NEW ZEALAND COUNCIL OF TRADE UNIONS
Te Kauae Kaimahi

Submission of the
New Zealand Council of Trade Unions
Te Kauae Kaimahi
to the

Education and Workforce Committee
on the

Employment Relations (Triangular Employment) Amendment Bill 2018

P O Box 6645
Wellington

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1. Introduction and outline of submission

1.1. This submission is made on behalf of the 30 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With 320,000 members, the CTU is one of the largest democratic organisations in New Zealand.

1.2. The CTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga) the Māori arm of Te Kauae Kaimahi (CTU) which represents approximately 60,000 Māori workers.

1.3. The CTU advocates for all New Zealand workers to receive fair treatment and recognition of their rights and voice at work. Workers are entitled to decent, secure work that is healthy and safe and provides adequate remuneration to allow workers to live in dignity.

1.4. The CTU strongly supports moves to address precarious and insecure employment, of which triangular employment is one factor. Triangular employment is an area of concern long identified by the union movement in New Zealand and the CTU welcomes the advancement of the public debate regarding this issue via the introduction of the Employment Relations (Triangular Employment) Amendment Bill 2018.

1.5. The CTU strongly supports the policy intent of the Bill. This submission proposes further improvements in the mechanisms in the Bill to ensure the optimal regulatory solution is applied to all the permutations of the phenomenon of triangular employment. Accordingly, in this submission, the CTU makes recommendations of amendments to improve provisions of the Bill and changes to the Bill to enable it to better address the concerns.

1.6. The CTU considers it important to note that the Bill seeks to ameliorate the negative effects of triangular employment and this should not be seen as an attempt to legitimise labour hire as an acceptable or preferable form of employment arrangement. As will be obvious in this submission, the CTU contends labour hire arrangements should only be used in limited circumstances to cover short-term contingencies.

1.7. This submission will be divided into the following sections:

a. Context;

b. New Zealand case law;
c. Purpose;
d. The formula adopted in the Bill of primary and secondary employer;
e. Control test;
f. Joinder;
g. The practice of issuing a personal grievance in a triangular employment relationship;
h. The potential limitations with the scope of the Bill:
    i. The circumstance of individual employment agreements (IEAs) applying to employees permanently engaged by the host employer, and labour hire employees also regulated by IEAs; and,
    ii. The interaction of individual employment agreements (IEAs) applying to labour hire workers in the event that IEAs may contain certain provisions above and beyond those in the collective agreement;
i. Alternative and/or complementary policy options;
j. Conclusion.

2. Definitions

2.1. The Employment Relations (Triangular Employment) Amendment Bill 2018 adopts the terminology of 'primary' and 'secondary' employer. The use of the word primary denotes that there is a principal employer. The NZCTU considers the use of this terminology to be a misnomer because it suggests the inverse of what happens in practice. For instance a host employer can be the employer. This point is expanded upon in the section 'formula' in this submission, As a result, the NZCTU will use the terminology 'employer' and 'controlling third party' (or host employer) in this submission.

3. Context

3.1. The problem the Bill seeks to address is one of exploitation or potential exploitation of workers in triangular employment arrangements, particularly in the case of labour hire employees. Triangular employment has become an increasingly common mode of employment as the use of labour-hire employment has expanded and there is a growing trend to engage workers on an "as needed" basis.

3.2. Labour hire, also known internationally as "agency work", involves a triangular work arrangement in which an intermediary (the work or labour hire agency) supplies workers to a company (the host) for a certain period of time.

3.3. There are a range of justifications by employers for the use of labour hire, including costs saving and other commercial uses and advantages, such as in the case of covering short-term positions.

3.4. The proliferation of labour hire has occurred not just in New Zealand but other comparative jurisdictions and like other jurisdictions, it has occurred within a regulatory vacuum. This is particularly true of New Zealand: OECD comparisons show New Zealand with the weakest regulation of temporary work agency employment in the OECD.[1]

3.5. The increasing use of labour hire arrangements is widening the gap between standard and non-standard workers, at a time when other forms of insecure work arrangements are internationally becoming more common, such as casual, dependent contractor and gig workers.

3.6. The potential for the abuse of workers in triangular employment relationships and/or for triangular employment relationships to seriously disadvantage the rights and health of workers is well recognised and observable in New Zealand.

3.7. A triangular employment relationship gives the host employer all or most of the benefits of being an employer, and powers of direction and control, while allowing it avoid the legal obligations normally associated with being an employer, such as providing minimum employment conditions.

3.8. The ambiguity over responsibilities between the agency and host employer has serious implications for workers' access to rights and entitlements. For instance, there is no obligation upon employers to provide labour hire workers with wages and conditions of work to labour hire workers that are equal to those provided to a directly employed worker. Many labour-hire workers are employed on a casual or contracting basis, with associated problems of low pay, no job security, inferior conditions of employment and an absence of skill development and training.[2]

3.9. As is noted by Gordon Anderson in his submission on this Bill, the MBIE Discussion Document Playing by the Rules (May 2014) noted at page 11 that "Working arrangements that involve 'triangular relationships' – in which a worker is employed by one employer to work for another employer – are particularly susceptible to this kind of breach" (ie serious breaches of employment standards).

[1] OECD. (2013). *OECD Employment Outlook 2013*, OECD, p.90. Retrieved from http://www.oecdilibrary.org/employment/oecd-employment-outlook-2013_empl_outlook-2013-en

[2] Parliament of Victoria, Inquiry into Labour Hire Employment in Victoria, Economic Development Committee, Final Report, June 2005.

3.10. Labour hire workers are particularly at risk with respect to their health and safety. It is well known that workers new to a job and temporary workers have higher injury rates. Labour hire workers are continually new to the jobs which they are temporarily placed in. As the Independent Taskforce on Health and Safety reported, "employees new to positions or engaged in temporary, casual or seasonal work may be particularly at risk".[3] Elsa Underhill of Deakin University who has conducted research into temporary agency workers, notes that:[4]

> International and Australian research agrees that temporary agency workers have a higher incidence of workplace injury, and those injuries are more severe and finds for such workers in Victoria, Australia that labour hire workers were more likely to be injured early in their placement than direct employees, despite similar qualifications.

3.11. Despite being originally touted by labour hire agencies as an effective mechanism to manage short-term labour shortages, triangular employment relationships are increasingly characterised by longer-term relationships. This means that the worker is increasingly integrated into the host employer's organisational structures. This leads to challenges in identifying the legal employer particularly with the changing character of the relationship over time.

3.12. Despite calls for change, the labour hire sector remains mostly unregulated leading to inevitable abuses. There is a large 'agency' workforce in New Zealand subject to these unfair triangular employment relationships, in servitude or slavery like conditions. These workers are on building sites, farms, in factories and at the airport in varying capacities. The facts of the recent *Prasad v LSG Sky Chefs New Zealand Ltd* case (discussed further in the case law section) illuminates the type of situation these workers face. In that case the court recognised the exploitative nature of LSG's use of labour hire, citing Ms Tulai's, an agency worker, working week of up to 62 hours and noting at one point she worked 34 full days of work without a day off. Both plaintiffs in that case worked for years for minimum wage or just above, with no holiday, sick leave or Kiwisaver entitlements, and they had to pay their own ACC cover.

[3] *Report of the Independent Taskforce on Workplace Health and Safety*, April 2013, p.13.
[4] Underhill, E. (2007). 'Temporary agency workers and the contribution of workplace unfamiliarity to workplace injuries'. In AIRAANZ 2007: diverging employment relations patterns in Australia and New Zealand", conference proceedings (at 11). Presented at the Association of Industrial Relations Academics of Australia and New Zealand. Conference, Auckland N.Z.: University of Auckland. Retrieved from http://hdl.handle.net/10536/DRO/DU:30008220

3.13. There has been a failure to adequately recognise and extend adequate protections to workers engaged in this type of insecure work.

3.14. The current framework regulating labour hire/triangular employment is inadequate to ensure fairness and basic employment and health and safety protections for workers engaged labour hire. Many labour hire employers exploit the vulnerability of their workers.

3.15. This can be largely blamed on the absence of specific regulations to allocate responsibilities between the agency and the host company.

3.16. There is a lack of general legislative provisions guaranteeing the equal treatment of labour hire employees.

3.17. Not only New Zealand, but the world, is grappling with this problem and New Zealand should attempt to be at the forefront of progressive reform. New Zealand is in prime position to be able to learn from and adopt overseas models, retrofitted to New Zealand context.

3.18. This submission will, in addition to analysing elements of the current Bill, put forward a suite of other policy options to manage the phenomenon of triangular employment relationships.

4. New Zealand Case Law

4.1. The CTU foreshadows there could be argument that s 6 of the Act already covers this issue of identifying an appropriate employer for the purposes of enforcement of responsibilities. However, recent case law on this provision highlights the ineffectiveness and impracticality of relying on s 6 of the Act to deal with triangular employment.

4.2. There have been a series of recent notable cases where the issue of triangular employment has been addressed by the Courts.

4.3. The first case in New Zealand to deal with triangular employment was *McDonald v Ontrack Infrastructure Limited*.[5] In this case the plaintiff had entered into an individual employment agreement with a labour hire company, Allied WorkForce Ltd ("Allied") as a casual worker. There was a contract between Allied and Ontrack Infrastructure

[5] [2010] NZEmpC 132 (5 October 2010).

Ltd ("Ontrack") for the supply of casual labour. The plaintiff was placed with Ontrack as a trainee track worker. When this placement terminated, the plaintiff raised a personal grievance on the basis that he had entered into a contract of service with Ontrack, which was alleged to have come into existence some time after the placement began as the result of the totality of his dealings with Ontrack and Allied. The defendant argued that the plaintiff remained under a contract of service with Allied while assigned to them.

4.4. The full Court was required to rely on UK and Australian case law. The Court determined that the approach was to apply s 6 of the Act, so as to determine the real nature of the relationship between the parties by implication from the parties' overt conduct rather than by reference to their expressed intentions.

4.5. The starting point was then said to be the contractual documents existing at the commencement of the placement, although these documents could not determine the real nature of the relationship. In particular, if the intentions of the parties could be derived from any "communications or actions or documentation" then the real nature of the relationship may be determined to be different from that appearing from the contractual documents (at [41]).

4.6. The Court noted this was an area of law where, although Parliament has legislated (in s 6 of the Act), a considerable overlay of Judge made law will be necessary and that Courts should move cautiously in developing doctrines such as implied triangular employment relationships. The inquiry will be intensely factual and the result of the case determined accordingly.

4.7. In the recent case of *Prasad v LSG Sky Chefs New Zealand Ltd*[6], E tū union took a case against LSG Sky Chefs New Zealand, on behalf of two workers who were engaged by labour hire company, Solutions Personnel. Solutions Personnel then contracted with LSG for the workers to perform work for LSG.

4.8. The Employment Court found that in spite of the contractual arrangements (or lack thereof) between the parties, the true nature of the relationship between LSG and the workers was that of an employer and employee.

4.9. This finding was based on a variety of factors, including the degree of control LSG had over the workers, the longevity and ongoing nature of the relationship (ie the

[6] *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150.

workers expected to be given work and LSG expected the workers to perform it personally), the fact LSG usually contacted the workers directly, and overall LSG treated labour hire workers no differently to its actual employees, except for the fact that labour hire workers were paid less.

4.10. This case was a powerful win for workers reducing the ability of companies avoiding employment-related obligations through the use of labour hire companies. While this is a big win for labour hire workers in exploitative relationships, the process was lengthy and required considerable resources to reach the outcome. The impact on other labour hire workers who are not unionised will take time to assess.

4.11. It is evident the New Zealand employment institutions have been grappling with cases of abuse of triangular employment relationships but without the means to do so effectively and in a timely fashion.

4.12. Relying on litigation underpinned by s 6 of the Act is not an appropriate or accessible remedy for workers in triangular employment relationships to seek equal pay and conditions with directly engaged employees, or to enforce their rights against an employer and host employer, or both.

4.13. For this reason, a statutory regime dealing with triangular employment is necessary and the CTU commends the current Bill for taking the first steps to address this regulatory gap.

5. Purpose

5.1. Taking into account both the context of the phenomenon of expanding use of labour hire employees (illegitimately in a large number of circumstances) and recent case law, the CTU now considers whether the purpose of the Bill is met by its provisions and in particular, will consider whether matters outside of the scope of the Bill should be given consideration.

5.2. The CTU understands the purpose of the Bill is twofold:

a. To extend coverage of collective agreements (where there is one in place at the host employer applying to its directly engaged employees), to labour hire employees who are members of the union; and,

b. To facilitate joining a controlling third party or host employer to a personal grievance.

5.3. The first purpose is to allow employees who are employed by one employer (the "employer"), but are working under the control and direction of another business or organisation (the "controlling third party" or “host employer”), the right to coverage of a collective agreement covering their work for the secondary employer.

5.4. Secondly, if the Bill becomes law it will give such employees the right to join the controlling third party to a personal grievance claim against the employer (if that personal grievance claim has also been raised with the controlling third party).

5.5. The amendments would ensure that workers working under the control of the third party, and, largely indistinguishable from employees of that third party, would be protected in two situations, translating into two important protections for labour hire employees.

5.6. For labour hire employees who are union members, they will be entitled to the protection of the coverage of any collective agreement to which the host employer is a party.

5.7. As is pointed out by Gordon Anderson in his submission, a secondary benefit is that the amendments would also assist in preventing the undermining of a collective agreement, by the use of non-employee workers to perform work covered by the collective.[7]

5.8. Second, the amendments would allow workers under the control of a third party to raise a personal grievance against that third party.

5.9. This is important because, as the law currently stands, a controlling third party / host employer can, seemingly without limitation, dispense with a labour hire worker’s services in a manner devoid of reason or justification, including potentially for discriminatory purposes. This means that labour hire employment for all intents and purposes is at-will, a position that is contrary to the clear statutory intention that dismissals be justified and that other adverse actions can be also challenged through a personal grievance.

[7] Gordon Anderson, Submission on the Employment Relations (Triangular Employment Amendment Bill) 2018

5.10. While the CTU is broadly supportive of 'first step' purposes of the Bill, it considers that the policy problem the Bill seeks to address could be broader than that which will be captured in the Bill.

5.11. This point is illuminated by comparing the current member's Bill to the 2008 then Government Bill, Employment Relations Amendment Bill (No. 3). This Bill was discharged on 6 March 2009 due to a change in government.

5.12. The CTU contends that the 2008 Bill contained provisions which should be picked up in the member's Bill in some respects.

5.13. The CTU will address the following elements:

a. The formula adopted in the present Bill of primary and secondary employer;
b. Control test;
c. Joinder;
d. The practice of issuing a personal grievance in a triangular employment relationship;
e. The potential deficiencies with the scope of the Bill:
    i. The circumstance of individual employment agreements (IEAs) applying to employees permanently engaged by the host employer, and labour hire employees also regulated by IEAs; and,
    ii. The interaction of individual employment agreements (IEAs) applying to labour hire workers in the event that IEAs may contain certain provisions above and beyond those in the collective agreement;
f. Alternative and/or complementary policy options.

6. Formula

6.1. In its current form, at clause 4, the Bill adopts a formula of 'primary' and 'secondary' employer to illuminate the triangular employment relationship.

6.2. Those definitions are as follows:

> ***primary employer,*** *for the purposes of sections 56(1)(c) and 102A, means any person who employs a person to do any work for hire or reward under a contract of service*
>
> ***secondary employer****, for the purposes of sections 56(1)(c) and 102A, means any person who enters into any contract or other arrangement with a primary employer whereby the employee of that primary employer performs work for the benefit of that person and where that person exercises or is entitled to exercise control or direction over the employee equivalent or substantially equivalent to that which would normally be expected of an employer.*

6.3. There are concerns with these definitions which have already been referred to in the 'definitions' section of this submission. The use of the word primary denotes that there

is a principal employer. The NZCTU considers the use of this terminology to be a misnomer because it suggests the inverse of what happens in practice. For instance a host employer can be the employer.

6.4. The formulation adopted in the Bill of primary and secondary employer can be contrasted with the formula adopted in the former Employment Relations Amendment Bill (No 3) 2008 which adopts the formula of employer and controlling third party.

6.5. In the 2008 Bill, controlling third party, is used instead of 'secondary employer'.

Controlling third party means a person –

(a) who has a contract or other arrangement with an employer under which an employee of the employer performs work for the benefit of the person; and

(b) who exercises or is entitled to exercise control over the employee that is substantially similar to the control an employer exercises or is entitled to exercise in relation to the employee.

6.6. The CTU argues that the formula of employer and controlling third party is a preferential formula to that of primary and secondary employer because the formula needs to be broad enough to accommodate all the possible permutations of triangular employment and to sufficiently flexible to adapt to continuing changes in employment trends.

6.7. Furthermore the adoption of the formula of controlling third party is more consistent with the approach adopted under health and safety legislation in New Zealand.

6.8. The Health and Safety at Work Act 2015 applies obligations and responsibilities under the legislation to a PCBU – person controlling a business or undertaking.

6.9. The CTU recommends that the formula of employer and controlling third party from the 2008 Bill be adopted in replacement of primary and secondary employer.

7. The Control Test

7.1. There is a difference in the control test put forward in the current member's Bill and the 2008 Government Bill.

7.2. In the current Bill, the control test is contained within the definition of secondary employer which states:

***secondary employer**, for the purposes of sections 56(1)(c) and 102A, means any person who enters into any contract or other arrangement with a primary employer whereby the employee of that primary employer performs work for the benefit of that person and where that person exercises or is entitled to exercise control or direction over the employee equivalent or substantially equivalent to that which would normally be expected of an employer*

7.3. In the 2008 Bill, the control test is contained within the definition of controlling third party.

Controlling third party means a person –

7.3.a.1. who has a contract or other arrangement with an employer under which an employee of the employer performs work for the benefit of the person; and

7.3.a.2. who exercises or is entitled to exercise control over the employee that is substantially similar to the control an employer exercises or is entitled to exercise in relation to the employee.

7.4. The CTU considers that the definition of "substantially similar" is preferable to "equivalent or substantially equivalent" as it is able to accommodate a wider variety of situations indicating elements of a triangular employment relationship.

7.5. This is consistent with the CTU's recommendation that the use of 'controlling third party' instead of 'secondary employer' should be adopted.

8. Joinder

8.1. The Bill inserts a new section 102A to provide that in certain circumstances an employee of a employer may, with the leave of the Authority or court, join a controlling third party / host employer to a personal grievance.

8.2. The CTU supports the intention of this provision of the Bill to simplify the resolution of personal grievances, increase access to mediation and reduce the costs to employees of bringing a grievance. The Bill does this by removing the need for a decision on the often complex, and hence expensive, question of which entity was the "employer" for the purposes of the grievance. However, the CTU recommends further advancements to the provisions.

8.3. Leaving aside the CTU's recommendation that 'secondary employer' should be replaced with 'controlling third party', the CTU considers that the ability to join a controlling third party to a personal grievance should be as of right.

8.4. It is submitted that an application for joinder and opposition to such an order should not be allowed to delay mediation.

8.5. The proposed s 102A might be amended to add subs (4) to allow the Authority to direct all parties to attend mediation at the point a joinder application is lodged.

8.6. Employees should be allowed to take personal grievances and other claims against other named parties (either along with or in place of their employer).

9. The practice of issuing a personal grievance in a triangular employment relationship

9.1. Current s102A in the Bill provides that where an employee employed by an employer raises a personal grievance against that employer the employee may*, if the grievance has also been raised with any secondary employer of that employee*, apply to the Authority or court to join that secondary employer to the grievance.

9.2. This provision requires that the personal grievance has been issued against the controlling third party in order to validly seek joinder of the secondary employer.

9.3. The CTU submits that the requirement for a potentially vulnerable and precarious employee in a complex triangular employment relationship to accurately identify the correct employment entity / entities in order to have a valid personal grievance against the correctly listed entities is a barrier to the protections the Bill seeks to provide.

9.4. The 2008 Bill contemplated, at least, that a personal grievance could be issued only to the employer in some limited circumstances such as where the employee had previously applied to the Authority to resolve a personal grievance with the person, and the Authority or the Court had determined that the person is not the employee's employer and the Authority or the Court determines that there is a serious question to be tried as to whether the controlling third party contributed towards the situation that the personal grievance relates to.[8]

9.5. The Employment Relations Authority, with its inquisitorial powers, should be able to assist employees to identify possible respondents and allow a personal grievance to be advanced where the controlling third party may not have been accurately identified at the time of raising the personal grievance.

[8] Employment Relations Amendment Bill (No 3) 2008, per clause 6.

10. Potential limitations with the scope of the Bill

10.1. The CTU has identified a number of matters related to the phenomenon of triangular employment which fall outside the scope of the Bill and need to be addressed by some mechanism. Accordingly, the CTU urges the Select Committee to consider the following areas:

a. The circumstance of individual employment agreements (IEAs) applying to employees permanently engaged by the host employer, and labour hire employees also regulated by IEAs; and,

b. The interaction of superior individual employment agreements (IEAs) applying to labour hire workers and collective agreements applying to permanent workers in the same work environment.

10.2. <u>The circumstance of individual employment agreements (IEAs) applying to employees permanently engaged by the host employer, and labour hire employees also regulated by IEAs</u>

10.3. The Bill only extends coverage of collective agreements, where there is one in place with the host employer, to labour hire employees, where those labour hire employees are union members. This means the Bill does not address the circumstance of labour hire employees being engaged by the agency under individual employment agreements which are inferior to individual employment agreements of permanently engaged employees.

10.4. It is conceivable there could be workers in triangular employment relationships which are not entitled to equivalent terms of conditions of employment by virtue of the fact the host employer does not have a collective agreement.

10.5. The bill could include a transition clause similar to what the European Commission proposes to reform the Posting of Workers Directive which deals with rules and regulations related to recruiting and sending workers to a country other than the country where the business is located. It deals with temporary work agencies (or labour hire companies) as well. The reform suggested includes:

> *'if the duration of posting exceeds 24 months, the labour law conditions of the host Member States will have to be applied, where this is favourable to the posted worker.'*

10.6. This could be adapted to read:

'if the duration of hiring exceeds 24 months, the employee has the right to be directly employed by the host employer, where this is favourable to the employee.'

10.7. It is noted, however, that those workers would still be able to bring a personal grievance against the host employer (subject to exceptions discussed above in this submission).

10.8. It may be the case that the Bill does not address this circumstance because comparisons between IEAs is impracticable or impeded by lack of access, or consent to access IEAs of the permanent workforce, however, it is suggested this should be considered further.

10.9. The CTU suggests further international comparative research could be undertaken to identify methods by which other jurisdictions manage this circumstance, including, for instance, the European Worker Directive.

10.10. <u>The interaction of individual employment agreements (IEAs) applying to labour hire workers in the event that IEAs may contain certain provisions above and beyond those in the collective agreement</u>

10.11. The Bill does not address directly the potential circumstance of an 'agency' worker receiving terms and conditions which may be above and beyond the collective agreement applied to employees engaged directly by the host employer.

10.12. The CTU acknowledges this comparison process may be difficult to evaluate as conditions may be superior in one way (e.g. pay) but worse in others (e.g. leave).

10.13. One method of addressing this lacuna is to include in the Bill a provision, as per s 61 of the current Act, that clarifies an agency worker can have an individual employment agreement over and above the provisions in the collective agreement.

10.14. Or, in the alternative, consideration could be given to a provision allowing a labour hire employee to choose between competing instruments, or a presumption that superior terms and conditions from either instrument apply.

11. Alternative and/or complementary policy options

11.1. Other jurisdictions have adopted different policy options to deal with the issue of triangular employment:[9]

11.2. In the United Kingdom, as from October 2011, after 12 weeks in a given job a labour hire worker has an entitlement to equal treatment (with respect to duration of working time, overtime, breaks, rest periods, night work, holidays, public holidays and pay) that would apply to the worker concerned if they had been recruited directly by that undertaking to occupy the same job.

11.3. In Australia, through a combination of provisions in collective bargaining agreements, awards and/or legislation, individual 'conversion clauses' are variously available to fixed-term employees, labour hire employees and to casual workers after a set period of time (e.g. 12 weeks). Individual right to conversion involves providing workers who have been employed with a particular employer for a significant period of time with the individual right to request conversion to permanent full-time or part-time employment. These clauses are generally subject to the right of employers to refuse such requests where they have reasonable grounds for doing so. Conversion clauses were put into a number of state and federal awards in the early 2000s but are now only found in a few modern awards.

11.4. The CTU acknowledges there is a need to limit and reduce distorted and exploitative use of labour hire. Accordingly the following comments apply to the legitimate use of labour hire, such as to cover short-term shortages:

11.5. The development of an industry code of practice for labour hire, in association with unions and adopted by labour hire operators, peak employer groups and governments.

11.6. A licensing scheme for labour hire operators to ensure that all operators meet basic minimum standards. Developments on this front in the Australian jurisdiction follow an inquiry chaired by Professor Anthony Forsyth, from the RMIT University's Graduate School of Business and Law.

[9] Australian Council of Trade Unions, *The future of work in Australia:dealing with insecurity and risk: An ACTU options paper on measures to promote job and income security*, Melbourne, Victoria Australia (2011).

11.7. Recently in the Victorian jurisdiction in Australia, there has been a labour hire Bill seeking to amend the Public Administration Act 2004 to establish a Labour Hire Licensing Authority and an Office of Labour Hire Licensing Commissioner.[10] Moreover, labour hire licensing schemes in Queensland[11] and South Australia[12] provide continuing impetus for a national scheme in Australia. Those schemes have various characteristics including:

- requiring providers of labour hire services to hold a licence, and hosts will be required to only use licensed providers;
- mandate that providers before obtaining a licence, pass a "fit and proper person" test and demonstrate compliance with workplace laws, labour hire laws, and minimum accommodation standards;
- list licensed providers on a publicly accessible register;
- establish an inspectorate within the labour hire Authority to monitor and investigate compliance; and,
- make "rogue operators" that do not comply or attempt to flout the scheme liable for hefty civil and criminal penalties.

11.8. Importantly the revised Explanatory Note for the Queensland scheme, confirms the scope of the Bill is intended to capture 'the triangular relationship between the worker, provider, and the client that a worker is supplied to which is characteristic of a labour hire arrangement, as well as variations on this model which can be used to disguise labour hire arrangements.'

11.9. Joint employment is a feature of various international jurisdictions (including in the United States and Canada) and occurs where more than one employer shares or co-determines matters relating to essential terms and conditions of employment. Joint employment is a potential solution where employers use the narrower definition of the employment relationship to shed or shield themselves from responsibility for workers (for example in labour hire and contracting out situations). As is the case in New Zealand, in Australian occupational health and safety laws there is precedent for the

[10] Labour Hire Licensing Bill 2017 (Vic).
[11] The *Labour Hire Licensing Bill 2017* (Qld) was passed late on 7 September by the Queensland Parliament, with the legislation set to commence in the first half of 2018 (though a formal commencement date is yet to be proclaimed)
[12] *Labour Hire Licensing Act 2017* (SA)

principles underlying joint employment, where liability may arise despite the absence of an employment relationship. Legislation and policy could recognise that both the labour hire operator and the host have a role in respect of employment responsibilities.

11.10. "Joint-liability regimes" have been adopted by many jurisdictions in Europe.

11.11. A "joint-employment doctrine" has been developed in the United States, to apportion liabilities between the agency and the host.

11.12. Consideration should be given to ratification of ILO Private Employment Agencies Convention 1997 (No 181), requiring member states to ensure that national law and practice provide adequate protections to employees of private employment agencies, including employers providing labour to third parties. In addition to the reforms outlined in the Bill, the CTU recommends that further options should be considered and applied in the New Zealand context; such as the following:

a. The regulation of labour hire agencies to limit the existence and scope to legitimate and defined purposes.

b. The entitlement for a labour hire employee to elect that the host employer be the employer after the elapse of a certain period of time. Associated with this, there needs to be deeming of continuous employment in certain circumstances in order to ensure unfair evasion tactics are not used to circumvent this provision.

c. Taking into account the reforms proposed in the Employment Relations Amendment Bill 2018, the 30 day rule and statutory form should be extended to labour hire employees by the host employer

d. To deal with some of the matter raised under the section 'limitations with the scope of the Bill', extending terms no worse than the host employer collective agreement to agency workers.

e. Addressing aspects of privacy of labour hire employees. Presently, as the CTU understands it, host employers can access a range of information from the labour hire agency in order to choose workers. This information relates to protected attributes of age, sex etc. This information is used by host employers for discriminatory purposes. The Bill must also seek to address this phenomenon.

12. *Conclusion*

12.1. The CTU strongly supports the first steps contained in the Employment Relations (Triangular Employment) Amendment Bill 2018 to address precarious and insecure employment, of which triangular employment is one factor. Accordingly, the CTU strongly supports the policy intent of the Bill but suggests further improvement in the mechanisms in the Bill to ensure the optimal regulatory solution is applied to all the permutations of the phenomenon of triangular employment.

12.2. The CTU considers it is important for the Bill to clearly identify its aims and, as a corollary, clearly identify what the Bill does not do, and *why*. It is important to take note of the further policy solutions that will be required to combat issues which are not addressed by this Bill.

12.3. The CTU urges the Select Committee to consider the broader permutations of triangular employment that may exist now, or in the future, particularly if tactics are deployed to evade any new regulation implemented.

12.4. While expressing support for this Bill, the CTU notes there are other effective and appropriate policy options available to legislators and policy makers which should be used in conjunction with the mechanisms in this Bill.