

Submission to Queensland Parliament Finance and Administration Committee

*Inquiry into the practices of the labour hire
industry in Queensland*

April 2016



AMMA is Australia's national resource industry employer group, a unified voice driving effective workforce outcomes. Having actively served resource employers for more than 97 years, AMMA's membership spans the entire resource industry value chain: exploration, construction, commercial blasting, mining, hydrocarbons, maritime, smelting and refining, transport and energy, as well as suppliers to those industries.

AMMA works to ensure Australia's resource industry is an attractive and competitive place to invest, do business, employ people and contribute to our national wellbeing and living standards.

The resource industry is and will remain a major pillar of the national economy and its success will be critical to what Australia can achieve as a society in the 21st Century and beyond.

The Australian resource industry currently directly generates over 8% of Australia's GDP. In 2014-15, the value of Australian resource exports was \$171.9 billion. This is projected to increase to \$256 billion in 2019-20. It is forecast that Australian resources will comprise the nation's top three exports by 2018-19. Over 50% of the value of all Australian exports are from the resource industry.

Australia is ranked number one in the world for iron ore, uranium, gold, zinc and nickel reserves, second for copper and bauxite reserves, fifth for thermal coal reserves, sixth for shale oil reserves and seventh for shale gas reserves.

AMMA members across the resource industry are responsible for significant levels of employment in Australia. The resources extraction and services industry directly employs 219,800 people. Adding resource-related construction and manufacturing, the industry directly accounts for four per cent of total employment in Australia.

Considering the significant flow-on benefits of the sector, an estimated 10 per cent of our national workforce, or 1.1 million Australians, is employed as a result of the resource industry.

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Table of contents

1. INTRODUCTION	1
2. NON-STANDARD MODES OF WORK.....	11
3. AMMA RECOMMENDATIONS	13

1. INTRODUCTION

1. On 2 December 2015, the Hon SJ Hinchliffe successfully moved a motion for the Queensland Parliament's Finance and Administration Committee to inquire into and report to the Legislative Assembly by 30 June 2016 on the practices of the labour hire industry in Queensland.
2. AMMA welcomes the opportunity to contribute to this inquiry and provide a written submission on key issues that AMMA has identified, having regard to the Terms of Reference (ToR), the Finance and Administration Committee's Issues Paper (18 March 2016), and other materials published by the Committee, such as a Briefing Paper (and various attachments) produced by the Office of Industrial Relations (OIR).
3. A media release issued by the Treasurer and then Minister for Employment and Industrial Relations, the Hon Curtis Pitt MP on 3 December 2015 indicated, *inter alia*, that "*[t]his inquiry is aimed at ensuring employers are complying with Queensland's workplace laws and that workers aren't unfairly exploited*" and "*[e]qually, employers shouldn't have to face unfair competition because they are doing the right thing when others are not*".¹
4. AMMA has participated in the ongoing Victorian inquiry and welcomed the statement contained within the Victorian inquiry's Background Paper which acknowledged that "*[l]abour hire is a legitimate way of engaging workers that is now an established feature of the Australian labour market*" and importantly, that the sector represents "*a major employer and contributor to the Victorian and national economies*".²
5. AMMA endorses and reiterates these sentiments. It would be concerning if the assumption underpinning this Inquiry is that labour hire or independent contracting arrangements are an inherently less desirable form of working and should be curtailed through new regulatory reform measures.
6. AMMA members operate across the entire resource sector (and across multiple states / territories). This includes companies that operate within the broader supply chain, with many AMMA member companies utilising labour hire arrangements in both the construction of a project and during its operation. AMMA also has labour hire and manning agent firms among its members.
7. This has been a longstanding feature of the resource industry and is recognised as a legitimate mode of engaging skilled workers to manage and operate various resource sector projects and operations across Australia, including within Queensland.

¹ Media release, Hon. Curtis Pitt, "Parliamentary inquiry to investigate rogue labour hire operators", 3 December 2015:
<http://statements.qld.gov.au/Statement/2015/12/3/parliamentary-inquiry-to-investigate-rogue-labour-hire-operators>

² Victorian Inquiry into the Labour Hire Industry and Insecure Work, Background Paper (October 2015), p.4.

8. A number of significant resource activities do occur within Queensland, and this inquiry could impact legitimate labour hire arrangements in the industries that AMMA represents.
9. Whilst there will no doubt be individual allegations of concern raised before this inquiry, it is important that the inquiry proceed upon the basis of a robust evidence base prior to formulating any possible policy recommendations which may impact sectors, such as the resource industry, more broadly.
10. AMMA would be concerned if recommendations are formulated that impose additional and unwarranted costs, legal obligations or restrictions across the board in response to isolated complaints raised by individuals within particular companies and confined to particular sub-sectors of the Queensland economy.
11. AMMA notes that at the public briefing held on 24 February 2016, Committee member, Mr Pegg MP, asked a question to the witnesses from the OIR, in the following terms: "*I am interested to know how rapidly labour hire as a form of employment or other insecure work arrangements are growing, both in the state and nationally ...*" Whilst the ToR for the Inquiry do not, unlike the concurrent inquiry in Victoria, specifically refer to the concept of "*insecure work*", AMMA is concerned that this is an amorphous concept which is largely subjective and has been misused by the trade union movement to further its industrial and political campaigns.
12. As the background paper to the Victorian Inquiry correctly acknowledges, "*[i]nsecure work is not a clearly defined concept*". We would go further and say it remains indistinguishable from a union campaign slogan.
13. It is unclear how useful that term is to describe any form of working arrangement. All working arrangements, even ongoing / permanent full-time employment, are not guaranteed to continue for any individual worker. The health and viability of a business in this globalised and competitive economy ultimately impacts the creation and duration of all jobs. Other forms of work are by their very nature of limited duration.
14. However, the most important perspective is how a job suits an individual's preferences and circumstances. As stated by the Productivity Commission (PC) in its final report into the Workplace Relations Framework in direct response to the ACTU's submissions on insecure and precarious work.³

... this perspective on non-standard work is an overly negative one. Indeed employees on fixed-term contracts have been found to be more satisfied with their jobs than other workers ... People in non-standard jobs are highly heterogeneous. Such jobs can suit people's circumstances well and can act as stepping stones for more secure employment.

³ Productivity Commission Final Report, Inquiry into the Workplace Relations Framework, November 2015, p.108.

AMMA Submission: Queensland Parliament Finance and Administration Committee - Inquiry into the Labour Hire Industry in Queensland (April 2016)

15. The PC's earlier draft report re-stated a previous observation by the PC which is apposite:⁴

Whether non-traditional work is satisfactory or unsatisfactory, from a worker's point of view, can only be assessed in relation to individual forms of employment and to particular socio-demographic groups within them.

16. The PC's final report makes a number of relevant observations on the extent and incidence of non-traditional work, which are summarised below:

- a. The prevalence of independent contracting has remained an important source of labour and has been stable over the last decade⁵;
 - b. Security of work appears to have changed relatively little in recent years⁶;
 - c. Increases in rates of casual employment have tapered off during the 2000s, the prevalence of independent contracting has been stable and average job tenures have not declined⁷;
 - d. It is not possible to characterise a 'normal' pattern of work⁸;
 - e. People in non-standard jobs are highly heterogeneous. Such jobs can suit people's circumstances well and may act as stepping stones for more secure employment⁹;
 - f. The increase in employment share of non-standard forms of employment has abated, and to some extent even reversed¹⁰;
 - g. Understanding contemporary trends in casual work should not only take account of gender, but also age and cohort effects¹¹;
 - h. There is little evidence that casualisation or other non-traditional forms of employment have been increasing in importance over the last decade, except among the young. On average, job security has been increasing. The biggest immediate risk is unemployment, particularly long-term and youth unemployment¹².
17. Given the OIR has referred to the ACTU's insecure work inquiry report in its Briefing Paper, and other submissions may also refer to this report, it is important that the Committee understands the context of that inquiry. The ACTU launched a public campaign framed as an inquiry into "insecure work" in October 2011. That was part of a

⁴ Productivity Commission Draft Report, Inquiry into the Workplace Relations Framework, August 2015, p.100.

⁵ Productivity Commission Final Report, Inquiry into the Workplace Relations Framework, November 2015, p.8

⁶ Ibid.

⁷ Ibid, at p.95.

⁸ Ibid, at p.97.

⁹ Ibid, at p.108.

¹⁰ Ibid, at p.109.

¹¹ Ibid, at p.110.

¹² Ibid, at p.137.

broader campaign titled “Secure Jobs. Better Future” designed to deliver the union movement particular regulatory reform outcomes.

18. The ACTU published an “options paper” for the insecure work inquiry, which stated¹³:

There is no universally accepted definition of insecure or precarious work. Through discussions with affiliates and their members about their experiences, the ACTU has developed the following working definition.

...

Insecure work is poor quality work that provides workers with little economic security and little control over their working lives. Indicators of insecure work include:

- (i) *unpredictable, fluctuating pay*
- (ii) *inferior rights and entitlements, including limited or no access to paid leave*
- (iii) *irregular and unpredictable working hours, or working hours that, although regular, are too long or too few and/or non-social or fragmented;*
- (iv) *lack of security and/or uncertainty over the length of the job; and*
- (v) *lack of voice at work on wages, conditions and work organisation.*

Insecure work can be experienced by all workers. However it is often associated with certain forms of employment, including casual work, fixed-term work, seasonal work, contracting and labour hire. It is also increasingly a problem faced by workers employed part-time and workers in non-traditional workplaces, such as home-based outworkers.

19. As part of this co-ordinated and strategic campaign, the ACTU organised a public inquiry, issued its Terms of Reference, and appointed individuals whom it wished to conduct the inquiry. The ACTU and affiliated organisations then provided submissions to that inquiry. The ACTU called the inquiry an “Independent Inquiry into Insecure Work”. The ACTU recommended a licensing system for labour hire companies and the inquiry’s final report, *inter alia*, recommended such a system¹⁴.
20. The ACTU also describes insecure work by attempting to compare some forms of working arrangement to the apparent “dramatic decline” in permanent work¹⁵:

¹³ The future of work in Australia: dealing with insecurity and risk - An ACTU options paper on measures to promote job and income security (2011), p.3.

¹⁴ http://www.actu.org.au/media/349417/lives_on_hold.pdf

¹⁵ <http://www.actu.org.au/our-work/independent-inquiry-into-insecure-work-in-australia>

The last two decades in Australia has seen a dramatic decline in permanent work, and corresponding growth of insecure forms of employment, such as casual, contract work and labour hire.

21. As can be seen, the above description pejoratively classifies casual, contract work and labour hire as "*insecure forms of employment*". Some trade union affiliates such as the AWU that provided a written submission to the ACTU inquiry also included FIFO and other distance workers as being "*insecure*"¹⁶:

Within the industries the AWU represents, there are some particularly vulnerable groups exposed to "insecure work". Insecure workers for the AWU include those engaged as independent contractors and casual, labour-hire or fixed-term employees, as well as fly-in-fly-out (FIFO) and drive-in-drive-out (DIDO) employees.

22. According to the AWU, members of the union are permanent employees and are "*secure*", whereas those who are insecure workers are generally not union members¹⁷:

Many of those employees within our coverage who are subject to insecure work are not members of the AWU, for varying reasons, and often because of the insecurity in their employment itself. It should be noted that the vast majority of the AWU's membership is made up of directly engaged permanent employees, who are relatively "secure" workers.

23. Whilst AMMA does not cavil with the ACTU and its affiliates being able to pursue their policies and political objectives through campaigning, AMMA would be concerned if a significant part of this official inquiry is to inquire into a term (more accurately described as a label or slogan), which is pejoratively used by the ACTU and trade union movement, and which can be used to demonise and restrict legitimate forms of work within and outside the resource sector.
24. The union campaign against non-standard forms of work is also motivated by the difficulty for unions in recruiting members whom are not in traditional forms of employment, and the record low levels of private sector union membership.
25. AMMA is also concerned that the ToR to this inquiry appears to unintentionally conflate unlawful practices (i.e. sham contracting / phoenix activities / underpayment of wages and entitlements) with lawful and legitimate labour hire and independent contracting activities in Queensland. Whilst the inquiry should explore the extent of unlawfulness and exploitation within parts of the Queensland labour market, consistent with the ToR, the Committee should be cautious to draw any inferences from the allegations raised by individuals and organisations when considering introducing additional regulation which would impact legitimate and lawful labour hire or independent contracting arrangements within the Queensland resource industry.

¹⁶ AWU submission, Inquiry into Insecure Work in Australia, p.2.

¹⁷ Ibid.

26. AMMA strongly encourages this inquiry to approach lawful arrangements on the one hand and unlawful conduct / arrangements which may also be used to deliberately exploit vulnerable individuals. It appears that the majority of allegations of exploitation by some individuals and firms which have been referred to by the OIR are already covered by existing legislation and agencies tasked to enforce laws concerning adverse action, sham contracting, company directors' duties, taxation, superannuation, minimum wages and conditions, migration, workplace safety and workers' compensation. Given a number of allegations of exploitation, mistreatment or unlawfulness are already covered by existing laws (depending on the alleged breach), it is difficult to see how further regulation on labour hire companies, or restrictions on non-standard forms of work, will deter people who are already operating outside of existing federal or state laws. AMMA is unaware of any data which would suggest that unlawfulness (with respect to one or more areas of regulation) is more likely to occur if it involves a labour hire company as opposed to an employment relationship within a firm.
27. Insofar as the resource industry is concerned, there are aspects of many operations which are safety-critical and the resource sector operates according to higher standards, regardless of whether a worker is directly engaged by a company or through a labour hire firm, and whether as an employee or independent contractor
28. AMMA is unaware of any data or allegations of unlawfulness within the resource sector which would suggest that new forms of regulation are warranted.
29. The ToR at paragraph (h) specifically considers the "*regulation of labour hire in Australian jurisdictions and internationally and effective enforcement mechanisms, including bonds, licensing, registration and other forms of compliance*".
30. Whilst options for additional regulation for the labour hire industry may be pushed by some proponents or canvassed in concurrent state reviews and inquiries, it is important that the basis for any new form of regulation be supported by facts and evidence, rather than anecdotes emanating in pockets of industry sectors of the economy or within single companies who utilise labour hire or independent contractors. Any proposed new form of regulation should be targeted and proportionate to address the public policy problems which are identified by the Committee. Such regulatory reform options, if they are ultimately recommended by the Committee, should be fully justified by a rigorous regulatory impact analysis of the benefits and costs of new regulation. AMMA notes that the Queensland ALP's 2015 State Policy Platform contains a specific policy to regulate the entire labour hire industry¹⁸:

4.45 Labor will regulate the labour hire industry to eliminate labour hire practices that undermine existing employment rights, conditions and job security, exploit workers, breach federal or state laws, and result in the avoidance of payroll tax and WorkCover premiums.

¹⁸ Queensland Labor State Policy Platform adopted at the 52nd State Conference of the Queensland Branch of the Australian Labor Party, 29 & 30 August 2015, p.25: http://www.queenslandlabor.org/wp-content/uploads/2015PolicyPlatform_ALP QLD a.pdf

31. AMMA is concerned that other policy commitments within the Platform appear to be skewed towards one form of employment, at the expense of all others, which would limit employment and working opportunities for persons who do not seek full-time permanent employment. For example, the Platform indicates¹⁹:
- 4.47 Labor will ensure the industrial relations system operates to reduce the incidence of underemployment and insecure work and will also set an objective test for determining when a worker is casual.*
- 4.48 Labor will ensure that employers give priority to permanent employment over other types of employment.*
32. AMMA notes with some concern that Paper 1 of the OIR's Briefing Paper has given some level of endorsement to a proposal by the Recruitment & Consulting Services Association (RCSA) which is intended to create a new Employment Services Industry Code (ESIC) under the *Competition and Consumer Act 2010* (Cth). Paper 1 to the OIR's Briefing Paper states:²⁰
- "Consequently, the proposed ESIC may on balance be seen as complementary to Queensland's legislation and a desirable addition and extension of regulation in an industry of both social and financial significance."*
33. An officer of the OIR has subsequently indicated at the public briefing that "*we are not endorsing their codes or anything – but they have a code of conduct which may give the committee some guidance*"²¹.
34. The RCSA currently has a code of professional conduct which applies to RCSA members as a result of their voluntary membership of the RCSA. AMMA has been involved in consultations with the RCSA and does not oppose such higher standards imposed on companies who voluntarily choose to be a member of an industry association and be accountable to higher standards (ie. above and beyond current regulatory requirements).
35. However, AMMA does oppose the RCSA's current proposal which seeks to impose industry-wide regulation on all labour hire firms and employment service providers which would also potentially impact resource industry companies who utilise labour hire firms. If enacted as a mandatory Code under the CCA (or replicated in Queensland in some other form), in its current form it would impose considerable new costs and unnecessary restrictions on all labour hire firms and employment service providers, including bona fide companies who are currently abiding by all applicable legislation.
36. There is no justification for such extensive and heavy-handed de-facto regulation and it is doubtful that individuals that are currently operating outside of the law, be it

¹⁹ Ibid.

²⁰ There are no page numbers to Paper 1 of the OIR Briefing Paper, see p.50 of the PDF version uploaded on the Committee website available here: <https://www.parliament.qld.gov.au/documents/committees/FAC/2015/I5-LabourHire/I5-bp-25Feb2016.pdf>

²¹ Proof Transcript of Proceedings, Public Briefing, Brisbane, 24 February 2016, p.5.

deliberately flouting employment or taxation obligations, will be deterred from doing so despite the existence of such a Code of Conduct.

The Queensland economy and the resource industry

37. As with all Australian jurisdictions, Queensland needs to be doing all it can to encourage and support investment and job creation.
38. Business has been very clear that the last thing it needs from state governments is the imposition of additional labour costs that are entirely divorced from improvements in productivity or competitiveness and which would only serve to make it harder to create and retain jobs.
39. AMMA cautions this inquiry to be mindful of the need to support jobs in Queensland and to attract investment opportunities for resource projects.
40. In recent years, Australia's competitiveness has declined as the cost of production for many commodities has risen faster than the global average.
41. Adding to labour on-costs, creating additional red tape or imposing new restrictions on labour hire or other forms of work can make employment and investment in this part of the country even less attractive.
42. Resource industry employers are concerned that this inquiry comes off the back of recent announcements and measures that negatively impact the resource industry.
43. For example, the Queensland Government announced last month that it would be moving to impose significant new restrictions and regulation on FIFO resource operations in Queensland²².
44. Separately, the Queensland Government remains committed to shutting down a successful mineral sands operation on North Stradbroke Island by 2019 and, with it, forcing the company concerned to terminate viable ongoing jobs, many of which are filled by indigenous workers.
45. Whilst the apparent focus of this inquiry appears to be other industries and certain forms of engagement (such as backpackers or overseas workers working within the horticulture sector), unfortunately the resource industry is right to be genuinely concerned that its capacity to engage critically skilled workers through independent contracting or labour hire arrangements may be curtailed through recommendations that emanate from this inquiry.
46. AMMA hopes its concerns are misplaced and a targeted and common sense approach will be applied by the Committee to focusing on particular industries which are clearly

²² Media release, Minister for State Development and Minister for Natural Resources and Mines, The Honourable Anthony Lynham, "Govt to deliver choice for resource communities workers", 17 March 2016.

displaying systemic problems rather than taking a broad approach that will impact all labour hire providers, workers and the companies that rely upon those services.

Missing questions

47. The various question boxes within the Issues Paper pose questions the inquiry would have submitters address.
48. In AMMA's view, specific omissions from the Issues Paper questions include but are not limited to:
 - a. What benefits does labour hiring deliver for the State of Queensland?
 - b. Why do Queensland businesses use labour hire arrangements?
 - c. What are the operational and financial benefits to Queensland businesses of using labour hire?
 - d. What are the labour market experiences of employees working for labour hire companies? Is labour hire an ongoing arrangement, a transition to ongoing work, etc?
 - e. Why do employees choose to work for labour hire companies? Are they satisfied with working under labour hire arrangements?
 - f. What is the best approach to address each particular concern?
 - g. Is regulation the best and most effective approach to addressing concerns regarding labour hire / non-traditional forms of work in Queensland?
 - h. What alternatives are there to imposing additional regulation on doing business in the State of Queensland?
 - i. How should any new regulation be developed and implemented?

2. NON-STANDARD MODES OF WORK

The importance of proper data analysis

49. AMMA cautions the Committee not to conflate a range of non-standard forms of work as if they are all types or forms of insecure work and inherently disadvantageous compared with permanent or ongoing forms of work (ie. full-time / part-time employment).
50. AMMA urges the inquiry to be guided by official and reliable data in terms of quantifying different classes and categories of work.
51. In relation to casual forms of work, the PC has observed recently that the "*increase in employment share of non-standard forms of employment has abated, and to some extent even reversed*"²³.
52. Casual forms of work have remained relatively static over the past two decades, with the PC noting that from 2002 to 2014, the share of part-time workers rose from 28.3 per cent to 30.6 per cent, whereas over the previous 12-year period it had grown by more than 7 percentage points²⁴.
53. This inquiry should ensure it accurately identifies and properly considers long-term trends for non-standard working arrangements and how that compares with permanent forms of work.
54. In relation to any proposals by this inquiry to introduce new regulation, it is important to consider the PC's recent comments in its draft report into the Workplace Relations Framework that the "*best labour market and workplace policies allow for a greater flow from unemployment to employment ... the future evolution of Australia's WR system should avoid creating excessive frictions that frustrates hires (and quits)*".²⁵
55. It is also important that the inquiry consider the impact of any regulatory measures which may unintentionally impinge on the ability for an individual to engage in non-standard modes of work, particularly when a person's only other alternative is unemployment. The PC has cautioned that "*all measures of labour utilisation suggest that the Australian labour market is weakening and the level of youth unemployment is high.*"²⁶
56. This inquiry needs to exercise great care not to make it more difficult for job seekers, particularly young people, to enter and maintain employment, and to ensure that nothing it does would make it more difficult to do business, secure investment and create jobs in Queensland.

²³ PC Draft Report, p. 101.

²⁴ Ibid, at p.107.

²⁵ Ibid, at p.113.

²⁶ Ibid, at p.118.

57. In relation to data on so-called “*sham contracting*”, AMMA refers to the following observation by the Panel that conducted a Post Implementation Review (PIR) of the *Fair Work Act 2009*²⁷:

Given the lack of data available the Panel cannot reach a conclusion about sham contracting in Australia across all industries.

Proposals to introduce new regulation

58. As with all proposals to introduce new regulation, any recommendations from this inquiry must be demonstrated and properly evidenced by cost-benefit analysis and, on balance, any proposed regulatory approach would need to outweigh other non-regulatory measures (such as voluntary compliance codes, best practice guidelines, dedicated industry campaigns and greater enforcement by regulatory agencies of existing laws).
59. It is also important to note that the legislative competence of the Queensland Parliament to regulate arrangements for certain workers (ie. independent contractors) and persons engaged by constitutional corporations is significantly curtailed as a result of a complex arrangement of state referrals of power together with federal coverage of relevant legislation (ie. the *Fair Work Act 2009* and *Independent Contractors Act 2006*).
60. Where the Commonwealth currently regulates particular subject matters, AMMA considers it should continue to do so and there should be no attempt to introduce new measures which may impose uncertain legal obligations on businesses or individuals.

International law

61. AMMA notes that Paper 1 to the OIR’s Briefing Paper refers to ILO conventions. In relation to Australia’s international obligations, and any proposals for Australia to ratify ILO Convention [181](#) (Private Employment Agencies Convention) or ILO Convention [96](#) (Fee-Charging Employment Agencies Convention), only the Executive of the Commonwealth has the capacity to enter into treaties.
62. There exist longstanding protocols as to whether the Australian Government will ratify treaty instruments, such as ILO conventions. This includes consultation with the social partners (unions and employer organisations) and relevant state and territory governments.
63. Ultimately, it is a matter for the Australian Government and not a State government or State Parliament to decide.

²⁷ Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation (June 2012), p.224.

AMMA Submission: Queensland Parliament Finance and Administration Committee - Inquiry into the Labour Hire Industry in Queensland (April 2016)

3. AMMA RECOMMENDATIONS

65. AMMA recommends that:

- a. Any findings and recommendations from this inquiry be supported by a proper evidence base and an acknowledgement that issues concerning individual companies or specific sectors of the Queensland economy are not the basis to justify industry-wide regulation, legal obligations or additional costs on other sectors and employers.
- b. The inquiry consider how to better promote legitimate and lawful arrangements already in place that rely on non-standard forms of labour but which serve the needs of individual workers and businesses.
- c. The inquiry consider the existing regulatory burden on employers, the existing legal protections (at federal and state levels) and justify by cost-benefit analysis why any additional regulatory measures are warranted.