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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON EMPLOYMENT, WORKPLACE RELATIONS AND WORKFORCE PARTICIPATION

Reference: Independent contracting and labour hire arrangements

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SYDNEY

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON EMPLOYMENT, WORKPLACE RELATIONS AND WORKFORCE PARTICIPATION

Wednesday, 30 March 2005

Members: Mr Barresi *(Chair)*, Mr Brendan O'Connor *(Deputy Chair)*, Mr Baker, Mr Burke, Ms Annette Ellis, Ms Hall, Mr Henry, Mrs May, Mr Randall and Mr Vasta

Members in attendance: Mr Baker, Mr Barresi, Ms Hall, Mr Henry, Mr O'Connor and Mr Vasta

Terms of reference for the inquiry:

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.

WITNESSES

Committee met at 11.03 a.m.

HARGRAVES, Mr David, Executive Officer-New South Wales, Australian Industry Group

CHAIR—I declare open this public hearing of the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation inquiry into independent contracting and labour hire arrangements. As we all know, this inquiry arises from a request to this committee by the minister. Written submissions were called for and 60 have been received to date. This is the first day of public hearings.

Although the committee does not require you to give evidence under oath, I should advise you that these hearings are formal proceedings of the parliament. Consequently, they warrant the same respect as proceedings of the House itself. It is customary to remind witnesses that giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The committee is not prepared to provide the protection of parliamentary privilege to allegations about particular individuals or companies. Would you like to make some introductory remarks or a statement in relation to your submission before we proceed to questions?

Mr Hargraves—Thanks for the opportunity to address the committee this morning. I will kick off by giving you a quick snapshot of the Australian Industry Group and who we are and what my role is in the organisation. The Australian Industry Group is a national employer body formed by the merger of the Metal Trades Industry Association and the Australian Chamber of Manufacturers. We have over 10,000 members, ranging from small businesses to large business. Whilst the heartland of our membership is in the manufacturing sector, we do have considerable membership within the construction sector, the airline and aviation sector, the printing sector, the information technology sector, call centres and the labour hire sector.

As a consequence of that, we represent the labour hire companies but we also represent the users of labour hire, so we are able to talk on behalf of both groups. Nearly all of the major labour hire companies are members of our organisation. They range from the very large ones, such as Skilled Engineering, Manpower and Adecco, to many of the medium-sized companies and also some of the smaller labour hire companies. We have regular meetings with those labour hire companies to get their feedback. The purpose of those meetings is really education and sharing information about things that are pertinent to the industry.

I have national responsibility for the labour hire sector within the Australian Industry Group. That means I coordinate the activities within the various branches of our organisation in terms of providing service to those organisations. The types of services that we provide would normally be anything that is employment related, including representation at industrial tribunals, changes to awards that impact upon labour hire companies and any lobbying and policy activities associated with labour hire. I have been involved in a number of inquiries. I prepared a submission to the New South Wales Labour Hire Task Force. I was also a member of the task force and of a working party that subsequently arose out of that task force.

Mr BRENDAN O'CONNOR—You were a witness and you were a member of the task force?

Mr Hargraves—Yes.

Mr BRENDAN O'CONNOR—You examined yourself?

Mr Hargraves—It did not work in the same way that these committees work. It was not actually a parliamentary committee.

Mr BRENDAN O'CONNOR—I see. It was a working group.

Mr Hargraves—It was basically a working group.

Mr BRENDAN O'CONNOR—It just sounded like you were very busy.

Mr Hargraves—I did not have any disagreements with myself anyway.

Mr BAKER—You were consistent.

Mr Hargraves—I also prepared a submission to the Victorian labour hire inquiry and gave evidence to that inquiry. You might be aware of a major matter in the New South Wales jurisdiction: the secure employment test case. I am coordinating the defence of that case on behalf of six employer associations. In short, I have had a reasonable amount of association with the labour hire sector. With that background, I will refer to a couple of highlights in our submission.

When we are looking at labour hire and independent contracting, I think it is relevant to look at what the drivers of the change are and why we have experienced in recent decades a growth in the utilisation of labour hire companies and also independent contractors. I guess there are many reasons why we have seen that change, but really a lot of it is driven by the need for flexibility. We hear quite a lot, and I think it is quite genuine, that employers are seeking increased flexibility. I think it is also true to say that these days employees are also seeking increased flexibility.

The work force is becoming increasingly diverse and employees have a wide variety of different needs and preferences. Therefore, I think that what we are seeing now is that many employees prefer to work as independent contractors and, similarly, many employees prefer to work for labour hire companies. Many might have us believe that working for a labour hire company is second-rate employment with inferior terms and conditions, and I think that is somewhat of a myth. Yes, I guess it would be true to say that some labour hire employees—and this is the other important aspect to raise—generally employ casual employees; however, they are not necessarily restricted to that. Some labour hire companies employ a large number of permanent employees and some labour hire companies employ a large number of apprentices, but it would be true to say that the large majority of employees in labour hire companies are casual employees. I raise that because, in talking about employee preferences, it is actually the case that many employees prefer it that way. That is not to say that other casual employees or all employees would prefer that. Clearly, some casual employees working for labour hire companies would like to have weekly employment or 'permanent employment', but it is hard to ascertain what proportion would fall into each category.

So we think that the flexibility of employers and employees is really the driving force behind that change. We are very concerned about the increased regulation that some are advocating in

relation to labour hire. An example of that proposed increased regulation is here in New South Wales in relation to the secure employment test case, which is before the New South Wales Industrial Relations Commission. I will mention that case in a little bit more detail later on. In our mind, that case will serve to be detrimental to employment within New South Wales. It certainly increases the degree of regulation of labour hire companies that exists. That case was initiated by the Labour Council in New South Wales on behalf of all of its affiliates. In respect of that particular case, we think that the union strategies are short-sighted because, if industry is unable to maintain sufficient labour flexibility, the effect will simply be to drive employment levels lower and to drive more companies out of business—and, in particular, to drive more companies to shift their operations overseas. Clearly, that is not going to be in the best interests of employers and employees in this state or nationally.

On page 5 of our submission—I am not going to take you through our submission page by page, but I will point you to some of the highlights—we talk about the utilisation of labour hire and the key reason for the growth being the rapidly changing work environment. I have listed a number of factors that we think have had a particularly important influence. I will quickly run through those: corporate restructuring; the need for increased flexibility, which I have just spoken about; greater competitive pressures as a result of globalisation; outsourcing in both the private and the public sectors; extended hours of operation due to increased service requirements; fast-changing technology; the trend for companies to concentrate on their core business; and growth in new industries. I guess that is an important point for us within itself. In the manufacturing sector we are seeing a decline in one of the traditional industries in this country which has been an employer of—if I could put it this way—traditional forms of labour. Fortunately, we are seeing the growth of new sectors, but new industries do not employ traditional forms of labour. Generally speaking, they have not done that and they are simply not going to.

Mr BRENDAN O'CONNOR—Unless they become unionised.

Mr Hargraves—Not even necessarily if they become unionised. That could be an effect of becoming unionised, but within itself that will not result in labour becoming permanent. You are not going to force these businesses to actually employ permanent labour when they do not want to.

Mr BRENDAN O'CONNOR—A hundred years ago, industries were staffed by casual labour, but I am happy to get to that later.

Mr Hargraves—The other point I would highlight relates to the part of my submission where I say that the labour hire industry has been the subject of adverse publicity in recent times. Trade unions in particular have traditionally had a very emotional—sometimes—and philosophical opposition to labour hire. This opposition seems to be based largely on what we say are incorrect beliefs. The first of these is that labour hire reduces full-time employment: we think there is an abundance of evidence which proves that the contrary is the case. The second of these is that labour hire employees are in precarious employment: to a point I think that is true, but I guess all employment these days is more precarious than in the past. To the extent that labour hire employees are in precarious employment, given what I have just said, that would be true. The third of these is that labour hire employees receive low benefits and are not protected by

industrial instruments: again, that is somewhat of a myth and the evidence does not support it at all.

The fourth incorrect belief about labour hire employees is that they receive inadequate protection for occupational health and safety, workers compensation and rehabilitation: this point raises its head quite often when talking about labour hire employees and their exposure to OH&S. There is some research—I am aware of a study in Victoria—which suggests that labour hire employees do have a high risk of injury. Obviously, it would be preferable that that was not the case. If you relate that back and ask, 'Why is it the case that labour hire employees have higher injury rates?' the first point I would make is that it is not because labour hire companies do not take OH&S seriously. In fact, from my experience I can say categorically that some labour hire companies' OH&S systems and policies are as sophisticated and well developed as those in any other sector—in some cases they are better. If you look at why it is the case, assuming this research is correct, it is a bit like asking, 'Why do they have more injuries in the coalmining sector than in call centres?' The reason is that it is an eminently more dangerous, high-risk sector.

It is also true in many cases that the work being given to labour hire companies or outsourced to companies which then engage labour hire employees may in fact be of a higher risk compared to their normal work. That would be another reason that could be pertinent. A third reason, which I think the same research identifies, would be that labour hire employees are generally younger than the work force overall and it would probably be fair to say that generally speaking younger employees are at a higher risk than more experienced, older employees. So there are some issues in respect of OH&S, workers compensation and rehabilitation associated with labour hire and they are complex.

The final point in my submission relates to the incorrect belief that labour hire employees receive inadequate training. Again, that is a sweeping generalisation put forward by some. It is not one that we agree with. In fact, one of the biggest employers of apprentices in Australia today is a labour hire company. There have been lots of myths about labour hire that have been promulgated over the years.

I would like to highlight the point—I am not going to take you to any of the detail of it—that it is really important to understand what labour hire is. The term is bandied about within the community and my experience is that not many people really understand what it means.

Labour hire is different things to different people. For example, one of the big labour hire companies that I am aware of operates an engineering company that manufactures fire-engines. Is it a labour hire company? It has a permanent work force. It is the same as any other engineering company. However, it is branded as a labour hire company but there is no resemblance to labour hire at all within that business. The same company operates a call centre in Tasmania. It is a commercial call centre, it competes with other call centres for business and it happens to be owned by a labour hire company but it is not actually doing labour hire work. So I think it is actually important to distinguish what labour hire actually is. The way I describe it for the most part is that labour hire per se is actually the situation when only labour is on hire to another party. But in a lot of the statistical data that you see it encompasses all of those things that I have included in the report.

The other point that I would take you to is on page 12 of our submission. I have taken the liberty of extracting from part of the submission that I gave to Victoria's Economic Development Committee inquiry as to some of the motivations why companies use labour hire arrangements. It is perhaps worth reading now:

> As the pressures of international and domestic competitiveness impact on business in Australia, companies look for more time and cost effective solutions. There are a number of things that labour hire companies are able to offer in terms of solutions. Firstly, they can offer better response times as they have access to a larger range of people. Secondly they have the technological support and infrastructure which facilitates easier identification of people who have the requisite skills and experience. Thirdly, they have specialist staff who have more highly developed interview skills and better and more developed selection procedures and practices. Fourthly, they have knowledge of the local market and where to look for people who have the requisite skills and what you need to pay them in terms of market rates to be able to attract them.

They are the value-added things that labour hire companies provide to their clients in terms of recruiting people. I will leave my comments there. I am happy to field any questions.

CHAIR—Thank you, Mr Hargraves, for your submission. I read through it with interest. I also thank you for the summary on the New South Wales security industry case, because I understand we are not actually going to be hearing from the New South Wales government although we do have a fairly good submission from them. I will kick off questions by going to the page where you listed the myths, the incorrect beliefs, about labour hire. I have two questions. First of all, from your explanation you agree that three out of the five listed there are incorrect, but for the other two there is some qualified support for those particular beliefs. Two things come to me. Firstly, does it vary based on the four layers of companies that you mention in your submission, where you talk about the four layers, from those in the large industry sectors—such as Skilled, Adecco and Manpower—down to the small sector? To what degree does it vary? Also, and this is an entirely different question but I will throw it in while I have got the chance: are there any particular industry groups that you believe are more prone to be successful by lending themselves towards labour hire than others? You mentioned call centres and engineering. It seems to me that perhaps the diversity out there is part of the confusion as well and that that is where some of the conflicting views emerge, because there is a particular type of industry that is engaging in labour hire.

Mr Hargraves—In relation to the first question—does it vary?—I think the answer is yes, it does. The larger companies such as Skilled, Manpower and Adecco are very large corporations who cannot really exist without having the right policies and practices in place. They are very good corporate citizens. Leigh Hubbard of the Victorian Trades Hall actually acknowledged publicly in a forum before the Victorian inquiry that they really had no issues with the top layer of companies in terms of the way they conduct their businesses.

CHAIR—Most have got enterprise agreements, certainly?

Mr Hargraves—Many have enterprise agreements, and many of those enterprise agreements are with unions. In some cases the agreements cover some of their operations, in other cases parts of their operations, depending where they are, what industries they are in et cetera. So it does vary. One of the problems that the labour hire industry faces is that there have been people on the bottom layer who have been, it is probably fair to say, unscrupulous in their dealings in some cases. Those companies have not necessarily had the resources or the sophistication of the

larger companies, and in some cases—and I must qualify this to the extent that there is no hard evidence for this; it is somewhat anecdotal—there is a belief within the labour hire sector, and I personally think it is probably right, that some of those smaller labour hire companies have not complied with industrial instruments. That is to nobody's advantage. The larger companies are saying, 'We play by the rules and we want everyone else in the game to be playing by the rules as well. If they are not then we are being disadvantaged.' I think there are some but we do not know whether or not they are a large number.

Secondly, in respect of safety, the smaller companies would not have the same infrastructure, procedures and policies for the management of the safety of their employees as the larger ones do. The medium companies probably fall somewhere between those two parameters. Some of those medium-sized companies can be as good if not better than even the larger companies, and others could fall somewhere in between. The short answer to your question is that yes, they vary quite a lot.

I find your second question about industry groups that lend themselves more to labour hire more difficult to answer. Certainly, from the research that I have done it would appear that most industry sectors are users of labour hire—some of them a bit more than others but companies these days are using labour hire for a range of different reasons. I do not think I can identify whether one particular industry sector lends itself more so than another to the utilisation of labour hire. But it is true to say that in the service industries in particular the peaks and troughs in their workloads change very quickly and therefore the demand for labour often changes very quickly as well.

Mr BRENDAN O'CONNOR—On the page that Mr Barresi referred to, page 6 of your submission, you refer to those five myths, those five contentions you believe to be incorrect. I have a few questions in relation to them. The second contention is that labour hire employees are in precarious employment. I did not hear a lot of the evidence, but you refuted that contention. What proportion of labour hire employees are casual employees?

Mr Hargraves—From the research we and others have done it appears that between 80 and 90 per cent of employees in labour hire companies are casual employees.

Mr BRENDAN O'CONNOR—Given that the casualised proportion of the entire work force is closer to a quarter, would not any independent observer conclude that it is more likely you would be more precariously employed with a labour hire company than with other employers? The ratio of the casualised work force is two or three to one for labour hire firms as compared with other employers.

Mr Hargraves—I can make a couple of points in relation to that. Firstly, if tomorrow labour hire companies were not in existence and you had a pool of people out there who were casual employees no longer working for those labour hire companies, it is more likely than not that those labour hire employees would be employed as direct casuals.

Mr BRENDAN O'CONNOR—You do not know that—

Mr Hargraves—No, I do not know that, that is right, but there are lots of reasons why those people are casuals. My belief is that those people would largely be employed as direct casuals.

The other point, as I said before, is that the fact a person is a casual does not necessarily mean that they are in more precarious employment than other forms of employment.

Mr BRENDAN O'CONNOR—Are you aware of situations where labour hire employees are collocated with employees on inferior conditions of employment?

Mr Hargraves—There would be some places where labour hire employees would be employed under different industrial instruments working on the same site.

Mr BRENDAN O'CONNOR—I did not ask you that question. I asked whether you were aware of any situations where labour hire employees are paid less or enjoy lesser conditions of employment than those other employees they are working with doing the same work.

Mr Hargraves—If you asked me to name one right now, I could not.

Mr BRENDAN O'CONNOR—Are you saying that you are not aware of any employees—

Mr Hargraves—I am sure that there would be some—

Mr BRENDAN O'CONNOR—What proportion of the labour cost of a labour hire employee is paid to the labour hire company itself? In other words, if I were company A and I wanted to enlist a dozen labour hire employees, how much do I pay to the labour hire company as the host employer for those employees? How does that work?

Mr Hargraves—That would really depend. The margins are what you are effectively talking about. It varies quite a lot.

Mr BRENDAN O'CONNOR—What would be the variance bracket?

Mr Hargraves—I think it would vary from—and I really cannot answer—

Mr BRENDAN O'CONNOR—As a proportion of the wage of the employee, would it be 10 per cent or 20 per cent?

Mr Hargraves—Probably the easiest way for me to answer that is in terms of their margins rather than as a percentage because I really would not know in terms of the percentage of the employee's wage. Their margins would vary from one or two per cent probably up to 15 per cent. That would be dependent upon the number of people being supplied and the duration.

Mr BRENDAN O'CONNOR—I will take the middle rank. If it were a seven to eight per cent oncost on top of the employee, why would an employer go to a labour hire firm, if they are paying the same conditions of employment to that labour hire employee as their own employees, if they have to pay an extra eight per cent?

Mr Hargraves—It is really, firstly, being able to secure labour quickly. It goes to a lot of those issues that I mentioned a few moments ago about the reasons companies use labour hire. Labour hire companies are very well equipped, far better equipped than most companies, to be able to identify potential labour sources in the market, recruit that labour, and interview, test and

get that labour in without consuming management resources. That is one really compelling reason why companies will use labour hire companies.

Mr BRENDAN O'CONNOR—It may cost more but you are saying that it can be adaptive and more responsive to their needs?

Mr Hargraves—Definitely.

Mr BRENDAN O'CONNOR—You said in your opening comments that it was difficult to be certain what proportion of employees would like to be either casual permanent or permanent part time. Why would you say that it is difficult? Isn't it possible for labour hire companies to survey their employees to know what they would prefer?

Mr Hargraves—I imagine that it would be possible for them to survey that—and perhaps an example might help. In the metals award—the engineering and associated industries award—there has been a provision for more than four years whereby employees of labour hire companies as well as direct casuals can request to be made 'permanent'. The research that we have conducted, as well as our anecdotal evidence, is that the take-up rate of people wanting to convert from casual employment, both in labour hire companies and direct companies, is in fact extremely low. There might be a whole range of reasons for that. Probably, one of the more important reasons might be that employees do not want to forgo the 25 per cent casual loading.

Mr BRENDAN O'CONNOR—In lieu of losing all their leave entitlements.

Mr Hargraves—That is right. But, clearly, a lot of those employees, including a lot of longstanding employees, have been presented with an opportunity to trade off money in order to get conditions. The large majority of those employees have said, 'No, we don't want to do that. We're quite happy with the way things are.' So the take-up rate has actually been extremely small.

Mr HENRY—Mr Hargraves, page 11 of your submission talks about an increase of 15.7 per cent per year in the growth of labour hire workers from 1990 to 2002. Have you any thoughts on what the future growth potential might be as far as labour hire is concerned, and what impact this might have with respect to the future training of skilled workers? Also, you mentioned one of the labour hire companies being a large employer of apprentices. Do you see that sort of trend continuing?

Mr Hargraves—Some recent research that I have read suggests that the rate of growth of labour hire is slowing down now, and that would coincide with my own anecdotal observations that that is probably the case.

Mr HENRY—Is that because of barriers to growth or just that it has met its economic level or plateau?

Mr Hargraves—In some cases employers who have had perhaps large numbers of labour hire employees are adjusting the balance a bit. A few years ago we went through a period where there was a really rapid expansion and a rapid use of labour hire, and now companies are looking at

that and saying, 'Is that really the right mix? Are we better off employing our own employees, either as direct casuals or as permanent employees?'

My response to your second question, which is an interesting one, is that I am now seeing that, because of the very low unemployment rate and the skills shortages that we currently have, it is clearly more difficult for labour hire companies to be able to source the right people, and that affects their bottom line and their whole business. Those companies are now asking, 'How do we go out and source and train people so that we can place them?' You are seeing companies such as Skilled Engineering, which already have a considerable training investment, looking at expanding that. We are seeing more and more labour hire companies looking at taking on apprentices and trainees. In my estimation, we are only going to see a growth in that over the next few years. In my opinion, those labour hire companies will be investing a lot more in those sorts of training schemes.

CHAIR—Just following up that question to some degree: how easy is it for an organisation or an individual to break into the labour hire business? Is it getting to the stage where the top layer has it all sewn up and the competitive pressures will make it too hard to break into?

Mr Hargraves—It is certainly true that the first layer, collectively, have a higher market share.

CHAIR—What would that be?

Mr Hargraves—I have seen different stats on that, but certainly the most recent ones that spring to mind are that the top six or seven would have about 50 per cent market share, but there are a lot of niche markets out there. One of the things that we basically said to the Victorian inquiry and to the New South Wales inquiry is that the barriers to the introduction of labour hire are really too low. We have advocated a system of accreditation whereby labour hire companies would need to pay a small fee in order to become accredited, and they would have to indicate their compliance with a voluntary code of practice. We think that the barrier is too low; it is too easy for somebody to get up and say, 'I'm going to start up a labour hire company tomorrow.'

CHAIR—Who would they pay that accreditation fee to?

Mr Hargraves—We have had discussions with different government bodies in different jurisdictions but we think that that would be a government administered fund. We do not see it as being a revenue stream for government but a fee that would represent a reasonable cost for getting into and operating within the industry. We would like to see that accreditation becoming so important that if you lost it you would not be able to operate in the industry.

Ms HALL—I would like to draw your attention to occupational health and safety. I noted in your oral submission that you mentioned that occupational health and safety depended on the industry that labour hire workers were involved in. I put it to you that if you look at particular industries you will find that there is a higher level of injury rate in those industries that use labour hire than there is in those that have permanent employees. To back up what I am saying, I will refer to the mining industry. The three most recent fatal accidents that have occurred within the mining industry have been related to labour hire people and contractors. What would you say to that?

Mr Hargraves—I do not know the circumstances of those cases so I cannot comment about those specifically.

Ms HALL—I could also refer to other industries in the area that I represent.

Mr Hargraves—I said before that if you look at coalmining as an example you find that it is an inherently dangerous industry.

Ms HALL—Yes, I agree with you.

Mr Hargraves—There is an issue about whether the work that labour hire employees are doing is higher risk. Within each of the industry sectors some of the work that is outsourced to labour hire companies or other companies may be work that is inherently more dangerous. If it is inherently more dangerous then it logically follows that the injury rate will be higher.

Ms HALL—So you are saying that these injuries happen because these workers are doing the dangerous work and the others are not?

Mr Hargraves—In some cases that is right, yes.

Ms HALL—But what about where they are working side by side?

Mr Hargraves—Again, there is no one answer here. As I said before, the nature of labour hire is such that the duration is relatively short in most cases. I think 70 per cent to 80 per cent of placements are for around two months. A person in the first two months of doing a job, because they are still learning the job and learning the dangers associated with it, would be at a higher risk. So that is probably a factor. The other factor, as I said before, is that people working for labour hire companies tend to be younger employees. Generally speaking, younger people are in higher risk categories than older employees. There is a range of factors.

Ms HALL—I would like to draw your attention to the fact that all the submissions I have read—even your own—acknowledge that there is a bit of a problem in the area of occupational health and safety. I am wondering if you have any solutions to offer this committee as to how that can be addressed to provide adequate coverage for workers working within labour hire?

Mr Hargraves—We have said with respect to OH&S—and I believe this is still the case—that in New South Wales, and I think in all states, case law has clearly established the notion of joint responsibility for labour hire employees. Particularly in New South Wales, there has been a whole series of cases where very heavy fines have been imposed on the labour hire companies and the client organisations where there has been an accident or, in the worst case, a death. So that notion has been well and truly entrenched amongst the labour hire companies.

CHAIR—Is that entrenched in the client organisation or do they believe that, by contracting out, they are also contracting out their responsibilities?

Mr Hargraves—That probably was the case five years ago but it is not now. That is not the reason why clients outsource to labour hire companies. Again, it is hard to generalise but I guess there would be some small sectors, particularly small businesses, that might still believe that that

is the case, but generally speaking it is not. Certainly, big and medium businesses do not believe that.

Ms HALL—What about selected duties, return to work and issues like that? That seems to be a problem area. Has your organisation got their head around that? Have they looked at ways of addressing that? I am asking for innovation here, not rhetoric.

CHAIR—We have to come up with recommendations on this as well.

Ms HALL—Yes. I want something innovative; I do not want to hear rhetoric.

CHAIR—We are running out of time, so if you could give a short answer to that, and if you have other information to add to it—and it is a very important question—we would like to receive that as well.

Mr Hargraves—In terms of looking at the things you can do, it would be very easy for us to sit back and say that you do not need to do anything, but we have not said that. We have been advocating for some time in different jurisdictions that there should be an accreditation system for labour hire. Our members, both the clients and the labour hire companies, are strong proponents of that. What does that do? It raises the bar in terms of performance in respect of safety and compliance with industrial instruments. That is one practical, tangible thing that can be done.

Mr BAKER—On page 10 of your submission, you say that the employment services industry has increased by 30.8 per cent over the three-year period since 2001-02. Obviously it is a huge growth industry and I am sure it will continue to be so. What strategies, apart from accreditation, are there to ensure that it is an industry or a business enterprise that is moving forward and that it ensures that it is legitimate and it has the basic mechanisms in there? I will jump back to where you said that there are four layers. Compared with some of the ones that are moving in at the ground level, as Ms Hall was saying, the big companies obviously do apply more OH&S and legal aspects to their businesses. You did touch on using accreditation to try to tighten it up. Are there any other strategies or recommendations that you can make that flow on from the others?

Mr Hargraves—The strategy that I think can be pursued is education, both of the labour hire companies and the consultants. To illustrate that: the labour hire industry is characterised by consultants who the labour hire companies recruit, and they not only become the recruiter of that labour but, in a lot of cases, they also become the supervisor of that labour. So they recruit the people and when they place them onto their various sites they are actually their manager, their supervisor, so they are responsible for them. How well equipped are those people to carry out those supervision activities? In a lot of cases they could probably benefit from a lot of supervisory type training. Their problem is made more difficult because, while they are supervising a team of people, they are not on the same site as those people—they are physically removed. They might see those people only once a week or once a month, so that makes their responsibilities more difficult. In the area of occupational health and safety, there is certainly room for improvement for those consultants to be required to undertake some form of training in OH&S.

Mr BAKER—It makes it difficult where you have a hire company that actually hires out into different industries. From an OH&S and educational point of view there is going to be a growing responsibility on them to ensure that each area is covered.

Mr Hargraves—That is right. We have actually put together a training program—we have run it only two or three times—for labour hire consultants. They should be able to understand the basics of how to assess risks.

Mr BAKER—Absolutely.

Mr Hargraves—What to do when they have assessed those risks? The other part of the problem here, getting slightly off the point, is: at what stage do labour hire companies walk away from the job? If they cannot persuade their client that they see something that is inherently dangerous then what do they do about it? In most cases they go to the client and say, 'We think this is dangerous. We are not comfortable about this. We think that you should improve it.' Quite often the client will respond. In other cases they will not. So what can the labour hire company actually do about it?

Mr BAKER—Who is responsible for that? Is it the industry they are going into, the employer or the—

Mr Hargraves—The labour hire companies in some cases walk away and say, 'We won't touch it.' If the risk is too great, they will forgo the commercial opportunity and say, 'We won't touch that.' But they quite often do whatever they can to minimise the risk. You have to have people who are capable of assessing what that risk is.

CHAIR—Mr Hargraves, we have run out of time. We have other witnesses who are patiently waiting. Thank you very much for your submission and for coming forward and giving evidence. For our information, when is the New South Wales secure test case due to be finalised?

Mr Hargraves—The evidentiary part of the case has either concluded or almost concluded. The submissions will be in July. We would expect a decision probably sometime around December at the earliest.

CHAIR—In your recommendation of federal government intervention using constitutional powers I assume you are referring to corporations power?

Mr Hargraves—Corporations power or external affairs power.

CHAIR—Thank you very much.

[11.55 a.m.]

TANNER, Mr Anthony John, Executive Director, Roofing Tile Association of Australia Inc.

CHAIR—Welcome. While the committee does not require you to give evidence under oath, I am obliged to advise you that these hearings are formal proceedings of the parliament. Consequently, they warrant the same respect as proceedings of the parliament itself. It is customary to remind witnesses that giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The committee is not prepared to provide the protection of parliamentary privilege to allegations about particular individuals or companies. Would you please make a brief introductory statement in relation to your submission, and then we will have time for questions.

Mr Tanner—I will briefly cover the submission. As you would have read, the Roofing Tile Association of Australia represents the manufacturers and the installers of concrete and terracotta roofing tiles around Australia. As such, it represents all the manufacturers and over 90 per cent of those people who individually get up on roofs and install the product.

As part of the residential construction industry, the independent contractor system has been in operation for in excess of 30 years. Roof tilers, plumbers, bricklayers, carpenters—all those people—are employed under a contract system, either by the builder or by some other person in the value chain. The roofing industry is a little unique in that for many years the manufacturers have installed a very significant percentage of the roofs in their own right. So they sell roofs rather than roof tiles. When they sell a roof to a builder, they normally do a contract with someone like AVJennings or Masterton Homes or a large company like Murbach Building Supplies. They would get the contract for all the work and then they would allocate that to a series of contractors who would be available to put those roofs on for them.

The industry itself has been very efficient. The housing industry provides Australia with very high quality, affordable housing, as you would all know. The other aspect of that industry, of course, is its volatility. You can go from 160,000 housing starts one year, and two years later you can be down to 110,000 housing starts, and then along comes a Sydney hailstorm or a GST and you get a huge peak and everyone is trying to build houses before a certain date. Managing those sorts of things has led to quite an efficient structure, whereby these contractors elect to go into this industry. This is not an industry where there has been employment in the short or medium term in the past and then we have moved to this sort of thing; this structure has developed, and the people that operate these small businesses and work on the roofs have made a work and a lifestyle choice to actually move into that type of work.

Looking at how the industry would work, people have made attempts in recent times to start getting in between the people who put the roofs on and the people who either get the contract from the builder or the manufacturers—they are looking to represent those people. Specifically, in a number of states the CFMEU has tried to represent the roof tilers over the years. The majority of roof tilers are not members of that union, but every now and again issues come up and the union seeks to represent them. There was one case in South Australia in 1991 where the companies and the roof tilers all got together to talk about rates and the trade practices

commission, as it was then, fined them $250,000 each for breach of the act through price fixing. So the people are very conscious of their duties and their responsibilities. The association is very mindful of occupational health and safety and has recently made submissions to the National Occupational Health and Safety Commission. It has recently got a couple of policies out in relation to some issues in Queensland and New South Wales about working on roofs. It also gets itself involved in training and apprenticeships and is very conscious of the need to increase the number of skilled tradespeople.

It is really very clear to this industry that this is the most efficient way of managing what is a very volatile but very efficient and well-organised industry. It really hopes that, in any move to somehow or other restructure that or when people seek protection, the actual housing industry is seen in a different light to some of the other industries that are seeking to find what may be cheaper or less onerous ways of structuring the work force. The particular way the housing industry is structured works well, and I think by far the majority of people I have met in this industry do recognise their obligations to the people that they employ in one way or another.

CHAIR—In your submission, you say that state legislation imposes inconsistent standards across your industry by making independent contractors employees for certain purposes. Can you mention what some of these state differences are and how it actually affects your particular industry, then I will get you to make a comment about the New South Wales test case.

Mr Tanner—The major areas where the industry has found difficulties with people deemed to be an employee have arisen out of the provisions in New South Wales and Victoria. I am not absolutely certain which provisions they are, but they actually deem people to be an employee if they get 80 per cent of their income from a certain company and under certain rules like that. Quite often, a number of these independent contractors do get up to 100 per cent of their income from a single company because they elect to go to a particular manufacturer or a particular builder and say, 'We will do all the work for you.' They maintain a relationship—they have a good relationship. The contracts are on a house-by-house provision, but basically they have continuity of work. By structuring themselves that way and by being efficient and productive, when the industry turns down these are the people you want to keep working.

Mr BRENDAN O'CONNOR—On that exact point, if that is the situation—that is, they have a contract and they are providing a service; and we could argue all day about whether it is a contract of or a contract for—how are they paid in that sort of example?

Mr Tanner—They are paid by the actual job they do. If they are a roofer, you would look at the size of the roof and the company would say, 'There are 250 square metres there and that might be $12 a square metre.' There might be so many dollars per metre of ridge capping and there might be special allowances for steep-pitch work and those sorts of things. So it is actually built up to then say, 'We will offer you $3,000 to put this roof on.' That is how the structure works.

The major area that the members have been concerned about is the payroll tax provisions. On two occasions, one in New South Wales and one in Victoria, the state treasuries sought to deem those people to be employees and gather payroll tax from the companies. The companies put in very strong submissions to basically say that they were not employees and that it was a different

relationship. It was not that the treasuries came back and said everything was okay, but they basically stopped communicating and so one would assume it was addressed.

Mr BAKER—So Monier or whoever might have 15 or 20 different independent tiling operators on their books and then decide, 'Yes, we will have him, him and him,' but there would be no official contract or agreement between the actual tiling company, the tiler, and, say, Monier. If, over the period of 12 months, that particular company did 80 per cent of the work for Monier, it would fall under that silly piece of legislation which says that because it is 80 per cent it becomes an argument about whether someone is an employee or a contractor.

Mr Tanner—That is exactly right. There is no contract that says, 'We will give you so many houses,' basically. There can be an understanding, but certainly, as far as a written contract is concerned, each particular job is quoted, there is a schedule, there is a site plan and it is detailed as to what it will cost.

Ms HALL—Tell me about the understanding. What kind of an understanding?

Mr Tanner—The understanding comes about if you have a group and it is more than 15 or 20. In New South Wales a particular company, like Monier, might have 100 contracting businesses on their books. The understanding is that through the cycle you would always seek to protect the good people that do work for you, so that there is a strong incentive to do the work well and to do the work efficiently. There is the incentive for the people who are being paid an amount of money to put a roof on that, if they do that roof in two days rather than three days, there is another job waiting for them. So there is a reward for effort.

Ms HALL—So the understanding that these contractors have with the company in question is that they are going to get ongoing work from that company.

Mr Tanner—Yes, that is correct.

Mr BAKER—And if you do a poor job, they will say, 'See you later.'

Mr Tanner—If a poor job comes about you know it is poor to start with. You also get complaints. If you suddenly find you are getting a significant number of complaints from a company then you might find that one subcontractor has been responsible for all those complaints. So you go back and ask the question why.

CHAIR—What proportion of the members that you represent would be one- or two-man operations—roof tiling organisations, subcontractors?

Mr Tanner—It varies from state to state, but in New South Wales and Queensland it would probably be in excess of 70 per cent. In Victoria it might be slightly over 60 per cent. They are mainly doing work in their own homes—

CHAIR—What would you say to the accusation that these people are perhaps just setting themselves up in that sort of situation in order to minimise their tax liabilities and also that they are not required to train and employ others as a result? I would not have thought there would be too many young apprentices working for those sorts of people.

Mr Tanner—In terms of the first part of your question about tax avoidance—

CHAIR—Not tax avoidance; it is minimisation.

Mr Tanner—Tax minimisation is probably one of the benefits, if that is available, that they may seek. There is no structure at all and no particular means by which any of the companies that actually give work to those contractors would ever set about hiding any costs. Whenever there has been an inquiry into somebody's dealings and information has been subpoenaed by one of those members, it has always been made available. In terms of the training, there are significant numbers of apprentices. In New South Wales currently at Nirimba TAFE there are about 130 roofing tile apprentices. In Victoria there are about 180 roofing tile apprentices. We are working closely with the TAFE in Queensland to increase the number of apprentices. There are some training issues which probably are not related to any specific industry in Queensland, but certainly the drop-out rate of apprentices in Queensland is much higher than in other states.

Ms HALL—What is the drop-out rate in Queensland?

Mr Tanner—Forty-seven per cent.

Ms HALL—That is very high.

Mr Tanner—It is very high. There has been some work done. The Beattie government commissioned an inquiry and discovered that something like two-thirds of them either had a poor relationship with their indentured employer, the people they were working for, or had just found that that was not the industry they wanted to go into. We are looking to understand that better. The courses in Nirimba TAFE, and especially the one in Victoria, are very sound and get good results.

Mr HENRY—I am just interested to get your perspective. A lot of submissions and a lot of people are talking about dependent contractors rather than independent contractors. Do you see this as being the short straw in reality? What sort of impact does that have in terms of roofing tiling?

Mr Tanner—I guess I am not absolutely certain about the thrust of the question, but the contract tilers that work for the companies are independent in that they can go tomorrow quite often and work for somebody else. The manufacturers, in their supply and fix operations, compete for work. For the Clarendon group—New South Wales' largest builder and probably Australia's second or third largest builder—the Monier group was doing all of that work and now the Boral group is doing all of it. What will happen, of course, is that a number of those independent contractors will travel with that work simply because that roofing work has to be done. Also, a builder will be saying, 'There were some good people there—we would like them to continue to do that work.' So they will tend to also have a relationship with the builder as well as the manufacturer. That increases their independence.

Mr HENRY—I guess in that move towards dependent contractors, the next step is employees.

Mr Tanner—That would be correct. Once they become dependent then all of those deemed-to-be-employee provisions may be much stronger. At the moment there is a significant movement of contractors from one company to another. There are actually times when they almost bid for their work. The 1999 Sydney hailstorm and the 2001 GST peak produced a 40 per cent increase in tiler rates through no intervention of any organised body. It was just the sheer need to put a roof on. Those people were able to say, 'Yes, I'll help you, but this is the price today.'

Mr HENRY—Just moving on to training, you indicated that there was a 40 per cent drop-out rate.

Mr Tanner—In Queensland.

Mr HENRY—That is a bit less than the average, as I understand it, anyway, for trades?

Ms HALL—I don't think so! It would not want to be!

Mr Tanner—No, it was actually the drop-out rate for people moving into a roof-tiling apprenticeship in Queensland. That rate is very high. We are seeking to understand exactly the reasons for that. We have made some discoveries. There have been some particular comments made to young apprentices such as: 'Why would you want to be a roof tiler? Wouldn't you be better off being a carpenter?' That could have persuaded them. Roof tiling by its nature means that you have to be fit and confident of walking on a roof.

Mr HENRY—How long has there been an apprenticeship in roof tiling?

Mr Tanner—The apprenticeship in roof tiling goes back quite a few years, but it has been reinvigorated in the last five to 10 years.

Mr BAKER—What about improvements in the current system moving forward? This is about being proactive, not reactive. If we are reactive then we need to turn that into being proactive.

Mr Tanner—Improvements in the current system that the members of the Roofing Tile Association are really keen about working with fall very much into the state government basket. Those improvements are to do with occupational health and safety but working closely with the Commonwealth. I was asked a question about inefficiency of different state laws. Occupational health and safety is one real problem. If you are working in Brisbane you will invariably be doing work across the border in Tweed Heads. If you are doing work in Albury-Wodonga you have different rules depending on which side of the river you are on. These are key rules about how you actually provide occupational health and safety.

CHAIR—Just on that, based on what we heard from the previous witness and also some things that I have read about how you cannot just diminish your responsibilities on occupational health and safety by contracting out, in a situation where the roof tiler is doing a job for Monier or one of the other building companies, do those building companies tend to say, 'You carry the risk'?

Mr Tanner—They do.

CHAIR—So what we heard before from Mr Hargraves actually does not apply in your industry—is that what you are saying? It does not apply from convention or law?

Mr Tanner—It does not apply from convention but I think now it does apply from law. We have worked very closely with the New South Wales, Victorian and Queensland governments under different codes of practice and we are looking to work closely with the committee on the national code. Those codes and the regulators now basically say, right from the point of design—that is, if you are designing the roof and you have some inherent safety issue in that roof—you as a designer can be held liable as the person who is putting the roof on. So, in this particular case, the members are very conscious of their duties. We work with the Housing Industry Association to remind their members that they do also have accountabilities in this area.

Mr BRENDAN O'CONNOR—Who pays the insurance?

Mr BAKER—It comes back to the building site, doesn't it?

Mr Tanner—It comes back to the actual person—the independent contractor.

Mr BRENDAN O'CONNOR—The way I look at it is that the relationship between a roof tiler, as core contractor, and a larger company in some senses is similar to many employment relationships. There are piecework employees who do fixed work—they are offered a sum of money to finish certain tasks—and they are actually employees. I am just touching on the comment made by the chair when he asked about the incentive to define oneself as an independent contractor. To me it seems that the larger company can avoid payroll tax by not calling those people 'employees' but instead calling them 'independent contractors'. The independent contractor can avoid paying Commonwealth tax by reducing the tax on their income because of the lower rate for independent contractors than there might be for employees. So there seems to be, potentially at least, a mutual benefit in these two parties saying that they are in a relationship that is really one based on an independent contractor with a company, as opposed to an employee and employer. Can you see why people might consider that as a possible reason why there has been such a staunch defence of the independent contractor in the industry?

Mr Tanner—Absolutely. I can see why people would draw that conclusion. If you had a stable industry that had a set amount of work every year and you could say, 'Yes, we can employ 5,000 people this year, 5,000 next year and 5,000 the year after,' I think that would be a very valid argument. In the housing industry you have such peaks and troughs that doing that might increase the cost of a roof by $500 to $1,000 if the extra costs of employing those people were passed on to the consumer. If you then included the carpenters, bricklayers and everybody else in the cycle, it could well be that you could suddenly find yourself adding $10,000 or $15,000 to the cost of a house. Housing affordability, of course, is one of the key benefits that this system offers.

Ms HALL—Given that from time to time there will be problems—be it occupational health and safety or disputes between the various levels—what mechanism does your industry have in place to deal with that and how effective is it?

Mr Tanner—The Roofing Tile Association of Australia is fairly new. It actually came into existence only last October. It is an amalgamation of some incorporated associations and loose-knit associations in other states. At this stage it has not sought to become a mediator in those sorts of disputes, other than representing the industry to government in these sorts of inquiries and especially in safety and training. The association has not involved itself in disputes between independent contractors and a particular company.

Ms HALL—What is the redress in a situation where someone may be identified as a 'rogue employer', for want of a better term? What redress does that contractor have?

Mr Tanner—That contractor has the redress of going to another employer.

Ms HALL—But if they lose a lot of money—

Mr Tanner—If they lose a lot of money and are not paid for work then the normal recourse through the courts under contract law would be—

Ms HALL—Which is very lengthy and time consuming, and often they lose out again.

Mr Tanner—Prior to this role I was actually general manager for the Monier group and I was in that business for 10 years. I cannot think of an occasion when we actually had a dispute of that nature. There are rogue contractors, and there will be rogue builders that come and go, especially in buoyant times.

Ms HALL—That is right.

Mr Tanner—The manufacturing members are here for a long time. Where they have to do the work, they will seek to do the work well. The industry has not been plagued by those sorts of problems, to my knowledge.

CHAIR—Mr Tanner, thank you very much for your submission and for your evidence today. We appreciate the time you have given us. If there is any other information that you believe we should be made aware of, please feel free to send it in to the secretariat. Thank you.

[12.20 p.m.]

JONES, Ms Michele, Industrial Relations Manager, Ross Human Directions

CHAIR—Welcome. Do you have any comments to make on the capacity in which you appear?

Ms Jones—Unfortunately, Julia Ross and the other director of the company, Jane Beaumont, cannot be present today, so I am filling in for them. I know more about the industrial relations side of the submission, so please bear that in mind if I do not know all the answers to your questions.

CHAIR—Although the committee does not require you to give evidence under oath, I should advise you that these hearings are formal proceedings of the parliament. Consequently, they warrant the same respect as proceedings of the House itself. It is customary to remind witnesses that giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The committee is not prepared to provide the protection of parliamentary privilege to allegations about particular individuals or companies. Would you like to make some introductory remarks or a brief opening statement in relation to your submission before we proceed to questions?

Ms Jones—Given that I am standing in for others, I do not have any opening remarks. I will take questions.

CHAIR—What is Ross Human Directions? Are you a labour hire company?

Ms Jones—Yes.

CHAIR—What is the size of your organisation, and what type of industry do you provide labour hire to? Please give us a brief background.

Ms Jones—We were Julia Ross Recruitment, which essentially offered office admin placements. About a year ago we purchased Spherion, which was an IT recruitment consulting company. As a result, we have doubled in size and are now the largest recruiter in Australia in those areas. We are now moving more into the professional placements area, and as a result we are finding a lot more of these independent contractor issues. Previously we just did the classic placement of temporary employees on a casual basis in secretarial positions, but we have moved on since then and have a wide range of placements now.

CHAIR—Are you essentially New South Wales based?

Ms Jones—No, we are national and international. For example, we have offices in New Zealand.

CHAIR—One of the things that intrigued me about your submission, which I do not believe any of the other witnesses today are covering—certainly not the ones that preceded you—was

the comments in regard to your experiences with foreign workers. Can you elaborate on that and on some of the issues regarding bringing temporary labour hire employees in on visas?

Ms Jones—I think, mainly due to the skill shortages that Australia is experiencing, we are increasingly having to recruit from overseas. As a result, we have a lot of people who are on working holiday visas—417s or 457s—or are requesting 457s, which are four-year visas. They do have to be an employee in that respect, either of the labour hire company or the client company. However, they can also come in on their own company basis. If they own their own company in their country, they can come in and be hired as a contractor because they are licensed in their own country to be a company. In those situations we are finding that to attract people we have to offer a variety of arrangements and one of those is independent contracting.

CHAIR—So those people are coming into Australia knowing full well that they will be working for a labour hire company as an independent contractor?

Ms Jones—They seek to get work through a labour hire company.

CHAIR—What are the types of work that a lot of the foreign workers are doing for you?

Ms Jones—IT is a big area.

Mr VASTA—Which countries are they coming from?

Ms Jones—Predominantly India and the UK, but we have Swedish people as well. It depends on their expertise; some countries offer different expertise.

Mr VASTA—You advertise in those countries and then you take a certain quota?

Ms Jones—We advertise internationally and people approach us to look for work in Australia, so we have quite a lot of interest from overseas.

Mr BAKER—Is there any problem with work visas?

Ms Jones—457s are relatively easy to get—that is when you are an employee. But if they come over and they have their own company they have to go under a different visa, so it is harder for them.

CHAIR—One of the other aspects in your submission concerns the definition by the Australian Taxation Office of 'independent contracting'. You are suggesting a revision of that—perhaps changing the 80-20 rule, particularly the time frame aspect of it. Why are you advocating that and what proportion of your independent contractors would actually benefit from such a longer period of assessment?

Ms Jones—When you are talking about specialist skills you are looking at periods longer than a year in which they might have to achieve a project or an outcome. I think the year they currently use is the financial year. They are talking about using the WorkCover premium year—80-20—for the WorkCover changes. I do not know how any company, let alone an individual, can monitor where the 80-20 period is calculated from. Apart from that, one year is not

necessarily applicable for a lot of work. Even the previous witness talked about how a contractor would like to stay with one company and pick up a variety of work from them. But they are still with one company. They still have different clients indirectly, because the company is using the services of others. So it is really impractical in a lot of situations just to have a 12-month period, regardless of whether it is a fiscal, calendar or WorkCover premium year.

Mr BRENDAN O'CONNOR—How long should it be for?

Ms Jones—Up to five years would be the maximum. The company has not formed an opinion on that. But certainly two years would seem to be more appropriate, and perhaps it should be looked at on a case-by-case basis.

Ms HALL—I find it really interesting to look at labour hire from this perspective, because I come from a more industrial area where labour hire tends to be at that level. The issue of mature age workers is quite important, particularly when we look at it in the context of our last inquiry. In relation to mature age workers—I may be getting a little outside what we are looking at here—do you have a particular strategy for attracting mature age workers? Do you have a particular way of evaluating and then organising for them to work with particular companies?

Ms Jones—In terms of strategy, I know Julia Ross talked about this issue when it was first introduced by the federal government as policy. I am not quite sure what she said, so I could not comment on that. While we encourage mature age workers, I think the main point of our paper is that they approach us wanting different types of arrangements for themselves because of their superannuation reasonable benefit limits, their income sources and whatever else they are getting. If you really want expert people to come back into the work force or to stay longer, they will not work unless it is under conditions that suit them financially—and it appears to be more and more the case that that is not as a full-time employee or even as a part-time employee.

Ms HALL—Would it be fair to assume that the greater the level of skill a person seeking a placement with a company has, the higher level of security they have and the more power they have to negotiate good conditions and pay?

Ms Jones—Absolutely. More than anything I think financial security determines the position people take when they are looking for work and under what circumstances they will work. Generally speaking, these days the more mature they are, the more likely they are to be financially secure.

Ms HALL—I am sorry, my question is: does the greater the level of skill a person has, no matter what age they are, mean the greater their bargaining power?

Ms Jones—Yes, it does, because they are in shorter and shorter supply, it would seem. As the submission said, we are often forced to knowingly take someone on when it might not actually be an independent contractor, by definitions such as for WorkCover, payroll and those types of definitions, but it is what they want and otherwise we will not get them and they will go to another labour hire company.

Ms HALL—So the skills shortage is having an impact in your industry?

Ms Jones—Yes, particularly in the IT area. While there are a lot of people entering it, there are also a lot of bottlenecks in certain areas of IT. What a lot of companies are looking for now is experience, so even though there are a lot of people in IT, there are a lot of people not earning much. It is really those high-skilled areas that are still in demand, and those people tend to be older. We have to just listen to what they want and try within the law to accommodate their needs, but that is getting harder and harder with all the definitions. Even then they might well be considered an employee at the end of the day if there is a legal case.

Mr BAKER—Your submission describes uncertainty surrounding case law using common law principles. Can you describe in more detail how this can be addressed?

Ms Jones—In the industrial relations cases that go on, there is a set of about six indicators of whether there is an employment relationship. Because it is looked at on a case-by-case basis, they cannot be applied perfectly in each case. We quite often get conflicting cases where it would seem as though the facts are fairly similar but the outcomes are different. What makes it hard for companies is that after several years of accepting an independent contracting arrangement with all the benefits that have come with it the person then turns around and wants to do what we would call double-dipping. They want the redundancy and a notice period that would be accorded to an employee whereas previously they have negotiated quite different conditions and were happy with that. Everyone hired as an independent contractor is hired at that risk at the moment, where there is no way of telling what the outcome might be in the Industrial Relations Commission. You can minimise your risks—that is all we, as a company, do—by looking at these cases and trying to put practices in place that are consistent with them, but ultimately the truth might be hard to prove when it comes down to one word against the other.

Mr BRENDAN O'CONNOR—So you are really after clarity in terms of approach, aren't you?

Mr BAKER—Consistency.

Mr BRENDAN O'CONNOR—What proportion of your employees in Australia are actually on visas and what proportion are permanent residents or citizens?

Ms Jones—We probably have 100 on visas.

Mr BRENDAN O'CONNOR—What is your total number in Australia?

Ms Jones—It is a bit difficult to say, because our temporary work force goes up and down quite a lot. It goes up to 6,000.

Mr BRENDAN O'CONNOR—So what do you pay them under? What instrument do you apply to pay your temporary employees?

Ms Jones—It depends on the job they do and what award they are under. They might be award free, as a lot of IT people are. Sometimes—more and more—we might be subject to another company's enterprise agreement, if they refer to labour hire site arrangements. We are under one federal award in the telecommunications industry for all those types of placements, but generally we are under state industrial awards or they are award free.

Mr BRENDAN O'CONNOR—Do you have your own enterprise agreement?

Ms Jones—Not at present. We are looking into that.

CHAIR—Are you looking at that across all 6,000 people, or are you going to do it industry by industry within your work force?

Ms Jones—Yes, I think, given the variety of our placements, we could not do one enterprise agreement. We would probably look at that issue if a major client wanted an enterprise agreement with us.

Mr BRENDAN O'CONNOR—Do you get a significant turnover of staff, with people wanting to get into more permanent work?

Ms Jones—That does happen. We have permanent arrangements with a lot of our clients anyway. It is just really that there are only a certain number of permanent vacancies.

Mr BRENDAN O'CONNOR—Who are the clients here that you are talking about?

Ms Jones—Major clients.

Mr BRENDAN O'CONNOR—Do you mean the host employer—that situation?

Ms Jones—Yes. We do not use that term. We find that it is even more confusing.

Mr BRENDAN O'CONNOR—No-one seems to want to use the words 'employer' or 'employee' these days.

Ms Jones—We are an employer.

Mr BRENDAN O'CONNOR—That is right. As an employer, are you responsible for the health and safety of your employees when they are on other worksites?

Ms Jones—Yes. But the legislation makes it a joint responsibility.

Mr BRENDAN O'CONNOR—So what responsibility do you take?

Ms Jones—We do inductions and site inspections and we are the first point of call when an incident occurs. Our employees are covered by WorkCover premiums.

Mr BRENDAN O'CONNOR—How much do you charge your clients? Have you some sort of schedule that you charge as a labour provider?

Ms Jones—Yes, our on-costs would include a component for our workers compensation.

Mr BRENDAN O'CONNOR—But if I want three employees with IT skills for 12 months working, say, 30 hours a week, how much do I have to pay you? How does that work? In other words, what do you take from the provision of the labour?

Ms Jones—I think that is a commercial-in-confidence question.

Mr BRENDAN O'CONNOR—Are you saying that if I came to you as an employer I could not get any idea of how much you would cost?

Ms Jones—No, we would look at the hourly rate.

Mr BRENDAN O'CONNOR—I will put it another way: what are the on-costs of your employees?

Ms Jones—The on-costs would vary up to, say, 25 per cent. That is given a mainly white-collar environment. The on-costs would increase in more high-risk placements, like industrial placements, which we do a few of.

CHAIR—Just to follow on from Mr O'Connor, I would like to ask the same question we asked the first witness: what advantage is there to an employer in paying you this fee and these on-costs rather than employing a person direct? Why would they do that? Why would they incur that extra cost? By the sound of it, they are also incurring workers compensation liabilities as well, because you are factoring in your WorkCover premiums in the fee you are charging. So why do they do it?

Ms Jones—Because generally speaking they are short-term placements. They do want someone for a particular time period or project so there is a benefit to them in paying a bit more just to get the short-term aspect of it. I think overall when you perhaps look at the total costs of an employee it may well be less expensive for them, when you look at company benefits and company policies and permanent facilities for permanent employees. Often those things do not apply to labour hire staff, so companies do not have to extend all those employee benefits to the short-term placements and that saves them money as well.

CHAIR—So it is for flexibility reasons, and there are also some cost savings.

Ms Jones—Yes. I do not know about the cost savings—I have wondered that myself. But there are certainly enough willing to do it. I think the cost savings would vary, depending on how long the assignment was.

CHAIR—As there are no further questions, thank you very much. Please pass on our thanks to your hierarchy for their submission and we thank you for making the effort to come in and give evidence first hand.

Proceedings suspended from 12.40 p.m. to 1.35 p.m.

CHRISTODOULOU, Mr Chris, Deputy Assistant Secretary, Unions New South Wales

HUGHES, Ms Alisha, Industrial Officer, Unions New South Wales

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that these hearings are formal proceedings of parliament and consequently they warrant the same respect as proceedings of parliament. It is customary to remind witnesses that giving false and misleading evidence is a serious matter and may be regarded as a contempt of parliament. The committee is not prepared to provide the protection of parliamentary privilege to allegations about particular individuals or companies. Would you like to make any opening comments or talk to your submission?

Mr Christodoulou—I might just make some opening comments or talk to the submission. I have some supplementary information I would like to hand up during that. First of all, Unions New South Wales have had, for a long period of time, some great concerns about the adverse effect that the rise of the use of labour hire companies is having on the work force generally and, in particular, the high use of casual labour associated with that industry. It is in that context that we are putting forward some of the information to this inquiry. We do recognise, however, that the labour hire industry has a legitimate role to play in a modern economy, as do modes of casual labour. There is no question about that. However, it is also apparent, particularly in the evidence that we have garnered through the secure employment test case in New South Wales—which I will talk about in a moment—that there are many employees now severely disadvantaged by the inappropriate use of labour hire and, in particular, by the fact that they are working in casual positions that ought in normal terms to be permanent positions.

With respect to independent contractors, again we acknowledge there is a very legitimate role for bona fide and legitimate independent contractors to play in our economy, but there are more and more incidents occurring where we think companies are basically turning people into independent contractors for the sole purpose of avoiding minimum wages and conditions obligations under awards, or things like workers comp premiums et cetera.

Our submission has been kept brief with this in mind: the ACTU, as I understand it, have put in a comprehensive submission—and we have seen a draft copy, not their final copy—which we fully support, along with their recommendations. The New South Wales government have also put in a submission. Save for one small matter, we are fully supportive of their submission too. What we have tried to do with our submission is highlight a couple of examples of some of the problems associated with individual workers and independent contractors associated with that disadvantage that I spoke of briefly.

In our submission we have enclosed a couple of documents that we think might be useful for the inquiry. First of all, in appendix A there is an affidavit by Professor Richard Hall. This was commissioned by Unions New South Wales for the test case. It outlines the trends, the evidence, the implications relating to the incidence and growth of casual labour and the use of labour hire. It is quite an extensive affidavit. We have not enclosed all the appendices that go with that affidavit, otherwise we would have been sending you volumes and volumes of information. But

Professor Richard Hall is fairly well known in academic circles, and that affidavit provides some useful information.

We have also enclosed the recent Productivity Commission report on labour hire employment in Australia which is written by the staff working at the commission, so it is not a commission document per se but the ownership is by the authors. I am sure you have probably already had that tabled but it is there for your information. In addition, I am sure you will already have the Parliamentary Library research note on casual employment trends and characteristics, but we have enclosed that. We have also made reference to a major report—we have not enclosed it only because it is fairly thick—that was commissioned by the Recruitment and Consulting Services Association, which is the peak body for labour hire companies. They commissioned that report, which was done by Linda Brennan and a range of other academics from RMIT, on the labour hire industry. Some interesting findings have come out of that report which we have alluded to, and they are that 66 per cent of labour hire employees said they would prefer to be employed directly by the host employer and that 64 per cent of the casual employees said they would prefer to exchange their casual loading for permanent entitlements such as annual leave, sick leave and redundancy. So that is a bit of background we have also included in our report.

I will now take you briefly to the secure employment test case. As a consequence of all our concerns about the rise in casualisation and labour hire, we made a decision some years ago to embark upon a major test case. I have enclosed, as appendix D of our submission, our opening submissions to the case which I think give a good picture of where we were taking the case at the beginning. The case itself is now concluded—we have only got submissions to put forward. Some 270 people gave evidence in that case, with over 300 exhibits. The case effectively deals with five claims, four of which deal specifically with labour hire and casual work, which fall within the terms of reference of this inquiry.

I will indicate what the claims are because that might not be transparent—they are in the submission but they are all through the submission rather than being put in finite terms. The first claim is that if you are working regularly and systematically as a casual and it is likely that the job you are in is going to continue, then the employer should offer you are permanent job. Then it is the choice of the casual employee as to whether they would like the permanent job or not. So we have kept the element of choice in there, which I must say is something the current federal government says is important to employees and employers. Secondly, we have also said that if you are an employee of a labour hire company and you happen to be working on a host employer site for six or more months, then that same choice should be given to you, but to be employed by the host employer. The reason that is important is that if we are successful with our first claim then the way of avoiding that is to simply get a labour hire company to come in and do your casual work. So, from that point of view, that claim stands with the casual conversion claim.

The third element is that if labour hire works as it should, and that is to provide supplementary and casual labour for demand peaks, then there is no reason why workers of the labour hire company should receive any less remuneration than those employees would otherwise have been paid had they been directly employed. So the third element of our claim is that there should be parity of rates between labour hire employees who work as casuals for a particular host employer and the direct casuals who work for a particular host employer.

The other element of our claim again touches on labour hire. We are seeking a provision in all awards that the host employer and the labour hire companies provide access to light duties or suitable duties if a labour hire employee suffers injury. In a major inquiry into the labour hire industry some years ago which was chaired by Jennie George, we found that labour hire workers that become injured have less opportunity to rehabilitate themselves back into the workplace, because a host employer will not provide access to the injured employee. Of course, the labour hire company themselves do not have a workplace of their own other than where they have contracts with hosts. So there is a provision in our claim for reasonable access to suitable employment for injured labour hire workers. The test case has other claims in it associated with outsourcing, but they are the specific ones that I think directly impact on the labour hire industry.

On labour hire itself, we have had numerous examples of how labour hire employees are disadvantaged by their current arrangements, but one that we like to highlight, and which is probably an extreme example but nonetheless one that is real and is there, is that of William Parker. His case is best highlighted in a letter that he wrote to Jackie Kelly that is in appendix E of our submission. The letter is fairly straightforward and is consistent with the evidence he gave during the case. Mr Parker has been employed at the site with this host employer for seven years. He has been receiving a roster 12 months in advance which included regular overtime. So he was regularly working in excess of 38 hours per week. He had received none of the benefits that permanents get; in fact, in the evidence he gave during the test case I think he only received about three weeks off in the whole seven years, so he was constantly working.

At least for the last four years, Mr Parker has been seeking to be converted to permanent status. The two labour hire companies that he has worked for have refused that request, and the host employer, which we believe is the organisation that should be even more obligated to give him a permanent job, has also refused that request. In the seven years he has been there, whilst he has received a casual loading, if he were ever given an hour's notice he would leave with no redundancy pay and would certainly be disadvantaged with respect to job security and the like.

Ms Hughes—One thing with Mr Parker's situation is that he has worked for two different labour hire firms in that time although he has been on the same site. One labour hire firm basically said, 'We are going to transfer you to another labour hire firm and you can continue working on this site.' He actually lost four years worth of New South Wales long service leave provision, so he has no entitlement after his seven years to take any long service leave. So there are many disadvantages of being a labour hire employee for Mr Parker as well.

Ms HALL—When he transferred from one company to the other, did the first company lose its contract with that host employer?

Ms Hughes—They just decided not to operate at that site anymore, and another labour hire company came in. It was no choice of Mr Parker's; the company simply moved him across.

Ms HALL—Were there other employees in a similar situation?

Ms Hughes—There were.

CHAIR—Did he have the option of staying with the first labour hire company and going to another site?

Ms Hughes—I believe from his evidence in the test case that he was simply told he would be moved across.

Mr Christodoulou—On the issue of independent contractors, I have given some very good examples of where we say there has been inappropriate use of independent contractors. I will quickly run through those, because I think they are all very different scenarios, and I have one supplementary example. The first example was during the year 2000, and this involved an extraordinary set of circumstances that I was personally involved in. A major multinational catering company tried to convert up to 600 young people from being direct employees to being independent contractors on a major Olympic venue. The young people were required to take out ABNs at the request of the employer and then be paid on a commission basis rather than the award rates or the agreement rates that were set via the New South Wales Industrial Relations Commission. I have attached: one of the letters that we received at the time from the parents; some of the advertisements that the company used to lure the workers to the stadium, which were all about proper rates of pay and not about being independent contractors; the advice the company had given to the workers about the changed arrangements; and some correspondence entered into at the time with the company by Unions New South Wales. Ultimately, we fixed it up by negotiating an agreed outcome which resulted in those people going back onto the agreed rates of pay and being or continuing to be employees.

I think that example highlights the role that unions can play in those circumstances. Although we did not end up going to the New South Wales Industrial Relations Commission because we were able to negotiate that outcome, it was clear that the fact that we could do that enabled us to be able to resolve that issue. One of our fears about some of the proposals in terms of IR changes is that we are going to lose the ability of the independent umpire to be able to look at these things without being involved in quite lengthy litigation.

I want to highlight another issue, and this is some new information that I will hand out. This is a statement we recently received which was produced for us by the LHMU. We put out a circular to say that we were coming to the inquiry and asked whether there were any more recent examples of people who were being disadvantaged by so-called independent contractor arrangements. The statement was prepared with the assistance of the union, because I understand that the person involved does not have very good English. I just want to make that clear. Nonetheless, as I understand it, what is in the statement is accurate and correct. The person was converted by the employer to become an independent contractor. Essentially, their work was no different—that is, they continued to do the same cleaning duties at Target for the same number of hours. What had changed was that they were getting less than the award entitlements—you will see the calculation on the back page—which they would have otherwise got, simply by being told that they would now be an independent contractor.

When you look at the differences—from the summary of award entitlements—you will see that they do not take into consideration either sick leave or long service leave accrual, or any other on-costs associated with being an independent contractor such as workers comp or administration costs. Also, one presumes—although it is unclear—that if this person is a legitimate independent contractor he would be organising his own cleaning equipment and the like.

Under New South Wales law this issue can be remedied in a number of ways. But clearly the easiest way of remedying this is simply by virtue of a dispute notification in the New South Wales Industrial Relations Commission. Under its general powers, there can be the ability to look at assessing this situation under various sections of the act. I suggest that it is these types of arrangements that we want to avoid. If any regulations or laws are to be introduced at a federal level, in our view they clearly have to be laws that protect employees against being deemed or being made to be independent contractors for the sole purpose of employers avoiding the award obligations that they should be paying to employees.

Last but not least under that heading, at appendix G there is a further statement from an independent contractor who works in the construction industry. You would be very aware of the recent collapse of Walter's. I must say that I was intimately involved in that dispute. When I say 'dispute', a range of employees' entitlements were affected by that collapse. Whilst I will not go into the issues about the direct employees, I will say that many independent contractors were left without any recourse. They were down the bottom of the pecking order in terms of claiming anything from the administrator. The union had a role to play in negotiating with the clients of Walter's to help some of the small companies get paid what was owed to them.

The reason I emphasise that is because I understand that there was also some suggestion that in the future there may be some consideration about unions not being able to represent independent contractors. I am not sure whether that is just a rumour or it is real, but our view clearly is that there is a role for us to play. It is clear that, had the union not played that role in the Walter's collapse, not only many independent contractors but also many companies or subcontractors that employ people would not have been paid the moneys owed to them. It was only the CFMEU that was able, through negotiation, to fix that problem at the end of the day.

CHAIR—Chris, your evidence so far has been fantastic and I am intrigued by everything you are saying, but we have only 15 minutes to go.

Mr Christodoulou—I will stop there, then. I will simply say that, apart from what we have got there, we do support the submissions of the ACTU and the New South Wales government.

CHAIR—Ms Hughes, do you have any comments to make?

Ms Hughes—No, I will not make any additional comments.

CHAIR—On the issue of full-time casuals and the expectation that people have to move across and how that should be available to them, we heard this morning from the AiG. They basically said that there is a clause in the metal trades industry award which allows casuals to do that. In the four years that it has been operational there has been very little uptake. I do not question that and I do not question your comments either. Could you give me an idea of why that would be the case in that particular award versus the evidence that you are getting that shows that people actually want to do that?

Mr Christodoulou—There could be a range of reasons. One is lack of education of the employees concerned that they have a right to convert. It may well be that employers are not enforcing the provision by offering the employment. There could be a whole host of reasons why employees may not be taking that issue up. But, at the end of the day, presuming that they were

all legitimate reasons why employees did not want to take that up, that is no reason why the clause should not be there. People who want permanent employment should have the choice available to them after that period of time.

CHAIR—You said that you support the ACTU's submission to the test case. Here it says that you support the submissions to the inquiry of the ACTU and the New South Wales government, except for the New South Wales government's position on the secure employment test case. Where is the difference between your position and the New South Wales government's position? The reason I ask is that up until yesterday we thought that the New South Wales government was going to be appearing before us, but they are no longer going to appear.

Mr Christodoulou—I was told that. When we walked in I did not know that either. In terms of the test case, the New South Wales government has appeared. They support, firstly, the commission dealing with all the matters we have raised before them. They say that there is merit in many of the clauses we want to put in the awards. Where we differ is that they say that rather than it being a test case standard, with the clauses that we seek being introduced in all the awards automatically, it should looked at on a case-by-case basis. That is where the difference lies—not that they do not support what we want to do. It is just that they do not think it should be automatic. That is why we put those words in our submission, because I did not want the inquiry to think that we were completely at one when that was clearly the difference in the test case.

The other thing that the New South Wales government has said is that perhaps the commission should establish a set of principles around the questions of casual conversion and contracting out et cetera, as distinct from having the clauses that we want go into the actual awards themselves.

CHAIR—You want a clause whereas they are going for conditions.

Mr Christodoulou—No, they are going for principles and a case-by-case approach.

CHAIR—Thank you.

Mr BRENDAN O'CONNOR—In terms of the role of Unions New South Wales in dealing with labour hire companies, have you on behalf of affiliated unions had to negotiate any agreements, whether they be awards or enterprise agreements, with any large labour hire companies? Has that happened a great deal? We are getting evidence suggesting that there are increasingly more instruments and regulations occurring, particularly with the larger companies.

Mr Christodoulou—Unions New South Wales has probably facilitated a number of meetings with labour hire companies. In the main it is true that a number of our affiliates are now entering into more enterprise agreements with labour hire companies in terms of regulating wages and conditions. They tend to be with the bigger companies. A lot of those bigger companies come along and say, 'Look, these agreements are fine but because we are paying site rates of pay and parity rates we are now being undercut by other operators.' So to some extent what our test case claim seeks to do is to introduce a level playing field by establishing the principle of parity in rates of pay.

CHAIR—Do you have a view on whether there should be some regulation about whether a company can set up and call itself a labour hire company? Does Unions New South Wales have a particular view on that?

Mr Christodoulou—We certainly support the proposals in the ACTU submission for a licensing system or a form of regulation. We set up a working party arising out of the task force to look at the licensing regime in New South Wales. That was put on hold as a consequence of our test case and it has not proceeded thus far. A licensing regime may be the best way to ensure that anyone setting up as a labour hire company has to meet certain standards, including standards of behaviour with respect to industrial relations.

Ms HALL—I would like to turn to OH&S. Earlier today we received evidence that the rate of injury for employees working in labour hire companies is no higher than that for those directly employed. The submission from CFMEU Mining is a little contrary to that. It states that the three most recent fatal accidents involved the deaths of people who were working for labour hire contractors in the mines. What is your experience? Do you find there is a higher rate of injury for those people working through labour hire companies? If so, what would you attribute this to? One suggestion this morning was that people working in the labour hire companies are given the dangerous jobs to do. I would like to hear your thoughts on that matter.

Mr Christodoulou—I have not got with me data on that. I know that we did have an expert witness, Professor Quinlan, who dealt with that matter. Unfortunately I was not at the hearing when that evidence was put. It well may be that I could provide the inquiry with the transcript of Professor Quinlan's statement which may have some data on that very question of whether there is a higher incidence. I can tell you that there is certainly a lot of information coming forward that, when a labour hire employee does get injured, the chances of that person being able to be provided with suitable duties or light duties in order to assist with their rehabilitation back to work is not as good at all as it would be if they were a direct employee of the company. This is why we have as one of our key claims the issue of having some accessibility to suitable duties provided by the host employer.

In terms of labour hire employees and contractors generally, evidence has come out the test case to suggest that there are two extremes. Some employers, when they have contractors and labour hire people coming on, make sure that the contractors and labour hire employees go through the very same induction process for occupational health and safety as their own employees. They require certain standards to be made and monitor the work that those people carry out as if they were their own employees. There is the other extreme where the labour hire company wants to do the right thing and make an assessment in the workplace of the risks involved before they send the employee in, and the host employer basically says: 'No, we just want the labour. You are not to come in and do a risk assessment of our workplace.' So you have all sorts of extremes happening out there, hence our claim in the test case that there ought to be a joint responsibility between the host employer and the labour hire company to provide a safe workplace and ensure that everyone has the proper inductions, so that everyone is treated equally in the same work environment.

CHAIR—I am a little confused by that. I seem to recall evidence from this morning saying that laws are in place for that joint responsibility now. Perhaps five or 10 years ago it was not

there but now there is joint responsibility legally entrenched. Is that not the case? Is that what you are saying?

Mr Christodoulou—Under the Occupation Health and Safety Act there is joint responsibility—that is true. We are saying, though, that that joint responsibility needs to be enunciated, I suppose, in more layman's terms in the actual awards so it is clearer about the responsibilities at the shop floor. A lot of workers and a lot of employers do not always pick up the Occupation Health and Safety Act and read it verbatim and understand what their obligations are. I can say that in practice there are some real problems with adherence to those particular aspects of the law.

CHAIR—So it is the application of it.

Mr HENRY—Moving on to the independent contractor arrangements, there seems to be a lot of complexity and certainly some confusion between various state jurisdictions and the federal arrangements with respect to who and what is an independent contractor. And there is the issue of the deeming provisions used to classify a number of self-employed or independent contractors as employees for the purposes of workers compensation, superannuation and other such things. What would Unions NSW see as an appropriate definition? How would you see it applying?

Mr Christodoulou—I do not think I can answer that question on behalf of Unions NSW, because we have not thought about it in terms of whether we could write what or who an independent contractor is. As you know, there is a lot of case law about control tests and the like and a number of other obligations. But there is one fundamental issue on which I think I can speak on behalf of all our affiliates and that is that nobody should be classed as an independent contractor if they are receiving remuneration less than what they would have received had they been an employee under their award, plus their on-costs—and their on-costs are normally around 30 to 35 per cent. So if somebody is getting lower than their award arrangement then they are clearly being disadvantaged and they ought not to be classed as an independent contractor, irrespective of the control tests or any other type of arrangement.

Mr HENRY—In your submission you also mention that unions provide services to independent contractors. Should those independent contractors also be members of unions?

Mr Christodoulou—Absolutely. If unions have the ability to represent independent contractors, as they have in the past, then unions ought to have the ability to represent them. The fine line here is that sometimes people are purported to be independent contractors when in fact they are really employees. There are also the examples I have given before of legitimate independent contractors who have a problem with a principal not making good their payments or who have all sorts of other problems with health and safety or whatever in the workplace. A lot of the time they turn to the union because they find that their own employer association has a conflict of interest. Let us say, for argument's sake, they are a member of the Master Builders Association. Is the Master Builders Association going to stick up for their rights as an independent contractor by going against one of the major construction companies that is also a member? Unions can play a role in representing these people, whether they are legitimate independent contractors or real employees.

CHAIR—What prohibition is there at the moment against them doing that?

Mr Christodoulou—There is probably none at the moment. I do not think there is anything—but, as I have already mentioned, it has been suggested that the federal government might be looking at putting in some prohibition.

Mr BRENDAN O'CONNOR—That is right. There is proposed legislation.

CHAIR—But right now—in terms of Stuart's question—there is no prohibition.

Mr Christodoulou—No, and the fact that there is none means that we can actually—

Mr BRENDAN O'CONNOR—But just to make it very clear: the committee members are aware—if they are not, they should be—that legislation is being proposed to proscribe the capacity for unions to represent independent contractors in certain circumstances.

In your submission, you talked about the problem that arises when a labour hire employee is injured and the host employer has no obligation to have them continue on in some form of alternative duties. Indeed, the labour hire company do not have the place to locate them, because they do not have an actual workplace. Have you thought of ways in which that can be addressed? Clearly, one way would be not to have labour hire employees in those situations. Leaving that out as probably a preferred option, are there ways in which you think undertakings could be given by a labour hire employee and the host employer that, in the event of an injury of an employee, some form of alternative duties would be provided to them so that the employee could be gainfully employed rather than sitting at home on WorkCover?

Mr Christodoulou—It actually forms a critical part of our claim in the test case, and the actual words are probably somewhere in the submission. We want to put in awards words that basically say that if an employee of a labour hire company is injured, the host employer, where reasonable to do so, will try to find alternative or suitable duties within that work environment in which the labour hire employee was injured.

That does not provide an absolute obligation, because it has to be reasonable, but at least having that provision in there would allow both the labour hire company and/or the employee and/or the insurance company and/or the union to have that discussion with the host employer and look at what they could do to facilitate that. To give an example, the New South Wales state government has many thousands of labour hire employees, say, in the clerical area. If those labour hire employees get injured at the moment there is not an obligation on the state government to act. Let us say that someone has been working for six months for the Department of Community Services and they get injured. There is not a capacity or an obligation for them to put that person on light duties. Had that person been employed as a casual directly, they would have had that obligation.

So that forms part of our claim. We think that will go a step towards assisting the problem. That is consistent with the recommendation made under the task force back in 2000 that Jennie George chaired. She proposed that that be put in legislation. The New South Wales government unfortunately have not picked it up. Our view is that if they have not picked it up maybe we have the capacity to convince the Industrial Relations Commission that they should.

CHAIR—I have two questions to follow that. Firstly, why has the New South Wales government not picked it up? Secondly, in the discussions that you have had with the big labour hire companies, the big players, what has been their reaction to it?

Mr Christodoulou—The recommendation of the task force was unanimous. That included all the labour hire companies that were represented on the task force. Their approach is that they are not opposed to it. They clearly see some advantages from their point of view, although some of the big players now will say that they have become so big that they are able to sometimes find other arrangements. Nonetheless, in the main they support the proposal. As to why the state government have not introduced it, I cannot give you a clear answer on that other than to say that their alternative approach in the test case is to say that when the labour hire company and the host employer enter into an arrangement part of that contractual arrangement should be this issue of the host employer providing some form of rehabilitation, and that should be a contractual arrangement between the two. That sounds all well and good, but they have provided no evidence to show anywhere where those contractual arrangements exist.

CHAIR—Where that actually takes place, yes.

Ms HALL—Brendan has asked half of this question, but the other half of the question is: given that there is joint responsibility for that injured worker, has the union a position on the labour hire company offering selected duties, having an obligation to seek some sort of work for that injured worker to undertake? Is that included in your test case?

Mr Christodoulou—There is already an obligation in the sense that they are the employer, but the reality is that most of them say, 'We can't meet the obligation because the host employer won't let us place the person back into the workplace.'

Ms HALL—Yes, but not necessarily with that host employer.

Mr Christodoulou—Most of the other host employers would say, 'Why should we take on the burden when the person is not our employee?' I suppose the answer in a practical sense is that we would like that to be an obligation but in practice it just does not happen. I cannot give you any examples of particular issues. There probably are some out there, where unions have negotiated these arrangements, but I cannot give you any right here and now.

CHAIR—Chris and Alisha, thank you very much for your submission, all the appendixes and the supplementary submission that you have given us today. Importantly, thank you for coming in today and giving us first-hand evidence.

Mr Christodoulou—Thank you.

CHAIR—If you have any other information, please pass it on to us. Thank you.

[2.21 p.m.]

SUTTON, Mr John, National Secretary, Construction and General Division, Construction, Forestry, Mining and Energy Union

ROBERTS, Mr Tom, Senior National Legal Officer, Construction and General Division, Construction, Forestry, Mining and Energy Union

CHAIR—The committee does not require you to give evidence under oath but I should advise you that these hearings are formal proceedings of the parliament and consequently warrant the same respect as proceedings of the House itself. I remind you that giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The committee is not prepared to provide the protection of parliamentary privilege to allegations about particular individuals or companies. I now invite you to make an opening statement or some introductory remarks.

Mr Sutton—Thank you for the opportunity to appear before your committee. I might say at the outset that I have had some 25 years experience working for the CFMEU construction division and the building union that existed before the CFMEU. My colleague Tom Roberts has had 17 years experience working as legal officer for the same organisation.

I will start my comments by dealing with something topical. It is no accident that we have a skills crisis on our doorstep in Australian industry today. Essentially, we have reaped what we have sown over the last 10 to 12 years in this country. The fashion emerged about 12 years ago, and has been exacerbated in the last 10 years under the Howard government's policies, that what was needed in industry was the lean and mean employer. The successful company was the company that managed to cut its overheads, that cut out the fat and that simply competed fiercely at the bottom line. That was the new vogue we were told about some 12 or so years ago. One of the major consequences of that kind of short-term thinking was that employers with large numbers of direct employees, employers who traditionally employed apprentices, employers who invested in R&D, employers who invested in the best safety—that is, employers who were concerned to plan for the future of their companies and their industry—largely became uncompetitive. They had to adapt, they had to change and they had to do it quickly. Parallelling that major change in Australian industry was the idea that defraying responsibility onto others was the way to go, the way to be successful. Hence the dramatic rise in outsourcing or, by another name, subcontracting and, of course, the startling growth of labour hire in that 12-year period.

I will speak firstly of subcontracting in the building industry—something I have had a lot of experience with over many years. It has grown dramatically in our industry since World War II. There is, let me say, an important place in the construction industry for legitimate subcontracting companies. Our major concern here today is the explosion of bogus independent contracting in the building industry. That has really spiralled in the last 20 to 30 years. It goes back a fair way, and it has continued to get worse and worse over that time.

While concrete ABS data is hard to find on this question, the Housing Industry Association have recently said via their principal, Ron Silberberg, that they believe that some 350,000 people are in the construction contracting business doing residential work of some kind or another. Those 350,000 workers in the construction industry represent considerably more then 50 per cent of the blue-collar work force of our industry. So we are talking about very large numbers of people who are in or about the contracting business, or are contractors of some kind or another.

What we have in these two thick folders here are many submissions that we have put to just about every inquiry that has been running in this country on this issue over a very long period. I can remember as far back as the 1979 Burns inquiry into contracting in the building industry. What you will find here is some of the material that we have tendered at these inquiries down the years. In our experience, at least two-thirds of the number of workers quoted by the HIA are not legitimate self-employed contractors—that is, the people I am speaking of are essentially employees under some disguised, dependent contractor situation.

There are enormous consequences in our industry that flow from the fundamental problem of so many workers being misdescribed and wrongly categorised. There are consequences for safety, for tax, for training and skill formation, for social security, for immigration issues, for superannuation, for workers compensation, for the uncompetitiveness of legitimate operators and for quality workmanship. I have listed there about nine consequential aspects of the very large number of workers in our industry who are being wrongly classified for a whole range of public purposes. I can develop each and every one of those areas with you, but we deal with all of those areas in these submissions here.

With regard to the second aspect of your inquiry, labour hire, I make the following few points. Firstly, there is a significant overlap between the problems of bogus self-employed workers and the malpractices of many labour hire companies in our industry. Secondly, as in industry generally, labour hire has proliferated in the building industry over the last 12 to 15 years. I looked in the Sydney *Yellow Pages* recently and saw 18 pages of hundreds, if not thousands—I was not game to get somebody to count them all—of body hire, labour hire, employment services companies, call them what you will. If you go back to the *Yellow Pages* of 15 years ago you will not find one page of them. The proliferation has been dramatic. Some of these operators are large and legitimate, and some are reasonably legitimate. But there are hundreds of inexperienced small operators who would practise a wide variety of rorts—rorts on the workers they are engaging and rorts on state and federal government revenues. That is the reality.

Thirdly, as I said in relation to subcontracting, there is a place for legitimate top-up labour supply companies in our industry but only the tightest of regulations can stop these companies from falling into engaging in abuses and rorts. Fourthly, the devolution of responsibility from the principal user enterprise or host enterprise has had an inevitable consequence for the safety and nontraining of workers involved, and a range of other social detriments. Only stronger regulation of labour hire at the state and federal government level can address the serious consequences of the growth of labour hire. We commend the recommendations by the Labour Council of New South Wales and our own New South Wales branch submission to the Jennie George labour hire inquiry that occurred in this state in the year 2000. We adopt and endorse the ACTU's submission to your committee. My colleague and I are happy to develop any of the points I have raised verbally or which are in the two folders.

CHAIR—Thank you. Mr Roberts, do you want to make any opening comments?

Mr Roberts—No.

Mr Sutton—Can I add one thing? As I was sitting in the back earlier, I thought I might clarify one issue. There was a question about whether there is any constraint at the moment on subcontractors getting together and collectively bargaining, as it were, and/or being represented by a trade union in some collective fashion. The ACCC takes the view that that is illegitimate conduct. The ACCC, as you know, is charged with the responsibility to police the Trade Practices Act. For some time now, the ACCC has taken the view that that is collusive behaviour under the Trade Practices Act. My own organisation has a long history of representing genuinely independent contractors in collective bargaining arrangements—roof tilers, wall and floor tilers, metal and timber fencers, vinyl layers, carpet layers. We have been representing those kinds of workers for many decades. That has become much more difficult in the last five or six years. The ACCC has cracked down very hard on our organisation, wanting to obtain evidence for prosecution and all the rest of those kinds of activities. They take the view that that is collusive behaviour.

You would be aware that recently the current federal government—I am not sure of the background but I applaud the initiative—commissioned the Dawson inquiry and the report, which came down consequently, and indicated that the Trade Practices Act ought to be substantially changed in this area to allow small businesses with revenue up to $3 million to collectively bargain. The government picked up the key recommendations of the Dawson report and has prepared legislation. We thought that was a very useful development in assisting the bargaining power of small business vis-a-vis big business. Of course, the most recent development is that the Housing Industry Association has let it be known to the world that it has been successful in lobbying the government to have an amendment put into legislation to say that trade unions can, under no circumstances, represent people in those situations. That will crash into the fact that unions such as our own—the Transport Workers Union, a range of other unions, the EPU—most recently had a major interstate dispute across the country where they represented hundreds of Foxtel installers in negotiations with Telstra, Foxtel and all the rest. I think this headed for conflict as well. To assist the committee, that is the background. If things stand as they are at present, without any change, the ACCC will continue to take a very dim view of any union that participates in such conduct.

Mr HENRY—How does that sit with the industrial registration as a union of the employees? Does that create conflict?

Mr Sutton—No. Under the rules of our union—I think you will find it is the case with many unions—we are able to represent employees, contractors.

Mr Roberts—The Workplace Relations Act permits unions to enrol as members people performing work as independent contractors, in the same way that it allows unions to enrol employees. The CFMEU and many other unions have for years had rules that allow them to enrol such independent contractors.

Mr Sutton—At a guess, we would have at least 10,000 such members. The Transport Workers Union has a very large number of such members.

CHAIR—Your comment, John, about the Trade Practices Act and the ACCC is more to do with agreements being struck up between labour hire companies and trade union organisations, or independent contractors. There would be nothing to stop them from saying, 'I want to be a member of the CFMEU.'

Mr Sutton—I am not going to comment on the labour hire companies—they are a different category—but I refer, for example, to roof tilers who work alone or in partnership with their wife. These people are presently members. You would find most roof tilers who put tiles on roofs in this country in the various states would be members of my organisation. They do it at the moment, but one has to query whether, under the new arrangements—if the amendment is carried—trade unions will be explicitly prohibited from representing the kinds of workers we have represented in the past.

CHAIR—You mentioned roof tilers, and that leads into my next question. We heard from the Roofing Tile Association this morning. There are 350,000 workers in residential construction and you say that approximately two-thirds of these may not be legitimate subcontractors. We heard the Roofing Tile Association say, basically, that if it were not for the fact that most of their members are independent contractors—and it is the industry's right to have independent contractors in the residential market—the average house price could be $10,000 to $15,000 more. They are saying that the consumer, at the end, has benefited from this. What is your response to that?

Mr Sutton—I go back a long way, obviously. I have watched the HIA, which is the parent body of the roof tilers association. If you go back far enough you will see the figures it dreamed up. It used to talk in terms of five to 10 per cent. Then it became 10 per cent. I have seen 15 per cent. There has never been any cogent evidence on this question. It tends to always blow up prior to elections; it tends to always get thrown around furiously prior to elections. Over the years the HIA has just grown the figure. You will never see any particularly tangible or cogent evidence for this. I guess another way of looking at it is that if it says that, what does it mean? Does it really say that these workers are paid 15 per cent, which I think was their latest figure—

CHAIR—All the guys said it was $10,000 to $15,000 cheaper.

Mr Sutton—Is the proposition they are advancing that these workers are paid less than like workers employed under collective bargaining arrangements—people working on major sites who are the beneficiaries of enterprise bargaining agreements? Is that what they are really saying? I refute it. It is political propaganda that has been floated over the years as part of their case. They are a powerful lobby. The HIA and the underling organisations are very powerful and they just trot that out without any real evidence.

Mr BRENDAN O'CONNOR—In relation to the roof tiling industry, as we are on the subject, there was also some discussion this morning about the possible convenience of defining an employee as an independent contractor for the provider of the principal to avoid payroll tax and for the provider of labour to avoid forms of income tax. Has the CFMEU come across any evidence that that sort of activity occurs as a result of financial incentives for the principal and the alleged independent contractor?

Mr Sutton—As I said in my opening, the name of the game is defraying responsibility onto others. The name of the game is avoiding on-costs, responsibility et cetera. That works all the way down the line. The principal wants to avoid, so he then says to the subcontractor, 'You're responsible.' The subcontractor traditionally tries to tailor their arrangements, with the assistance of an accountant, to see how they can avoid responsibility as well. It can take so many different forms. The name of the game is avoiding state and federal government imposts, whether that be workers compensation premiums or pay roll tax. There have been umpteen inquiries into this sort of stuff.

Mr BRENDAN O'CONNOR—If these assertions are correct then you are asserting that millions of dollars of state and Commonwealth taxes have been avoided, in effect.

Mr Sutton—Absolutely. There are so many elements to this in the building industry: people who pay the wrong tariff, people who should be paying significantly higher workers compensation but do not and miscategorise or misclassify their situation et cetera. What it invariably means is that premiums rise because the amount of people paying the proper amount into the pool is not big enough—those that are doing the right thing, the legitimate firms. In the past I have brought to the table big legitimate subcontract companies, who we argue with and fight with. They have given evidence about how their market share rapidly contracts because they cannot compete with firms that go in 50 per cent lower because they have got workers—they might have 50 workers—but not one employee. Of course the firms they are competing with avoid all these obligations, whereas the legitimate firm is paying workers compensation premiums for 200 men. They are the ones that carry this enormous weight. They are the ones who train apprentices. Something has got to give. What gives is that they either get out of the game or tailor their arrangements and chop up their show into six companies. One company might be legitimate, because there are certain parts of the market that can only work legitimately, and the other companies will work in other parts of the market where you can get away with all the rorts.

CHAIR—I am sure there would be a number of organisations and subcontractors out there who are obviously using the system to minimise their tax. But I seem to recall reading very recently, John, that during the 1990s the ATO conducted a major audit of people who would normally categorise themselves as subcontractors or independent contractors. Of those 65,000 audits, 700 people were ordered to pay more tax, which was quite small considering the number of audits. That was in the 1990s; I do not know whether things have moved on since then. I know anecdotally that some of the things you are saying happen—my brother is in the building industry. It seems, though, that perhaps this is not the sole motivation to become an independent contractor.

Mr Sutton—I have got little doubt that the single biggest driver of independent contracting or quasi-contracting in all of its various manifestations—everything from totally illegitimate to fully legitimate—is tax. We have proven that with various submissions to inquiries. We have had academics conduct studies into this. Of the worker who is a carpenter employee working in identical circumstances to the worker who is a carpenter subcontractor, the one who is an employee does pay substantially more tax than the one who is a subcontractor. We have proven that; I do not think there is any argument about that.

The most recent material on the question you are going to was at the recent royal commission into the building industry conducted by Terry Cole. The tax office came along on a number of occasions, and they indicated that 40 per cent of all tax evasion in Australia is in the building industry, despite the fact that we only make up six per cent in our share of GDP and our share of the work force. We say that is understating it; we say tax evasion, avoidance is absolutely rife in this industry.

We are only too well aware of what went on in the Ralph inquiry, which was the basis for ANTS—the new taxation system that Costello brought in. John Ralph indicated that he was greatly concerned at the collapse in the PAYE tax take. He was greatly concerned at the collapse in that. He made recommendations which Costello, to his credit, picked up in the initial ANTS package. I think some of you people would well and truly recall that the basis of the real deal at the time was, 'We will cut the company tax rate on the basis of revenue neutrality. We are going to bring in a whole lot of extra money.' In fact, $2½ billion was slated to be brought in over a five-year period by cracking down on the abuses in this area—that is, people who are misclassified as independent contractors when they are in fact employees and should be paying employee tax. Five years later, the tax office has not yet been able to produce any material. Some of us are quite keen to see it—was that $2½ billion reaped? Did they bring it in? That was in fact the basis of the whole revenue neutrality package—it was not the only basis, there were other drivers as well such as trusts, and there some other things which were meant to change as well which did not change, as some of you may well be aware.

Mr HENRY—John, in your submission you talk about the ABS statistics indicating that the 'own account workers'—using their term—are 217,900 compared with some 566,000 employees. You also mentioned that it was about 12 years ago that this independent subcontractor issue started to balloon out. Isn't it fair to say, though, that many years before that the unions had an issue with so-called pyramid subcontracting, which was the devolution of responsibility down the contractual chain? To some extent, the unions are aiding and abetting this process by allowing membership of their unions for these people who see themselves as either being self-employed or independent contractors. Finally, what do you see as being a legitimate independent contractor?

Mr Sutton—I did say that over the last 20 to 30 years this question has really ballooned out. What I said has become much more exacerbated in the last 12 years is the bogus independent contractor—the one-man/one-woman outfits. In the building industry it is usually a one-man outfit, although often of course they will get together with their wives and have a partnership and split the income and all the rest of it. But it is the latter bit that has really become quite exacerbated in the last 12 years.

As to the question of whether the unions should or should not enrol such people, this was a very hot debate inside unions like my own some 25 or 30 years ago. It was a very hot debate about the tradition of the fifties and the sixties and workers who left the fold and set themselves up as independent contractors, whether they did it willingly or unwillingly. That is the big point here. If you are travelling around Australia, in many parts of this country if you want to work as a building tradesman you have no option but to work as a subcontractor. If you are a bricklayer in Dubbo, Wagga, Bendigo, Darwin or Hobart or wherever and you want wages, holiday pay, sick pay, superannuation, workers compensation and all that you had better get out of the building industry. You cannot simply go to an employer and say, 'I know all your workers are so-

called contractors, but I would actually like to be an employee on all of these things.' You will be classed as either a troublemaker or a lunatic—you are just in the wrong neck of the woods. If you want one of those kinds of jobs, go to Sydney or Melbourne. They might have that kind of thing for a bricklayer, a plasterer or a painter in Sydney or Melbourne.

CHAIR—So apprentices, as soon as they finish their apprenticeship, go straight into self-employment?

Mr Roberts—We have seen apprentice subcontractors.

Mr Sutton—The biggest trend of the last 10 years has been apprentice subcontractors. We go along to the tech colleges and every third kid says, 'My boss said I'm a subcontractor apprentice. I don't get paid wages; I get paid as a subcontractor apprentice. That's the only way the boss will keep me on.'

I divert from what I was saying. What I was saying was that we had a big internal debate on whether we should take the 'impure' people into the union and try to win minimum standards for them and collectivise the impure people—those who in the folly of their ways have gone off and subcontracted. The debate was won by those who said we simply have to because there are very large numbers of workers who cannot follow their trade or calling unless they work as a subcontractor. I can show you contract rates we have been negotiating for all of those classifications—roof tilers, wall and floor tilers, carpet layers. For many years, I used to represent the vinyl floor layers. I used to go out to Parramatta in the middle of winter and God knows what and go to meetings of the vinyl floor layers. This has a long history. That is the debate. I agree with you that it probably has had a downside but it has helped provide a safety net for people who otherwise would have been subjected to the forces of the market.

On the third question about the definition, you heard from Christodoulou and others that the lawyers have had a picnic with this over the years. Tom could probably tell you about all the cases. The tax office has a definition. There are lots of definitions. The one thing I do not buy is that the reason for the big problems in this area is that everybody is confused and that if only there was one crystal clear definition all the problems would go away. That is rubbish; do not buy that.

Ms HALL—Your industry is in the three worst so far as its safety record, isn't it?

Mr Sutton—Yes.

Ms HALL—How does the high level of subcontracting and the entry into the workplaces of labour hire impact on safety? What sorts of strategies need to be put in place to address that? Do people receive an adequate level of training before they go onto the sites?

Mr Sutton—I would agree with what I heard from Christodoulou from the Labour Council. There are some large labour hire firms that do turn their mind to this a bit. They are very much a small minority. The vast majority of labour hire operators cannot stand on all that ceremony. It is quick, cheap and nasty stuff and you learn on the run. Mostly, it is unskilled stuff which you pick up on the run. The problem we are having in the industry is the big upsurge in the numbers of illegal immigrants on sites. That is only going to get worse with ideas about guest labour and all

the rest of it. The big bandaid to the skills crisis is to bring in more guest labour. But by and large these workers do not get the training required. They are walking into different situations every day.

The building industry is an itinerant industry but labour hire is really at an extreme. You can be shifted twice during the day; you can be shifted everyday. Obviously you wait at home for the phone some days but when you get out you are constantly going to different sites. Some sites are dark; some sites are light; some sites are down in the ground; some sites are up high. You are constantly in different environments. You might get adequate training and induction and all the rest of it on the very big city building sites where the union is prevalent but in the suburbs, in the regions, in the country towns et cetera there is zero regulation. You just take your chances in those kinds of situation.

Ms HALL—Which types of workers have the highest level of injury?

Mr Sutton—Traditionally it has been those in the housing industry or in the civil engineering industry. Those in commercial construction have the lowest, although it is still very high. Housing has a prevalence of contractors. There are very few employees that build housing. It is all this self-employed stuff and you just do not get paid if you are injured. You do not get paid to stay at home and recuperate; you get paid by results. That is an express term that exists for these kinds of workers: payment by results. You cannot just sit at home, because the mortgage and a lot of bills have to be paid. You have to get out and work. You have to cut corners in a lot of those situations. In the housing industry you really have to race; production is rapid stuff. That is why there is more prevalence of injury.

CHAIR—Thank you very much for your contribution.

[2.56 p.m.]

ENDACOTT, Mr Keenon Jason, Industrial Research Officer, Mining and Energy Division, Northern District Branch, Construction, Forestry, Mining and Energy Union

CHAIR—Welcome. Do you have any comments to make on the capacity in which you appear?

Mr Endacott—I am speaking on behalf of the CFMEU. The northern district branch predominantly deals with coal and covers the northern districts coalfields. There is a southern and western district—

Mr BRENDAN O'CONNOR—Is this submission on behalf of the entire division?

Mr Endacott—Yes. It was prepared by the northern district branch, and it was circulated to the other districts of the union.

CHAIR—Although the committee does not require you to give evidence under oath, I should advise you that these hearings are formal proceedings of the parliament. Consequently, they warrant the same respect as proceedings of the House itself. It is customary to remind witnesses that giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Would you like to make a statement in relation to your submission or make any other introductory comments?

Mr Endacott—Thank you for inviting us to attend. Certainly the issue of labour hire arrangements, specifically with respect to the coal industry—and independent contractors to a lesser degree—is important to the division. As set out in the submission, we represent approximately 5,000 workers, predominantly working for coal companies as production engineering employees or for contract companies that work predominantly in the coal industry. Perhaps because of a manifestation of the industry, independent contractors are a lesser entity, even though issues do occasionally arise with respect to them. I think coal companies normally like to deal with established contracting companies rather than individuals. So I speak more about labour hire arrangements, which have certainly become increasingly prevalent in the coal industry.

Firstly, we set out the experiences we have had with labour hire arrangements, and those probably fall predominantly in the category of contractors. You have contractors, and then you have labour hire companies, which are often referred to as contracting companies, that supply employees on a varying basis. They can supply up to 80 or 90 people on a permanent basis to a mine site. If we take one of the bigger operators: there may be three such companies, each supplying about 80 employees, so at some mines you can have maybe 30 or 40 per cent of employees as long-term labour hire employees. Obviously, you also have the categories of people who turn over within that capacity.

This has become a concern to the union for a number of reasons. One is that, because labour hire employees tend to be more transient, because they can work between multiple sites and

because they are less cohesive than the regular work force, they are normally paid significantly less, even though they may do exactly the same work and may do it over a period of time. Even if they are regularly at a mine site, they would not receive sick leave or annual leave. They would be classified as casuals even though their relationship may be more regular, and they would get paid maybe $20,000 a year less than the full-time employees.

We indicate in our submissions that we acknowledge the legitimate role of labour hire and independent contracting arrangements within any work force, but we say the circumstances should be limited to occasions on which you need employees to be topped up, not as they have been used. At some operations it has become so that you basically cannot run the mine without them any day of the week, any week of the year. Certainly, we can understand the need for them on occasions, due to production fluctuations, absenteeism, workers comp, annual leave and long service leave—that may be relevant—or in an underground mine, perhaps, when there is a longwall turnover. They would need additional labour for that sort of period, but not, as we set out, as has been occurring over recent years in the coalmining industry.

I want to speak briefly about safety and emphasise that. Other areas have been set out. To work on a mine you need to be inducted and you normally need to have an induction card. Those inductions can take six hours or longer, but certainly the inductions are not sufficient to enable someone to effectively plug into the work force. A concern, as we have set out in the submissions, is that these persons may go between different work sites and may operate on the basis of the 'best fit' system. You recall the one that best fits to a whole series of operations rather than what is specifically at each operation.

There is a requirement under the New South Wales Coal Mines Regulation Act that employees must know the mine manager's rules, and the schemes in place must keep up with them. In fact, if they are not, they can be individually fined under the Coal Mines Regulation Act for not performing their functions. I believe that also applies to not keeping up with the rules and the schemes in place at an operation, which seems important.

Another issue with respect to safety is that it is our view that a more transient work force and one that has less job security—for example, if workers are employed as casuals and can be replaced—is less likely to stand up for its rights with respect to safety. I can give an example that is repeatedly raised with me by full-time employees of mines. It relates to occasions at which there is significant rain. A lot of these guys are operating 240-tonne trucks—they are the ones with 12-foot high oils—and permanents say they pull up as soon as the roads start getting slippery, because you do not want to come down with 240 tonnes worth of coal or overburden and lose control. But, because labour hire workers are employed per hour, the minute they pull up and say it is not safe to drive, they are told, 'We don't need you,' and they are sent home. For someone who is employed on an hourly basis that is probably not that unreasonable, but the problem is that persons are reluctant to pull up.

They say that it happens with regularity that full-time employees pull up and the people who know they will be sent home think, 'Should I pull up or just keep driving past?' Then you are left with the assessment. You ask: 'What do I do? I am a permanent employee. Do I just keep sitting parked up because 30 per cent of the work force has made a decision that they are intending to drive past?' Normally they work in 12-hour shifts, for example. There are seven-day employees. If you pull up on one shift and it is during the week that you are rostered to work 24 hours, you

lose half a week's pay, or close to half, and you do not know, if it is raining, whether you are going to get work the next week. They are certainly concerns.

We also have concerns about people who are employed per engagement. They receive a phone call at six o'clock at night saying, 'We need someone to operate a vehicle all night.' As someone who is looking for work, what do you do? You think, 'I haven't slept today.' Unless you have slept there is no way you can start night shift. That is just an issue of fact. We believe that certainly there is a concern that people do offer to work when prudence should determine that they would not work.

Before finishing, I would make the point that labour hire is a more transient and less secure form of employment, as we have detailed in our submission. A general policy position that we think people would agree with is that a more secure society, family, government and legislature leads to a better community in general. We say that should be no different in respect of employment. If you can have more secure arrangements in employment then that should be encouraged, because it manifests itself in all aspects of society. We acknowledge that independent contractors and labour hire have a position, but they should not have a position where they are entrenched in maintaining the normal operation of a mine as opposed to where it may be that certain individual flexibilities are required on occasion.

CHAIR—Thank you for that introduction and your observations on health and safety. They are things which interest us. It seems to be the crux of a lot of the evidence that has been given to us so far. Just for my interest, because the only things I know about mines are what I see on TV, what is a whole-of-mine contractor? I never knew such a thing existed.

Mr Endacott—A whole-of-mine contract is where a company will contract to operate everything. The mine may be owned by Xtrata or BHP but they just contract out the operation. A company will come in and operate everything.

CHAIR—That is not so bad, though, is it? If they are operating the whole mine, they would be responsible for all aspects of it, including OH&S?

Mr Endacott—That is right.

CHAIR—It is their entire responsibility?

Mr Endacott—Yes, that is right. In defining the three types of contractor, the predominant contractor is the one that the labour hire category falls into.

CHAIR—That is the one you have greater concern about?

Mr Endacott—Yes.

Ms HALL—I have cited your submission a couple of times today. You say at paragraph 3.2.10 that, of the three most recent fatal accidents, all involve deaths of contractors.

Mr Endacott—Yes.

Ms HALL—I have put this to various people throughout the day. One of the witnesses said that occurred because the labour hire contractors tend to be put into the more dangerous positions. Would that be true or do you think it is more systemic than that?

Mr Endacott—In part it is true and in part it is more systemic than that. The New South Wales government recently held a review of mine safety and individual employees in the coal industry attended. They referred to occasions on which the company indicated that contractors were put into positions because the permanent employees would have refused. There is also an issue about contracting companies—as I referred to at 3.2.10—not having what we understand to be safe operating procedures, correct documentation and appropriate support rules. That all contributed to that.

Ms HALL—Do you think that within the mining industry labour hire employees are used to break down some of the conditions that permanent miners enjoy?

Mr Endacott—Yes, we do. I gave an example of labour hire employees being paid $20,000 a year less. Without a doubt labour hire is used to erode conditions. One of the mines has a high percentage of labour hire providers as a result of mass retrenchments followed by an increase in labour through the use of labour hire firms. When we have had discussions with companies—trying to get more regular employment and improved conditions of employment—we have been left in no doubt that it is the mine that controls how much they are paid.

I will give examples. We are told, 'We have to talk to the mine and see if you are entitled to be paid money.' We have been shown costings where the bill breaks down every single cost component and indicates the 10 per cent that the labour hire firm gets paid. So basically the arrangement is that the mine pays everything the employee is entitled to and gives the labour hire firm 10 per cent of that as the profit margin. So there can be no doubt that it creates an artificial labour market that keeps wages lower. Certainly in the majority of operations—I will not say it is the case in all operations—labour hire employees get paid less than the permanent employees would get paid.

Ms HALL—And labour hire is used to increase hours—like the 12-hour shifts and that type of thing. Are any of those retrenched workers then employed by the labour hire companies to work within the same mines?

Mr Endacott—Yes.

CHAIR—This sounds like question time with dorothy dixers.

Mr Endacott—When retrenchments were occurring a number of years ago there were lots of examples of people being retrenched and then working for labour hire companies at the same place for a number of years.

Mr HENRY—In your submission, under 'Strategies to ensure independent contracting and labour hire arrangements are legitimate', you say at 4.1:

...control tests, adopted by the High Court, are an appropriate way of determining whether a person is an independent contractor, labour hire employee.

Then at 4.4 you say:

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

But you do not elaborate on those. Do you have any information to support that statement in terms of the factors they use and how they compare with 4.1?

Mr Endacott—I would, but I could not answer that off the top of my head at the moment.

Mr HENRY—I thought it was interesting that you put that there and there was nothing to support it in terms of those factors.

Mr Endacott—When I have been involved in disputes about labour hire arrangements with respect to independent contractors, I have consulted the tests of the High Court to resolve the issues from our perspective. Normally I go the ATO. They have a nice summary at the end of the 11 points you look at. Then I look at the nature of the relationship with the 11 points and whether that is resolved to my satisfaction—whether they are independent contractors or employees—and whether that is the case from the employer's perspective. There are reasonably good tests and if you take an honest and deliberate approach to the tests and what is happening in a relationship it is easy to decide whether someone is an employee or an independent contractor.

Ms HALL—You could probably send us additional information on that.

Mr HENRY—Yes, that would be good.

Ms HALL—I think it is mentioned in some of the other submissions too.

CHAIR—I am intrigued by your example of the rain and the permanent drivers versus labour hire employees. That has got to be an issue, surely, purely of training and understanding what the rules are. Could it be that the permanent guys are far more willing to apply the letter of the law of when rain is rain versus perhaps a labour hire person when perhaps that has not been explained specifically? I imagine that if it is torrential rain everybody stops.

Mr Endacott—Yes.

CHAIR—There would not be any question of that; there is no margin of doubt there. I am just using rain as an example but there must be other OH&S examples as well where there are the margins. What is the answer there? It is not necessarily not having any labour hire contractors at all. It could very well simply be an issue of training and ensuring that everyone goes through the same induction and safety training whether they are a permanent or a casual employee.

Mr Endacott—Training always helps, but my experience is to never underestimate economic drivers in the employment relationship or in any other sort of relationship. The example that I give to the permanent employees is to say ring up the OCE—the open cut examiner that is required under the act to be in charge of a district—and say: 'I have been driving for years. It is slippery and it is not safe. If one of the labour hire guys goes down and is involved in an incident, I have told you,' and get them to pull them in line. It may well be training, because

training is always a component of everything in the employment relationship, but I believe it is economic drivers.

Mr BRENDAN O'CONNOR—There is no guaranteed income—that is the problem.

CHAIR—But isn't there someone on-site who would say, 'We are closing this road for the next hour or so'?

Mr Endacott—Yes. The open cut examiner would be able to do that and on occasions would do that.

Mr BRENDAN O'CONNOR—For occupational health and safety stoppages, employees are paid in the event of having to stop to prevent an accident and so on. But employees of labour hire firms in the instance that you are referring to do not get that entitlement?

Mr Endacott—No, they would not, because the shift would come to an end.

Mr BRENDAN O'CONNOR—It would not stop a labour hire company entering into an arrangement with the client for them to actually say that they should be treated in the same way. But that does not happen?

Mr Endacott—No, that does not happen

Ms HALL—And it is when it is marginal that it becomes an issue, when you could operate but it creates danger, and they will continue.

Mr Endacott—Yes, it is. But I am informed by my members that it is becoming more than marginal. They will not necessarily pull up unless someone actually says, 'Pull up.'

CHAIR—Thank you very much for your evidence. Thank you for coming all the way from Newcastle. We appreciate your adventurous spirit in coming to Sydney. Any other information that you have, please send it through.

Proceedings suspended from 3.18 p.m. to 3.33 p.m.

BLAIR, Mr Garry, Member, Transport Workers Union

DEWBERRY, Mr Paul, Section President, Transport Workers Union

HAYDEN, Mr Bob, Delegate, Transport Workers Union

KAINE, Mr Michael, Senior Legal Adviser, Transport Workers Union

MATHEWS, Mr Tony, Delegate, Transport Workers Union

McKNULTY, Mr Tony, Delegate, Transport Workers Union

NEAL, Mr Collin, Life Member, Transport Workers Union

PURCELL, Mr Edward, Member, Transport Workers Union

RULLO, Mr Robert, Delegate, Transport Workers Union

SHELDON, Mr Anthony, State Secretary, Transport Workers Union

WALSH, Mr Paul, Delegate, Transport Workers Union

CHAIR—Welcome. Do you have anything to add tot he capacity in which you are appearing?

Mr Dewberry—I am a lorry owner-driver.

CHAIR—While the committee does not require you to give evidence under oath, I advise you that these hearings are formal proceedings of the parliament. Consequently, they warrant the same respect as proceedings of the House itself. It is customary to remind witnesses that giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The committee is not prepared to provide the protection of parliamentary privilege to allegations about particular individuals or companies. However, if there are issues to be raised which are of a confidential nature, please indicate that beforehand and the committee will consider going in camera to take that evidence. Tony, do you want to make an opening comment or speak to your submission?

Mr Sheldon—The first thing is that we come to today's hearing with some trepidation because we are well aware of the recent political history leading into the question of independent contractors, and specifically the potential effect of proposals from the federal government prior to the most recent election to give new rights to independent contractors, which were the right to no longer have the freedom of choice of joining a union and the right to not have the Australian Industrial Relations Commission represent them. We had that in mind and also recent events in federal parliament, where there was an attempt, through legislation that specifically deals with takeovers and mergers, to provide for contractors to negotiate with major corporations and attempts to get exemptions from the ACCC. There was a specific statement to say that unions were not allowed to represent owner-drivers. In that more recent environment I am making these

statements with some trepidation about the value of the information that we are going to be delivering today.

Nevertheless, we are hoping that the committee will hear a couple of stories—and there are many more that—that we will provide to committee members relating to the specific ramifications for these dependent contractors. We will also discuss the consequences if the industrial relations system in New South Wales is affected—an industrial relations system that has grown up over 100 years—specifically as that relates to protections for owner-drivers. We have had a large number of people as members. Senator Jack Kane from the 1920s sort of lost his way in the later years but he always remained a member of the TWU. He was an owner-driver and an employee of the Department of Main Roads at the time.

So we have had a long history of representation of owner-drivers. As you will see in our submission, through that history there have been a number of variations to legislation, including in the mid-nineties, by Liberal governments in this state to give further protections to owner-drivers. There has been a series of inquiries by successive Liberal governments in this state reviewing the appropriateness of regulation of contract carriers. Legislation has also been brought forward in what was commonly known as the 'motor lorry loophole', which meant that some courier owner-drivers were not afforded the protections of chapter 6 of the New South Wales Industrial Relations Act 1996. That was varied under a conservative government by unanimous resolution of parliament with the support of most of the substantial employer associations and the full support of the upper house. Again we find ourselves in a bit of trepidation when we think that the most recent history of regulation in this state is potentially about to be brought asunder.

The things that the work force has gone through in relation to independent contractors—I think they are more appropriately called 'dependent contractors'—and employers range from circumstances where employees were once required to use their long service leave to buy a truck, the company's truck, so the company could offload both the equipment and the capital cost of investing in vehicles, to circumstances where, in some cases, employees' long service leave was even used to pay goodwill for the vehicle because the money paid was well above the actual value of the vehicle itself.

Throughout the period of years of regulation of this industry there has been a series of other amendments, not just the motor lorry loophole amendment but also the goodwill legislation that was passed—again—by a conservative government. The only significant legislation regarding owner-driver rights and regulation to be passed in the last 14 years has been by conservative governments—Liberal governments—in this state as to cases in this state. That has been for a very good reason: to make sure there is fairness in the workplace. These people are in the trap of being somewhere between business people and employees. Some could describe them as employees with expensive tools of trade. Others could describe them as purely being business people that need to have particular special rights and protections in this industry because of the obviously dramatic effects of poor remuneration, which then flow not only to the fairness of the system but also to issues such as the safety of the vehicle that is maintained. A series of reports—committee reports; coroners' reports; *Beyond the midnight oil*, the report to federal parliament some years ago; and the Quinlan inquiry one—have all stated, even though in slightly different ways, that the issue of remuneration is a substantial issue in the trucking industry, and one which is causing deaths and fatalities. They have stated the need for further regulation, not

less. So what we are actually putting to the committee today is this: we believe there is a necessity for further regulation of this industry, further protections for small business and further rights as to freedom of choice in joining a union.

We have had freedom of choice in this state as to joining a union—rightly so—for many decades and through that period 12,000 people in this state—owner-drivers—have opted to be members of the Transport Workers Union and to have it represent them. A quarter of the membership of our branch committee management, our union's governing body, are owner-drivers, and that flows through our executive groupings and also our delegate representations, going to a little bit over a third of our delegates throughout our entire organisation. We see it as being absolutely critical that, having considered the statements of the last three months—many statements having been based on poorly formed information—the information that we will give you today and the information we have given you in this report, you will come to the conclusion that there is a need for extra regulation of this industry covering the need for positive arrangements for dispute-settling procedures, remuneration—which goes to the issues of safety and fairness—consistency for road transport operators and the opportunity for goodwill to be protected.

Not only is goodwill affected by any potential legislation; there is also the effect on rates. Not having the existing system will undermine goodwill. Obviously in many circumstances goodwill is based on the earning capacity of the vehicle. If there is deregulation, for many small businesses and families that goodwill will be devastated overnight or over years, which will have a very large effect on what we consider to be the constituency of both the electors and the community that has largely been of a conservative mind. By their nature they have a lot to lose. Importantly, you can hear in a moment from the owner-drivers who are here, but I can say they will not be in a situation where they can sit idly by and see $100,000 worth of goodwill collapse. They cannot sit idly by whilst the GST determination that we have, which is a Commonwealth contract for owner-drivers, collapses. They cannot sit idly by and see their rates collapse, because that would affect not only their earning capacity and their support of their families but also the payments on their vehicles, safety arrangements for their vehicles and proper remuneration for their vehicles. So the consequences of any ill finding by this committee would be dramatic to the utmost on the community, owner-drivers and their families. I think the report speaks for itself. I would like to ask Paul Dewberry to explain his circumstances and concerns.

CHAIR—Just to reiterate, if you are going to start venturing into areas where perhaps there is sensitive information, let us know beforehand. Then we will consider that.

Mr Dewberry—I am currently a lorry owner-driver. I have been in that situation for 26 years. I am currently under contract with Hanson Construction Materials, which was formerly Pioneer Concrete, and have been for 15 years. What Tony has just spoken about comes down to choices. I made the choice to go into an industry that was regulated 26 years ago. I have enjoyed the benefits of an industry that was regulated. I have certainly had choices all my life. I chose to come into the industry so I could give my children the private education that I wanted for them. I have supplied that to them. I also invested in a job for myself that would carry me through to retirement. At the end of that term, I would like to sell that job, as I bought one, for superannuation purposes—something that would be good for my own being.

Changes could be made to legislation that would not enable me to have access to industrial relations. I have counterparts in Victoria—as you know, they do not experience the Industrial Relations Commission that we see here in New South Wales—who have had their contracts terminated. They finish within 18 months to two years. They are out of a job. There is no collection of goodwill for them. Their goodwill has been terminated. They have mortgages that they are halfway through paying off. If they cannot successfully get a job to pay those mortgages they will be out on the street.

CHAIR—Are these owner-drivers working for private contracts?

Mr Dewberry—For Pioneer Construction Materials, which is now Hanson. That was on the basis of there being no industrial relations down there. The resources were not there. In our contractual arrangement here, which is blessed by the TWU, we have resources such as legal resources from the TWU that we enjoy as well as the Industrial Relations Commission that mediates and conciliates on problems we have with contracts. We have just signed up for a new 10-year deal through the Industrial Relations Commission and TWU. Having been a chairman for the Pioneer industry and formally chairman for the concrete industry, there have been many times during the time of the last 10-year contract that we have had to call on mediation through the Industrial Relations Commission. We have been able to call on that and have disputes arbitrated in a successful way. If that is not there and our right is taken away, who knows what will happen. We will see the disruption we had in the early seventies with the long-distance hauliers and everything else.

If it is deregulated—and what we are talking about here is a form of deregulation—I think it will be a race to the bottom with rates and conditions. We see people who have enjoyed a fair living in the past. There are no millionaires here. We are just middle-class people trying to earn a living and being repaid for our labour in a way in which we see fit. If a change is made, it will be a race to the bottom with rates because the companies know that we cannot afford to take it to any other commission or court and pay generous legal fees, as we know are out there. We simply cannot afford it. Our contracts do not let us. There is no form of rate structure that helps us form a legal bond or kitty, if you like, to fight legal battles. The companies know that.

Mr Purcell—I have been an operator, independent sole trader, subcontractor, contractor and company for over 55 years. In 2002, I was a subcontractor for a public corporation body, Australia Post. The Royal Mail then terminated my services in July 2002.

I appeared before the IRC in August 2002 and the hearing lasted for seven days. The decision was brought down in July 2003 that I was to be reinstated. Without the IRC I would not have been re-employed. I found that the IRC had industrial knowledge, experience and resolve, and if I had followed any other avenue, I would not have achieved the same result. It is clear there is nothing better we can call on; therefore, the IRC must stand.

Mr Neal—I am here representing lorry owner-drivers involved in the tip-truck owners section of the union. They do all the excavation and demolition work in the metropolitan area here. I have been a lorry owner-driver for well in excess of 30 years. Unfortunately, I was born into the industry: my family was involved in it and now my son is involved in it. I started before the contract determination came into existence. As far as contractors were concerned, it was catch and kill—you could not get paid, and it was an ongoing rat race. Luckily, I survived, simply

because I inherited a lot of customers from my father and uncles, and that is how I got through the early days. During the late eighties and early nineties I was elected to be honorary secretary of the tip-truck owners section, and in that period I estimate that we collected over $1 million through the Industrial Relations Commission from shonky contractors who would not pay—they just took off. So without the union resources, without the contract determination and without the Industrial Relations Commission, there would be so many blokes out of work and who had lost their homes it would not be funny.

I think what should be remembered is that when a lorry owner-driver does not get paid, he cannot pay his fuel bill, he cannot pay his tyre bill, he cannot pay his mechanic. He has got to keep his truck registered and he still has to feed his wife and kids, so the first thing that misses out is the local garage man or what have you, and it just shuffles on down the line. If we have not got the resources of the Transport Workers Union and the Industrial Relations Commission, it will be worse now than it ever was. When I first came into the industry, you had to have the deposit to buy truck, whereas today you do not have to have that. As long as you have got your first month's payment and the stamp duty, they will let you into a quarter of a million dollar truck as long as you hand over the deeds to your house. If we go back to the bad old days, there will be blokes walking out of houses left, right and centre because they will not be able to keep up their payments.

Mr Walsh—Thank you for the time, Mr Chair and other committee members. I am also an owner-driver. I operate in the local Sydney environment. Fortunately I do not too long haul any more. In the long-haul industry last year we saw 103 deaths, and that is effectively a non-regulated environment they operate in. Safety is the first casualty in a non-regulated industry. A parallel of this can be drawn directly to my colleagues in short haul in the local area and in medium haul within New South Wales, where exactly the same deregulation effects will come to bear, and that is that the casualty will be safety. The reason safety goes out the window is that if you are not able to achieve the same remuneration for the amount of hours you are doing now, the choices are simple: you must work more hours to try to catch up or you start to make short cuts in the way you run your maintenance schedules, the way you replace vehicles and in the rest of the cost factors that go with that.

It is clear that it has been more hours in the long-distance industry that has seen all those deaths. Poor maintenance schedules are also having a bearing on it. I can see that exactly the same situation that now exists in the long-distance industry is going to be replicated in the sector of the industry I am working in. Those deaths are going to be replicated, and the injuries and the lost time. Safety will go out the window and the public will be at risk.

The one thing I know each day is that at the moment in the industry I work in there are risks but there is a reasonable opportunity that I will come home at night. My wife is fairly comfortable that, when I walk out the door at 4.30 or five o'clock in the morning, at 6 o'clock that night I will probably walk in the door. I do not want to go back to the situation that I was in many years ago—and I know plenty of people who work in that industry—where she is worried until I walk back in the door and my kids do not know if I am going to get home. I am not even thinking about the rest of the stuff: the ability to make a living and the damage to my goodwill that these other guys have talked about. It is just the fact that safety will suffer. It must suffer; it always does suffer. There is an example out there today in the long-distance industry, which is

not regulated, which shows us the template for the future for the guys who are here before you today.

Mr Rullo—I am here to represent car-carrying in New South Wales. I am a father of two children who has recently purchased a brand-new prime mover in order to successfully do my job adequately. The car-carrying determination as it stands at the moment allows me to keep up all my payments on my truck at the end of the month. It helps me also to keep my children in Catholic schools and, being of Italian heritage, to send them to Italian school—things that I have missed out on. Like Paul, I can service my vehicle and keep it maintained in a manner of safety. If the new law abolishing determinations is introduced in July, I stand to lose over $2,000 a week, which I will only be able to sustain for about a month before I lose my truck and my house. I will probably have to live out on the street because I will not be able to service my level of debt. I have been a subcontractor for about 10 years now; I am only young in the industry. That is about where I am.

CHAIR—Are there any others who would like to speak?

Mr McKnulty—I am a courier driver. I have been doing courier driving here in Sydney for 20 years. I enjoy doing it. It is a job that I like doing. I have built my business as an independent courier driver up to the point where now I run two vehicles. I keep a spare vehicle so that when my normal work vehicle needs servicing I can put that in and still maintain a level of work that is not disrupted by using the second vehicle. I have the ability to maintain that level of servicing because I have a minimum set of rates that I can look forward to to maintain that level of income. So each week as I go along I know that I always have to maintain a certain level of income to maintain a safety standard not only for myself but also in the future. Every five years I try to turn over that vehicle and get a new one so that I am not driving something that is old and run-down.

In the past in this industry, before we had contact determinations, I have seen people just going out in the old family car. Then at the weekend they would be using that same family car, possibly with the brakes dried up and a level of servicing that was not sufficient for the standards we operate to now under the contract determination. I do not want to go back to that sort of period. With my business that I have been in for 20 years, I feel that the incentive schemes allow not only me to be more productive and efficient but those efficiencies and productivities to flow over to the company that I contract to and to the general business and the public out there. The greater efficiencies that I create flow on to them.

Mr Hayden—I am a lorry owner-driver. I work in a yard where we have 60 lorry owner-drivers. The particular point of interest to the committee here is not only what the other gentlemen have already said about goodwill, safety and everything else. Our industry works through a large transport company, the principal contractor between us and the main prime contractor, which has been the breweries, in our case, or other people. We provide to the industry, which they love, a large investment in capital. We would have over $10 million worth of rolling stock that lorry owner-drivers own on their behalf, that we provide. They are sign-written in their colours and their insignia, and they drive around the streets free of charge for them. We have a contract and a contracted rate, whereas they have company employees as well that drive. The company employees are unfinancial for them. They have to pay company drivers overtime, and they will not let them work.

These larger companies nowadays have us on call seven days a week, 365 days a year. Whether we work 14 hours or six hours, we are paid the same rate. There is no overtime rate on the delivery fees of the products. They use us to their benefit. They collect a commission off us to do it. They call you out Easter Sunday to make deliveries. They ring you on Saturday night to tell you to be there Sunday morning to do deliveries. This is what they cannot do with their company fleets in the first place. If you take away the position of protection that we have a rate which is reasonable, you will have these guys turning up for the company doing it for half-price, and that will always result in poor safety. The large companies themselves will not put the trucks on; they will not invest the money in them. They like the privilege that you are not an employee of theirs; you pay your own workers compensation and your own insurance. If you have an accident on site they just tell you to go and fill in your own forms. They are avoiding the liability of having employees, and it is only to their advantage. If the legislation changes you only go further and further. They will just have people lined up at the front gates, and they will say, 'Who's coming for how much today?' They cannot make money out of using other trucks and paying people properly as it is.

Mr Blair—I am an independent contractor owner-driver. Most of these owner-drivers are talking about what could happen. They are visualising things that can happen if the commission changes and we are not able to adjust our cases. I am an example of someone who the union has defended in court. I was in the hearing for five days, and I had a victory for very unfair dismissal, so I have been through the whole system.

Mr BRENDAN O'CONNOR—Was that in the commission or in a court?

Mr Blair—In the Industrial Relations Commission itself. I have been through the system. It was a five-day hearing. Three judges gave victory to me. I had to win that case because otherwise it would have been absolutely devastating for my family. As it is, unfortunately, I am back there for another two times. The proceedings are to go to the industrial commission for conferences. I am right in the firing line if anything happens to the commission, if it changes. Unfortunately also, through the stress of everything, my family has broken up. I am the classic example of the end result of what can happen if life is a little bit unfair. Without the union and the commission—and I really stress this—I cannot get everything together. I really need the commission and the union. I appreciate what the union did for me in the first case. I have had to go independent for other cases in court. If it closes down, I have got no recourse and 25 years of working has gone out the window.

CHAIR—Thank you. I am sorry to hear that. Good luck.

Mr Mathews—I have been in the industry as a lorry owner-driver for 21 years. I will just enhance pretty much what all the other speakers have said before. One of our major concerns is the recovery of costs that we obviously have to outlay to perform our tasks. I wish we could say that the companies that we represent are all above aboard and that they would try to maintain a fair and reasonable income for us to survive on. Unfortunately, as history has proven—and you have heard about some of the incidents that have happened—that probably will not be the case. Another major concern is rates. As long as we can recover our rates and get a fair and reasonable labour costing in our endeavours to meet our obligations we will be happy. In the system that we currently work under, we are able to achieve that.

As we said, the removal of the processes that are in place, the forcing down of rates, the OH&S issues that we discussed earlier and the deregulation of our line-haul operators are a major concern to us all. The last thing we want to see is our drivers not come in through the gate one morning or one night because of a fatality on the road, because they had to do another job and exceed their hours. In summary, I plead with you: if it is not broken, don't fix it. It is working very well with the people of this union. We thank our union and our organisers all the time. It gives us an out. If we have a problem, there is a mediator and, nine times out of 10, it is usually fixed in that arena. In closing, I just say that we are trying to earn an honest living.

CHAIR—To all the owner-drivers who spoke, I thank you for coming forward. Appearing before parliamentary committees is not the sort of thing that you do every day, so I appreciate that it can be pretty tough to sit here and say your piece. Thank you for your presentation and your candid evidence as well. I wish you all well. It seems to me that the principal issues of concern to you are the possible end to contract determinations, as you see it, perhaps a neutering of the power of the Industrial Relations Commission and perhaps some prohibition on the union representing owner-drivers. Are they the key three things, Tony?

Mr Sheldon—That is correct.

CHAIR—The issue of goodwill came up quite a bit as well.

Mr Sheldon—Goodwill, unfair dismissals—

CHAIR—There are many questions. I think the tax department has a problem with the whole concept of goodwill for independent contractors. It is an issue which we will raise with them when we talk to them at some stage.

Mr Sheldon—The tax department had a problem with us about three years ago over the 20 per cent tax.

CHAIR—On the issue of union representation, we heard earlier today from, I think, John Sutton, from the CFMEU, who said that right now, irrespective of any future legislation that might arise, because of the Trade Practices Act and the ACCC there is some doubt as to whether unions are able to represent or sign up independent contractors as members of the union. I never knew there was a problem. He claims that there are doubts because of the ACCC and the Trade Practices Act. What is your interpretation of that? I want to get to the bottom of this issue.

Mr BRENDAN O'CONNOR—Particularly with the issue of collusion if it is a business—I am not sure if that helps.

Mr Sheldon—Actually, we might be interested in that section of the act. We talk specifically about the road transport industry; we are not really in a position to talk about the other industries.

Mr Kaine—In relation to the road transport industry, section 310A of the industrial relations act of New South Wales, enacted by the New South Wales parliament as it is entitled to do under section 51 of the Trade Practices Act, specifically authorises matters relating to trade practices and owner-drivers. If you indulge me for a second, specifically authorised by this act for purposes of section 51 is 'anything done by the Commission in exercising its functions under

this Chapter'—that is chapter 6, which is the chapter that I have referred to in the submission. It also says, 'Anything done by a person in order to comply with a contract determination of the Commission', or 'the entering into an agreement approved by the commission under this Chapter'—and this is very important—or 'the doing of anything preparatory or incidental to the entering into of any such agreement'. We read that very broadly, and I think it would encompass the concern that you have raised. It refers to anything done under such an agreement and anything done by the contracts of carriage tribunal, which is the tribunal that deals with the goodwill applications. That is something that the New South Wales legislature has been acutely aware of and it has taken the appropriate steps under the federal legislation to ensure that transport workers and the union in this state do not fall foul of those particular problems.

Mr BRENDAN O'CONNOR—Firstly, it has been an extraordinary array of evidence provided, and it is good to see people at the coalface giving evidence to parliamentary committees, not just people representing those people at the coalface. It has been a fantastic effort this afternoon. You talked about contract determination—I do not pretend to understand that fully, but I do understand it has obviously brought great relief to a lot of owner-drivers. What is the situation in other states in relation to that? Does the same contract determination approach apply in other states? If not, why not? What consequences flow from that?

Mr Sheldon—Queensland has a capacity to have contract determinations. As the legislation has been bedded down, there have been a number of cases about what the legislation covers. But in effect it at least covers the right for companies' principal contractors that engage owner-drivers as dependent contractors to enter into agreements collectively and for the union to do representation. It is very similar to this state in that people can do collective agreements. By the way, 170 of them happen to be by us and none of them are by anybody else. In the case of Victoria, there are ongoing discussions about legislation down there. South Australia has recently had a debate for about 18 months on it. I understand the Independent Contractors Association was quite vocal. I cannot quite work out who they actually represent—certainly not anybody here.

Mr BRENDAN O'CONNOR—They are in the *Finance Review* a bit, I notice.

Mr Sheldon—Yes.

Mr BRENDAN O'CONNOR—So there are states where it is not the same situation at all. I am assuming your contention would be that there are adverse consequences that flow from not having contract determination.

Mr Sheldon—A direct adverse consequence that Paul raised before is where people spend substantial sums of money on goodwill. There are the adverse consequences in the case of the long-distance industry—people mentioned in particular the interstate transport of goods—where there have been 103 deaths this year in heavy vehicle accidents just in New South Wales. In the last five years there have been 8,000 serious injuries just in New South Wales. One-third of those have been identified by the Road Traffic Authority as being fatigue related. The coroner's report and the other inquiries I mentioned earlier in my evidence and in the submission again connect it to remuneration and lack of regulation.

Mr BRENDAN O'CONNOR—Is it the case that if you are registered in New South Wales then, even if you are undertaking long haul, you are covered in that way? I do not understand how that operates. You have interstate business effectively; how would it operate?

Mr Sheldon—If you run interstates you are not covered by a contract determination. For your operations in the state, you are. However, the Australian road transport industry organisation, the employer association—a major group—and the TWU negotiate a recommended rate for long haul trucking that travels interstate. However, that is not enforceable; it is their recommended rate. This touches on the issue of the ACCC.

Mr BRENDAN O'CONNOR—Finally—and this is a very important area—I ask about something you may have touched on already. If you have there is no need to respond to those parts. There is clearly a concern from your organisation that the Commonwealth is contemplating prevailing over existing state laws in relation to your area and particularly about how it will affect owner-drivers. Is there anything that you may not have given in evidence this afternoon that you can contemplate providing to the committee that may flow if the Commonwealth took over the jurisdiction of the current Industrial Relations Commission of New South Wales?

Mr Sheldon—There are a couple of obvious things—that is, the regulation of this industry has grown over 100 years and has substantially moved forward in the last 20. It moved forward again in the mid-1990s, as I mentioned before, with Liberal governments. Throughout the late 1970s and through the 1970s and 1980s, with a lack of regulation, there were blockades of the country. That was done largely by people that did not have a recourse to go anywhere, but they decided they actually wanted to go home and see their family occasionally and not be drugged up or doing extraordinary hours.

One thing that is particularly frightening—certainly from the evidence people have given here and the evidence that exists in these inquiries—is that one-third of drivers in the long distance industry, which is an unregulated sector of the industry interstate, admit to taking illegal stimulants. Anecdotally we say it is substantially higher than that, but one-third of people admit it. You would have to be pretty drugged up to say to a government inquiry that at a truck stop you take drugs or illegal stimulants. There are many horrific personal instances of innocent families being killed, along with innocent drivers—'innocent drivers' from the point of view of the circumstances they have been thrown in the middle of. You have a vehicle worth a quarter of a million dollars and potentially some goodwill—but a quarter of a million dollars worth of vehicle—and you lose your home. They get the truck back; you lose your home. Then you have the consequences of saying, 'I have a choice. I either put food on the table for the family and keep my home going or I do what the client requires me to do,' and they will do what the client requires them to do.

Given the nature of the industry—and all the studies that exist about the drug taking—there is the potential, with further deregulation and lack of representation, for this to be transposed in the New South Wales system. The other states—and I refer to the question that was asked before—have various forms of regulation, formal and informal arrangements of regulation, for owner-drivers. Many of those are through agreements reached with employers. A lot of representation occurs now and has occurred, again historically, in the states for over 100 years.

CHAIR—While we are on the state differentiation, I am not sure who it was—was it the Pioneer trucks man?—but someone pointed out the differences between New South Wales and Victoria and how many of the Victorian drivers may be going out of business or certainly finding their case being very much detrimental. Why is that the case? What is so different about the Victoria v New South Wales application in your particular organisation?

Mr Dewberry—In answering Mr O'Connor's question, Chair, we have contract determinations in New South Wales that set a minimum cartage rate and conditions. From talking to my counterparts in Victoria, they do not have that exclusive right. They have a determination to back them up. So it was up to the negotiations with the company.

CHAIR—My question, though, is why does not Victoria have it.

Mr Sheldon—Paul is probably addressing the consequences. But it might be easier if Michael actually explains the Victorian situation.

Mr Kaine—Are you asking why it is different for those drivers?

CHAIR—Why don't the drivers in Victoria have the same level of protection and entitlements as those in New South Wales? And do not talk to me about federalism.

Mr Kaine—Because the system in New South Wales has evolved uniquely over a period of 70 to 80 years. It may be a consequence of the intense proliferation of transport work in New South Wales. I do not know. I cannot give you an answer to that question. What I can say is that Victoria does not have what we consider to be very basic protections, such as protection from arbitrary termination. A company should not be able to simply arbitrarily terminate contracts of people who have been working for them exclusively for a period of 10 years without acknowledging the risks that those drivers have undertaken and the capital input they have given to the business.

CHAIR—So a driver driving for Lindsay Fox in Victoria and one driving for Lindsay Fox in New South Wales would have different conditions? Would that be the case?

Mr Kaine—An owner driver in New South Wales would have the benefit of those protections; an owner driver in Victoria may not necessarily have those.

Mr BRENDAN O'CONNOR—Unless they have an industrial instrument, perhaps, with that.

CHAIR—But not legislation.

Mr Kaine—And in the larger companies it is the case throughout the country that there have been negotiated on a collective basis through the TWU arrangements which—

CHAIR—Sure.

Mr BAKER—So the same could be said for Queensland, Western Australia and South Australia.

Mr Kaine—Yes.

Mr Sheldon—Because of having state regulations, there are more than just the consequential things that people have raised. The excavation ministry in Victoria had a three-week shutdown because the excavation drivers had nowhere to go to argue for a fair rate of return. The excavation drivers said, 'Where else can we go?' The Australian Industrial Relations Commission had some hearings but the capacity to actually delve into it to the same degree that the New South Wales system allows does not exist.

CHAIR—Thanks, Tony.

Mr HENRY—My compliments, too, on the presentation. It is good to see the drivers all coming along today to talk to us. Just getting, in some sense, to the nub of this discussion that has been going on, in your submission you indicate that the New South Wales model is your preferred way of operating—obviously, because that is where you are. Have there been any discussions with TWU branches in other states to look at adopting a similar model? If there was national consistency in that, would that create any concerns? It would seem to me that it would not do that; it would give you a positive outcome across the county. I understand that your responsibilities are probably for New South Wales but given that we are looking at moving to a more national approach, this might assist in addressing that.

Mr Sheldon—One of the things that people also deal with in the state system, particularly owner drivers, is various state road laws and various other arrangements that exist with the state jurisdiction. When we do a costing formula, that is regulated by the Industrial Relations Commission. The parties, either by consent or by argument, strike an arrangement on rates. It takes into account all the costs that exist within the particular local environment.

Mr HENRY—So the rates can vary from state to state, can they?

Mr Sheldon—Yes. Also, the peculiarities of the history vary substantially from state to state. There is a depth of history within this state. For example, Paul has had goodwill in his company for 40 years. We have had quite a few attempts in recent times for the company to withdraw that in a similar way to what has occurred in Victoria. But the history of regulation with regard to his goodwill means it has a corporate understanding within the New South Wales system that cannot be transposed into a hearing in Melbourne or legal argument in the Federal Court or a Supreme Court or even the High Court. So that fact and the change is a disservice to the people regardless of whether the instruments are similar in a federal document. However, interstate work is a more complex issue. This an area that is not regulated now. It has its own set of circumstances that requires a national response. The construction market that Paul works to in Sydney, New South Wales, is substantially different from Melbourne.

Mr HENRY—But your submission does say, doesn't it, that you suggest that the New South Wales model could be implemented in other states and territories?

Mr Kaine—Is that in the federal submission or the state submission? There is a federal one.

Mr HENRY—No, it is in your submission.

Mr Kaine—I think that the New South Wales system in its essence—that is, the predominant elements of chapter 6 that we have outlined in the document—would serve well as a model.

Ms HALL—The contract determination helps subcontractors plan financially. You have a minimum wage. How does that help you plan for your businesses? Maybe one of the drivers could answer.

Mr Neal—I have in my bag the actual figures on how our rates are worked out—the percentages.

Ms HALL—Are you happy to submit that to the committee and give us a copy of it?

Mr Neal—Yes.

Ms HALL—You can provide it later, but you might like to talk to it now.

Mr Neal—The figures are not just plucked out of the air. They are actually based on costings. When you work it all out, our rate of pay—because we do not work for any one contractor in our industry; we ring up different contractors every day to get a job—is equivalent to casual drivers. Our actual rate of pay in our hands is $21.77 an hour, which is not a great deal. But, to be competitive, we cannot go any higher. If our blokes come in to buy a new truck or something like that, they have to pay the top figure. But fleet owners might order 12 trucks, so they will give them one for nothing because they have spent that much money. So they are entitled to discounts. It is the same with fuel. They get their fuel cheaper. That is what makes it very difficult. That is the difference between our state and other states. We work directly, in our industry, for contractors. In Victoria and Queensland, which I know about specifically, they actually work for blokes who are like agents. If you open your mouth and say, 'I'm not getting enough money' or 'I'd like to see a contract determination set up,' you will never get another job. You are gone. They do not want to create waves. If you do not work for the rate they determine, you are gone. As soon as you open your mouth, that is it. These agents in our industry in Victoria and Queensland control the whole industry.

Ms HALL—What kind of financial investment have the drivers here made in your businesses—you and your families? What sort of repayments are you making on your equipment? How does contract determination and your ability to do that impact on that?

Mr Rullo—I have a $250,000 prime mover, on which my monthly repayments are about $3,200. I need to fill it up every week, which takes 1,000 litres of fuel. At current fuel prices, that costs me about $1,200 a week or $4,800 a month.

Ms HALL—Then there is your upkeep.

Mr Rullo—That is right, servicing. For a complete overhaul, top to toe, I am looking at over $2,000.

Ms HALL—How often does that occur?

Mr Rullo—That occurs once a year. To service it in between costs a minimum of $800 each time. To change my front steering tyres costs about $800 each; that is not to mention the other eight tyres I have to carry on the back of my prime mover, which cost about the same. My registration costs about $9,000 a year. I am looking at over $6,000 a year for insurance. On top of that, like everybody else, I have a house mortgage and a young family. If the system changes, I am history; I am gone and so is my family.

Ms HALL—It is pretty scary.

Mr Kaine—It might be helpful for the committee for me to add to that. In the car carrying industry, there is a car carrying contract determination. That determination sets in place industry agreed parameters for costings. The industry, usually on an annual basis, will agree on a predetermined and industry agreed formula for how those costings will rise and fall in determining rises in the cost of living. Therefore, people can have the security of being able to financially plan and plan for their families on the basis of cost recovery.

Ms HALL—So, if that were not in place, it would be devastating.

Mr Kaine—Absolutely.

Ms HALL—I notice that a couple of you—I think it might have been Ed and Garry—have talked about going to the Industrial Relations Commission. Have any of you put in claims to the IRC for underpayment? You were talking about your visits there being quite successful. Would such claims be more difficult if they were dealt with in a civil court?

Mr Kaine—Yes, they would be much more difficult. You risk incurring legal costs, and that is a barrier to bringing action. Under the system, the disputes procedure in the Industrial Relations Act allows an owner-driver to bring a small claim, something under $10,000, and process that in an efficient way before the commission, which is not bound by rules of formal evidence and is a non-cost jurisdiction. Actions can be run very efficiently and very quickly. That, of course, contributes to the level playing field in the industry because it is a disincentive for underpayment and it is an incentive for people to agitate their rights.

CHAIR—Tony, thank you very much for coming to give evidence and for your submission; it is obviously a vital piece of evidence for us to consider. I thank all owner-drivers who have come in and given up their time—your time is valuable. As Brendan has said, it adds so much to our own body of knowledge when we hear direct from those who are affected rather than through perhaps some sort of research paper that has been put together. I am not saying such papers are not valuable, of course; they are all very valuable. But to hear evidence first-hand is fantastic and I really do thank you for having the courage to come here and give evidence and, more importantly, for finding the time to be with us, which is more important.

Tony, just to you: a discussion paper was put out by the minister today. We only received it about an hour ago—that is, five minutes before you sat down—and I have only looked at the chapter headings. Once you have had a chance to look at this, if there is anything else you want to add for us to consider, I ask that you send us perhaps further information. I would be particularly interested in what you have to say in response to the discussion paper that has been

put out. I understand that you have had some either formal or informal discussions already with the minister. Is that right?

Mr Sheldon—We had informal discussions some months ago with the minister.

CHAIR—Thank you very much.

[4.36 p.m.]

THOMAS, Mr Andrew George, National Industrial Officer, Australian Rail, Tram and Bus Industry Union

CHAIR—Welcome. The committee do not require you to give evidence under oath, but I should advise you that these hearings are formal proceedings of parliament and consequently warrant the same respect as proceedings of the House itself. I remind you that the giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. We are not prepared to provide the protection of parliamentary privilege to allegations about particular individuals or companies. I invite you to make a statement in relation to your submission.

Mr Thomas—Thank you. May I, at the outset, express the RTBU's appreciation for being given the time to address the committee publicly, in addition to your accepting our submission.

The Rail, Tram and Bus Industry Union is a federally registered union, with some 35,000 members spread across each of the states and territories. The membership is employed by a large number of companies, in both public and private sectors, which are involved in the operation, maintenance and other associated activities of railways, tramways and public bus operations in the major capital cities.

As our submission notes, in recent years the RTBU has become involved with a number of labour hire agencies, which have obtained work in the industry. Our experience has been largely with those labour hire agencies. Whilst in our experience the use of independent contractors is not unknown, it is not significant, at least to date. Where it goes in the future may well depend in part on what happens in the next couple of years.

It is our submission that the contemporary dynamics of independent contractors and labour hire agencies involve, in particular, the growth of a product of three interrelated factors. Firstly, for the employer or principal, they are relative to direct employment—it is cheaper. In our view the relative cheapness of these forms of labour derives from one or more of three features: the capacity to pay lower wages and apply lower conditions; the advantages of numerical flexibility—that is, you can get rid of labour more cheaply and for less cost; and the capacity to avoid forms of regulations specifically designed to protect employees or to provide benefits to employees.

When each of these features is analysed, you find that they are cheaper for the employer and principal, not because they result in the elimination of costs associated with direct employment but because they result in a transfer of those costs from the employer or principal to the person who will actually perform the work, be it through the arrangement of an independent contractor or an employee of a labour hire agency. For example, a full-time employee covered by an award and an enterprise agreement is ultimately replaced by an employee of a labour hire agency employed on a casual basis and on an Australian workplace agreement with wages and conditions less than those provided by the direct employer. It is not rocket science to work out who paid the price in that relationship.

Secondly, the use of independent contractors and labour hire agencies has grown simply because, in certain places, it has been pushed as a means of cost cutting. In recent years, the incidence of high unemployment, the swing in the balance of power in the workplace in favour of the employer and the introduction or existence of accommodative legislation, together with a predisposition to address competition narrowly through labour costs, have only emphasised their use.

In that instance, if we take independent contractors: advocates assert—in our view, in the absence of supporting information and certainly in the face of contrary evidence—that a contract for service is the product of an agreement entered into voluntarily by persons in a roughly equal power relationship and with access to the common law. It is acknowledged by them that occasionally there is a sham arrangement, just as we would acknowledge that in some cases an independent contractor may possess the powers he or she is alleged to have. But in the main we are not talking about a person with unique information technology skills or an engineer with a particular talent.

As evidence in other submissions shows, we find persons employed as cleaners and couriers are employed on the basis of an independent contractual relationship. To suggest that those individuals in those occupations share an even power relationship with a company is, in our view, to defy reality. To suggest that these individuals understand the idiosyncrasies of the employment relationship—particularly given that it is difficult enough for the experts—or that they have the time and resources to pursue a matter through the judicial system is the stuff of fantasy. The fact is that the system is stacked against these people, and the employers are using it.

The third reason is that, in reality, the use of independent contractors or labour hire agencies has no material effect on the day-to-day control by the principal over the production process or the provision of a particular service. Indeed, with a labour hire agency it can enhance the principal's control, because it may permit that principal to increase or decrease the number of employees engaged in the principal's business at his or her whim and at no cost. The principal avoids any redundancy payment, the payment of any accrued entitlements and the potential for an unfair dismissal claim.

With respect to independent contractors, as is set out in our submission, we quote Professor Stewart. In his article in the *Australian Journal of Labour Law,* he said that any labour lawyer worth his or her salt could draft a contract for service that will cause a person:

> … to resemble an independent contractor, but over whom the hirer will retain maximum control.

The common element in each of these reasons is that the advantages for the employer of utilising the independent contractors or labour hire agencies are offset by the disadvantages to the independent contractor or employee. The ultimate outcome is that the employer or principal enhances their control over the workplace at the expense of the person providing the labour. The International Labour Organisation, in a recent report—

CHAIR—I am sorry to interrupt your flow, but just for time expediency, if you have something else that you want to table to speed up the process rather than going through the

laborious exercise of reading out whatever you were going to be presenting, that would be appreciated.

Mr Thomas—I was not going to read or quote all of it, but I have one document that I would like to tender, and I can refer to another document, which is available on the internet from the ILO. Perhaps I should talk to the secretariat, because I think this document is well worth looking at.

CHAIR—I just did not want to short-change you by not having time to ask you questions.

Mr Thomas—Sure. The first document is ILO convention 181 on private employment agencies. I will come back to that in summing up. The second document I want to refer to is material I became aware of post sending this submission. At the present time the ILO is doing a lot of work on what it generally calls the employment relationship, and in one of the reports that have been prepared for the next ILO conference in early 2006 is this document called 'The employment relationship'. It goes through, from an international perspective, including Australia's—there has in fact been a country report done on Australia by two academics from Melbourne University—

CHAIR—The ILO is in Melbourne next week.

Mr Thomas—Is that right? I was not aware of that. This material is well worth reading, and you can read it and make what judgments you will of that.

CHAIR—Is this the private employment agency convention that you refer to in your submission when you say that the European Commission is developing a draft directive?

Mr Thomas—No.

CHAIR—Is that separate?

Mr Thomas—The European Commission has a directive on temporary employment agencies, which is a separate document. As I tend to focus on employees, for obvious reasons, I want to note that in this report the ILO identifies a number of negative implications for employers. It also notes that the lack of legal certainty and the precarious nature of the employment can lead to low morale and high turnover, thereby adversely affecting productivity. The potential for certain employers to take advantage of or manipulate the employment relationship in their favour can also distort competition. Further, as noted in our submission, it can have a negative impact on things like training and, in turn, the skills base, which is a very topical subject in this country at present. It can also have a negative impact on occupational health and safety. I think you heard from the TWU on that subject. Finally, it can have a negative impact on the revenue base of government, whose work arrangements are set in place as mechanisms to avoid tax, which is what happens, and the ILO referred to that.

The RTBU have sought to redress this imbalance—it is not so much of a tax issue; that is a bit beyond our control—through our policy deliberations and day-to-day industrial activities. As you have read, our submission has set out a policy which adopts a principle of job security for direct employment whilst recognising that there may be occasions when an employer can utilise

labour hire agencies—those occasions being where the employer does not employ persons with the requisite skills to perform the particular task. In those circumstances, the RTBU seeks to ensure that the job security of direct employees is not undermined in any way. To that end, our policy seeks to ensure that the skills base of direct employees meets the type of work required, thereby mitigating the need for what is commonly referred to as 'outside labour', and that, in the event that labour from a labour hire agency becomes necessary, the wages, conditions and entitlements of its employees are no less favourable than the wages, conditions and entitlements of the direct employees. This prevents our members' jobs from becoming bargaining chips.

We also note that a variety of other methods have been proposed, and they are set out in our submission. They include deeming type provisions; the draft European directive on temporary employment agencies that was referred to; ILO convention 181 that provides, amongst other things, for a state to be able to prohibit under certain conditions or in certain parts of industry the use of private employment agents; measures to ensure the adequate protection of workers; a recognition of the right to freedom of association; and the promotion of collective bargaining.

In summary, the RTBU, in accordance with its rules and policies, is charged amongst other things with the responsibility of protecting and enhancing the working conditions of its members. It is a concern of the RTBU that the operation of independent contractors and labour hire agents has been used as a vehicle to undermine those working conditions. That, in turn, has led the RTBU to develop a policy and undertake programs to fulfil its charter. We will continue to endeavour to ensure that our members are not on the receiving end of an employer's use of such forms of labour. In that regard we submit to this committee that public policy considerations require that regulation exists to ensure that one part of the labour market does not pay the price for developments in another part of the labour market. There are a number of ways to address this important public policy issue and we urge this committee to give them favourable consideration.

CHAIR—My feeling is that most of what you are dealing with would be covered by the public transport sector. That is essentially what we are talking about here. Where there has been contracting out in the public transport sector, the whole sector has been contracted out. It is a similar situation to what we discussed earlier with the CFMEU, with regard to a whole of mine contract. In that situation wouldn't the entitlements and rights of each of the employees still be maintained or is there subcontracting taking place within the sector—and how widespread is it?

Mr Thomas—It is a bit of a mixed bag. It is true to say that if we look at the privatisation of the railways in Victoria, the provisions of transmission generally applied, and as part of that process it was agreed with the then Kennett government that existing wages and conditions would carry through to the new employer. And, by and large, that has happened. But once they are privatised companies contract out; they contract out maintenance, in particular.

CHAIR—They contract out specific jobs.

Mr Thomas—Yes. Then the maintenance company may—if, for example, it is upgrading a particular section of railway track—bring in labour hire agents. Because they are big projects and a lot of people and a number of companies are involved, by and large the unions are in there from the outset to provide a higher degree of protection than would otherwise be available. I can give you examples. I had a phone call recently from a person here in Sydney—working for a

labour hire company in the railways—who complained bitterly to me that they had been underpaid relative to an employee of the State Rail Authority. They asked that in approaching the employer we did not use their name because they were concerned that it would be the last time they would be employed as a casual.

As another example, a number of employees who came from Queensland were taken all the way down to Victoria into the Latrobe Valley on the promise of two years work. They arrived, and a week later, were told they were no longer needed. They were told to pack their bags and go and that all their costs would be borne by them. We became involved. We were not able to get them two years work but we did get them a lot more than one week. That example might be an exception.

CHAIR—Would your union coverage extend down to that maintenance area and be ongoing?

Mr Thomas—Yes, we can cover anybody employed in, or in connection with, the rail industry—be they in the public or private sector.

Mr BRENDAN O'CONNOR—Does that include contractors?

Mr Thomas—Yes, we have as members employees of major labour hire companies—for example, Skilled Engineering.

Ms HALL—A lot work on the rail here in New South Wales, don't they?

Mr Thomas—Yes. Skilled Engineering, in fact, have their own—

CHAIR—Are there any jobs or functions within your sector that lend themselves to independent contracting and labour hire—and where you would be comfortable with that happening? If so, what are they?

Mr Thomas—In essence, if a company is not in a position to employ people for a one-off project—they simply do not have the employees and they do not the skills base themselves and they are not going to require them for an extended period of time—we then look at two options: firstly, whether or not the company can employ those persons on a fixed-term basis, say, for 12 months or six months, for the duration of the project. If that is not possible then labour hire contracts become the only alternative. The use of independent contractors—as in an individual—as I said in the submission, may well operate at a higher management level. They may well be independent contractors working in information technology or certain unique parts of an engineering project. But the part of the industry which we focus our attention on does not in our view lend itself to independent contractors. Why would you want an independent contractor as a train driver? There are 3,000 of them—

CHAIR—I understand that.

Mr BRENDAN O'CONNOR—There has been extraordinary change in the public transport sector, particularly in places like Victoria, over the last 10 or 15 years with privatisation of so much of the system. As a national official situated in New South Wales, have you had any involvement in Victoria at all? You would know of it—

Mr Thomas—I am actually an ex Victorian. I still follow Aussie Rules.

Mr BRENDAN O'CONNOR—Is there a big difference between the workers in the industries you represent where there have been much larger levels of outsourcing and privatisation and where there are still public sector employees, or does the growth in labour hire employees and independent contractor status of people working in the industry differ depending on the nature of the change that has occurred over the last 10 or 15 years?

Mr Thomas—If you go from Queensland, which is still essentially a publicly owned system, to Victoria, which is totally the other way with the exception of the country passenger services, it does not seem to have made a great deal of difference. Both sides of the industry will use labour hire companies, particularly in the maintenance area, and in some places, as I think you will find in our submission, there are companies even using some locomotive drivers through labour hire companies. In the submission you will note that I gave two examples, both of which occurred in Western Australia where one gentleman turned up via a labour hire company and his only experience with driving trains was driving small passenger trains in the Netherlands. And there was another person whose experience with driving trains was operating a small locomotive in the sugar industry in Queensland. So they get onto a 6,000-horsepower locomotive pulling 5,000 tonnes across the Nullarbor.

Mr BAKER—Wouldn't there be a licensing issue?

Mr Thomas—They are supposed to be competent.

Mr BAKER—I have a driver's licence but I cannot go and drive a log truck.

Mr BRENDAN O'CONNOR—Thank God!

Ms HALL—Thank goodness!

Mr Thomas—They are supposed to be judged to be competent. They turn up and it seems to be that they are held out to be competent. When you turn up to perform the work, the first thing is that you have to have what they call route knowledge. You have to understand the length of track which you are going to operate over: where the signals are , where the crossings and loops are. The person then spends some time with two qualified drivers learning that and that is when you normally work out that the person is not quite up to scratch.

Mr BRENDAN O'CONNOR—I just want to finish on the point I raised. I am very mindful of the fact that the accident rate in the public transit system went up, skyrocketed, in Britain when they dismantled the system into 400 or 500 different operators. I do not have the figures before me, but the increase in fatalities was about 400 or 500 per cent over a decade. I am happy to be corrected, but I recall that it was extraordinary. There are arguments as to whether the causal link was primarily the fact that British Rail was completely broken up into separate and not necessarily cooperating units. Is there evidence that the introduction of independent contractors and labour hire employees into the public transit system has led to potential dangers in the system as a result of a lack of collaboration or cooperation that is required for the sort of system that we have in place?

Mr Thomas—I certainly would not be so brave as to draw a direct causal link, because I do not have any evidence. But in our view there is no doubt that safety has suffered in recent years. It is not solely the product of the use of labour hire agencies; there has been a whole deregulatory push.

Mr BRENDAN O'CONNOR—So you are saying that it is a contributing factor.

Mr Thomas—Yes. As the TWU witnesses stated, the emphasis is on making money or, in the railways in many places, reducing the cost.

CHAIR—So it is not a lack of cooperation between entities; it is the drive for a reduction in costs that is perhaps cutting the maintenance bill or even the maintenance scheduling.

Mr Thomas—Yes. A lot of exercises have been undertaken to reduce costs. The railway is no different from any other industry in that respect. The difficulty with the railway as against some other industry is that if there is going to be an accident it is usually significant.

CHAIR—Horrific.

Ms HALL—I am approaching this very much from the perspective of a person from New South Wales. In New South Wales there have been quite significant changes in rail maintenance between the ARIC and the ARTC. Accompanying those changes there has been a large investment recently by the state government in rail infrastructure, but accompanying that there have been enormous redundancies. Those people who have been made redundant who were working for ARIC—or ARTC, which is going to happen further down the track—are just moving over and working with the labour hire companies. I would like you to comment on that from the point of view of the workers that you represent and the impact that you think that is going to have on the industry and safety in the long term.

Mr Thomas—Many of the people currently working for labour hire agencies were full-time employees who took redundancy. They have this view that the grass is always greener on the other side until they get to the other side.

Ms HALL—Weren't they put in the position where they were told, 'Either you take that or you've got to go and sit in a tent over there'?

Mr Thomas—In effect, that is what happens. Many places have a policy of no forced redundancy, but there are very subtle ways to do it—unless you want to become the world's greatest expert on crossword puzzles or you do not mind being bored.

Ms HALL—Exactly.

Mr Thomas—Many of the labour hire employees are ex rail. Many of them have rung up complaining, because when they worked on the railways they used to get this or that and it is all gone. There is no doubt that many have gone on to a level of wages and conditions that is lower than the one they previously had. The reason for that is that many of them are employed casually. We do not know who they are until they are employed—labour hire agencies are not going to ring us—and all of a sudden they turn up. Most of the time you find out when they turn

up. You do not know who they are or where they are employed. We have the luxury that some other places do not have, in that they generally do not turn up at work on their own; they work with people who are our members. Workers are like others: they sit down and compare things, and if one is getting overtime and the other is not—

Ms HALL—Particularly on the railways.

Mr BAKER—I am just a bit concerned. I am going back to what you said about the employment of train drivers who had driven only small trains in Holland. Regarding the licensing regime, surely the labour hire companies have a responsibility that they cannot hire out people who are not suitably qualified, whether they are drivers or in maintenance. When you look at it, there must be a huge liability perspective, whether it is in maintenance or in a building trade. Surely they cannot hire out people passing off as builders when they are not qualified.

Mr Thomas—I would agree with you.

Mr BAKER—Is that happening?

Mr Thomas—Instances certainly happen where people hold themselves out to have qualifications that they do not have. With a car driver's licence, you are allowed to drive anywhere in this country. It is operated by the state. There is no national licensing system for locomotive drivers. You are employed by a company—they train you because they are a registered training operator, or, if not, they would get one—and that company gives you your competencies to drive, and therefore you are a qualified driver and they give you a card.

Mr BAKER—So you are saying that there is no national training code, per se, for licensing a locomotive driver?

Mr Thomas—No. It is being addressed, but there isn't one. Part of it is a product of the history of rail. They talk about the break of gauge mentality and all of that. Railways were essentially state based institutions.

CHAIR—Mr Thomas, we are getting to the end of the day. You have been most patient, so thank you for waiting to come on. Thank you also for your submission and your personal evidence today. If you have any other information, please pass it on to us. We will try to report by some time around July or August.

Mr Thomas—You are obviously going to be busy.

CHAIR—We are. Thank you very much.

Resolved (on motion by **Ms Hall**):

That this committee authorises publication of the transcript of the evidence given before it at public hearing this day.

Committee adjourned at 5.08 p.m.