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Should host employers have greater responsibility for temporary agency workers' employment rights?

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Abstract

Many temporary agency workers receive poorer pay and employment conditions than workers performing similar tasks under traditional, direct hire arrangements. This is due to a number of factors, especially the failure in practice of employment regulation developed for standard employee–employer employment arrangements to be fully applicable in such indirect employment arrangements. This paper examines agency workers' employment rights both against the standards of the International Labour Organization's core labour rights, and in relation to occupational health and safety performance. The analysis demonstrates how a third party, the host employer, can influence the employment conditions of agency employees, yet bear limited responsibility for whether they satisfy minimum standards. These remain duties of the agency employer. The paper identifies a need to reconsider the legal responsibility of hosts and agency employers towards agency workers. Sharing responsibilities between hosts and agency employers may improve the likelihood of closing the gap between agency and direct hire workers' employment conditions.

Keywords

agency employers, employment regulation, host employers, health and safety, rehabilitation, temporary agency workers

There is compelling international and Australian evidence that temporary agency workers (also known as labour hire workers) have worse employment conditions than their direct hire counterparts. They experience a consistent wage disadvantage (Garen, 2006; ILO, 2009; Kvasnicka and Werwatz, 2003; Nienhüser and Matiaske,

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2006; Watson, 2004); worse job security (ILO, 2009; Lewchuck et al. 2003; Louie et al. 2006); obstacles to unionisation and collective bargaining (Heery, 2004; ILO, 2009; Raday, 1999; Underhill, 1999); and a higher risk of workplace injury followed by a lower likelihood of return to work (Lippel, 2006; Silverstein et al. 2002; Underhill, 2002, 2008; Virtanen et al. 2005). While these disadvantages stem from a number of sources, the regulatory framework governing agency workers' employment is a significant factor in their vulnerability.

In Australia, employment regulation notionally offers the same rights and protection to temporary agency as to direct hire employees. However the triangular nature of agency employment creates barriers to its successful application. Agency workers are employed by one party, but their pay and employment conditions are substantially influenced by another, the host employer, who bears only limited legal responsibility for those employment standards. This mismatch between who bears responsibility and who determines employment standards has opened up gaps in protection. Our examination of the ways in which hosts influence the employment conditions of agency workers is developed in two parts. We look first at the application of the International Labour Organization's (ILO) core labour standards to agency workers, and second at hosts' influence upon OHS and return to work post-injury outcomes. From this analysis the paper argues that there is a need to reconsider the allocation of legal responsibilities for agency workers' employment protection, so that host employers have the same responsibility when influencing agency workers' employment standards as they do for their own staff.

The paper begins with an overview of the influential approaches taken by the ILO and the European Union (EU) towards regulating temporary agency work. They provide a comparative context in which to understand how Australian regulation has lagged behind international standards. Second, the approach Australia has taken to regulating agency workers' employment entitlements is outlined, focusing on impediments to enforcement which arise from the structure of the agency industry, and contribute to a culture of non-compliance. Third, we examine the influence of hosts upon the application of core ILO labour standards, and their role in determining OHS and return-to-work outcomes. The concluding discussion addresses the question of whether agency workers' employment rights and conditions would be better protected by reconsidering employer responsibilities for agency workers. While this question is open to debate, the problem is important because of the expansion of temporary agency work, the poor employment conditions associated with it, and the need to remedy pervasive gaps in regulatory compliance.

The analysis is based upon multiple sources of data. First are decisions of industrial tribunals and courts involving agency employers, hosts, and agency workers which document agency workers' employment conditions. Second, it draws upon a survey of 147 agency workers conducted in the state of Victoria supported by five focus groups of agency workers and representative union officials (reported in detail in Underhill, 2008). Their responses reveal agency workers' perspectives regarding their employment experience. Third is a sample of Victorian workers' compensation claims files of injured agency and comparable direct hire workers (198 of each) which had been investigated by insurance claims agents. These files documented workers' employment circumstances preceding their workplace injury, and their subsequent rehabilitation.

Both the second and third sources of data were analysed in detail in Underhill (2008); only limited data is presented here. Fourth, interviews were conducted with a prosecution agency, union officials and senior managers from a labour hire agency. Lastly, other published empirical data and government reports inform upon the practices of agencies and hosts, from their perspectives.

Protecting temporary agency workers

International approaches

The need for special protection for temporary agency workers was first raised at the ILO in the early 1970s (ILO, 1994). However it was not until 1997 that a convention dealing with temporary agency workers was agreed (Convention No. 181 and Recommendation 188). The lengthy debates leading to Convention 181 revealed inherent conflicts which arise in devising regulations which seek to avoid constraints upon the business activities of agency employers while codifying minimum standards for agency workers. The convention seeks to achieve the former through the licensing or certification of agency employers to enable checking of their job placement capabilities and facilitate compliance monitoring. It is not intended to restrain competition in the industry (Demarat, 2006; Gravel, 2006; ILO, 2007). To establish minimum employment standards, the convention supports two approaches. It requires governments to 'take the necessary measures to ensure adequate protection for the workers employed by private employment agencies' (C. 181, Article 11) in relation to nine aspects of employment: collective bargaining; minimum wages; working time and other conditions; statutory social security benefits; access to training; protection in the field of OHS; compensation when occupational accidents or diseases occur; compensation in cases of insolvency and protection of worker claims; and maternity/parental protection and benefits. These are additional to the four core ILO labour rights of freedom of association, non-discrimination, and the elimination of forced, and child labour. The convention also states that governments can determine 'the *respective responsibilities* of private employment agencies... and of user enterprises' (C. 181, Article 12; emphasis added) in relation to those nine employment issues. Although the primary focus is upon the employment obligations of agencies, it is open to governments to determine the extent to which host employers are also brought into the regulatory net.

The convention became operative in 2000 but its ratification rate has been low (ILO, 2009). The Australian government, according to the ILO, is among a small group of governments which have not considered ratification 'either because their labour markets are experiencing a period of transition or their private employment agencies are underdeveloped' (ILO, 2010: 174). In countries where ratification has occurred, unions have been critical of its application. In particular, the licensing of agency employers has not prevented unlicensed agencies from operating, and in some countries licensing costs have encouraged the growth of non-licensed, unregulated agencies. In other countries, agency workers' rights have been enshrined in legislation but proven unenforceable because of such workers' employment insecurity (ILO, 2010). Nevertheless, the ILO continues to encourage ratification because of continued

concerns about international temporary agency employers moving migrant workforces across borders in ways which undermine local labour protection and, more recently, because of the extent to which agency workers have borne the brunt of the global financial crisis (ILO, 2009, 2010).

Within the EU, prolonged negotiations took place before a directive on temporary agency workers was finalised in 2008. Discussions between central union and employer bodies began in 2001 but quickly stalled over the principle of equal treatment between agency workers and host employees. A 2002 draft directive promoted non-discrimination between agency and host workers with respect to basic working conditions, specifying that agency workers be treated equally to 'a worker in the user (host) undertaking in an identical or similar job' (EC, 2002: 11). This requirement could be waived for short placements (less than 6 weeks), when agency workers were paid between placements, and when collective agreements among agency workers offered different standards (Vosko, 2009). However the draft directive remained contested until 2008 when a revised directive was approved by the Council of the EU. The final directive requires that agency workers be offered the equivalent terms and conditions as 'would apply if the worker had been recruited directly by the user firm to occupy the same job' (Council of the EU, 2008, Article 5.1), for placements of 12 weeks or longer. This is a weaker standard than that of the earlier draft directive. The benchmark for equivalent treatment is no longer a permanent host employee, but can be another contingent worker hired by the host; and the minimum placement time before equivalence is required has doubled. Over the protracted period leading up to the directive, most EU countries developed their own regulations which placed employer responsibilities upon the agency, and the Directive is consistent with this (Vosko, 2009). One exception was the United Kingdom where legal developments were moving towards recognising the role of the host as a joint if not sole employer (McCann, 2008). The EU directive appears to have impeded this development.

Both the ILO and EU approaches to regulating temporary agency workers illustrate the conflicts and tradeoffs which arise when seeking to protect both agency employers' business interests and agency employees' employment rights. Especially controversial is the issue of equivalent employment conditions for host and agency workers. While wage rates are important for most employers, they are of critical importance to agency employers because of the extent to which the success of their business model rests upon the supply of labour at a cost lower than that which the host can achieve. The regulation of minimum employment conditions for agency workers is contested especially fiercely between agency employers and unions which represent both host and competing equivalent agency workers. In Australia, governments have mostly avoided debates over these issues by abstaining from regulation of the kind promoted by the ILO and the EU.

The Australian approach

Until recently, employment regulation in Australia relied on both state and federal laws. With the shift to a national industrial relations system now complete, regulation is largely confined to the federal system. The regulation of OHS is also shifting towards a national system. Hence the discussion here concerns federal rather than

state level regulation. In Australia, most agency workers are hired as casual employees, the key criterion in determining their rights. In 2000, 80% of agency workers were casual (ABS, 2000), and anecdotal evidence suggests this practice continues. Thus in 2008/09, the largest labour hire agency company in Australia employed 92% of its 25 000 workers as casuals (Hargrave and Janes, 2009). Casual agency workers are hired by the hour, and are entitled to protection only from unfair dismissal when regularly engaged by an agency with more than 15 employees for at least six months. They are not entitled to sick, vacation or other types of paid leave. They do, however, share some rights with permanent employees. They have the right to protection from discrimination on the basis of union membership or activities, and on other grounds such as sex, age, pregnancy and race. They also have the right to participate in collective bargaining.

These rights reside primarily in the *Fair Work Act 2009*, which imposes responsibility on the common law employer – the agency, not the host. But they are rights which have only limited practical application. Faced with the risk of job loss for raising a grievance; the need to accept any job placement to maintain an income; and their geographically dispersed and often transitory work location, these workers have little power to enforce their few employment entitlements (Underhill, 2008). Yet casual employment is regarded by agency employers as integral to their ‘spot-market’ business model built upon hiring labour only for the duration of placements with hosts (EDC, 2005). As long as casual employment, with its inherent vulnerability, is considered a lynchpin for the success of agency arrangements, these workers will require special protection.

Agency workers’ minimum wage entitlements, until recently, were dependent upon whether their employer was a party to a federal award, covered by a state common rule award, or had entered into an enterprise agreement. Gaps in coverage were common. For example, a 1998 survey of 43 agencies operating generally in unionised industries found 31% were not respondents to an award (KPMG, 1998: 29). In 2003, Brennan et al. (2003: 62–3) found 16% of members of the major employer association, the Recruitment and Consulting Services Association (RCSA), and 25% of non-members were covered by neither an award or enterprise agreement in relation to blue collar workers, and 20% and 38% respectively with respect to white-collar workers. The award modernisation process undertaken by the national industrial tribunal, Fair Work Australia, will close some of these gaps. In 2009, Fair Work Australia determined that modern awards should include a ‘labour hire’ clause which entitles agency workers to the *award* wages and conditions applicable to host employees (AIRC, 2009). This has the potential to offer a degree of equivalence with host workers’ entitlements but only when the host employees are also receiving minimum award entitlements. It does not extend to wages and conditions under collective agreements, nor will it offer equivalence on issues determined by host company policies such as access to training and associated wage increments.

The right to rates of pay equivalent to those of host employees (like the demand for equivalence so extensively debated in the EU and ILO) has not been enshrined in legislation, and has been strongly resisted by agency employers, in some instances with support from industrial tribunals. For example, union attempts to seek such a right in Western Australia in 2004 were refused by the industrial tribunal in part

because of the onerous burden it would place on agency employers who would be required to continually adjust rates of pay.¹ Before the introduction of the *WorkChoices Act 2005*, unions representing host employees in the federal industrial relations system could negotiate the conditional use of agency workers with host employers, including that agency workers be covered by a collective agreement or receive the same rates of pay as host employees. That right was removed under *WorkChoices*. The *Fair Work Act 2009* reinstated the more limited right of unions to negotiate equivalent rates of pay for agency workers, as a condition of their use by hosts. This provides an indirect means for agency workers to achieve equivalent rate of pay. They have such a right only when it is negotiated by other parties – the host and its workers (unionised or otherwise). With union membership severely eroded, such agreements may not be sufficiently widespread to protect the majority of agency workers.

Turning to OHS and post-injury rehabilitation, state governments, particularly in Victoria, have sought to overcome problems associated with OHS and agency workers, and these are mostly replicated under the new national OHS regulatory arrangements. The new federal Model OHS laws place an obligation upon organisations to provide a safe and healthy working environment for all involved in the business undertaking, irrespective of whether they are employees of the organisation. Host employers will thus bear responsibility for agency workers placed at their workplace, a responsibility shared with the agency employer (Model Act Division 2). The Victorian experience, discussed below, suggests that such sharing arrangements can be problematic. Statutory authorities report agency employment as the most problematic from a monitoring and compliance perspective, and agency workers continue to be injured at a higher rate than direct hire workers (Johnstone and Quinlan, 2006; Underhill, 2002). On the related topic of return to work after a workplace injury, all states (while differing on detail) encourage employers (defined in common law terms) to rehabilitate injured workers by taking them back. However, none allocate a role for hosts in this process (Underhill, 2008).

Lastly comes the important regulatory problem of compliance (the monitoring and enforcement of rights and obligations) without which any regulatory framework risks losing its legitimacy (ILO, 2009: 42). The structure of the Australian temporary agency industry, coupled with casual hiring arrangements, compromises compliance. Within the industry are many small businesses that compete on the basis of intense price competition. Barriers to entry are low; capital requirements are minimal; and business licensing regulations, which might otherwise deter new entrants, do not exist (Parliament of the Commonwealth of Australia, 2005). Among the smallest of these businesses are one-person operations whose assets consist of little more than a mobile phone. For medium sized businesses, set-up costs extend to rudimentary office facilities and internet access. Consequently, small to medium size operators can quickly close and re-open under another corporate identity when at risk of prosecution or, in the case of workers' compensation, when experience based premiums intended to reflect the costs of claims, become excessive (Johnstone and Quinlan, 2006; Vickery, Interview, 2008). Except in the case of lengthy placements, they can also fly 'under the radar' with respect to compliance with employment conditions and safety practices. Important here are restrictions on the right of union officials to enter workplaces. These can delay access to a host workplace during which time an agency worker can

complete a short placement (AMWU interview, 2009; Johnstone and Quinlan, 2006). In contrast to the agency industry, host businesses tend to be large permanent organisations. An estimated 40% of workplaces with between 200 and 500 employees, and 55% of those with more than 500 employees use temporary agency workers (Parliament of the Commonwealth of Australia, 2005: 42). They do not have an easy option of closing and re-opening elsewhere. They have more substantial assets in a fixed location, and are likely to have a public face which is not easily discarded for the sake of evading legal obligations.

With the exception of OHS regulation, all of the rights and obligations in relation to agency workers fall upon the agency employer. Host employers are not recognised in relation to employment protection, nor is the concept of joint employment. In 2005, an Australian government inquiry into independent contracting and labour hire arrangements included a dissenting report by the then opposition Labor Party members of parliament which recommended radical change to the regulation of the temporary agency industry. Their report recommended mandatory licensing for agency employers, joint responsibility by agency employers and hosts with respect to OHS and unfair dismissals, and a prohibition on agency employers undercutting wages and conditions at host firms (Parliament of the Commonwealth of Australia, 2005: 168–72). Following the change in government in 2007 and the overhaul of federal employment law in 2009, some of these recommendations have been implemented. However others such as licensing and joint responsibility for unfair dismissals have yet to be considered, and the prohibition on agency employers undercutting host employment conditions has been given only weak endorsement by allowing unions to negotiate such an outcome. Without recognition of the role which hosts play in undermining employment conditions and security of agency workers, gaps in protection will continue; as long as compliance rests upon employers who can easily evade their obligations, a culture of non-compliance will also be pervasive.

The role of host employers

ILO core labour rights

The regulatory framework applicable to agency workers places most obligations upon the common law employer which is the agency, not the host. Yet the actions of agency employers are often a response to the demands of hosts, or arise from the agency employer's inability to control the work environment in which their employees are placed. The analysis which follows focuses upon the ILO core labour rights: freedom of association and the right to collective bargaining, the elimination of forced labour, of employment discrimination, and of child labour. These apply irrespective of ratification of the core ILO conventions from which they originate (ILO, 2003); they thus provide a minimum standard against which the rights and protection offered to agency workers can be assessed.

Table 1 provides a matrix of who bears responsibility for agency workers' basic labour rights juxtaposed to which parties control the exercise of those rights. In the discussion which follows, the exercise of control in relation to each of these rights will be explained through an account of common practices in the agency industry.

Table 1. Legal responsibilities and sources of control over basic employment rights in the Australian temporary agency industry

Control over issue	Legal responsibility	
	Agency employer has sole legal responsibility	Host and agency employer share legal responsibility
Agency employer controls issue	Forced labour Child labour	
Agency and host share control	Freedom of association Collective bargaining Equal remuneration Discrimination	OHS: host has greater degree of control over day-to-day issues; agency controls pre-placement issues
Host controls issue	Return to work post-injury	

The first two ILO core rights (the elimination of forced labour and child labour) are generally uncontested in Australian industry (although illegal exceptions do occur such as forced labour in the sex industry). There is no evidence that temporary agency employers use forced labour or recruit workers below a minimum age. Nor is there evidence to suggest hosts place pressure upon them to breach these obligations. A breach of these two core rights would be considered socially unacceptable by Australian society. However such social attitudes are weaker with respect to other labour protections.

Freedom of association, or the right to join a union, is a right all agency employees have, yet they report widespread discrimination for being union members (such as being offered no further placements), and believe that hosts use agency employment to deunionise workplaces. Our survey of agency workers found 20% were discriminated against for being union members, and 13% for being union delegates. Just under one-third believed deunionisation was the main reason their host used agency arrangements (Underhill, 2008). Importantly, there is a common belief among agency workers that discrimination based upon union membership and activity results in part from agencies responding to host requests to remove union members from worksites. Unwilling to risk the loss of a client, agencies readily comply (Underhill, 2005). Such beliefs underpin the reluctance of agency workers to report workplace problems either directly or through unions, and to participate in union activities through formal job delegate roles. Consequently union officials report agency workers demand anonymity when reporting a workplace problem for fear of exposure as a unionist, a demand which often impedes resolution of the problem.

Proving discrimination for union membership can be especially problematic for agency workers given the temporary nature of placements. In a rare case heard before an industrial tribunal, six permanent agency workers who had been involved in union activities at the host workplace were dismissed with one week's notice due to lack of work, but replaced by others at the host's workplace within a fortnight. Their employer was found to have not breached the *Workplace Relations Act 1996*. The commission member adjudicating the case in the Australian Industrial Relations

Commission 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'.² Involvement in union activities was not accepted as the reason for their dismissal, notwithstanding those activities may have been an 'opportunistic reason for their non re-engagement' (p. 13). Even permanent agency workers are at risk of discrimination because of the expectation that their placements are temporary.

The right to collectively bargain is also problematic for temporary agency workers. Hosts often undermine (but also on occasions promote) such bargaining. First, collective bargaining is constrained by the impediments agency workers face in being union members. Second, the very nature of agency employment, with a dispersed and often itinerant workforce, impedes the capacity of agency workers to negotiate and take action collectively (Underhill, 1997). Third, when collective agreements exist, they have (occasionally) been breached by agency employers who enter into contracts with hosts at prices which cannot sustain the agreed wage rates. In such instances, agencies have asked employees to 'put aside' their collective entitlements while placed with those hosts (Underhill, 2008). Fourth, a survey of agency employees found 41% believed their host utilised agency workers to avoid collective arrangements and statutory minimum wages at their workplace (Underhill, 2008). Such hosts would seem unlikely to accept agency workers whose wages were subject to a collective agreement offering above minimum rates of pay. Thus a recent Federal Court case revealed agency employees who became entitled to a collective agreement (which included overtime rates of pay) were subsequently denied further placements by the host unless they agreed to Australian Workplace Agreements at lower rates of pay. In a rare example of a prosecution against a host in relation to agency workers, the host was found to have engaged in illegal coercion.³ In his decision, the judge observed that the host 'enjoyed a significant power disparity in relation to [the agency worker]' (p. 5). Fifth, and in contrast, hosts have also played a role in promoting collective agreements among agency workers. Prior to the *WorkChoices Act 2005*, collective agreements between hosts and blue-collar unions representing host workers often required that only agency workers covered by collective agreements be placed at the workplace.

The elimination of discrimination through equal remuneration and other non-discriminatory employment practices is the fourth core labour right. As with the right to collectively bargain, hosts have both negative and positive influences upon whether agency workers receive the same rate of pay as host employees. Agency workers' perception that hosts use agencies to evade their own employees' minimum entitlements (noted above) points to an unwillingness by hosts to accept agency workers with entitlements equivalent to their own employees. In contrast, a 2004 survey of agency employers found that of those who matched their employees' rates to host rates of pay, 46% did so because the host's collective agreement required them to do so. In one such case, 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.⁴ Only 28% of agency employers matched host rates because of a collective agreement with their own employees.⁵ Hosts play a dominant role in determining whether agency workers receive equal remuneration.

Like other workers, agency employees are also entitled to protection from discrimination on the basis of gender, race and other factors. The role of hosts in initiating

discriminatory action beyond that related to union membership has not been documented, and to the author's knowledge there have been no prosecutions of agency employers or hosts under discrimination law in Australia. However, in a 2002 prosecution for unfair dismissal on the grounds of pregnancy, an agency worker successfully argued that the host initiated the dismissal and was in law her employer.⁶ Her agency subsequently offered her no further placements. Given agency employees' job insecurity, coupled with a perception that workers quickly become known as 'trouble-makers' across the agency industry, it is likely that discrimination is poorly controlled.

For each of the core labour rights, agency workers appear poorly protected. Their loss of rights flows from poor compliance by agency employers, from factors inherent to the nature of temporary agency employment (including casual employment and dispersed workplaces), and from the actions of hosts. Agency employers could disregard the preferences of hosts, but the competitive pressures of the industry mean to do so would cause loss of business. This is of greater concern to agency employers than the risk of prosecution for failing to comply with employment rights. Hosts, on the other hand, rarely face such risks.

OHS and return to work

Turning to OHS, the national Model OHS laws impose obligations upon hosts and agency employers in a manner consistent with that applied under the *Victorian Occupational Health and Safety Act (Vic.) 2004* (The Act). The Victorian experience thus provides an indication of how these obligations may work under the new Model OHS laws. To meet their obligations under The Act, agency employers are required to ensure their workers are placed in a safe and healthy working environment by ensuring workers have sufficient training to perform tasks safely, and monitoring conditions at the host workplace. This includes conducting a risk assessment at the host workplace before placing workers, assessing and monitoring the host's OHS management system, and reaching clear contractual agreement with the host on the allocation of shared responsibilities (WorkSafe Victoria, 2006). In this way, agency employers ensure the host workplace is safe at the time of the placement, and on an ongoing basis. Hosts, in turn, are obliged to take the same actions towards agency workers as they do towards their own employees with respect to providing a safe workplace. The latter reflects, in part, the extent to which OHS protection is contingent upon the constant involvement of the host.

At first glance, these arrangements appear to provide extraordinary protection for agency workers. Risks at a host workplace will be 'double-checked' – by the agency and the host; training will be provided to meet general and specific OHS needs; and the worker OHS representation system allows worker participation at both the host workplace and in the employment agency's OHS system. Yet agency workers in Victoria, like elsewhere, continue to experience higher levels of workplace injury. There are many explanations for this higher incidence of injury, associated with economic pressures, disorganisation and regulatory failure (Underhill, 2008). Here, we focus only upon those related to regulatory failure.

In an industry dominated by small employers where cost pressures dominate, only the largest of agencies (said to employ less than 20% of the industry workforce)

allocate sufficient resources to meet their obligations under The Act (Hargrave and Janes, 2009). Instead, OHS training provided by agency employers is poor, risk assessment of host workplaces is inadequate, and insufficient attention is paid to matching the agency employees' skills and capabilities to the host's job requirements. Hosts, on the other hand, expect agency workers to be appropriately placed for the task, and capable of performing those tasks immediately, without the need for extensive training or supervision (Underhill, 2008). Shared responsibilities are also compromised. Agency employers claim shared responsibilities create ambiguities, while their employees experience buck passing between agency and hosts, with neither party resolving OHS problems (EDC, 2005). Agencies are unwilling to interfere in hosts' workplace practices or demand workplace changes for fear of loss of commercial contracts while hosts resist interference by agencies and regard agency employees' problems as belonging to the agency (Brennan et al. 2003; Gallagher et al. 2003). Compliance with statutory obligations comes second to commercial need (Johnstone and Quinlan, 2006; Underhill, 2008). In this context, hosts continue to dominate the OHS environment into which agency workers are placed, while washing their hands of responsibility.

Not all agency–host OHS arrangements operate in this way. Some larger agency employers have invested substantially in OHS practices, and claim the 'double-checking' of OHS risks contributes to improved OHS practices at host worksites (Skilled Group, 2005). On at least one occasion the intensive scrutiny of a host's OHS practices by the agency resulted in the host, but not the agency employer being prosecuted following an injury to an agency worker.⁷ Furthermore, some hosts now include OHS indicators as a tendering requirement for agency employers. In this way, shared responsibilities coupled with shared commitment to OHS can result in improved outcomes (see also Hasle, 2007).

The last issue to be considered is agency workers' right to return to work following a workplace injury. Compliance by temporary agency employers with return-to-work obligations has been acknowledged as especially problematic by inspectorates and several government inquiries (ECD, 2005; Parliament of the Commonwealth of Australia, 2003; Quinlan, 2004). Our analysis of workers' compensation claims of injured agency workers found only 35% returned to work with their employer post-injury, compared to 58% of comparable direct hire employees. Instead, 36% were offered no further placements (effectively dismissed) while 19% found employment elsewhere while awaiting the offer of another placement from their employer. Here, hosts' discretion over whom they accept from an agency is a major barrier to agency workers exercising their right to return post-injury. Hosts do not have a legal responsibility to take back workers injured at their workplace, and are mostly unwilling to accept such placements, especially when they involve modified duties. Some agency employers have sought to overcome the barriers created by hosts through placing injured agency workers with charities, often performing menial tasks far below their pre-injury capabilities and potentially undermining their effective rehabilitation (Kenny, 1999; Pimental, 1998; Vickery, Interview, 2008; Williams and Westmorland, 2002). Without the co-operation of hosts, agency employers cannot meet their legal obligations and injured agency workers are left with few employment options.

Despite common acceptance that a failure to return to work post-injury is a major disadvantage for injured agency employees, governments have been reluctant to draw hosts into the regulatory net. Calls by agency employers and unions to require hosts to share responsibility have mostly fallen on deaf ears (EDC, 2005; Labour Hire Task Force, 2001; Productivity Commission, 2004). An exception is the Victorian government's response to a recent inquiry into workers' compensation (Hanks, 2008). That inquiry's report observed that requiring host employers to provide suitable duties to injured agency workers 'would be oppressive and undermine the cost-effectiveness of labour hire arrangements' (Hanks, 2008: 153). The report nevertheless recommended that hosts have an obligation to 'take reasonable steps to co-operate with labour hire employers on the return to work of injured labour hire workers' (Hanks, 2008: 24). The Victorian government supported this recommendation, and amended the *Accident Compensation Act (1985)* in July 2010 to reflect this new approach. The requirement for hosts to co-operate with temporary agency employers does not equate with shared responsibility, and it presupposes that contrary to current practices, agency employers will seek to place rather than dismiss 'tainted' injured workers, and be willing to place pressure upon hosts to facilitate a return to work (Quinlan, 2004). However it is a clear acknowledgement of the extent to which hosts determine return to work outcomes.

Victoria's troubled experience of shared OHS responsibilities and one-sided obligations upon return to work post-injury raises a number of issues regarding the protection of agency workers. First, shared responsibilities require a willingness to reach a prior understanding of what is to be shared, rather than determining shared responsibilities once a problem has arisen. Otherwise problems remain unresolved while the protagonists argue among themselves. Second, shared responsibilities work best in an environment where both parties have a willingness to comply with legal obligations. Such willingness is least likely to occur in an industry plagued by unregulated price competition. Third, without shared obligations, parties which control the workplace also control the outcomes, irrespective of who bears legal responsibilities. Hosts continue to refuse to take back injured workers, leaving agency employers with few choices but to ignore the rehabilitation rights of injured workers, justified by their inability to place such workers with hosts.

Reconsidering who bears legal responsibility for agency workers

The paper so far has shown many ways in which host employers play a critical role in determining the employment conditions of agency workers while bearing little responsibility for them. Arguably it is time to rethink who carries those responsibilities. The experience of the ILO and the EU demonstrated the tensions between retaining the commercial freedom of agencies while strengthening employment protection for agency workers. In neither case is it clear that the second objective has been fully accomplished. Pivotal to the EU approach is the requirement for equivalence between agency workers and host employees. Effective enforcement of this equivalence is the heart of the difficulty. In Australia, where regulation of agency workers occurs in their capacity as casuals, it has proven limited, and impracticable. The review of Australian agency workers employment practices in relation to ILO core labour standards

showed a persistent shortfall. Similarly, a review of OHS and return to work showed continued weaknesses in regulatory effectiveness. In each of these areas, hosts were shown to play a crucial role in determining outcomes for agency workers, yet their role is predominantly unrecognised in Australian law. Australia has yet to find a way to protect agency workers successfully. The remainder of this section turns to this challenge.

Imposing all legal obligations upon hosts for agency workers' employment rights is one approach. It carries two advantages. First, the party which contributes to the breach of employment rights would potentially bear the consequence of such breaches. Hosts would no longer be able to choose which laws they are obliged to comply with according to how they structure their work arrangements. Second, enforcement would be facilitated because hosts cannot evade enforcement processes as easily as employment agencies. But this would free agency employers of all employer obligations. This would be a curious reward for persistent non-compliance with statutory obligations. It could also open the way for other parties, such as other types of sub-contractors, to argue for an 'exemption' from traditional employer obligations (Johnstone and Quinlan, 2006).

Sharing all employment related obligations between hosts and agencies is another option. It offers the potential for greater compliance than existing arrangements, particularly if it discourages hosts from partnering with agencies that they believe are breaching their own obligations. This may work best when hosts are also made accountable for the actions of agency employers who breach their obligations. The approach towards 'gangmasters' in the United Kingdom, where hosts are penalised for using unlicensed gangmasters, is one example (ILO, 2007). Innovations in supply chain regulation, whereby principal contractors are responsible for outstanding wage payments of subcontractors, is another (Nossar, 2006; Walters and James, 2009). However, both require a culture of compliance among hosts. It also requires recognition that treating agency workers differently from host employees performing comparable work is a form of discrimination for which hosts and agencies are responsible. Without this recognition, shared responsibility may simply amount to an improvement in enforcement in the face of poorer pay and conditions (Davidov, 2004; Deakin, 2001).

What would be the consequences of this approach? First, in relation to equal rates of pay and collective bargaining, hosts who draw upon agency workers to avoid existing rates of pay for their workforce would be unable to do so, unless they replace their entire workforce with agency workers (with the associated risk of prosecution for evading a regulatory instrument). Agencies which have competed only through undercutting employment entitlements at the host workplace may find it difficult to survive. This may ultimately result in a restructuring of the industry as smaller agencies lose any cost advantage based upon lower employment standards. A similar outcome is said to have occurred in the German agency industry as collective bargaining became more widespread, creating a floor in wage rates (Storrie, 2004). Second, in relation to dismissals and discrimination on the basis of union membership, hosts may be more reticent in demanding agency employers remove union members because of the risk of prosecution. Third, injured agency workers would have an identifiable workplace to which they would have a right to return. Their employer would no longer be able to justify their dismissal on the grounds of unavailability of placements.

Fourth, the additional responsibilities placed on hosts coupled with the potential for more effective enforcement may result in hosts reconsidering their use of agency employment. Agencies may need to find alternative sources of competitive advantage. They might, for example, base their competitive advantage on the quality or specialised skills of their workforce, or the quality of their recruitment and selection processes (Mittlacher, 2005). At least one large agency in Australia has already sought such an advantage by supplying a 'safer' agency workforce than others (Skilled Group, 2008). More stable relationships between agencies and hosts may evolve as factors other than cost come to dominate contracting decisions. Fifth, as hosts come to bear the equivalent of employer responsibilities towards agency workers, they may also seek the potential benefits of employer status, such as employee commitment (de Cuyper and De Witte, 2005; McKeown and Hanley, 2009; Veitch and Cooper-Thomas, 2009), through less reliance on agency arrangements. They may draw upon agencies to fill short-term absences rather than replacement of their workforce. Alternatively, agencies may continue to provide longer term placements but with their role focused upon payroll administration.

Shared responsibilities may result in improved protection for some agency workers, but it would not overcome all sources of vulnerability experienced by agency workers. It would not address the lack of protection from unfair dismissals associated with agency workers' casual employment status; nor would it overcome the ability of 'fringe operators' to place workers with hosts who are also willing to take a chance on not being prosecuted. The Victorian experience with shared responsibilities for OHS shows non-compliance by both parties can be sustained when the risk of prosecution is low. In this context, unless barriers to entry are created to reduce the large number of small operators, shared responsibilities may simply increase complexity and blame shifting.

In reconsidering legal obligations for agency workers, there is unlikely to be an easy solution acceptable to both hosts and agency employers. While agency employers may support greater responsibility for hosts over OHS (EDC, 2005), they may give less support for shared responsibilities upon employment issues which give them their competitive advantage. Likewise, hosts are likely to oppose increased responsibility for workers whom they do not employ, particularly when that responsibility reduces the ease with which they can utilise an on-call workforce. Yet as long as such an impasse prevails, current employment arrangements will continue to be unacceptable to both agency workers, and direct hire workers whose rights are undercut by agency employment.

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