Labour hire and employee protection

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The growth of labour hire has been one of the most dramatic recent developments in the Australian labour market. This column first raised concerns about it more than five years ago [http://www.alia.org.au/incite/1998/01/workwatch.html]. Since then the trend has gathered momentum. As I predicted then, high-profile international 'flexible labour' firms like Adecco and Manpower have now become major players in Australian recruitment. The former, for example, has current Australian revenues of around $1 billion.

There are both positives and negatives arising from this. Certainly many employers are attracted by opportunities for greater flexibility in staffing their organisations. But employees can be unfairly treated. The larger firms are far less likely to exploit vulnerable workers, but there is obviously pressure from low-cost operators willing to cut corners to compete with more established businesses. There remains little regulation of hire companies. Codes of conduct do not extend beyond self-regulation.

The general problem is well defined in a paper by Dr Richard Hall of the Australian Centre for Industrial Relations Research and Training, *[Labour hire in Australia: motivation, dynamics and prospects*, ACIRRT Working paper 76, ISBN 1 86487 486 4]. From a legal perspective, labour hire splits contract and control. Workers operate at, and under the day-to-day control of, the client organisation. But they are paid by and have a contractual [that is employment] relationship with the labour hire company, to which the client pays a fee, thereby also establishing a contractual relationship.

Legally, this can become highly complicated in practice. First, the law can be unclear about where liability lies. Second, the legal character of relationships is often uncertain with agencies often describing their workers as 'associates' or 'contractors' in order to deny employee status. Third, occupational health and safety issues can be especially problematic since the labour hire company may be in no practical position to observe an employer duty of care. The worker is remote from it and under the control of the client, who purports not to be the employer thus acknowledging no such duty. Similar problems can arise in regard to termination. Who is liable under unfair dismissal laws?

From the individual's standpoint, labour hire workers are usually engaged as casual employees or dependent contractors. Conditions are frequently characterised by low or below-award pay, insecurity, few career paths and limited training and development opportunities. The Australian Industry Group's submission to the NSW Labour Hire Taskforce [2000] estimated that ninety-seven per cent of labour hire workers are engaged as casuals. In those industries where wage rates have been studied, the link between labour hire work and substandard pay has been stark. In Queensland construction, only ten of ninety labour hire companies pay their employees at or above award rates. In banking, casual labour hire staff receive up to $3 an hour less than permanent bank staff doing exactly the same work. Incentive for low pay is a structural feature of the labour hire industry. At the same time, because circumvention of registered awards and agreements occurs, and because vulnerable individuals are unlikely to complain about it, protection of labour hire workers falls well short of that available to standard employees.

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Action to provide a better balance of interests has been slow in coming. In this regard, it must be said that this is a highly complex area. Some states — notably New South Wales — have been keen to examine how best to regulate the activities of labour hire companies. In conducting a major Inquiry, the state government's aim has been to protect employees from some of the disturbing aspects of this form of employment without removing its flexibility benefits for employers. It is an extremely delicate balance. ALIA's concern for its members was set out in my submissions to the NSW Inquiry two years ago [http://www.alia.org.au/submissions/nsw.inquiry.html].

NSW does at least have a strong set of unfair contract provisions within its *Industrial Relations Act* [especially section 106] which bring many questionable labour hire arrangements under the jurisdiction of the Industrial Relations Commission. Under these laws, the deeming of workers as dependent contractors means they must be regarded as employees. Accordingly, many labour hire contracts that define such people as contractors are unlawful, even if the worker has seemingly signed away her rights by agreeing to be regarded as an associate or contractor. Although these are powerful legal restraints on labour hire companies, employees are often fearful of using them for obvious reasons, including their vulnerability and dependency on the labour hire company for further work. ALIA continues to believe that strict enforceable codes of conduct are desirable.

There have always been many quite legitimate reasons why employers wish to use flexible labour. Temporary employment agencies have played a useful role for decades. But it cannot be denied that in recent years employers have used labour hire essentially to drive down labour costs by reducing established wage levels and conditions. On occasions, labour hire has also been a vehicle used by employers to replace existing workforces with lower-cost, non-union labour. The result has been a labour market tilted too far toward employer preferences and much too far away from appropriate protection for employees.

In these circumstances, there is a clear need for stronger policy action to restore a balance. The New South Wales Government's proposals for a new labour hire licensing regime is an encouraging first step. ■