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The OHS Regulatory Challenges Posed by Agency Workers: Evidence From Australia

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Abstract

Labour leasing or agency labour (also known as labour hire in Australia and New Zealand) is a rapidly growing work arrangement in most if not all industrialised countries. Unlike the two-party employer/employee relationship, labour leasing establishes a three-party or triangular relationship between the worker, the agency that supplies them and the host employer. There is emerging evidence that this triangular relationship, in combination with the temporary nature of most placements, poses particular problems for laws regulating employment conditions (industrial relations, occupational health and safety (OHS), and workers' compensation/social security) and the agencies administering them. This paper examines recent Australian experience with regard to protecting the health and safety of agency workers, drawing on detailed interviews and workplace visits with inspectors, as well as analysis of statutory provisions, documentary records (such as reports and guidance material), and enforcement activity (notably prosecutions) by OHS agencies.

Introduction

Labour leasing or temporary agency work (also known by the older term 'labour hire' in Australia and New Zealand) refers to the practice whereby workers engaged by a third party firm or agency (as an employee or independent contractor) are supplied to undertake tasks for other 'host' employers on a temporary basis. A variety of terms are used to describe leased workers, some specific to a particular country or industry, including labour hire, body hire, agency workers, on-hire workers, temps, top-up team and peak period people.

The practice of labour leasing is not new. In industries like construction and agriculture the use of 'body hire' agents can be traced back more than 100 years. However, over the past 20 years the extent of these practices has expanded dramatically in Europe, North America and Australasia in terms of the number of firms supplying labour, the number of workers supplied and range of occupations involved (encompassing everything from labourers and clerical staff to drivers, miners and skilled professionals like nurses and engineers). While the labour leasing industry includes many small operators, some firms, like Manpower and ADECCO, operate globally and have become major employers in their own right.

While it appears that most temporary employees are still hired directly by their employers, agency workers represent an increasingly significant component of the contingent workforce. As far as we are aware, the OECD, ILO and similar agencies do not produce comparable data (published or unpublished) on the prevalence of labour leasing. Compilation of data would present considerable difficulties, as many countries do not collect the relevant information on a regular basis. There are also problems ensuring reasonable definitional consistency: for example, distinguishing between employment agencies (who see their only task as job placement) and labour leasing firms; as well as whether to recognise firms that lease their workers out on an informal or occasional basis even though this is not their principal business (for recent OHS cases involving such firms see *WorkCover Authority of NSW (Inspector Legge) v Coffey Engineering Pty Ltd (no.2)* (2001) 110 IR 447; and *WorkCover Authority of New South (Inspector Dall) v Daracon Contractors Pty Limited* [2005] NSWIRComm 149).

Nonetheless, evidence that does exist indicates significant growth. A survey by the US Bureau of Labour Statistics (BLS, 1995a&b) found that the number of workers employed by firms supplying temporary help, and employing 20 or more workers, grew by 43% between 1989 and 1994 – a period when overall non-farm employment grew by only 5%. One labour-leasing firm, Manpower, now claims to be the largest single employer in the USA. Similarly, in the UK the number of agency workers increased from 50,000 in 1984 to 250,000 in 1999 (Forde, 2001: 631). A report on temporary agency work in the European Union (Storrie, 2002: 1-2) pointed to its rapid growth, with an estimated two million (or 1.2% of the workforce) working in this sector by 1999. In Australia, surveys undertaken by the Australian Bureau of Statistics (ABS) in 1998-99 and 2001 suggested that between two and five percent of employees were agency workers (the large range is due to different survey methods employed), while a far larger number (about 12% of

employees) obtained their jobs through agencies (Burgess, Rasmussen and Connell, 2004: 27). The ABS surveys did not include trend data but other research suggests a pattern of rapid growth similar to the USA and Europe. For example, a study by the WorkCover Corporation of South Australia found that total remuneration paid by the labour hire industry (a crude indicator of employment) grew by 550% in the decade after 1991 (for other references to growth see New South Wales Labour Hire Task Force, 2001: 15-31).

The reasons for the growth of agency labour are the subject of ongoing debate. It is principally seen to be part of the shift to contingent work arrangements more generally with causal factors commonly identified including the competitive pressures associated with globalisation (and the internationalization of labour supply firms as well as management consulting firms advocating 'outsourcing'), public sector reforms that increased the demand for 'outside' labour, private sector downsizing/restructuring (see for example Burgess, Rasmussen and Connell, 2004: 28-30). There is evidence that regulatory and institutional differences between countries may influence the extent to which agency workers and other contingent workers are used (Olsen and Kalleberg, 2004).

Over the past decade labour leasing has attracted increased attention from government agencies and academic researchers (see for example, Peck and Theodore, 1998; NSW Labour Hire Task Force, 2001; Storrie, 2002; Economic Development Committee, 2004; Olsen and Kalleberg, 2004). Leased labour entails a triangular relationship between the worker, the temporary work agency and the host employer: generally the contractual relationships are between the agency and the worker and the agency and the host, with no contractual relationship between the host and the worker. These relationships result in complex overlapping responsibilities in terms of managing the employment relationship and workers meeting the expectations of two 'masters'. Rubery et al (2002: 645) argue the consequent blurring of responsibilities for performance and occupational health and safety (OHS) 'affects not only legal responsibilities, grievance and disciplinary issues and the extent and transparency of equity in employment conditions, but also the definition, constitution and implementation of the employment contract defined in psychological and social terms.'

More specifically, several studies have found that human resource management functions have been largely transferred to the temporary work agency, and the replacement of permanent with temporary workers has also been associated with a shift to 'hard' human resources practices which emphasise short-term cost-cutting and discipline over building organisational commitment through consultation (see for example Storey, 2001 and Connell and Burgess, 2002). Other studies have examined the wage rates and working conditions of temporary agency workers as well as their attitudes to this type of work arrangement (see for example Dietz, 1996 and Allach and Inkson, 2004).

The growth of temporary agency work poses a number of challenges for labour, OHS, workers' compensation/social security, taxation and other legislation. These laws were, by and large, predicated on the presumption of direct and ongoing employment

arrangements. As already noted, leased labour entails a triangular relationship between agency workers, the temporary work agency and the host employer and this complicates regulatory oversight (Vosko, 1997 and Stanworth and Druker, 2000; Economic Development Committee, 2004). Even within the same jurisdiction, the allocation of legal responsibilities between the temporary work agency and host employer can vary according to the legislation establishing specific labour standards (industrial relations, OHS and workers' compensation) or the precise circumstances of a particular work arrangement. In some areas, like OHS, responsibility is often shared, at least at the level of the obligations imposed by the OHS statutes (see the discussion below). This situation facilitates confusion and even efforts to manipulate legal liability, creating a challenge for government agencies in terms of ensuring regulatory coverage and compliance with labour standards. As early as the 1960s a number of European countries introduced regulatory measures to restrict the use of agency labour or impose additional conditions on its use (see Veldkamp and Raetsen, 1973). These measures (such as partial bans and licensing requirements) had limited effects and were revised in the context of both the growth of temporary work more generally and the increasing pre-eminence of market-driven policies within the European Union (Stanworth and Druker, 2000). At the same time, recognition that many agency workers (especially those lacking scarce skills) were vulnerable to exploitation (such as failing to receive statutory entitlements to overtime or holiday pay) has led to new regulatory measures, though questions have been raised with regard to the enforcement of these provisions (Stanworth and Druker, 2000. For evidence of a similar debate in Japan see Mizushima, 2004).

In Australia, the few specific regulatory measures that might apply to agency labour (such as licensing requirements for employment agencies) were largely removed as part of the regulatory reform process undertaken in the 1980s. As in Europe, over the past five years policy makers have started to give consideration to the need to provide specific regulatory measures to address problems linked to agency employment.

One of the most significant problems raised in connection with agency labour in Australia, the USA and other countries has concerned OHS: agency workers are at greater risk of injury and may be denied adequate protection under OHS legislation (including inspector activities) and workers' compensation/rehabilitation laws. There is an emerging body of international evidence supporting the contention that agency workers face a greater risk of injury than other workers undertaking the same tasks (see for example Kochan et al, 1994; Butler, Park and Zaidman 1998; Foley, 1998; Hébert, Duguay and Massicotte, 2003; Silverstein et al 1998, 2002; and Francois, and Lievin, 2000). For example, analyzing workers' compensation claims data for work-related disorders of the upper extremities amongst temporary/contingent workers (labour hire) in Washington State between 1987 and 1995, Silverstein et al (1998) found temporary help agencies were in the top 10 high-risk industries after 1989, with claims being most pronounced with regard to assembly and machine operators, followed by construction workers. Similarly, a Quebec report (Hébert et al, 2003) analyzing compensated work-related injury/illness absence for different industry sub-sectors (1995-97) found labour hire headed the list of the ten subsectors identified with the highest prevalence of compensated absence (at 81.5 with the next highest being carpentry at 49.3).

Findings of research undertaken in Australia are consistent with international studies. Underhill (2002) analysed workers' compensation claims data in the state of Victoria for the period 1994-2001. She found the rapid growth of the industry was associated with a more than commensurate increase in workers' compensation claims at the same time that the number of workers' compensation claims by non-labour hire workers was indicating no measurable increase. Using ABS workforce survey data to estimate claim frequency rates, Underhill (2002: 4) found that 3.47% of labour hire workers made workers' compensation claims in 1999/2000, compared to 1.85% of other Victorian employees. Further, examining the agency of injury, Underhill found labour hire workers faced a much greater likelihood of being hit by or hitting moving objects resulting in a higher level of wounds and crushing. They also experienced more trips and falls in occupations requiring mobility at the workplace as well as a higher level of repetitive strain injuries amongst clerical workers (Underhill, 2002: 5). Finally, in terms of claim duration Underhill (2002: 5) found that labour hire workers were responsible for a lower level of claims requiring less than 10 days off work but a higher level of claims requiring up to one year's compensation (although she acknowledges reporting effects might affect this finding). It is worth noting that this report - commissioned by the government OHS agency in Victoria (Worksafe Victoria) - was subsequently criticized as 'statistically invalid' by the Recruitment and Consulting Services Association (*RCSA Media Release 15 June 2004*), the peak body representing the labour hire industry - a claim vigorously denied by its author.

Research findings pointing to inferior OHS outcomes for agency workers have reinforced concerns amongst regulatory agencies responsible for OHS and workers' compensation, based on more fragmentary evidence and anecdotal experience. The latter include serious workplace incidents involving agency workers (and the evidence and enforcement issues revealed in subsequent coronial inquests, inspectoral investigations and prosecutions), observations by inspectors during routine inspections, complaints from unions as well as evidence of claim-shifting, manipulation and premium avoidance involving labour hire arrangements. For example, a coronial inquest into the death of 19 year old recycling truck 'runner' Glenn Chapman (killed when he slipped off a footrest and a truck reversed over him) revealed that the young worker had received only ten minutes of verbal instruction about working on the back of the truck from CityWide Solutions, the labour hire firm that employed him (*Occupational Health News*, 2003: 2). Problems associated with protecting labour hire workers have also been raised in a series of state and federal government inquiries into OHS laws or related issues. This has sometimes occurred as part of a more general consideration of changing work arrangements. For example, in a discussion paper on workplace safety, prepared for the Royal Commission into the Building and Construction Industry, Durham (2002: 8) argued the association between contingent work arrangements, economic pressure and corner cutting was critical to the industry's poor OHS performance.

Over the past 20 years there has been a steady emergence of non-traditional working arrangements, including temporary workers such as casual and part-time employees and subcontractors, and labour hire companies. The construction industry has experienced a decrease in permanent employee numbers and a rise

in the number of businesses that rely on outsourced work. In this respect, the building and construction industry reflects trends in other industries. Building sites combine many enterprises.

The economic environment of the industry drives a culture where the objective of many contractors working in the industry is to come to the site, start and finish the contracted work, and leave for the next job as quickly as possible. In this culture safe work practices are often regarded as likely to slow the work down and cost money.

Notwithstanding this, labour hire/agency work has been singled out from other contingent work arrangements as warranting particular attention. This is highlighted by government inquiries into labour hire (see for example New South Wales Labour Hire Task Force 2001; and Parliamentary Committee Inquiry into Labour Hire Employment in Victoria (Economic Development Committee, 2004)) as well as focused attention to it in more general government inquiries (see Maxwell, 2004), the production of guidance material on labour hire by OHS regulatory agencies and introduction of specific labour hire premium rates and targeted enforcement by workers' compensation agencies. The OHS problems associated with labour hire have also been the subject of union reports and submissions (see for example CFMEU, no date) as well as specific claims in relation to award provisions (legally enforceable collective employment conditions handed down by industrial tribunals in Australia), most notably a recent test case on secure employment in New South Wales.

In this paper we will focus on regulatory issues raised by agency labour in connection with OHS legislation (the challenges agency workers pose for workers' compensation have been addressed in another paper, see Quinlan, 2004). After briefly describing research methods the paper argues that even though the Australian OHS legislation (with one exception) does not explicitly refer to labour hire, the general duty provisions do provide a reasonable framework for the regulation of OHS in labour hire arrangements. We also show that the courts, in attributing responsibility between labour hire agencies and host employers, start with the view that responsibility is shared equally, although the circumstances of each case may result in the court imposing greater culpability on one of the parties. We show, however, that despite the relatively clear legal framework regulating OHS in labour hire, labour hire agencies and host firms involved in triangular labour hire relationships regard the allocation of responsibility as a contested terrain, and evidence (including evidence from OHS inspectorates) indicates considerable variations amongst labour hire firms in terms of acknowledging and meeting their statutory responsibilities. Labour hire representatives have claimed that there are practical difficulties in meeting their extensive legal obligations. Some labour hire agencies and representatives have sought to reduce or limit their legal obligations through various measures, including lobbying government and the use of hold harmless clauses. Finally, the paper then argues that there is an ill-fit between provisions for worker participation in the OHS statutes (health and safety representatives and committees), and labour hire arrangements which undermines the effectiveness of worker participation arrangements in labour hire.

Research Methods

Research data in this paper are drawn from three sources. First, the paper draws on a research project undertaken for WorkCover New South Wales on the prevention and workers' compensation challenges posed by changing work arrangements undertaken between November 2001 and September 2002 (Quinlan, 2003). The project (hereafter referred to as the WorkCover NSW project) covered state, territory and federal OHS jurisdictions (not just New South Wales), and received the active cooperation of all relevant government agencies. As part of this process meetings were held with 10 of the 12 tripartite industry reference groups (IRG's) established in New South Wales to identify relevant issues. Following this, focus group and individual interviews were conducted (using a semi-structured interview schedule) with 63 OHS regulatory staff (both policy and operational) in the federal, state and territory jurisdictions and 40 senior employer/industry and union representatives from a number of jurisdictions. The interview schedule consisted of a series of open-ended questions asking respondents' views on the OHS effects, if any, of a series of different work arrangements or situations (casual/temporary/fixed contract jobs, part-time employment, downsizing/job insecurity, self-employment, small business, labour hire, outsourcing, home-based work, telework and multiple jobholding). Participants were asked to comment on their experience and to express their views on existing regulatory remedies or interventions addressing these problems (including, guidance material, tripartite or collaborative initiatives) as well as employer and union initiatives. Information obtained in these interviews was combined with information derived from an examination of relevant OHS statutes and regulations, and government documentary material (codes, guidance material, information bulletins, internal and public reports) in all jurisdictions. Documentary material collected after completing the project has been incorporated into this paper.

Second, this study draws on interviews and field trips conducted with inspectorial staff working for four jurisdictions (Queensland, Victoria, Tasmania and Western Australia) in 2003-4 as part of another research project (hereafter referred to as the Process Standards project). In total, over 80 inspectors were interviewed and researchers accompanied 40 of these inspectors for a day, entailing at least one workplace visit (covering a wide range of industries including farms, schools, prisons, building sites, retail outlets, warehouses and factories). Although the project's primary objective was to examine the shift from prescriptive to process and performance standards in OHS legislation, inspectors were asked questions about changing work arrangements (the use of temporary workers, leased workers, subcontractors etc) as part of this. Issues concerning the use of leased workers also arose in the course of workplace visits with inspectors (for which detailed notes were kept).

Third and finally, a detailed search and analysis of prosecution reports and court proceedings relating to labour hire firms and host firms under OHS legislation was undertaken.

An Overview of Regulatory Problems

The triangular relationship and the OHS responsibilities of duty-holders

At present in Australia OHS legislation is largely the responsibility of State and Territory governments (although the federal government has recently announced its intention to take control of the area). Like OHS legislation in the UK, Canada and many other countries the legislation enacted by the various state and territory jurisdictions has largely been built upon the model established in the UK Robens Report (1972) and includes general duty provisions identifying the responsibilities of various parties, including employers, self-employed persons (such as contractors and sub-contractors), employees, designers, suppliers, importers and manufacturers of plant, equipment and substances for use at the workplace. These duties place greater responsibilities on employers in comparison to employees in recognition that the former exercise far greater control of the workplace and work processes. With regard to other parties, duties are allocated commensurate with a chain of responsibility in relation to how, when and to what extent their decisions or actions may contribute to a safe and healthy work environment. Hence responsibility for faultily designed and manufactured machinery may principally reside with those who designed, manufactured or supplied it, especially if the employer using the equipment took all reasonable steps to purchase machinery they believed to be safe and used it appropriately (in terms of tasks and the training of operators etc). In short, the law allocates responsibility to multiple duty-holders and a single event or failure may give rise to simultaneous contraventions of the same or different duties by an array of parties. OHS agencies have developed principles which, together with a consideration of the facts in each case, they use to decide the degree of blame (affecting the charge brought and penalty sought) in relation to breaches involving more than one party. The clearest example is in relation to subcontracting arrangements where if, as often happens, both the subcontractor and principle contractor are at fault agencies are likely to seek to impose a more serious penalty on the latter because of the greater degree of control they exercise. As will be seen below a similar approach has been taken in relation to cases involving labour hire firms.

The legal framework

With one exception (see below) the Australian OHS statutes do not explicitly refer to labour hire arrangements. Labour hire agencies and host firms are regulated by the general duties that employers owe to employees and that employers and self-employed persons owe to persons other than employees.

Thus if the worker is technically an 'employee' of the labour hire agency, the agency owes the employee the employer's general duty to employees: in broad terms to 'ensure' or to provide and maintain, so far as is reasonably practicable, for 'employees' a working environment that is safe and without risks to health (see Johnstone, 2004: chapter 4).

Some Australian courts go to considerable lengths to categorise workers as 'employees' of the labour hire agency. For example, in *Swift Placements Pty Ltd v WorkCover*

Authority of New South Wales (2000) 96 IR 69 the New South Wales Industrial Relations Commission in Full Session upheld the trial judge's decision to categorise a labour hire worker as an 'employee' of the labour hire company, and rejected an argument that the labour hire company was not the employer because the worker was subject to the directions of the host firm. The contract between the worker and the labour hire company was for the worker to perform work 'on a casual basis from time-to-time and where the performance of work, for which wages would be paid, would depend on the [labour hire company] allocating work to [the employee] according to the requirements of its clients.' It contained numerous indicia of the employment relationship, including a sufficient degree of control, and contractual terms that the employee had to contact the labour hire company daily to ascertain whether work was available, had to attend the place nominated for work and undertake the work directed, had to follow the directions of the person nominated by the company to give directions (the client), and so on. The Full Bench accepted the view taken by the trial judge that the contract between the labour hire company and worker obliged the worker to carry out work at the client premises 'under the full direction and control' of the client. This did not undermine the 'ultimate or legal control' exercised by the labour hire company, which ultimately would enable the labour hire company to dismiss the worker for inadequate performance (see also *Mason & Cox Pty Ltd v McCann* (1999) 74 SASR 438).

If the worker is not an 'employee', but an independent contractor (see for example *Building Workers' Industrial Union of Australia v Odco* (1991) 29 FCR 104 and Creighton and Stewart, 2005: 290), then the duty owed by the labour hire agency to the worker is under the employer's statutory duty to persons other than employees. Here the most far-reaching provisions are to be found in the *Occupational Health and Safety Act* 2004 (Vic) sections 23 and 24 (which strongly resemble section 3 of the British *Health and Safety at Work Act* 1974) and the *Workplace Health and Safety Act* 1995 (Qld), sections 28(3), and 29(2). These provisions state that employers and self-employed persons must ensure persons, who are not employees, 'are not exposed' to risks to OHS arising from 'the conduct of the undertaking'.¹ The courts have taken a broad approach to interpreting the key expressions 'exposed to risk' (see *R v Board of Trustees of the Science Museum* [1993] 1 WLR 1171) and 'conduct of the undertaking' (*Whittaker v Delmina Pty Ltd* (1998) 87 IR 268 at 280-281; *WorkCover Authority of New South Wales (Inspector Martin) v Edmund Hubert Kuipers and Civil Services Pty Ltd* [2004] NSWIRComm 303 para [55]); *R v Associated Octel Co Ltd* [1996] 4 All ER 846 at 851-852; *R v Mara* [1987] 1 WLR 87; and *Sterling-Winthrop Group Limited v Allen* (1987) SCCR 25).

Although not expressed in the same terms as the Victorian and Queensland duties, the duties owed to others in sections 29(1) and 30A(b) of the *Work Health Act* 1986 (NT) and to non-employees in section 21 of the *Occupational Safety and Health Act* 1986 (WA)

¹ Note that the WHSA(Qld) includes also section 29A, which provides that a person (who may not necessarily be an employer or self-employed person) who conducts a business or undertaking (even if not conducted for gain or reward) has an obligation to ensure the OHS of each person who performs a work activity (even if on a voluntary basis) for the purposes of the business or undertaking.

would also appear to extend the duties of agencies to labour hire workers who are not employees.

In the other Australian jurisdictions the duties to persons other than employees are geographically limited. For example, sections 8(2) and 9(1) of the *Occupational Health and Safety Act 2000* (NSW) are similar to the Victorian and Queensland provisions, but specify that the duty only applies to non-employees 'while they are at the employer's or self-employed person's place of work.' Likewise, the provisions in the *Occupational Health and Safety Act 1989* (ACT) (section 28(1)) and in the *Occupational Health and Safety (Commonwealth Employees) Act 1991* (Cth) (section 17) restrict the reach of the duty to persons 'at or near the workplace'. These geographical limitations are significant, and prevent the duties from extending to labour hire agencies where the worker is not an 'employee' and will not be at or near the agency's workplace.

While the host employer will always owe a duty of care to the worker under the duty to persons other than employees, discussed in the previous paragraphs, some of the employer's general duty provisions are worded so as to enable the courts to find that the duty is owed to a worker who is technically an 'employee', even if not of the employer owing the duty. For example, section 19(1) of the *Occupational Health, Safety and Welfare Act 1986* (SA) couches the employer's duty to apply 'in respect of each employee employed or engaged by the employer'. In *Moore v Fielders Steel Roofing Pty Ltd* [2003] SAIRC 75 the South Australian Industrial Court interpreted the expression 'engaged' very broadly to mean 'provide occupation (for a person)' so that a person employed under a contract of employment by a third party (in this case an 'employee' of a labour hire agency) and who works for 'the employer' pursuant to an agreement between the employer and labour hire agency is owed a duty because the 'employer' 'engages' the labour hire 'employee' even though there is no contract between the 'employer' and the 'employee' (see also the definition of 'employee' in section 4).

Further, while some of the Australian OHS statutes include provisions which deem contractors (and their employees) to be 'employees' protected by the employers general duty to 'employees', the OSHA (WA) deems all labour hire workers, whether employees or contractors of the labour hire agency, to be 'employees' of both the labour hire agency and the client, in relation to matters over which they respectively have the capacity to exercise control (section 23F). Section 23F of the Act purports to catch all other arrangements, by including similar deeming provisions in relation to 'labour arrangements in general', that is where any other worker who carries out work for another person even if there is no contract between the worker and the other person, provided the person has the power of direction and control in relation to that work 'in a similar manner to the power of an employer under a contract of employment' (section 23E).

An important point to make about all of these duties is that they are non-delegable and the employer (whether the agency or the host) is personally, not vicariously, liable under its duty to employees and non-employees (see *Linework Limited v Department of Labour* [2001] 2 NZLR 639; *R v British Steel plc* [1995] 1 WLR 1356; *R v Associated Octel*; and

R v Gateway Foodmarkets Ltd [1997] 3 All ER 78; and *WorkCover Authority of New South Wales (Inspector Mansell) v Daly Smith Corporation (Aust) Pty Limited and Thomas Edwin Curtis Smith* [2004] NSWIRComm 349). The employer must ensure that not only does it have appropriate processes and procedures to manage OHS so as to eliminate, or at least reduce risks, it must ensure that those processes and procedures are fully implemented throughout the organisation. It cannot delegate its duty to another party, and it is no defence to argue that another party owed an overlapping duty to the worker.

Responsibility from the perspective of the agency: a contested terrain

Despite this legal framework, ascribing responsibility in triangular relationships such as those involving the use of multi-tiered subcontracting or leased workers, is a source of ambiguity and confusion if not a contested terrain in the eyes of the contractors/subcontractors or leasing agency on the one hand and the principal contractor or host employer on the other hand. Employer attempts to shift the burden of responsibility for OHS to their workers or middle managers are common but the triangular relationship of labour leasing provides scope for blame shifting to two other parties as well as potential for confusion and debate over what shared responsibility means in terms of particular activities connected to managing OHS (such as induction and training).

This problem is not unique to Australia. Reviewing the situation in the EU, Storrie (2002, 48) stated:

Nowhere does the duality of the employment relationship combine with the short duration of assignment in such a potentially problematic fashion as where issues of workplace health and safety are concerned. In most Member States, there is some form of dual employer responsibility for these matters.

While in principle there would appear to be a rationale for some form of dual responsibility between the agency and the user firm, it is obvious that there is potential here not only for a lack of clarity, but also for abuse.

A survey of 1,000 recruitment agencies undertaken for the UK Health and Safety Executive provided evidence of this confusion. The survey (HSE, 2000: 13) found knowledge of OHS legislation amongst agencies was low, with 80% believing responsibility for OHS rested with the host employer. Mel Draper, head of the HSE's Policy Division (*HSE Press Release* 18 September 2000) stated:

This research confirms that there is a lack of clarity among recruitment agencies and host employers about responsibilities for the health and safety of agency workers. We are concerned this may lead to some workers not receiving the same level of protection as others. Although there was evidence of good practice, it is disappointing that on the whole recruitment agencies believe responsibility for agency workers' health and safety is with the host employer.

Relatively culpability from the courts' perspective

Yet the Australian courts have made it clear that both labour hire agencies and host firms have extensive OHS legal obligations to leased workers. It is clear that host firms owe the same legal OHS duties to labour hire workers as they do to their own workers (see Johnstone, 1999). Further, a series of well-publicised prosecutions as well as initiatives by government agencies (investigations/special taskforces and the production of guidance material etc) have demonstrated that labour hire firms do have far-reaching responsibilities for OHS. For example, in the leading case *Drake Personnel Limited v WorkCover Authority of New South Wales (Inspector Ch'ng)* (1999) 90 IR 432 at 455-56 the New South Wales Industrial Relations Commission in Full Session stated that:

A labour hire agency does not employ people to work for itself but to work for a client, it does not directly on a day to day basis supervise the tasks carried out by the employee and it is usually not in control of the workplace where the work is done. However, these circumstances do not obviate, or diminish, the obligation of the employer under the [employer's general duty]. Indeed ... an employer who sends its employees into another workplace over which they exercise limited control is, for that reason, under a particular positive obligation to ensure that those premises, or the work done, do not present a threat to the health, safety or welfare of those employees. Certainly, there is no basis to consider that such an employer has a lesser liability or obligation under [the employer's general duty]... A labour hire company cannot escape liability merely because the client to whom an employee is hired out is also under a duty to ensure that persons working at their workplace are not exposed to risks to their health and safety or because of some alleged implied obligation to inform the labour hire company of the work to be performed. In our view, a labour hire company is required by the OH&S Act to take positive steps to ensure that the premises to which its employees are sent to work do not present risks to health and safety. This obligation would, in appropriate circumstances, require it to ensure that its employees are not instructed to, and do not, carry out work in a manner that is unsafe.

In the present case, it seems to us that this would require, at the very least, that the appellant give an express instruction to the client and its employee that it be notified before the employee is instructed to work on a different machine. ... We add that the labour hirer's obligation under [the employer's general duty] may not be met by a term inserted into the contract between that employer and the third party as to the engagement of an employee to do particular tasks to the effect that such employee will not be transferred to do other work without prior notice. The labour hirer has a positive obligation under section 15(1) to directly supervise and monitor the work of the employee to ensure a safe working environment.

In *Labour Co-operative Limited v WorkCover Authority of New South Wales (Inspector Robins)* (2003) 121 IR 78 at 84-85 the Full Bench of the New South Wales Industrial Relations Commission upheld the trial judge's finding that it was reasonably practicable for the labour hire agency to have ensured against the risks to the worker's safety by 'adopting a positive and pro-active approach with [the client] to require steps to be put in place to avoid the risks as a condition of it making available' the services of the worker. The labour hire agency had sufficient control to ensure the adequacy of instruction, training and supervision, and could refuse to supply its employees to the client 'until

appropriate and sufficient measures to ensure safety were implemented.’ (See also *WorkCover Authority of New South Wales (Inspector Legge) v Coffey Engineering Pty Ltd (No 2)* (2001) 110 IR 447).

Since 1998 prosecutions of labour hire agencies and host firms have been taken regularly in most Australian jurisdictions, particularly in New South Wales and Victoria. In New South Wales, for example, the first prosecution of an agency and a host firm took place in 1997, and there have been half a dozen or so prosecutions of agencies and of host firms each year since 2002. In Victoria the first successful prosecution of an agency and of a host firm took place in 1999 (*Extrastaff* and *NCI Speciality Metals* respectively), and since 2002 there appear to have been half a dozen prosecutions of agencies and of host firms annually. There have also been successful prosecutions against directors of labour hire companies for failing to prevent the agency from contravening its general duty to the worker (see for example *Inspector Sharpin v Concrete Civil Pty Ltd and Inspector Sharpin v Daryl Smith* [2004] NSWIRComm 173 and *Workover Authority of New South Wales (Inspector Mansell) v Daly Smith Corporation (Aust) Pty Limited and Thomas Edwin Curtis Smith* [2005] NSWIRComm 101).

Whatever approach to relative liability is argued by employers or taken by OHS inspectorates, the courts appear to be prepared to allocate liability equally between the agency and the host firm, although the facts of the particular case may sway the court to impose greater penalties on one or other of the parties. The New South Wales Industrial Relations Commission in a string of cases over the past few years has established clear sentencing principles for labour hire cases, building on general principles of OHS sentencing developed in that state since the late 1980s.

Briefly, the sentencing judge must assess the relative seriousness of each offender’s particular offence in relation to the worst case for which the maximum penalty is provided (the proportionality principle). The starting point in sentencing each defendant is the ‘objective seriousness of each offence’ – the ‘nature and quality’ of the offence, including the seriousness of the risk to which workers were subjected and the seriousness of the consequences that could have resulted from the contravention; whether it involves obvious and foreseeable risks; and whether there were simple and straightforward steps available to remedy any failures on the part of the defendant. The court must also determine the need for general deterrence and specific deterrence. In imposing a penalty in the first New South Wales labour hire prosecution, Hungerford J in *WorkCover Authority of New South (Inspector Ankucic) v Drake Personnel Ltd t/a Drake Industrial (No 1)* (1997) 89 IR 374 at 382 stated that an employer labour hire company ‘has a special responsibility to ensure the health, safety and welfare of its employees at the other workplace for no other reason than that workplace is removed from the employer’s direct management and control and would usually be at a location foreign, or at least unfamiliar, to the employees concerned.’ This ‘special duty’ has been emphasised as providing the basis for courts to impose penalties on labour hire agencies that will serve as a general deterrent to other labour hire agencies (*WorkCover Authority of New South (Inspector Przibilla) v Hindmarsh & Roddy Engineering Pty Limited* [2004] NSWIRComm 383 at para 21). Similarly, Boland J in *WorkCover Authority of New South (Inspector Atkins) v*

Network Production Personnel Pty Limited [2004] NSWIRComm 71 at para 17 noted that:

The incidence of labour hire is now common and widespread. Any person engaged in hiring out their employees needs to understand that they have the same responsibilities as other employers in respect of occupational health and safety and if they fail in that regards the face very significant financial penalty. There is a strong case for including a significant element for general deterrence in sentencing the defendant.

In *WorkCover Authority of New South Wales (Inspector Mansell) v Daly Smith Corporation (Aust) Pty Limited and Thomas Edwin Curtis Smith* [2005] NSWIRComm 101 at para [42] Staunton J justified an emphasis on general deterrence by reference to 'the nature of the obligations imposed upon labour hire companies.' Her Honour observed that

The 'positive' obligation attracted by labour hire companies poses a significant duty to ensure that their employees are not subjected to risk to health and safety, which is effected, in part, by ensuring the work to be undertaken is properly risk assessed and that those employees are adequately trained, instructed and supervised as to that work.

Specific deterrence requires the courts to assess factors such as post-incident measures taken by the defendant, and other factors indicating whether the defendant shows a propensity to re-offend.

Once the 'objective' seriousness of the offence been determined, there may be 'subjective considerations' in relation to each defendant (such as each defendant's prior record, cooperation with the inspectorate, contrition, or an early plea of guilty), which might mitigate or aggravate the penalty.

In labour hire cases, the offences committed by the agency and the host generally arise 'out of the same incident and the different charges result primarily from the different role of each defendant' (*WorkCover Authority of New South Wales (Inspector Christensen) v Harnischfeger of Australia Pty Ltd; WorkCover Authority of New South Wales (Inspector Christensen) v Zelbarry International Pty Ltd* [2004] NSWIRComm 131, para 46). A key sentencing principle is that of parity: 'equal justice requires that the like should be treated alike but that, if there are relevant differences, due allowance should be made for them. In the case of co-offenders, different sentences may reflect different degrees of culpability or their different circumstances': *Postiglione v The Queen* (1997) 189 CLR 447 at 301. While the principle of parity generally applies to co-offenders convicted of the same crime, Haylen J in *WorkCover Authority of New South Wales (Inspector Christensen) v Harnischfeger of Australia Pty Ltd; WorkCover Authority of New South Wales (Inspector Christensen) v Zelbarry International Pty Ltd* [2004] NSWIRComm 131 noted that case law showed that 'it is not unusual, in cases where there are two or more defendants involved in the same workplace incident, that an assessment is made that in a general sense, although charged under different sections, the culpability of each defendant is considered to be broadly equal' (para 48): see *Warman International Ltd v WorkCover Authority of New South Wales* (1998) 80 IR 326. In *WorkCover Authority of New South*

(Inspector Dall) v Daracon Contractors Pty Limited [2005] NSWIRComm 149 Haylen J remarked that:

Parity is to be determined by having regard to the circumstances of the co-offenders and their respective degrees of culpability. It will also be determined by different criminal histories, which may justify a real difference in sentence. A different factual basis may justify a different sentence for a co-offender, but the difference is not to be disproportionate. It is also repeatedly said that it does not automatically follow that the co-offender should receive the same sentence.

The allocation of relative culpability is best illustrated by some recent decisions of the New South Wales Industrial Relations Commission.

In some cases, the court has imposed the same penalty on both the agency and the host firm. For example, in *WorkCover Authority of New South (Inspector Dall) v Daracon Contractors Pty Limited* [2005] NSWIRComm 149 Haylen J remarked that, while the objective and subjective considerations in for the agency and the host were different,

overall I cannot find [the agency] more culpable than [the host]. I am not satisfied that it is less culpable than [the host] ... I think that, having regard to the principles I must consider that the proper result here is to fine [the agency] the same ultimate sum [as awarded against the host firm].

In other cases, the only difference in overall culpability has been the criminal record of one of the parties. In *WorkCover Authority of New South (Inspector Gill) v J D Thompson Personne Pty Limited; WorkCover Authority of New South (Inspector Gill) v Visy Paper Pty Limited* [2005] NSWIRComm 73, Backman J at para [89] decided that:

Both defendants failed to ensure a safe system of work in the context of the sorting of paper and cardboard recyclable material at [the host's] premises. Neither defendant conducted a risk assessment of the specific task involving the sorting of recyclable paper and cardboard (that is, the task being performed by [the worker] at the time of the accident). Neither defendant undertook an appropriate audit of the type of work being conducted by [the worker], and, neither defendant had in place a documented safety procedure for the work. These similarities render the culpabilities of both defendants broadly equal. The [host], however, has prior convictions for occupational health and safety offences which mean that its overall culpability [and the ultimate penalty imposed] is higher.

In some circumstances, the host firm is held to be relatively more culpable. In *WorkCover Authority of New South Wales (Inspector Christensen) v Harnischfeger of Australia Pty Ltd; WorkCover Authority of New South Wales (Inspector Christensen) v Zelbarry International Pty Ltd* [2004] NSWIRComm 131 Haylen J considered that the host firm had comprehensively failed to carry out its OHS obligations, with numerous deficiencies in the firm's system of work demonstrating that it had committed 'a serious breach of the Act' (for details see para [59]). It had also previously been convicted of an offence under the Act (including a failure to perform a risk assessment). Subjective factors which mitigated culpability were the firm's early plea of guilty and the steps it took to investigate and report the incident, and to co-operate with the inspectorate. Taking all of

these factors into account, the court imposed a fine of \$200,000 upon the client firm. The agency had failed to establish systems requiring the host to report relevant training, incidents and other matters, and did not conduct a risk assessment when the work began. The evidence suggested ‘a wholesale delegation’ of the agency’s responsibilities to the host (para [65]). Haylen J (at para [65]) rejected the agency’s submission that it was entitled to rely upon the host’s safety system:

Cases abound in this jurisdiction which underline the requirement of labour hire companies ..., when relying on the system of the host employer, to satisfy itself that the system adopted was more than a paper system, was actively enforced and policed at the workplace and was effective as a safe system of work: a labour hire company is required by the Occupational Health and Safety Act to take positive steps to ensure that the premises to its employees are sent do not represent risks to health and safety. ... Any relevant discussion by [the agency] with its employee ... would have raised immediate concerns about the actual system of work rather than that which had been laid down as policy. It is these factors which underline the seriousness of the omissions of [the agency] and the seriousness of this particular breach.’

While Haylen J accepted that, in the circumstances, the agency was not as culpable as the host, he did not accept that there was a large difference in culpability. The ‘subjective considerations’ reducing the penalty of the agency (early plea of guilty, good prior OHS record, the concern and contrition of the agency, and the steps taken after the incident) were greater than those applying to the host firm, and the court imposed a fine of \$140,000 on the agency.

On the other hand, in *WorkCover Authority of New South (Inspector Przibilla) v Hindmarsh & Roddy Engineering Pty Limited* [2004] NSWIRComm 383 Boland J imposed a higher penalty (\$170,000) on the agency than on the host firm (\$117,000 in *Inspector Przibilla v Hyne & Son Pty Limited* [2004] NSWIRComm 384). While both the host and agency suggested that the worker’s inadvertence had contributed to his injury, Boland J (*WorkCover Authority of New South (Inspector Przibilla) v Hindmarsh & Roddy Engineering Pty Limited* [2004] NSWIRComm 383 at paras [20] and [21]) stated that:

there is a responsibility on the [agency] to *ensure* that [the worker] was not placed at risk of injury regardless of any carelessness or inadvertence on the part of the employee. In putting arrangements into place to protect workers from injury an employer is required to take into consideration human frailties and guard against them. The arrangements this [agency] had in place to meet its responsibilities under [the employer’s general duty] were completely inadequate.

... Extra care is required in the circumstances of an unfamiliar environment and the employer has to approach its responsibilities regarding occupational health and safety as though the workplace was its own.

In sentencing the host firm (*WorkCover Authority of New South (Inspector Przibilla) v Hyne & Son Pty Limited* [2004] NSWIRComm 384 at para [32]) Boland J remarked that:

I do not consider the offence committed by [the host] as objectively serious as that committed by the [agency]. In [the agency] case the failures related to the system of work and supervision. In the present case the failures related to the system of work and supervision and instruction. The difference in the failures charged is not significant. The [agency], however, was the employer of [the worker] and had an immediate and direct responsibility to ensure [the worker's] safety. Moreover, the employer failed to take adequate steps to ensure the proper supervision of [the worker] in the absence of [the agency supervisor] on the day of the incident and to set up work arrangements with [the host] to ensure [the worker] would not be placed at risk. In my opinion, the contribution by the [agency] to the risk was greater than that of [the host].

Labour hire agency approaches to OHS legal responsibilities

Despite the relative clarity of the legal responsibilities of labour hire agencies, available evidence indicates considerable variations amongst labour hire firms in terms of acknowledging and meeting these responsibilities. In 2004 the Recruitment and Consulting Services Association (RCSA) – the body representing labour hire operators in Australia (with around 1000 members in 2002) – undertook a survey of member firms. The majority of respondents stated that they always or usually ensured employees were aware of site OHS procedures (90%) and site hazards (83%), assessed the client's OHS management system (71%), conducted pre-placement workplace inspections (74%) and provided on-site training (63%). On the other hand only 41% always or usually provided protective equipment without charging the employee. Disturbingly, only 16% always or usually refused to supply employees to a client for OHS reasons, and 43% stated they never refused on this ground (RCSA cited in Curtain, 2004). It should be noted that the RCSA tends to represent larger and more established labour hire operators and has produced OHS guidance material for members so these results may not be representative of all firms in the industry. Further, findings on the provision of information, training and so on need to be treated cautiously as a British study (HSE, 2000: 8) found a significant discrepancy between agency and agency worker responses in this regard (with only 40% of workers claiming they been informed of specific features of their placements affecting OHS – far lower than the number of agencies claiming to provide this information).

In recent years labour leasing firms and the RCSA have been involved in collaborative working parties or consultation on the development of guidance material relating to labour hire by government OHS agencies. This shift can be interpreted as a pragmatic acceptance that labour hire firms have legal responsibilities. However, as in other countries there are ongoing tensions between the industry (or elements within it) and regulators over the extent of these obligations and even whether labour hire firms should have legislative obligations. Unions have been critical of the RCSA's involvement in the production of guidance material, seeing it as an attempt to head-off more stringent regulatory requirements. The Australian Council of Trade Unions (ACTU, 2000a) has criticized these publications for understating the obligations of labour hire firms under OHS statutes and for not mentioning unions, HSRs OHS representatives, consultative processes or participation by leased workers in host employer OHS management systems.

With the regard to the extent of obligations, labour hire industry representatives are apt to point to practical difficulties. For example, a representative interviewed for the WorkCover NSW project stated:

There are clients in remote areas in Western Australia, clients up in the northwest who say we want someone. It is not economic for me to fly someone up there, check out the health and safety, come back and report say 'yes its okay to send somebody up' and then three weeks later go and check it again. I'm reliant on the host employer to have adequate occupational health and safety provisions and our contractual relationship being one where there's dual trust that they're doing the right thing. I am not able to contract out of my obligations but I am also not able to monitor all these different sites for all these different workers. It's a physical impossibility.

The same representative also noted that labour hire companies are in a weak situation when they detect problems.

An argument we run as an industry, and we would do it at our company as well, is that occupational health and safety is a joint responsibility. We as the direct employer are responsible for induction, teaching them (workers) basic occupational health and safety routines – how to lift things, how to do this, how to do that – but we can't be responsible for the maintenance of machinery, where people happen to drop pallets in the warehouse, all those other sorts of things. We can walk into a client and say "you don't have any safety guards on that machinery." Our options are twofold. Either to sit there and say "we're not doing any work until you put safety guards on that" or call out workers out. With so much competition in the marketplace, sure we can pull our workers out but there are plenty of others queued up behind us that will put their workers in there just to get the turnover.

Even ignoring these complexities, the provision of workers belonging to dozens if not hundreds of different occupations into thousands of different workplaces clearly poses a serious logistical challenge in terms of ensuring adequate risk assessment, induction, training and supervision. One way of dealing with this would be for labour hire firms to revert to more specialised fields of activity, becoming niche suppliers to those areas where they believe they can manage risks. There is evidence of niche suppliers in industries like mining (where use has also been made of multi-workplace induction 'passports'). Even so, some gaps remain, with one mine manager observing:

Contractors were saying to us: "we come and go very regularly but we miss things that happen in the intervening period such as safety alerts or toolbox talks." They (the alerts and talks) were still relevant and current at that time but for some reason they missed it. So its an issue of how you keep the constant information flow.

Most fundamentally perhaps, reverting to a niche approach is not a general solution as it is unlikely to appeal to medium to large labour hire operators.

Another option would be the 'preferred subcontractor' model where labour leasing firms sought to build a long-term relationship with clients where commitment to OHS on both sides was seen to be critical to renewed engagements. Again, while some labour hire firms have made efforts in this regard the competitive nature of the industry is a major impediment. As one labour hire firm manager observed:

...centralised purchasing has a basic fault in that 'they are what they are', and therefore the first thing they look at is price, the second thing they look at is price and the third thing they look at is price. They tend to disregard some of these what they say is periphery "fluffy things". They're not worried about OHS...What we do find is that a sophisticated user of our services will understand and will look at our occupational health and safety processes - our induction processes and our history and they will use that as part of the evaluation criteria. But the sophisticated users - it's the old 80/20 rule - is only 20% of the market. The other 80% are unsophisticated users and unsophisticated users don't care.

The moot point is whether the logistical constraints just mentioned should influence OHS standards and the allocation of responsibility amongst duty holders when this issue does not arise in a direct employment relationship.

Regulators' views of labour hire compliance

When asked to comment on changed work arrangements, labour hire/agency work was by far the issue most frequently nominated as especially problematic by inspectors and other regulatory officers interviewed for the WorkCover NSW project (2001/2) and the Process Standards project (2003/4). While several agencies had undertaken projects on labour hire the perceptions of interviewees were mostly based on their own direct experience, with many nominating particular incidents as indicative of the problems they were encountering. We also had a chance to witness these issues first hand while accompanying inspectors on workplace visits for the Process Standards project. For example, during one visit to a large manufacturing plant to investigate an incident where a worker had been hit by a forklift truck, it was revealed that several forklift drivers supplied by a labour hire firm had been 'sent back' after it was discovered they lacked basic competency even though they held a forklift driver's license.

The WorkCover NSW project identified a number of trends or features of labour hire that regulators saw as disturbing. One was the growing use of labour hire by small firms, which was seen to pose greater risks, as these firms were less likely to have a formal OHS management system in place or the resources to undertake induction etc. Another point of concern was the potentially dangerous association of labour hire with other changes to work organisation. In its submission to the NSW Labour Hire Task Force, WorkCover NSW (2001: 59-60) stated:

Companies often resort to labour hire as a short term solution to problems created by organisational changes such as: rapid downsizing, plant closures, budget cuts, shifts in operations, repeated phases of management restructuring, and other forms of corporate restructure. As a result their management systems are often in

disarray, and labour hire workers step into environments of elevated OHS risk arising from adverse effects created by this process.

Several regulatory officials pointed to the more positive experience in some industries, with one referring to the hotel sector of the hospitality industry where she noted labour hire firms insisted on a level of training (one used a virtual kitchen) before these workers (including chefs, waiters, bar staff and kitchen hands) could be leased to a host employer. Regulatory officers were also able to nominate labour hire firms that had made significant efforts in terms of managing OHS risks (including induction, training and prior-entry risk assessment). As one officer observed:

We've got some labour hire agencies, probably from medium-sized to large, who will not provide staff on short notice. So the host employer calls them and says "I want a worker to do certain things and I want them here at six o'clock tomorrow morning." In many cases if they don't already have a relationship with the host employer they will decline the opportunity to provide labour. So we're starting to develop a culture at least amongst the large organisations that if you haven't seen the workplace and you've got no idea of what risks you're exposing your employee to then for god sake don't send them out there. The second thing is that we got a number of agencies that are not supplying labour to their clients without them first having undertaken an induction in their own organisation. Now the labour hire agency receives an offer of employment from somebody on their database. That person will have already been through their generic organisation induction so they'll have gone through the pay rules and how everything operates but also there's an OHS element in there as well. This is how our safety system operates and in the event of any issues these are the steps you have to follow. So they give them a very rudimentary introduction into risk assessment.

Even with regard to these firms there were problems as the officer went on to point out:

The difficulty in all of that is what happens when they're in the host employer? Does the host employer give them an equally adequate induction and introduce them to the way the safety system operates? Now that's where we seem to find the system breaks down.

Further, as in the UK (see HSE, 2000: 1) the vast majority of labour hire operations are small and lack the experience, expertise or logistical resources to provide adequate induction/training let alone develop sophisticated OHS management systems (and including some moonlight operators with a cavalier attitude to regulatory compliance. Grist, 1999). There is also considerable turnover amongst small operators, accentuated during any economic downturn, with one industry spokesperson claiming that 40% of operators had 'disappeared' in the 1991 recession. This volatility represents a considerable challenge to regulators, limiting the 'learning' effect of enforcement. For example, officers in one jurisdiction referred to the impending prosecution of a firm (whose first placement had been killed), noting that the prosecuted firm would probably go out of business and its place taken by another equally inexperienced operator.

Overall, the many concerns expressed by regulators were consistent with views expressed by host employers and unions interviewed as part of the WorkCover NSW project. During discussions held with Industry Reference Groups (IRG) a number of employer representatives expressed the view that in their experience, leased workers were more problematic in terms of OHS than temporary workers they directly hired. For example, at the Health and Community Services IRG reference was made to difficulties in knowing the precise skill mix (and not just in relation to OHS) of staff received and potential problems that could arise when leased staff were transferred from their original task to another after arrival. For their part, representatives of the labour leasing industry were apt to argue that, while many host employers adopted a responsible attitude, some showed little interest or concern for the supervision of leased workers.

The IRG meetings and interviews indicated that labour hire was a particular concern for unions. Union representatives repeatedly claimed that the desire of leased workers to obtain further work with that host and possibly a permanent position caused them to accept inferior conditions, to work faster (and unsustainably as 'rate busters' in some instances) or cut corners in relation to OHS, and to be reluctant to raise OHS problems with management. In one of a number of cases cited (some with supporting documentation), representatives from the Victorian Meat Industry Employees Union (AMIEU) referred to the use of labour hire workers in small boning rooms with inferior OHS standards that would not have been accepted by permanent employees and the difficulties HSRs encountered in addressing these issues. Similarly, the rail transport union claimed that locomotive drivers retained by several labour hire firms could exceed maximum hours/fatigue management regulations by taking sequential shifts with different private rail freight operators. Other problems raised included failure to provide adequate induction, training and supervision; the use of illegal immigrants (and other 'illegal' arrangements including tax evasion² and engaging workers in receipt of social security payments); and the use of labour hire as a form of probationary employment. Again, representatives of the labour hire industry rejected these claims. However, as the statement of one manager indicates, these responses actually lent support to the regulatory and other problems posed by labour hire:

The unions will consistently raise this one (that) workers are bullied into submission. That's not true. In the unskilled area there is a ready supply of labour. Sure we'll hang on to a reliable worker and we'll ask the unreliable ones to move on. So from that point of view there is a culture of compliance. But there's also pressure coming back from awards and so on, and this again is a South Australian ruling, if the person is there for more than 12 months in the one job then they must be offered a full-time job. That's well and good and that's understandable but that's not what our clients want. Our clients use us because they want a flexible workforce. They're fruit pickers and the fruit's only picked four months of the year or if they're warehouses like (names company) then they

² Recent litigation involving state and federal taxation authorities supports these allegations. See, for example, *Trylow & Anor v Federal Commissioner of Taxation* [2004] FCA 446 (Hill J) 16 April 2004, Sydney; *Moore Park Gardens v Chief Commissioner of State Revenue (NSW)*, [2004] NSWSC 417 (Gzell J) 19 May 2004; and *Forstaff & Os v Chief Commissioner of State Revenue (NSW)* [2004] NSWSC 573 (McDougall J), 8 July 2004.

do have peaks and troughs and going into Christmas you want a lot of workers. They pull in those temporary people and then once Christmas is over they let them go because they don't need them anymore. They don't have to go through the hassles of employing, they don't have to go through all the issues with the unions and it's a nice clean relationship as far as they are concerned...The only area where some bullying may occur is in highly technical areas where there's a very limited pool of candidates and that's where you try to grab a candidate and hang on to him (sic) because you know he is able to service your clients to their needs. The incentive is to try and engender the loyalty of the person. If you can't engender their loyalty then you use whatever other tactics are available to keep them in because they're a valuable commodity.

By and large regulators interviewed supported union contentions that labour leasing was conducive to an erosion of working conditions, including OHS, via the manipulatory avoidance, if not outright evasion, of regulatory standards (see also Gryst, 1999). A report prepared for the European Foundation for the Improvement of Living and Working Conditions (Storrie, 2002: 52-3) reached similar conclusions about the scope for compliance problems:

In France the national report states that 'everyone knows...and the Labour Inspectorate is aware' that is easy to circumvent the limitations on assignment duration. The UK national report refers to trade union sources that claim '...clear evidence of considerable abuse and malpractice.' It cites avoidance of statutory holiday pay and non-payment of social security contributions as examples. The German report mentions abuse in the regulation of working time, holiday pay and sick pay, and refers in particular to some agencies bypassing their obligation to pay wages during 'unproductive periods' by providing such wage substitution on the basis of only 35 hours per week when workers may have been working longer hours. A postal campaign by Austrian trade unions to inform temporary agency workers of their employment rights has led to a large number of court cases, mainly concerning the payment of wages when not hired out.

Attempts to eliminate responsibility

Beyond the debate over how to share responsibility there is a more extreme position. In the course of a series of state and federal government inquiries into OHS, labour hire/contracting and employment standards individual labour hire firms and industry representatives (or those sympathetic to them) have argued that shared responsibility is onerous and impractical and OHS responsibilities should reside exclusively with the host employer (see representations by the Master Builders Association to the NSW Labour Hire Task Force Final Report, 2001: 10 and the Maxwell inquiry in Victoria, 2004). During interviews for the WorkCover NSW project in 2001-2, regulatory staff in half the jurisdictions visited indicated that labour-leasing firms had expressed similar views to them. This viewpoint was seen as both perplexing and alarming. To take the words of one regulator, 'any party who, to an extent, had control of OHS had legislative responsibilities under the general duty provisions'. Agency staff referred to serious incidents that had occurred as a result of misunderstandings or confusion over legal responsibilities.

Removing or severely circumscribing the obligations of labour hire firms was viewed with alarm on a number of other grounds. These included evidence of poorer OHS outcomes associated with labour leasing and concerns that small firms (with limited resources etc) were now making greater use of labour hire. Further, such a move would negate the well-established and fundamental principle of OHS law that general duties are personal and non-delegable. It would create inconsistencies regarding the legal obligations of parties in analogous situations, like those between contractors and subcontractors (arguably worse as labour hire could be viewed as a highly structured form of subcontracting). Finally, it would set a dangerous precedent by providing a specific exemption to the otherwise wide range of duty holders (including multiple duty holders in vertical and horizontal chains of responsibility) that is central feature of post-Robens OHS legislation. Taken as a whole, it is not hard to see why regulators were concerned. If ambiguity about shared responsibility resulted in narrowing the scope of legal obligations (rather than clarification) this would amount to the compliance problems associated with particular work arrangements effectively dictating OHS standards (at least for some parties) with potential cascading effects on the regulatory regime (as parties responded to inconsistencies).

Attempts to limit legal obligations for OHS are not confined to labour hire firms. Although host firms cannot deny a legislative duty to workers engaged in their undertakings a number have sought to 'risk shift' via hold harmless contracts. Hold harmless clauses essentially entail an agreement by one party to a contract to take complete responsibility for an issue/area and thereby indemnify the other party for any losses incurred in relation to any incidence arising in this area, such as damages claims or fines imposed arising from a failure to comply with OHS regulatory standards. In the case of labour leasing this could (and usually does) mean the labour hire firm agreeing to assume responsibility for the OHS of leased workers and the costs of any OHS breaches that arise in connection with this. The use of these contracts appears to have originated in the USA but by 2000 concern was being expressed about their increasing use in Australia, by unions and even several multinational labour hire firms. Labour hire firm representatives interviewed for the WorkCover NSW project referred to the pressure to accept contracts, with one observing:

We've got three or four clients (who use them). Its not so much the competitive edge, it's the pressure from the host employer or client who says 'I will only do business with a company that has a hold harmless contract' and particularly those companies seem to be the large global American companies who have global policies, who have in-house legal teams and who go through a due diligence process with their insurers every year...some guy sits back in Milwaukee, and (in relation to the general duties in Australian OHS legislation) have no idea, have no idea.

Consistent with this, in 2003 a survey of labour hire firms undertaken Brennan, Valos and Hindle (2003) found that 45% of firms who were members of the Recruitment and Consulting Services Association (or RCSA, which represents the labour hire industry in

Australia) and 47% of non-RCSA members had been asked to sign hold harmless contracts.

Regulatory officers from a number of jurisdictions interviewed for the WorkCover NSW project (Quinlan, 2003) referred to the growing use of hold harmless contracts by host employers, including government agencies and departments (a development they found especially deplorable). The provisions were viewed as an attempt to defeat the intent of general duty provisions in OHS legislation or at least obfuscate legal responsibilities in the eyes of the parties in ways that would make enforcement more difficult even if the contracts cannot formally shift liability under OHS legislation. Regulators believed the attempt to defeat legislative intent (as well as public interest tests) made the contracts unenforceable and reference was made to court decisions in Western Australia and South Australia affirming this (the situation with claims for damages for injury appears more ambiguous. (See *The Workers Rehabilitation and Compensation Corporation (Appellant) v JR Engineering Services Pty Ltd, Western Mining Corporation (Olympic Dam Operations) and Jeffrey John Ball (Respondent 3)*, No. SCGRG 94/970 Judgment No. 4992, Workers' Compensation [1995] SASC 4992 (10 March 1995)). Notwithstanding this and a growing number of successful prosecutions of both host employers and labour hire firms for OHS breaches, the absence of a direct challenge to the use of hold harmless contracts by parliaments or enforcement agencies has enabled confusion amongst duty holders to continue even though US experience (based on very different OHS laws) would question the enforceability and 'value' of hold harmless clauses (Johnstone, Mayhew and Quinlan, 2001).

Worker Involvement and the willingness to raise OHS issues

Beyond the challenges posed for general duty provisions, the increased use of labour hire, along with direct-hire temporary workers and subcontractors, can also weaken the scope for worker involvement in OHS, both in terms of their capacity/willingness to raise problems at the workplace and the effectiveness of participatory mechanisms established by legislation, notably workplace OHS committees and health and safety representatives or HSRs (Johnstone, Quinlan and Walters, 2005). Both the HSR and committee provisions in the OHS statutes tend to be geared towards conventional employer-employee relationships (see Johnstone et al, 2005), and are ill-suited to triangular labour hire arrangements. Further, labour hire arrangements themselves undermine the effectiveness of worker representation. Although there is limited vetting of participatory mechanisms as part of workplace inspections, regulatory officers interviewed for the WorkCover NSW project readily identified the problem. In South Australia the agency (then part of the WorkCover Corporation) investigated the issue, with one of those involved stating:

We found that organisations that have got temporary labour hire and casual staff will tend to consult with the permanent employees and they may only be five and then you've got 300 casual employees and they wonder why people don't know about policies and processes and people are not being supervised etc.

Consistent with Aronsson's (1999) research in Sweden, regulators interviewed for the WorkCover project argued that temporary workers and contractors were less likely to raise OHS problems than their permanent counterparts, or to have these issues treated seriously when they did raise them. There was evidence that, mirroring the risk shifting amongst duty holders referred to earlier, labour hire workers and subcontractors were 'internalising' responsibility for OHS. A survey of workers undertaken for Workplace Safety Board in Tasmania broke respondents into five attitudinal groups (the committed, the uninvolved, the dis-empowered, responsibility avoiders and risk accepters). When discussing 'risk accepters' who constituted 17% of the survey, the report commented that many workers in this group had expressed the view that they hadn't raised OHS issues with their boss because he didn't own the premises where they worked (ie they were labour hire or outsourced to another workplace or work was undertaken away from their employer's premises). In other words, these workers frequently believed OHS could not be addressed since any concern raised would need to be relayed by their 'boss' to the party in control.

Regulators also believed that labour hire workers were reluctant to raise OHS issues with their 'host' employer for fear this would adversely affect their employment - fears accentuated by the knowledge that 'host' employers could terminate engagements without giving a reason and the increasing use of labour hire as a probationary step to a permanent job. Typical were the comments of an OHS regulator responsible for the construction industry:

...working with the (names a building material firm), a common practice there is they try and bypass all the unfair dismissal legislation by initially getting all their staff from a labour hire firm and they use the two or three months as an assessment period and then they ask the labour hire firm "we'd like to employ this person full-time." So I think we're finding more employers are using labour hire firms as part of their selection process...You don't need to give the labour hire company any reason as to why you don't want the worker.

A related issue concerns the willingness of labour hire workers to raise problems with inspectors (either by phone or in the course of a workplace visit). The majority of inspectors interviewed for the Process Standards project believed worker reluctance to raise OHS issues for fear of employer-initiated reprisal was a serious issue and a significant minority were able to nominate specific instances of victimisation. Again, labour hire workers are especially vulnerable in this regard because their employment is temporary, can be terminated without reasons and they are less likely to belong to unions.

Conclusion

The Australian OHS statutes impose significant and far-reaching obligations on labour hire agencies in relation to leased workers, and courts determining liability and penalties in OHS prosecutions start from the position that labour hire agencies and host firms have equal responsibility for the health, safety and welfare of labour hire workers. As we

showed earlier in this paper, these obligations require labour hire agencies and host firms to conduct proper inductions, hazard identification and risk assessment and control processes, and to ensure proper instruction, training and supervision of workers placed with host firms. Our empirical evidence, however, suggests that as with practices like outsourcing, there was a concern amongst regulators that the growth of labour leasing was effectively leading to special pleading for lower OHS standards on the basis that these arrangements were too difficult for the parties (employer, labour hire firm or subcontractor) to control the attendant risks.

Regulators have started to respond to the problems associated with labour hire by producing guidance material on the legal responsibilities of both labour hire firms, commissioning research, establishing tripartite taskforces, initiating campaigns, prosecuting labour hire firms and host employers for OHS breaches following serious incidents, and establishing workers' compensation premiums specific to the industry. It is unclear whether these responses will be sufficient to curb problems because of the difficulty of 'educating' duty holders in a context where there are numerous small operators (amongst whom there is considerable turnover) and labour hire is but one of a range of issues (including others related to workplace change) with which agencies must contend. Unions have sought to stimulate a more effective regulatory response by issuing their own guidance material (eg ACTU, 2000b); establishing labour hire activist networks and hotlines (to report regulatory breaches); trying to insert OHS provisions on labour hire in awards and industrial agreements (such as the NSW Secure Employment Test Case); calling for more vigorous enforcement; and pressing for additional regulatory controls – most notably the compulsory registration and licensing of all labour hire operators. European experience suggests such measures would need to be vigorously administered to have the desired effect and this might prove difficult for already 'stretched' inspectorates. Nonetheless, as with a number of other contingent work arrangements, the widespread use of agency work poses a serious threat to the maintenance of OHS standards that cannot be ignored by regulators.

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