

Rethinking employer responsibilities for temporary agency workers

Elsa Underhill and Malcolm Rimmer
Deakin University and LaTrobe University, Melbourne Australia

This paper considers the difficulty of regulating for decent work among temporary agency workers. It is concerned primarily with who should bear responsibility for regulatory obligations. The paper draws upon the Australian experience of temporary agency workers with respect to their occupational health and safety and return to work post-injury. The triangular nature of agency work, coupled with extreme job insecurity, weakens the capacity of agency workers to bargain over these matters, and impedes the enforcement of minimum entitlements. These difficulties may be reduced were the host made more responsible for agency workers' rights. A subsidiary question concerns whether the extension of core labour rights to cover these issues will help.

1. Introduction

International Labour Organization (ILO) labour standards seek to ensure that economic development “is not undertaken for its own sake but to improve the lives of human beings” through “freedom, equity, security and dignity” at work (www.ilocarib.org.tt). In 1998, the ILO distinguished core labour standards, which include eight conventions and apply to all nation states, from non-core standards, which apply only to those nations which ratify conventions on non-core standards (ILO 2003). Conventions have been passed in relation to occupational health and safety (OHS), and vocational rehabilitation of disabled workers, but neither are core labour rights (C.155 and C.159). A characteristic of ILO conventions is that they are couched primarily in terms of the responsibilities of employers and employees.

The ILO convention of relevance to temporary agency work (C.181 Private Employment Agencies) differs from others in that it seeks to both regulate businesses (the private employment agencies) and protect workers placed by those agencies (Gravel 2006; Demarat 2006). It also differs in that it recognises a third party (termed “user enterprises”, referred to in this paper as the “host”) who may also have statutory obligations to observe the rights of employees of the employment agency (C.181 Article 12). That convention requires governments to “take the necessary measures to ensure adequate protection for the workers employed by private employment agencies” (C.181 Article 11) but is more cautious in relation to obligations of host employers. Here, governments can determine “the *respective responsibilities* of private employment agencies...and of user enterprises” (C.181 Article 12;

emphasis added). In effect, governments that ratify this convention are required to ensure temporary agency employers bear the legal obligations expected of all employers, but can choose whether some or all of those obligations are also imposed upon the host. At the time of writing, only 21 nations had ratified that convention (www.ilo.org/ilolex). The Australian government is not one of those, and continues to restrict employment protection obligations to agencies, leaving hosts free of regulation.

However, some State governments in Australia have been more responsive to the needs of temporary agency workers. For example, the Victorian government has imposed shared OHS obligations upon both agencies and hosts, although in the related sphere of an injured worker's right to return to work, it has retained the traditional approach confining obligations to the employment agency. This paper examines the way these responsibilities are applied with respect to OHS and the return to work of injured agency workers, and asks whether that allocation of duties needs reconsideration. It then addresses a second issue of whether these aspects of employment could be more effectively protected were OHS and return to work designated as core labour rights.

The paper is divided into the following sections. Section two discusses why it is important to reconsider the allocation of responsibilities for agency employees' employment rights between the agency and the host. Section three examines why agency workers have special problems ensuring the enforcement of their rights and compliance with regulation upon OHS and return to work post-injury. There are three considerations in focusing upon these two issues. First, there is strong international evidence that agency workers are disadvantaged with respect to OHS and post-injury employment relative to other types of workers (Francois and Lievin 1995; Lippel 2006; Silverstein et al. 2002; Underhill 2002, 2008; Virtanen et al 2005). Second, in Victoria, the responsibility for OHS is shared between the agency and host, but the responsibility for post-injury employment is borne solely by the agency. These contrasting approaches raise different problems and result in differing outcomes for agency workers. Third, the option of making hosts responsible for return to work post-injury has been raised in public debate in Australia, but rejected in deference to the economic sustainability of the temporary employment agency business model (Productivity Commission 2004; EDC 2005; Parliament of the Commonwealth of Australia 2005). In section four, the paper turns to the secondary question of whether agency workers' protection may benefit from extending core labour rights to encompass OHS and return to work.

Agency workers' protection in relation to core labour rights is examined, revisiting the issue of who bears responsibility for agency workers' conditions, and whether the present designations are appropriate. Section five examines the implications of shifting responsibility for agency workers' employment rights to the host enterprise, to better align with the realities of who exercises control in the workplace.

2. Why distinguish regulatory protection for temporary agency workers and direct hire employees?

Consideration of the allocation of responsibility for agency workers' employment rights is important for two main reasons. The first concerns the extent to which a third party, the host, directly influences the employment relationship between temporary agency employers and their employees. The second concerns the need for effective protection. Existing arrangements are easily undermined by the nature of the industry and its inherent employment arrangements. Alternative approaches may offer better solutions.

Temporary agency operations typically involve an agency hiring employees who are then placed with a host for a fee based on hours worked. The host, or user enterprise, has a very direct relationship with the agency employers' employees. Hosts direct the work that agency workers perform; control their working hours; control the work environment; and, it will be argued below, influence critical decisions on unionisation and the selection of agency workers to be placed at their workplace. This places hosts in a different position from businesses which purchase goods and services from other types of businesses. In those cases, the purchaser of goods and services is remote from the labour which produces that good or service. In temporary agency employment however, it is labour, not a product or service distinct from that labour, which is purchased and over which hosts have considerable control.

Hosts' influential role was acknowledged in the ILO Convention on private employment agencies, which states that governments can determine "the *respective responsibilities* of private employment agencies...and of user enterprises" (C.181 Article 12) in relation to eight employment issues. These are collective bargaining; minimum wages; working time and other conditions; statutory social security benefits; access to training; protection in the field of OHS; compensation in case of occupational accidents or diseases; compensation in cases of insolvency and protection of worker claims; and maternity/parental protection and benefits. That Convention was passed following lengthy debates about whether such an

action would encroach on the commercial practices of agency employers, and the freedom of hosts to enter commercial contracts at will (ILO 1994; see also ILO 2006).

Effective protection of workers' rights requires compliance supported by enforcement mechanisms, both of which are significantly compromised in Australia by the structure of the temporary agency industry and the hiring arrangements for temporary agency workers. The temporary agency industry is characterised by 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). Amongst the smallest of these businesses are one-person operations whose assets consist of little more than a mobile phone. For medium to large businesses, set-up costs entail little more than establishing rudimentary office facilities to record client requests, interview workers, and contact workers when placements become available. 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 (Vickery, Interview, 2008). They also fly 'under the radar' with respect to the industrial relations implications of poor safety practices. Hosts, on the other hand, 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 product or service brand which is not easily discarded for the sake of evading legal obligations.

Hiring arrangements of agency workers also compromise compliance and enforcement of workers' rights. In Australia, the majority of agency workers are casual employees (ABS 2000). They are hired by the hour, and only have protection from unfair dismissal after 12 months regular engagement by an agency with more than 15 employees (an entitlement removed in 2006 and reinstated in July 2009). They are not entitled to sick, vacation or other types of paid leave. Faced with the risk of job loss for raising a grievance, and the need to accept any job placement to maintain an income, these workers have no power to enforce their employment entitlements (Underhill and Rimmer 2009). Yet casual employment is regarded by agency employers as integral to their 'spot-market' business model, hiring labour simply 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. Without effective regulation, the

conditions for the economic success of agencies necessarily imposes a disproportionate burden upon employees. Parallels can be drawn with recent innovative approaches to supply-chain regulation which offers an alternative model to ensure compliance with, and enforcement of, vulnerable employees' entitlements (Walters and James 2009). Consideration is necessary of a similar approach.

3. How Victoria allocates responsibility for OHS and return to work post-injury

In the State of Victoria, all employers have an obligation to provide, so far as reasonably practicable, a safe and healthy work environment for their employees (Occupational Health and Safety Act (Vic) s.21, *The Act*). This obligation applies equally to temporary agency employers. In addition, hosts share responsibility for the OHS of temporary agency employees by virtue of their responsibility to not expose 'other persons' to OHS risks arising from the conduct of their undertaking (including for example, customers in retail outlets) (*The Act* s.23). Since 2004, independent contractors and their employees have also been deemed employees of the host for OHS purposes (*The Act* s.21(3)). Hosts' responsibility for 'other persons' was not originally designed with temporary agency workers in mind. However more recent amendments concerning worker participation and consultation in OHS, and the above deeming provision, were developed to cater for the peculiarities of agency employment. In Victoria, worker participation in OHS is formalised through the role of OHS worker representatives and OHS committees (at least half of whom must be employees). In 2004, following an enquiry into the *Occupational Health and Safety Act (Vic.) 1985*, new provisions were introduced to enable temporary agency workers to participate in host consultative processes; to enable host OHS worker representatives to act on behalf of agency workers placed with the host; and to enable OHS representatives to act on behalf of workers at multiple host workplaces, as well as establish OHS committees made up of workers drawn from multiple host workplaces (WorkSafe Victoria 2005a).

To meet their obligations under the Act, agency employers are expected to undertake 'standard' employer approaches to health and safety, such as ensuring workers have sufficient training to perform tasks safely, and they also required to monitor conditions at the host workplace. These activities include conducting risk assessments of the tasks to be performed by placed workers, assessing and monitoring the management of the health and safety system at the host workplace, and reaching clear agreement in contractual arrangements with the host on the allocation of shared responsibilities (WorkSafe Victoria

2006). In this way, they ensure the host workplace is safe at the time of the placement, and on an on-going basis. Hosts, in turn, are obliged to take the same actions towards agency workers as they do towards their own employees. This includes, for example, providing necessary instruction and supervision to ensure safe performance of tasks, conducting risk assessments, monitoring working conditions to ensure new OHS risks are not introduced, and advising the agency employer should a change of job tasks arise for agency employees (WorkSafe Victoria 2005b). Their obligations reflect, in part, the extent to which OHS protection at the workplace is contingent upon the constant involvement of the host.

At first glance, these arrangements appear to provide extraordinary protection for the OHS of 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 is sufficiently flexible to allow worker participation at both the host workplace and in relation to the employment agency’s OHS system. Yet agency workers in Victoria, like elsewhere, continue to experience higher levels of workplace injury. There are multiple explanations for this persistent pattern 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, and where cost pressures dominate, only the largest of agencies have sufficient capital to support an infrastructure which meets the obligations imposed under the OHS Act. But the larger agencies are estimated to employ less than 20% of the agency workforce (Hargrave and Janes 2009). For most of the sector, OHS training provided to agency workers is poor, risk assessment of host workplaces is inadequate, and workers are placed with hosts with insufficient attention paid to the matching of the worker 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 provision of extensive additional training or supervision. No care is taken in practice over OHS, and compliance with statutory obligations comes second to commercial need (Johnstone and Quinlan 2006; Underhill 2008).

Shared responsibilities are also compromised. Agency employers claim shared responsibilities create ambiguities, whilst agency employees claim they result in buck passing between agency and hosts, with neither party resolving OHS problems (EDC 2005). Agencies

are unwilling to interfere in the hosts' workplace practices or demand workplace changes for fear of loss of commercial contracts (Gallagher et al. 2003). Hosts, on the other hand, regard agency employees' problems as belonging to the agency. They are also resistant to interference by agencies in their operations (Brennan et al. 2003). In this context, hosts continue to shape and dominate the work environment into which agency workers are placed, whilst washing their hands of responsibility.

Turning to the role of worker participation in OHS, shared OHS representation between agency and host employees has brought some advantages. This is because agency workers themselves are unwilling to become OHS representatives for fear of job loss. On the rare occasions when agency workers become OHS representatives they are usually moved to another host (thereby losing their OHS role) or advised their placement has finished and no others are available (AMWU, Interview 2009). Drawing upon host OHS employees for representation overcomes this vulnerability, although the benefits are limited. First, not all OHS problems encountered by agency workers are shared by host employees. Host OHS representatives can be unwilling to represent agency workers when the issue is not one shared by host employees. They are also powerless to represent agency workers over issues which relate to the agency employer's OHS practices rather than the host's. Second, host employees are often hostile towards agency workers, especially when their presence threatens host employees' job security. For these reasons, host OHS representatives can be unwilling to offer effective representation to agency workers (Underhill 2008; AMWU, Interview 2009).

The 2004 legislative changes also support agency employees' involvement in host OHS consultative committees. However evidence suggests few agencies have promoted such involvement (ACREW 2007). Low levels of formal OHS representation and informal participation are not unique to temporary agency workers, but are common amongst precarious employees more generally (Keegal 2009). The problem of lack of representation and participation amongst labour hire employees, however, has more acute consequences because of their prevalence in high risk occupations and industries.

Not all agency-host OHS arrangements operate in the way described above. Some larger agency employers have invested substantially in OHS practices, and also claim the 'double-checking' of OHS risks contributes to improved OHS practices at hosts' worksites (Skilled Group 2005). On at least one occasion this has resulted in the host, but not the agency

employer being prosecuted following an injury to an agency worker.¹ Furthermore, some hosts now include OHS indicators in their tendering processes when choosing an agency employer. Even amongst these better agency employers, however, worker OHS representation remains problematic with few OHS representatives to be found (AMWU Interview 2009).

The larger agency employers are not fully quarantined from the cost pressures which promote a general tendency to cut corners on legal obligations. Indeed, at least one of the larger operators has continuously lobbied for the creation of barriers to entry in agency work to place obstacles against such competitive pressures (Skilled 2005). Arguably, the acceptance of business needs over compliance may be compounded in the Australian context which is said to generally have a culture of non-compliance with respect to employer obligations (Pocock, Buchanan and Campbell 2004). By way of contrast, Hasle (2007) describes the experience of subcontracting in Denmark where, notwithstanding the absence of shared responsibilities, a major organisation went to extraordinary steps to ensure a shared approach was adopted because it was seen as the most effective means to establish and maintain safe practices.

The Victorian approach to employer obligations for returning injured workers to work, reflects a more traditional approaches to employer responsibilities. The agency employer has full responsibility; the host bears none. Employers have an obligation to return injured workers to 'suitable' duties within 12 months of a workers' compensation claim being accepted, and have other administrative obligations with respect to return to work plans and procedures. These obligations do not extend to injured workers having a right to enforce their return to work, although employers can be fined for breaching legal obligations by continuing to refuse an offer of suitable duties to the injured employee. Once the 12 month period has expired, employers face restrictions upon the dismissal of injured workers through employment regulations which protects workers against discrimination on the grounds of disability or sickness (*Accident Compensation Act (Vic.) 1985*, s.122, and Part VI).

Compliance by temporary agency employers with return to work obligations is especially problematic, a problem acknowledged by inspectorates and several government enquiries (Quinlan 2004; Parliament of the Commonwealth of Australia 2003; EDC 2005). Underhill (2008: 255) found that only 35% of injured temporary agency workers returned to work with

their employer post-injury, compared to 58% of direct hire employees. Instead, 36% were offered no further placements (effectively dismissed) whilst 19% found employment elsewhere (whilst awaiting the offer of another placement from their employer). Here, the issue of who bears responsibility for return to work obligations is particularly pertinent to enabling employees to return to work, especially on modified duties. Hosts, who do not bear that responsibility, are mostly unwilling to accept placements of injured workers. Only those with longer term relationships with agencies show any willingness to facilitate such a process. Some agency employers have sought to overcome this hurdle by placing injured agency workers with charities, often performing menial tasks (such as filling envelopes) far below their pre-injury capabilities and potentially undermining their effective return to work (Pimental 1998; Kenny 1999; Sager and James 2005 citing Williams and Westmorland 2002; Vickery, Interview 2008). Importantly, without the cooperation of hosts, agency employers cannot meet their legal obligations, leaving injured workers with few employment options.

Despite common acceptance that return to work post-injury is a major disadvantage for injured agency employees, governments and their associated agencies have been reluctant to draw hosts into the regulatory net. Calls by labour hire employers and unions for governments to require hosts to share responsibility have fallen on deaf ears (Labour Hire Task Force 2001; Productivity Commission 2004; EDC 2005, 101). In 2004, a national inquiry into workers' compensation frameworks responded to such calls by suggesting that:

The Commission notes the difficulties faced by labour hire companies in providing suitable duties but considers that these difficulties are also likely to be faced by the host company. The host company's decision to enter into a labour hire arrangement reflects the temporary nature of the intended employment relationship. Furthermore, the costs of workers' compensation claims would normally be reflected in labour hire agreements entered into by the host company and the labour hire company (Productivity Commission 2004, 200-201).

Such an analysis prioritises the commercial arrangements underpinning labour hire arrangements over the need to provide effective mechanisms for improving return to work outcomes for injured workers. It also shows a lack of understanding of the compliance problems associated with workers' compensation obligations in an industry with low barriers to entry.

A more recent Victorian enquiry into workers' compensation was more sensitive to the problem (Hanks 2008). The 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" (p.153). However the Report went on to recommend that hosts should have an obligation to "take reasonable steps to co-operate with labour hire employers on the return to work of injured labour hire workers" (p.24). The Victorian government has announced its support for this recommendation, although the drafting of regulations to effect this change has not yet been completed. A 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 injured workers. Nevertheless, it is an acknowledgement of the extent to which the role of hosts largely determines return to work processes.

Victoria's troubled experience of shared OHS responsibilities and one-sided obligations with respect to return to work post-injury raises a number of issues with respect to the protection of agency workers. First, shared responsibilities require a willingness to reach an understanding of what is to be shared, rather than deciding upon shared responsibilities once a problem has arisen. Without this, problems remain unresolved whilst the protagonists argue amongst themselves. Second, shared responsibilities work best in an environment where both parties have a willingness to comply with their legal obligations. This is least likely to occur in an industry plagued by intense unregulated price competition. Third, without shared obligations, parties which control the workplace also control the outcomes, irrespective of whom bears legal responsibilities. This is most evident in relation to return to work obligations, where agency employers continued to ignore the rehabilitation rights of injured workers in the knowledge that hosts will be unwilling to accept 'tainted' workers (Quinlan 2004).

4. Protection of agency workers' core labour rights

The discussion so far has focused on two aspects of employment which are not regarded by the ILO as 'core employment rights'. Would the problems faced by agency workers with respect to OHS and return to work be less onerous if these were core employment rights upon which governments are expected to extend protection? An examination of the application of

agency workers' core labour rights, particularly from the perspective of who influences compliance with those rights, throws some light on this.

All governments in Australia place responsibility for core labour rights on the agency employer. The only exception concerns protection from discrimination, which encompasses actions by agency employers and hosts. Yet many actions taken by agency employers are in response to the demands of hosts, taken in conjunction with hosts, or are a response to agency employers' inability to control the work environment in which their employees are placed. Table 1 provides a matrix of whom bears responsibility for agency workers' core labour rights, counterposed against which parties control the exercise of those rights. OHS and return to work have also been included.

Table 1: Legal responsibilities and sources of control over labour rights in the Australian temporary agency industry

		Legal responsibility			
		Agency employer has sole legal responsibility	Agency & hosts have separate legal responsibilities	Host & agency employer share legal responsibility	No designated legal responsibility
Control over issue	Agency employer controls issue	Forced labour Minimum Age Child labour			
	Agency and host share control	Freedom of association Collective bargaining (post-July 2009) Equal remuneration Discrimination	Discrimination	OHS; host has greater degree of control over day-to-day issues eg. pace of work; use of equipment	Collective bargaining (pre-July 2009)
	Host controls issue	Return to work post-injury			

The agency employer has sole responsibility for most core labour rights, but shares control of their application with hosts. In the discussion which follows, the exercise of control in relation to each of these rights will be explained primarily through an account of common practices in the agency industry, based upon empirical data drawn from multiple sources. An examination of court cases can further demonstrate the application of that control and how the judicial system has interpreted legal responsibility for core labour rights. However this is problematic in the case of agency workers. There is a perception amongst agency workers that enforcing legal rights against their employer will result in job loss, leading potentially to

black listing across the temporary agency industry (Underhill and Rimmer 2009). Compounding this reluctance is their low levels of unionisation. Without a union to offer support, or instigate the prosecution, aggrieved workers may be further discouraged from taking actions. Hence prosecutions for breaches of employment obligations by agency employers are rare. Also, regulatory changes in the Australian industrial systems in recent years have breached a number of ILO conventions, including core labour standards (Biffl and Isaac 2005). The scope for legal action to enforce core labour rights was consequently reduced, and some weaknesses identified in the protection of agency workers were shared by other types of workers. However, the consequences of gaps in protection will be more acute for agency workers because of the nature of agency operations.

The first of these core rights, forced labour, minimum age and child labour protections are mostly complied with throughout Australian industry (illegal exceptions do arise with respect to forced labour in the sex industry). In the temporary agency industry, agency employers control the exercise of these protections through their decisions to not use forced labour or recruit workers below a minimum age. There is no evidence to suggest they are under pressure from hosts to breach any of these rights. A breach of these protections would be viewed as socially unacceptable across Australian society. Such social pressures, however, are less pervasive with respect to other labour protections.

Freedom of association, or the right of employees to join unions is a right which agency employers are legally obliged to respect in relation to their employees (Stewart 2009). Yet agency employees report widespread discrimination for being union members. Underhill's (2005) survey of 147 agency workers found 20% were discriminated against for being union members, and 13% for being union delegates. Similarly, union officials report a reluctance by agency workers to be identified when reporting a workplace problem for fear of union membership being revealed. But proving discrimination on the grounds of union membership is problematic given the temporary nature of placements. For example, in one case, 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 within a fortnight. Their employer was not found to have breached the WRA.ⁱⁱ 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".ⁱⁱⁱ 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”.^{iv}

There is also a common belief amongst agency workers that disadvantage based upon union membership and activity results from hosts’ decisions. Hosts request the removal of union activists from their worksites, and agency employers, unwilling to risk the loss of a client, readily comply with such requests (Underhill 2005). Whilst such beliefs are difficult to substantiate, they underpin reluctance by agency workers to report workplace problems through unions, and to participate in union activities through formal job delegate roles.

The legal right of all workers in Australia to freely participate in collective bargaining was repealed by the WorkChoices legislation of 2005, which removed obligations upon employers to bargain collectively, and prohibited certain content from agreements (Stewart 2009). That legislation has since been repealed and new bargaining rights created. These have only just been implemented, and will not be considered here. Instead, the discussion focuses upon the pre-WorkChoices environment, when factors unique to agency workers impacted upon their ability to negotiate collectively compared with direct hire employees. These factors are unlikely to be affected significantly by recent regulatory changes. First, the right of agency workers to collectively bargain is constrained by the impediments they face in being union members. As observed above, these impediments arise from both employer and hosts’ discretion.

Second, when collective agreements exist, they have (occasionally) been breached by employers who enter into contracts with hosts at prices which undercut the negotiated wage rates. In such instances, agencies have asked employees to ‘put aside’ their collective entitlements whilst placed with those hosts. Third, survey evidence from agency employees has found 41% believed their host utilised agency workers to avoid collective arrangements (including statutory minimum wages) at their workplace (Underhill 2008). It is likely (but not proven) that such hosts would also reject placements by agency workers’ whose employment was subject to collective bargaining offering above minimum rates of pay. Fourth, and in contrast, hosts have also played a role in promoting collective agreements amongst agency workers. Prior to 2006, collective agreements in unionised manual host workplaces often required that only agency workers covered by collective agreements be placed at the

workplace. In this way, the host's practices dictated the need for agency employers to enter collective bargaining with their own employees (Underhill and Rimmer, 2009).

These practices reveal a significant role for hosts in determining whether the right to collectively bargain is complied with by agency employers. Yet that role is not subject to legal regulation. Also, the very nature of agency employment, with a dispersed and often itinerant workforce impedes the capacity of agency workers to negotiate collectively, and take collective action. Even taking collective action can be compromised by hosts, who can replace striking agency workers with others, without breaching statutory obligations. This extensive web of constraints upon agency workers' rights to collectively bargain suggests alternate mechanisms may be necessary to protect this core labour right.

The elimination of discrimination through equal remuneration and other non-discriminatory employment practices is the fourth core labour right. For agency workers, the right to equal remuneration has been interpreted to mean the right to remuneration equal to that paid to comparable host employees (ILO 1994; Demaret 2006). Overseas research has consistently identified a wage disadvantage for agency workers, and similar outcomes are evident in Australia (Kalleberg 2003; Garen 2006; Kvasnicka and Werwatz 2003; Pocock, Prosser and Bridge 2004; Watson 2004). As with collective bargaining amongst agency workers, hosts play both a negative and positive role in influencing whether agency workers receive the same rate of pay as host employees. The perception of agency employees that hosts use agencies to evade their employees' minimum entitlements points to an unwillingness by hosts to accept agency workers with entitlements equivalent to direct hire employees. In contrast, a 2004 survey of agency employers found that of those who matched their employees' rates of pay to host rates, 46% did so because the host's enterprise agreement required them to do so. Only 28% did so because of an enterprise agreement with their own employees.^v Clearly hosts play a significant role in determining agency workers' right to equal remuneration when that right exists.

The protection of agency workers from discrimination on the basis of gender, race and other factors (aside from union membership) is the only core labour right where both the agency and the host have direct legal responsibility. Interestingly, this obligation upon hosts did not arise from recognition that hosts can also discriminate against agency workers, but from the nature of anti-discrimination legislation which extends beyond employment relationships.

Anti-discrimination legislation offers the potential for re-instatement in employment, and damages payable to agency workers by employers and hosts. But the legal process is drawn out and costly compared to the enforcement of other employment protections (Hennessy 1997). To the authors' knowledge, there have been no prosecutions of agency employers or hosts under discrimination law in Australia. This is not to suggest that discrimination does not occur. For example, a pregnant agency worker was dismissed in 2002, but lodged a claim for unfair dismissal (a different jurisdiction) rather than discrimination. Her host was found guilty, but only because the host was ultimately found to be her employer. Her agency subsequently offered her no further places.^{vi} Given agency employees' job insecurity, coupled with a perception that workers quickly become known as 'troublemakers' across the agency industry, 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 imposes a greater penalty upon employers than the risk of prosecution for failing to comply with employment rights. Hosts, on the other hand, face no such risks.

The protection of agency workers' rights with respect to OHS and return to work are compromised by a combination of the allocation of legal responsibility and the nature of agency employment operations. Shared responsibilities for OHS did not overcome poor compliance with OHS obligations, whilst placing sole responsibility with agencies for return to work post-injury has proven impracticable. Similar problems are evident with respect to compliance with core labour standards.

From this discussion, it can be argued that the distinction between core and non-core obligations is secondary to the appropriateness of the existing allocation of legal responsibility. Improved compliance and enforcement requires better targeting of the parties substantially responsible for breaches of labour rights, namely hosts.

5. Improving protection of agency workers' rights through reallocating legal responsibilities

The approach endorsed by the ILO through Convention 181 promotes greater protection of agency workers' rights through creating barriers to entry into the temporary agency industry, and through identifying employment issues which the agency employer is responsible for, but it does not direct nation states on the question of shared responsibilities between agencies and hosts. Low barriers to entry create a competitive environment in Australia which encourages agency firms to disregard their legal obligations in favour of competitive advantage. Creating barriers to entry would potentially drive 'fringe operators' out, allowing consolidation of the industry and overcoming enforcement difficulties related to small-medium agencies. It would remove some cost pressures upon remaining 'legitimate' businesses, and in turn, disincentives to comply with legal obligations. But such a step does not address the issue of matching responsibilities to control over employment rights.

Imposing legal obligations upon hosts to comply with agency workers' employment rights means that the party which contributes to the breach of those rights bears the consequence of such breaches. Hosts would no longer benefit from being able to choose whether or not they comply with employment rights. Enforcement would be facilitated because, as noted earlier, hosts cannot as easily evade enforcement processes in the way that employment agencies can. But should those responsibilities also be shared with the agency? To do otherwise would free agency employers of all employer obligations. This would be a curious reward for persistent non-compliance with statutory obligations. But equally, notwithstanding the Treaty of Versailles' affirmation that labour is not a commodity (ILO 1994), agency employment involves profiting from selling labour's services. Removing employer obligations from agency employers would require acknowledgement of that commodification, an unacceptable concept for many.

Sharing obligations between hosts and agencies offers the potential for greater compliance when hosts are unwilling to partner with agencies whom they believe are breaching their obligations. This may work best when hosts, through this sharing, are 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 in one approach (ILO 2007). Innovations in supply chain regulation, whereby principle contractors are responsible for outstanding wage payments of subcontractors, is

another (Nossar 2006, Walters and James 2009). However, this also requires a culture of compliance amongst hosts, including recognition that agency employees should not be a means of undermining host employee entitlements (see also Deakin 2001; Davidov 2004).

To date, the Victorian experience with shared responsibilities suggests that it can result in non-compliance unless responsibilities are clearly delineated between agencies and hosts. Compliance and enforcement may be straightforward for issues such as equal remuneration with host employees, but less so for issues governed by employer discretion such as discrimination, or whether a unionised worker has equal access to placements. The more direct means of achieving employment protection may be to place the responsibilities solely with the host.

What would the consequences of this approach be for the temporary agency industry? First, 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. Agencies which have competed only through undercutting employment entitlements may find it difficult to survive. This may ultimately result in a restructuring of the industry as smaller agencies find their cost advantage based upon non-compliance is devalued. A similar outcome is said to have occurred in the German agency industry as collective bargaining amongst agency workers has become more widespread (Storrie 2004). Second, agencies may be forced to find an alternative source of competitive advantage. Agencies 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. At least one large agency in Australia has already sought such an advantage through supplying a 'safer' agency workforce than other agencies (Skilled 2008). Third, more stable placements and relationships between agencies and hosts may evolve as hosts recognise that their capacity to comply with statutory obligations is contingent upon agencies also respecting agency workers' rights. Fourth, 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). Agencies may find demand is reduced to short term employee absence placements, rather than longer term replacement of host workforces. Alternatively, agencies may continue to provide longer term placements but with their role focused upon payroll administration. Some, but not all of these potential outcomes would be favoured by temporary agency employers.

6. Conclusion

Temporary agency employment raises fundamental questions about how best to protect workers' rights. The Australian experience demonstrates that a continuation with traditional approaches to employment regulation does not offer adequate protection to temporary agency workers. The regulatory approach to agency and host responsibilities for OHS in Victoria demonstrates a different approach, of sharing responsibility, but in an industry characterised by intense price competition and a culture of non-compliance, shared responsibility (for OHS) often amounts to shared irresponsibility. In the case of responsibilities for return to work post-injury, where agencies bear full responsibility and hosts bear none, injured agency workers are especially disadvantaged. As neither OHS nor return to work post-injury are core labour rights, consideration was given to whether agency workers' core labour rights were better protected. The evidence suggests that similar compliance problems also arise with respect to agency workers' core rights. The critical issue is not whether agency workers' rights are core or non-core, but whether legislation imposes obligations upon those who significantly contribute to the breach of those obligations. Whilst agency employers are ultimately legally responsible because they are employers, hosts play a substantial role in determining whether workers' rights are protected, yet bear no responsibility (with the exception of OHS). The nature of the temporary agency industry results in agency employers forgoing their employment obligations in favour of maintaining host clients.

Under these circumstances a rethink of responsibilities for the protection of temporary agency workers is necessary, particularly the responsibilities imposed upon hosts. The ILO Convention on private employment agencies leaves this role open to nation states to decide upon. Several options were considered. Sharing responsibilities between agencies and hosts perhaps best reflects the realities of whom determines employment rights for agency workers. But in the Australian context, based upon the experience of shared responsibilities for OHS, shared responsibilities work best when both parties agree on the application of those responsibilities, and have an intent to comply with those responsibilities. Unless barriers to entry are created in the Australian industry to reduce price competition amongst a large number of small operators, shared responsibilities are unlikely to be effective in protecting workers' rights. A related option is sharing those responsibilities, but imposing greater penalties upon hosts who contract with agencies which breach their obligations.

A more controversial approach is to place all responsibilities upon the host. This would overcome some enforcement problems, but requires a fundamental shift away from the belief that labour is not a commodity. The purchaser of their services, and not their employer, would bear full responsibility. Also, such an approach may have substantial implications for the role of agency employment and the structure of the agency industry. Whilst removing employer obligations may appear to favour those who have shown a disregard for the role of law, it may also result in a diminution of the attractiveness of agency workers to hosts. The distinction between agency employees and direct hire employees would be substantially reduced and the option of using agency employment to undercut existing conditions would be closed. Other incentives for using agency employment, such as drawing upon specialised skills or filling temporary vacancies, may remain intact.

In reconsidering the protection of agency workers, there is unlikely to be an easy solution which is acceptable to both hosts and agency employers. But equally, current arrangements remain unacceptable to many agency workers, as well as direct hire employees whose core rights can also be threatened by agency employment. As nations start to reconsider the role of government regulation of business more generally, it is an appropriate time to also re-open the debate on regulation of agency employment.

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Endnotes

ⁱ For example, in the case of WorkCover of NSW (Inspector Farid Katf) v APC Socotherm Pty. Ltd. (2006) NSWIRComm 165 (31 May 2006), the host was prosecuted but not the labour hire agency which had conducted a risk assessment prior to placing the worker.

ⁱⁱ Bruce Neilson, Lawrence Brookes, Andrew Wood, Robert Gore, Paul Bertram and Terry Clancy v JSM Trading Pty Limited t/a Workhire Pty Ltd PR929657 (2003) AIRC 331 (1 April 2003).

ⁱⁱⁱ SDP Kaufman, in Bruce Neilson et al. v JSM Trading at 2-3.

^{iv} SDP Kaufman, in Bruce Neilson et al. v JSM Trading at 13.

^v Australian Workers' Union (AWU), West Australian Branch, Industrial Union of Workers v Adecco and Flexi staff Pty Ltd (2004) WAIRComm 13533 (7 December 2004).

^{vi} Oanh Nguyen and A-N-T Contract Packers Pty Ltd Trading as A-N-T Personnel and Thiess Services Pty Ltd Trading as Thiess Services, IRC(NSW) No 3826 of 2002.