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Making it work:

Inquiry into independent contracting and labour hire arrangements

House of Representatives Standing Committee on Employment, Workplace
Relations and Workforce Participation

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Mr Brendan O'Connor MP, Mr Tony Burke MP, Ms Annette Ellis MP, Ms Jill Hall MP

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Foreword

The growth of independent contracting and labour hire employment (in the last fifteen years) clearly indicates that it has become a preferred employment choice for many Australians. Currently over 10 per cent of the workforce identifies themselves as being independent contractors across a wide variety of industries.

The growth in these work arrangements has been attributed to employers' preferences for an agile workforce that can respond to changing work demands. Additionally, for some workers maximising their independence in determining work options is part of the attractiveness of independent contracting arrangements. For many they perceive that lifestyle and remuneration objectives are more readily achievable than through the rigidity of traditional employment options.

Identifying the future role of less common forms of work than direct employment, such as independent contracting and labour hire, is at the core of different political party perspectives.

It has been a challenging task for the Committee to examine current state and federal workplace relations systems to identify strategies to promote greater consistency across Australia.

This inquiry was conducted at a time of increasing debate on the conditions of Australian workers with possible changes to federal workplace relations legislation affecting the coverage of state legislation.

There has been concern that some employers may design contractual arrangements to craft workers as 'independent contractors' and thus avoid legal obligations that would be owed to employees.

The Committee investigated whether labour hire and contracting arrangements are, in some instances, being used to evade responsibilities – particularly in the areas of occupational health and safety and employee entitlements. The lack of comprehensive training and development strategies to meet current and future skills shortage was also examined.

Recommendations are included in the report to address the need for labour hire agencies and host businesses to fulfil their responsibilities for safe working conditions and to meet Australia’s skills requirements. A voluntary industry code of practice is proposed to improve the operation of the labour hire industry.

The need for greater clarity and consistency in distinguishing between an employee and an independent contractor was overwhelmingly presented to the Committee and subsequently considered. A pragmatic strategy using existing national approaches, including the common law and components of the personal services income taxation tests, is considered to provide the most achievable Australian-wide outcome.

It is important to ensure that the advantages of independent contracting and labour hire are not infringed upon while trying to curb the devising of artificial workplace arrangements that do not reflect the true nature of relationships.


Considering independent contractors within commercial relationships provides the framework for supporting and developing independent contractors’ business structures. Improved access to relevant information on rights and responsibilities is a key to ensuring there is informed choice in selecting working arrangements. Additionally, when a dispute arises regarding a contract for service, accessible, affordable resolution procedures are necessary.

It can be expected that there will be objections to some suggested reforms. A balanced approach has been sought to recognise the needs of labour hire agencies, workers, employers, and independent contractors. The Committee believes that what are essentially commercial business relationships should be preserved, while steps are taken to prevent artificial work relationships that seek to avoid important employer responsibilities.

Submissions and witnesses to the inquiry provided very valuable material and we are grateful for their involvement in the process with evidence being received from every state and territory. Once again the Members of this Committee demonstrated considerable commitment to working together to report in a reasonably short time-line. I thank the Members for their dedication to the inquiry. There has been dissent on party lines on some of the recommendations. However, there is unified support for the majority of the report. I also thank the dedicated professionalism of the Inquiry Secretariat for their counsel, assistance and patience throughout the process.

The strategies outlined here are designed to make labour hire and independent contracting arrangements work for Australians and for Australian businesses. They work to make a competitive Australia offering a range of working arrangements to suit industry, occupation, employer and worker requirements.

Mr Phillip Barresi MP
Chair



Membership of the Committee

Chair Mr Phillip Barresi MP

Deputy Chair Mr Brendan O'Connor MP

Members Mr Mark Baker MP
 Mr Tony Burke MP
 Ms Annette Ellis MP
 Ms Jill Hall MP
 Mr Stuart Henry MP
 Mrs Margaret May MP
 Mr Don Randall MP
 Mr Ross Vasta MP

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Administrative Officer	Mr Daniel Miletic



Terms of reference

Inquiry into independent contracting and labour hire arrangements

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.



List of abbreviations

ABN	Australian Business Number
ABR	Australian Business Register
ABS	Australian Bureau of Statistics
ACCC	Australian Competition and Consumer Commission
ACCI	Australian Chamber of Commerce and Industry
ACTU	Australian Council of Trade Unions
Ai Group	Australian Industry Group
AiIT	Australian Institute of Interpreters and Translators Inc
AIRC	Australian Industrial Relations Commission
AMWU	Australian Manufacturing and Workers Union
ANTA	Australian National Training Authority
APESMA	Association of Professional Engineers, Scientists and Managers Australia
ASCC	Australian Safety and Compensation Council
ASU	Australian Services Union
ATO	Australian Tax Office
AWA	Australian Workplace Agreements
AWIRS	Australian Workplace Industrial Relations Survey

CCF	Civil Contractors Federation
CEITT	International Confederation of Temporary Work Businesses
CEPU	Communications, Electrical and Plumbing Union
CFMEU	Construction, Forestry, Mining and Energy Union
Cole Report	The Final Report of the Royal Commission into the Building and Construction Industry
Dawson Review	Review of the competition provisions of the <i>Trade Practices Act 1974</i>
DEST	Department of Education, Science and Training
DEWR	Department of Employment and Workplace Relations
DOCEP	Department of Consumer and Employment Protection
DSP	Disability Support Pension
EBA	Enterprise bargaining agreement
ESS	Australian Bureau of Statistics Employment Services Survey
FOES	Australian Bureau of Statistics Forms of Employment Survey
GTA	Group Training Australia
GTO	Group Training Organisation
HIA	Housing Industry Association
ICA	Independent Contractors of Australia
ILO	International Labour Organisation
IT	Information Technology
MBA	Master Builders Australia
NFF	National Farmers' Federation
NOHSC	National Occupational Health and Safety Commission
NRCOHSR	National Research Centre for OHS regulation

NSW IR Act	NSW <i>Industrial Relations Act 1996</i>
NSW RTA	NSW Road Transport Association
NUW	National Union of Workers
OEA	Office of the Employment Advocate
OHS	Occupational Health and Safety
Owner Drivers Bill	Owner Drivers and Forestry Contractors Bill 2005 (Vic)
OWS	Office of Workplace Services
PAYG	Pay As You Go
PSI	Alienation of Personal Services Income Act (2000)
QIRC	Queensland Industrial Relations Commission
Qld IR Act	Queensland <i>Industrial Relations Act 1999</i>
RCSA	Recruitment and Consulting Services Association
RTBU	Australian Rail, Tram and Bus Union
RTO	Registered Training Organisation
SBDC	Small Business Development Corporation (WA)
TP Bill 2005	The Trade Practices (Amendment) Bill 2005 (Cth)
TPA	<i>Trade Practices Act 1974</i> (Cth)
TWU	Transport Workers' Union
VACC	Victorian Automobile Chamber of Commerce
WR Act	<i>Workplace Relations Act 1996</i> (Cth)
WRMC	Workplace Relations Ministers' Council



List of recommendations

Inquiry into independent contracting and labour hire arrangements

Chapter 3 Labour hire

Recommendation 1 – Paragraph 3.57

The Committee recommends that the Australian Government Department of Employment and Workplace Relations:

- commission research into the prevalence of independent contracting and labour hire arrangements, ensuring comparability with earlier surveys and available data items; and
- work with the Australian Bureau of Statistics to expand existing survey categories in order to generate ongoing data on independent contracting and labour hire arrangements.

Chapter 4 Issues to address

Recommendation 2 - Paragraph 4.48

The Committee recommends that the Australian Government maintain the common law approach to determine employment status and distinguish between employees and legitimate independent contractors.

Recommendation 3 - Paragraph 4.48

The Committee recommends that the Australian Government, when drafting federal legislation, in addition to the common law position, adopt components of Australian income tax assessment alienation of personal services income legislation tests to identify independent contractors.

Recommendation 4 - Paragraph 4.48

The Committee recommends that the Australian Government, in conjunction with State and Territory governments, pursue through the Workplace Relations Ministers' Council national consistency in identifying independent contractors. The Committee recommends that this is achieved by, in addition to the common law position, adopting components of Australian income tax assessment alienation of personal services income legislation tests in the drafting of relevant state and territory legislation.

Recommendation 5 - Paragraph 4.72

The Committee recommends that the Australian Government Departments of Employment and Workplace Relations, and Education Science and Training, through the National Skills Shortage Strategy, develop a program of skills development and a best practice guide targeted at the labour hire industry. The development of this program and guide should be in consultation with the Recruitment and Consulting Services Association as the peak industry body, labour hire agencies and relevant employee bodies.

Recommendation 6 - Paragraph 4.107

The Committee recommends that the Australian Government, through the Department of Employment and Workplace Relations, the Australian Safety and Compensation Commission and the Workplace Relations Ministers' Council, improve occupational health and safety in the labour hire industry through the following national initiatives:

- improving the collation of data on injury rates for labour hire workers compared to direct employees;
- requiring appropriate occupational health and safety training for workers by labour hire agencies and host businesses; and
- monitoring and enforcing compliance with occupational health and safety regulation.

Recommendation 7 - Paragraph 4.107

The Committee recommends that the Australian Government, through the Department of Employment and Workplace Relations, the Australian Safety and Compensation Commission and the Workplace Relations Ministers' Council, develop initiatives to achieve greater understanding and more clearly delineate responsibilities among labour hire agencies and host businesses in relation to occupational health and safety.

Recommendation 8 - Paragraph 4.109

The Committee recommends that the Australian Government, through the Department of Employment and Workplace Relations, the Australian Safety and Compensation Commission and the Workplace Relations Ministers' Council, improve occupational health and safety for independent contractors through the following national initiatives:

- improving the collation of data on injury rates for independent contractors compared to direct employees;
- requiring appropriate occupational health and safety training for independent contractors; and
- monitoring and enforcing compliance with occupational health and safety regulation.

Recommendation 9 - Paragraph 4.109

The Committee recommends that the Australian Government, through the Department of Employment and Workplace Relations, the Australian Safety and Compensation Commission and the Workplace Relations Ministers' Council:

- examine how incentives for independent contractors may discourage compliance with occupational health and safety requirements; and
- develop initiatives to ensure greater understanding among independent contractors and host businesses of respective responsibilities in relation to occupational health and safety.

Recommendation 10 - Paragraph 4.132

The Committee recommends that the Australian Government Department of Employment and Workplace Relations, through the Australian Safety and Compensation Council review workers' compensation schemes to assess and improve the consistency of employment services categories measuring the injury rates of labour hire workers and independent contractors compared to direct employees.

Recommendation 11- Paragraph 4.156

The Committee recommends that the Australian Government, through the relevant departments and peak industry bodies, establish a voluntary labour hire industry code of practice. The Committee recommends that the voluntary code is established by 2007, and endorsed by the Australian Competition and Consumer Commission.

Chapter 5 Commercial arrangements

Recommendation 12 - Paragraph 5.112

The Committee recommends that the Australian Government broaden the description used in the *Workplace Relations Act 1996* of an independent contractor and extend it beyond 'a natural person'.

Recommendation 13- Paragraph 5.114

The Committee recommends that the Australian Government Office of Small Business collate and further develop a series of resources for independent contractors. Collated resources should provide assistance on:

- setting up a small business;
- financial and reporting requirements;
- dispute resolution options; and
- business management practices.

Recommendation 14 - Paragraph 5.116

The Committee recommends that the Australian Government incorporate the following protections when drafting legislation for independent contractors:

- preserving the legal status of independent contractors as small businesses;
- providing a broad description of independent contractor to cover all forms of small business structures;
- regulating independent contractors as small businesses within a framework of commercial laws and institutions, rather than industrial laws and institutions; and
- providing alternative dispute resolution procedures.

Chapter 6 Future for working arrangements

Recommendation 15 - Paragraph 6.86

The Committee recommends that, if constitutional powers are used to implement a national industrial relations system, then the Australian Government ensure that legislation protects legitimate independent contractor arrangements by providing:

- national regulatory consistency;
- definitional clarity in relation to working arrangements and responsibilities; and
- accessible dispute resolution procedures.

Recommendation 16- Paragraph 6.95

The Committee recommends that the Australian Government extend jurisdiction of the Federal Magistrates Court to hear cases associated with dispute resolution of unfair contracts for service.

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.

Independent contracting

- 2.1 Over the last twenty years there has been growth in the number and proportions of independent contractors in the Australian workforce. Around ten per cent of people in employment worked as self-employed contractors in 1998.¹ This figure is an estimate as there is difficulty in identifying such contractors from other employment types.
- 2.2 Differentiating between independent contractors and employees has required the common law to provide guidance. This chapter provides an overview of the need for the courts to determine employment status using factors rather than a definition. It also includes reference to dependent contractors, the occupations and industries in which the majority of independent contractors work, and the advantages and disadvantages of working under independent contracting arrangements for businesses and workers. Finally the chapter reviews current legislative provisions.
- 2.3 Evidence to the Committee provided substantial detail on many of these matters. The report provides a summation of the volume of evidence received.

¹ Waite, M and Will, L, 2001, *Self-employed contractors in Australia: incidence and characteristics*, Productivity Commission Staff Research Paper, AusInfo, Canberra, p. 56.

Definitions

An overview of employee, independent contractor and employer

- 2.4 The different definitions of 'employee', 'independent contractor' and 'employer', in both Commonwealth and state jurisdictions have been the subject of long-standing concern.²
- 2.5 In Australia, industrial or workplace relations regulation generally identifies employees as those in an employment relationship under a contract of service, where the control of a person's work is exercised by an employer, and therefore is a contract of employment. This is separate from those who are self-employed and work as independent contractors, contracting their services out to a number of clients, being in business for themselves and operating under commercial contracts.³
- 2.6 Where there is a difficulty in differentiating between the two groups, these matters are left to the courts to determine on the basis of various common law tests and criteria.⁴
- 2.7 The *Small Business Deregulation Task Force Report* examined this issue of employee definition in 1996. The Government responded to improving understanding with *Unravelling the Threads – Who is or is not an Employee*, a guide on some of the most common areas of Commonwealth, state and territory legislation which cause confusion to employers.⁵
- 2.8 The guide is available on the internet. It provides some introductory comments and then provides links to each state and territory site with an overview, definitions and legislation on a range of employee requirements including:
- annual holidays;

2 DEWR, *Exhibit No. 25*, p. 11.

3 NSW Government, *Submission No. 35*, p. 11; Prof. A. Stewart, *Submission No. 69*, p. 4, provides further elaboration of the concept of employment. It assumes the existence of a contract of employment (or contract of service) between a person who pays for work to be performed and a person who is to perform that work. As such, it excludes a range of work relationships which either (a) are not contractual in nature at all, as where work is performed voluntarily or for purely domestic purposes; (b) do not involve a contract directly between the parties; or (c) involve a contractual relationship which is characterised as something other than a contract of employment, as where the worker is said to be an 'independent contractor' engaged pursuant to a 'contract for services'.

4 Qld Government, *Submission No. 66*, p. 7.

5 DEWR, *Exhibit No. 25*, pp. 11-12.

- anti-discrimination;
- long service leave;
- occupational health and safety;
- payroll tax;
- workers' compensation;
- fringe benefits tax;
- income tax;
- superannuation; and
- common law.⁶

2.9 The website, which seeks to provide guidance, also demonstrates the range of legislative requirements that employers must meet. Other descriptions of definitions for the Commonwealth include the *Workplace Relations Act 1996 (Cth)* (WR Act). Subsection 4(1) of the WR Act uses the common law meanings, that is:

- 'employee' includes any person whose usual occupation is that of employee, but does not include someone undertaking a vocational placement;
- 'employer' is a person who is usually an employer, but is expanded to include an unincorporated club; and
- 'independent contractor' takes its common law meaning in subsection 4(1A) of the Act but is limited to natural persons except in regard to the freedom of association provisions in Part XA of the WR Act.⁷

2.10 The terminology for an individual contractor can vary, depending on the industry involved. Independent contractor, sub-contractor or self-employed contractor are often interchanged terms used to describe business arrangements. Other definitions suggest that a contract for services is a commercial contract where control of the work is exercised through the terms of the contract and both parties have an

6 Australian Government, Department of Industry, Tourism and Resources, *Unravelling the Threads. Who is or is not an employee*. For NSW this leads to a document with 89 pages; accessed 25 May 2005, <www.isr.gov.au/content/itrinternet/cmscontent.cfm?ObjectID=5DB70DAB-0B1D-4737-8F2E2E224EAC7A42>.

7 DEWR, *Exhibit No. 25*, p. 11; IR Australia, *Submission No. 31*, p. 1.

equal right to control the terms through the offer and acceptance process.⁸

Differentiating between employees and independent contractors

- 2.11 The common law definitions have been criticised because their application has required developing a multi-factor test to assess whether a worker is an employee or a contractor. The NSW Government submission provides a more detailed overview of the background to identify the existence of a contractual relationship, and then distinguish between contracts of service and contracts for services, and the application in the courts.⁹
- 2.12 In summary, the approach adopted by the courts in applying the common law principles as to employment status relies on a test which involves the consideration of a number of established factors or indicia. It was determined by the High Court in cases such as *Stevens v Brodribb Sawmilling Co Pty Ltd (1986)*. Some of these indicia are characteristic of a contract of service and others suggest a non-employment relationship. The task of the court or tribunal is to assess the status of a worker considering the parties' relationship in respect of each of these indicia and to determine, on balance, if an employment relationship exists.¹⁰
- 2.13 The NSW Government submission citing Professor Andrew Stewart states that there is no unanimously accepted understanding of how many indicia, or what combination, must point towards a contract of service before the worker can be characterised as an employee. Essentially, this 'multi-factor' test proceeds on the assumption that the courts will know an employment contract when they see it.¹¹
- 2.14 As to the relative importance of each indicia, the extent of the hirer's right to control not just what work is done, but the way it is done, is very important. The greater the hirer's capacity for control, the more likely it is that the worker is an employee. Additionally, having the power to delegate or sub-contract is another very important

8 Small Business Development Corporation (SBDC), *Submission No. 58*, p. 3; Waite, M and Will, L, 2001, *Self Employed Contractors in Australia*, Productivity Commission Staff Research Paper, p. 1.

9 NSW Government, *Submission No. 35*, pp. 13-17.

10 Stewart, A, 2002, *Redefining Employment? Meeting the Challenge of Contract and Agency Labour*, 15, *Australian Journal of Labour Law*, p. 243.

11 NSW Government, *Submission No. 35*, pp. 15-16.

determinative factor.¹² Other relevant indicia are summarised in Table 2.1. Additional information on differentiating between employers and independent contractors and the implication for legislation requirements is included in Appendix E.

Table 2.1 Indicia for multi-factor test to determine if an employment relationship exists.

Indicia	Explanation
1 The degree of control the worker has over the work	For example, is the worker subject to direction on how the work will be done, not just what the job is?
2 The degree to which the worker is integrated into, and is treated as part of the hirer's enterprise	For example, if the worker wears the hirer's uniform and represents the hirer's enterprise to the public, this supports the worker being an employee
3 Whether the worker is making a significant capital contribution (such as by using his or her own motor vehicle and carrying the maintenance and running costs) to the enterprise	If the worker is doing this, it supports finding an independent contractor arrangement exists. If all the worker brings, on the other hand, are the ordinary tools of his or her trade, this is not likely to be a significant factor
4 How the hirer pays the worker – for example, by results or on an hourly basis.	If the worker is paid by the results achieved, it supports finding an independent contractor arrangement exists;
5 Whether the worker has an obligation to work	If the hirer has the right to dictate hours of work and the worker cannot refuse tasks, this supports the worker being an employee
6 The provision of leave, superannuation and other entitlements	These usually apply to employment and not to an independent contractor
7 The place of work	If the worker works at his or her own premises, this supports the worker being an independent contractor
8 Whether the worker has the right to delegate the work to others	If the worker can employ other people to do the work (that is, 'subcontract the work out'), this supports the worker being an independent contractor;
9 Whether income tax is deducted by the hirer	This supports the worker being an employee
10 Whether the worker provides similar services to the general public	For example, if a worker advertises his or her services to the public or tenders for work, this supports an independent contracting arrangement
11 Whether there is any scope for the worker to bargain for the rate of remuneration	If there is no scope, this supports a finding that the worker is an employee
12 Whether the worker is providing skilled labour or labour that requires special qualification	If so, this supports an independent contracting arrangement
13 Whether the issue of deterrence of future harm arises	For example, where the hirer is in a position to reduce accidents by efficient organisation and supervision, this may support the worker being an employee, particularly in cases concerning vicarious liability.

Source *Compiled from Australian Government, Department of Employment and Workplace Relations, Exhibit No. 25, Appendix 2, p. 36.*

12 Stewart, A, 2002, Redefining Employment? Meeting the Challenge of Contract and Agency Labour, 15, *Australian Journal of Labour Law*, p. 243.

- 2.15 The application of this approach has not led to uniform outcomes. It has been suggested that the lack of a clear, objective distinction between employee and contractor status results in significant compliance costs for businesses engaging a diverse workforce.¹³
- 2.16 However, this is not a universal view. Some in the business sector submit that differentiating between employment and genuine independent contracting arrangements should be determined only by courts using the well established common law principles.¹⁴
- 2.17 It is also argued that it is not a fault with the principles which leads to what some consider to be subjective outcomes; rather it is the complex factual situations to which they apply.¹⁵
- 2.18 Further discussion of definitions continues in Chapter 4, and concerns with contracting arrangements in Chapter 5.

Dependent contractors

- 2.19 The difficulty in identifying the working relationship has given rise to new terminology, which in turn adds to the complexity. This is illustrated in the notion of 'dependent contractors'. The term attempts to describe those workers that are not considered to be genuinely independent of the principal business for whom the work is being performed. They are described as sharing most of the characteristics of an employee, and having economic dependency on one organisation.¹⁶ It is estimated that around 25 per cent of independent contractors are in a dependent employment relationship.¹⁷
- 2.20 However, some submissions to the inquiry strongly reject the notion of dependency, and state that workers are either employees and therefore should be regulated under workplace legislation, or are independent contractors and should be regulated under commercial legislation.¹⁸

13 DEWR, *Exhibit No. 25*, p. 12.

14 SBDC, *Submission No. 58*, p. 3.

15 DEWR, *Exhibit No. 25*, p. 12.

16 NSW Government, *Submission No. 35*, p. 11; Australian Rail, Tram and Bus Union, (RTBU) *Submission No. 45*, p. 3.

17 Australian Council of Trade Unions (ACTU), *Submission No. 60*, p. 11.

18 Australian Chamber of Commerce and Industry (ACCI), *Submission No. 25*, pp. 23-25; Independent Contractors Association (ICA), *Submission No. 20*, pp. 6-8.

- 2.21 In the Australian Government discussion paper *Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements* it states that:
- ... the common law appropriately maintains the distinction between employment and independent contracting arrangements. Unlike many statutory definitions, it does not 'deem' classes of workers to be one or the other, but looks to the individual circumstances involved. It does not recognise the 'half-way house' notion of 'dependent contractors' which can serve to blur the distinction between commercial relationships and employment relationships.¹⁹
- 2.22 This is contrary to the position of a number of state government submissions which include the deeming of individuals to be employees in certain occupations. State legislation to support this approach has been introduced in some jurisdictions because of the perceived dependency involved, and the lack of bargaining power of one party to enable fair and effective contracting arrangements.²⁰
- 2.23 On one front, the Australian Government has sought to clarify independent contractor arrangements in relation to taxation with the introduction of the *Alienation of Personal Services Income Act 2000* (PSI). This was to ensure that taxation of those that are essentially in an employment relationship continues under the Pay As You Go (PAYG) system, rather than as a business and at a lesser rate with more access to deductions in the PAYG instalment system.²¹
- 2.24 The issues of the common law, deeming and consistency with the personal services income assessment and the effectiveness of these measures are considered in more detail in Chapter 4. This is fundamental to the consideration of strategies that can be pursued consistently and legitimately across state and federal jurisdictions.

Other legislation

- 2.25 The identification of an employment relationship is necessary as there are responsibilities relating to: industrial relations; occupational health and safety (OHS); workers compensation; liability; minimum labour standards; collective bargaining rights; employment

19 DEWR, *Exhibit No. 25*, p. 12.

20 NSW Government, *Submission No. 35*, pp. 35-36; Qld Government, *Submission No. 66*, p. 34; Vic. Government, *Submission No. 71*, p. 7, in relation to outworkers.

21 Qld Government, *Submission No. 66*, p. 36.

termination; taxation; and superannuation.²² Where an employment relationship is not identified then, these responsibilities, in the main, do not fall on the host business but on the independent contractor to make their own arrangements. OHS legislation generally imposes obligations in relation to employees and contractors alike, although the details of the duties may differ.

- 2.26 However, for some legislation the definition of employment is broad and includes work under a contract for services, including independent contracting arrangements. This includes, for example, the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1992* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Aged Discrimination Act 2004* (Cth). This reflects a policy approach which seeks to provide protection from discrimination in all areas of work no matter the form of the relationship.²³
- 2.27 This section on definitions has sought to identify the key features of the difference between employees and independent contractors, and the importance of the common law approach in differentiating between them. Further discussion of this continues in Chapter 4 where strategies to respond to these issues are discussed.
- 2.28 The difficulties, in identifying who's who, also spill over into determining the prevalence of independent contractors, which is discussed in the next section.

Prevalence of independent contractors

- 2.29 As mentioned briefly in Chapter 1, difficulties in definition and identification present problems for estimating the prevalence of independent contractors (or self-employed contractors) in Australia. However, researchers agree that in the last twenty years there has been growth in the overall numbers and proportions of independent contractors in Australia.²⁴
- 2.30 According to estimates by the Productivity Commission, around 10.1 per cent of people in employment in Australia worked as self-

22 IR Australia, *Submission No. 31*, p. 1; DEWR, *Exhibit No. 25*, p. 12.

23 DEWR, *Exhibit No. 25*, p. 12.

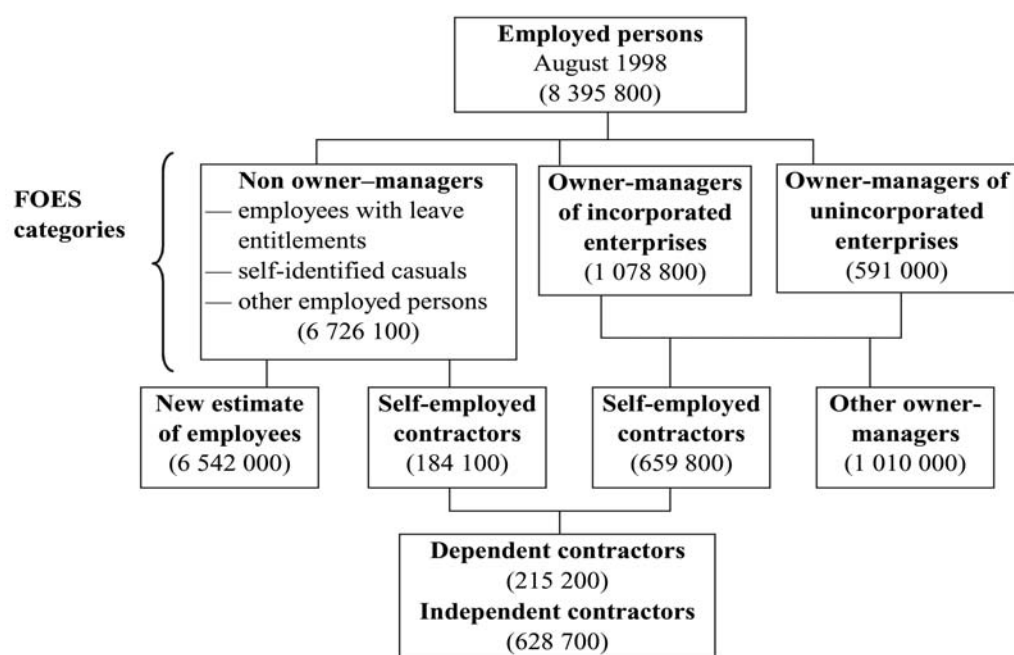
24 Qld Government, *Submission No. 66*, p. 10. Refer to Waite, M and Will, L, 2001, *Self-employed contractors in Australia: incidence and characteristics*, Productivity Commission Staff Research Paper, AusInfo, Canberra, for a full discussion of estimation difficulties.

employed contractors.²⁵ Other researchers cite a growth of around 15 per cent from 1978 to 1998.²⁶

2.31 The ABS Forms of Employment Survey (FOES) provides the most recent data on self-employed contractors. However, previous research has required estimates developed from unpublished data from this survey. Owner-managers are considered to make up the majority of self-employed contractors (up to 80 per cent).²⁷ Notwithstanding this, self-employed contractors are potentially located in most of the FOES categories.

2.32 Figure 2.1 indicates the overlap in the data types, and provides an estimate of prevalence of working arrangements. This is the most in-depth analysis currently available.

Figure 2.1 Distribution of employment by type, August 1998(a)



Source: Waite, M and Will, L, 2001, *Self-employed contractors in Australia: incidence and characteristics*, Productivity Commission Staff Research Paper, AusInfo, Canberra, Figure 4.1, p. 37. (a) Persons who work as contributing family members and only for payment in kind are excluded. Data source: ABS, *Forms of Employment Survey*, Cat. No. 6359.0.

25 Waite, M and Will, L, 2001, *Self-employed contractors in Australia: incidence and characteristics*, Productivity Commission Staff Research Paper, AusInfo, Canberra, p. 56.

26 DEWR, *Exhibit No. 25*, p. 7, citing research by VandenHeuvel, A and Wooden M, 1995, *Self employed contractors in Australia: how many and who are they?* *Journal of Industrial Relations*, vol 37, no. 2.

27 Qld Government, *Submission No. 66*, p. 10.

2.33 The most recent FOES published in May 2005 provides a comparison of employment types from 1998 to 2004 (Table 2.2). Prior to this, time-series data on self-employed contracting does not exist.

Table 2.2 Employed persons aged 16-69 years (a) (b), Employment type – August 1998 to November 2004 (excerpt).

<i>Employment type</i>	August 1998		November 2004	
	<i>'000</i>	<i>%</i>	<i>'000</i>	<i>%</i>
Employees with paid leave entitlements(c)				
Works on a fixed term contract	198.3	2.4	201.5	2.1
Does not work on a fixed term contract	4 881.1	58.4	5 537.6	57.8
Employees without paid leave entitlements (c)(d)				
Works on a fixed term contract	67.8	0.8	82.1	0.9
Does not work on a fixed term contract	1 613.9	19.3	1 895.4	19.8
Owner managers of incorporated enterprises				
Works on a contract basis	205.1	2.5	132.9	1.4
Does not work on a contract basis	314.1	3.8	544.2	5.7
Has employees	336.3	4.0	432.1	4.5
Does not have employees	182.9	2.2	244.9	2.6
Owner managers of unincorporated enterprises				
Works on contract basis	369.4	4.4	314.1	3.3
Does not work on a contract basis	701.3	8.4	875.6	9.1
Has employees	293.9	3.5	288.3	3.0
Does not have employees	776.9	9.3	901.4	9.4
Total	8 351.0	100.0	9 583.0	100.0

Source Adapted from ABS, *Forms of Employment, Cat. No. 6359.0, November 2004, Table 1.* (a) Excludes persons who were contributing family workers in their main job; (b) Scope of 2001 survey was restricted to persons aged 15-69 years; (c) Excludes owner managers of incorporated enterprises. (d) Includes persons who did not know whether they were entitled to paid holiday leave and paid sick leave in their main job.

- 2.34 Given that more detailed analysis has not been completed since the 2004 information was released in May 2005, these most recent figures allow for some comparison using owner-managers as a proxy.²⁸ The figures show that for both types of owner-managers there has been a decrease in the proportion that works on a contract basis from 1998 to 2004. That is, a decrease from 6.9 per cent to 4.7 per cent of all employed persons for owner-managers of incorporated and unincorporated enterprises.²⁹ Those working on a non-contract basis have increased. Without further breakdown of the data, meaningful analysis and interpretation is not possible.
- 2.35 As an example of one state's figures provided to the inquiry, Queensland reports that self-employed contractors represent 6.7 per cent of their total employment (June 2004). They also cite a decrease in proportions compared to overall employment since 1998 figures, but an overall increase in numbers.³⁰
- 2.36 Given that some of the data deficiency also occurs in relation to labour hire, the Committee has addressed this issue with a recommendation relating to both labour hire and independent contractors in the following chapter on labour hire. (See Recommendation 1 in Chapter 3.)

Occupation

- 2.37 Independent contractors are found in every occupation type. Referring to the most comprehensive analysis by the Productivity Commission, tradespersons and related workers are by far the largest group of self-employed contractors. Tradespersons and related workers account for only 11.9 per cent of all employees. Twenty seven per cent of all self-employed contractors work in the trades.³¹

28 Other surveys use own-account workers as a proxy, Australian Manufacturing Workers Union (AMWU), *Submission No. 46*, p. 13.

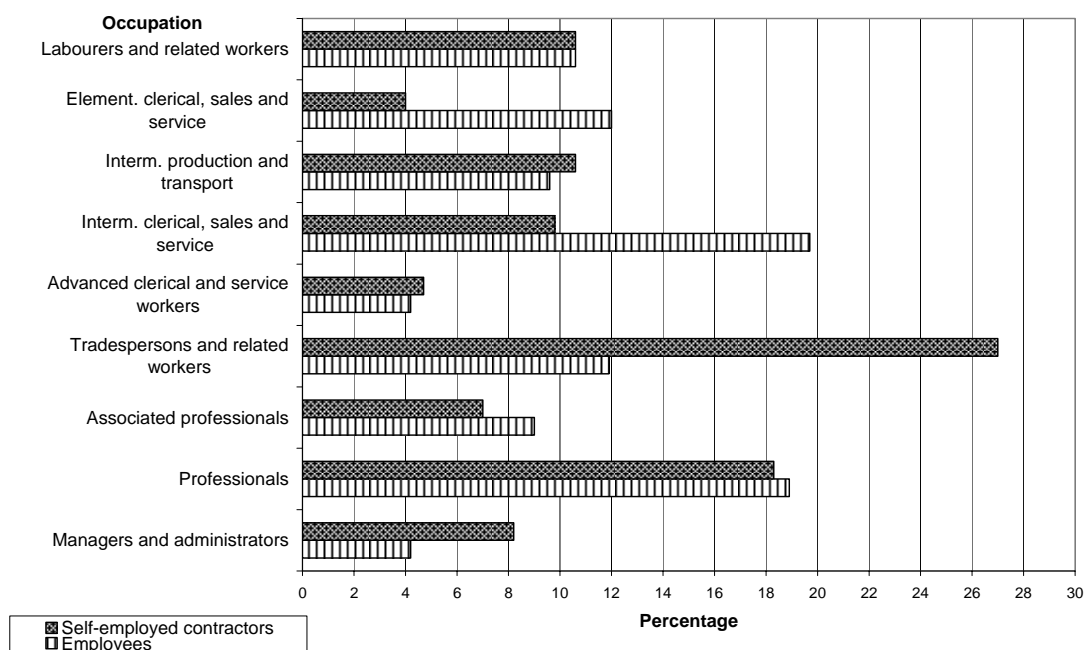
29 ABS, *Forms of Employment*, Cat. No. 6359.0, November 2004: Glossary: *Owner managers*: persons who work in their own business, with or without employees, whether or not the business is of limited liability. *Incorporated enterprise* is an enterprise which is registered as a separate legal entity to its members or owners. Also known as a limited liability company. *Unincorporated enterprise* is a business entity in which the owner and the business are legally inseparable, so that the owner is liable for any business debts that are incurred; p. 41.

30 Qld Government, *Submission No. 66*, p. 11.

31 Waite, M and Will, L, 2001, *Self-employed contractors in Australia: incidence and characteristics*, Productivity Commission Staff Research Paper, AusInfo, Canberra, p. 45.

- 2.38 Professionals were the second largest group of all self-employed contractors at 18.3 per cent, with a similar proportion of employees. The Association of Professional Engineers, Scientists and Managers Australia (APESMA) has reported significant growth of a special interest group for independent contractors and consultants, with a 120 per cent increase from 2001 to 2005.³²
- 2.39 Together, the occupations of intermediate production and transport, and labourers and related workers make up 10.6 per cent each of the total amount of self-employed contractors in the Australian workforce. The proportion of employee labourers and related workers to all employees is also 10.6 per cent. The proportion of intermediate production and transport workers who work as employees is 9.6 per cent.³³

Figure 2.2 Percentage distribution of employees and self-employed contractors by occupation, August 1998 (a).



Source Adapted from Waite, M and Will, L, 2001, *Self-employed contractors in Australia: incidence and characteristics*, Productivity Commission Staff Research Paper, AusInfo, Canberra, Table 5, p. 47. Estimates derived from unpublished data from ABS Cat. No. 6359.0. (a) The category 'employee' includes employees and self-identified casuals.

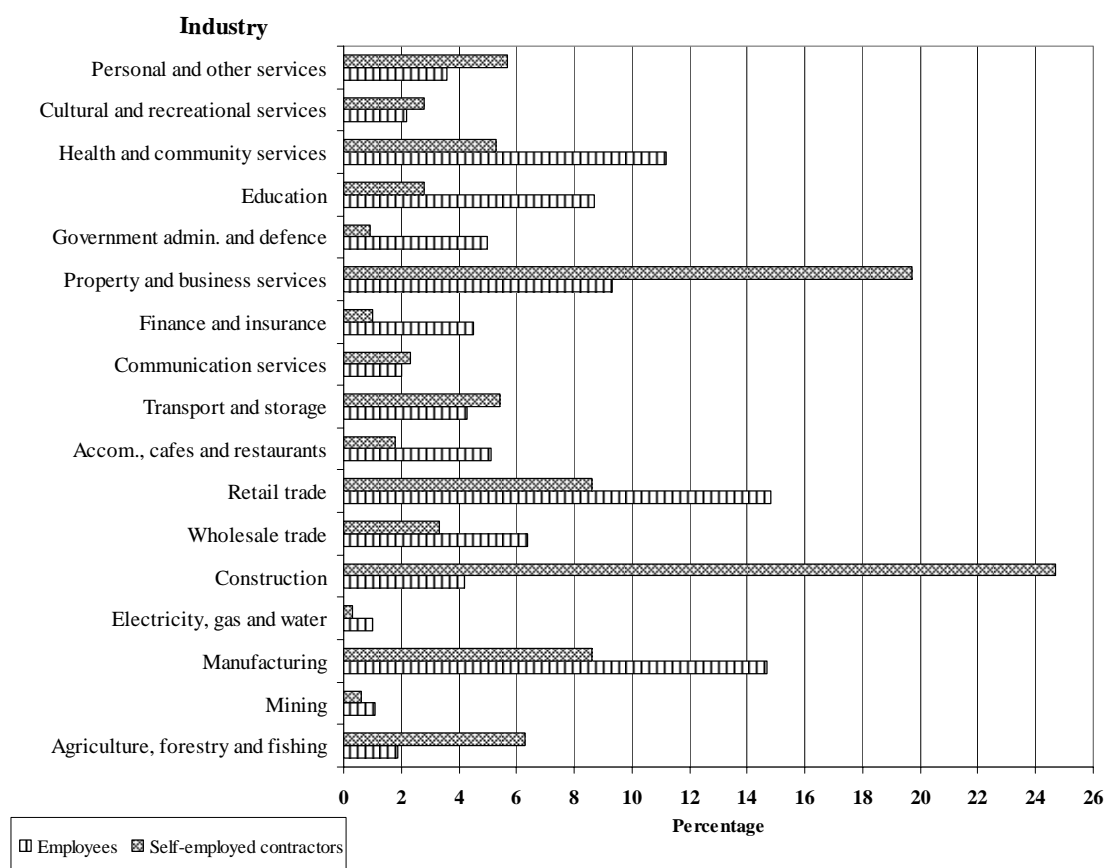
32 APESMA, *Submission No. 7*, p. 6.

33 DEWR, *Exhibit No. 25*, p. 8.

2.40 For detail on state and territory comparisons, and distribution of self-employed contractors across occupations and industries refer to the publication *Self-employed Contractors in Australia: incidence and characteristics*.³⁴

2.41 This publication includes the category of dependent contractors and states that they share many characteristics with employees. However, Professor Stewart states that not all dependent contractors are likely to be disguised employees, since it is possible for some genuine businesses to work for a single client at a time, and for lengthy periods.³⁵

Figure 2.3 Percentage distribution of employees and self-employed contractors by industry, August 1998(a).



Source Adapted from Waite, M and Will, L, 2001, *Self-employed contractors in Australia: incidence and characteristics*, Productivity Commission Staff Research Paper, AusInfo, Canberra, Table 5, p. 47. Estimates derived from unpublished data from ABS Cat. No. 6359.0. (a) The category 'employee' includes employees and self-identified casuals.

34 Waite, M and Will, L, 2001, *Self-employed contractors in Australia: incidence and characteristics*, Productivity Commission Staff Research Paper, AusInfo, Canberra.

35 Prof. A. Stewart, *Submission No. 69*, footnote 3, p. 3.

Industry

- 2.42 Independent contracting is apparent across all sectors of industry, but tends to be concentrated within a number of industries.
- 2.43 Around one-third of self-employed contractors work in construction (34.6 per cent), followed next by a significant proportion in property and business services (18.4 per cent). Transport and storage (9.0 per cent) and manufacturing (8.3 per cent) had high concentrations of self-employed contractors in 2001.³⁶
- 2.44 In construction, especially in housing as opposed to commercial construction, it was stated that sub-contracting is prevalent. Explanations of this high rate of contracting suggest that the construction industry is sensitive to the economic cycle which means that the demand for labour fluctuates with the peaks and troughs of the cycle.³⁷ The Construction Forestry Mining and Energy Union (CFMEU) from their research support the finding of a significant proportion of independent contractors in the construction industry.³⁸
- 2.45 Property and business services includes computer services such as help desk services, hardware installation and system design and maintenance. These services are often contracted out to skilled workers in Australia.³⁹
- 2.46 The most common type of independent contractors in the transport services industry is owner-drivers. Owner-drivers supply their own vehicle to deliver goods for a client. In 1998, 5.4 per cent of all self-employed contractors worked in the transport and storage industry.⁴⁰
- 2.47 Victoria has recently completed an extensive review of owner-drivers and forestry contractors. Around 10 per cent of all employed persons in the Victorian transport and storage industry were identified as contractors. The key factor that distinguishes owner-drivers from employees is that they provide a vehicle or vehicles for hire, along with services of driving the vehicle.

36 Qld Government, *Submission No. 66*, p. 12. The figures cited from 1998 in Waite, M and Will, L, 2001, *Self-employed contractors in Australia: incidence and characteristics*, Table 5.7, p. 47 differ but the proportions are similar.

37 DEWR, *Exhibit No. 25*, p. 7.

38 CFMEU, *Submission No. 5*, Appendix 2: Speech of Mr J. Sutton National Secretary CFMEU Construction and General Division, p. 3.

39 DEWR, *Exhibit No. 25*, p. 8.

40 DEWR, *Exhibit No. 25*, p. 8 citing Waite, M and Will, L, 2001, *Self-employed contractors in Australia: incidence and characteristics*, p. 47.

- 2.48 However, the review found and submissions to this inquiry state that, owner-drivers have working conditions similar to employees, and are often referred to as dependent contractors (as opposed to the traditional notion of independent contractors who work for many clients), or as 'disguised employees'.⁴¹ This issue will be raised further in the next section under arrangements and in Chapter 4.
- 2.49 In 1998, the manufacturing industry accounted for 8.6 per cent of self-employed contractors. There are different types of contract workers in manufacturing. These range from business-to-business relationships (where the contractor supplies finished parts or components for the production process), to the self-employed contractors who are paid according to their output and produce part, if not most, of the finished goods. Additionally, contractors also include those whose input is not directly related to the finished product (for example, cleaners and maintenance).⁴²
- 2.50 The National Farmers' Federation (NFF) states that there is insufficient data to provide a breakdown of independent contractors and labour hire workers in agriculture, other than 14.5 per cent of workers describe themselves as self-employed contractors in that industry.⁴³

Working arrangements – advantages and disadvantages

- 2.51 Although there is debate about the legitimacy of distinguishing between independent contractors and dependent contractors (and use of the term), evidence has been provided to the Committee that suggests that not all contracting arrangements are fully meeting the tests of independency.
- 2.52 As reviewed earlier in this chapter in Table 2.1 showing the indicia for establishing an employment relationship, how the independent contractor works and is managed will vary.

41 Vic. Government, *Submission No. 71*, pp. 8-9; TWU-Vic./Tas. Branch, *Submission No. 56*, pp. 4-7.

42 DEWR, *Exhibit No. 25*, p. 8.

43 NFF, *Submission No. 39*, p. 6.

- 2.53 Some workers seek to be classified as an independent contractor, prompted by at least two conditions, which are not necessarily mutually exclusive:
- free choice and seeking more independent working arrangements and the opportunities to grow a small business; and
 - if already employed, the option for a worker to increase weekly take home pay, but be required to take on additional costs and responsibilities.
- 2.54 Some industry sectors are dominated by independent contractor arrangements and workers seeking to enter these sectors are obliged to enter into these types of arrangements.
- 2.55 Evidence from a range of contracting organisations indicated that independent contracting is being embraced by workers who see advantages in working under less regulated structures with opportunities to improve their standard of living. This may include more freedom to choose working hours, decide when to take holidays, who they work for, what type of work they undertake and what rates they wish to charge.⁴⁴
- 2.56 Other individuals, responding to a survey of professionals, engineers and managers, also cited the following reasons for choosing independent contracting:
- better lifestyle;
 - better balance between work and family; and
 - better money.⁴⁵
- 2.57 The majority indicated that they were satisfied operating under contractor arrangements. However, while many workers indicated that they chose independent contracting for a better balance between work and family, many reported that family disruption had occurred, so their expectations had not been met. Other disadvantages included:
- lack of income security, and difficulty in securing loans;
 - difficulty in locating clients; and
 - few holidays and long hours.⁴⁶

44 AICA, *Submission No. 64*, pp. 7, 20; Tasmanian Contracting Services, *Submission No. 62*, p. 1; ICA, *Submission No. 20*, p. 5; Mr J. O'Sullivan, DEWR, *Transcript of Evidence*, 12 May 2005, p. 30.

45 APESMA, *Submission No. 7*, p. 10.

- 2.58 The advantages for independent contractors appear to be more apparent for those at higher skilled work levels which would apply to professionals, engineers and managers.⁴⁷ Other submissions suggest that those that are less able to have control over working procedures, are unable to subcontract, and who are reliant mainly on one client have poorer economic and social outcomes.⁴⁸
- 2.59 If a distinction of independent and dependent contractor is appropriate, in a comparison of contractors, the Productivity Commission (2001) found that workers in lower skilled occupations often with less control over their working arrangements are more likely to fit into a dependent contractor category:
- 72 per cent of independent contractors were in skilled occupations; and
 - 72 per cent of dependant contractors were in the lower skilled occupations such as plant machine operators and drivers.⁴⁹
- 2.60 However, this use of the classification of higher skilled and lower skilled is not supported in some cases. Independent Contractors Australia questioned its use,⁵⁰ and the Australian Services Union (ASU) provided an example of an IT worker who they considered was in an employee type arrangement while classified as an independent contractor.⁵¹
- 2.61 In summary, the reasons for the growth of independent contracting (and labour hire) are attributed to employer driven and employee (or worker) factors. These include:
- employer driven factors:
 - ⇒ responding to fluctuations in demand – a trend to engage ‘just-in-time’ labour to avoid continuing costs;
 - ⇒ needing specialist skills;
 - ⇒ reducing overall administration and labour costs through an all-inclusive fee (plus the provisions of specialised services);

46 APESMA, *Submission No. 7*, pp. 10-11.

47 This is perhaps reflected in the APESMA survey mentioned earlier.

48 Vic. Government, *Submission No. 71*, p. 11.

49 Qld Government, *Submission No. 66*, p. 4.

50 Mr K. Phillips, ICA, *Transcript of Evidence*, 26 April 2005, p. 63.

51 Mr P. Slape, ASU, *Transcript of Evidence*, 27 April 2005, p. 65.

- ⇒ engaging labour under contracts for service as opposed to employment to reduce exposure to industrial relations regulation;
- ⇒ removing the influence of unionised workers; and
- ⇒ reducing staffing numbers for reporting purposes.⁵²
- employee or worker driven factors:
 - ⇒ own choice to work on a self-employed basis;
 - ⇒ flexibility;
 - ⇒ working culture reluctance to be an employee;
 - ⇒ incentives in certain skill areas, such as recently in information technology;
 - ⇒ a trend for higher income earners to become contractors for income tax purposes; and
 - ⇒ predominant industry working arrangement trends.⁵³

Advantage for business outweighing the advantage for individuals?

- 2.62 Some argue that the growth in independent contracting mainly rests on the advantages to the business. As stated, the benefits include the reported capacity to pay lower rates overall and lower conditions, contracts can be terminated more quickly and there is less regulation without the need for employee protection or benefits.⁵⁴
- 2.63 The Australian Rail, Tram and Bus Union (RTBU) state that this advantage is offset by the disadvantages to the independent contractor taking on additional costs and the risks outweigh the benefits.⁵⁵
- 2.64 One labour hire agency notes that it is not only the client sector that specifies a preference for independent contracting arrangements. Individuals request these arrangements, mainly for the flexibility and tax advantages they offer. It was suggested that with the current skill shortages facing businesses, many professionals will only provide their services as an independent contractor. Ross Human Directions

52 Qld Government, *Submission No. 66*, pp. 15-16; Ms V. Nock, *Manpower, Transcript of Evidence*, 31 March 2005, p. 29; Mr D. Cameron, *AMWU, Transcript of Evidence*, 31 March 2005, p. 70.

53 Vic. Government, *Submission No. 71*, p. 10; Qld Government, *Submission No. 66*, pp. 16-17; TWU-Australia, *Submission No. 24*, p. 5.

54 Mr A. Thomas, *RTBU, Transcript of Evidence*, 30 March 2005, p. 65.

55 Mr A. Thomas, *RTBU, Transcript of Evidence*, 30 March 2005, p. 65.

state that the claims that employees are being coerced into signing “contracts for service” in order to get work are not applicable to clients of responsible members in the recruitment industry.⁵⁶

- 2.65 The Committee has received a range of evidence on this matter not just within the labour hire industry, with examples that workers are either:
- being encouraged to become independent contractors and are inappropriately categorised; or are
 - not negotiating reasonable rates to ensure that they are financially able to meet their obligations.
- 2.66 These include workers in a broad range of industries and occupations. For example in the sex industry, manufacturing, aged care, transport and owner-drivers, security, cleaning, clerical and interpreters and translators,⁵⁷ among others.
- 2.67 If this is the case then avenues of redress should be and have been considered. It was stated that independent contractors are meant to be regulated under commercial law. The next section provides a summary of the legislation that is applicable.
- 2.68 Due to concerns about worker welfare, state governments have introduced unfair contracts provisions and deeming legislation to ensure that such workers have protections under the industrial relations legislation. They consider that many of these workers are dependent contractors or disguised employees.

Trade practices and contracts legislation

- 2.69 Business groups and those specifically representing independent contractors indicate that contractors are individuals who organise their work through a commercial contract, rather than through an

56 Ross Human Directions, *Submission No. 54*, p. 6.

57 Australian Sex Workers Association, *Submission No. 74*, p. 1; NT AIDS and Hepatitis Council, *Submission No. 63*, p. 1; Australian Institute of Interpreters and Translators, *Submission No. 37*, pp. 11-12; Department of Employment and Consumer Protection WA, *Submission No. 33*, pp. 1-3; Liquor Hospitality and Miscellaneous Workers Union, *Submission No. 12*, pp. 1-2; TWU-NSW, *Submission No. 40*, pp. 6-7; The Salvation Army Moneycare Service ACT, *Submission No. 68*, p. 1; NUW, *Submission No. 47*, p. 13.

employment contract.⁵⁸ Independent Contractors of Australia (ICA) argue they are 'businesses in their own right'.⁵⁹

2.70 Independent contractors are subject to the obligations and protections which are regulated under commercial law such as the *Trade Practices Act 1974* (Cth), (TPA). The Housing Industry Association (HIA) summarises that:

- contracts are negotiated individually and their contents will reflect competitive forces and relative bargaining power;
- unlike employee entitlements under Awards, contracts can not be changed or varied by central authority across whole classes of contractors;
- individual harsh and unconscionable contracts can be re-made by courts and Industrial Commissions, but only in exceptional circumstances; and
- the *Trade Practices Act 1974* regulates the abuse of market power and prohibits a range of unfair practices including collusive bargaining, price-fixing and resale price maintenance ...⁶⁰

2.71 As noted in point three above, the TPA contains provisions proscribing unconscionable conduct in business to business transactions. These transactions are mirrored in state corresponding legislation such as the *Fair Trading Act 1999* (Vic).⁶¹

2.72 Other state legislation includes:

- NSW - s106 *Industrial Relations Act 1996* -- provides that a tribunal may declare a contract void if, in the view of the tribunal, the performance of the work constituted an unfair contract where:
 - ⇒ it is unfair, harsh or unconscionable;
 - ⇒ unfair tactics or pressure were exerted on the parties to get agreement;
 - ⇒ it is against the public interest;
 - ⇒ the total remuneration is less than that received by an employee performing the work;

58 ACTU, *Submission No. 60*, p.11.

59 ICA, *Submission No. 20*, p. 5.

60 HIA, *Submission No. 61*. pp. 7-8.

61 Vic. Government, *Submission No. 71*, pp. 39-40.

⇒ it avoids, or is designed to avoid, the provision of an award or agreement.⁶²

- South Australia – *Industrial and Employee Relations Act 1994* and *Industrial Law Reform (Fair Work) Act 2005*. Attempts to include unfair contract provisions, and contractor deeming provisions were not supported in the final bill.⁶³
- Victoria – referred its workplace relations powers to the Commonwealth, thereby covered by federal legislation which includes unfair contracts; *Workplace Relations Amendment (Improved Protection for Victorian Workers) Act 2003* provides some protection for clothing industry and contract workers.
- Tasmania – *Industrial Relations Act 1984* incorporates outworkers in its definition of employee. It currently contains no deeming or unfair contracts provisions. However, the Tasmanian Government released a discussion paper last year which would add these kinds of provisions.
- Western Australia – *Industrial Relations Act 1979* (expansion of common law definition)
- ACT and Northern Territory – covered by the WR Act
- Queensland – s275 and s276 *Industrial Relations Act 1999*. Section 275 of the Qld IR Act allows the Commission to declare a class of contractors to be employees; section 276 gives the Queensland Industrial Relations Commission power to investigate contractual remedies.⁶⁴

2.73 As an example, the Queensland Government provides a Fact Sheet on Unfair Contracts based on Section 276 of the Queensland *Industrial Relations Act 1999*. It states that the purpose of the section is to provide a review process: for contractors (a contract *for* service) that is an unfair contract; or a contract *of* services (with respect to an employee) that is not covered by an award or agreement which is an unfair contract.⁶⁵

62 DEWR, *Exhibit No. 25*, pp. 15 -17.

63 Government of South Australia, Hon Michael Wright MP, *Fair Work Laws Start*, News Release, 16 May 2005; *Workplace Express*, 10 March 2005, 'Finally SA's new IR bill gets through Parliament'.

64 DEWR, *Exhibit No. 25*, pp. 17-19.

65 Qld Government, Department of Industrial Relations, *Wageline: Unfair Contracts: Fact Sheet*, p. 1, accessed 31 May 2005, <www.wageline.qld.gov.au/pdfs/publications/fctsht_unfaircontracts_v1mar05.pdf>.

Workplace Relations Act 1996

- 2.74 The Queensland unfair contracts provisions in the legislation are similar to the Commonwealth WR Act 1996. However the Australian Government in 1996 and 1999 sought to remove these provisions.⁶⁶ The removal of these provisions would be consistent with the Government's policy that independent contracting arrangements should be regulated by commercial law, not workplace relations law.
- 2.75 The Victorian Government supports at the minimum the retention of the existing Commonwealth workplace relations unfair contracts jurisdiction in ss127A-C of the WR Act 1996 and the existing criteria in s127A(4).⁶⁷
- 2.76 These include the allowance of a court to attach a financial consequence to certain kinds of relationships that indicate poor bargaining power, lack of information, undue pressure or vulnerability, but do not meet the legal test of employment. The Court may examine all of the relevant factors, which are listed in section 127A(4) as:
- the relevant strength of the bargaining positions of the parties to the contract and, if applicable, any persons acting on their behalf;
 - whether any undue influence or pressure was exerted on, or any unfair tactics were used against, a party to the contract;
 - whether the contract provides total remuneration that is, or is likely to be, less than that of an employee performing similar work; and
 - any other matter that the Court thinks relevant.⁶⁸
- 2.77 An opposing view to the restriction of independent contractors' regulation to commercial law was also provided to the Committee. The Australian Nursing Federation supports changes to industrial relations law that ensures that independent contractors are covered by awards and collective agreements; have the right to participate in their unions; and are generally subject to the relevant industrial tribunal. 'Industrial relations systems do, and should continue to accommodate non-standard forms of employment'.⁶⁹

66 DEWR, *Exhibit No. 25*, p. 20.

67 Vic. Government, *Submission No. 71*, p. 41.

68 Vic. Government, *Submission No. 71*, p. 37.

69 ANF, *Submission No. 19*, p. 7.

2.78 Concerns about restricted access to provisions in Section 127 of the WR Act were also in submissions to the Committee.⁷⁰ Strategies to address these issues are discussed in more detail in Chapter 4. One strategy includes proposals by the Australian Government to amend the *Trade Practices Act*. The *Trade Practices (Amendment) Bill 2005* (TP Bill 2005) contains provisions that make it easier for small businesses to collectively deal with a single larger principal contractor.

In summary

- 2.79 The growth in independent contractors to approximately 10 per cent of the workforce has enabled more individuals to develop their business skills and realise self-employment aspirations.
- 2.80 Independent contractors are in most industry sectors, but particularly in the construction industry, some sectors of the transport industry and in trade and professional occupations. Both identification and quantification are hampered by varying approaches, inadequate data collection and analysis. This probably represents the range of different arrangements that independent contractors work in, but more analysis is required.
- 2.81 The advantages and disadvantages of independent contracting were reviewed from the business and worker perspective. The appropriateness of the category of dependent contractors was briefly discussed, and the view presented by a range of organisations and governments that such workers are disadvantaged.
- 2.82 How independent contractors and their commercial contracts are regulated indicates the differing perspectives of state and Commonwealth government. Legislative responses were reviewed and issues highlighted that are investigated further in Chapter 4.

70 ASU, *Submission No. 53*, pp. 5-6.

Labour hire

- 3.1 The labour hire industry has existed in Australia since at least the 1950s. Initially, labour hire agencies specialised in supplying clerical and administrative staff to workplaces to fill temporary gaps caused by staff absences or short-term peaks of activity. The labour hire industry has since evolved to operate in other parts of the economy, with communications, mining, manufacturing, finance and insurance, property and business services all reporting a high incidence of labour hire usage.
- 3.2 In recent years, there has been substantial growth in the labour hire industry. Labour hire has emerged as a substantial element of the Australian labour market and the economy with about 3 per cent of people working in labour hire arrangements.¹

Terminology

- 3.3 Labour hire is identified in a number of ways. The firm providing the workers can be referred to as a 'labour hire agency', 'labour hire firm', 'on-hired service provider' or 'employment agency'. The generally accepted term is 'labour hire agency'.² Labour hire agencies
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1 Ai Group, *Submission No. 49*, p. 5; CFMEU, *Submission No. 5*, Appendix 11: NSW Labour Hire Task Force Report, p. 15; Unions NSW, *Exhibit No. 33*, p. XII.

2 Due to this broader function, the Recruitment and Consulting Services Association (RCSA) states that on-hire should be the preferred description, RCSA, *Submission No. 67*, p. 3.

frequently also perform other types of work such as employment consulting in areas such as occupational health and safety or outsourced project work where a client outsources an entire function, such as payroll.

- 3.4 The firm to which the worker is on-hired is called the 'host business', 'host employer' or 'client'. Workers in labour hire arrangements may be employees of the labour hire agency or independent contractors.³ For clarity and consistency, host business will be used for the firm where the worker is placed.

Working arrangements

- 3.5 Labour hire is the practice of utilising the worker of a labour hire agency to work for a host business, generally for short periods of time. The labour hire agency can engage labour hire workers as casuals or on a fixed contract. It is less common for labour hire agencies to engage workers as permanent employees, and some argued that this arrangement does not support the foundations of a labour hire relationship.⁴
- 3.6 Labour hire is described generally as a triangular relationship that is formed when the services of a worker are on-hired by a labour hire agency to a host business.⁵
- 3.7 Labour hire workers may be employed directly by the labour hire agency, or as independent or dependent contractors.⁶
- 3.8 The essential quality of a labour hire arrangement is the splitting of contractual and control relationships. The 'standard' arrangement is:
- the worker at the site is under the direction or control of the host or client organisation in relation to the performance of work;
 - the labour hire agency has responsibility for the wages and other on-costs of the worker and has a direct contractual relationship with them; and
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3 DEWR, *Exhibit No. 25*, p. 24.

4 Job Watch, *Submission No. 23*, p. 5.

5 Qld Government, *Submission No. 66*, p. 13; DEWR, *Exhibit No. 25*, p. 24; CFMEU, *Submission No. 5*, Appendix 11: NSW Labour Hire Task Force Report, pp. 18-19; AMWU, *Submission No. 46*, p. 9.

6 CFMEU, *Submission No. 5*, Appendix 13: ACTU Submission to NSW Labour Hire Task Force, p. 2.

- the client or host pays the labour hire agency for providing the labour and thus has a contractual relationship with the labour hire agency.⁷
- 3.9 Workers can be provided to a host business on a casual, part-time, full-time or on-going basis as either temporary or relief workers, to supplement staff during periods of peak or seasonal demand, as specialist staff or on a more permanent basis following the outsourcing of part of a business.⁸
- 3.10 Evidence to the Committee identified a number of labour hire arrangements: the employee services model; contractor services model, otherwise known as the 'Odco' style; and Group Training Organisations. A study carried out by RMIT University (sponsored by RCSA), entitled '*On-hired Workers in Australia: Motivations and Outcomes*', identified five distinct categories of services supplied by labour hire agencies. These include labour hire employee services; labour hire contractor services; recruitment services; employment consulting services; and managed project /contract services.⁹

Labour hire employee services

- 3.11 Labour hire of employee services involves the employment of labour hire workers by a labour hire agency to a host business to meet specifically the organisation's production or service requirements. This arrangement is the most common method of labour hire.
- 3.12 The labour hire agency pays the worker and withholds income tax deductions. The worker may be employed casually (the majority), permanently, for a fixed term or contract on a full-time or part-time basis, or as a trainee or apprentice.
- 3.13 The employee services model is well established at common law. The labour hire agency will be found to be the employer of the worker rather than the host even though the general day-to-day control over the worker's performance rests with the host. This is because in a genuine labour hire arrangement, there is no contract between the host and the labour hire worker and therefore there cannot be an employment relationship between them.¹⁰

7 Job Watch, *Submission No. 23*, p. 5; Ai Group, *Submission No. 49*, pp. 7-8.

8 CFMEU, *Submission No. 5*, Appendix 13: ACTU Submission to NSW Labour Hire Task Force, p. 2.

9 Ai Group, *Submission No. 49*, pp. 8-9.

10 DEWR, *Exhibit No. 25*, pp. 24-25.

Labour hire contractor services

- 3.14 Labour hire of contractor services involves the labour hire agency hiring contractors (that is workers with their own Australian Business Numbers (ABNs), as determined by taxation legislation) to host businesses to meet the client's production or service requirements.
- 3.15 The contractor services model is based on 'Odco' arrangements, which are independent contracting arrangements in the labour hire industry. 'Odco' arrangements create an independent contracting arrangement where the workers are neither employees of the labour hire agency nor the host business. These kinds of arrangements were upheld in a full Federal Court decision, *Building Workers Industrial Union of Australia v Odco Pty Ltd*. On other occasions, courts have found that contractual arrangements did not confirm to 'Odco' arrangements, and have held on the facts that the workers in question were 'employees', notwithstanding having been described in contractual documents as 'contractors'.¹¹
- 3.16 'Odco' arrangements operate in a range of industries. Independent contractors working under this system include farm hands, doctors, secretaries, personal assistants, family day-care workers, fishermen, salespeople, cleaners, security guards and building workers.¹²

Recruitment services

- 3.17 Recruitment services also fall within the role of some labour hire agencies. Recruitment services source and place workers on behalf of a client business. Workers are employed directly by the host business under this arrangement. An example of a recruitment service is the Job Network Service.¹³

Employment consulting services

- 3.18 Employment consulting services provide advice to assist a client business with employment issues. They provide consultants to specifically advise in areas such as human resources, organisational development, employee relations, outsourcing services, OHS, training and testing. These consultants may be either workers of the

11 *Building Workers Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104 cited in DEWR, *Exhibit No. 25*, pp. 25-26.

12 DEWR, *Exhibit No. 25*, p. 25; Ai Group, *Submission No. 49*, pp. 8-9.

13 Ai Group, *Submission No. 49*, pp. 8-9.

employment consulting service or independent contractors, provided by the employment consulting service to the host business.¹⁴

Managed project /contract services

3.19 Labour hire agencies can provide specific services to a client for a project or contract basis where the client has outsourced specific operational functions. The labour hire provider directly engages employees, contractors and other service providers to ensure satisfactory completion of the contract. For example, contract maintenance, engineering, security, catering, project IT, construction and outsourced call centres can be provided under managed project/contract services labour hire.¹⁵

Group Training Organisations

3.20 Group Training Organisation's (GTOs) are not-for-profit entities and are established predominately to provide training and employment opportunities. GTOs employ apprentices and trainees and are responsible for ensuring that those employees receive suitable training and experience.¹⁶

3.21 From a general policy perspective, GTOs are often viewed as labour hire agencies. However, they are subject to additional legislative requirements and employment, in this instance, is the means for the delivery of training to the apprentice or trainee:

When you look at the way in which group training companies operate, they are, to all intents and purposes, on the same operating basis as a labour hire firm. Of course, the types of placements that they generate are slightly different but, nevertheless, when you look at the structure it is no different.¹⁷

3.22 However, other evidence to the Committee suggested that GTOs cannot be viewed as entirely labour hire agencies. While there are some initial similarities, Group Training Australia (GTA) states that it

14 Ai Group, *Submission No. 49*, pp. 8-9.

15 Ai Group, *Submission No. 49*, pp. 8-9.

16 Mr J. Barron, GTA, *Transcript of Evidence*, 12 May 2005, p. 16; GTA, *Submission No. 36*, pp 3-4.

17 Ms D. Ralston, Qld Council of Unions, *Transcript of Evidence*, 12 May 2005, p. 13; see also Mr J. Hart, Restaurant and Catering Industry of Australia, *Transcript of Evidence*, 31 March 2005, p. 5;

is fundamentally different from labour hire.¹⁸ GTOs are different in that they employ apprentices and trainees under an indenture and post the apprentice or trainee out to a host business. The apprentice or trainee obtains on the job training under the conditions of their indenture. The GTO also ensures that the apprentice or trainee receives the off the job training, through a Registered Training Organisation (RTO).¹⁹

Advantages and disadvantages

3.23 The Recruitment and Consulting Services Association (RCSA) stated in their submission that there are many benefits in a labour hire arrangement for clients and workers. The benefits for the client company are that labour hire arrangements allow them:

... to have a flexible workforce to meet peaks in demand that enables companies to maintain a core workforce with the capacity to top up to immediately meet work schedules that reduces costs.²⁰

3.24 This outsourcing of labour enables businesses to cover peak periods, staff illness or leave, or to manage specific work such as programmed maintenance. This is an important feature for manufacturers where production is cyclical and clearly focused on a just-in-time production approach.²¹ The use of labour hire can reduce ongoing staff numbers, which may bring benefits for the company reporting requirements in some instances.²²

3.25 Benefits that RCSA has identified for employees (as listed in Box 3.1) are that labour hire can provide a wider variety and diversity of work and offers increased flexibility.²³

18 Mr J. Barron, *GTA, Transcript of Evidence*, 12 May 2005, p. 16; CFMEU, *Submission No. 5*, Appendix 11: NSW Labour Hire Task Force Report, p. 51; Mr J. Priday, *GTA, Transcript of Evidence*, 12 May 2005, p. 17.

19 *GTA, Submission No. 36*, p. 8.

20 SKILLED Group, *Submission No. 52*, p. 5; RCSA, *Submission No. 67*, pp. 15-18.

21 SKILLED Group, *Submission No. 52*, p. 5.

22 Ms V. Nock, *Manpower, Transcript of Evidence*, 31st March 2005, p. 29.

23 DEWR, *Exhibit No. 25*, pp. 28-29.

Box 3.1 Labour Hire Benefits

To Clients	To Employees
<ul style="list-style-type: none"> • Flexibility • Specialist skills • Access to skills – current skills shortage • Cover peaks in business • Outsource non-core areas • Staff illness/leave • Reduced costs • Manage key areas of expertise such as OHS • Access to large supply of suitable labour to meet peaks and troughs in production • Assess individuals before offering permanent employment 	<ul style="list-style-type: none"> • Variety and diversity of work • Flexibility of working hours and balance of work and family life • Flexibility in choosing jobs • Multi-skilling through broad experience • On-the-job training • Superior wages and working conditions • Rehabilitation and return to work policies • Not having to take work home or do unpaid overtime; • Matching of skills with employment demands

Source Adapted from SKILLED Group, Submission No. 52, p. 6, based on SKILLED's Auspoll survey 2003-2004 and DEWR, Exhibit No. 25, pp. 28 – 29.

3.26 Workers can also benefit from labour hire arrangements. Labour hire can offer workers (including the unskilled, re-entrants to the labour market, and mature aged workers) the opportunity to gain a broad range of skills, experience and exposure to different working environments. For those who wish to work on a casual basis due to family or study commitments, it can provide the opportunity to maintain contact with the workplace. Similarly, it can help young people gain entry to the labour market, and provides a method for ageing workers to phase their withdrawal from the workforce.²⁴

3.27 Evidence to the Committee from a range of sources suggests that people seeking full-time employment may view labour hire as a means of gaining skills and experience, which can lead to permanent full-time employment. The RCSA estimates that 55 per cent of labour hire workers look to temporary labour hire arrangements as a bridge to full-time employment.²⁵

24 DEWR, Exhibit No. 25, p. 29; MBA, Submission No. 22, p. 12.

25 CFMEU, Submission No. 5, Appendix 11: NSW Labour Hire Task Force Report, p. 16; RCSA, Submission No. 67, p. 31; MBA, Submission No. 22, p. 12; Ai Group, Submission No. 49, pp. 17-18.

Disadvantages

- 3.28 The Victorian Parliament interim report on *Labour Hire Employment in Victoria* acknowledged a number of concerns about the labour hire industry. The report identified that labour hire workers may find it unclear about the lines of responsibility in the labour hire arrangement and to whom they report.²⁶
- 3.29 The Australian Council of Trade Unions (ACTU) commented that:
- Non-standard work arrangements are increasingly being used to undermine the employment relationship and the protections attached to it. The growth of these forms of work has also contributed to the lack of skills development and has serious implications for the management of occupational health and safety.²⁷
- 3.30 Independent contractors working within a labour hire arrangement also raised concerns. Under this type of arrangement, the relationship between the agency is not one of direct employment and the worker does not have protections or entitlements that are attached to employment, such as awards.²⁸
- 3.31 Evidence suggested that labour hire arrangements could in effect create a two-tier workplace, where labour hire workers may not receive the same rights and conditions as direct employees. Some evidence suggested that at times labour hire workers receive inferior rights and conditions.²⁹ The Victorian Parliament Interim Report suggested this concern may create a divisive culture within the workplace and could also predicate an erosion of the conditions for direct employees.³⁰
- 3.32 The Transport Workers' Union (TWU) identified a number of disadvantages for labour hire workers. Labour hire workers often do not know whether they have work the following day. Job insecurity

26 Parliament of Victoria, Economic Development Committee, *Labour Hire Employment in Victoria, Interim Report*, December 2004, p. 17.

27 ACTU, *Submission No. 60*, p. 1.

28 Parliament of Victoria, Economic Development Committee, *Labour Hire Employment in Victoria, Interim Report*, December 2004, pp. 19-20.

29 ACTU, *Submission No. 60*, p. 2; AMWU, *Submission No. 46*, pp. 24, 36.

30 Parliament of Victoria, Economic Development Committee, *Labour Hire Employment in Victoria, Interim Report*, December 2004, p. 22.

has a major economic, social, and health and safety impact for labour hire workers.³¹

- 3.33 For the individual labour hire worker, obtaining loans and meeting financial commitments can be extremely difficult in situations where there is a lack of job security. Labour hire workers often do not receive penalty payments for overtime. Moreover, they often do not receive annual leave, sick leave, long service leave and other entitlements associated with permanent employment, in part because they may not stay in a workplace long enough to accrue the entitlement.³²
- 3.34 The Skilled Engineering survey of employees, cited by the CFMEU, found that the least advantageous aspects of labour hire work were employee morale, security of income, wages and conditions and access to training.³³
- 3.35 The use of labour hire workers could contribute to a lack of investment in training. This may in turn impact upon a wider skills shortage that is a current major concern both at state and federal government levels.³⁴ The reduced access and level of training may contribute to injuries in the workplace.³⁵ (More detail is provided in Chapter 4.)

Overview of labour hire employment

Composition of the labour hire industry

- 3.36 Within the labour hire industry, there is some differentiation in the size and focus of companies. In the top layer, seven to eight large companies have the dominant share of the market. Some of these large organisations are Australian (eg. SKILLED Group) while others are large global organisations (eg. Adecco and Manpower).
- 3.37 The second layer of organisations comprises medium sized organisations, which are a combination of Australian owned and international companies.

31 TWU-Vic./Tas., *Submission No. 56*, pp. 24-25, 27.

32 TWU-Vic./Tas., *Submission No. 56*, pp. 24-25, 27.

33 CFMEU, *Submission No. 5*, Appendix 11: NSW Labour Hire Task Force Report, p. 33.

34 Vic. Government, *Submission 71*, p. 19.

35 TWU-Vic./Tas., *Submission No. 56*, pp. 25, 27.

- 3.38 The third layer of labour hire agencies are either niche businesses, which cater for specific industries (eg. information technology), or small labour hire agencies that cover a wide range of industries.
- 3.39 The fourth layer consists of companies that focus on a particular industry sector.³⁶

Casual and permanent workers

- 3.40 Labour hire workers made up around 3 per cent of the total workforce in 2002.³⁷ In the general workforce, around 27 per cent of employees are reported to be casual employees. However, in the labour hire sector, the majority of labour hire workers are employed on a casual basis (about 75 per cent). This is approximately 2.25 per cent of the total workforce.³⁸
- 3.41 Compared to other casual employees, labour hire workers tend to be employed in higher skilled occupations, be better educated and younger, and are more likely to be aged between 24 to 44 years.³⁹
- 3.42 The Australian Manufacturing and Workers Union (AMWU), citing the 1998 Australian National Training Authority (ANTA) survey of labour hire workers, identified that 81 per cent of all labour hire contracts have a concluding time span of less than three weeks.⁴⁰

Table 3.1 Proportion of labour hire workers by contract length - 1998

Contract length	Total workers	Percentage
Less than one day	548	8
1-6 days	1569	24
1-3 weeks	3183	49
1-3 months	635	10
4 months or more	595	9
Total	6530	100

Source *AMWU, Submission No. 46, p 10, citing Campbell, I, Watson, I & Buchanan, J, 2004, "Temporary agency work in Australia Part I", in International Perspectives on Temporary Agency Work (eds. Burgess, J. & Connell, J.) Routledge, London, p. 139.*

36 Ai Group, *Submission No. 49*, p. 6; SKILLED Group, *Submission No. 52*, p. 9.

37 Unions NSW, *Exhibit No. 33*, p. 4.

38 Qld Government, *Submission No. 66*, p. 20 citing ABS Forms of Employment Survey (FOES) Cat. No. 6359.0, 2001 data.

39 DEWR, *Exhibit No. 25*, p. 27.

40 AMWU, *Submission No. 46*, p. 10.

- 3.43 Table 3.1 illustrates that although there are a large number of workers participating in contracts of 4 months or more, the majority of labour hire workers are employed on short-term contracts between 1 and 3 weeks.
- 3.44 Manpower informed the Committee that assignments vary in length and can last from four hours to several years. They identified cases where labour hire workers have been assigned to the same position for up to seven years.⁴¹

The value of the industry

- 3.45 The Australian Industry Group (Ai Group) state that the labour hire industry is an integral part of the national labour infrastructure and contributes greatly to the national economy. The ABS has valued the employment services industry at \$10.2 billion for 2001-2002. The employment services industry increased its total income by 30.8 per cent between 1999 and 2002.⁴²
- 3.46 The labour hire industry features a number of large companies. The impressive growth of these companies highlights the important contribution that the labour hire sector makes to the Australian economy. However, there is a low level of industry concentration with the top 20 companies accounting for less than 30 per cent of the market.⁴³

The growth of the labour hire industry

- 3.47 Labour hire employment is not a new type of work arrangement in Australia. The use of agencies or companies to provide workers to client companies dates back to the 1950s. It is in the last decade that labour hire has become increasingly prevalent. Labour hire workers numbered around 270 000 in 2002, equivalent to about 3 per cent of all employed persons.
- 3.48 In workplaces with 20 or more employees, the number of labour hire workers grew from 33 000 in 1990 to 190 000 in 2002. This was an

41 Ms J. Hunt, Manpower Services, *Transcript of Evidence*, 31 March 2005, p. 25.

42 ABS, 2003, *Employment Services Australia 2001-02*, Cat. No. 8558.0, p. 7; CFMEU, *Submission No. 5*, Appendix 11: NSW Labour Hire Task Force Report, p. 18; SKILLED Group, *Submission No. 52*, p. 8.

43 Ai Group, *Submission No. 49*, p. 10; SKILLED Group, SSB Investor Conference Presentation Slides, p. 12, 26 November 2002, accessed 23 June 2005, <www.skilled.com.au/Common/invest/media/asx_261102.pdf>.

increase of 15.7 per cent a year. The percentage of employees who are labour hire workers grew from 0.8 per cent in 1990 to 3.9 per cent in 2002.⁴⁴

- 3.49 It is estimated that over a quarter of Australian workplaces utilise labour hire agencies and that over 1 200 labour hire agencies are operating in Victoria alone.⁴⁵
- 3.50 The growth of the labour hire industry between 1990 and 2002 can be attributed to a number of factors. The rise in enterprise bargaining and outsourcing have contributed to the increased use of labour hire arrangements. Reasons that companies may have increased their use of labour hire are reported to be due to changes in industrial relations and the increasingly competitive environment in which businesses operate.⁴⁶

Major users of labour hire (industry trends)

- 3.51 Large workplaces are the biggest clients of labour hire services. Almost 40 per cent of workplaces consisting of 200 to 500 employees use labour hire services, while 55 per cent of workplaces with more than 500 employees use labour hire agencies.⁴⁷
- 3.52 The Productivity Commission Staff Working Paper *'The Growth of Labour Hire Employment in Australia'*, states that the probability of a client business using labour hire increases proportionally with its size. Forty-five per cent of businesses with more than 1 000 employees are likely to use labour hire. Whereas smaller workplaces, with 65 employees or less, have about a twenty per cent probability of using labour hire, but these businesses use it more intensively.⁴⁸
- 3.53 Evidence to the Committee suggests that labour hire workers are most prevalent in a number of industries, particularly in manufacturing. As illustrated in Table 3.2 labour hire also seems to be prevalent in property and business services, health and community services,

44 Ai Group, *Submission No. 49*, p. 11; CFMEU, *Submission No. 5*, p. 13; Unions NSW, *Exhibit No. 33*, p. XII.

45 CFMEU, *Submission No. 5*, Appendix 13: ACTU Submission to NSW Labour Hire Task Force, p. 2; Parliament of Victoria, Economic Development Committee, *Inquiry into Labour Hire Employment in Victoria*, Interim Report, December 2004, p. 8.

46 Unions NSW, *Exhibit No. 33*, p. XII.

47 CFMEU, *Submission No. 5*, Appendix 14: ACTU Submission to Victoria Labour Hire Inquiry, p. 1.

48 Unions NSW, *Exhibit No. 33*, p. 25.

finance and insurance, retail trade and transport and storage industries.⁴⁹

Table 3.2 Distribution of Agency Workers in Australia, by industry - 2002

Industry	Percentage of all Agency Workers
Agriculture	1.6
Mining	2.8
Manufacturing	19.6
Electricity, Gas and Water Supply	3.1
Construction	3.1
Wholesale Trade	4.6
Retail Trade	7.4
Accommodation, Cafes and Restaurants	4.6
Transport and Storage	5.0
Communication Services	7.9
Finance and Insurance	5.6
Property and Business Services	13.8
Government Administration and Defence	4.2
Education	1.2
Health and Community Services	12.3
Cultural and Recreational Services	0.7
Personal and Other Services	2.6
Total	100

Source adapted from AMWU, Submission No. 46, p 12, citing Hall, R using HILDA Wave 1 Confidentialised Unit Record Files, 2002. Nb. Rounding has occurred in this table.

Difficulties due to differing definitions

- 3.54 Labour hire constitutes a major part of the employment services industry. The employment services industry also includes clients of businesses that primarily provide ancillary employment services, such as assistance in preparing resumes or career counselling.
- 3.55 The difficulty arises in reporting on the employment services industry and differentiating from those who facilitate labour hire placements and from those who provide other employment services.⁵⁰

49 DEWR, Exhibit No. 25, p. 26; Qld Government, Submission No. 66, p. 14; Qld Council of Unions, Submission No. 41, p. 6; Job Watch, Submission No. 23, p. 8; MBA, Submission No. 22, p. 13.

50 Unions NSW, Exhibit No. 33, p. 37; DEWR, Exhibit No. 25, p. 7.

3.56 Evidence to the Committee noted concerns that there is a lack of reliable statistical information on the number of labour hire workers and labour hire agencies in Australia. The AMWU stated that:

... there are difficulties analysing the growth of labour hire and contracting based on the existing data. To understand the issues surrounding labour hire and contracting, and to develop an appropriate policy response, it is essential that we have an accurate estimation of the size of the labour hire industry and contracting.⁵¹

3.57 Similarly, in ABS publications it was found that time-series data specifically on self-employed contracting do not exist. FOES provides the most detail on different categories of employment, however self-employed contractors are classified within the employee, own-account worker, and employer groups, and can not be separately identified. Therefore, further analysis is required.⁵²

Recommendation 1

The Committee recommends that the Australian Government Department of Employment and Workplace Relations:

- **commission research into the prevalence of independent contracting and labour hire arrangements, ensuring comparability with earlier surveys and available data items; and**
- **work with the Australian Bureau of Statistics to expand existing survey categories in order to generate ongoing data on independent contracting and labour hire arrangements.**

51 AMWU, *Submission No. 46*, pp. 15-16; CFMEU, *Submission No. 5*, Appendix 11: NSW Labour Hire Task Force Report, p. 18; DEWR, *Exhibit No. 25*, p. 7.

52 Waite, M and Will, L, 2001, *Self-employed contractors in Australia: incidence and characteristics*, Productivity Commission Staff Research Paper, AusInfo, Canberra, p. 27; ABS, *Forms of Employment Survey*, Cat. No. 6359.0.

Labour hire in operation

- 3.58 The increased prevalence of labour hire in the modern economy has led to some concerns about the operation of labour hire. A number of recommendations were made to the Committee, including establishing a national code of practice and revising legislation. A number of state inquiries into labour hire are also currently underway or have been recently completed.

Industry code of practice

- 3.59 There has been much discussion about establishing various industry codes of practice.⁵³ The Cole Report, *'The Final Report of the Royal Commission into the Building and Construction Industry'* tabled in March 2003, recommended:

The Commonwealth initiate, through the Workplace Relations Minister's Council, the development of a Code of Conduct and Practice for Labour Hire in the building and construction industry.⁵⁴

- 3.60 The Master Builders Australia (MBA) suggest that a Commonwealth code could be developed following input from labour hire agencies and other stakeholders at a conference called specifically for that purpose.

It is essentially the responsibility of the labour hire industry to develop solutions and standards appropriate for the industry.... it should be a national document that comprehensively and consistently deals with the intricacies of the three-way relationships founding labour hire arrangements⁵⁵

- 3.61 The RCSA, the peak body of the labour hire industry has a Code of Professional Practice. The RCSA Code has operated for over ten years and was approved by the Australian Competition and Consumer Commission (ACCC) in 2003. The code of practice applies to all RCSA members, but is not enforceable on non-members.⁵⁶

53 Code of practice and code of conduct are used interchangeably in the report.

54 MBA, *Submission No. 22*, p. 13.

55 MBA, *Submission No. 22*, pp. 13-14.

56 AMWU, *Submission No. 46*, pp. 28-29; Mrs J. Hunt, Manpower Services, *Transcript of Evidence*, 31 March 2005, p. 23; RCSA, *RCSA Code for Professional Practice*, accessed 13 July 2005, <www.rcsa.com.au/documents/cfpp/cfpp_2005.doc>.

- 3.62 Issues regarding the possible development of a code of practice for the labour hire industry are discussed in more detail in Chapter 4.

Current legislation

- 3.63 A host businesses' responsibilities to employees and other workers varies across state, territory and Commonwealth laws, industrial awards and agreements, tribunal decisions and contracts of employment. These variations have led to confusion about entitlements and obligations for labour hire workers and host businesses.
- 3.64 As discussed in Chapter 2, employee and employer are concepts established under common law in Australia. To decide whether a person is an employee, the courts will examine the circumstances between the worker and the business. Then they will determine whether the worker is engaged under a contract of service.
- 3.65 In most states and territories as well as the Commonwealth, the definitions of 'employer' and 'employee' depend upon common law definitions. There is no specific mention of labour hire. Victoria, the ACT and the NT are covered by federal workplace relations legislation, which currently does not contain labour hire provisions. Workplace relations legislation in SA, Tasmania and NSW similarly do not contain labour hire provisions.⁵⁷
- 3.66 As of early 2005, the only states to contain provisions regarding labour hire workers were Queensland and Western Australia. Queensland and Western Australia's labour hire provisions in effect restate the common law position, that in the absence of a sham arrangement, a labour hire agency will be determined to be the employer, not the host business.⁵⁸
- 3.67 Under the Queensland *Industrial Relations Act 1999*, labour hire agencies are included in the definition of 'employer'. Section 6(3) defines the term 'labour hire agency' as an entity that conducts a business that includes the supply of services of workers to others.⁵⁹ Section 6 (2) (d) of the Act defines 'employer' in part as:

... a group training organisation or labour hire agency that arranges for an employee (who is party to a contract of

57 DEWR, *Exhibit No. 25*, p. 30.

58 DEWR, *Exhibit No. 25*, p. 30; Qld Government, *Submission No. 66*, p. 8.

59 CFMEU, *Submission No. 5*, Appendix 11: NSW Labour Hire Task Force Report, p. 36.

service with the organisation or agency) to do work for someone else, even though the employee is working for the other person under an arrangement between the organisation or agency and the other person.⁶⁰

- 3.68 The WA *Industrial Relations Act 1979* provides that a labour hire agency that arranges for a worker (who is party to a contract of service with the agency) to do work for someone else, is the employer of that worker. The legislation provides that this is the case even though the worker is carrying out duties for the host business under a labour hire arrangement.⁶¹
- 3.69 In 2005, the Queensland Government amended the *Private Employment Agents Act*. The amendments in Part 2 of the Act provides for a code of conduct as the main way of regulating the conduct of private employment agents in their relationships with persons looking for work or for workers.⁶²
- 3.70 The SA Government commissioned a review into the SA industrial relations system, which was completed in October 2002. The review made 16 recommendations, including that legislation require that the employer be identified in a labour hire arrangement.
- 3.71 The *Fair Work Act 1994 (SA)* came into effect in May 2005. This Act covered many of these recommendations from the review, but omitted from final legislation some of the recommendations including the power to deem contractors to be employees and changing unfair dismissal claims by labour hire workers against host businesses.⁶³

Current state inquiries

- 3.72 The growth in the number of labour hire agency placements and concerns about conditions and the effect on direct employment has resulted in a number of states initiating their own inquiries into labour hire.

60 CFMEU, *Submission No. 5*, Appendix 11: NSW Labour Hire Task Force Report, p. 36.

61 DEWR, *Exhibit No. 25*, p. 30.

62 Qld Government, *Private Employment Agents Act 2005*, accessed 31 May 2005, <www.legislation.qld.gov.au/LEGISLTN/CURRENT/P/PrivatEmAgA05.pdf>.

63 SA Government, *Fair Work Act 1994*, accessed 31 May 2005, <www.eric.sa.gov.au/uploaded_files/fairwork_consolidated.pdf>.

- 3.73 In August 2003, the NSW Labour Council filed an application for a 'Secure Employment Test Case' in the NSW Industrial Relations Commission. This application aims to:
- restrict the use of labour hire arrangements by requiring host businesses to offer permanent employment to labour hire workers after six months of regular engagement.
 - require host businesses to provide OHS training to labour hire workers; and
 - require host businesses to pay the equivalent amount in wages and conditions had those workers been direct employees of that host business.⁶⁴
- 3.74 Hearings have concluded in the NSW Industrial Relations Commission with reporting expected in late 2005.
- 3.75 The Victorian Parliament's Economic Development Committee conducted an inquiry into labour hire employment in Victoria. An interim report was released in December 2004, which primarily looked into OHS standards in the labour hire industry. The Committee recommended that a registration system for labour hire agencies be established and be linked to a code of practice setting out safety standards.
- 3.76 The final report of the Victorian Parliament's Economic Development Committee was tabled in July 2005.
- 3.77 The Tasmanian Government is currently reviewing the *Industrial Relations Act 1984*. One of the proposed amendments is for a person engaged through a labour hire arrangement to be deemed an employee on application.

International aspects of temporary work and employment agencies

- 3.78 Submissions to the inquiry drew attention to international conventions and codes relating to the labour hire industry. Comparing Australia's labour hire industry internationally is difficult. Although the term 'labour hire' is used in Australia, other terms such as 'contract labour' and 'temporary help' are used overseas.

64 DEWR, *Exhibit No. 25*, pp. 10, 34; NSW Government, *Submission No. 35*, p. 42.

- 3.79 However it is described, labour hire is now an international phenomenon. Information from the International Confederation of Temporary Work Businesses (CIETT), the international representative of the on-hire industry, indicates that almost 350 million people work under on-hire arrangements in just 17 of the world's major economies. When other major economies are taken into account, the figure is likely to be closer to 400 million people working in this sector every day.⁶⁵
- 3.80 CIETT indicate that industry usage in different economies and cultures varies significantly depending on the legal approach to regulating agency work. Percentages of workers employed through agency work range from 4.5 per cent in the Netherlands to 0.7 per cent in Spain.⁶⁶
- 3.81 Australia's rate is around 3 per cent, which indicates that Australia has a comparably high level of participation of labour hire workers.⁶⁷
- 3.82 For some years, the International Labour Organisation (ILO) sought to discourage labour hiring. ILO *Convention 96 Fee-Charging Employment Agencies Convention (Revised), 1949* sought to eliminate the labour hire business in ratifying states.⁶⁸
- 3.83 However, Convention 96 was unsuccessful and since 1949, the labour hire industry has spread throughout the world. It now makes a key contribution to many diverse labour markets and economies.
- Labour hire agencies offer the flexibility both employers and employees look for. Their main objective is to find jobs for temporary workers, ensuring that they have work whenever they want. Both user companies and workers benefit from flexible working arrangements which suit their respective needs.⁶⁹
- 3.84 The ILO describes three categories of contract labour:
- Job contracting (contracting out of work);
 - Labour only contracting; and
 - Direct contracting (that is independent contractors).⁷⁰

65 ACCI, *Submission No. 25*, pp. 35-36.

66 ACCI, *Submission No. 25*, pp. 35-36.

67 ACCI, *Submission No. 25*, pp. 44-45.

68 ACCI, *Submission No. 25*, pp. 44-45.

69 ACCI *Submission No. 25*, p. 45.

70 Ai Group, *Submission No. 49*, p. 7.

- 3.85 At the present time the ILO is focussing on defining the employment relationship, as described in a report prepared for the next ILO conference in early 2006, *'The employment relationship'*. This report, examines the definition of an employment relationship from a range of nation's perspective, including Australia's.⁷¹
- 3.86 The ILO *Convention No. 181, Private Employment Agencies, 1997* lists the general principles protecting workers in employment and job seekers against poor terms and conditions of employment. The Convention provides that Members States determine a regulatory framework for the operation of private employment agents in terms of a system of licensing or certification.
- 3.87 To date, Australia has not ratified this Convention.⁷²
- 3.88 The ILO's committee of experts have agreed that a national policy might include but not be limited to:
- providing workers and employers with clear guidance concerning employment relationships, in particular the distinction between dependent workers and self-employed persons;
 - providing effective appropriate protection for workers;
 - combating disguised employment which has the effect of depriving dependent workers of proper legal protection;
 - not interfering with genuine commercial or genuine independent contracting;
 - providing access to appropriate resolution mechanisms to determine the status of workers.⁷³
- 3.89 AMWU and ACTU, in evidence to the Committee, stated that the minimum requirements identified by the ILO should be considered when formulating a national policy on labour hire arrangements.⁷⁴
- 3.90 Although Australia has not ratified the ILO Convention 181, as a member of CIETT, Australia follows the international CIETT Code of Practice. CIETT notes that the Code of Practice closely accords with the most up-to-date ILO Recommendation on labour hiring.⁷⁵

71 AMWU, *Submission No. 46*, p. 75; International Labour Conference, *The Scope of the employment relationship*, Report V, 95th Session 2006, International Labour Office, Geneva 2005.

72 CFMEU, *Submission No. 5*, Appendix 11: NSW Labour Hire Task Force Report, p. 51.

73 AMWU, *Submission No. 46*, p. 36.

74 AMWU, *Submission No. 46*, p. 36; ACTU, *Submission No. 60*, pp. 25-26.

75 ACCI, *Submission No. 25*, p. 44.

- 3.91 The CIETT International Labour Hire Code of Practice includes the following provisions:
- members shall ensure that agency workers are suitable for the assignment;
 - members shall protect the security of confidential information obtained from both agency workers and clients;
 - advertisements for job vacancies must be genuine;
 - agency workers shall be advised of:
 - ⇒ the conditions of the assignment & the kind of work
 - ⇒ the remuneration
 - ⇒ any changes to the above;
 - members shall not seek to prevent agency workers from seeking jobs where they wish to do so (including with the user); and
 - services by (agencies) shall be available to agency workers free of charge.⁷⁶
- 3.92 The RCSA's Code of Professional Practice addresses many of CIETT's International Labour Hire Code of Practice criteria.
- 3.93 The RCSA code for professional practice covers the eight principles including: confidentiality and privacy; honest dealings; respect for work relationships, respect for laws, respect for safety, respect for certainty of engagement; professional knowledge principle; and good order.⁷⁷
- 3.94 This international perspective may provide some guidance for actions that the Australian Government could undertake. Issues to consider include definitions, licensing and limits of engagement of labour hire.

Award restrictions and proposed federal legislation

- 3.95 Some awards limit the use of labour hire arrangements. Award restrictions on use of labour hire can include a requirement that the host employer offer ongoing employment to any casual employee of the labour hire agency with six months of regular engagement. There may also be a requirement that labour hire workers receive wages and

⁷⁶ ACCI, *Submission No. 25*, p. 44.

⁷⁷ *RCSA Code for Professional Practice*, accessed 31 May 2005, <www.rcsa.com.au/documents/cfpp/cfpp_2005.doc>.

- conditions no less than those they would have received as direct employees of the host business.⁷⁸
- 3.96 Examples of awards that contain provisions that limit the placement of labour hire workers include the Fresh Start Bakeries Australia Pty Limited (NSW) Enterprise Award 2004, and the Hydro Aluminium Kurri Kurri Smelter Upgrade and Retro-Fit Project Consent Award 2004. Both of these awards place restrictions on the length of engagement that labour hire workers can undertake.⁷⁹
- 3.97 On 30 March 2005, the Minister for Employment and Workplace Relations, the Hon Kevin Andrews MP released the discussion paper *'Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements.'* The paper canvasses legislative responses to regulate independent contracting and labour hire arrangements to protect:
- ... independent contracting arrangements (including 'Odco' arrangements) as commercial arrangements, not employment arrangements, under the law... [and ensure] 'sham' arrangements are not legitimised".⁸⁰
- 3.98 Legislative change was foreshadowed in the 2004 Coalition election policy.
- 3.99 The discussion paper states that consideration could be given to amending the WR Act to include similar provisions of definitions of labour hire as Western Australia and Queensland. This would give statutory recognition to the current common law definition of a labour hire worker.⁸¹ There has been some support for this proposal.⁸²
- 3.100 In most Australian jurisdictions, apart from Victoria, Northern Territory and Tasmania, employment agencies are required to be licensed. However, in some jurisdictions, the relevant legislation may require some labour hire agencies to register as an employment agency.⁸³

78 Qld Government, *Submission No. 66*, p. 21; DEWR, *Exhibit No. 25*, p. 34 proposals in NSW Secure Employment Test case.

79 NSW Department of Commerce, Office of Industrial Relations, accessed through Awards Online on 31 May 2005, <www.industrialrelations.nsw.gov.au/awards/index.html>.

80 DEWR, *Submission No. 65*, pp. 1-2.

81 DEWR, *Exhibit No. 25*, p. 30.

82 Qld Government, *Submission No. 66*, p. 41; Mr M. Anderson, *Submission No. 70*, p. 5; DEWR- Australian Public Service Commission, *Exhibit No. 74*, p. 8; DEWR- Toll Transport Pty Ltd, *Exhibit No. 79*, p. 10.

83 CFMEU, *Submission No. 5*, Appendix 11: NSW Labour Hire Task Force Report, pp. 36-42.

- 3.101 Some evidence to the Committee suggests that governments, particularly at the state level, should introduce new legislation to impose further regulatory requirements, including registration of labour hire agencies.⁸⁴ Other evidence cautions against applying further regulatory requirements into workplace relations legislation.⁸⁵
- 3.102 The Australian Government Department of Employment Workplace Relations (DEWR) discussion paper highlighted concerns about the impact that the variety of laws and regulations could have upon the labour hire industry. The paper proposes that the WR Act should be amended to contain provisions to discourage limitations that relate to engaging labour hire workers or imposing conditions on their terms of engagement.⁸⁶ These issues will be discussed in more detail in Chapters 4 and 6.

In summary

- 3.103 Labour hire workers represented around 3 per cent of all employed persons in 2002 in Australia. In the past ten years, labour hire has become a more common type of employment in Australia as well as internationally.
- 3.104 This Chapter examined different labour hire arrangements including workers employed directly by the labour hire company, or as independent contractors.
- 3.105 Variation in definitions across different states and territories was identified. An industry code of practice was discussed and compared with international conventions and practices. The legislative framework under which labour hire currently operates was outlined along with proposals for future legislation.

84 Mr G. Hargrave, SKILLED Group, *Transcript of Evidence*, 27 April 2005, p. 14; Mr D. Cameron, AMWU, *Transcript of Evidence*, 31 March 2005, p. 69; Mr C. Christodoulou, Unions NSW, *Transcript of Evidence*, 30 March 2005, p. 32; Ms S. Burrow, ACTU, *Transcript of Evidence*, 26 April 2005, p. 41.

85 Mr A. Cameron, RCSA, *Transcript of Evidence*, 26 April 2005, p. 21.

86 DEWR, *Exhibit No. 25*, pp. 29-30.

Issues to address

- 4.1 An overview of critical issues raised during the course of the inquiry is provided in this chapter. Discussion of labour hire and independent contracting is included.
- 4.2 Foremost was the need for greater clarity and consistency in the identification of the employee, independent contractor and labour hire worker. Identifying the employer to determine responsibilities is critical.
- 4.3 The majority of evidence regarding skills shortages and OHS issues related to the labour hire industry. However, concerns regarding the ability of independent contractors to improve skills were raised, as well as a description of pressures on contractors to meet targets rather than strictly adhere to safety requirements. The complexity of workers' compensation and the state variation was of particular note.
- 4.4 Discussion of strategies to ensure that there is better adherence to employer obligations and safety requirements concludes the chapter. Registration, licensing and an industry wide code of practice were proposals suggested.
- 4.5 The Committee also acknowledges that greater clarity is required around other issues such as superannuation. Further discussion on the need for clarity of responsibilities in relation to taxation is discussed in the following chapter.

Definitions/identification of worker status

Employee or independent contractor

- 4.6 As discussed in Chapter 2 there has been substantial debate on the need for improved definitions of employee, independent contractor and employment. The three approaches to address this debate include the common law approach, the legislative approach, and the personal services income taxation approach.
- 4.7 DEWR summarises:
- The common law approach
 - ⇒ The common law has traditionally maintained a distinction between ‘employees’ and ‘independent contractors’. Employees are engaged under a contract of service whereas independent contractors are engaged under a contract for service. The courts have adopted a multi-factor (indicia) test to determine whether a person is an employee or an independent contractor. DEWR stated that common law allows greater flexibility than legislation and provides an effective mechanism to address ‘sham’ arrangements.
 - Legislative approach – statutory definition
 - ⇒ Subsection 4(1) of the WR Act uses the common law meaning of employee, as it does for ‘independent contractor’ (subsection 4(1A)). Other Commonwealth, state and territory legislation adopt different definitions, specifying what is an ‘employee’ or ‘worker’.¹ It is argued by DEWR that if a statutory definition was adopted, it may be possible to subvert the legislature’s intention using legal pretences.
 - Personal services income (PSI) approach
 - ⇒ This approach suggests that to determine an independent contractor’s status, a person is an independent contractor if they are currently recognised as a Personal Services Business under the *Income Tax Assessment Act 1997*. A disadvantage to this approach is that the definition would not be simple or clear.²

1 See for example: Qld Government, *Submission No. 66*, *Qld Industrial Relations Act 1999* for a broad definition, p. 34; DEWR, *Exhibit No. 25*, p. 18 referring to the *SA Industrial and Employee Relations Act 1994*; HIA, *Submission No. 61*, p. 5 referring to the *Superannuation Guarantee (Administration) Act 1992 (Cth)*, s.12(3).

2 DEWR, *Exhibit No. 25*, pp. 13-14.

- 4.8 In evidence to the Committee the advantages and disadvantages of these approaches were debated and are considered fundamental to any further consideration of a legislative response.

Common law approach

- 4.9 There is significant support for the continuation of the common law approach. One business association stated that difficulties in agreeing to a changed definition, and the costs involved once that change was made, were considered paramount.³ Continuation of the status quo was advocated by the NFF. They support relying on a basic statutory minimum and letting the parties pursue actions through applying common law. The common law test is useful to determine the situation by using a check list.⁴ See Appendix E for a review of the differences.⁵
- 4.10 The Australian Chamber of Commerce and Industry (ACCI) states that the starting point should be recognition that the common law provides appropriate definitions.⁶ If there is to be codification then this should be based on the common law distinctions.
- 4.11 The Law Council of Australia's view is that the common law control test works well in most circumstances. They state that in the majority of cases the situation is quite clear cut. It is only unclear in borderline cases where relationships might have been established that are not entirely bona fide, or in complicated circumstances.⁷
- 4.12 The Victorian Government stated that the discussion on whether it is possible to produce a workable definition of employee for industrial relations purposes should continue, but doubts the value of trying to define an independent contractor.⁸ They comment that:

Pending any consensus on this issue, however, the common law definition should continue to be the determinant of the line between employees and independent contractors. One of

3 Mr G. Blyth, CCI WA, *Transcript of Evidence*, 20 May 2005, pp. 4-5.

4 Mrs. D. Wawn, NFF, *Transcript of Evidence*, 9 May 2005, p. 12.

5 Australian Government, Office of the Employment Advocate, *Independent contractor or employee?* accessed 22 June 2005, <www.oea.gov.au/docs/contractorvsemployee.pdf>.

6 Mr P. Anderson, ACCI, *Transcript of Evidence*, 26 April 2005, pp. 8-9. See also Mr P. Bosa, Labour Force Australia, *Transcript of Evidence*, 26 April 2005, p. 66; Mr D. Houlihan, IR Australia, *Transcript of Evidence*, 31 March 2005, p. 82.

7 Mr T. Hulett, Law Council of Australia, *Transcript of Evidence*, 27 April 2005, pp. 58-59.

8 Vic. Government, *Submission No. 71*, pp. 26-28.

the advantages of the common law definition is that it is by its nature already “nationally consistent”.⁹

- 4.13 However, a significant number of organisations and individuals indicated that greater clarity and consistency were required,¹⁰ and some governments supported such efforts.
- 4.14 Professor Andrew Stewart argues that the current common law definitions should be replaced with a more extensive definition of employment. His criticism of the current system mainly rests on the abuse of the standard employee-employer relationship. This may be instigated by the employer, possibly by the worker, or by both parties for financial gain and the avoidance or shifting of responsibilities.¹¹ Further Professor Stewart describes the approach of courts and tribunals as:

... necessarily impressionistic, since there is no universally accepted understanding of how many indicia, or what combination of indicia, must point towards a contract of service before the worker can be characterised as an employee.¹²

Legislative approach – statutory definition

- 4.15 Although some organisations and individuals advocated the need for greater clarity and consistency, few were able to provide greater detail on how this might be achieved, apart from reference to the PSI taxation definitions.
- 4.16 Possible solutions have been adopted by various legislators to address ‘employment-like’ arrangements. These include ‘deeming’ workers in various occupations to be employees for specific purposes. This will be discussed further in a later section. Changes to the tax system and provisions in unfair contracts provisions have also been suggested as possible solutions.
- 4.17 However, Professor Stewart argues that these other responses are superficial and a more effective approach would be to deal with the

9 Vic. Government, *Submission No. 71*, p. 29.

10 For example see Prof. A. Stewart, *Submission No. 69*, p. 17; HIA, *Submission No. 61*, p. 14; MBA, *Submission No. 22*, pp. 17-18; Building Service Contractors Association of Australia, *Submission No. 16*, p. 4; Vic. Government, *Submission No. 71*, pp. 28-29; Qld Government, *Submission No. 66*, p. 8.

11 Prof. A. Stewart, *Submission No. 69*, pp. 2-4.

12 Prof. A. Stewart, *Submission No. 69*, p. 5.

source problem.¹³ That is to adopt a standard or model definition of employment that can be included in any legislation, state or Commonwealth, where it is considered necessary to apply obligations or extend entitlements, but not to apply to those genuinely in a business of their own account.¹⁴

- 4.18 It is not suggested that the definition should be universal but that there needs to be greater congruence and certainty in drawing a more realistic boundary.¹⁵ This is required by business groups to reduce the variation that is present with deeming provisions.¹⁶
- 4.19 A definition suggested by Professor Stewart provides that:
- the onus is on the denial of the existence of an employment relationship, and to show that the worker is genuinely carrying on a business;
 - factors need to be set out and considered;¹⁷
 - factors should include three of the four tests adopted in the PSI legislation (employment, unrelated clients and business premises tests). It does not include the proportion of income asked over one year ('the 80/20 rule') to remove the time factor requirements;¹⁸
 - an additional paragraph focuses on employment agencies such as in labour hire to clarify the agency as the employer. The final paragraph seeks to address the use of interposed entities such as personal companies and family trusts.¹⁹ (Refer to Appendix G for further information on a definition proposed by Professor Stewart.)
- 4.20 Further discussion of these issues occurs later in the report in sections: Responsibilities – who is the employer, and Business structures.
- 4.21 AMWU supports the further extension and clarification of the statutory definition of the employment relationship. In particular the AMWU supports similar definitions proposed by Professor Stewart to ensure that independent contractor (and labour hire) arrangements

13 Prof. A. Stewart, *Submission No. 69*, p. 9; See also Mr. T. Hulett, Law Council of Australia, *Transcript of Evidence*, 27 April 2005, p. 62.

14 Prof. A. Stewart, *Submission No. 69*, pp. 8-9.

15 Prof. A. Stewart, *Submission No. 69*, pp. 8-9.

16 See for example Ai Group, *Submission No. 49*, pp. 24-25.

17 Prof. A. Stewart, *Submission No. 69*, pp. 10-11.

18 Prof. A. Stewart, *Submission No. 69*, p. 12.

19 Prof. A. Stewart, *Submission No. 69*, p. 12.

are not used inappropriately to evade the rights and obligations attached to the employment relationship.²⁰

4.22 In support of an independent contractor definition MBA state that independent contractor legislation should include three components to identify an independent contractor:

- a codification of the common law test as the basis for the distinction between a contractor and an employee;
- an external indicator of status such as a personal services business determination; and
- registration for meeting the above requirements with a Commonwealth agency.²¹

4.23 The first two of the MBA components have been echoed in Professor Stewart's incorporation of components of the indicia of the common law approach but with an extended definition using the personal services income tests. The third component of a registrar will be discussed later in Chapter 6.

4.24 However, there is criticism of a definitional approach to improving clarity and certainty of employee or independent contractor status. ICA states that reliance on redefining 'employment' will not lead to the desired outcomes.²²

4.25 The Law Council of Australia comment that definitions have their own problem: it can be very difficult to draft something that picks up all circumstances.²³ While the Victorian Government support the drive for nationally consistent and workable definitions, they express support for the maintenance of the common law approach at this stage, with some qualifications, noting that:

... any new statutory definition is not likely to alter the practical reality that parties will still go to the courts to determine which side of the line of a stated formulation they fall on, regardless of whether that formulation is set down by a court or in a statute.²⁴

4.26 In response, the Committee notes that this is possible with any legislative change. The responsibility for improving clarity and

20 AMWU, *Submission No. 46*, p. 75.

21 MBA, *Submission No. 22*, pp. 17-18.

22 ICA, *Submission No. 20*, p. 18.

23 Mr. T. Hulett, Law Council of Australia, *Transcript of Evidence*, 27 April 2005, p. 62.

24 Vic. Government, *Submission No. 71*, p. 28.

certainty in the longer term for employees, independent contractors and business should not be avoided.

Personal services income approach

- 4.27 A range of organisations considered components of the personal services income rules to be of benefit in differentiating between employees and independent contractors.²⁵ The taxation definition has similar elements to the common law approach, for example providing one's own tools, and the capacity to delegate.
- 4.28 The *Income Tax Assessment Act 1997* provides that certain independent contractors are to be taxed as employees (though the legislation indicates that they do not become an employee for any other purposes).²⁶ However, they will not be taxed as employees if they are found to be running a personal services business, which will be the case if any of the following applies:
- they satisfy the 'results test' for at least 75 per cent of income, that is:
 - ⇒ they work to produce a specified result or outcome(s) under the contract or arrangement;
 - ⇒ they provide the tools and equipment necessary (if any) to produce the result(s) (if no tools or equipment are required they meet this component of the test); and
 - ⇒ they are liable for the cost of rectifying any defective work;
 - less than 80 per cent or more of personal services income (PSI) in an income year comes from each client and must meet one of the other three personal services business tests. These are the:
 - ⇒ unrelated clients test: having two or more unrelated clients; or
 - ⇒ employment test: having employees or subcontractors that perform 20 per cent of the work, or apprentices for at least half of the year; or
 - ⇒ business premises test: having business premises that are physically separate from their home, or from premises of the person for whom they are working; or

25 For example see HIA, *Submission No. 61*, p. 6; Ross Human Directions, *Submission No. 54*, p. 3; Courier and Taxi Truck Association; *Submission No. 50*, Attachment 2, p. 5.

26 *Income Tax Assessment Act 1997* (Cth) Divs 84-87, as originally introduced by the *New Business Tax System (Alienation of Personal Service Income) Act 2000*.

- receive a personal services business determination from the Commissioner of Taxation.²⁷
- 4.29 This also applies whether the income is received directly by the individual independent contractor or is received by a company, trust or partnership (personal services entity). One criticism with this approach of using the PSI definition to identify independent contractors is that it is more restrictive than the common law approach; and that independent contractors at law would become employees for the purpose of workplace regulation.²⁸
- 4.30 HIA supports the use of the 'results test' as used in the PSI legislation. They suggest that tax status is an important business indicator, and ensures that 'independent contractor status is not awarded to those who are really employees and should be paying tax under PAYG'.²⁹
- 4.31 HIA consider that instead of defining 'employee' the PSI tests identify who is an independent contractor, and therefore not an employee. They suggest that this leaves the common law untouched, and does not require forming additional definitions in legislation. They provide an example where this approach has been used in the Queensland *Workcover Act* in 2002 to exclude independent contractors from being considered as an employee:
- 'Notwithstanding anything contained elsewhere in this or any other Act, a person who is recognised as a Personal Services Business for the purposes of Division 87 of the Income Tax Assessment Act 1997 is not to be taken to be a worker/employee for the purposes of this Act, and a second person contracting with them is not to be taken as their employer.'³⁰
- 4.32 This then enables independent contractors to be excluded from other legislation that is designed for an employment relationship. Ross Human Directions (a labour hire agency) also supports the use of the Australian Tax Office (ATO) definition, except for the timeframe for the assessment of the 80/20 rule. They indicate that this should be increased to reflect the existence of long-term project lengths.³¹

27 DEWR, *Exhibit No. 25*, pp. 13; ATO, *Step by step guide – personal service income*, accessed 7 June 2005, <www.ato.gov.au/print.asp?doc=/content/33827.htm>.

28 DEWR, *Exhibit No. 25*, p. 13.

29 HIA, *Submission No. 61*, p. 14.

30 HIA, *Submission No. 61*, p. 15.

31 Ross Human Directions, *Submission No. 54*, p. 3.

- 4.33 The NSW Government also considers that the use of PSI tests included with the *Income Test Assessment Act 1997* (Cth) could be used to identify independent contractors.³²
- 4.34 However, criticisms of adopting the personal services income approach is that the development of the taxation definition was for revenue considerations and was not designed for workplace relations purposes.³³ (Further consideration of taxation issues occurs later in Chapter 5, under Business structures.)
- 4.35 One approach to deal with a possible changing definition is to fund test cases to ensure that determinations are set and the cost is not borne by businesses and individuals. This approach has been adopted for example by the ATO in the applicability of anti-avoidance provisions for independent contractors.³⁴

Responsibilities – who is the employer?

- 4.36 One of the important issues in the discussion is determining ‘who is the responsible employer?’ Disputes have arisen over who is the responsible employer (the host or the labour hire agency) or, if a contractor is involved, whether there is in reality an employer.
- 4.37 As mentioned in Chapter 3, the ‘standard’ arrangement is that the worker at the site is under the direction or control of the host business, but it is the labour hire agency that has responsibility for the wages and other on-costs of the worker. The host business pays the labour hire agency for providing the labour and thus has a contractual relationship with the labour hire agency.³⁵

Joint employment

- 4.38 Joint employment allows an employee to be employed by more than one employer at the one time. Joint employment arose in the United States in the 1930s as a statutory response to labour hire arrangements being used to avoid collective bargaining laws and employee

32 NSW Government, *Submission No. 35*, p. 44; see also Prof. A. Stewart, *Submission No. 69*, p. 12.

33 DEWR, *Exhibit No. 25*, p. 13; Mr G. Blyth, CCI WA, *Transcript of Evidence*, 20 May 2005, p. 12.

34 The Treasury, *Submission No. 73*, p. 4.

35 Job Watch, *Submission No. 23*, p. 5; Ai Group, *Submission No. 49*, pp. 7-8.

entitlements protections. The concept is not recognised as part of common law in Australia.³⁶

- 4.39 Joint employment is primarily used to establish liability at law for benefits or entitlements for employees in circumstances where an employer is unable or unwilling to pay the entitlements. Under these circumstances if another entity can be found to be a 'joint employer' then recovery action can be taken against that entity.³⁷
- 4.40 In the DEWR discussion paper, a number of concerns about joint employment and employer's responsibilities under a joint employment arrangement are identified, including:
- payment of the employee's wage;
 - payment of taxes – PAYG and GST federally and the payment of payroll tax at a state level;
 - liability for insurance;
 - payment of superannuation;
 - dispute resolution;
 - discrimination law;
 - workplace health and safety; and
 - copyrights, patents and designs.³⁸
- 4.41 In addition, joint employment raises issues for the employee. In particular, it becomes unclear to which employer the employee owes duties of good faith and loyalty. It is also unclear what employees should do if they receive conflicting directions from their joint employers.³⁹
- 4.42 The DEWR discussion paper does not support the introduction of the concept of joint employment into Australian law in any jurisdiction.⁴⁰
- 4.43 Some submissions to the Committee did give qualified support to the notion of joint employment.⁴¹

36 DEWR, *Exhibit No. 25*, p. 32.

37 Qld. Government, *Submission No. 66*, p. 39.

38 Adapted from DEWR, *Exhibit No. 25*, pp. 32-33.

39 DEWR, *Exhibit No. 25*, p. 33; ACTU, *Submission No. 60*, p. 14.

40 DEWR, *Exhibit No 25*, pp. 32-33.

41 Job Watch, *Submission No. 23*, p. 12; NUW, *Submission No. 47*, p. 7; ACTU, *Submission No. 60*, p. 16.

- 4.44 Job Watch suggested that joint employment may assist in preventing host employers from avoiding responsibility for the unfair dismissal of labour hire workers. However, they caution that this may not be a practical option for most employers as any claim against a host employer would most likely involve a costly jurisdictional hearing.⁴² ACTU assert that joint responsibility should be recognised in respect of OHS and unfair dismissal proceedings.⁴³ National Union of Workers (NUW) state that joint employment as established in the US, if given statutory recognition in Australia, may relieve many problems experienced by labour hire workers.⁴⁴

Consistency in definition

- 4.45 This section has provided a review of three different approaches to improving consistency and clarity in the identification of employees or independent contractors.
- 4.46 The Committee can see the benefits of redefining the employment relationship to incorporate known business structure arrangements, however, has concerns regarding manipulation of a statutory definition. The Committee's view is to retain the common law position but supplement it with components of the PSI tests. This would provide greater consistency with the ATO rulings.
- 4.47 The Committee suggests the exclusion of one component, that is, the timeframe for assessment of the 80/20 rule. It is suggested that other tests remain as their removal would not improve consistency across legislation and would add to the confusion.
- 4.48 The Committee is aware that this is not a clean and simple solution and it is noted that there is dissent within the Committee on these recommendations. However, the recommendation does narrow the application of the status of independent contractors and should reduce the likelihood of the creation of sham arrangements. Artificial contracting arrangements are discussed in more detail in the next chapter.

42 Job Watch, *Submission No. 23*, p. 12.

43 ACTU, *Submission No. 60*, p. 3.

44 NUW, *Submission No. 47*, p. 7.

Recommendation 2

The Committee recommends that the Australian Government maintain the common law approach to determine employment status and distinguish between employees and legitimate independent contractors.

Recommendation 3

The Committee recommends that the Australian Government, when drafting federal legislation, in addition to the common law position adopt components of Australian income tax assessment alienation of personal services income legislation tests to identify independent contractors.

Recommendation 4

The Committee recommends that the Australian Government, in conjunction with State and Territory governments, pursue through the Workplace Relations Ministers' Council national consistency in identifying independent contractors. The Committee recommends that this is achieved by, in addition to the common law position, adopting components of Australian income tax assessment alienation of personal services income legislation tests in the drafting of relevant state and territory legislation.

Training and Development – skills shortages

- 4.49 One of the major issues facing the Australian economy is ensuring a sufficient supply of skilled workers to meet industry demands. It has been suggested that the increased use of labour hire and contractors may contribute to a lack of investment in training. This may in turn impact upon a wider skills shortage which is a major concern to state and federal governments.⁴⁵

⁴⁵ Vic. Government, *Submission 71*, p. 19; ACTU, *Submission No. 60*, p. 21; CFMEU – Mining and Energy Division, Northern Branch; *Submission No. 18*, p. 11.

- 4.50 Skill shortages exist when employers are unable to fill or have considerable difficulty in filling vacancies for an occupation. It may also include difficulty in recruiting for specialised skill needs within that occupation, at current levels of remuneration and conditions of employment. Skill shortages are occurring in a range of industries, across a number of trades and professions.⁴⁶
- 4.51 It is reported that the option of contracting out labour, the general push to 'downsize', and adoption of 'just-in-time' management techniques, has led to employer reluctance to take on trainee labour whether directly or through labour hire agencies. AMWU told the Committee that:
- ...the overwhelming majority of evidence supports the conclusion that the growth of outsourcing (both labour hire and contracting) has had a negative impact on skills formation. The national skills shortage, especially in the manufacturing sector, is partly attributable to this phenomenon.⁴⁷
- 4.52 As mentioned in Chapter 3, one of the main benefits to a host business for using outsourced labour is reduced costs and risks of direct employment of staff. This includes reducing costs of training and developing employees.⁴⁸

Skill training provided to labour hire workers

- 4.53 A host business uses a labour hire agency to provide supplementary labour. Evidence to the Committee considers it unlikely that a host business would invest money in the training of supplementary labour, as companies prefer to invest in their ongoing workforce.⁴⁹
- 4.54 However, many labour hire firms rely on the host business to provide their employees with training. It can be difficult for a labour hire agency to provide training due to the mobility of its workers. Profit

46 SKILLED Group, *Submission No. 52*, p. 11; Queensland Nurses' Union, *Submission No. 24*, p. 4; MBA, *Submission No. 22*, p. 9.

47 AMWU, *Submission No. 46*, p. 63.

48 Qld Government, *Submission No. 66*, p 16.

49 CFMEU, *Submission No. 5*, Appendix 14: ACTU Submission to Victoria Labour Hire Inquiry, pp. 5-6; Hall R, 2005, Try Before You Buy, *About the House*, Issue 23, May 2005, p. 32.

margins may also be low, as there is no guarantee of a return on the investment in training.⁵⁰

- 4.55 The increasing use of labour hire has been identified as contributing to lower levels of employee commitment as well as employer commitment to training. The labour hire workers themselves may feel little obligation to undertake training.⁵¹
- 4.56 Access to training and skills development can be directly influenced by a worker's labour market position. Research on the delivery of training to casual and part-time workers has shown reduced access to training and skills development and skills based career paths.⁵²
- 4.57 The view that labour hire firms do not invest in training is reinforced by the findings of a RMIT study in 2003 titled *On-hired Workers in Australia: Motivations and Outcomes*. This study showed that only about 50 per cent of labour hire employers surveyed provided any training to their employees.⁵³ It was reported that 61 per cent of RCSA members and 48 per cent of non-members consistently provide safety induction training to their labour hire workers.⁵⁴
- 4.58 Furthermore, the RMIT study identified that only 48 per cent of labour hire employees stated that they had received formal training from their employer. The labour hire industry does not invest significantly in trade training with 88 per cent of labour hire employers surveyed stating that they rarely or never engaged apprentices.⁵⁵ The percentage of labour hire employees receiving training is well below the average for all employees. In 2002, 81 per cent of all Australian employers provided some training for their employees.⁵⁶
- 4.59 Independent contractors associated with APESMA state that almost half participated in less professional development as an independent

50 CFMEU, *Submission No. 5*, Appendix 14: ACTU Submission to Victoria Labour Hire Inquiry, pp. 5-6; Qld Government, *Submission No. 66*, p. 28.

51 Hall R, 2000, Outsourcing, contracting-out and labour hire: implications for human resource development in Australian organizations, *Asia Pacific Journal of Human Resources*, vol. 38, no. 2, p. 23.

52 CFMEU, *Submission No. 5*, Appendix 13: ACTU Submission to NSW Labour Hire Task Force, p. 7.

53 Qld Government, *Submission No. 66*, p.28.

54 RCSA, *Exhibit No. 26*: Brennan, L, Vales, M and Hindle, K, *On-hired works in Australia: Motivations and Outcomes*, RMIT University, Swinburne University and Customer Focus Research, 2003, pp. 79-80.

55 Qld Government, *Submission No. 66*, p.28.

56 ABS, *Employer Training Expenditure and Practices, 2001-02*, Australia, 2003, Cat. No. 6362.0, Table No. 1, p. 13.

contractor than as an employee.⁵⁷ MBA state that traditional apprenticeships in carpentry have given way to contractors with more limited skills due to the skills shortage.⁵⁸ They suggest that there needs to be a way to increase and broaden those contractors' skills.

Responsibility for training

- 4.60 There is a wide diversity of views as to the nature and extent of training provided by labour hire companies. The shortage of skills across Australia is not exclusively caused by the growth of the labour hire industry or the growth of casual employment across the economy. It is claimed by a number of the larger labour hire firms that they spent significant resources on ensuring their staff were properly trained to undertake assignments.⁵⁹
- 4.61 Examples of larger labour hire agencies confirming their commitment to training and skill development include:
- RCSA — there are several RCSA members who undertake their own training and apprenticeship programs. In some cases, a labour hire agency may partner with the host business, for example the telecommunications sector, and train the labour hire worker to a particular certificate level required of the worksite.⁶⁰
 - Adecco — the majority of its employees are required to meet strict competency standards and have experience in a vast array of workplaces. They state their workers are often more skilled and productive than clients' employees.⁶¹
 - Skilled Engineering — has a strong record of training and development on traineeships and apprenticeships and other training programs.⁶²
- 4.62 There are also many group training schemes that provide apprenticeships for workers within a labour hire setting. This form of

57 APESMA, *Submission No. 7*, p. 14.

58 MBA, *Submission No. 22*, p. 10.

59 For other debate on this issue see also Qld Government, *Submission No. 66*, p. 28; Parliament of Victoria, Economic Development Committee, *Labour Hire Employment in Victoria*, Interim Report, December 2004, pp. 59-65.

60 ACCI, *Submission No. 25*, p. 50.

61 CFMEU, *Submission No. 5*, Appendix 11: NSW Labour Hire Task Force Report, p. 25 citing Adecco submission, p. 10 to NSW Labour Hire Task Force Inquiry.

62 CFMEU, *Submission No. 5*, Appendix 11: NSW Labour Hire Task Force Report, p. 25 citing Skilled Engineering submission, p. 8 to NSW Labour Hire Task Force Inquiry.

employment includes labour hire workers that are contracted out to a number of employers during the course of their apprenticeships.⁶³

- 4.63 A positive example of training in the labour hire industry is GTOs. GTOs have additional responsibilities for their workers. The GTO is the employer, and as such is responsible for the payment of wages and other employment entitlements. In addition to brokering the placement, the GTO is then responsible for managing and co-ordinating the on and off-the-job training. It may even be the approved provider of the off-the-job training inspecting the workplace to ensure conformance to OHS requirements.⁶⁴
- 4.64 MBA is supportive of group training schemes and do not believe that there is a need for further regulation on GTOs.⁶⁵
- 4.65 However, as training is the objective of group training schemes, other labour hire organisations' training practices need to be examined.
- 4.66 It was stated that labour hire firms need to have a greater responsibility to ensure they play their part in the provision of training. A number of recommendations were put to the Committee, to increase the occurrence and quality of training that a labour hire worker received.
- 4.67 One suggestion to the Committee was that labour hire agencies be required to detail in their annual reports the provision of training to workers. Another suggestion was that a labour hire worker could each year, be entitled to 5 days of paid industry and OHS training. This would enable them to maintain contact with industry trends and competency standards.⁶⁶
- 4.68 Best practice in this area provides an example of how labour hire companies can combine the training of their workforce with the contracting out of that workforce to their clients. An example of a labour hire agency applying a best practice model is the:

... creation of a dedicated unit for the prevention of workplace injuries staffed by qualified OH&S Co-ordinators

63 GTA, *Submission No. 36*, p. 4.

64 GTA, *Submission No. 36*, pp. 3-4, 9-10.

65 MBA, *Submission No. 22*, p. 11.

66 CFMEU, *Submission No. 5*, Appendix 13: ACTU Submission to NSW Labour Hire Task Force, p. 20; TWU, Vic./ Tas., *Submission No. 56*, p. 28.

and the provision of OH&S induction training to labour hire employees.⁶⁷

- 4.69 The *National Industry Skills Initiative*, part of the National Skills Shortages Strategy, suggested the formation of an Industry Committee, which should consist of major industry bodies. This industry group could consult the Department of Education, Science and Training (DEST), labour hire companies, state training agencies, RTOs, and GTOs to identify ways to facilitate a greater role in skills development, particularly in increasing the take up of New Apprenticeships.⁶⁸ The National Industry Skills Initiative suggested that ANTA should form this Industry Committee. With the new administrative arrangements following the transfer of ANTA responsibilities to DEST, the Committee considers that this activity should continue.⁶⁹
- 4.70 GTA entered into a partnership with ACCI in 2004 to take part in the government's national skills shortage strategy. They have completed a project, which examined ways which GTOs could better assist older workers as well as those returning to work from injury undertake further skills training.⁷⁰
- 4.71 APESMA acknowledge the responsibility that independent contractors have for their own professional development. They suggest that the Commonwealth should fund scholarships and competitive funding schemes for their members to promote and enable greater access to professional development for independent contractors and labour hire workers.⁷¹
- 4.72 The Committee considers that there needs to be greater emphasis on the importance of skills development in labour hire arrangements. Pursuing initiatives in the labour hire industry through the National Skills Shortage Strategy would be an appropriate response. RCSA may be able to provide guidance and assistance in developing such strategies and should be included in consultations.

67 CFMEU, *Submission No. 5*, Appendix 11: NSW Labour Hire Task Force Report, p. 32 citing Manpower submission pp. 4-5 to NSW Labour Hire Task Force Inquiry.

68 Australian Government, *National Industry Skills Initiative, Engineering Industry, Industry Skills Action Plan*, p. 6, accessed 27 June 2005, <www.getatrade.gov.au/documents/action_plans/engineering_action_plan.pdf>.

69 From 1 July 2005, the responsibilities and functions of ANTA were transferred to DEST; accessed 14 July 2005, <www.dest.gov.au/sectors/training_skills/policy_issues_reviews/key_issues/nts/#Background>.

70 Mr J. Barron, GTA, *Transcript of Evidence*, 12 May 2005, p. 23.

71 APESMA, *Submission No. 7*, p. 14.

Recommendation 5

The Committee recommends that the Australian Government Departments of Employment and Workplace Relations, and Education Science and Training, through the National Skills Shortage Strategy, develop a program of skills development and a best practice guide targeted at the labour hire industry. The development of this program and guide should be in consultation with the Recruitment and Consulting Services Association as the peak industry body, labour hire agencies and relevant employee bodies.

- 4.73 Australian Independent Contractors Agency further suggests that the whole area of vocational education needs to be re-examined for independent contractors as the apprenticeship system requires the establishment of an employment relationship.⁷²
- 4.74 Some professional associations already provide access to accredited training and development pathways for members. The Committee is encouraged by these developments.

Occupational health and safety

- 4.75 Significant concerns were reported to the Committee regarding the increased risk of injury for labour hire workers and independent contractors. One major issue was the dispersal or unclear responsibility for OHS matters. Inadequacies in legislation and pursuing compliance are additional problems identified.

Background

- 4.76 Australia's labour force consists of ten million workers.⁷³ There are at least 2 000 work-related deaths each year. Each year, about five per cent of workers will suffer a work-related injury or disease. In 2002–2003, there were around 134 000 compensated injury and disease claims resulting in one week or more lost from work.⁷⁴

72 AICA, *Submission No. 64*, p. 18.

73 ABS, *Labour Force*, Cat. No. 6202.0, June 2005, p. 3.

74 NOHSC, *Annual Report 2003–2004*, p. 8.

- 4.77 While data from the National Occupational Health and Safety Commission (NOHSC) shows there have been reductions in the incidence of work-related death and injury or disease claims over the recent years, significant numbers of Australians are still killed and injured every year at work. In 2001, Australia's fatality incidence rate was 2.6 employees per 100 000 workers. The economic cost of poor OHS performance in Australia was reported in 2000 to be about \$31 billion a year.⁷⁵
- 4.78 Some evidence to the Committee states that the workplace health and safety of labour hire workers is not as good as that of direct employees. Submissions referred to recent reports to support these assertions including the NSW Labour Hire Taskforce Report and the report *Changing Work and OHS: The Challenge of Labour Hire Employment*.⁷⁶
- 4.79 When analysing workers' compensation claims in Victoria, it was found that labour hire workers are more likely to be injured than direct employees, and their injuries are often more severe. This conclusion is consistent with other Australian and international evidence.⁷⁷
- 4.80 There are various reasons, such as being less experienced on the work site and/or being a younger worker, that may increase the prevalence of labour hire workers' injuries. Direct hire employees may be given access to more training and be given a transition period into the job to better learn the processes and avoid potential hazards.⁷⁸ Labour hire workers are sometimes contracted to perform work in industries that are more hazardous or at more precarious times of the production process.⁷⁹

75 NOHSC, 2004, *Fatal Occupational Injuries - How does Australia compare internationally?*, Canberra, pp. 6, 15.

76 Qld Government, *Submission No. 66*, p. 27, citing Underhill, E, 2003, *Changing Work and OHS: The Challenge of Labour Hire Employment*; Qld Council of Unions, *Submission No. 41*, p. 8; Parliament of Victoria, Economic Development Committee, 2004, *Labour Hire Employment in Victoria*, Interim Report, December 2004, p. 37.

77 Qld Government, *Submission No. 66*, p. 27, citing Underhill, E, 2003, *Changing Work and OHS: The Challenge of Labour Hire Employment* Vic. Government, *Labour Hire Employment in Victoria*, Interim Report, December 2004, pp. 37-38.

78 Qld Government, *Submission No. 66*, pp. 27-28; AMWU, *Submission No. 46*, p. 44; Qld Council of Unions, *Submission No. 41*, p. 8;

79 CFMEU - Mining and Energy Division, Mr K. Endacott, *Transcript of Evidence*, 30 March 2005, p. 47.

- 4.81 It was reported that contractors also face a significantly higher risk of serious injury and death:⁸⁰

A growing reliance on sub-contracted supplier networks, including labour hire, generates complex inter-organisational arrangements that can be abstruse, opaque and expensive to regulate. It creates delay in following up on accidents.⁸¹

- 4.82 Higher rates of labour hire injuries have also been identified due to the higher proportion of younger workers.⁸² One of the roles of GTOs is to ensure that the apprentice is fully versed in OHS and understands their responsibilities. They receive induction training by the GTO and this responsibility comes under the code for New Apprenticeships Centres – a Commonwealth code of the rights and responsibilities of the employers and the apprentices and trainees.⁸³

- 4.83 However, other evidence to the Committee does not support concerns raised about labour hire arrangements necessarily leading to more injuries. RCSA states that labour hire providers, especially the larger organisations, work with clients to ensure compliance with occupational health and safety legislation and that their workers are placed in a safe and secure environment.⁸⁴

Legislation and regulations

- 4.84 One of the issues facing Australian OHS regulations is the changing composition of the Australian labour market. As more flexible working arrangements have emerged, firms have increasingly used subcontracting, outsourcing (labour hire workers), franchising, home-based work and downsizing, leading to more casual, part-time and contingent forms of work, self-employment and small business. However this flexibility is currently not reflected in the myriad of OHS legislation and regulations in Australia.
- 4.85 The Australian, state and territory governments each administer their own OHS Acts and workers' compensation schemes. There are ten principal OHS statutes across Australia, one in each state and

80 CFMEU, *Submission No. 5*, Appendix 13: ACTU Submission to NSW Labour Hire Task Force, p. 25.

81 CFMEU, *Submission No. 5*, Appendix 11: NSW Labour Hire Task Force Report, p. 57 citing WorkCover NSW submission p. 3 to NSW Labour Hire Task Force Inquiry.

82 Qld Government, *Submission No. 66*, p. 5.

83 Mr J. Priday, GTA, *Transcript of Evidence*, 12 May 2005, p. 21.

84 Small Business Development Corporation, *Submission No. 58*, p. 8; RCSA, *Submission No. 67*, p. 12; RCSA, *Submission No. 67.1*, pp. 9-11.

territory, and two of the Australian Government (one relating to Australian Government employees and the other relating to seafarers). See Appendix F for a list of each state and territories OHS and Workers' Compensation regulatory bodies.⁸⁵

- 4.86 The principal objective of OHS regulation is to prevent injury and illness. All jurisdictions have specific OHS legislation which establishes a general duty of care that is imposed on employers, the self employed, persons in control of premises where work is undertaken, occupiers, suppliers and employees.
- 4.87 All OHS Acts provide regulations to cover such matters as working in confined spaces, plant design and use, electrical hazards, manual handling, risk management, consultation and training. Failure to comply with regulations is a breach of the relevant OHS Act and may result in penalties being applied.
- 4.88 One of the issues identified in the Productivity Commission Report, titled *National Workers' Compensation and Occupational Health and Safety Frameworks* is that across jurisdictions, OHS legislation uses different definitions for an 'employee'.⁸⁶
- 4.89 While the definitions do not generally appear to undermine the nature of the duties under OHS legislation, there are significant variations between jurisdictions and this could result in different interpretations of employer responsibilities. This may impact on information collected on work-related injury and disease.⁸⁷
- 4.90 The problem of defining a worker has not been seen as a fundamental issue for OHS legislation as it is in other areas. Recent reviews have, nonetheless, suggested that definitional changes could be considered. For example, in an issues paper for the review of the Queensland *Workplace Health and Safety Act 1995*, the Department of Industrial Relations (2001) noted:

One possible solution to avoid the complexity of 'deeming' and any associated issues is to abolish the concept of imposing an obligation on an 'employer' and substitute

85 Productivity Commission 2004, *National Workers' Compensation and Occupational Health and Safety Frameworks*, Report No. 27, Canberra, pp. 50-51.

86 Productivity Commission 2004, *National Workers' Compensation and Occupational Health and Safety Frameworks*, Report No. 27, Canberra, pp. 63-64.

87 Productivity Commission 2004, *National Workers' Compensation and Occupational Health and Safety Frameworks*, Report No. 27, Canberra, pp. 63-65; Courier, Taxi & Truck Association, *Submission No. 50*, pp. 9-10.

instead the notion of placing an obligation on all 'persons' to ensure the health and safety of the person's workers [more broadly defined] ...⁸⁸

- 4.91 However, it is not certain that deeming would alleviate issues of definition or responsibility. Instead, deeming may create confusion about the duty of care, its scope and to whom it is owed. Deeming laws may allow particular types of persons to be overlooked in OHS legislation. For example, the identification of the 'employer' as being in control of the worksite means that others who are not employers, but who exercise some form of control over a worksite, may escape their duty of care.⁸⁹
- 4.92 Evidence suggests that current OHS administration is not necessarily keeping pace with changing working arrangements. The National Research Centre for OHS Regulation (NRCOHSR) concluded that there is a need for OHS regulators to pay greater attention to work relationships outside the traditional employment relationship.⁹⁰ The Small Business Development Corporation also supports these findings.
- 4.93 The NRCOHSR recommended that regulators need to develop standards, guidance material, inspection programs and enforcement strategies that accommodate subcontracting, labour hire, home-based work and franchise arrangements.⁹¹

National OHS Strategy

- 4.94 On 24 May 2002, the Workplace Relations Ministers' Council (WRMC) endorsed the release of *The National OHS Strategy 2002–2012*. The Strategy was agreed to by all Australian governments, as well as ACCI and ACTU. The Strategy aims to work cooperatively over a ten-year period on national priorities for improving OHS, and to achieve a set number of national targets for reducing the incidence of workplace deaths and injuries.⁹²

88 Productivity Commission 2004, *National Workers' Compensation and Occupational Health and Safety Frameworks*, Report No. 27, Canberra, pp. 62-63.

89 Small Business Development Corporation, *Submission No. 58*, p. 7.

90 Small Business Development Corporation, *Submission No. 58*, pp. 7-8.

91 Small Business Development Corporation, *Submission No. 58*, p. 8.

92 National Occupational Health and Safety Commission, *National OHS Strategy 2002 – 2012*, accessed 7 July 2005, <www.nohsc.gov.au/nationalstrategy/Strategy2sep.pdf>.

Responsibility

- 4.95 It was reported that labour hire agencies and host businesses have a joint responsibility under OHS legislation to ensure the safety and health of labour hire workers. Some organisations also stated that OHS Acts may not offer clear guidance on how responsibilities are split between the labour hire agency and the host business.⁹³
- 4.96 Evidence to the inquiry indicated that there appears to be confusion about responsibilities between the labour hire agency and the host business. This uncertainty at times has meant that either party may not acknowledge OHS responsibilities, as it could be assumed it is the other party's responsibility.⁹⁴
- 4.97 In Queensland, GTOs are provided with an additional layer of protection. The Queensland OHS legislation prescribes that should there be an accident, it is ultimately the host employer who is liable for the incident. The host employer presumably bears responsibility in terms of any punitive arrangements that are built into the legislation. In other jurisdictions, where there is no statutory definition, there is a shared responsibility.⁹⁵
- 4.98 The Queensland OHS legislation 'public safety' obligation extends the applicability of obligations on host businesses to labour hire workers.⁹⁶ Section 29A of the Queensland *Workplace Health and Safety Act 1995* describes that:
- As well as any obligation the person may have under section 28 to ensure the person's own employees, if any, are not exposed to risks to their health and safety, the person also has, under this section, an obligation to ensure the labour hire employees are not exposed to risks to their health and safety while they are performing the work activity.⁹⁷
- 4.99 ACCI reiterates the view that all the parties should have a duty of care under OHS legislation – both the business that has contracted the labour hire agency to provide the worker, as well as the labour hire agency itself. Each bears a separate duty of care.

93 AICA, *Submission No. 64*, pp. 13-15.

94 AMWU, *Submission No. 46*, p. 38; Mr D. Cameron, AMWU, *Transcript of Evidence*, 31 March 2005, p. 80.

95 Mr J. Priday, GTA, *Transcript of Evidence*, 12 May 2005, pp. 18-20.

96 Queensland Government, *Submission No. 66*, p. 26.

97 Queensland *Workplace Health and Safety Act 1995*, section 29A; example of obligation under this section, p. 25.

Occupational health and safety needs to be taken seriously by all persons who provide labour services or who engage for the provision of labour services. The rights and obligations, though, need to be independently held – that is, the employer needs to have their obligations; employees, their obligations; contractors, their obligations; and so on for manufacturers, designers and the like, right through the supply chain. It should not be available for one party to transfer their obligations to another party.⁹⁸

- 4.100 The host business under general OHS provisions bears responsibility for the health and safety of labour hire workers on sites controlled by them. They must ensure that persons outside their direct employment are not exposed to risks to their health or safety.⁹⁹

The key in applying OH&S principles to this scenario is to make sure that the duty of care is based on what is reasonable and what is practical in each of those circumstances. Obviously, whilst it is not the direct employer of the individual, the business will still have a duty of care to ensure that the individual employee of the labour hire company working in their premises is working in a safe environment and is not exposed to unsafe systems of work and the like. The business, in practice, has more control over those issues – and it is those issues of control which will affect whether it meets its duty of care.¹⁰⁰

- 4.101 The labour hire agency, which supplies the labour of a worker to a client business, is considered that worker's employer, except where there is a direct contract between the worker and the client.¹⁰¹ Independent Contractors Australia states that independent contractors have clear OHS responsibilities under all relevant state OHS legislation.¹⁰²

- 4.102 Organisations need not only to acknowledge their duty of care, but they need to ensure that they carry out their responsibilities under a duty of care. Duties imposed on a labour hire agency may include:

- ensuring their compliance with state OHS legislation;
- conducting hazard identification on the work site;

98 Mr P. Anderson, ACCI, *Transcript of Evidence*, 26 April 2005, p. 14.

99 CFMEU, *Submission No. 5*, Appendix 11: NSW Labour Hire Task Force Report, p. 56.

100 Mr P. Anderson, ACCI, *Transcript of Evidence*, 26 April 2005, p. 14.

101 Mr P. Anderson, ACCI, *Transcript of Evidence*, 26 April 2005, pp. 14-15.

102 ICA, *Submission No. 20*, p. 14.

- informing the labour hire workers of these hazards;
 - not supplying, or withdrawing workers from sites that do not comply with or have changed their procedures until they can be reassessed;
 - ensuring that the worker is provided with appropriate training to undertake the duties of the job; and
 - ensuring the work is properly supervised and that inspections of the workplace have been carried out.¹⁰³
- 4.103 To fulfil the requirements of providing information to the worker about their responsibilities and safety requirements, most labour hire agencies provide induction training. Induction training usually involves a safety induction and a company induction including the workers and the company's responsibilities. The company induction provides the worker with additional information relevant to their placement, including privacy rights, workplace bullying as well as information on their conditions and entitlements.¹⁰⁴ However, evidence suggests that this does not always occur.¹⁰⁵
- 4.104 It is important for a labour hire agency to ensure that workers receive all relevant safety information for the sites they work on, as some labour hire workers may attend multiple sites with multiple practices and hazards.¹⁰⁶
- 4.105 One of the recommendations in the Parliament of Victoria interim report of *Labour Hire Employment in Victoria* was that an industry-wide registration system is established in Victoria aimed specifically at improving the OHS performance of labour hire companies. The report explained that the key function of the registration scheme must be the development of minimum labour hire standards and procedures, which it says could be expressed in a code of practice.¹⁰⁷
- 4.106 Some labour hire agencies have made considerable efforts to be recognised as being OHS responsible. The RCSA in their survey cite examples of labour hire agencies not allowing their workers to attend a host business where safety issues have been identified and not

103 CFMEU, *Submission No. 5*, Appendix 13: ACTU Submission to NSW Labour Hire Task Force, p. 27.

104 Company Solutions (Australia) Pty Ltd, *Submission No. 28*, p. 3.

105 Mr J. Webster, *Transcript of Evidence*, 20 May 2005, p. 55; AMWU, *Submission No. 46*, p. 40.

106 CFMEU – Mining and Energy Division, Northern District Branch, *Submission No. 18*, p. 6.

107 Vic. Government, *Submission No. 71*, p. 5.

addressed.¹⁰⁸ There is a promotional advantage with at least one organisation awarded OHS accreditation under AS/NZS 4801, which is the Australian and New Zealand Safety Standard.¹⁰⁹

- 4.107 The Committee emphasises that while some labour hire agencies have experienced excellent health and safety results, overall the perception of the industry record is generally reported as poor. One key to managing OHS risk is training. The other is enforcing and ensuring compliance with regulations.

Recommendation 6

The Committee recommends that the Australian Government, through the Department of Employment and Workplace Relations, the Australian Safety and Compensation Commission and the Workplace Relations Ministers' Council, improve occupational health and safety in the labour hire industry through the following national initiatives:

- **improving the collation of data on injury rates for labour hire workers compared to direct employees;**
- **requiring appropriate occupational health and safety training for workers by labour hire agencies and host businesses; and**
- **monitoring and enforcing compliance with occupational health and safety regulation.**

Recommendation 7

The Committee recommends that the Australian Government, through the Department of Employment and Workplace Relations, the Australian Safety and Compensation Commission and the Workplace Relations Ministers' Council, develop initiatives to achieve greater understanding and more clearly delineate responsibilities among labour hire agencies and host businesses in relation to occupational health and safety.

- 4.108 The pressure on independent contractors to meet production targets is considered to affect safety performance. Examples in the transport,

108 RCSA, *Submission No. 67.1*, pp. 9-10.

109 SKILLED Group, *Submission No. 52*, p. 9.

building and construction, clothing outworkers, and mining industries suggest that work targets and payment structures conflict with the ability to adhere to safety requirements.¹¹⁰

4.109 It has been argued that the competitive pressures of contracting results in poorer occupational health and safety outcomes. This is principally because:

- contracting is often a ‘payment by results’ system which is based on the amount of work, not the time required, thereby encouraging contractors to minimise time in order to maximise productivity and profit;
- contractors are, or work for, small businesses, which are less likely to have health and safety resources, knowledge or information; and
- contractors often engage in horizontal and vertical contract relationships in which responsibilities, tasks, levels of supervision and communication processes are more inclined to become disorganised or confused.¹¹¹

Recommendation 8

The Committee recommends that the Australian Government, through the Department of Employment and Workplace Relations, the Australian Safety and Compensation Commission and the Workplace Relations Ministers’ Council, improve occupational health and safety for independent contractors through the following national initiatives:

- **improving the collation of data on injury rates for independent contractors compared to direct employees**
- **requiring appropriate occupational health and safety training for independent contractors; and**
- **monitoring and enforcing compliance with occupational health and safety regulation.**

110 TWU – Vic./Tas. Branch, *Submission No. 56*, pp. 13-17; TWU – NSW, *Submission No. 40*, p. 19, para. 47; NSW RTA, *Submission No. 75*, pp. 6-7; Vic. Government, *Submission No. 71*, p. 7; Qld Government, *Submission No. 66*, pp. 23-24.

111 Qld Government, *Submission No. 66*, pp. 23-24.

Recommendation 9

The Committee recommends that the Australian Government, through the Department of Employment and Workplace Relations, the Australian Safety and Compensation Commission and the Workplace Relations Ministers' Council:

- **examine how incentives for independent contractors may discourage compliance with occupational health and safety requirements; and**
- **develop initiatives to ensure greater understanding among independent contractors and host businesses of respective responsibilities in relation to occupational health and safety.**

Workers' compensation

- 4.110 OHS legislative provisions and workers' compensation regulations are not uniform across Australia. Jurisdictions base their definition of the work relationship that should be covered by workers' compensation schemes work on the common law definition of employee. However, in the state and territory workers' compensation legislation, each jurisdiction supplements the common law definition through the use of a unique set of inclusions and exclusions.¹¹² (Deeming provisions are discussed later in this and the next chapter).
- 4.111 As an example, the Queensland *Workplace Health and Safety Act 1995* considers a labour hire organisation that hires a worker to a client company to be the legal employer of the worker. While the labour hire agency is viewed as the legal employer, the client has equal responsibility for the worker when the worker is working for them.¹¹³
- 4.112 In addition, the definition of worker in the Queensland *Workers' Compensation and Rehabilitation Act 2003* was amended to introduce a 'results test' which determines who is a worker and who is an employer. The 'results test' closely aligns with the Commonwealth's PSI and was introduced to ensure consistency in the determinations made by the ATO and WorkCover Queensland as to who is and who is not a worker.¹¹⁴

112 Insurance Council of Australia, *Submission No. 11*, p. 1.

113 Ms D. Ralston, Qld Council of Unions, *Transcript of Evidence*, 12 May 2005, p. 10.

114 Qld Government, *Submission No. 66*, pp. 5-6.

- 4.113 In circumstances where labour hire workers are deemed to be the employees of the labour hire agency that employs them, the labour hire agency would be entirely responsible for workers' compensation premiums, as well as carrying a legal responsibility (shared with the host employer) to provide a safe workplace.
- 4.114 One issue raised was that the labour hire agency often has little leverage to influence the safety performance of host businesses. An additional effect on premiums is whether the business is willing or able to provide other duties to facilitate the early return to work of workers injured whilst working on their premises.¹¹⁵
- 4.115 Evidence to the Committee suggested that one of the reasons employers use labour hire or contracting arrangements is in part to reduce or avoid their obligation to provide workers' compensation coverage to employees. Currently in some states and territories, it was reported that workers' compensation benefits for workers employed through sub-contracting or labour hire arrangements are reduced. Some contract workers are effectively denied workers' compensation coverage entirely.¹¹⁶
- 4.116 Ensuring a clear definition, applicable across all state and territory jurisdictions, would assist clarify the workplace safety arrangements of independent contract or labour hire workers.¹¹⁷ The Australian Lawyers Alliance supports the adoption of a nationally consistent approach to help ensure that all workers are protected in some way.¹¹⁸

Workers' compensation responsibilities

- 4.117 Broadly, there are two forms of legal protection available to workers who suffer work related injury while employed as a contractor, or in a labour hire arrangement: workers' compensation and public liability coverage.
- 4.118 The definitions of employer and employee hold great significance to businesses that use independent contractor and labour hire arrangements. The identification of the employer is used to determine the level of premiums to be paid and, where this is unclear, could lead to underpayment of premiums. This has the potential to disadvantage certain industries or businesses by the payment of higher premiums.

115 Insurance Council of Australia, *Submission No. 11*, p. 3

116 Australian Lawyers Alliance, *Submission No. 55*, p. 3.

117 Insurance Council of Australia, *Submission No. 11*, p. 3.

118 Australian Lawyers Alliance, *Submission No. 55*, p. 3.

Additionally this may lead to the avoidance of responsibility for rehabilitation and return to work.

- 4.119 In addition to statutory benefits, some states also allow workers to sue negligent employers at common law. The schemes all provide different levels of statutory benefits and have different rules allowing access to common law, some allowing no common law access at all. The schemes with common law all have mechanisms that control access and limit total damages recoverable.¹¹⁹
- 4.120 The Insurance Council of Australia identified concerns regarding cost shifting from workers' compensation to liability insurance. They stated that when a claim is made for an injured person, that person is for all relevant purposes considered an employee of the labour hire company, and hence covered under workers' compensation. However, the workers' compensation insurer seeks to claim from the liability insurer who covers the host company. It is very difficult for the liability insurer to deny a claim when the labour hire employee is on the host company's premises and under that organisation's supervision.¹²⁰
- 4.121 One solution offered to the Committee would be to alter workers' compensation legislation to allow for host businesses to be able to add labour hire workers or contract workers to their workers' compensation cover and pay a premium accordingly.¹²¹
- 4.122 Under Western Australia's "no fault" workers' compensation scheme, employers are protected from claims for injuries incurred by workers in the workplace. As the workers' compensation legislation extends the definition of 'worker' to include independent contractors and labour hire workers, public liability claims for injuries can only be brought against a company if the worker can prove negligence by the employer. Consequently it was stated that public liability claims by labour hire workers are not an issue in Western Australia.¹²²
- 4.123 The Small Business Development Corporation (SBDC) believe that the WA workers' compensation system offers certainty for independent contractors and labour hire workers. The system is generally clear in identifying who is responsible for workers' compensation if a contractor is working on site or through a labour hire company. SBDC

119 Australian Lawyers Alliance, *Submission No. 55*, pp. 3-4.

120 Insurance Council of Australia, *Submission No. 11*, p. 5.

121 Insurance Council of Australia, *Submission No. 11*, p. 6.

122 Small Business Development Corporation, *Submission No. 58*, p. 11.

- recommends that these principles should be common through all Australian jurisdictions.¹²³
- 4.124 The RCSA expressed concern at not being able to access data from workers' compensation authorities to enable greater examination of industry, employer and employment type trends.¹²⁴
- 4.125 Cross-border issues regarding workers' compensation were raised with the Committee. These issues were identified in the former House of Representatives Standing Committee on Employment and Workplace Relations report *Back on the job: Report on the inquiry into aspects of Australian workers' compensation schemes*.¹²⁵
- 4.126 The Australian Government responded positively to most of the recommendations in the report and identified that there is merit in considering a national standard that covers the widest possible number of workers.¹²⁶
- 4.127 Submissions to this inquiry have also recommended that mutual recognition of existing workers' compensation be applied throughout Australia. The NFF called on state governments to address workers' compensation mutual recognition and for NOHSC, and the new Australian Safety and Compensation Council (ASCC) to examine cross-border workers' compensation arrangements to ensure greater consistency.¹²⁷
- 4.128 The Productivity Commission, in their report *National Workers' Compensation and Occupational Health and Safety Frameworks*, identified a number of areas where national consistency could be improved. The Australian Government, in its response to the Productivity Commission report, announced the establishment of ASCC on 18 May 2004.¹²⁸

123 Small Business Development Corporation, *Submission No. 58*, p. 11.

124 RCSA, *Submission No. 67.1*, pp. 7-9.

125 Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Employment and Workplace Relations, *Back on the job: Report on the inquiry into aspects of Australian workers' compensation schemes*, June 2003, Canberra.

126 Australian Government, *Response of the Australian Government to the Report of the House of Representatives Standing Committee on Employment and Workplace Relations*, Tabled 17 November 2004, pp. 2, 7.

127 Mrs D. Wawn, NFF, *Transcript of Evidence*, 9 May 2005, p. 10.

128 Productivity Commission, *National Workers' Compensation and Occupational Health and Safety Frameworks*, Report No. 27, 2004, Canberra; Australian Government, *Response of the Australian Government to the Productivity Commission Inquiry Report No. 27*, 16 March 2004, *National Workers' Compensation and Occupational Health and Safety Frameworks*, <www.treasurer.gov.au/tsr/content/publications/workers_compensation_response.asp>;

- 4.129 ASCC would have representatives from each State and Territory government, as well as the Commonwealth Government, along with employer and employee representatives. The ASCC will develop policy advice on workers' compensation and OHS programs for the WRMC.¹²⁹
- 4.130 The ASCC is also charged with coordinating national efforts to prevent workplace death, injury and disease and to improve workers' compensation arrangements, and rehabilitation and return to work of injured employees.¹³⁰
- 4.131 The Committee notes that the issues relating to a common definition of worker and the cross border arrangements that have been identified to this inquiry are expected to be considered by the ASCC and the WRMC. The Committee encourages further work on these issues to address business and worker concerns.
- 4.132 The Committee notes that addressing these issues will require improved data collection to identify specific labour hire and contractor trends in workers' compensation.

accessed 21 June 2005; The Hon Kevin Andrews MP Minister For Employment and Workplace Relations and The Hon Peter Costello MP Treasurer, Joint Media Release, *Response To Productivity Commission Report On Workers' Compensation And Occupational Health And Safety*, 24 June 2004. The Committee notes that, as of 4 August 2005, the Australian Safety Compensation Council has yet to be established.

- 129 Productivity Commission, *National Workers' Compensation and Occupational Health and Safety Frameworks*, Report No. 27, 2004, Canberra; Australian Government, *Response of the Australian Government to the Productivity Commission Inquiry Report No. 27*, 16 March 2004, National Workers' Compensation and Occupational Health and Safety Frameworks, <www.treasurer.gov.au/tsr/content/publications/workers_compensation_response.asp>, accessed 21 June 2005.
- 130 Productivity Commission, *National Workers' Compensation and Occupational Health and Safety Frameworks*, Report No. 27, 2004, Canberra; Australian Government, *Response of the Australian Government to the Productivity Commission Inquiry Report No. 27*, 16 March 2004, National Workers' Compensation and Occupational Health and Safety Frameworks, <www.treasurer.gov.au/tsr/content/publications/workers_compensation_response.asp>, accessed 21 June 2005.

Recommendation 10

The Committee recommends that the Australian Government Department of Employment and Workplace Relations, through the Australian Safety and Compensation Council review workers' compensation schemes to assess and improve the consistency of employment services categories measuring the injury rates of labour hire workers and independent contractors compared to direct employees.

Labour hire – regulation

- 4.133 Some employers, unions, committees and governments have generally supported a national system of registration for the labour hire industry to address OHS, training and meeting employer obligations.¹³¹ However, other evidence indicated that there is not a need for the introduction of specific industry regulations, nor that the additional costs associated with extra reporting requirements would lead to specific improvements.¹³²
- 4.134 The labour hire industry is currently voluntarily self-regulated by membership of the RCSA. The RCSA has developed a code of professional practice which has been approved by the ACCC. The RCSA disciplines its members through their Regional Ethics Committee, which may impose sanctions on its members. Sanctions may include fines, suspensions or reprimands. The Regional Ethics Committee may also direct the member to attend education courses and pay all or part of the costs incurred by the RCSA for carrying out the disciplinary action.¹³³

131 Skilled Group, *Submission No. 52*, p. 12; AMWU, Mr D. Cameron, *Transcript of Evidence*, 31 March 2005, pp. 68-69; Unions NSW, Mr C. Christodoulou, *Transcript of Evidence*, 30 March 2005, p. 32; ACTU, *Submission No. 60*, pp. 28-29; Qld Government, *Submission No. 66*, p. 43 refers to a code of practice; Victorian Parliament, Economic Development Committee, 2004, *Inquiry into labour hire employment in Victoria*, Interim Report, p. 78.

132 RCSA, *Submission No. 67.1*, pp. 2-7 for an overview of RCSA members complying with industrial requirements; Mr P. Bosa, Labour Force Australia, *Transcript of Evidence*, 26 April 2005, p. 66; Mr. P. Wieske, Personnel Contracting, *Transcript of Evidence*, 20 May 2005, p. 35; DEWR-Toll Transport, *Exhibit No. 79*, p. 9; DEWR – Victorian Automobile Chamber of Commerce, *Exhibit No. 88*, p. 26.

133 Mr A. C. Cameron, RCSA, *Transcript of Evidence*, 26 April 2005, p. 21; RCSA Disciplinary & Dispute Resolution Procedure, accessed 28 July 2005, <www.rcsa.com.au/documents/

- 4.135 However, only members of the RCSA are required to follow this code of practice. RCSA have not supported the introduction of a licensing and regulation system for labour hire agencies at this stage.¹³⁴
- 4.136 RCSA state that there is little evidence of systematic non-compliance in the industrial relations jurisdiction. While they recognise the need for improved understanding in the areas of discrimination and unfair dismissal, they submit that OHS legislation needs to appropriately recognise the level of control exercised by the parties in the current joint obligations. In their research, non-members of RCSA or the client businesses tend to have lower standards in meeting conditions or compliance requirements.¹³⁵
- 4.137 Group training schemes, as one component of labour hire, deliver a valuable service in promoting skills development and trade training. National group training standards have been developed for apprentice on-hire. GTA advised that not all states require GTOs to comply with those national standards, however GTA advocate that this should occur for both not-for-profit and for-profit enterprises.¹³⁶
- 4.138 The Victorian Automobile Chamber of Commerce (VACC) is concerned with additional burdens on group apprenticeship schemes. They note that they are required to comply with state regulation and also voluntarily comply with the national standards. VACC state that additional regulation adds to the cost of compliance and restricts the capacity to provide additional training services.¹³⁷
- 4.139 Evidence to the inquiry recommended the introduction of a licensing scheme at the Commonwealth level, to ensure that all labour hire operators are subject to the same regulatory framework, and to minimise unfair competition because of the substandard provision of wages, conditions, training and other matters. SKILLED Group supported a licensing scheme to ensure improved performance and an improved perception of the operation of labour hire agencies.¹³⁸

cfpp/DisciplinaryDisputeResolutionProcedureSummary.pdf>. Code of practice and code of conduct are used interchangeably in the report.

134 Mrs J. Hunt, Manpower Services, *Transcript of Evidence*, 31 March 2005, p. 23; Mr A. C. Cameron, RCSA, *Transcript of Evidence*, 26 April 2005, p. 21.

135 RCSA, *Submission No. 67.1*, pp. 2-13.

136 Mr J. Barron, Group Training Australia, Correspondence, 1 June 2005, pp. 1-2.

137 DEWR-Victorian Automobile Chamber of Commerce, *Exhibit No. 88*, p. 11.

138 ACTU, *Submission No. 60*, p. 28; SKILLED Group, *Submission No. 52*, pp. 9-12; DEWR-Rowley Patrick, *Exhibit No. 66*, p. 9.

- 4.140 A licensing scheme could include requirements for initial accreditation, subsequent regular reporting, professional standards, referral of matters to appropriate compliance authorities and penalties for non-compliance with licence conditions.¹³⁹ State inquiries such as in Victoria and NSW, have advocated a labour hire registration scheme aimed at improving OHS. The Victorian Scheme proposed a focus on risk assessments, workplace induction, provision of personal protective equipment and OHS training.¹⁴⁰
- 4.141 A labour hire licensing system could also be used in a capacity to pass on relevant information to appropriate state or federal compliance authorities about OHS, workers' compensation, superannuation, anti-discrimination, wages and conditions or other obligations.¹⁴¹
- 4.142 DEWR commented that responses to their Discussion Paper indicated there was some support to implement a registration system for labour hire agencies, and for the registration system to have an educative function, as well as a code of practice including reference to safety standards.¹⁴²
- 4.143 In some Australian jurisdictions, employment agents are required to be licensed by the state or territories employment agents act.¹⁴³ Employment agents' acts generally cover recruitment and job placement agencies. Some states and territories already have a code of practice under their relevant employment agents acts. Labour hire agencies, however, do not appear to fit the definition of these Acts unless they also carry out recruitment service operations.¹⁴⁴
- 4.144 In other responses to DEWR's Discussion Paper, it was suggested that labour hire definitions should be restricted to the commercial arrangement between two companies, where a labour hire agency provides a worker to perform duties for the host business.

139 ACTU, *Submission No. 60*, p. 31.

140 Parliament of Victoria, Economic Development Committee, 2004, *Inquiry into labour hire employment in Victoria*, Interim Report, pp. xiii-xiv; CFMEU, *Submission No. 5*, Appendix 11: NSW Labour Hire Task Force Report, p. 9.

141 Mr G. Hargrave, *Transcript of Evidence*, 27 April 2005, p. 14; Mr D. Cameron, *Transcript of Evidence*, 31 March 2005, p. 68; Mr C. Christodoulou, *Transcript of Evidence*, 30 March 2005, p. 32; Ms S. Burrow, *Transcript of Evidence*, 26 April 2005, pp. 40-42; ACTU, *Submission No. 60*, p. 29.

142 DEWR, *Exhibit No. 25*, pp. 4, 34 referring to other inquiries, Ms C. Waterhouse, DEWR, *Transcript of Evidence*, 16 June 2005, p. 31.

143 Qld - *Private Employment Agents Act 2005*; WA - *Employment Agents Act 1976*; SA- *Employment Agents Registration Act 1993*; ACT - *Agents Act 2003*.

144 ACT Government, *Submission No. 34*, p. 3.

It should not be taken to include employment agencies or recruitment consultants as those terms [are] generally understood.¹⁴⁵

Code of practice

- 4.145 ACTU state that professional standards should be enforced by a code of practice. A labour hire agency code of practice should be developed in association with unions or professional associations and adopted by labour hire operators, peak employer groups and governments.¹⁴⁶
- 4.146 ACCC consider that a voluntary industry code of conduct is more flexible than government legislation and can be amended more efficiently in response to industry changes. The code acts as a quality control within a particular industry and would help ensure the consistency and quality of standards across the labour hire industry.¹⁴⁷
- 4.147 As discussed in Chapter 3, the RCSA has had a code of practice in place for over ten years. ACCC approved the code in 2003. The code of conduct applies to all RCSA members, but is not enforceable on non-members.
- 4.148 RCSA's 'Code for Professional Practice' commits association members to a wide range of ethical, professional and operational standards and behaviours. Specific principles in the code address:
- confidentiality and privacy of employee and client information;
 - honest dealings with employees and clients;
 - truth in advertising;
 - proper disclosure of fees;
 - proper respect for work relationships with employees and clients;
 - respect for the law, including employment law;
 - respect for OHS, including risk minimisation and scope for actions by employees; and
 - attempts to provide employees with certainty and clarity in terms of their engagement.¹⁴⁸

145 DEWR-Rio Tinto, *Exhibit No. 62*, p. 7.

146 ACTU, *Submission No. 60*, pp. 30-31; DEWR-Rowley Patrick, *Exhibit No. 66*, p. 9.

147 ACCC, *Guidelines for developing effective voluntary industry codes of conduct*, February 2005, p. 3, accessed 19 July 2005, <www.accc.gov.au/content/item.phtml?itemId=590196&nodeId=file423617e7b3099&fn=Voluntary+industry+codes_Feb2005.pdf>.

148 ACCI, *Submission No. 25*, pp. 42-43.

4.149 Evidence to the Committee indicated that while there is support for the RCSA code of practice, there has been additional evidence supporting the establishment of an industry-wide national code of practice.¹⁴⁹

In the context of the development of the envisaged Code, we note that it should be a national document that comprehensively and consistently deals with the intricacies of the three-way relationships founding labour hire arrangements. We believe that the national Code should encompass the OH&S responsibilities associated with labour hire arrangements.¹⁵⁰

4.150 ACCC identifies that there are significant benefits in developing and complying with voluntary industry codes of conduct. Some of these benefits include:

- greater transparency of the industry to which signatories to the code belong;
- greater stakeholder or investor confidence in the industry/business;
- ensuring compliance with the [Trade Practices] Act to significantly minimise breaches; and
- a competitive marketing advantage.¹⁵¹

4.151 ACCC have recently introduced a system of endorsing voluntary industry codes of conduct in February 2005. ACCC's *Guidelines for developing effective voluntary industry codes of conduct* are designed to help industries improve voluntary compliance with the *Trade Practices Act 1974*.

4.152 A voluntary industry code of conduct sets out specific standards for an industry in its dealings with members and its customers. Its signatories voluntarily agree to the standards.¹⁵² The content of a code could be developed by input from labour hire companies and other stakeholders. It is essentially the responsibility of the labour hire

149 MBA, *Submission No. 22*, p. 13; ACTU, *Submission No. 60*, pp. 5, 28; Courier, Taxi & Truck Association, *Submission No. 50*, p. 5; Mr S. Ellis, *Submission No. 1*, p. 2; Mrs J. Hunt, *Manpower, Transcript of Evidence*, 31 March 2005, p. 24.

150 MBA, *Submission No. 22*, p. 13.

151 ACCC, *Guidelines for developing effective voluntary industry codes of conduct*, February 2005, p. 3.

152 ACCC, *Guidelines for developing effective voluntary industry codes of conduct*, February 2005, p. 1.

industry to develop solutions and standards appropriate for the industry.¹⁵³

- 4.153 ACCC guidelines state that an effective code should incorporate a strategy that will raise consumers' awareness of the code and its contents, including its complaints handling provisions. In many cases where a code has failed, ACCC explain that it is because employers or industry members are either unaware of the code or fail to follow it in everyday dealings. ACCC state that it is therefore essential that the code contain a provision requiring employees and agents to be instructed in its principles and procedures.¹⁵⁴
- 4.154 If the labour hire industry does not readily accept or comply with a voluntary code of conduct, a mandatory code of conduct could be enforced on the labour hire industry. This could be implemented to ensure that the Trade Practices Act is being adhered to and that the industry is acting in the best interests of its workers and its clients.
- 4.155 An example of a mandatory code of conduct, which ACCC administer, is in the franchising industry. The Franchising Industry Code of Conduct commenced as a voluntary code, but the voluntary system was perceived to be inadequate to address market failures as there was less than total coverage of the franchising sector.¹⁵⁵
- The people who needed to be covered were the ones who did not participate. There was a perception that when "push came to shove" the voluntary scheme lacked teeth.¹⁵⁶
- 4.156 The Committee notes that there were a range of opinions on the need for regulation. A national industry wide voluntary code of practice needs to be developed within a reasonable timeframe that addresses concerns of OHS, skills development, and compliance with employer obligations, for example. Additionally the code should not support any avenue by which labour hire agencies may use artificial contract arrangements to avoid employment responsibilities. It is noted that there is dissent within the Committee on this recommendation.

153 MBA, *Submission No. 22*, p. 13.

154 ACCC, *Guidelines for developing effective voluntary industry codes of conduct*, February 2005, p. 11.

155 Mr S. Ellis, *Submission No. 1*, p. 2.

156 ACCC, Address given by Chairman Professor Allan Fels, *Administering the Franchising Code of Conduct*, 1 September 1998, p. 1; accessed 19 July 2005, <www.accc.gov.au/content/item.phtml?itemId=97070&nodeId=file42116a44ca236&fn=Administering%20the%20Franchising%20Code%20of%20Conduct.pdf>.

Recommendation 11

The Committee recommends that the Australian Government, through the relevant departments and peak industry bodies, establish a voluntary labour hire industry code of practice. The Committee recommends that the voluntary code is established by 2007, and endorsed by the Australian Competition and Consumer Commission.

In summary

- 4.157 This chapter reviewed the debate on the need for clarity and consistency in identifying the difference between independent contractors and employees across a range of legislation. Three approaches were considered: the common law approach, a statutory definition, and adopting aspects of the personal service income definition in taxation law.
- 4.158 The need for greater focus on training and skills development for workers not in direct employment is considered an essential requirement to assist address skill shortages. Evidence suggests that labour hire workers have less access to employer funded training and an increase in the use of labour hire and independent contracting has been a contributing factor in the declining skills of some industries and labour markets.
- 4.159 The trends suggest that labour hire workers and contractors have poorer safety records, therefore additional resources need to be targeted to ensure compliance with safety regulations. However, a lack of reliable data on OHS, workers' compensation and labour hire and contracting arrangements is hampering a definitive view on the comparative health and safety of direct employees compared to more intermittent workers.
- 4.160 To improve OHS compliance and ensure that other employer obligations are being met, the introduction of a voluntary industry wide code of practice for the labour hire industry is recommended.

Commercial arrangements

- 5.1 Some have described independent contracting as a commercial relationship, while others consider it requires industrial or workplace relations regulation. This chapter discusses the operation of deeming provisions where independent contractors have their status altered, to be protected by industrial regulation, as an employee. Further examination of the trade practices and unfair contracts legislation is included to determine the extent of applicability to independent contractors. Avenues of redress where unconscionable conduct is present are also discussed.
- 5.2 Business structures are then discussed to identify the form and incidence of possible sham arrangements or disguised employment. Possible drivers for employers to enter into different working arrangements and pressures for independent contractors to incorporate are reviewed. A summary of tax minimisation strategies is also included.

Deeming

- 5.3 Independent contracting and labour hire arrangements have presented challenges for legislators to determine the most appropriate method to protect workers where in situations of unequal bargaining power. Discussion of this legislation is warranted as a context to consider strategies to ensure consistency of protection for workers across Australia.

- 5.4 Denying the presence of an employment relationship through the use of contracts or other business arrangements were concerns reported to the Committee. Rigid definitions and the ability to circumvent legislative intent through contractual arrangements have prompted legislatures to consider other options. These concerns have prompted some state governments to introduce 'deeming' legislation to ensure protections for certain workers.
- 5.5 Deeming involves the power to declare persons who work under a contract for service, such as independent contractors, to be employees. Deeming provisions are different from common law tests because they are designed to classify as employees groups of workers with service contracts. Common law tests can only be applied to individuals on a case-by-case basis.¹
- 5.6 Queensland and NSW have been the more prominent advocates in introducing deeming legislation. South Australia considered further deeming amendments with the South Australian *Industrial Law Reform (Fair Work Bill) 2004* but these were not supported by the Legislative Council, and hence were not included in the final Act.² Tasmania is currently considering provisions similar to Queensland as announced in a discussion paper released last year.³
- 5.7 In some states, for example Tasmania and Western Australia there is no specific workplace relations deeming legislation. However, there is legislation which pertains to industrial relations and which effectively deems by expanding the definition of employee to include for example outworkers, contract cleaners, labour hire workers and piece workers.⁴ Discussion of other labour legislation which has broader coverage is included later in the chapter.
- 5.8 The WR Act has no deeming provisions, and therefore this applies to Victoria, ACT and the Northern Territory. In Victoria there is improved protection of clothing industry contract outworkers, and specific provision for minors with the *Child Employment Act 2003*.⁵

1 ACCI, *Submission No. 25*, pp. 19-20; NSW Government, *Submission No. 35*, p. 35.

2 South Australian Attorney General's Department, Update of 2004 Index of South Australian Legislation, Industrial Law Reform (Fair Work) Act 2005, p. 9, accessed 11 March 2005, <www.parliament.sa.gov.au/leg/index/update.pdf>; Workplace express, 10 March 2005, Finally, SA's new IR bill gets through Parliament, accessed 11 March 2005, <www.workplaceexpress.com.au/news_print.php?selkey+24248>.

3 DEWR, *Exhibit No. 25*, p. 18.

4 DEWR, *Exhibit No. 25*, p. 18.

5 Vic. Government, *Submission No. 71*, pp. 6-7; DEWR, *Exhibit No. 25*, pp. 18-19.

Queensland

5.9 The Queensland Government states that:

The increasing move away from the conventional employee/employer relationship towards workers engaged under labour hire arrangements and under dependent contractor status, has effectively taken these workers outside of the industrial relations system and the benefits and protections associated with being defined as an employee under relevant industrial laws.⁶

5.10 Section 275 of the Queensland *Industrial Relations Act 1999* (Qld IR Act) gives the Queensland Industrial Relations Commission (QIRC) the power to declare persons who work under a contract for services to be employees (employee 'deeming').⁷

5.11 Persons or workers that this deeming applies to includes: outworkers, lessees of equipment or vehicles, drivers wholly or partly owning their vehicles and persons working as partners in a business or association. The list of criteria that Section 275 of the Qld IR Act allows the Commission to declare a class of contractors to be employees includes:

- the relative bargaining power of the class of persons; or
- the economic dependency of the class of persons on the contract; or
- the particular circumstances and needs of low-paid employees; or
- whether the contract is designed to, or does, avoid the provisions of an industrial agreement; or
- whether the contract is designed to, or does exclude the operation of the Queensland minimum wage; or
- the particular circumstances and need of employees including women, persons from a non-English speaking background, young persons and outworkers.⁸

5.12 Section 275 has not been widely used. Examples of cases relating to independent contractors were provided to the Committee. One application to the QIRC was dismissed with shearers being found to be contractors rather than employees (*AWU v Hammonds Pty Ltd*). Another case considered that security workers previously being engaged as employees should continue to be considered as employees

6 Qld Government, *Submission No. 66*, pp. 6-7.

7 Qld Government, *Submission No. 66*, p. 7.

8 DEWR, *Exhibit No. 25*, p. 17; ASU, *Submission No. 53*, p. 9.

rather than as independent contractors (*ALHMWU v Bark Australia Pty Ltd*).⁹

New South Wales

- 5.13 Schedule 1 of the NSW *Industrial Relations Act 1996* (NSW IR Act) deems certain types of workers to be employees. The NSW Government states that the deeming provisions recognise that a number of categories of workers exist who are often in weak negotiation positions. In many instances, the relationship which exists is not substantively different to that of employee and employer, and hence should be covered by the protection of generally accepted standards of industrial regulation.¹⁰
- 5.14 The NSW legislation includes:
- a range of specific occupations, such as cleaners, carpenters, joiners or bricklayers, plumbers, drainers or plasterers, painters and clothing outworkers;
 - power to deem others to be employees by regulation,
 - a system of contract determination, and
 - a process to test if employment contracts are unfair.¹¹
- 5.15 The NSW Government considers that if there were not deeming provisions, there may be a significant degree of inequality in bargaining power between the worker and the provider of work.¹²

Advantages and disadvantages of deeming

- 5.16 Supporters of deeming provisions generally point to the need to protect workers from unequal bargaining power to negotiate reasonable contract conditions. Submissions of support were mainly received from state governments and unions.¹³ The advocates of deeming highlight that this approach ‘overcomes some of the shortcomings of a rigid definition’ and case law to identify who is an employee.¹⁴

9 Qld Government, *Submission No. 66*, p. 7; NFF, *Submission No. 39*, p. 8; AWU v Hammonds Pty Ltd [1999] (B885 of 1999) QIRC, 15 November 2000; ALHMWU v Bark Australia [2001] QIRC 22, 28 February 2001; 166 QGIG 254.

10 NSW Government, *Submission No. 35*, p. 35.

11 NSW Government, *Submission No. 35*, p. 35; Qld Government, *Submission No. 66*, p. 8.

12 NSW Government, *Submission No. 35*, p. 35.

13 Vic. Government, *Submission No. 71*, p. 7; NSW Government, *Submission No. 35*, p. 35; Qld Government, *Submission No. 66*, p. 41; ASU, *Submission No. 53*, p. 9; CFMEU, *Submission No. 5*, Appendix 13; ACTU Submission to NSW Labour Hire Task Force, pp. 15-16; see also Australian Lawyers Alliance, *Submission No. 55*, pp. 3, 14.

14 Qld Government, *Submission No. 66*, p. 41; Prof. A. Stewart, *Submission No. 69*, p. 6-7.

5.17 In contrast, detractors of deeming approaches included employer organisations, independent contracting bodies and some in the law profession. Critics cite the piecemeal approach, disregard of the common law distinction, and the lack of consideration of the substantive nature of working relationships as being of considerable concern.¹⁵

Supporters

5.18 The NSW Government states that deeming affirms the role of government in protecting persons who enter into contracting arrangements with limited information or misunderstanding of how the relationship will operate. It achieves this goal by a variety of means, including:

- both general and specially tailored legislative provisions, including the definition of ‘employee’;
- expanding the category of employee by deeming certain classes of ‘at risk’ workers to also be employees; and
- providing remedies for workers in unfair or exploitative relationships.¹⁶

5.19 The NSW Government acknowledges that workers identified by deeming provisions would otherwise be considered to be independent contractors under common law. They are viewed by both the courts and legislature to be ‘in business for themselves’. They state that, like employees, there may be a significant degree of inequality in bargaining power between the worker and the provider of work.¹⁷

5.20 The NSW Government rejects that the Commonwealth should move to nullify the effect of the NSW deeming provisions.¹⁸ Further discussion of this issue is raised in Chapter 6 under pursuing consistency in independent contracting.

5.21 Other supporters indicate that deeming provisions provide lower paid workers protection from exploitation in unfair contracts. It was stated that the idea that employees have the right to negotiate conditions of work that suit their individual needs does not reflect the reality and the majority of outcomes. The costs, length of the process

15 HIA, *Submission No. 61*, p. 1; ACCI, *Submission No. 25*, p. 6; Ai Group, *Submission No. 49*, pp. 24-25; MBA, *Submission No. 22*, p. 14; NFF, *Submission No. 39*, p. 7; ICA, *Submission No. 20*, p. 8; AICA, *Submission No. 64*, p. 12; Prof. A. Stewart, *Submission No. 69*, pp. 7-8; Mr. T Hulett, Law Council of Australia, *Transcript of Evidence*, 27 April 2005, p. 62.

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

17 NSW Government, *Submission No. 35*, p. 35.

18 NSW Government, *Submission No. 35*, p. 36.

and the uncertainty are major disincentives to take action to seek redress.¹⁹

- 5.22 Australian Lawyers Alliance highlighted that the use of deeming legislation would be of benefit to ensure that all workers, regardless of their nominal employer, are covered by the relevant workers' compensation scheme.²⁰
- 5.23 The CFMEU supports the extension of the definition of the employer to include partnerships, group training schemes and labour hire agencies.²¹ The Australian Services Union stated that the use of deeming provisions to treat dependent contractors such as family day care workers as employees for the purpose of wages and conditions and unfair termination of contract should be considered.²² The ACTU provide some support for deeming; however, seek greater definitional clarity that truly reflects the working relationship.²³

Detractors

- 5.24 DEWR states that inappropriate and unduly complex state legislation restricts independent contractors' ability to maximise their productivity and contributions to the Australian labour market. Further, deeming also inhibits businesses' ability to manage their workforce so that it can be augmented or restricted depending on work demands.²⁴
- 5.25 Ai Group comments that
- ...despite the fact that an individual may, under common law, legitimately be an independent contractor, Federal and state governments have enacted legislation which deems certain independent contractors to be employees for particular purposes.²⁵
- 5.26 They also cited concern with the disparate nature of the types of workers deemed to be employees in Schedule 1 of the NSW IR Act, and the potential for lobbying to increase the range of workers included.²⁶

19 Qld Government, *Submission No. 66*, p. 35; Mr M. Anderson, *Submission No. 70*, p. 4.

20 Australian Lawyers Alliance, *Submission No. 55*, p. 3.

21 CFMEU, *Submission No. 5*, Appendix 13: ACTU Submission to NSW Labour Hire Task Force, p. 16.

22 ASU, *Submission No. 53*, pp. 9, 12.

23 ACTU, *Submission No. 60*, pp. 18-20.

24 DEWR, *Exhibit No. 25*, p. 21.

25 Ai Group, *Submission No. 49*, p. 25.

26 Ai Group, *Submission No. 49*, pp. 24-25.

- 5.27 The Ai Group comment that some statutory provisions concerning independent contractors are appropriate.²⁷
- 5.28 In South Australia, the *Industrial and Employee Relations Act 1994* includes examples that highlight the difficulty of distinguishing between employees and independent contractors. When a person packs goods under a contract for services at home they are deemed to be an employee, but not if they do so at a business's premises.²⁸
- 5.29 SBDC also highlighted concern with the intent of South Australian legislation that has a broad definition of 'outworker' rather than restricting the legislation to the clothing industry, such as has occurred in other states. This would have implications for a wide range of professionals that work from home such as accountants, IT workers and sales persons.²⁹
- 5.30 It was reported to the Committee that the ambiguity of independent contractor status creates commercial uncertainty, complexity and additional costs which lead to competitive handicaps for contractors.³⁰
- 5.31 ACCI states that the confusion created by unfair contracts legislation and deeming extends beyond contracts for services with individuals. It also impacts on other commercial relationships between franchisers franchisees, contractors and sub-contractors.
- 5.32 ACCI supports:
- removing deeming of individual contractors as employees from the Australian system of labour law;
 - precluding the operation of state deeming provisions;
 - ending applications to state authorities under state deeming provisions;
 - reversing any previous declarations deeming contractors or classes of contractors to be employees; and
 - retaining the protection of clothing industry outworkers, and only including such regulation in other industries in exceptional circumstances.³¹
- 5.33 The Committee considers that strategies to address the unequal bargaining power would be more effective at the source rather than

27 Ai Group, *Submission No. 49*, p. 24.

28 DEWR, *Exhibit No. 25*, p. 21.

29 SBDC, *Submission No. 58*, p. 5.

30 HIA, *Submission No. 61*, p. 1; Courier and Taxi Truck Association, *Submission No. 50*, p. 6.

31 ACCI, *Submission No. 25*, pp. 28-29.

overlaying a blanket solution which does not respect common law or contractual arrangements.

- 5.34 The Committee's view is that a lower cost, user friendly process for making determinations about employee or independent contractor status needs to be introduced with national coverage. In addition a contract review process needs to be retained to challenge unfair contracts. The adoption of the method to determine status, as proposed in the previous chapter, would assist in this process. The issues are considered further later in this and the next chapter.

Other legislation

- 5.35 Other regulatory areas of law have a broader scope than the common law distinction between independent contractors and employees. Similar to the debate about the advantages and disadvantages of deeming in industrial or workplace relations matters, there is dispute about the necessity of such broad coverage. Areas of consideration include:

- occupational health and safety legislation imposing duties beyond the traditional concept of the employment relationship;
- workers' compensation legislation applying to certain workers under a contract for service;
- payroll tax covering contractors performing work other than pursuant to a trade or business which they carry on and do not sub-contract to anyone else;
- discrimination legislation applying to both contractors and employees;
- long service leave in some jurisdictions; and
- the superannuation guarantee which provides that if a person works under a contract that is wholly or principally (more than half) for the labour of the person, the person is an employee of the other party to the contract.³²

- 5.36 In the field of OHS legislation, critics of the deeming approach state that:

The deemed inclusion of a diverse range of workers, represents a potpourri of examples without any single defining principle, apart from some inchoate notion that they represent socially desirable areas of coverage.³³

32 Qld Government, *Submission No. 66*, p. 7; and Ai Group, *Submission No. 49*, p. 25.

33 MBA, *Submission No. 22*, p. 16 citing Clayton A, Johnstone R and Sceates S, 2003, *The Legal Concept of Work-Related Injury and Disease in Australian OH&S and Workers' Compensation*

- 5.37 Workers' compensation arrangements were frequently mentioned as causing particular concern with deeming provisions. The Insurance Council of Australia supports a clearer definition, and is cautious on the deeming approach.³⁴
- 5.38 Workers' compensation coverage is required if independent contractors work through an agency, yet income protection insurance would normally be sought when they are not working through an agency.³⁵ HIA outlined their concern with state systems which bring independent contractors into the industrial relations systems. Additionally OHS regulation adds to the cost of using contractors, as does payroll tax, workers' compensation and superannuation.³⁶ This issue of costs is discussed in more detail in a later section on Business structures.
- 5.39 DEWR states that OHS and discrimination laws:
- ... are not 'deeming' provisions which change the nature of the common law relationship between the hirer and worker. Rather, these laws often use the term 'employment' as a definitional device to describe the classes of people to be covered for that legislative purpose. The breadth of the definition will depend on the policy objective of the legislation [in] question. For example, OHS and discrimination laws have generally been drafted to apply to workers generally, irrespective of whether they are hired as employees or independent contractors. This is because the purpose of these laws is to seek to protect people in their working lives generally and this may be the reason they are framed broadly.³⁷
- 5.40 The Victorian and Queensland governments question quarantining workplace relations legislation in this way, suggesting that if there is a good policy objective to do so then there is justification. They cite the Australian Government introducing the PSI legislation to clarify

Systems, ANU National Research Centre for OHS Regulation; Australian Lawyers Alliance, *Exhibit No. 24: National Research Centre for OH&S Regulation: Working Paper No. 3. The legal concept of work-related injury and disease in Australian OH&S and Workers' Compensation Systems*, April 2002, p. 19.

34 Insurance Council of Australia, *Submission No. 11*, p. 3.

35 AICA, *Submission No. 64*, p. 15.

36 HIA, *Submission No. 61*, p. 1.

37 DEWR, *Exhibit No. 25*, p. 19.

independent contractor status in relation to taxation to reduce revenue moving out of the PAYG system.³⁸

Deeming as a consistent approach

- 5.41 There are a range of views on the need for providing some protections to workers, and the use of deeming to encompass independent contractors and labour hire workers within the industrial relations systems.
- 5.42 However, the piecemeal approach and different coverage in various jurisdictions suggests that there is no consistent adoption of deeming. In addition, some legal practitioners had reservations on the creation of an artificial construct to override in some cases the existence of a commercial relationship. This supports business organisations' other criticisms of deeming.
- 5.43 Professor Stewart states that deeming is usually a reactive strategy, relying on identifying a group or occupation of workers and invoking the relevant deeming mechanism.³⁹ Additionally, deeming provisions are generally directed at the status of a class of workers and do not address the reality that an individual worker can operate in a legitimately independent way as a business. That is, the worker is considered an employee regardless of their preference or actual circumstances.⁴⁰
- 5.44 Alternatives suggested by submissions include:
- a registration system of contractors which would negate the need for deeming legislation.⁴¹
 - a consistent appropriate definition of 'employment' or 'employee' depending on the legislation involved and the policy goal across jurisdictions.⁴²

Power of relationships

- 5.45 The states' approach to resolve the imbalance of bargaining also relates to recent cases where it has been argued that employees have been requested to consider independent contracting (some would say with coercion), and new recruits are required to be engaged as

38 Qld Government, *Submission No. 66*, p. 7; Vic. Government, *Submission No. 71*, p. 20.

39 Prof. A. Stewart, *Submission No. 69*, pp. 7-8.

40 ACCI, *Submission No. 25*, pp. 19-20; AICA, *Submission No. 64*, p. 12.

41 MBA, *Submission No. 22*, p. 15.

42 Prof. A. Stewart, *Submission No. 69*, p. 9.

independent contractors.⁴³ One description of this change in arrangements suggests that:

The nature of the work, the payer of remuneration and the workplace itself does not change. This type of arrangement can be termed as 'the Friday employee becomes the Monday independent contractor.

The arrangement, although agreed to by both the individual and the principal, is generally speaking, an attempt to free the employer from a range of costs and obligations eg workers' compensation and superannuation costs.⁴⁴

- 5.46 Therefore, methods to determine the appropriate working relationship status are required. It has been suggested that access to the Federal Magistrates Court would assist in providing a simpler and more accessible alternative to litigation in the federal arena. It was stated the costs of current court action are prohibitive.⁴⁵
- 5.47 Other suggestions include use of the Australian Industrial Relations Commission (AIRC) as an arbitral body to issue a certificate then apply to the court if seeking a variation or appeal.⁴⁶ However, the Federal Magistrates Court was considered by some to be a more appropriate forum to consider possible commercial contracts than a specialist body (the AIRC) that specialises in contracts of employment.⁴⁷
- 5.48 Independent contractors are not covered by industrial legislation, unless a court challenge is made to their particular status. Nor would deeming provisions be available unless so specified.
- 5.49 This raises avenues of redress and what should be possible or appropriate representation. Deeming overrides the existence of commercial relationships. Commercial relationships are regulated in part through the TPA. Therefore, consideration of this legislation and unfair contracts as applying to independent contractors is required.

43 National Union of Workers, *Submission No. 47*, p. 13.

44 Courier and Taxi Truck Association, *Submission No. 50*, pp. 4-5; see also CFMEU, *Submission No. 5*, Appendix 6: CFMEU submission to Review of Business Taxation, 1999, following paragraph 4.5.

45 DEWR, *Exhibit No. 25*, p. 20; see also Mr A. Cameron, RCSA, *Transcript of Evidence*, 26 April 2005, p. 27.

46 Vic. Government, *Submission No. 71*, pp. 30-32.

47 Canberra Business Council, *Submission No. 30*, p. 3; Labour Force Australia, *Submission No. 26*, p. 4.

Trade Practices Act 1974

Commercial relationships

- 5.50 It was stated that independent contractors are seen as individuals who organise their work through a commercial contract, rather than through an employment contract. This view is recognised by many of the submissions to the inquiry.⁴⁸
- 5.51 ACCI in their submission state that commercial relationships are often ones of substantial dependence and considerable variation in economic size between the principal and the contractor.⁴⁹
- 5.52 In addition, ICA argue that independent contractors are ‘businesses in their own right.’⁵⁰ It is the WR Act that regulates the employment relationship. Therefore, as the common law definition of employee excludes independent contractors, the TPA being a commercial regulation, could be considered a more appropriate framework for independent contracting relationships. ICA state that:

The regulation of labour under the Trade Practices Act is an important tool which releases people from being treated as a commodity.⁵¹

Trade Practices Act: background

- 5.53 The object of the TPA is to enhance the welfare of Australians through the promotion of competition and fair trading and to offer consumer protection. The TPA provides guidelines for the protection of anti-competitive behaviour, often described as monopolistic business practices, and acts as a guiding principal as to how companies conduct business.⁵²
- 5.54 The laws regulating competition, contained in Part IV of the TPA, are comprehensive and extensive. Practices such as collusive agreements (preventing contractors from getting together in order to maximise their negotiating power), exclusive dealings, price discrimination, and the misuse of market power to eliminate or damage a competitor, false representation and misleading advertising are deemed illegal and thus prohibited; however specific exemptions from the TPA are

48 For example ACTU, *Submission No. 60*, p. 11; ICA, *Submission No. 20*, p. 5; DEWR, *Exhibit No. 25*, p. 5; NSW Government, *Submission No. 35*, p. 11.

49 ACCI, *Submission No. 25*, p. 23.

50 ICA, *Submission No. 20*, p. 5.

51 ICA, *Submission No. 20*, p. 15.

52 The *Trade Practices Act 1974* was Act No. 51 of 1974 as amended, its long title is: An Act relating to certain Trade Practices.

- possible.⁵³ Such an exemption could be authorising a collective bargaining arrangement for a group of independent contractors.⁵⁴
- 5.55 Issues associated with unfair contracts are contained in Part IV of the TPA which deals with restrictive trade practices. Section 45 deals with contracts, arrangements or understandings that restrict dealings or affect competition. Section 45(A) deals with contracts, arrangements or understandings in relation to prices. All of these have a bearing on, but are not limited to, unfair contracts.
- 5.56 ACCC is the regulatory body with the responsibility of enforcing trade practices law. Its key role is to attempt to educate, persuade or influence businesses into pursuing their interests within the legally defined boundaries of fair competition. The major emphasis of the ACCC is on anti-competitive business practices.
- 5.57 In recent times amendments to the TPA that are related to issues of this inquiry have been proposed. The main purpose of the TP Bill 2005 is to amend the TPA consistent with the government's response to the 'Review of the competition provisions of the Trade Practices Act 1974' (the Dawson Review).⁵⁵ Aspects of these amendments will be discussed later in this chapter.
- 5.58 If independent contractors are to wholly operate under commercial regulation then the effectiveness of the TPA for small businesses needs to be considered.

Collective bargaining

- 5.59 One mechanism for ensuring that small businesses and independent contractors do not suffer from inequality of bargaining power is through collective bargaining.
- 5.60 ACCC describe collective bargaining as:
- ... an arrangement whereby multiple competitors in an industry come together, either directly or through the appointment of a representative to negotiate on their behalf, to negotiate the terms and conditions of supply with another, usually larger, business.⁵⁶

53 Specific exemptions may relate to authorisations, whereby the ACCC may grant an exemption on the basis of anti-competitiveness. ACCI, *Submission No. 25*, p. 43.

54 Treasury, *Submission No. 73*, p. 5.

55 *Review of the Competition Provisions of the Trade Practices Act*. (Also known as the Dawson Review), January 2005. Commonwealth of Australia; accessed 15 June 2005 <<http://tpareview.treasury.gov.au/content/report.asp>>.

56 ACCC, '*Authorising and notifying collective bargaining*', accessed 15 June 2005 <www.accc.gov.au/content/index.phtml/itemId/522935/fromItemId/314462>.

- 5.61 Under current legislation, ACCC can authorise collective bargaining arrangements that would otherwise risk breaching the TPA in circumstances where the public benefit of such an arrangement will overshadow the disadvantage caused by substantial lessening of competition.⁵⁷
- 5.62 Difficulty in accessing authorisations was outlined by one group of independent contractors, the Australian Institute of Interpreters and Translators Inc (AIIT). The AIIT state the majority of their members do not have a choice between salaried employment and contracting. Furthermore, they are trapped into accepting contracting conditions over which they have no influence. To oppose the decline of their working conditions, contractors find themselves in 'jeopardy', under the TPA, by organising joint action or by trying to set minimum fees and conditions.⁵⁸
- The interpreters find themselves isolated, outweighed, and powerless in their efforts to obtain acceptable conditions.⁵⁹
- 5.63 A further example to illustrate the issue of reduced individual bargaining power can be found in the submission from the TWU, where it was made clear that owner-drivers generally suffer from an inequality of bargaining power with the companies they contract to.⁶⁰
- 5.64 TWU state that the companies that owner-drivers negotiate with have extensive resources at their disposal to maximise their profits and minimise their liability to taxation, workers' compensation, superannuation and unfair dismissal in the negotiating process. Economic dependency becomes an issue for the owner-driver and a benefit for the contracting companies bargaining position.⁶¹
- 5.65 In reviewing authorisations for exemptions to the TPA to allow collective bargaining, the Treasury include in their submission, a list of authorisation determinations for the last ten years, from 1996 to 2005. The majority of the outcomes indicate that the determinations were granted or granted with conditions.⁶² In this period of time, 136 matters were presented to the commission; 126 matters did not include trade union involvement.

57 The Treasury, *Submission No. 73*, p. 5.

58 AIIT, *Submission No. 37*, p. 3.

59 AIIT, *Submission No. 37*, p. 3.

60 TWU, *Submission No. 42*, p. 3.

61 The TWU's involvement in seeking authorisations over the past ten years has not been extensive as they have made four representations. Further details can be found in: Treasury, *Submission No. 73*, Attachment No. 1, pp. 1-16.

62 Information sourced from the Treasury, *Submission No. 73*, Attachment No. 1, pp. 1-16.

- 5.66 In the ten year time frame there appeared to be no specific increase or decrease in union involvement, however there is an indication of a rise in collective bargaining. The increase in collective bargaining can not be directly correlated to unions in the bargaining process.⁶³

Trade Practices Act Amendment Bill

- 5.67 Proposed amendments included in the Trade Practices Act Amendment Bill 2005 (TP Bill) are intended to reduce the regulatory burden on small businesses by implementing a process for collective bargaining by small business dealing with large business.⁶⁴ The Treasury state that the notification process will provide a streamlined and less costly alternative to the authorisation process.
- 5.68 One area of interest to the inquiry includes section 51(20(a)) of the TPA which allows trade unions to engage in collective bargaining regarding remuneration, conditions of employment, hours of work or working conditions of employees. The TP Bill 2005, if enacted, would exclude trade unions acting as agents for small businesses in collective bargaining negotiations.
- 5.69 Many submissions to the inquiry from employee groups maintain that independent bargaining power will be reduced through the introduction of amendments to the TPA, reducing union representation into the bargaining process. ACTU stated that
- ... many independent contractors find themselves with little or no individual bargaining power when negotiating the terms of their engagement with their contractor or client.⁶⁵
- 5.70 Concerns arise from the proposed reforms to the TPA, namely s93AB(9) of the TP Bill 2005. This is expressed by the TWU:
- In order [for] the TWU to negotiate collectively and within the legal limits set by Part IV of the Trade Practices Act 1974 (TPA) it is necessary for the TWU to obtain dispensation from these provisions of the TPA in the form of authorisations which may be granted by the ACCC.⁶⁶
- 5.71 Section 93AB of the TP Bill 2005 states:
- (9) A notice given by a corporation under subsection (1) is not a valid collective bargaining notice if it is given, on behalf of the corporation, by:

63 Treasury, *Submission No. 73*, Attachment A.

64 Treasury, *Submission No. 73*, p. 5.

65 ACTU, *Submission No. 60*, p. 19.

66 TWU-Vic./Tas., *Submission No. 56*, p. 18.

- a. a trade union; or
- b. an officer of a trade union; or
- c. a person acting on the direction of a trade union.⁶⁷

Representation

- 5.72 Further evidence to the inquiry indicated that representation is an issue for independent contractors. The ACTU believe that independent contractors should have the rights and avenues for redress for representation.⁶⁸
- 5.73 ACCI stated:
- If there is to be representation, whoever does it – whether it is unions, lawyers or whoever does contractor representation – it is a matter of recognising that that is a commercial relationship and that as a commercial relationship it does have some fundamentally different structures from direct employment.⁶⁹
- 5.74 The NSW Office of Industrial Relations, in their submission to the inquiry, commented that there is no clear reason for excluding unions from being able to notify collective bargaining under the new scheme.⁷⁰ Furthermore, they state that the results under the scheme demonstrate how the TWU contributes to the achievement of ‘settled and productive’ relationships in the industry.
- 5.75 ICA suggested that the TPA may need to be amended to clarify that independent contractors come within the reach of the Act and unfair contracts are not excluded under the ‘employment exclusion’ provisions of the Act.⁷¹

Unfair contracts

- 5.76 As previously discussed in Chapter 2, an unfair contract is a contract that is harsh, unconscionable or is against the public interest.
- 5.77 Factors considered when deciding whether a contract is unfair are: the relative bargaining power of the parties, whether any undue influence

67 Section 93AB (9), *Trade Practices Act Amendment Bill (No.1) 2005*. p. 51 accessed 15 June 2005; <<http://parlinfoweb.parl.net/parlinfo/Repository/Legis/Bills/Linked/17020505.pdf>>.

68 ACTU, Ms. N. Delavec, *Transcript of Evidence*, 26 April 2005, p. 42; Mr. P. Anderson, ACCI, *Transcript of Evidence*, 26 April 2005, p. 10.

69 Mr. P. Anderson, ACCI, *Transcript of Evidence*, 26 April 2005, p. 10.

70 NSW Government, *Submission No. 35*, p. 40.

71 DEWR-ICA, *Exhibit No. 69*, pp. 3 & 6-7.

or pressure or unfair tactics has been exerted, or whether the contract became unfair due to the conduct of the parties or variation to the contract.⁷²

Federal and state legislation

- 5.78 Under Sections 127A-C of the WR Act, the Federal Court of Australia is empowered to examine contracts for services binding on an independent contractor which relate to performance of work. This section of the WR Act also provides a remedy for independent contractors.
- 5.79 The remedy is limited to an independent contractor who is a 'natural person'. However, there are constitutional limitations. It is also required that one of the parties be a Commonwealth authority, or a financial trading or foreign corporation, or relate to matters that take place in or are connected with a Territory.⁷³
- 5.80 Amendments to the WR Act to remove its unfair contracts provisions in section 127A-127C were proposed, but not passed, in separate Bills in 1996 and 1999. DEWR stated that the removal of these provisions would be consistent with the Australian Government's policy that independent contracting arrangements should be regulated by commercial law, not workplace relations law.⁷⁴
- 5.81 However there seems to have been a recent shift in approach with legislative changes associated with the building and construction industry. Additionally Freedom of Association provisions do not confine independent contractors to only be natural persons and therefore could include partnership arrangements or company structures.⁷⁵
- 5.82 A brief summary of the unfair contracts legislation across the states is provided by DEWR:
- In NSW, the unfair contracts laws are found in Section 106 of the NSW IR Act. This allows the NSW Industrial Relations Commission to review 'any contract whereby a person performs work in any industry' which includes independent contractor arrangements;⁷⁶

72 *Trade Practices Act 1974*, Part IV, s. 45; *Workplace Relations Act 1996*, Division 3, Part VI, s. 127.

73 DEWR, *Exhibit No. 25*, p. 19. Natural persons do not include partnerships or companies.

74 DEWR, *Exhibit No. 25*, p. 20.

75 DEWR, *Exhibit No. 25*, p. 20; Vic. Government, *Submission No. 71*, p. 26-27.

76 DEWR, *Exhibit No. 25*, p.15.

- Queensland also has specific provisions in relation to unfair contracts. Section 276 of the Qld IR Act, gives the QIRC power to investigate contractual remedies. It includes contracts of service not covered by an industrial instrument, and also independent contracting arrangements;⁷⁷
- In South Australia, there are no unfair contracts provisions in the *Industrial Law Reform (Fair Work) Act 2005*;
- Victoria has referred its workplace relations powers to the Commonwealth and so is covered by the federal legislation which includes unfair contracts provisions;
- In Tasmania, the *Industrial Relations Act 1984* currently contains no deeming or unfair contracts provisions;
- In Western Australia, the *Industrial Relations Act 1979* has no unfair contracts jurisdiction applying to contracts for services; and
- The Australian Capital Territory and the Northern Territory are covered by the WR Act and so are not subject to deeming provisions. The ACT Legislative Assembly recently introduced the Fair Work Contractors Bill 2004. If passed, this Bill will confer an unfair contracts jurisdiction on the ACT Consumer and Trader Tribunal. This provides a less costly option.⁷⁸

Concerns

5.83 There is support for continuing states' and territories' unfair contracts provisions. It was stated that currently unfair contracts reviews are undertaken by the Federal Court, which can be costly and time-consuming.⁷⁹ Additionally there is limited applicability given the constitutional constraints and requirement for the independent contractor to be a natural person.⁸⁰

5.84 The Communications Electrical & Plumbing Union (CEPU) stated that by maintaining the state and territory legislation on unfair contracts, costs involved to bring forth any action are reduced and more accessible:

... [for] ordinary people to take action for unfair contracts where their only avenue of redress is a cost prohibitive Federal Court action⁸¹

77 DEWR, *Exhibit No. 25*, p.17.

78 DEWR, *Exhibit No. 25*, pp. 15 -20; DEWR-ACT Government, *Exhibit No. 84*, p. 4.

79 DEWR, *Exhibit No. 25*, pp. 15 -20; Prof. A. Stewart, *Submission No. 69*, p. 18; DEWR-ACT Government, *Exhibit No. 84*, p. 4

80 ASU, *Submission No. 53*, pp. 5-6.

81 DEWR-CEPU, *Exhibit No. 48*, p. 8.

- 5.85 As indicated earlier, independent contractors would have recourse to provisions of the TPA to regulate their commercial relationship.⁸² There is overlap with some unfair contract legislation in industrial regulation.
- 5.86 However, others oppose limiting avenues of redress to trade practices citing concerns of court costs and the need for specialist employment law expertise. NUW state that it is in the interest of all parties to such a contract to have access to a reliable, inexpensive and independent dispute settling mechanism.⁸³
- 5.87 The transport industry raised a number of issues relating to unfair or harsh contractual terms and commercial practices. Concerns include: improper deduction of administrative costs; many hours of unpaid work; breach of contract; and unreasonable restraint of trade provisions.⁸⁴ These issues contravene many of the provisions within the TPA.⁸⁵
- 5.88 Other issues arising from the submissions is that contractors may face restrictive practices, such as demands to sign a union-devised enterprise bargaining agreement (EBA) under Federal/State law, and demands to take out workers' compensation 'top up' insurance, which are employment requirements.⁸⁶
- 5.89 Another concern falling under the category of 'Unfair Contracts' (Part 4, s. 45 TPA), is the burden of restrictions which may prevent independent contractors working effectively and lead to a competitive disadvantage for employees.⁸⁷ This is connected to undercutting.
- 5.90 Amongst the evidence submitted to the enquiry, the concern about undercutting involved independent contractors and labour hire arrangements. The TWU Victoria/Tasmania stated:
- ... the Government should ensure the characterisation of 'employees' and 'independent contractors' allows only legitimate independent contracting to occur, and not as a means of undercutting the comparable safety net rates of pay of employees in an unsafe and unsustainable manner.⁸⁸

82 *Trade Practices Act*, Part IV, Section 45.

83 NUW, *Submission No. 47*, p. 8.

84 TWU Vic./Tas., *Submission No. 56*, p. 22.

85 Vic. Government, *Submission No. 71*, p. 37.

86 HIA, *Submission No. 61*, p. 8; and further discussed in lesser detail in NSW Government, *Submission No. 35*; pp. 22-23; TWU, *Submission No. 42*, pp. 13-14.

87 HIA, *Submission No. 61*, pp. 11-12.

88 TWU-Vic./Tas., *Submission No. 56*, p. 23.

- 5.91 Furthermore, it was considered that undercutting is an act that has a detrimental effect on community standards and expectations. It was stated that independent contractors should meet the same tests as other industrial arrangements so as to not be disadvantaged by the burden of restrictions in comparison to other types of workers.⁸⁹
- 5.92 The QIRC (s275) commented on undercutting with regard to security guards who were designated as contractors but deemed to be employees by the QIRC bench. This was due to the bench refusing to:
- ... send a message that in a competitive industry with very tight margins it is acceptable to deprive workers of entitlements to annual leave, sick leave, long service leave, bereavement leave, family leave, overtime payments, rest pauses, shift allowances, payment for public holidays, penalties for ordinary hours performed on weekends, superannuation entitlements and workcover protection in order to be able to quote lower prices to clients. ...
- Objectively viewed the Independent Contractor Agreement is designed to avoid the Award and the certified agreement.⁹⁰
- 5.93 In NSW, evidence submitted to the inquiry from the transport industry expressed concerns in relation to regulation, noting that NSW was the most regulated of all the states and territories.⁹¹ Implications of removing, or interfering with the chapter 6 support mechanisms (of the NSW IR Act) would result in the disruption of over 170 registered contract agreements that 'were freely entered into between owner-drivers and companies which strike an agreed balance ... of remuneration and other essential conditions'⁹²
- 5.94 TWU of NSW state that any revision of the current system of industrial relations (section 6, specifically unfair contracts) must maintain the current protection of minimum standards, including a mechanism for guaranteeing remuneration rates not falling below a reasonable 'running' cost.⁹³
- 5.95 However, others in the NSW transport industry state that although the contract determination set minimum rates, undercutting has occurred and now the rate set was sometimes a maximum which was leading to considerable hardship for some independent contractors.

89 Mr. K. Harvey, ASU, *Transcript of Evidence*, 27 April 2005, p. 66.

90 ALHMWU v Bark Australia [2001] QIRC 22 (28 February 2001); 166 QGIG 254.

91 See NSW RTA, *Submission No. 75*, pp. 5-8; also TWU-NSW, *Submission No. 40*, paras. 19 and 40-41; Ch 6 *Industrial Relations Act 1996* (NSW).

92 TWU-NSW, *Submission No. 40*, pp. 33-34.

93 TWU-NSW, *Submission No. 40*, p. 34.

Alternative conciliation and dispute resolution strategies should be considered. In addition more support for independent contractor owner-drivers and access to business management advice is required.⁹⁴

- 5.96 It is apparent that there is a lack of consistency in the appropriate legislative approach, trade practices or workplace relations, to respond to contract issues for independent contractors. There is no clear vision on where the boundaries should be set based on the perception and substantive relationship of the independent contractor's position. Business and workers are calling for greater clarity.

Ways forward

- 5.97 The creation of a consistent national system for the review of unfair contracts has been suggested. However, should this occur the federal legislation should be extended to cover arrangements with contractors who are not natural persons (s 4(1a) of the WR Act) in order to include partnerships and companies to ensure that disguised employment arrangements are limited.⁹⁵ (Although it may lead to some confusion as found with this extension beyond natural persons when included with the Freedom of Association provisions in Part XA, WR Act.⁹⁶)
- 5.98 Other possibilities, in addition to amending the TPA or the WR Act or developing independent contractor legislation, are to consider alternative ways to support improved contract negotiation and dispute resolution for independent contractors as small businesses.⁹⁷ Giving the Federal Magistrates Court jurisdiction to hear matters relating to unfair contracts would assist. However lower-cost, more user friendly and speedier options need to be considered.⁹⁸
- 5.99 Victoria provides a recent example. Within owner-drivers in the transport industry there is a high prevalence of contracting and sub-

94 Mr J. Taylor, Courier and Taxi Truck Association, *Transcript of Evidence*, 31 March 2005, p. 45; NSW RTA, *Submission No. 75*, pp. 9-11.

95 Prof. A. Stewart, *Submission No. 69*, p. 18.

96 Vic. Government, *Submission No. 71*, p. 26.

97 *Trade Practices Act 1974* currently prohibits price fixing, certain exclusive dealing, boycotts, abuse of market power, misleading, and false & unconscionable conduct. Section 51 (AC) covers unconscionable conduct criteria for small business transactions.

98 DEWR, *Exhibit No. 25*, p. 20; see also Mr A. Cameron, RCSA, *Transcript of Evidence*, 26 April 2005, p. 27.

contracting arrangements. Approximately 80-85 per cent of owner-drivers within the industry operate as corporations, whilst 15-20 per cent operate as sole traders or partnerships.⁹⁹

- 5.100 TWU relates experiences that independent contractors have little bargaining power and often confront a 'take it or leave it' behaviour.¹⁰⁰ These types of contracts are provided as 'standard forms' and no alteration is calculated.
- 5.101 The 'take it or leave it' approach would generally be described as unconscionable conduct, and therefore could be appealed under Section 51 AC of the TPA.¹⁰¹ It is apparent, however, that the costs and time of accessing courts dissuade contractors from regularly using this remedy.
- 5.102 The NSW Road Transport Association (RTA), through a survey of their members, has expressed interest in alternatives to the present system, namely a system whereby mediation as a method of dispute resolution is present, and in some cases, the common law.¹⁰² One possibility raised with the Committee is the proposed Victorian *Owner Drivers and Forestry Contractors Bill 2005* (Owner Drivers Bill). The TWU, in representation of owner-drivers, also support alternatives to the current system.¹⁰³
- 5.103 The Owner Drivers Bill takes an alternative approach to self-employed workers and small businesses. The policy approach adopted in the Owner Drivers Bill does not apply a labour law styled-solution to owner-drivers; instead it deals with them within a framework of commercial and fair trading laws. It is modelled on the *Retail Leases Act 2003* (Vic), which is stated as successfully addressing similar issues of market failure.¹⁰⁴
- 5.104 The Owner Drivers Bill can be summarised as:
- not altering the legal status of the contractors as small businesses;

99 NSW RTA, *Submission No. 75*, p. 2; TWU-NSW, *Submission No. 40*, p. 3. However, across all the total transport and storage sector approximately 72 per cent of workers are employees. Waite, M and Will, L, 2001, *Self-employed contractors in Australia: incidence and characteristics*, Productivity Commission Staff Research Paper, p. 48.

100 TWU-Federal, *Submission No. 42*, p. 10.

101 ACCC, 2004, *Guide to unconscionable conduct*, accessed 20 June 2005 <www.accc.gov.au/content/item.phtml?itemId=544299&nodeId=file42310ef82b432&fn=UnconscionableConduct_Oct2004.pdf>.

102 NSW RTA, *Submission No. 75*, p. 9.

103 Mr W. Noonan, TWU, *Transcript of Evidence*, 27 April 2005, p. 27; also discussed to a lesser degree in Prof. A. Stewart, *Submission No. 69*, p. 2.

104 Vic. Government, *Submission No. 71*, p. 9.

- containing a broad definition of owner-driver to cover all forms of small business structures, including businesses that employ other workers;
 - dealing with these small businesses within a framework of commercial laws and institutions, rather than industrial laws and institutions;
 - focussing on the identified market failure of information imbalance, requiring provision of information to owner-drivers on typical business overhead costs and on small business skills;
 - not prescribing or regulating commercial terms, with the exception of requiring a minimum period of notice of termination;
 - providing for alternative dispute resolution based on existing business-to-business trading laws; and
 - allowing for the appointment of agents to conduct contractual negotiations and allows for joint negotiations by groups of owner-drivers or forestry contractors with their single hirer.¹⁰⁵
- 5.105 The Owners Drivers Bill also allows for codes of practice to be developed on commercial conduct. Codes can be made regulations after advice from Industry Councils comprising representatives of all industry interests.¹⁰⁶
- 5.106 The Owner Drivers Bill bears a close relationship to the TPA, in that it imports the powers under unconscionable conduct, and sections relating to disputes between traders of the *Fair Trading Act 1999* (Vic), and adds in a process of mediation by a Small Business Commissioner.
- 5.107 Further requirements to this Bill include: contracts to be in writing; provisions for disclosure of certain information to contractors; and prohibition of certain harsh and oppressive practices.
- 5.108 However, the Victorian Association of Forest Industries argues that the Owner Drivers Bill will result in codified and regulated contracting that is anti-competitive in business to business arrangements.¹⁰⁷
- 5.109 Therefore a balance needs to be sought between additional regulation, providing some protection for independent contractors, and still ensuring competitive practices.

105 Vic. Government, *Submission No. 71*, p. 9; Owner Drivers and Forestry Contractors Bill 2005.

106 Vic. Government, *Submission No. 71*, pp. 9-10.

107 Vic. Association of Forest Industries, *Submission No. 76*, p. 2.

- 5.110 Additional support for increased information was also advocated by the farming industry. NFF supports improved contracting documentation and has produced the 'NFF Kit' which details farmers' regulatory obligations when hiring contractors.¹⁰⁸
- 5.111 The NFF kit highlights the difficulties and variations across jurisdictions in dealing with contractors and labour hire firms. The kit explains the rights and obligations on the farmer when engaging independent contractors and provides a basic template contract. It offers a questionnaire which aids in determining the control test (i.e. whether they are an employee or a contractor). It also offers a contact list of relevant state organisations (such as workers' compensation, taxation, superannuation, immigration, award wages and OH S).¹⁰⁹

Committee view

- 5.112 The Committee considers that there are some advantages to the approach proposed by the Owner Drivers Bill. One benefit is the broader view of independent contractors as including a business structure, rather than being limited to natural persons.

Recommendation 12

The Committee recommends that the Australian Government broaden the description used in the *Workplace Relations Act 1996* of an independent contractor and extend it beyond 'a natural person'.

- 5.113 The Committee is aware of the role that ACCC plays in assisting small business and their rights under trade practices.¹¹⁰ Additionally the Australian Government Office of Small Business builds and maintains links with small businesses and their representative organisations and examines critical factors influencing the growth of small firms and the small business sector generally.¹¹¹
- 5.114 However, there appears to be an opportunity to specifically target independent contractors to identify their information needs and

108 The kit can be found in: NFF, *Submission No. 39*, Attachment B.

109 NFF, *Submission No. 39*, Attachment B.

110 See for example publications such as ACCC, 2004, *Small Business and the Trade Practices Act*, accessed 30 June 2005, <www.accc.gov.au/content/index.phtml/itemId/304583>.

111 Department of Industry, Tourism and Resources, *Office of Small Business – what we do*, accessed 30 June 2005, <<http://sblegal.industry.gov.au/contactus.asp>>.

develop appropriate legislation suited to their requirements at the smallest end of business arrangements.

Recommendation 13

The Committee recommends that the Australian Government Office of Small Business collate and further develop a series of resources for independent contractors. Collated resources should provide assistance on:

- **setting up a small business;**
- **financial and reporting requirements;**
- **dispute resolution options; and**
- **business management practices.**

5.115 The Committee considers that further supporting the commercial nature of independent contracting is the most appropriate course of action, along with additional strategies to provide better support and access to dispute resolution. Independent contractors would have recourse to provisions of the TPA to regulate their commercial relationship.¹¹²

5.116 It is noted that there is dissent within the Committee on this approach.

Recommendation 14

The Committee recommends that the Australian Government incorporate the following protections when drafting legislation for independent contractors:

- **preserving the legal status of independent contractors as small businesses;**
- **providing a broad description of independent contractor to cover all forms of small business structures;**
- **regulating independent contractors as small businesses within a framework of commercial laws and institutions, rather than industrial laws and institutions; and**
- **providing alternative dispute resolution procedures.**

112 *Trade Practices Act*, Part IV, Section 45.

Artificial business relationships

- 5.117 Continuing the theme of the chapter of commercial arrangements and business structures, consideration will now be given to where questions have been raised about the legitimate nature of some working relationships.
- 5.118 Methods identified by which employers can avoid an employment relationship include:
- manipulating the indicia of employment;
 - hiring labour through an agency; and
 - interposing another kind of entity such as
 - ⇒ tertiary beneficiary trusts,
 - ⇒ partnership arrangements,
 - ⇒ corporations, and
 - ⇒ franchises.¹¹³
- 5.119 Arrangements relating to labour hire, manipulating the indicia of employment to craft a finding of independent contractor, and incorporation will be discussed in the following sections.

Labour hire arrangements

- 5.120 Chapter 4 outlines some of the concerns with using labour hire arrangements, such as skills development, OHS and employment conditions. It has been stated by Job Watch that using labour hire also removes the responsibility for unfair dismissal from the host business to the labour hire agency. A termination of employment is required in order to lodge an unfair dismissal claim against the labour hire agency.¹¹⁴
- 5.121 However, if the worker does not gain further work at the host business or through the labour hire agency, it is difficult to substantiate that a termination has occurred. The triangular relationship prevents a claim being made against the host business.¹¹⁵

113 Qld Government, *Submission No.66*, pp. 6, 30-31. Law Council of Australia, *Submission No. 59*, p. 2. In Tertiary Beneficiary Trusts workers are treated as beneficiaries and paid dividends rather than wages. Greater regulation of franchising arrangements occurred with the introduction of the franchising code of conduct under the TPA referred to in the previous chapter.

114 Job Watch, *Submission No. 23*, pp. 11-12.

115 Job Watch, *Submission No. 23*, pp. 11-12.

- 5.122 A Western Australian example indicated that in some instances labour hire arrangements may be being used inappropriately.¹¹⁶ Evidence was heard from a labour hire worker who had worked regular shift hours for 11 years with a host business. Over this time the worker did not receive any of the leave entitlements of a direct employee and, when their hours were reduced without consultation, they had no recourse due to the nature of labour hire placement – despite the expectation of ongoing employment and the length of service with the host business.¹¹⁷
- 5.123 It has been reported that the use of this triangular relationship, to avoid a finding of an employment relationship for other reasons, also occurs in contractor placement services, such as ‘Odco’ style arrangements.¹¹⁸ Therefore, the following section on independent contracting would also apply to these arrangements.

Independent contracting and business structures

- 5.124 There is widespread in principle support for genuine independent contracting. However, the use of ‘sham’ or artificial contract arrangements to hide a genuine employment relationship is not condoned by governments, business groups or worker representatives.¹¹⁹ Strong views were presented to the Committee on the need to curb such arrangements.
- 5.125 It was stated that the use of independent contractor arrangements has changed from meeting specialist skills needed for a period of time, such as licensed plumbers or electricians, to employers engaging an entire workforce on what were considered by one union to be sham contractor arrangements.¹²⁰ They state that, as a result, workers are taken outside of the industrial relations system, and deprived of the benefits and protections associated with being defined as an employee under relevant industrial laws.

116 Ms J. Freeman, UnionsWA, *Transcript of Evidence*, 20 May 2005, p. 45.

117 Ms J. Freeman, UnionsWA, *Transcript of Evidence*, 20 May 2005, p. 48; AMWU, *Submission No. 46*, p. 26.

118 Prof. A. Stewart, *Submission No. 69* p. 20.

119 For example Qld Government, *Submission No. 66*, p. 3; CFMEU – Mining & Energy Division, *Submission No. 18*, p. 9; NFF, *Submission No. 39*, p. 9; DOCEP – WA Government, *Submission No. 33*, p. 1.

120 NUW, *Submission No. 47*, p. 3.

What is a 'sham'

- 5.126 Concerns about independent contracting arrangements are not limited to the narrow definition of 'sham' arrangements; there are also disguised employee or artificial contracting arrangements. One reasonably limited definition of 'sham' was offered by the Victorian Government:

The term "sham" is used to describe an *attempt* by parties to disguise what is in law an employment relationship as a contracting relationship. "Sham contracting" is thus a narrow concept.¹²¹

- 5.127 Professor Stewart continues this view in his submission, where he states:

It is only a sham when parties construct what they would both understand to be an employment arrangement and then try and disguise it as something else by adopting an arrangement that does not genuinely reflect their intentions.¹²²

- 5.128 DEWR describe sham arrangements are where employers seek to conceal employment relationships to appear as independent contracting arrangements in order to avoid responsibility for some legal entitlements payable to employees.¹²³

- 5.129 DEWR stated that there is difficulty in estimating the prevalence of sham contracting:

It is going to be very difficult to estimate the incidence of sham arrangements for the same sorts of reasons that it is hard to estimate the size of the black economy. By their nature, they are deceptive arrangements that look like an independent contracting arrangement but are, in fact, an employment relationship, so trying to identify those in any sort of systematic way from surveys or ABS statistics or those sorts of sources is going to be very difficult. Probably the best examples we have are examples that have come to light through legal proceedings.¹²⁴

- 5.130 A broader view of sham arrangements included evidence from a union body on the problematic nature of sham, or 'bogus' independent contracting arrangements.¹²⁵ Where employers classify

121 Vic. Government, *Submission No. 71*, p. 34.

122 Prof. A. Stewart, *Submission No. 69*, p. 7.

123 DEWR, *Exhibit No. 25*, p. 22.

124 Mr B. Pridmore, DEWR, *Transcript of Evidence*, 16 June 2005, p. 32.

125 CFMEU, *Submission No. 5*, p. 4.

their workers as sub-contractors, they are able to avoid award entitlements, and are described as 'disguised employment'. In the building and construction industry, CFMEU state that sham arrangements are widespread. In their view the result is: workers with lower overall remuneration; undercutting of honest employers; and loss of revenue to the Australian Government and the community.¹²⁶

- 5.131 The CFMEU believe that by forcing workers into bogus subcontracting, it has the effect of creating large numbers of tax evaders, 'weak legislation has the effect of generating a positive incentive for tax evasion'.¹²⁷
- 5.132 Furthermore, they state it is this relationship of cost-saving and tax-savings that has allowed the sham arrangements to thrive. Tax minimisation or avoidance will be discussed in a later section.
- 5.133 The Department of Consumer and Employment Protection (DOCEP) in WA argue that there is no evidence to suggest a high incidence of sham arrangements in the building and construction industry. However, there appears to be an increasing trend in the number of complaints received regarding sham arrangements in the service industry, such as hospitality, retail, aged care, clerical and security.¹²⁸ It was revealed that in these cases, true employment relationships existed but were concealed under the guise of independent contracting.
- 5.134 The avoidance of legal entitlements, including tax evasion and remuneration issues, is not the only concern expressed in the submissions. Lack of training, safety issues and economic insecurity on behalf of the independent contractor were also issues identified.¹²⁹
- 5.135 On the surface, it was submitted that sham independent contracting may appear appealing to the worker. Often the worker is paid cash in hand, and the earnings remain undeclared.¹³⁰
- 5.136 Evidence indicates that many workers are not aware of the practical implications of working as an independent contractor, which may hinder their ability to make informed choices.¹³¹

126 CFMEU, *Submission No. 5*, p. 4.

127 CFMEU, *Submission No. 5*, Appendix 9: CFMEU submission to Inquiry into Structure and Distributive Effects of the Australian Taxation System, p. 2.

128 DOCEP-WA, *Submission No. 33*, p. 2.

129 ACTU, *Submission No. 60*, pp. 18-19; AMWU, *Submission No. 46*, pp. 32-33, 57-60.

130 CFMEU, *Submission No. 18*, pp. 2-3.

131 DOCEP-WA Government, *Submission No. 33*, p. 1.

- 5.137 There is nothing inherently wrong with an independent contracting arrangement, if both parties freely enter into it with a proper understanding of the nature and effects of such a relationship.¹³² However, a typical example provided to the Committee relates to young workers in marginal employment, who are required to sign agreements to become contractors.
- 5.138 The issue raised is the lack of independence, and if the worker is inexperienced they may not appreciate that what they are agreeing to is transferring responsibility from the employer to the individual worker for issues such as payment of:
- tax;
 - superannuation;
 - workers' compensation insurance; and
 - public liability insurance effectively making them liable for any damage to property.¹³³
- 5.139 However, if the contract is wholly or principally for labour then the employer still has obligations. ATO advised that they have an employer obligations program where employers are visited to ensure they fulfil their obligations in relation to PAYG withholding and superannuation.¹³⁴
- 5.140 One example of transferring responsibility, offered by Unions NSW, occurred in 2000 at the Olympic Stadium. A multinational catering company working in a major Olympic venue tried to avoid paying award wages to its catering employees, some who were as young as 15 years old, by attempting to turn them into independent contractors.
- Parents of some of the employees contacted Unions NSW to complain that their children were being required to take out an A.B.N. and would only be paid on a commission basis. This arrangement was contrary to an advertisement placed in many regional newspapers to lure workers during the Olympic games and contrary to an Industrial Award, which applied to the Employer.¹³⁵
- 5.141 This example highlights that some workers may be exploited by business, and the usefulness of representation or ensuring sufficient

132 NSW Government, *Submission No. 35*, p. 4.

133 Qld Government, *Submission No.66*, p. 30.

134 Mr T. Sullivan, ATO, *Transcript of Evidence*, 16 June 2005, p. 17.

135 Unions NSW, *Submission No. 44*, pp. 11-12; Unions NSW, *Exhibit No. 37*: Copy of correspondence regarding minors and independent contracting.

investigatory resources are available to assist in helping to resolve the issues.¹³⁶ A second example can be drawn on to emphasize the vulnerability of workers in the workplace when there are not sufficient safeguards to protect their rights.

- 5.142 In this example, a Salvation Army client, with a mild intellectual disability and on Disability Support Pension (DSP) for four years, has worked part-time as a cleaner since October 2004. The client informed Centrelink each fortnight of her income, and they adjusted her DSP accordingly. The client is concerned about not paying tax, as the employer is not deducting the tax from her earnings.¹³⁷
- 5.143 The cleaning agency informed the client that she was a sub-contractor as she had signed a contract stating the arrangement. The client did sign a contract; however she had no idea what it meant for her employment. She receives a weekly pay, and does not invoice the agency. She is offered work on a weekly basis; however, she does not have regular customers of her own.
- 5.144 It was made clear to the Salvation Army that some cleaning agencies were moving to sub-contractors rather than employees in the hope of avoiding responsibilities in regard to workers' compensation, superannuation, pro-rata long service leave and holiday pay. The client was to apply for an ABN; however, it was stated she did not understand the implications this would have on her rights as a worker or her possible taxation debts.¹³⁸
- 5.145 The implications for the contractors are that they are limited in their avenues of recourse. There are anti-avoidance provisions in tax law; however, this does not help the contractor in relation to the other issues such as superannuation guarantee,¹³⁹ workers' compensation and other legal requirements for which the principal business may be responsible.
- 5.146 For the purposes of the superannuation guarantee, for independent contractors even if an ABN is quoted they may be considered an employee. However there is no obligation if the contract is with a company or partnership, nor if the person contracted is engaged to

136 DOCEP- WA Government, *Submission No. 33*, p. 1.

137 Salvation Army, *Submission No. 68*, p. 1.

138 Salvation Army, *Submission No. 68*, p. 1.

139 Even in the federal arena, it was found that two thirds of Commonwealth agencies audited did not meet their superannuation obligations for independent contractors when contracts were wholly or principally for labour. This was thought in the main to be a lack of awareness of obligations; ANAO, 2004, *ANAO Audit Report No. 13 2004-05, Superannuation payments for Independent Contractors working for the Australian Government*, pp. 12-13.

produce a result or is free to engage other people to perform the work.¹⁴⁰

5.147 Further areas of interest include the genuine doubt about employment status because of the nature of the working relationship. This can happen where self-employed workers gradually enter into permanent arrangements with a single client,

... where persons are recruited and work at a distance without fixed hours or days, have special payment arrangements, but still follow instructions and are subject to control.¹⁴¹

5.148 The broader view of 'sham' arrangements assumes the creation of business structures to avoid employment obligations. Strategies for investigation and possible remedies are included in the next chapter.

Incorporation

5.149 Evidence from the submissions to the inquiry indicates that employers often dictate the nature of the contractual dealings, and that the workers often do not have the bargaining power to influence the result. In some instances the control extends to the employer requiring contractors to incorporate, or use a company as a trading entity. The Victorian Government believes this to be:

... motivated by a desire to avoid existing Federal unfair contracts laws and to avoid the statutory and common law regulation and costs associated with a finding of employment.¹⁴²

5.150 The Law Council note that:

It is also established law that a company or partnership cannot usually be classified as an employee. In the transport industry, for example, it is common practice for owner-drivers to be incorporated.¹⁴³

5.151 The TWU Vic/Tas branch supports this view that owner-drivers operate either as sole traders, partnerships or as incorporated companies. They state that in the past 10 years there has been a

140 ATO, *Superannuation guarantee-employer obligations*, accessed 24 May 2005, <www.ato.gov.au/super/content..asp?doc=/content/19136.htm>.

141 Qld Government, *Submission No.66*, p. 30.

142 Vic. Government, *Submission No. 71*, p. 34.

143 Law Council of Australia, *Submission No. 59*, p. 2.

substantial increase in the number of owner-drivers operating as incorporated companies.¹⁴⁴

Implications

- 5.152 The implications for independent contractors who are incorporated are the additional costs of maintaining a corporate entity. However, there are tax advantages with payment of the corporate tax rate rather than the individual rate as long as they meet the personal service business requirements.¹⁴⁵ (Refer to the next section.) This indicates the incentive for independent contractors/employees to move over to a company entity.¹⁴⁶
- 5.153 In addition, Division 84 of the Income Tax Assessment Act 1997 provides for deductible business expenses for contractors, based on them operating a Personal Services Business. A person must be a contractor at common law to be eligible.¹⁴⁷ However, the extra costs of superannuation, workers' compensation and/or insurance, and leave need to be taken into consideration.
- 5.154 The hirer (principal contractor) is not required to make superannuation contributions for incorporated contractors, and in Victoria, the hirer (principal contractor) is not obliged to make payments of workers' compensation premiums.¹⁴⁸
- The significant financial savings achieved to the benefit of hirers and the detriment of the workers that result from incorporation have prompted a significant trend among the hirers of labour to require contractors to be incorporated.¹⁴⁹
- 5.155 Furthermore it is noted that, in Victoria under Commonwealth legislation, contractors who incorporate do not have standing to make an application under the unfair contracts section, ss.127A-C, of the WR Act. 'This provision has contributed to a trend towards incorporation.'¹⁵⁰

144 TWU-Vic./Tas., *Submission No. 56*, p. 6.

145 For example company (general) tax rate is a standard 30% (2003-2004); individual taxable income \$21,601 - \$58,000 = 30%; \$58,001 - \$70,000 = 42%; over \$70,000 = 47%, accessed 17 June 2005 <www.ato.gov.au/print.asp?doc=/content/12333.htm>; and <www.ato.gov.au/businesses/content.asp?doc=/content/44266.htm>.

146 DEWR-Ms R. Bremers, *Exhibit No. 44*, p. 2.

147 HIA, *Submission No. 61*, pp. 5-6.

148 Vic. Government, *Submission No. 71*, p. 17.

149 Vic. Government, *Submission No. 71*, p. 17.

150 Vic. Government, *Submission No. 71*, p. 38.

- 5.156 The Victorian Government observes that the Federal Government's Small Business Deregulation Taskforce noted this was a common practice.
- 5.157 Increasing numbers of larger businesses require small businesses and independent contractors to incorporate so that those contracting their services are able to avoid the costs that flow from deeming provisions.
- Where small businesses accede to this requirement, additional compliance costs are inevitable. In these situations, the regulations are working against the viability of small businesses and dictating the structure of their business arrangements.¹⁵¹
- 5.158 As highlighted in an earlier section, expanding the description of independent contractors beyond only natural persons under the unfair contracts provisions, ss. 127A-C, of the WR Act may diminish the pressure from employers to avoid federal legislation under unfair contracts provisions.
- 5.159 The Committee considers that this may have the effect of reducing the incentive to re-structure business arrangements where the demands of the trade do not require it, and therefore lessen the additional costs to the independent contractor.

Tax minimisation

- 5.160 As discussed earlier in the report the introduction of legislative measures in 2000 to limit tax avoidance relating to independent contractors has mainly focussed on personal services income.
- Most of the contractors who work through any of our licensed agencies are sole traders or individuals, so PSI does not come into the equation. PSI is really a tax avoidance issue for businesses that structure into entities and try to divert income that they have earned from personal services through a corporate tax rate.¹⁵²
- 5.161 Income tax law requires businesses to withhold tax on payments to both employees and contractors through the PAYG system. If a labour hire firm acting as a principal contractor supplies workers, the business pays the labour hire firm, not the workers. The business is

151 Commonwealth Small Business Deregulation Taskforce *Time for Business: Report of the Small Business Deregulation Taskforce*, November 1998, p. 51 cited in Vic. Government, *Submission No. 71*, p. 35.

152 Ms J. Meinen, Labour Force Australia, *Transcript of Evidence*, 26 April 2005, p. 74.

not required to withhold tax from payments made to the labour hire firm, unless it does not quote its ABN.¹⁵³

- 5.162 However, if the business is a labour hire firm, like any other employer they must withhold tax from any payments made to individual workers.
- 5.163 Personal services income is income that is earned by the personal efforts or skills of an individual. This income can be 'alienated' when an entity (a company, trust or partnership) is interposed between the individual and the person paying for their services, so that the interposed entity derives the income rather than the individual.
- 5.164 The income may be split with other members of the interposed entity or retained within the interposed entity, allowing less tax to be paid or the tax liability to be deferred.¹⁵⁴
- 5.165 AMWU also cited concerns with independent contractors' tax arrangements and the creation of other entities.

On the impact on the Commonwealth revenue, in a study by the National Institute of Economic and Industry Research for the union, NIEIR concluded that growth in contracting is leading to a \$14.38 billion per annum risk to the tax base. Most independent contractors are in fact dependent contractors or employees. The loss in the tax base is a mixture of tax evasion and tax avoidance, including the failure to report substantial amounts of income, claims for fictional or improper deductions and the ability to split income with families and relatives and lower the average tax rate. As you see in our submission, sole traders claim that 8.96 per cent of their business income is spent on motor vehicle expenses, in contrast to the average construction company who claim 2.84 per cent.

Partnerships in the manufacturing industry claim on average 66.21 per cent of their income as 'other expenses' compared to a manufacturing company standard of 48.74 per cent. In the finance and insurance industries, sole traders claim 2.04 per cent of their income as payments to related entities. This is likely to be income splitting so that the tax base is reduced by half.¹⁵⁵

153 ATO, *Determine the status of your workers*, accessed 21 June 2005
<www.ato.gov.au/businesses/content.asp?doc=/content/35887.htm>.

154 The Treasury, *Submission No. 73*, p. 2.

155 Mr D. Cameron, AMWU, *Transcript of Evidence*, 31 March 2005, p. 69.

- 5.166 PSI legislation acts to address these issues by preventing individuals from claiming to be businesses in order to avoid paying income tax at individual rates. It does not affect individuals who are genuinely in business.¹⁵⁶
- 5.167 In 2001, the Government introduced self-assessment to determine whether individuals are independent contractors against the 'results test'. If the results test is passed, the taxpayer is not affected by the alienation measures regardless of the proportion of their income derived from a single source.
- 5.168 To satisfy the 'results test' the individual must:
- work to produce a result; and
 - provide plant and equipment or tools of the trade (if required); and
 - be liable for rectification of any defects in work performed.
- 5.169 If individuals cannot meet the results' test then the 80 per cent rule and personal services business tests are used to determine business status.
- 5.170 The intent of the provisions is to achieve consistent taxation treatment for personal services income irrespective of the structures in places to receive that income. Additionally, the law does not impinge on any commercial or contractual obligation between parties affected by the measures and does not impact on genuine business undertakings.¹⁵⁷

Compliance with PSI

- 5.171 However, Professor Stewart outlines a lack of faith (due to a lack of resources) in the compliance audit program related to alienation of personal services income which checks that contractors are correctly reporting.¹⁵⁸
- 5.172 ATO reports that of taxpayers seeking to be considered as a personal service business, 75 per cent self assess under the results test. The remainder use a combination of the 80/20 rule, unrelated clients, business premises or employment tests. (One per cent or less have personal service business determinations from the Commissioner of Taxation.)¹⁵⁹
- 5.173 ATO indicated that of the over 550 compliance audits undertaken in this area, approximately one third required adjustments. The main

156 The Treasury, *Submission No. 73*, p. 2.

157 The Treasury, *Submission No. 73*, p. 2.

158 Prof. A. Stewart, *Submission No. 69*, pp. 8-9.

159 The Treasury, *Submission No. 73*, p. 3; Mr M. Konza, ATO, Transcript of Evidence, 16 June 2005, p. 8.

industries the ATO focussed on were those contractors working through labour hire firms generally in information technology (IT) and building and construction. ATO indicated that they believed that the legislation has had the desired effect and they are now receiving fewer inquiries and are beginning to divert their resources to other areas of greater compliance need.¹⁶⁰

- 5.174 However, the anti-avoidance provisions in Part IVA of the Income Tax Act may still apply to personal service business. Therefore, ATO is conducting a test case program to clarify the application of Part IVA.¹⁶¹

Proliferation of Australian Business Numbers

- 5.175 The construction industry has a high proportion of independent contracting arrangements. The Civil Contractors Federation (CCF) comments on the need for tighter regulation of independent contractor status.¹⁶² They state that the use of ABNs in the construction industry as a proxy for contractor status is inadequate with a proliferation of sub-contractors.
- 5.176 Additionally, the CFMEU states that ABN applications need to be scrutinised more thoroughly.¹⁶³ The application for the issuing of business numbers is basically self assessment. All the ATO will verify is: first, that the person does not already have an ABN; and, second, the identity of the person.
- 5.177 ATO responded that an ABN is expected to be delivered to a business within 10 working days. This does not allow significant checking time. However, if the description of the business and the registration look questionable then they will be queried.¹⁶⁴
- 5.178 The ATO also outlined the difficulties in linking requests for ABNs through the Australian Business Register with current employment status and work site.¹⁶⁵ An individual's tax file number is required if the business structure is as a sole trader. However, if the business

160 The Treasury, *Submission No. 73*, p. 5; Mr M. Konza, ATO, *Transcript of Evidence*, 16 June 2005, pp. 3, 6.

161 Mr M. Konza, ATO, *Transcript of Evidence*, 16 June 2005, p. 3.

162 CCF, *Submission No. 15*, pp. 7-9.

163 CFMEU, *Submission No. 5*, Appendix 9, p. 1.

164 Mr M. Konza, ATO, *Transcript of Evidence*, 16 June 2005, p. 9.

165 Mr M. Konza, ATO, *Transcript of Evidence*, 16 June 2005, pp. 9-10.

- structure to be established is as a company then a new tax file number will be sought.¹⁶⁶
- 5.179 Given that building contractors are involved in an industry which usually meets the results test,¹⁶⁷ and that they often work at multiple sites, then it would appear that in the main that independent contractor status for tax purposes (i.e. as a personal service business) would be legitimate.
- 5.180 Other industries also raised concerns. For example workers in the IT industry state that the results test is biased against professionals.¹⁶⁸ ATO acknowledge that they do focus on the IT industry because IT contractors, programmers for example, are not generally paid to deliver a completed product, but are paid on an hourly basis. This would then suggest that they do not meet the results test.¹⁶⁹
- 5.181 The effect of issuing ABNs impacts on the withholding of taxation. ATO cautions that just because a worker quotes an ABN does not mean that they are an independent contractor. Whether a worker is an employee or an independent contractor depends on all the facts and circumstances of how a business engages the worker.¹⁷⁰
- 5.182 However, HIA states that withholding obligations do not necessarily apply when the taxpayer is a contractor who quotes an ABN.¹⁷¹ Most independent contractors provide for their tax obligations through the PAYG instalments system.¹⁷²
- 5.183 ATO stated that they had worked with a range of industry groups and unions to develop information sheets and provide advice to the industry sector to support the changes that were introduced with the personal service income legislation. These included organisations in the building and construction industry, ICA, RCSA, APESMA and the transport industry.¹⁷³
- 5.184 However, Labour Force Australia commented on the interaction between the labour hire sector and contractors, and stated that some

166 ATO, *Registering your business*, accessed 29 July 2005, p. 2, <www.ato.gov.au/print.asp?doc=/content/25316.htm>.

167 Mr M. Konza, ATO, *Transcript of Evidence*, 16 June 2005, pp. 10-12.

168 DEWR-Ms R. Bremers, *Exhibit No. 44*, pp. 1-2;

169 Mr M. Konza, ATO, *Transcript of Evidence*, 16 June 2005, p. 6.

170 ATO, *Determine the status of your workers*, accessed 21 June 2005, <www.ato.gov.au/businesses/content.asp?doc=/content/35887.htm>.

171 HIA, *Submission No. 61*, pp. 5-6.

172 ATO, *PAYG withholding guide no 2 - How to determine if workers are employees or independent contractors*, accessed 21 June 2005, <www.ato.gov.au/businesses/content.asp?doc=/content/4540.htm>.

173 Mr M. Konza, ATO, *Transcript of Evidence*, 16 June 2005, p. 3.

independent contractors were not clear on the requirements of taxation legislation:

When the tax law changed to PAYG in 2000 it specifically included a section for labour hire but did not discriminate whether it was employment or contracting. The tax requirement, as it relates to labour hire, is that PAYG is deducted from individuals and sole traders regardless of whether they have an ABN or GST registration.¹⁷⁴

- 5.185 The Committee is concerned that if a business requests former employees to register for an ABN and then regard them as contractors this situation does not take into account the legalities of the common law distinction, unless other changes to working arrangements are made.
- 5.186 Additionally, this situation may lead to confusion, tax liabilities for the contractor and the loss of revenue for the Australian Government. The business is reducing their liabilities and not correctly withholding or reporting. Additionally independent contractors in this situation may not be aware of their changed tax obligations.
- 5.187 The Committee considers that additional strategies are still needed to ensure that independent contracting arrangements are legitimate.

In summary

- 5.188 Deeming as a device to provide protection for workers with lesser bargaining power has been used by a number of states, across a range of legislation. The advantages and disadvantages have been discussed.
- 5.189 The concept of independent contracting as a commercial relationship was raised in evidence. Suggestions were made to use unfair contract provisions in the TPA and the WR Act to further strengthen or customise support for independent contractors. An alternative legislative approach proposed in Victoria with the owner-drivers was considered.
- 5.190 Artificial independent contracting arrangements were reviewed. There is great difficulty in quantifying the incidence of sham and disguised employment arrangements. The trend for incorporation as a business structure was discussed, followed by concern raised regarding tax minimisation strategies.

174 Ms J. Meinen, Labour Force Australia, *Transcript of Evidence*, 26 April 2005, p. 74.

- 5.191 The next chapter will consider the future role of labour hire and independent contracting arrangements. Strategies to pursue national consistency and legitimacy in labour hire and independent contracting will build on material presented in earlier chapters.

Future for working arrangements

- 6.1 Of topical concern is the future of labour hire and independent contractors working arrangements in Australia. Recent public policy announcements by the Australian Government suggest major changes to the regulation of working arrangements.¹ Some commentators suggest that the use of employees will diminish and contractors will increasingly fill their place to ensure that Australia remains internationally competitive.²
- 6.2 However, recent actions in courts, test cases and collective agreements indicate that the use of casual or non-ongoing employees, such as in labour hire, and independent contractors may be limited to ensure that these workers receive similar conditions to direct employees. Additionally the proportions of types of workers may be regulated depending on business needs and employee demands.³

1 The Hon. J. Howard MP, *Ministerial Statement: Workplace Relations Reform*, House of Representatives Hansard, 26 May 2005, pp. 38-43.

2 Freeman, P., 14 June 2005, *Bulletin with Newsweek*, 'Seize the day', p. 3 citing Mr P. Ruthven, Chairman of IBIS World.

3 Corrs, Chambers, Westgarth Lawyers, Corrs in Brief, *AIRC Full Bench Decision Clarifies "Matters Pertaining" Post-Electrolux*, 29 March 2005, p. 1; NSW Government, *Submission No. 35*, citing *Secure Employment Test Case*, p. 42; *Human resources*, 6 April 2004, 'Casuals cause strong test case'; accessed 1 July 2005, <www.humanresourcesmagazine.com.au/articles/2f/0c01f12f.asp>; NUW, 4 July 2005, Press Release; *After 65 days, resolution achieved in Kemalex dispute - workers return to work*, accessed 5 July 2005, <www.nuw.org.au/articles/vic/MediaReleases/kemalexresolution/view>.

- 6.3 How various governments, workers, representative bodies and businesses respond to these actions will steer Australia's future for at least the next decade.
- 6.4 This chapter examines the future role of labour hire and independent contracting in the Australian economy. It includes labour hire and contracting as complementary staffing strategies to direct employment, and the effect of enterprise bargaining agreements on these work arrangements.

The future role of labour hire and contracting

- 6.5 In a highly competitive global market, flexibility and response times are crucial and as a result, demand from companies for labour hire and contractor placement services has increased.⁴
- 6.6 Around 10 per cent of people in employment in Australia work as self-employed contractors.⁵ From the period of 1978 to 1998, growth of self-employed contractors was around 15 per cent.⁶ However, from 1998 to 2004 there appeared to be a flattening of growth.⁷ Similarly, the number of labour hire workers increased by around 15 per cent a year to 2002. The percentage of employees who are labour hire workers grew from 0.8 per cent in 1990 to 3.9 per cent in 2002.⁸
- 6.7 A recent survey indicated that growth of fixed-term contracts is levelling.⁹ Therefore, the assumption of persistent growth may not be well founded and it is unclear what the future trends are for labour hire workers and independent contractors.
- 6.8 Supporting labour hire and contracting arrangements is essential because of the following trends:
- a shortage of skilled labour in certain industries and occupations;
 - the encouraging of mature age people back into the workforce or to remain in the workforce longer; and

4 Ross Human Directions, *Submission No. 54*, p. 2; Qld Government, *Submission No. 66*, pp. 15-16; DEWR, *Exhibit No. 25*, p. 8.

5 Waite, M and Will, L, 2001, *Self-employed contractors in Australia: incidence and characteristics*, Productivity Commission Staff Research Paper, AusInfo, Canberra, p. x.

6 DEWR, *Exhibit No. 25*, p. 7, citing research by VandenHeuvel, A and Wooden, M, 1995, Self employed contractors in Australia: how many and who are they? *Journal of Industrial Relations*, vol. 37, no. 2.

7 ABS, *Forms of Employment*, Cat. No. 6359.0, November 2004, p. 8.

8 Ai Group, *Submission No. 49*, p. 11; CFMEU, *Submission No. 5*, p. 13; Unions NSW, *Exhibit No. 33*, p. xii.

9 ABS, *Forms of Employment*, Cat. No. 6359.0, November 2004, p. 8.

- the increased global competition for jobs and the need for Australia to compete against large scale outsourcing arrangements in developing countries.¹⁰
- 6.9 From the various responses of submissions, the growth of labour hire and independent contracting has a number of advantages as well as concerns. The relative benefits depend greatly on the view of the role of these working arrangements.

Supplementation or substitution

- 6.10 As discussed in Chapter 3, labour hire arrangements can offer significant benefits to employers and employees. Labour hire employment provides an important source of flexibility that can allow businesses to supplement their core staff with workers to meet peaks and troughs in demand, and to manage staff absences or skills shortages.¹¹
- 6.11 AMWU and UnionsWA suggest some employers seek to use labour hire arrangements to drive down labour costs¹² and avoid meeting employee entitlements and protections.¹³
- 6.12 However, evidence to the Committee has suggested that some employers may use labour hire and independent contracting as a substitute for employees to avoid costs such as superannuation, and to avoid industrial obligations such as OHS requirements. This substitution is not supported by unions and state and territory governments.¹⁴
- 6.13 MBA reported that:
- If labour hire workers are used because of the unavailability of direct workers with the necessary skills, then the two groups may be regarded as complements rather than substitutes.¹⁵
- 6.14 This view of complementarity recognises the legitimate role of all forms of working arrangements. It is less easily to determine how conditions of such working arrangements are managed.

10 Ross Human Directions, *Submission No. 54*, p. 2.

11 DEWR, *Exhibit No. 25*, p. 28; ACTU, *Submission No. 60*, p. 12.

12 AMWU, *Submission No. 46*, p. 26.

13 Ms J. Freeman, UnionsWA, *Transcript of Evidence*, 20 May 2005, p. 48.

14 ACT Government, *Submission No. 34*, pp. 2-3; Queensland Nurses Union, *Submission No. 24*, p. 11.

15 Master Builders Australia, *Submission No. 22*, p. 10.

Enterprise bargaining agreements and awards

- 6.15 A focal point of modern Australian industrial law (in both the federal and state systems) is EBAs. Individual contracts such as Australian Workplace Agreements (AWAs) are being promoted by the Australian Government. Awards now perform a 'safety net' function to underpin bargaining.
- 6.16 It was stated by Ai Group that labour hire employees enjoy a similar level of award protection as other employees. Federal and state awards apply equally to labour hire companies as they do to other companies.¹⁶
- 6.17 However, NUW suggested that labour hire employment is uniquely unsuited to enterprise bargaining. Employees engaged on a casual, temporary or assignment basis, employed remotely at a host employer's operation are in no position to bargain.¹⁷
- In the labour hire sector very few employees are covered by EBAs. Most are covered by basic award conditions only. Those who are not award-covered will be concentrated in highly specialised professional areas such as information technology, and the legal profession.¹⁸
- 6.18 However Ai Group cautioned against assuming that enterprise agreements are uncommon throughout the labour hire sector. Ai Group has seen no evidence that the coverage of labour hire employees under enterprise agreements is lower than the coverage of employees under agreements generally.¹⁹
- 6.19 Insufficient evidence was received to validate either claim.
- 6.20 There were also concerns raised regarding restrictions on the use of labour hire and contracting. DEWR referred to the concern the Australian Government has on the inclusion of limitations of labour hire and independent contractors in industrial agreements.²⁰ Additionally, Ai Group indicated that restrictions on labour hire and

16 Ai Group, *Submission No. 49*, p. 13.

17 NUW, *Submission No. 47*, p. 6. See also CFMEU, *Submission No. 5*, Appendix 13: ACTU Submission to NSW Labour Hire Task Force, p. 17; Mr C. Cooper, CEPU, *Transcript of Evidence*, 27 April 2005, p. 2; Mr G. Hargrave, SKILLED Group, *Transcript of Evidence*, 27 April 2005, pp. 16-17.

18 Qld Government, *Submission No. 66*, p. 22.

19 Ai Group, *Submission No. 49*, p. 13; see also Mr N. Wakeling, member of RCSA (Adecco), *Transcript of Evidence*, 26 April 2005, pp. 24-26 for support of labour hire agreements.

20 DEWR, *Exhibit No. 25*, pp. 9, 10, 29, 30.

- contracting should be treated as 'objectionable provisions' under the WR Act and be prohibited within enterprise agreements.²¹
- 6.21 Recent court and commission decisions have further examined current arrangements relating to labour hire and independent contracting. The High Court decision in the Electrolux case²² in September 2004 found that a certified agreement must only contain provisions that affect the employee/employer relationship and provisions that are incidental or ancillary to their relationship are not valid.
- 6.22 In March 2005, the AIRC full bench found that provisions regulating the engagement of labour hire employees, including limits on the proportion of labour hire workers in an organisation, are valid. AIRC also found that clauses inserted into agreements directing that labour hire workers be paid the same rates as direct employees also pertain.²³
- 6.23 However in July 2005, the AIRC (Commissioner Richards) found that labour hire and contractor provisions that forbid their engagement in a particular circumstance did not pertain to the employee/employer relationship and were not permissible. No judgement was provided on labour hire workers and site rates.²⁴ Therefore, there is still a lack of clarity on these matters.
- 6.24 Professor Stewart submitted that there may be legitimate interest for direct employees in a decision by a host business to obtain supplementary or replacement labour from workers who are not direct employees, because of the potential effect on employee jobs or on the integrity of the terms established for their employment.²⁵
- 6.25 Professor Stewart stated that it would be both legally and industrially acceptable for a firm to agree with its employees that such labour will only be engaged in particular circumstances or on particular terms.
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21 Ai Group, *Submission No. 49*, p. 26.

22 Electrolux Home Products Pty Ltd v Australian Workers Union [2004] HCA 40(2 September 2004).

23 ACTU, *Submission No. 60*, p. 13; DEWR, WageNet, *Workplace Relations Amendment (Agreement Validation) Act 2004*, accessed 28 June 2005, <www.workplace.gov.au/workplace/Category/Legislation/WRAct/WorkplaceRelationsAmendmentAgreementValidationAct2004.htm>; Corrs, Chambers, Westgarth Lawyers, Corrs in Brief, *AIRC Full Bench Decision Clarifies "Matters Pertaining" Post-Electrolux*, 29 March 2005, p. 1.

24 CCH Australia Ltd, 22 July 2005, *AIRC: Clause regulating engagement of contractors doesn't pertain*; accessed 25 July 2005, <www.cch.com.au/fe_news.asp?document_id=62291&topic_code=9&category_code=0&printfriendly=1>; Bundaberg Foundry Engineers Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and another PR96036 (18 July 2005).

25 Prof. A. Stewart, *Submission No. 69*, p. 16.

There is no warrant for the legislature to intrude upon the freedom of employers and their employees to deal with this issue. If firms are prepared to agree on conditions for the use of contract or agency labour, as part of the compromises and trade-offs that mark every enterprise agreement that is a choice that should be respected.²⁶

6.26 ACCI maintain that contracts for services under which work is performed are essentially commercial arrangements. Consequently ACCI consider that, provided the contract is lawful, where persons freely enter into these contracts, they should:

... not have them varied, redefined, reshaped, annulled, downgraded or otherwise interfered with by persons or bodies (including governments, regulators, tribunals or courts) who are not parties to those contracts.²⁷

6.27 However, the DEWR Discussion Paper posed that changes could be introduced as part of the proposed Independent Contractors Act.²⁸

Future arrangements of independent contracting

6.28 Ten years ago, concerns with differentiating between independent contractor and employee status were identified in the media.²⁹ The implications of business structure for tax, payroll tax, superannuation and workers compensation were raised as issues. It was further suggested that there are ways to minimise obligations through documenting contractual relationships, using a company or partnership structure, and using labour hire agencies with specialised experience in the area.

6.29 Today these issues are still current. The Committee recognises the need to structure suitable business arrangements to suit industry and personal needs. However, legislative obligations need to be met, and the Committee does not condone the creation of artificial structures to avoid regulatory compliance by host businesses, labour hire agencies, or principal contractors; or the creation of artificial independent

26 Prof. A. Stewart, *Submission No. 69*, p. 16.

27 ACCI, *Submission No. 25*, p. 5.

28 DEWR, *Exhibit No. 25*, p. 10.

29 Lawson, M, 1995, *Australian Financial Review*, 'Huge financial penalties if contractors deemed employees', 14 February 1995, p. 35, cited in CFMEU, *Submission No. 5*, Appendix 1, Attachment 12: CFMEU's submission to Royal Commission into Building and Construction Industry July 2002.

contracting arrangements to avoid the finding of an employer/employee relationship.

- 6.30 Therefore, investigation services are required to pursue business and employer responsibilities.

Investigations and remedies

- 6.31 There are investigatory services in most states or territories. Federally the Office of Workplace Services (OWS) provides this function or it is outsourced to a state service as a one-stop workplace relations shop.³⁰ DOCEP in WA indicated that they had undertaken investigations associated with employment relationships and independent contracting.³¹
- 6.32 However, investigatory powers and remedies appear to be limited to investigating employment entitlements under federal awards or agreements (OWS), or for Australian Workplace Agreements (Office of the Employment Advocate (OEA)). The OEA only cater for independent contractors' concerns about Freedom of Association.³² Therefore, independent contractors do not appear to be well covered by these services.
- 6.33 DEWR state that workers in disguised employment relationships should have remedies available to them. As discussed, courts perform this role to some extent. However, this involves parties bringing proceedings to recover entitlements or seeking legal remedies.
- 6.34 An option proposed by DEWR is to extend the coverage of workplace relations inspectors appointed under the WR Act, through OWS.³³ This would be further extending the reach of DEWR into possible business relationships, which may not be supported by the business community. An additional option would be to pursue the remedies available under the Trade Practices Act under unconscionable conduct.
- 6.35 There could be a greater role for the OWS to review claims of coercion for workers to accept independent contractor arrangements. There is

30 Australian Government, Wagenet, *Inquiry and Compliance Service*, accessed 2 July 2005, <www.wagenet.gov.au/WageNet/templates/PageMaker.asp?category=Services&fileName=../FactSheets/DataFiles/Employees/advisoryCompliance.html>.

31 DOCEP-WA, *Submission No. 33*, p. 2.

32 Australian Government, Office of the Employment Advocate, *Freedom of Association*, <www.oea.gov.au/docs/flyer-freedom_of_association1.pdf>, *Independent contractor or employee?*; <www.oea.gov.au/docs/contractorvsemmployee.pdf>, accessed 2 July 2005.

33 DEWR, *Exhibit No. 25*, p. 22.

support for this approach from DOCEP who state that there is evidence of such coercion occurring.³⁴

- 6.36 The Royal Commission into the Building and Construction Industry had recommended access to DEWR workplace services for labour only sub-contractors seeking unpaid entitlements.³⁵ However, the ACTU was critical of OWS's ability to pursue complaints, citing instances where OWS has not investigated employee complaints or has not sought to prosecute employers for the breach of an agreement of award.³⁶
- 6.37 The Committee considers that attention needs to be given to determining the appropriate jurisdiction for pursuing independent contracting concerns.

Future strategies

- 6.38 Essentially the strategies recommended are to provide assistance for establishing genuine arrangements, reduce incentives for the establishment of artificial avoidance structures, identify where there may be sham arrangements operating, and introduce penalties.
- 6.39 The Queensland Government states that the introduction of the Commonwealth's PSI has acted to 'tighten the definition' of an independent contractor.³⁷ ATO note that they have seen some evidence of taxpayers returning to wage and salaries.³⁸
- 6.40 The Committee considers that the recommendations it has made in Chapter 4 to incorporate in legislation some components of the taxation approach (tests for personal services business), in addition to current common law, will promote consistency and assist in reducing the incidence of possible sham independent contractor arrangements. However, there is still a need to establish appropriate models and checks for legitimate independent contracting arrangements.
- 6.41 The Committee endorses the introduction of a voluntary code of practice with the labour hire industry, as discussed in an earlier

34 DOCEP-WA, *Submission No. 33*, pp. 1-3.

35 The Hon. T. Cole, 2003, *Final Report of the Royal Commission into the Building and Construction Industry*, Vol. 1, p. 138.

36 ACTU Submission to the Senate Employment, Workplace Relations and Education References Committee inquiry into the Building and Construction Industry, 2003, p. 49, accessed 7 July 2005 <www.aph.gov.au/senate/committee/eet_ctte/completed_inquiries/2002-04/building03/submissions/sub017.doc>.

37 Qld Government, *Submission No. 66*, p. 6.

38 Mr M. Konza, ATO, *Transcript of Evidence*, 16 June 2005, pp. 3, 7.

chapter. A code of practice was recommended by the ACTU and some industry employer bodies,³⁹ and they proposed that labour hire should not seek to place workers on artificial contractor arrangements to avoid employment responsibilities.⁴⁰ The following section considers evidence received regarding a registration system for independent contractors.

- 6.42 The CFMEU suggest a more rigorous system for uncovering sham arrangements be put into place and state that '[s]uch a system must be consistent, that is, once a person is deemed an employee for tax purposes, they should be deemed an employee for all purposes.'⁴¹

Independent contractors – register and/or registrar?

- 6.43 Support for introducing a registration system for independent contracting and the difficulties of such a scheme were presented to the Committee.
- 6.44 A number of strategies were suggested to limit the development of sham or disguised employment relationships. Ross Human Directions supported the proposal for independent contractors to make a statutory declaration that they meet the 'tests' in order to be considered an independent contractor.⁴²
- 6.45 CCF propose a registration process for independent contractors. They suggest a Registration Contractor Number associated with ABNs that could be on delegated authority issued by industry associations and associated with the Australian Securities and Investments Commission.⁴³
- 6.46 The ATO indicates that there may be merit in such a scheme for identifying contractors. However, there are two issues: (i) whether under common law a worker is an independent contractor or an employee; and (ii) for taxation purposes whether as an independent contractor they meet the tests to be a personal services business, rather than be taxed like an employee as receiving personal services income.⁴⁴

39 MBA, *Submission No. 22*, p. 13; ACTU, *Submission No. 60*, pp. 5, 28; Courier, Taxi & Truck Association, *Submission No. 50*, p. 5; Mr S. Ellis, *Submission No. 1*, p. 2; Mrs J. Hunt, *Manpower, Transcript of Evidence*, 31 March 2005, p. 24.

40 ACTU, *Submission No. 60*, p. 28.

41 CFMEU- Mining and Energy Division- Northern Branch, *Submission No. 18*, p. 12.

42 Ross Human Directions, *Submission No. 54*, p. 11.

43 CCF, *Submission No. 15*, p. 9.

44 Mr M. Konza, ATO, *Transcript of Evidence*, 16 June 2005, p. 11. The changes in the tax law states the changes introduced by the PSI in 2000/01 'only affect the treatment of your

- 6.47 The Committee's recommendations in Chapter 4 aligns legislative, common law and taxation approaches to minimise differential treatments and apply more consistent findings to issues of employment status.
- 6.48 The Queensland Government suggests that linking the PSI tests in the taxation regime provides an opportunity to apply these criteria when an ABN is lodged, so that questionable contracting arrangements can be avoided from the outset.⁴⁵
- 6.49 The DEWR Discussion Paper proposes setting up a registrar to determine the nature of the working relationship, rather than wait for adjudication by a court or tribunal.⁴⁶
- 6.50 However, TWU (Federal) states that they would be concerned that this would be an administrative function, rather than what they consider should occur, which is a formal hearing to allow determinations as to rights and an appeal mechanism. TWU considers that the establishment of a low cost tribunal would assist more in establishing the status of employees or independent contactors.⁴⁷
- 6.51 The Victorian Government support the AIRC's involvement to provide a more formal approach, with an appeal mechanism for obtaining a declaration of employee status from the Federal Magistrate's Court or the Federal Court. They suggest that any such process must be fast, informal and low cost.⁴⁸
- 6.52 Professor Stewart suggests that linking with the taxation system would provide an alternative registration system. Seeking a personal services business determination or assessment from the Commissioner of Taxation would become a readily available method of lessening doubt as to the status of an independent contractor.⁴⁹
- 6.53 However, he comments that there would be difficulties in making the determination conclusively binding, at least in relation to federal

personal services income. They do not affect your legal, contractual or workplace arrangements – you will not be treated as an employee as a result to the changes to the tax law.' *Alienation of personal services income: obtaining a personal services business determination*, accessed 24 May 2005,

<www.ato.gov.au/businesses/content.asp?doc=/content/13042.htm>.

45 Qld Government, *Submission No. 66*, pp. 42-43.

46 DEWR, *Exhibit No. 25*, p. 14.

47 DEWR-TWU, *Exhibit No. 64*, p. 33.

48 Vic. Government, *Submission No. 71*, p. 32.

49 Prof. A. Stewart, *Submission No. 69*, p. 12; see also Vic. Government, *Submission No. 71*, p. 32.

matters, due to constitutional restrictions.⁵⁰ This would then require linking to the Federal Magistrate's Court or the Federal Court.

- 6.54 The NSW Government in examining the definition of a worker for workers' compensation purposes, state that there would be difficulties with a registration system for independent contractors.

Many of the common law tests rely on evidence that is unknown or yet to be established at the commencement of a contract, which makes it difficult to determine the contractor's status in advance. Also, a contractor's status cannot necessarily be determined by the terms of the contract, as courts will look at the whole circumstances of the relationship between the parties when deciding whether an employment relationship exists.⁵¹

- 6.55 The Committee views that setting up a registration system may have difficulties, as the changing circumstances and nature of the contracting relationship would create challenges.

Civil penalties

- 6.56 The DEWR Discussion Paper suggests creating a civil penalty applying to parties who enter sham or disguised employment arrangements, as one of a number of measures to discourage the practice.⁵²
- 6.57 Professor Stewart suggests that firms should not be punished by applying additional penalties. Instead it should be ensured that they meet their due employment obligations just as if they had secured labour from persons who in functional terms are their employees.⁵³ Australian Business Limited supports this view, and suggests that if other strategies do not achieve the desired aim, then additional penalties could be introduced.⁵⁴
- 6.58 Ross Human Directions supports a legal avenue that allows a review of contractual arrangements where there is evidence of a lack of legitimacy. This avenue would enable both parties to have penalties

50 Prof. A. Stewart, *Submission No. 69*, p. 12.

51 NSW Government, *Submission No. 35*, p. 43.

52 Vic. Government, *Submission No. 71*, p. 34.

53 Prof. A. Stewart, *Submission No. 69*, p. 19; see also DEWR-KM Associates, *Exhibit No. 80*, p. 9.

54 DEWR-ABL/ABI, *Exhibit No. 47*; pp. 12-13.

applied to them if they are found to have made false statements or coerced the other party.⁵⁵

- 6.59 Ross Human Directions recommend a system whereby independent contractors sign a declaration stating they meet the contractor definition 'tests', (similar to a form proposed for the Workcover scheme in NSW). Penalties should be applied to the contractor for any false statements and there should be the capacity for labour hire companies to recover any employment-related costs incurred.⁵⁶ Others in the labour hire industry also support penalties.⁵⁷
- 6.60 The Committee notes that this issue did not feature prominently in evidence to the inquiry so further examination is required.
- 6.61 Discussion will now turn to ways to support independent contractors in their business arrangements, and the overlap with the workplace relations system.

Variation and constitutional powers

- 6.62 It was reported to the Committee that maintaining some of the states' and territories' unfair contracts and other industrial legislation that 'deems' independent contractors to be employees is required to protect disadvantaged workers. However, the Committee considers that this approach has not achieved consistency, clarity or simplification.
- 6.63 The complex interaction of workplace regulation can be attributed to structural factors, including the interaction of federal and state responsibilities under the Constitution. Efforts to discuss and resolve such issues through the Council of Australian Governments and WRMC and administrative forums should be pursued. However, there has been a recent lack of agreement at these Councils.
- 6.64 Greater definitional clarity and effective dispute resolution procedures are required to provide the appropriate worker protections and business flexibility essential for modern workplaces. The Australian Government has proposed a number of changes to the workplace relations system across Australia.

55 Ross Human Directions, *Submission No. 54*, p. 11.

56 Ross Human Directions, *Submission No. 54*, p. 11.

57 DEWR-Rowley Patrick, *Exhibit No. 66*, p. 3; DEWR-Australian Taxi Industry Association, *Exhibit No. 56*, p. 5.

- 6.65 One approach that has been canvassed is to seek referral of the necessary constitutional power from the states to the Commonwealth. (This was already agreed to by Victoria in 1996.⁵⁸) The other states advised in June 2005 that they will not refer their powers.⁵⁹
- 6.66 The Australian Government has also proposed the possibility of using other powers, such as the corporations' power in the Constitution, to broaden the applicability of workplace relations reform and create a more unitary system.⁶⁰ Such a strategy was included for consideration in the DEWR Discussion Paper on independent contracting and labour hire arrangements.
- 6.67 While Committee members may have party views on the use of the corporations' power, the Committee does not seek to express a view in the context of the Committee report. The concept of a unitary workplace relations system which would take precedence over state and territory systems was not the basis for this inquiry and the Committee did not seek evidence on this issue.
- 6.68 However, given that the Australian Government has signalled its intention to pursue this avenue, the Committee has sought to consider the implications for independent contractors in a potentially changed workplace relations environment.
- 6.69 The following section presupposes that the Australian Government moves to implement a unitary industrial relations system. The Committee reiterates that it is not within its scope to examine this initiative. Consistent with the terms of reference for the inquiry, the Committee comments are confined to strategies to ensure consistent and legitimate use of independent contracting arrangements. Given potential changes in Australian industrial relations, in this last section the Committee has examined strategies in the context of a changed industrial relations system.

Use of constitutional powers

- 6.70 In their stakeholder issues, the DEWR Discussion Paper canvassed whether the proposed Independent Contractors Act should override

58 Victoria ceded the bulk of its industrial relations jurisdiction to the Federal Parliament in December 1996. See *Commonwealth Powers (Industrial Relations) Act 1996* (Vic) and Part XV of the *WR Act 1996* (Cth).

59 COAG, *Council of Australian Governments Communiqué*, 3 June 2005, p. 2, accessed 4 July 2005, <<http://coag.gov.au/meetings/030605/coag030605.pdf>>.

60 The Hon. J. Howard MP, *Ministerial Statement: Workplace Relations Reform*, House of Representatives Hansard, 26 May 2005, p. 42; Mr J. O'Sullivan, DEWR, *Transcript of Evidence*, 12 May 2005, p. 35.

state and territory unfair contracts laws, deeming provisions and other legislation, and seek to cover the field (as far as constitutionally possible).⁶¹

- 6.71 These issues will now be reviewed.
- 6.72 The Commonwealth can only override state laws to the extent its constitutional power will allow; however for the territories, the Australian Government has the full power to regulate employee relations through the federal parliament.
- 6.73 Under consideration is the application of s 51(xxxv) of the Constitution, relating to the use of conciliation and arbitration which involve industrial disputes that spill across state boundaries. This is somewhat limited in applying nationally to workplace relations.⁶²
- 6.74 However, the corporations' power (s 51(xx)) is broader as it applies to foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth. This power is primarily for the regulation of the activities of corporations in Australia, but it may be used by the federal parliament to regulate the workplace relations of corporations.
- 6.75 The corporations' power has been used to support the creation of AWAs and in part to support the making of some certified agreements in the WR Act.⁶³ It has also been sought to be used to 'immunise' corporations from state laws on unfair dismissal and right of entry for example.⁶⁴ The DEWR Paper suggests that:
- Accordingly, if parties wish to avail themselves of the protection of any Commonwealth legislation in this regard, they may need to take some positive action to bring themselves within the jurisdiction of such legislation. For unincorporated parties, this might most easily be achieved by incorporation.⁶⁵
- 6.76 However, it must be acknowledged that there are limitations to the use of the corporations' power.⁶⁶ If the corporations' power is used, it

61 DEWR, *Exhibit No. 25*, pp. 19-21.

62 Prof. A. Stewart, 27 June 2005, CCH Australia Ltd, *A simple plan for workplace regulation?* Accessed 27 June 2005, p. 2,
<www.cch.com.au/feature_story.asp?document_id=61420&topic_code=9&category_code=0>.

63 Wallace-Bruce, N, 1998, *Employee Relations Law*, LBC Information Services, Sydney, p. 18.

64 Prof. A. Stewart, 27 June 2005, CCH Australia Ltd, *A simple plan for workplace regulation?* Accessed 27 June 2005, pp. 2-3,
<www.cch.com.au/feature_story.asp?document_id=61420&topic_code=9&category_code=0>.

65 DEWR, *Exhibit No. 25*, p. 19.

66 Mr J. Smythe, DEWR, 16 June 2005, *Transcript of Evidence*, p. 21.

remains to be seen whether the majority of small businesses will seek incorporation, given the more onerous reporting requirements. It is estimated that, even if the corporations' power is used, a proportion of the community (approximately 15 per cent) would not be covered.⁶⁷

- 6.77 Other powers may also be considered such as the trade and commerce (s 51(i)) and external affairs (s 51 (xxix)) powers among others. However, these would require establishing a relationship with interstate trade or international trade and obligations.⁶⁸

Unfair contracts provisions

- 6.78 In considering whether the proposed Independent Contractors Act should override state and territory unfair contracts laws and seek to cover the field of unfair contracts provisions, a range of views were received.
- 6.79 The AMWU note that proposed changes should not aim to minimise employment conditions, but rather governments should aim at lifting conditions to the same level as other areas in society. While advocating a consistent approach between state and federal jurisdictions, they express concern that federal moves to override state and territory laws may be a substitute for tackling disguised employment.⁶⁹
- 6.80 Other organisations would prefer that, where the over-ruling of state unfair contracts law is necessary, consideration is given to repealing the current provisions in the WR Act (sections 127A – 127C) and including contract review provisions in the proposed Independent Contractors Act.⁷⁰ Business groups, such as ACCI, AIG and Australian Business Limited, support federal moves to over-ride deeming and unfair contracts legislation.
- 6.81 However, the ACT Government strongly oppose the intention that the proposed Independent Contractors Act will override state and territory laws.⁷¹

67 Mr K. Harvey, ASU, *Transcript of Evidence*, 27 April 2005, p. 72; Mr B. Pridmore, DEWR, *Transcript of Evidence*, 12 May 2005, p. 35.

68 Mr T. Hulett & Mr A. Ray, Law Council of Australia – SBWG; *Transcript of Evidence*, 27 April 2005, pp. 60-61; Wallace-Bruce, N, 1998, *Employee Relations Law*, LBC Information Services, Sydney, pp. 17-19.

69 DEWR-AMWU, *Exhibit No. 45*, pp. 7-8.

70 DEWR-ABL/ ABL, *Exhibit No. 47*, pp 11-12; DEWR-Ai Group, *Exhibit No. 50*, p.19; DEWR- MBA-WA, *Exhibit No. 67*, section 3.6.

71 DEWR-ACT Government, *Exhibit 84*, p. 5.

- 6.82 The Textile, Clothing and Footwear Union of Australia are also strongly opposed to the proposal, asserting that it would be a regressive step in respect to some of the most disadvantaged workers in the country. They suggest that the proposal would decimate key aspects of the regulatory system which has been newly developed in a number of states in their particular industry.⁷² This view is also supported by the Queensland Government.⁷³
- 6.83 The TWU Vic./Tas. Branch claim that to over-ride state and territory laws would not be acting in the public interest, as these regulations play a fundamentally important role in preventing unsafe work practices within the transport industry.⁷⁴
- 6.84 There is also some support for using a range of powers for the protection of independent contractors.⁷⁵ MBA support the introduction of the Australian Government's independent contractors' legislation, asserting the importance of the states' industrial relations system of the states not being used to undermine the status of independent contractors.⁷⁶ CCF believes the Australian Government's independent contractor legislation should be the sole legislation nationally to regulate independent contractors.⁷⁷
- 6.85 It is apparent that there are a range of views on the justification and possible benefits of this approach. The Committee's role is not to investigate or comment on this course of action. If the corporation's power is used to over-ride state and territory unfair contracts and deeming legislation, there will still be a need for state systems to cover the remaining workers and small businesses.
- 6.86 The Committee considers that the effect of some state and territory deeming legislation could be to prevent those in legitimate contracting arrangements from exercising their rights to operate a small business. Therefore, a more balanced measure of protections and flexibility is needed for independent contractors. It is noted that there is dissent within the Committee on this recommendation.

72 DEWR-TCFUA, *Exhibit No. 46*, para. 76, p. 28.

73 DEWR-Qld Government, *Exhibit No. 54*, pp. 13-14.

74 DEWR-TWU-Vic./Tas., *Exhibit No. 55*, para. 12.6.1.

75 Mr. D. Hargraves, Ai Group, *Transcript of Evidence*, 30 March 2005, p. 12.

76 MBA, *Submission No. 22*, p. 14.

77 DEWR-CCF, *Exhibit No. 49*, p. 2.

Recommendation 15

The Committee recommends that, if constitutional powers are used to implement a national industrial relations system, then the Australian Government ensure that legislation protects legitimate independent contractor arrangements by providing:

- national regulatory consistency;
- definitional clarity in relation to working arrangements and responsibilities; and
- accessible dispute resolution procedures.

Dispute resolution

- 6.87 The Committee considers that greater accessibility for dispute resolution procedures is essential and the broader description of an independent contractor to include other business arrangements, as suggested in Chapter 5, is re-iterated.
- 6.88 A range of dispute resolution processes in relation to unfair contracts is required. Importantly, there should be scope for mediation and low-level type interventions where confusion or disputes relating to these issues arise.
- 6.89 The ACCC in their *Guide to unconscionable conduct*⁷⁸ indicate that states and territories have included provisions that mirror s 51AC of the Trade Practices Act in their legislative regimes, that is unfair contracts or unconscionable conduct. The guide indicates that by including these provisions in state law, disputes can often be heard in forums other than the courts, for example specialist tribunals. As well as allowing greater access to justice, this can reduce the costs of resolving matters, and may provide more flexible methods of resolving the issue.
- 6.90 The Office of the Mediation Adviser as part of the Office of Small Business provides assistance to franchisors and franchisees to resolve their problems and disputes without going to court.⁷⁹ Additionally the Australian Government is piloting a Small Business Mediation

78 ACCC, 2004, *Guide to unconscionable conduct*, accessed 18 July 2005, <<http://www.accc.gov.au/content/index.phtml/itemId/544299>>, p. 10.

79 OMA, *Resolving Franchise Disputes*, accessed 26 June 2005, <www.mediationadviser.com.au>.

Programme as part of the Australian Industrial Registry in Victoria.⁸⁰ Hence, there are some other options that can be considered on a national level.

- 6.91 Victoria and the ACT have set up Office of Small Business Commissioners to assist with dispute resolution, promoting informed decision-making on retail leases for example.⁸¹ Therefore there is scope at federal, state and territory levels to use commercial contract structures to ensure advocacy of independent contractors as small businesses.
- 6.92 There is argument for access to an associated tribunal as a lesser court to the Federal Magistrates Court to hear unfair contracts disputes. The ACCC provides small business advice on the operation of the Trade Practices Act and protecting small business rights against anti-competitive big business but do not provide individual dispute resolution services.⁸²
- 6.93 As discussed in Chapter 5 pursuit of a commercial approach may have advantages, and is supported by the majority of the business community and independent contracting agencies. The Federal Magistrates Court currently has jurisdiction to hear some matters relating to unfair trade practices as part of the *Trade Practices Act* 1974.⁸³
- 6.94 The objective of the Federal Magistrates Court is to provide a simpler and more accessible alternative to litigation. The court is able to call on a range of means to resolve disputes and there is no automatic assumption that every matter will end in a contested hearing. The Federal Magistrates Court can employ a range of means to consider disputes such as: conciliation, counselling and mediation.
- 6.95 As a minimum, the Committee considers the jurisdiction of the Federal Magistrates Court should be broadened to enable hearing of independent contractor cases associated with such legislation.

80 AIRC, *Pilot Small Business Mediation Programme*, accessed 4 July 2005, <www.airc.gov.au/pilot.pdf>.

81 Office of the Victorian Small Business Commissioner, accessed 4 July 2005, <www.sbc.vic.gov.au/>; ACT Office of the Small Business Commissioner, <www.business.act.gov.au/businessnews/actsbc.html>.

82 ACCC, *ACCC update*, Issue 13, June 2003, p. 13, accessed 4 July 2005, <www.accc.gov.au/content/index.phtml/itemId/349239>; *Small business and the Trade Practices Act*, November 2004.

83 Federal Magistrates Court, 2004, *Jurisdiction of the Federal Magistrates Court of Australia*, accessed 6 May 2005, <www.fmc.gov.au/html/jurisdiction.html>.

Recommendation 16

The Committee recommends that the Australian Government extend jurisdiction of the Federal Magistrates Court to hear cases associated with dispute resolution of unfair contracts for service.

In summary

- 6.96 Labour hire and independent contracting arrangements are expected to continue to provide flexibility and opportunities for both business and workers in the Australian economy into the future.
- 6.97 Some concerns were raised to the Committee that labour hire workers may not experience comparable conditions as direct employees and often do not have access to EBA standards. Future industrial relations reforms affecting direct employees might reduce the comparative advantage to business of labour hire workers and independent contractors. The tightening of the skills market may see the growth of labour hire and independent contracting level out.
- 6.98 However, factors such as international competition may continue to demand increasing productivity, and this will pressure working arrangements to maintain or increase their flexibility to strengthen the use of the labour hire industry and independent contracting arrangements.⁸⁴
- 6.99 One of the major themes in the evidence received for this inquiry is identifying the appropriate treatment of independent contractors when there are questions about their status. Where there is significant management control, and the main features of the relationship are almost indistinguishable to employment, then the response to ensure legitimate arrangements should be through industrial or workplace relations means.
- 6.100 However, as the independent contracting relationship is considered a commercial arrangement, then this requires management as a business to business and the response should be through trade regulation. It is important to ensure that these business relationships are honoured and not subjected to excessive protectionist regulation.

84 Unions NSW, *Exhibit No. 33*, p. 36.

Additionally, the Committee notes the challenge of providing appropriate support for those in weaker bargaining positions.

- 6.101 The call for greater national consistency was echoed throughout the inquiry. The Committee considers that, as in so many areas of state and federal responsibilities, where there is overlap a consultative and cooperative approach can be the most productive in achieving harmonisation. The Committee supports efforts in some OHS areas and workers compensation in working towards a national approach.⁸⁵
- 6.102 It was reported to the Committee that maintaining some of the states' and territories' unfair contracts and other industrial legislation that 'deems' independent contractors to be employees is required to protect disadvantaged workers. However, the Committee considers that consistency is not being achieved by this approach.
- 6.103 Therefore, the Committee considers that the recommendations outlined in earlier chapters and those considered here can improve the likelihood of greater clarity and consistency. This will provide improved support for labour hire workers and independent contractors, while ensuring that disguised employment or sham arrangements do not proliferate.

Independent contractors

- 6.104 There is a range of work performed by independent contractors, some of which is highly skilled. The Committee also heard evidence of instances of coercive or artificial contracting arrangements being established that appear to disadvantage, in the main, lower skilled workers.
- 6.105 The Committee recognises the role of legitimate independent contracting arrangements. However, there were divergent views from witnesses, and amongst Committee members, as to whether independent contracting should be considered a commercial or a workplace relations arrangement.
- 6.106 The Committee's concern is to address issues raised in evidence and provide clarity and consistency in definitional approaches to independent contractors, protection from unfair contracts, and freedom to undertake business.

85 Although recent industrial manslaughter legislation does not display such consistency. For a recent overview see *Workplace Info*; 1 July 2005, Industrial Manslaughter rules should be consistent: AMMA, accessed 2 July 2005, <www.workplaceinfo.com.au/registered/alert/2005/050701396.htm?52253.5>.

- 6.107 This can be achieved by:
- increased data on the prevalence of this type of working arrangement;
 - closer alignment of the description of independent contractors across federal legislation with the personal services business tests in the Income Tax Act;
 - pursuing national consistency of definitional approaches to independent contractors across state and territory jurisdictions;
 - improved education for businesses and independent contractors of respective legislative requirements and responsibilities, particularly in regard to occupational health and safety, coupled with compliance and enforcement measures;
 - amendments to the Workplace Relations Act, broadening the description of independent contractors to include other entities;
 - greater provision of information and resources for independent contractors on business, financial and dispute resolution procedures;
 - improving access to alternative dispute resolution procedures for unfair contract issues and reducing the costs of bringing forward such cases.

Labour hire

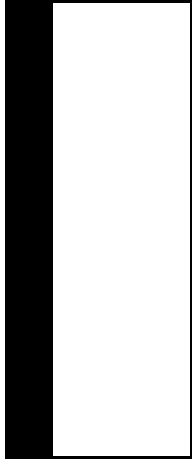
- 6.108 Labour hire arrangements are found across a wide range of sectors, supplying short term and sometimes more continuing types of employment. While the availability of a flexible workforce is essential to meet some fluctuating work demands, the Committee heard evidence that the triangular nature of the employment relationship may lead to confusion and even evasion regarding legal responsibilities in some areas.
- 6.109 The Committee's concern is to ensure that the use of labour hire: conforms to legitimate employment arrangements and an industry code of professional standards; has greater clarity regarding host business and agency responsibilities; and contributes to skill formation in the Australian workforce.
- 6.110 This can be achieved by:
- increased data on the prevalence of this type of working arrangement;
 - improved education for labour hire agencies, host businesses and workers of respective legislative requirements and responsibilities,

particularly in regard to occupational health and safety, coupled with compliance and enforcement measures;

- improved skill development of workers through greater involvement of labour hire agencies in providing training; and
- the establishment of a voluntary code of practice for the labour hire industry.

Mr Phillip Barresi MP

Chair



Dissenting Report

Mr Brendan O'Connor MP, Mr Tony Burke MP, Ms Annette Ellis MP, Ms Jill Hall MP

Introduction

- 1.1 The House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation has completed an inquiry into Labour Hire Arrangements and Independent Contracting. The Committee received many submissions and convened a series of public hearings across the country in order to provide the basis of this report to be tabled in parliament. The Committee found common ground in some recommendations enclosed in the report, however, dissenting members considered other recommendations to be ineffective or contrary to the evidence provided to the Committee. In some areas needing immediate attention, the Committee failed to propose concrete solutions to problems associated with the rapid growth of labour hire employment and independent contracting.

Independent Contracting

- 1.2 In particular, the report fails to properly address the blurring of the line between independent contractors and employees. While clarifying the definitions is not always simple, we received ample evidence to suggest ways to reduce the current confusion. Furthermore, although Committee members recognised the existence of sham arrangements and forms of disguised employment the Committee failed to recommend any concrete solutions to this growing problem.
- 1.3 It was accepted by all Committee members that there were genuine independent contractors but an inordinate amount of evidence suggested that many workers were being forced to work as so-called independent contractors in order to avoid taxation or traditional employer responsibilities, such as superannuation contributions or workers' compensation insurance.

Labour Hire Arrangements

- 1.4 The Committee was provided with significant evidence highlighting the extraordinary growth of labour hire employment in the last 15 years. All Committee members accepted the possible benefits of labour hire employment but the Committee failed to accept the intrinsic deficiencies with labour hire arrangements. In particular, the Committee failed to address the extremely high proportion of labour hire workers that are precariously employed. The rate of casual employment in the labour hire industry was anywhere between 75-95 percent, according to the evidence.
- 1.5 Furthermore, the Committee was provided credible evidence that the triangular relationship, involving the labour hire agency, the host firm and the labour hire worker has led to a blurring of legal obligations and entitlements in a number of areas, such as occupational health and safety and return to work policies. The Committee has identified the need to understand and clearly delineate the respective responsibilities of occupational health and safety requirements. None of the recommendations provide sufficient solutions, however, to ensure host firms and labour hire agencies jointly share the responsibilities of OH&S laws.

Minister's decision to set up his own inquiry

- 1.6 The Committee's task was made more difficult by the Minister establishing his own closed inquiry along almost identical lines, to be undertaken by officers of his own department. This Ministerial inquiry commenced with the issuing of a discussion paper on labour hire arrangements and independent contractors, was not open to the public and did not involve the parliament. The discussion paper appeared to already state the Government's preferences in this area of public policy and, as a result, had hampered the Committee in investigating matters referred to it without interference. The decision by the Minister to concurrently establish his own inquiry was viewed by some Committee members as pre-empting and prejudicing the process of the Committee and an example of the executive's contempt of the parliament.

Dissenting Recommendations

- 1.7 Dissenting members have sought to reach unanimity with all Committee members on recommendations but found that this was not possible. As a consequence dissenting members felt the need to reject many Committee recommendations on the basis that they did not reflect the evidence that was provided. Furthermore, dissenting members considered that in some significant areas the Committee failed to recommend solutions to deficiencies in existing laws pertaining to labour hire arrangements and independent contractors. Accordingly, the dissenting members will provide reasons for opposing certain recommendations and propose alternatives. Additional recommendations will be proposed where dissenting members consider the report has inadequately addressed matters relevant to the inquiry.

THE RECOMMENDATIONS

- A. The dissenting members have agreed upon recommendations 1, 5, 6, 7, 8, 9, 10, 11 and 13.
- B. The following recommendations of the Committee are opposed and alternative recommendations are proffered:

Opposition to Recommendation 2

“The Committee recommends that the Australian Government maintain the common law approach to determine employment status and distinguish between employees and legitimate independent contractors.”

- 1.8 The dissenting members consider that there is a better approach than relying upon the common law approach to distinguish between employees and independent contractors. Although the courts have sought to clarify the lines between the two forms of employment there remains great confusion. As Professor Stewart submitted to the Committee:

“The [common law] approach is necessarily impressionistic, since there is no universally accepted understanding of how many indicia, or what combination of indicia, must point towards a contract of service before the worker can be characterised as an employee. In effect, this ‘multi-factor’ test proceeds on the assertion that the courts will know an employment contract when they see it.”

- 1.9 Moreover, although the Courts are in a position to consider the “totality” of the relationship, they primarily determine the status of the parties by reference to any terms formally agreed between them. This emphasis on form rather than substance has led contracts to be constructed in a manner that would lead courts to conclude that an actual employer/employee relationship is instead a relationship between a principal and an independent contractor.
- 1.10 The dissenting members therefore considered that the best approach to increasing certainty in this area and removing ambiguity is to offer a comprehensive definition of “employee”. Of all the evidence provided to the Committee the most compelling proposal on offer

emanated from Professor Andrew Stewart's submission.¹ Accordingly, dissenting members propose the following recommendation instead of the Committee's Recommendation 2:

Alternative Recommendation 2

The Committee recommends that the Australian Government provide a new definition of "employee" by replacing the current definition of "employee" in s. 4(1) of the *Workplace Relations Act 1996*. It should be expressed in the following form:

- (1) A person (the worker) who contracts to supply their labour to another is to be presumed to do so as an employee, unless it can be shown that the other party is a client or customer of a business genuinely carried on by the worker.**
- (2) A contract is not to be regarded as one other than for the supply of labour merely because:**
 - (a) the contract permits the work in question to be delegated or sub-contracted to others; or**
 - (b) the contract is also for the supply of the use of an asset or for the production of goods for sale; or**
 - (c) the labour is to be used to achieve a particular result.**
- (3) In determining whether a worker is genuinely carrying on a business, regard should be had to the following factors:**
 - (a) the extent of the control exercised over the worker by the other party;**
 - (b) the extent to which the worker is integrated into, or represented to the public as part of, the other party's business or organisation;**
 - (c) the degree to which the worker is or is not economically dependent on the other party;**
 - (d) whether the worker actually engages others to assist in providing the relevant labour;**
 - (e) whether the worker has business premises (in the sense used in the personal services income legislation); and**
 - (f) whether the worker has performed work for two or more unrelated clients in the past year, as a result of the worker advertising their services to the public.**

¹ Prof. A. Stewart, *Submission No. 69*, pp. 10-11.

- (4) Courts are to have regard for this purpose to:**
 - (a) the practical reality of each relationship, and not merely the formally agreed terms; and**
 - (b) the objects of the statutory provisions in respect to which it is necessary to determine the issue of employment status.**
- (5) An employment agency which contracts to supply the labour of a person (the worker) to another party (the client) is to be deemed to be that person's employer, except where this results in a direct contract between the worker and the client.**
- (6) Where:**
 - (a) an arrangement is made to supply the labour of a person (the worker) to another party (the ultimate employer) through a contract or chain of contracts involving another entity (the intermediary), and**
 - (b) it cannot be shown that the intermediary is genuinely carrying on a business in relation to that labour that is independent of the ultimate employer, on the basis of factors similar to those set out in (3) above, the worker is to be deemed to be the employee of the ultimate employer.**

Opposition to Recommendation 3

"The Committee recommends that the Australian Government, when drafting federal legislation, in addition to the common law position, adopt components of the Australian income tax assessment alienation of personal services income legislation tests to identify independent contractors."

- 1.11 The dissenting members contend that the Committee report has taken the wrong approach in properly distinguishing employees and independent contractors. In particular, the Committee report does not convincingly explain why it is necessary to have a definition of "independent contractor" at all.
- 1.12 As the overwhelming majority of the Australian workforce comprises employees and there is evidence to show efforts are made to hide employment relationships and not hide independent contractors, it is sensible to start with who is an "employee". By definition, a person who is genuinely running their own business and working as an independent contractor should not be regarded as an employee, and

hence would not be subject to the various laws that apply only to employees.

- 1.13 We also consider that although the personal services income (PSI) legislation may act as a deterrent to avoid taxation obligations it has many deficiencies.
- 1.14 Firstly, although the PSI legislation seeks to prevent tax avoidance its effectiveness is unknown, as confirmed by Treasury's evidence that well over 99% of the tax claims in this area are self-assessed. It is therefore not known whether these provisions, weak as they are, are being properly enforced.
- 1.15 Secondly, there are too many ways to escape the legislation, enabling taxpayers who are not genuinely operating a business to be classed as running a "personal services business". The Committee heard evidence that 75% of those claiming to operate a business were self-assessing and relying upon the "results test".
- 1.16 This heavy reliance upon the "results test" and extraordinarily high proportion of self-assessing PSI applicants fails to instil any confidence in the dissenting members that the current system is an effective means of distinguishing independent contractors from employees.

Alternative Recommendation 3

The Committee considers that there is no need to define "independent contractor" if the proposed "employee" definition is adopted. The Committee therefore recommends that the Australian Government apply the proposed "employee" definition (which contains components of the PSI legislation). Only those able to distinguish themselves from this definition of employment should be determined to be independent contractors.

Opposition to Recommendation 4

"The Committee recommends that the Australian Government, in conjunction with State and Territory governments, pursue through the Workplace Relations Ministers' Council national consistency in identifying independent contractors. The Committee recommends that this is achieved by, in addition to the common law position, adopting components of Australian income tax assessment

alienation of personal services income legislation tests in the drafting of relevant state and territory legislation.”

- 1.17 The Committee received evidence suggesting the preference for national consistency in identifying independent contractors. Dissenting members agree that national consistency would have some advantages but should not be at the expense of overriding State laws and legislation.
- 1.18 Although State legislation could be improved upon from State to State, there is far more evidence of State governments seeking to uncover disguised employment by the use of deeming provisions and preventing exploitative arrangements than any efforts by the Australian Government. Dissenting members are not confident that the current Australian Government would concern itself with current practices that seek to force employees to accept being described as an independent contractor for wrong, often unlawful purposes when pursuing national consistency.

Alternative to Recommendation 4

The Committee recommends that the Australian Government, with the agreement of State and Territory governments, pursue through the Workplace Relations Ministers’ Council national consistency in identifying the difference between employees and independent contractors. The Committee recommends that this be achieved by applying the proposed definition of “employee” as outlined above and placing the onus on those who seek to be independent contractors to establish that they are genuinely running a business.

Opposition to Recommendation 12

“The Committee recommends that the Australian Government broaden the description used in the *Workplace Relations Act 1996* of an independent contractor and extend it beyond ‘a natural person’.”

- 1.19 The Committee heard evidence that there was a need to widen the definition of independent contractor as contained in the *Workplace Relations Act 1996* to ensure it goes beyond ‘natural person’. This would for instance enable contractors working through personal companies to bring unfair contract claims.
- 1.20 We are not opposed to this as such, but oppose the recommendation as drafted simply in order to make it clear that we see no need for any broader or more generally applicable definition of “independent

contractor". Consistent with our proposed definition of "employee", we also believe that a similar approach be adopted with employees.

Alternative to Recommendation 12

To the extent that the *Workplace Relations Act 1996* currently refers to "independent contractors", for example in the unfair contract provisions in ss. 127A-127C, the Committee recommends that workers should be covered by those provisions regardless of whether they contract to supply their labour directly, or operate through a personal company or some other legal entity.

Opposition to Recommendation 14

"The Committee recommends that the Australian Government incorporate the following protections when drafting legislation for independent contractors:

- preserving the legal status of independent contractors as small businesses;
- providing a broad description of independent contractor to cover all forms of small business structures;
- regulating independent contractors as small businesses within a framework of commercial laws and institutions, rather than industrial laws and institutions; and
- providing alternative dispute resolution procedures."

1.21 Dissenting members consider that it is essential that genuine independent contractors are protected from unfair contracts and unfair competition but do not agree for the need to provide a definition given the comprehensive definition of employee proposed earlier. Furthermore, dissenting members consider it necessary that the Australian Government do more to protect small business against unfair trading practices of larger enterprises.

Alternative to Recommendation 14

The Committee recommends that the Australian Government examine ways to improve protection for genuine independent contractors against unfair trading practices, including through access to inexpensive and informal dispute resolution procedures.

Opposition to Recommendation 15

“The Committee recommends that, if constitutional powers are used to implement a national industrial relations system, then the Australian Government ensure that legislation protects legitimate independent contractor arrangements by providing:

- national regulatory consistency;
- definitional clarity in relation to working arrangements and responsibilities; and
- accessible dispute resolution procedures.”

1.22 Dissenting members do not consider it appropriate for the Australian Government to seek to implement a national industrial relations system without the consent of State and Territory governments. The only area in which the Commonwealth comprehensively covered the industrial relations jurisdiction of a State was when Victoria referred those powers to the Commonwealth.

1.23 In the event that the Commonwealth successfully implements a national industrial relations system the Australian Government should first clearly define an “employee” by adopting the definition as outlined earlier in this dissenting report. Further more the Australian government should legislate to prevent forms of disguised employment.

Alternative to Recommendation 15

The Committee recommends that if constitutional powers are used to implement a national industrial relations system, it should only be undertaken with the agreement with the States and Territories. If such a national system were adopted then the Australian Government should ensure that legislation protects employees from forms of disguised employment practices by adopting the recommended “employee” definition and properly enforcing the legal difference between employee and genuine independent contractor arrangements. Such a system should also protect genuine independent contractors from unfair contracts.

Opposition to Recommendation 16

“The Committee recommends that the Australian Government extend jurisdiction of the Federal Magistrates Court to hear cases associated with dispute resolution of unfair contracts for service.”

- 1.24 Dissenting members consider that the most appropriate place for these matters to be dealt with is in industrial tribunals, such as the Australian Industrial Relations Commission (AIRC). The unfair contracts jurisdiction was indeed originally conferred on the AIRC and as the High Court of Australia has found that there is no constitutional impediment to allowing it to hear such cases, dissenting members consider this body (and bodies like it at the State level), are the most cost-efficient and accessible forums in which to expedite proceedings of this kind.
- 1.25 If, however, this recommendation is not accepted, we would not be opposed to the Federal Magistrates Court being able to deal with disputes regarding unfair contracts for services, as an alternative to the Federal Court

Alternative to Recommendation 16

The Committee recommends that the Australian Government reinstate the capacity of the Australian Industrial Relations Commission with the power to hear cases associated relating to unfair contracts for service. However if this is not accepted, the Federal Magistrates Court should be empowered to hear cases of this kind as an alternative to the Federal Court.

C. Additional Recommendations

Precarious Employment

- 1.26 The overwhelming evidence provided to the Committee illustrated the disturbing growth in casual employment as a result of the growth in labour hire employment. Labour hire companies and unions alike provided evidence that the proportion of labour hire employees casually employed was far in excess of the Australian workforce at large. The incidence of casual employment remains high even amongst long-term employed labour hire employees. Although the Committee agreed unanimously that labour hire companies can provide employers particular skills and can provide flexibility in the

workplace, there was significant evidence to highlight the plight of such employees being employed indefinitely as casuals.

- 1.27 Dissenting members acknowledge the increased complexity associated with this area given the triangular relationship of the host firm, the labour hire agency and the worker. It is not reasonable, however, to deny “permanent casuals” the opportunity of more certainty and job security if there are no reasonable commercial grounds against doing so.
- 1.28 Accordingly, dissenting members consider the following recommendation should be proposed:

Recommendation 17

The Committee recommends that the Australian Government attend to the spiralling increase in casual employment by legislating to confer on labour hire workers the right to request permanent employment by the host firm after twelve months continuous service with the host. The host firm would have to give reasonable grounds why it could not employ such a worker. The Australian Industrial Relations Commission should be authorised to hear any dispute over a refusal to grant such a request.

Employer responsibilities

- 1.29 The Committee received evidence that suggested that the responsibilities of the labour hire agency and the host firm are vague and not clearly understood, particularly in relation to occupational health and safety. The Committee considered there were deficiencies in this area (see Recommendation 6) but did not address the weaknesses in the current arrangements. Furthermore, all employees should have the right to challenge a termination of employment. Dissenting members therefore propose the following recommendation:

Recommendation 18

The Committee recommend that the Australian Government enact laws that recognise that both the labour hire agency and host firm have a role in respect of employment responsibilities. The Australian Government, with the agreement of the State and Territory governments, should ensure that both agency and host share joint responsibility for matters concerning OH&S. The Australian Government should ensure joint responsibility in any unfair dismissal proceedings.

Transmission of Business

- 1.30 The Committee received evidence from many witnesses that a primary reason for the growth of labour hire employment was the ability to undercut industrial instruments, such as awards or certified agreements. Many unions submitted that employers seek to outsource functions to obviate industrial awards or agreements and therefore enable labour hire agencies to pay inferior wages and conditions, while the work remains essentially the same. Employer bodies and labour hire companies denied that this was a motivating factor behind using labour hire employment and instead suggested that the driving factors behind the utilization of labour hire employment are that it provides flexibility and access to skills the host employer may not possess.
- 1.31 If the concern amongst some witnesses is that undercutting conditions was prevalent and this view was not accepted as being the case by other witnesses, then the dissenting members see no difficulty in recommending that it be unlawful for labour hire agencies to undercut the industrial instruments or workplace agreements of the host firm.

Recommendation 19

The Committee recommends that the Australian Government legislate to protect the effectiveness of industrial agreements and awards by prohibiting labour hire agencies from undercutting wages and conditions prescribed within the awards or workplace agreements applying to the host firm.

Representation for Independent Contractors

- 1.32 The Committee received evidence concerning the proposed plans by the Australian Government to limit unions from representing independent contractors. The proposed amendments included in the Trade Practices Act Amendment Bill 2005 (TP Bill 2005) are supported by dissenting Members insofar as they provide small businesses relief from regulatory burdens in seeking to engage in collective bargaining with larger businesses. The dissenting members, however, are most disturbed that the effect of section 93AB(9) of the TP Bill 2005 would be to deny independent contractors the right to choose a trade union to represent their interests at least if they wanted to benefit from the new arrangements. The Australian Government's intention to limit

the rights of small businesses to choose their agent is anti-competitive and discriminatory. Furthermore, we cannot see why bodies such as the Pharmacy Guild of Australia or the AFL Players Association can have an unrestricted right to represent small businesses but a trade union cannot. We can only surmise that this unreasonable provision is motivated by an enmity towards employee organisations but will have the effect of harming small businesses and trade unions alike.

Recommendation 20

The Committee recommends that the Australian Government remove proposed s 93AB(9) from the TP Bill 2005 and provide independent contractors with the right to choose their representative whether that be a trade union or not.

'ODCO' Arrangements

- 1.33 Dissenting members do not support the statutory recognition of 'ODCO' arrangements in independent contractors' legislation, if such 'recognition' has the effect of entrenching such arrangements and shielding them from proper scrutiny. Labour hire contractors who are used as a form of disguised employment should be considered to be employees for the purposes for industrial relations and other workplace legislation, as indeed would occur under the proposed definition of employment we have advocated.
- 1.34 The only specific recognition that should be given to 'ODCO' arrangements is the recognition that they are often used as a form of disguised employment.
- 1.35 Labour hire workers should be protected by health and safety laws and workers compensation whether they are engaged as contractors or employees.

Recommendation 21

The Committee recommends that the Australian Government recognise that so-called 'ODCO' arrangements are a form of disguised employment and should not be recognised as a legitimate contractual arrangement. The Australian Government should effectively outlaw this practice by adopting the definition of employment set out in Alternative Recommendation 2.

Awards and Agreements

- 1.36 Dissenting members are particularly concerned about proposals contained in the Ministerial discussion paper that awards and agreements be banned from contain clauses which relate to independent contracting or labour hire. Dissenting members strongly oppose such proposals, as they fail to recognise the modern reality of these forms of work, and the huge impact they have on the lives of both contractors and labour hire workers, and the direct employees that they replace or work alongside.
- 1.37 Restricting matters that can be in agreements is seriously hypocritical, given this government's constant comments about the need for agreement making between parties without interference. It is also contrary to the objects of the Workplace Relations Act which encourage agreement making between the parties.
- 1.38 To refuse to allow parties to come to an agreement about matters relating to labour hire or contracting is purely ideological and has no good basis in public policy. It also ignores recent decisions of the Industrial Relations Commission which support the view that such clauses are directly relevant to the employment relationship, such as the Full Bench Schefenacker decision (18 March 2005).

Recommendation 22

The Committee recommends that the Australian Government not seek to prohibit the inclusion of clauses relating to labour hire or independent contracting in awards or industrial agreements.

Registration of Labour Hire Companies

- 1.39 The Committee received evidence from labour hire companies and unions suggesting the need to register labour hire companies. It was contended that many labour hire companies were not competent to be legally recognised a labour hire companies and therefore it was considered that a register be established to ensure that business conducted by labour hire companies meet an appropriate industry standard.

Recommendation 23

The Committee recommends that the Australian Government establish a mandatory register to ensure that labour hire companies comply with proper employment and business practices.

CONCLUSION

- 1.40 This inquiry into independent contractors and labour hire arrangements has revealed some disturbing trends in the changing employment arrangements for Australian workers and employers. Although there was evidence to show the value in labour hire arrangements and genuine independent contracting there was comprehensive and compelling evidence exposing unfair practices, disguised forms of employment, and exploitation of employees.
- 1.41 Submissions and oral testimony asserted that the driving factors behind the shift from employee to contractor include the attempts to avoid taxation obligations and for employers to abrogate their traditional responsibilities, such as superannuation, workers compensation, training and occupational health and safety, by restructuring the employment arrangement to one that is ostensibly a contract between a principal and a contractor. This pattern has placed commercial pressure upon other employers to follow suit.
- 1.42 Dissenting members recognise that there are genuine independent contractors in the workforce but do not consider that a person's legal status can be determined purely by self-description. There should be a clear divide between contractors and employees and that would best be achieved by defining an employee at the outset and then determining what an independent contractor is by what an employee is not.
- 1.43 Furthermore, we consider that labour hire arrangements should be properly regulated in order to properly delineate rights and responsibilities between labour hire agencies, host employers and labour hire workers. We consider current deficiencies include the high incidence of "permanent casuals" and the blurring of responsibilities in the area of occupational health and safety. Dissenting members see a place for genuine independent contractors and labour hire arrangements but contend that there are too many deficiencies in the existing Commonwealth laws that have left a growing proportion of Australian workers unfairly vulnerable.

ACKNOWLEDGEMENTS

- 1.44 The dissenting members would like to thank the Chair and other Committee members for the manner in which the inquiry was conducted. The dissenting members would also like to acknowledge the good work of the secretariat in preparing the Report.
- 1.45 It was disappointing that the secretariat was not sufficiently resourced to assist members wishing to expressly dissent against all or part of the Report and consider the Australian Government should provide more resources to ensure that the parliamentary committee system works effectively.

Mr Brendan O'Connor MP
Deputy Chair

Mr Tony Burke MP

Ms Annette Ellis MP

Ms Jill Hall MP



Conduct of the inquiry

Advertising the inquiry

The inquiry was initially advertised in *The Australian* and *The Australian Financial Review* on 28 January 2005. The inquiry was also advertised in the House of Representatives 'About the House' fortnightly advertisement in *The Australian* on 9 February, 23 February and 9 March 2005.

The Committee wrote to relevant Australian Government Ministers and to state and territory governments. In addition, the Committee wrote to a range of organisations, including professional associations, unions, major industry groups, academics, media organisations, businesses and individuals.

In total, 6 Media Releases were sent, advertising the launch of the inquiry and each set of public hearings.

Evidence to the inquiry

The Committee received 77 submissions and 3 supplementary submissions. These submissions are listed in Appendix B.

The Committee received 94 exhibits to the inquiry, which were provided as attachments to written submissions, received during public hearings or sent to the Committee by other parties. These are listed in Appendix C.

Public hearings

The Committee held eight public hearings across Australia in Canberra, Sydney, Melbourne and Perth. A videoconference was held with witnesses in Brisbane. The Committee called 107 witnesses. These witnesses are listed in Appendix D.

Transcripts of hearings

At the public hearings over 500 pages of evidence were recorded by Hansard. The transcripts and the submissions, which have been published, are available for inspection from the Committee Office of the House of Representatives, the National Library of Australia or on the inquiry website at: <http://www.aph.gov.au/house/committee/ewrwp/index.htm>



List of submissions

No.	Individual/Organisation
1	Mr Scott Ellis
2	The Jaycees Community Foundation Inc.
3	Name withheld
4	Mr Bart Wissink
5	Construction, Forestry, Mining and Energy Union – Construction and General Division
6	Combined Small Business Alliance of Western Australia Inc.
7	The Association of Professional Engineers, Scientists and Managers Australia
8	Corston Pty Ltd
9	Name withheld
10	Mr Bill Cremen
11	Insurance Council of Australia Ltd
12	Liquor, Hospitality and Miscellaneous Union
13	Roofing Tile Association of Australia Inc.
14	National Working Women's Centres
15	Civil Contractors Federation
16	The Building Service Contractors of Australia
17	Master Builders Association of Western Australia
18	Construction, Forestry, Mining and Energy Union - Mining and Energy Division – Northern District Branch

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- 18.1 Construction, Forestry, Mining and Energy Union - Mining and Energy Division – Northern District Branch
 - 19 Australian Nursing Federation
 - 20 Independent Contractors of Australia
 - 21 Aged Care Queensland
 - 22 Master Builders Australia Inc.
 - 23 Job Watch Inc.
 - 24 Queensland Nurses' Union
 - 25 Australian Chamber of Commerce & Industry
 - 26 Labour Force Australia Pty Ltd
 - 27 Small Business Reform Group
 - 28 Company Solutions (Australia) Pty Ltd
 - 29 Confidential
 - 30 Canberra Business Council
 - 31 IR Australia Pty Ltd
 - 32 Name withheld
 - 33 Department of Consumer and Employment Protection – Government of Western Australian
 - 34 Australian Capital Territory Government
 - 35 New South Wales Government
 - 36 Group Training Australia Ltd
 - 37 The Australian Institute of Interpreters and Translators Inc.
 - 38 Media, Entertainment and Arts Alliance
 - 39 National Farmers' Federation
 - 40 The Transport Workers Union of New South Wales
 - 41 Queensland Council of Unions
 - 42 Transport Workers' Union of Australia
 - 43 Direct Selling Association of Australia Inc.
 - 44 Unions NSW

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- 44.1 Confidential
 - 45 Australian Rail Tram and Bus Industry Union
 - 46 Australian Manufacturing Workers Union
 - 47 National Union of Workers
 - 48 Restaurant and Catering Australia
 - 49 Australian Industry Group
 - 50 Courier and Taxi Truck Association
 - 51 Manpower Services (Australia) Pty Ltd
 - 52 SKILLED Group
 - 53 Australian Services Union
 - 54 Ross Human Directions
 - 55 Australian Lawyers Alliance
 - 56 Transport Workers' Union (Victorian/Tasmanian Branch)
 - 57 Communications Electrical and Plumbing Union (Communications Division)
 - 58 The Small Business Development Corporation
 - 59 Law Council of Australia - Small Business Working Group
 - 60 Australian Council of Trade Unions
 - 61 Housing Industry Association Ltd
 - 62 Tasmanian Contracting Services (on behalf of names withheld)
 - 63 Northern Territory AIDS and Hepatitis Council
 - 64 Australian Independent Contractors Agency Pty Ltd
 - 65 Australian Government, Department of Employment and Workplace Relations
 - 66 Queensland Government, Department of Industrial Relations
 - 67 The Recruitment & Consulting Services Association
 - 67.1 The Recruitment & Consulting Services Association
 - 68 The Salvation Army Money Care Service, ACT
 - 69 Professor Andrew Stewart

- 70 Mr Marcus Anderson
- 71 Victorian Government
- 72 Mr Tony Corp
- 73 Australian Government, Department of the Treasury
- 74 Scarlet Alliance
- 75 NSW Road Transport Association Inc.
- 76 Victorian Association of Forest Industries
- 77 Name withheld



List of exhibits

No.	From	Exhibit Title
1	Construction, Forestry, Mining and Energy Union – Construction and General Division (CFMEU – C & GD)	The CFMEU's submission to the Royal Commission into the Building and Construction Industry (the Royal Commission) headed <i>Illegitimate Subcontracting in the Construction Industry</i> regarding 'Working Arrangements, Tax Evasion etc' 18 July 2002.
2	CFMEU – C & GD	Speech of John Sutton, National Secretary of the CFMEU (C &GD) to the Australian Taxation Office (ATO) Building and Construction Industry Forum, 28 November 2003.
3	CFMEU– C & GD	<i>For Fairness and Services: Restoring the Integrity of the Taxation System</i> , jointly compiled by the CFMEU and Australian Council of Social Service, August 2004.
4	CFMEU – C & GD	The CFMEU's submission to the Senate Economics Committee, Review of the New Tax System (Alienation of Personal Services Income) Bill 2000 and two related bills, May 2000.
5	CFMEU – C & GD	Hansard extract of evidence given by John Sutton (National Secretary, CFMEU– C & GD), Raoul Wainwright (National Legal/Research Officer, CFMEU– C & GD) and Ralph Willis to the Senate Economics Legislation Committee, 23 May 2000.

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| 6 | CFMEU - C & GD | The CFMEU's submission to the Review of Business Taxation, June 1999. |
| 7 | CFMEU - C & GD | Hansard extract of evidence given by John Sutton (National Secretary, CFMEU- C & GD), Raoul Wainwright (National Legal/Research Officer, CFMEU- C & GD) and Dan Murphy (Director, Fugen Holdings) to the Senate Select Committee on a New Tax System, 5 March 1999. |
| 8 | CFMEU - C & GD | The CFMEU's submission to the Senate Select Committee on a New Tax System, January 1999. |
| 9 | CFMEU - C & GD | The CFMEU's submission to the Inquiry into the Structure and Distributive Effects of the Australian Taxation System. |
| 10 | CFMEU - C & GD | <i>Union Experience of Labour Hire in the Industry</i> , document prepared by the CFMEU for the ATO's 'Cash Economy and Tax Evasion Subcommittee', July 2004. |
| 11 | CFMEU - C & GD | Final Report of the NSW Government Labour Hire Task Force, 2001. |
| 12 | CFMEU - C & GD | Submission of the Labor Council of NSW (in conjunction with the CFMEU- C & GD, NSW Branch) to the NSW Government Labour Hire Task Force, 14 September 2000. |
| 13 | CFMEU - C & GD | Submission of the Australian Council of Trade Unions (ACTU) to the NSW Government Labour Hire Task Force, September 2000. |
| 14 | CFMEU - C & GD | Submission of the ACTU to the Inquiry into Labour Hire Employment in Victoria, December 2003. |
| 15 | CFMEU - C & GD | 'Inquiry into independent contracting', <i>Stawell Times News-Ararat Advertiser</i> , 11 February 2005. |
| 16 | CFMEU - C & GD | ATO's written response to questions posed by the CFMEU during the Royal Commission into the Building and Construction Industry headed 'Response to CFMEU Questions', 2002. |

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| 17 | CFMEU - C & GD | ATO's Submission to the Royal Commission into the Building and Construction Industry, June 2002. |
| 18 | CFMEU - C & GD | <i>The New Business Tax System: Stage 2 Response</i> , Media Release of Treasurer Peter Costello, No. 74, 11 November 1999. |
| 19 | CFMEU - C & GD | Newspaper clippings headed; 'Irish link in major Oz cash laundering scam', 'Sydney link to \$11m crime cash', 'Corkman to face extradition hearing', 'Crime authorities crack down on budding bodgie', 'Foreign workers preferred' and 'Jobs racket claimed'. |
| 20 | CFMEU - C & GD | Letter from the CFMEU to the Minister for Immigration and Multicultural Affairs, 18 May 1999, with attachments. |
| 21 | Association of Professional Engineers, Scientists and Managers Australia (APESMA) | <i>Connect 2004 Survey of Independent Contractors and Consultants</i> . |
| 22 | APESMA | APESMA feedback on PSI legislation. |
| 23 | Australian Rail Tram and Bus Industry Union | International Labour Organisation: <i>C181 Private Employment Agencies Convention</i> , 1997. |
| 24 | Australian Lawyers Alliance | National Research Centre for OH&S Regulation: Working Paper No. 3. <i>The legal concept of work-related injury and disease in Australian OH&S and Workers Compensation Systems</i> , April 2002. |
| 25 | Department of Employment and Workplace Relations (DEWR) | <i>DEWR Discussion Paper: Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements</i> , March 2005. |
| 26 | Recruitment & Consulting Services Association (RCSA) | Brennan, L, Vales, M and Hindle, K, <i>On-hired works in Australia: Motivations and Outcomes</i> , RMIT University, Swinburne University and Customer Focus Research, 2003. |

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| 27 | Independent Contractors of Australia | DVD Introduction for Independent Contractors of Australia. |
| 28 | SKILLED Group | Presentation of Introduction SKILLED Group. |
| 29 | CFMEU, Mining and Energy Division | Brozovsky, J, Mason, J and O'Neal, C, Independent contractors: A look at the consequences, <i>Management Accounting</i> , Vol. 78, No. 2, p.18,1996. |
| 30 | CFMEU, Mining and Energy Division | Employer's Supplemental Tax Guide (USA) Department of The Treasury, Internal Revenue Service, 2005. |
| 31 | CFMEU, Mining and Energy Division | Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding, Department of The Treasury, Internal Revenue Service, 2005. |
| 32 | Unions NSW | Affidavit of Professor Richard Hall provided to the NSW Secure Employment Test Case. |
| 33 | Unions NSW | Laplagne, P, Glover, M and Fry, T, <i>The Growth of Labour Hire Employment in Australia</i> , Productivity Commission Staff Working Paper, Canberra, 2005. |
| 34 | Unions NSW | Kruger, T, Parliamentary Research Library Note on <i>Casual Employment Trends and Characteristics</i> , 2004. |
| 35 | Unions NSW | Unions NSW Opening Submission to the NSW Secure Employment Test Case. |
| 36 | Unions NSW | Copy of correspondence sent by William Parker to The Honourable Jackie Kelly, Member for Lindsay highlighting the disadvantages he faces as a Labour Hire casual. |
| 37 | Unions NSW | Copy of letter sent by parents; copy of advertisement place in local newspapers; advice by the company to the vendors re minors and independent contracting. |
| 38 | Unions NSW | Correspondence from an independent contractor re changes to legislation regarding independent contracting, 2001. |

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| 39 | Unions NSW | Executive Summary of <i>NSW Labour Hire Taskforce Final Report 2001</i> and recommendations. |
| 40 | Master Builders Australia Inc | The Master Builders of Australia submission to the DEWR on the <i>Discussion Paper: Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements</i> , (Forwarded with Sub 22). |
| 41 | Confidential | |
| 42 | Chamber of Commerce and Industry of Western Australia (Inc) | Chamber of Commerce and Industry of WA submission to the DEWR <i>Discussion paper: Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements</i> . |
| 43 | Housing Industry Association | Period Trade Contract Conditions, provided by G. Simpson. |
| 44 | DEWR on behalf of Ms Robin Bremers | Submission by R.Bremers in response to DEWR <i>Discussion Paper :Proposal for Legislative Reform in Independent Contracting and Labour Hire Arrangements</i> . |
| 45 | DEWR on behalf of Australian Manufacturing Workers Union (AMWU) | Submission by the AMWU in response to DEWR Discussion Paper. |
| 46 | DEWR on behalf of Textile, Clothing & Footwear Union of Australia (TCF UA)) | Submission by the TCF UA in response to DEWR Discussion Paper. |
| 47 | DEWR on behalf of Australian Business Limited (ABL) | Submission by ABL in response to DEWR Discussion Paper. |
| 48 | DEWR on behalf of CEPU | Submission by the CEPU in response to DEWR Discussion Paper. |
| 49 | DEWR on behalf of Civil Contractors Federation (CCF) | Submission by the CCF in response to DEWR Discussion Paper. |

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| 50 | DEWR on behalf of Australian Industry Group (Ai Group) | Submission by the Ai Group in response to DEWR Discussion Paper. |
| 51 | DEWR on behalf of Adecco | Submission by Adecco in response to DEWR Discussion Paper. |
| 52 | DEWR on behalf of Equal Opportunity Commission (EOC) Victoria | Submission by the EOC Victoria in response to DEWR Discussion Paper. |
| 53 | DEWR on behalf of Transport Workers Union (TWU) of NSW | Submission by the TWU of NSW in response to DEWR Discussion Paper. |
| 54 | DEWR on behalf of Queensland Government | Submission by the Queensland Government in response to DEWR Discussion Paper. |
| 55 | DEWR on behalf of TWU Victorian/Tasmanian Branch | Submission by the TWU Victorian/Tasmanian Branch in response to DEWR Discussion Paper. |
| 56 | DEWR on behalf of New South Wales Taxi Industry Association (NSWTIA) | Submission by the NSWTIA in response to DEWR Discussion Paper. |
| 57 | DEWR on behalf of Mr Marcus Anderson | Submission by M. Anderson in response to DEWR Discussion Paper. |
| 58 | DEWR on behalf of APESMA | Submission by APESMA in response to DEWR Discussion Paper. |
| 59 | DEWR on behalf of the Government of Western Australia | Submission by the Government of Western Australia in response to DEWR Discussion Paper. |
| 60 | DEWR on behalf of Direct Selling Association of Australia Inc (DSAA) | Submission by the DSAA in response to DEWR Discussion Paper. |
| 61 | DEWR on behalf of | Submission by the CFMEU – C & GD in response |

	CFMEU – C & GD	to DEWR Discussion Paper.
62	DEWR on behalf of Rio Tinto	Submission by Rio Tinto in response to DEWR Discussion Paper.
63	DEWR on behalf of the Master Plumbers & Mechanical Contractors Association	Submission by the Master Plumbers & Mechanical Contractors Association in response to DEWR Discussion Paper.
64	DEWR on behalf of TWU of Australia	Submission by the TWU of Australia in response to DEWR Discussion Paper.
65	DEWR on behalf of Labour Force Australia Pty Ltd	Submission by Labour Force Australia Pty Ltd in response to DEWR Discussion Paper.
66	DEWR on behalf of Rowley Patrick Pty Ltd	Submission by Rowley Patrick Pty Ltd in response to DEWR Discussion Paper.
67	DEWR on behalf of Master Builders Association of Western Australia	Submission by Master Builders Association of Western Australia in response to DEWR Discussion Paper.
68	DEWR on behalf of the Australian Institute of Interpreters and Translators Inc (AUSIT).	Submission by the AUSIT in response to DEWR Discussion Paper.
69	DEWR on behalf of Independent Contractors of Australia	Submission by the Independent Contractors of Australia in response to DEWR Discussion Paper.
70	DEWR on behalf of Australian Chamber of Commerce & Industry (ACCI)	Submission by the ACCI in response to DEWR Discussion Paper.
71	DEWR on behalf of Unions WA	Submission by Unions WA in response to DEWR Discussion Paper.
72	DEWR on behalf of NSW State Government	Submission by the NSW Government in response to DEWR Discussion Paper.

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| 73 | DEWR on behalf of Australian Services Union | Submission by the Australian Services Union in response to DEWR Discussion Paper. |
| 74 | DEWR on behalf of Australian Public Service Commission | Submission by the Australian Public Service Commission in response to DEWR Discussion Paper. |
| 75 | DEWR on behalf of Newmont Australia Limited | Submission by Newmont Australia Limited in response to DEWR Discussion Paper. |
| 76 | DEWR on behalf of Recruitment & Consulting Services Association (RCSA) | Submission by RCSA in response to DEWR Discussion Paper. |
| 77 | DEWR on behalf of Media, Entertainment and Arts Alliance | Submission by Media, Entertainment and Arts Alliance in response to DEWR Discussion Paper. |
| 78 | DEWR on behalf of the Law Society of NSW | Submission by Law Society of NSW in response to DEWR Discussion Paper. |
| 79 | DEWR on behalf of Toll Transport | Submission by Toll Transport in response to DEWR Discussion Paper. |
| 80 | DEWR on behalf of K.M. Corke and Associates | Submission by K.M. Corke and Associates in response to DEWR Discussion Paper. |
| 81 | DEWR on behalf of Information Technology Contract & Recruitment Association | Submission by Information Technology Contract & Recruitment Association in response to DEWR Discussion Paper. |
| 82 | DEWR on behalf of Unions NSW | Submission by Unions NSW in response to DEWR Discussion Paper. |
| 83 | DEWR on behalf of SKILLED Group | Submission by SKILLED Group in response to DEWR Discussion Paper. |
| 84 | DEWR on behalf of ACT Government | Submission by the ACT Government in response to DEWR Discussion Paper. |
| 85 | DEWR on behalf of Australian Taxi Industry | Submission by ATIA in response to DEWR Discussion Paper. |

	Association (ATIA)	
86	DEWR on behalf of Mr Allan Viney	Submission by A. Viney in response to DEWR Discussion Paper.
87	DEWR on behalf of National Farmers' Federation (NFF)	Submission by NFF in response to DEWR Discussion Paper.
88	DEWR on behalf of Victorian Automobile Chamber of Commerce	Submission by Victorian Automobile Chamber of Commerce in response to DEWR Discussion Paper.
89	DEWR on behalf of Housing Industry Association (HIA)	Submission by the HIA in response to DEWR Discussion Paper.
90	DEWR on behalf of Mr William Barker JP	Submission by W. Barker in response to DEWR Discussion Paper.
91	DEWR on behalf of Courier and Taxi Truck Association	Submission by the Courier and Taxi Truck Association in response to DEWR Discussion Paper.
92	DEWR on behalf of Australian Council of Trade Unions (ACTU)	Submission by ACTU in response to DEWR Discussion Paper.
93	DEWR on behalf of Mr Peter McPhillimy	Submission by P. McPhillimy in response to DEWR Discussion Paper.
94	DEWR on behalf of EOC Western Australia	Submission by the EOC Western Australia in response to DEWR Discussion Paper.



List of hearings and witnesses

Wednesday, 30 March 2005 - Sydney

Australian Industry Group

Mr David Hargraves, Executive Officer, New South Wales

Australian Rail, Tram and Bus Industry Union

Mr Andrew Thomas, National Industrial Officer

Construction, Forestry, Mining and Energy Union

Mr John Sutton, National Secretary, Construction and General Division

Mr Tom Roberts, Senior National Legal Officer, Construction and General Division

Mr Keenon Endacott, Industrial Research Officer, Mining and Energy Division, Northern District Branch

Roofing Tile Association of Australia Inc.

Mr Anthony Tanner, Executive Director

Ross Human Directions

Ms Michele Jones, Industrial Relations Manager

Unions New South Wales

Mr Chris Christodoulou, Deputy Assistant Secretary

Ms Alisha Hughes, Industrial Officer

Transport Workers Union

Mr Garry Blair, Member

Mr Paul Dewberry, Section President

Mr Bob Hayden, Delegate
Mr Michael Kaine, Senior Legal Adviser
Mr Tony Mathews, Delegate
Mr Tony McKnulty, Delegate
Mr Collin Neal, Life Member
Mr Edward Purcell, Member
Mr Robert Rullo, Delegate
Mr Anthony Sheldon, State Secretary
Mr Paul Walsh, Delegate

Thursday, 31 March 2005 - Sydney

Australian Institute of Interpreters and Translators Inc.

Ms Yveline Piller, National President & Chair, Pay and Conditions
Committee
Mr Vivian Stevenson, Member

Australian Lawyers Alliance

Mr Benjamin Cochrane, Legal and Policy Officer
Mr Simon Morrison, Chair, National Workers' Compensation Special
Interest Group

Australian Manufacturing Workers Union

Mr Doug Cameron, National Secretary
Mr Pat Conroy, National Research Officer

Courier and Taxi Truck Association

Mr Peter Reichman, Treasurer
Ms Kathleen Robertson, Chief Executive Officer
Mr James Taylor, President

Direct Selling Association of Australia Inc.

Mr Leslie Dell, Executive Director

IR Australia Pty Ltd

Mr Daniel Houlihan, Industrial Relations Adviser

Manpower Services

Mrs Jennifer Hunt, Solicitor, Workplace Relations and Corporate

Ms Vicki Nock, General Manager, Marketing, Knowledge and Innovation.

Media Entertainment and Arts Alliance

Mr Simon Whipp, National Director

Restaurant and Catering Industry Association of Australia

Mr John Hart, Chief Executive Officer

Tuesday, 26 April 2005 - Melbourne**Individuals**

Mr Simon Bailey

Mrs Rhonda Hodgetts

Professor Andrew Stewart, School of Law, Flinders University

Association of Professional Engineers, Scientists and Managers, Australia

Mr Geoff Fary, Executive Director, Industrial Relations

Ms Kim Rickard, National Information Officer

Australian Chamber of Commerce and Industry

Mr Peter Anderson, Director, Workplace Policy

Mr Scott Barklamb, Manager, Workplace Relations

Australian Council of Trade Unions

Ms Sharan Burrow, President

Ms Nada Delavec, Industrial Officer

Independent Contractors of Australia

Mrs Angela MacRae, Board Member

Mr Ken Phillips, Executive Director

Labour Force Australia Pty Ltd

Mr Peter Bosa, Chairman

Ms Judy Meinen, Managing Director

Recruitment and Consulting Services Association Ltd

Mr Andrew Cameron, Policy Adviser and Issues Management Consultant

Mr Tony Fritsche, Member

Mr Reginald Shields, Honorary Member

Mr Paul Veith, Life Member and WorkPlace Relations Committee Co-opted Member for Matters for National Importance

Mr Nicholas Wakeling, Chair, Victorian WorkPlace Relations Committee

Wednesday, 27 April 2005 - Melbourne**Individual**

Mr Duncan Fraser

Mr Ian Hastings

Australian Nursing Federation

Mr Nicholas Blake, Federal Industrial Officer

Australian Services Union

Mr Keith Harvey, Assistant National Secretary

Mr Paul Slape, National Secretary

Building Service Contractors Association of Australia

Mr Neil Jackson, Chief Executive Officer

Civil Contractors Federation

Mr Geoff Stevenson, National IR Manager

Mr Douglas Williams, Executive Director

Communications, Electrical and Plumbing Union

Mr Colin Cooper, Divisional President, Communications Division

Ms Rosalind Eason, Senior Research Officer, Communications Division

Mr David Irons, Senior Industrial Officer, Communications Division

Job Watch Inc.

Mr Andrew McCarthy, Solicitor

Law Council of Australia

Mr Tony Hulett, Member, Small Business Working Group, Business Law Section

Mr Andrew Ray, Chair, Small Business Working Group, Business Law Section

National Union of Workers

Mr Tim Lyons, Senior Advocate, National Office

Mr Antony Thow, Assistant Secretary, Victorian Branch

SKILLED Group Ltd

Mr Kevin Bassett, Group Occupational Health and Safety Manager

Mr Ken Bieg, Company Secretary

Mr Ray Fitzgerald, Industrial Relations Director

Mr Greg Hargrave, Managing Director and Chief Executive Officer

Ms Julie McBeth, Corporate Affairs Manager

Mr Brian Stapleton, Chief Human Resources Officer

Transport Workers Union of Australia

Mr Linton Duffin, Federal Legal Officer

Mr Brendan Johnson, Industrial Advocate

Mr William Noonan, Branch Secretary, Victorian-Tasmanian Branch

Monday, 9 May 2005 - Canberra

Housing Industry Association

Mr Scott Lambert, Executive Director, Industrial Relations and Legal Services

Dr Malcolm Roberts, Executive Director, Federal Relations

Mr Glenn Simpson, Senior Executive Director, Business Services

Master Builders Australia Inc.

Mr Richard Calver, National Director, Industrial Relations and Legal Counsel

Mr Wilhelm Harnisch, Chief Executive Officer

National Farmers Federation

Mrs Denita Wawn, Workplace Relations Manager and Industrial Advocate

Thursday, 12 May 2005 - Canberra

Aged Care Queensland Inc.

Ms Margaret Darwin, Workplace Relations Manager

Department of Employment and Workplace Relations

Mr Jeremy O'Sullivan, Assistant Secretary, Legal Policy Branch,
Workplace Relations Legal Group

Mr Brant Pridmore, Director, Working Arrangements Section, Strategic
Policy Branch, Workplace Relations Policy Group

Ms Catherine Waterhouse, Senior Government Lawyer, Bargaining
and Industrial Action Section, Workplace Relations Legal Group

Group Training Australia Ltd

Mr James Barron, Chief Executive Officer

Mr Jeff Priday, National Projects Manager

Queensland Council of Unions

Mr Christopher Barrett, Assistant General Secretary

Ms Deborah Ralston, Industrial Officer

Friday, 20 May 2005 - Perth

Chamber of Commerce and Industry of Western Australia

Mr Geoffrey Blyth, Director, Industrial Relations Services

Liquor Hospitality and Miscellaneous Union

Mr Paul Davies, Official, Western Australian Branch

Tricord Personnel

Mr Peter Wieske, Director/Client Services Manager, Personnel Contracting Pty Ltd trading as Tricord Personnel

UnionsWA

Mr Alan Barker, Union Member

Ms Janine Freeman, Assistant Secretary

Mr John Webster, Union Member

Thursday, 16 May 2005 - Canberra**Australian Taxation Office**

Mr Mark Konza, Deputy Commissioner of Small Business

Mr Tony Sullivan, Assistant Commissioner, Small Business Active Compliance'

Department of Employment and Workplace Relations

Mr Brant Pridmore, Director, Policy Coordination Team, Strategic Policy Branch, Workplace Relations Policy Group

Mr James Smythe, Chief Counsel, Workplace Relations Legal Group

Ms Catherine Waterhouse, Senior Government Lawyer, Bargaining and Industrial Action Section, Workplace Relations Legal Group

Department of the Treasury

Ms Marianne Dolman, Policy Officer, Competition Policy Framework Unit, Competition and Consumer Policy Division

Mr Martin Jacobs, Manager, Individuals Non Business Unit, Revenue Group

Mr Mark O'Connor, Principal Adviser, Individuals and Exempt Tax Division, Revenue Group

Mrs Sandra Patch, Senior Adviser, Competition Policy Framework Unit, Competition and Consumer Policy Division



Independent contractor or employee?

Source: Australian Government, Office of the Employment Advocate, *Independent contractor or employee?* Referred to in paragraph 2.14

Question	Employee relationship indicators	Independent contractor relationship indicator
Is the individual operating under a business name, sole trader, company or partnership arrangement?	<ul style="list-style-type: none"> An employee is less likely to operate under a business name, sole trader, company or partnership. However these devices may be used as a mere “sham” to manipulate the appearance of the relationship. 	<ul style="list-style-type: none"> Contractors are more likely to operate under one of these arrangements.
How is the work arrangement set up? What is the practical working arrangement?	<ul style="list-style-type: none"> An employee is normally employed under specific terms and conditions which are often governed by an award, industrial instrument or employment contract. 	<ul style="list-style-type: none"> The working arrangements for contractors (usually set out in a contract for services) are more likely to focus on the work to be performed including the specifications, time to complete, contract cost, and liability of the person performing the work.
Where is the work performed?	<ul style="list-style-type: none"> The work is more likely to be conducted at the employer’s place of business or other specified locations as directed by the employer. 	<ul style="list-style-type: none"> The work is more likely to be performed at the specified and agreed location(s). The Contractor may have its own place of business (although is not essential).

<p>Who provides the tools, equipment and resources for the job?</p>	<ul style="list-style-type: none"> • The employer is more likely to provide materials incidental to the performance of the duties (including office space and equipment) and it is less likely that an employee would incur significant expenditure on materials, plant and equipment. 	<ul style="list-style-type: none"> • The contract will specify who is required to provide tools and equipment. However it is usually the responsibility of the contractor. • The contract may be either for the supply of labour or materials. It may also specify the terms upon which the materials are supplied. • A contractor is more likely to make its own arrangements regarding offices space and equipment, particularly in relation to managing its separate business.
<p>Who is responsible for exercising control over the manner and time in which the work is to be performed?</p>	<ul style="list-style-type: none"> • The employer normally directs or has the right to direct the manner in which work is to be performed. • There is an obligation on the employee to obey the lawful directions of the employer. 	<ul style="list-style-type: none"> • The work may be subject to performance management/indicators, inspection and supervision as provided in any contract for services/goods. • The contractor normally has freedom in the ways tasks are performed, subject to job specifications.
<p>Does the contract require the work to be performed personally?</p>	<ul style="list-style-type: none"> • There is an implied or express agreement that the work allocated is to be performed by the employee. • There may be a power of delegation of duties to other employees of the employer. 	<ul style="list-style-type: none"> • A contract for services may contain a provision allowing work to be performed by persons other than the contractor such as a subcontractor or employees of the contractor.

<p>Does the job relate to a specified period or specific tasks within which the job is to be performed or is it of a continuing duration?</p>	<ul style="list-style-type: none"> • The employee/employer relationship is likely to require a person to perform work on a continuous or systematic basis. A fixed term contract may be indicative of an employee employer relationship where it relates to the person performing general duties of a specific type rather than any specified tasks. 	<ul style="list-style-type: none"> • A contract for services or terms of the engagement would normally describe or specify the work and the time within which it is to be performed.
<p>Who determines the working hours and leave requirements?</p>	<ul style="list-style-type: none"> • Working hours and the granting of leave is more likely to be subject to the discretion of the employer and may be subject to a person's entitlements under their relevant industrial instrument or statute. • An employee is generally expected to attend to work during specific times unless they are on approved leave or leave entitled to them under their industrial instrument or statute. 	<ul style="list-style-type: none"> • A contractor does not necessarily require permission to take leave, or to work set working hours. • A contractor can within the confines of the contract attend work at their discretion, but is often legally bound by the contract to ensure that the contracted work or service is completed at the specified time.
<p>Is the person performing the work, in his or her activities, part of the principal's business?</p>	<ul style="list-style-type: none"> • The work is performed as an integral part of the business of the employer. The employee may also be described as a member/representative of the principal's business. 	<ul style="list-style-type: none"> • The work although performed for the principal business is not necessarily integrated into it.
<p>Is the work relationship continuing?</p>	<ul style="list-style-type: none"> • A contract of employment may be of continuing duration, requiring the employee to perform ongoing duties and tasks. This however does not exclude fixed, short term or casual engagement which is common in professional or specialised fields of employment. 	<p>The work is undertaken to produce a given result. The contractor whilst undertaking the work is not necessarily under the direct order or control of the principal. The contractor can use their discretion on matters not specified in the contract for service.</p>

<p>Is the person performing the work free to accept work from other employers/principals and or to conduct business on their own accord?</p>	<ul style="list-style-type: none"> • An employee's ability to undertake other employment or business activities may be hindered if those ventures conflict with their duty to undertake their employment duties. 	<ul style="list-style-type: none"> • The contractor is more likely to be at liberty to accept work from others and to solicit and conduct other business, subject to their current commitment to fulfil existing contractual arrangements.
<p>Does the person performing the work have the right to refuse to undertake a particular job or task?</p>	<ul style="list-style-type: none"> • An employee does not generally have the right to refuse lawful and appropriate directions from the employer to perform allocated tasks. The persistent refusal to perform task may constitute grounds for dismissal. 	<ul style="list-style-type: none"> • The tasks to be performed by a contractor are normally agreed prior to entering into the contract for service. The contract will govern what tasks will be performed. The principal may seek remedies for the failure to perform under the contract.
<p>Is income tax being deducted from the individual's remuneration?</p>	<ul style="list-style-type: none"> • It is likely that income tax will be deducted from an employee's wages. 	<ul style="list-style-type: none"> • It is less likely that income tax will be deducted from contractor's payment, although the contractor and principal may enter into an agreement where PAYG payments may be withheld by the principal. Where this is not the case, a contractor will charge the principal GST for goods or services provided as part of the service.

Subject	Employee	Independent contractor
Superannuation	<ul style="list-style-type: none"> The employer must pay superannuation contributions on behalf of employees. 	<ul style="list-style-type: none"> Contractors will make their own arrangement concerning superannuation.
Taxation implications Professional taxation advice should be sought for details on this issue.	<ul style="list-style-type: none"> The taxation implications for employees is calculated based on an employee's income in accordance with the <i>Income Tax Assessment Act 1997</i>. 	<ul style="list-style-type: none"> Contractors have different taxation responsibilities in relation to goods and services tax (GST) and personal services income. For example, in certain circumstances "contractors" earning 80% of their income from the one principal may be deemed to be employees for the purposes of tax law, and should seek advice from the ATO, financial or tax planner on this issue.
Termination of the agreement	<ul style="list-style-type: none"> The employee's service may be terminated in accordance with relevant law and the industrial instrument they are employed under. 	<ul style="list-style-type: none"> The services may be terminated in accordance with the terms of the contract for service/goods.
Liability for losses resulting from substandard work	<ul style="list-style-type: none"> It may be likely that the employer will be vicariously liable for damage or loss suffered from work performed by an employee. 	<ul style="list-style-type: none"> The principal will not be vicariously liable for any losses resulting from substandard work. <p>The principal's liability may be reduced where loss or damage results from the contractor's poor performance, but this may not be always the case where the principal retains a duty of care to ensure that the work is performed properly (for example).</p>

Remedy available to employer/principal where the work performed is substandard.	<ul style="list-style-type: none"> • The services of an employee may be terminated in accordance with relevant law and the instrument under which the employee is engaged. 	<ul style="list-style-type: none"> • The termination provisions of the contract may allow for the principal to terminate the contract. • Damages may also be payable if the contractor has breached the contract (by default).
Tax invoices	<ul style="list-style-type: none"> • Payment is more likely to be made by reference to the relevant law or the industrial instrument setting the terms of employment. 	<ul style="list-style-type: none"> • A contractor would normally render a Tax invoice or payment request on an account payable by the principal in accordance with its obligations under GST legislation.
Workers compensation	<ul style="list-style-type: none"> • The employer is liable to cover employees for workers compensation, and must take out insurance to protect against this situation. 	<ul style="list-style-type: none"> • A contractor may be more likely to undertake their own workers' compensation cover.
Other entitlements	<ul style="list-style-type: none"> • An employee has in accordance with relevant law and their industrial instrument an entitlement to payment for leave, holidays and other benefits. • Payment is normally made on a regular basis (weekly, fortnightly, monthly, hourly or piece work rate). 	<ul style="list-style-type: none"> • The contract is more likely to provide for the specified work to be performed for an agreed sum identified in, and payable in accordance with, the contract.

Source: Australian Government, Office of the Employment Advocate, *Independent contractor or employee?* accessed 22 June 2005, www.oea.gov.au/docs/contractorvsemployee.pdf.



OHS administering organisations

Table indicating the range of organisations involved in administering and policing OHS and workers' compensation (WC)

Referred to in paragraph 4.83

Jurisdiction	Administering organisation and its accountability
Commonwealth	The Safety, Rehabilitation and Compensation Commission, Comcare and Australian Safety and Compensation Council (from August 2005) [WC and OHS] - responsible to the Minister for Employment and Workplace Relations
Seafarers	Seacare Authority [WC and OHS] - reports to the Minister for Employment and Workplace Relations
New South Wales	WorkCover Authority of NSW (WorkCover NSW) [WC and OHS] - responsible to the Minister for Commerce
Victoria	Victorian WorkCover Authority [WC and OHS]. WorkSafe Victoria is the VWA's OHS arm - responsible to the Minister for WorkCover who is also the Minister for Industrial Relations (Department of Industry and Regional Development).
Queensland	Division of Workplace Health and Safety [OHS] – a division of the Department of Industrial Relations - responsible to the Minister for Industrial Relations
Western Australia	WorkSafe Division [OHS] of the Department of Consumer and Employment Protection (IR is included in the portfolio) - responsible to the Minister for Consumer and Employment Protection
South Australia	WorkCover Corporation [WC and OHS] - responsible to the Minister for Industrial Relations Enforcement by Workplace Services [OHS] division of the Department of Administrative and Information Services (Workplace [industrial] Relations is included in the portfolio).
Tasmania	WorkCover Tasmania [WC and OHS] - responsible to the Minister for Infrastructure (Industrial Relations is included in the portfolio). Enforcement is by Workplace Standards Tasmania [OHS] within the Department of Infrastructure, Energy and Resources.
ACT	ACT WorkCover [WC and OHS] - responsible to the Minister for Industrial Relations
NT	Northern Territory Work Health Authority [WC and OHS]. NT WorkSafe is the OHS arm of the Authority - responsible to the Minister for Employment Education and Training

Note: WC: workers' compensation; OHS: occupational health and safety; IR: industrial relations.

Source Adapted from *Productivity Commission 2004, National Workers' Compensation and Occupational Health and Safety Frameworks, Report No. 27, Canberra, p. 51.*



A proposed redefinition of employment

Professor A. Stewart, Submission No. 69, p. 10-11.

Referred to in paragraph 4.19

The following standard definition of employment is proposed:

- (1) A person (the worker) who contracts to supply their labour to another is to be presumed to do so as an employee, unless it can be shown that the other party is a client or customer of a business genuinely carried on by the worker.

- (2) A contract is not to be regarded as one other than for the supply of labour merely because:
 - (a) the contract permits the work in question to be delegated or sub-contracted to others; or
 - (b) the contract is also for the supply of the use of an asset or for the production of goods for sale; or
 - (c) the labour is to be used to achieve a particular result .

- (3) In determining whether a worker is genuinely carrying on a business, regard should be had to the following factors:
 - (a) the extent of the control exercised over the worker by the other party;
 - (b) the extent to which the worker is integrated into, or represented to the public as part of, the other party's business or organisation;
 - (c) the degree to which the worker is or is not economically dependent on the other party;
 - (d) whether the worker actually engages others to assist in providing the relevant labour;
 - (e) whether the worker has business premises (in the sense used in the personal services income legislation); and

- (f) whether the worker has performed work for two or more unrelated clients in the past year, as a result of the worker advertising their services to the public.
- (4) Courts are to have regard for this purpose to:
- (a) the practical reality of each relationship, and not merely the formally agreed terms; and
 - (b) the objects of the statutory provisions in respect to which it is necessary to determine the issue of employment status.
- (5) An employment agency¹ which contracts to supply the labour of a person (the worker) to another party (the client) is to be deemed to be that person's employer, except where this results in a direct contract between the worker and the client.
- (6) Where:
- (a) an arrangement is made to supply the labour of a person (the worker) to another party (the ultimate employer) through a contract or chain of contracts involving another entity (the intermediary); and
 - (b) it cannot be shown that the intermediary is genuinely carrying on a business in relation to that labour that is independent of the ultimate employer, on the basis of factors similar to those set out in (3) above, the worker is to be deemed to be the employee of the ultimate employer.

1 That is, an entity whose business involves or includes the supply of workers to other unrelated businesses or organisations, whether through a contract or a chain of contracts.