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Official Committee Hansard

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON EMPLOYMENT, WORKPLACE RELATIONS AND WORKFORCE PARTICIPATION

Reference: Independent contracting and labour hire arrangements

THURSDAY, 12 MAY 2005

CANBERRA

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON EMPLOYMENT, WORKPLACE RELATIONS AND WORKFORCE PARTICIPATION

Thursday, 12 May 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 Barressi, Mr Baker, Ms Annette Ellis, Ms Hall, Mr Henry, Mr Brendan O'Connor, Mr Randall 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 10.27 am

DARWIN, Ms Margaret, Workplace Relations Manager, Aged Care Queensland Inc.

Evidence was taken via teleconference—

CHAIR—I declare open this public hearing of the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation inquiry into independent contractors and labour hire arrangements. The inquiry arises from a request to this committee by the Minister for Employment and Workplace Relations. Written submissions were called for and 70 and have received to date. The committee is continuing on a program of public hearings. This hearing is the sixth of the inquiry and will commence with a video conference from Canberra to Brisbane and then will continue with witnesses here in Canberra.

I welcome Ms Darwin from Aged Care Queensland. Although the committee does not require you to give evidence under oath, I advise you that these hearings are formal proceedings of the parliament and consequently they warrant the same respect as proceedings of the House itself. It is customary to remind witnesses that the giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The committee prefers to hear evidence in public but, if you have issues that you would like to raise in private, we will consider your request. I now invite you to make a statement in relation to your submission and to make any other introductory remarks.

Ms Darwin—The reason that Aged Care Queensland put in a submission to this inquiry is that within the aged care and community care sectors—and Aged Care Queensland goes across both sectors—due to a skills shortage, the specialisation that is required in these sectors and also the rural and remote areas that we cover, increasingly, these sectors are using labour hire or independent contractors to fulfil their duty of care to both the residents and the clients.

Our main concern regards the increasingly sophisticated contracts that employers have to engage in with labour hire companies to ensure that they are not held accountable or responsible for a whole range of areas. It is getting far more sophisticated, and many members do not have the funding or resourcing to be able to enter into those legal requirements. That would be in things like the Queensland Industrial Relations Commission being able to deem them to be employees—and a range of those cases have gone on in Queensland. It would be in terms of the employer having to ensure that the labour hire company pays the correct award entitlement—and we have had such cases. That is not an issue in every award but it certainly is an issue in some awards. Then there is a raft of other legal requirements.

The contract might, for example, hold the labour hire company accountable for ensuring that they have a knowledge of workplace health and safety, antidiscrimination et cetera. We are not trying to get out of the employer's responsibility at the individual workplace but, to have to go through all of that orientation on every aspect, rather than just what is specific to a facility, creates enormous costs and also means that, for quite a long period of time, they cannot come in and actually work on the floor, which also creates problems.

On top of that, in the rural and remote areas, the insurance issue is creating a range of problems for people such as physiotherapists, who would normally be independent and come

into an aged care facility when required. They do not want to become employees, because there is not the work for them on a full-time basis, and they end up working in other industries or for private labour hire companies because of the cost of insurance.

CHAIR—Thank you very much for your submission and, more importantly, thank you for making yourself available through this most unusual way of giving evidence to the inquiry—but we do it this way every now and then. Ms Ellis has to leave us shortly, so I am going to ask her to start off the questions from the committee and then we will move around.

Ms ANNETTE ELLIS—Margaret, thank you for joining us in this fairly unique sort of committee hearing. I thank Aged Care Queensland for putting in a submission to the inquiry. I want to refer you to some of the difficulties you were just commenting on. Can you give us a real example? Can I particularly suggest that you talk about the aged care nursing area, because you have a unique contact with that industry over and above a lot of our other witnesses? You can keep it confidential and keep names out of it if you have to, but could you give us an example of how some of those difficulties have affected the hiring and use of ad hoc or casual labour, particularly with respect to nursing staff?

Ms Darwin—I obviously cannot give the name of the organisation, but—

Ms ANNETTE ELLIS—I do not want you to.

Ms Darwin—I can give you a range of examples. Manual handling is now a thing that is right across the industry. While organisations will enter into a contract with a labour hire company to say that they should be responsible for making sure that they have staff who know about manual handling and have gone through all of that process—and, as you know, there are a number of disparate systems out with respect to the no-lift policy—when they actually get on the floor there is still a responsibility on the employer to make sure that they have that knowledge before they start lifting a resident. This responsibility is in terms of their duty of care to the resident and also to the worker, even though the worker is employed by the labour hire company. We have had examples where that has been very problematic.

We have had examples where the labour hire company have said that they have checked people's registration and they have not and there have been problems with medication. In one such case we went through the Health Rights Commission. We have had other examples where we have been told that nursing staff have a good knowledge of gerontology and a range of other things and then we have found that those nurses do not understand difficult behaviours of some of the residents who might be suffering with, say, Alzheimer's or dementia. That creates a problem in how they deal with the residents, and other staff do not want to come on the floor or work with them unless they are trained in all of those systems.

CHAIR—Obviously Queensland is unique in that it is highly decentralised as a state, with lots of regional and rural and remote communities—more so than in any other state. Are there particular costs and disadvantages that you have in Queensland in your industry that other states may not have? Could that perhaps be one of the reasons that labour hire independent contractors are probably more in need?

Ms Darwin—More than any other area, I certainly think the allied health area is a big issue. Whereas nursing is a requirement and they can recruit those people on a full-time basis, allied health staff in a residential come in only at specific times within a week. So you cannot necessarily have them as an employee but you in fact require them. Often that skill is not within the town and often a number of facilities have to be joined together to have a person with those skills work across the sector. That becomes a real dilemma.

I have been told by some of our members that the other side of it is being able to get medical practitioners—they do not class themselves as labour hire, but it is the same type of thing—or doctors to come to some of the facilities. Again, it is a requirement, though, under accreditation for the aged care sector. Those sorts of things make it really difficult. You might have a facility that has only 20 residents but it still needs access to allied health and to the whole range of the multidisciplinary team and it cannot get that access.

Another issue I think I raised when I made my opening statement—but I do not know whether it is unique to Queensland—is that, in some of the rural and remote areas, in order to be able to provide a range of staff that are required for meals et cetera, they have gone out to labour hire. Yet under our Private Hospital and Nursing Home Award in Queensland there is an onus on the employer to ensure that the labour hire company pays its workers the correct award. One of our members was taken to the Industrial Relations Commission and had penalties awarded against it because it had engaged a labour hire company that was not paying the award requirements to the contractors who were coming in to cook in its kitchen.

CHAIR—You mentioned some of the concerns in the industry, particularly the test that is used to determined an independent contractor. You made the point—the very valid point—that, in your particular industry, the test of 'providing the tools' perhaps does not apply when it is the skills that have been brought into the work, such as that of the physiotherapist. Are you saying that perhaps some of the current definitions, particularly the common-law definition, fails to meet your industry's needs? Do you have some suggestions as to how we should be determining that definition?

Ms Darwin—It is the definition, but it is also the issue that, to ensure that you meet all those requirements, you really do need to enter into what I consider to be more and more unambiguous legal contracts with a labour hire company. That means, for example, that the organisation has to engage a firm of solicitors and go through getting them to write individual legal contracts to ensure all those things are covered. That is an extremely costly basis. You could change the definition of common law or you could in fact have some standard legal contract that, if it were by signed both parties, would cover all those areas—for example, a model contract. If they have signed that then they cannot be held responsible, unless they have lied in what they signed.

CHAIR—I have one more question and then I will hand over to the deputy chair. In your submission you mentioned that there should be developed a standard form that can be used. I guess that is picking up on your last point. Have you seen some of the other pro formas that have been adopted by other industries? The NFF presented one to us on Monday. We understand the Master Builders Association also have one. Have you as industry developed some sort of guide, pro forma or kit that your members can use? Would that help?

Ms Darwin—We are actually in the process of doing that now because this has come up as such a big problem for the industry. We have been trying to put that together, as well as a model contract, to ensure that we are covering all these areas. But there is such a range of variables in terms of both the organisation and the companies that they are actually engaging with. We are in the process of doing that. I have seen some of the other models but they are not the current ones that they are operating under. I think that, with a number of the changes in legislation that have occurred, we really need to be very clear about them. For example, just recently there was an issue with antidiscrimination, with what should have been a fairly straightforward case in terms of labour hire for a clerical position. Yet the organisation was held vicariously liable because they did not point out to the worker coming from the labour hire company exactly what they believe in terms of their policy for antidiscrimination. But really it was standard legislation, and in our view that labour hire company should have been responsible for ensuring that their workers knew about that before they engaged in it. It is a number of those things that we are trying to put into this model contract for our members at the moment.

Mr BRENDAN O'CONNOR—I am looking at your submission now. On page 1, under 'Allied health staff' you say:

In rural and remote areas throughout Queensland the services of the Allied Health staff may be provided by an independent contractor.

In relation to the occupations in that category, are you suggesting that the independent contractors are effectively employers of staff and they are providing staff to you, or are you suggesting that some of the staff are independent contractors?

Ms Darwin—There are two things. In the rural and remote areas a number of the physiotherapists are in fact self-employed, and therefore they are independent contractors. They are becoming more and more scarce because of the insurance issue; they are joining private physiotherapists' practices. It is becoming a bit like the GP situation: you do not necessarily get home visits. That is making it extremely difficult for aged care facilities. They can often be deemed to be an employee, which creates a problem in terms of them being a sole practitioner versus being an employee.

Mr BRENDAN O'CONNOR—That sentence says 'staff may be provided by an independent contractor'. You are not saying 'staff as independent contractors'?

Ms Darwin—No.

Mr BRENDAN O'CONNOR—Under the heading 'Nursing staff' you say:

Nursing and care staff are only outsourced because of a skills shortage.

Could you expand on the problem of skills shortages and why you believe that is the sole reason for outsourcing?

Ms Darwin—Historically, aged care facilities never sought nurses from an outside nursing agency except in extreme circumstances such as if they suddenly had a rush of flu through the facility and staff were off sick. What is happening now is that aged care facilities' inability to get

registered nurses often means they are running on a high percentage of independent contractors or nurses from a labour hire company at all times. Instead of it being a one-off occasion, you might find that over a 12-month period 15 per cent of the staff at any one time were engaged from a labour hire company. That varies depending on where in Queensland the facility is located.

Mr BRENDAN O'CONNOR—On page 2, under the heading 'Occupational health and safety' you have indicated a view that 'workplaces should be the responsibility of the labour hire firm or the independent contractor'. Why do you believe the responsibility for OH&S should be left to those two groups?

Ms Darwin—That is probably not worded clearly enough. I am saying that there are some specific OH&S matters that would obviously remain the responsibility of the employer, but there is a range of other OH&S matters. I used the example for Senator Allison of them coming in and saying they have done the no-lift policy and then immediately hurting their back. The onus should be on the labour hire company and not on the employer.

Mr BRENDAN O'CONNOR—Are you referring to independent contractors as well?

Ms Darwin—Yes, I am.

Mr BRENDAN O'CONNOR—Finally, on the last page, under the heading 'Strategies to ensure independent contract arrangements are legitimate' you indicate that a standard form should be developed. Do you think a standard form would remove the likelihood of sham arrangements?

Ms Darwin—I do not think anything would totally remove that outcome, but I do think it would minimise it. As I said originally, it could remove the need for all these facilities, which in the main are very small and do not have the resources, to engage a range of lawyers to enter into very sophisticated contracts and forms to ensure they minimise any vicarious liability for the employer. So I do not think you are going to get out of that totally, but I do think a range of that can minimise it.

CHAIR—Without mentioning names, could you highlight one or two of the sham arrangements that have occurred in your industry?

Ms Darwin—An example, as I said before, is lack of checking of qualifications. You are still liable under your duty of care to that resident or client if something goes wrong in regard to that. It is those types of things, where they say, 'Yes, this person meets this qualification.'

CHAIR—I have a question following on from Mr O'Connor's question to you about occupational health and safety. I have a concern with the proposition you are putting. Perhaps I am reading it incorrectly. If the duty of care is principally on the independent contractor and the labour hire company, aren't we in fact encouraging the host employer to abdicate the responsibilities that they have? Isn't there some encouragement to do so? I know you are saying there are some things that they should still be responsible for, but doesn't that create an environment where they can say, 'I can get out of my occupational health and safety responsibilities or perhaps even my WorkCover premium liabilities by moving into independent

contracting labour hire'? That proposition has been put to us by some witnesses who are against these forms of employment.

Ms Darwin—As I said before, given where Australia is going on skill shortages at the moment, I think it is going to be a long time before this industry will be able to get out of labour hire. You can look at what has caused the workplace health and safety problem and you can see that there are a range of things. Training, as I said, is a big one. If the company has said that they have trained a person and if the right equipment was present within the facility then it should not be the responsibility of the facility to have backtracked and said, 'That person did not know how to use that.' If it is a different model of equipment they should, but not for the standard things. There are a range of standards. Another example is a registered nurse who knows how to dispose of needles. They go into a sharps container. That is standard practice right throughout the industry. The labour hire company should know that and should have given training or impressed policies on their worker to ensure that they followed that.

Mr HENRY—I am interested in your comments in your submission with respect to section 275 of the Queensland Industrial Relations Act relating to the deeming of certain persons to be employees rather than contractors. What is your view of this approach? Has that had any impact on many workers in your industry with respect to their recognition as independent contractors or labour hire employees?

Ms Darwin—In terms of that section, it has. Certainly it has had an impact for some of the groundspeople and some of the electricians et cetera. The problem for us is that, while there are these tests, they do not have the standard things. Again, using the physiotherapist that I used before as an example, they use the organisation's tools—they do not bring in their own tools. Many of them, especially in the small rural towns, might not be advertising their services elsewhere because basically that is the employer in the town.

Mr HENRY—They are not offering services to anyone else in that town or any other town?

Ms Darwin—They might offer them. I will take it away from allied health. A groundsperson might decide to be independent and have their own ABN et cetera. But, at the same time, if that is the main employer in the town, whilst they might do the odd job for another person, when you look at it as a whole they really meet the test of being an employee for that organisation, because that is the main employer and what they are doing elsewhere is so minimal.

Mr HENRY—So it would be fair to say, then, that, for example, for an electrician or a plumber, their principal income would be derived from that particular care unit in that town even though they do not provide services to them all through any given week or anything of that sort?

Ms Darwin—They would probably provide services every week but they could actually meet the requirement of a part-time employee as well—very much so.

Mr HENRY—That is an impediment as far as that individual is concerned and also for the aged care organisation itself?

Ms Darwin—That is right, because basically the individual does not want to go over to be an employee and the aged care organisation is worried that they pay this but have to pay that and

then at the same time, should that person get disgruntled in the future, they could then have a case for a whole range of other things brought back on them.

Mr HENRY—How would you see those deeming provisions impacting on your suggestion of developing an independent contractor agreement in those circumstances?

Ms Darwin—It would almost be like ensuring that the worker—if I can put it in those terms—has full knowledge of this and signs over their rights to be deemed to be an employee, with the knowledge of all the issues involved.

CHAIR—Ms Ellis has rejoined us. I will give her one more chance to ask questions.

Ms ANNETTE ELLIS—If this has already been asked, forgive me. As I was leaving the hearing before, you made mention of the fact that part of the difficulty was not only the manual handling question but also the question of administration of medication. I do not know whether you have had the opportunity to elaborate on that at all, but that is probably one of the most vital and important parts of aged care nursing. I am wondering whether you have any more to add to that—although please keep privacy—in terms of any outcomes in which you think contracts and arrangements could have been better done to alleviate any of that worry.

Ms Darwin—You are always going to have a duty of care to residents or clients, but there is the issue of the training et cetera that the labour hire company is saying that the person has. I talked about tracking whether they have their registration as an RN. But there is a range of other factors. We had one just recently, although one could argue that there was a mistake elsewhere. But a registered nurse has to know enough to check the dosage of morphine that is going to be administered to see whether it was wrong. What you do in a facility with your own staff is to continually put people through updates of their competencies in regard to administration of medication, dosages et cetera. Most facilities would have a process for that. That does not occur with the labour hire companies.

CHAIR—I have one last question. Are the labour hire companies that you are referring to reputable organisations in Queensland for that specialised industry, or are they just labour hire companies that have moved into the sector? Do they specialise in aged care?

Ms Darwin—They do not necessarily specialise in aged care. They certainly specialise in nursing. However, that will depend. Because of the demographics of the state, while that is certainly the case in Brisbane and some of the major provincial areas, when it comes to the other areas, no, they could be rank amateurs in the area. Because of the skills shortages, people do not have any alternative but to engage them.

CHAIR—Thank you very much for your time and also for putting up with this form of giving evidence. We appreciate your written submission and also your appearance today. If there is any other information you have, please pass it on. If you finish that kit prior to the end of June, could you send through an example of that to us? We would like to see it.

Ms Darwin—I will.

CHAIR—Thank you.

Proceedings suspended from 10.59 am to 11.19 am

BARRETT, Mr Christopher, Assistant General Secretary, Queensland Council of Unions

RALSTON, Ms Deborah, Industrial Officer, Queensland Council of Unions

Evidence was taken via teleconference—

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I advise you that these hearings are formal proceedings of the parliament and consequently they warrant the same respect as the proceedings of the House itself. It is customary to remind witnesses that the giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. The committee prefers to hear evidence in public but if you would like to raise issues in private we would consider your request, although we cannot guarantee the confidentiality of in camera evidence. So we do prefer all evidence to be on the public record. I now invite you to make a brief statement in relation to your submission or to make any other introductory remarks before we go to questions.

Ms Ralston—I will make a short statement. There is a growing body of case law developed from litigation surrounding determining whether contractors, dependent and independent, are employees and therefore subject to industrial relations legislation. Recent arbitral and judicial decisions have established the variances that may exist with the engagement of a labour hire worker. As such, it might be more prudent to recognise labour hire simply as a tripartite relationship between worker, agency and host employer where the contractual relationship may and does vary.

The capacity to ensure consistency in terminology across the legislation is important not only in ensuring a recognisable term but also in the effective administration of legislation that pertains to work. This triangular arrangement, although muddying employment law, has not placed in jeopardy the deeming of such workers as employees for the purposes of WorkCover legislation in Queensland. The issue from the QCU perspective is to arrive at a consistent definition for the purposes of all pieces of work related legislation, not to remove the industrial legislative framework.

In an environment where labour hire employment is increasing exponentially there is a great degree of benefit in ensuring a common approach to the rights and obligations placed on the labour hire worker, the labour hire firm and the on-hire employer. Consistency in terminology and definition across a range of areas relating to employment, such as health and safety, workers compensation, industrial relations and taxation, provide some guidance to achieving this outcome.

Although some arguments have developed concerning the interpretational issues surrounding the engagement of independent contractors and the labour hire sector, in the main the Queensland approach to dealing with this sector and these workers has addressed these complexities. However, as with most contemporary employment issues, there is a capacity to recast the legislative framework to achieve an even greater level of consistency in the definitional area.

In doing so, there is no suggestion that what exists could not continue to operate effectively, but there could be movement towards a more streamlined legislative framework. For example, the Health and Safety Act in Queensland considers a labour hire organisation that hires a worker to a client company to be the legal employer of the worker. While the labour hire firm is viewed as the legal employer, the client has equal responsibility for the worker when the worker is working for them. Under the Workers Compensation and Rehabilitation Act, a worker and an employer are defined using the personal services business test.

The QCU supports definitional consistency in relation to the agency worker and client with regard to adherence to various pieces of workplace legislation. The QCU has gone some way to securing this outcome by moving the WorkCover legislation to adopting the personal services business test. This test, along with the inclusion of a range of employment indicia, could form the basis of discussions within the Queensland jurisdiction to arriving at a consistent terminology for the labour hire and independent contractor sector. When you consider the breadth of labour hire activity in Queensland, this goes some way to confirming why the QCU, along with the state Labor government, are proactive in considering how best to regulate the sector for the benefit of all participants.

If we refer to the FOES data from 2001, we see that a comparable level of labour hire employment is shown across Queensland and Australia. As such, in 2001 in Queensland, there were approximately 23,500 labour hire workers, with a corresponding level of 162,000 Australia-wide. There is a concentration of labour hire employment in the communications, manufacturing and property and business service industries Australia-wide. However, the industry concentration in Queensland, according to the FOES data, differs somewhat. Although there is a concentration in the manufacturing and property and business service industries, labour hire is also prevalent in mining, electricity, gas and water supply, transport and storage.

The Productivity Commission identified labour hire workers as more likely engaged to perform semi-skilled tasks, where they complement skilled workers. However, in Queensland, labour hire workers are engaged in all occupational groupings, with prevalence in trade and related areas, clerical and service areas, both advanced and intermediate, as well as in semi-skilled areas.

Issues surrounding the lack of safe work practices are evident in the labour hire sector. Although data on the Queensland impact is not available, it is feasible to apply data such as that applicable to Victoria and assume similar statistical breakdown applies to all other states. In the Underhill report, prepared for Worksafe Victoria, an identification of changed occupational concentration on labour hire claimants over the mid-1990s to 2000 was evident. In the mid-1990s, injured labour hire employees were more likely to be tradespersons and related workers. By 2000, a change in occupational claimants to intermediate production and transport workers, labourers and related workers occurred. Of note, however, are the claims by non-labour hire workers as much less concentrated in these occupations.

Underhill's report advanced a range of reasons for the higher injury rate within the labour hire sector. Amongst these were the itinerancy of assignments, the age and experience of the workers, the types of work that they undertake and the requests of host employers. The unfamiliarity of workplaces in which they are placed and the transience means a limited opportunity to familiarise themselves with the workplace. Corresponding to age is the lower level of experience

in combating workplace risk. It may also be likely that the worker is exposed to work that they may not be familiar with, thus compounding the risk factor.

One area to be considered as part of the regulation of this sector is that which applies to employment agents in Queensland. Currently under the Private Employment Agents Act 2005, capacity exists for the operation of a code of conduct for this sector. Reference to a committee where breaches of that code occurred is legislatively accommodated. A referral then to district court for the purposes of securing an injunction against the employment agency for a continuing breach and thus an application to prevent them from operating as an agent can occur. To a large extent, private employment agents in Queensland operate both an employment agency arm and a labour hire arm. As such, the capacity to extend such regulatory framework to the labour hire sector is not insurmountable within this jurisdiction. We thank the committee for allowing us to place this overview of the QCU submission before you.

CHAIR—Thanks, Deborah. Chris, do you want to make any opening comments?

Mr Barrett—No; we will just go with that for the moment.

CHAIR—Deborah, are you saying that the legislative response to this should basically use the personal services test as its base, or would it be a combination of personal services and the common law? I just want to clarify that.

Ms Ralston—No, we would not rely solely on the personal services business test. Our view is that an amalgam of tests, to cast the net as widely as possible, would be far more preferable. So you would actually look at that test along with common law references, coupled with a list of some indicia that are reflective of the contracting sector.

CHAIR—You are obviously quite supportive of and happy with the direction Queensland is going in response to this issue of growing labour hire companies and independent contracting and you would ask us to seriously consider that as a model for a federal response—I can see that, but with occupational—

Ms Ralston—Could I just make a point on that.

CHAIR—Yes.

Ms Ralston—We are supportive of that as a concept, but you have to bear in mind that the development of the legislative framework here has been achieved on a collaborative basis. So, of course, there is capacity to settle those issues in the best interests of all parties. That certainly makes a difference.

CHAIR—Could you expand on the duty of care—that principle as it applies in occupational health and safety? We have had what I think is conflicting evidence in terms of who is primarily responsible for occupational health and safety—whether the responsibility lies purely with the independent contractors and labour hire companies or is a shared arrangement. I know you cannot totally abdicate your responsibility. Some members of the union movement have told us that the growing incidence of labour hire companies is used by employers to abdicate that

responsibility. Do you share that view up there in Queensland, and has it basically been addressed through the Queensland response?

Ms Ralston—If you refer to the submission we made, we do identify that the health and safety legislation here:

> ... considers a labour hire organisation that hires a worker to a client company to be the legal employer of the worker. While the labour hire firm is viewed as the legal employer, the client has equal responsibility for the worker when the worker is working for them.

So it is a shared responsibility, so, yes, there is a legal obligation in relation to the connection, but in relation to the practical set of circumstances in regard to the labour hire firm and the on-hire employer, it is a shared obligation.

CHAIR—How does that play out in practice with WorkCover premiums?

Ms Ralston—Both entities would have to pay WorkCover premiums, but the WorkCover legislation prescribes a test to determine who is an employer and who is not an employer, and in that instance it relies upon the personal services business test.

Mr BRENDAN O'CONNOR—Could you expand upon your view on the need to regulate—or not—labour hire companies. We have had a number of witnesses from unions and, indeed, employers—Skilled Engineering, for example—who have said that there has to be greater regulation of labour hire companies. In fact, Skilled Engineering indicated that there should be a registrar, to ensure that the labour hire company is fit to be a company. Can you outline your views on that particular matter?

Ms Ralston—I might perhaps make an analogy with the private employment agency sector here, which I referred to earlier. There is a view held within that particular committee structure—and there is a representative from Recruitment and Consultancy Services Australia on that committee—that unless you have a framework which all participants adhere to you run the risk of there always being someone there wanting to undercut the situation. So you create consistency in relation to such things as your code of conduct. That way everyone adheres to the same criteria and there cannot be the development of rogue agencies.

Mr BRENDAN O'CONNOR—On a similar but different matter, the master builders this week talked about the need to register independent contractors. I do not remember gleaning from your submission any particular position in relation to that—I could be wrong. Could you enlighten us, if you have a view, on whether indeed independent contractors—those that are genuinely to be described as such—should be registered under some sort of national register?

Ms Ralston—Yes, we are supportive of that position.

Mr HENRY—I am interested in exploring with you the lack of skills development and training which appears to be somewhat of a concern with respect to the increased use of labour hire operators. What is your experience with that in Queensland? Are you aware of any strategies that might improve that training situation?

Ms Ralston—One of the difficulties is that when you look at the mix of occupational groups that are used within the labour hire sector they are to a large extent at what is a pre-trade level. So the capacity for the development of those skills from a workplace perspective diminishes if the individual is only placed there for a short period. There is actually a perpetuation of the underskilling of those workers, because it may well be that in normal circumstances, if they were directly engaged, they would have the capacity to develop their skills at that workplace and move through a classification structure. But the notion is that they are employed for a particular task, and there is no capacity to develop their skills.

Mr HENRY—I note that the Queensland Industrial Relations Act lumps group training in with labour hire in the definition of employers. Do you see group training organisations as labour hire companies? Obviously, group training is very much focused on training.

CHAIR—Before you answer that, I should let you know that Group Training Australia are our next witnesses and they are in the room.

Ms Ralston—When you look at the way in which group training companies operate, they are, to all intents and purposes, on the same operating basis as a labour hire firm. Of course, the types of placements that they generate are slightly different but, nevertheless, when you look at the structure it is no different.

Mr HENRY—But they would mostly be engaged on a contact of training rather than a contract of employment, I would imagine.

Ms Ralston—That would be the case, and the contract of training would be regulated by the vocational employment and training legislation.

Mr HENRY—I understand that under the Industrial Relations Act they are also embraced by the deeming provisions of that act under section 275. Are you aware of where that provision has been applied against a group training company at all?

Ms Ralston—No, we are not aware of that.

Mr BAKER—Recent research from RMIT in 2003 states that the majority of on-hire employees and contractors are happy with the variety and flexibility offered to them, considering the short nature of a lot of occupational jobs in today's world. I am interested in your comment on that.

Ms Ralston—I am not familiar with the research, and isolating one particular response within a research paper may not be reflective of the overall information gathered. I am not prepared to comment on that.

CHAIR—I guess the other side of that, though, is this: do you have evidence as a body up in Queensland of the claims of greater workplace satisfaction—balancing work and home, flexibility in arrangements and all those sorts of things—which those who are promoting labour hire and independent contracting say are some of the spin-off effects and the reason people are doing it? Do you have evidence as an organisation that that is not the case?

Ms Ralston—We do not have evidence at this stage, but there is some commissioned work that Griffith University is undertaking around that point. That material might be available in the second half of this year. But anecdotally, labour hire employment suffers the same types of difficulties that casual engagement does—that is, notionally, if you are called into work in the morning and you have family responsibilities you might find it extremely difficult to find anyone to care for your children, which is the same issue that arises for casual engagement. You can make an analogy. In not all instances is it the most conducive arrangement for workers.

Mr BAKER—Taking that to the next step: do you have any alternatives, other than national federal legislation, to solve the problems of going from state to state—a lot of industries are transient: building, harvesting, agriculture et cetera—and dealing with different state legislation and industrial commissions? I understand that you are working well in Queensland, but when contractors and employees move from state to state they encounter all different forms of legislation.

Ms Ralston—Certainly from a Queensland perspective we are not familiar with evidence of transience between states in relation to labour hire workers. We are unfamiliar with any evidence surrounding labour hire workers leaving Queensland to take up engagements in another state.

Mr BAKER—We only heard yesterday that, for example, in the agriculture industry you might start a season in Tasmania and work through Victoria, New South Wales and Queensland. In the one year workers could move through three or four different states and deal with three or four different pieces of state industrial relations legislation.

Ms Ralston—The alternative would be to establish a regulatory regime within an award structure and apply it federally. I think the key point is that to address issues such as labour hire and independent contracting and benefit all parties, you need to have a collaborative arrangement and be able to discuss the issues openly—and arrive at a consensus position on the best course of action for regulation. It cannot be imposed and then be expected to operate from that imposition perspective. That is the difference in Queensland: the regime here was developed bearing in mind the nuances of Queensland and taking into account the interests of all parties.

CHAIR—Are you planning to make a submission in response to the minister's discussion paper?

Ms Ralston—Yes, we have done that already.

Mr HENRY—The focus of your submission is largely on labour hire arrangements. I want to explore with you whether unions in Queensland would have independent contractors as members.

Ms Ralston—I think they would, yes.

CHAIR—This is the final question from me. The Queensland response to this, as you say, has been formulated through collaboration—and, by and large, you are very supportive of it and think it is on the right track. Has it, in your view, eliminated sham arrangements in Queensland? If not, what else needs to be done? Even if there is no federal response, what else would

Queensland need to do in order to remove the last impediments to eliminating sham arrangements?

Ms Ralston—One of the areas we are pursuing with the state government at this stage is the extension of the private employment agents legislation—because to all intents and purposes the private employment agent operates a conjunctive arm, which is the labour hire firm. If the extension of the code of conduct were made to labour hire, then there would be a regulatory regime. I think that may well go towards achieving removal of what could be the final area of sham arrangements. I do not believe that that type of proposal would be unreceptive to peak employer bodies representing the interests of labour hire firms.

CHAIR—Those particular groups you are referring to—are they the Odco type arrangements?

Ms Ralston—No, I am referring to labour hire firms.

CHAIR—There are a couple of definitions of labour hire. It depends on who we are talking about, as we get different definitions. Labour hire has been divided up into two categories, Odco being one of those.

Ms Ralston—I think Odco is a ruse. It is designed to establish a contractual exclusion so that there is no relationship between anyone and there are no issues of WorkCover, health and safety, and taxation—they are all removed.

Mr HENRY—You mention Odco in your submission. Is that an arrangement you see as being acceptable if we are going to have these sorts of structures?

Ms Ralston—Is Odco an acceptable arrangement?

Mr HENRY—Yes.

Ms Ralston—No.

CHAIR—I could have answered that for you. Ms Ralston and Mr Barrett, thank you very much for your written submission and for appearing before us today. I also thank you for your patience as we had to vote in a division.

Ms Ralston—We also thank the ACCC staff.

[11.52 am]

BARRON, Mr James, Chief Executive Officer, Group Training Australia Ltd

PRIDAY, Mr Jeff, National Projects Manager, Group Training Australia Ltd

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 the parliament. Consequently, they warrant the same respect as proceedings of the House itself. I remind you that the giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. We prefer to hear evidence in public, but if you have issues you would like to raise in private the committee will consider any such request. Do you wish to make an opening statement or any introductory remarks concerning your submission?

Mr Barron—Group Training Australia welcomes the opportunity to appear before this inquiry, particularly in the context of clarifying the role of a group training organisation, as opposed to that of a labour hire firm. We also welcome the opportunity to further encourage government to examine the need for a national approach to critical issues such as workers compensation and OH&S—two policy areas that are adversely impacting on the capacity of group training to continue to underpin much of Australia's traditional trade base. From a legislative and general policy perspective, group training organisations are often put in the same category as labour hire firms. We reject this entirely. Whilst there are some initial similarities, group training is fundamentally different from labour hire. Labour hire is about one thing: labour hire. Group training certainly on-hires the apprentice or trainee to the host employer, but there is so much more to what group training does than the simple task of hiring labour. The employment placement function and, very importantly, the management of training, are critical features of group training. The delivery of pastoral care and additional care and support is equally fundamental to the essence of group training. Labour hire is for profit; group training is not for profit.

Group Training Australia believes it is important for this committee to understand the fundamental differences between what a group training organisation does and what a labour hire firm does, particularly in the climate of escalating skills shortage. This understanding is critical in securing the future of group training and its capacity to continue to deliver training outcomes across the board. It is also timely as we understand the government is considering redefining labour hire in the proposed amendments to the Workplace Relations Act for independent contractors, which could see group training as being categorised as labour hire. Group training is unique; the only successful training intermediary in this country. Given that, governments should seriously consider recognising this and define specifically in the relevant workplace relations legislation what group training is along the lines of what we have outlined here today.

CHAIR—Jeff, do you want to make any comments?

Mr Priday—No, I am quite happy to take questions.

CHAIR—Jim, do you consider yourself under threat as a body with any pending government response on independent contracting and labour hire?

Mr Barron—The issue has been continually muddied between how to define a labour hire firm and how to define a group training organisation. Often our associations and our members and our network feel—under threat might be too strong a term, but we do believe that given the extent of the contribution to skills formation by group training companies, it is a bit unfair to be continually lobbed in the same category as a labour hire firm whose functions are entirely different, particularly in the context of skilling. As I said, labour hire is about one thing: labour hire. We believe it is time that the differences and the value of what a group training company does are recognised by legislation.

CHAIR—This committee, or its predecessors, conducted an inquiry into group training a number of years ago. I know a number of years have passed since then, but I recall you guys certainly came out of the inquiry very favourably.

Mr Barron—Yes.

Mr Priday—We think it is important to differentiate the nature. Obviously it is a form of labour hire, it is an on-hire mechanism, but we think it is important to differentiate the nature of our work so that we can, in some sense, impress upon government the importance of what we are doing for national skills formation as well as the way in which insurers are prone to see us in terms of public liability and workers compensation categorised as labour hire. It is an argument we are constantly battling with.

Mr VASTA—Why do the unions see you categorised the same as labour hire?

Mr Barron—You will have to ask them. There are a few union bodies around the country that have a particular, jaundiced view of what group training is about. They have this view that group training is somehow just a commercial exercise about cheap and nasty training, which could not be further from the truth. The ETU have had particular views about group training over the years, as has the CFMEU. A lot of it is tied up with group training's capacity to particularly involve itself in issues like school based apprenticeships. In New South Wales, the CFMEU is particularly opposed to that. That is basically the reason why we do not have school based apprenticeships in New South Wales. There has always been a particularly lively discussion between some unions around the country on what group training does. Generally, unions have very good relations with the great majority of GTOs around the country. It is just some of the association reps who have a jaundiced view.

CHAIR—I want to go back to the other side of the threat to GTOs—that is, the state jurisdictions and the legislation that they are introducing. You have noted that the uncertainty in the definition and the application of occupational health and safety legislation is creating a problem for you. Can you elaborate on that? You have made comments about the industrial manslaughter legislation and some of the host employers not being willing to take on new apprentices. Is there actually a recorded drop-off of employers that group training companies are referring people to at the moment? Or is it simply a fear that you have? When you answer that, can you identify certain jurisdictions?

Mr Barron—Jeff will comment in more detail on that, but certainly there are instances in some states around the country where host employers have returned apprentices and trainees to the GTO under the threat of issues in respect of workers comp or public liability. We are talking significant numbers in some cases. On the flip side of that, the future of many GTOs is their capacity to deliver a competent board. A lot of potential board members are starting to think twice about why would they want to be on a group training organisation board because, in relation to the way the current legislation rolls out across jurisdictions, the liability issues are real. We call for uniformity but also a bit of commonsense. It seems ridiculous to us that GTOs around the country are still dealing with workers comp and OH&S issues. The host employer basically has no legal responsibility, and it all falls into the backyard of the group training organisation. That has caused enormous heartburn amongst many GTOs, and we can only see it getting worse into the future if it is not dealt with. Jeff may want to add to that and comment on the manslaughter issue.

Mr Priday—We like the Queensland model, where the occupational health and safety legislation specifies that, for the purposes of the act, the host employer is the employer. I am not sure whether that should be the same with labour hire. We are certainly happy with that being the case in Queensland, and we would like to see that replicated around the country. It has not been tested in the courts, as someone has pointed out to me on several occasions. But it affords a degree of comfort that most of our member companies elsewhere, and the directors of those companies, would like to enjoy. We have problems in South Australian in relation to the rights that the WorkCover Authority have been given to recover from host employers in the event of a third-party wrongdoer being approved. As a result of that, a large number of host employers are starting to send apprentices and trainees back to the group training organisations, rather than wear the hike in their premium costs. That has been an issue there.

CHAIR—What about in Victoria, where there are some mooted changes in industrial manslaughter?

Mr Priday—That is another issue. We have that in Victoria and it is mooted for the ACT, or perhaps it has come in in the ACT. I am not quite sure, but it has certainly been mooted elsewhere, such as New South Wales. It is a concern for us because it is hard enough to get voluntary directors on the boards of not-for-profit group training organisations. A number of them, of course, are now aware that their houses are on the line in the sense that their responsibilities as directors are no less onerous because they are working in the not-for-profit sector. They are now faced with the prospect of industrial manslaughter legislation, which makes it that much harder to entice someone onto a board. In all good faith, they do what they can, but it is always possible that they will find they are wearing the opprobrium and carrying the responsibility for an accident that they could never have prevented. They do not have day-to-day control or supervision over workplaces. Some of those workplaces are particularly dynamic, such as those in the building and construction industry. A check today can see a work site varied completely tomorrow.

CHAIR—You mentioned Queensland. We also heard from the Queensland Council of Unions just a moment ago and, when I asked that question about occupational health and safety and liability, it was pretty clear from what Ms Ralston said that that duty of care should be with both parties. You are saying that you actually prefer it to lie with the host employer. Is that correct? You do not see that you have not only a role but a liability?

Mr Barron—I do not think we are talking about ceding all duty of care back to the host 100 per cent, but there has to be a commonsense recognition that there needs to be some sensible sort of divvying up of responsibilities in this partnership—and it is a partnership. Given that it is a partnership, we believe that there should be appropriate recognition of that in the consequence of legal issues in respect of workers comp and OH&S. At the moment it is sheeted 100 per cent back to the group training company, and in some cases where there have been court cases undertaken it has been to the financial detriment of GTOs and through no fault of their own.

Mr BRENDAN O'CONNOR—Before I go to the issues that were just referred to by the chair in relation to the responsibility of host employers, I am looking at the core business of group training and you are making it very clear that it is to train trainees and apprentices. Why is it that Group Training Australia has to employ these trainees and apprentices? Why could employers not employ them directly, as indentured apprentices or trainees? Why go through a third party? Does that not create a complexity we did not need in the first place?

Mr Barron—That is a very good question. I do not want to take you back 35 years to when it was first mooted, but the rationale for the beginning of group training was that the building and construction industry was moving to subcontracting arrangements and therefore no new apprentices were being put on. So Lend Lease and some unions decided they needed, in that industry, an intermediary that could come in and ensure that there would be a steady stream of take-up of apprenticeships. Group training started in recognition of the changing nature of a particular industry.

We have an internal debate about that because the growth of group training has taken the responsibility off employers to do what a lot of people would say is their responsibility—to employ directly. We believe there is room for a genuine training intermediary in this country. We believe it is one of the few successful intermediaries in any OECD country. It recognises that for many small to medium sized employers, which is what our general business is made up of, the cost of training and apprentices is prohibitive. If there was an intermediary they would go to that. In a perfect world you would not need group training and every employer would do the right thing. That does not happen. You need an intermediary. And we believe this is one that fits into the current workplace very well.

Mr BRENDAN O'CONNOR—In paragraph 1.12 you say:

... the Queensland government has shown foresight on this matter—

that is, on OH&S—

by specifying in its workplace health and safety legislation that a GTO's host employer is the employer for the purposes of the legislation.

In answering a question from the chair you indicated that there was in fact some shared responsibility. I am not clear on the definition. I guess we can review the Queensland act to see exactly where that sits. On the next page you recommend to the committee:

That the government take action to bring State and Territory workplace health and safety laws into line with the Queensland model outlined above.

In light of that recommendation can you clarify your view as to the responsibilities of the client or host employer and the provider of employees, either a labour hire company or, in your case, Group Training Australia?

Mr Barron—I will let Jeff answer that question, but just to clarify: when I said 'shared responsibility' I was talking as much about the spirit of the arrangement as anything else and the consequence of who does what. That would then flow into other aspects of the training arrangement.

Mr Priday—I agree with that. I think there is a shared responsibility. There is a duty of care. The group training organisation is responsible for inducting the apprentice or trainee. They have field staff who make field visits monitoring the progress of the apprentice or trainee. They inspect the worksite. They do an initial inspection to ensure that the workplace conforms with occupational health and safety requirements. But in Queensland there is a piece of legislation which says that should an accident occur it is the host employer who is essentially liable for what has taken place in the workplace and presumably bears responsibility in terms of any punitive arrangements that are built into the legislation. In other jurisdictions where there is no statutory definition there is a shared responsibility. Should liability be demonstrated, litigation would see, I imagine, penalties being imposed on the group training organisation as much as the host employer. We assume that the Queensland model ensures that largely the group training organisation would not incur those penalties.

Mr BRENDAN O'CONNOR—There has been a concern about whether there are overlapping responsibilities. Because the responsibilities are blurred, there could be a situation where things fall between the cracks because there is an assumption that the host employer will undertake the responsibility for the matter. Can you reflect on that concern raised by other witnesses?

Mr Barron—I am not too sure what that would mean. I would have thought that it would be pretty clear what the host employer's responsibilities are on worksites.

Mr BRENDAN O'CONNOR—You said earlier that, notwithstanding the fact that you supported the Queensland legislation, you agreed that there was a need to share responsibilities.

Mr Barron—That is what happens now. That is what group training is about. It is a shared responsibility. The point is that, when it comes to litigation, the shared responsibility seems to fracture and it is all back to the group training organisation. That is our point. In any successful host-GTO relationship, as Jeff pointed out, there are always shared responsibilities in spirit, but I think what irks a lot of GTOs is that, when push comes to shove, host employers are basically given a free pass when something goes wrong. It is all basically sheeted home to the GTO, which is off-site, which has done everything it sees as being fit and proper under the training contract, and yet, sight unseen, something happens on a work site and it is responsible in a court of law in some jurisdictions.

Mr BRENDAN O'CONNOR—But isn't the reason that people contract labour hire companies that they want to shift responsibilities away from themselves and onto other bodies? Isn't that part of the reason why that occurs?

Mr Barron—Some would see that as being a plus, yes, absolutely.

CHAIR—Some would probably say also that that is one of the reasons why group training companies have been so popular and have grown over the years, because you have taken on that responsibility—

Mr Barron—Absolutely.

CHAIR—that total responsibility for the employee. So why should we now all of a sudden change that? That was the whole reason for your being.

Mr Barron—But I think it has got to the point now where if recognition of the growing issue is not forthcoming then it does threaten, I think, the existence of some GTOs into the future. I think we have managed the situation because there have not been a particularly large number of cases that have been sheeted home to GTOs—enough to concern us. I think our point is that, into the future, where GTOs are fundamentally underpinning many of the traditional trade skills in different jurisdictions, this is becoming more and more of an issue. Continually being grouped in with labour hire is doing us no favours.

Ms HALL—I hate to labour the point, but my question goes to this issue too. I just want to push it a little bit further. To be fair to you, I will state from the beginning that I think it is probably a shared responsibility and one that should be shared. When you are placing an apprentice, who is responsible for the induction?

Mr Priday—The group training organisation would induct them and the New Apprenticeships centres, I think, would probably want to ensure that that had taken place. I am not sure to what extent the state training authorities and what is left of their inspectorates have a responsibility in the area of induction, but certainly, where all of our people are concerned, the GTO would induct them.

Ms HALL—And this induction includes OH&S?

Mr Priday—Yes.

Ms HALL—Is it the role of the group training organisation to ensure that that apprentice is fully versed in OH&S and understands their responsibilities?

Mr Priday—That would be part of the induction and, in an ideal world, that information would be taken on board by all apprentices. There is a code for New Apprenticeships centres—a Commonwealth code of the rights and responsibilities of the employers and the apprentices and trainees—that is given to them.

Ms HALL—Do you provide follow-up support to those apprentices during their placements with host employers?

Mr Barron—I do not think there is any ‘one size fits all’. Indeed, in the national standards for group training brought down two years ago, this aspect was part of one of the standards—that

there be a requirement for all GTOs to ensure that they have proven that they have done this. When there is auditing of those standards, of course those issues would be investigated.

Ms HALL—So, by the very nature of the role that you play, you have a role in OH&S. By abrogating that role and just passing it straight to the host employer, couldn't there be a little bit of—

Mr Barron—We are not talking about abrogation; we are talking about fair and reasonable divvying up of responsibilities, and recognition of that. No-one is talking about ceding everything back to the host. No-one is talking about abrogation. I do not think we use that word. We are talking about a fair and reasonable recognition of a shared responsibility when it comes to litigation and issues that basically are influencing GTOs' future planning decisions.

Ms HALL—I am very much of the opinion—and you have not convinced me otherwise—that it is a shared responsibility. You are responsible for the induction and the ongoing support, but the host employer is responsible for making sure that safe work practices are employed on-site.

CHAIR—Group Training Australia is giving evidence at the moment. Go on, Jill.

Ms HALL—What was that?

CHAIR—Keep going. Next question?

Ms ANNETTE ELLIS—Do GTOs have a relationship with people with a disability in terms of training them and getting them into the work force?

Mr Barron—Yes, we do.

Ms ANNETTE ELLIS—What proportion of your client base would—

Mr Barron—Group training has a strong record in disability training. Last time we looked at the statistics, group training's proportion of total disability training numbers was about 20 per cent or 21 per cent nationwide.

Ms ANNETTE ELLIS—Of all people with a disability?

Mr Barron—Yes. GTA has sponsored a project which is now into its third year in respect of identifying best practice partnerships between disability employment agencies and group training organisations, which is proving very successful. The government continues to be very interested in that project. The recent review of group training changed what would be purchased from government and one of the four categories they identified was in the area of disability. Many GTOs have a very strong record in disability training. The way government policy is being structured these days, they may have a greater involvement down the track.

Ms ANNETTE ELLIS—Is any of that information you just referred to available for the committee to have a look at?

Mr Barron—Yes.

Ms ANNETTE ELLIS—Would you be able to arrange for that to be sent to the committee secretary? I would be very interested in seeing that.

Mr Barron—Yes.

Ms ANNETTE ELLIS—What is your opinion on the issue that has just been spoken about: the responsibility role and where it starts and finishes in GTOs? Is there any different emphasis or requirement needed in relation to people with a disability when we talk about OH&S and the responsibility of the employer and where responsibility sits?

Mr Priday—I do not know whether it needs to be any different. There is evidence that people with a disability have a better occupational health and safety record than people without a disability—as I understand it. There is certainly a degree of apprehension among our people, as there is with most employers, about employing people with a disability, because there is an expectation that they may be more prone to an accident. People do not want to take someone on if they think there is more likely to be an occupational health and safety incident.

The project that we are running, which has attempted to create partnerships between group training organisations and the disability employment agencies, works around that issue. We have the field staff of the GTOs and the DEAs working together marketing to host employers, providing some training to them and providing a level of support throughout the duration of the indenture to overcome those kinds of issues and concerns on the part of the host employers. We have met with a lot of success in getting people with a disability indentured and supported through either a traditional apprenticeship or a traineeship.

Ms ANNETTE ELLIS—Is the comment you just made about the there being some reluctance on the part of some employers anecdotal or do you have that information in a form you can share with us?

Mr Priday—I would have to say that was anecdotal. I do not think I have any other information.

Ms ANNETTE ELLIS—I feared it might have been anecdotal. Anything else that you have from GTA in relation to the question of the relationship between people with a disability and employment and training would be very valuable for the committee to get hold of.

Mr Priday—Sure.

Mr Barron—Adding to that, as part of the government's national skills shortage strategy, last year we entered into a partnership with ACCI and we have completed a project looking at how group training organisations can better assist older workers as well as those returning to work from injury. This very issue you raise is in that report. We did a lot of case studies. We hope that that will be available in the not too distant future in some form. That issue is addressed.

Mr HENRY—I support the proposition that you started your submission with: differentiating group training organisations from labour hire organisations. I wonder how you are going to address that and how you are going to attack that, given that some GTO organisations are actually entering into labour hire business with qualified tradespeople? You then have some

labour hire companies starting up as group training organisations. Whilst on the one hand the Queensland occupational health and safety legislation supports part of your proposition with respect to occupational health and safety, the Queensland Industrial Relations Act, under section 6(2)(d), defines an employer in part as:

... a group training organisation or a labour hire agency that arranges for ...

So it lumps you into that sort of category. How do you plan to differentiate who you are? I appreciate that it is a huge challenge.

Mr Barron—I guess we continue to do what we do, and appearing before committees like this is part of that. I do not get hung up on the exceptions when arguing the case. Of course there are always going to be exceptions to the general group training rule. There are always going to be GTOs that get into labour hire; there is always going to be the opposite, as well. Skilled Engineering, of course, calls itself a group training organisation but we are talking about the overwhelming majority, who will always be the not-for-profit organisations and will always be specific group training operations. They have nothing to do with labour hire. So we will just continue to push our case in various forums. One of the strongest arrows to our bow is the fact that in every quarter there is evidence about the extent of group training's underpinning of traditional trades in various states where it is up to 50 or 60 per cent. In WA for instance—your home state, Mr Henry—there is ample evidence of the importance of it.

Last time I checked, most labour hire companies had not been contributing to the formation of national skills and were not contributing to the skills shortage solution. I know that some are, but the great majority are not; they have nothing to do with training. So I think we just have to make the point over and over again and hope that governments finally understand that we cannot afford just to do the easy thing and lump it all together and say, 'That's fine.' Sooner or later that is going to have a fundamental impact on the future of operations in some states. When we continue to have hosts saying, 'No, it is too much; we are just going to hand back 400 kids overnight,' I suspect a lot of politicians will start getting interested very quickly, if it is in their electorate. We think that it does not have to get to that stage.

Mr HENRY—Then again, just looking at the occupational health and safety aspect of it, I understand that many group training organisations run extensive induction and occupational health and safety programs for apprentices and also invite host employers to participate in some of those programs in some circumstances. I note in your submission that you support the Queensland Occupational Health and Safety Act with respect to the host employer being the employer for the purpose of the legislation. There might be some conflict with that particular item of legislation and their industrial relations legislation in terms of the definition of an employer, which could create some challenges for you, but I think you are saying that the host employer should have the responsibility for the workplaces where the apprentices are trained by that particular host. Would it be a reasonable supposition that the primary responsibility for occupational health and safety should lie with the host employer who is responsible for the workplace?

Mr Barron—That is correct.

Mr Priday—That is our position. As I said earlier, that has yet to be tested in the courts. We would not like to see a test because that would mean there had been an accident but we would be very interested to see what position was taken in relation to that.

Mr HENRY—If you extend that to the group training organisation having the prime responsibility for the workplace where that apprentice is being trained by the host employer, the cost of managing a group training arrangement would be prohibitive—to say nothing about the issue of industrial manslaughter.

Mr Priday—Our Queensland organisation have also tried to have the WorkCover legislation in Queensland reflect the same provisions as their occupational health and safety legislation. Needless to say, they have not been successful on that.

CHAIR—Yet we have heard from labour hire companies over the last few weeks—Manpower, for example, and a few of the others—who say that before they would place someone with a host employer they would do an assessment of workplace safety. Whether they really do it or not I do not know; I take their word for it. To me that indicates responsibility by them in placing somebody in a work location and making sure that all the OHS requirements are there and also providing induction and training, which was what Ms Hall was trying to get at. Do you guys go through a similar process to that?

Mr Barron—Yes, but that is on day 1 or it could be on day 7. But what happens on day 423 unless you have field officers roaming the country and visiting work sites every day? That is impossible because a group training organisation would have to have a prohibitive charge-out rate to hosts and they would not buy it. It is about resourcing as much as everything else.

CHAIR—Don't you have mentors? Don't you have a mentoring program where you actually go out—

Mr Barron—Yes, but take this example in the building and construction industry. The builder is on one site in the morning and perhaps clears off with someone to another site in the afternoon. If the labour hire company are saying they are checking absolutely every site, that is fine. We do too up to a point. But if someone is at one site in the morning and that is essentially where you have expected them to be and that site has been tested, they may very well find themselves in the afternoon on another site unbeknown to the group training organisation.

Mr BAKER—From a philosophical perspective and given the apprentice situation, GTOs find apprentices sometimes have more than one employer?

Mr Barron—Correct.

Mr Priday—Yes, host employers.

Mr BAKER—With a labour hire company, part of the philosophy is that independence and flexibility to move from job to job. You are required to meet state requirements and can apply for national standards. Would you feel more comfortable with labour hire companies having to meet those types of requirements? On one hand, you are doing the training of an apprentice, with the

host moving from site to site. What is the difference between a qualified tradesperson and a labour hire company doing exactly the same if they are qualified from a trades perspective?

Mr Barron—To answer the first part of your question, I do not think forcing labour hire firms to meet some set of standards—and of course a lot of them do anyway—is going to assuage our concerns as to the general issues that we have raised here today. We would still face the inadequacy, patchiness and unevenness of legislation across jurisdictions as to how GTOs are treated, from a litigation point of view, in respect of workers compensation and OH&S. As for the second part of your question as to what is different, primarily, as we said before, the big difference we see is that the fundamental core role of a GTO is the placement and the management of the training of the actual apprenticeship or traineeship. The great vast overwhelming majority of labour hire firms are basically about an extra set of hands and legs on a work site—contracted labour. They are two vastly different issues and things—a primary responsibility and the operation of a labour hire firm, as opposed to a GTO. There are some exceptions of course, and Skilled would say they are an exception.

Mr BAKER—I refer to your two recommendations that call for federal intervention and legislation. Looking from a federal perspective, are there any other areas in which you believe national legislation could override state legislation to make things run simpler and smoother?

Mr Barron—If we can move the mountain a bit closer to where we want it to be in respect of what we have said in the recommendations, that would be a good start. That in itself would be a Herculean task, and we understand that. We were given some hope when a few years ago Minister Abbott, when he was the minister for employment and workplace relations, gave the Productivity Commission terms of reference to undertake a study of the jurisdictional issues across borders about OH&S, insurance and public liability. The recommendations of the Productivity Commission did come down on a possible Commonwealth approach. At the time the Commonwealth did not go along with that. We have had discussions with DEWR since then, and we remain optimistic that they may revisit it.

Mr Priday—There is, of course, the national training system, where there is scope for a more unified national approach. Thereby hangs a tale—but it sounds like you do not have the time.

CHAIR—I will finish off on that in a moment.

Mr VASTA—We have heard of evidence that a labour hire company has its own insurance, the host employer has its own insurance and, when there is a problem, there is a fight between the insurance companies as to who is responsible. Have you heard of this practice occurring?

Mr Priday—It certainly sounds plausible—quite likely. We have a big problem in South Australia, as we have said, where they have scope to go back and recover from host employers who are facing huge premium increases. As a result of that capacity they are sending their apprentices and trainees back. And they are not necessarily employing through direct indenture. If they send them back that is the risk—the potential loss to the training system and to national skills formation. If they take them on themselves I guess we are no worse off, but they do not necessarily do that.

Mr Barron—With regard to the insurance, one of the things we have spoken to DEWR about is the possibility of a Comcare type arrangement which could bring in the network at a national level. In our joint project with ACCI one of our recommendations will say that, as part of a national pilot, there be some national insurance scheme for the duration of the pilot that basically ensures that taking on people with a disability or older workers is not prohibitive for potential employers. We believe that if something could be done in that area it would be a significant step forward—as important as an actual increase in funding arrangements. This issue is absolutely vital.

Mr VASTA—I agree.

CHAIR—I do not want to verbal you but, if I can just encapsulate one of your concerns, I guess you are saying that, whatever the government response on this issue of independent contracting and on labour hire specifically, you should not be bracketed with labour hire companies and that perhaps you should somehow be hived off under a separate definition and requirements. Does that catch what you are saying?

Mr Priday—I think we need to be careful there. Yes, we argue for this differentiation of product, if I can use that term, but I notice in the paper the minister has put out on the proposed legislative changes that we might be precluded, if we are not too careful, from some of the benefits of those proposed changes if we do not get the definition right.

CHAIR—I will talk to DEWR about that next.

Mr Priday—It is something we probably need to speak to the people behind us at some stage.

Mr Barron—I think there is room enough for two. There is surely some capacity for individual-specific acknowledgement of group training in various legislative issues that does not get us caught up in the things we have raised here today with the committee.

Mr HENRY—I think it is reasonably easy to differentiate. Group training organisations are essentially training organisations while labour hire companies are commercial and have a commercial interest in hiring bodies.

CHAIR—The only problem with that is, of course, what you have already identified, and that is that there are some who are trying to do both. That brings me to my last question. You guys, being a GTO, currently have to comply with the registration and accreditation system. Do the commercial operators such as Skilled Engineering and others who engage in group training have to comply with that as well?

Mr Priday—Yes.

CHAIR—For that portion of their business?

Mr Priday—They have to comply for that portion of their business where they are involved in apprentice on-hire. They can call themselves group training organisations once they have complied in all states except Queensland, where they have to find some other description

because you can only be a group training organisation in Queensland if you are not for profit, and most of those organisations are not.

CHAIR—Thank you very much for your time, for your patience and for your submission.

[12.37 pm]

O'SULLIVAN, Mr Jeremy Martin, Assistant Secretary, Legal Policy Branch, Workplace Relations Legal Group, Department of Employment and Workplace Relations

PRIDMORE, Mr Brant Layton, Director, Working Arrangements Section, Strategic Policy Branch, Workplace Relations Policy Group, Department of Employment and Workplace Relations

WATERHOUSE, Ms Catherine Julia, Senior Government Lawyer, Bargaining and Industrial Action Section, Workplace Relations Legal Group, Department of Employment and Workplace Relations

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 the parliament and consequently warrant the same respect as proceedings of the House itself. I also remind you that the giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. We would prefer to hear evidence in public, but if you have issues that you would like to raise in private we will consider your request. One or all of you are most welcome to make an opening statement or an introductory comment.

Mr O'Sullivan—I would like to thank the committee for inviting the department to appear at this hearing today and for the opportunity to make an opening statement. I will provide background on the department's consultation exercise in this area and I will then outline the importance of labour hire and independent contracting in the Australian work force. Finally I will run through some of the major themes emerging from the department's discussion paper.

As the committee would be aware, the government's 2004 election commitments included creating a new independent contractors act to enshrine and protect the status of independent contractors and encourage independent contracting as a wholly legitimate form of work. These policies reflect the government's position that independent contracting arrangements are commercial arrangements that should not be inappropriately regulated by workplace relations laws. The Minister for Employment and Workplace Relations undertook to consult widely on possible legislative change in this area. To this end, the minister asked the department to prepare discussion paper to canvass options for legislative reform to prevent unreasonable workplace regulation of independent contractors.

The departmental paper also raises labour hire issues, as current laws place constraints on the engagement of labour hire employees that are linked to the barriers faced by independent contractors. As you are aware, the departmental discussion paper largely formed our submission to this inquiry. This was released on 30 March 2005 for a six-week consultation period. At this early stage we are not in a position to comment on the outcome of the consultation process. The proposed time frame is to have legislation ready for introduction in the second half of this year. The legislation will be informed by the submissions we receive, as well as taking account of the recommendations of this inquiry.

CHAIR—Thank you.

Mr O'Sullivan—I turn now to the importance of labour hire and independent contracting in Australia. Independent contracting and labour hire arrangements form an essential part of the Australian work force. The Productivity Commission has reported that in 2002 labour hire employees numbered around 270,000 or the equivalent of about three per cent of all employed persons. Further, the Australian Bureau of Statistics estimated that in 2002 there were over 2,500 labour hire agencies in an industry which contributed over $10 billion to the Australian economy. The most recent Productivity Commission data concerning independent contracting found that in 1998 there were 844,000 persons working as self-employed contractors, equivalent to about 10 per cent of all employed persons. If growth in independent contracting has continued at the same rate as it was growing in 1998 there would now be close to one million persons engaged in independent contracting in Australia.

There are some sectors of the community who characterise labour hire and independent contracting as somewhat illegitimate ways to work. The government's view is that, on the contrary, these arrangements have allowed businesses and workers to choose a form of work more appropriate to their circumstances. One criticism which has been levelled at labour hire is that it is predominantly used by business to drive down their costs. However, we are not aware of any empirical evidence that this is a significant motivation and would suggest that there are other reasons why business use labour hire arrangements and are prepared to pay a premium for them. These include finding the right workers quickly in an environment where skills shortages are a problem. This is especially important to allow businesses to engage staff to meet peaks in demand. It also enables employers to outsource, for example, their human resources responsibilities or other specialist areas, allowing them to focus on their core business—that is, what the business does best. Further, it can offer business the opportunity to 'try before they buy' so they can offer permanent direct employment to workers they are impressed with.

Labour hire arrangements also provide advantages to labour hire workers. Labour hire offers workers, including the unskilled, re-entrance to the labour market, and mature age workers the opportunity to gain a broad range of skills, experience and exposure to different working environments. It gives those who wish to work on a casual basis, often because of family or study commitments, the opportunity to do so. Similarly, it can help young people gain entry to the labour market and it provides a method for mature age workers to phase their withdrawal from the work force. There are also many advantages to working as an independent contractor. Independent contracting offers workers more freedom to choose working hours, to decide when they take their holidays, who they work for, what type of work they undertake and what rates they wish to charge.

The department's discussion paper provides material on all of the committee's terms of reference. It gives an indication of some of the current thinking of the government on these issues, but until we have had the chance to examine all the evidence, including from submissions we receive, I stress that the policy underlying the proposed act cannot be considered to be settled. Broadly speaking, the paper addresses five main areas, which I will deal with in turn.

The first area concerns definitions. The existence of different definitions within state and federal jurisdictions is clearly an area that has been of longstanding concern to stakeholders. The paper canvasses some options, including whether the current common law definitions of

employee and independent contractor should be retained or whether they should be legislatively defined.

The second area concerns barriers to the use of independent contractors and labour hire workers. These are in the nature of clauses in agreements and awards which seek to restrict the engagement of independent contractors and labour hire workers or which require them to be afforded certain conditions. Examples would be where an award says labour hire can only be used to fill labour gaps when permanent employees are on leave, or a requirement that independent contractors are to be afforded the same terms and conditions as employees. This is one area where the discussion paper has put forward the options as proposals for comment rather than issues. This reflects the government's strong inclination to remove these kinds of barriers to labour hire and independent contracting.

The third area that the paper discusses is the removal of independent contractors from the scope of workplace relations laws. Of particular concern to the government are provisions in state legislation which deem independent contractors in a range of industries as employees. The government generally opposes these provisions, which seek to draw independent contractors into the net of workplace relations regulation, on the basis that they invalidate individuals' freedom to work as independent contractors. The paper raises the issue of whether the Commonwealth should seek to override state workplace relations laws affecting independent contractors, including deeming provisions and unfair contracts laws. The possibility of the proposed independent contractors act providing a national scheme for unfair contracts is also raised.

Sham arrangements are the fourth area I will mention, as the discussion paper seeks submissions on ensuring these are not legitimised. It is important here to be clear what is meant by a sham arrangement. A sham arrangement is something that is intended to be mistaken for something else. This could occur where an employer seeks to cloak an employment relationship with the appearance of an independent contracting arrangement in a flawed attempt to avoid legal entitlements payable to employees. These situations need to be distinguished from lawfully established non-employment arrangements. It is quite lawful for business to engage independent contractors. The sham only occurs where the person is inappropriately characterised as an independent contractor but is at law an employee.

The final area that the department is seeking views on is the idea of regulating the labour hire industry. This has had some support from sectors of the industry itself, so we are very interested in assessing the level of that support and the views of the wider stakeholder group.

That is all I propose to say by way of an opening statement, save alerting the committee to the respective responsibilities of my colleagues here today. Ms Waterhouse and I will primarily assist the committee with legal issues. We are both from the legal group. Mr Pridmore is from our Strategic Policy Branch and will assist with non-legal issues arising from this inquiry, including the role of labour hire and independent contracting. This concludes our opening statement.

CHAIR—Ms Waterhouse and Mr Pridmore, would you like to make an opening comment.

Ms Waterhouse—No.

Mr Pridmore—No.

CHAIR—My first question goes to the deeming laws. You mention that the government opposes the deeming provisions because they regulate independent contractors through workplace relations rather than commercial arrangements and, importantly, they are not consistent across a range of industries and thus are ambiguous. Can you explain how that inconsistency plays out? Where is the inconsistency with deeming in Australia? Is it mainly due to the different state legislations? Is it the interpretation of who is and who is not an employee? I am just trying to get an understanding of where that inconsistency falls.

Mr O'Sullivan—Mr Pridmore can perhaps help me on this. To some extent, some of the submissions we are receiving are going to enlighten us a little bit on that. But I would say, yes, there are inconsistencies in the definition of the kinds of independent contractors that at common law are independent contractors but that are deemed by certain states, typically in a particular industry, to be employees whereas in other states that would not occur.

Ms Waterhouse—An example of that is in New South Wales legislation, where there is quite a list of the kinds of industries where the people working in them would be considered to be deemed employees, regardless of whether they were independent contractors according to the common-law test. There is a different approach in Queensland, where submissions can be made to the commission to suggest that certain kinds of industry workers should be deemed to be employees. There was a case about shearers in Queensland. So they take a bit of a different approach. In New South Wales it is done by the minister setting it in regulations, and there is a long list. The difficulty is that, if you are running an Australia wide company, in some situations you will hire someone as an independent contractor and they will be one at law, but in other states you would need to consider the legislative framework to know whether they are an employee or an independent contractor.

CHAIR—Let me then make a proposal to you—and this may be strange coming from a government member. Would you not be able to get rid of those inconsistencies of deeming by still having deeming provisions but making sure that they are consistent with deeming provisions in every jurisdiction, rather than getting rid of deeming completely?

Mr O'Sullivan—I think the government's view is that any proposed independent contractors act should not reduce choice and flexibility in working arrangements or prevent genuine contractors from continuing to operate, irrespective of which industry they are in.

CHAIR—So a concern about deeming is that it identifies industries themselves?

Mr O'Sullivan—Exactly.

CHAIR—Have you guys formed an opinion at the moment about the common-law definition and its continuing application as a benchmark for defining who is an employee and who is not?

Mr O'Sullivan—It would not be appropriate for us, without considering all the submissions we have received, to yet form a fixed opinion. I can probably not help the committee with any more on this at this stage.

CHAIR—You mentioned sham arrangements as well and, consistently among all witnesses, no-one wants to see sham arrangements take place. You said that a sham arrangement is one where at law an individual is an employee. How do we know that they are an employee at law?

Mr O'Sullivan—I will probably go back a little further to address your first question. The government would probably need to be persuaded that the common-law tests are faulty, but that is why we have gone out and are having discussions—to find out and to test the water, so to speak. When you ask, 'How do you know at law'—and I hope I am not going too specific on this—'that a particular person in a particular relationship with either a principal or an employer is an employee or an independent contractor?' the thing that the common law has got going for it is at least 200 years of precedent and well-understood tests to define or to conclusively establish what the particular relationship is. So far, from what I understand, very few cases—and they would be in the minority—cause problems, at least for courts. Some commentators might say, 'In a similar case a different result was established,' but those cases, to be fair to the courts, can be distinguished.

CHAIR—Yes, but that is only if they have gone through the court process and had a ruling.

Mr O'Sullivan—That is how things are ultimately determined. But people can always go and get a legal opinion. That is almost the case with any kind of contractual relationship. People can ask, 'What are my obligations?' Sometimes they are readily apparent to the parties; sometimes there may be a grey area where they go and seek legal advice and opinion. In very rare instances—and it really is in very rare instances—people go off to court. It is usually when something bad has happened.

Mr BRENDAN O'CONNOR—I do not know where to start. We have only 35 minutes, but I hope to see you back sometime before we finish with this matter. I am not sure how long you have been employed in the department, but my question is: are you aware of a similar circumstance that this committee finds itself in in relation to this area of law where a minister will release a paper that goes to matters that are currently before a committee, a committee that has been asked by the same minister under the terms of reference to consider matters? As far as you are concerned, is this an unusual circumstance?

Mr O'Sullivan—I am not sure that is something I can comment on.

Mr BRENDAN O'CONNOR—I am asking whether you have experienced this situation before as an officer of the department, where you were before a committee to have regard to a paper issued by a minister when that same minister referred the matter to the committee. Have you been in the situation where you have had parallel inquiries at the same time—on one hand, by a member of the executive of parliament and, on the other hand, by a committee considering those same matters?

Mr O'Sullivan—I can only answer by saying I would not put any weight on my opinion because I am not an expert in that area. By that I mean that I have very little experience in these kinds of processes, but I do have a considerable amount of experience as a lawyer. What I would say—and I tried to make this clear—is that the purpose of this discussion paper was to put out some options to get some feedback and, to be fair, to give an indication to the community what the government's position was on certain matters, or its position at this stage. For example, the

government is concerned about deeming provisions, as I have discussed. The government is also clearly concerned about industrial agreements being used to impede or prevent independent contractors getting work in certain businesses.

Mr BRENDAN O'CONNOR—Can you see that some committee members might feel that the discussion paper itself has prejudiced and pre-empted the committee's findings in this matter?

Mr O'Sullivan—I am sorry but I think you are putting me in a difficult position here, because I cannot see that that is a reasonable view—

Mr BRENDAN O'CONNOR—I think your minister may have put you in a difficult position. The fact is that, as part of your submission, you attached the paper that has been released. This paper was released during the committee's efforts to respond to the terms of reference by the Minister for Employment and Workplace Relations. I am asking you whether you think it has prejudiced the committee's ability to recommend to the minister findings on these matters.

Mr O'Sullivan—I certainly do not believe it has, and to be quite frank I do not see that that is a reasonable view to hold—that is my honest answer.

Mr BRENDAN O'CONNOR—Does the department have concerns that not regulating labour hire companies or not properly regulating independent contractors would lead to greater casualisation of the Australian work force?

Mr O'Sullivan—We certainly do not have a settled view on that. That is again one of the things that I am sure, like your committee, the department are hoping to get advice on from the community—hence the discussion paper.

Mr Pridmore—I can add something on the statistical side. Labour hire workers constitute about three per cent of the total work force, so they are not going to make a very big contribution to casualisation when casuals constitute about a quarter of total employment. So the potential contribution of labour hire to that is pretty limited.

Mr BRENDAN O'CONNOR—About 25 per cent of the work force is casualised, but I put it to you that in labour hire companies the figure is more like 70 or 80 per cent. I suppose I am putting to you also that there has been exponential growth in labour hire employees. In addition, there is the whole notion of how a person is defined as an independent contractor. But, leaving the independent contractor aside, I am asserting that if employers such as labour hire companies employ primarily casual employees, then clearly that would lead to an increase in casualisation of the work force. That is where I am coming from. I do not know if you want to reflect on those comments.

Mr Pridmore—I do not know that I have a lot to add to what I said before. An increase in labour hire workers—not that they have been increasing very markedly over the last few years—would, all things being equal, increase the rate of casualisation; but, since we are talking about only three per cent of the work force, I think that is going to have a very small effect.

Mr BRENDAN O'CONNOR—You said earlier in answers to questions posed by the chair that there may well be a need—and I think you qualified it; I am glad to hear that you did—to regulate the deeming provisions that are currently incorporated into state legislation. Is it the department's view that the states do not have the right to codify common law in their own jurisdictions?

Mr O'Sullivan—Clearly, states have rights to pass legislation within their own legislative capacity, as does the Commonwealth.

Mr BRENDAN O'CONNOR—If, indeed, the Commonwealth chose to prevail over state law in relation to this area by the use of the corporations power, what does it expect to do to the areas that would not be covered by the corporations power pursuant to the Constitution?

Mr O'Sullivan—You will have to clarify the question.

Mr BRENDAN O'CONNOR—Clearly, if the Commonwealth intends to prevail over state law—that is effectively what you were mooting this morning—

Mr O'Sullivan—I was not imputing anything; I said it was considering.

Mr BRENDAN O'CONNOR—I did not say 'imputing'.

Mr O'Sullivan—I beg your pardon.

Mr BRENDAN O'CONNOR—Nonetheless, the point I was making was that the Commonwealth is considering whether it will legislate to prevail over state law. Is that correct?

Mr O'Sullivan—Yes.

Mr BRENDAN O'CONNOR—Even if it were to do that, can the department give me a view as to whether, in doing so, that would cover all employees in the nation?

Mr O'Sullivan—I am not able to give you a legal opinion at this committee hearing. It would not be proper for me to do so.

CHAIR—We have used the corporations power before in industrial relations.

Mr O'Sullivan—Yes.

CHAIR—What coverage does it have out in the work force? What total coverage would it reach?

Mr O'Sullivan—My understanding is that—and Brant may be able to help me with this—employees employed by corporations make up something like 80 per cent of the employment population. Is that right?

Mr Pridmore—Yes, 80 per cent to 85 per cent is our estimate.

CHAIR—Who drops out? Which groups are not part of that?

Mr O'Sullivan—I think we would have to be careful about who would drop out, because there are certainly constitutional heads of power other than the corporations power. But if we are talking about the corporations power, those employees of constitutional corporations may be covered by laws enacted by the Commonwealth in reliance on that power for that purpose.

Mr BRENDAN O'CONNOR—What other powers are you including? Are you including foreign affairs powers, the external affairs power?

Mr O'Sullivan—No, I am not including any. I was just clarifying the fact that—

Mr BRENDAN O'CONNOR—You mentioned that there were other powers that could be used. What other powers could be used?

Mr O'Sullivan—The reason I said it would not be proper for me to give this committee advice on constitutional matters is that, under legal services directions, that advice is tied to the Attorney-General's Department. I am just not prepared to give legal advice on that matter.

Mr BRENDAN O'CONNOR—In your letter to the committee secretary you indicated that you are looking at reform to prevent 'unreasonable workplace regulation of independent contractors, including the removal of constraints and barriers on the freedom to contract'. Could you comment on why, given the rights of an employer and its employees to enter into a registered agreement pursuant to the Workplace Relations Act to provide security for employees for a given term, say for the life of the agreement, the privity of that contract should be superseded by provisions in a Commonwealth law which suggest that the employer and those employees would not have a right to protect the security of those employees by preventing, for the period of that agreement, labour-hire employees from undertaking work for that employer if it has been genuinely agreed to by all parties? Why is the privity of that contract not important?

Mr O'Sullivan—There are a few premises in there.

Mr BRENDAN O'CONNOR—It is a complex area; I accept that.

Mr O'Sullivan—I certainly do not accept as a general proposition that the engagement by a business of independent contractors necessarily affects the security of employment of employees of that business. I cannot accept that as a general proposition.

Mr BRENDAN O'CONNOR—I am not trying to sound esoteric. As an example, if there is a company of 50 employees and they are performing a particular task and they have entered into a collective arrangement pursuant to the Workplace Relations Act to say that that work will be undertaken by employees rather than labour-hire employees or independent contractors, why is the privity of that contract, genuinely entered into by the parties pursuant to a Commonwealth law, not an important right if indeed the government believes we should leave the parties to determine matters? Why can they not enter into that contract by using an industrial instrument pursuant to the Workplace Relations Act? Why does this department consider it worth considering an option that would allow a provision to prevent employers from entering into that arrangement genuinely?

Mr O'Sullivan—I understand the question; thank you for putting it that way. When any government considers—and it is not done in haste—whether a legislative response is needed to prevent, say, certain contracts that may be contrary to the public interest, that is an example where a government, whether they be state or Commonwealth, will on occasion limit freedom to contract. The typical example—and it is kind of relevant to this area—is restrictions on unreasonable restraints of trade. Different people will have different views, and that is one of the reasons we have put out a discussion paper to flesh out these views. But, on one view, such an agreement that basically prevents a class of workers from working in a particular business is clearly a restraint of trade. The question—and this is something for the government to work out after being informed by recommendations or submissions from this committee and submissions sought from the discussion paper—is whether such agreements to exclude that class of persons are, on balance, contrary to the public interest. And I think that is the kind of thing that would make any government think it has a right to legislate, just as every government must act in the public interest, essentially.

Mr BRENDAN O'CONNOR—If indeed the government wants a national debate about these matters, and it has asked people to comment upon its paper, are those responses to the minister's paper available to this committee or not?

Mr O'Sullivan—That is something I will have to take on notice.

CHAIR—It is fair to say that one of the things you put out in the discussion paper in relation to freedom of contracting is that it is where there is no undue influence of pressure exerted or unfair tactics used. Is that correct?

Mr O'Sullivan—Yes.

CHAIR—That would distinguish a genuine contract from one which was not genuine. So if there has been no undue influence or unfair tactics by the employer and a group of employees then is that acceptable?

Mr O'Sullivan—Any contract can be vitiated if there is not free or proper consent or agreement. Duress is one of the circumstances in which a contract will be vitiated.

Ms HALL—Thank you very much for appearing here today. It is very good to have you here and to have the opportunity to ask a couple of questions. In your verbal submission here today, you mentioned that the two areas that you are mainly interested in are deeming and industrial relations agreements. Is that correct?

Mr O'Sullivan—No, I would not say they were the two main areas that we are interested in. We are obviously interested in all the areas pertinent to the government's consideration of what should be in an independent contractors act. I said that there were two areas where we indicated in the discussion paper what the government's position at that point was. In other words, the government, I think it is fair to say, has at least an inclination to legislate to address state deeming provision laws that deem a class of people who, applying the common law test, for example, are clearly independent contractors. That is one area on which the government has put its view in this discussion paper. The other area is agreements and awards which prohibit or

create barriers for business engaging independent contractors or labour hire. We are looking at a lot of areas, but they were two areas where the government had considered views.

Ms HALL—The area that seems to be a little bit lacking consideration in your submission, and probably in the paper as well, is concern about ensuring some sort of security and conditions for workers. It seems to me that they are very much secondary in any considerations—and if I am incorrect or missing something here, please feel free to point it out to me. I am concerned that the whole impetus is towards business and the labour hire contract and the labour hirers and those people utilising or seeking to contract people through independent contracts. What interest or—

Mr O'Sullivan—I think I will have to ask you to take me to what there is in the paper that causes you concern.

Ms HALL—Total omission.

Mr O'Sullivan—Of what?

Ms HALL—Concern for looking at it from that perspective.

Ms Waterhouse—I think that the paper addresses in some parts that there can be advantages to workers as well under labour hire arrangements.

Ms HALL—But I do not see any empirical data to support that. Earlier you referred to empirical evidence about the shifting of costs. I would just like to refer you to evidence we received from Manpower in Sydney where they talked very much about how labour hire is quite often utilised to shift costs from one line to meet reporting procedures and in virtually the same breath they were justifying the fact that people are employed, per se, as casual employees for periods of seven years, and examples were given. It is quite good evidence we received from Manpower and the department may be interested in having a look at that.

Mr O'Sullivan—We certainly will. I was not suggesting for a second that that would not be a consideration for business. Some of the submissions that we have already received to date also point to other reasons. Indeed, the engagement of a specialised independent contractor would at first blush appear to be at a greater cost than an employee. But, generally speaking, businesses are entitled to make their own business commercial decisions and they weigh up any number of facts. The fact that we acknowledge that in no way suggests that this is anti-employee—absolutely not. This bill is very much dealing with the state of independent contractors, and many, if not most, of the people who work for labour hire firms are employees so they are a big employer.

Ms HALL—Would you acknowledge that labour hire leads to a great deal of insecurity for workers? Particularly when it comes to the financial arrangements we heard from one labour hire group—it might have been Manpower again—that they have had to organise special arrangements for employees of the labour hire company to be able to access housing loans and things like that. What strategies or recommendations are you going to be looking at including in any final papers to look at that from the employees' perspective?

Mr O'Sullivan—Dealing with your first point, I would say that until we have considered all the submissions I am simply not in a position to acknowledge that.

Ms HALL—That it does not create insecurity?

Mr O'Sullivan—I am not sure on what that is premised.

Ms HALL—It is on the fact that lending agencies will not give money to people that are working in labour hire companies.

Mr O'Sullivan—What I was going to say was that we will be getting a lot of submissions from labour hire companies, including, no doubt, Manpower and other big players in the area. As I said before, many of those players actually employ significant numbers. Whether you are an employee of a labour hire firm or an employee of a particular small business, I certainly would not necessarily assume that one position has greater tenure or security than the other. It is just going to depend exactly on the particular terms of the employment relationship.

Ms HALL—For your own benefit, when you are finalising your report it may be worth while talking to some financial institutions to see how they view it, because that has been a constant factor in the information that we have been receiving.

CHAIR—Yes, there is a growing number of financial institutions that are recognising employees who work for labour hire companies.

Mr HENRY—I am interested in exploring with you an aspect further to your submission and other submissions that people have made. For example, today we had Aged Care Queensland speak to us about their strategies for managing relationships with independent contractors on behalf of their member organisations. They were talking about the development of a standard form of contract for the engagement of an independent contractor. I think it is fair to say that there are probably many employers across Australia who have also engaged legal advice and legal support in developing contracts to engage independent contractors, yet deeming provisions may well override those arrangements. That seems to be extremely unreasonable given that those employers are making their best efforts to provide an appropriate relationship for the carrying out of work. You have made some comments about separating these commercial arrangements from industrial law. Would you expand on those a little.

Mr O'Sullivan—I do not know if this is helpful but sometimes I think there is a bit of confusion. There is any manner of contracts and, largely speaking, the only kinds of contracts that the Workplace Relations Act and similar state industrial relations legislation deal with are employment contracts. The government indicated a concern with deeming provisions because they are looking to address what has been over the last few years a change in the status quo whereby some state industrial relations legislation has sought to apply those workplace relations acts to relationships that they had hitherto not applied to.

Similarly, an independent contracting act or such proposed legislation would only really apply to those genuine independent commercial relationships. They really are just another commercial relationship, and what we are trying to ascertain in our discussion paper is this: is there any good reason for what is essentially state industrial relations legislation to apply to what is essentially a

commercial relationship to produce typically a product or a particular service for a usually fixed time? We leave it to business to generally determine which relationship it needs to engage in to achieve a considered result. In many instances—indeed in most instances—businesses will prove that point: 'That is something that we have got to do regularly and repetitively. We need those skills. An employment relationship is the appropriate one, being the most economic et cetera.' But there are many instances that we have identified in the discussion paper—typically peaks in demand—whereby it would be more convenient, either to keep the business afloat or make it more profitable, if they could have access to this different form of obtaining labour. I do not know if that is helpful.

Mr HENRY—Where I am coming from is that I have a sense that it is unreasonable that we have a whole bunch of employers investing in advice that can be overturned because industrial law may prevail as a result of a deeming provision or some other arrangement.

Mr O'Sullivan—If you have a deeming provision that basically says that in a particular industry, even if you have a genuine independent contracting relationship, you are going to be deemed for workplace relations purposes—irrespective of OH&S, super, whatever—to be an employee then any advice is probably a waste of time because that is it; you just do not have that choice.

Mr HENRY—That is the point. So what I am saying is that there is certainly a significant amount of confusion out there amongst the industry that is engaging people for advice. That advice may be a costly exercise without an appropriate outcome.

Ms Waterhouse—It could be overridden by law.

Mr BAKER—Over the last few weeks and months we have heard of frustrations about the inconsistencies from state to state, especially from national employers, in getting the contracts written which, as Stuart said, can be thrown out from a deeming and workers compensation perspective. Has there been any communication from the states of any willingness at all to be involved in what we are doing—for them to put forward submissions themselves? I know the nature of the state governments makes it interesting, but is there any willingness at all for everybody to come together to achieve the perfect outcome?

Mr O'Sullivan—At my level I could not give you a comprehensive answer because I would not necessarily be privy to that. But certainly there are a number of state governments that are putting in submissions to our discussion paper.

Mr BAKER—That would the ideal outcome. Hopefully then a lot of the inconsistencies could be rolled into one at a federal level.

Mr O'Sullivan—I think the states and the Commonwealth often have discussions in respect of all manner of workplace relations. This is just one area of it, so I would be surprised if there was not a dialogue. As I said in my evidence on that, some of them have indicated that they will be putting in submissions to our discussion paper.

CHAIR—Have you read some of those state submissions?

Mr O'Sullivan—I have not read any of the state submissions.

CHAIR—Okay. You will not then be able to answer my question. I am trying to get a feel for what may be the likely response from the various state jurisdictions if there were Commonwealth legislation to protect independent contractors and labour hire companies from deeming provisions and also to take them out of the industrial workplace relations sphere.

Ms Waterhouse—It depends on what proposals actually end up being put forward and until we know what reaction they might have. It is a bit pre-emptive at this stage, given that we do not have a settled policy or anything that we are going ahead with as yet, to try to suppose what the states' reactions might be.

Ms ANNETTE ELLIS—My apologies for being absent for a bit. I am not sure whether this question has been asked. Mr Henry referred to evidence this morning from the witness from Aged Care Queensland Inc. and I want to go back that for a minute. They were making the claim, which is not contended at all, as we are aware of these situations, that an operator in the aged care industry will go into a labour hire arrangement and bring in, say, aged care nursing staff to help out at a peak period of need, staff absence or—the witness made a very strong point—skills shortage and patching in. The questions that the 'host facility', for want of a better term, will ask at the time of the labour hire are about the extent of qualification and understanding of the industry of the employee who is going to walk through the door. They are told that, yes, they are expert in gerontology and they know how to give medication and they then find in many cases that that is not the case. The witness gave evidence of where that can be very problematic in an industry like that. In DEWR's opinion, what needs to be done on the labour hire side of this debate to ensure that that cannot happen? Where does DEWR see the line of responsibility sitting, given that the labour hire arrangement is of the fashion that I think was described this morning?

Mr O'Sullivan—In that situation, it springs to my mind that a number of offences, certainly civil and possibly criminal, have been committed already. Just off the top of my head, it speaks to me of there being sufficient laws to deal with that amount of either fraud or misleading and deceptive conduct for the host business to take civil action against the labour hire company if that company misrepresented the person's qualifications and if the hired employee misrepresented his or her qualifications; potentially it is fraud as well. Obviously, we do not condone that kind of thing.

Ms ANNETTE ELLIS—Neither do we.

Mr O'Sullivan—Indeed.

Ms ANNETTE ELLIS—With the greatest of respect, it is evident that, if something absolutely tragic occurs as a result, there is common-law or criminal law to apply. But I am getting at why it happens in the first place. This inquiry is for us to look at the situations that exist and, should they be unsatisfactory, what we need to recommend to ensure that they change. I am asking DEWR what, in its opinion, needs to be done to prevent that occurring. In your view, what can we do about that labour hire arrangement?

Ms Waterhouse—One of the issues that the paper raises—this is perhaps a more general point—has been around for a while and comes especially from some of the bigger labour hire companies themselves. That is the idea that there be some sort of regulation. I understand that already there is a voluntary code of practice for the RCSA, from which you have had evidence.

CHAIR—Yes, there is. I was about to ask you that very question.

Ms ANNETTE ELLIS—The RCSA?

CHAIR—Yes, Recruitment and Consulting Services of Australia.

Ms Waterhouse—It is a peak body of many labour hire groups. I know that Adecco is a member—

CHAIR—And Manpower and so on.

Ms Waterhouse—as is Skilled Engineering.

CHAIR—You float the idea of regulation, but you also make the point in your paper that a counterargument to regulation is that it could be costly and an additional layer of bureaucracy; you talk about the advantage and also the disadvantage. Continuing Ms Ellis's point, you also float the idea that perhaps there should be stronger civil or criminal penalties. That is an acknowledgment that perhaps the current recourse available to some of the host employers may not be sufficient to deter the making of sham arrangements and the existence of sham operators.

Ms Waterhouse—We are trying to get more evidence on that, as are you at the moment. But yes, that is what that point is directed to. As you know, the paper raises many issues, some of which have been raised before and are out there. We have tried to capture and get comment on a lot of them so we can inform ourselves and, in turn, inform our minister of what legislative approach he might like to take.

Ms ANNETTE ELLIS—I will finish by making a comment and would welcome any comment you wish to make in reply. Even though this is an isolated part of our debate, because it is looking only at aged care, it could be indicative of any health service. The whole of the allied health professional area, let alone primary health care, is riddled by staff shortage, skills shortage and the need to hire and bring in staff on a casual basis. Even though we have heard of that only this morning, I suggest that it is a much broader area of concern. I suggest strongly that, as a committee, we need to look very carefully at how we can make recommendations to stop these things from occurring in the first place, for two reasons. The two reasons are that, firstly, we do not want them to occur and neither do you and, secondly, none of the people within that sector has the time or the resources to contemplate even being in a regime that will lead to long and costly civil or other type legal action. Our joint responsibility should be to make sure that these things do not begin in the first place. Would you agree with that as a general comment?

Mr O'Sullivan—I am not sure I understood every element of your comment. I apologise; you have made many good points, but I cannot remember what the first ones were.

Ms ANNETTE ELLIS—The first one was to stop it happening in the first place.

Mr O'Sullivan—As I think the chair pointed out, whenever a government uses its legislative authority to regulate something, there is always a downside to that, so we have to think about it long and hard. In one sense, that is the purpose of discussion paper: to flesh these issues out. The ultimate test is whether the public interest is best served by a government introducing a new layer of regulation. A point that I think is worth repeating is that there is already a fair amount of law in this area, and you are quite right: a lot of people do not necessarily want to take their own legal action against a perhaps unscrupulous labour hire firm. The simple response for a breach of the Trade Practices Act is to refer it to the ACCC.

Ms ANNETTE ELLIS—I take that point. I am not disagreeing with you but I am saying that there is responsibility right through this process, including the legislative responsibility. We will not do it just for the sake of another bit of bureaucracy, but if people down the line cop it that is unfortunate. I think the responsibility should be dealt with quite evenly. I am not for one minute suggesting that we blithely recommend bureaucracy, but we need to look seriously at just what the implications really are. The point you made, Mr O'Sullivan, about public interest holds water there.

Mr O'Sullivan—Exactly. I think that is the ultimate point.

CHAIR—One of the things that you raise in your paper—and I am sure that you are going to be inundated with questions from us about the submissions to the discussion paper—is the total confusion over definitions. I do not mean the definition of who or what is or is not an employee versus an independent contractor but of what constitutes labour hire, independent contractors, dependent versus independent, on hire—the whole thing. I hope that through the process we end up with something very clear-cut, because a lot of the industry out there—just about everybody—has said that they are totally confused by the various definitions around. I will leave that with you.

Mr O'Sullivan, there are no more questions. There are a couple of things that I want to raise with you. It is obvious to us from the questions that we have asked and the answers that you have given that it is early in the process and you are not able to give us a lot of definitive statements because you have a discussion paper floating out there. We would like to bring you back again some time, probably in mid-June, before we start finalising our draft report. That it is probably essential at that stage. You may have some additional information or perhaps we may need to clarify some of the points that we have received from witnesses, so hopefully you are prepared to do that at the time, in mid-June. I would welcome your participation at that time.

Mr O'Sullivan—I am sure the department would be happy to come again.

CHAIR—Just for your information and assistance in responding to some of the questions that you received this morning—I know you are a lawyer and you probably know the law better than anybody else—as a government official, you are not required to answer questions which seek opinion on policy, the reasons for policy decisions or advice. I should have picked that up myself, so I apologise. Thank you very much.

Resolved (on motion by **Mr Baker**):

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

Committee adjourned at 1.33 pm