Mining and Energy Division

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CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION
MINING AND ENERGY DIVISION

NORTHERN DISTRICT BRANCH

SUBMISSION TO THE INQUIRY INTO INDEPENDENT CONTRACTORS AND LABOUR HIRE ARRANGEMENTS

To the Standing Committee On Employment, Workplace Relations and Workforce Participation

INTRODUCTION

1.1 The Northern District of the Construction, Forestry, Mining and Energy Union, Mining and Energy Division, is the principle Union that represents the interests of persons working in the coal industry in the Northern District coalfields of New South Wales. The District has approximately 5,000 members and has significant membership representation at underground, open cut and coal preparation plants that are located in the Northern District coalfields.

1.2 The Union makes the following submission to the Federal Parliament's inquiry into independent contracting and labour hire arrangements. Whilst the Union acknowledges that, in limited circumstances, labour-hire and independent contracting arrangements have a legitimate role within the economy, it is our experience that in most cases these forms of employment carry lower levels of pay, conditions and job security and are frequently entered into for the specific purpose of avoiding employer obligations under various industrial laws and instruments. The result is that a majority of independent contractors and labour-hire employees are worse off under these arrangements.

1.3 Business groups claim that precarious forms of employment such as casual labour, labour-hire and individual contracting bring about substantial cost savings, however no evidence has been put forward which quantifies these savings. In addition to the lower wages paid to labour hire workers, labour hire companies generally charge a fee of between 8% to 15% to the client. In order to make a profit, labour-hire agencies cannot offer its employees terms and conditions that are comparable to employees of the client. Therefore, there is a trade-off between cost-efficiency for business and conditions of employment for agency employees. The result is that the distribution of income moves from employees to employers.

1.4 In addition to lower levels of income, labour hire workers and individual contractors are generally not entitled to any form of paid leave, redundancy or

unfair dismissal provisions, while superannuation and workers compensation insurance is often not paid correctly and their employment is far less secure than that of permanent employees.

1.5 It is recognises that the majority of independent contractors and agency employees would prefer the benefits and security of permanent employment, whether part-time or full-time. As these precarious forms of employment become more common, permanent and secure work is becoming a privilege rather than the norm.

1.6 Independent contractors, and in particular those operating 'sham' arrangements, have significant opportunities to avoid paying taxation. Income earned by contractors is often paid in cash and remains undeclared.

1.7 The business community focuses on the alleged benefits that non-standard employment brings to business, however it fails to address the issues surrounding low pay, limited training and development opportunities, insecure employment and occupational health and safety standards. The Government must take these concerns into account when examining precarious employment arrangements as part of this inquiry.

2. STATUS OF INDEPENDENT CONTRACTING AND LABOUR HIRE ARRANGEMENTS

2.1 A review of current and recently expired Enterprise Agreements within the Northern District Coalfields revealed the following:

Out of 67 Agreements, 34 (51%) involved predominantly the regulation of persons not employed by the operator of the relevant mine. 28 Agreements (42%) regulated conditions of employment of direct employees of mine operators. The remaining 5 (7%) of Agreements involved coal handling and preparation plants. While there are a large number of workers employed through labour hire and subcontracting firms in the coal industry, there does not appear to be many, if any at all, independent contractors.

2.2 Since approximately 1997 onwards there has been a significant shift from mining companies using direct employees towards the utilisation of labour-hire employees to perform a significant proportion of the day-to-day activities of a mine. While the prevalence of independent contractors is low within the mining industry, they are regularly engaged for specialist tasks. Precarious employment arrangements that are utilised fall into three major categories:-

2.2.1 Whole of mine contractors, which are engaged to operate a mining project in its entirety. This type of contractor effectively stands in the shoes of the mine owner for all purposes.

2.2.2 Permanent contractors – contractors who are engaged to do core work at a mine on a permanent basis. They hold contracts to perform a particular function in the mining process. The work they perform includes such things as overburden removal, coal haulage, railroad out secondary support and underground development.

2.2.3 Predominant contractors, who are the contractors that are predominantly or most prevalently used by mining companies. They are contractors used to perform a task in the mining process. They are not usually engaged on a permanent basis but are used regularly, and are the type of firms used predominantly by a mine when they need to use contractors.

3. ISSUES RELATED TO INDEPENDENT CONTRACTING AND LABOUR HIRE ARRANGEMENTS

3.1 Security of employment

Contract and labour hire employment is less secure as it is often a term of the contract that employment may be terminated at any time with no recourse to unfair dismissal laws. A decrease in the security of employment comes at a cost to the Australian community. It reduces consumer confidence in the

economy and leads to increases in unemployment during economic downturns. While businesses are more likely to retain employees during periods of slow or negative growth, the ease of dismissing contractors and labour-hire employees encourages businesses to cut back their workforce, further reducing consumer spending and increasing the community's reliance on unemployment benefits.

It is more difficult for independent contractors and labour-hire employees to secure finance for consumer items such as holidays, cars and housing, and other spending which drives the economy. Additionally, a reduction in the ability to borrow discourages investment in shares, property and business. A rise in labour hire and independent contract employment may, in the short term, deliver cost-savings for business, however any decrease in consumer demand will eventually flow on to business as a cost in the long term.

3.2 Occupational Health and Safety

Within the mining industry, there are a number of factors that contribute to unsafe work practices among contractors and labour hire employees:

3.2.1 Predominant contractors and labour hire employees that are employed to operate heavy plant and equipment commence working at the operation after limited induction. In some cases these people work for a labour hire firm in which they are casually employed, sometimes per engagement, typically on 12 hour shifts. They can be called in at short notice to work, for example a night shift, in which there are no effective systems in place to ensure the person has had the correct amount of rest prior to commencement.

3.2.2 There exists a failure for short term contractors and labour hire employees to identify occupational health and safety concerns. In the event of plant operators, if the roads become dangerous due to wet weather or environmental conditions, and they bring this matter to their supervisor, as they are casually employed they are told work is no

longer available for them because of the weather conditions and are sent home. This approach discourages these casual contractors who are driving heavy equipment from raising this issue because if they do, their daily or weekly earnings are considerably affected.

3.2.3 Contractors/labour hire personnel may be inducted to work at one, two, up to ten different mining operations, with each mining operation having its own management systems, rules and schemes. In the majority of cases the contracting company does not have its own specific safety management systems but relies upon those that have been approved by the NSW Department of Mineral Resources for the mine. Unfortunately due to the transient nature of their employment an employee is unable to become familiar, as is required by Clause 10 of the *Coal Mines (General) Regulation* 1999 (NSW), with the provisions of the *Coal Mines Regulation Act* (NSW) and its regulations. Many contractors and labour hire employees work at mines devoid of the necessary knowledge of the rules, schemes and safe workplace systems that are in operation at the mine.

3.2.4 Many contractors and labour hire employees would be unaware in any detailed sense of the Mine Manager's rules and schemes, being only briefly taken to those during their induction and not being provided with a copy or having access to those, as should be made available to direct employees of the mine.

3.2.5 The Union has asked contracting and labour hire companies that work between different sites for their policies and procedures and has been informed that they don't really have any and that they rely upon those of the mines. There is a perception among contractors that an induction satisfies all safety requirements, however they are attending multiple sites with multiple practices and detailed work method statements, and fail to conduct risk assessments for each set of different circumstances. There is a lack of control over contractors, whereby both management, contract companies and labour hire

providers do not wish to assume complete accountability for their safety. When a contractor or labour hire employees perform work on a mine site, the contractor or labour hire provider simply believe safety management of its employees is under the management systems, statutory control and accountability of mine management. However this distinction does not exist in the *Coal Mines Regulation Act* (NSW), its associated regulations or the *Occupational Health and Safety Act 2000* (NSW), where there is a requirement that the mine and the employer, whether that be the mine, contractor or labour hire company, must take steps to ensure the workplace is safe, including the systems of work to be followed by the employees.

3.2.6 Clause 15 of the *Coal Mines (General) Regulation* 1999 requires employees to inspect their place of work before commencing work for dangers. They are required to take the necessary steps to remove dangers and if it is not within their powers they are required to bring it to the attention of those who can rectify it. Employees of contractors and labour hire agencies that work at mine sites lack familiarity with the operation and supervisory structures, and as a result they are often failing to perform these functions. In the case of contractors or labour hire employees who operate heavy plant and equipment, they are required to commence extended shifts with hot seat changeovers, which means work is commenced within the production cycle.

3.2.7 The Union has enquired of contracting companies who provide labour on hourly hire, who allege to employ up to 150 people, to be supplied with a copy of all procedures and systems of work the employees are to comply with that have been produced by the Company. Even though these employees work between numerous coal mines, documents were produced that dealt with a four paragraph health and safety policy, a three paragraph environmental policy, a one page drug and alcohol policy, an emergency response policy and a termination of employment procedure. When an enquiry was made of other policies and systems the employees were to comply with, the Company's view

was you needed to talk to the mines they work at. This type of safety management approach is inappropriate for a transient workforce that does work at multiple mines.

3.2.8 Contractors and labour hire employees regularly exceed safe hours of work. They are required to work at different sites and it becomes difficult for companies to regulate or supervise the number of hours done in any one day or week at all sites. Such practices lead to unacceptably high levels of fatigue through the working of long shifts with minimal rest breaks in between.

3.2.9 Many labour hire companies have either inadequate consultative mechanisms or no formal OH & S consultative mechanisms in place. Many operate without an Occupational Health and Safety Committee.

3.2.10 Of the three most recent fatal accidents (one occurring during November 2003 and two occurring during May 2004), all involved the deaths of contractors. It is clear that in at least one of these fatalities fatigue appeared to have contributed to the accident, taking into account the time and hours spent on the job. In two of the fatalities, safe operating procedures were inadequate and in one of them, fit for purpose equipment was not used, correct documentation and appropriate support rules were not in place and, in all three, a weakness in the management systems is apparent.

In practice it is unclear who carries the responsibility for the Occupational Health and Safety of contract and labour hire employees. In some cases, liability has been attributed to labour hire companies, and in others, WorkCover NSW has argued that the host employer bears the responsibility under the *Occupational Health and Safety Act* (NSW)[1].

[1] Hall, R., (2002), Labour Hire in Australia: Motivation, Dynamics and Prospects, ACIRRT Working Paper no. 76, Sydney University, April, p. 5

3.3 Diminishing wages and working conditions

The ACTU[2] has identified a number of means used by employers through labour hire agencies and independent contracting arrangements, to bring about short-term cost-savings:

- Failure to pay prevailing award or agreement rates,
- Standing down employees without pay between jobs during low workload periods,
- Payment of cash for overtime,
- Continuing to treat employees as casuals,
- Transfer of training costs from employer to employee and the community.

Legitimising sham independent contractor arrangements will drive down the wages and conditions of many thousands or workers who, in substance, should be regarded as employees, as well as increasing the risk of tax evasion. Australian Workplace Agreements (AWA's) already offer employers the most extreme levels of flexibility reducing worker rights and establishing unfair control over employees.

3.4 Manipulation of contract labour to achieve desired outcomes

3.4.1 It is the Union's experience that mining managers will often promise labour hire employees a permanent position if their work performance is of a high standard. This encourages those employees to cut corners, attend for work while unfit for duty, work excessive hours and unpaid overtime with the (often empty) expectation that an offer of permanent work is imminent.

3.4.2 The vast majority of contractors and labour hire employees in the mining industry would prefer to work in a permanent full-time position. People are employed under these types of arrangements

[2] ACTU, *Submission to Labour Hire Taskforce*, NSW Department of Industrial Relations, September 2000

because mining operators increasingly outsource labour and often that is the only form of work available. For the vast majority, this type of work is not a matter of free choice but rather is taken up under pressure as a last resort in order to gain employment.

3.4.3 Although the aim of the proposed legislation is to protect the rights of those who wish to work as independent contractors, it must also protect the rights of those persons who wish to work as employees. Where an apparent "independent contractor" is clearly performing work on an employee/employer basis, the contractor must have access to legal avenues protecting their entitlements under various pieces of industrial legislation. The current common law control tests operate as an adequate protection which sufficiently balances the interests of both employers and employees.

3.5 Cost Savings

Any cost savings achieved by businesses through the utilisation of labour-hire and independent contracting arrangements come at the expense of (i) employees, in the form of lower wages and poorer conditions and (ii) the community, through a reduction in the amount of tax received by the treasury. Labour-hire companies in particular do business by charging a fee to the host employer, usually on a per-hour basis. Therefore if per hour labour-hire costs to the host employer are less than per-hour employee costs, the labour-hire worker must receive less than the employee in order for the agency to make a profit.

3.5 Training and Development

Australia is currently experiencing a shortage of skilled tradespeople. A business employing permanent employees generally has a greater incentive to provide training, however where skills are in high demand the problem of poaching arises where companies who are in urgent need of skills offer higher wages to skilled employees to attract them. This creates a disincentive for

small firms to train, as once their employees become trained, they become more attractive to other employers who are not willing to train, but are willing to pay a 'premium' for labour that is already skilled. The lack of training offered to independent contractors and labour-hire workers has contributed to the skills shortage and the problem will only be exacerbated through the promotion of precarious employment.

3.7 Taxation

In its 2003 report to the Australian Tax Commissioner, the Cash Economy Task Force[3] acknowledged that there were problems with 'sham' independent contracting arrangements:

> *"The Task Force supports research the Tax Office is currently conducting into labour market trends. This research points to the main factors driving this trend as being a desire by employers to reduce the on-costs of employment, such as payroll tax, workers' compensation premiums, superannuation contributions and leave payments and to manage the risks of employment, such as possible unfair dismissal actions, compensation and redundancy payouts, and the inflexibility of a workforce of permanent employees in a rapidly changing business environment. In the main, legally effective means have been used to engage workers other than as direct employees. However, at the margins the Tax Office has detected arrangements that it believes do not alter the substantial employment relationship and PAYGW should be applied. The Tax Office is taking steps to ensure that withholding is made where it is legally required."*

We therefore have a situation where the ATO is classifying certain independent contractors as employees for tax purposes while for all other purposes they remain classified as contractors. A tax office declaration that an employment relationship is not substantially different from that of employer/employee is an employee is a reasonable indicator that the person is in fact an employee, and should be entitled to the wages and conditions covered by the appropriate industrial instrument, as well as be subject to the liability of ordinary PAYE tax.

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[3] *The Cash Economy Under the New Tax System*, Report by Cash Economy Task Force to the Australian Tax Office, September 2003, p.12

4. STRATEGIES TO ENSURE INDEPENDENT CONTRACTING AND LABOUR HIRE ARRANGEMENTS ARE LEGITIMATE

4.1 It is our view that current laws are merely adequate in addressing the problem of legitimacy within independent contracting and labour hire arrangements. Current control tests, adopted by the High Court, are an appropriate way of determining whether a person is an independent contractor, labour hire employee or a direct employee in matters brought before the courts.

4.2 However, a more rigorous system must be put in place for the purposes of uncovering 'sham' employment arrangements to ensure employers do not avoid their obligations to their employees and the tax office. Such 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. Appropriate safeguards must be in place to protect those who are legitimate employees wrongly employed as contractors. At present, it is extremely time consuming and expensive for a person to bring an action against an employer claiming employee status.

4.3 In practice the employment relationship between the parties may become quite complex. First, there is typically a *control* relationship but not a *contractual* relationship between the worker and the client or host company. Second, the character of the legal relationship between the worker and the labour-hire firm may not always be clear. For example, while some labour hire workers might be employees of the labour hire firm, labour hire firms often describe their workers as 'associates' or 'contractors' and seek to construct them as contractors rather than employees[4]. The result is a clear lack of control over these employees as both the labour hire agency and the host employer attempt to absolve their responsibility over them.

4.4 In the United States, the Internal Revenue Service uses a number of factors to determine the independent contractor status of workers.

[4] Hall, R., (2002), Labour Hire in Australia: Motivation, Dynamics and Prospects, ACIRRT Working Paper no. 76, Sydney University, April, p. 4

4.5 Judicial Concerns

4.5.1 There are a number of well known factors distinguishing independent contractors from employees (*Hollis v Vabu* (2001) HCA 44). Employees carry out their work as representatives of the employer, whereas independent contractors carry out their work as the principal. The distinction between an employee and independent contractor is rooted fundamentally in the difference between a person who serves his employer's business, and a person who carries on a trade or business of his own. Courts regularly make the distinction between a contract "of" service (employee) and a contract "for" service (contractor). Generally independent contractors are faced with less controls and supervision over their work than employees.

The High Court in *Hollis v Vabu* commented on the legitimacy of some forms of independent contracting arrangements:

> "*These couriers were not providing skilled labour or labour which required special qualifications. A bicycle courier is unable to make an independent career as a free-lancer or to generate any 'goodwill' as a bicycle courier"*.

This statement suggests that it is difficult for unskilled workers to be regarded as independent contractors due to the nature of the work.

4.5.2 By definition employees are subject to greater levels of control by the employer than independent contractors. True independent contractors should be able to effectively delegate their tasks and be able to perform work for more than one company. The independent contractor must have a sufficient level of autonomy to conduct his or her own business affairs for the benefit of the business rather than that of the employer. In addition, the existence of rosters, start and finish times and the provision of company uniforms and tools are representative of an

employer/employee relationship rather than relationship of independent contractor. In a true independent contracting relationship the contractor has a free choice whether to accept work from a particular business. It is questionable as to how often this free choice is exercised.

4.5.3 The Union submits that Parliament should not legislate with the effect of artificially characterising employer/employee relationships as those of independent contractor. As was said by Gray J in *Re Porter; Re TWU*[5]:

> "*Although the parties are free, as a matter of law, to choose the nature of the contract which they will make between themselves, their own characterisation of that contract will not be conclusive. A court will always look at all the terms of the contract, to determine its true essence, and will not be bound by the express choice of the parties as to the label to be attached to it…, the parties cannot create something which has every feature of a rooster , but call it a duck and insist that everybody else rocognise it as a duck.*
>
> *There was evidence…that…an owner driver who is heavily indebted to a finance company for the hire purchase of a truck is less independent than a person who is employed to drive a truck owned by the employer. The employee driver may leave and seek a job driving any sort of vehicle with any other employer. The owner-driver must be assured of a steady supply of work in order to keep up payments in respect of the truck, and can only take work for which the particular truck is suitable…Evidence was given of a practice of withholding work from owner-drivers for some periods, by way of reprisal for their failure to attend and perform services as desired."*

[5] (1989) 34 IR 179, at p. 184

> The law of contract looks to the substance of the agreement rather than the labels attached to them by the parties. This is well settled in every area of contract law and should not be overridden lightly.

4.6 The Federal Government Department of Employment and Workplace Relations advice on its "Wagenet" website provides:

> "*It is not possible for an employer to avoid obligations by creating a sham contractual relationship on paper*"[6]

While the coalition election policy document titled "Protecting and Supporting Independent Contractors reads:

> "*While courts have developed tests to uncover "sham" independent contractor arrangements, there is a view in the community that these tests have gone too far and that, too frequently, the honest intentions of parties are disregarded and overturned".*

There is a view in the business community that the tests have gone too far as they are not in the best interests of business. Business leaders are seeking legislation that will make it possible for an employer to avoid obligations by creating a sham contractual relationship on paper. This is unacceptable.

If we assume that the parties enter into such arrangements on a purely voluntary basis as a matter of free choice, then why is there a need for protection? It is to protect the interests of business, not those of the contractor. In any action to claim employee status, the contractor is essentially the applicant. The Union is concerned that the legislation will have the effect of barring the existing rights of the contractor to claim employee status. If the contractor is bringing such an action, they clearly have not chosen to become a

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6 http://www.wagenet.gov.au/WageNet/templates/PageMaker.asp?category=FactSheets&fileName=/Wagenet/FactSheets/DataFiles/General/EmployeeOrContractorB.html accessed 23 February 2005, 11:45am

contractor out of their own free will, but rather out of necessity or coercion. The legislature has a duty to protect these people from such sham arrangements rather than to exacerbate the problem.

4.7 Additionally, if we assume, as it has been argued by business and government, that independent contracting arrangements offer better pay and conditions, efforts by contractors to pursue employee status through the courts would be futile, as the conditions offered through the existing industrial systems would of a lower standard. However, this assumption is ridiculous. Businesses benefit from these precarious types of employment knowing that independent contracting and labour-hire arrangements result in lower pay and conditions and an increased level of power in the working relationship. The legislation would not protect anyone other than business, directly at the expense of working people.

The abovementioned policy document assumes that all independent contracting arrangements are entered into at the parties' own free will:

> "*They choose to be independent contractors, not because there are no other options, but because they can work and achieve more than they could within the rigid structure of full-time permanent employment and industrial relations restrictions"*.

This may be true for some independent contractors, however a large number do in fact become independent contractors because there are no other options. The current law protects people against sham arrangements while allowing legitimate contracting arrangements to continue unaffected. Additionally, claiming employee status through the courts is an extremely difficult task. The current position at common law is adequate to balance the interests of both business and employees, however a more rigid system of uncovering sham arrangements is desirable.

5. THE CASE IN THE COAL INDUSTRY

5.1 Predominant contractors seem to resemble employees. Many contractors are placed ‘on the books’ of labour hire providers however they perform work which is in substance and manner, indistinguishable from that of permanent employees. These contractors work alongside permanent employees and perform the same work yet are not afforded the same levels of pay, conditions and job security. Contractors are often placed on a mine roster system on an indefinite basis, their hours of work and leave arrangements are controlled by mine management and they are provided with tools by the mine. In some cases these arrangements have continued for up to three years. This type of arrangement is common and merely exists to reduce costs and absolve responsibility. For the mineworker, this is not a matter of free choice.

6. CONCLUSION

We ask the Government to take steps to address the problems, that have been identified in these submissions, with the use of independent contractors and labour hire operations.