrued entitlements) under the Scheme.

6.9 Of note however is that there were a number of employees of Code Blue that we are aware of whom were not Australian citizens or permanent residents who were not eligible for assistance under the GEERS now FEG scheme. These are usually on student visas or partner/spousal visas with eligibility to work. It is unfair that the national system precludes recovery of lost wages and accrued entitlements for these workers. Any licensing or certification system for labour hire agencies at the state level should provide compensation for those excluded from the FEG Scheme.

6.10 Ironically, the hospitals and health services who were the end users of the agency nurses didn't have any idea that Code Blue was indicating to those nurses that they, the hospitals, were the actual employer. When the hospitals and health networks were asked if they

believed they had an employer – employee relationship with the Code Blue nurses they universally denied this was the case and wrote letters supporting that view to GEERS/FEG.

6.11 All of this shows that despite the case law, the issue of the legal status of agency workers is still far from clear. In the case of Code Blue nurses it took almost two years to finally resolve their claims with GEERS/DEEWR. It also demonstrates in our view the need for regulation of labour hire companies and guarantees about both the standards of their operation, the claims they make in relation to employment status and guarantees about potential losses that will not be covered by GEERS (or for all non-citizens or permanent residents, all of their losses).

Bargaining

6.12 Of course the issue of whether the employee is an employee of the labour hire agency or an independent contractor is a key question. But another, assuming that they are an 'employee' is how the rights to organise and collectively bargain actually apply to these labour hire/agency workers (recalling the protections that are at the forefront in Convention 181 and apply to all workers irrespective of mode of engagement through the core Conventions C87 and C 98).

Our experience is that while everyone would say they have the right to organise and collectively bargain, it is nevertheless extremely difficult to get these employees organise or to bargain because labour hire employees don't congregate at one workplace (let alone at the agency or labour hire headquarters). This is despite the fact that we might have 30-40% of those workers at the agency unionised. Even if you could get these workers to the point of bargaining what would they bargain for, especially in relation to wages, when they often work in multiple workplaces? It is clear that in relation to labour hire/agency workers that in many industries (like the aged care example given above) that they are used as cheap substitute labour to undercut the price of labour in the industry sector and boost profits for the company.

7. The way forward

7.1 To some degree some of the possible elements are covered in other sections of this submission. For example in relation to **fixed-term employment** (please see part 3.4). In relation to part-time work (see part 3.1 above) these are really matters for bargaining , although the general European trend towards a minimum number of part-time hours, usually 24 hours, or fewer only by request or through the enterprise agreement provisions, is attractive.

Labour Hire

7.2 We have supported recommendations of the VTHC and NUW that there be a licensing system for labour hire and temporary agency work and have supplemented their suggestions.

We note Attachment 1 of the ACTU submission which would seem to indicate that there is no overwhelming legal impediment to the introduction of such a licensing or certification system.

They point to recent cases of regulation including Namibia in mid-2015. The ACTU indicate that regulation would probably involve more than one law, namely:

- One applying to labour hire agencies dealing with licensing, capitalisation, reports etc.; and
- Another applying to customers of labour hire agencies requiring that they use only licensed labour hire agencies in Victoria, and dealing with industrial matters in the form discussed proposed.

7.3 We note that some 15 countries around the world (from Belgium to South Africa) only allow licensing or registration where there is an objective reason for the labour hire and in most cases that reason is temporary in nature (such as the need to replace an absent worker or to perform a role not ordinarily carried out in the business). In other words labour hire is not permitted where the job being done is permanent in nature - like running the kitchen at an aged care facility or cleaning floors of an office building. Exceptions are sometimes made, usually for the construction industry. Given the problems labour hire work causes for workers, together with the attendant ohs and productivity issues, we would support such a further restriction being imposed on top of a registration system that requires 'fit and proper person' tests. This is certainly the only way that we see that labour hire should operate in the health industry, for the benefit of nurses, patients and the efficient use of scarce resources. We note that even in China, in 2013, the Labour Contract law was amended to restrict the use of labour hire to a) auxiliary positions outside the user firm's core business, b) temporary positions for a maximum of six months and c) replacement of absent workers.[33] Similar legislation was passed in Indonesia in 2012 and Vietnam in 2013.

7.4 Of course, there may be competition policy and law implications and if such a further restriction (apart from registration/licensing) was imposed then exemptions may need to be sought. The interaction between state legislation in this area and competition policy is not something we are qualified to speak about. However, what we do know is that any State Government has an interest in maximising permanent employment and minimising the myriad negative impacts of labour hire and insecure work.

7.5 The actual relationship between the agency and the worker is one which differs around the world. In most countries the law says it is of limited duration but in some it is open-ended. Others such as the UK provide that the relationship must be one of self-employment. We remain concerned about this latter approach as sham or dependent contracting would be thereby encouraged. Few workers are genuinely or independently self-employed. We have suggested that to be registered in Victoria a company would have to assume an employer-employee relationship with the labour hire workers (although we also suggest as do other unions that in certain matters such as dismissal and general protections the concept of joint responsibility should be adopted).

7.6 Further, we note that labour hire is sometimes used to replace workers who are engaged in lawful industrial action. However the European Union (Directive 2008/104/EC) allows member states to restrict the use of labour hire during industrial action and most have done so, as have

[33] Report for discussion Tripartite Meeting of Experts on Non-standard Forms of Employment (Geneva, 16–19 February 2015) p48

"a vast number of countries".[34] In fact the Code of Conduct of the International Confederation of Private Employment Agencies provides for a similar restriction.

7.7 Last but not least there is the principle of 'equal treatment' and a range of countries (around 32) provide that labour hire workers must be treated equally in relation to pay and basic terms and conditions of employment, with another seven countries providing equal treatment in relation to pay only or providing some exceptions from the broad equal treatment principle.[35] In health we would expect that a labour hire nurse coming into the acute hospital or aged care facility would be paid no less than the worker sin that workplace under the relevant enterprise agreement and enjoy the other conditions of employment related to that workplace. IT seems to us that if we are to prevent labour hire being used as cheap labour substitution for permanent workers then this is a principle that should be a requirement for registration as a labour hire provider.

Fair Work Act

7.8 We have supported the adoption of various recommendations consistent with other unions and the VTHC.

7.9 However, a key areas that would require legislative amendment is the issue of joint responsibility for treatment of labour hire employees between the labour hire company and the host employer (unfair dismissal, general protections for example) and also that labour hire employees are treated as employees of the user firm for the purposes of collective bargaining (and that any resulting bargain apply to the labour hire workers within that user firm. We understand that in the USA and Canada, for example, the "joint-employer doctrine" determined by the courts allows temporary agency workers to be treated as employees of both the agency and user firm – including in Canada access to the user firm's bargaining and collective agreements.

7.10 The 2015 ILO meeting of Experts on NSFE concluded that one measure to protect workers should be to ensure workers in non-standard forms of employment had access to freedom of association and collective bargaining. They recognised that NSFE:

> *…pose challenges when it comes to the effective realization of freedom of association and collective bargaining rights. Some triangular relationships pose particular challenges. Government, employers and workers should use social dialogue to develop innovative approaches, including regulatory initiatives that enable workers in non-standard forms of employment to exercise these rights and enjoy the protection afforded them under the applicable collective agreements.*
>
> We hope that this inquiry is the beginning of that social dialogue that will result in innovative changes here in Victoria and at a national level.

Other matters

[34] ibid. p43
[35] ibid. p44

7.11 In relation to occupational health and safety Worksafe should be required to put more focus ion labour hire and other forms of insecure work. There was some focus on insecure work, especially agency work, about seven years ago when we understand a workplace guide was produced on labour hire. However, if there was a registration and certification system for labour hire, Worksafe could play a critical role in advice, education and monitoring of obligations around OHS and return to work in particular.