

Introduction

- 1.1 Significant change has occurred in working arrangements in Australia over the last twenty years. Employers seek greater flexibility in strategies to meet changing business demands. Workers seek opportunities to balance their competing work-life demands, or look for different arrangements which may provide greater independence in their employment situation.
- 1.2 Independent contracting and labour hire are two strategies to meet business and workers' requirements as part of less common working arrangements. Estimates of the percentage of labour hire employees of all employed persons are around 3 per cent (2002).¹ Independent contractors or self-employed contractors form around 10 per cent of employed persons.²
- 1.3 Submissions to the inquiry provided a range of views on the benefits and costs of these arrangements. Evidence extolled the advantages of these arrangements to business and some independent contractors. However, other evidence expressed concern that labour hire and contracting arrangements may be detrimental to occupational health and safety, employment conditions and entitlements, and skills development as examples.

1 Unions NSW, *Exhibit No. 33: Laplagne, P, Glover, M and Fry, T, 2005, The Growth of Labour Hire Employment in Australia*, Productivity Commission Staff Working Paper, Melbourne, February 2005, p. xii.

2 Waite, M & Will, L, 2001, *Self-employed contractors in Australia: Incidence and Characteristics*, Productivity Commission Staff Research Paper, AusInfo, Canberra.

- 1.4 Although there are genuine independent contractors and labour hire companies, the former entity is sometimes accused of being a common form of disguised employment in order to avoid employment obligations and taxes, and the latter, being a method of supplying cheap, casual labour.
- 1.5 Both labour hire and independent contracting are investigated in this report with some overlap on issues. One significant difference between the two arrangements is the position of the worker with respect to legislation and regulation. Independent contracting is considered a commercial arrangement whereas, in the main, labour hire involves workplace legislation regulation. However, there is blurring of the division when independent contractors are involved in labour hire.

Background to the inquiry

- 1.6 This inquiry was undertaken following the 2004 re-election of the Coalition Government, and a stated commitment in its election policy to protect and support independent contractors. The Committee was mindful of this background to ensure that views were sought and considered from state and territory governments, business groups, workers and their representatives, labour hire companies and other stakeholders.
- 1.7 The terms of reference for the inquiry were adopted on 9 December 2004 by the Committee. The Minister for Employment and Workplace Relations, the Hon Kevin Andrews MP, requested the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation Committee to inquire into and report on:
- the status and range of independent contracting and labour hire arrangements;
 - ways independent contracting can be pursued consistently across state and federal jurisdictions;
 - the role of labour hire arrangements in the modern Australian economy; and
 - strategies to ensure independent contract arrangements are legitimate.

- 1.8 The Australian Government released a *Discussion Paper: Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements*³ in March 2005 requesting feedback on possible options by early May 2005. Non-government members of the Committee expressed concern on the timing of the release of the paper while the Committee was conducting its inquiry.
- 1.9 In late May 2005 the Government announced its intention to develop a package of reforms that are proposed for introduction in the latter part of 2005. This list of reforms confirms the intention to protect the status of independent contractors.⁴ This timing has placed some urgency on the inquiry process and the tabling of the report.

Aims of the report

- 1.10 The first aim of the report is to provide a brief overview of the status, range and role of independent contracting and labour hire arrangements in the modern Australian economy. Other recent publications provide more detail, particularly on labour hire, and the report has not sought to reiterate at length this background data.
- 1.11 The second aim is to report on issues that arose when considering the implications of these forms of working arrangements. Evidence received during public hearings mainly focussed on this matter, especially on the need for greater clarity and consistency in identifying when the worker is an employee or an independent contractor, and who is the employer, if at all. It was identified early in the process that occupational health and safety, and adherence to current legislation are areas needing attention.
- 1.12 The third aim is to provide guidance on strategies to pursue greater consistency across state and federal jurisdictions. This was a challenging task given the positions stated by state, territory and federal governments and their refusal to meet with the Committee.

3 Australian Government, Department of Employment and Workplace Relations (DEWR), *Submission No. 65, Exhibit No. 25: Discussion Paper: Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements*.

4 DEWR, *Building better workplace relations: fact sheet for employees*: accessed 2 June 2005, <www.workplace.gov.au/NR/rdonlyres/A69B9BF7-AB67-4F20-94D1-95D33AC1A3BD/0/BuildingBetterWorkplaceRelationsEmployers.pdf>.

- 1.13 Ensuring that independent contracting arrangements are legitimate is the final aim of the report. A number of cases were brought to the Committee's attention where written contractual arrangements are claimed to not reflect the substantive relationship of employment. Judicial decisions in more recent years appear to be more consistently examining the substantive arrangement. The legal definition of a 'sham' arrangement has a narrow legal understanding. However there is concern that artificial contracting arrangements continue to disguise an employment relationship.

Reviews of labour hire and independent contracting

- 1.14 Other recent reviews of labour hire provided valuable background to the inquiry. The reader is referred to these reports for a broader examination than is possible here. These include:
- Laplagne, P; Glover, M & Fry, T, 2005 *The Growth of Labour Hire Employment in Australia*, Productivity Commission Staff Research Paper, Melbourne, February; and
 - Parliament of Victoria, Economic Development Committee, *Inquiry into Labour Hire Employment in Victoria: Interim Report (2004) and Final Report (2005)*.
- 1.15 Other reviews and legislation are currently being considered that address labour hire and independent contracting. These include in NSW the 'Secure Employment Test Case'.⁵

Difficulties due to differing definitions

- 1.16 Part of the challenge of this report was differences in definition and coverage. Identifying who is a labour hire worker or an independent contractor has created research problems. Differences in content and collection methods of surveys affect comparability over time.

5 NSW Government, *Submission No. 35*, p. 42.

- 1.17 Surveys of households and labour hire agencies enables economy wide estimates of the rate of labour hire employment; however, some surveys of workplaces excluded smaller employers. One example is the Australian Workplace Industrial Relations Survey (AWIRS) which may underestimate the prevalence of labour hire workers.⁶
- 1.18 Changes in the Australian Bureau of Statistics (ABS) Employment Services Survey (ESS) excluded some categories of workers from 1999. These were workers that would not normally be considered as labour hire workers. However the ESS does include labour hire contractors in their survey.⁷
- 1.19 Identifying and describing who is an independent contractor has its own difficulties. Independent contractors are defined by one set of principles in Australian courts. However, they are known as earners of personal services income by the Australian Tax Office, and as self-employed contractors by researchers.⁸ Weaknesses in both Labour Force Survey data produced by the ABS and the AWIRS have similarly been identified to labour hire data difficulties.⁹
- 1.20 The implications of these problems are that estimates are not strictly comparable between different surveys and that adjustments are required. Due in part to the lack of reliable quantification, this inquiry has focussed primarily on the issues raised by witnesses, rather than on the prevalence and growth of labour hire and independent contracting.

Structure of the report

- 1.21 Chapters Two and Three provide background to independent contracting and labour hire. An overview of the definitions, prevalence and arrangements involved with labour hire and independent contracting is included. Chapter Two examines the debate around independent and dependent contracting, advantages and disadvantages, business perspectives and an overview of relevant legislation.

6 Unions NSW, *Exhibit No. 33*, p. 8.

7 Unions NSW, *Exhibit No. 33*, pp. 7-9, 37-38.

8 Waite, M & Will, L (2001) *Self-employed contractors in Australia: Incidence and Characteristics*, Productivity Commission Staff Research Paper, AusInfo, Canberra, p. 1.

9 Waite, M & Will, L (2001) *Self-employed contractors in Australia: Incidence and Characteristics*, Productivity Commission Staff Research Paper, AusInfo, Canberra, p. 24.

- 1.22 Chapter Three provides an overview of labour hire employment. It discusses the different arrangements, advantages and disadvantages for business and workers, the high proportion of casual employees, overseas work, and state and territory legislation.
- 1.23 Chapter Four begins to outline the issues relating to independent contracting that were raised during the course of the inquiry. These include discussion of common law, statutory definitions, and the personal services income approach in seeking a consistent definition.
- 1.24 Chapter Four also discusses labour hire: occupational health and safety, the effect on other workers, and skills development are investigated. The future of labour hire and the possible requirement for greater regulation are considered.
- 1.25 Chapter Five assesses the commercial nature of independent contracting. It examines the practice of deeming independent contractors to be employees; the applicability of trade practices and unfair contracts legislation; and the incentives for and prevalence of possible disguised employment arrangements.
- 1.26 In Chapter Six the Committee examines public policy implications, consistency across jurisdictions, ensuring legitimacy of arrangements, and the need for pursuit and acceptance of responsibility.