Job security in the modern Australian workforce

Submission to the Select Committee on Job Security

Date: 15 September 2021

On behalf of: Daniel Walton, AWU National Secretary

THE AUSTRALIAN WORKERS' UNION

Submission - Job security in the modern Australian workforce

15 SEPTEMBER 2021

Overview

Thank you for the opportunity to make this submission on the issues raised in the Terms of Reference for this Committee.

The Australian Workers' Union (AWU) represents around 70,000 members nationally in a diverse range of industries: mining, energy, manufacturing, civil construction and agriculture, along with many others. These industries each face different challenges relating to the growing insecurity of jobs in the Australian workforce generally. Increasing casualisation and the use of labour hire and fly-in fly-out (FIFO) workforces present challenges for some workers. At the most extreme end, employers rely upon exploited labour hire workers with pay and conditions well below that required by law. This submission touches on each of those issues in turn.

The ongoing COVID-19 pandemic highlights the precarity of work across our membership, and has exposed significant risks associated with insecure work. While many cities were otherwise empty, AWU members turned up to do the work necessary to keep Australia's industries and economy going. Recovering from the pandemic provides an opportunity for Australia to set a new higher standard: quality, secure jobs for all Australians.

We would welcome the opportunity to appear before the Committee to provide further evidence on how increasing insecurity affects our members, and the opportunities for reform.

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Recommendations

RECOMMENDATION 1: The Australian Government should meet its commitment of establishing a national labour hire licensing scheme, based on existing state schemes in Queensland and Victoria, requiring continued demonstration of compliance and for labour hire operators to demonstrate that they are fit and proper persons.

RECOMMENDATION 2: The *Fair Work Act 2009* should be amended to provide the same rights, pay and conditions to labour hire workers and employees of a host employer, with appropriate anti-circumvention measures.

RECOMMENDATION 3: The definition of 'casual employee' in the *Fair Work Act 2009* should be amended to ensure that workers who are effectively employed on a permanent basis are classified as permanent employees.

RECOMMENDATION 4: Employers should be required to conduct thorough local labour market testing and engage with unions prior to being permitted to use FIFO workforces.

RECOMMENDATION 5: Employers should be subject to ongoing monitoring and reporting requirements to ensure that they are meeting best-practice in managing the health and safety of their workers (including mental health) in FIFO practices.

RECOMMENDATION 6: The Pacific Labour Scheme and Seasonal Worker Program, and their current standards for approved employer standards and access for unions and pastoral care providers, should form the minimum standard of Australia's temporary migration program for workers on Australian farms.

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1 Labour hire and casualisation

1.1 Labour hire

Many workers across the AWU's coverage are employed not by the company for whom they are providing their services, but by intermediary labour hire companies. Machinery operators, for example, are the occupation most likely to be hired under labour hire arrangements.[1] Australia has one of the highest rates of 'non-standard employment' in the world according to the OECD.[2] This is often done under the guise of 'flexibility' or to fill specific 'skill shortages'. At Transport for NSW, for example, there are well over 150 labour hire employees, well over an internal cap of 70-80.

In practice, the aim is to prevent labour hire employees from having access to the same pay and conditions provided under existing enterprise agreements (EAs). This becomes increasingly transparent when employers fire their own employees and seek to rehire them under labour hire contracts.

The use of labour hire seeks to erode pay, conditions and safety requirements that the AWU has fought hard to secure. Workers can be side-by-side on the same site, doing the same work, on dramatically different terms. Further, the 'true' employer is not responsible for ensuring that many obligations to employees are met: those are the responsibility of the intermediary labour hire firm, while the employer merely pays for the services provided. This allows employers to turn a blind eye to compliance issues. Many labour hire providers are smaller than the employers they provide workers for, and can even take an underhanded or outright ignorant approach to their legal obligations. If workers raise issues, shifts can be revoked by the labour hire firm. Most recently, the Snowy Hydro 2.0 joint venture partners have sought to pass off serious safety concerns to their labour hire provider, NX Blue (case study below).[3]

CASE STUDY: Snowy Hydro 2.0

Complaints raised by workers on site, included over poor fatigue management and unsafe practices. This sadly led to a horrific incident where a labour hire worker on the site, a crane supervisor, was in a car crash on the Snowy Mountains Highway on Saturday night after he was returning to remote offsite accommodation in the middle of a storm. Due to the weather conditions he was unable to be evacuated by helicopter and had to be transported by road to Canberra Hospital.

This worker should never have been put in this situation. Future Generation and Snowy Hydro should have halted work earlier in the day when the storm began to hit.

The AWU sounded the alarm on this in late 2020. Snowy Hydro and their joint venture partner initially tried to pass the buck to their labour hire firm, NX Blue. NX Blue said it was the joint venture partners'

[1] Australian Bureau of Statistics – Working Characteristics Table 13.3.
[2] OECD 'In it together: Why lower inequality benefits all' (2015).
[3] https://www.awu.net.au/national/news/2021/05/14409/awu-welcomes-intervention-after-raising-alarm-on-dodgy-practices-and-low-morale-at-snowy-hydro-2-0/

fault. The joint venture partners only acted on our concerns at the end of May this year, but the involvement of a labour hire operator allowed the blame to be avoided.

In the most cynical of cases, employers even attempt to establish 'in-house' labour hire firms to put their own workers at 'arms-length'. In 2018, BHP created two entities, OS ACPM Pty Ltd and OS MCAP Pty Ltd, to employ workers exclusively at BHP sites. BHP drafted two enterprise agreements and had them voted up by a small group of employees. The conditions were far inferior to those received by direct BHP employees. The AWU (through the Western Mine Workers' Alliance with CFMMEU Mining & Energy) succeeded in preventing BHP from having the enterprise agreements approved by the Fair Work Commission on the basis that the terms of the agreements had not been properly explained to employees. There is no real justification, other than cutting costs, for two workers, doing the same work, to be on different terms of employment.

The Morrison Government committed in 2019 to establishing a national labour hire licensing scheme, based on existing state schemes in Queensland and Victoria, which would require continued demonstration of compliance and a 'fit and proper' test by labour hire operators. Two years later, a national scheme is no closer. The Australian Government should recommit to establishing a national labour hire licencing scheme, incorporating all the features currently in the Victorian and Queensland schemes.

Further, the *Fair Work Act 2009* should be amended to ensure workers doing the same work for a labour hire firm receive the same pay and conditions as employees of the host employer.

RECOMMENDATION 1: The Australian Government should meet its commitment of establishing a national labour hire licensing scheme, based on existing state schemes in Queensland and Victoria, requiring continued demonstration of compliance and for labour hire operators to demonstrate that they are fit and proper persons.

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1.2 Casualisation

Similar issues arise for workforces where the majority of workers are casual. Although casual loadings are provided ostensibly as compensation for the loss of entitlements available to permanent workers, in

practice, the lack of any employment security makes these workers particularly vulnerable:

- Workers may not be notified whether they are working until the day before, or the day of, a shift. This can make it impossible to manage any responsibilities outside of work, including family and caring roles and medical appointments.
- A lack of job security for casual workers, and the risk of 'blacklisting' or immediate termination, makes it near-impossible for workers to access credit such as a mortgage.
- Where concerns are raised about employers' practices, casual workers are the most vulnerable to being 'effectively dismissed', by having shifts dropped.

If a worker is effectively permanent, they should be treated as permanent.

The Coalition Government had an opportunity to remedy the insecure position of casual employees earlier this year. Instead of creating a serious assessment about whether a worker is truly casual, the amended casual definition under the *Fair Work Act 2009* simply defers to the language used in the employment contract.

The reality is employers draft these contracts and employees generally have no chance to negotiate around the terms. That means an employer can get an employee to sign a casual contract and then engage them just like a permanent worker with no consequence. The courts then cannot look at the reality of the relationship; their assessment is basically confined to the contract. The current definition gives employers extreme flexibility while the worker has no employment security – with flow-on consequences for their ability to access credit and plan their lives.

RECOMMENDATION 3: The definition of 'casual employee' in the *Fair Work Act 2009* should be amended to ensure that workers who are effectively employed on a permanent basis are classified as permanent employees.

2 Fly-in, fly-out work

The massive boom in the size of the mining sector over the last twenty years has made it necessary for employers to recruit workers from outside of their regions. This is particularly true of mines in remote locations, or oil rigs, which cannot be practicably serviced without temporary periods of isolated on-site work. Even where it is not strictly necessary, many mining operations have a workforce composed entirely of workers from outside of the local region. Typically, rosters for these sites have workers on site for weeks at a time, then off work entirely for a period.

Many of the AWU's members in mining and petroleum, particularly in Western Australia and Queensland, are part of fly-in fly-out (FIFO) mining and petroleum workforces. Many appreciate the

financial and career opportunities that are made available through this work. However, the significant time away from family and friends can create significant strain on these relationships and on the mental health of workers. Countless stories have emerged of drug use and family breakdown that have resulted from employers failing to look after their workers.

The Western Australian Legislative Assembly tabled its report on the impact of FIFO work practices on mental health in 2015, leading to the development of a FIFO Code of Practice by the Western Australian Department of Mines in 2019. Unfortunately, this code of practice is routinely ignored (case study below).

CASE STUDY: WA FIFO code of practice

- Even time rosters are recommended as the best option for mental health of workers. But the majority of companies do not do even time rosters – they do 8 days on / 6 days off – and by the time workers have travelled and rested, in practice this means workers only really get 4 days off after 8 days of work.
- The AWU considers 2 weeks on, 2 weeks off is best practice so that workers can spend a considerable amount of time at home. This is particularly true when quarantine and other requirements limit the amount of time workers have to spend with their families and friends at home.
- Construction rosters in the Pilbara have been 4 weeks on, 1 week off (or in practice, 8 weeks on, 2 weeks off) – unions have successfully fought for the best employers to move to 3 weeks on, 1 week off.
- Employers also push the boundaries of the standard – for example, the code of practice sets a standard of a 12-hour maximum limit for a shift, but employers require shifts of nearly 13 hours.

Employers say they do their best, but prior to the code of conduct, they did not take any initiative to reduce these rosters. Now they follow it as a bare minimum rather than pursuing best practice.

The AWU is currently conducting a survey on the psychosocial hazards of oil and gas work, including the effects of isolation and rostering practices. This survey is being undertaken in cooperation with the AWU's Offshore Alliance partner, the Maritime Union of Australia; the offshore oil and gas regulator: the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) and the Australian Petroleum Production and Exploration Association (APPEA). Results of this survey are expected to be available in late 2021. Governments should review this research and commit to making the necessary changes to protect the mental health and wellbeing of workers in the sector.

These risks have unfortunately been exacerbated during the COVID-19 pandemic, as travel restrictions

have required long quarantine periods and separated many workers from their families. The AWU worked with employers across all states where border restrictions were in place to continue the essential and time-critical work of our resources industry and to look after employee health and wellbeing. This has meant relocation of workers, provision of additional RDOs or leave, and increased pay to recognise the risk of COVID-19 spread. BHP, for example, moved their FIFO workers to a 2-weeks-on, 2-weeks-off roster, and provided accommodation for workers and their partners in Perth. Similar arrangements were reached with Rio Tinto and FMG.

Further, reliance on FIFO work can foment opposition to resources projects in nearby regional towns. Many of these towns see hundreds or thousands of workers ferried in and out of worksites, without seeing any economic benefit. Indeed, in some cases, workers in towns near projects need to travel to capital cities to take up work. Given the precarious economic conditions in many regional centres, exacerbated by declines in tourism from the COVID-19 pandemic, this is likely to have significant knock-on effects. A workforce entirely composed of non-residents is also less likely to be aware of local issues, potentially exacerbating the risk of failing to understand local concerns.

Some legislative changes have been made to try and quell these concerns. For example, in Queensland, mines can no longer employ an entirely FIFO-based workforce. However, these changes do not go far enough. Employers should be required to conduct thorough local labour market testing and engage with unions prior to being permitted to use FIFO workforces. They should also be monitored on an ongoing basis to ensure that they are meeting best-practice in managing the health and safety of their workers (including mental health) in FIFO practices.

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3 Exploitation in horticulture

The *Horticulture Award 2020* permits piece rate pay, where workers are paid per unit of produce picked. The Award ostensibly requires that piece rates 'must enable the average competent employee to earn at least 15% more per hour than the minimum hourly rate'. In practice, multiple inquiries have found that almost all growers who use piece rates to pay below the national minimum wage of $20.33, and substantially below the minimum casual hourly rate specified in the Award of $25.41.

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Poor pay and conditions have been justified on the basis of 'labour shortages' – that there are too few Australians willing to take up the work. But every day, Australians, including thousands of AWU members, get up to work in jobs that are just as tough and arduous as fruit picking. The difference is they have access to Australian standards of pay and Australian working rights.

The AWU is currently awaiting the outcomes of its application for the Fair Work Commission to introduce a minimum wage floor into the Horticulture Award – to reflect the reality that, despite the terms of the award, barely any piecework employees earn the minimum rates.

Over the last decade, Australia's horticulture industry has arguably become the most exploitative in the country. At the same time, it has become the most reliant sector on overseas migrant workers. The extent of exploitation in the horticulture industry is undeniable, uncovered empirically by countless parliamentary inquiries, government taskforce reports, civil sector research and media reporting. [4] It also goes unanswered, with the obvious policy responses being ignored and side-lined year-on-year as more evidence is revealed and exploitation worsens.

Unlike other industries, the horticulture industry demands high-volumes of work in acute time frames, compensates on piecework, is regionally located and has a high degree of non-monetary compensation associated with employment (particularly the provision of accommodation) (see case study below).

CASE STUDY: backpacker exploitation

Kate Hsu, from Taiwan, was paid a piece rate of 60 cents per kilogram while picking strawberries.

She worked 12 hours a day, but could only make $50 per day - $4 an hour. After three months, she was able to earn $100 per day. This is still only $8 an hour.

Later she was picking oranges at a rate of $25 per bin. When she started, she could only gather a bin of oranges per day, so her daily income was $25. She had rent of $110 and bills at the same time. To save money, she was forced to 'dumpster dive' after the closure of supermarkets.

She was never given the option to earn an hourly rate.

Unfortunately, Kate's story represents only the tip of the iceberg of widespread exploitation in the sector, that could be totally avoided with a minimum wage floor and proper regulation of the sector.

Over time, bad policy planning has meant that the industry has become structurally dependent on a migrant labour workforce, controlled by systemic and complex labour hire contract arrangements, and

[4] Most recently, Unions NSW, "Wage Theft, The Shadow Market. Part Two: The Horticultural Industry," March 2021, https://www.unionsnsw.org.au/wp-content/uploads/2021/03/Wage-Theives-Horticulture-Report-online.pdf; Fair Work Ombudsman, "Harvest Trail Inquiry," 2018.

barely regulated by enforcement agencies.

The AWU, along with the Shop, Distribute and Allied Employees Association (SDA) and the Transport Workers' Union (TWU), have formed the Retail Supply Chain Alliance (RSCA), covering the horticulture industry from the farm to the supermarket. The RSCA has publicly advocated for significant improvements to the conditions of farm workers in Australia.

The recent announcement by the Australian Government of its intent to introduce an agriculture visa will only serve to vindicate growers' reliance on workers who lack adequate pay, conditions or job security. The United Kingdom has rightly rejected the long-standing requirement under the Working Holiday Maker (WHM) visa for 88 days of farm work, observing widespread exploitation of visa holders. While the RSCA welcomes the removal of this requirement, growers have lobbied for a 'substitute' form of cheap, exploitable labour – the role that the Agriculture visa appears likely to take. Indeed, the Agriculture Minister stated in an appearance on ABC Radio National on June 16 that the new ASEAN visa was explicitly designed to have fewer conditions and protections than the existing programs.

Further announcements by the Minister claim that 'the primary and growing method for meeting agricultural workforce shortages are the existing Seasonal Worker Programme (SWP) and Pacific Labour Scheme (PLS)'. Yet all of the crucial details for the Agriculture visa are yet to be determined, despite the Government rushing towards an arbitrary deadline of the end of September to establish the visa. Recent examples of the Government's 'policy-on-the-run' have included:

- The program has been expanded from ASEAN nations to any number of yet-to-be-determined countries, with the Government stating it intends to undertake bilateral negotiations with any source countries for the visa. This alone risks undermining the special relationship Australia has with its Pacific neighbours.
- Despite the name, the visa's scope has been expanded to include forestry, fishing and other industries despite no evidence of labour market strain in these sectors.
- No commitments have been made to require labour market testing to ensure that locals are not displaced by cheap, exploitable labour.
- Pacific countries were not consulted with prior to the announcement of the visa.
- No commitments have been made to provide the same core protections available for workers under the Pacific visa schemes: namely, employer approval, and access to unions, the Fair Work Ombudsman and pastoral care providers.
- Quarantine arrangements have been recognised as the fundamental limitation to increasing migrant workforces, but the Government has deferred this problem to State and Territory

governments. Expansion of quarantine to regional areas puts vulnerable communities at risk of exposure.

The RSCA is deeply concerned that workers coming into the country under the Government's new Agriculture visa will continue to erode the conditions offered to other workers. This is a particular risk with our Pacific neighbours, with consequences for our strategic relationships – given that the Government claims that Pacific labour mobility is the 'centrepiece' of Australia's 'Pacific step-up' and a fundamental part of our developmental assistance to these countries. Maintaining the integrity and job security of Australia's agricultural workforce requires that no new visas are introduced which undercut the core protections for PLS and SWP workers.

RECOMMENDATION 6: The Pacific Labour Scheme and Seasonal Worker Program, and their current standards for approved employer standards and access for unions and pastoral care providers, should form the minimum standard of Australia's temporary migration program for workers on Australian farms.