

# CFMEU

## CONSTRUCTION

**IN THE FAIR WORK COMMISSION**  
**Matter Number:** AM2021/54

*Fair Work Act 2009*

Clause 48 of Schedule 1

**Casual terms award review 2021**  
**(AM2021/54)**

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**SUBMISSION OF THE CONSTRUCTION, FORESTRY, MARITIME, MINING AND  
ENERGY UNION (CONSTRUCTION & GENERAL DIVISION) ON STAGE 2,  
GROUP 1 AWARDS**

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10<sup>th</sup> August 2021

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## Introduction

1. On 27<sup>th</sup> March 2021, the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* amended the *Fair Work Act 2009 (Cth)* (**the Act**) in relation to casual employment. New clause 48 of Schedule 1 to the Act requires the Commission to review certain casual terms in modern awards and vary the awards as required to resolve difficulties in their interaction with the Act as amended (**Casual terms review**).
2. On 9<sup>th</sup> April 2021 the President issued a Statement ([2021] FWC 1894) setting out a proposed approach to reviewing and varying modern awards based on their interaction with the new casual employee definition and casual conversion arrangements inserted in the Act. It was proposed that the Casual terms review be conducted in two stages with the first stage being a 5 member Full Bench considering the nature and scope of the Casual terms review, and reviewing relevant terms in a small initial group of modern awards that raise a range of possible interaction issues. The second stage would involve a 3 member Full Bench (a subset of the 5 member Full Bench) reviewing the remaining modern awards in convenient groupings.
3. On 19<sup>th</sup> April 2021 the Full Bench established to conduct the first stage issued a Statement and Directions ([2021] FWCFB 2143) which confirmed the two stage process. Following the filing of submissions and a hearing held on 24<sup>th</sup> June 2021, that Full Bench issued a decision ([2021] FWCFB 4144) in relation to Stage 1 on 16<sup>th</sup> July 2021 (July 2021 decision). The decision sets out the statutory framework for the review and provides a detailed discussion of 'relevant' terms in the Stage 1 priority awards and how they interact with the new definitions under the Act as amended.
4. On 3<sup>rd</sup> August 2021 the Full Bench established to conduct stage 2 of the Casual terms review issued a Statement ([2021] FWCFB 4714) (**the August Statement**), which included at Attachment A an amended list of awards organised by grouping. The August Statement identified at paragraph [8] the awards to be included in group 1 of the stage 2 review. The list of awards included the *Building and Construction General On-site Award 2020*, *Joinery and Building Trades Award 2020* and the *Mobile Crane Hiring Award 2020* (the **construction awards**). The Construction, Forestry, Maritime, Mining and Energy Union (Construction and General Division) (**CFMMEU C&G**) has members covered by these awards and therefore has an interest in these proceedings.
5. In the August Statement the Full Bench said that they had reviewed the July 2021 decision and adopted the reasoning of the Full Bench in relation to those 'relevant terms' that can be subject of the Review. Taking into account the reasoning and conclusions in the July 2021 decision,

the Full Bench had formed provisional views in relation to the Group 1 awards which were set out in the Attachment B to the August Statement.<sup>1</sup>

6. The August Statement also identified a number of specific issues contained within the Group 1 awards,<sup>2</sup> and directed that interested parties provide any responses in relation to the provisional views concerning the Group 1 awards, except in relation to the Meat Award, by 4pm (AEST) Tuesday, 10<sup>th</sup> August 2021.<sup>3</sup>
7. The CFMMEU C&G makes this submission in accordance with those directions. Before going to the detailed response to the provisional views the CFMMEU C&G would however express its concern at the limited time given to parties to prepare a response and collect evidence in support of its response, particularly when a number of cities and regions have been placed in mandatory lockdown due to the delta strain of Covid-19. The CFMMEU C&G submits that this extremely unusual situation must be taken into account to the extent that parties are required to provide evidence to support the arguments made. The CFMMEU would also request an opportunity to provide a reply submission to any material filed by other parties before any hearings occur or a decision is made.

#### **Provisional Views Not Opposed**

8. There are a number of the provisional views in the August Statement and Attachment B to the August Statement that are not opposed by the CFMMEU C&G. These are set out below and are grouped by award.

#### Building and Construction General On-site Award 2020

9. In the August Statement the Full Bench stated at paragraph [12] that:

*“[12] In reviewing the awards in Group 1, we have identified a possible fourth category of definitions of casual employee and casual employment, being ‘engaged and paid in accordance with the provisions of this clause’ or similar. This fourth category of definition appears in the Building and Construction General On-site Award 2020 (Building and Construction Award), the Mobile Crane Hiring Award 2020 (Mobile Crane Award), the Joinery and Building Trades Award 2020 (Joinery Award), the*

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<sup>1</sup> 2021 FWCFB 4714 at paragraph [9]

<sup>2</sup> Ibid, paragraphs [10] to [74]

<sup>3</sup> Ibid, paragraph [75]

*Amusement, Events and Recreation Award 2020 (Amusement Award) and the Travelling Shows Award 2020 (Travelling Shows Award).”*

10. The Full Bench expressed a provisional view in paragraph [14] that the ‘engaged and paid in accordance with the provisions of this clause’ type definition is not consistent with the definition in s.15A of the Act, and in paragraph [15] expressed a provisional view that this type of definition should be removed from awards and replaced with a new definition of ‘casual employee’ in the definitions clause of an Award which references s.15A(1) of the Act to make it consistent or operate effectively with the Act.
11. The CFMMEU C&G does not oppose the provisional views expressed in paragraphs [14] and [15].
12. In paragraph [66] of the August Statement the Full Bench expresses a provisional view that *“daily hire employment does not fall within the definition of casual employment in s.15A of the Act and that clause 9 of the Building and Construction Award is therefore not a relevant term.”* The CFMMEU C&G does not oppose this provisional view.
13. In Attachment B to the August Statement the Full Bench identifies its provisional view on a number of clauses in the *Building and Construction General On-site Award 2020*. The CFMMEU C&G does not oppose the following provisional views:

<b>Clause</b>	<b>Provisional view</b>	<b>Action</b>
9—Daily hire employees	Not a relevant term	No variation required
12.1—casual definition	<p><b>Engaged and paid in accordance with casual clause</b></p> <p>Similar to ‘Engaged as a casual’ definition – not consistent – relevant uncertainty or difficulty exists (see [69]-[70] of <a href="#">[2021] FWCFB 4144</a>)</p> <p>Replace with reference to s.15A(1) to make consistent or operate effectively (see [105], [106], [110], [111] of <a href="#">[2021] FWCFB 4144</a>)</p>	<p>Delete clause 12.1</p> <p>Insert new definition of ‘casual employee’ in clause 2—Definitions as follows: <b>casual employee</b> has the meaning given by section 15A of the Act.</p>
12.2—Casuals entitled to all rates excluding annual leave etc	Not a relevant term	

12.3— requirement to inform	Includes a requirement to inform employee in writing of hours of work.  Such provisions not directly inconsistent but give rise to difficulty relating to interaction between award clause and casual definition in Act [124]  Similar provision in Pastoral Award was found not to be necessary to achieve modern awards objective (at [126] of <a href="#">[2021] FWCFB 4144</a> )	Propose the following wording:  <b>12.3</b> An employer, when engaging a person for casual employment, must inform the employee, in writing, that the employee is to be employed as a casual, stating by whom the employee is employed, the job to be performed, the classification level, <del>the actual or likely number of hours to be worked,</del> and the relevant rate of pay.
12.4—minimum payment	Not inconsistent (at [163] of <a href="#">[2021] FWCFB 4144</a> )	No variation necessary
12.5—casual loading	Not inconsistent (at [176] and [178] of <a href="#">[2021] FWCFB 4144</a> )	No variation necessary
12.6 and 29— overtime for casuals	General term- not inconsistent (at [179] and [185] of <a href="#">[2021] FWCFB 4144</a> )	No variation necessary
12.6, 12.7 and 30—penalty rates for casuals	General term- not inconsistent (at [179] and [185] of <a href="#">[2021] FWCFB 4144</a> )	No variation necessary
27.7—accident pay	General term - not inconsistent (at [179] and [185] of <a href="#">[2021] FWCFB 4144</a> )	No variation required

#### Joinery and Building Trades Award 2020

14. As identified in paragraph 10 above, in the August Statement the Full Bench expressed provisional views in paragraphs [14] and [15] in relation to the ‘engaged and paid in accordance with the provisions of this clause’ type definition found in the *Joinery and Building Trades Award 2020*. The CFMMEU does not oppose these provisional views in regard to the *Joinery and Building Trades Award 2020*.

15. In paragraph [30] of the August Statement the Full Bench deals with Clause 11.3 of the *Joinery and Building Trades Award 2020*. The Full Bench states a provisional view that clause 11.3 be amended as follows:

“11.3 A casual employee must have a minimum daily engagement of 7.6 hours.”

The CFMMEU C&G does not oppose this provisional view.

16. In Attachment B to the August Statement the Full Bench identifies its provisional view on a number of clauses in the *Joinery and Building Trades Award 2020*. The CFMMEU C&G does not oppose the following provisional views:

Clause	Provisional view	Action
9—full-time employee	Residual definition of full-time employee – not a relevant term (at [134] and [135] of <a href="#">[2021] FWCFB 4144</a> )	No variation necessary.
11.1—definition of casual employee	Engaged and paid in accordance with casual clause  Similar to ‘Engaged as a casual’ definition – not consistent – relevant uncertainty or difficulty exists (see [69]-[70] of <a href="#">[2021] FWCFB 4144</a> )  Replace with reference to s.15A(1) to make consistent or operate effectively (see [105], [106], [110], [111] of <a href="#">[2021] FWCFB 4144</a> )	Delete clause 11.1.  Insert new definition of ‘casual employee’ in clause 2—Definitions as follows: <b>casual employee</b> has the meaning given by section 15A of the Act.
11.2—requirement to inform	Includes a requirement to inform employee in writing of hours of work.  Such provisions not directly inconsistent but give rise to difficulty relating to interaction between award clause and casual definition in Act (at [124])  Similar provision in Pastoral Award was found not to be necessary to achieve modern awards objective (at [126] of <a href="#">[2021] FWCFB 4144</a> )	Propose the following wording:  <b>11.2</b> An employer, when engaging a person for casual employment, must inform the employee, in writing, that the employee is to be employed as a casual, stating by whom the employee is employed, the job to be performed, the classification level, <del>the actual or likely number of hours to be worked,</del> and the relevant rate of pay.
22.7—accident pay	General term - not inconsistent (at [179] and	No variation required

	[185] of <a href="#">[2021] FWCFB 4144</a> )	
11.3—minimum engagement	‘Paid by hour’ definition - not consistent (see [81]-[84] of <a href="#">[2021] FWCFB 4144</a> )  Replace with reference to s.15A(1) to make consistent or operate effectively (see [105], [106], [110], [111] of <a href="#">[2021] FWCFB 4144</a> )	Propose the following wording:  <b>11.3</b> A casual employee <u>must have</u> <del>is engaged by the hour</del> with a minimum daily engagement of 7.6 hours.
11.5 and 24.2(c) — overtime for casuals	General term - not inconsistent (at [179] and [185] of <a href="#">[2021] FWCFB 4144</a> )	No variation necessary
11.5, 24.3(f), 24.4(b) — penalty rates for casuals	General term- not inconsistent (at [179] and [185] of <a href="#">[2021] FWCFB 4144</a> )	No variation necessary
11.6—termination of employment	General term- not inconsistent (at [179] and [185] of <a href="#">[2021] FWCFB 4144</a> )	No variation necessary
E.4.3(c) —National Training Wage – calculation of reduction to trainee’s pay	General term - not inconsistent (at [179] and [185] of <a href="#">[2021] FWCFB 4144</a> )	No variation required

Mobile Crane Hiring Award 2020

17. As identified in paragraph 10 above, in the August Statement the Full Bench expressed provisional views in paragraphs [14] and [15] in relation to the ‘engaged and paid in accordance with the provisions of this clause’ type definition found in the *Mobile Crane Hiring Award 2020*. The CFMMEU does not oppose these provisional views in regard to the *Mobile Crane Hiring Award 2020*.

18. In Attachment B to the August Statement the Full Bench identities its provisional view on a number of clauses in the *Mobile Crane Hiring Award 2020*. The CFMMEU C&G does not oppose the following provisional views:

Clause	Provisional view	Action
8.2—requirement to inform at engagement	Not inconsistent (at [120]-[121] of <a href="#">[2021] FWCFB 4144</a> )	No variation necessary
9.1—definition of casual employee	<b>Engaged and paid in accordance with casual clause</b>  Similar to ‘Engaged as a casual’ definition – not consistent –	Delete clause 9.1  Insert new definition of ‘casual employee’ in clause 2—Definitions as

	relevant uncertainty or difficulty exists (see [69]-[70] of <a href="#">[2021] FWCFB 4144</a> )  Replace with reference to s.15A(1) to make consistent or operate effectively (see [105], [106], [110], [111] of <a href="#">[2021] FWCFB 4144</a> )	follows: <b>casual employee</b> has the meaning given by section 15A of the Act.
9.2—casuals entitled to all applicable rates and conditions except annual leave etc	Not inconsistent (at [176] and [178] of <a href="#">[2021] FWCFB 4144</a> )	No variation necessary
9.3—requirement to inform at engagement	Includes a requirement to inform at engagement of the likely number of hours at clause 9.3(d).  Such provisions not directly inconsistent but give rise to difficulty relating to interaction between award clause and casual definition in Act [124]  Provisions not necessary to achieve modern awards objective (at [126] of <a href="#">[2021] FWCFB 4144</a> )	Delete clause 9.3(d)
9.4—casual loading	Not inconsistent (at [176] and [178] of <a href="#">[2021] FWCFB 4144</a> )	No variation necessary
9.5—overtime for casuals	General term - not inconsistent (at [179] and [185] of <a href="#">[2021] FWCFB 4144</a> )	No variation necessary
9.6—minimum payment	Not inconsistent (at [163] of <a href="#">[2021] FWCFB 4144</a> )	No variation necessary
19.8—accident pay	General term - not inconsistent (at [179] and [185] of <a href="#">[2021] FWCFB 4144</a> )	No variation required
24.1(a)—casuals excluded from annual leave	Not a relevant term	

### Provisional Views Opposed

19. In paragraph [27] of the Statement the Full Bench identifies clause 11.7 of the *Joinery and Building Trades Award 2020* as a further matter of note. Clause 11.7 provides as follows:

11.7 An employee must not be engaged and re-engaged to avoid any obligation under this award.



20. In paragraph [28] the Full Bench expresses its provisional view that the clause be deleted. The CFMMEU C&G opposes this provisional view. We do so on the basis that the clause is related to an existing provision that provides some protection to workers employed under the award and that it acts as a disincentive to employers manipulating casual employment arrangements to avoid providing permanent employment. The clause will have work to do should the Full Bench adopt the alternative proposal suggested by the CFMMEU C&G set out below.
21. The other provisional views opposed by the CFMMEU C&G mainly involve the casual conversion clauses in the construction awards. The CFMMEU C&G submits that there are distinguishing features of the construction awards and the building and construction industry that were not considered by the 5 member Full Bench in reaching its July Decision. These features, expanded on below, include a history of limitations on the duration of casual employment in awards prior to award modernisation. The CFMMEU C&G submits that these distinguishing features justify either the maintenance of the right of a casual employee to request conversion to full-time or part-time employment after 6 months employment or the adoption of an alternate approach for the construction awards.
22. The Full Bench consideration and provisional views on the construction awards existing casual conversion clauses are set out in paragraphs [23]-[32] of the August Statement. The provisional view on the *Building and Construction General On-site Award 2020* is that:

*“[24] The Building Award casual conversion clause is in substantially the same form as the Manufacturing Award and the Food Manufacturing Award. Our reasoning above applies and it is our provisional view that the term should be deleted from the award and replaced with a reference to the NES casual conversion entitlements in order to satisfy the requirement in cl.48(3) of Schedule 1.”*

A similar view was expressed for the *Joinery and Building Trades Award 2020* and the *Mobile Crane Hiring Award 2020*.<sup>4</sup>

23. The reasoning referred to is that set out in paragraphs [20] to [22] of the August Statement :

*“[20] In the July 2021 decision, the Full Bench considered a similar provision in the Manufacturing and Associated Industries and Occupations Award 2020 (Manufacturing Award). In relation to that award, the Full Bench found that the award clause was less beneficial than the residual right to conversion now provided*

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<sup>4</sup> See paragraphs [26] and [32] of the August Statement

*for in the National Employment Standards (NES) and that the clause conflicted with the NES residual right to convert.*

*[21] Having come to these conclusions, the Full Bench considered whether proposals advanced by a number of unions to modify the clause to supplement the casual conversion NES would make the Manufacturing Award consistent or operate effectively with the Act as amended. After considering the historical context, the Full Bench ultimately found that amending the clause as proposed would not meet the modern awards objective and determined to delete the clause from the Manufacturing Award and replace with a reference to the NES casual conversion entitlements.*

*[22] The abovementioned clause in the Food Manufacturing Award is in substantially the same form as that contained in the Manufacturing Award. For essentially the same reasons as stated in respect of the Manufacturing Award in the July 2021 decision, our provisional views are:*

- (1) The Food Manufacturing Award casual conversion clause is less beneficial overall than the residual right to casual conversion under the Act.*
- (2) Difficulty or uncertainty arises in relation to this clause because of the significantly different prescriptions in the award and the Act about the same subject matter.*
- (3) The term should be deleted and replaced with a reference to the NES casual conversion entitlements in order to satisfy the requirement in cl.48(3) of Schedule 1.”*

24. The CFMMEU C&G does not agree with the finding of the Full Bench in regard to the Manufacturing Award ( and therefore the provisional views of the Full Bench in this matter in regard to the construction awards) that the award clause was less beneficial than the residual right to conversion now provided for in the National Employment Standards (NES). The reasons given in the July Decision were that:

*“The award clause is less beneficial in the following respects:*

- it requires the employer to give notice of the right to request conversion within 4 weeks of the employee becoming qualified to do so, as distinct from before or as soon as practicable after the employee commences employment under s125B;*
- the award right is a one-off right, as distinct from the ongoing residual right in the Act;*

- *the time for the employer to respond to the request is shorter under the Act (21 days) than the award (4 weeks);*
- *the award arguably provides for broader and less defined grounds for the employer to refuse a request.”<sup>5</sup>*

25. The CFMMEU C&G would point out that the most important part of the existing casual conversion clauses in the construction awards is the trigger after 6 months as reflected in clause 13.1 of the *Building and Construction General On-site Award 2020*:

13.1 A casual employee, other than an irregular casual employee, who has been engaged by a particular employer for a sequence of periods of employment under this award during a period of 6 months, thereafter has the right to elect to have their contract of employment converted to full-time or part-time employment if the employment is to continue beyond the conversion process.

26. It should be noted that the 5 member Full Bench recognised that this aspect was more beneficial (as did many of the parties) as reflected in paragraph [218] of the July Decision:

*“[218] In the Provisional Views Statement, we expressed the following provisional view concerning the first question:*

*‘The Manufacturing Award casual conversion clause (cl.11.5) is more beneficial than the NES residual right to casual conversion to the extent that it allows a request for conversion to be made after only 6 months’ casual employment...’*

27. The Full Bench’s reasoning in this respect is not easily fathomable. The benefits of casual conversion after 6 months which exist in the current construction awards are clearly superior to the so called “benefits” of the NES casual conversion provision (as set out in paragraph 24 above) recently introduced by the Federal Government.

28. The CFMMEU C&G submits that in this respect, the current NES conversion provisions benefits are flimsy and bear no real benefit to the workers it purports to assist in obtaining stable and reliable work. For example::

- An employee being given a piece of paper on commencement of employment about a possible future benefit that might, or might not, arise in 12 months is not a material benefit, but a perfunctory exercise in futility in circumstances

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<sup>5</sup> 2021 FWCFB 4144 at [218]

where the labour force is already destabilised such that many workers cannot think beyond their next week’s pay check, let alone in 12 months’ time;

- an ongoing residual right to conversion after a minimum of 12 months engagement subject to many conditions which, by their nature ,will wholesale disentitle workers in circumstances where most construction projects do not last more than two years;
- a shorter time for the employer to respond to the request of 21 days under the Act compared to 28 days under the Award again does not bear any material benefit but is a technical speed up in what will be, pragmatically speaking, an unenforceable right; and
- the arguably narrower and more defined grounds for the employer to refuse a request under the FW Act.

29. It would be an error for the Full Bench to abandon the current conversion rights in the construction awards in favour of the inferior NES entitlements. Doing so would further diminish the rights of workers who continue to battle the erosion of job security in an already fraught and unpredictable industry where the next week’s pay can be shut off at a moment’s notice.

30. It is critical, where regard is had to the modern awards objective, and by moral obligation, that the Full Bench look to the working reality of those covered by the construction awards, and ensure that their needs and livelihoods are preserved, rather than defer to the artifice of security of the NES conversion provisions.

31. The CFMMEU C&G would point out that the qualifying requirements between the existing casual conversion provision in the awards and the residual request are different to the detriment of employees:

Award Clause	S.66F of the Act
<p>13.1 A casual employee, other than an irregular casual employee, who has been engaged by a particular employer <b><u>for a sequence of periods of employment under this award during a period of 6 months</u></b>, thereafter has the right to elect to have their contract of employment converted to full-time or part-time employment if the employment is to continue beyond the conversion process.</p>	<p>(1) A casual employee may make a request of an employer under this section if:</p> <p>(a) <b><u>the employee has been employed by the employer for a period of at least 12 months</u></b> beginning the day the employment started; and</p> <p>(b) <b><u>the employee has, in the period of 6 months ending the day the request is given, worked a regular pattern of hours on an ongoing basis</u></b></p>

	<p>which, without significant adjustment, the employee could continue to work as a full-time employee or a part-time employee (as the case may be); <b>and</b></p> <p><b><u>(c) all of the following apply:</u></b></p> <p><b><u>(i) the employee has not, at any time during the period referred to in paragraph (b), refused an offer made to the employee under section 66B;</u></b></p> <p><b><u>(ii) the employer has not, at any time during that period, given the employee a notice in accordance with paragraph 66C(3)(a) (which deals with notice of employer decisions not to make offers on reasonable grounds);</u></b></p> <p><b><u>(iii) the employer has not, at any time during that period, given a response to the employee under section 66G refusing a previous request made under this section;</u></b></p> <p>(iv) if the employer is not a small business employer—the request is not made during the period of 21 days after the period referred to in paragraph 66B(1)(a).</p>
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32. The reasons for refusal under the NES provision are also to the advantage of employers. Under the *Building and Construction General On-site Award 2020* the relevant provisions are:

13.5 Any casual employee who has a right to elect under clause 13.1, on receiving notice under clause 13.3 or after the expiry of the time for giving such notice, may give 4 weeks' notice in writing to the employer that they seek to elect to convert their contract of employment to full-time or part-time employment, and within 4 weeks of receiving such notice the employer must consent to or refuse the election but must not unreasonably refuse.

...

13.10 Where, in accordance with clause 13.5 an employer refuses an election to convert, the reasons for doing so must be fully stated to and discussed with the employee concerned and a genuine attempt made to reach agreement.

....

13.12 An employee must not be engaged and re-engaged to avoid any obligation under this award.

33. The grounds on which an employer can refuse a request are set out in s.66H of the Act:

#### **66H Refusals of requests**

- (1) The employer must not refuse the request unless:
  - (a) the employer has consulted the employee; and
  - (b) there are reasonable grounds to refuse the request; and
  - (c) the reasonable grounds are based on facts that are known, or reasonably foreseeable, at the time of refusing the request.
- (2) Without limiting paragraph (1)(b), reasonable grounds for refusing the request include the following:
  - (a) it would require a significant adjustment to the employee's hours of work in order for the employee to be employed as a full-time employee or part-time employee;
  - (b) the employee's position will cease to exist in the period of 12 months after giving the request;
  - (c) the hours of work which the employee is required to perform will be significantly reduced in the period of 12 months after giving the request;
  - (d) there will be a significant change in either or both of the following in the period of 12 months after giving the request:
    - (i) the days on which the employee's hours of work are required to be performed;
    - (ii) the times at which the employee's hours of work are required to be performed;which cannot be accommodated within the days or times the employee is available to work during that period;

(e) granting the request would not comply with a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory.

(3) If the employer refuses the request, the written response under section 66G must include details of the reasons for the refusal.

34. There is nothing in the NES entitlement that requires the employer to make a genuine attempt to reach agreement or that restricts an employer from engaging and re-engaging a casual employee to avoid casual conversion. Moreover the NES provision gives employers signposts on how they can avoid casual conversion.

35. David Peetz, Professor of Employment Relations, Centre for Work, Organisation and Wellbeing, Griffith University, in a recent article for the Conversation<sup>6</sup> appropriately described the changes to the NES in the following way,

*“I’ve drilled into previously unpublished data from the Australian Bureau of Statistics to get a better sense of what “casual employment” means for those employed as such.*

*Overall, what I’ve found suggests the “casual” employment relationship is not about doing work for which employers need flexibility. It’s not about workers doing things that need doing at varying times for short periods.*

*The flexibility is really in employers’ ability to hire and fire, thereby increasing their power. For many casual employees there’s no real flexibility, only permanent insecurity.*

*The federal government’s new bill will not solve this. It will reinforce it.”*

36. The comments of Professor Andrew Stewart on the recent High Court decision in *Workpac v Rossato & Ors* [2021] HCA 23 (as reported in *Workplace Express*) are, we submit, also just as relevant to these proceedings:

*“Stewart says the High Court is “really making it clear that they’re not interested in substance or practical reality” and that when it comes to formal written contracts “they’re not interested in the purposes of a statute like the Fair Work Act”.*

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<sup>6</sup> <https://theconversation.com/the-truth-about-much-casual-work-its-really-about-permanent-insecurity-151687>

*"What really stands out is the absence of any attention to the idea of trying to have regard to the need to protect workers against superior bargaining power.*

*"They make it crystal clear that equality of bargaining power is not a matter that has any relevance, and they make it absolutely clear that the principle of freedom of contract holds sway over any arguments that might be based on the idea of labour law having a protective purpose."*

37. The Full Bench should divert from recent history practice, whereby casual employees have received no real benefit from the decisions of tribunals, courts and legislators, and choose to protect those of our community who enjoy no stability, no security and generally little favour in our industrial relations landscape. It's time that casual workers be assured a right to improve their lives and finally get a fair go.

### **Historical Context of the Construction Awards**

38. Significantly for the current matter, in the July Decision the Full Bench considered the historical context of the Manufacturing Award. The historical context of the construction awards are starkly different and we submit should now be considered by this Full Bench.

39. The CFMMEU C&G would point out that each of the construction awards have their own particular history in regard to the terms and conditions applying to casual employment. There is a common factor however in that up until the making of the modern awards, all three awards had a limitation on the duration of casual employment. It was only through the award modernisation proceedings that the awards were changed to include the casual conversion clause.

40. The history of the casual clause in the *Building and Construction General On-site Award 2020* can be traced back to some the first awards made in the industry.<sup>7</sup>

41. In the 1960's the Carpenters and Joiners Award 1962<sup>8</sup> contained the following definition:

*"Casual hand" means an employee engaged by the hour who is or has been employ for a period of less than five days (exclusive of overtime) and who has not been summarily dismissed for misconduct or inefficiency or has not by his own act terminated his employment; provided that a person who is engaged on weekly hiring in any other capacity than a carpenter and who, without*

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<sup>7</sup> Unfortunately Covid-19 restrictions in Sydney have prevented access to historical files to further expand on this point.

<sup>8</sup> 101 CAR 433



*interruption in the continuity of his employment, is directed to do carpenter's work, shall not be deemed to be a casual hand within the meaning of this definition.*

42. Up until 2002 there were two casual provisions under the *National Building and Construction Industry Award 2000*. Clause 13.1.2 dealt with casual labour in weekly hire operator classifications which limited engagement as a casual to 2 weeks, and clause 13.2.2 dealt with casual labour in daily hire tradespersons and labourers classifications which limited a casual to employment of less than 5 days<sup>9</sup>.

43. In 2002 the *National Building and Construction Industry Award 2000* was varied by consent<sup>10</sup> to include a new clause 13.4 as follows:

**“13.4 Casual employment**

*13.4.1 A casual employee is one engaged and paid in accordance with the provisions of this clause. A casual employee shall be entitled to all of the applicable rates and conditions of employment prescribed by this Award except annual leave, personal leave, parental leave, jury service, public holidays and redundancy.*

*13.4.2 An employer when engaging a person for casual employment must inform the employee in writing that the employee is to be employed as a casual, stating by whom the employee is employed, the job to be performed, the classification level, the actual or likely number of hours to be worked, and the relevant rate of pay.*

*13.4.3 A casual employee may be employed by a particular employer on a regular and systematic basis for any period not exceeding six weeks. If the employment is to continue on a regular and systematic basis beyond six weeks the employee must then be employed pursuant to clause 13.1 or 13.2 of this Award.*

*13.4.4 The provisions of 13.4.3 shall not apply to a casual employee who has been engaged by a particular employer to perform work on an occasional basis and whose work pattern is not regular and systematic.*

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<sup>9</sup> See Print S0643

<sup>10</sup> See PR919660

13.4.5 *On each occasion a casual employee is required to attend work the employee shall be entitled to payment for a minimum of four hours' work, plus the relevant fares and travel allowance prescribed by clause 38.*

13.4.6 *A casual employee for working ordinary time shall be paid 125 per cent of the hourly rate prescribed by clause 18.1.2 for the employee's classification.*

13.4.7 *A casual employee required to work overtime or weekend work shall be entitled to the relevant penalty rates prescribed by clauses 29 and 31, provided that :*

13.4.7(a) *where the relevant penalty rate is time and a half, the employee shall be paid 175 per cent of the hourly rate prescribed by clause 18.1.2 for the employee's classification; and*

13.4.7(b) *where the relevant penalty rate is double time, the employee shall be paid 225 per cent of the hourly rate prescribed by clause 18.1.2 for the employee's classification.*

13.4.8 *A casual employee required to work on a public holiday prescribed by clause 36 shall be paid 275 per cent of the hourly rate prescribed by clause 18.1.2 for the employee's classification.*

13.4.9 *Termination of all casual engagements shall require one hour's notice on either side or the payment or forfeiture of one hour's pay, as the case may be."*

44. This consent variation increased the casual loading to 25%, specified what the casual loading was paid for (13.4.1), introduced the requirement for the casual to be advised in writing on a number of issues related to the engagement including the actual or likely hours of work (13.4.2), and allowed for all casuals to be employed for up to 6 weeks (13.4.3).

45. The casual employment clause in the *National Building and Construction Industry Award 2000* remained unaltered until the making of the modern award. In the decision releasing the exposure drafts for stage 2 the AIRC Full Bench (AIRC FB) stated,

*"[40] We have removed, from each award, restrictions on the maximum duration of casual employment, replacing them with a casual conversion clause. In respect of the Plumbing*

*and Fire Sprinklers Modern Award, we have also included provision for part-time employment.”*<sup>11</sup>

46. Unfortunately the AIRCFB did not provide any reasons as to why the limitation clauses were removed.

47. The history of the casual clause in the *Mobile Crane Hiring Award 2020* has followed a similar path. The casual clause in the *Mobile Crane Hiring Award 1990*<sup>12</sup> was as follows:

*“Casual employment*

*(d) A casual employee is one engaged and paid as such. A casual employee for working ordinary time shall be paid per hour 1/38 of the weekly award wage prescribed herein for the work which he or she performs, plus 20 per cent.*

*Casual employees shall be engaged for a minimum period of one day and engagement as a casual will not continue for a continuous period beyond 4 weeks from the date of engagement.*

*Provided that by agreement, the period may be extended for a further continuous period of up to 2 weeks to meet unforeseen work requirements.*

*Where agreement to operate this clause is obtained at yard level, this clause shall have immediate effect. In the absence of agreement, the clause shall apply 1 January 1990.”*

48. The Casual clause in the *Mobile Crane Hiring Award 2002*<sup>13</sup> included the following provisions:

*9.4.2 Casual employees shall be engaged for a minimum period of four (4) hours per day and engagement as a casual will not continue for a continuous period beyond four (4) weeks from the date of engagement.*

*Provided that by agreement, between the employee and the employer, the period of engagement may be extended up to a period not exceeding 13 weeks where the casual is replacing an employee who is absent from work due to any type of leave prescribed by the Award, long service leave, unpaid leave, an injury for which worker's compensation*

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<sup>11</sup> 2009 AIRCFB 50

<sup>12</sup> Print J5377

<sup>13</sup> AP816842CRV - Mobile Crane Hiring Award 2002

*benefits are being paid, or to meet specific work projects. Provided further that such agreement be recorded in the time and wages record.*

*9.4.3 Arrangements by employers or employees designed to deliberately break the continuity of casual employment will not be accepted as breaking such continuity. Any continuous employment beyond 4 weeks from the date of engagement, where no agreement has been reached with the employee and recorded in the time and wages record, shall be treated as weekly employment.*

*9.4.4 This sub-clause shall not be used to reduce existing levels of weekly hire employees and as far as practicable shall not affect the skill development or earning opportunities of weekly hire employees.*

49. In regard to the *National Joinery and Building Trades Award 2020* and its predecessors, the casual clause was arbitrated by Commissioner Grimshaw when the *National Joinery and Building Trades Products Award* was first made in 1993.<sup>14</sup> In the decision Commissioner Grimshaw decided,

**“CLAUSE 30 CASUAL EMPLOYMENT**

*The employers sought the removal of all restrictions currently existing on the usage of casuals, they being the limitation of employing casuals for more than twelve weeks in any twelve months without the consent of the branch secretary of the union.*

*The submissions, exhibits and evidence in this matter seemed to centre on two aspects being the use of casuals and requiring the consent of the union secretary for any change.*

*Nothing of any substance was put to demonstrate a need for any changes to the use of casuals, for example the evidence suggested a greater need for part-time employees than any extension of casuals, in fact the evidence unchallenged suggests little if any benefits financially occur to the employer with lengthy use of casuals, rather the reverse.*

*Without detailing all the evidence and submissions as with other clauses dealt with, no substantial compelling case has been made out to justify altering the standards*

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<sup>14</sup> Print K6181

*currently applying. I therefore decide this clause shall be as contained in Exhibit CFMEU 10.”*

50. A number of employer organisations appealed the decision of Commissioner Grimshaw and one of the issues under consideration was that of the casual provision. The Full Bench (which had been reconstituted as a consequence of the retirement of SDP Keogh, and comprised of SDP MacBean, DP Harrison and Commissioner Cox) handed down their decision on 6th July 1995 (Print M2644). In it they said the following:

*“We now turn to the issue of part-time and casual employment. Dealing firstly with casuals, the Employers had put before the Commissioner a clause which sought a reduction in the minimum daily engagement of casuals from 7.6 hours to 4 hours and the removal of a limit placed on the engagement of casuals for a period of no more than 12 weeks in any 12 month period, except with the consent of the Secretary of the State Branch of the union. The Employers complained that the Commissioner, in his decision, addressed the issue of the removal of the restriction on casuals working beyond the 12 weeks, without the permission of the union, but did not address the issue of the reduction from 7.6 to 4 hours.*

*Accepting that this is so, and that this Full Bench should now consider this issue itself, there would appear, however, to have been no evidence or at least no sufficient evidence of any complaint concerning the operation of this part of the clause. No difficulties could be identified in its operation. Accordingly, there was no basis upon which the Commissioner should have been required to exercise his discretion to alter the Award, nor for us now to do so. It seems clear to us that the real issue that was highlighted, in the evidence to which we were taken, was the perception that there was a limit on the engagement of employees to either the category of casual, and that engagement was limited to a 12 week period, or full-time. All of the evidence seemed to overlook the fact that there is no bar in the Award on the engagement of a full-time person for a fixed term. Each of the persons who gave evidence seemed to desire an ability to employ a person for a particular or specific project or job. It seems clear to us that the issue of concern to the Employers may have arisen out of a misunderstanding of the flexibility that they already have, consistent with the Award, to engage a person for a fixed term albeit during that time as a full-time employee.”*

51. The casual clause was varied in 2002<sup>15</sup> to increase the casual loading, but the 12 week limitation remained and the clause in the award provided as follows:

*“13.2 Casual Employment*

*13.2.1 A casual employee is one engaged and paid in accordance with the provisions of this clause. A casual employee shall be entitled to all of the applicable rates and conditions of employment prescribed by this Award except annual leave, personal leave, parental leave, jury service, public holidays, notice of termination of employment and redundancy.*

*13.2.2 An employer when engaging a person for casual employment must inform the employee in writing that the employee is to be employed as a casual, stating by whom the employee is employed, the job to be performed, the classification level, the actual or likely number of hours to be worked, and the relevant rate of pay.*

*13.2.3 Engagement shall be by the hour with a minimum daily engagement of 7.6 hours.*

*13.2.4 Termination of employment shall be by one hour’s notice or by the payment or forfeiture, as the case may be, of the remainder of the day’s wages or one hour’s pay, whichever amount is greater.*

*13.2.5 An employee shall not be employed as a casual employee for more than twelve weeks in any twelve months, provided that such period may, by mutual agreement between the employer and employee (and which is to be recorded in the time and wages record), be extended to meet the following circumstances :*

*13.2.5(a) exceptional work demands;*

*13.2.5(b) relieving an employee who is on extended leave or workers compensation.*

*13.2.6 A casual employee for working ordinary time shall be paid 125 per cent of the hourly equivalent (i.e. one thirty-eighth) of the appropriate weekly rate prescribed by clause 17 for the employee’s classification.*

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<sup>15</sup> PR931673

*13.2.7 A casual employee required to work overtime, or weekend work, or on a public holiday shall be entitled to the relevant penalty rates prescribed by clauses 27, 28 and 34, provided that :*

*13.2.7(a) where the relevant penalty is time and a half, the employee shall be paid 175 per cent of the hourly equivalent of the appropriate weekly rate prescribed by clause 17 for the employee's classification; and*

*13.2.7(b) where the relevant penalty is double time, the employee shall be paid 225 per cent of the hourly equivalent of the appropriate weekly rate prescribed by clause 17 for the employee's classification; and*

*13.2.7(c) where the relevant penalty is double time and a half, the employee shall be paid 275 per cent of the hourly equivalent of the appropriate weekly rate prescribed by clause 17 for the employee's classification.”*

52. What the above award history demonstrates is that the construction awards up until award modernisation all included a limit on the duration that a worker could be employed as a casual. For reasons unknown, the AIRC Full Bench that made the modern awards decided to replace the limits on the duration with the current casual conversions clause to apply after 6 months employment on a regular and systematic basis.<sup>16</sup> Unfortunately this significant change has not had the desired impact of limiting casual employment in the industry.

### **Casual Employment in the Building and Construction Industry**

53. There has been a significant growth of casual employment in the building and construction industry since the introduction of the current casual conversion provisions into the construction awards. The ABS provide statistics on types of employment<sup>17</sup> and since 2014 have included, on a quarterly basis, a breakdown of employees with leave entitlements and employees without leave entitlements (an accepted proxy for casual employment) by industry. The industry breakdown is based on the ANZIC industry division<sup>18</sup> of the main job. Division E Construction, includes the following sectors:

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<sup>16</sup> See 2009 AIRCFB 345 at paragraphs [113] and [115], and 2009 AIRCFB 50 at paragraph [40]

<sup>17</sup> 6291.0.55.001 - EQ05 - Employed persons by Industry division (ANZSIC) and Status in employment of main job, February 1991 onwards

<sup>18</sup> <https://www.abs.gov.au/ausstats/abs@.nsf/mf/1292.0>

## Division E Construction

### Subdivision 30 Building Construction

#### Group 301 Residential Building Construction

Class 3011 House Construction

Class 3019 Other Residential Building Construction

#### Group 302 Non-Residential Building Construction

Class 3020 Non-Residential Building Construction

### Subdivision 31 Heavy and Civil Engineering Construction

#### Group 310 Heavy and Civil Engineering Construction

Class 3101 Road and Bridge Construction

Class 3109 Other Heavy and Civil Engineering Construction

### Subdivision 32 Construction Services

#### Group 321 Land Development and Site Preparation Services

Class 3211 Land Development and Subdivision

Class 3212 Site Preparation Services

#### Group 322 Building Structure Services

Class 3221 Concreting Services

Class 3222 Bricklaying Services

Class 3223 Roofing Services

Class 3224 Structural Steel Erection Services

#### Group 323 Building Installation Services

Class 3231 Plumbing Services

Class 3232 Electrical Services

Class 3233 Air Conditioning and Heating Services

Class 3234 Fire and Security Alarm Installation Services

Class 3239 Other Building Installation Services

#### Group 324 Building Completion Services

Class 3241 Plastering and Ceiling Services

Class 3242 Carpentry Services

Class 3243 Tiling and Carpeting Services

Class 3244 Painting and Decorating Services

Class 3245 Glazing Services

#### Group 329 Other Construction Services

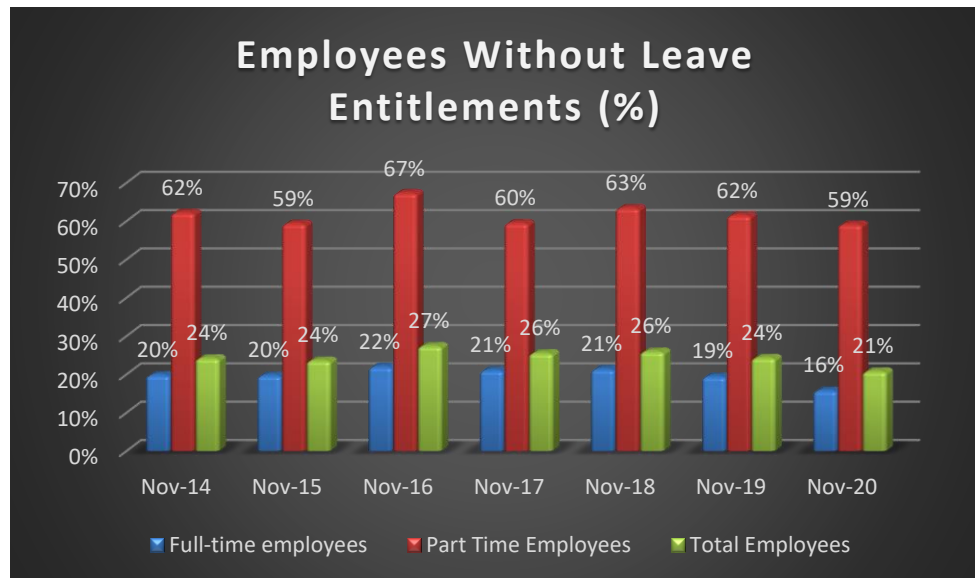
Class 3291 Landscape Construction Services

Class 3292 Hire of Construction Machinery with Operator

Class 3299 Other Construction Services n.e.c.



54. The following graph compiled by the CFMMEU C&G uses the figures from the November quarters each year to show the level of casual employment in the construction industry:



55. What the ABS figures show is that since 2014 and up to the start of the Covid-19 crisis in March 2020 the level of casual employment for full-time employees has ranged between 18-22% and for part-time employees ranged between 57-69%, giving a total range for all employees of 23 - 27%. This is significantly high for an industry in which daily hire is still a predominant form of employment. The overall figures from the ABS statistics for the construction industry have been extracted and are set out in Appendix A.

56. A related matter is the growth in labour hire in the industry and the manipulation of the system by large corporations which have increased the casual temporary employment of employees with no leave entitlements. According to the recent Australasian Centre for Corporate Responsibility (ACCR) report “*Labour Hire & Contracting Across the ASX100*” (see Appendix B),

*“Labour hire and contracting is no longer just used to manage short-term and seasonal fluctuations. As this report highlights, in some sectors, labour hire has been used to substitute large sections of the permanent workforce.” (p.3)*

.....

**CONTEMPORARY LABOUR HIRE ARRANGEMENTS IN AUSTRALIA**

*Triangular or intermediary working arrangements are not a recent innovation and have existed since at least the 1950s. However, the use of labour hire has grown rapidly*

*since the 1990s. This growth has been accompanied by a transformation of the role of labour hire employment in the labour market, from a model that predominantly involved the use of “short term, supplementary or ‘top up’ labour” to one that “increasingly takes in a variety of work arrangements which may extend through to longer-term supplementation of the workforce or substitution of permanent workers.....*

*The contemporary labour hire industry includes many different types of labour hire agencies, spanning from large, multinational corporations with thousands of staff (e.g. CIMIC), through medium-sized and mid-tier labour hire providers, to operators consisting of an individual (or a few individuals) “with a van and mobile phone”. Different types of labour hire agencies are often specific to individual sectors and represent a diverse range of risks to host companies and investors.” (p.11)*

*“The COVID-19 crisis has highlighted the risks to individual workers, communities and businesses of a significant percentage of workers having no access to paid sick leave. Many workers without sick leave cannot afford to self-isolate, or to take other necessary precautions to protect themselves and others.”(p.15)*

### ***Labour hire in the construction sector***

*The Australian construction industry is highly fragmented and characterised by short term contracting, informal employment practices, and layers of subcontracting. Many contract and labour hire firms in the construction industry are small-scale, and provide services to primary building contractors, property developers and building and infrastructure owners.....*

*As with the mining industry, the construction industry heavily relies upon labour hire, with host companies contracting out a range of activities from the provision of labour, to the management of independent contractors, and even the contracting out of core operations .....*

*Having fast and flexible access to a casual workforce is attractive to companies wanting to manage the volatility of the industry, by shifting workers onto project-based employment to manage fluctuations in demand. Labour hire and subcontracting arrangements in the construction industry share many similarities to those in the mining sector. They range from the provision of casual/temporary supplementary labour, short-term contractors, long-term contractors, and contract service providers contracted to run whole segments of a project.*

*However, there is a significant difference between the commercial construction and mining sector — the proliferation of two illegitimate and illegal subcontracting practices: phoenixing and sham contracting .....*

*In the construction industry, phoenix companies are often labour hire providers and or subcontractors. Highlighting the scale of this problem in the construction industry the Australian Tax Office (ATO) found that of 19,800 potential phoenix groups, 72% contained at least one building or construction entity. (p.28)*

57. The growth in casual employment and labour hire is also reflected in the increasing number of enterprise agreements filed by labour hire companies for approval by the Fair Work Commission that are intended to apply in the building and construction industry. Many of these agreements contain wage rates that are a few cents per hour above the award and in many cases do not contain any casual conversion provision. The extent to which unscrupulous employers attempt to have approved agreements that clearly fail the Better Off Overall Test show how easily casual employees can be exploited. That so many enterprise agreements for labour hire companies require undertakings (in many cases due to the intervention of the CFMMEU) is a sad indictment on the industry.

58. Further proof of the exploitation of casual workers in the construction industry can be found in the recent report by an organisation not known for being on the side of workers, the ABCC. In its June 2020 Labour Hire Campaign report (see Appendix C) it stated,

*“Fifty of the sixty-three employers audited were non-compliant with Australian workplace laws.*

*The rate of non-compliance between employers that were covered by a modern award compared to those using an enterprise agreement was statistically insignificant.*

.....

### ***Monetary Entitlements***

*Sixty four per cent of non-compliant employers (32) had failed to pay the correct:*

- base rate for ordinary hours*
- allowances*
- overtime or*
- penalties.*

*Errors occurred where an employer used an industrial instrument that did not apply to the workers or when they were operating with limited knowledge of their obligations.*

*The WA branch of a national labour hire employer was not complying with the minimum engagement time for casual employees as provided under the applicable industrial instrument.*

....

*A 2018 APH research paper stated that:*

- *Labour hire employees are much more likely to be employed on a casual basis and have a greater expectation of leaving their employment in 12 months.*
- *Almost four in five (78.8 per cent) labour hire employees in August 2018 were employed on a casual basis compared with the average for all employees of 24.6 per cent.*
- *Just under a quarter (24.4 per cent) of labour hire employees did not expect to be working for the same employer in 12 months—more than double the estimate for all employees (at 9.9 per cent).”*

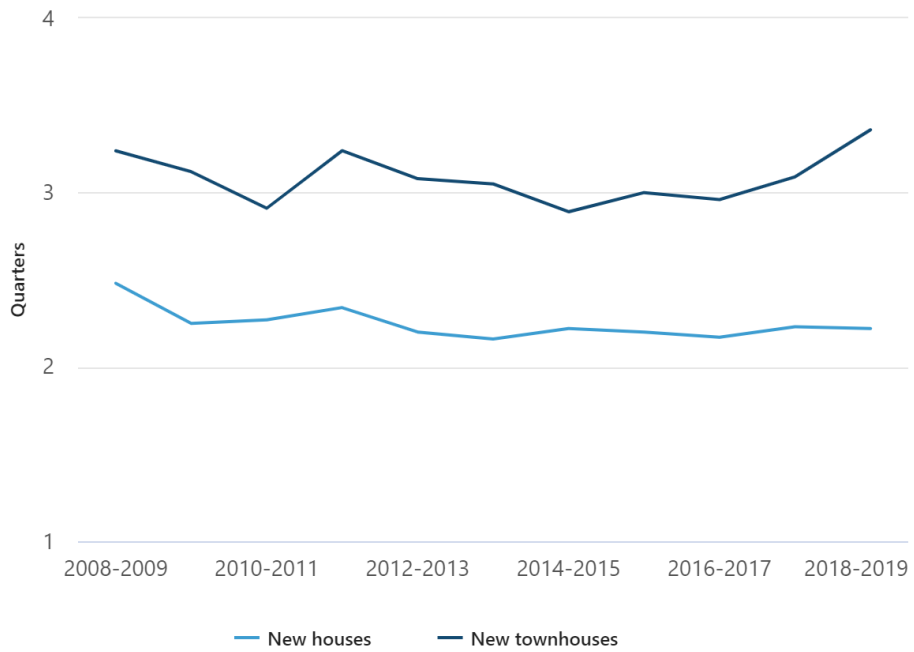
### **The Project Nature and Duration of Work in the Building and Construction Industry**

59. It is well recognised that employment in the building and construction is mainly organised on a project by project basis. The ABS provides information on the average completion times for new houses, townhouses and flats, units or apartments from 2008-09 to 2018-19.<sup>19</sup> The following graphs are taken from the ABS article:

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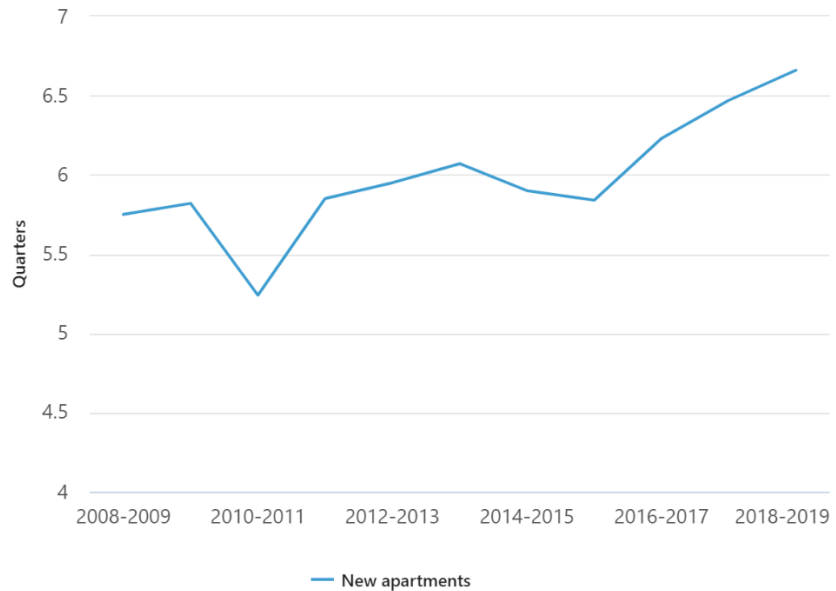
<sup>19</sup> <https://www.abs.gov.au/articles/average-dwelling-completion-times>

Graph 1: Average completion times of new houses and new townhouses, Australia



Source: Australian Bureau of Statistics, Average dwelling completion times 9/10/2019

Graph 2: Average completion times of new flats, units or apartments, Australia



Source: Australian Bureau of Statistics, Average dwelling completion times 9/10/2019

60. According to the ABS:

- Average completion times for houses remained fairly steady over the period, varying between 2.16 quarters (six months and two weeks) and 2.48 quarters (seven months and two weeks) to complete. Average completion times for townhouses were slightly more volatile over the same period, varying between 2.89 quarters (eight months and three weeks) and 3.36 quarters (ten months).
- Average completion times for flats, units or apartments have increased, particularly over the past three years, from 5.84 quarters (17 months and two weeks) in 2015-16 to 6.66 quarters (19 months and four weeks) in 2018-19. This is in line with an increase in the number of apartments approved, particularly from late 2014 onwards (see Building Approvals, Australia (cat. no. 8731.0)).

61. Statistical information on commercial projects is harder to find. But generally multi-storey buildings under 30 storeys and civil construction projects under \$400m are also completed in less than 2 years. The following table gives examples of projects<sup>20</sup> that would be completed in under 2 years:

<b>Project</b>	<b>Estimated Cost</b>	<b>Start Date for construction</b>	<b>Estimated Completion Date</b>
WIND FARM (SAPPHIRE WIND FARM)	\$588m	January 2017	3 <sup>rd</sup> quarter 2018
ROADS (2) - duplication   ROADWORKS - safety improvements (FLEURIEU CONNECTIONS - MAIN SOUTH RD & VICTOR HARBOR RD)	\$560m	4 <sup>th</sup> quarter 2021	2023
RAIL LINE - duplication (HURSTBRIDGE RAIL LINE - STAGE 2)	\$547m	May 2021	December 2022
TRANSMISSION LINE (PROJECT ENERGY CONNECT - BUNDEY & ROBERTSTOWN SUBSTATION)	\$520m	2 <sup>nd</sup> quarter 2022	2 <sup>nd</sup> quarter 2024
INTERSECTION   ROUNDABOUT   ROADWORKS - upgrade (BLACK SPOT PROGRAMME 2020 / 2021 - SOUTHERN DOWNS)	\$506m	December 2019	June 2021
PIPELINE (BROKEN HILL WATER PIPELINE)	\$467m	January 2018	January 2019

<sup>20</sup> The information was sourced from BCI Australia <https://www.bciaustralia.com/>

APARTMENTS (429)   SHOPS   SCHOOL   MEDICAL CENTRE   CHILDCARE CENTRE - 2 towers - 18 storey (SKY VILLAGE)	\$450m	October 2021	1 <sup>st</sup> quarter 2023
MEDICINAL CANNABIS PROPAGATION & PROCESSING FACILITY - single storey (ASTERION INTENSIVE HORTICULTURE & RURAL INDUSTRY)	\$450m	August 2021	May 2023
HOTEL (125 rooms)   CIVIC CENTRE   LIBRARY - up to 23 storey (LIVERPOOL CIVIC PLACE & UNIVERSITY OF WOLLONGONG CAMPUS)	\$400m	2 <sup>nd</sup> quarter 2022	2 <sup>nd</sup> quarter 2023
OFFICES   SHOPS (6) - 2 buildings – 27 & 33 storey (PARRAMATTA SQUARE STAGES 4 & 6 (4PS & 6PS))	\$395m	November 2017	November 2019
APARTMENTS (240)   SHOPS   RESTAURANT   CAFE   OFFICE - 9 buildings - 6 to 11 storey (VICTORIA & VINE)	\$350m	April 2020	4 <sup>th</sup> quarter 2021
UNITS (576)   SHOPS / OFFICES (31) - 6 buildings - up to 12 storey (ASPEN VILLAGE)	\$150m	January 2021	1 <sup>st</sup> quarter 2022
APARTMENTS (240)   RESTAURANTS (9)   SUPERMARKET   OFFICE   SHOPS (6) - 3 buildings - 5 to 24 storey (ONE SUBIACO)	\$126m	September 2020	September 2022
ENABLING WORKS for ROAD   ROUNDABOUT & INTERSECTION - upgrade (BADGERYS CREEK RD AREA & AEROTROPOLIS ENABLING WORKS)	\$50m	November 2021	November 2022
MULTI-STOREY CAR PARK (1,503 spaces) for HOSPITAL - 8 storey (THE PRINCE CHARLES HOSPITAL)	\$45m	2 <sup>nd</sup> quarter 2022	April 2024

### **New NES Casual Conversion Provision Will Have Little or No Work to Do**

62. As identified in paragraph 33 above, one of the grounds for refusing a request under s.66H of the FW Act in s.66H(2)(b) is:

(b) the employee's position will cease to exist in the period of 12 months after giving the request;

63. The practical effect of this provision is that even if a casual employee meets the eligibility requirement of 12 months employment, with at least the last 6 months being worked with a regular pattern of hours on an ongoing basis, the employer can still refuse conversion if the position will cease to exist in the following 12 months. The NES provision essentially has increased the period of casual employment before an employee can convert to fulltime or part-time employment to 2 years!

64. Based on the average duration of construction projects identified in paragraphs 59-61 above, construction workers engaged on a casual basis will have little to no chance of ever converting to full-time or part-time employment under the NES provision.

### **Proposed Variation to the Awards**

65. The CFMMEU C&G notes that in the July Decision the Full Bench said that,

*“[241] Turning directly to the third provisional view, we confirm our view that redrafting cl.11.5 to incorporate the residual right of conversion under the Act, but on the basis that an employee is eligible to make a request after 6 months' employment, would make the award consistent and operate effectively with the Act.”*

66. The Full Bench however decided against this approach for the Manufacturing Award on the basis that cl.11.5 redrafted in this way would not be necessary to meet the modern award objective, as required by s.138. The Full Bench did so taking into account the historical context of the Manufacturing Award and its view that,

*“establishing a Manufacturing Award entitlement in parallel with the NES, but with a modified eligibility period, would increase the regulatory burden on employers and make the award system more complex and less easy to understand, with the result that we consider that the considerations in paragraphs (f) and (g) in s.134(1) would weigh significantly against making the proposed variation to cl.11.5. The other considerations in s.134(1) we consider to be neutral. Accordingly, varying cl.11.5 in the manner proposed in the third provisional view would not meet the requirement in s.138.”<sup>21</sup>*

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<sup>21</sup> [2021] FWCFB 4144 at paragraph [246]



67. The CFMMEU C&G submits that the historical context of the construction awards, and the express provisions limiting the duration of casual employment prior to award modernisation, clearly differentiate these awards from the Manufacturing Award.
68. As for the modern awards objective the CFMMEU C&G would point out the overarching requirement is set out in s.134(1), i.e. that “The FWC **must** ensure that modern awards, together with the National Employment Standards, **provide a fair and relevant minimum safety net** of terms and conditions”. Removing a right for casual employees in the building and construction to convert after 6 months, and relying on the NES provision that will have no practical effect or operation, is we submit not fair to employees and fails to take into account the relative living standards and the needs of the low paid, particularly in the current Covid-19 environment. The considerations in s.134(1)(f) and (g) cannot be seen as having a greater priority.
69. The CFMMEU C&G submits that the Full Bench should therefore vary the construction awards and redraft the casual clause to incorporate the residual right of conversion under the Act, but on the basis that an employee is eligible to make a request after 6 months’ employment.

#### **Alternate Variations to the Construction Awards**

70. If the Full Bench is not of a view to vary the construction awards as set out in paragraph 69 above, the CFMMEU C&G submits that the Full Bench should delete the casual conversion clauses in their entirety and vary the awards to re-insert the limitations on the duration of casual employment that existed before the casual conversion clauses were inserted. Attached, at Appendix D, are draft determinations for the construction awards which reflect this position.
71. The CFMMEU C&G submits that this is the best approach to ensure that casual employees are not engaged to the detriment of workers who seek employment on a weekly hire full-time, weekly hire part-time or daily hire basis. It will ensure that workers in the building and construction industry can expect stable and, to the extent that the industry allows, ongoing and regular employment which provides for paid leave and termination and redundancy benefits, which as the recent Covid-19 crisis has demonstrated are vital and necessary requirements in a civilised society.
72. The inclusion of these limitations would not be inconsistent with the new NES provisions, as the Full Bench in the July Decision recognised:

*“[94] In respect of the second question, our provisional view was:*

*‘Yes, on the premise that we consider that such a limitation constitutes a ‘relevant term’. A limitation on the length of any casual employment should not be expressed as part of the definition of casual employment. If any such limitation is separated from the casual definition, it does not cause interaction issues with the NES casual conversion entitlements in Div.4A of Pt.2-2 of the Act, is not inconsistent with those entitlements and is not prohibited by s.55(1). The casual conversion entitlements operate on the basis of employment meeting the prescribed conditions for a period of at least 12 months: s.66B(1)(a) and s.66F(1)(a). If an award clause limits casual employment to a period of less than 12 months, there is no interaction between that clause and Div.4A, nor can such a clause exclude the Div.4A entitlements since those entitlements cannot apply to such time-limited employment.’*

*[95] Following the hearing on 24 June 2021, the Commission was informed that the IEU and AIS had reached a consent position regarding a proposed variation to cl.2 and 12 of the Teachers Award as follows:*

- Amend cl.2 by inserting the following after ‘all other teachers’:*

*casual employee has the meaning in s 15A of the Act*

- Amending cl.12 as follows:*

*12.1 Casual employment means employment on a day-to-day basis A casual employee shall be engaged for a period of not more than 4 consecutive weeks, or 4 consecutive term weeks in the case of a teacher in a school or preschool.*

*12.2 [No change].*

*12.3 [No change].*

*[96] The AEU and Community Connections Solutions Australia also support the proposed consent variation.*

*[97] Other interested parties were given until 4pm on 29 June 2021 to file submissions in respect of the proposed variation. We did not receive any submissions opposing the proposed consent variation.*

*[98] We are satisfied that cl.12.1 is a relevant term that gives rise to an interaction difficulty within the meaning of cl.48(2)(b) and the variation of the Teachers Award in*

*the manner proposed by the IEU and AIS will make the award operate effectively with the Act as amended. We will make the change proposed.”*

73. Similarly in these proceedings the Full Bench, in dealing with a clause that referred to a “temporal limit” in the Children’s Services Award, reached the provisional view that,

*“[71] The above provision is expressed in a way that, on one view, makes it definitional in relation to casual employment. However, its intended substantive effect may be to place an effective temporal limit on the employment of casual employees. For these reasons, it appears to be analogous to clause 12.1 of the Teachers Award considered in [91]-[98] of the July 2021 decision. Our provisional view is that clause 10.5(b) is a relevant term and, in its current form, may give rise to interaction difficulty with s.15A of the Act.*

*[72] Our provisional view is that, in conjunction with the introduction of a definition of casual employee in clause 3 of the Children’s Services Award 2010 that refers to s.15A of the Act (see Attachment B below), clause 10.5(b) should be varied to provide:*

*“(b) A casual employee ~~is one~~ may be engaged only for temporary and relief purposes.”*

74. The CFMMEU C&G submits that varying the construction awards, as set out in the draft determinations in Appendix D, and re-inserting the limitations on casual employment would make the awards operate effectively with the Act as amended. We further submit that this approach would be in the best interest of employees and employers, as it would prevent a race to the bottom and stop the expansion of unrestricted casual employment in the building and construction industry.

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**Appendix A – Employees with leave entitlements and employees without leave entitlements  
in the construction industry**

Mid-quarter month	Status in employment of main job	Industry division of main job: ANZSIC (2006) Rev.2.0	Employed full-time ('000)	Employed part-time ('000)	Totals ('000)	Employed full-time without paid leave %	Employed part-time without paid leave %	Total Employees without paid leave %
Aug-2014	Employee with paid leave entitlements	Construction	429.7599	31.89647	<b>461.6564</b>			
Aug-2014	Employee without paid leave entitlements	Construction	100.0792	46.24936	<b>146.3285</b>	19%	59%	24%
		<b>Total</b>	<b>529.8391</b>	<b>78.14583</b>	<b>607.985</b>			
Nov-2014	Employee with paid leave entitlements	Construction	475.7154	26.07234	<b>501.7877</b>			
Nov-2014	Employee without paid leave entitlements	Construction	117.6494	42.94503	<b>160.5944</b>	20%	62%	24%
		<b>Total</b>	<b>593.3647</b>	<b>69.01737</b>	<b>662.3821</b>			
Feb-2015	Employee with paid leave entitlements	Construction	462.2829	18.15268	<b>480.4356</b>			
Feb-2015	Employee without paid leave entitlements	Construction	113.5598	43.06795	<b>156.6278</b>	20%	70%	25%
		<b>Total</b>	<b>575.8428</b>	<b>61.22064</b>	<b>637.0634</b>			
May-2015	Employee with paid leave entitlements	Construction	475.1191	26.17847	<b>501.2975</b>			
May-2015	Employee without paid leave entitlements	Construction	114.2619	47.07865	<b>161.3406</b>	19%	64%	24%
		<b>Total</b>	<b>589.381</b>	<b>73.25713</b>	<b>662.6381</b>			
Aug-2015	Employee with paid	Construction	455.8177	20.4352	<b>476.2529</b>			

Aug-2015	leave entitlements Employee without paid leave entitlements	Construction	103.1759	42.23418	<b>145.4101</b>	18%	67%	23%
		<b>Total</b>	<b>558.9936</b>	<b>62.66938</b>	<b>621.663</b>			
Nov-2015	Employee with paid leave entitlements	Construction	459.8637	25.47856	<b>485.3423</b>			
Nov-2015	Employee without paid leave entitlements	Construction	113.0814	37.23024	<b>150.3117</b>	20%	59%	24%
		<b>Total</b>	<b>572.9452</b>	<b>62.7088</b>	<b>635.654</b>			
Feb-2016	Employee with paid leave entitlements	Construction	441.8366	25.78391	<b>467.6205</b>			
Feb-2016	Employee without paid leave entitlements	Construction	111.412	42.975	<b>154.387</b>	20%	63%	25%
		<b>Total</b>	<b>553.2486</b>	<b>68.7589</b>	<b>622.0075</b>			
May-2016	Employee with paid leave entitlements	Construction	467.0424	28.52996	<b>495.5724</b>			
May-2016	Employee without paid leave entitlements	Construction	128.5005	48.36827	<b>176.8688</b>	22%	63%	26%
		<b>Total</b>	<b>595.5429</b>	<b>76.89823</b>	<b>672.4412</b>			
Aug-2016	Employee with paid leave entitlements	Construction	449.8995	26.08017	<b>475.9797</b>			
Aug-2016	Employee without paid leave entitlements	Construction	114.3882	47.77344	<b>162.1616</b>	20%	65%	25%
		<b>Total</b>	<b>564.2877</b>	<b>73.85361</b>	<b>638.1413</b>			
Nov-2016	Employee with paid leave entitlements	Construction	451.022	25.64258	<b>476.6646</b>			
Nov-2016	Employee without paid leave entitlements	Construction	127.2409	52.92314	<b>180.164</b>	22%	67%	27%

	leave entitlements							
		<b>Total</b>	<b>578.2629</b>	<b>78.56572</b>	<b>656.8286</b>			
Feb-2017	Employee with paid leave entitlements	Construction	488.3934	30.42874	<b>518.8222</b>			
Feb-2017	Employee without paid leave entitlements	Construction	123.4364	47.18855	<b>170.625</b>	20%	61%	25%
		<b>Total</b>	<b>611.8299</b>	<b>77.61729</b>	<b>689.4472</b>			
May-2017	Employee with paid leave entitlements	Construction	509.0314	28.91533	<b>537.9468</b>			
May-2017	Employee without paid leave entitlements	Construction	126.7546	54.4559	<b>181.2105</b>	20%	65%	25%
		<b>Total</b>	<b>635.786</b>	<b>83.37123</b>	<b>719.1572</b>			
Aug-2017	Employee with paid leave entitlements	Construction	526.5687	31.67178	<b>558.2405</b>			
Aug-2017	Employee without paid leave entitlements	Construction	126.2208	44.93912	<b>171.1599</b>	19%	59%	23%
		<b>Total</b>	<b>652.7895</b>	<b>76.6109</b>	<b>729.4004</b>			
Nov-2017	Employee with paid leave entitlements	Construction	521.8675	35.43045				
Nov-2017	Employee without paid leave entitlements	Construction	139.3732	52.14082	<b>191.514</b>	21%	60%	26%
		<b>Total</b>	<b>661.2406</b>	<b>87.57127</b>	<b>748.8119</b>			
Feb-2018	Employee with paid leave entitlements	Construction	545.5404	35.30872	<b>580.8492</b>			
Feb-2018	Employee without paid leave entitlements	Construction	148.5183	52.04899	<b>200.5673</b>	21%	60%	26%
		<b>Total</b>	<b>694.0588</b>	<b>87.35771</b>	<b>781.4165</b>			

May-2018	Employee with paid leave entitlements	Construction	550.3041	26.46974	<b>576.7739</b>			
May-2018	Employee without paid leave entitlements	Construction	126.5184	51.03139	<b>177.5498</b>	19%	66%	24%
		<b>Total</b>	<b>676.8225</b>	<b>77.50113</b>	<b>754.3237</b>			
Aug-2018	Employee with paid leave entitlements	Construction	552.8073	28.01501				
Aug-2018	Employee without paid leave entitlements	Construction	125.642	59.55945	<b>185.2014</b>	19%	68%	24%
		<b>Total</b>	<b>678.4492</b>	<b>87.57446</b>	<b>766.0237</b>			
Nov-2018	Employee with paid leave entitlements	Construction	515.2127	29.56836	<b>544.7811</b>			
Nov-2018	Employee without paid leave entitlements	Construction	139.9618	51.3506	<b>191.3124</b>	21%	63%	26%
		<b>Total</b>	<b>655.1745</b>	<b>80.91896</b>	<b>736.0935</b>			
Feb-2019	Employee with paid leave entitlements	Construction	558.0772	24.83647	<b>582.9137</b>			
Feb-2019	Employee without paid leave entitlements	Construction	128.9862	41.7578	<b>170.744</b>	19%	63%	23%
		<b>Total</b>	<b>687.0634</b>	<b>66.59427</b>	<b>753.6576</b>			
May-2019	Employee with paid leave entitlements	Construction	545.0146	34.88668	<b>579.9013</b>			
May-2019	Employee without paid leave entitlements	Construction	144.2131	46.11183	<b>190.3249</b>	21%	57%	25%
		<b>Total</b>	<b>689.2277</b>	<b>80.99851</b>	<b>770.2263</b>			
Aug-2019	Employee with paid leave entitlements	Construction	519.6295	25.99529	<b>545.6247</b>			

Aug-2019	Employee without paid leave entitlements	Construction	135.1722	56.57221	<b>191.7444</b>	21%	69%	26%
		<b>Total</b>	<b>654.8017</b>	<b>82.56751</b>	<b>737.3692</b>			
Nov-2019	Employee with paid leave entitlements	Construction	545.1528	34.20189	<b>579.3547</b>			
Nov-2019	Employee without paid leave entitlements	Construction	131.7233	54.68346	<b>186.4067</b>	19%	62%	24%
		<b>Total</b>	<b>676.876</b>	<b>88.88535</b>	<b>765.7614</b>			
Feb-2020	Employee with paid leave entitlements	Construction	558.3505	33.92967	<b>592.2802</b>			
Feb-2020	Employee without paid leave entitlements	Construction	119.9908	52.26745	<b>172.2582</b>	18%	61%	23%
		<b>Total</b>	<b>678.3413</b>	<b>86.19712</b>	<b>764.5385</b>			
May-2020	Employee with paid leave entitlements	Construction	556.1853	38.93184	<b>595.1172</b>			
May-2020	Employee without paid leave entitlements	Construction	119.7276	60.28831	<b>180.0159</b>	18%	61%	23%
		<b>Total</b>	<b>675.9129</b>	<b>99.22015</b>	<b>775.1331</b>			
Aug-2020	Employee with paid leave entitlements	Construction	550.3109	42.37737	<b>592.6882</b>			
Aug-2020	Employee without paid leave entitlements	Construction	95.51908	60.85707	<b>156.3761</b>	15%	59%	21%
		<b>Total</b>	<b>645.8299</b>	<b>103.2344</b>	<b>749.0644</b>			
Nov-2020	Employee with paid leave entitlements	Construction	574.3595	36.41334	<b>610.7728</b>			
Nov-2020	Employee without paid leave entitlements	Construction	107.8179	52.7973	<b>160.6152</b>	16%	59%	21%



		<b>Total</b>	<b>682.1773</b>	<b>89.21064</b>	<b>771.388</b>			
Feb-2021	Employee with paid leave entitlements	Construction	565.2373	33.09976	<b>598.3371</b>			
Feb-2021	Employee without paid leave entitlements	Construction	95.63905	53.85132	<b>149.4904</b>	14%	62%	20%
		<b>Total</b>	<b>660.8764</b>	<b>86.95108</b>	<b>747.8274</b>			
May-2021	Employee with paid leave entitlements	Construction	550.2008	37.89019	<b>588.091</b>			
May-2021	Employee without paid leave entitlements	Construction	109.8353	58.97721	<b>168.8125</b>	17%	61%	22%
		<b>Total</b>	<b>660.0361</b>	<b>96.8674</b>	<b>756.9035</b>			

**Appendix B - ACCR report “Labour Hire & Contracting Across the ASX100”**

## **Appendix C – June 2020 Labour Hire Campaign report**

## Appendix D – Draft Determinations

MA 0000020 PRXXXXXX

### DRAFT DETERMINATION

*Fair Work Act 2009*

cl.48 of Schedule 1 – Variations to modern awards

### Casual terms award review 2021

(AM2021/54)

### BUILDING AND CONSTRUCTION GENERAL ON-SITE AWARD 2020

[MA000020]

Building, metal and civil construction industries

VICE-PRESIDENT HATCHER

DEPUTY PRESIDENT EASTON

COMMISSIONER BISSETT

SYDNEY, .....SEPTEMBER 2021

*Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 — casual amendments — review of modern awards—award varied.*

A. Pursuant to clause 48 of Schedule 1 to the Fair Work Act 2009 and the decision issued by the Full Bench on .....2021 [[2021] FWCFB XXXX], the above award is varied as follows:

1. By inserting in alphabetical order in clause 2 a definition of 'casual employee' as follows:

**casual employee** has the meaning given by section 15A of the Act.

2. By deleting the second row in the table in clause 7.2 (containing in the first column '13.11' and in the second column 'Casual conversion to full-time or part-time employment').

3. By deleting clause 12. Casual employees and replacing it with the following:

#### **12. Casual employees**

12.1.1 A casual employee may be employed by a particular employer on a regular and systematic basis for any period not exceeding six weeks.

12.1.2 The provisions of 12.1.1 shall not apply to a casual employee who has been engaged by a particular employer to perform work on an occasional basis and whose work pattern is not regular and systematic.

- 12.2 A casual employee is entitled to all of the applicable rates and conditions of employment prescribed by this award except annual leave, paid personal/carer's leave, paid community service leave, notice of termination and redundancy benefits.
- 12.3 An employer, when engaging a person for casual employment, must inform the employee, in writing, that the employee is to be employed as a casual, stating by whom the employee is employed, the job to be performed, the classification level, and the relevant rate of pay.
- 12.4 A casual employee is entitled to payment for a minimum of 4 hours' work per engagement, plus the relevant fares and travel allowance and expenses prescribed by clauses 25—Living away from home—distant work and 26—Travelling time entitlements on each occasion they are required to attend work.
- 12.5 A casual employee must be paid a casual loading of 25% for ordinary hours as provided for in this award. The casual loading is paid as compensation for annual leave, personal/carer's leave, community service leave, notice of termination and redundancy benefits and public holidays not worked.
- 12.6 A casual employee required to work overtime or weekend work will be entitled to the relevant penalty rates prescribed by clauses 29—Overtime and 30—Penalty rates, provided that:
- (a) where the relevant penalty rate is 150%, the employee must be paid 175% of the ordinary hourly rate prescribed for the employee's classification; and
  - (b) where the relevant penalty rate is 200%, the employee must be paid 225% of the ordinary hourly rate prescribed for the employee's classification.
- NOTE: The overtime and weekend work penalty rates for casual employees have been calculated by adding the casual loading prescribed by clause 12.5 to the overtime and weekend work penalty rates prescribed by clauses 29.4(a) and 30.1.
- 12.7 A casual employee required to work on a public holiday prescribed by the NES must be paid 275% of the ordinary hourly rate prescribed for the employee's classification.
- 12.8 An employee must not be engaged and re-engaged to avoid any obligation under this award.

4. By deleting clause 13. Casual conversion to full-time or part-time employment

B. This determination takes effect on ... September 2021.

**VICE-PRESIDENT**

**DRAFT DETERMINATION**

*Fair Work Act 2009*

cl.48 of Schedule 1 – Variations to modern awards

**Casual terms award review 2021**

(AM2021/54)

**JOINERY AND BUILDING TRADES AWARD 2020**

[MA000029]

Building, metal and civil construction industries

VICE-PRESIDENT HATCHER

DEPUTY PRESIDENT EASTON

COMMISSIONER BISSETT

SYDNEY, .....SEPTEMBER 2021

*Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Act 2021 — casual amendments — review of modern awards—award varied.*

A. Pursuant to clause 48 of Schedule 1 to the Fair Work Act 2009 and the decision issued by the Full Bench on .....2021 [[2021] FWCFB XXXX], the above award is varied as follows:

1. By inserting in alphabetical order in clause 2 a definition of ‘casual employee’ as follows:  
**casual employee** has the meaning given by section 15A of the Act.
2. By deleting the second row in the table in clause 7.2 (containing in the first column ‘12.10’ and in the second column ‘Casual conversion to full-time or part-time employment’).
3. By deleting clause 11. Casual employees and replacing it with the following:

**11. Casual employees**

**11.1** An employee shall not be employed as a casual employee for more than twelve weeks in any twelve months, provided that such period may, by mutual agreement between the employer and employee (and which is to be recorded in the time and wages record), be extended to meet the following circumstances :

11.1.1 exceptional work demands;

11.1.2 relieving an employee who is on extended leave or workers compensation.

- 11.2** An employer when engaging a person for casual employment must inform the employee in writing that the employee is to be employed as a casual, stating by whom the employee is employed, the job to be performed, the classification level and the relevant rate of pay.
- 11.3** A casual employee must have a minimum daily engagement of 7.6 hours.
- 11.4** A casual employee for working ordinary hours must be paid the **ordinary hourly rate** per hour prescribed in clause [19—Minimum rates](#), for the employee’s classification plus a casual loading of **25%**.
- 11.5** A casual employee required to work overtime or on a public holiday is entitled to the relevant penalty rates prescribed by clauses [16.3](#) and [16.4](#), clause [24—Overtime](#) and clauses [25.5\(a\)](#) and [24.5\(b\)](#), in addition to the **25%** casual loading as follows:

<b>Relevant penalty rate for full-time &amp; part-time employees</b>	<b>Rate for casual employee (inclusive of 25% casual loading)</b>
<b>% of ordinary hourly rate</b>	
150	175
200	225
250	275

- 11.6** Termination of employment is by one hour’s notice or by the payment or forfeiture, as the case may be, of the remainder of the day’s wages or one hour’s pay, whichever amount is greater.
- 11.7** An employee must not be engaged and re-engaged to avoid any obligation under this award.

4. By deleting clause 12. Casual conversion to full-time or part-time employment.

B. This determination takes effect on ... September 2021.

**VICE-PRESIDENT**

**DRAFT DETERMINATION**

*Fair Work Act 2009*

cl.48 of Schedule 1 – Variations to modern awards

**Casual terms award review 2021**

(AM2021/54)

**MOBILE CRANE HIRING AWARD 2020**

[MA000032]

Building, metal and civil construction industries

VICE-PRESIDENT HATCHER

DEPUTY PRESIDENT EASTON

COMMISSIONER BISSETT

SYDNEY, .....SEPTEMBER 2021

*Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Act 2021 — casual amendments — review of modern awards—award varied.*

A. Pursuant to clause 48 of Schedule 1 to the Fair Work Act 2009 and the decision issued by the Full Bench on .....2021 [[2021] FWCFB XXXX], the above award is varied as follows:

1. By inserting in alphabetical order in clause 2 a definition of ‘casual employee’ as follows:

**casual employee** has the meaning given by section 15A of the Act.

2. By deleting the second row in the table in clause 7.2 (containing in the first column ‘9.7(g)’ and in the second column ‘Casual conversion to full-time or part-time employment’).

3. By deleting clause 9. Casual employees and replacing it with the following:

**9. Casual employees**

**9.1(a)** Engagement as a casual will not continue for a continuous period beyond four (4) weeks from the date of engagement. Provided that by agreement, between the employee and the employer, the period of engagement may be extended up to a period not exceeding 13 weeks where the casual is replacing an employee who is absent from work due to any type of leave prescribed by the Award, long service leave, unpaid leave, an injury for which worker's compensation benefits are being



paid, or to meet specific work projects. Provided further that such agreement be recorded in the time and wages record.

**9.1(b)** Arrangements by employers or employees designed to deliberately break the continuity of casual employment will not be accepted as breaking such continuity.

**9.2** A casual employee will be entitled to all of the applicable rates and conditions of employment prescribed by this award except annual leave, paid personal leave, paid parental leave, paid community service leave, public holidays, notice of termination and redundancy.

**9.3** An employer when engaging a person for casual employment must inform the employee in writing that the employee is to be employed as a casual, stating:

(a) by whom the employee is employed;

(b) the job to be performed;

(c) the classification level; and

(d) the relevant rate of pay.

**9.4** In addition to the rate appropriate for the type of work, a casual employee must be paid a **25%** loading of the ordinary hourly rate.

**9.5** A casual employee required to work overtime, or on a Saturday, or on a Sunday, or on a public holiday, will be entitled to the relevant penalty rates prescribed by clause [22—Overtime](#), in addition to the **25%** casual loading as follows:

<b>Relevant penalty for full-time &amp; part-time employees</b>	<b>Rate for casual employee (inclusive of 25% casual loading)</b>
<b>% of ordinary hourly rate</b>	
150	175
200	225
250	275

**9.6** Casual employees will be engaged for a minimum period of 4 hours per day.

**9.7** An employee must not be engaged and re-engaged to avoid any obligation under this award.

B. This determination takes effect on ... September 2021.

**VICE-PRESIDENT**

# Labour Hire & Contracting Across the ASX100

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Dr Katie Hepworth

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May 12, 2020

[accr.org.au](http://accr.org.au)

 ACCR



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## **ABOUT ACCR**

The Australasian Centre for Corporate Responsibility (ACCR) is a research and shareholder advocacy organisation. We publish research and analysis on the environmental, social and governance practices of corporate Australia. We have a small portfolio of shares that we hold for the purpose of engaging with companies, including through the filing of shareholder resolutions. ACCR is philanthropically funded, not-for-profit, and independent.

ACCR's workers' rights program has four streams: decent worker, worker-driven social responsibility, safety at work, and climate equity.

## **ABOUT THIS REPORT**

This report has been prepared by Dr Katie Hepworth, ACCR's Director of Workers' Rights, with additional support from the ACCR research team. Dr Hepworth has worked extensively on workers' rights in global supply chains across a range of academic, international development and trade union roles.

ACCR would like to acknowledge the feedback from academics, companies, investors and trade unions at various stages of the research and preparation of the report.

## FORWARD

The COVID-19 crisis—and the accompanying recession—has both illuminated and intensified divisions in the Australian workforce.

Workers in essential sectors such as health care, cleaning, transport, logistics, education, energy and resources are being relied upon to produce and provide for us all in extreme and often dangerous circumstances. Many workers on the ‘front lines’ are being poorly paid or underpaid, and lack access to adequate health and safety equipment (PPE).

Many are experiencing an intensification of their workloads, but without being compensated for it. Many of these workers are employed in insecure and precarious situations.

They lack job security and have no access to paid sick leave. There have already been numerous reports in Australia and globally of workers unable to properly self-isolate, due to a lack of wage and welfare payments or other entitlements, along with reports of workers feeling unable to raise virus-related OHS issues due to the precarious nature of their employment.

Millions of other workers, of course, have lost jobs or shifts.

Australia’s labour hire workforce is a crucial part of this picture. Labour hire and contracting is no longer just used to manage short-term and seasonal fluctuations. As this report highlights, in some sectors, labour hire has been used to substitute large sections of the permanent workforce.

In producing this report, ACCR set out to investigate the particular risks to companies - and investors - of this workforce transformation. Many of these risks have been acutely highlighted by the pandemic.

Suppliers, contractors and labour hire workers are—in most cases—acutely exposed to the health and economic impacts of the pandemic. These indirect workforces are exposed to economic hardship through the cancellation of supplier contracts in industries affected by shutdowns. Labour hire and contracting workers face greater health risks due to their exclusion from pandemic sick leave provisions. In addition, temporary migrant workers face particular vulnerabilities—including heightened risk of falling into slavery-like conditions.

COVID-19 is a whole-of-economy crisis requiring a whole-of-economy response. While governments are leading with stimulus, there is a role for investors in ensuring companies adhere to strong social, labour rights and human rights standards.

The pandemic is an opportunity for investors to bolster their engagement on the “S” in ESG. By advocating for an economic recovery based on decent, safe and secure work, investors can ensure that we “build back better” after the crisis.

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# Executive Summary

**Over the last three decades, one of the most profound changes to the structuring of the Australian workforce has been the expansion of labour hire employment arrangements, particularly in specific industries and sectors. Originally used primarily to manage short-term or seasonal fluctuations in demand, in some sectors labour hire now constitutes a significant proportion—or even the majority—of the regular workforce.**

Labour hire is broadly defined as a triangular employment arrangement involving three parties: a worker; a host company; and an intermediary, such as a labour hire agency. In the ‘standard’ form of this triangular arrangement, the host company contracts an intermediary labour hire agency to provide them with labour. The labour hire agency then contracts a worker to provide that labour, and is responsible for paying the worker.

Fundamentally, labour hire arrangements split contractual and control relationships: the labour hire worker has a direct contractual relationship with the labour hire agency, but it is the host company who oversees their day-to-day work. The introduction of sub-contracting arrangements can further complicate the contractual and control relationships.

Employers may choose to use labour hire workers for a number of reasons, including:

- to reduce costs

- to adapt to volatile labour markets
- to outsource particular segments of their operations (e.g. recruitment and HR)
- to gain access to specialised workforces
- to undermine or circumvent union presence
- to avoid employer obligations
- to exert greater control over a workforce
- to shift risks and liabilities away from an employer.<sup>1</sup>

However, in doing so, they may also increase their exposure to a range of workforce, business and operational risks.

The report describes the key workforce and operational risks associated with triangular working arrangements, analyses how ASX100 companies in selected sectors are exposed to these risks, and how they are reporting on their use of these arrangements.

It focuses on three key sectors: mining, construction, and commercial cleaning.<sup>2</sup> As large scale property owners have some of the highest exposure to cleaning related business risks (including modern slavery), the cleaning section focuses on both cleaning providers and property services companies. The report has also highlighted risks in an emerging area of the construction sector: large-scale solar installation.

These sectors were chosen because they demonstrated high rates of

labour hire, involve significant non-compliance by labour hire providers with employment and other legislation, and/or due to the severity of risks in a sector.

## COMPANIES REVIEWED WERE:

AWS	<b>Alumina</b>
BHP	<b>BHP</b>
CHC	<b>Charter Hall</b>
CIM	<b>CIMIC</b>
DXS	<b>Dexus</b>
DOW	<b>Downer</b>
EVN	<b>Evolution Mining</b>
FMG	<b>Fortescue</b>
GMC	<b>Goodman</b>
GPT	<b>GPT</b>
ILU	<b>Iluka</b>
LLC	<b>Lendlease</b>
MGR	<b>Mirvac</b>
NCM	<b>Newcrest</b>
NST	<b>Northern Star</b>
RIO	<b>Rio Tinto</b>
SCG	<b>Scentre</b>
S32	<b>South 32</b>
SGP	<b>Stockland</b>
VCX	<b>Vicinity</b>
WHC	<b>Whitehaven</b>

While this report focuses on publicly listed companies within selected “high-risk” sectors, the risks discussed in the report are common to public companies across the index and to private companies which engage labour hire services.

1. R Hall, *Labour Hire in Australia: Motivation, Dynamics and Prospects*, Sydney, University of Sydney, April 2002.

2. The oil and gas sector was originally included in this report, as this sector has also seen a dramatic expansion of the labour hire industry in recent years. However, due to rapid and significant changes in the sector due to COVID-19, it has been excluded from the report, and will be released as a follow-up briefing paper later in 2020.

## KEY RISKS

While there are a number of reasons why companies may choose to use labour hire, the triangular nature of these arrangements also introduces significant risks, including:

- Poorer Occupational Health and Safety (OHS) outcomes
- Increased possibility of involvement in modern slavery, labour exploitation and wage theft
- Lower levels of worker engagement and loyalty
- Loss of human and intellectual capital
- Reduced visibility of workforce composition, including diversity
- Reduced workforce development, due to less access to training, skills acquisition

COVID-19 has illustrated specific risks associated with the fissuring of the workforce and the outsourcing of responsibility from host companies to labour hire agencies and contractors. For example, the failure to extend sick leave and other entitlements to this segment of the workforce can put the whole workforce at risk - including direct employees. There have been numerous examples in Australia and globally of workers unable to properly self-isolate, due to a lack of wage and welfare payments or other entitlements, along with reports of workers unable to raise virus-related OHS issues due to the precarious nature of their employment.

Investor engagement on these risks is currently being hampered by poor company reporting on workforce issues. Although labour hire workers make up a substantial proportion of the workforce in certain sectors, most companies only report on their 'direct' workforce. Generally speaking, company reporting across the ASX is insufficient to allow investors to engage with companies about their

employment models and overall workforce strategy.

**In response, ACCR has developed a reporting framework, to guide companies in providing investors with reliable material and materiality-based disclosures, and to support investors to engage with companies on their management and performance in relation to these risks (see Section Five, pp. 35-37).**

## KEY FINDINGS

ACCR analysed the workforce reporting of 19 "host companies" in the mining, construction and property service sectors, with a focus on disclosures regarding the labour hire and contract workforce. This analysis found:

- **Company disclosure on labour hire and/or contractors is very limited.** Very few companies publicly report any information about their use of labour hire and contractors. Of the companies analysed, 42% made no material disclosure about their labour hire and/or contracting workforce in annual reporting documents. Only one company provided data relating to the size of their labour hire and/or contracting workforce in all operations (in Australia and, if applicable, globally), as well as disaggregated data on health and safety outcomes for their labour hire and/or contracting workforce specifically.
- **Most companies do not define 'labour hire' and/or 'contractor' as terms in their reporting.** Only two companies define these terms, and their definitions capture different sections of their respective workforces. Without these definitions, it is impossible to tell whether company disclosures reflect the entirety

of the labour hire/contractor workforce.

- **Most companies do not report on the size of their labour hire and/or contractor workforce, in either their Australian or global operations.** All companies analysed have operations in Australia, but only 42% reported the total number and/or percentage of contractors and/or labour hire in these operations. Of the companies analysed with global operations, 64% reported the total number and/or percentage of contractors and/or labour hire in their global operations.
- **While most companies report some numerical health and safety data, very few disaggregate this for their contractor and/or labour hire workforce.** 84% of companies reported at least some numerical information on health and safety outcomes. However, only 26% companies provide any safety data disaggregated by direct employees and contractors.

This analysis is presented in Section 3.

### Sectors



Mining



Commercial Construction



Contract Services in Construction and Mining



Property Services/  
Commercial Cleaning Services



Emerging: Large Scale Solar Installation



## STRUCTURE OF THE REPORT

This report is divided into five sections:

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**01**      **Section one** provides a background on the use of labour hire in Australia, outlines the diverse range of triangular employment arrangements that are broadly considered to be labour hire, and identifies key sectors that are significantly exposed to labour hire related risks.

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**02**      **Section two** outlines the range of business and operational risks associated with the use of labour hire.

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**03**      **Section three** presents the results of ACCR's analysis of company reporting on labour hire.

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**04**      **Section four** details the specific risks in each of the high-risk sectors, using case studies from ASX100 companies to highlight the relevance of these risks to investors. Sectors featured in this section are: mining, construction, commercial cleaning, and the emerging sector of large-scale solar farm installation.

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**05**      **Section five** is a guide for improved reporting and engagement on this issue, for companies and investors.

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# Methodology

**This report identifies key workforce risks associated with the use of labour hire. It combines analysis of academic literature, government inquiries, media reporting and company reporting on labour hire in Australia.**

To identify key workforce risks related to labour hire working arrangements, ACCR completed a desktop analysis of state and federal government inquiries<sup>3</sup> covering labour hire matters over the last five years, and an academic literature review on the use of labour hire in Australia. Additional information was then gathered from media reportage, statements by the Fair Work Ombudsman, court documents, and enterprise agreements.

This report focuses on three industry sectors where labour hire is particularly prevalent, or where the risks associated with the use of labour hire are considerable: **mining, construction, and commercial cleaning**. The report has also highlighted risks in an emerging area of the construction sector that evidences specific risks: **large-scale solar installation**. In identifying the sectors to be analysed in this report, ACCR took into account the rates of labour hire in sector, non-compliance by labour hire providers with employment and other relevant legislation, and the severity of risks in each sector.

Sectors where there are no ASX100 host companies were excluded from

this analysis (e.g. meat processing and horticulture). In both these sectors, ASX100 companies are exposed to labour hire related risks through their supply chains, and have a degree of control of their suppliers to address these risks. However, it was determined that they were beyond the scope of this report.

To identify the relevant subset of ASX100 companies for each sector, ACCR used both IBISWorld and Global Industry Classification Standard (GICS) industry codes to draw from a list of ASX100 companies (see Appendix). The ASX100 list was current as of 30 December 2019.

ACCR reviewed relevant company documents—including Annual Reports, Sustainability Reports, Corporate Governance statements or appendixes, and/or ESG Analyst toolkits. Company documents were reviewed for the fiscal year ending 30 June 2019 or the calendar year ending 30 December 2018, depending on a company’s reporting cycle. The cut-off date for information to be included in our analysis was 30 December 2019.

Case studies have also been used to illustrate labour hire related risks in each sector. The case studies are illustrative only and are not intended to provide a comprehensive picture of all labour hire related risks in every sector. Case study information was prepared by reviewing government inquiries, media reportage, and materials from corporate regulatory bodies.

In preparing this report, ACCR also consulted with companies, unions, investors, and government agencies.

## NOTE ON TERMINOLOGY

ACCR’s desktop review identified a number of terms to describe triangular employment relationships, including: labour hire, contingent workforce, contractors, and particularly in the case of the property services and cleaning sectors, suppliers. These terms were often used interchangeably, and unless defined, provide limited information regarding the nature of the employment relationship.

As discussed in Section One of this report, each of these terms may encompass quite different relationships between the host company, direct employer and the individual worker. These differences often relate to whether a worker is required to perform their work onsite or offsite, and whether their work is required daily or almost daily for the routine operation of that site.

In this report, we use the term “labour hire” and “contractor” interchangeably to refer to all types of triangular employment arrangements, unless otherwise specified for clarity. We note that “contractors” may be used to refer to individual workers and to companies providing contract services.

3. Since 2015, several state and federal government inquiries have examined the dynamics of labour hire and other third party contracting arrangements in Australia, or discussed labour hire as a dimension of other industrial relations matters, such as wage theft. These inquiries include: Inquiry into the Labour Hire Industry and Insecure Work, Victoria (2015 - 2016); Inquiry into the Practices of the Labour Hire Industry in Queensland (2015 - 2016); Black Economy Taskforce (2016 - 2017); Corporate Avoidance of the Fair Work Act (2016 - 2017); Inquiry into the Extent, Nature and Consequence of Insecure Work in the ACT (2017); Select Committee on the Future of Work and Workers (2017 - 2018); Inquiry into Wage Theft in Queensland (2018); Migrant Workers’ Taskforce (2016 - 2019).

## GLOBAL REPORTING INDEX (GRI)

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### Employees

The GRI (2018, p.8) defines an employee as “an individual who is in an employment relationship with the organization, according to national law or its application.”

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### Workers

The GRI (2018, p.22) defines a worker as “a person that performs work.” It specifies:

1. The term ‘**workers**’ includes, but is not limited to, **employees**.
2. Further examples of workers include interns, apprentices, self-employed persons, and persons working for organizations other than the reporting organization, e.g., for suppliers.
3. In the context of the GRI Standards, in some cases it is specified whether a particular subset of workers is to be used.

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### Contractors

The GRI (2018, p.19) considers contractors to be a **subset of suppliers**, specifically: “Persons or organizations working onsite or offsite on behalf of an organization. A contractor can contract their own workers directly, or contract subcontractors or independent contractors.” Using this definition, **contractors could also include labour hire providers and/or agencies**.

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### Sub-contractors

Persons or organizations working onsite or offsite on behalf of an organization that have a direct contractual relationship with a contractor or sub-contractor, but not necessarily with the organization. A sub-contractor can contract their own workers directly or contract independent contractors.

## BACKGROUND

# Labour Hire In Australia

### WHAT IS LABOUR HIRE?

**Labour hire is broadly defined as a “triangular employment arrangement”, involving three parties: a worker supplying labour; a host company or entity; and an intermediary, such as a labour hire agency (see Figure 1).**

In the ‘standard’ form of this arrangement, the host company contracts an intermediary labour hire agency to provide them with labour. The labour hire agency then contracts a worker to provide that labour and is responsible for paying the worker.

Fundamentally, labour hire arrangements split contractual and control relationships: the labour hire worker has a direct contractual relationship with the labour hire agency, but it is the host company who oversees their day-to-day work. The introduction of sub-contracting arrangements can further complicate these contractual and control relationships.

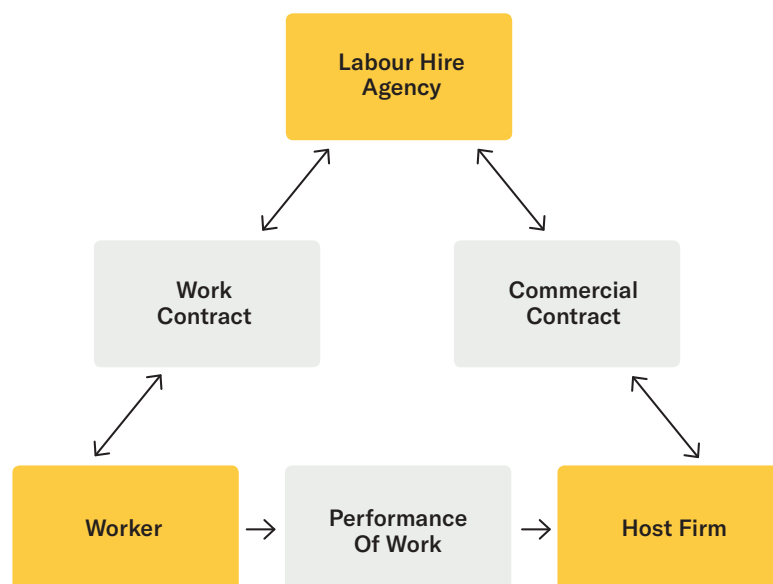
There are considerable variations in the contractual and control relationships that are broadly defined as labour hire, including:

- Labour hire workers filling short term vacancies for a host
- Labour hire workers performing seasonal work for a host on a short-term basis

- Labour hire workers performing long term work for a host, alongside permanent direct employees of the host
- The staffing of a host’s entire business, or a specific business unit, with labour hire workers
- A host contracting out a particular business function (e.g. maintenance) to a labour hire agency<sup>4</sup>

Each of these employment arrangements represents diverse risks to the company, and may have different impacts on the host company’s long-term value. Investors engaging companies on their use of labour hire must seek to understand the types of employment arrangements used by a company, and their potential impact on a company’s overall value creation.

FIGURE 1. STANDARD LABOUR HIRE ARRANGEMENT



4. Department of Premier and Cabinet, *Inquiry into the Labour Hire Industry and Insecure Work (2015 - 2016)*, Melbourne, Victorian Department of Premier and Cabinet, 2016, p. 52, <<https://bit.ly/2UN0zRo>> [accessed 6 April 2020].

## CONTEMPORARY LABOUR HIRE ARRANGEMENTS IN AUSTRALIA

Triangular or intermediary working arrangements are not a recent innovation and have existed since at least the 1950s.<sup>5</sup> However, the use of labour hire has grown rapidly since the 1990s. This growth has been accompanied by a transformation of the role of labour hire employment in the labour market, from a model that predominantly involved the use of “short term, supplementary or ‘top up’ labour” to one that “increasingly takes in a variety of work arrangements which may extend through to longer-term supplementation of the workforce or substitution of permanent workers”.<sup>6</sup>

There are a number of reasons why employers may choose to use labour hire workers: to reduce costs, to adapt to volatile labour markets, for specialisation, to undermine or circumvent union presence, to avoid employer obligations, to exert greater control over a workforce, or to shift risks and liabilities away from an employer.<sup>7</sup>

The contemporary labour hire industry includes many different types of labour hire agencies, spanning from large, multinational corporations with thousands of staff (e.g. CIMIC), through medium-sized and mid-tier labour hire providers, to operators consisting of an individual (or a few individuals) “with a van and mobile phone”.<sup>8</sup> Different types of labour hire agencies are often specific to individual sectors and represent a diverse range of risks to host companies and investors.

## THE EXTENT OF LABOUR HIRE IN AUSTRALIA

It is difficult to ascertain the exact size of the labour hire workforce in Australia. Researchers argue that existing datasets may significantly under-report numbers of labour hire workers in Australia for various reasons, including confusion on the part of labour hire workers regarding their employment relationship, and whether they are “being paid by a labour hire firm or the organisation they are on-hired to”.<sup>9</sup>

The use of labour hire varies considerably between different sectors. According to ABS 2019 data, the sectors with the highest proportion of non-employees (both independent contractors and other business operators) were agriculture, forestry and fishing (56%) and construction (39%), while the sectors with the highest percentage of independent contractors were construction (27%), administration and support services (17%) and professional, scientific and technical services (14%).<sup>10</sup>

Furthermore, particular types of labour hire arrangements are more prevalent in particular sectors. For example, the Queensland Mining Inspectorate (QMI) reports that 50% of the QLD mining workforce are labour hire, with some mining operations being staffed almost entirely by labour hire workers (see Section Four).

5. Hall, p. 4.

6. *Inquiry into the Practices of the Labour Hire Industry in Queensland*, Brisbane, Queensland Government, 2016, p. 9, <<https://bit.ly/34dbjvm>> [accessed 6 April 2020].

7. Hall.

8. Department of Premier and Cabinet, p. 52.

9. G Gilfillan, *Trends in Use of Non-standard Forms of Employment*, Canberra, Parliament of Australia, 18 December 2018, <<https://bit.ly/3e0vukU>>; see also Hall.

10. ABS, ‘6333.0 - Characteristics of Employment, Australia, August 2019, Table 10 Form of employment by industry, occupation and educational qualification’, ABS, 2019, <<https://bit.ly/3cn4Txg>> [accessed 19 December 2019].

## LABOUR HIRE

# Business, Operational and Workforce Risks

**This section draws on a range of academic literature, government inquiries and reports to outline the most significant risks associated with the growth of labour hire.**

Key risks include:

- Poorer Occupational Health and Safety (OHS) outcomes
- Increased possibility of involvement in modern slavery, labour exploitation and wage theft
- Loss of human and intellectual capital
- Reduced visibility of workforce composition, including diversity
- Reduced workforce development, due to less access to training, skills acquisition

ACCR's analysis of company documents found that insufficient and/or inconsistent reporting also limited investors' oversight of workforce diversity.

Given these risks, investors should engage companies on their whole

workforce, including both direct employees and labour hire or contract workers, in order to make judgements on the sustainability and appropriateness of their employment model.<sup>11</sup>

### OCCUPATIONAL HEALTH AND SAFETY (OHS)

The International Labour Organisation (ILO) defines OHS as: "the promotion and maintenance of the highest degree of physical, mental and social well-being of workers in all occupations by preventing departures from health, controlling risks and the adaptation of work to people, and people to their jobs".<sup>12</sup>

A poor OHS record can erode company and shareholder value. It can lead to increased compensation premiums, decreased productivity and delays,<sup>13</sup> absenteeism, higher health care costs, potential lawsuits, negative publicity, reputational damage, and a loss of investor and consumer trust.<sup>14</sup> It may even decrease access to external capital.<sup>15</sup>

A growing body of research highlights the occupational health and safety risks associated with precarious workplace arrangements, including labour hire.<sup>16</sup> Studies have shown that labour hire workers face greater health and safety risks than other workers undertaking equivalent work.<sup>17</sup> Significantly, "all studies of labour hire workers and occupational health and safety in Australia and overseas have found that labour hire employees are more likely to be injured at work, compared to direct hire workers in like occupations".<sup>18</sup>

The increased vulnerability of labour hire workers to occupational injuries, accidents and poor health is due to a range of interrelated factors affecting contingent workers, including:

- Contested or disarticulated responsibility for health and safety management between host companies and labour hire agencies.<sup>19</sup>
- Labour hire workers receiving poor induction, training and/or having reduced familiarity of the rules governing OHS on each job site, as

11. NAPF, *Where is the workforce in corporate reporting?*, London, NAPF, 2015, p. 14, <<https://bit.ly/2ReWcfM>> [accessed 6 April 2020].

12. V Forastieri, *Improving health in the workplace: ILO's framework for action*, Geneva, ILO, 2014, <<https://bit.ly/34eOs2x>> [accessed 15 January 2020].

13. For example, in November 2019, the Queensland Mining Inspectorate (QMI) stated that it had shut down mines on 58 separate occasions in the previous year due to safety concerns (Queensland Department of Natural Resources 2019).

14. N Khushrushahi, *Investor guidance on occupational health and safety in Canada: An overview of corporate best practices*, Toronto, SHARE Canada, 2012, <<https://bit.ly/34cO8BD>> [accessed 6 April 2020]; see also ACSI, *The Future of Health and Safety Reporting: A Framework for Companies*, Melbourne, ACSI, 2019, <<https://bit.ly/2V5DqbR>> [accessed 6 April 2020].

15. E Ekevell, B Gillespie & L Riege, *Improving safety performance in the Australian mining industry through enhanced reporting*, PWC, 2008, <<https://pwc.to/2xXs6Xb>> [accessed 6 April 2020].

16. see C Gallagher, E Underhill & M Rimmer, 'Occupational safety and health management systems in Australia: barriers to success', in *Policy and Practice in Health and Safety*, vol. 1, 2003, 67–81; M Quinlan et al., 'Supply Chains and the Manufacture of Precarious Work: The Safety Implications of Outsourcing/ Offshoring Heavy Aircraft Maintenance', in *E-Journal of International and Comparative Labour Studies*, vol. 5, 2016, 1–30.

17. R Johnstone & M Quinlan, 'The OHS regulatory challenges posed by agency workers: evidence from Australia', in *Employee Relations*, vol. 28, 2006, 273–289.

18. E Underhill, *Response to Workplace Relations Framework Draft Report*, 2015, <<https://bit.ly/2ULUi8z>> [accessed 6 April 2020].

19. M Quinlan, R Johnstone & M McNamara, 'Australian Health and Safety Inspectors' Perceptions and Actions in Relation to Changed Work Arrangements', in *The Journal of Industrial Relations*, Bohle, vol. 51, 2009, 557–573.



compared to direct hire workers.<sup>20</sup>

- Labour hire workers are often reluctant or unable to raise OHS issues, due to their vulnerability to termination.<sup>21</sup>
- Additional complexities for the implementation of effective Occupational Health and Safety Management Systems (OHSMS), imposed by temporary and precarious forms of employment.<sup>22</sup>
- Occupational health and safety risks can be more difficult to monitor and identify, particularly for workplace inspectors.<sup>23</sup>

### MODERN SLAVERY, LABOUR EXPLOITATION AND WAGE THEFT

Wage theft and modern slavery anywhere in a company’s value chains can lead to negative publicity, public campaigns, and a loss of consumer confidence that can have a negative impact on shareholder value. This can be seen from growing public attention and even boycotts by consumers in response to several high profile “wage theft” cases.

There are an estimated 15,000 people living in slavery-like conditions in Australia. In high-risk sectors, like

commercial cleaning, non-compliance with labour law is endemic and often severe, and is linked to a range of factors including:

- A predominantly migrant workforce, often with low English language competency and knowledge of Australian workplace laws, and precarious—or no—visa rights
- Significant downward price pressures by lead companies, particularly in sectors where lead companies have significant market power
- **Complex and informal sub-contracting and labour hire arrangements**, often involving sophisticated pyramid structures and multiple sub-contracting arrangements
- **Low barriers to entry for labour hire providers**<sup>28</sup>

Modern slavery exists on a spectrum of labour exploitation and abuse. Wage theft and excessive working hours can quickly deteriorate into modern slavery through threats and coercion, with some workers particularly vulnerable to falling into slavery-like conditions.<sup>29</sup>

A number of legal and other compliance initiatives have emerged in recent years, in order to address modern slavery and labour exploitation risks in supply chains,

### Over-representation of labour hire workers in OHS incidents

- The 2015 Victorian Inquiry into the Labour Hire Industry and Insecure Work found higher injury rates for labour hire workers than for direct employees.<sup>24</sup>
- ACSI found that contractors were significantly overrepresented in workplace fatalities, making up 70% of all reported fatalities across the ASX200 in 2018. Note: that labour hire workers may be included in these figures.<sup>25</sup>
- Since 2001, contractors on QLD mines have been over-represented in fatalities involving vehicle interaction and tyre management, relative to the proportion of the workforce they represent.<sup>26</sup>
- Labour hire workers represented 64% of serious accidents in Queensland coal mines in 2018/19 and 67% in 2017/18,<sup>27</sup> despite only making up approximately 50% of the workforce.

20 M Quinlan & P Bohle, ‘Over-Stretched and Unreciprocated Commitment: Reviewing Research on the OHS Effects of Downsizing and Job Insecurity’, in *International Journal of Health Services*, vol. 39, 2009, 1–44.

21 E Underhill & M Quinlan, ‘Beyond statutory enforcement - alternative approaches to improving OSH in the temporary agency sector’, in *Policy and Practice in Health and Safety*, vol. 9, 2011, 109–131 (pp. 109–111).

22 Gallagher, Underhill and Rimmer, 67–81 (p. 78).

23 Quinlan, Johnstone and McNamara, 557–573.

24 Department of Premier and Cabinet, p. 22.

25 ACSI, *The Future of Health and Safety Reporting: A Framework for Companies*, p. 15.

26 State of Queensland, *Queensland Mines and Quarries Safety Performance and Health Report 2016/2017*, Brisbane, State of Queensland, 2017, <<https://bit.ly/2RcuiRp>> [accessed 6 April 2020].

27 State of Queensland, *Queensland Mines and Quarries Safety Performance and Health Report 2018/2019*, Brisbane, State of Queensland, 2019, p. 36, <<https://bit.ly/2XoQ1Kb>> [accessed 6 April 2020].

28 Commonwealth of Australia, *Report of the Migrant Workers Taskforce*, Canberra, Commonwealth of Australia, 2019, <<https://bit.ly/39Sjs5a>> [accessed 6 April 2020].

29 J Nolan & M Boersma, *Addressing Modern Slavery*, Sydney, UNSW Press, 2019, p. 10.

and to prevent lead companies from “outsourc[ing] their non-compliance”.<sup>30</sup> These include:

- The Modern Slavery Act
- The Fair Work Ombudsman (FWO) using accessorial liability provisions and proactive compliance agreements to hold the top of the chain accountable
- Labour hire licensing schemes, in different state jurisdictions
- Multi-stakeholder agreements that include lead companies, suppliers, trade unions, and which include an active role for workers

### The Modern Slavery Act

The Commonwealth Modern Slavery Act (MSA) came into effect on 1 January 2019. The MSA requires Australian businesses with a revenue of at least AU\$100 million to submit annual reports on the risks of modern slavery to their supply chains and operations to a central, public register. For companies reporting on a financial year, their first reporting period will end on 30 June 2020, and they will be required to report by 31 December 2020.<sup>31</sup>

There are seven mandatory criteria that must be included in a reporting entity’s modern slavery statement. These include a description of the risks in the entity’s operations and supply chains, the actions taken by the entity, including any due diligence and reporting processes, and how the

company assesses the actions they take.<sup>32</sup> ACSI has produced detailed guidance for companies and investors on the Act and its implications for reporting and engagement.<sup>33</sup>

### Accessorial Liability and Proactive Compliance Agreements

The FWO has paid increasing attention to the responsibility of lead companies in a supply chain for labour rights violations by their suppliers and labour hire providers. They have two mechanisms at their disposal:

**1. Accessorial Liability:** this allows parties other than the direct employer to be considered an accessory to any contraventions of workplace laws, and be held liable for any penalties and compensation that stem from this contravention.<sup>34</sup> The Fair Work Act includes accessorial liability provisions. These were increased via the Protecting Vulnerable Workers Act in 2017.

**2. Proactive Compliance Deeds:** these are legally binding enforcement mechanisms between the FWO and a company or companies accused of non-compliance with the Fair Work Act. Companies at the top of the supply chain and/or host companies can be parties to a deed if the FWO believes they have legal, ethical or moral responsibility to promote compliance, due to their:

- significant power over suppliers and/or contractors, or

- a degree of oversight over their supply chain, and therefore a legal, ethical or moral responsibility to promote compliance.<sup>35</sup>

### Labour hire licensing schemes

Labour hire licensing schemes were recently established in Victoria, Queensland and South Australia to increase barriers to entry for labour hire providers, and reduce rates of non-compliance. The schemes include significant penalties for providers who operate without a licence and for host companies who utilise the services of unlicensed labour hire providers. Each state-based scheme defines labour hire services, and outlines who or what is considered a labour hire provider.<sup>36</sup> All three schemes capture a variety of intermediary working arrangements, including different types of service providers such as contract cleaners.

### Multi-stakeholder agreementss

Reviews of workplace compliance initiatives in global supply chains have found that voluntary self-regulation and “private compliance initiatives” (codes of conduct, auditing, etc.) are insufficient to effectively manage business and operational risks from labour violations in supply chains.<sup>37</sup> Research has found that workplace audits alone are insufficient for identifying and understanding workplace issues such as harassment, wage theft, excessive overtime, and freedom of association violations, and

30. S Kaine & M Rawling, ‘Strategic “Co-enforcement” in Supply Chains: The Case of the Cleaning Accountability Framework’, in *Australian Journal of Labour Law*, 2019, 305–331 (p. 329).

31. Parliament of Australia, ‘Modern Slavery Bill 2018: Explanatory Memorandum’, Parliament of Australia, 2018, <<https://bit.ly/3aYztN3>> [accessed 6 April 2020].

32. Department of Home Affairs, *Commonwealth Modern Slavery Act 2018: Guidance for reporting entities*, , 2018, p. 96, <<https://bit.ly/2WlWUd0>> [accessed 5 April 2020].

33. ACSI, *Modern Slavery, risks, rights and responsibilities*, Melbourne, ACSI, 2019, <<https://bit.ly/3bVUmIz>> [accessed 6 April 2020].

34. Lander & Rogers Lawyers, ‘Accessorial Liability – where do your responsibilities begin and end?’, 2014, <<https://bit.ly/2UPE7ax>> [accessed 15 January 2020].

35. FWO, ‘Compliance partnerships’, in *Fair Work Ombudsman*, 2020, <<https://bit.ly/2yGsUQP>> [accessed 7 April 2020].

36. See: The Queensland *Labour Hire Licensing Act 2017*, section 7 [<https://bit.ly/2wIqXIM>]; The South Australia Labour Hire Licensing Act 2017, section 7 [<https://bit.ly/2RflhHv>]; The Victoria Labour Hire Licensing Act 2018 (Vic.), section 7 [<https://bit.ly/2yE2KhE>].

37. ILO (2016). *Workplace Compliance in Global Supply Chains*, [https://www.ilo.org/sector/Resources/publications/WCMS\\_540914/lang--en/index.htm](https://www.ilo.org/sector/Resources/publications/WCMS_540914/lang--en/index.htm), pp.10 – 15; Ethical Trading Initiative (2004) “Putting Ethics to Work”, <http://www.ethicaltrade.org/Z/lib/annrep/2004/en/index.shtml>; World Bank (2003) “Strengthening Implementation of Corporate Social Responsibility in Global Supply Chains”, [http://siteresources.worldbank.org/INTPSD/Resources/CSR/Strengthening\\_Implementatio.pdf](http://siteresources.worldbank.org/INTPSD/Resources/CSR/Strengthening_Implementatio.pdf).



that auditing can capture “distort[ed]... realities of a workplace”.<sup>38</sup> Audits are also limited in identifying modern slavery.<sup>39</sup>

By contrast, multi-stakeholder initiatives, which actively involve workers and their representatives in compliance measures, have been shown to be effective in addressing labour risks.<sup>40</sup> These initiatives often support workers to raise workplace issues early, allowing businesses to resolve them “before they escalate into more lengthy and complex disputes that may come at a high cost”.<sup>41</sup>

An example of a multi-stakeholder agreement that includes an active role for workers, the Cleaning Accountability Framework, is discussed in Section Four (p. 31).

## **“TWO-TIER” WORKFORCES AND THE LOSS OF HUMAN CAPITAL**

The use of labour hire can result in the creation of a “two-tier” workforce, where labour hire workers do not receive the same wages and conditions as the directly employed workforce. Conditions that are not extended to the labour hire workforce may include holiday leave, access to training, security of employment, and even wage rates.

Under Australian law, enterprise agreements that cover direct employees do not apply to the labour hire or contractor workforce. These workers must negotiate a separate agreement with their direct employer. While host companies can choose

to extend the same conditions to labour hire workers and contractors, in practice this is rarely done. As discussed in detail in the mining section, labour hire workers can earn as much as 30% less than permanent employees working side-by-side in the same job on the same site.

A two-tier workforce may have negative, material impacts on a company. It may impact on:

...the ability to generate a positive culture throughout an organisation. Subsequently, this risks having a damaging impact upon staff morale, potentially resulting in higher attrition rates and thus higher recruitment costs for employers.<sup>42</sup>

If the creation of a two-tier workforce undermines a company’s ability to retain human and intellectual capital, any immediate cost-benefits that stem from this structure may be outweighed by the broader impacts to productivity, and costs associated with recruitment and retraining, with impacts on long-term value creation.<sup>43</sup>

Furthermore, where equivalent training is not extended to the labour hire workforce, this will result in long-term deskilling of the overall workforce—particularly in sectors such as mining, that require a relatively skilled workforce and where labour hire makes up a majority of the workforce. Additionally, where companies choose to engage workers on short-term contracts (either through labour hire, or individual contracts) to carry out specialised or skilled work, this can erode or

undermine the skills development of the company’s permanent workforce. When particular skills are siphoned away from the permanent workforce in this manner, a company’s workforce loses opportunities to upskill, and to progress into higher skilled roles.

### Labour hire, sick leave and COVID-19

24.4% of Australian employees have no access to paid sick leave as they are employed on a casual basis. 37% of self-employed people also have no access to paid sick leave. It is argued that casuals receive a loading to compensate them for their lack of leave. However, analysis finds that casual workers in many industries routinely earn 30% less than permanently employed workers.<sup>44</sup>

While casual work and labour hire are distinct categories of precarious work, there is significant overlap between these categories. In the commercial cleaning sector, most - if not all - contract cleaners are also casual. Similarly, an increasing proportion of contract mine workers are hired on casual contracts and have no access to sick leave.

The COVID-19 crisis has highlighted the risks to individual workers, communities and businesses of a significant percentage of workers having no access to paid sick leave. Many workers without sick leave cannot afford to self-isolate, or to take other necessary precautions to protect themselves and others. In early March, newspapers reported on a hospitality worker who had gone to work at the Hobart casino, despite being told to self-isolate awaiting tests for the

38. ILO, *Workplace Compliance in Global Supply Chains*, Geneva, ILO, 2017, <<https://bit.ly/35taMpO>> [accessed 1 March 2019].

39. Nolan and Boersma.

40. <https://wsr-network.org/success-stories/>.

41. L Curtze & S Gibbons, *Access to remedy - operational grievance mechanisms. An issues paper for ETI*, London, ETI, 2017, <<https://bit.ly/2KXxLjm>> [accessed 3 March 2019].

42. NAPF, p. 14.

43. S Young & S Rawsthorne, *Hidden Talent: What do Companies’ Annual Reports tell us about their Workers?: An Analysis of the FTSE 100*, London, PLSA, 2017, <<https://bit.ly/2xNOp1D>> [accessed 6 April 2020].

44. Credit Suisse, *Not Such a Casual Cost*, 23 August 2018.

virus.<sup>45</sup> As a low paid casual worker this person stated that he could not afford to quarantine without having access to paid leave.

A number of employers have recognised the risks to their entire workforces if all staff cannot afford to quarantine due to a lack of paid sick leave and have extended paid sick leave provisions to casual staff.<sup>46</sup> However, in almost all cases these schemes have not been extended to labour hire workers and contractors.<sup>47</sup>

### DIMINISHED INVESTOR OVERSIGHT OF WORKFORCE COMPOSITION, INCLUDING DIVERSITY

Diversity is an “essential component of sound corporate governance and critical to a well-functioning organisation”.<sup>48</sup> Companies with strong gender and racial diversity tend to outperform peers on a range of financial metrics.<sup>49</sup> Furthermore, a failure to adequately implement sound Equal Employment Opportunity (EEO) policies may lead to increased recruitment, reputational and legal risks.<sup>50</sup>

ACCR’s review of company reporting on gender and Indigeneity found that reporting was focused on employees only. This diminishes investor oversight of the overall workforce composition, hindering engagement and the mitigation of risks associated with a lack of diversity. It also impacts investors’ ability to assess the efficacy of a company’s diversity policies and targets.

#### Case Study

### DIVERSITY IN THE MINING SECTOR



In the Australian mining sector, labour hire and contractors make up 60% of the entire workforce in some companies, and almost the entire workforce on some sites (see Section Four).

ACCR reviewed the reporting documents of 10 mining companies (see Appendix). While 80% of companies analysed provided reporting on the gender division of their employees, only 20% of companies provided any information on the gender division

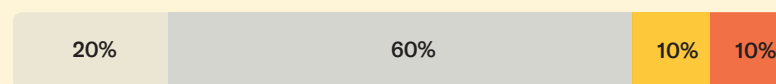
of either their labour hire or contract workforce. As labour hire workers are estimated to earn up to 30% less than permanent employees, the failure to report on gender diversity in permanent and labour hire roles means investors are unable to adequately judge a company’s gender pay gap.

Additionally, while 50% of companies reported data on their Indigenous workforce, only 10% provided data on their Indigenous labour hire and/or contractor workers.

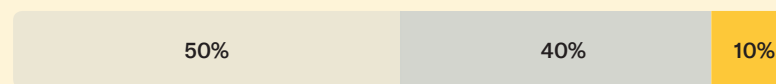
FIGURE 2. MINING COMPANIES REPORTING ON DIVERSITY

- Doesn't report
- Reports figures for **employees only**.
- Provides combined figure for **employees and LH**. Contractors excluded.
- Provides a breakdown for **contractors and employees**. LH not included.

#### GENDER



#### INDIGENEITY



45. L Shannon, ‘Hotel employee went to work while awaiting coronavirus test results’, in *ABC News*, 8 March 2020, <<https://ab.co/3e8ULcr>> [accessed 9 April 2020].

46. Crown Casino, ‘Crown announces support to employees facing challenges associated with coronavirus’, 2020, <<https://bit.ly/3a0L1hu>> [accessed 9 April 2020].

47. For example, the extension of leave provisions to public sector casuals left out the 23,000 labour hire workers and contractors who provide core services to the APS. L Hart, ‘Union wins paid COVID-19 leave for casuals’, in *Community and Public Sector Union*, 2020, <<https://bit.ly/2wqilk1>> [accessed 9 April 2020].

48. UNPRI, ‘Incorporating diversity’, 2016, <<https://bit.ly/2V3tCzb>> [accessed 6 April 2020].

49. UNPRI.

50. Glass Lewis, ‘2019 Proxy Paper Guidelines: An overview of the Glass Lewis Approach to Proxy Advice’, Glass Lewis, 2019, <<https://bit.ly/2JMbVZ2>> [accessed 6 April 2020]; ICCR, ICCR’s 2019 Proxy Resolutions and Voting Guide, ICCR, 2019, <<https://bit.ly/2YNBs3i>> [accessed 1 May 2020].

# Company Reporting on Labour Hire Across the ASX100

**Given the risks and challenges associated with the use of labour hire employment, investors should seek comprehensive disclosures on a company’s entire workforce, including direct employees and labour hire workers, in order to make reasonable judgements about the appropriateness and sustainability of a companies’ employment model.** Reporting should be sufficient to allow investors to ask questions about whether a company’s workforce strategy is based on low labour costs or maintaining and developing its human capital, and whether it will deliver long-term value for the company.<sup>51</sup>

ACCR conducted a review of reporting by 19 ASX100 companies with a significant exposure to labour hire or contractor related risks in key sectors identified in this report: mining, construction, and commercial cleaning (property services). The two ASX100 listed contracting companies, CIMIC and Downer, were not included in this analysis as they are not strictly “host companies”. **See Appendix for the full list of companies, and Methodology for how companies were selected.**

Section Two identified a number of risks associated with the increased

use of labour hire and contractors. Improved reporting across a number of key indicators that would allow investors engage companies on the extent to which their employment model exacerbates or mitigates these risks. These indicators are:

- Clear definitions of labour hire and/or contractors.
- Disaggregated workforce numbers for direct employees AND labour hire and/or contractors.
- Disaggregated OHS data for direct employees AND labour hire and/or contractors.
- Disaggregated diversity data for direct employees AND labour hire and/or contractors.
- Disaggregated turnover data for direct employees AND labour hire and/or contractors.

**Finding 1: Company disclosure on labour hire and/or contractors is very limited.**

See Table 1

Company reporting on labour hire and contract workers is very limited. Very few companies publicly report any information about their use of labour hire and contractors.<sup>52</sup> Of the companies analysed, 8 (or 42%) made no material disclosure about their labour hire and/or contracting

workforce in annual reporting documents.

Where companies do disclose, they typically provide only general statistical data, which gives limited insight into a company’s overall employment model and the total make-up of its workforce.

Overall, it is impossible to deduce if and how companies are using labour hire and/or contract workers in their operations, or to make useful comparisons between companies. It is fair to say that in reporting on their workforces, companies are only providing ‘part of the picture’.

**Finding 2: Very few companies define what they mean by ‘contractor’ or ‘labour hire’.**

See Table 1

Even where there was some reporting on these issues, it is not clear which part of the workforce was captured in the data, given differences in the terms used, and a lack of clarity about how these terms were defined by each company. Without these definitions, it is impossible to determine whether company disclosures reflect the entirety of a company’s workforce.

Only two companies (11%) defined their use of the terms labour hire and/or contractor in their company documents: Rio Tinto and Fortescue.<sup>53</sup>

51. NAPF, p. 14.

52. As part of our engagement, ACCR asked companies if they did use labour hire and/or contractors over the reporting period, but did not disclose this in reporting documents; or b. did not use labour hire and/or contractors over the reporting period, and could therefore not be expected to report any information. No company responded to say that they did not use labour hire workers and/or contractors over the reporting period.

53. In their feedback Evolution Mining provided ACCR with definitions for labour hire (staff who are sourced from a labour hire company to carry out specific programs of work and whose work is directed and managed by an Evolution manager) and contractors (staff who work for a subcontracted business who carry out work on behalf of Evolution and whose work is directed and managed by the contractor).

**RIO Tinto (2019, p.83)**

“Contractor is a person or organisation providing services to an employer at the employer’s workplace in line with agreed specifications, terms and conditions. In the context of our Rio Tinto’s health, safety and environmental standards, we classify contractors in three categories:

- Category 1: Individuals working on temporary contracts within existing operations
- Category 2: Companies or individuals hired for a discrete project which will be carried out in a designated area separate from existing operations
- Category 3: Companies or individuals contracted to carry out specific tasks or provide specified services within existing operations.”

**Fortescue (2019, p.124)**

Labour hire workers are defined as: “Contractors backfilling permanent Fortescue roles and not hired in a service contractor capacity.”

Contractors are defined as: “non-Fortescue employees, working with the company to support specific business activities”.

Each of the categories defined above describe third-party employment relationships. All Rio categories may include workers employed via labour hire arrangements. To complicate matters, while Fortescue does distinguish between contractors and labour hire workers, their definition of contractors could include workers employed through labour hire agencies, as the primary distinction between “contractors” and “labour hire” is determined by

their relationship to the permanent workforce NOT on the type of contract they are employed under.

As these two definitions make clear, company reporting on labour hire and contractors is variable, and may include a range of different employment relationships. Secondly, where companies do not define the terms they are reporting on, the data presented may not reflect the true numbers of workers employed under triangular employment relationships. For example: Fortescue only reports on its labour hire workers (provides a number), but not contractors.

***Finding 3: Company reporting on the size of their labour hire and/or contractor workforce is poor.***

See Table 2

All 19 companies analysed have operations in Australia. Of these, only 8 (42%) companies reported the total number and/or percentage of contractors and/or labour hire in their Australian operations.

Of the 19 companies analysed, 11 have global operations. Of these, 7 (64%) reported the total number and/or percentage of contractors and/or labour hire in their global operations.

***Finding 4: While most companies report some health and safety data, very few provide disaggregated data for their contractor and/or labour hire workforce.***

See Table 3

Most companies reported at least some numerical information on health and safety outcomes. ACCR interpreted this very broadly— ‘some numerical information’ could include any combination of data on, for the reporting period: numbers of fatalities, All Injury Frequency Rate (AIFR),

Total Recordable Injury Frequency Rate (TRIFR), Medically Treated Injury Frequency Rate (MTIFR), ‘near miss’ or High Potential Incident (HPI), injury severity rates, and/or recordable occupational illness rates.

3 of 19 (16%) of companies provided no numerical data at all.

Only 5 of 19 (26%) companies reported any disaggregated OHS data for their labour hire and/or contractor workforce.<sup>54</sup>

Overall, OHS information disclosure varied substantially among companies, and was selective and limited.

Companies used inconsistent OHS indicators, and were not clear or forthcoming about why particular indicators were used, or how numbers and percentages had been calculated. As SafeWork Australia has noted, many commonly used indicators, including LTIFR (“Lost Time Injury Frequency Rate”), are not valid or reliable measurements of injury or wellbeing, and tell us little about health and safety risks and controls, or about the frequency or consequences of injuries.<sup>55</sup>

***Finding 5: No companies provide turnover data for labour hire or contractors.***

ACCR acknowledges the difficulty in providing turnover data for labour hire and contract staff, given that a percentage are employed on short term contracts to meet very specific and/or fluctuating needs. However, where labour hire is used to replace large sections of the workforce, and where workers are employed on regular and long-term rosters, this data should be available to investors as it would provide better visibility of why workers are employed on repeated fixed term contracts.

54. Similarly, ACSI found that: “in 2018 only 19% of ASX200 companies disclosed whether contractors were included in their LTIFR or TRIFR (or both) figures. The rest did not disclose contractor injury rates or did not indicate whether contractors were included in their data.” ACSI, p. 16.

55. SafeWork Australia, *Safe Work Australia, SafeWork Australia*, 2019, <<https://bit.ly/3beaGni>> [accessed 6 December 2019].



Sectors



Mining



Construction



Property Services (cleaning)

TABLE 01: ANY MATERIAL DISCLOSURE ON LABOUR HIRE AND/OR CONTRACTING














Company	Defines “labour hire” and/or “contractor” in reporting documents	Provides any material disclosure on labour hire and/or contracting workforce <sup>56</sup>
Alumina (AWS)	×	×
BHP (BHP)	×	✓
Evolution Mining (EVN)	×	✓
Fortescue (FMG)	✓ Both	✓
Iluka (ILU)	×	✓
Newcrest (NCM)	×	✓
Northern Star (NST)	×	✓
Rio Tinto (RIO)	✓ Contractor only	✓
South 32 (S32)	×	×
Whitehaven (WHC)	×	×
Charter Hall (CHC)	×	×
Dexus (DXS)	×	✓
Goodman (GMG)	×	✓
GPT (GPT)	×	×
Lendlease (LLC)	×	×
Mirvac (MGR)	×	×
Scentre (SCG)	×	✓
Stockland (SGP)	×	×
Vicinity (VCX)	×	✓

56. Includes: reporting on total number and/or percentage of contractors and/or labour hire in Australian and, if applicable, global operations (See Table 2); reporting on OHS data, disaggregated for the company’s labour hire and/or contractor workforce, as well as direct employees (See Table 3).

57. Company provides some reporting on its ‘contingent’ workforce, which includes contractors.

**Notes:** Companies were considered to have provided material disclosure if they provided quantitative, disaggregated data on any of the following: numbers of labour hire and/ contractors in either their global or Australian operations, OHS data.

TABLE 02: DISCLOSURES ON THE SIZE OF THE LABOUR HIRE WORKFORCE

Company	Operations	Reports total number and/ or percentage of contractors and/ or labour hire in global operations	Percentage of contractors and/ or labour hire in global operations	Reports total number and/ or percentage of contractors and/ or labour hire in Australian operations	Percentage of contractors and/ or labour hire in Australian operations
 Alumina (AWS)	Australia and global	×	×	×	×
 BHP (BHP)	Australia and global	✓	60%	✓	54%
 Evolution Mining (EVN)	Australia and global	NA	NA	✓	30%
 Fortescue (FMG)	Australia and global	✓	16%	×	×
 Iluka (ILU)	Australia and global	✓	29%	✓	40%
 Newcrest (NCM)	Australia and global	✓	55%	✓	60%
 Northern Star (NST)	Australia and global	✓	33%	×	×
 Rio Tinto (RIO)	Australia and global	✓	68%	×	×
 South 32 (S32)	Australia and global	×	×	×	×
 Whitehaven (WHC)	Australia only	NA	NA	✓ <sup>59</sup>	NA <sup>60</sup>
 Charter Hall (CHC)	Australia only	NA	NA	×	×
 Dexus (DXS)	Australia only	NA	NA	✓ <sup>61</sup>	11% <sup>62</sup>
 Goodman (GMG)	Australia and global	×	×	×	×

58. Footnote next: Note: this figure is for the two Australian sites (Telfer and Cadia) as Newcrest disaggregates contractor numbers by individual sites, exploration (total) and corporate offices (total).












59. Only reports total number of FTE contractors.

60. A percentage was not able to be calculated, as Whitehaven provided a total number of employees plus the total number of FTE contractors only.


61. For ‘contingent workforce’: Contractors, agency temps or consultants that performed work on a time and materials basis (e.g. a project with a defined beginning and end date). Note: this does not include cleaners, who are classified as “critical suppliers”.


62. FTE only.

TABLE O2 (continued)

Company	Operations	Reports total number and/or percentage of contractors and/or labour hire in global operations	Percentage of contractors and/or labour hire in global operations	Reports total number and/or percentage of contractors and/or labour hire in Australian operations	Percentage of contractors and/or labour hire in Australian operations
  GPT (GPT)	Australia only	NA	NA	×	×
  Lendlease (LLC)	Australia and global	×	×	×	×
  Mirvac (MGR)	Australia only	NA	NA	×	×
  Scentre (SCG)	Australia and global	✓	60%	✓	61%
  Stockland (SGP)	Australia only	NA	NA	×	×
 Vicinity (VCX)	Australia only	NA	NA	✓	5%




















Sectors

 Mining

 Construction

 Property Services (cleaning)

TABLE 03: DISCLOSURES ON THE SIZE OF THE LABOUR HIRE WORKFORCE

Company	Reports on OHS (any data)	Reports on OHS data, disaggregated for labour hire and/or contractor workforce
 Alumina (AWS)	×	×
 BHP (BHP)	✓	×
 Evolution Mining (EVN)	✓	✓
 Fortescue (FMG)	✓	✓
 Iluka (ILU)	✓	×
 Newcrest (NCM)	✓	✓
 Northern Star (NST)	×	×
 Rio Tinto (RIO)	✓	×
 South 32 (S32)	✓	×
 Whitehaven (WHC)	✓	×
 Charter Hall (CHC)	✓	×
 Dexus (DXS)	✓	×
 Goodman (GMG)	✓	✓
 GPT (GPT)	×	×
 Lendlease (LLC)	✓	×
 Mirvac (MGR)	✓	×
 Scentre (SCG)	✓	×
 Stockland (SGP)	✓	×
 Vicinity (VCX)	✓	×

Sectors



Mining



Construction



Property Services (cleaning)



# Labour Hire in Key Sectors

As noted elsewhere in this report, there is considerable differentiation among sectors in terms of: the extent of the use of labour hire, the type of labour hire arrangements, and the risks involved. For these reasons, investors should have an understanding of the risks associated with the use of labour hire in general, as well as more specifically in relation to a given sector or subsector of the labour market.

The report focuses on key sectors: mining, construction, commercial cleaning, and large-scale solar installation.<sup>63</sup> These sectors were chosen because they evidenced high rates of labour hire, significant non-compliance by labour hire providers with employment and other legislation, and/or due to the severity of risks in a sector (see Methodology for further information). In this section of the report, we discuss each sector in more detail, and outline some more specific, sector-related risks involved in the use of labour hire. This section also reviews two ASX-listed contractors.

## MINING



### Sector Overview

The mining sector includes companies that extract naturally occurring mineral solids, including bauxite, iron ore and other precious metals and minerals. Activities include underground or open cut mining, dredging, quarrying, well operations or evaporation pans, recovery from ore dumps or tailings, and other preparation work customarily performed at a mine site, or as a part of mining activity. Mining processes are often incorporated into Australian mining activities.

### ASX100 companies in the mining sector

Alumina Ltd. (AWS), BHP Group Ltd. (BHP), Evolution Mining Ltd. (EVN), Fortescue Metals Group Ltd. (FMG), Iluka Resources Ltd. (ILU), Newcrest Mining Ltd. (NCM), Northern Star Resources Ltd. (NST), Rio Tinto Ltd. (RIO), South 32 (S32), Whitehaven Coal Ltd. (WHC). Two ASX100 service contractors in the mining industry - Downer Edi Ltd. and CIMIC Group Ltd. - are discussed below in 'Contract Services in the Mining and Construction Sectors', on p. 30.

### Labour hire in the mining sector

The mining sector has some of the highest rates of labour hire in Australia. In some mining operations, labour hire and contract workers constitute almost the entirety of operations.<sup>64</sup>

While labour hire has always been used in the mining sector, since 2012 “many mining operators have moved to predominantly labour hire workforces in recent years with the stated aim of reducing overheads and increasing workforce flexibility”.<sup>65</sup> In 2017, Rio Tinto announced that they will only use labour hire workers in their iron ore operations.<sup>66</sup> Deloitte notes that 88% of new hires to BHP in the two years to 2019 were labour hire, while 50% of new workers at Fortescue in the same period were indirect hires.<sup>67</sup>

A recent Queensland government labour hire inquiry identified four types of labour hire arrangements in the mining sector. Each of these arrangements is “triangular” in some way, although there are significant differences in the relationship between the three parties involved (the host company, labour hire agency/contractor, and workers).

63. The oil and gas sector was originally included in this report, as this sector has also seen a dramatic expansion of the labour hire industry in recent years. However, due to rapid and significant changes in the sector due to COVID-19, it has been excluded from the report, and will be released as a follow-up briefing paper later in 2020.

64. Queensland Government, p. 11.

65. Queensland Government; see also Commonwealth of Australia, *Keep it in the Regions*, Canberra, Commonwealth of Australia, 2018, <<https://bit.ly/3dY6SsN>> [accessed 6 April 2020].

66. B Creagh, 'Rio Tinto contractor conundrum: The new normal in the Pilbara?', in *Australian Mining*, 2016, <<https://bit.ly/2V4qjYy>> [accessed 7 February 2020].

67. P Milne, 'Casual workforce a “threat” to mine culture, says industry expert', in *The West Australian*, 29 January 2019, First edition, section News, p. 7.

- **Contract-run mining operations:** where a labour hire organisation is contracted to run the mining operation on behalf of a lease holder. This gives an overall appearance of permanency, and workers may even have an Enterprise Bargaining Agreement (EBA) with the labour hire organisation. However, the leaseholder will still exert a degree of control over employees - employees can be terminated if the leaseholder terminates the contract of the labour hire agency, and have their conditions changed by the leaseholder.
- **Long-term contracting:** long-term contracted workers are considered “full-time” employees of a labour hire company, employed on contracts over 6 months. They usually have skills that direct employees at a mine site do not. The mine operator can remove their rights to work at any time.<sup>68</sup>
- **Short-term contracting:** where workers are employed for short-term tasks such as repairs. They generally work full-time for the length of the task.
- **Casual, temporary supplementary labour:** this is the most prevalent form of labour hire in the industry. These are non-permanent workers, who receive a flat rate of pay. While technically ‘casual’, many of these workers will be on regular, long-term rosters.<sup>69</sup>

Deloitte summarises the companies in the above arrangements into two predominant groups: “labour hire agencies” and “service contractors”.<sup>70</sup> Service contractors are companies engaged to undertake specific, often specialised tasks and will often have their own workforces and equipment, while labour hire workers are “employed by a labour hire company but undertake work for the host minerals company”, typically under the direction of the host company. This distinction corresponds to feedback provided by companies profiled in this report.

#### **Risk: A two-tier workforce**

In the Australian mining industry, labour hire employees are often employed on significantly different conditions to their directly employed counterparts on the same site. The federal parliamentary inquiry Keep It in the Regions found significant differences in the conditions of labour hire workers and permanent staff in the mining industry:

- Labour hire workers are paid on average 30 percent less than permanent workers (even taking into account casual loading, and considering unpaid leave arrangements);
- 72 percent of workers on labour hire contracts reported they are worse off than their previous employment in regards to pay and conditions.<sup>71</sup>

Another area of difference between direct employees and labour hire

workers is in the provision of safety equipment. The Queensland Mining Inspectorate (QMI) also found that in many cases labour hire workers and contractors were asked to provide their own safety equipment.<sup>72</sup> This is in breach of Queensland OHS legislation, which states that the company in charge of a worksite must provide equipment for the entire onsite workforce, irrespective of whether workers are direct employees or contractors. The lack of protective equipment is just one factor in poorer safety outcomes for labour hire and contract workers (see below).

The implementation of a two-tier workforce can be an explicit company strategy. At BHP’s Mt Arthur coal mine in the NSW Hunter Valley, the workforce is a mix of employees hired directly by BHP, and casual labour hire workers employed by Chandler McLeod on the Chandler Macleod Northern Districts of NSW Enterprise Agreement 2015. These labour hire workers reportedly earn 40% less than their directly employed counterparts.<sup>73</sup> The shift to a two tier workforce at the Mt Arthur mine is detailed in a 2015 internal BHP report. That report outlined a strategy to reduce the percentage of direct, permanent employment to 60% by 2017, with the remaining workers employed as casuals via a third party labour hire provider. This was despite the report acknowledging significant short-comings in the use of labour hire, including that permanent staff have better safety records and bring “greater productivity to the table”.<sup>74</sup>

68. Note: in some cases the majority of functions can be contracted to different companies, with only a small core workforce who are directly employed. The Queensland Mining Inspectorate noted that on some of the mine sites they monitor, the directly employed workforce can be under 10% of the total workforce.

69. Queensland Government.

70. A Ponsonby, *Economic effects of changes to labour hire laws*, Deloitte Access Economics, 2019, p. iv, <<https://bit.ly/2xVw6rb>> [accessed 6 April 2020].

71. Commonwealth of Australia, *Keep It in the Regions*, pp. 142–3.

72. V Zhou, ‘Mining inspectorate probes worker safety allowance in QLD’, in *Safe To Work*, 2018, <<https://bit.ly/2U0eNBA>>.

73. Kirkwood, ‘Big Mount Arthur coal mine class action launched at Beresfield on Tuesday’, in *Newcastle Herald*, , 26 June 2018, <<https://bit.ly/39NbAXf>> [accessed 5 February 2020].

74. McCarthy, ‘BHP strategy for more casual workers’, in *Newcastle Herald*, 19 October 2015, <<https://bit.ly/3e3AISl>> [accessed 7 February 2020].

As discussed below (p. 25), this can increase litigation and other compensation risks for companies.

Additionally, Deloitte has argued that a shift to contract labour in the mining sector may undermine the loyalty of workers, which is necessary for “safety, collaboration and innovation”.<sup>75</sup>

Deloitte cites differential rates of pay, along with employment agreements that allow contracts to be terminated with as little as four hours notice, as factors that may impact on loyalty and performance.

**Risk: Poorer OHS outcomes for labour hire employees and service contractors**

The Queensland Mining Inspectorate (QMI) is one of the few sources of publicly available OHS data in Australia that disaggregates information for contractors and direct employees.<sup>76</sup> QMI reports that since 2001, contractors have been overrepresented in fatalities involving vehicle interaction and tyre management, relative to the proportion of the workforce they represent.<sup>77</sup> Contractors also represented 64% of serious accidents in coal mines in 2018/19 and 67% in 2017/18,<sup>78</sup> despite only making up approximately 50% of the coal mining workforce.

Academic studies indicate similar trends. Given this, it is concerning that only three ASX100 mining companies report any safety data that is disaggregated by employees and labour hire: Evolution Mining,

Fortescue and Newcrest Mining (see company reporting, pp. 17-22).

The lack of equivalent training offered to labour hire workers also has negative OHS implications. Workers’ representatives in this industry have reported that:

... labour hire has led to more workers entering mining worksites without proper training. It’s certainly something that has led to a lot of inexperienced people coming in, not being trained or not mentored right, and has led to a culture of behaviour where the employer just thinks they can do whatever they like and get away with it.<sup>79</sup>

Additionally, the presence of multiple labour hire agencies and service contractors can stymie the flow of information between workers and companies, undermining site safety and risk management. Groups of workers may be isolated from each other, with different start and finish times, break times, meal locations, even parking arrangements.

The correlation between extensive use of labour hire and poorer OHS outcomes has been posited as a factor in the spate of mining deaths in Queensland,<sup>80</sup> with eight fatalities reported in the two years to January 2020.<sup>81</sup>

**Risk: Increased litigation and compensation risk from wrongly defined casuals**

A significant proportion of workers employed by labour hire agencies in the mining industry are employed as casuals.<sup>82</sup> Another recent and well-publicised court case involving WorkPac, the 2018 WorkPac Pty Ltd v Skene case, led by the CFMMEU, introduced litigation and compensation risks associated with casual employment in the mining sector.

In this case, the Full Federal Court found that Fly-in Fly-out (FIFO) labour hire worker, Paul Skene, was an employee entitled to annual leave payments under the National Employment Standards (NES). Skene was employed as a truck operator on a continuous roster arrangement - seven days on, and seven days off - but was categorised as a casual worker in his contract. He worked for nearly two years, before being dismissed.

The court determined that Skene was not a casual worker, based on a number of factors, including that he was available on an ongoing basis and had a stable and regular roster or hours.<sup>83</sup> It found that it is the substance of the employment relationship that determines whether someone is a casual, not whether they are simply described as a casual or paid a casual loading. Factors identified as defining a casual employment relationship include:

- the absence of a firm, advance commitment as to the duration of

75. Milne, p. 7.

76. Labour hire workers are included in their contractor statistics.

77. State of Queensland, *Queensland Mines and Quarries Safety Performance and Health Report 2016/2017*, p. 12.

78. State of Queensland, *Queensland Mines and Quarries Safety Performance and Health Report 2018/2019*, p. 36.

79. K Gregory, “‘It should have been a wedding, not a funeral’: Jack Gerdes went to work at a coal mine and never came home”, in *ABC News*, , 2019, <<https://ab.co/2Xg1mMg>> [accessed 3 February 2020].

80. Gregory.

81. ABC News, ‘Miner “trapped in machinery” dies at central Queensland coal mine’, in *ABC News*, 13 January 2020, <<https://ab.co/2UOmd80>> [accessed 6 April 2020].

82. Milne, p. 7.

83. Credit Suisse.

the employee's employment or the days (or hours) the employee will work;

- no advance commitment from the employer to continuing and indefinite work according to an agreed pattern of work; and
- irregular work patterns, uncertainty, discontinuity, intermittency of work and unpredictability.<sup>86</sup>

This case has increased litigation and compensation risks for labour hire providers. Relatedly:

- The CFMMEU has brought a class action against WorkPac on behalf of a mineworker who worked for three years as a casual on a flat hourly rate at the Mount Thorley Warkworth mine in the Hunter Valley.
- Law firm Adero has launched class actions against Hays and Stellar Recruitment,<sup>87</sup> and are considering further class actions at Mt Arthur Coal Mine in NSW and with Glencore and its contractors Programmed and Skilled, and at Coal & Allied and its recruitment company SubZero.<sup>88</sup>
- The Electrical Trades Union (ETU) is currently signing up workers to pursue potential underpayment claims in the Federal Court for workers wrongly classified as casuals.<sup>89</sup>

In the Skene case the Court did not award “pecuniary damages”, as the company's actions were not knowingly deliberate. However, future settlements may include penalties in addition to damages and interest.<sup>90</sup>

#### Case Study

### UNFAIR DISMISSAL OF LABOUR HIRE WORKER FOR RAISING SAFETY ISSUES AT BHP MITSUBISHI ALLIANCE (BMA) MINE: MS KIM STAR V WORKPAC PTY LTD T/A WORKPAC GROUP [2018] FWC 5745



Due to their relative job insecurity, labour hire workers may be less willing or less able to raise health and safety issues with their employer or host company.

This issue was demonstrated in the **Ms Kim Star v WorkPac Pty Ltd T/A WorkPac Group** case.<sup>84</sup> WorkPac is a major labour hire supplier, particularly in the mining and construction industries.

Kim Star had been supplied as a casual employee by WorkPac at BHP Billiton Mitsubishi Alliance (BMA)'s Goonyella Riverside mine, for a period of four years. BMA then directed its client, WorkPac, to demobilise Ms Star from the worksite. Ms Star was not assigned any further or alternate work.

On the shift immediately prior to this notification, Star had been involved in a safety incident. During that incident,

Ms Star refused to complete a task until sufficient lighting, that accorded with the relevant standard operating procedure (SOP), was provided.

The Fair Work Commission (FWC) ruled that Star's dismissal was unfair, and ordered that she be reinstated on the basis that it was “more probable than not” that her notification of dismissal was related to this incident. The FWC directed WorkPac to reinstate Ms Star to her position at BMA.

This case raises questions about the extent to which casuals and labour hire workers can raise safety issues at work. It is particularly concerning given that BMA's own internal investigations into major safety incidents found that the company had a culture of favouring productivity over safety, which had led to significant near miss incidents and even the death of a worker.<sup>85</sup>

Given the significance of the decision for the organisation of work on mining sites, ACCR has concerns that no mining companies reported on the impact of this decision on their business in their annual reporting documents. It is unclear how listed companies in this sector are addressing these risks and taking steps to bring their employment practices in line with the Workpac v Skene decision.

84. Fair Work Commission, ‘Ms Kim Star v WorkPac Pty Ltd T/A WorkPac Group (U2017/12786)’, 2018, <<https://bit.ly/2V5h6ze>> [accessed 6 April 2020].

85. S Elks, ‘Production before worker safety for miner’, in *The Australian*, 31 January 2020, <<https://bit.ly/2xX36zj>> [accessed 6 April 2020].

86. I Landau & D Allen, ‘Major Court and Tribunal Decisions in Australia in 2018’, in *Journal of Industrial Relations*, vol. 61, 2019, 421–437 (p. 423).

87. D Marin-Guzman, ‘Hays, Stellar Recruitment hit with \$50 million class actions over casuals’, in *Australian Financial Review*, 8 January 2019, <<https://bit.ly/3e480Lv>> [accessed 8 February 2020].

88. Kirkwood.

89. <https://www.etunational.asn.au/stopcasualripoffs>

90. Credit Suisse, *Not Such a Casual Cost*, 23 August 2018.



Case Study

**BHP AND OPERATIONS SERVICES & THE CREATION OF “IN-HOUSE” LABOUR HIRE**



Shortly after the Skene decision, BHP registered two new subsidiaries as part of a move to internalise a portion of their contract labour force.<sup>91</sup> These subsidiaries will operate under a new group: BHP Operations Services. Prior to the creation of Operations Services, BHP reported that 54% of its workforce was contractors.

BHP has stated that this change was made in recognition of the impact of the growth of contractor numbers on the company’s social licence, and that through this change they will be able to: “promote permanent employment opportunities, in line with expectations of governments, communities and employees”.<sup>92</sup>

However, the creation of Operations Services (OS) may not address community expectations or the loss of social licence, and creates a second-tier BHP workforce. OS employees wear BHP-branded uniforms and are employed on BHP sites. However, their contracts stipulate:

- Significantly lower wages and conditions than current employees, including lower rates of pay, no accident pay, no payment for FIFO flights home.
- OS employees are hired on an OS enterprise agreement with significantly lower rates than the current BMA agreement, and the payment of FIFO flights is at the discretion of the company.
- OS employees have minimal control over their deployment between BHP sites and even regions, beyond being provided with “reasonable notice”. Under their employment agreement, workers may be transferred to any BHP site in Australia.
- OS employees have less control over shift rostering. At BHP’s FY19 AGM, the CFMMEU put questions to the company about why projected rosters for OS employees indicated that these workers could be required to

work on Christmas Day - with some OS rosters requiring workers to spend six of the next seven Christmases working.<sup>93</sup> By comparison, workers on the union BMA agreement only work Christmas Day if they agree to do so.

These conditions are set out in the Operations Services Production Agreement 2018 and the Operations Services Maintenance Agreement 2018. At the time of writing, these agreements were yet to be approved by the Fair Work Commission, and had been appealed by the CFMMEU.<sup>94</sup>

BHP reports that they have brought their workforce in-house due to high turnover in their labour hire workforce. Given that BHP only provides turnover rates for its direct employees, ACCR was unable to confirm this, nor is it able to assess whether there has been a significant drop in turnover in the workforce brought in-house under OS.

91. M Stevens, ‘BHP forms its own labour hire firm to make casuals permanent’, in *Australian Financial Review*, 6 December 2018, <<https://bit.ly/3e4qpIq>> [accessed 19 December 2019].

92. M Stevens, ‘BHP returns to direct employment in the coal fields’, in *Australian Financial Review*, 5 December 2018, <<https://bit.ly/2JPLFmZ>> [accessed 14 February 2020].

93. R Thompson, ‘Workers are voting with their feet: Drayton’, in *Muswellbrook Chronicle*, 8 November 2019, <<https://bit.ly/3e21qoR>> [accessed 8 April 2020].

94. See: [https://www.fwc.gov.au/documents/documents/agreements\\_applications/ag2018\\_5649.pdf](https://www.fwc.gov.au/documents/documents/agreements_applications/ag2018_5649.pdf); [https://www.fwc.gov.au/documents/documents/agreements\\_applications/ag2018\\_6025.pdf](https://www.fwc.gov.au/documents/documents/agreements_applications/ag2018_6025.pdf)

## COMMERCIAL CONSTRUCTION



### Sector Overview

The commercial building and construction industry in Australia includes companies involved in heavy and civil engineering construction, residential and non-residential building construction, and other construction services such as land development and installation.

### ASX100 Companies in the Commercial Construction Sector

Charter Hall Group Ltd. (CHC), Goodman Group Ltd. (GMG), GPT Group Ltd. (GPT), Lendlease Group Ltd. (LLC), Mirvac Group Ltd. (MGR), Scentre Group Ltd. (SCG), Stockland Ltd. (SGP). Two ASX100 service contractors in the construction industry - Downer Edi Ltd. (DOW) and CIMIC Group Ltd. (CIM)- are discussed below under 'Contract Services in the Mining and Construction Sectors' on p. 30.

### Labour hire in the construction sector

The Australian construction industry is highly fragmented and characterised by short term contracting, informal employment practices, and layers of subcontracting.<sup>95</sup> Many contract and labour hire firms in the construction industry are small-scale, and provide services to primary building contractors, property developers and building and infrastructure owners.<sup>96</sup>

As with the mining industry, the construction industry heavily relies upon labour hire, with host companies contracting out a range of activities from the provision of labour, to the management of independent contractors, and even the contracting out of core operations see Contract Services in the Mining and Construction Sectors, p. 30.). Having fast and flexible access to a casual workforce is attractive to companies wanting to manage the volatility of the industry, by shifting workers onto project-based employment to manage fluctuations in demand.

Labour hire and subcontracting arrangements in the construction industry share many similarities to those in the mining sector. They range from the provision of casual/temporary supplementary labour, short-term contractors, long-term contractors, and contract service providers contracted to run whole segments of a project.

However, there is a significant difference between the commercial construction and mining sector — the proliferation of two illegitimate and illegal subcontracting practices: phoenixing and sham contracting.<sup>97</sup>

ACCR is not alleging that any of the ASX100 companies analysed here are directly engaged in these activities. However, due to the lack of consistent and transparent reporting requirements on this issue there is no way to tell. However, these are illegal practices that they may be exposed to through their supply chains, and which

may expose them to further risks, like modern slavery. These companies must therefore take steps to mitigate this exposure through the implementation of rigorous supplier and contractor procurement processes.

### Risk: Illegal Phoenix Activity

ASIC defines illegal phoenix activity as where:

... a new company is created to continue the business of an existing company that has been deliberately liquidated to avoid paying outstanding company debts, which can include taxes, trade creditors and employee entitlements.<sup>98</sup>

In the construction industry, phoenix companies are often labour hire providers and or subcontractors. Highlighting the scale of this problem in the construction industry the Australian Tax Office (ATO)<sup>99</sup> found that of 19,800 potential phoenix groups, 72% contained at least one building or construction entity.

The sector-wide risks of illegal phoenixing activity were highlighted in a 2019 inquiry into the NSW building industry that was called after a series of high profile building failures.<sup>100</sup> The inquiry found that illegal phoenixing heightened the risk of defects, by allowing companies to avoid the responsibility of having to rectify defects. The inquiry highlighted a number of cases of developers:

...creating special purpose companies that they can wind

95. H Lingard, T Cooke & N Blismas, 'Safety climate in conditions of construction subcontracting: A multi-level analysis', in *Construction Management and Economics*, vol. 28, 2010, 815–825.

96. A Kelly, *Industry Report E - Construction in Australia*, IBISWorld, IBISWorld, September 2019.

97. Commonwealth of Australia, *Black Economy Taskforce Final Report*, Canberra, Commonwealth of Australia, 2017, <<https://bit.ly/3dXDCMt>> [accessed 6 April 2020]; see also H Anderson, 'Is illegal phoenix activity rife among construction companies?', in *The Conversation*, 12 June 2015, <<https://bit.ly/2ULN70b>> [accessed 6 April 2020]; PWC, *Phoenix activity: Sizing the problem and matching the solutions*, Fair Work Ombudsman, 2012, <<https://bit.ly/34eJAug>> [accessed 6 April 2020].

98. 'ASIC action on illegal phoenix activity', 2020, <<https://bit.ly/2wYNOdB>> [accessed 6 April 2020].

99. *Submission: Inquiry into insolvency in the Australian construction industry*, Australian Taxation Office, 2015, p. 20, <<https://bit.ly/3aONSv3>> [accessed 6 April 2020].

100. NSW Legislative Council, *Regulation of building standards, building quality and building disputes*, Sydney, NSW Legislative Council, 2019, <<https://bit.ly/2x0Nwmu>> [accessed 6 April 2020]. For a full list of failures see pp. 10-17.

up after they have completed the work, and therefore there is no party that people can go to legally to seek recompense for defective works.<sup>101</sup>

A number of reforms have been proposed to address illegal phoenixing activity, however, this process has stalled.

**Risk: Sham contracting**

Sham contracting is rife in the Australian construction industry.<sup>102</sup> Sham contracting is the illegal practice of mischaracterising a genuine employment relationship as a contracting relationship, shifting risks and obligations away from employers and onto workers.<sup>103</sup> It is used by employers to shirk their legal obligations under the Fair Work Act 2009, such as paying workers minimum wage and penalty rates, leave and redundancy. The use of sham contracting also frustrates workers' access to legal regulatory regimes intended to protect and support them, such as workers compensation, occupational health and safety laws, and superannuation provisions.

**Risk: Unlicensed trades subcontracted to the construction industry**

Another issue that has emerged through various government inquiries and media reports, is the hiring of unlicensed tradespeople to complete skilled, often dangerous work. This work is typically in the electrical industry. For example, in NSW, electricians are required to be licensed to carry out electrical work. However, there is substantial evidence that unlicensed electrical work is taking place in the construction industry.<sup>104</sup>

In some cases, this overlaps with the issue of sham contracting, with the Black Economy Taskforce hearing evidence of “unscrupulous labour hire firms organising ABNs for backpacker workforces on various high-rise construction sites”.<sup>105</sup>

101. NSW Legislative Council, p. 59.

102. Senate Standing Committee on Education and Employment, Corporate Avoidance of the Fair Work Act, Canberra, Parliament of Australia, September 2017, <<https://bit.ly/3eOpWH3>> [accessed 6 April 2020].

103. Victorian Government, 'Sham contracting in the building and construction industry', 2019, <<https://bit.ly/2wiGfOk>> [accessed 6 April 2020].

104. NSW Legislative Council.

105. Commonwealth of Australia, Black Economy Taskforce Final Report, p. 248.

## CONTRACT SERVICES IN THE MINING AND CONSTRUCTION SECTORS



### Sector Overview

A significant and growing proportion of contracting in the mining and construction industries relies on “service contractors”. In this arrangement, a host company contracts a “service contractor” to manage and deliver core operations on their behalf. A service contractor is a company that will have their own workforce composed of direct employees and labour hire workers. Service contractors will typically provide their own labour, machinery and materials to deliver contracted operations for the host. A service contractor may also engage subcontractors to perform particular operations and/or provide supplementary labour.

If the host company terminates the contract with the service contractor, the service contractor can then terminate the contracts with its workforce and subcontractors.

There may be multiple service contractors on a given site, each contracted to deliver specific elements of a project.

### Key ASX100 Companies

There are two ASX100 companies who contract and provide services to the mining and construction sectors: Downer Edi Ltd. (DOW) and CIMIC Group Ltd. (CIM). Both companies’ core business is providing services to the mining, oil and gas, and construction sectors (with a focus on infrastructure). However, a small

proportion of their income comes from contracts for services (e.g. cleaning).

Both Downer and CIMIC have a number of subsidiaries who are contracted to provide various services:

- Downer: Downer, KHSA, Spotless
- CIMIC: CPB Contractors, Sedgman, Thiess, UGL

UGL and a number of Downer’s subsidiaries are licensed under the Queensland Labour Hire Act to provide labour hire services in Queensland.<sup>106</sup>

Downer’s subsidiary, Spotless provides cleaning, maintenance and security services.

### Risks associated with contract services

Downer and CIMIC are exposed to the industry wide risks that were detailed above in the mining and construction sections. While both Downer and CIMIC are predominantly known as service contractors who provide

services to other companies, they also engage subcontractors and labour hire agencies. In fact, both Downer and CIMIC note that their largest expense is subcontractors, with their subcontractor expenses comparable to their direct personnel expenses.<sup>107</sup>

Downer and CIMIC are used by mining and construction companies to provide labour to host companies on inferior conditions to the general workforce. For example, in 2014 CIMIC subsidiary Thiess put in a bid to BHP to replace directly employed workers with lower-cost contractors at their Norwich Park mine site. Internal documents showed that BHP intended to “leverage off the success of this model to introduce it to other operations”.<sup>108</sup>

Both companies have also used subsidiaries to hire workers on conditions substantially below conditions in the parent company’s enterprise agreement.

### Case Study

#### CARRAPATEENA CONSTRUCTION PROJECT



In 2017, the Downer—Ausenco JV partnership were awarded a contract by Oz Minerals for works on the Carrapateena copper gold mine project in Port Augusta, South Australia.<sup>109</sup> Work began in 2018. The recruitment process for the site was managed by Downer and job advertisements carried the Downer brand. However, when workers

accepted the job and received their contract, the contract was not with Downer EDI. Instead, the contracting party was Maclab Services, and the contract specified that workers would be paid in accordance with the Maclab Services Enterprise Agreement, which included lower rates of pay than the Downer Enterprise agreement.

106. <https://ols.oir.qld.gov.au/licence-register/>.

107. Subcontracting expenses represent 32% of CIMIC’s total expenses. Subcontracting expenses in CY18 were \$4,391,500, personnel expenses in the same year were \$3,654,000. Subcontracting expenses represent 36.88% of Downer’s total expenses. Subcontracting expenses in FY18 were \$4,193,700, while personnel expenses in the same year were \$4,340,400.

108. E Bagshaw, ‘BHP, Thiess wanted to pick a fight with the unions to drive down wages’, in *Sydney Morning Herald*, 20 February 2018, <<https://bit.ly/2UUCmc6>> [accessed 8 April 2020].

109. <https://www.ausenco.com/en/Carrapateena-epc-contract>.



## COMMERCIAL CLEANING SERVICES



### Sector Overview

Commercial cleaning services involve the cleaning of large residential and commercial buildings, including supermarkets, hospitals, and offices.

### ASX100 Companies in the Commercial Cleaning Services Sector

There is only one ASX100 provider of commercial cleaning services in Australia: Downer EDI (through its subsidiary Spotless).

However, several other companies across the ASX100 procure and manage commercial cleaning services. Property owners often manage a number of services - including cleaning - for their clients, and are particularly exposed to risks due to their contracting of cleaning services. ASX100 companies whose primary business is property ownership and management are: Charter Hall Group Ltd. (CHC), Dexus Ltd. (DXS), Goodman Group Ltd. (GMG), GPT Group Ltd. (GPT), Lendlease Group Ltd. (LLC), Mirvac Group Ltd. (MGR), Scentre Group Ltd. (SCG), Stockland Ltd. (SGP), and Vicinity Ltd. (VCX).

### Labour hire and other forms of contracting in the Commercial Cleaning Services Sector

Commercial cleaning services has been identified as one of the Australian sectors at highest risk for modern slavery.<sup>110</sup> As detailed in Section Two, a significant factor in the high

levels of non-compliance in this sector is the complexity of labour hire and contracting relationships, often involving multiple layers subcontracting. As Kaine and Rawling note:

In this sector, owners of large buildings and their tenants outsource work to cleaning companies who may engage workers and/or outsource the work to smaller cleaning businesses, creating a structural pressure that contributes to low pay and poor working conditions (and often poor quality cleaning for clients and unsustainable cleaning contractor business models).<sup>111</sup>

The same structural issues that have led to widespread legal non-compliance have significant implications for OHS, with rates of work-place injuries increasing to more than twice the national average in recent years.<sup>112</sup>

### Accessorial Liability, Proactive Compliance Agreements and the Cleaning Accountability Framework

This game-changing initiative aims to support ethical labour practices in the cleaning industry – for cleaners and cleaning companies, property owners, tenants and investors. [...] Once approved, certification can be displayed, letting tenants and patrons know our conduct with cleaners is ethical and fair. This aligns with our commitment to maintaining high ethical standards on all Cbus Property projects and investments,

and to work with suppliers whose values are consistent with ours.<sup>113</sup>

Cbus Property

ACSI argues that the high-risk of slavery-like practices flourishing in services procurement, including cleaning, can only be addressed via a “cross-sector approach between business, property owners and managers, unions and statutory agencies”.<sup>114</sup>

The Cleaning Accountability Framework (CAF) is an example of a multistakeholder approach, and involves lead/host companies (e.g. property owners), investors and asset managers; cleaning companies; employee representatives, industry associations, and the Fair Work Ombudsman.<sup>115</sup> CAF advocates for responsible contracting practices. Participants involved in this scheme, including investors, have described how it assists in ensuring that labour practices in the cleaning industry are ethical, fair, and high-quality.<sup>116</sup>

There are two elements which distinguish CAF from most other compliance initiatives:

- Cleaners are given a formal role in the certification of buildings, and in the ongoing compliance with labour standards.
- CAF has determined benchmarks for productivity rates and on-costs to assess whether the contract is sufficient to enable cleaners (including employees of any subcontractors) to work within safe productivity levels and be paid at least legal minimum wages and entitlements.

110. ACSI, *Modern Slavery, Risks, Rights and Responsibilities*.

111. Kaine and Rawling, 305–331 (p. 309).

112. Kaine and Rawling, 305–331 (pp. 316–317).

113. *CBUS Property: Sustainability Report 2018*, CBUS, 2018, <<https://bit.ly/3bSeScY>>.

114. ACSI, *Modern Slavery, Risks, Rights and Responsibilities*, p. 14.

115. CAF, ‘Cleaning Accountability Framework - About’, in *Cleaning Accountability Framework Inc.*, 2020, <<https://bit.ly/3e2EHjd>> [accessed 6 April 2020].

116. Daryl Browning, Chief Executive Officer, ISPT: “ISPT is proud to have been a supporter of the Cleaning Accountability Framework since its inception demonstrating how we value workers rights. Our customers value quality cleaning services when they are in an ISPT building. This leads to longer leases and ultimately returns for our investors, and the 50% of Australian workers these investors represent.” ISPT, *Sustainability Report*, ISPT, 2017, <<https://bit.ly/3bTcTp0>> [accessed 6 April 2020].

The CAF Advisory Group includes: AustralianSuper, United Workers Union (UWU), ISPT Super Property, AMP Capital, JLL, CBRE, BIC, ISS Facility Services, and Property Council of Australia (PCA). The Fair Work Ombudsman is also a member of the committee, and was actively involved in developing CAF.

In selected cases of significant and widespread exploitation, the FWO has included participation in building certification via CAF in their legally-binding proactive compliance agreements. For example, in August 2018, FWO entered into a legally binding, proactive compliance agreement with Woolworths about the company's cleaning supply chains. The agreement requires regular audits of cleaning contractors and strengthens contracting requirements.

#### COVID-19: modern slavery and exposure risks for cleaners

There is a risk of significant job losses in the commercial cleaning industry due to the shutdown of some commercial buildings. CAF warns that job losses and workplace shutdowns related to the COVID-19 crisis may increase modern slavery risks for those currently employed in the cleaning industry, including contractors. Already, cleaners are reporting a significant loss of shifts due to COVID-19 related shutdowns.

At the time of writing, temporary migrant workers are not eligible for either the JobSeeker or JobKeeper payments if they are stood down or terminated due to the virus. Temporary migrant workers make up a significant proportion of the industry workforce. These low paid workers live paycheck to paycheck, and have minimal or low savings. Job losses puts these workers at greater risk of falling into slavery-like conditions as they are likely to seek out:

...even more precarious work and expos[e] themselves to a greater risk of exploitation. ... As work dries up, desperation among workers grows. In such circumstances working conditions can quickly deteriorate at the hands of unscrupulous employers.<sup>117</sup>

As companies respond to the COVID-19 crisis, their focus has been predominantly on their direct workforce. It is crucial that companies also take responsibility for their labour hire and contracting workforce - particularly where those workers perform core functions for a company, as in the case of cleaners.

CAF has outlined a set of best practice principles and ethical business conduct guidelines for building owners, including steps that they can take to minimise impacts on contract cleaning workers who are currently vulnerable due to job losses and a lack of social security support. The advice includes

maintaining oversight of the cleaning contractor workforce to ensure that reductions in hours are spread between workers, and the redirection of any government support payments to workers.<sup>118</sup>

#### COVID-19: intensification of work, OHS risk and ensuring tenant confidence in building hygiene

Following the relaxation of COVID-19 restrictions, commercial business tenants who have moved to working from home arrangements for their employees will need assurance from building owners that cleaning services are sufficient to meet the additional hygiene requirements, before any employees return to work.

Building owners may also have to reassess their cleaning contracts to ensure that they are sufficient (in terms of staff and hours) to cover the additional cleaning required to meet new hygiene and safety standards and advice. Lead or host companies which do need to increase or update their supplier contracts to reflect these new standards must ensure that contracted cleaners are not working unpaid to keep buildings safe. Companies must also ensure that their contractors are providing workers with satisfactory safeguards (including fit-for-purpose personal protective equipment), implementing recommended social distancing and hygiene policies, and providing sufficient training in how to carry out their work safely. Building owners have a responsibility to ensure that keeping their buildings safe for all tenants does not occur at the expense of workers.

Similarly, host companies in sectors that have seen an intensification of cleaning requirements due to COVID-19 (e.g. aged care and hospitals) must revise their cleaning contracts to reflect this, and ensure that cleaners are paid for all additional cleaning hours worked to stop the spread of the virus.

117. Boersma and Nolan in CAF, 'Cleaners are our frontline defence', in *Cleaning Accountability Framework Inc.*, 2020, <<https://bit.ly/2XkOuom>> [accessed 6 April 2020].

118. CAF, *Advice Relating to Reductions in Cleaning Services*, CAF, 17 April 2020.

**EMERGING SECTORS:  
LARGE-SCALE SOLAR  
INSTALLATION**



**Large-scale solar installation**

Large-scale solar installations are commonly known as “solar farms”.

**ASX100 companies in the large-scale solar installation sector**

There are currently 16 large-scale solar installations being funded by the Australian Renewable Energy Agency (ARENA).<sup>119</sup> No ASX100 companies are listed as lead organisations. Two ASX100 companies are primary contractors on four solar farms: CIMIC Group Ltd. and Downer Edi Ltd. (DOW).

**Labour hire in the large scale solar industry**

Large scale solar installation can be considered a subset of the construction industry, however the nature of the installation and the remoteness of the sites, means that there are unique risks associated with this emerging sector. There have been a number of media reports, inquiry submissions, and Worksafe audits which all highlight a range of significant risks in the sector, including:

- Migrant workers are being employed on wages significantly below Australian legal minimums, and who are vulnerable to falling into modern slavery.
- Unlicensed labourers being used to perform electrical work, in breach of OHS legislation.
- Labour hire workers told to provide their own protective equipment, in breach of OHS legislation.
- Use of subsidiaries and contractors to undercut wages and conditions.

**Risk 1. Exploitation of migrant labour and the potential for modern slavery**

In their submission to the *Senate Inquiry into the Effectiveness of the Current Temporary Skilled Visa system in Targeting Genuine Skills shortages*, the Electrical Trades Union (ETU) stated that they had evidence of Filipino and Thai workers employed on subclass 400 “specialist” visa arrangements, earning only \$40 per day, on a site in Collinsville, North Queensland. These workers were eating plain white rice for every meal, as “it was the only sustenance they could afford”.<sup>120</sup>

The ETU also presented evidence of 115 Bulgarian nationals who had been flown in to complete work on a different site. These workers were kept separate to the local workgroup. They had their own accommodation, canteen, shift patterns, and communicated with management via a translator.

These wages are significantly below legal minimums and substantially below the typical wage for even unskilled labourers on solar sites. Nevertheless, there is some evidence that free trade agreements, which Australia is signatory to, have created the requirement for classes of visas to be created to employ temporary foreign workers on country of origin wages and conditions.

While the practice of hiring workers on wages below Australian minimums is therefore - in many cases - legal, it is exploitative, and leaves workers vulnerable to falling into modern slavery. As noted in Section Two, modern slavery exists on a spectrum of labour exploitation and wage theft, with migrant workers who are

particularly vulnerable to falling into slavery-like conditions due to language barriers and precarious visa conditions. This is exacerbated by the remoteness of most solar farms, which significantly limits oversight by regulators and unions.

Keeping groups of workers separated also increases OHS risks on a site. As discussed in Section Two, the presence of multiple, isolated work groups on a site increases OHS risk, as incidents and lessons are not able to be effectively communicated between different groups.

There is also evidence that labour exploitation in the solar industry is undermining the social licence of renewables projects more broadly (see p. 34).

The Collinsville solar farms discussed at the hearing were all managed by Edify Energy. Downer EDI provided some contract labour to the site, but it is not alleged that they employed the migrant labour discussed here.

**Risk 2. Unlicensed labour undermining OHS and workmanship**

There is substantial evidence of contractors using unlicensed workers to perform electrical work on solar farms in contravention of various state legislations and regulations, and with potentially deadly consequences for the workers on a site. It also has implications for the ongoing performance of the installation and the overall longevity of the project.

For example, in September 2019, WorkCover Queensland released their report on their audit of Queensland solar farms with the Electrical Safety Commission. As

119. For a list of current projects see: <https://arena.gov.au/projects/?project-value-start=0&project-value-end=200000000>

120. ETU, *Submission to Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the effectiveness of the current temporary skilled visa system in targeting genuine skills shortages*, ETU, 2018, <<https://bit.ly/3aQ6AT5>> [accessed 6 April 2020].

part of those audits, they visited 30 farms over 12 months and issued 67 improvement and infringement notices, for issues including: unsafe isolation and securing and protection of cables, earthing, marking and labelling, and testing. They also found unlicensed people performing electrical work, including carrying out cable installation (including on high voltage installations), making connections for the earthing system, and making the plug-in connections of the interconnecting wiring between PV panels.<sup>121</sup>

In Victoria, the ETU reported that UGL (CIMIC) had hired unlicensed backpackers to perform electrical work on a site in Bannerton, Northern Victoria.<sup>122</sup> In response, Energy Safe Victoria released advice clarifying who was eligible to work on large scale electrical installations.<sup>123</sup> Job ads for these workers show rates substantially below those for licensed electricians.

### **Risk 3: Undermining the social licence for the expansion of the renewables sector**

[F]ailing to take account of the social dimension will give rise to pressures to delay, dilute or abandon climate policy. This will make the shift to a low carbon economy less likely, thereby placing investors at risk from rising climate costs.<sup>124</sup>

*The Keep it in the Regions Inquiry* highlighted how the use of labour hire to undercut labour conditions risks undermining a sector's social licence in the communities where projects are based.<sup>125</sup> While the inquiry didn't explicitly look at large-scale solar

farm installation, its conclusions and recommendations are relevant to this sector.

The risks outlined above are immediate and significant risks to the workers, projects, companies and investors. They also have the potential to undermine the social licence of large-scale solar installations in rural communities, and impact on broader acceptance of the need to shift to renewable power generation. This puts the expansion of the renewable sector at risk, and slows - or may even halt - necessary and urgent action to transition to a low-carbon economy and prevent climate catastrophe.

The transition to a low-carbon economy is a "whole-economy challenge" that involves governments, investors, companies, workers and unions. Investors have a role in integrating social and workforce dimensions in all their climate engagement actions.<sup>126</sup> As the examples above make clear, there is an immediate role for investors to play in engaging companies on decent work in their clean energy projects, and promoting high labour standards and inclusive growth in all their clean energy projects.

121. WorkCover Queensland, 'Electrical safety on solar farms', in *WorkSafe Queensland*, 2019, <<https://bit.ly/2xXe6gs>> [accessed 6 April 2020].

122. ETU, 'Solar Scandal', 2019, <<https://bit.ly/34l7VyT>> [accessed 8 April 2020].

123. Energy Safe Victoria, 'Who can work on large-scale solar farms?', in *Energy Safe Victoria*, 2020, <<https://bit.ly/3c15qUR>> [accessed 6 April 2020].

124. N Robins, V Brunsting & D Wood, *Climate Change and the Just Transition: A Guide for Investor Action*, London, UNPRI, Grantham Research Institute, London School of Economics, Harvard Kennedy School, 2018, p. 11, <<https://bit.ly/3dTLp4i>> [accessed 6 April 2020].

125. Commonwealth of Australia, *Keep It in the Regions*.

126. Robins, Brunsting and Wood, p. 11.



# Company Reporting and Investor Engagement Guide

**This report has highlighted general shortcomings in the reporting by ASX100 on their use of labour hire and/or contractor workforces.** In almost all cases, the reporting was found to be insufficient to allow investors to identify the employment model used, let alone determine the sustainability of that model and how it contributes to long-term shareholder value.

ACCR notes that this lack of reporting also reflects the absence of indicators in commonly used reporting frameworks, such as the GRI.<sup>127</sup>

ACCR has developed this framework to guide companies on the types of material and materiality-based disclosures that would provide investors with sufficient information to assess their workforce strategy. Investors should use their ownership rights to engage companies on their disclosures and on the risks and benefits of their workforce strategy.

In preparing this guide, ACCR reviewed existing benchmarking and reporting initiatives, and identified indicators that broadly captured the contingent, contractor, or labour hire workforce. Where possible, this guide has sought to extend these initiatives rather than developing entirely new sets of indicators and disclosures.

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## UNDERSTANDING THE EMPLOYMENT MODEL

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*Definitions of labour hire, contractors and/or any other significant segments of the indirect workforce.*

The boundary of each workforce segment should be clearly defined, and the definition should clearly articulate the level of control the company has over each group of workers.

As identified above, in the cleaning section, suppliers may be included as part of the core workforce, particularly if they perform tasks that are necessary to the daily operations of a company (for example).

In many sectors, it should also include independent contractors delivering core services on behalf of the company.

Groups of workers who are not considered as part of the core workforce and excluded from reporting should be noted, so that investors can assess the validity of these exclusions.

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*Number of workers, disaggregated according to the definitions provided above and type of contract (e.g. full-time, part-time, casual)*

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Where indirect workers are higher on a very short-term contractors (e.g. to perform specific tasks), it may be more appropriate to provide an average for the reporting period either as numbers of workers or FTE.

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These disclosures are aimed at providing investors with transparent data that gives a clear picture of the employment model used by a company, and the breakdown of the whole workforce (including direct employees and any triangular employment relationships).

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127. ACCR has reviewed a number of existing labour rights benchmarks and ESG frameworks and their suggested reporting metrics for contingent, supplier, contractor, subcontractor and labour hire workforces, including: Committee on Workers' Capital (CWC) Guidelines for the Evaluation of Workers' Human Rights and Labour Standards; Corporate Human Rights Benchmark (CHRB); Ethical Trading Initiative (ETI) Base Code; Global Reporting Initiative (GRI); OECD Guidelines for Multinational Enterprises; UN Guiding Principles on Business and Human Rights (UNGPs); UN Principles of Responsible Investment (UNPRI); Workforce Disclosure Initiative (WDI).

## OCCUPATIONAL HEALTH AND SAFETY (OHS)

### ***Reporting on safety incidents should be disaggregated by direct hires AND labour hire and/or contractors***

At a minimum, companies should provide detail on fatalities, critical incidents and the severity of incidents. These disclosures should be disaggregated by direct hires AND labour hire and/or contractors. If a segment of the workforce is excluded from these disclosures, this should be noted and an explanation given as to why.

Note: in many cases, companies are already recording the number of hours worked by contractors as part of their OHS disclosures. The publication of disaggregated data would therefore not unduly burden them.

### ***Reporting on Occupational Health and Safety Management System (OHSMS) should include specific detail on inclusion on labour hire workers and contractors***

This should include information on the OHS induction and training process for labour hire workers and contractors, and if it differs to the process for direct employees.

It should also detail how information is shared between contractors and the host company, and between contractors. In particular, how incidents and lessons learnt are communicated to contractors.

It should detail what due diligence the host company undertakes to audit the safety performance of its contractors.

ACSI has developed a detailed framework for companies and investors on improved health and safety disclosures.<sup>128</sup> ACCR supports this framework, which sets out four key themes underpinning health and safety management, questions for investors to ask to satisfy themselves as to how companies are addressing those themes, and sample qualitative and quantitative disclosures for companies. The above questions are provided as an adjunct to that framework, and are aimed at guiding investors in determining the impact of a company's employment model on OHS outcomes, and what policies and procedures it has in place to address the particular OHS risks associated with labour hire and/or contractor workforces.

In addition, in high-risk industries, investors may also seek to engage companies on regulatory disclosures, and specifically, whether any of their primary contractors/labour hire agencies received notices for regulatory breaches or penalties, for work on a host company's site. If their primary contractors/labour hire agencies have received notices, investors should seek to determine what due diligence the host company has taken with respect to those breaches.

## MODERN SLAVERY AND LABOUR EXPLOITATION

### ***Host or lead companies with control over a worksite or worksites where a risk of modern slavery has been identified, should outline their "approach to collaboration" with key stakeholders to assess, monitor, mitigate and remediate modern slavery risks.***

A number of guides have been produced to assist companies to meet their responsibilities under the Modern Slavery Act 2018 (Cth), and develop best practice approaches to addressing modern slavery in their value chains.<sup>129</sup> Each of these guides note that company responses to identified modern slavery risks will depend on the degree of control a company has over a worksite or worksites, the amount of leverage that the company has over a supplier, and the severity of risk in a particular sector and/or supply chain.

As noted above, some Australian companies are exposed to modern slavery risks through their procurement of services in Australia (e.g. cleaning and security), on sites that they control. In these cases, companies should undertake more extensive due diligence. Where the level of control is sufficient, they may be responsible for remediation where adverse human rights impacts are identified.

As discussed in Section Two, host or lead company participation in multi-stakeholder mechanisms or agreements, where workers have an active role in monitoring and assessment, has been identified as necessary to addressing modern slavery risks and responsibilities in high-risk industries.

128. ACSI, *The Future of Health and Safety Reporting: A Framework for Companies*, pp. 19–28.

129. ACSI, *Modern Slavery, Risks, Rights and Responsibilities*; Department of Home Affairs, p. 96.

## A TWO-TIER WORKFORCE

### *Benefits provided to direct employees that are not provided to contractors and/or labour hire*

GRI indicator 402.02 asks companies to report on “benefits provided to full-time employees that are not provided to temporary or part-time employees”, with this data to be disaggregated by significant locations of operation. In companies and sectors where there are a significant number of indirect workers employed to perform core operations for a host company (as opposed to specialised tasks), investors should also review how the conditions extended to labour hire workers and contractors compare to direct employees. These conditions include rates of pay, leave provisions, and training opportunities.

## MANAGEMENT OF HUMAN AND INTELLECTUAL CAPITAL – TURNOVER

### *The turnover rate disaggregated for the direct and indirect workforce*

This should note if any segments of the workforce were excluded from reporting and why. For example, contractors were hired on a task or project basis.

AND/OR

### *Average length of service of full-time/part-time/contractor workers by type of employment*

This should note if any segments of the workforce were excluded from reporting and why. For example, contractors were hired on a task or project basis.

Labour hire and/or contract labour may impact the ability for companies to attract and retain necessary human and intellectual capital. Turnover rates of the permanent workforce can be indicative of corporate stability, and satisfaction (or dissatisfaction) amongst the workforce. They may also indicate structural changes in the organisation.

In the case of labour hire workers and contractors hired on a seasonal or project basis, turnover data may not necessarily be representative of a company’s retention of human capital. However, in cases where labour hire is used to replace large sections of the workforce, where labour hire workers are employed on regular and long term rosters, and/or where a host company contracts out core business operations, turnover rates for the contingent workforce compared to the direct employed workforce would allow investors to assess the sustainability of a company’s chosen employment model and its success in retaining necessary human and intellectual capital.

For these contract types, it may be more appropriate to provide the average length of service by contract type. Alternatively, it may be more appropriate to the percentage of indirect contracts that completed their contract term versus those that ended prior to the completion of the contract.

## WORKFORCE COMPOSITION – DIVERSITY

### *Number of workers for materially relevant diversity disclosures, disaggregated by direct/indirect workforce (at a minimum)*

Companies report on a wide range of diversity metrics, including

gender, race, indigeneity, disability, sexuality. Where this data is provided, it should also be provided for the indirect workforce. Data should specify the segment of the workforce they capture, if significant parts of the workforce are excluded, and if so, why.

### *Disclose company policies regarding the workforce diversity of suppliers*






















A number of companies include supplier workforce diversity statistics and policies in their supplier selection criteria.

Workforce diversity measures are now a common part of corporate governance engagement and reporting by Australian listed companies. Investors and other stakeholders, including ACCR, have taken an interest in how companies are reporting on issues including gender diversity, Equal Opportunity Employment, and the recruitment of Indigenous employees. Many companies have been eager to demonstrate their commitment to these issues. For example, through WGEA reporting and awards, Reconciliation Actions Plans (RAPs), and Australian Workforce Equality Index (AWEI).

In order to adequately assess a company’s performance against its stated diversity policies and targets, investors and other stakeholders need to be provided with clear information and data. From a workforce point of view, this means reporting on the company’s entire workforce, not just its direct employees. If company reporting is partial, incomplete or unclear, then investors will be unable to properly assess the extent to which a company is meeting its diversity goals and targets.

# Appendix: company selection

The following companies were identified using both IBISWorld and Global Industry Classification Standard (GICS) industry codes, to draw from a list of ASX100 companies, current as at 30 December 2019. For further information, see the Methodology section of the report, pp. 8-9.

SECTOR	COMPANY	GICS IDY3DESC
	Alumina Ltd. (AWS)	Mining and Metals
	BHP Group Ltd. (BHP)	Mining and Metals
	Charter Hall Group Ltd. (CHC)	Equity Real Estate Investment Trusts (REITS)
	CIMIC Group Ltd. (CIM)	Construction & engineering
	Dexus Ltd. (DXS)	Equity Real Estate Investment Trusts (REITS)
	Downer Edi Ltd. (DOW)	Commercial Services & Supplies
	Evolution Mining Ltd. (EVN)	Mining and Metals
	Fortescue Metals Group Ltd. (FMG)	Mining and Metals
	Goodman Group Ltd. (GMG)	Equity Real Estate Investment Trusts (REITS)
	GPT Group Ltd. (GPT)	Equity Real Estate Investment Trusts (REITS)
	Iluka Resources Ltd. (ILU)	Mining and Metals
	Lendlease Group Ltd. (LLC)	Real estate management & development
	Mirvac Group Ltd. (MGR)	Equity Real Estate Investment Trusts (REITS)
	Newcrest Mining Ltd. (NCM)	Mining and Metals
	Northern Star Resources Ltd. (NST)	Mining and Metals
	Rio Tinto Ltd. (RIO)	Mining and Metals
	Scentre Group Ltd. (SCG)	Equity Real Estate Investment Trusts (REITS)
	South 32 Ltd. (S32)	Mining and Metals
	Stockland Ltd. (SGP)	Equity Real Estate Investment Trusts (REITS)
	Vicinity Ltd. (VCX)	Equity Real Estate Investment Trusts (REITS)
	Whitehaven Coal Ltd. (WHC)	Coal and Consumable Fuels

## Sectors



Mining



Commercial Construction



Contract Services in  
Construction and Mining



Property Services/  
Commercial Cleaning  
Services





# LABOUR HIRE

CAMPAIGN REPORT · JUNE 2020



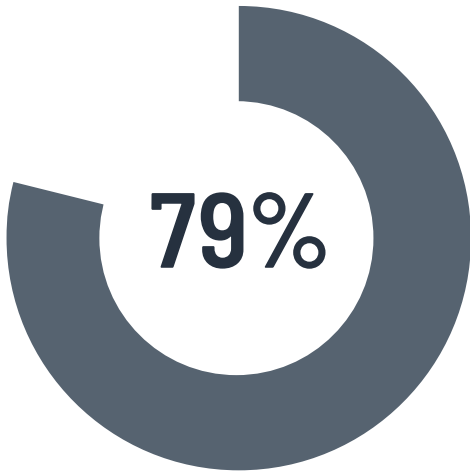
Australian Government

Australian Building and  
Construction Commission



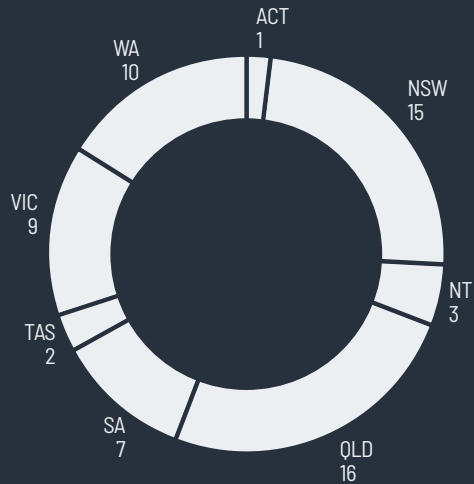
# AT A GLANCE

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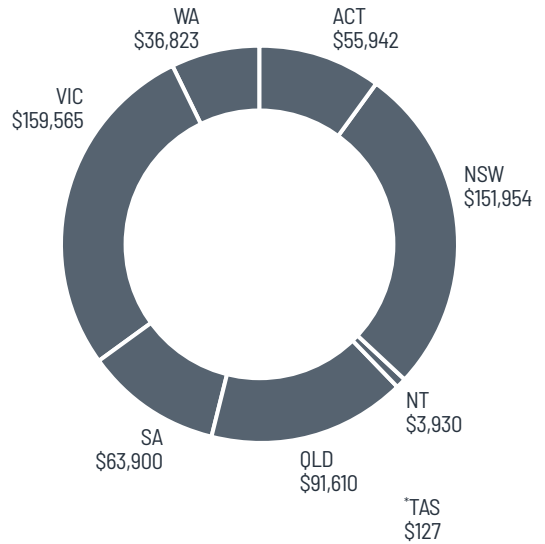
OF COMPANIES  
AUDITED ARE  
NOT COMPLYING  
WITH AUSTRALIAN  
WORKPLACE LAWS

**63**  
LABOUR HIRE  
COMPANIES  
AUDITED



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**\$563,850**  
RECOVERED FOR  
1337 WORKERS



**12**  
COMPLIANT

**30**  
NON-COMPLIANT,  
BREACH RECTIFIED

**20**  
NON-COMPLIANT,  
EDUCATION

**1**  
UPGRADED,  
INVESTIGATION

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## BACKGROUND

The labour hire industry is a significant employer of building workers.

Labour hire arrangements involve a triangular relationship in which a labour hire business supplies a worker to a host employer for an agreed fee. This arrangement enables a flexible approach to the engagement of labour, without some of the constraints associated with engaging ongoing employees.

Numerous inquiries undertaken by all levels of government in the past few years have highlighted the vulnerability of labour hire employees. Several jurisdictions have introduced labour hire licensing schemes.

The precarious nature of labour hire employment means that workers are less likely to speak up about their working conditions.

During 2019, the Australian Building and Construction Commission (ABCC) engaged in an audit program targeting labour hire employers.

## METHODOLOGY

ABC Inspectors carried out compliance audits on 63 labour hire employers in the building and construction industry. The focus of these audits was to ensure that employees were being correctly paid, including their base rate of pay, penalty rates, overtime rates and allowances. The audits also checked the employers' record keeping and pay slips.

The compliance audits only covered workers engaged in building work within the meaning of section 6 of the *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP Act).

Labour hire employers selected were located across Australia and employed a range of classification and employment types. Information received from industry led to an inclusion of a small number of specific employers.

ABC Inspectors assessed time and wages records for compliance with the *Fair Work Act 2009* (Fair Work Act), the Fair Work

Regulations 2009 and the modern award or enterprise agreement.

An enterprise agreement predominantly covered 41 per cent of workers. A modern award covered the remaining 59 per cent. The most common award was the Building and Construction General On-Site Award 2010.

ABC Inspectors provided education to labour hire employers to help them understand their obligations. Where potential underpayments were identified the ABC Inspector worked with each employer to rectify any issues identified and ensured evidence was obtained of all back payments.

Where there were deficiencies in record keeping or pay slips the ABC Inspector assisted the company to improve their practices and sought evidence of ongoing compliance.

## KEY FINDINGS

Fifty of the sixty-three employers audited were non-compliant with Australian workplace laws.

The rate of non-compliance between employers that were covered by a modern award compared to those using an enterprise agreement was statistically insignificant.



### Record keeping within the labour hire sector was poor.

#### Record Keeping

Forty eight per cent of non-compliant employers (24) contravened the record keeping and/or pay slip provisions of the Fair Work Act.

The ABCC identified non-compliance issues including:

- failure to keep a record of overtime hours worked by an employee
- incorrect ABN/employer name on the pay slip
- pay slip not recording the pay period for which the payment related
- pay slip not recording the date the payment was made.

#### Monetary Entitlements

Sixty four per cent of non-compliant employers (32) had failed to pay the correct:

- base rate for ordinary hours
- allowances
- overtime or
- penalties.

Errors occurred where an employer used an industrial instrument that did not apply to the workers or when they were operating with limited knowledge of their obligations.







# CASE STUDIES

## TRAVEL ALLOWANCE

A labour hire employer in regional New South Wales did not pay the fares and travel pattern allowance as required in clause 25.2 of the Building and Construction General On-site Award 2010 (the Award).

The labour hire employer argued that because workers do not use vehicles to travel to the construction site (workers used public transport), they were not required to pay the allowance. This is inconsistent with the Award provision.

The audit further identified that the employer did not pay the meal allowance provided for in clause 20 of the Award to employees who had worked more than one and a half hours of overtime.

This resulted in back payments totalling \$7,164 to 12 employees. The process also provided the ABCC with the opportunity to educate the labour hire employer on their workplace obligations.

## MINIMUM ENGAGEMENT FOR CASUALS

The WA branch of a national labour hire employer was not complying with the minimum engagement time for casual employees as provided under the applicable industrial instrument.

According to clause 14.4 of the Building and Construction General On-site Award 2010, casual employees are entitled to be paid for a minimum of four hours work per engagement. Where casual employees are required to attend work, they are to be paid for at least four hours of work. This entitlement exists even if they are not required or do not work for all four hours.

The ABCC educated the WA labour hire employer and requested it rectify the above for all affected casual employees. As a result, the WA labour hire employer back paid \$4,913 to 53 employees.

## MINIMUM RATE OF PAY FOR APPRENTICES

A labour hire employer in Queensland specialising in the placement of apprentices in the commercial construction industry was found to be underpaying the minimum rate of pay, overtime and allowances for its apprentices.

The issues related to the employer not updating its rates from the previous minimum wage increase, therefore the flow on effect meant their penalty and overtime rates were incorrect as well. The employer had also failed to increase the travel allowance owed to employees from their progression in years of their apprenticeships.

The employer paid back a total of \$21,601 to their seven apprentices, including one payment of more than \$5,000. The ABCC also educated the labour hire employer on their rights and obligations.



## MORE DETAIL ABOUT THE LABOUR HIRE INDUSTRY

Labour hire arrangements involve a triangular relationship in which a labour hire business supplies a worker to a host employer for an agreed fee. This arrangement enables a flexible approach to the engagement of labour, without some of the constraints associated with engaging ongoing employees.

The labour hire employer is responsible for ensuring the employee is correctly paid. The industrial instrument that applies to the worker is the award or enterprise agreement that applies to the labour hire business.

The labour hire industry is a significant employer of workers. However, there is a lack of disaggregated information to ascertain how many labour hire workers are engaged in the building and construction industry or fall within the jurisdiction of the ABCC.

In 2015, the Productivity Commission estimated that labour hire accounts for around 1.8 per cent of the labour market or 212,400 employed persons.<sup>1</sup>

A 2018 APH research paper<sup>2</sup> stated that:

- Labour hire employees are much more likely to be employed on a casual basis and have a greater expectation of leaving their employment in 12 months.
- Almost four in five (78.8 per cent) labour hire employees in August 2018 were employed on a casual basis compared with the average for all employees of 24.6 per cent.

- Just under a quarter (24.4 per cent) of labour hire employees did not expect to be working for the same employer in 12 months—more than double the estimate for all employees (at 9.9 per cent).

Numerous inquiries undertaken by all levels of government in the past few years have highlighted the vulnerability of labour hire employees. These reports include:

- South Australia Parliament House of Assembly Economic and Finance Committee, *Inquiry into the labour hire industry: final report*, October 2016
- Victorian Inquiry into Labour Hire Industry and Insecure Work, *Victorian Inquiry into the Labour Hire Industry and Insecure Work: final report*, August 2016
- Australia Parliament Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, March 2016
- Queensland Legislative Assembly Finance and Administration Committee, *Inquiry into the practices of the labour hire industry in Queensland*, June 2016

Several jurisdictions have introduced labour hire licensing schemes, including:

- *Labour Hire Licensing Act 2017 (Qld)*
- *Labour Hire Licensing Act 2018 (Vic)*
- *Labour Hire Licensing Act 2017 (SA)*

1 Productivity Commission, Workplace Relations Framework: Productivity Commission Inquiry Report, vol. 2, PC, Melbourne, 2015, p. 1092.

2 Trends in use of non-standard forms of employment (10 December 2018) APH Research Paper, Geoff Gilfillan, Statistics and Mapping Section (Sources: 2001, 2008 and 2001—ABS, Forms of Employment, cat. no. 6359.0; 2014, 2016 and 2018—ABS, Characteristics of Employment, cat. no. 6333.0, Table 13.3)

## ABOUT THE ABCC

The ABCC is an independent statutory agency established under the *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP Act). The ABCC commenced operations on 2 December 2016 and replaced its predecessor agency, Fair Work Building & Construction (FWBC).

Section 16 of the BCIIP Act provides that the ABCC's statutory functions include:

- promoting the main object of the BCIIP Act;
- monitoring and promoting appropriate standards of conduct by building industry participants, including by:
  - monitoring and promoting compliance with this Act, designated building laws (including the Fair Work Act and fair work instruments) and the Building Code (Building Laws) by building industry participants; and
  - referring matters to other relevant agencies and bodies;
- investigating suspected contraventions by building industry participants of Building Laws;
- ensuring building employers and building contractors comply with their obligations under Building Laws;
- instituting, or intervening in, proceedings in accordance with the BCIIP Act;
- providing assistance and advice to building industry participants regarding their rights and obligations under Building Laws;
- providing representation to a building industry participant who is, or might become, a party to a proceeding under Building Laws, if the ABC Commissioner considers that providing the representation would promote the enforcement of the relevant Building Law; and
- disseminating information about Building Laws, and about other matters affecting building industry participants, including disseminating information by facilitating ongoing discussions with building industry participants.

## THE ABCC'S JURISDICTION

The ABCC's jurisdiction covers building industry participants as defined in the BCIIIP Act.

Building industry participants include:

- A building employee
- A building employer
- A building contractor
- A person who enters into a contract with a building contractor where building work is carried out or arranged
- A building association (for example, union or employer association)
- An officer, delegate or other representative of a building association.

For the ABCC to have jurisdiction there must also be a connection to building work. That is the particular activity in which the workplace parties are engaged constitutes building work as defined by the BCIIIP Act.

## DEFINITION OF BUILDING WORK

Section 6 of the BCIIIP Act defines 'Building Work'.

Broadly the definition captures civil, commercial and multi-dwelling residential building and construction activities but does not include: the drilling for oil or natural gas; the extraction of minerals; or, the construction of less than five single dwelling-houses.






# CONCLUSION

The ABCC was disappointed to discover such a high level of non-compliance in a sector established to provide labour to the construction industry.

Employers that profit from a business model designed to relieve others of their lawful obligations should be beyond reproach.

All labour hire employers found not complying with their lawful obligations rectified the alleged contraventions to the satisfaction of the ABCC, including by repaying workers in full.

Host employers need to be aware that in contracting out labour obligations without significant oversight they may expose themselves to risks of liability.



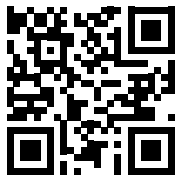
## **Ensuring the correct wages and entitlements are paid to vulnerable labour hire workers is essential given the precarious nature of their employment.**

The findings of this compliance activity will inform the ABCC's future proactive programs.

The ABCC encourages individuals with concerns about labour hire engagement within the commercial building sector to report it to us. People can anonymously report using this form: <https://www.abcc.gov.au/contact/anonymous-reporting-form>



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ON SITE APP**



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