Submission No. 42

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

Inquiry into Independent contracting and labour hire arrangements

1. The Transport Workers' Union of Australia ("the TWU") welcomes the opportunity to make a submission to the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation ("the Committee") into the issues of independent contracting and the labour hire industry.

2. The Minister for Employment and Workplace Relations has requested the 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.

Who we are

3. The TWU is the principal union involved in the road transport industry in Australia. We have approximately 80,000 members.

4. The TWU's membership is predominantly found in the road transport industry although there are a significant number of members employed in air transport. The TWU also has a significant number of members who are engaged as owner-drivers in the road transport industry.

5. Contractors are commonly classed as "owner-drivers" in the road transport industry. Owner-drivers are a well understood component of the transport industry, although as a matter of law there is no certainty in any particular case that the owner-driver is an independent contractor.

6. Nonetheless it is easy to describe owner-driver operations in the transport industry. Owner-drivers are persons who either own their vehicle or, more commonly, particularly when dealing with the larger more specialised elements of the transport industry, are purchasing the vehicle through loans or hire-purchase arrangements.

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7. Traditionally owner-drivers in the transport industry were sole traders or partnerships and subject to contracts which were essentially oral. In more recent times principal contractors have been requiring that owner-drivers sign extensive standard form contracts and incorporate.

8. Notwithstanding the complex situation as a matter of legal principle, the terms owner-driver and contractor will be interchangeable in this submission. Nonetheless committee members ought properly appreciate that there are often complex questions of law associated with the work of owner-drivers. This is addressed later in the submission.

9. The use of independent contractors in the airline industry is rare, although obviously once air freight hits the ground contractors can be used in the delivery of such freight.

10. In both the air and road transport industries the use of labour hire is prevalent and growing.

11. Approximately one-quarter of the TWU's membership are owner-drivers in the road freight industry. It is not an exaggeration for the TWU to say it represents **directly** as many small businesses as would be represented by employer organisations before the Committee.

12. The owner-drivers represented by the TWU include owner-drivers in the following areas:

a) courier services (typically owning one-tonne vans or smaller vehicles and contracting to one single company – for example DX couriers, Ipec etc);

b) concrete tippers (typically contracting to one single entity – for example Boral concrete, Readymix etc);

c) car carrying services running line haul (contractors typically engaged to provide services on a daily basis to companies such as Patrick, TNT);

d) refrigerated transport;

e) furniture removal;

f) tow trucks;

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g) waste disposal;

h) general freight whether express or otherwise;

i) oil and petroleum;

j) building and construction.

13. These submissions are structured in the following way:

a) submissions about the road transport industry;

b) submissions about assessing whether owner-drivers are independent contractors;

c) submissions about the nature of owner-driver work;

d) submissions about the externalities associated with lack of regulation in the area of owner-driver work;

d) submissions about the means to ensure contracting arrangements are legitimate;

e) submissions about labour hire employment.

14. Nonetheless, at the outset, the TWU wishes to make its position very clear. Owner-drivers in the road transport industry are working people who, in most, but not all cases, suffer from an inequality of bargaining power with the companies they contract to.

15. Owner-drivers, to the extent they are given the opportunity to negotiate at all, will be negotiating with multinational companies, large employing corporations and organisations with significant teams of specialists engaged in employment relations, human resources management and contract law. The companies that owner-drivers negotiate with come to the negotiating table with extensive advice on how to structure their affairs to maximise their profits. They have access to lawyers, accountants and other professional bodies to establish corporate structures in the manner to minimise liability for taxation, workers compensation, superannuation, unfair dismissal and so on.

16. Companies frequently provide contracts on a take it or leave it basis and structure the contracts in a manner which provide the contractor with obligations *largely identical* to the obligations imposed on employees. The difference is, however, that the contractor does not have a situation where the "employer" (head contractor) has the reciprocal duties which would otherwise be in existence. Nor does the contractor, it should be noted, have the other entitlements associated with employment – for example

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contractors rarely have access to employer-paid superannuation, workers compensation insurance and other such benefits.

17. Owner-drivers are entitled to seek representation in negotiations, as indeed any party is entitled to representation in negotiations. Further, such representation should not be restricted to particular types of representatives. It would be outrageous for the Government to say, for example, that no commercial law firm should represent companies in Australia. Equally it should be regarded as outrageous to say that contractors should be prevented from choosing who is to represent them.

18. Like any other organisation seeking to represent individuals, be they covered by a corporate shell or unincorporated, unions should be allowed to do any of the following (and the list is inclusive):

a) draft contracts;
b) provide legal advice;
c) represent the contractor in negotiations;
d) devise strategies for collective bargaining;
e) market themselves as able to perform any such role.

19. The TWU currently performs such a role in the road transport industry. What basis is there for saying that unions who provide such services to members operating in industry should be prevented from such representational rights ? What basis is there for saying that unions cannot perform such tasks and provide such services ?

20. The only basis is knee-jerk anti-unionism.

21. There is a contestable market-place in existence. If owner-drivers choose to have the TWU to represent them when negotiating rates, terms and conditions of delivery and so on rather than lawyers, industrial relations consultants or accountants the Government should not be seeking to prevent these workers from exercising their choice.

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22. It is staggering to think that the Government would prevent small businesses or workers from exercising their free choice as to the bodies that represent them and the circumstances in which such representation takes place.

23. To the best of the TWU's knowledge such restrictions on freedom of choice have only previously been found in Communist or Fascist societies. It ill behoves a liberal democracy such as Australia to have the Government intervene to restrict such worker's freedom of choice.

The road freight industry

24. To appreciate the nature of owner-drivers in the transport industry it is necessary to appreciate the nature of the transport industry itself.

25. In 2003 the Bureau of Transport and Regional Economics (BTRE) published *An overview of the Australian Road Freight Transport Industry (working paper 60)*.

26. The road freight industry employs approximately 153,000 employees. This includes all white collar staff managers, clerks, freight forwarders etc, warehouse personnel as well as truck drivers.[1]

27. There are approximately 47,000 businesses operating in the hire and reward part of the road freight transport business. However over 90% of these are small establishments with one or two trucks.[2] These are the obvious owner-drivers within the road transport industry.

28. The road transport industry is extremely competitive and generally poorly remunerated and poorly rewarded. For example, real road freight rates have fallen by 44.4% since 1971.[3] Margins are extremely tight. As can be imagined from the fact that freight rates have fallen as far as they have, owner-drivers are price takers as are most transport companies.

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1 Bureau of Transport and Regional Economics, *An Overview of the Australian Road Freight Transport Industry*, Working Paper 60, p48
2 Ibid., p45
3 Ibid., p6

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29. The BTRE report notes the nature of sub-contracting within the road freight transport industry when it sets out the structure of the industry in its table at page 3. We have included a copy of this table as Attachment 1 to our submission to the Committee.

30. The BTRE distinguished between different types of owner-drivers, in our view rightly. It stated that

> *independent contractors can be further classified under one of the following categories:*
> - *a tow operator who supplies a prime mover and is sub-contracted to tow a trailer from terminal to terminal;*
> - *a "painted" sub-contractor whose equipment bears the name of the forwarder or shipper to whom he or she is contracted on a permanent or semi-permanent basis;*
> - *a specialist sub-contractor who supplies specialised equipment for the carriage of particular commodities such as cement, sand or beer; and*
> - *an independent sub-contractor employed on an itinerant basis.*[4]

31. These are important categorisations and make conceptual sense. In practice it is really only the final category which is the arms length independent contractor as traditionally understood. Each of the other categories involves a level of economic dependence.

32. In the previous three categories it is often the case that:

a) there is typically no difference in the actual work performed by an owner-driver and the work performed by an employee – the only difference in work is that the owner-driver brings their own vehicle;
b) owner-drivers will work for only one entity on an ongoing basis and often for extended periods;
c) the work that owner-drivers perform is typically subject to the same level of control and direction to which an employee is subject – owner-drivers are often told where to

[4] Bureau of Transport and Regional Economics, *An Overview of the Australian Road Freight Transport Industry*, Working Paper 60, p4

work, when, what to wear, whether they are allowed to attend work unshaven and so on;

d) owner-drivers are integrated into the overall business structure including through the use of uniforms, truck painted in company colours and so on.

33. Importantly the rewards for owner-drivers can be trifling. The BTRE study states that the average operating income for owner-operators is $70,000 (in 1999/2000). However more than 70 per cent of the income is needed to pay non-wage expenses (hire-purchase of the vehicle, fuel etc). What remains is slightly over $20,000 per business per year.[5] This is the case whether the owner-operator is engaged in the road freight industry or the road freight forwarding sector.

34. The BRTE makes the point that the industry is highly competitive with low barriers to entry. The top four firms account for only 15 per cent of the market share and the top eight firms account for just 21 per cent.[6]

35. The industry structure is important for an understanding of why the TWU believes that independent contractors in the sector are entitled to representation from the union, and to have rights to prevent exploitation of their lack of bargaining power and relative weakness in a negotiating system.

Independent Contracting, Dependent Contracting and Employees

36. It is necessary to understand what we are discussing in this context.

37. Independent contractors are persons who are not engaged as employees. So much is obvious. However what this means in practice is often difficult. It is frequently difficult to distinguish between a contract for services and a contract of service. This is particularly so in the transport industry. Anyone who is familiar with the developments in the law concerning independent contractor and employee would be aware of the decisions in *Humberstone v Northern Timber Mills*[7], *Stevens v Brodribb Samilling Co Pty Ltd*[8] and *Hollis v Vabu*[9]. All such cases were involved in the transport industry and

5 Ibid., p60
6 Ibid., at p47
7 (1949) 79 CLR 389
8 (1986) 160 CLR 16
9 (2001) 207 CLR 21

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dealt with the issue of owner-drivers. In most such cases the determination turned on fine distinctions.

38. The tests established by each decision have not been easily applied in subsequent decisions. The relationship between contractor and employee is not easily drawn.

39. Justice Gray in *Re Porter; Re TWU*[10] correctly pointed out that

> *As the subsequent authorities, especially Stevens, make clear, the various indicia of each contract must be examined, with particular reference to the right to control the performance of the work, in order to ascertain whether its essence is the provision of a vehicle, or the supply of work and skill in the operation of that vehicle. At one extreme, the impact of ownership of a vehicle upon the nature of the contract may be no more significant than the impact of ownership by a carpenter of carpentry tools used in the performance of work under the carpenter's contract. At the other extreme, it may be clear that an owner-driver carries on an independent business, contracting for all and sundry, and merely accepting large amounts of work from one particular source. Between these two extremes, there may be many gradations. There is no simple way of determining whether owner-drivers are employees or independent contractors, without examining the particular facts.*

40. The fact that it is often difficult to establish, in any particular situation, whether someone is an owner-driver or an employee. This is compounded by the way owner-drivers are utilised in the transport industry.

41. Many owner-drivers in the transport industry work for a single company. They do not hold themselves out as running a business available to the world. Most owner-drivers work to one business on a regular contract. This contract will usually have the contractor working to all intents and purposes as an employee – attending for work, being directed where to attend, being directed where to deliver and so on. The contractor is fundamentally fixed to working for the one entity.

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10 (1989) 32 IR 87

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42. It is important to distinguish between independent contractors who hold themselves out to the world at large, and dependent contractors who generally provide themselves to a single contracting entity.

43. Contrary to the views of some commentators[11] there is a general agreement in academic and policy circles that there are properly considered to be different types of independent contractors. The most obvious distinction is that between the independent contractor and the dependent contractor.

44. In a paper prepared by the Productivity Commission it was accepted that the independent contracting included both dependent contractors and independent contractors.[12] Independent contractors are those whose working arrangements with each client reflect a contractor-client relationship, while dependent contractors are those whose working arrangements are similar to those of employees.

45. The Productivity Commission paper recognises that the difference is real and properly comprehended as being a distinction which matters. The report states that

> *the distinction between employees and independent contractors is not always easily drawn. This is especially the case in situations where employers hire persons as contractors under employment arrangements more consistent with employee status...these persons are not truly independent of their employer.*

46. The academic and policy positions are also found in some judicial analysis. Justice Gray in *Re Porter* noted that

> *Some difficulty may arise where the practical considerations on a party conflict with the express stipulations in the contract...The reality may be that economic considerations dictate that work will only be accepted from the other party to the contract...In such circumstances there is no particular reason why a court should ignore the practical circumstances, and cling to theoretical niceties. The level of*

[11] See for example work by Ken Phillips and Mike Nahan from the Institute of Public Affairs criticising this distinction.

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

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economic dependence of one party upon another, ***and the manner in which that economic dependence may be exploited,*** *will always be relevant factors in the determination whether a particular contract is one of employment* ***(emphasis added).***[13]

47. The difficulty is that employment law has not properly dealt with the distinction between independent contractor and employee given the gradations and grey nature of the distinctions between the two categories. Professor Andrew Stewart has written a series of papers addressing these issues. In a paper presented to the Australian Labour Lawyers Association in 2002 he stated

> *Now any competent employment lawyer knows how to "exploit" these indicia so as to arrive at the right result for their client. Typically, the lawyer is asked to draw up a contract for a hirer to obtain labour from a person who will be made to resemble an independent contractor, but over whom the hirer will retain maximum control. The trick is to ensure that as many of the indicia as possible point in the desired direction.*[14]

48. Professor Stewart goes on to comment that the usual practice of Australian courts is to focus on the form of the contract rather than the substance. If the contract is appropriately drafted it can make the Court unwilling to examine the practical realities of the relationship rather than the substantive basis in the relationship.

49. Implicit in the above commentary is a recognition that the independent contractor is subject to the contracts provided to them drafted, developed and managed by the principal contractor. There is, in our experience, no doubt that this is true. Independent contractors come to the relationship with little bargaining power and often confront "take it or leave it" behaviour. The contracts are provided in "standard forms" and no alteration is envisaged.

50. Indeed in our experience, principal contractors are not only dictating to their contractors the terms and conditions of engagement, they are also dictating the very

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[13] *Re Porter* at 184-185

[14] Stewart A., *Redefining employment ? Meeting the challenge of contract and agency labour*, ALLA Conference October 2002

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nature of the business structure that the contractor is to use. Increasingly principal contractors are requiring independent contractors who regularly work for them to incorporate. This would appear to be both a means of seeking to add an additional factor in favour of contractor status and to subvert the operation of section 127A-127C of the *Workplace Relations Act*.

51. This direction as to how a party should structure their business demonstrates the extent of market power exhibited by principal contractors.

52. This experience is implicit in the decision of the Full Federal Court and the circumstances surrounding the decision in *Damevski v Giudice* where the principal "contractor"/employer unilaterally determined that the employees would have their employment terminated and then be required to re-establish themselves (ultimately unsuccessfully) as independent contractors.[15]

53. This assessment of the nature of the working arrangement recognises that the power that exists in many of the relationships rests with the principal contractor.

54. The existence of dependent contractors has also been recognised by Government agencies and inquiries beyond the research areas. The Australian Taxation Office (ATO) itself has been considering this issue.

55. The ATO has been aware that the demographic changes associated with the increased number of independent contractors has the capacity to reduce taxation receipts, possibly leading to a transfer of taxation from contractors and companies to pay-as-you-earn employees.[16] Indeed it is suggested that tax liabilities for individuals can be halved where they are said to be contractors rather than employees.[17]

56. The Review of Business Taxation (known as the Ralph Review) noted that the existence of independent contracting had the effect of providing for greater deductions

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[15] 129 IR 53

[16] See for example research conducted by VandenHeuvel and Wooden 'Self employed contractors in Australia: how many and who are they ?', *Journal of Industrial Relations* vol 37 no. 2 pp263-80 and Wooden and VandenHeuvel A., 'The use of contractors in Australian workplaces', *Labour Economics and Productivity*, Vol 8 (Oct) pp163-94.

[17] Buchanan J., and Allan C., 'The growth of contractors in the construction industry: implications for tax revenue', *Economic and Labour Relations Review*, 11(1), pp46-75

than would be available to an employee, and there was greater scope for income splitting.[18]

57. The report noted that

> *There is evidence of a significant and accelerating trend for employees to move out of a simple employment relationship to become unincorporated contractors or the owner-managers of interposed entities while not really changing the nature of the employer-employee relationship...As the economic reality of the earning of their income is unchanged, their income should be taxed on the same basis as other PAYE income.*[19]

58. The Ralph report noted that many of the "independent contractors" in the economy were actually highly dependent contractors. As a result the Government introduced legislation focused on the economic dependence of the worker and not the formal contractual relationship. The passage of the *Alienation of Personal Services Income Act 2000* required that individuals who earned more than 80 per cent of their income from a single source paid tax on the same basis as an employee.

59. The legislation precluded such persons from being considered as employees other than for the purpose of the Act.[20] The TWU is not opposed to this form of Act. After all it is the basis behind various provisions in Workers Compensation statutes which operate in a similar way.[21] What the TWU seeks is that persons who stand in a position of economic dependence and inferiority in the bargaining relationship be given a fair go.

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18 Ralph J., *Review of Business Taxation*, 1999

19 Ibid at p48-49

20 In the event, the Government ultimately was forced to amend the legislation to ensure that where persons supplied their own plant or equipment they would be treated for taxation purposes as though they ran a business. However this does not alter the essential point that the Government and its review into taxation were concerned about dependent contractors and sham contractors representing themselves as independent contractors.

21 See for example sections 8 and 9 of the *Accident Compensation Act 1985 (Vic)*

60. The use of independent contracting should not be used purely to capitalise on the bargaining strength of employers to work in their advantage. It should not be used as a means of reducing the entitlements associated with employment.[22]

Inequality of bargaining power

61. It is, we submit, the case that owner-drivers are not in an equal footing by comparison to the organisations engaging them.

62. Indeed the industry is generally negotiating at a disadvantage. Professor Quinlan in his report for the NSW Government on the long distance industry states

> *the transport industry is generally in a weak bargaining position in relation to its clients. The result of this, and lack of client recognition of responsibility for safety outcomes, has been tendering conventions, contract provisions and freight rates that are not infrequently incompatible with compliance with laws and levels of safety deemed acceptable by the community.*[23]

63. Like most employees who also suffer from an inequality of bargaining power, owner-drivers are economically dependent upon the corporation engaging them. They do not have the resources, skills or capacity to negotiate on an equal footing with principal contractors.

64. In addition they suffer from the economic imperative associated with work. However, this is exacerbated in the case of owner-drivers by the expense that such persons undertake to pursue their career. Unlike employees, owner-drivers are subject to contracts which involve the owner-driver purchasing large vehicles, often on hire-purchase arrangements. The economic imperative to work is so much stronger with owner-drivers, and to work to obtain any form of income to ensure that the cost of capital (the hire-purchase arrangements etc) is appropriately defrayed.

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22 Watson I., Buchanan J., Campbell I., and Briggs C., state "For employers the advantages are numerous. They are not bound by minimum rates of pay, nor paid annual leave and paid sick leave, severance pay, unfair dismissal rights and superannuation payments. In addition they can sometimes avoid payments associated with employment such as payroll tax and workers compensation." in *Fragmented Futures* at p71

23 *Report of Inquiry into Safety in the Long Haul Trucking Industry*, Chair Professor Michael Quinlan, at p180

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65. They suffer from an inequality of bargaining power and are subjected to principal contractors altering the terms and conditions under which they are engaged, or just as often refusing to further negotiate terms for many years during which they are engaged.

66. In many contracts that the union deals with there are no mechanisms to increase rates and often owner-drivers suffer from static incomes in nominal terms and declining incomes in real terms. Any attempt to increase rates is met with outright refusal or purposeful delays.

67. Further the principal contractor can demand during the life of the contract that rates be reviewed downwards, that goodwill be extinguished, that the contractor change corporate entity, that the contractor do extra components of work without compensation, that the contractor engage or not engage persons and on appropriate terms and so on.

68. Given the bargaining position of the dependent contractor in the transport industry and their resemblance to employees, Governments, if they are serious about ensuring that independent contracting arrangements are to be legitimate, should properly be considering what forms of regulation can exist to prevent exploitation.

69. Contrary to the Government's rhetoric the TWU does not wish to see independent contractors forced to become employees. What the TWU wishes is to ensure that owner-drivers in the road transport system are not subject to exploitative contracts and regulation solely based on the desires of the principal contractor through standard form contracts and the like.

70. This regulation is particularly necessary in the transport industry given the existence of public safety concerns.

Externalities, road transport and owner-drivers

71. One of the difficulties with the road transport sector is that there are externality consequences associated with the nature of work in the owner-driver sector. All road

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users have a vested interest in the safest possible operation of the transport industry. This, after all, is the justification for such an extensive national sphere of land transport regulation. Such regulation includes driving hours regulations, speed regulations, dangerous goods regulations and so on.

72. As such any system of employment law, including systems which give preference to independent contracting or dependent contracting, which operates as a countervailing force to road safety and road safety laws should, prima facie, be redesigned to provide the greatest possible conformity with road safety laws.

73. The Committee should not be in the position of countenancing employment (or owner-driver) arrangements, however structured, which have the potential of lessening the safety of road users. The committee should bear in mind that every year a significant number of transport workers are killed or severely injured, and a significant number of road users also suffer death or injury arising from accidents between trucks and other road users.

74. In a paper published by ACIL Tasman reviewing the relationship between the rates received by owner-drivers and safety[24], the report noted that there was both Australian and overseas evidence which suggested that there was a link between owner-operator compensation and the propensity to speed. Likewise there was evidence which suggested that independent owner-operators were more likely to report the need to earn a living for breaking road rules.

75. Furthermore, research which has been conducted by the NSW Injury Risk Management Research Centre on behalf of the Australian Transport Safety Bureau which has demonstrated the link between payment systems drug use and fatigue in the transport industry. Such results are far from unusual.

76. The Quinlan report into the Long Distance Industry[25] noted that

[24] ACIL Tasman, *Freight rates and safety performance in the road freight industry*, A paper prepared for the SCOT Working Group, 2003.

[25] *Report of Inquiry into Safety in the Long Haul Trucking Industry*, Chair Professor Michael Quinlan, at pp222-223

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Minimum payments made to owner-drivers are also a serious issue, since these drivers directly compete for work with employer/employee drivers and financial pressures occasioned by inadequate returns lead fairly directly to compromises in terms of vehicle maintenance, driving hours, drug use and other critical safety issues. There is a serious imbalance in the present system which sets a minimum wage rate for one group of workers in an industry while another group undertaking precisely the same tasks and, indeed competing, with the former for work, is exempted. It creates a strong inducement to use subcontracting and shifts in employment status as a means of gaining competitive advantage. This might be acceptable in some industries but not in the highly competitive road transport industry where efforts to remain viable by owner/drivers and transport firms often lead to compromises on safety, that, in turn, pose a serious risk not only to drivers but other road users.

77. The existence of widespread road rules are intended to operate to protect the Australian community. The evidence exists, however, compensation systems for owner-drivers has the capacity to lessen public safety.

78. Interestingly the position of the TWU is similar to that of Mr Baldwin, the Liberal Member for Paterson in the House of Representatives. On 7 March 2005 Mr Baldwin stated

At the moment, the price of freight has been driven down so low that most operators, particularly small operators, are operating at a loss. Unfortunately, some people take short cuts in maintenance, registration or insurance, but at the end of the day the person who pays the price is the driver trying to compete and stay in business.[26]

79. Lower levels of compensation lead to public safety consequences. These consequences are clear and obvious and any thinking person is aware of them.

[26] House of Representatives Hansard, 7 March 2005 at p42

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80. It is for these reasons that the TWU has consistently campaigned for safe and sustainable minimum rates for drivers in the transport industry. The TWU's campaign is not limited to employee drivers but to all members of the union. The TWU has been seeking proper minimum rates for owner-drivers as well as for employee drivers.

81. The TWU seeks these rates because it is aware, as Mr Baldwin is aware, of the consequences of a failure to meet the standards. The failure to meet road safety standards because of, for example, fatigue associated with excessive hours due to low rates of remuneration, or inadequate maintenance of vehicles, has the potential, and sadly the actual, consequences which Professor Quinlan and Mr Baldwin discussed.

82. We do not seek these rates to turn the contractors into employees. We seek these rates to ensure that such persons are properly compensated for the work they perform.

Collective bargaining

83. One of the mechanisms for ensuring that small businesses do not suffer from the inequality of bargaining power is through collective bargaining. Owner-drivers like all small businesses seek to address their relative lack of bargaining power through collective bargaining. The TWU has been assisting owner-drivers in such activities for years.

84. Unfortunately the Trade Practices Act has operated to prevent collective bargaining, except in circumstances where the ACCC (and its forerunners) provided an authorization from the provisions of the Act.

85. The TWU currently holds a number of such authorisations, in particular in relation to the area of long distance owner-driver rates.[27] These authorisations have been consistently acted upon by the TWU over the years since it was first granted and no objection has been raised to this.

86. Recently, the Government created the Dawson committee to review the Trade Practices Act. Amongst the issues the committee considered was the issue of collective bargaining for small businesses.

[27] See Reg No A30103, File No. 84/14

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87. The Dawson Inquiry (The Review of the Trade Practices Act)concluded that collective bargaining would be appropriate for small businesses dealing with larger businesses. The Report did not accept the idea that small businesses be exempted from the provisions of the Act dealing with anti-competitive conduct altogether, but recommended that a notification process be developed to allow small businesses to bargain collectively with large businesses (see Recommendation 7.1). Furthermore it was considered appropriate that provision be made for third parties to make a collective bargaining notification on behalf of a group of small businesses (Recommendation 7.4).[28]

88. Arising from the Dawson Inquiry the ACCC published a report which would operate to influence thinking on the development of legislation to give effect to the Dawson Inquiry.[29] This report nowhere suggested that any group be excluded from the scope of the collective bargaining provisions.

89. Likewise the Senate investigated the Dawson Inquiry in its report, *The effectiveness of the Trade Practices Act in protecting small business.* Nowhere in this report, either by the majority or the Government's minority report, is there any recommendation that certain groups be excluded from the operation of the collective bargaining provisions.

90. However, arising from the Dawson Inquiry the Government introduced the *Trade Practices Legislation Amendment Bill (No. 1) 2005* into the House of Representatives in February 2005.

91. Contrary to all that had preceded the legislation the Government included in its Bill proposed section 93AB(9).

92. This section reads

> *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:*
> *(a) a trade union; or*

[28] *Review of the Competition Provisions of the Trade Practices Act,* January 2003
[29] Australian Competition and Consumer Commission, *Collective bargaining and boycott discussion paper,* July 2004

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(b) an officer of a trade union; or

(c) a person acting on the direction of a trade union

93. It seems to us that this proposed section is plainly perverse and contrary to any legitimate notion of how collective bargaining should and is intended to operate.

94. Government's should not be in the business of specifying who can act on behalf of any individual (or group of individuals) seeking to negotiate the terms and conditions embodied in their contract.

95. It is difficult to imagine a more pernicious piece of legislation. If one inserted the words "law firm" or "accounting firm" instead of the word "union" the position of the Government would be untenable.

96. Lest it be forgotten we continue to live in a country where unions have the right to enrol, and independent contractors have the right to enrol in trade unions.

97. Equally the proposed legislation would seek to prevent the TWU (and other unions) from acting in accordance with the notification procedure. This is despite the fact that the TWU currently holds authorisations from the ACCC (and the TPC) which have demonstrated the union's bona fides when acting for owner-drivers.

98. The TWU believes that it is capable of properly notifying for the purposes of providing its members with the capacity to engage in collective bargaining to offset the market power exhibited by the principal contractors in the road transport industry. The TWU submits that the proposed section in the Bill suggested above will guarantee that independent contracting arrangements are illegitimate and is contrary to any form of good public policy.

Unfair contracts

99. In a number of recent reviews of industrial systems there has been strong support for the existence of unfair contract jurisdictions.

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100. In the McCallum Inquiry into the Victorian industrial system, the majority of the taskforce recommended that

> *there should be a low cost and accessible unfair contract jurisdiction available for all people engaged as an independent contractor in Victoria. Such jurisdiction should provide a power to vary either wholly or partly, a contract where it is held to be unfair, as well as to enforce the provisions of the contract, and apply penalties for breaches of contract.*[30]

101. The Stevens inquiry in South Australia also examined the issue of independent contracting. The report noted that

> *the growth of independent contractor arrangements into non-traditional industries at the expense of traditional employment has the potential to create a system where the power arrangements are skewed strongly towards the employer with the potential for adverse industrial relations and occupational health and safety outcomes.*[31]

102. The review recommended that South Australia should adopt unfair contract provisions with the criteria for the Commission to review such contracts being whether the contract is harsh, unconscionable or unfair, not be against the public interest, not provide remuneration which would be less than an employee would have received and not be designed to avoid the provisions of an industrial instrument.[32]

103. The Ford review into the Labour Relations reform Act 2002 also considered whether the West Australian legislation should be amended to give the West Australian Industrial relations Commission the power to review unfair contracts.

104. The review recommended that

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[30] Report of the Victorian Taskforce into McCallum p138
[31] Review of the South Australian industrial relations system ("the Stevens Inquiry") p55
[32] Ibid p58

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serious consideration should be given to amending the IRA 1979 to confer upon the WAIRC an appropriately limited power to deal with unfair contracts between employers and both employees and independent contractors.[33]

105. These inquiries have all been conducted at arms length from each of the Governments. The outcomes have nonetheless been all to the same end. Government's have a role, indeed properly considered an obligation, to ensure that contracts are not harsh or unfair and that appropriate review mechanisms are put in place.

106. There could be no greater certainty in the system to ensure that independent contracting is legitimate than to ensure that the contracts are properly reviewed to prevent exploitation of market power.

107. This is particularly the case when, as was recognised by the researchers of the Productivity Commission amongst others, there is a rise in the number of persons engaged ostensibly under commercial contracts but in reality subject to arrangements which are consistent with the person being an employee.

Dispute Resolution Procedure

108. The TWU notes that in many of the standard form contracts which have been promoted have required that a mediation be used to resolve any dispute. The mediator is usally someone selected by the company, or the relevant Law Institute. All costs are to be shared equally by both parties.

109. This form of dispute resolution procedure is designed to prevent the owner-driver from raising any disputes. The contractor who, as already demonstrated, is hardly making a substantial amount of profits (including wages) is expected to share the costs of mediation equally with companies which are generally far more pecunious.

110. This type of situation lessens owner-drivers rights. It is the very reason that various State Governments have introduced low cost disputes tribunals such as the Victorian Civil and Administrative Tribunal (VCAT), Offices of Small Business Commissioners and so on. All of these organisations were developed to recognise the disadvantaged

[33] Ford Review p98

position of small businesses (and small organisations) when it came to resolving disputes in the courts.

111. It would seem only logical that if we are truly interested in assisting small businesses (and owner-drivers represent a category of this) that clauses in contracts requiring payment equally of costs associated with dispute resolution procedures places an undue proportion of the burden on the small business.

112. It is for this reason that the various State Governments have granted access to State industrial tribunals to resolve disputes affecting owner-drivers. The TWU believes that this ought be maintained and strengthened. The TWU believes that appropriate dispute resolution procedures would involve the use of free or cost-free jurisdictions to ensure that access for small businesses to dispute resolution procedures is not artificially prevented by those with the deepest pockets.

Agreements

113. The McCallum Inquiry also noted that there was a significant difficulty associated with dependent contractors in the transport industry and the existence of collective agreements.

114. It must be remembered that many such persons work to standard terms and conditions and to all intents and purposes resemble the work of employees.

115. The taskforce noted that there was a need for a body to register multi-contractor arrangements for owner-drivers in the transport and forestry industries to bring stability to these types of employment arrangements.[34]

116. The TWU is strongly of the view that collective agreements reached as a result of collective bargaining between a group of independent contractors and the principal contractor should be capable of being registered by an appropriate body (in the relevant State or Federal jurisdiction, including for example the ACCC), and enforced where breached.

[34] McCallum p139

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Contract determination

117. In NSW the State Industrial Relations Commission has long had the power to set minimum rates of pay for owner-drivers in the transport industry through the contract determination system.

118. It is important to remember that this system is not prescriptive in the sense of requiring principal contractors to pay only that rate.

119. However what it does provide is for a fair and enforceable *minimum* rate of pay depending upon the nature of the vehicle being operated and the relevant component of the transport industry where the vehicle is being operated.

120. Again the system does not prescribe payment. The system establishes, through the use of costing models, minimum rates which are fair and reasonable.

Strategies to Ensure Independent Contract Arrangements are Legitimate

121. The TWU notes that the ultimate questions for the committee are what strategies could be implemented to ensure that independent contracts are legitimate.

122. The TWU believes that its submissions demonstrate the importance of focussing on the real nature of the relationship – its substantive elements, and not the mere formalistic and superficial descriptors.

123. The TWU further notes that the road transport sector has had owner-operators for many years. The TWU has been representing these owner-drivers for many years. We have a history of understanding what owner-drivers want and we are in a position where we have delivered improvements in their terms and conditions through negotiations on many occasions.

124. We submit that the following matters should be properly considered to be appropriate policy responses to ensure that independent contract arrangements are legitimate:

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a) there should be a review mechanism to ensure that contracts between a principal contractor and an independent contractor are not unfair;

b) that collective "contracts" or agreements between a principal contractor and independent contractors be capable of registration and enforcement in a manner consistent with agreements for employees;

c) independent contractors should be entitled to use the notification procedures proposed in the Trade Practices Amendment Bill but should be entitled to freely associate into any organisation of their own choice and any such organisation should be entitled to make the notifications in accordance with the Trade Practices Act;

d) that contract determination systems be encouraged as a proper means of protecting the position ofowner-operators;

e) that a cost-free dispute resolution tribunal be available to resolve disputes and grievances between owner-operators and the businesses they contract to.

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Labour Hire

125. The TWU notes at the beginning of its submissions that it is not opposed to the use of labour hire employees, **provided** such employment is not used as a means of either reducing direct employment or to avoid the terms and conditions which would otherwise apply at the workplace.

126. The use of labour hire should not be a means of avoiding entitlements for employees but should properly be seen as a means for dealing with a need for short term flexibility enhancements.

127. Labour hire is a growing phenomenon in the labour market.

128. Unfortunately, like the difficulty associated with establishing when a person is an independent contractor and when a person is an employee, there is much difficulty associated with knowing the rights and obligations that exist as between the host employer, the labour hire company and the employee.

What is labour hire

129. Labour hire is an employment arrangement which unlike the normal employment relationship involves three parties.

130. Typically the labour hire worker (usually an employee but there are circumstances where it is a contractor) has a contract with the labour hire company. As such the labour hire company pays the worker in accordance with the terms of the contract.

131. Equally, the host company and the labour hire company have a contractual relationship. This relationship will usually involve the labour hire company supplying labour for a fee, while the labour hire company delegates many of its rights under the employment relationship to the host employer.

132. The gap that exists therefore is between the worker and the host company. Although there is no contract in existence between the host company and the worker many of the usual rights in the contract are provided to the host employer. This will involve providing advice about the hours of work, the terms and conditions of employment, firing in the sense of refusing further work with the host employer and so on.

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133. Further difficulties exist as the nature of the labour hire relationship itself varies. For example workers engaged by labour hire companies can be genuine independent contractors, dependent contractors, sham contractors or employees. Employees can be permanent employees, or more frequently casual employees.

134. Likewise labour hire engagements can be ongoing (and exhibit all of the hallmarks of permanent employment), temporary or short term, fixed-term or daily.[35]

135. The different types of engagement of labour hire workers is further compounded when the issues of independent contracting, dependent contracting and employment are added to the mix. These issues are dealt with in our submissions previously. Nonetheless they do show the complexity of the arrangements and the different types of issues that confront policy makers.

The extent of labour hire

136. A recent report has been released by the Productivity Commission detailing the extent of labour hire employment in Australia.[36]

137. The report noted that labour hire employment in workplaces with 20 or more employees grew from approximately 33,000 workers to 190,000 between 1990 and 2002. The authors state that this increase was approximately 15.7% per annum over that period. Total labour hire employment was around 270,000 (including workplaces with less than 20 employees).

138. Accordingly there has been an increase in the proportion of employment which is comprised by labour hire employment from approximately 0.8% to about 2.9% of all employed persons.

139. This level of increase in the economy is consistent with anecdotal evidence and the experience of the TWU in the road transport and also more recently the airline industry.

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[35] For a discussion of these issues see the interim report into Labour Hire Employment in Victoria conducted by the Economic Development Committee of the Parliament of Victoria.

[36] Laplagne P., Glover M. and Fry T., 2005, *The Growth of Labour Hire Employment in Australia*, Productivity Commission Staff Working Paper, Melbourne.

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140. Indeed the report indicates that workplaces in transport and storage are amongst the most likely to use labour hire employees.[37]

141. Interestingly the authors note that firms which have sought to reduce costs have a much higher probability of using labour hire. The question then becomes whether such reduction in costs is achieved through reducing the (average) wages of employees, or whether it is used to reduce costs through mechanisms other than wages. Such reductions may involve better recruiting and, once hired, longer retention periods.

142. The TWU believes that if the latter is the case the use of labour hire is being appropriately pursued. Better recruiting, better hiring and better retention of employees are objectives that clever employers should be pursuing. However if it is the former the use of labour hire is really developed as a means to reduce the wages of employees. For example the increased use of labour hire may arise from making existing employees redundant and hiring labour hire employees on lower rates.

Difficulties associated with labour hire

A. The tripartite relationship

143. The interim report of the Victorian Government into labour hire emploment notes that one of the difficulties often associated with labour hire is the nature of the tripartite relationship. This relationship creates the phenomenon where many of the obligations in the employment contract being exercised by both the host employer and the labour hire company, while the worker has obligations to both companies.

144. It has been said that

> *The problems of labour-hire...are also rooted in the triangular nature of labour-hire arrangements: the fact that workers are paid by one employer but work for another. Confusion over lines of responsibility in exercising the employer are evident, with serious consequences for workers' conditions and entitlements.*[38]

[37] Laplagne et al p27

[38] Watson I., Buchanan J., Campbell I and Briggs C, *Fragmented Futures: New Challenges in Working Life*, Federation Press 2003.

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145.This confusion results in numerous expense for all parties. Employees frequently are unaware of the exact nature of their responsibilities under employment law, under OH&S obligations, under taxation law and under the delegated responsibilities associated with joint employment in a non-technical sense.

146.The fact that there are different entities exercising control over the employee, or having the right to exercise control makes for substantial confusion. In some circumstances employees are unaware of their employment circumstances. This is particularly the case when the host company exercises control to discipline (including dismiss) an employee, but no remedy exists for an employee as the labour hire company claims that the employee has never been dismissed.

147.Such actions are the triumph of form over substance.

148.Equally many host companies are unaware of what obligations exist between the parties and the proliferation of smaller, less ethical labour hire companies has meant that the rights of employees are not always properly conveyed.

B. Skills shortages and lack of appropriate training

149.One of the fundamental difficulties associated with labour hire engagement is that such employees are often undertained. It is, of course, not rational behaviour on the part of any host company who is engaging such employees on a short-term basis to invest time and money in such training.

150.Likewise there is no incentive that exists on the part of the labour hire company to upskill their employees. This of course also makes perfect sense. The labour hire company is not using the employee itself and only needs to place the worker.

151.This has been put in the following way

declining skill formation capacity was linked to new forms of business organisation and the increased use of non-standard employment...(this resulted from) lean workforces, supplemented casuals and labour-hire workers as required.[39]

152. In the current environment where the need for trained and skilled employees is substantial, the use of labour hire employment has the capacity to act as a bottleneck to business and economic growth.

C. Job Insecurity

153. Labour hire employment is often associated, correctly in our view, with insecure employment.

154. Most labour hire employment is casual. Casual employment need not be involuntary, nor it need be short-term. However casual employment of itself is less secure than permanent employment. Labour hire employment is generally less secure than casual employment where a person is engaged directly by the company as a casual employee.

155. Job insecurity is something which is often complained of by labour hire employees.[40] It is not enough, in our submission, to suggest that labour hire companies will seek to maintain labour hire employees in employment. It ought be sufficient to recognise that the possibility that a person might be unemployed for days or weeks can lead to feelings of insecurity.

156. Likewise it is not sufficient to suggest that some employees of labour hire enjoy the variety of workplaces. Many labour hire employees in the transport industry are using the labour hire experience to obtain permanent employment with one of the "majors". They would clearly prefer to work for one employer, and for that employer to be one of the better companies in the transport industy. Unfortunately the experience will often involve greater insecurity until that permanent employment is ultimately obtained.

D. Different conditions for employees at the same workplace

[39] Watson I., Buchanan J., Campbell I and Briggs C., *Fragmented Futures: New challenges in working life* Federation Press p162

[40] Interim Report of the Victorian Inquiry into Labour Hire Employment p19

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157. The scope to allow labour hire companies to avoid the payment of "site" rates is a significant concern for the TWU. The existence of obligations in certified agreements (and indeed agreements outside the scope of the *Workplace Relations Act*) to ensure that employees of labour hire companies receive no less than the rates received by employees of the host company is good industrial practice and ensures that such workers are not discriminated against on the basis of who is the employer.

158. There has been in recent weeks some suggestions that the regulation of the labour hire relationship should be excluded from the terms of awards or certified agreements in the Australian Industrial Relations Commission.[41] Leaving aside the inconsistencies in the submission of the Australian Industry Group (for example, the idea that individuals should not be allowed to have a union become bound by an agreement, but that individual choice in other aspects of industrial relations should reign supreme) the submission suggests that the issue of site rates should be excluded from negotiation at the workplace.

159. This submission of course ignores the legitimate interest that employees have in protecting their terms and conditions of employment. It suggests that the only person interested in what occurs at the workplace is the employer.

160. However it is a narrow and overly restrictive conceptualisation of good workplace practices to only consider the rates of pay for labour hire employees by virtue of their employment. Properly considered these employees are working at the workplace alongside the employees of the host company, often doing identical work. In these circumstances it is bad practice to allow such employees to receive remuneration less than that received by the employees of the host company.

161. There are a number of reasons for this. Firstly, it is better for workplace morale that employees performing the same work at the same workplace are not treated differently depending upon whom the employer is. This is the case both for the employees of the host company and also for the employees of the labour hire company.

[41] See for example the recent submission of the Australian Industry Group, *Making the Australian Economy Work Better – Workplace Relations*

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162. Secondly, it allows for increased flexibility at the workplace. Employees of the host company are more willing to allow the use of labour hire employees, who in other circumstances would be perceived as threatening their job security, when they believe that they are not being engaged at a cost advantage.

163. Thirdly, there is less opportunity for industrial disputation. Industrial disputation is a not uncommon result of employees receiving different rates of pay when performing the same work.

164. Ultimately the TWU believes that where a majority of employees at a workplace support the existence of a requirement to pay site rates, the Commonwealth Government ought not be seeking to prevent this.

E. Greater risk of injuries

165. The evidence appears uncontroversial that employees of labour hire companies suffer injuries more frequently and when they do suffer injury, they are more likely to suffer injuries which are more costly in terms of the claim cost as measured against total remuneration.[42]

166. The Victorian Workcover Authority commissioned research into this matter in 2002. It was found that the broader factors which result in higher workers compensation include

> *the economic pressures on labour hire employees caused by the insecurity of their employment, resulting in higher risk work practices, such as: an inclination to work unsustainably long hours; the disorganisation that may arise as a result of blurred responsibility lines between host and agency; and the likelihood that labour hire workers will be less involved in OHS consultation processes in a host workplace.*[43]

167. The higher levels of claims and the greater cost of claims are matters which should concern all members of the Committee. Like the other matters which we have raised

[42] Victorian Taskforce Interim Inquiry p36/37

[43] Victorian Taskforce interim report at p38 quoting from research of Underhill E., *Extending knowledge on occupational health and safety and labour hire employment: A literature review and analysis of Victorian Workers' Compensation Claims*, Report for Worksafe victoria, Melbourne 2002.

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these are concerns which should always be at the forefront of the Committee's minds when considering the nature of labour hire employment.

168. However the higher costs and worse record on occupational health and safety is a matter that should be considered at all times. Leaving aside the real and substantial issues for individuals (which we submit are a matter of primacy and fundamental importance), this affects the costs for business and the public interest.

169. In such circumstances to allow labour hire to continue without any form of regulation other than self-regulation is to condemn numerous workers, their families and businesses to higher levels of injuries and higher costs.

The role of labour hire arrangements in the modern Australian economy

170. Ultimately the Committee has been asked to examine the role of labour hire arrangements in the modern Australian economy. The TWU believes the submissions it has made address this aspect of the Committee's inquiries.

171. However, it would be unfortunate if the Committee chose to ignore the extensive research and findings of the inquiries conducted in the past five years dealing with the issues which this inquiry is also examining.

172. These inquiries, most of which have been conducted by independent bodies and not parliamentary committees, have considered the issues before the Committee logically and coherently and have considered responses which might assist public policy in the industrial law field.

173. Arising from the reports conducted to date it is difficult to conclude otherwise than to believe that regulation of labour hire arrangements and companies is appropriate.

174. It is clear that courts have often struggled to deal with the proper relationship between the three parties and obligations are imposed across all three parties. The traditional employment law model fails to properly deal with the complexities associated with labour hire employment. This failure leads to added uncertainties for

employees and employers. The worst aspect of this is the impact it has on occupational health and safety for employees.

175. The TWU notes that there has been a number of inquiries which have made recommendations which would solve some aspects of the problems associated with labour hire. This Committee should pay heed to those recommendations.