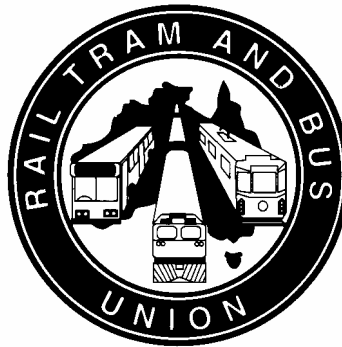


**SUBMISSION OF THE
AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION**



**HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON EMPLOYMENT,
WORKPLACE RELATIONS AND WORKFORCE PARTICIPATION
INQUIRY INTO INDEPENDENT CONTRACTORS AND LABOUR HIRE AGENCIES**

MARCH 2005

INTRODUCTION

1. The Australian Rail, Tram and Bus Industry Union (hereinafter referred to as the “RTBU”) is a union of employees registered pursuant to the Workplace Relations Act 1996 (Cwth).
2. The RTBU has coverage of employees employed in or in connection with the railway industry, employees employed in the tramway industry and employees employed by publicly owned bus operators in a number of capital cities. The range of work performed by RTBU members includes work involved in the operation of trains (both passenger and freight), trams and buses, work involved in the maintenance and upkeep of railway and tramway infrastructure and railway, tramway and bus rolling stock, and the administration and other functions associated with the operation and maintenance of the trains, tram and buses and accompanying infrastructure.
3. The RTBU currently has some 35,000 members employed in both the public and private sectors. Representing these members involves dealing with around 60 companies who are either operators or maintainers or providers of labour in the rail, tram and bus industry as described above.
4. The RTBU welcomes this opportunity to address the Standing Committee on issues associated with independent contractors and labour hire agencies.
5. The terms of reference confront the Committee with a daunting task. This, in our view, is because of the somewhat broad and general construction of the points set out in the terms of reference. Further, in recent years, there has been an expansion in the number of relevant issues concerning these forms of employment as can be seen in the burgeoning literature on the subject. In this submission the RTBU intends to appraise the Committee of our position and attitude to independent contractors and labour hire agencies and in particular the factors that influence that position. As such it does not pretend to present an exhaustive analysis of independent contractors and labour hire agencies but rather to identify the key factors that have determined the position of the RTBU.
6. Before doing so, it is important to ensure there is a consistent meaning of the terms “independent contractors” and “labour hire agencies” as they are to be used in this submission. The next part of this submission sets out the meaning ascribed to these terms by the RTBU in the context of this submission. In that regard the terms are addressed in a general sense as the RTBU acknowledges that there are a number of complex legal issues associated with these terms.
7. This is followed by a description of the RTBU’s position on the use of independent contractors and labour hire agencies and an explanation of the reasons for holding that position.
8. The submission then addresses the state of play on the incidence of independent contractors and labour hire agencies in the rail, tram and bus industry.
9. Finally the submission contains a summary and conclusion. This part includes some suggestions about what, from a public policy perspective, should be done on this subject.

INDEPENDENT CONTRACTORS AND LABOUR HIRE AGENCIES

10. The term “independent contractor” as we understand it applies to an individual who has entered into a contract for services with a company or person to provide an agreed good or service. The independent contractor, generally, is charged with the provision of a good or service at a certain price and to be delivered by a certain time and at a certain quality. As long as those conditions are met, the independent contractor is free to determine the “how, when, where and why” that end is met. The independent contractor may, for various reasons, be an unincorporated association, a sole trader or a business. The independent contractor is contrasted with an employee who is employed under a contract of service by an employer.
11. The RTBU recognises that there is a great deal of complexity and controversy concerning the definition of an independent contractor. In particular, when is an independent contractor genuinely “independent” of the principal for whom the work is being performed. This controversy has been waged in a number of places and in particular in the courts. It is fair to say that the position taken by the courts over the years has not assisted in the resolution of this controversy. It is also the view of the RTBU that many independent contractors who are ostensibly regarded as “independent” are in fact dependant on the principal and share all or most of the characteristics of an employee. This controversy is touched on later in this submission.
12. Labour hire agencies fall into 3 categories.
13. The first and probably the most common category is the labour hire agency that is an actual employer of labour. The labour hire agency, in turn, “hires” out its employees to another company (the principal) at whose premises the actual work is performed.
14. The second category is the labour hire agency that enters into separate independent contractor relationships with a number of individuals. Then, in turn, the labour hire agency arranges work for the independent contractor with another company. The distinguishing characteristic of this arrangement is that it (at least ostensibly) avoids any contract of service or employer/employee relationship between either the individual and the labour hire agency or the individual and the company where the actual work is performed. It is perhaps best seen in the controversial “TroubleShooters Available” case.
15. The third category is the labour hire agency that is, in effect, a recruitment agency. It neither employs labour nor makes labour available to a client company, but rather acts as an agency that introduces a person to a company and if the company is satisfied with the person it will subsequently employ him/her.
16. There is also a need to distinguish independent contractors and labour hire agencies from “contracting out”. Contracting out is where a company resolves to no longer undertake a part of its overall production process through the use of its employees but rather utilises another company to undertake that part of the process. While contracting out has expanded rapidly in recent years the tendency has been to focus on particular jobs such as maintenance, cleaning, delivery of goods, payroll services and canteen services. The point is that contracting out does not necessarily involve the use of independent contractors or labour hire agencies. The “contracted out” work may be performed by another company using its own employees or it may be performed by a labour hire company. There is no doubt, however, that the increased incidence of contracting out has been accompanied by an increased use of labour hire agencies.

THE POSITION OF THE RTBU ON INDEPENDENT CONTRACTORS AND LABOUR HIRE AGENCIES

17. As a registered union the RTBU has a set of objects in its rules. These objects include the following:

- *to uphold the rights of combination of labour, to maximise the amount of labour employed within the rail, tram and bus industry and to improve, protect and foster the best interests of its members;*
- *to take all necessary steps and actions under any relevant legislation or otherwise, for the purpose of securing satisfactory industrial and working conditions without discrimination, in respect of the remuneration of labour and other conditions in or in relation to employment in the rail, tram and bus industry;*
- *to provide for the protection and safety of its members and members of the public in the course of or in connection with its members' employment;*
- *to improve the social and economic position of its members;*
- *to assist members by all reasonable and proper means, to address any and all grievances which the members may have...;*
- *to organise and/or assist in the training and education of members and without limiting the generality of the foregoing, to assist any movement or institution for the training of members in the skills and duties of their occupation or their rights and duties as members of the working class;*
- *to formulate and carry into operation schemes for the industrial, social, recreational, intellectual and general advancement of members and to make arrangements with persons engaged in any trade, business or profession for the provision to members of any special benefits, privileges and advantages and in particular in relation to goods and services.*

18. The fulfilment of these objects as contained in the rules of the union, together with a range of other factors that impact on the wages, conditions, health and welfare of the members have caused the RTBU to address the issue of forms of labour other than direct employment. In particular, given the structural changes that have occurred in the rail, tram and bus industry in recent years, the RTBU has been obliged to address the issue of labour hire agencies.

19. Under the union's rules the National Council is the peak policy making body. It meets on a biennial basis. At its biennial meeting in October 2001, the RTBU National Council resolved that, in the context of maximising job security of the membership, *permanent direct employment is the preferred form of engagement of employees* and, in light of that position, went on to develop of policy establishing *clear parameters for the engagement of fixed term, casual and indirectly engaged employees (for example labour-hire).*

20. With respect to labour hire agencies, the National Council resolved the following;

Indirect employment arrangements such as labour-hire, are not to be used except in the following circumstances:-

**Where expert technical skills are required;*

**Where Information Technology skills are required and it is not possible to employ people full-time or fixed term;*

** Where specialist short term administrative skills are required to meet contingencies;*

However, labour hire will not be used to the exclusion of the development of permanent staff skills and career prospects;

Employers will consult with the RTBU to develop an agreed Code of Practice to be applied to external labour suppliers (eg labour-hire firms). Such Code of Practice shall include but shall not be limited to matters such as:

- *Industrial Relations Practices*
- *Remuneration*
- *Embargoes on Prescribed Payments Systems (PPS), ATO “Voluntary Agreements” and “labour-only” contractors*
- *Maintaining a register of employees;*
- *Bona Fide employment relationships; and*
- *Time and Wages Records*

21. The 2001 National Council went on to resolve to pursue a memorandum of understanding (MOU) with labour hire agencies that proposed to supply labour to employers in the rail, tram and bus industry union. The MOU was to set in place an interim arrangement pending the negotiation of an enterprise agreement between the RTBU and the labour hire agency. A model MOU was drafted by the National Council – its contents included a provision that the wages and conditions of labour hire agency employees be no less favourable than those paid to the permanent direct employees of the relevant company, the parameters of an enterprise agreement to be negotiated between the RTBU and the labour hire company and a statement by the labour hire company that it has no intention of introducing individual contracts through Australian Workplace Agreements.
22. The objects of the RTBU as set out in its rules reveal that, amongst other things, the RTBU has a responsibility to protect and defend its members’ job security, wages and conditions, occupational health, safety and welfare and their rights in the workplace. The policy on the use of labour hire companies was drafted with those parameters in mind.
23. The 2001 National Council policy determined that the imperative of job security is best defended and enhanced by the utilisation by employers of permanent direct employment. In other words, employment on a permanent full time or part time basis by the employer who both owns and operates the business. Inherent in the notion of permanent direct employment are, in addition to job security, enhanced means of pursuing collective union based enterprise agreements, consultation rights, rights of representation by a union, skills development and training, career paths, advantages of long term employment such as various forms of leave and superannuation outcomes. The utilisation of fixed term or casual employment or employment through labour hire agencies presented a challenge to the job security imperative and the other benefits
24. The RTBU did not reject out of hand the utilisation of labour hire agencies. It was recognised that in limited circumstances labour hire agencies may have a role to play. Those limited circumstances effectively involved the absence of appropriately qualified employees of the employer concerned with any proposal to use labour hire agencies. Further, that where employees of a labour hire agency are used a number of protective measures are put in place such that the wages and conditions of those employees shall be no less favourable than those

wages and conditions provided to permanent direct employees of the company to which the labour hire agency is to provide labour. Further, that the labour hire agency must deal with the union regarding the determination of the conditions under which its employees shall work in a company where the union has direct permanent employees as members. Finally employees of labour hire agencies are not to be used so as to undermine the development of the skills and careers of direct employees.

25. Whilst the policy does not refer explicitly to independent contractors, it would have equal application given that independent contractors do not fit the category of direct permanent employment. At the same time, with respect to labour hire agencies, the union policy seeks to ensure that the problems associated with the “Troubleshooters Available” type arrangements do not arise by providing that labour hire agencies operate on an employer/employee basis.
26. The position taken by the RTBU on independent contractors and labour hire agencies reflected in part contemporary developments in the workplace regarding the utilisation of these forms of labour.
27. The RTBU sees the growth of independent contractors and labour hire agencies since the 1980’s as one among a number of strategies adopted by employers to reduce the cost of labour to them and in doing so transferring a number of responsibilities and costs in the employment relationship to either the independent contractor or labour hire agency. With respect to the labour hire agency, the cost is then transferred to the employee, particularly through the use of casual employment arrangements.
28. The capacity to transfer the cost of the employment relationship to the employee has its foundation in the traditional notion of the contract of employment. In particular, it involves the advantages to employers of utilising labour in a form that avoids a contract of employment between the employer and an individual “hired” to perform the work.
29. In a critique of the contract of employment, Professor Andrew Stewart states that *it is the definitional function of the contract of employment that has attracted most ire from commentators* (Stewart A. “Redefining Employment? Meeting the Challenge of Contract and Agency Labour” Australian Journal of Labour Law, Vol 15, No.3, December 2002, p.3). In addition to the absence of a single test to distinguish between employees and independent contractors, Stewart states that *this ire stems more particularly from a concern that reliance on the common law conception potentially excludes a wide range of workers from the benefit of protective regulation, when logic, fairness and indeed the purpose underlying the regulation in question might suggest they should have access to its benefits* (p.3). Stewart goes on to say *This concern has been exacerbated by a recent upsurge in arrangements which explicitly seek to confer on the worker the status of being ‘self-employed’ and thus in effect treat them as being in business on their own account* (p.3).
30. In addressing the growth of self employed persons, Stewart states *But what cannot also be discounted as an explanation for the apparent growth in the ranks of the self-employed is the very fact that so much labour regulation hinges on the existence of an employment contract. The cost savings associated with avoiding that regulation – and those savings may be considerable, as will be explained – may provide an obvious economic incentive for a particular form of ‘vertical disintegration’ in which employees are replaced by contract labour* (p.4). The types of regulation that can be avoided by the employer who “hires” the independent contractor or employees through labour hire agencies include workers compensation (depending upon any deeming provisions), superannuation, occupational health and safety, discrimination and certain tax obligations eg payroll tax (see Stewart, pp. 7-8). The costs/responsibilities associated with

these forms of regulation are transferred to the independent contractor or the labour hire agency. Further, with respect to an independent contractor, the benefits of industrial awards such as minimum rates and various forms of leave do not apply. For a labour hire agency it takes on the cost/responsibility of any such regulation or industrial instrument/s assuming its employees are covered by an award or is a party to an enterprise agreement. Herein lies one of the problems with labour hire agencies – the replacement of existing direct permanent employees by employees of a labour hire agency can create a space for a sufficiently motivated employer or labour hire agency to seek to avoid enterprise agreements and awards or to introduce wages and conditions that are lower than those typically paid to the type of work being performed or at the relevant employer. It is in these circumstances that we see steps being taken to avoid unions and to introduce individual contracts through Australian Workplace Agreements.

31. The practical application of a “contract of service” as defining an employer/employee relationship and a “contract for service” as defining an employer/independent contractor relationship is, in our submission, an unsatisfactory one. A lot of time and resources have been spent in the judicial system on the issue of whether a “worker” is an employee or an independent contractor (see for example the recent decision of the Western Australian Industrial Appeals Court in *Personnel Contracting Pty. Ltd trading as Tricord Personnel and the Construction, Forestry, Mining and Energy Union of Workers* [2004] WASCA 312). Whilst the courts have developed a “multi-factor” test (see Stewart pp.9-10), the test is such that it leaves a lot of room for dispute as to the proper characterisation of the relationship. This multi factor test involves applying a number of indicia to the contractual relationship to determine whether it is one “for” service or “of” service. However, as Stewart notes *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....*(p.10). Another factor that needs to be taken into account here is the time and cost associated with pursuing any dispute through the courts. Assuming the individual has some understanding of the “multi-factor” test, it becomes a time consuming and expensive exercise. Given the complexity of the distinction between an independent contractor and employee and given the time and cost involved, it would be understandable that an individual could be reluctant to pursue a matter.
32. As permanent direct employees, RTBU members are entitled to the benefits of the legislation mentioned in point 30 above, to the protection provided by union membership and to the benefits of awards and enterprise agreements. It is the absence of these protections for independent contractors that makes an independent contracting relationship attractive to certain employers. At the same time, the confusion that is the current state of the law with respect to the distinction between an employee and an independent contractor can be manipulated by employers who seek to take advantage of the absence of a contract of employment. It is this absence of the various protections for independent contractors vis a vis employees that causes the RTBU to oppose the use of independent contractors except within a very strict regime. The fact of the matter is that they can, and are, used to undermine the position of permanent direct employees.
33. In addition to the point on labour hire agencies raised in point 30 above, there is also a range of problems inherent in the use of labour hire agencies. These problems have been aptly summarised by Richard Hall (Richard Hall. “Labour Hire in Australia: Motivation, Dynamics and Prospects Working Paper 76, Australian Centre for Industrial Relations Research and Training, University of Sydney, April 2002) as follows:

- *Labour hire workers tend to be engaged as either casual employees or dependent contractors. The employment conditions tend to be characterised by insecurity, precariousness, the absence of career paths, low or below award pay and substandard conditions.*
- *Labour hire employment tends to be associated with limited training and skills development.*
- *Labour hire employment is often associated with limited industrial protection afforded by awards, enterprise bargaining arrangements and union coverage.*

33. With respect to the first point in Hall's working paper he goes on to give a number of examples:

- An Australian Industry Group survey estimate that some 97% of labour hire employees are employed on a casual basis (p.7):
- An estimation by the Recruitment and Consulting Services Association (RCSA) that the average length of a labour hire assignment is 6 weeks, whilst the ACTU found that a minority (10%) remain with the same client for over 2 years.
- Labour hire staff in the operations and call centres of the banking industry being paid between \$1 and \$3 per hour less than permanent bank employees.
- The Queensland Council of Unions statement that only 10 of 90 labour hire companies in the construction industry in Queensland pay at or above award rates.
- Labour hire agencies prepared to pay award rates being squeezed out by competitor labour hire companies who are willing to pay below award rates.

A report prepared for the NSW Government also contains a number of examples of the downside of the use of labour hire agencies from an employee perspective – see Department of Industrial Relations (NSW), Labour Hire Task Force Final Report. Report of the Task Force to the Department of Industrial Relations, New South Wales, 2001, pp. 30-31.

34. The issue of a skills shortage is a critical one in Australia. Barely a day goes by without employers pleading for something to be done to increase the level and variety of skills in the Australian workforce. Labour hire agencies are not generally known for their commitment and expenditure on training. As Hall, Bretherton and Buchanan report *Labour-hire operators and outsourced service providers invariably state that they cannot afford to invest in training, given the tightness of the margins, the competitive environment in which they operate, and the pressure to keep labour costs to a minimum* (Hall R., Bretherton T. and Buchanan J., "It's not my problem' The Growth of Non-standard Work and its Impact on Vocational Education and Training in Australia, National Centre of Vocational Research, Leabrook, 2000. p.vii). They note that what training does occur is focussed on induction or 'near-fit' training that is entirely funded by either the government or the individual (p.vii). They go on to say *Employers using labour hire or outsourcing have tried to shift the burden of training onto the labour-hire firm or the outsourced service provider. However, these organisations are in turn trying to minimise any investment in training. At the same time the government's role in direct provision of generalist and comprehensive trade and vocational training has declined in favour of support for a training market and user choice* (p. viii). In this respect, it can be seen that the emergence of labour hire agencies as large scale providers of labour has had a negative effect on the quantity and quality of training of Australian workers – an effect that has been exacerbated by the tendency of industry and government to reduce their role in training.

35. There is also a concern that the presence of labour hire agencies can be used as a means of pursuing an anti-union agenda either by the labour hire agency itself or the company to whom the labour is provided. The nature of the relationship between the labour hire agency and the principal company is usually such that the principal can instruct the labour hire agency that it no longer wants a certain employee/s on its site. The labour hire agency is obliged to remove that employee and it is its responsibility to find the employee alternative employment. The principal may not be required to give a reason for the removal of the particular employee. It may well be

that the employee is a union member and/or a union activist and the principal wishes to rid itself of any potential dealings with a union. Such a situation occurred recently in Queensland. In *AMEPKI v CHR Group Pty. Ltd.* ([2004] 178 QGIC 64), a labour hire company was convicted for breaching the freedom of association provisions in the Industrial Relations Act 1999 (Qld), when it terminated an employee who it had removed from a particular company at the demand of that company in circumstances where the removal was based on that company's objection to the employee being a member of a union. The situation here was that the labour hire company paid the price for acquiescing to a demand by the employer that involved an unlawful event, namely the breach of the freedom of association provisions in the Queensland legislation. Whilst the labour hire company did not escape a penalty on this occasion it is not difficult to envisage a scenario where a company demands the removal (or declines to accept them in the first place) of an active union member ostensibly on grounds unrelated to his/her union activities. The point of the decision of the Queensland Industrial Commission is to show that sufficiently motivated employers may use a labour hire system as a vehicle for applying its anti-union attitudes.

36. The example in point 35 shows that the use of labour hire agencies permits the principal to increase or decrease the workforce at its whim and without facing any penalty. Doing so on the basis of removing union activists may be one of many reasons for modifying at short notice the size of the workforce. It may also be that the employer genuinely no longer has any work to do. Whatever is the reason, it is also likely that it will produce a workforce that is reluctant to pursue its rights or make legitimate complaints due to a fear that the principal may effectively "black ban" them. In the event employees of the labour hire agency are no longer required by the principal, the downside of the loss of employment is met by the employee of the labour hire agency and, if he/she is employed on a casual basis by the labour hire agency, unemployment is the likely consequence. As such, job insecurity becomes a feature of employment by a labour hire agency. On the other side, the principal incurs no cost – no payment of redundancy, no payment of accrued entitlements, no potential for an unfair dismissal claim and no payment of notice of termination.
37. The abovementioned issues regarding the use of independent contractors and labour hire agencies do not pretend to be an exhaustive list of the relevant issues. What they do show, however, is that these forms of employment have a negative impact on labour generally and that the impact is a result of a system that permits the costs of any employment relationship – broadly defined – to be transferred from the employer for whom the work is actually being performed to the individual who actually performs the work. This is done by substituting the operation of direct permanent employment and the benefits that go with it, by either a "contractor" relationship or through a contract of employment with a third party. The motive for the employer who actually wants the work performed can only be that it is more efficient (read cheaper) than direct permanent employment, and the only reason for that is because it allows the employer to avoid the costs associated with a range of benefits enjoyed by direct permanent employees. It follows that the employer's gain is the employees' loss. Thus, as a union whose primary responsibility is the defence and improvement of the wages, conditions, and workplace welfare of its members, the use of independent contractors and labour hire agencies presents a range of problems. The policy as determined by the RTBU is an endeavour to ensure that our members and employees in general do not assume the burden of an employer's decision to utilise independent contractors or labour hire agencies.

THE INCIDENCE OF INDEPENDENT CONTRACTORS AND LABOUR HIRE AGENCIES IN THE RAIL, TRAM AND BUS INDUSTRY

38. The rail, tram and bus industry has traditionally been characterised by direct permanent employment. The overwhelming majority of these employees were employed on a full time permanent employment basis.
39. Up until the 1990's the rail, tram and bus industry was, with a couple of minor exceptions, publicly owned and operated. In 1990 the rail system was owned and operated by a combination of the Federal Government and all State Governments other than Tasmania. The Tramway system was confined to Victoria and South Australia where it was owned and operated by the respective State Governments. The bus systems were, with the exception of Brisbane where it was owned and operated by the Brisbane City Council, owned and operated by the respective State Governments.
40. The rail, tram and bus systems were operated on a vertically integrated basis. The employer in the relevant system undertook all functions associated with its operation. This included the physical operation of the service, the maintenance (including infrastructure and rolling stock) of the service and the operation of a number of other integral parts of the service such as marketing, the sale of tickets, cleaning services, hospitality services and printing services.
41. In terms of employment the rail, tram and bus industry was up until the 1990's a large employer of labour.
42. With the onset of the 1990's the structure of the rail, tram and bus industry began to change significantly. Structural reforms such as the rationalisation of services and infrastructure, deregulation, and privatisation brought with them massive change in the way in which the industry began to operate. This included a significant fall in employment, an expansion in the number of employers in the industry, the removal of vertical integration, and the introduction of large scale contracting out, particularly with respect to maintenance.
43. Accompanying this structural change was the emergence of labour hire agencies in the industry.
44. Initially, labour hire agencies tended to concentrate their activities in the maintenance area and in particular infrastructure maintenance. Whilst they did not undertake work on a full time basis, they were used to provide certain types of labour on certain infrastructure projects eg the upgrade of a current section of railway track or the construction of a new section of railway track. In particular labour hire agencies were utilised to undertake what is known as 'track protection'. This work involves the protection of employees working on the railway track from trains that are traversing the same section of track. It includes the laying of warning detonators on the railway track, the use of radios to monitor the position of trains, the use of flags as a warning to oncoming trains and the infrastructure workers and continual observation of the track to ensure that nothing untoward occurs.
45. The RTBU experience is that most employees employed by the labour hire agencies are employees who had been employed by one or more of the railway employers and had been made redundant by that employer. As such, they had been made redundant only to return to the industry via a labour hire agency. Further, it is our experience that the overwhelming majority of labour hire employees utilised in infrastructure activities are employed on a casual basis.

46. The RTBU experience is that the provision of training for these employees is the minimum that has to be provided. Under the various Railway Safety Acts in each State/Territory, any employee working on or around the railway track must possess a certificate certifying that the employee has been trained in the various safety features and requirements necessary to satisfy the Rail Regulator that the employee is capable of performing such work in a safe manner. For obvious reasons this training must be provided.
47. In addition to the use of labour hire companies in the infrastructure maintenance area, labour hire agencies have emerged recently in the supply of locomotive drivers and in some cases rail operations employees to rail operators. In most cases the RTBU has been able to successfully negotiate an outcome regarding wages and conditions. There are, however, situations where labour hire agencies have sought to avoid the RTBU and to pay wages and conditions that are less than would otherwise be the case. It is the intention of the RTBU to address these situations where they arise.
48. With respect to locomotive drivers, there is a currently a serious under supply. It has been estimated by one employer in the industry that there is a current deficit of some 2000 locomotive drivers in Australia. As such employers turn to labour hire companies in a search for additional labour – labour that, frankly, does not exist. This in turn is putting pressure on the need to ensure that locomotive drivers are properly trained. In recent times there have been reports to the RTBU of locomotive drivers employed by labour hire agencies not meeting appropriate standards but being sent for work required by various rail operators. For example, it has been reported that the extent of one driver's qualifications was to operate a 2 car passenger train in Europe. The person had never operated a diesel electric locomotive hauling freight and had no knowledge of the relevant safeworking rules. Whilst this person was removed from such work, the fact is that the person lacked the requisite competencies and should never have reported for such work. Another example concerned a person whose driving competencies only involved operating small locomotives used in the sugar industry. These persons should not have been sent by the labour hire agency to the employer in the first place and it is of serious concern to the RTBU that it occurred.
49. The RTBU is also aware of examples where employees of labour hire agencies have turned up to perform work that involves load lifting in circumstances where the employees were not appropriately qualified to operate such equipment. It is then expected that the direct employees would provide the training.
49. The RTBU is aware of a further example where the employees of a labour hire company had relocated from one state to another on the basis of a promise that there was work available for a period of 36 weeks. This turned out not to be the case and the employees were left stranded after a couple of weeks
50. With respect to the labour hire agencies, the RTBU has, in most cases, been able to negotiate appropriate wages and conditions for their employees. In that regard it is noted that the employees of the labour hire agencies do not work on their own but rather as part of a larger crew of employees who are employed by companies with whom the RTBU has enterprise agreements. As such, the capacity of a labour hire agency in these circumstances to circumvent the RTBU is limited. Further consistent with policy, the RTBU has, in a number of enterprise agreements, a provision covering the use of contractors which oblige the company to utilise labour hire employees in circumstances where they receive wages and conditions no less favourable than the employees of the company utilising such labour. For example, the Pacific National Enterprise Agreement 2004 states *In using contract labour or labour hire agencies in the circumstances described above, it is not Pacific National's intention to put in place*

arrangements where the employees of a contractor or labour hire agency receive less favourable terms and conditions of employment, taken overall, than those of an employee of Pacific National undertaking the same work. It is understood that this labour is working under the direct supervision and control of Pacific National (see Pacific National Enterprise Agreement 2004, AG832552 PR944142, dated 27 February 2004).

51. The nature of the industry coupled with the fact that where employers seek to use labour outside direct employment they do so through labour hire agencies has meant that the use of independent contractors has been minimal. This is particularly the case in those parts of the industry where RTBU members predominate. It may be that independent contractors are used in certain unique areas such as information technology or as management consultants, but they either do not appear or appear in a minimal way in areas where the RTBU has enterprise agreements.
52. In discussions with employers in the industry the RTBU has always sought to maximise the use of direct permanent employment. The nature of the industry is such is that it lends itself to that type of employment. Where an employer experiences a change that demands additional labour for a period of time, the RTBU preference is for persons to be employed on a fixed term basis thereby attracting the same wages and conditions as other employees of the same employer and increasing the probability of continuing as an employee after the completion of the fixed term. Where the utilisation of labour through labour hire agencies becomes a reality, the RTBU seeks to ensure the employees are paid no less favourably than the employees of the relevant company and receive all of the protection that can be provided by a union and where it appears to the RTBU that the employees are performing work that has a permanent character seek to have the positions converted to permanent ones. The RTBU is of the view that there are positions where labour hire employees are being utilised which, in reality should be occupied by permanent employees and where this exists the RTBU will continue to pursue permanent employment.

SUMMARY AND CONCLUSION

53. The use of independent contractors and labour hire agencies has become a regular feature in the Australian labour market and industry in general in recent years. There is no doubt that the incidence of such employment has increased as a proportion of the overall employment (see for example Laplagne P., Glover M., and Fry T. “The Growth of Labour Hire Employment in Australia” Productivity Commission Staff Working Paper, Productivity Commission, Melbourne, February 2005).
54. The use of such forms of employment has also emerged in the rail, tram and bus industry in recent years.
55. The RTBU is concerned that the use of independent contractors and labour hire agencies is motivated by the opportunity to reduce labour costs to the employer, whether by the more flexible control over the number of persons required to perform the work or by a reduction in the costs of wages, conditions and entitlements. The RTBU is of the view that the cost to the employer is reduced by lowering the number and level of employee entitlements such as wages and conditions and job security. As such, the cost of the introduction of independent contractors and labour hire employees is ultimately borne by the employee. In addition, to the extent that costs are reduced, it represents a potential threat to the ongoing employment and the wages and conditions of employees employed directly by employers who could have access to labour hire agencies or independent contractors.
56. In those circumstances and given the objects of the union, the RTBU has adopted a policy that seeks to maintain the job security of and preference for direct employment. This policy seeks to confine the use of labour hire agencies to particular work and to ensure that where employees of labour hire agencies are utilised they are paid wages and conditions no less favourable than those paid to the direct permanent employees of the relevant employer.
57. In setting up this Inquiry, the Committee Chair, Mr. Phillip Barresi stated that whilst it was important to support flexibility it was also important to *ensure that proper protections are in place that clarify obligations such as health and safety, tax requirements and other entitlements for both contractors and those employed through labour hire services* (Media Alert 24 January 2005). In our view it is not only an issue of “clarifying” such protections but to ensure that proper protections are in place. At present this is not the situation and as such it helps to motivate the opposition to such forms of employment.
58. The use of labour hire agencies is not only a subject of controversy in Australia. It is also under consideration in the European Community where the European Commission has developed a draft Directive on Temporary Agency Workers. Fundamental to the operation of that Directive is that *temporary workers shall, during their posting, receive at least as favourable treatment as a comparable worker in the user enterprise in respect of basic working and employment conditions, including seniority. Any differences must be justified by objective reasons. Where appropriate, the principle of pro rata temporis should apply* (European Industrial Relations Observatory on-line, “Commission proposes Directive on Temporary agency workers” www.eiro.eurofound.ie/2002/04/feature/eu020405f.html). This amended Directive was proposed in March 2002. It is still the subject of discussion in Europe and, unfortunately, is yet to be agreed by the relevant parties. Nevertheless it reveals that a serious and genuine concern about the use of temporary agency workers or labour hire agency workers is their payment of wages and employment entitlements that are less than those paid to the direct permanent employees.

59. In Spain, legislation is being introduced to the Spanish Congress regarding the use of subcontractors in the building industry. This legislation includes creating a register of all subcontractors, monitoring to ensure compliance with legal minima, limits on the quantity of work that can be contracted out and a prohibition on subcontracting chains (see International Federation of Building and Wood Workers, "FECOMA Comisiones Obreras set to win new controls over subcontractors, www.ifbww.org/index.cfm?n, dated 19 January 2005). It is noted in this report that the Spanish construction sector has the worst health and safety record in Europe. Spain has opted for a legislative approach to ensure that employers in the construction industry meet their responsibilities.
60. In his article on the use of contract and labour hire agencies, Stewart proposes an extended use of the deeming provisions to address the problem of employees being dressed up as contractors (Stewart, pp.30-36). As he aptly states *The principle of freedom of contract should not protect arrangements which clothe workers in the trappings of independence, but do not in any meaningful sense make them entrepreneurs* (p.30)
61. The NSW Labour Hire Task Force proposed the introduction of a licensing regime. The licensing regime would be predicated on a licence holder meeting *fundamental statutory responsibilities such as holding appropriate insurance coverage, the payment of workers compensation premiums, superannuation, payroll tax and entitlements under applicable industrial instruments. Breaches of statutory responsibilities would be prosecuted under the relevant statute and a test of good character* (Department of Industrial Relations (NSW), p. 54). It was proposed that a working party be formed to address the issues associated with any licensing arrangement.
62. The proposals mentioned in points 57-60 above are, in many respects consistent with the policy position of the RTBU in that they seek to ensure that the mere change in the form of employment does not automatically result in a loss or potential loss of entitlements and protections that exist for employees. There is no reasonable basis in our submission upon which an individual should be denied fundamental rights of employment merely because he/she is employed under a different regime. It would appear very odd and unfair to two persons working side by side undertaking the same work for effectively the same employer but in circumstances where the direct permanent employee is on better wages and conditions and employment entitlements than the person working alongside who so happens to be employed on a casual basis by a labour hire agency or as an independent contractor.
63. It should also be put beyond doubt that where an independent contractor or the employees of a labour hire agency perform work for an employer that the wages and conditions must be no less favourable than the wages and conditions paid to direct permanent employees employed by that employer.
64. Finally, as set out in RTBU policy, the use of independent contractors and labour hire companies should only occur in circumstances where it is not possible for direct permanent employees or direct employment on a fixed term basis to perform the work. At the very least, it should be possible for the parties to an enterprise agreement to have a provision in that agreement governing the circumstances under which independent contractors and labour hire agencies may be utilised. At present, there is a problem with the extent that an enterprise agreement may provide for "contractors" in light of the recent High Court decision in the Electrolux Case (*Electrolux Home Products Pty. Ltd. v Australian Workers Union* [2004] HCA 40, 2 September 2004). In a recent Federal Court decision, French J. after considering a number of decisions concerning the use of contractors including the Electrolux Case stated that *A distinction has been drawn between provisions regulating or prohibiting the use of independent*

contractors and provisions which prescribe minimum terms and condition for the employees of independent contractors (Wesfarmers Premier Coal v AMWU, W230 of 2004, 23 December 2004, French J.) On the basis of that determination, an enterprise agreement may provide for the conditions under which contractors may be employed but not for provisions concerning whether or not they may be used. In the event that the parties are willing to and indeed do agree on the circumstances upon which independent contractors or labour hire agencies can be used, there is no proper reason why such agreement should not be capable of being included in an enterprise agreement certified by the Australian Industrial Relations Commission. As such the legislation should be amended to allow the parties to include such a provision in an enterprise agreement.

65. It is concluded here that provision should be made to ensure that independent contractors and employees of labour hire agencies have access to the same beneficial legislation and regulation as employees and that the “no less favourable” test be applied to their wages and conditions and employment entitlements. Further, that they should only be used where direct employment is not possible or under circumstances where it is in accordance with the provisions of an enterprise agreement.
66. To the extent that it is argued that the provisions sought by the RTBU diminish the incentive for employers to utilise independent contractors or labour hire agencies, this would be because it removes the capacity for employers to reduce its costs of the utilisation of labour by transferring them to the employee/worker. In our view, the employee/worker should not become an unwitting and involuntary pawn in the game of employer cost cutting. If the employer is seeking more efficient ways to operate, there are alternatives to shifting the cost burden onto its employees or someone else. Further, the promotion of employers employing direct permanent employees will compel them to focus more attention on their short term and long term skill requirements and take the appropriate action to ensure training of employees occurs rather than hoping against hope that someone will do it for them. For as long as the attraction of independent contractors and labour hire agencies to employers is predicated on savings to them as a consequence of undermining the job security and wages and conditions of employees (including direct employment employees, employees of labour hire companies and independent contractors), it will remain an unfair system and will be the subject of ongoing controversy.

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