



**UNIONS NSW SUBMISSION TO
THE STANDING COMMITTEE ON
EMPLOYMENT, WORKPLACE RELATIONS
AND WORKPLACE PARTICIPATION**

INQUIRY INTO

**INDEPENDENT CONTRACTORS AND
LABOUR HIRE ARRANGEMENTS**

MARCH 2005



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INTRODUCTION

For many years Unions NSW¹ has been concerned about the adverse impact that the rise in the use of Labour Hire Companies is having on the workforce generally and, in particular, the high use of casual labour associated with that industry.

Unions NSW recognises that there is a legitimate role for Labour Hire Companies in a modern economy as there is for casual modes of employment. However it is also apparent, particularly in the evidence provided to the New South Wales Secure Employment Test Case,² that many employees are being disadvantaged by such arrangements. It is also the case that there has been a steady increase in the use of “independent contractors” across a range of industries. Again there are many circumstances where the use of “independent contractors” are both bona fide and legitimate, however there are also many instances where workers are being forced into unfair arrangements by employers with the sole motivation of avoiding their award and other statutory obligations.

¹ Unions NSW is the operating name of the Labor Council of New South Wales

² IRC No.4330 of 2003 Application by the Labor Council of New South Wales Re Secure Employment.

It is on this basis that Unions NSW seeks to make a brief submission to the House of Representatives Employment Workplace Relations and Workforce Participation Committee with respect to its Inquiry into: -

1. the status and range of independent contracting and labour hire arrangements;
2. ways independent contracting can be pursued consistently across state and federal jurisdictions;
3. the role of labour hire arrangements in the modern Australian economy; and
4. strategies to ensure independent contract arrangements are legitimate.

Unions NSW purposefully keeps its submission brief and general particularly, given the stated policy aims of the Federal Government with respect to its Industrial Relations agenda. Public announcements made by the Honourable Kevin Andrews, Minister for Employment and Workplace Relations that the government intends to create a unitary industrial relations system

with reduced Tribunal powers and a reduced role for unions means that it is unlikely that any of our concerns will be addressed by the outcome of the Inquiry.

Unions NSW supports the submissions made by the Australian Council of Trade Unions (ACTU) to the Inquiry and therefore these submissions should be seen as complimentary to those of the ACTU. In addition Unions NSW also supports the general thrust of the NSW Government's submission to the Inquiry, particularly Part 3 Remedies (but not its position on the Secure Employment Test Case).

THE LANDSCAPE

Appendix A encloses an affidavit of Professor Richard Hall provided to the NSW Secure Employment Test Case which outlines the trends, evidence and implications relating to the incidence and growth of casual employment and the use of Labor Hire workers.

Appendix B encloses a copy of a Productivity Commission Staff Working Paper written by Laplagne, P., Glover, M. and Fry, T. entitled "The Growth of Labor Hire Employment in Australia".

Both documents simply reiterate what is now becoming folklore, that is, Australia now has one of the highest incidents of casual employment in the O.E.C.D. and in addition has seen a corresponding increase in the growth of Labour Hire Companies.

Professor Hall's statement at paragraph 11 of his affidavit best summarises the effects that these changes are having on job security.

"In terms of employment conditions for employees, the distinctive features of casual employment are the lack of benefits, the lack of job security and the lack of certainty as to hours of work typically associated with such employment. Of course, these features may be more or less present in individual instances of casual employment. It has often been observed that a significant proportion of casual employees have been employed in their current jobs (or

with their current employer) for long periods of time (eg. Smith and Ewer 1999). It might then be suggested that this form of employment cannot be considered 'insecure' because it is not necessarily 'short-term' or 'temporary'. However, this ignores the fact that there is a distinction between 'secure' employment and 'long-term' employment. Just because an employee employed on a casual basis (without leave entitlements) might have been employed for a long period of time does not mean that he or she is as secure in their job as a permanent employee (with leave entitlements). Similarly, just because a casual employee typically works the same hours of work each day, week or month, does not mean that he or she is as able to insist on the continuity of those hours to the same extent as a permanent employee."

Appendix C contains a Parliamentary Research Library Note on casual employment trends and characteristics. This Research

Note concludes that casual employment (like unemployment) is mainly involuntary workers would prefer to be in an ongoing job,³

In terms of Labour Hire, most employees of such companies face a double dose of insecurity. Firstly most are casuals and therefore notwithstanding in some cases their regularity of employment over long periods of time they can be terminated by an hours notice.

It is not surprising therefore in a recent survey conducted by Dr. Linda Brennan, Dr. Michael Valos and Professor Kevin Hindle on behalf of RMIT University⁴ 66% of Labour Hire employees said they would prefer to be employed directly by the host employer.

In the same survey 64% of casual employees said they would prefer to exchange their casual loading for permanent entitlements e.g. annual leave, sick leave, redundancy pay etc.

³ Parliamentary Library Department of Parliamentary Services Research Note 2003-04 No. 53, 24 May 2004 Casual Employment: trends and characteristics.

⁴ RMIT Survey, Brennan, Dr. L, Valos, Dr. M and Hindle, Prof. Kevin. Commissioned on behalf of the Recruitment and Consulting Services Association December 2003.

NSW SECURE EMPLOYMENT TEST CASE

Appendix D is a copy of Unions NSW opening submissions to the NSW Secure Employment Test Case. The opening submissions provide a good overview of the issues associated with the increased use of casuals and Labour Hire and the remedies sought in the case.

Over 270 people have given evidence in the case with a total of more than 300 exhibits. The case will conclude in June of this year.

In our view, if the claim succeeds it will in part resolve many of the negative aspects associated with the use of Labour Hire companies without affecting the legitimacy of the industry's existence and operation in a modern economy.

LABOUR HIRE

Whilst Unions NSW support the legitimate use of Labour Hire companies to provide supplementary labour, there is a growing concern that many companies are using Labour Hire

arrangements to undermine wages and conditions negotiated as part of enterprise bargaining or to avoid award obligations.

The Secure Employment Test Case has highlighted a number of examples of workers who are engaged by Labour Hire Companies who would

- (i) prefer to be permanent rather than casual;
- (ii) who have worked regularly as a casual for many years;
- (iii) who are disadvantaged as to their wages and conditions because the host employer does not directly employ them.

One such example is William Parker who gave evidence during the Secure Employment Test Case.

Appendix E is a copy of a letter sent by Mr Parker to the Honourable Jackie Kelly, Member for Lindsay, which highlights the disadvantages he faces as a Labour Hire casual. In our view there can be no justification or defence by an employer whether they be the Host Employer or Labour Hire Company for the circumstances faced by Mr Parker.

If the Inquiry is to have any relevance and balance then its recommendations should provide solutions to the predicament faced by Mr Parker.

INDEPENDENT CONTRACTORS

The use of independent contractors, whilst legitimate in many circumstances, can also be abused by many employers who seek to take advantage of persons who should really be employees.

A good example of this was in the year 2000 when a multinational catering company working in a major Olympic venue tried to avoid paying award wages to its catering employees (some as young as 15) by attempting to turn them into "independent contractors".

Parents of some of the employees contacted Unions NSW to complain that their children were being required to take out an A.B.N. and would only be paid on a commission basis. This

arrangement was contrary to an advertisement placed in many regional newspapers to lure workers during the Olympic games and contrary to an Industrial Award, which applied to the Employer.

Appendix F contains:

- (i) Copy of a letter sent by one of the parents;
- (ii) Advertisement placed in local newspapers to lure workers;
- (iii) Advice by the company to the vendors'
- (iv) Correspondence from Unions NSW to the company outlining the issues;
- (v) An agreement reached by the company with Unions NSW to resolve the issues.

This dispute highlights how vulnerable workers can be to the exploits of business and, in particular, the role that unions play in helping to resolve these issues.

Unions NSW are not opposed to bonafide independent contractors. In such cases, these contractors have a degree of

control over the work and services they provide, choice about who they provide services to, and have all the necessary insurance, taxation and business arrangements in place that comply with their statutory obligations.

Legitimate independent contractors however can often fall victim to circumstances beyond their control, particularly when their clients either try to take advantage of them or fail to meet their contractual obligations.

In such circumstances independent contractors can turn to a range of bodies or institutions for assistance e.g. Solicitors, Government Departments, Industrial Tribunals and often Trade Unions.

Unions have always played a role in assisting independent contractors across a range of industries including the Construction, Transport and Clothing sectors.

Any change to restrict independent contractors being represented by unions or having tribunals in certain industries set minimum rates of remuneration for them would, in our view, disadvantage many legitimate operators.

Appendix G is a copy of correspondence from an independent contractor who has been utilising the services of the Construction, Forestry, Mining and Energy Union (CFMEU) to secure contractual payments still owing as a consequence of the Walters collapse. This contractor, like thousands of others, chose to use the union as the most effective means of negotiating a settlement to unpaid monies. In our view, any move away from providing this choice would clearly disadvantage many such persons.

OCCUPATIONAL HEALTH AND SAFETY ISSUES

Labour Hire and independent contractor arrangements present particular challenges in ensuring proper occupational health and safety standards are met. Employees of Labour Hire companies can often be disadvantaged, in particular, when an injury occurs

and when there is no legal obligation (in NSW) on the host employer to provide suitable duties.

The above issues were canvassed in the NSW Labour Hire Taskforce Final Report, which was released in 2001.⁵

A copy of the Executive Summary of the report and its recommendations are found in **Appendix H**.

A key recommendation of the report with respect to mandating joint responsibility on the host employers and labour hire companies for rehabilitation and return to work has not at this stage been implemented by the NSW Government.

Unions NSW has sought, as part of its Secure Employment Test Case, a standard clause, which would require Host Employers to take reasonable steps to provide suitable duties for injured employees.

REMEDIES AND CONCLUSION

⁵ Labor Hire Taskforce set up by the NSW Government in September 2000 and chaired by Ms Jennie George.

Unions NSW support the Remedies put forward by the ACTU and the NSW Government in their submissions to the House of Representatives Inquiry.

Further, we believe that the remedies sought in the NSW Secure Employment Test Case, will also go some way to protecting the rights of labour hire employees and provide casual workers with real choice about their status of employment.

Notwithstanding any points made in this Submission, Unions NSW does not believe that the House of Representatives Inquiry will deliver any meaningful recommendations that would assist workers, particularly if there is an erosion of the award system and general powers of Industrial tribunals as contemplated by the Federal Government.

In conclusion, a representative of Unions NSW will be available to speak to this Submission when the Inquiry is in Sydney.