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Since 1919

Submission to the Queensland Parliament Finance and Administration Committee

INQUIRY INTO THE PRACTICES OF THE LABOUR HIRE INDUSTRY IN QUEENSLAND

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EXECUTIVE SUMMARY

Maurice Blackburn has been advocating on behalf of Queensland workers regarding their employment rights, workplace safety and workers compensation for a generation. It is in this context that we welcome the opportunity to make a submission to the *Inquiry into the practices of the Labour Hire Industry in Queensland*.

Over our time advocating for local workers, the economic, social and legal context of work in Queensland has evolved significantly. While traditional frameworks of industrial relations and workplace safety has largely served employees well in the past, the rise of labour hire and insecure employment arrangements, particularly over the past two decades, has resulted in a need for reforms.

Although no policy makers would ever publicly assert that working people employed under labour hire and other arrangements should be treated unfairly, paid improperly or made to carry out their duties in unsafe conditions, the evolution of work, combined with a failure to update policies, has led to just that.

Our submissions highlight the changing nature of employment arrangements that Queensland workers are experiencing, including changes to the industrial landscape, workplace health and safety standards and the ability of workers to access workers compensation.

Maurice Blackburn Lawyers has considerable experience representing workers employed through insecure arrangements such as through labour hire and franchising. This has revealed that many workers are being exposed to substantial underpayments and unlawful working conditions through cost and risk-shifting models and we are currently representing multiple 7-Eleven workers who have experienced this form of unlawful treatment in the workplace.

At Maurice Blackburn, we strongly believe that the establishment of a licence scheme for the Queensland labour hire industry is an appropriate policy response to such problems. Similar schemes have been successfully implemented overseas, including several OECD nations. Such a scheme would ensure that labour hire providers are financially stable and that occupational health and safety obligations were being met.

It would require all labour hire providers to be licensed. Furthermore, end-user enterprises would be legally obliged to use licensed providers. The end-user enterprise would also have to guarantee the payment of any entitlements owed by the labour hire provider to its workers, which would also ensure that costs and risks were not inappropriately shifted.

Maurice Blackburn applauds the Queensland Government for initiating the Inquiry and looks forward to the end result of its work.

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INSECURE WORK

There is a high degree of public concern regarding the impact of insecure work. This concern arises from the increasing prevalence of such arrangements, the inherently detrimental features of those arrangements, and the disproportionate impact of insecure work on the most vulnerable members of the workforce. It strikes at the fundamentals that Queenslanders associate with work – regular pay, ongoing employment, protection and fair conditions, and the opportunity for advancement.

Vulnerable workers are those workers who do not have a level of bargaining power in the labour market. They may include unskilled workers, international students, migrant workers, young people and women returning from the workforce after having children.

Insecure work arrangements can be identified in most sectors of the job market including supply chain industries (e.g. food industry), labour hire and franchising industries. These industries appear to be marked by labour law compliance shifting, ie. compliance obligations are shifted to the immediate employer of labour as distinct from what might properly be regarded as the ultimate beneficiary exercising a substantial or effective control. A significant driver of this compliance shifting is to:

> i. evade the obligation to comply with industrial laws (including basic entitlements such as award rates of pay); and/or,
>
> ii. shift that obligation to conveniently 'arm's length' employing entities who have a greater propensity to engage in the direct mechanics of exploiting vulnerable workers.

Invariably, this results in vulnerable workers being exposed to substantial underpayments and unlawful working conditions. It is a cost and risk shifting model.

Maurice Blackburn Lawyers is experienced in advocating on behalf of clients working in insecure work arrangements in a number of different contexts, including labour hire and franchising. We are presently representing a number of workers in claims against 7-Eleven, after it was revealed that:

> a) franchisees were the legal employers, hence took on the obligation of compliance with labour laws;
>
> b) many employees were systematically underpaid using a number of unlawful mechanisms including false records and payslips;
>
> c) exploited and underpaid employees were from a vulnerable sector of the community being overseas students; and,
>
> d) the franchisor failed to properly regulate the conduct of franchisees and has only latterly responded to systemic exploitation after it became a public issue through reporting by Fairfax Media and ABC's Four Corners.

This exploitation of vulnerable workers is not an isolated example. The Fair Work Ombudsman's Inquiry into the practices of poultry producer Baiada Group identified an operating model whereby the end-user enterprise has ceased to engage its labour directly. The Baiada Group, who supply Woolworths, Coles, IGA, McDonald's and KFC, was found to have financially benefited from a complex supply chain of up to four tiers of labour hire providers who were seriously contravening basic labour laws.

LICENCE SCHEME FOR THE QUEENSLAND LABOUR HIRE INDUSTRY

The issues identified above indicate that a licencing scheme for the labour hire industry is an appropriate policy response.

The purpose and benefit of a licencing scheme would ensure:

a) that labour hire providers are financially stable and able to meet their obligations in respect of their workforce; and,

b) that labour hire providers have the capacity to meet their occupational health and safety obligations.

A licencing scheme would create a greater degree of certainty that labour hire providers would have capacity to meet employment obligations. This would minimise circumstances where workers would incur financial loss due to incapacity to pay or non-compliance with industrial laws. This would also be of great benefit to vulnerable workers.

Licensing schemes have been successfully used in other OECD Countries such as Canada, Korea, Japan, Germany, Austria, Spain, Luxembourg, the Netherlands, Sweden, Belgium, France, South Africa, Portugal, and to a limited extent, in the UK. They have been introduced to protect the rights and entitlements of workers and provide transparency and stability in the labour hire industry.[1]

An appropriate licencing scheme could have the following features:

a) require a labour hire provider[2] to hold a licence to operate in Queensland;

b) prohibit an end-user enterprise[3] from engaging the services of an unlicensed labour hire provider; and,

c) require an end-user enterprise to make reasonable enquiries into whether or not the labour hire provider holds a current licence.

d) Where an end-user enterprise has:

i. engaged the services of an unlicensed labour hire provider; or

ii. has knowingly or recklessly engaged the services of a licenced labour hire provider that is not complying with the conditions of their licence;

e) the end-user enterprise would be liable to guarantee the payment of any entitlements owed by the labour hire provider to its workers, to the extent that those entitlements arose from the work done for that end-user enterprise; and,

f) a contravention of the scheme may be enforced by way of civil penalties.

[1] Australian Council of Trade Unions, Report of the Independent Inquiry into Insecure Work in Australia, Lives on Hold – Unlocking the potential of Australia's Workforce, 2012.
[2] *Labour hire provider'* is a person or company who is wholly or substantially in the business of providing labour to an end-user enterprise.
[3] '*End-user enterprise'* refers to the person or company that is the principal beneficiary of the labour provided by the Labour hire provider

A Licencing Body

The scheme would require the Queensland Government to create a regulatory body to oversee the operation of a licencing scheme for the labour hire industry. The licencing body would be responsible for:

1) approving and revoking licence registration;

2) enforcing licence conditions; and,

3) prosecuting contraventions of the scheme.

The Licencing Body would also have a research and public policy purpose and be responsible for:

- conducting research on the impact of insecure work on vulnerable groups in the Queensland workforce;
- proposing regulatory reform to protect the rights of vulnerable workers in insecure work in Queensland; and,
- engaging with stakeholders such as employers, employees, unions, lawyers and academics.

Licence Applications

Applications for a licence would be made to the Licencing Body. When considering whether to grant a licence, the Licencing Body would have to take into account the following:

a) the identities of those persons who are, or would be, if a licence was allocated to the applicant, in a position to influence or control the licence;

b) the business record of the labour hire provider;

c) the business record of each person who is, or would be, if a licence was allocated to the applicant, in a position to influence or control the licence;

d) the nature and manner in which work is performed in the industry or sector in which the licence applicant is expected to operate in;

e) the capacity of the applicant to meet its occupational health and safety obligations;

f) the financial security of the licence applicant and its capacity to meet its financial obligations to its workers;

g) whether the licence applicant, or a person who is, or would be, if a licence was allocated to the applicant, in a position to influence or control the licence:

i. has ever been convicted of an offence against an industrial law;

ii. has ever been ordered to pay a civil penalty under the licencing scheme or any other industrial law;

h) whether a licence issued to the labour hire provider has been revoked or suspended previously; or

i) any other matters that the Licencing Body considers relevant.

The Licencing Body may or may not grant an application for a licence for a specified period not exceeding three years.

Licence Conditions

In granting a licence to a labour hire provider, the Licencing Body may impose conditions upon the licence in accordance with how the Licencing Body sees fit. The matters that may be dealt with as conditions on a license could include:

i) limitations upon the industry, industry sector or types of businesses in which the registered labour hire provider may operate, where operating in those environments involves, or is likely to involve the exploitation of workers;

ii) any additional measures to be taken by the registered labour hire provider to protect the health and safety of its workers;

iii) the amount of any security and where such security should be lodged or held for the purpose of securing the payment of potential claims by workers of the registered labour hire provider; and,

iv) any requirement for the registered labour hire provider to take out adequate and appropriate insurance.

It would be a condition of every licence that the labour hire provider not charge, or pass on, directly or indirectly, fees or costs to its workers.

Variation and Revocation

The Licencing Body may, on its own motion or on the application of any interested person, vary or revoke the licence, or any condition upon a licence of a licenced labour hire provider, if it appears to the Licencing Body that a condition of a licence, or any requirement under law (including compliance with Awards), has not or is not being complied with.

AMENDMENT TO INDUSTRIAL LAWS

A proper response to the issue of insecure work requires amendment to industrial laws. Existing legislative instruments do not adequately deal with the challenges posed by labour hire arrangements. For example, though there is legislation in Queensland which imposes a code of conduct on Private Employment Agents (pursuant to the *Private Employment Agents Act 2005* (Qld)), this legislation expressly excludes labour hire operations.

Critically, the current delineation of powers between the State and Commonwealth in respect of industrial laws creates a limitation on the capacity of the State to properly respond to the detrimental impact of insecure work.

Consequently, it is submitted that the Queensland Government, through the Council of Australian Government (COAG), should advocate strongly for changes to Commonwealth industrial laws. Any such changes may require amendment of State and Commonwealth referral legislation to ensure that any enhanced Commonwealth industrial laws apply to employers who are not constitutional corporations. In that regard, further referral of powers by the State may require amendments to the *Fair Work (Commonwealth Powers) and Other Provisions Act 2009 (*Qld), and reception of those powers by the Commonwealth under the *Fair Work Act 2009* (Cth).

There is already a model of regulation for insecure work that has been devised to regulate labour law compliance shifting. The textile, clothing and footwear (TCF) industry has, for an extended period of time, had an award regime of protections in place for outworkers working as part of a supply chain. In 2011, this regime was also given statutory effect by the enactment of Part 6-4A of the *Fair Work Act 2009* (Cth). The regime includes a mechanism to enable TCF outworkers to recover unpaid amounts owed to them by shifting compliance up the supply chain. The mechanism also allows TCF outworkers to recover what they are owed from an indirectly responsible entity further up the supply chain in circumstances where those responsible for doing so have not fulfilled their obligations to the outworker. As long as the TCF outworker has the requisite connection to the entity up the supply chain, the entity will be an indirectly responsible entity. There can be more than one indirectly responsible entity in relation to a particular unpaid amount. In that circumstance, the entities are jointly liable to pay the unpaid amount.

However, the primary liability to pay the TCF outworker remains with the person who employed or engaged them. If the TCF outworker has taken reasonable steps to recover the unpaid amount from that person without success, they may then initiate proceedings in reliance on this regime.

If the indirectly responsible entity pays the unpaid amount, that entity will be able to recover an equivalent amount − plus interest − from the responsible person, whether by way of offset or proceedings in the Federal Court, Federal Circuit Court, or eligible state or territory court.

This method of shifting compliance responsibilities to an ultimate beneficiary could be used in supply chain industries and franchising industries where the risk of exploitation of vulnerable workers is high. It would also create an incentive for the ultimate beneficiary (eg the franchisor or a Baida-style enterprise) to ensure that there is compliance with industrial laws by the direct employers of vulnerable workers.

WORKERS COMPENSATION AND LABOUR HIRE EMPLOYEES

If there is an injury caused to a worker arising out of, or in the course of any employment, the worker is entitled to compensation in accordance with the *Workers' Compensation and Rehabilitation Act 2003 (WCRA)*[4].

If a worker's incapacity for work results from, or is materially contributed to by, an injury which entitles the worker to compensation, compensation must be paid in the form of weekly payments, subject to and in accordance with the *WCRA*[5].

An injured worker's weekly entitlements are calculated with reference to their normal weekly earnings (NWE) from employment (be it continuous or intermittent) in the 12 months immediately before the day the worker sustained an injury.[6] This is a consideration of the amount averaged. It is calculated once only and does not change during the life of the claim. The calculated amount is fixed and does not alter even if the claim is closed and later reopened.

If a worker has not had employment for the 12 months immediately before the day the worker sustained an injury, normal weekly earnings are deemed to be the normal weekly earnings of the worker from the employment (continuous or intermittent) had by the worker in the period in which the worker has sustained the employment.[7]

Certain payments are included in the calculation of normal weekly earnings[8], such as:

- overtime;
- higher duties;
- penalties; and
- allowances.

However, certain allowances are not taken into account when calculating the NWE[9]:

- Travelling;
- Car;
- Removal;
- Meal;
- Education;
- Living in the country or away from home;
- Entertainment;
- Clothing;
- Tools;
- Vehicle expenses.

The wages definition also excludes the 9.25% contribution made by the employer to the worker's scheme for superannuation benefits.

As a result, workers who rely on the aforementioned allowances for substantial proportions of their weekly income are likely to be disadvantaged as compared to workers who receive a higher base wage.

[4] Part 10, *Workers' Compensation and Rehabilitation Act 2003 (Qld)*
[5] Section 149 *Workers' Compensation and Rehabilitation Act 2003 (Qld)*
[6] Section 106 (1) *Workers' Compensation and Rehabilitation Act 2003 (Qld)*
[7] Section 106 (2) *Workers' Compensation and Rehabilitation Act 2003 (Qld)*
[8] Schedule 6, *Workers' Compensation and Rehabilitation Act 2003 (Qld)*
[9] Schedule 6, *Workers' Compensation and Rehabilitation Act 2003 (Qld)*

Additionally, workers who have fluctuating periods of income can find themselves disadvantaged as compared to workers who have continuous periods of income with respect to the once-only calculation of their NWE. This will depend upon whether they were earning higher-than-average or lower-than-average earnings at the time of their injury, which is a matter of happenstance.

As referenced in the Inquiry background paper, labour hire workers are more likely to be engaged in insecure work, working irregular hours[10]. Consequently, if labour hire workers sustain an injury in compensable circumstances they are likely to be disadvantaged with respect to the calculation of their NWE as compared to other workers.

In addition to this, the calculation of NWE allows the Insurer to take into account earnings lost from a 'second job' as long as this employment was the subject of a contract of service.[11] This means the labour hire worker who has a second job working under an ABN or through their own business (which many do to supplement their irregular income), will not be entitled to have this income taken into account in determining their NWE.

Weekly payments are paid at the rate of 85% of a worker's NWE for 26 weeks, which then reduces to 75% until the end of the first 2 years of the incapacity[12]. Some workers receive weekly payments of compensation beyond this time[13]. Thus, WorkCover does not provide for full income replacement.

Workers who are covered by a union-negotiated enterprise bargaining agreement (EBA) are likely to also be entitled to Accident Make-Up pay for a period of time. This usually covers the shortfall between the worker's pre-injury wage and their entitlement to weekly payments under WIRCA.

In our experience, labour hire workers are less likely to be covered by an EBA that entitles them to Accident Make-Up pay, whether with their employer or the host employer. As a consequence, labour hire workers who sustain an injury are likely to be disadvantaged than other workers with respect to their Accident Make-Up Pay entitlements.

Return to Work and Labour Hire

Part 4 Division 7 of the *WCRA* requires employers to provide injured workers with suitable alternative duties following a workplace injury.

These obligations in a labour hire context are difficult to manage. Such difficulties were outlined [albeit within the context of the state of Victoria's legislative regime] in the 2008 review of the *Accident Compensation Act 1985* (ACA) authored by Peter Hanks QC[14].

The *WCRA* specifies that a labour hire agency for a worker who is party to a contract (regardless of whether the contract is a contract of service) with the agency or organisation to do work for someone else. The agency continues to be the worker's employer while the worker does this work[15].

[10] Queensland Inquiry into the practices of the Labour Hire Industry in Queensland, Issues Paper (2016), p 2.
[11] Section 83(1) 150 *Workers' Compensation and Rehabilitation Regulation 2003 (Qld)*
[12] Section 150 *Workers' Compensation and Rehabilitation Act 2003 (Qld)*
[13] Section 150 (c) *Workers' Compensation and Rehabilitation Act 2003 (Qld)*
[14] Peter Hanks, *Accident Compensation Act Review* (2008), p 152.
[15] Schedule 3.2 *Workers' Compensation and Rehabilitation Act 2003 (Qld)*

Under the Act, the host employer (as opposed to the labour hire agency) is not required to support an injured worker's return to work. Nor is a host employer obliged to keep an injured worker's position open while they recover. Furthermore, in all likelihood, the labour hire agency will have no suitable alternative duties available to the worker.

As a result, labour hire workers are less likely to be offered a return to work program that sees them returning to their job with the host employer. If anything, they might be offered a position with the host in a role and an environment that is unfamiliar to them. Thus a labour hire worker is disadvantaged as compared to other workers with respect to the suitable employment options that may be presented to them (if at all). Consequently, the prospects of a successful return to work for a labour hire worker are significantly reduced which is inconsistent with the objects of the WCRA.[16]

The Inquiry might also wish to consider labour hire workers and employers' return to work obligations, in particular:

I. What the obligations are of host employers regarding offering suitable employment to injured labour hire workers, and to otherwise assist them with their return to work?

II. Whether labour hire companies and host employers should be obliged to cooperate and assist injured labour hire workers return to work?

Current obligations

Queensland employers are compelled, by virtue of the *Work Health and Safety Act 2011 (WH&S Act)* to provide their employees with a safe system of work.

There exist categories of insecure workers where there is uncertainty as to who must discharge this obligation. The High Court decision of *Baiada Poultry v R* demonstrates this ambiguity[17].

Section 3 of the WH&S Act sets out the objectives of the legislation. They are:

a) to secure the health, safety and welfare of employees and other persons at work;
b) to eliminate, at the source, risks to the health, safety or welfare of employees and other persons at work;
c) to provide a framework for continuous improvement and progressively higher standards; and to provide for the involvement of employees, employers, and organisations representing those persons, in the formulation and implementation of health, safety and welfare standards.

The WH&S Act sets out the obligation to provide a safe working environment:

- The WH&S Act seeks to serve its stated objectives by imposing obligations on employers and employees.
- The most substantial obligation the WH&S Act places on employers is that "
- "Employee", for the purposes of section 7[18], includes independent contractors, employees of independent contractors and employees of labour hire companies who has been assigned to work in the person's business or undertaking

[16] Section 5(2)(f) *Workers' Compensation and Rehabilitation Act 2003 (Qld)* – inury management, emphasising rehabilitation of worker particularly for return to work;
[17] *Baiada Poultry Pty Ltd v The Queen [2012] HCA 14*
[18] Section 7 *Workers' Compensation and Rehabilitation Act 2003 (Qld)*

- The effect of the definition of worker is that independent contractors have the same obligations as employers for matters over which the independent contractor has control

The obligations of an employer and an employee under the WH&S Act are clear when the relationship between the employer and the employee are clear. However, there is ambiguity regarding the obligations of an employer/host in the three-way relationship between labour hire workers, contractors and their employees and sub-contractors and their employees.

Areas of ambiguity include:

I. Who has the duty to provide a safe system of work?

II. What is 'reasonably practicable' with regard to providing and maintaining a safe system of work?

III. Can employers rely on contractors and sub-contractors to discharge their WH&S Act obligations?

The High Court decision of *Baiada Poultry v R* highlights the ambiguity in this area of the law and demonstrates how the obligations to provide a safe workplace can become complex when dealing with contractors, sub-contractors and employees.

Facts of *Baiada Poultry v R* are:

- Baiada Poultry carried on a business of processing poultry meat at their plant in Laverton North, Melbourne. As part of their business, Baiada provided chicken growers with chickens, feed and assistance, and in return, chicken growers agreed to raise the chickens.

- Baiada Poultry engaged independent contractors to round up and pack the chickens, and different contractors to transport the chickens from the various farms to its processing plant.

- Andrea and John Houben were contract growers for Baiada Poultry. DMP Poultech Pty Ltd (DMP) was a contractor engaged by Baiada Poultry to catch and pack the chickens at the Houben's farm. Azzopardi Haulage Pty Ltd (Azzopardi Haulage) was a trucking/logistics company engaged by Baiada Poultry to transport the chickens from the Houben's farm to the Baiada Poultry processing plant.

- An employee of DMP was assisting Mr Azzopardi, the principal of Azzopardi Haulage, to secure a load on a semi-trailer. A DMP employee was operating a forklift, despite being unlicensed to operate the forklift. In the process of rearranging the load, a steel pallet fell on Mr Azzopardi and he was killed.

- Baiada Poultry was charged for breaching section 22 of the *Occupational Health and Safety Act Victoria* (1994) [the direct equivalent of the Queensland WH&S Act] and at trial, was found guilty. Baiada Poultry appealed to the Victorian Supreme Court and then the High Court over directions given to the jury at trial.

There were several key aspects of the High Court's decision about statutory obligations in *Baiada Poultry v R:*

- The decision is primarily concerned with issues around directions to the jury at trial. However, the High Court also considered the nature of Baiada Poultry's statutory duty and then made comment on the obligations more broadly.

- The majority judgment of French CJ, Gummow, Hayne, Heydon and Crennan JJ stated that simply demonstrating that an employer can take a step to make a workplace safer, does not necessarily mean that they are obliged to.

- Heydon J opined that, where a contractor has specialist skills with regard to safety, it is reasonably practicable for an employer to rely on that contractor's specialist skills with regard to safety.

As a result, there are consequences of the Baiada decision for the Inquiry to consider.

Given the objectives of the WH&S Act (as stated above), the decision highlights the difficulties associated with applying these objectives and the WH&S Act in practice. The Inquiry may wish to consider the following questions:

I. Is there ambiguity regarding when an employer owes a statutory duty under the WH&S Act to one or more particular categories of worker, ie, a labour hire worker, a contractor, a sub-contractor, an employee?

II. Is there ambiguity around the steps an employer must take to discharge their obligations, if any, under the WH&S Act to one or more particular categories of worker?

III. When is it reasonably practicable for a principal to give directions to a contractor or other categories of worker with regard to a safe system of work?

IV. When is it reasonably practicable for a principal to monitor a system of work controlled by a contractor or other categories of worker with regard to safety?

V. Should an employer be able to rely on contractors and sub-contractors to discharge their obligations under the WH&S Act?

Labour Hire workers and the Common Law

An important question is to ask who is owed a duty of care and what is the scope of that duty of care?

A labour hire company is an employer and has a non-delegable duty to take reasonable care for the safety of their employees. However, there is also a concurrent duty owed to the worker by the host.

A worker employed by a labour hire company who sustains an injury that has arisen out of or in the course of their employment in negligent circumstances while contracted to the host is likely to pursue a common law claim against both their labour hire employer and the host.

The extent of liability between the two possible defendants will be determined on an individual basis with the circumstances of the event causing injury being central to the determination of liability.

One of the factors to be taken into account when determining the liability between the employer and the host is the level of control over the operations and workplace exhibited by the host.

Despite the above 'control' considerations, the labour hire employer still has a duty to take reasonable care to ensure that:

1. the host workplace is safe;

2. the host workplace has appropriate safety systems;

3. the task for which the labour hire employee is being supplied is clearly defined; and,

4. the labour hire employee is properly trained for that task.[19]

Uncertainty regarding the extent to which it is "reasonably practicable" for a labour hire employer to monitor and supervise the acts/omissions in the host workplace while the employee is working there are often the subject of disputation between the labour hire employer and the host workplace.

In our experience, where common law claims have eventuated, the reality of the situation is usually that the labour hire employer has never attended the site at which the worker was injured, let alone considered the adequacy of the system of work.

Problems with the application of the WCRA with respect to proceeding with a common law claim for damages include:

- Claims are less likely to resolve pre-litigation because of the number of issues that are in dispute between the parties.
- When there are multiple defendant parties, there are higher chances of disputes over indemnity, which often involve contract law. This increases costs in a jurisdiction where costs are not contributed to by the labour hire employer (as Insured) and causes delays for claimants.
- It is our experience that most host employers will not engage in meaningful settlement discussions and/or the provision of documents until such time as

[19] *TNT Australia Pty Ltd v Christie* [2003] NSWCA 47

proceedings have been issued against them. Thus the labour hire worker can incur protracted delay to the resolution of their claim.

The Inquiry may wish to examine if some legislative amendment to the WCRA could resolve these issues.

There are also two crucial questions for the Inquiry regarding labour hire workers and the Common Law:

I. is there any evidence of labour hire arrangements being used to dilute their responsibilities under workplace laws and other legal obligations?
II. Should a labour hire worker be disadvantaged as compared to other workers with respect to pursuing a claim for Common Law damages?

Proving Economic Loss with a history of Insecure Employment.

The effects of insecure employment on Queensland workers cover a broad spectrum of personal, financial, community and family consequences. The challenges that can arise for an insecure worker when seeking to claim damages in the Common Law as a result of their economic loss is one of those effects.

In cases where the worker's residual work capacity is not clear, the Court is required to consider a variety of scenarios to determine which of those scenarios most fairly reflects the worker's earning capacity. To determine the value of the relevant comparator (the worker's "without injury earnings"), the Court must first determine the gross income of a worker by expressing, as an annual rate, the income that the worker:

- was earning from personal exertion; or
- was capable of earning from personal exertion; or
- would have earned from personal exertion; or
- would have been capable of earning from personal exertion during that part of the period within three years before and three years after the injury, as most fairly reflects the workers earning capacity had the injury not occurred.

It is our experience that when a worker who has a history of under-employment or insecure employment makes a claim for economic loss, the defendant is less likely to grant such an application as ascertaining the value of that loss can be more complicated than for other workers. Despite the above authority, the sporadic nature of income and/or reduced hours of employment makes the determination of the comparator more complicated than in other cases.