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1. INTRODUCTION

International debates about the working conditions of temporary agency workers suggest that these employees, by the very nature of their triangular hiring relationship, require special protective legislation. Agency work involves an agency employing a worker who is then placed with a host business for a fee. The host controls the day-to-day work of the agency employee, but does not bear the responsibilities of an employer. This triangular relationship raises several fundamental questions, including who should assume legal responsibility for employment conditions (the agency or the host), and whether the state must intervene to preserve employment protection in what is simultaneously a commercial arrangement (between employer and host) and an employment arrangement (between hiring agency and employee).\(^1\) Too easily, agency workers can fall between the cracks in protective regulation unless they are given explicit attention.

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Although the International Labour Organization (ILO) has passed a convention and recommendation concerning the regulation of agency workers, national approaches vary considerably. Some European Union (EU) countries have developed special legislation to restrict the use of, and protect the employment conditions of agency workers by requiring the equal treatment of agency and host employees and regulating placement durations to prevent displacement of host employees. Raday described such interventions as ‘calling the bluff and deconstructing the triangle’ by attempting to prevent agency employment from undermining collectively agreed employment arrangements for direct hire host employees. Other countries, including Australia, have preferred to allow agency arrangements to operate in a relatively unrestricted way. On the one hand, protective employment legislation in Australia has not been updated to capture agency employment as it has grown; on the other hand, regulations governing job placement agencies and independent contractors have been introduced to facilitate and indeed subsidise their expansion.

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This paper is concerned with the impact of this laissez faire approach on agency workers in Australia, and with the response of Australian trade unions. Temporary agency jobs grew rapidly in Australia during the late 1990s. By the turn of the century, they made up around 3% of the workforce, and anecdotal evidence suggests their share of employment has continued to grow albeit at a slower rate. Their proportion of the workforce however, belies their wider impact upon labour market behaviour. When agency work lowers employment standards, a ripple effect occurs, spreading to threaten the employment conditions of direct hire employees.

In the context of a weak regulatory environment, trade unions in Australia responded to temporary agency employment in two ways. First, collective agreements were negotiated directly with agency employers to regulate terms and conditions of agency workers’ employment. Secondly, collective agreements were negotiated with hosts to limit the use of agency workers and determine their employment conditions. This second approach offered additional protection to some temporary agency workers and simultaneously protected direct hire employees. However, in 2006 the right of unions to continue this approach was curtailed through the Work Choices amendments to the Workplace Relations Act 1996 (WRA). Agency workers could no longer make common cause with host employees and were left to fend for themselves.

The remainder of this paper falls into five parts. First is an outline of the limited legislative protection for agency workers in Australia. Second, the paper explains how trade unions extended their entitlements through collective bargaining with agency and host employers. However, those agreements had weak substantive content and undercut union job control, favouring the needs of agency employers and hosts, while low levels of unionization (in general and especially amongst agency workers) meant any protection through collective bargaining was limited in coverage. The majority of agency workers continued to experience poorer terms and conditions of employment than their direct hire equivalents, and their differential treatment by hosts and often hostile responses from host employees compounded their sense of vulnerability. These outcomes are summarized in section three, drawing upon empirical data, submissions to government enquiries, and decisions of arbitral tribunals. The fourth section looks at the legal constraints on union bargaining over the use of agency employment, introduced in the Work Choices legislation in 2006. This legislation quickly impacted upon temporary agency employment. The fifth section then considers briefly the prospects for change under the policy of the current Federal Labour government which was elected in November 2007 to replace the conservative Howard government.

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LEGISLATIVE PROTECTION FOR TEMPORARY AGENCY WORKERS

Historically, minimum employment standards in Australia were determined primarily in ‘awards’ prescribed by industrial tribunals established by the federal and state governments. Since 1991, enterprise agreements have developed to displace awards as the main source of employment protection for about 40% of the workforce. However, awards (especially state ‘common rule’ awards) continue to form a weak safety net supporting just over a quarter of the workforce who are especially vulnerable and unable to negotiate anything better. In 1993, federal legislative standards governing a minimum hourly wage and leave provisions were introduced to supplement award minimum standards. Yet despite these efforts to establish a comprehensive safety net, gaps persisted. In particular, as Mitlacher and Burgess concluded, regulatory arrangements protecting agency workers in Australia were ‘almost non-existent’. Australia has not introduced the protections found in other countries such as limits on the length of a placement, or synchronization of employment contracts with host placements. Agency workers instead slipped through the regulatory net of awards and legal standards designed for traditional employment relationships.

Most agency workers in Australia are employed on a casual basis, and the regulation of agency work stems from protection designed for employees designated as casual workers. This has profound implications for their employment entitlements, and their capacity to collectively bargain to improve pay and conditions. Casual employment is a form of engagement recognized under Australian legislation but offered little protection by those statutes. It does not have an equivalent in other developed countries, although on-call employment appears its closest counterpart. Casual employees are paid by the hour, and enter a new contract of employment each time they commence a new engagement (or shift). They are not entitled to paid sick and annual leave, although their hourly wage may include a loading to compensate for the loss of such entitlements.

The circumstances under which casuals are engaged is left to the discretion of employers, constrained only by the state of the labour market, by collective agreements, and by awards which (until 1996) often placed a ceiling on the proportion or number of casual employees. Temporary agency employers justify their

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8. Mitlacher and Burgess ibid., 425.
extensive use of casual employment on the grounds that the availability of work is
dependent upon demand from hosts and is therefore unpredictable. Yet some
agency workers are placed with a single host for lengthy periods notwithstanding
their casual status, especially when the host has outsourced complete functions to
the agency.

An important source of labour market vulnerability for casual employees is
their exclusion from unfair dismissal protection. Permanent employees are entitled
to procedural and substantive fairness in relation to dismissals, and can be reinstated,
re-employed or receive compensation of up to six months wages when their dis-
missal is deemed harsh, unjust or unreasonable. Casual employees are only enti-
tled to this protection when they have been employed on a regular basis for more
than twelve months and have an expectation of continuing employment. Irregular
casuals, those employed for less than twelve months with the one employer, can be
dismissed without justification, with one hour’s notice. This gap in dismissal
protection has diminished since March 2006 following amendments to the WRA
which now exclude all employees employed by small businesses (i.e., 100 or fewer
employees) from unfair dismissal protection, and extend allowable grounds for
dismissal to include ‘operational’ reasons, a term interpreted broadly in subsequent
unfair dismissal cases. Only on relatively rare occasions have agency employers
failed to persuade tribunals that their employees are irregular casuals. In one case,
an employer was found to have breached dismissal provisions even though the
employees’ contracts specified that they were hired on the basis of engagements
‘from time to time’. The dismissed employee had regularly worked an average
of 23 hours per week for twenty-six months but was dismissed without notice.

From 2001, casual employees continually engaged for more than six months
could request conversion to permanent employment, subject to that right being
included in an award or agreement. This potentially expanded dismissal

14. Evidence presented before the Secure Employment Test Case (NSWIRComm 2006, 38), for example, included a labour hire casual who could not gain permanency, notwithstanding sixteen years placement with the same host (para. 269).
15. Workplace Relations Act 1996 (Cth), Part 12, Division 4 (hereafter WRA).
16. WRA 1996 s. 638.
18. WRA s. 643 (10).
19. WRA s. 643 (8); For example, Village Cinemas v. Carter, AIRCFB 35 (15 Jan. 2007).
protection to agency workers able to convert to permanent employment, however the entitlement was prohibited from federal awards in amendments to the WRA in March 2006. Unions in the state of New South Wales (NSW) successfully applied to the NSW tribunal for the inclusion of a similar conversion entitlement in NSW State common rule awards in 2006. The tribunal included casual agency employees in their decision, but refused the further union claim that agency employees also have a right to convert to permanent employment with their host after six months continuous placement. The extension of the right to convert to permanent employment could have had a significant effect across the NSW agency hire sector, however one month later NSW awards came within the jurisdiction of the federal WRA. This newly won conversion entitlement thus expires in March 2009 when all state awards become federal awards which are prohibited from carrying such clauses.

The majority of temporary agency employees thus remain vulnerable to dismissal at will. Even permanent agency employees may not be protected from employment insecurity by the dismissal provisions of the WRA. In one case, six permanent agency employees who had been involved in union activities were dismissed on one week’s notice due to lack of work, but replaced by newly recruited employees within a fortnight. The temporary agency company was found not to have breached the WRA. The tribunal member adjudicating the case commented that ‘[I]t was common and accepted that it was not improper for retrenchments to take place in such circumstances on as little as 24 hours’ notice’. The union’s allegation that the dismissals arose from the workers’ union activities was not accepted, notwithstanding that such activities may have been an ‘opportunistic reason for their non re-engagement’. The ease with which employers can dismiss casual employees, coupled with the acceptability of dismissing permanent agency employees in the absence of immediate placements has encouraged host employers to utilize agency employees at the expense of direct hire employees. Furthermore, when

22. WRA s. 513.
25. WRA Sch. 8. Note however, the status of content excluded from awards in 2006 may change under the current Labor government (see later).
27. SDP Kaufman, in Bruce Neilson et al. v. JSM Trading at 2-3.
28. SDP Kaufman commented that ‘Even if it be the case that the applicants’ so-called union activities were an opportunistic reason for their non re-engagement this, in my view, was not a factor in the termination of the employment of any of them’. Bruce Neilson et al. v. JSM Trading at 13.
temporary agency employees have applied for redress for an alleged unfair dismissal, their cases have often been complicated (and therefore rendered more costly) by contests over whether they were employed by the agency or the host. As will be shown below, the absence of unambiguous protection against unfair dismissal has reduced the bargaining power of temporary agency workers.

Low minimum wages and poor employment conditions for casual agency employees can be related to weak regulatory protection. Agency workers can be employed under one of five regulatory instruments. The first are minimum statutory entitlements. These began in the early 1990s with Schedule 1A of the WRA which set minimum standards for all employees in Victoria, other than those covered by a federal award or agreement. It provided five entitlements: a minimum hourly rate of pay for 38 hours per week (set at an industry level); five days paid sick leave; four weeks paid recreation leave per annum; unpaid maternity and paternity leave; and minimum notice of termination. Only the first of these, the hourly rate of pay, applied to casual agency employees. Workers employed by three types of agencies were likely to have only this minimal level of protection: those employed by small agencies placing workers with similarly small, non-unionized hosts (typically too small to be brought into the more regulated sphere involving unions); larger agencies placing workers with poorly unionized or non-unionized hosts (where agency employees had little bargaining power of their own, nor could they call upon the collective power of host employees); and agencies supplying workers in areas of high demand, such as nurses and information technology specialists (where market forces resulted in these workers receiving more than their minimum entitlement). The first of these scenarios is especially common since fewer than 2% of agency employers have more than 100 employees.31 Schedule 1A of WRA was repealed in 2006 and replaced by five minimum standards now determined by the Australian Fair Pay Commission (AFPC) for all Australia.32 These largely replicate Schedule 1A, although paid sick leave was extended to ten days and broadened to personal leave while the minimum termination period was repealed.33 Hence permanent agency employees formerly covered by Schedule 1A lost their entitlement to a minimum termination notice, whilst casual employees’ entitlement to a minimum hourly rate of pay remained unchanged.

The second regulatory instrument involved individual agreements known as Australian Workplace Agreements (AWA). These were introduced in 1996 to allow employers to vary employment conditions away from awards and agreements. A number of studies have found AWAs offered lower levels of wages and

32. WRA, Part 21, Division 2.
33. WRA, Part 7, Division 1.
conditions, however few agency employers initially employed workers under AWAs. In Victoria, for example, they could rely upon the low Schedule 1A entitlements instead. In 2006, the process for establishing AWAs was simplified and their minimum employment standards reduced to those of the AFPC which would then displace any prevailing award and collective agreement entitlements. The use of AWAs by agency employers subsequently increased, encouraged by the sector’s employer association which offered a template AWA for agency employers to adapt to their own circumstances. Importantly from a cost flexibility perspective, AWAs could be configured to allow different rates of pay for each placement.

The third regulatory instrument consisted of federal awards determined by the Australian Industrial Relations Commission. Until the early 1990s, awards were the dominant form of employment regulation in Australia, offering comprehensive protections and entitlements. In 1996, their content was pared back to twenty matters, and award wage increases limited to ‘safety-net’ increases determined periodically at a national level and intended primarily to protect the needs of low paid workers. Of those 20 award matters, less than half were relevant to casual agency workers. These were rates of pay, a minimum engagement period (often set at four hours), loadings for casual employment, ordinary hours of work and loadings for work performed outside of those hours, rest breaks, tool allowances and (subject to minimum engagement periods) pension entitlements. Permanent agency employees, on the other hand, were entitled to all award conditions, including annual leave, sick/carers leave, long service leave, public holidays, overtime, redundancy pay, notice of termination, stand-down provisions, and access to dispute settlement processes. Nevertheless, agency employees were disadvantaged relative to employees under collective agreements when award rates of pay, dependent upon safety net wage increases, fell behind wages paid in collective agreements.


35. Until Mar. 2006, the procedure for establishing AWAs, including checks of their content by the Office of the Employment Advocate, was widely regarded by employers as sufficiently cumbersome and bureaucratic to deter their use (R. Mitchell & J. Fetter, ‘Human resource management and individualisation in Australian labour law,’ Journal of Industrial Relations 45, no. 3 (2003): 292-325).


38. WRA Sections s. 88B(2) and 89A(2), prior to the Work Choices amendments.

State awards formed the fourth regulatory instrument. Mitlacher and Burgess note their importance as a further source of protection for agency employees (outside Victoria which abolished them in 1991), but state awards also have limitations. First, the propensity of agency employees to be employed as casuals means their entitlements remain restricted as with federal awards. Second, attempts by unions to establish common rule awards tailored to the special needs of the agency industry have failed. For example, in Western Australia, the Australian Workers’ Union applied for a common rule award for agency workers in 2004 that included a demand that workers be paid the wage rate applicable to host employees when that amount was in excess of the proposed award rate of pay. This was akin to the proposed EU Directive on temporary agency employment, that agency workers receive equal pay with host employees. The union’s application was dismissed, in part, because of the onerous burden placed on employers in applying this clause. In the view of the tribunal, the administrative burden on the employer outweighed the need for equitable wage levels between agency and host employees. Weak though state awards are, they remain scheduled to be dismantled under the Work Choices amendments to the WRA.

Whilst federal awards appeared to offer substantially more to agency employees than other regulatory instruments, their coverage was limited. This is because they are easily evaded. Barriers to entry for agencies are low and smaller ‘fly-by-night’ firms operate award-free or simply ignore legal obligations towards their employees. Also, employers are only legally bound by a federal award if they are directly named as an individual respondent, or if they belong to an employer association registered under the WRA. In Victoria, for example, around 50 agency employers in the manufacturing and electrical contracting sectors were respondents to federal awards through membership of the employer association, the Australian Industry Group. But the Recruitment and Consulting Services Association (RCSA), the main employer association for agency employers (to which around half the sector’s employers belong), is not a registered employer association and therefore its members are not a party to an award. Many agency employers, especially smaller ones, were thus unlikely to be bound by a federal award. Instead they were covered by State common rule awards which left no legal loophole for any employer to escape. The importance of award coverage, especially State awards, is borne out by research. A 1998 national survey of 43 agencies operating in unionized industries found 69% were respondents to an award.

Also, Brennan et al.’s 2003 study\(^4^5\) found only 16% of RCSA members, and 25% of non-members were covered by neither an award or enterprise agreement.\(^4^6\) The likelihood is that award coverage arose more from state common rule awards than federal awards, a supposition supported by the RCSA’s claim in 2004 that 62% of their members were covered by a state award, whilst only 21% were respondents to a federal award.\(^4^7\)

Since the regulatory entitlements discussed above are generally weak, trade unions have tried to bargain to improve the employment conditions for agency workers, and to limit the extent to which agency workers undercut direct hire employees’ conditions. Such collective agreements provide the fifth form of regulatory instrument governing agency employment. The form and success of union bargaining for temporary agency employees is discussed in the next section.

3. COLLECTIVE AGREEMENTS AND AGENCY WORKERS

Manufacturing was the first blue-collar industry to encounter the growth of agency employment during the late 1980s.\(^4^8\) At the time, the industry was heavily unionized and maintained an active shop steward system. Manufacturing unions reacted quickly to agency employment and negotiated their first collective agreement with a group of major agency employers in 1993. This first and most enduring agreement (most recently renegotiated in 2007) applied to placements within the Victorian capital city of Melbourne. It provided for rates of pay equivalent to those paid to host employees, preference to union members (outlawed in 1996), and other entitlements such as pension contributions and the supply of protective clothing by the employer.\(^4^9\) It also restricted the duration of placements for casual employees, although the extent to which this arrangement was enforced is unknown. Agency employers entered into such agreements because it gave them access to clients where unions had previously opposed their presence. Subsequent renegotiations of that agreement have only once involved collective action. That strike lasted seven weeks. It was dependent upon the support of host employer shop stewards and full-time organizers from the Australian Manufacturing Workers’ Union since agency workers themselves were poorly organized, in part because of their vulnerability to discrimination and dismissal.\(^5^0\)

In the 1990s, when the national industrial system


\(^{46}\) Ibid. Their research did not distinguish between awards and enterprise agreements.

\(^{47}\) AWU v. Adecco and Others 2004 WAIRC 13533.


\(^{50}\) Underhill *ibid.*
shifted away from industry and occupational based awards to enterprise bargaining, enterprise agreements were negotiated with the larger agency employers. Most of these replicated the earlier multi-employer agreement.51

Most collective agreements applied to agency employees irrespective of their placement, although a small number were restricted to placements with individual hosts. Whilst they offered higher rates of pay than federal awards, they were also tailored to suit agency hire conditions in ways that restricted access to entitlements. For example, an Adecco collective agreement covering workers placed with a steel manufacturing host entitled Adecco to direct employees to take annual leave to suit the operational requirements of the host.52 In contrast, comparable permanent direct hire employees covered by the engineering industry award could not be instructed to take leave unless their employer gave four weeks’ notice.53 By allowing flexibility to meet the hosts’ operational needs, employee job control over matters such as the pace and timing of work could be compromised. In effect agency workers were placed at the host’s beck and call by being required to work to that employers’ direction. An example can be found in a collective agreement which formalized irregular working hours for agency workers in the following terms:

In the course of a three (3) month period, employees could work at up to 20 different workplaces. This requires starting and finishing at different times as required by the client. Employees are also called upon to work overtime and shiftwork at short notice, as this is the nature of the industry.54

Traditional forms of shop-floor union organizing pose special difficulties for agency workers. First, the threat of dismissal, or not being offered further placements, dissuades most casual agency workers from becoming shop stewards, who are instead typically drawn from the (very small pool of) permanent agency workers. Second, the very nature of the industry, supplying temporary workers, means the stewards’ tasks of locating, recruiting and communicating with fellow members are problematic.55 Collective agreements with agency employers provided some remedy for this by allowing shop stewards to spend one day per month visiting members at hosts’ workplaces.56 However, they have also specified that such visits only take place on a day nominated by the employer and in the presence of an employer representative, potentially curtailing the independence of shop stewards.57

53. Clause 7.1.9, Metal Engineering Award, 1998.
54. Clause 13, Alton Personnel PL Metal & Associated Industries Labour Hire Certified Agreement, 2003-2006. This clause was common to all collective agreements cited.
56. Ibid.
Furthermore, shop stewards elected to represent agency employees at a specific host cannot be certain their placement with that host will continue. Thus an Adecco collective agreement cautioned union representatives that ‘[t]he Company at all times will endeavour to employ the duly elected shop steward at [the host], however, it should be pointed out that in this type of industry this is not always possible’.  

A more generous enterprise agreement stated that the ‘shop steward shall be the last employee of the company to be moved from the job site, provided that the shop steward has the appropriate skills and qualifications to perform the work’. That agreement also allowed paid time for shop stewards to attend union meetings, a rare entitlement for agency workers.

Whilst collective agreements gave agency employees better conditions than awards and statutory minimum standards, they fell short of the conditions of employment enjoyed by direct hire employees. Irregular hours (with an accompanying irregular total wage); work intensification accepted because of uncertainty over whether the next shift would be forthcoming; and more dangerous work practices remained entrenched. This appears a common outcome when agency workers collectively bargain for themselves. Their inherently weak bargaining position undermines attempts to match employment conditions to those of direct hire employees. Lack of a regular workplace and the tendency to be scattered among many employers inherently reduces their capacity to organize in unions and bargain collectively. In Australia, their casual employment status compounds these barriers. Those who participate in collective bargaining are easily dismissed without redress. Whilst employers are prohibited from discriminating against employees who participate in union activities, compliance with the law is low and prosecutions for breaches uncommon.

In two rare cases, unions succeeded in prosecuting a host and an agency employer for discrimination against union activists. In the first case, a meat industry employer retrenched the workforce and then re-opened the site with a shelf company which in turn used an agency employer to rehire the workforce. The former direct hire employer thus became the host. The direct hire employer’s enterprise agreement had included a provision for re-employment based upon

63. Part 16, Divisions 1 and 2 WRA. 2006.
seniority. The agency did not employ all of the former direct hire workers otherwise entitled to re-employment on seniority grounds, excluding some because they had been union activists. The host was found to have discriminated against those workers. The second case involved the allegedly more common practice of agencies dismissing workers involved in union activities at the host worksite, at the host’s request. In this case, the agency employer was found to have breached freedom of association provisions in the WRA. However these cases are exceptional and serve mainly to highlight the common practice of hosts using agency employees to de-unionize.

Under these circumstances, agency employees’ pay and conditions were most effectively improved, indirectly, through union agreements with hosts which specified the conditions under which agency workers were allowed to work alongside host employees. In the 1980s, the main manufacturing union in Victoria placed a requirement upon hosts that agency workers only be allowed in a workplace when they received the same award conditions as host employees. This mirrored the multi-employer collective agreement reached with agency employers, and extended its application to agency workers not covered by the agreement nor otherwise entitled to award conditions. This practice spread to other unionized industries, such as construction, and was revised in the 1990s to require agency workers be covered by a collective agreement or be paid the same rate as host employees’ collective agreement. In one such agreement, agency employees’ rates of pay increased by 20%-30% after the host and union agreed they be paid the same rate as host employees performing identical work. These agreements typically placed a ceiling on the proportion of the workforce employed through an agency (often as high as 20%), and included procedures for transfer of agency workers to permanent direct hire employment should that proportion be exceeded. Unionized host employees supported these agreements because they limited the extent to which agency workers could undercut their own employment conditions, thus creating a cheap labour alternative.

These collective agreements with hosts, a product of union influence at the host workplace, were an important mechanism for lifting rates of pay for agency workers. A 2004 survey of RCSA members found that of those who matched their employees’ rates of pay to host rates, 46% did so because the host’s enterprise

66. *AMEPKI v. CHR Group Pty. Ltd.* (2005) QIRComm 6 (24 Dec. 2004); 178 QGIG 64. The AIRC decision outlined in n. 26 demonstrated the difficulties unions have encountered in such cases.
agreement required this rate of pay. Only 28% did so because of an enterprise agreement with their own employees. However, these practices depended upon host workplaces being unionized – a diminishing proportion of the total since the early 1980s. Collective agreements were also limited predominantly to fixing wage rates, most other employment conditions being unregulated.

In March 2006, consistent with the conservative Federal government’s philosophy of ‘decreasing the burdens on business’ through offering less protection to a highly flexible component of the workforce, these collective arrangements were prohibited from awards and collective agreements. That such a prohibition breached ILO standards on the freedom to collectively bargain has been observed elsewhere and will not be discussed further here. In the longer term, the continued prohibition on such arrangements may enable the ‘carving out’ of a poorly regulated, potentially non-unionized sector within unionized host workplaces.

4. SLIPPING THROUGH THE GAPS

Notwithstanding the kind of union collective agreements described in the previous section, most agency employees find their employment conditions are unregulated except for a statutory entitlement to an hourly wage. Whilst comprehensive data has not been collected on this topic, small surveys and focus groups of agency workers, and submissions to several government enquiries point to the absence of basic protective standards, irrespective of whether agency workers are placed in unionized or non-unionized workplaces. Four aspects of employment protection are examined here: job security, minimum wages, employee voice and health and safety.

Turning first to job security, the lower level of protection for agency workers was discussed above in relation to their inability to collectively bargain and maintain employee union representation. As noted, around four out five agency workers are employed as casual employees, hired by the hour without protection from arbitrary dismissal nor entitlements to paid leave, such as sick leave. All studies

of agency workers in Australia have affirmed this ratio. Louie et al.’s study found their job insecurity was not limited to their present position, but evident through longer term itinerancy with only one in four being in the same job for more than two years (compared to 70% of other workers, such as permanent and direct hire casual employees). This level of insecurity impacts upon every aspect of employment protection, including their ability to enforce the few statutory employment rights to which they are entitled.

Second is pay. The range of instruments governing agency workers’ minimum wage entitlements points to the potential for considerable diversity in wage levels. However, wage outcomes appear skewed towards the lower end of wage distributions. First, high dependence upon minimum award wages means many agency workers are likely to be earning substantially less than those on collective agreements. The current award rate of pay, for example, is approximately A$300 per week less than the most recent round of collective agreements for agency workers in Victoria (covering around 30 agency employers). Second, casual employees would normally be entitled to a loading of 20%-30% to compensate for the absence of leave entitlements. Yet Watson’s analysis of a national survey of just under 14,000 individuals in 2001 (approximately 250 of whom were agency workers) estimated the hourly wages of casual agency males (including loadings) were only 8% more than equivalent permanent male employees’. Either their base hourly rate of pay was less than permanent employees’ or they were not fully compensated for the absence of other entitlements. Third, a study based on focus groups of agency workers found call centre agency workers earned only one-third of the hourly rate paid to equivalent permanent direct hire workers for weekend work (the latter received additional compensation for weekend work). The same study found that storepersons received similar wages but were consistently allocated the worst tasks, and experienced higher levels of work intensity relative to their direct hire counterparts. Fourth, because agency workers are only paid for the time placed with hosts, their total weekly wage can fluctuate considerably irrespective of their hourly wage.

Third is workplace voice. Agency workers’ capacity to express grievances is constrained by their casual status which offers little protection from dismissal for voicing workplace concerns, or being involved in union activities. One survey of

74. Louie et al., ibid.
agency workers in Victoria found a significant minority (around 25%) were dismissed for raising a grievance, and as many again were afraid to raise such issues for fear of job loss.\textsuperscript{78} Similar findings were evident in a case study of agency workers in the Victorian construction industry.\textsuperscript{79}

Fourth is occupational health and safety (OHS). Like agency workers in other countries, those in Australia also experience poorer OHS outcomes.\textsuperscript{80} Whilst health and safety regulation has not been discussed in this article, agency workers’ disadvantaged position in relation to OHS and return to work post-injury is underpinned by the employment insecurity and lack of workplace voice discussed above. They are poorly placed to refuse unsafe jobs, to take time off to recover from minor injuries, and to insist that their employer comply with OHS laws requiring training, safe work practices and consultation on workplace safety.\textsuperscript{81} Yet this is not inevitable. A survey of agency workers in Victoria found those with a capacity to voice concerns without discrimination also had better access to OHS information, felt safer at a workplace, and were able to refuse unsafe tasks.\textsuperscript{82} More often, agency practices, such as the prioritising of rapid placements over appropriate matching and training of workers, have buttressed a culture of regulatory non-compliance with OHS obligations.\textsuperscript{83}

The poor employment conditions considered above have provoked Australian unions into seeking protection either through state regulation (a universal if inferior safety net) or through collective bargaining (which is superior but limited in coverage). Both forms of protection were curtailed by the Work Choices legislative amendments introduced by the Federal government in 2006.

5. REGULATION OF TEMPORARY AGENCY WORKERS UNDER WORK CHOICES

In March 2006, the Federal government substantially amended the WRA 1996. The amendments of most relevance to this discussion were those which prohibited collective agreements and awards from containing clauses which constrained or


regulated temporary agency workers (and other forms of non-standard employment); removed unfair dismissal protection for workers employed by organizations with 100 or fewer employees; and restricted the arrangements under which union officials could enter worksites. Awards were amended to remove clauses which breached the revised WRA, and collective agreements subsequently negotiated were substantially pared back.

These changes impacted quickly upon agency employment practices. The collective agreement renegotiated with agency employers in Victorian manufacturing in 2007 was diluted heavily, with most critical protections removed. The agreement no longer provides for agency workers to receive the same hourly rate of pay as host employees; shop steward roles have been replaced by employee representatives and explicit rights (such as time release of one day per month to visit hosts) replaced by vague terms such as ‘necessary access’; and limits on the duration of placements of casual employees, as well as a minimum four hour engagement, have been removed. Agreements covering agency workers continue to offer higher wage rates than the award safety net rate, but less than the wages paid to equivalent host employees. Furthermore, unions have encountered difficulty enforcing agreements with agency employers. Shop steward networks amongst agency and host workers have been weakened by other Work Choices amendments, including the loss of unfair dismissal protection and reduced access to work sites by union officials.

Collective agreements with hosts can also no longer ensure agency workers receive equivalent wages to host employees, nor limit the presence of agency workers. Whilst some host employers have been willing to continue past practices, others have not. Collective agreements which required consultation over the use of agency employment have been diluted to require only advice of such use. Employers need no longer consult over how many agency workers are hired, which agency is used (and therefore whether the agency has a collective agreement), and what rate agency workers should be paid. This has impacted severely upon the capacity of unions to control the use of agency workers, and protect direct hire workers from undercutting.

The stability of larger agency employers has also been threatened by the loss of a floor on wages and employment conditions. They are increasingly undercut by smaller agencies employing workers hired as independent contractors with no statutory minimum entitlements. The capacity of the industry to be destabilized by small operators has long been recognized by the larger agency employers who have lobbied governments, unsuccessfully, for more restrictive barriers to entry. As the scope has expanded for hosts to engage agency workers free of union

84. WRA Regulation 8.5 in Ch. 2; Part 12, Division 4; and Part 15 respectively.
85. For example, the Collex Toyota On-Site Services Agreement 2006 (AG848775 PR971883) paid A$126 per week less than that received by direct hire tradespersons from Jul. 2007.
86. Skilled Group, Submission to the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation Inquiry into Independent Contracting and Labour Hire Arrangements, (Melbourne, Skilled Engineering, 2005).
intervention, the willingness of larger agencies to abide by collective agreements has fallen.

Lastly, the capacity of unions to respond to both agency and host employees’ workplace grievances has been reduced through new restrictions on access to workplaces. Union officials are now required to have permits (granted to ‘fit and proper’ persons); provide an employer with details of a suspected breach of employment entitlements when they visit a workplace; give at least 24 hours’ notice of their visit; and meet with members in a location designated by the employer.87 Previously, agency workers relied on anonymity to report concerns to unions (because of fear of dismissal). Since unions are now required to advise employers in advance of the nature of worker concerns, such anonymity is no longer possible. A similar concern arises from the right of an employer to specify where a workplace union meeting can be held. Some employers have directed that meetings take place in view of the managers’ offices, raising fears about future discrimination or dismissal of union members. Finally, the requirement for union officials to give 24 hours’ notice before entering a workplace means that agency workers undercutting agreement conditions may have completed their workplace before the official can get access to the site.

Over time, the eroded collective agreements available under the Work Choices legislation will result in the eradication of all legal rights available to host employees to respond to agency workers’ presence and conditions of employment. The changes introduced under the Howard government have weakened an already fragile means of regulating the employment of agency workers. Unions had been dependent upon bargaining power (and formerly the federal tribunal) to lift wages for agency workers to a level commensurate with direct hire employees. This rested heavily upon agreements with hosts, which are no longer allowed; the bargaining power of agency workers, which has always been weak; and action by direct hire shop stewards coupled with fast responses from full time officials, which have now been curtailed. With the Howard government removed from power in November 2007, what are the prospects for change?

6. PROSPECTS FOR CHANGE

The election of the Labour Party to federal government in November 2007 offers only limited prospects for reinstating and expanding protections for agency workers. Temporary agency workers were not mentioned directly in the Labour Party’s industrial relations policy, although that policy offered indirect aid by supporting the removal of prohibitions on the content of collective agreements.88 Labour also proposed legislative support for good faith bargaining practices and affirmed its support for union representation at the workplace, but did not explain how this

87. WRA Part 15.
would be provided for in legislation. Unions would once again be allowed to regulate the wages of agency workers through negotiations with hosts, and expand the range of issues negotiated with agency employers, such as equivalence with host employees’ wages. Whether the now weakened union movement will have the industrial capacity to achieve these outcomes remains to be seen. They were achieved in the past through collective bargaining supplemented by compulsory arbitration, and the latter will not be reintroduced. Agency employer agreements have mainly been negotiated with groups of employers, but the Labour Party has stated it will only support industry or multi-employer bargaining for low wage workers 'such as employees in the community services sector, cleaning and child care industries'. Whether they would extend this right to agency workers, who may work in unionized sectors but are inherently vulnerable because of their casual employment, remains to be determined.

Effective intervention to assist agency workers directly seems unlikely. The new Labour government, at this stage, appears interested primarily in reinstatement of the weak protections for agency workers that existed prior to the Work Choices amendments of 2006. To date, the government has not acknowledged the inadequacies of that regulation to both protect agency workers, and to protect direct hire workers from the threats of agency employment. However, there are Labour members of parliament aware of the need to do better. Following a Federal government enquiry into agency employment and independent contractors in 2005, several Labour parliamentarians (then in opposition) recommended that agency workers have ‘the right to request permanent employment with the host after twelve months continuous services with the host’; that hosts and agencies jointly share responsibility for OHS and unfair dismissals; and that agencies be prohibited ‘from undercutting wages and conditions prescribed within the awards or workplace agreements applying to the host firm’. These recommendations show an understanding of critical issues. But they have not been incorporated in Labour Party policy, nor legislative plans. Furthermore, the Labour government may be influenced by the employer association representing agency employers, which has consistently opposed regulation and encouraged individualization of employment agreements. This association is represented in the Government’s ‘business advisory’ group which will advise the government on proposed industrial relations legislative changes. The association is likely to resist regulatory change requiring the majority of agency employers to change their business model to one less dependent upon undercutting host wages and conditions.

89. Ibid., 14.
91. Ibid., 169.
Notwithstanding the proposed changes noted above, and the reinvigoration of a Government-Labour Advisory Council to consult with unions on policy,\textsuperscript{93} the Federal government is unlikely to lift employment conditions for Australian agency workers to the standards achieved in some EU countries. More likely is a scenario in which unions will have to depend upon their own bargaining power to regulate agency workers’ conditions. It will take substantial lobbying by unions to persuade the current government that not only have employment practices changed substantially, but those changes demand a radical departure from reliance upon collective bargaining to ensure agency workers receive fair treatment, fair wages and a sense of dignity in the workplace.

\textsuperscript{93} Unions to help shape policy, The Age Newspaper, Melbourne, 3/03/2008, 1.