COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON EMPLOYMENT, WORKPLACE RELATIONS AND WORKFORCE PARTICIPATION

Reference: Independent contracting and labour hire arrangements

THURSDAY, 16 JUNE 2005

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON EMPLOYMENT, WORKPLACE RELATIONS AND WORKFORCE PARTICIPATION

Thursday, 16 June 2005

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

Members in attendance: Mr Baker, Mr Barresi, Ms Annette Ellis, Ms Hall, Mr Henry, Mrs May, Mr Brendan O'Connor and Mr Vasta

Terms of reference for the inquiry:

To inquire into and report on:

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

WITNESSES

Committee met at 11.16 am

KONZA, Mr Mark, Deputy Commissioner of Small Business, Australian Taxation Office

SULLIVAN, Mr Tony, Assistant Commissioner, Small Business Active Compliance, Australian Taxation Office

DOLMAN, Ms Marianne, Policy Officer, Competition Policy Framework Unit, Competition and Consumer Policy Division, Department of the Treasury

JACOBS, Mr Martin, Manager, Individuals Non Business Unit, Revenue Group, Department of the Treasury

O'CONNOR, Mr Mark, Principal Adviser, Individuals and Exempt Tax Division, Revenue Group, Department of the Treasury

PATCH, Mrs Sandra Louise, Senior Adviser, Competition Policy Framework Unit, Competition and Consumer Policy Division, Markets Group, Department of the Treasury

CHAIR (Mr Barresi)—I declare open this public hearing of the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation inquiry into independent contracting and labour hire arrangements. The inquiry arises from a request to this committee by the Minister for Employment and Workplace Relations. Written submissions were called for, and we have received 75 submissions to date. Today's hearing is the final hearing of the inquiry.

I welcome witnesses from the Department of the Treasury and the Australian Taxation Office. Although the committee does not require you to give evidence under oath, I advise you that these hearings are formal proceedings of the parliament. Consequently, they warrant the same respect as proceedings of the House itself. It is customary to remind witnesses that giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. We do prefer to hear evidence in public but, if you have issues that you would like to raise in private, we will consider your request.

The committee would like to go through various aspects that we are inquiring into. We want to spend some time on personal services income and the Trade Practices Act and we would like to get an overview on the superannuation guarantee. They are basically the areas that we are interested in covering this morning. I now invite you to make an opening statement.

Mr Jacobs—At the committee's invitation, the Department of the Treasury has provided a submission to the committee's inquiry into independent contractors. Our submission provides the committee with additional information on issues raised by other submissions received by the committee that fall within Treasury's portfolio responsibilities. The submission provides information to the committee about the following issues: alienation of personal services income measures, including the potential application of part IVA, which is the general antiavoidance rule, to personal services businesses; ATO compliance activity in relation to personal services income measures; and the restrictions imposed by the Trade Practices Act 1974 on collective

bargaining and the authorisation process. My colleagues Mrs Sandra Patch and Ms Marianne Dolman are available to provide further information on those issues.

I would now like to provide some background comments in relation to the personal services income measures. These measures were introduced in 2001 following recommendations by the Ralph Review of Business Taxation. The legislation prevents individuals who earn income as individuals from claiming to be businesses in order to avoid paying income tax at individual rates and to claim deductions available to businesses. The provisions achieve consistent taxation treatment for personal services income irrespective of the structures in place to receive that income.

The law does not impinge on any commercial or contractual obligation between parties affected by the measures and does not impact on genuine business undertakings. The legislation sets out a number of tests that are designed to allow independent contractors and entities to either self-assess or seek a determination from the Commissioner of Taxation that they are not affected by the measures. The measures offer flexibility to take into account the unique circumstances of particular businesses. This flexibility delivers an equitable regime through limiting the number of businesses that may need to be assessed on a case-by-case basis by the commissioner. Our submission provides a description of the relevant tests.

Some submissions to this committee have suggested that the 80 per cent rule, which is required to be satisfied during a 12-month period, is too restrictive. This period allows taxpayers to self-assess for a period which is consistent with the period over which the income is earned. In addition, a taxpayer can seek a determination from the commissioner if the taxpayer is not able to satisfy the 80 per cent rule during the 12-month period as a result of unusual circumstances. Our submission also provides details of the potential application of part IVA and the activities of the ATO in this area. In addition, the submission discusses the ATO's compliance activities in relation to the personal services income measures. Mr Mark Konza and Mr Tony Sullivan, representatives from the ATO, are in attendance today to provide further information on these aspects as well as to address any issues in relation to employers meeting obligations under the superannuation guarantee arrangement for contractors.

CHAIR—Does anyone else want to make an opening statement?

Mr Konza—Yes, I would like to. On behalf of the Taxation Office, thank you for the opportunity to appear before the committee. I thought it might be helpful to provide the committee with an outline of our general approach in implementing the personal services income measure, comments on the level of compliance with the personal services income measure, including results of our audit work, and comments on the current status of our administration of the PSI measure.

In relation to the general approach adopted by the ATO in implementing the PSI measure, consistent with the compliance model which the ATO uses, there was a strong focus on education and help in the initial stages of the project, particularly helping tax agents to understand the requirements. We have worked closely with the accounting profession organisations, key industry groups and some of the unions. For example, we have a tax practitioner working group which is specifically focused on resolving issues to do with implementing the PSI measure and we have had that group in place since 2001. As well, we have

had ongoing discussions with many of the key industry groups impacted by the PSI measure, many of which have made submissions to this committee. They include: the Master Builders Association Australia, the Housing Industry Association, independent contractors association, Recruitment and Consulting Services Association, the Association of Professional Engineers, Scientists and Managers, and the Courier and Taxi Truck Association. We have also worked with the Construction, Forestry, Mining and Energy Union and the Transport Workers Union. We have developed customised information products for many of these industries and groups in addition to publishing a wide range of general information in relation to the personal services income measure.

Our preliminary view is that overall compliance with the personal services income measure is at a satisfactory level. We have seen a decline in the level of deductions for rent, motor vehicles, payments to associates and retained profits by those taxpayers to whom the measure applies. We have also seen some evidence of taxpayers returning to salary and wages. There has been a large increase in the number of taxpayers declaring that they are in receipt of personal services income, although we consider that there are many others who are not correctly reporting personal services income in their tax returns. Many of these incorrectly report their income as business income instead of personal services income, and there is also some confusion among tax agents in distinguishing between personal services income and income from a business structure.

The vast majority of taxpayers who pass one of the personal services business tests pass the first test—that is, the results test. Seventy-five per cent of those who pass the personal services business test pass the results test whilst 19 per cent pass the unrelated clients test. The ATO has undertaken just over 2,000 personal services income audits during the past three years. The main focus has been on people working through labour hire firms—mainly IT contractors and those working in the building and construction industry. An adjustment has been made in approximately one-third of the cases. The adjustment rate is higher in relation to the labour hire firm cases.

Regarding the current status of implementing the PSI measure, the level of community interest in the topic has decreased significantly from our perspective. The ATO receives relatively few requests for advice or assistance. The level of consultation with and interest by the tax profession and industry groups mentioned earlier has declined significantly. In fact, for the past two years or more, more interest has shifted from the PSI measure to the potential application of our general antiavoidance provisions, part IVA, to taxpayers who earn personal services income but who are not affected by the PSI measure.

In response to concerns raised by tax professional organisations, a fact sheet setting out the ATO's current position was published in March 2003. At the same time, the commissioner announced a test case program aimed at seeking further guidance from the courts on how the law operates in today's environment in relation to income splitting.

In view of the overall position in relation to the personal services income measure as outlined, the ATO has considerably reduced the level of resources it commits to a level commensurate with its relative risk. We continue to supply advice and assistance as part of our normal operations and we have a small audit group which undertakes cases to reinforce the legislation on an ongoing basis.

CHAIR—Thank you very much. I will start, Mr Konza, with one of the comments you made in your opening statement regarding one-third of cases having had adjustments. Could you elaborate on that in terms of some of the detail of those adjustments and what you have found in those audits that you are doing.

Mr Konza—I guess we always have to start with a bit of a caution. The ATO tries to targets its compliance activity using the information that we have available so that we focus our efforts on those who are most likely to need an adjustment. So any wider measure should not be extrapolated from the fact that one-third of the cases were adjusted except to say that we think it is obvious that there is a continued risk because we do find, as I said, adjustments required in the targeting that we do.

CHAIR—Is it adjustments based on perhaps an incorrect assessment going in or is it because their presenting position as a contractor or labour hire employee has not been upheld and is invalid?

Mr Konza—It is difficult to generalise, but I suppose we would say that these are cases where people have assessed themselves as being engaged in a personal services business. We say that they do not pass the relevant tests—the results test et cetera—and in fact the personal services income legislation applies to them. That results in the denial of certain deductions, and if there is an interposed entity that they are using, such as a company, the income that may have been kept in the company gets attributed to the taxpayer and taxed. They are the adjustments that get taxed.

Ms HALL—Basically, they are saying that they are independent contractors but they are not; they are employees in actual fact.

Mr Konza—No.

Ms HALL—I am being a bit too black and white?

Mr Konza—At a global level, the way that the personal services income measure operates, as Mr Jacobs said, is that it does not disturb the contractual arrangements that are in place. It simply backs out any taxation advantage that those arrangements might have given. They are the adjustments that we make. We back out the extra deductions.

Ms HALL—So I am being too black and white there.

Mr BRENDAN O'CONNOR—I want to refer to the actual PSI test—the 80 per cent rule. Having listened to evidence over the course of a number of months from a whole range of witnesses, I am interested in understanding the extent to which the rule captures so-called independent contractors. I am particularly interested in the way in which the exemptions apply—the results test and so on. I am wondering whether Treasury has any idea of what proportions of independent contractors would be captured by this provision if those exemptions were not there, if the exemptions that allow them to escape the 80 per cent rule were not there. Do you have any idea?

Mr Jacobs—No. So you are saying, 'If one of the tests wasn't there'?

Mr BRENDAN O'CONNOR—I know when the debate happened inside government—I do not ask you to comment on that—when it was put forward by the previous minister, there was a view by a number of government ministers about having that test to ensure that tax avoidance was not occurring. Because of a lot of lobbying from a number of bodies, the exemptions were put in place. I guess the assertion I am happy to make for the purpose of this discussion is that those exemptions really tore the guts out of the 80 per cent rule in effectively not applying properly to those people who are able to avoid tax. What I guess I am looking to find from you, the department, is—while you say you do not have a specific idea as to those people who are now exempt as a result of those provisions being put in to weaken, in my view, the actual definition—how easy it is to avoid the 80 per cent rule. For example, if you set up a business at your home, does that avoid the 80 per cent rule? What are the provisions? What would be Treasury's concerns about the possible fabricated way in which a person can avoid the 80 per cent rule?

Mr Jacobs—I can provide some context about the four tests that are there. The first test is effectively the results test, which is looking at whether the contractor has an obligation to provide rectification of any results that they provide. That is the primary test, which we have said is being used by 75 per cent of people.

Mr BRENDAN O'CONNOR—On that point, do you only have to fulfil one of the tests to be exempted?

Mr Jacobs—No.

Mr BRENDAN O'CONNOR—So it has to be the four?

Mr Jacobs—Sorry, if you satisfy the results test, you are out. But there are a number of elements to satisfying the results test.

Mr BRENDAN O'CONNOR—So how do you know that these people are satisfying the results test?

Mr Jacobs—Treasury probably cannot answer that; it is a more administrative question.

Mr Konza—Treasury relies on us for that.

Mr BRENDAN O'CONNOR—How do you know people are complying with these provisions?

Mr Konza—I will make two comments. The first question that you asked Mr Jacobs cannot be factually answered, because of the ordering of the tests. If we are concerned about the results tests we will go to the taxpayer and ask to see the contracts. That will then tell us the form of the relationship. If we have any further concerns we will ask questions about the substance of the relationship and we will ask to see instances of rectification. We also use a common sense approach, I guess, in that in the building industry, for example, it is fairly sensible to think that if someone mucks up a job they will be asked to come back and fix it up, so that does not worry us too much. But then in other employment arrangements you would question or want to be convinced that the person actually can be held liable for the results.

Mr BRENDAN O'CONNOR—Theoretically, that sounds fine. But what are the practicalities of applying that policing? What resources are afforded to the department to police the many tens or hundreds of thousands of people who are calling themselves independent contractors?

Mr Konza—As I said, we have a fairly small audit group. We do not take the approach of policing all of that market. We in the tax office manage a whole spectrum of risks and we apply our resources to the risks that are most pressing.

Mr BRENDAN O'CONNOR—In your view, when you are looking to consider whether people are genuinely in this relationship to exempt themselves from the 80 per cent rule, what proportion of those people has been examined in reality?

Mr Konza—As we said, we have done about 2,000 audits and there are about 300,000 people affected by the measure. But, for example, one reason why we have looked at labour hire arrangements concerning IT contractors is because we are aware that the results test is not so easy to apply in the IT industry and that perhaps also the custom in the IT industry is that IT contractors—programmers and the like—are not generally paid to deliver a completed product. They are often paid on an hourly basis. So we will go in and say, 'You claim to be running an information technology business: can we please see the contracts?' If the contract provides for them to deliver a workable widget counting system then that looks OK. But generally, in the cases we select—as I said, we target—we find that there is a standard IT contract which provides for hours of work.

CHAIR—As you said, the IT industry has probably traditionally been a grey area; how many of those have sought determinations from the tax department? Do you use those as a benchmark against which to assess others?

Mr Sullivan—In an overall sense, the number of people applying for a personal services determination has declined markedly over the past four years. In the first year, 2000-01, we received 1,861 applications for a determination. In the current year, 2004-05, we have only received 147.

CHAIR—Why is that? One could be fairly negative and say that perhaps it is because the self-assessment is so easy—that is, why bother to go through a determination?

Mr Konza—That is right, but—

CHAIR—And then that falls into Professor Stewart's criticism. He says there is a lack of faith in your audit process; the auditing does not capture those who perhaps should be captured.

Mr Konza—To answer your question: we do not know today what portion of those determinations actually come out of the IT industry. Sorry, we do know. I am told that about 14 per cent of those have been from the IT industry. There have been 3½ thousand cases received so that would mean about 450 determinations have been sought from us by the IT industry.

CHAIR—That would give you a fairly good benchmark then, wouldn't it?

Mr Konza—Yes, it could. It is easy to say that people are self-assessing wrongfully, but we equally find that people are using their experience to reshape their businesses so that they meet the PSI test. That is the advantage of having a clear set of tests, as you have in the PSI. People can say, 'Okay, I know how I need to structure my business to stay on the right side of the commissioner.'

CHAIR—And it is one of the reasons why some of them have moved out of the PSI and back into an employee-employer relationship.

Mr Konza—Yes, because they found they were not going to get the tax advantages that perhaps they were seeking in that case and saw no point in it.

Mr VASTA—What about the construction industry? Is there any kind of assessment with that industry as opposed to IT? Is there a proportion that you have got?

Mr Konza—On the determinations?

Mr VASTA—Yes.

Mr Konza—Yes, there would be. It is 13 per cent, so it is a very similar number.

Mr BRENDAN O'CONNOR—What year is that?

Mr Konza—It is cumulative from 2001 until now, of the 3½ thousand determinations we have received over that five-year period.

Mr VASTA—It is about the same as IT?

Mr Konza—It is about the same, yes. In fact, there is no stand-out group. The four top groups are construction, finance and insurance, HR and management consultancy, and IT. They all range between 10 per cent and 16 per cent.

CHAIR—Are you prepared to table those figures for us?

Mr Konza—We need to check whether we can table the actual report, but I can provide figures to the committee.

CHAIR—Thank you.

Ms HALL—Given that you stated that there were few requests to the ATO for assistance in the application of the tests—

Mr Konza—Currently there are few requests.

Ms HALL—You said 'little request for advice'.

Mr Konza—Currently; there were lots of requests in 2000-01.

Ms HALL—You are still finding that people are having problems understanding the application of the tests. What proactive steps have you taken to overcome this problem?

Mr Konza—In your question there is an assumption that it is a misunderstanding. Sometimes it is a lack of willingness to apply the tests, so there are two sides to it. On the understanding side, as I said in my opening comments, we have produced a great deal of material and, more importantly, we work with the industry sectors—

Ms HALL—Are you saying these people are just trying to get around the obligations and use the fact that they do not understand as their defence?

Mr Konza—Whenever you bring a remedial provision into the tax legislation, a small percentage of people will want to deny its existence. Some people have continued operating the same way without applying the PSI legislation but some people have misunderstood, I am sure. So we work with the industry sectors to make sure that, if there is an issue that they are aware of, a misunderstanding or a lack of clarity about how the legislation might apply in that industry, we get tailored information to that sector.

Mr BRENDAN O'CONNOR—Just on that point on compliance, we heard from Professor Andrew Stewart, who, in his submission, indicated that he certainly had concerns about the compliance matter and in fact indicated that the compliance audit program related to the PSI effectively meant that 75 per cent of those who were required to report to the ATO were self-assessing. Would that be a fair assertion by Professor Stewart—that 75 per cent would be self-assessing in relation to this?

Mr Konza—I think the figures show that 99 per cent are self-assessing because there are 3,000 determinations.

Mr BRENDAN O'CONNOR—In fact you said there were—what?—2,300.

Mr Konza—In a population of 300,000.

Mr BRENDAN O'CONNOR—So it is less than one per cent that would—

Mr Konza—Ask for a determination; that is right. One would hope that determinations are sought by those whose affairs are particularly marginal or particularly complicated. We would hope that most people would just be taking our booklets and that—

Mr BRENDAN O'CONNOR—We are relying upon your hope—that is, the department's; not yours personally—that 99 per cent are doing the right thing.

Mr Konza—A hope backed up by a compliance program, yes.

Mr BRENDAN O'CONNOR—A compliance program that applies only to less than one per cent.

Mr Konza—That is what we have been doing so far but we have also been monitoring the return data that comes in and seeing, as I said in my opening statement, movements in claims

and income consistent with correct application of the measure. It is not a blind hope; it is a hope supported by observing movements in the data and by testing in the field. We do not go out and do 50,000 audits. We do not have the resources to do that. We target hotspot areas.

Mrs MAY—I would just like to focus my comments a little bit on the construction industry. Certainly the committee has received comments about the need for tighter regulation of the independent contractor status. A number of comments have come to us about the distribution of ABNs and the need for policing that, particularly in the construction industry. Would you have a comment on those comments that we have received?

CHAIR—Basically they are saying that it is too easy to get an ABN.

Mrs MAY—When people apply for an ABN, what sort of test do you put? You obviously look to see whether they are already registered for an ABN and you do an identity check. Is that going far enough? What do you do to really confirm who that person is?

Mr Konza—The Australian Business Register is a place where people are able to register their business. They do not undergo a series of tests by us to see whether they are entitled to be in business. We do check data quality. We do have checks to make sure of the identity of that person, so it is not fraudulent as far as we can tell.

Mrs MAY—So what sorts of checks are done on identity? What do you ask for?

Mr Konza—We look for the tax file number and the personal identities of the people who are behind the business.

Mrs MAY—So there is data matching of some description.

Mr Konza—Yes, that is right. A person is entitled to an ABN if they intend to carry on a business. The commissioner is under an expectation to deliver ABNs to applicants within 10 working days. It is essential for them, if they are starting up or are in business, to have their ABN, or else ABN withholding tax could become applicable to them. That would cause severe inconvenience to their business. When we look at the ABNs that are on our register we check to see whether, on the face of them, the holders are entitled to them. Sometimes we look at registrations and the description of the business leads one to wonder whether that entity is actually entitled to its status, so we will query those.

Mr BRENDAN O'CONNOR—If 150 ABN applications come to you from one work site and those people were, until that point, identified as employees does that not raise questions? Why is it that companies seem to be able to convert employees into independent contractors en masse and not be detected by Treasury?

Mrs MAY—Or a site.

Mr Konza—Firstly, we would not be aware of 150 applications coming from one work site, because there would be 150 independent applications coming through on either the internet or our forms from 150 applicants.

Mr BRENDAN O'CONNOR—But you would know from who they were that they were employed by a particular employer, wouldn't you?

Mr Konza—Not in a real-time basis like that.

Mr BRENDAN O'CONNOR—How do you confirm the identity of a person? You would obviously go their tax file number.

Mr Konza—Yes.

Mr BRENDAN O'CONNOR—Included with their tax file number there would be a reference to their employer or employers, surely? There must be a way in which you can get it?

Mr Konza—But what would that prove?

Mr BRENDAN O'CONNOR—Let me explain to you what it might prove. If within 10 days, 150 ABN applications came in and all had the same employer, there may be an issue in that these employees are being coercively placed into an independent contract arrangement. That is, I guess, the point that would be made.

Mr Konza—Our systems are not capable of making that sort of linkage fast enough.

Ms HALL—Maybe they need to be changed to be made capable—

CHAIR—A question has been asked of Mr Konza. Allow him to answer it, please.

Mr Konza—The second thing is that the great majority of small business tax returns lodged with us are lodged by people who have salary and wages. Numerically, most small businesses are organised by people who also have wages. Returning to the original question, we check the registration. We do whatever we can within that 10-day window. We also check for the lodgment of business activity statements, for deregistrations and so forth.

In answer to the question before that question—sorry to be working backwards—one of the comments we have, to use the building and construction industry example, is that I might come to a building site on Tuesday and assist the builder in tying the steel in preparation for the laying of a slab. In doing so, I would probably be acting as an employee. I am supplying only my labour, at the direction of the builder. The next day, I turn up with my $500,000 concrete pump and I use it to pump the concrete onto that steel. Clearly this is a business. It is not even a personal services business; it is a business. So the fact that someone has an ABN or a registration of some sort will not practically help payers in that decision that they make from time to time—that is, is this person in front of me an employee or a contractor? Even though the person may have an ABN, their contract may still be one of personal service and they are an employee.

CHAIR—We had a recommendation put to us by the Civil Contractors Federation to perhaps help you in this process by having what is called an RCN. Have you read that part of the submission?

Mr Konza—Yes.

CHAIR—It seems as though it would require only a minor variation to the ABN. Those RCNs could be authorised to be given out by the industry association or some other body that would obviously comply with whatever requirements we as a government put on them in terms of the code of conduct of their industry. What are your views about the merits of adopting such an idea?

Mr Konza—It is probably not my job to make such comment on policy proposals. I simply make the observation that we are dealing with two problems—

CHAIR—This is in terms of whether it would assist or detract—are there limitations to it or problems with it? It is not our recommendation; it is theirs.

Mr Konza—The only thing I would like to say about that is that we just have to be careful to separate two problems. The first is the question of whether or not someone is a contractor and the second is the question a payer faces. A payer faces the question of whether a person they want to provide them with certain services should have an employment contract or a contract for services. The RCN idea might have some merit in respect of the first problem but I simply observe that it would not touch the second problem. It is the second problem that the building industry is mostly concerned about.

Mr HENRY—I want to continue with the building and construction industry and explore some of the applications of the 80-20 rule. I suggest that a number of people in the industry would want to seek determinations because of the nature of the industry and the fact that there seems to be—there is certainly a perception—a growing number of independent contractors providing services to the industry. For example, we have a situation in Western Australia where we are going through a bit of a resources boom, and a lot of construction work is going on. A project might last two or three years and some independent contractors may be contracted to the head contractor and working on that particular job for two or three years, so they do not meet the 80-rule rule. That is one example, and I am wondering how that is being addressed. At the other end of the scale, in the project housing area, independent contractors may be working for one builder over a period of time that is well beyond 12 months but on a number of different sites, so they do not comply with the 80-20 rule. I am wondering how that is addressed and whether issues have come up in that context.

Mr Konza—Firstly, in the building and construction industry the results test carves out a lot of people before they get to the 80-20 rule. Secondly, if a person has a concern, they can apply for a determination and the commissioner has a discretion to give a determination in exceptional circumstances.

Mr HENRY—So the results test takes precedence over the 80-20 application?

Mr Konza—Absolutely.

Mr HENRY—Is that true in other industry sectors as well?

Mr Konza—As I think I observed a little earlier, the results test is probably easier to prove in the building industry and that is why we have observed it in operation there. The only other

industry we would be prepared to comment on would be the IT industry, which we have already contrasted.

Mr HENRY—We heard in evidence from the CFMEU that they were happy to recruit independent contractors as members. Does that have any impact on your assessments in terms of whether they are employees or independent contractors?

Mr Konza—No, we do not ask that question.

CHAIR—Mrs Patch, do you have any comments you would like to make with regard to your portfolio responsibilities?

Mrs Patch—Not unless the committee has some questions.

CHAIR—On the Trade Practices Act?

Mrs Patch—Yes.

CHAIR—You are putting some test cases together for litigation. Is that correct?

Mrs Patch—Do you mean for collective bargaining?

CHAIR—Yes.

Mrs Patch—The Australian Competition and Consumer Commission has the responsibility for determining applications for authorisation of collective bargaining on public benefit grounds. Collective bargaining would otherwise be prohibited, pursuant to section 45 of the act. People are entitled to apply to the ACCC for authorisation on public benefit grounds; in other words, the test is whether the public benefit outweighs the anticompetitive detriment arising from the collective bargaining. We provided material to the committee indicating authorisations that have been provided in the past for collective bargaining. Schedule 3 of the Trade Practices Amendment Bill (No. 1) 2005, otherwise known as the Dawson bill, provides a notification procedure for small business for collective bargaining. It will be a simpler, speedier and less expensive process for small business to seek ACCC views on collective bargaining. That is basically how we see it working.

CHAIR—Have any of them been submitted with regard to their treatment through Treasury and the tax department? Has any of that come through?

Mrs Patch—I do not think so.

CHAIR—So there has been no industry representation on general rulings?

Mr Konza—We do not think so.

Mr VASTA—Restaurants and caterers have not come to you at all?

Mr Konza—Not on this issue. For us, this is a subset of taxation risk more generally. Our interaction with restaurant and catering is more around cash economy issues than personal services income issues.

CHAIR—Would you accept an industry association coming to you for an industry ruling as opposed to a specific entity ruling?

Mr Konza—We have both public rulings and determinations. We also have a system called 'class rulings', where people are able to describe a class of people. I would need to check where these determinations fit into the legal structure of our rulings. I have to say that I have never looked. Generally speaking, we do have a class rulings system, and people use it for an industry or even a whole group of employees in respect of work related expenses and so forth.

Mr BRENDAN O'CONNOR—Just going back to the ABN matters and the application, you are saying that there are a number of constraints such as the number of ABNs and the limited time frame in which you are turning them over. I think people sympathise with the difficulties for the department on those matters. Whilst we are pursuing these things, there is not any attempt to criticise individual officers.

Mr Konza—We are always happy to acknowledge we can do better.

Mr BRENDAN O'CONNOR—We acknowledge that you have constraints. We are looking to see whether we can recommend other things that can mitigate those constraints. In relation to the ABN, the impression I am getting is that committee members—it would seem unanimously, without being too prejudicial on this matter—consider that sham arrangements exist. We can argue as to what they are and so on. We have had number of high profile cases. I will not make references to those, but there has been a concern about middle-sized or larger employers converting employees into independent contractors. When it comes to the attention of the department, does the department intervene or investigate allegations made about whether an ABN should have applied? Do you proactively intervene in those matters to seek whether that assertion is correct?

Mr Konza—We will get feedback to us from unions, for example, or from tax agents. Occasionally tax agents come to us and say: 'Look, these people don't know what they're doing. They're just being told.' So we will get the details and follow those up. We are actually looking to improve what we do on the business register, and we are looking to put more questions in so that we get more detail. To caution, we also observe that, if you do get an employer telling people that they have to go and get an ABN and that is the way it is going to be, they also tend to tell them what to tell the tax office to get it through, because the person will say, 'What am I supposed to write?' and they will say, 'You write this.'

Mr BRENDAN O'CONNOR—I understand. They tell them what to do in every circumstance.

Mr Konza—It is a bit of a limitation. We do get information and we do follow that up. The other way we find them is when we do not get a business activity statement from someone. We follow it up and say: 'Where's our activity statement? You owed us one a month ago.'

Sometimes you get people, because they do not know what they are doing, who say, 'What do you mean?' Then we can unravel things in that way.

Mr BRENDAN O'CONNOR—That is when way you might come across a sham arrangement. But you would also, upon advice of alleged sham arrangements, investigate those matters.

Mr Konza—Yes. We have, for example in the building industry, a forum. What is that called?

Mr Sullivan—The ATO building and construction forum, which consists of members of the tax office, the main industry associations and the unions. That group has identified the status of the worker as a major concern, so we have a subcommittee that is looking at that. There is a range of initiatives that we have planned to try and improve our processes and to help educate employers in deciding whether or not the people working for them—

Mr BRENDAN O'CONNOR—That is a highly unionised industry. What about other industries where there is a whole host of ABNs?

Mr Konza—The focus of that program, whilst it is initially on building and construction, will be extended.

CHAIR—We are running out of time, but we certainly want to explore the issues of the superannuation obligations; in your compliance measures whether or not you are uncovering cases of labour hire organisations, independent contractors, who have not had their superannuation guarantees paid; and whether or not that in itself becomes a signal that there is a breach of the relationship.

Mr Konza—We try and use different data sources to cross-verify. Quite often we find, say, in building and construction that, although people have not had pay-as-you-go withheld and dispatched to us, superannuation guarantee payments have in fact been made because the unions want to make sure that their members get their retirement due.

Mr BRENDAN O'CONNOR—If you are a member of a union.

Mr Konza—That is right. That is why I was talking about that industry. Sometimes we use people who are paying super guarantee to uncover cases of pay-as-you-go withholding. Other times we use pay-as-you-go withholding. We have inspectors, and we use those inquiries to uncover cases of superannuation guarantee not being paid. WorkCover in each state has a work force inspector as well. We exchange data with them, and, if they find someone who has employees to whom they have a workers compensation obligation, we will go and check why their other obligations have not been met.

CHAIR—Would the absence of the payment of the superannuation guarantee to a person in itself mean that the person is an independent contractor or employed through a labour hire organisation?

Mr Konza—No—although if it is lawfully not being paid, because the superannuation guarantee actually has a tighter test than the common-law definition of employment.

Ms HALL—Do you have an audit team that does spot checks on whether those labour hire companies are paying the superannuation guarantee? If you do, can you give us an idea of the percentage that are not paying it?

Mr Konza—I would need to take that on notice, if I could, to get those details.

Ms ANNETTE ELLIS—My colleagues have mentioned the larger situations where there might be a mass movement of people from employee status to ABN status. I am referring to a situation where a woman is employed—in whatever sort of work; it does not matter—and her English might not be the greatest. This is an actual case, but I want to put it hypothetically. The only way she is able to continue employment is to be basically coerced into the secondary arrangement. Then the ATO discovers, through her lack of administration and total ignorance, that tax is not being paid appropriately, for argument's sake. If the ATO finds a situation like that, because I am convinced that she is not one in one million, then action has to be brought against her, obviously. What do you do when you discover that sort of case in relation to the employer or the employer that was—they still are the employer in this very grey area of employment? I have had a case very similar to this myself. It is very concerning to me that there may be many cases out there where a person has no choice with regard to their employment but to do as the boss tells them and then they fall foul of the ATO through their ignorance. We could agree or disagree about how the ATO responds to that person. However, what sort of investigation would occur in relation to this so-called employer?

Mr Konza—We have to begin with an assumption that we establish that the person is in fact an employee. In some of those cases that is not so easy, because people who are coerced in that way often are responsible for the results.

Ms ANNETTE ELLIS—Exactly; that is the very point I am making.

Mr Konza—In that case there is probably little that the ATO can do, because they meet the PSI test—unless we saw them as being—

Mr BRENDAN O'CONNOR—I think the case here is in relation to where they have been coerced and they have not put in a business activity statement.

Ms ANNETTE ELLIS—Yes. They do not know what they are supposed to have provided to the ATO.

Mr BRENDAN O'CONNOR—They have not done that, and clearly you have to, on the face of it, see them as a small business that has breached its requirements. If they then assert that they were put in this position, is there an obligation on the department to then go to what now may be called the principal in a commercial arrangement who was, only last week or last month, the employer of that person? If there is a pattern where a number of people have clearly been placed in a situation where they are not capable and do not have the wherewithal to fulfil their requirements to the department, do you take that second step and say, 'You've still got a problem'? However, if you uncover that they are not really a business for the purposes of the act, is there an obligation on the department to proceed against the principal or the former employer?

Ms ANNETTE ELLIS—Can I add that, in the case I referred to, there was never an intention by that employee to ever become a business. They would have never known that they were becoming one, to be quite frank. Mr Konza, a little earlier you made a comment which I take in good faith and agree with. You said that in some cases people are actually told what to say when they come along and make these changes. I do not think that is unique.

Mr Konza—The commissioner is not allowed to reconstruct commercial transactions or substitute his view on how things should have been conducted, other than if we were to use the antiavoidance provision part IVA. In that circumstance, it does not sound like we would easily be able to make that case. If everything has been done—

CHAIR—Are you making those comments according to current legislation?

Mr Konza—Yes, that is right. What you are saying in your hypothetical is that the form of what is going on is taken to be correct in substance, it is really happening, but that it relates only to the willingness of the parties to engage in that transaction. I think I am correct in saying that is not something the commissioner would form a view on.

CHAIR—Ms Ellis's question is a very pertinent one, because while the antiavoidance obligations seem to be purely focused on the principal entity that is involved—the employee who has now become a subcontractor—should the antiavoidance obligations of the tax department extend to the employer who has now changed that relationship as well?

Mr Konza—At the moment the antiavoidance provisions apply to the avoidance of taxation. What you are talking about is the avoidance of an employer obligation. The antiavoidance provisions in the tax act apply when otherwise a transaction would be legal—that is, it gets through the rest of the legislation and then we have the antiavoidance as a net at the end. It is to do with the avoidance of taxation. In the circumstance you have described, that organisation is not designed to avoid taxation. It might be designed to avoid an employer obligation, but if it is really being carried out, it is not a sham, at the moment—

CHAIR—So whether the motivation was because of increasing their share price or avoiding their occupational health and safety obligations or all those other areas—

Ms ANNETTE ELLIS—They just did not want to have the responsibility.

CHAIR—If it is for other reasons, you are not really interested; it is only if it is to avoid the tax obligation. That is where it rests.

Mr BRENDAN O'CONNOR—What if, for example, super is no longer paid to that person? Super comes under the auspices of the department. In that circumstance, would you not be interested in what has happened there?

Mr Konza—The superannuation guarantee legislation provides an extra catch in that if it is a contract principally for labour then it is captured under superannuation guarantee. I am guessing that, in some of the cases you are talking about, it would allow us to take action on the superannuation front.

Mr Sullivan—The tax office has an employer obligations program whereby we have field people who are out visiting employers to make sure they fulfil all of their obligations in relation to PAYG withholding and superannuation. These things are being checked as a matter of course.

Mr VASTA—That is true, because when I had a restaurant Sunsuper would come around, and there would be other superannuation functions. At that time, you had only to go through Sunsuper. They made sure that the obligation was on us. Lend Lease were really starting to expand into small businesses. We would pay Lend Lease, as did a lot of small businesses, especially when the GST came in, as no-one else wanted to do it themselves. They have not got the time to do the payroll and everything else, and Lend Lease made sure that all ATO obligations and obligations under the superannuation training guarantees were done.

CHAIR—Thanks for your evidence, Ross.

Ms ANNETTE ELLIS—My question cuts to the very core of our inquiry, which is when an employer decides to divest themselves of their responsibilities as an employer and the method by which they go through that. In the case that I am citing—I am saying it is hypothetical but I know it is real—the fault rises when the ex-employee, as I am now calling her, falls foul of the ATO because of taxation requirements when she has been the victim of actions out of her control, to be quite honest.

CHAIR—We will follow through on that with DEWR, who are sitting behind—

Ms ANNETTE ELLIS—Listening to all of this.

CHAIR—and the ATO and we will ask them the same question. I have one last question. In your view, does the test that you apply on personal services have precedence over any common rule test that is applied on the independent contracting relationship? We have heard so much about cases going into courts for rulings and the common-law test being applied. Where does the definition of 'relationship' come from? As far as you are concerned, is it the APSI test and nothing else if someone says to you, 'No, we've been to the courts, we've had a ruling and therefore we feel that we're safe'?

Mr Sullivan—There are separate issues here. The decision about whether a person is an employee or not is based on the common-law principles, and a separate set of tests applies to whether a person meets any of the personal services income tests. If somebody does not meet the personal services income tests, it does not automatically translate that that person is therefore an employee.

CHAIR—This is where the confusion lies in this whole debate, and we have witness after witness who come to us and say: 'There's no clarity in the definition. You have the tax department with one definition. You have the common rule test as well, and we just need certainty.' Would it help if there was one definition which would go across all these jurisdictions rather than saying, 'We're the tax department, and our boundaries and responsibilities end at this point'?

Mr Konza—The common-law test has a number of aspects to it. It has been developed by the court in response to the diversity of circumstances the courts encounter. Any simple test would have to deal with the diversity of circumstances that the test would encounter.

CHAIR—Thank you very much for your evidence this morning. Mr Konza and Mr Jacobs, could you please get back to the committee on those matters. Thank you.

[12.28 pm]

PRIDMORE, Mr Brant Layton, Director, Policy Coordination Team, Strategic Policy Branch, Workplace Relations Policy Group, Department of Employment and Workplace Relations

SMYTHE, Mr James Edward, Chief Counsel, Workplace Relations Legal 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—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 the proceedings of the House itself. I will continue when we return from the division which has just been called in the House of Representatives.

Proceedings suspended from 12.29 pm to 12.49 pm

CHAIR—I apologise for that break. We also apologise for keeping you so long waiting—we were just debating whether or not to bring you back next week.

Ms Waterhouse—Yes, I think it is a good idea.

CHAIR—We will push on. 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. We prefer to hear evidence in public, but if you have issues to raise that you would like to do so in private we will consider your request. Would you like to make an opening statement?

Mr Smythe—Just briefly. I thank the committee for inviting the department to appear at the hearing and for the opportunity to make an opening statement. As the committee is aware, departmental officers previously appeared on 12 May this year. We are appearing again at the committee's request. Much of the background of the department's consultation on independent contracting and labour hire arrangements was outlined in the opening statement of my colleague Mr Jeremy O'Sullivan at the earlier hearing and I do not propose to reiterate it today. I propose to give a brief, broad overview of the submissions received by the department and to address where we see the process going from here.

As the committee is aware, the closing date for submissions on the departmental discussion paper entitled *Proposals for legislative reforms in independent contracting and labour hire arrangements* has now past. We received over 60 submissions from stakeholders. During the department's previous appearance, the committee requested copies of these submissions. Departmental officers contacted each of the stakeholders who made submissions and sought their consent for their submissions to be forwarded to the committee. We have provided 56 submissions to the committee secretariat to date.

As the committee will be able to see for itself, the submissions demonstrate that there is a range of views about possible reforms in this area. Of the submissions received by the department, about half were from individuals and groups coming from what might be termed an employer's or principal's perspective, including labour hire companies. The remaining submissions were largely from an employee or individual contractor's perspective and from state and territory governments.

The department is still in the process of analysing these submissions and will be preparing a briefing for the Minister for Employment and Workplace Relations on the outcome of our stakeholder consultation. I understand that at the department's previous appearance before the committee questions were raised about the parallel process of the committee's inquiry and the department's consultation exercise. As the committee is aware, the proposed reform of independent contracting laws form part of the government's 2004 election commitments. Issues concerning labour hire have been added to both the committee's and the department's considerations because of the links between labour hire issues and independent contracting.

The minister has undertaken to consult broadly with stakeholders and to maximise exposure of these issues before settling the legislation. I understand the minister is keen to have the value of this committee's recommendations as well as departmental briefing before coming to a settled view about the proposed legislation. The minister noted in his letter suggesting that the committee undertake the present inquiry that a report in the first half of 2005 would be timely. This would allow him the opportunity to consider the committee's recommendations and to have departmental briefing for a bill he intends to introduce in the spring 2005 sittings.

I note that the committee's most recent media releases confirm a midyear reporting date, which would allow the minister's consideration of the committee's recommendations before settling the legislation. I should stress to the committee that the department is still preparing briefing material for our minister on the outcome of our consultation process. I am not in a position today to advise the committee on the content of the proposed legislation, as that remains to be settled. As I have said, the minister would prefer not to settle the content of the bill until he has had the benefit of this committee's report, to the extent that the timing of the committee's reporting allows, as well as the benefit of the departmental briefing.

That is all I propose to say in opening, save alerting the committee to the respective responsibilities of my colleagues. Ms Waterhouse and I will be primarily concerned with legal issues. We are both from the legal group in the department. Mr Pridmore is from the strategic policy branch and will assist with non-legal issues arising from this inquiry, including the role of labour hire and independent contract arrangements in Australia's work force.

CHAIR—Ms Waterhouse, would you like to make any comment?

Ms Waterhouse—No, thank you.

CHAIR—Mr Pridmore?

Mr Pridmore—No.

CHAIR—Just to clarify our own time arrangements, we probably will not be in a position to table a report until that first or second week of the session when we come back in August. So mid-August at the latest, considering that we come back on 8 or 9 August. It will not be tabled midyear or out of session. I understand that time frame fits in nicely with the minister's expectations as well.

Mr Smythe—I cannot comment on that.

CHAIR—I am telling you.

Mr Smythe—Thank you.

CHAIR—Thank you very much for coming back and meeting with us as a department. As you say, we did meet with some officials earlier on. You would have heard some of the questioning that took place with Treasury and the ATO. Do you have any comments you would like to make based on some of the issues that were raised there and some of the responses that we received from the ATO?

Mr Smythe—The only comment I would make is to reiterate what is implicit in the opening statement: the government has not settled the detail of what is proposed in this legislation. To the extent that problems of equity, fairness and protection are raised, they are matters which the government may well take into account in formulating this proposed legislation.

CHAIR—My question is more about the definition and the delineation of responsibilities that we have. You would have heard my question with regard to the confusion that is out there. I am sure that a lot of the submissions that you have received have also spoken about the need for clarity in the definition of what is and what is not a contractor, subcontractor and labour hire person. The tax department seems to have the view that the four tests, principally the results test, are sufficient for their purposes, and that is where it starts and ends in terms of the responsibility. Do you see any merit in having an all-encompassing definition which will give certainty not only to the industry but also to you guys that have to enforce some of these provisions?

Mr Smythe—Not only do we have to enforce them; we also have to make recommendations to government as to how to formulate such definitions. Obviously in any regulatory environment it would be wonderful if we could construct some clear national all-encompassing definitions, but I am not confident that is an easy task. The sort of conduct that we are looking to deregulate here covers a vast multitude of arrangements. What is more, the capacity of the Commonwealth parliament to make laws is confined by the Constitution. Even in the context of the laws that the government is proposing, the constitutional powers would probably be the corporations power, which would only allow the government to make laws with respect to corporations. So already we have got a part of the community which would not be covered by the proposed law. That being said, obviously the government will take into account all the submissions that are made and recommendations of this committee in looking for a way to provide as much clarity as is possible.

CHAIR—Would you be looking at such a definition yourself? I know that you have not formulated your own response yet, but would that be one of the things that you are looking at presenting to the minister?

Mr Smythe—We are certainly aware that a number of submissions have canvassed what they believe to be comprehensive definitions. The difficulty we face, as a matter of principle, in introducing a new definition in legislation is that that almost inevitably leads to litigation about what the definition means. When you introduce new concepts by way of new definitions, you do not necessarily get clarity initially. You might have a running-in period where the old, relatively settled, common law definition gets turned on its head. I could not guarantee that, at the end of the day, we will have a legislated, all-encompassing definition, but we will certainly be looking at the various submissions that have been made. If there is one that, by general consensus, is regarded as doing the job then that would be a sensible way to go.

CHAIR—Even codifying the current common law test would still be open for debate and challenge?

Mr Smythe—It would still be open for debate and challenge, yes. As soon as you put anything into legislation you are slightly changing—

Mr BRENDAN O'CONNOR—But that assertion you could make against any piece of legislation. Every piece of legislation made by the Commonwealth is challengeable. You can question definitions and have those matters challenged. I guess what you are asserting, on behalf of the minister, is that the Commonwealth should not consider, or even contemplate, regulating this area with law and allow the common law—

Mr Smythe—I did not assert anything of the sort.

Mr BRENDAN O'CONNOR—You did say it would be preferable if we could find a clear, national, all-encompassing provision but that that would be difficult. The question for the department is: why is it not even being attempted? Why is there not even a proposition being put forward? You also said that we can only go so far as the corporations' powers would allow, and that presumes that there would be no collaborative effort with the states in clarifying this nationally. Why would those assumptions be made already by the Commonwealth?

Mr Smythe—They haven't been.

Mr BRENDAN O'CONNOR—Then why would you say that it can only go so far as the corporations' power would allow? Is that not presuming that we would not be able to enter into some discussions with the states?

Ms Waterhouse—We have some submissions from the states already that do not support a legislative definition. It might be useful to talk about the submissions that we received. The majority of submissions we received support retention of the common law as it is now. The Victorian government and quite a number of other bodies are not supporting a legislative definition.

Ms HALL—What other bodies?

CHAIR—Do they give reasons for that?

Mr BRENDAN O'CONNOR—Can you just go to the part in the Victorian submission that says they do not believe there should be any regulation by legislation of independent contractors.

Ms Waterhouse—There are three questions there. Firstly, I will go through some of the reasons that were given: courts are best placed to make these judgments about employment status based on the current test. We received that from the Chamber of Commerce and Industry Western Australia, the Master Builders Association of Western Australia—

Mr BRENDAN O'CONNOR—We have all those submissions.

CHAIR—Keep going.

Ms Waterhouse—The Independent Contractors of Australia—ICA—and the Victorian government. I have a list of all the submissions that supported it, but not all submissions give very detailed reasons as to why they support it. But I could go through that if you wish. The main argument of the Chamber of Commerce and Industry Western Australia was that a statutory definition would lead to greater amounts of litigation. Those who opposed included Professor Stewart and the AMWU.

Mr BRENDAN O'CONNOR—I do not mean to trouble you, but we have very little time. The majority of the submissions that have been put to you under your own review have been submitted to us. I know there are about 27 that have not been given directly to us but those ones you refer to have been submissions made to us. We have examined those witnesses. You made the comment that the Victorian government said they do not believe the Commonwealth should consider these matters in relation to clarifying through legislation. I am more interested to know what they said exactly in relation to that because that was a surprise to me.

Ms Waterhouse—I would like to clarify with my colleagues here if that is okay.

Mr BRENDAN O'CONNOR—You can take it on notice. I understand it is very difficult to ask you about that specifically.

CHAIR—You obviously have a matrix there. You mentioned the Victorian government. Do you have anything listed there against the Victorian government about responses?

Ms Waterhouse—The argument was that courts are best placed to make these judgments about employment status. This is an internal working document.

Mr BRENDAN O'CONNOR—I guess I am asking where in the Victorian submission that point has been made. I can see where the clear conflict is between the Commonwealth and the states: one of them seems to include deeming provisions—the Commonwealth's consideration of overriding the states' rights to apply deeming provisions under state law. That runs contrary to the assertions you have made about the Victorian government's submission.

Ms Waterhouse—My colleague has just brought me the Victorian submission and it is on page 22. One of the proposed options included is:

- Retaining the common law definitions and allowing courts to continue to determine the question using established common law principles.

But we do not have a specific response to that.

Mr BRENDAN O'CONNOR—I am happy to look at that. We have that submission.

Ms HALL—Maybe you should give us that in writing.

CHAIR—No, we have the submission; it is submission No. 71.

Mr BRENDAN O'CONNOR—It is a particularly sensitive thing to say that the Victorian government has done that, but I will check for myself.

Ms Waterhouse—I should also say that there are not so many gaps that you do not have 27 of our submissions. There were actually only six, I understand, for which we did not receive consent to pass them on to you.

Mr BRENDAN O'CONNOR—I meant there were 27 that had not formally been given to us. I know you have provided some. I appreciate that. In fact, I asked whether you could provide them. I understood that there was one you had not provided, but now I am informed there are six. That is certainly a larger number than I was told.

Ms Waterhouse—Four are from individuals.

CHAIR—In the evidence that you have received, is there an overwhelming concern from independent contractors that they do need protection? Do they actually state, 'We need protection of our status now'?

Ms Waterhouse—We did not receive that many submissions from individual independent contractors but we received them from peak bodies, which tended to—

CHAIR—The associations and representatives?

Ms Waterhouse—Yes. They certainly were concerned that there had been a blurring between what they saw as workplace relations laws and commercial laws in deciding matters to do with independent contractors.

CHAIR—I know you have not drafted the legislation—in fact, you have not even put the recommendations in—but in your discussion paper it does say that you could insert in the Workplace Relations Act an object that would protect the status of independent contractors. How would that look? Can you go through that? How would it operate in reality?

Mr Smythe—That would be just one of a number of measures to protect the status of independent contractors. But from time to time the Industrial Relations Commission, when making various decisions and awards, has to determine whether the people in respect of whom it is considering them are employees or independent contractors. We think that, if we added something to the objects in the Workplace Relations Act, where there was a lineball call there

would be less likelihood of the commission erring on the side of finding someone to be an employee.

Mr BRENDAN O'CONNOR—So it still only provides a guide for arbitration in that situation.

Mr Smythe—If decisions need to be made by the Industrial Relations Commission as to whether someone is an employee or an independent contractor in lineball situations, an object which recognises the legitimacy of independent contracting arrangements would assist in that decision making.

Ms ANNETTE ELLIS—If you do not mind, Chair, I would like to extend the question that I asked the previous witnesses to these witnesses.

CHAIR—Sure.

Ms ANNETTE ELLIS—You may have heard me referring to a hypothetical case in relation to an employee who found themselves becoming a contractor without realising that had happened. I referred to it earlier as a hypothetical, but I now actually have with me the information that was brought to my office. With your indulgence, I will just refer to the major points—and there is no way of identifying this person, because I do not know their name. A non-government agency brought this case to my attention.

In brief, this person is a client of that agency and has been on DSP for four years. She has worked part time as a cleaner since October last year for 20 hours a week and has constantly let Centrelink know what she is doing in relation to her employment, because of her DSP. She was worried that she was not paying any tax, as it appeared the employer had not been taking it out. This NGO then established that in fact the person had become a subcontractor of her employer, had agreed to all of the terms and had signed a contract.

The client, this individual, had said that she remembered signing some paperwork, but she was not quite sure what it was. She is not too good with forms; she has a mild intellectual disability. She was worried about losing her job, so she did what her employer suggested she should do. She then had to take out an ABN. She did not know what that meant. She got the papers. At the time that this case was brought to my attention, the NGO was still attempting to work through with her the situation that she found herself in. The situation was that by her signature, but not by her true knowledge, she had become a subcontractor and now had a debt with the ATO because of the nonpayment of tax. She was still unsure of her status.

There is a little bit more to the question than I was suggesting earlier on, when I recall all of the details. I want to know what the department's view is, because this cuts to the heart of our inquiry when we talk about the attempt by some employers to move their employee into a small business arrangement. While this case is unique to some extent, I would suggest that it is not completely unique. There will be many people in similar situations because of their types of background, whether they are DSP recipients, have a lack of English or whatever their situation might be. I am not sure who I should be asking, but when we look at our terms of reference, what is the department's view in relation to keeping an eye on the behaviour of employers when they attempt to shift people—and in this case succeed, to the person's detriment—off their

employing basis onto a subcontracting basis, in the circumstances that I have outlined or anything similar to it? I am not sure who is equipped to answer this. It seems extremely concerning to me because we know that it is happening.

Mr Smythe—I guess that would be something that the department could take into account in formulating appropriate protective laws in respect of independent contracting and labour-hire arrangements.

Ms ANNETTE ELLIS—Are you saying that the legislation being considered will change the circumstances to allow people like this to be protected because they are currently not? I do not know about you, but I find this extremely concerning. In a sense, this is a worst case because the person has a mild intellectual disability and is on DSP. But we could apply these circumstances to many hundreds, in fact thousands, of employees in circumstances in which they are not equipped, for whatever reason, to protect themselves or understand what is being done to them in the effect of the employer wishing to shed themselves of their employer responsibilities. That is what this boils down to.

CHAIR—All right, you have asked your question.

Mr Smythe—I am sorry, what was the question?

Ms ANNETTE ELLIS—The question is: what is the department going to do about a circumstance like this? It is outrageous to ask me what the question is.

CHAIR—We asked this of the ATO and the ATO stopped at the point of saying, 'We are responsible for tax and nothing else, not in terms of motivation.' I guess the question is: is there a legitimate role for the department, perhaps through its compliance measures, to look at the motivation that an employer has in moving people off the employee-employer relationship to a contract relationship? Is there a legitimate role for the department to play? If we were to make a recommendation—I am now asking for your advice—that we should be vigilant about such actions, are there legal restrictions that would stop us from moving down that track?

Mr Smythe—That would depend on what the legislation contained. We hear the comments that are being made. As I have said, the department and I guess the government will take those into account in determining what appropriate protections might be built into the legislation.

Mr BRENDAN O'CONNOR—So you had not contemplated any specific provisions that may prevent vulnerable workers being converted into sham arrangements? It may be too early, but in your view of what is going on in the department, has there been any consideration about these coercive conversions from employee into an independent contractor?

Mr Smythe—The department has not yet made any recommendations to government about proposed legislation.

Ms HALL—Has the department given any thought to the situation where a whole workplace is transferred from being employees to being independent contractors? Is that something that the department finds acceptable? Is that something you would recommend for or against when you are reporting to your minister?

Mr Smythe—I cannot disclose what we will be recommending for and against.

Ms HALL—What is the point of us having you here if you are not answering the questions?

CHAIR—Jill, in fairness, the recommendation to the minister has not yet been formulated. But, Mr Smythe, that is why I couched my question the way I did—that is, if we were inclined to make a recommendation of that kind, would there be impediments in the current operation of the act or some other legal implications that would say, 'Look, you really can't go that far because our obligations only end with the entity, not with the entities around it'?

Mr Smythe—No, it is within the capacity of the Commonwealth parliament to make laws. The parliament can make laws about a range of things. I cannot think immediately of any legal or constitutional impediments to passing laws which would provide protections.

Ms Waterhouse—I do not know if this is directly on your point, but the discussion paper did canvass the issue of the introduction of a civil penalty provision which would apply to hirers who deliberately attempt to avoid employer responsibilities by seeking to establish a false independent contracting arrangement. It suggested that those penalty provisions could be enforced by the Office of Workplace Services, which enforces other kinds of provisions under the act.

CHAIR—So you have actually canvassed that in your discussion paper?

Ms Waterhouse—Yes, that is right.

CHAIR—Have you had some responses to that?

Ms Waterhouse—I understand that that received considerable support from employers and unions. There was some opposition in so far as, I suppose, we did not actually try to frame that kind of offence. So there was some hesitation about ensuring that innocent people would not be caught by it.

CHAIR—That is with labour hire. Could that be applied to independent contracting?

Ms Waterhouse—There can be two arrangements for labour hire—

CHAIR—I understand that.

Ms Waterhouse—so it could apply to labour hire arrangements where someone is trying to be engaged as an independent contractor.

Ms ANNETTE ELLIS—It is evident that there is no protection at the minute. I am appreciative of the fact that it is obviously in consideration. There is a real question, though, which we asked the ATO and now I need to ask you. In a perfect world, let us say that, as a result of the consultation and the legislation, there is recognition of this instance occurring. How are you going to find out that that employer has done that? What mechanism can you imagine that you would need to have in place? The ATO can find out that there is something amiss, because a person is not paying tax. But they said that that is their only concern. So where is the link

between the ATO finding the error in their way and the department then having a role in relation to the employer action where a sham like this is created? How do you know that it is happening, and how would you find a trigger to alert you to that?

Ms Waterhouse—My understanding from some previous cases is that it would be complaint based. It could be raised, say, with the Office of Workplace Services if someone feels that they are not getting the entitlements that they should—that they are in fact in a disguised relationship. So they might feel that they should be getting award wages and they are not, or sometimes they will raise things with unions and that will come to the attention of—

Ms ANNETTE ELLIS—Do you see that there could be a role for maybe—monitoring is a softer word for it—somehow scoping through of your own volition and just seeing whether you discover these things?

Mr BRENDAN O'CONNOR—Auditing.

Ms ANNETTE ELLIS—Thank you. Auditing.

Ms Waterhouse—It is not something that I have turned my mind to.

Ms ANNETTE ELLIS—I do not wish to labour this, but it is a terribly important point of principle to me—that is, the ATO and you could have an arrangement that they can let you know that something is going on. I do not know whether intergovernmental relations allow that to happen; it is obviously too logical.

Alternatively, if a person is getting their award wage but they have lost a lot of other things as a result of this transfer to a sham relationship—their continuity of employment; a range of things—I am not quite sure that there would be the grounds for a fully recognised legitimate complaint to bring to the department as much as other things that we may not like. You and I may agree that we do not like employers creating these sham arrangements, but there needs to be a really good way of finding out that they are doing it other than just a complaint from a person.

CHAIR—Is there some way we can introduce into the system a trigger that would alert the department, the Office of the Employment Advocate, the Industrial Relations Commission—whatever the body is—that there might be something more to this than meets the eye so let's investigate? Is there some way we can do that?

Ms ANNETTE ELLIS—Or can we leave that with you as a very big suggestion.

CHAIR—Are you able to take that on and think about whether or not it is possible to do that?

Mr Smythe—All the comments, observations and suggestions that are made will be considered.

CHAIR—I understand that. I am asking whether there is a volition there and a way of doing it or whether it is not within your bailiwick to work with.

Mr Smythe—I am not sure what you are asking. We cannot give you any guarantees as to what the government will or will not do.

Mr BAKER—In relation to the high costs involved with common law claims, some submissions have advocated lower cost and speedier options to resolving disputes. Have you considered any other alternatives?

Ms Waterhouse—One of the issues the discussion paper raises in relation to unfair contracts is whether the Federal Magistrates Court could be given jurisdiction. Currently, only the Federal Court has jurisdiction, and that is obviously a more costly procedure.

CHAIR—What about a small business commissioner?

Ms Waterhouse—That was not raised in the discussion paper, but I recall that it has been raised in some of the submissions.

Mr BAKER—There has also been some criticism of section 127A of the Workplace Relations Act, relating to the unfair contracts provisions, as being ineffective in that it is too expensive and time consuming. Alternatives that have been suggested include access to the Federal Magistrates Court, as you said, to provide an alternative dispute resolution process; or the use of a small business commissioner, which Phil said. But we need to look further ahead. There is a small business commissioner in Victoria. Can you take it on board that one of the most important things is the cost factor? I would like to make that a main point. A lot of businesses run on the very edge. The costs of some of these disputes can push them over the edge, and then we all lose. If there is nothing that you have immediately in your thoughts, could you please explore those options.

Organisations such as master builders associations advocate a register for independent contractors to help establish status and consistency in recognition. They suggest that this adds certainty, lower costs and speedier determinations than relying totally on the common law to test cases. Although it is a regulatory requirement and would assist to deter sham contractors and ensure legitimacy, your paper questions the effectiveness of the suggestion. Can you expand on this view and on what options are currently being considered?

Ms Waterhouse—The idea of a registrar was canvassed in the discussion paper. It was the fifth stakeholder issue. My understanding is that this proposal received limited support from stakeholders. There can be a few problems, one of which is that relationships can change over time. Although someone might be considered at law to be an independent contractor on the day the registrar would stamp it, circumstances may change that relationship. There is no absolute certainty that the person will be an independent contractor forever after, if circumstances change. It does not give quite the guarantee that I think some submissions were looking for. There were also some issues about whether that would just increase red tape.

Mr BAKER—Doesn't it make sense to bring under the umbrella some of the industry occupations and industry businesses like master builders?

Ms Waterhouse—To have those associations themselves declare their status?

CHAIR—Yes, to have the industry associations being the administrators of the system as long as they meet certain government provisions and codes of conduct that satisfy us as a government.

Ms Waterhouse—They would then make the declaration as to whether—

CHAIR—Yes.

Ms Waterhouse—That was not something that was canvassed in the discussion paper; it was the idea of a more independent registrar, but that is something we could consider.

CHAIR—You are right: it is two separate issues. One is the independent registrar, which is for the entire population—and I can see the cost and the bureaucracy that is involved there. The alternative would be perhaps at a lower cost, allowing the industry associations themselves to make that decision based on their own code of conduct—whether it be the recruitment consultants of an association, the National Farmers Federation or whatever.

Mr BRENDAN O'CONNOR—Surely it would make it a lot easier to police.

CHAIR—If you had received similar submissions to us you would have seen that some of these associations have developed kits and guides for their members. The Master Builders Association and National Farmers Federation are the two that come to mind—I do not know of any others; there might be one or two others. Have you had a chance to look at those kits to see whether they are useful or are simply a stopgap measure?

Ms Waterhouse—I have not looked at them in detail. I have been concentrating on the main submissions.

CHAIR—Some of these kits passed a test case situation. That will create a bit of certainty because they have already gone through the scrutiny of the courts.

Mr BAKER—They give industry specific guidelines and specific certainty.

CHAIR—My question is about the kits. Ms Waterhouse, you have not had a chance to look at them at all?

Ms Waterhouse—No, I have not.

Mr BRENDAN O'CONNOR—Before I ask a question, I wish to say that we are running out of time. You are the most important department as far as this inquiry is concerned, as I see it. I would like an opportunity, if possible—and if it is convenient for the committee and indeed for the department—if we run out of time today, to possibly meet next week. I do not think we have had sufficient time to raise a number of questions. What we have not raised is the possibility of registering labour hire companies. Major labour hire companies, Skilled Engineering, I think, Adecco and a number of the larger players in the industry—I might be wrong about Adecco—have raised concerns with us that some of the smaller companies do not have the wherewithal to look after employees in the way in which labour hire companies have to. Therefore, they have said there should be some registration. They are also concerned that people are not complying

with state and Commonwealth laws and are not really acting properly in relation to their business. These companies put to us that there should be some registration of companies, given that there has been a mushrooming of labour hire companies, so that properly constructed labour hire companies can do the work they are supposed to do. Has the department considered that issue? I am not sure I have read it.

Ms Waterhouse—Our discussion paper did raise regulation of labour hire companies.

Mr BRENDAN O'CONNOR—Is there a position that has advanced further than that in the discussion paper? I understand you cannot comment on anything else.

Ms Waterhouse—It is something that we are continuing to look into. There was a fair degree of stakeholder support, including, as you say, from some of the labour hire companies. It was also raised in the paper as one avenue to address minimising sham arrangements, and it would have an educative function as well. It is something that is being looked at in the discussion paper.

Ms HALL—One of the issues that has been raised by both employee groups and the labour hire companies is occupational health and safety and the uncertainty that exists between the host employer and the labour hire company. I am wondering about the department's approach to this. I note that the discussion paper does not advocate a joint approach, but quite a large amount of evidence that we have received has supported it—or at least the delineation of the responsibilities of each party and clarifying the situation.

Ms Waterhouse—As you said, it was not something that was directly addressed in the discussion paper. My general understanding is that occupational health and safety laws would give rise to responsibilities on behalf of both host bodies, because they would have the general duty of care to anyone on their premises, and labour hire companies, who are generally found to be the employer. So that kind of joint responsibility would exist in a number of jurisdictions already.

Ms HALL—When you are looking at your recommendations and giving them more detailed consideration, that is an area you need to consider. It has become fairly obvious to me, and I think other members of the committee would probably agree, that it is an area that you need to get your minds around. Also, we talked about sham employment arrangements earlier. I need to refer you back to the discussion paper you circulated and released, as you mentioned it there. The committee would be most interested to know the incidence that you have come across of sham employment arrangements and the extent to which it is out there in the community.

CHAIR—If you have, through your submission, some evidence to indicate there are sham arrangements, are you able to provide that to us? That is if we do not already have it in the submissions that we have received.

Ms Waterhouse—The submissions you have received would have covered anything that we would have received as evidence on that as far as our discussion paper goes.

CHAIR—Mr Pridmore, do you have any comments to make regarding labour hire generally and sham arrangements specifically, considering that your policy area is labour hire?

Mr Pridmore—It is going to be very difficult to estimate the incidence of sham arrangements for the same sorts of reasons that it is hard to estimate the size of the black economy. By their nature, they are deceptive arrangements that look like an independent contracting arrangement but are, in fact, an employment relationship, so trying to identify those in any sort of systematic way from surveys or ABS statistics or those sorts of sources is going to be very difficult. Probably the best examples we have are examples that have come to light through legal proceedings. We can get a picture of what these arrangements are like, but quantifying the number of them is going to be very hard.

CHAIR—We have run out of time. As the deputy chair said, you are a critical department in our deliberations. We are not going to be rushed through the process; we want to make sure we take our time and consider all the issues. We would like an opportunity to read some of the submissions you have received that we have not. I know there are not many, but there are a few there.

Mr BRENDAN O'CONNOR—We are now in receipt of them, but I have not had time to look at them.

CHAIR—We may very well ask you to come back, or at least other representatives of DEWR, over the next couple of weeks. But for the time being, we thank you for your evidence. If there is anything you have agreed to get back to us on, we would like to receive that at some stage. You can send it directly to the inquiry secretary. Thank you very much.

Resolved (on motion by **Mr O'Connor**):

That this committee authorises publication, including publication on the parliamentary database, of the transcript of the evidence given before it at public hearing this day.

Committee adjourned at 1.35 pm