



Victorian Inquiry into the Labour Hire Industry and Insecure Work

November 2015

AMMA is Australia's national resource industry employer group, a unified voice driving effective workforce outcome to ensure the Australian resource industry is an attractive place to invest, do business, and create jobs.

Having actively served resource employers for more than 97 years, AMMA's membership covers employers in every allied sector of this diverse and rapidly evolving industry.

AMMA works with its strong network of likeminded companies and resource industry experts to achieve significant workforce outcomes for the entire resource industry.

Our members include companies working Australians in mining, hydrocarbons, maritime, exploration, energy, transport, construction, smelting and refining, as well as suppliers to those industries.

The resource industry currently employs more than 1.1 million people either directly or indirectly and accounts for 18% of economic activity in Australia¹ (double its share of a decade ago).

Australia's earnings from resources and energy commodities are forecast to increase to around \$178 billion in 2015-16².

First published in 2015 by
AMMA, Australian Mines and Metals Association

Email: policy@amma.org.au
Phone: (03) 9614 4777
Website: www.amma.org.au
ABN: 32 004 078 237

© AMMA 2015

This publication is copyright. Apart from any use permitted under the Copyright Act 1968 (Cth), no part may be reproduced by any process, nor may any other exclusive right be exercised, without the permission of the Chief Executive, AMMA, GPO Box 2933, BRISBANE QLD 4001

¹ Reserve Bank of Australia research discussion paper, *Industry dimensions of the resources boom*, February 2013

² Office of the Chief Economist, *Resources and Energy Quarterly—June Quarter 2015*

Table of contents

1. INTRODUCTION.....	1
2. NON-STANDARD MODES OF WORK.....	11
3. AMMA RECOMMENDATIONS	14



1. INTRODUCTION

1. On 10 September 2015, Victoria's Minister for Industrial Relations, the Hon Natalie Hutchins MP announced the Chairperson and Terms of Reference (ToR) for an inquiry pursuant to the *Inquiries Act 2014* (Vic) into the following issues:
 - a. *"The extent, nature and consequence of labour hire employment in Victoria"*; and
 - b. *"The extent, nature and consequence of other forms of insecure work in Victoria"*.
2. AMMA welcomes the opportunity to contribute to this inquiry and provide this brief written submission on key issues that AMMA has identified in this early stage of the inquiry, having regard to the ToR, the background paper and other relevant materials.
3. AMMA notes that the introductory paragraphs within the foreword to the background paper (October 2015) acknowledges that "[l]abour hire is a legitimate way of engaging workers that is now an established feature of the Australian labour market" and importantly, that the sector represents "a major employer and contributor to the Victorian and national economies".³
4. AMMA endorses this statement and supports this inquiry doing its work within these parameters.
5. AMMA members operate across the entire resource sector (and across multiple states / territories). This includes companies that operate within the broader supply chain, with many AMMA member companies utilising labour hire arrangements in both the construction of a project and during its operation.
6. This has been a longstanding feature of the resource industry and is recognised as a legitimate mode of engaging skilled workers to manage and operate various resource sector projects and operations across Australia, including within Victoria.
7. Whilst the majority of Australia's largest resource operations are not located within Victoria, a number of significant resource activities do occur within Victoria, and this inquiry therefore could impact legitimate labour hire arrangements in the industries that AMMA represents. This is why this inquiry is important to AMMA and its members.
8. This month, the Victorian Government hosted the International Mining and Resources Conference (IMARC) in Melbourne. AMMA was proud to be associated with IMARC 2015 as an official partner. This event attracted international investors and, in particular, showcased what Victoria has to offer in

³ Victorian Inquiry into the Labour Hire Industry and Insecure Work, Background Paper (October 2015), p.4.

terms of injecting investment into the Victorian resource sector to support the state's economy and create jobs.

9. AMMA strongly supported the sentiments delivered by the Victorian Minister for Energy and Resources, Lily D'Ambrosio, when she welcomed the 2,500 delegates – representing more than 30 countries – by reiterating that:⁴

The Andrews Labor Government is committed to supporting a strong and sustainable mining industry that attracts more investment and creates jobs in Victoria.

10. Whilst there will no doubt be individual allegations of concern raised before this inquiry, it is important that the inquiry proceed upon the basis of a robust evidence base prior to formulating any possible policy recommendations which may impact sectors more broadly, such as the resource industry.
11. AMMA would be concerned if recommendations are formulated that impose additional and unwarranted costs, legal obligations or restrictions across the board in response to isolated complaints raised by individuals within particular companies and confined to particular sub-sectors of the Victorian economy.
12. Regarding the Terms of Inquiry relating to “*insecure work*”, AMMA is concerned this is an amorphous concept which is largely subjective and has been misused by the trade union movement to further their industrial and political campaigns.
13. As the background paper correctly acknowledges, “[i]nsecure work is not a clearly defined concept”. We would go further and say it remains indistinguishable from a union campaign slogan.
14. It is regrettable that a large portion of this inquiry is devoted to a concept which is not clearly-defined and is open to contention particularly when those who use it to further their industrial objectives describe various forms of work within the Australian labour market as “*insecure work*”.
15. It is unclear how useful that term is to describe any form of working arrangement. All working arrangements, even ongoing / permanent full-time employment, are not guaranteed to continue for any individual worker. The health and viability of a business in this globalised and competitive economy ultimately impacts the creation and duration of all jobs. Other forms of work are by their very nature of limited duration.
16. However, the most important perspective is how a job suits an individual's preferences and circumstances. As stated by the Productivity Commission in its draft report into the Workplace Relations Framework in direct response to the ACTU's submissions on insecure and precarious work:⁵

... this perspective on non-standard work is an overly negative one. What holds for some does not hold for all. There is little evidence that the prevalence of non-traditional forms of labour is an adequate predictor of

⁴ http://www.imarcmelbourne.com/files/151110_media_release_minister_day_1.pdf

⁵ Productivity Commission (Draft Report), Inquiry into the Workplace Relations Framework, August 2015, p.100.

low quality jobs. People in non-standard jobs are highly heterogeneous. Such jobs can suit people's circumstances well and can act as stepping stones for more secure employment.

17. The draft report re-states a previous observation by the PC which is apposite:⁶

Whether non-traditional work is satisfactory or unsatisfactory, from a worker's point of view, can only be assessed in relation to individual forms of employment and to particular socio-demographic groups within them.

18. Given the repeated citations of the ACTU's insecure work inquiry report, the context of that inquiry is important to understand. The ACTU launched a public campaign framed as an inquiry into "insecure work" in October 2011. This was part of a broader campaign titled "Secure Jobs. Better Future", designed to deliver the union movement particular regulatory reform outcomes.

19. The ACTU published an "options paper" for the insecure work inquiry, which stated:⁷

There is no universally accepted definition of insecure or precarious work. Through discussions with affiliates and their members about their experiences, the ACTU has developed the following working definition.

...

Insecure work is poor quality work that provides workers with little economic security and little control over their working lives. Indicators of insecure work include:

- (i) unpredictable, fluctuating pay*
- (ii) inferior rights and entitlements, including limited or no access to paid leave*
- (iii) irregular and unpredictable working hours, or working hours that, although regular, are too long or too few and/or non-social or fragmented;*
- (iv) lack of security and/or uncertainty over the length of the job; and*
- (v) lack of voice at work on wages, conditions and work organisation.*

Insecure work can be experienced by all workers. However it is often associated with certain forms of employment, including casual work, fixed-term work, seasonal work, contracting and labour hire. It is also increasingly a problem faced by workers employed part-time and workers in non-traditional workplaces, such as home-based outworkers.

⁶ Ibid.

⁷ The future of work in Australia: dealing with insecurity and risk - An ACTU options paper on measures to promote job and income security (2011), p.3.

20. As part of this co-ordinated and strategic campaign, the ACTU organised a public inquiry, issued its Terms of Reference, and appointed individuals whom it wished to conduct the inquiry. The ACTU and affiliated organisations then provided submissions to that inquiry. The ACTU called the inquiry an “*Independent Inquiry into Insecure Work*”. The ACTU recommended a licensing system for labour hire companies and the inquiry’s final report, *inter alia*, recommended such a system⁸.
21. The ACTU also describes insecure work by attempting to compare some forms of working arrangement to the apparent “*dramatic decline*” in permanent work⁹:

The last two decades in Australia has seen a dramatic decline in permanent work, and corresponding growth of insecure forms of employment, such as casual, contract work and labour hire.

22. As can be seen, the above description pejoratively classifies casual, contract work and labour hire as “*insecure forms of employment*”. Some trade union affiliates such as the AWU that provided a written submission to the ACTU inquiry also included FIFO and other workers as being “*insecure*”¹⁰:

Within the industries the AWU represents, there are some particularly vulnerable groups exposed to “insecure work”. Insecure workers for the AWU include those engaged as independent contractors and casual, labour-hire or fixed-term employees, as well as fly-in-fly-out (FIFO) and drive-in-drive-out (DIDO) employees.

23. According to the AWU, members of the union are permanent employees and are “*secure*”, whereas those who are insecure workers are generally not union members¹¹:

Many of those employees within our coverage who are subject to insecure work are not members of the AWU, for varying reasons, and often because of the insecurity in their employment itself. It should be noted that the vast majority of the AWU’s membership is made up of directly engaged permanent employees, who are relatively “secure” workers.

24. Whilst AMMA does not cavil with the ACTU and its affiliates being able to pursue their policies and political objectives through campaigning, AMMA is concerned that a significant part of this official inquiry is to inquire into a term (more accurately described as a label or slogan), which is pejoratively used by the ACTU and trade union movement, and which can be used to demonise and restrict legitimate forms of work within and outside the resource sector.

⁸ http://www.actu.org.au/media/349417/lives_on_hold.pdf

⁹ <http://www.actu.org.au/our-work/independent-inquiry-into-insecure-work-in-australia>

¹⁰ AWU submission, Inquiry into Insecure Work in Australia, p.2.

¹¹ *Ibid.*

25. The union campaign against non-standard forms of work is also motivated by the difficulty for unions in recruiting members whom are not in traditional forms of employment, and the record low levels of private sector union membership.
26. AMMA's concern is not misconceived. For example, the first part of the ToR for this inquiry refers to "*labour hire employment*" and the second part of the ToR is expressed as "*other forms of insecure work*".
27. By implication, labour hire is characterised as insecure work, and tarred with the same brush as "*sham contracting and phoenix corporate structures*". Chapter 4.1 to the background paper titled, "*Other forms of insecure work*" mentions casual employment, fixed-term employment and independent contracting as forms of insecure work.
28. The problem with this approach is there appears to be an unfortunate conflation of unlawful practices (i.e. sham contracting / phoenix activities) with lawful and legitimate arrangements (i.e. casual, fixed-term and independent contracting arrangements).
29. Part of the problem is the way the term insecure work is applied by those who use it to further specific objectives. AMMA strongly encourages this inquiry to approach both labour hire and so-called insecure work by properly distinguishing between lawful arrangements on the one hand and unlawful conduct / arrangements which may also be used to deliberately exploit vulnerable individuals.
30. The second concern AMMA has, even before submissions have been filed, is the disproportionate reliance on the ACTU's insecure work inquiry in this inquiry's background paper. For example, the background paper cites the ACTU insecure work inquiry report no less than seven times. However, it only makes limited reference to official statistics such as Australian Bureau of Statistics (ABS) data and barely mentions the previous Victorian Parliamentary Inquiry into Labour Hire Employment in Victoria (June 2005) and its findings and recommendations.
31. The third concern relates to the canvassing of regulatory reform options at this early stage, even before the inquiry has commenced identifying any extant problems or issues. The inquiry is charged with examining the extent, nature and consequences of labour hire and insecure work and making recommendations, having regard to matters outlined in the ToR. There is a range of regulatory options outlined in the background paper, none of which point to any particular type of regulatory measure or outcome.
32. This should be an iterative process, with any discussion and consideration of recommendations coming after an identification of current practices and any subsequent areas of concern.
33. However, the chair of this inquiry has publicly outlined his position about a number of matters relevant to the ToR and appears to have already formed a pre-determined position in relation to a number of issues and specific forms of regulation.

34. In an article by the Chair that was published online on 18 November 2015 (Attachment A), AMMA notes the following paragraph:
- I have been appointed to chair this Inquiry, which was established in October this year to fulfil an election commitment by the Daniel Andrews government to review the impact of short-term, temporary and casual work on the job security of Victorian workers and to develop a licensing system for labour hire agencies.*
35. AMMA notes that Part (c) of the ToR does not require the Chair to “develop a licensing system for labour hire agencies”.
36. It is therefore legitimate for AMMA and all participants in this inquiry to ask what is the point of having an inquiry which is stated by the Chair in the foreword to the background paper to be “*primarily a fact-finding Inquiry*” when it appears that an outcome may have been arrived at before the fact-finding has concluded?¹²
37. The comments within the article are also at odds with the Chair's opening statement at the first public hearing, which does not refer to a mandate to develop a licensing system for labour hire agencies¹³.
38. Looking at the questions on p.24 of the background paper, the question should not be what regulatory options are available, but whether:
- a. Additional regulation is warranted and represents the best or most effective mechanism to address a particular area of concern.
 - b. Additional regulation would be effective in the context of Commonwealth law regulating employment in Victoria.
 - c. The impact of additional regulation would, on balance, represent the best approach to achieving desired ends.
 - d. There are alternatives to imposing additional regulation on doing business in Victoria.
39. The Chair's published article also refers to a limited number of allegations in media reports, which may or may not involve unlawfulness, under the heading “*Scandal after scandal*”. To describe the reported allegations in this way can be interpreted by a fair-minded lay observer that the Chair has already substantially formulated a view as to the “*nature, extent and consequence*” of labour hire or insecure work in Victoria, which may influence the recommendations that could be made.
40. In light of the above concerns, the process for this inquiry should be altered. AMMA recommends that the Chair issue an interim or draft report for comment

¹² Background Paper, p.4.

¹³ Opening statement of the Chair, Mildura 23 November <http://economicdevelopment.vic.gov.au/about-us/strategies-and-initiatives/inquiry-into-the-labour-hire-industry-and-insecure-work/opening-statement-from-inquiry-chairperson>.

and invite further feedback from stakeholders prior to providing a final report to the Premier and Victorian Minister for Industrial Relations by 31 July 2016.

41. This is particularly relevant where the Chair has specifically indicated that he will develop a licensing system for labour hire agencies which may impact resource sector companies.

The Victorian economy and jobs

42. Victoria, as with all Australian jurisdictions, needs to be doing all it can to encourage and support investment and job creation.
43. Whilst Victoria may be outperforming most other states financially, the vulnerability of the economy (and jobs) confronting our nation also confronts Victoria. For example, in Victoria:
 - a. The unemployment rate is 6% as of June 2015¹⁴ and threatens to increase further.
 - b. Significant shifts away from the manufacturing sector are ongoing.
 - c. Youth unemployment is at its highest level since the 1990s¹⁵.
44. Business has been very clear that the last thing it needs from state governments is the imposition of additional labour costs that are entirely divorced from improvements in productivity or competitiveness and would only serve to make it harder to create and retain jobs.
45. AMMA cautions the inquiry to be mindful of the need to support jobs in Victoria and to attract investment opportunities for resource projects.

The Victorian resource industry

46. Most of the current operating mines in Victoria are either extracting mineral sands (North West Victoria), gold (Central and Western Victoria), brown coal (South East Victoria) or gas (Southern Victoria).
47. Presently, there are 12 major Victorian resource and energy projects (magnesium, coal, silver, titanium, gas, zircon and molybdenum) in the pipeline. Nationally, there are 232. In other words, the number of projects that could come online will probably not offset the number of projects going into restoration and rehabilitation.
48. Six per cent of national resource sector GDP is generated from Victoria, yet 10% of resource sector employment occurs in Victoria¹⁶. This means for our industry:

¹⁴ http://lmip.gov.au/default.aspx?LMIP/LFR_SAF0UR/VIC_LFR_LM_UnemploymentRateTimeSeries

¹⁵ <http://www.theage.com.au/victoria/youth-unemployment-in-victoria-reaches-highest-rates-since-the-90s-20150311-141ce5.html>

¹⁶ According to the ABS cat no. 5220 and 6291 respectively, cited in KPMG [report](#), *Workplace relations and the competitiveness of the Australian resources sector*, published in March 2015

- a. Labour costs are already higher in Victoria per unit of resource output than they are in competing Australian jurisdictions.
 - b. Were an additional on-cost applied to employment in that state, it would disproportionately impact a labour-intensive industry like the Victorian resource industry.
49. The internationally respected Fraser Institute Report¹⁷ compares sentiment with regard to doing business and investing in resource jurisdictions throughout the world.
 50. It shows that the key mining states of Australia - Qld and WA - are falling out of favour with mining executives globally, and other states such as Victoria are seen as less attractive places to invest than Russia, Nicaragua, the Ivory Coast and the Democratic Republic of Congo.
 51. Victoria's investment attractiveness fell by 23 places from 43 in 2013 to 66 in 2014 out of 122 jurisdictions in the world.
 52. AMMA is not suggesting that Australia should align its regulatory framework with that of the above countries. Rather, these observations aim to highlight that global trade requires competition with other global producers and exporters, requiring a constant focus on the cost of production. In recent years, Australia's competitiveness has declined, as the cost of production for many commodities has risen faster than the global average.
 53. In relation to Victoria, a number of current Victorian resource projects / operations are either at risk due to their age (i.e. depleting reserves, particularly for gold mines) or are under attack by the 'fossil fuel' or 'divestment' agenda (particularly brown coal mines).
 54. Adding to labour on-costs, creating additional red tape or imposing new restrictions on labour hire or other forms of work can make employment and investment in this part of the country even less attractive and detract from the Victorian Government's commitment to "*invigorating the State's mining and mining services sectors*"¹⁸.

Missing questions

55. The various question boxes throughout the background paper pose questions the inquiry would have submitters address. AMMA urges the inquiry to think about what has not been asked, and what should have been asked, and to address that (as AMMA recommends) through an exposure draft or draft report to which participants in this inquiry could then respond.
56. In AMMA's view, specific omissions from the background paper questions include but are not limited to:

¹⁷ Fraser Institute, [Survey of Mining Companies: 2014](#)

¹⁸ http://www.imarmacmelbourne.com/Content/Victoria-Government/9_3/

- a. Question Box 3.3¹⁹:
 - i What benefits does labour hiring deliver for the State of Victoria?
 - ii Why do Victorian businesses use labour hire arrangements?
 - iii What are the operational and financial benefits to Victorian businesses of using labour hire?
 - iv What are the labour market experiences of employees working for labour hire companies? Is labour hire an ongoing arrangement, a transition to ongoing work, etc?
 - v Why do employees choose to work for labour hire companies? Are they satisfied with working under labour hire arrangements?
- b. Question Box 5.6²⁰:
 - i What is the best approach to address each particular concern?
 - ii Is regulation the best and most effective approach to addressing concerns regarding labour hire / non-traditional forms of work in Victoria?
 - iii What alternatives are there to imposing additional regulation on doing business in the State of Victoria?
 - iv How should any new regulation be developed and implemented?

¹⁹ Background Paper, p.10

²⁰ Background Paper, p.24



2. NON-STANDARD MODES OF WORK

The importance of proper data analysis

57. AMMA notes that Chapter 4 of the background paper outlines a range of non-standard forms of work as if they are all types or forms of insecure work and inherently disadvantageous compared with permanent or ongoing forms of work (ie. full-time / part-time employment)²¹.
58. AMMA urges the inquiry to be guided by official and reliable data in terms of quantifying different classes and categories of work.
59. For example, the background paper states that the incidence of casual work and independent contracting is “*highly prevalent in Australia*”²². In relation to casual forms of work, the PC has observed recently that the “*increase in employment share of non-standard forms of employment has abated, and to some extent even reversed*”²³.
60. Casual forms of work have remained relatively static over the past two decades, with the PC noting that from 2002 to 2014, the share of part-time workers rose from 28.3 per cent to 30.6 per cent, whereas over the previous 12-year period, it had grown by more than 7 percentage points²⁴.
61. This inquiry should ensure it accurately identifies and properly considers long-term trends for non-standard working arrangements and how that compares with permanent forms of work.
62. In relation to any proposals by this inquiry to introduce new regulation, it is important to consider the PC’s recent comments in its draft report into the Workplace Relations Framework that the “*best labour market and workplace policies allow for a greater flow from unemployment to employment ... the future evolution of Australia’s WR system should avoid creating excessive frictions that frustrates hires (and quits)*.”²⁵
63. It is also important that the inquiry consider the impact of any regulatory measures which may unintentionally impact on the ability for an individual to engage in non-standard modes of work, particularly when a person’s only other alternative is unemployment. The PC has cautioned that “*all measures of labour utilisation suggest that the Australian labour market is weakening and the level of youth unemployment is high*.”²⁶
64. This inquiry needs to exercise great care not to make it more difficult for job seekers, particularly young people, to enter and maintain employment, and to

²¹ Background Paper, October 2015, pp.11-18

²² Ibid, at p.11.

²³ PC Draft Report, p. 101.

²⁴ Ibid, at p.107.

²⁵ Ibid, at p.113.

²⁶ Ibid, at p.118.

ensure that nothing it does would make it more difficult to do business, secure investment and create jobs in Victoria.

65. In relation to data on so-called “*sham contracting*”, whilst the background paper notes some data suggesting misclassification of employees as independent contractors, AMMA refers to the following observation by the Panel that conducted a Post Implementation Review (PIR) of the *Fair Work Act 2009*²⁷:

Given the lack of data available the Panel cannot reach a conclusion about sham contracting in Australia across all industries.

Proposals to introduce new regulation

66. The ToR for this inquiry in part (c) refer to a range of matters that should be considered when making any recommendations. AMMA will consider responding to other submissions by providing a supplementary submission in response to these issues.
67. As with all proposals to introduce new regulation, any recommendations from this inquiry must be demonstrated / properly evidenced by cost-benefit analysis and, on balance, any proposed regulatory approach would need to outweigh other non-regulatory measures (such as voluntary compliance codes, best practice guidelines, dedicated industry campaigns and greater enforcement by regulatory agencies of existing laws).
68. It is also important to note that the legislative competence of the Victorian Parliament to regulate arrangements for certain workers (ie. independent contractors) and persons engaged by constitutional corporations is significantly curtailed as a result of a complex arrangements of state referrals of power together with federal coverage of relevant legislation (ie. the *Fair Work Act 2009* and *Independent Contractors Act 2006*).
69. Where the Commonwealth currently regulates particular subject matters, AMMA considers it should continue to do so and there should be no attempt to introduce new measures which may impose uncertain legal obligations on businesses or individuals.
70. In support of this, we note that Victoria led all other states in referring its legislative powers for regulating workplace relations to the Commonwealth and was very much the innovator leading the way towards the significantly expanded coverage of the *Fair Work Act 2009*. Victoria benefitted considerably from moving away from state regulation of workplace relations and considerable caution should be exercised in recommending any new state regulation in this area, particularly given the predominant application of Commonwealth law in regulating work in Victoria.

²⁷ Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation (June 2012), p.224.

International law

71. In relation to Australia's international obligations, and any proposals for Australia to ratify ILO Convention [181](#) (Private Employment Agencies Convention) or ILO Convention [96](#) (Fee-Charging Employment Agencies Convention), only the Executive of the Commonwealth has the capacity to enter into treaties.
72. There exist longstanding protocols as to whether the Australian Government will ratify treaty instruments, such as ILO conventions. This includes consultation with the social partners (unions and employer organisations) and relevant state and territory governments.
73. Ultimately, it is a matter for the Australian Government and not a State government or State Parliament to decide.

3. AMMA RECOMMENDATIONS

75. AMMA recommends that:
- a. The Chair of this inquiry issue an interim or draft report for comment and further feedback from relevant stakeholders prior to providing a final report to the Premier and Victorian Minister for Industrial Relations by 31 July 2016.
 - b. Any findings and recommendations be supported by a proper evidence base and an acknowledgement that issues concerning individual companies or specific sectors of the Victorian economy are not the basis to justify industry-wide regulation, legal obligations or additional costs on other sectors and employers.
 - c. The inquiry consider how to better promote legitimate and lawful arrangements already in place that rely on non-standard forms of labour but which serve the needs of individual workers and businesses.
 - d. The inquiry consider the existing regulatory burden on employers, the existing legal protections (at federal and state levels) and justify by cost-benefit analysis why any additional regulatory measures are warranted.