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

MONDAY, 9 MAY 2005

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON EMPLOYMENT, WORKPLACE RELATIONS AND WORKFORCE PARTICIPATION

Monday, 9 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 Baker, Mr Barresi, Ms Annette Ellis, 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

CALVER, Mr Richard Maurice, National Director, Industrial Relations and Legal Counsel, Master Builders Australia Inc. **26**

HARNISCH, Mr Wilhelm, Chief Executive Officer, Master Builders Australia Inc. **26**

LAMBERT, Mr Scott, Executive Director, Industrial Relations and Legal Services, Housing Industry Association **15**

ROBERTS, Dr Malcolm, Executive Director, Federal Relations, Housing Industry Association **15**

SIMPSON, Mr Glenn, Senior Executive Director, Business Services, Housing Industry Association **15**

WAWN, Mrs Denita, Workplace Relations Manager and Industrial Advocate, National Farmers Federation **1**

Committee met at 11.19 am

WAWN, Mrs Denita, Workplace Relations Manager and Industrial Advocate, National Farmers Federation

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. To date we have received around 70 submissions. The committee has a continuing program of public hearings, of which this is the fifth for this inquiry. Although the committee does not require you to give evidence under oath, I should advise you that these hearings are formal proceedings of the parliament. Consequently they warrant the same respect as proceedings of the House itself. It is customary to remind you that giving 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. If you have issues that you would like raise in private, we will consider your request. Would you like to make a statement in relation to your submission or any other introductory remarks?

Mrs Wawn—The NFF will make some brief remarks, but obviously we believe it is important to open up to as many questions and discussion as possible. Briefly, there is a large proliferation of contractual relationships and labour hire companies in the agricultural sector. Traditional contracting relationships, such as share farming and shearing contractors, have been a way of life for agriculture since Australia's agricultural history was established. We have now seen the growth of labour hire and independent contracting in agriculture, particularly in relation to labour hire for fruit picking and specialist agricultural services such as harvesting and chemical spraying. As a consequence of a large dependency on these arrangements, we believe it is critical that these contractual arrangements are maintained and not restricted in any way. We stick to common law arrangements.

The growth in contracting is predominantly a result of two things. One is the difficulty with costs and compliance of direct employment, particularly in agriculture, given the seasonal fluctuations. The demand for labour usually results in a greater need for contracting arrangements as opposed to having permanent labour forces on farms. Technological advancement has also seen a decrease in the number of permanent employees in the sector and an increase in labour hire and contracting relationships. That is partially due to the cost of machinery. The technological advancements in machinery mean you need specialist services. Our president will occasionally say that you can no longer drag someone from the pub to drive your harvester; you need someone who can understand how to utilise harvesting machinery these days.

In terms of seeking recognition of the principle of freedom of contract, the NFF believes that freedom of contract should not be redefined or terminated by a party who is not a party to that contract, and we believe that common law provides a clear basis for contracts in its legal framework. The NFF does not support sham contractual arrangements, which would not have legal standing in common law in any event. The NFF is also encouraging its members to pursue more written contractual arrangements because a verbal contract with a handshake is usually the way to go for many in the farming sector.

The NFF believes that moves by some states and territories to narrow the common law status of contracts in most instances has been unwarranted and is against the principles of freedom of contract. In particular, the NFF opposes any law that deems a contractor to be an employee and the principles underlying unfair contractual legislation. The NFF fundamentally supports the ability of businesses and individuals to work in contracting or labour hire arrangements. It has worked in our sector since virtually the establishment of the Australian agricultural industry, and we believe that it should not be hindered by inflexible and unfair legislative regimes. Hence, we support labour hire and contracting and the intention of the federal government to develop an independent contractors act to ensure that these basic principles are established throughout Australia.

CHAIR—Thank you for your submission. You referred to some sham arrangements. Do you have any examples of what some of those arrangements in the agricultural sector might look like?

Mrs Wawn—Certainly. It does not seem to happen often. We hear about these sham arrangements, but we do not really see much evidence of them. Nine times out of 10, when you look at the detail of it, it is grey as opposed to distinct black and white. Effectively, what occurs is that a relationship exists, usually a one-to-one relationship, so that the person is working at a farm for 100 per cent of their time. They are working under the arrangements of the farmer, with the farmer actually managing the person, as opposed to the person managing their own activities. In most instances, there is an agreement that they get paid X amount per month and they undertake those duties. They think it is a contractual relationship—and sometimes there are none of the legal requirements to maintain that contractual relationship—when in fact it is an employment relationship. The intention of the parties is always a contractual relationship and they work under that regime, but in a legal sense it is actually an employment relationship. We do not think that effectively is a sham relationship. It is simply that the parties have the intent of a contractual relationship but legally they do not have that structure in place.

Certainly, there is no evidence of which we have been aware of deliberate sham relationships existing in agriculture. They may well exist in agriculture, but we have never come across any evidence to that effect. The difficulty is in people on the ground understanding what the law is. That is where the difficulty is. It is not a deliberate act; it is simply that, despite an intention to have a contractual relationship, they have not set the legal groundwork to ensure that that contractual relationship is such. So I would not call that a sham per se; it is simply confusion as to how the legal activities work.

I was down in Warrnambool a few weeks ago speaking to a range of dairy farmers. They were concerned about what type of relationship they actually had. I was speaking to about 20 of them at lunchtime. They all explained to me arrangements which were very clearly contractual relationships, but they were concerned that they were actually in employment relationships and they had not realised it. The big issue for the NFF has been pushing our independent contractors kit and getting a lot of this stuff in writing so that people are aware of the legal relationship.

CHAIR—I notice that at paragraph 37 of your submission you state:

... the potential for arrangements at a farm level to constitute an employment relationship without the knowledge of the farmer or the service provider.

I find it hard to understand how the farmer would not know what the employment relationship would be like. Surely he must be asking a series of questions of any potential service provider or employee.

Mrs Wawn—That is not necessarily the case. People just want something done and they organise to get it done. They do not think about the legal consequences; they assume that they have a contractual relationship. They are not aware of these 10 or 20 points that they need to double-check to make sure that they do have a contractual relationship. On the ground, it is very hard for them to go through those things. They do not think about going through those things. They just go, 'Yep, I need this job done; you've got to do it,' and, 'Yep, it's a contract,' when in some instances you find that they are probably skirting the line. That is why we are encouraging them to take the kit. We made it very simple. There are a lot of other kits that are far more complex, but we made it very simple to at least start the ball rolling.

CHAIR—What is the uptake of that kit? Has it been tested at all?

Mrs Wawn—It has not been tested. We only introduced it about six months ago, so it has not been tested. I am not 100 per cent sure about the uptake of it, because (a) it has not been tested and (b) it has been produced by the NFF and then distributed through our member organisations. When I was down at United Dairy Farmers in Victoria the other week, I talked about it, and we had a raid of virtually everyone wanting a copy of it that was made available to them on that day. We have a committee meeting next week with all our people from around Australia, and I can certainly ask them about how well it has been received and get back to you on that. But certainly, in my direct contact with farmers, they are indicating that it has been really helpful. They had not even thought about putting anything in writing. They said: 'It's a handshake relationship. We get the guy to come in and do the spraying. We get the guy to come in and do the shearing.' They do not think beyond that.

CHAIR—On the face of it, it looks like a very good guide for potential employers on a farm. My concern is whether or not it withstands the test of legal process. You do have a disclaimer there as well.

Mrs Wawn—We do.

CHAIR—How was the kit produced?

Mrs Wawn—This was produced in consultation with all our workplace relations policy managers throughout Australia. We had a lawyer who is used to dealing with farmers draw it up so that it was not overly legalistic. We stress that it is a template. We would much rather they used this two-page document as opposed to nothing. It is a good start for them to make that cultural shift and put something in writing. Talking to dairy farmers the other day, we found that in most instances they had very much a contractual relationship, but they were not aware of whether or not they did until we went through that check list. The other big area is labour hire, with the use of contractors who bring in their own employees. That has been a big concern for us. This kit was initially established because of the difficulties with fruit-pickers coming in who had been arranged through contractors, and our guys were getting hit.

CHAIR—Would that kit have prevented the Queensland case from taking place?

Mrs Wawn—I do not think so, no.

CHAIR—Why?

Mrs Wawn—The Queensland case was more about whether or not there was a contract or an employment relationship. My understanding is that there were written contracts in that case. So that was all about what the law was in Queensland, the state legislation and the state award system, as opposed to any common law arrangement between one party and another.

CHAIR—And your concern is that if a number of state jurisdictions have their own laws then it will continue that uncertainty.

Mrs Wawn—That is correct, yes, in relation to deeming provisions particularly, for example, but also contracts provisions.

Mr BRENDAN O'CONNOR—I am just going through your submission, Mrs Wawn, and it strikes me as an interesting contention that NFF indicates the need for flexibility but does not illustrate why there is not sufficient flexibility in the definition of an employee under either the federal or the state systems. I am referring to a number of contentions on the first page. Also, in paragraph 15 you indicate:

… 14.5% of employed persons in the agricultural industry identify themselves as self-employed contractors.

I assume from that that the remainder are employees of either labour hire, the farmer or contractors. My question to you is: given that the majority of people who work in these industries are employees, what it is that makes it impossible to have all work undertaken by employees?

Mrs Wawn—What makes it impossible?

Mr BRENDAN O'CONNOR—What makes it difficult? What are the impediments? The reason I am taking that line is that there has been an understanding of the nature of work in the agricultural industry generally. The work is seasonal, not constant, and as a result many of the industrial instruments that regulate employment for employees in that industry have taken that into account.

Mrs Wawn—Yes.

Mr BRENDAN O'CONNOR—So what is the problem?

Mrs Wawn—You are right; the agricultural awards are more flexible in terms of employment. There is no question about that. In terms of the breakdown of employees in the agriculture sector, the 100 per cent also includes owner-operators. So when you cut it down to the number of employees it is even smaller.

Mr BRENDAN O'CONNOR—Less than 85.5 per cent?

Mrs Wawn—That is right because, of that 85.5 per cent, about 30 to 40 per cent would be deemed owner-operators.

Mr BRENDAN O'CONNOR—Can you provide further information at some point?

Mrs Wawn—Yes, we can. There are around 400,000 people employed in agriculture. When you break that down, 150,000 deem themselves owner-operators or managers. Around 200,000 to 250,000 are employees, so obviously the self-employed contractors would come in at around 150,000.

Mr BRENDAN O'CONNOR—That makes sense. So those that are not self-employed or effectively operating their own businesses are employees?

Mrs Wawn—They are employees. They will either be direct employees of the farmer or employees of contractors—for example, shearing or fruit-picking teams.

Mr BRENDAN O'CONNOR—I am really trying to get at what compels a farmer to enlist the services of a contractor rather than an employee, given that you do not have to make employees permanent in this area.

Mrs Wawn—There are a number of reasons. The biggest issues we are hearing at the moment are the cost implications of direct employment and of compliance—for example, workers compensation costs and occupational health and safety compliance. Other areas include concerns about termination of employment. We had an interesting case recently where it was suggested that even a seasonal worker can also have rights under the termination of employment provisions, which has limited—

Mr BRENDAN O'CONNOR—Which state was that in?

Mrs Wawn—That is a decision of the federal commission which is of considerable concern to us. There are also issues of what work is available and when, so it is very ad hoc. One minute you have some work and then you do not have work. You can employ workers on a casual basis, but the workers do not like working on an ad hoc basis because it does not give them a sense of security. There is a whole range of reasons around those costs of compliance. We have major labour shortages in this sector as well, so there is also the time involved in finding labour. For those reasons—predominantly because they do not have the HR capacity—they would prefer to look at contracting as an alternative source of labour when they need it, depending on their seasonal fluctuations. We have listed the type of work done by contractors, who have been there for generations in the farming sector in those contractual relationships. Nothing has changed dramatically in farming, really, when it comes to contracting; it has probably simply increased, particularly as the horticultural sector has grown.

Mr BRENDAN O'CONNOR—Part of the reason, then, for the growth in independent contracting is to avoid having to pay, directly at least, those on-costs that you refer to.

Mrs Wawn—It is the on-costs but, more importantly, the compliance costs. We talked earlier about the fact that in many respects farmers will have a verbal arrangement as opposed to a written arrangement. They really do not want, and do not think they have the capacity for, the

compliance side of it. It is not just the direct costs; it is the indirect costs of running your business in compliance.

Mr BRENDAN O'CONNOR—So that should go to whether the worker is then called an independent contractor.

Mrs Wawn—No, not necessarily. In some instances these contractors are big operators, such as the shearing teams. The committee may have spoken to Ian Hastings two weeks ago in Melbourne. He is a chemical sprayer.

CHAIR—Yes, that is right.

Mrs Wawn—Those guys have big operations. Obviously, it is far easier for them and they have more understanding of the HR issues because they are employing 10 or 15 people as opposed to one.

Mr BRENDAN O'CONNOR—We can distinguish those large operators from the individual with an ABN who has to undertake today what they did not have to do yesterday, which is take on the compliance costs and on-costs themselves. Are you concerned that there is a lack of ability for those workers to conduct themselves as a business when in reality they are employees?

Mrs Wawn—I do not think it is any more difficult than for a farmer. In both instances there is a need to have an understanding of what the laws are. It is a transference. The issue is: who has the rights and responsibilities? A contractual relationship usually means there is more of a balance of responsibilities as opposed to an employment relationship where there is virtually a sole focus on the employer being responsible. We find that, in many instances, there are contractual relationships that have lasted for generations in farming based on verbal relationships and everyone has very much looked after their own interests.

Mr BRENDAN O'CONNOR—You are opposed to the deeming provisions that have been proposed, and indeed applied, by governments whereby, under certain criteria, an independent contractor may indeed be seen to be—that is, deemed to be—an employee.

Mrs Wawn—Yes.

Mr BRENDAN O'CONNOR—If there is no authority to delineate between an employee and an independent contractor then who is to make the decision? Are you saying in effect that if you say you are an independent contractor you are an independent contractor?

Mrs Wawn—We are saying that there are obviously common law provisions that say whether or not you have a contractual or an employment relationship and those common law relationships should exist and not be overridden by legislation. Obviously the intent of the parties is going to be important in determining whether or not there is a contractual relationship. Obviously that comes down to the intent on both sides as opposed to one party opposed to another. Certainly that intent can be shown, for example, by a written contract.

Mr BRENDAN O'CONNOR—Sure, but if I intend to be something that I am not under law, it does not make me that, does it?

Mrs Wawn—No, it does not. But obviously we already have common law tests, which have been proven through the court structure as being a sound way of determining whether or not you have an employment relationship or a contractual arrangement.

CHAIR—You are after a codified system; is that right?

Mrs Wawn—No, not necessarily. We are simply saying, 'Let's recognise the common law as it stands.'

Mr BRENDAN O'CONNOR—You talk about a codified unitary system in your submission.

CHAIR—I thought I read somewhere that you were in support of having it codified.

Mrs Wawn—It is a codification effectively of the common law. It is not so much about replicating the tests but having an act that actually says: 'Here is the common law. There may be areas where we believe there is, for example, prima facie recognition that the parties have done X, Y, or Z and therefore it is a contractual relationship.' We have a few more details as to how we see the act actually working, but unfortunately that has gone to our committee for approval so that I can file it to the ministerial discussion paper on Wednesday. We have got some details there but, really, our fundamental premise is on the common law principles of how a contractual relationship works.

CHAIR—Particularly on the test of control.

Mrs Wawn—That is correct.

CHAIR—That is what your kit is mainly based on.

Mrs Wawn—That is right, yes.

Mr VASTA—I want to touch on the issue of occupational health and safety. Are the larger companies, the contractors, providing a series of seminars on occupational health and safety? Before you were talking about how you cannot just go to the pub and find, say, a tractor operator. You were saying that these contractors are skilled up so that the farmer does not have to go over the same thing twice. What actually happens in that arrangement?

Mrs Wawn—I guess there are two areas. If you use contractors and they are bringing in labour to undertake a task at the farm then obviously there is a duty of care that the farmer is always going to have in terms of making sure that they have a safe workplace, but the responsibility then lies with the contractor to ensure that he or she has undertaken all of the compliance with occupational health and safety—it is not then the responsibility of the farmer. There are, however, certain nuances of that farm having very particular issues. So obviously there is a need to identify in a practical sense where the high risk areas may be on the farm. One of the things that we are pushing our farmers to say to the contractor is, 'Make sure that all those

employees are trained in occupational health and safety.' Obviously they are then complying with the legislation and they do not have to redo it themselves.

Mr VASTA—When the smaller or independent contractor comes onto the farm, is it the farmer who will show them around?

Mrs Wawn—Again, it is the farmer who has to show them around. If they are working in a particular area of the work site, they have to identify the risks of that particular work site. But with the actual work to be undertaken, particularly if it is using a piece of machinery or something of that nature, it is obviously up to the contractor to look after their own safety.

Mr VASTA—And this has happened for generations?

Mrs Wawn—That is right.

Mr VASTA—And there has not been a problem?

Mrs Wawn—Obviously you hear of accidents occurring and of discussions between the farmer and the contractor about who is responsible, and that has caused some ructions. Nevertheless, if the farmer has done all that they should do in terms of duty of care under common law principles then it is the contractor that should be responsible for their own actions if an accident occurs—if they have been the ones responsible for undertaking that activity.

Mr VASTA—In Queensland there have been a lot of farmers, rather than their helpers, who have been injured.

Mrs Wawn—Yes. Unfortunately, we do not have a very good reputation. We predominantly injure ourselves more than our contractors or our workers. The statistics are showing, in many respects, that we are actually complying with occupational health and safety when it comes to third parties coming onto the farm, including employees, but then we forget about it ourselves. Farmers are not too good in that regard. They are getting better.

Mrs MAY—Would it be fair to say that the majority of your members are from small business? When you talk about the number of people they hire—and I have had nothing to do with the land and farming, ever; it is not an area that I am very familiar with—I imagine that your members employ around the same number as the small businesses in strip shopping centres which I represent. Would that be fair to say?

Mrs Wawn—Very much so; 95 per cent of farms are deemed small business.

Mrs MAY—The information I get back from my own small businesses is the lack of information on compliance costs. Where do they go for that information? Obviously this kit is going to provide some of that information. Is there a cost for the kit?

Mrs Wawn—No, there is not. It is free to the extent that, if you are a member of a farming organisation, you can access the kit.

Mr BRENDAN O'CONNOR—What about the farmers union?

Mrs Wawn—I do not know what each member organisation has been doing, but we have been recommending to our member organisations that it becomes available to anyone who asks for it. Obviously we want to ensure that the information gets across. There is no doubt they cannot get access to specific information, or they have so much information they do not have time to read it. Hence the rule on this kit was to make it no more than four pages. We publicise it whenever we are at meetings and so forth, and people have become aware of it. There is obviously the importance also of having the resources of workplace relations departments within member organisations.

To give you a good example of how a small business operates, one of the farmers that we organised two weeks ago in Melbourne, Duncan Fraser, has a property in Hay of 10,000-odd hectares and he does not have one single employee. You think, 'How on earth can a guy look after a property that large?' He does it because he uses contractual services when he needs them. He brings in shearers, he brings in guys to help him fence and those sorts of things. He is relying on a very big landmass, but he is very much a small business operator who relies heavily on contractual services in the district to help him when he needs it due to seasonal fluctuations. He also had, at one stage, a sharefarming relationship as well.

Mrs MAY—In your submission you refer often to the federal government becoming involved, overriding state and territory legislation. There is a discussion paper that you have referred to which the federal government will be putting out shortly.

CHAIR—It is already out.

Mrs MAY—Did you make submissions to that? Were you involved in it? Will you be making submissions on that discussion paper?

Mrs Wawn—We will be. The submissions are due in on Wednesday of this week. We are currently putting together our final draft to put to that discussion paper, because obviously there are some very specific questions that the discussion paper has asked. Really what we are seeking, effectively, is federal government involvement to ensure that the traditional way upon which we see contractual relationships have developed over time are not eroded by third parties and that freedom of contract is maintained in this country. That is effectively the premise of where we pursue the act. It does not have to be complex or re-established rules; it is really re-establishing what has traditionally been there and ensuring that we do not have overriding third parties getting involved in contractual arrangements.

Mrs MAY—Obviously over time OH&S has become an issue that needs to be strengthened. There would be areas that need strengthening from those traditional labour hire arrangements that have gone on for many years.

Mrs Wawn—I think we have to be very cautious about how we look at OH&S. I do not have any written reported evidence, but certainly even when I spoke to some academics the other day who specialise in occupational health and safety, they said that the onerous nature of some state occupational health and safety legislation has ensured that there is so much focus on compliance—and everyone's backs are getting up because of that compliance structure—that the cultural shift that we have been trying to work on to get everyone to think of safe farms is actually dropping. We are losing that cultural ground that we had actually been able to achieve of

getting people to understand the inherent importance of safety and the reasons why you need safety in terms of the farm family, productivity gains in the workplace and so forth and minimising costs because they are so focused on legislation and compliance. So we say that there is no doubt that we have to have a greater focus on occupational health and safety—and NFF has certainly rafted up its push on occupational health and safety—but we actually think some of the legislation has gone too far.

Mrs MAY—Would you say that, with that legislation going too far, that is where you could see some labour shortages in different parts of the industry?

Mrs Wawn—I guess there are two issues in terms of occupational health and safety and labour shortages. First of all, again, the reason why people do not employ is compliance issues, and occupational health and safety is becoming the biggest issue in terms of compliance issues. The second issue is that, to attract labour, you need to ensure that you have got a safe business—which is the flip side of it. Certainly there is an issue of ensuring that, again, you focus occupational health and safety on productivity issues and the welfare and safety of your employees, your contractors and yourself in terms of that broader business sense. So that has caused some ructions as well, because it was all focused on compliance.

Mr BAKER—Mrs Wawn, I am intrigued with this issue, and perhaps you could enlighten us. The farming industry or the agricultural industry is unique in that, whether it be harvesting, as in barley, peas et cetera, or fruit picking, there are groups that operate in Tasmania then, as the season moves forward, they travel to Victoria, New South Wales, Queensland, right up through the belt. Going from state to state, from legislation to legislation, must be an absolute nightmare for individuals, contractors et cetera.

Mrs Wawn—Yes.

Mr BAKER—Also, you mentioned that a lot of them operate under a handshake agreement. Could you run through how they operate in that aspect, how they find their way through the maze? Are there any alternatives that the NFF could put forward other than federal legislation overriding state legislation?

Mrs Wawn—Certainly. Cross-border issues are huge, particularly with workers compensation. When there was the Productivity Commission inquiry into workers compensation about 18 months to two years ago, we pushed to ensure that there was mutual recognition of existing workers compensation. So if you are a contractor which has teams throughout Australia, the fact that you have got workers compensation say, for example, in Tasmania, means that it will be acknowledged in the remainder of the states rather than having to have workers compensation in every single state. But certainly the contracting teams that go across state borders really get very frustrated in terms of compliance with various different state legislations. We find that as the horticulture sector has increased in terms of the numbers of pickers, you are getting an even greater increase of people going across the border. So that is a particular issue. We understand there is some work being done by the state governments on fixing up the workers compensation mutual recognition and we obviously hope that the National Occupational Health and Safety Commission, NOHSC, and the new ASCC will ensure that there is more consistency on occupational health and safety. But we have been saying that for decades, so we will not hold our breath.

The interesting thing about the handshake relationship is that nine times out of 10 you never hear of any problems arising from the handshake agreements because all the parties are in the belief that they know where everyone stands. The difficulty, obviously, is these more legal issues, particularly if it is a one-to-one relationship—someone coming in to do a fencing contract or something like that. The complexities of a handshake agreement arise predominantly where there is a contractor with their employees coming on site.

A really good example of a handshake agreement where there are difficulties is fruit-picking, particularly in relation to illegal workers. You will say, for example: 'Okay, you are going to bring in 30-odd workers. Mate, I presume they are okay to work in Australia.' 'Yep, not a problem.' They come in; the place is raided; suddenly you have lost 20 out of those 30 workers and you have product to pick. The farmer is in an absolute shambles, because he has no-one to pick. And because he does not have a written contract there is no way in which he can have penalty clauses in terms of noncompliance with the contractor.

The pushing of written contracts has predominantly been for us, for farmers with contractors who then bring in employees, particularly in relation to ensuring that the legal requirement for employees is complied with—illegal workers, superannuation, workers comp and so forth. That is where the farmers can get hit. It is not so much the one-to-one relationships; it is where multiple numbers of workers come in through that contractual relationship.

In terms of alternatives, we could always ask the state governments to desist from their deeming provisions and fair contracts legislation, but so far, according to our state farming organisations, that is not occurring. I do not think we need to go into a debate on federalism versus a unitary system here this morning.

CHAIR—Are the state branches of the NFF supportive of federal intervention?

Mrs Wawn—Yes, they are.

Mr BAKER—That was my next question.

Mrs Wawn—You would not have this submission unless we had got approval from all our member organisations.

CHAIR—State parochialism does extend to the organisational level as well.

Mrs Wawn—Indeed, it does.

Mr BAKER—So you can say that the NFF is totally watertight.

Mrs Wawn—This submission, which also supports an independent contractors act, has been supported by all of our member organisations.

CHAIR—You mention that safety nets should be put in place. Can you give us an idea of some of the things that you would include in the safety net?

Mrs Wawn—A safety net really—

CHAIR—It is just so easy to say.

Mrs Wawn—The use of the term 'safety net' is effectively about the common law. It is the common law arrangements. It is a bit like when we talk about safety nets in the federal industrial relations system.

CHAIR—It is interesting that you see the common law test of control as a good definition. A lot of the other evidence that we have received indicates to us that there is still a lot of uncertainty about using that as some form of benchmark.

Mrs Wawn—The one issue with a common law test is always that it is a movable feast moving with societal change. Sometimes we have to be very careful about going into too much detail when we codify things. That is not dissimilar to our arguments on industrial relations reform. The act has gone too far in codifying and being prescriptive. Instead, we should go back to some basic statutory minima and let the parties work it out from there so it becomes more of a common law arrangement. People can pursue their actions through common law. It is very difficult. You can go both ways, but ultimately the common law test, if you put it relatively simplistically, is not that difficult to determine if you have it in an easy check list. The difficulty arises when you get a whole range of other things—a codification of obligations that changes that.

Ms ANNETTE ELLIS—My question reflects the comments you have been making about the handshake agreements. Forgive me if it is in the submission or has been asked before, but do you think that there should be a registration system for contract arrangements for labour hire firms or independent contractors?

Mrs Wawn—No.

Ms ANNETTE ELLIS—Why not?

Mrs Wawn—Again, you are needing to register and it makes things that much harder. We are saying that it is simply a freedom of contract relationship. You do not need to start creating registers and those sorts of things. There are existing court systems so that if there is a breakdown in the relationship there are existing mechanisms to pursue that.

Mr BRENDAN O'CONNOR—The NFF is registered?

Mrs Wawn—No, it is not a registered organisation.

Mr BRENDAN O'CONNOR—Doesn't it represent itself before the commission?

Mrs Wawn—We intervene.

Mr BRENDAN O'CONNOR—You always get in!

Mrs Wawn—I always get in.

Ms ANNETTE ELLIS—I am not necessarily pursuing this either—I am just throwing it in. You made comments earlier about where the onus might lie when the farmer, for example, decides to take on a group of workers through a labour hire arrangement or a contract infringement of some kind and the legitimacy or the legality of those workers then coming into question. The only reason I am asking that question is to get your view on whether or not the registration system could somehow tighten that up and put the onus quite clearly where it should sit rather than, as it does at the minute, where it does not sit.

Mrs Wawn—We certainly debated that and there certainly has been some considerable discussion about whether or not that would actually assist our farmers more than just the current system of saying that we have heard they are okay—

Ms ANNETTE ELLIS—And not really knowing whether they are.

Mrs Wawn—and not really knowing whether they are. That adds another layer of compliance in terms of businesses having to comply—

Ms ANNETTE ELLIS—Sure. I guess the hard question really is—and again, this is not an advocacy as much as throwing it into the debate—whether or not that compliance is actually needed rather than allowing the open system that is there at the minute where there are deficiencies. That is the hard question for both sides of the debate, I would imagine.

Mrs Wawn—Yes, that is right. We certainly had quite a considerable debate about that and came down in the end to not having registration.

CHAIR—But compliance obligations are not on the farmer; they are on the labour hire company. Are there labour hire organisations in rural Australia that are members of the NFF?

Mrs Wawn—I could not answer that question but I can put that in writing to let you know—

CHAIR—So why are you concerned about the registration process for those who are going to be offering a service which is to take the worry away from the farmer? As you say, often the farmer is not aware of the relationship that exists.

Mrs Wawn—Ultimately, it is an additional cost for the contractor, and who is going to wear that cost—the farmer.

Ms ANNETTE ELLIS—Is that better than having 20 pickers walk out of the job? This is all part of it—

Mrs Wawn—Our argument was that we established the kit and the template contract. We also recommend on top of that that you have penalty provisions if there is a breach of contract.

Mr BRENDAN O'CONNOR—That is not labour hire employees—

Mrs Wawn—If you are not doing the direct employment relationship and it is a labour hire, you have got a contracted service with the labour hire and then, yes, you can still have a contract with them to ensure that they are complying.

CHAIR—Thank you very much. We appreciate your submission and your evidence.

[12.05 pm]

LAMBERT, Mr Scott, Executive Director, Industrial Relations and Legal Services, Housing Industry Association

ROBERTS, Dr Malcolm, Executive Director, Federal Relations, Housing Industry Association

SIMPSON, Mr Glenn, Senior Executive Director, Business Services, Housing Industry Association

CHAIR—I welcome representatives of the Housing Industry Association. While 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 giving 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. Would you like to make a statement in relation to your submission or any other introductory remarks? Each one of you is invited to do that, by the way.

Mr Simpson—There are some remarks I would like to make going to things that have happened since our written submission was provided to this committee. There certainly has been a good deal of public debate, and we have been reading with great interest the transcript of evidence given to the committee and we have read submissions in writing put by other parties.

CHAIR—It is good to know someone is reading them.

Mr Simpson—Nothing could be more agreeable. We are not seeking to canvass the evidence in detail, but there are a couple of comments I would like to make. Firstly, we support the submission by the Australian Chamber of Commerce and Industry and the evidence that was given by them. Today we wish only to speak in detail about the housing industry, which, as you will know, largely relies on the contract system. We do take the point that one size in legislative policy does not necessarily fit all. We do not seek to advocate solutions for other people's industries. We only speaking for our industry and we accept that what works for us may not work elsewhere. We do note that housing, of course, is a very important area of contracting for the Australian economy and has been for the last 50 years. It has been the growth of contracting in other areas where contracting has really come to the fore. So far as the housing industry is concerned, the proportion of contractors used really has not changed.

The Housing Industry Association has 38,000 members, with over half of those being contractors working in the housing industry. We point out that most people in the housing industry or indeed in the building and construction industry generally would not be members of any industry organisation or of a union—neither of the HIA or the Master Builders Association and their state branches nor of any of the unions that operate in construction. It is a very low level industry in terms of firm size and organisation.

I note that a couple of people who have given evidence to the committee have queried whether organisations such as the HIA do in fact represent contractors. I thought I should say something about that. We do, we assert, represent contractors. The reason we say that is that more than 50 per cent of our members are contractors and they have elected to join the Housing Industry Association rather than some other organisation which they would have been eligible to join, such as the Construction, Forestry, Mining and Energy Union. Our members who are contractors have actually voted with their feet. They are not active in the union. They are not seeking the union to represent them or have them deemed to be employees so that they can enjoy the benefits of labour regulation; on the contrary, they are active in the HIA asking HIA to protect them against the pressures they get in their day-to-day working lives from unions and from officials who are trying to interfere, as they see it, with them getting on with the job. It is interesting to note that the recent inquiry into the trucking industry in Victoria found similar attitudes on behalf of contractors in that industry, which the people conducting the inquiry had some difficulty understanding. I can assure you that that attitude of independence from vigorously competitive workers is very much the norm for HIA members.

Secondly, our arguments, we say, are important because they have important economic consequences for Australia. Housing has relied on contractors for the last 50 years. We all know that housing affordability has been under considerable threat in Australia in recent times, with the increases in land prices, and it is HIA's position that it is a fundamental aspect of housing affordability that houses are built by contractors. There have been a number of inquiries into this. There was a housing affordability summit here in Parliament House last year. A number of inquiries have found that the cost of using employees to build houses would be some 20 per cent higher than the cost of using contractors. This might be acceptable in the commercial building industry, where cost is simply another business factor that can be passed on, but it is not acceptable in housing, where house prices are very important to those who are buying their own house and where the market is extremely price sensitive. So we say that the committee should be aware that any change to current laws relating to contractors, either helping them or hindering them, will necessarily have an impact on housing affordability. In fact, our members have for some time felt very much under challenge from industrial commissions, unions and, indeed, state and territory legislation, which is one of the reasons HIA has for some considerable time been calling for more protection for contractors and, in particular, the establishment of contractor status as a legitimate alternative way of doing work.

I would like to turn to one important change in HIA's position since our submission, and that is in relation to the test of a contractor—and I was interested to hear what Denita Wawn of the National Farmers Federation had to say earlier. We have been discussing this issue with a number of other organisations. In the interests of presenting I will not say a united position but a position which is consistent across the groups who represent contractors, and changing emphasis only slightly, we now take the view that the common law test should indeed be the only test. Our submission advocated a tax status test as an additional test. We have changed emphasis. We say that that should now be a matter of evidentiary weight rather than a test in its own right. Contractors consist of two groups: people who are personal services businesses, all of whom are contractors because the tax commissioner has ruled them as contractors and you cannot be a personal services business unless you are a contractor, and people who are not personal services businesses. There are a large number of people who are not personal services businesses who yet are contractors, and we would not like to see personal services business status outweigh in some emotional sense the common law test of who is a contractor. So it is our position that the

common law test ought to be the test. However, if you are a personal services business—and that works really well for our industry—then there should be some recognition that you have already been through the Commissioner for Taxation's test.

We say now that if you are a personal services business for tax purposes then that ought to be, prima facie, contractor status. So if you are a personal services business, you ought to be able to say, 'I'm a contractor until you prove I'm not,' rather than the situation in other circumstances where what would be the case is: 'I think I'm a contractor; I acknowledge you might have a different opinion and we'll have to wait for a court to sort it out.' We say that tax status is something that everybody does anyway. There are no extra costs. The Commissioner for Taxation has looked at it. If the Commissioner for Taxation is happy to accept tax from me on the basis that the Commissioner for Taxation thinks I am a contractor, then that ought to have some legal status, even if it is only prima facie. Apparently a number of other people who have given evidence to the committee, including the ACTU and Professor Stewart, would agree up to a point. The question is: at what point do you cut if off? But they agree that tax status has some merit.

Finally, I would like to say something about dependent contractors—which, again, is something that has been agitated before this committee by a number of witnesses. We say that those who are working in a dependent and controlled way are either employees and should be regulated as such or they have other features as well as this reliance on a single source of income. Those other features could include risk taking as to whether they will make a profit or a loss, working for a result, being able to set their own work hours and being able to employ someone or subcontract some of the work, which would result in them being common law contractors. So, to our way of thinking, they are either employees or contractors. There is no such thing as a dependent contractor.

A number of people seem to think it is somehow wrong for two people to enter into a contract if they are not equal in bargaining power or if they intend the contract to be part of a long-term relationship. We reject that. That is not necessarily a sign of dependency in either direction; it is merely the sign of a mature commercial relationship. In our view, a person can be a labour-only contractor. I note that Professor Stewart at least would not give them the status of a contractor because they are not, in his sense, running their own business—that is, having employees, an advertising budget, a large number of clients or a substantial business premises. To our mind, that is all very well but that does not take into account how those businesses came to be. At some stage they started up as one or perhaps two people in a partnership who had nothing but their own skills and labour to sell and gradually they built the business up. We would say that they are nevertheless contractors.

Arguments that cost has been the main driver for contracting—and, again, dependent contracting, as is alleged—to our mind is, certainly in our industry, clearly wrong. We have had contractors for over 50 years doing most of the work in the industry. Likewise, arguments that tax is the driver are, to our mind, wrong, at least in the present day. Whatever might have been done under the old PPS system, since 2000 the tax system has fundamentally changed. In particular, in 2002 the alienation of personal services income legislation has meant that contractors and employees are on a level playing field insofar as tax is concerned. If people think otherwise it may be that they have not caught up with the law. In that regard, we would consider

that the estimate by the AMWU that $14 billion of tax is being lost by contractors is somewhat fanciful.

The real issue, to our mind, is whether genuine contractors should ever, under any circumstances, be treated as employees. Some would say, 'Yes, they should'—these are what they classify as dependent contractors. We say no. We say that you must move away from the proposition that employment is the standard work arrangement and contracting is somehow second-hand and inferior. In the housing industry at least, contractors do not want to be employees. They will not work as employees. That is what our members are telling us. They are asking why HIA has not done more to allow them to do that. We have had a huge fight in South Australia, for example, over the fair work bill, which would have given the commission power to deem contractors to be employees if it felt like it. Our members were very strong, saying that we should have done more to oppose that, and eventually we played some part in having the legislation modified, because that is what our members wanted. They do not want to be involved in labour regulation. They do not want to be protected. They see labour regulation, a union or an industrial relations commission, telling them that they cannot work on a particular day and they cannot work in particular ways as simply something standing between them and their ability to make money.

Again, in other industries it may be different, but in the housing industry you have CFMEU officials driving around on rostered days off making sure that all building sites are closed. This is just ludicrous. They are now moving to a nine-day fortnight. If a contractor wants to work on one of the rostered days off, the contractor may well have very good reasons for doing that, but labour regulation and the union movement prevent them from doing that. That is why they very strongly feel that they do not need the protection of labour laws.

It has been said by some that contracting is the work force of the future—and, to our mind, there are many indications of that. If that is true it needs proper recognition in its own right, not merely as a non-standard work arrangement. That is why we very strongly feel that there ought to be some safe haven in legislation for contractors. Thank you. That is all I wanted to say as an opening statement.

CHAIR—Let me take up from where you finished off, Mr Simpson. If contracting is the way of the future for the work force, and it will grow even more so, isn't it even more imperative for the government to entertain the notion of a form of registration process to ensure that we have legitimate operators rather than sham operators out there?

Mr Simpson—I listened with interest to what Mrs Wawn said, and I was party to some discussions that she had with other people last week. The trouble with registration, as we see it, is that when a dispute arises it turns out that the people involved in the dispute have not bothered registering. When a dispute arises and somebody has registered, then it is a dispute before a court. And the court is not going to be bound by the opinion of a registrar on the issues that the court itself has to decide, because if the court were bound it would have no effective role.

CHAIR—Unless a court had, as a reference point, a codification of the common law test.

Mr Simpson—That is a separate question, with respect. The codification of the common law test cannot in itself make the common law test more certain. The trouble with the common law

test, if I can digress for just a moment, is that although the factors are clear, everyone gives them their own weight. It is unscientific. A scientific experiment is true if it can be reproduced by different people at different places at different times and have the same result. Common law tests cannot. Codifying the common law test puts in legislation what is now in the case law, in the court reports, but it still does not give it any more certainty. It still requires an opinion former to form an opinion at some future time. If I were a contractor today and I put all my documents in to the registrar, the registrar would charge me $150 and the documents would be sent off. Then an examiner of contractors would look at it, tick me off from a list and say, 'Yes, this person is a contractor.' So I go away and say, 'I am a contractor,' but then I wind up before WorkCover Queensland, which says, 'No, you're not.' I then say, 'But I've got a tick from the registrar.' The Queensland WorkCover authority says: 'Well, that may have been true when you got the tick, although we don't recognise it, but circumstances have changed since then. You're now doing different work in a different place in different circumstances, and we will look at it de novo.' So, at the end of the day, you do not get a great deal of protection from registration. All you get is some official's opinion that at a particular point in time in the past you met what they thought were the statutory or, indeed, the common law tests. You could give that some additional weight through legislation to make it a prima facie contractor status, but courts will still make up their own minds.

It would be of some benefit, but to our mind it is of less benefit than a number of other suggestions that we had for giving some evidentiary weight to contractor status, one of which would be to use written documentation or a pro forma to a contractors act, for example, so that if both parties filled it in and annexed it to their contract it would attract some legislative status. We could make that a pro forma that was attached to all the industry documents. Certainly we could in our industry. For every written contract that the parties filled out correctly, it would be equivalent to saying: 'I've tested myself. I understand all these things, and we both think we're a contractor.' It still will not change, it still cannot turn a rooster into a duck, but at least it can make sure that the feathers get counted properly when the contract is made. You cannot go to registrar for every contract; you can only go to a registrar maybe once every year or two. There are problems.

CHAIR—I understand your point. Have you had a chance to look at the NFF's kit that they talked about earlier on?

Mr Simpson—No, I have not. But we have something similar; we have contractor check lists.

CHAIR—There were two things: one was a checklist, the other one was a model contract.

Mr Simpson—We have that as well. We have what we call a period and trade contract.

CHAIR—Can we see it? Have you submitted it to us?

Mr Simpson—No, we have not. We are more than happy to do that. I will make a note of that.

CHAIR—What is the uptake of that?

Mr Simpson—It is very high.

CHAIR—Has it been challenged by anybody—

Mr Simpson—On the contrary—

CHAIR—whether it be by the union party or anyone else?

Mr Simpson—Well, the unions challenge everything we do—that is only par for the course—

CHAIR—Has it been legally challenged?

Mr Simpson—but we have run it by the tax office and the tax office have said: 'Yes, if you work to this contract then you will pass the test of a personal services business for tax purposes and you will be a contractor.'

CHAIR—Only for tax purposes, though?

Mr Simpson—But they have said, 'We will treat you as a contractor because in our opinion this is evidence that you are a contractor.'

CHAIR—I am just throwing these things up. We are also hearing evidence from a whole lot of other witnesses saying that the PSI test is insufficient and that it just does not provide you with that assurance. So getting a ruling from the tax office does not get you out of the woods.

Mr Simpson—There are a couple of things I might say about that. Firstly, if you want advice about tax, you really ought to start with the tax office rather than with either us or some third party. We have been in long discussions with the tax office. We have played a large role in lobbying the tax office and the government about having the legislation look the way it does now. But it is unquestionably a matter of law that you cannot be a personal services business in the opinion of the tax office unless you are a common-law contractor. Now, if the tax office's opinion is wrong, as may be the case, then the tax office's opinion is wrong, but courts, tribunals and officials form opinions all the time, many of which are wrong. You are no worse off. At least you have had somebody look at it. At least you cannot be plainly, on the face of it and without any doubt someone who is an employee. You have at least got through that hoop.

Secondly, the tax office has a considerable interest in making sure that this test is fairly applied. It is not like the Australian business number, where it was clearly in the tax office's interest to issue as many of those as possible to get as many people into the system as possible. Here is a situation where there are deductions—and quite substantial deductions—available for people who have personal services businesses. The Taxation Office, while it is not a black-letter law, rigorous enforcer in all circumstances, does have a significant amount of revenue at risk here, and it will not allow people, willy-nilly, to claim deductions to which they are not entitled.

Having said that, the tax office themselves have said to us that they are now moving into the enforcement phase in this area. They have got the system up and running; they now expect to audit everybody in the building and construction industry who claims personal services business status within the next three years.

CHAIR—Mr Simpson, we have to move on. Other members have questions to ask as well. I have one last question before I hand over to the deputy chair. You stated the important economic consequences for Australia of making sure that independent contractors still operate freely and openly in your industry and that there is a potential effect on housing affordability—20 per cent higher—if contractors are not used. What is that based on? Is there some sort of assessment that has been done to which you can point us?

Mr Simpson—Yes, it is in our submission.

CHAIR—Secondly, there will be those who say that, with increasing cost, the true cost is actually from labour shortage and that independent contractors are doing very little to promote the trades and increase the uptake of people to move into those trade areas, so a lot of our problems of affordability are due to labour shortage.

Mr Simpson—With respect, no, that is not the case. These studies of the extra costs have occurred over a 10-year period, and the skills shortage has really only started to bite in the construction industry in the last two years. Secondly, it is not true to say that contractors involve less training. It is happening right across the Australian economy. Qantas is not taking on apprentices anymore. That is not due to contractors; it is due to the fact that the economy is more competitive and people are looking for ways to cut costs everywhere. HIA runs a group apprenticeship scheme where we place apprentices with our members, and our members are finding it very difficult to meet the costs of having an apprentice, because apprentices are a net cost—or they almost balance—over four years. That is a skills debate. Without wishing to go deeply into that, we reject the proposition that contractors have somehow contributed to the deskilling of the industry. In our industry, we have had contractors for 50 years. It is just not true.

Dr Roberts—If I could add to Mr Simpson's answer, I would point you to an analysis done by Econtech in February 2003 for the Department of Employment and Workplace Relations called *Economic analysis of the building and construction sector*. That is obviously not our report, but it has been very widely read and distributed.

Mr Simpson—And bear in mind that we are talking about comparative advantage. If costs are going up, they are going up for everybody, but contractors remain 20 per cent cheaper than employees at any given cost level.

Dr Roberts—I would add that, obviously, one of the differences is a contractor is paid to perform a particular task. So, in terms of productivity, it is not simply a comparison of hourly rates or other costs; it is a question of looking at how much it costs to do a task in the residential sector, as opposed to the commercial sector. That is what the Econtech analysis looked at. To some extent, some of their findings are a wee bit conservative because they did not include in their calculations additional costs in the commercial sector such as site allowances.

Mr BRENDAN O'CONNOR—As I understand it, in terms of explaining the association to the committee you indicated that you have 39 businesses. I am assuming from that that you mean 39 businesses are members of your association. Is that right?

Mr Simpson—Thirty-nine thousand. People join as individuals, so it may be that a firm like Tamawood Holdings would have four or five employees join. It may not be 39,000 businesses; it may be less than that.

Mr BRENDAN O'CONNOR—Are you suggesting therefore that a number of persons could be involved in the same business, registered as part of that 39,000?

Mr Simpson—Given that most of the industry consists of firms of five or fewer employees, that would be a very small proportion of our membership.

Mr BRENDAN O'CONNOR—You said that the industry employs 394,000 Australians, so are you suggesting then that, on your estimate, you would be representative of 10 per cent of the industry?

Mr Simpson—Yes. Indeed, we would be saying that not only are we representative of 10 per cent of the industry but we would be the most representative organisation. There is no other organisation that would be more representative or would have more members in the housing industry than us. It is simply a fact that it is an untidy industry, consisting almost entirely of very small firms, most of whom do not see any need or do not have the capital—the financial resources—to join either us, the Master Builders, the Civil Contractors Federation or a chamber.

Mr BRENDAN O'CONNOR—Do you have constitutional coverage of employees under your association?

Mr Simpson—We cover anyone who is working in the industry. We are not an association of employers. We have solicitors, we have draughtspeople who join us individually and we have kitchen and bathroom designers. Most of those people are in business. There is not a great deal of point in joining the HIA unless you expect to get something from it. What we provide is assistance to business persons but we are not an association of employers.

Mr BRENDAN O'CONNOR—You are not an employer body?

Mr Simpson—No, we are not.

Mr BRENDAN O'CONNOR—Are you suggesting, therefore, that under your constitution there would be reference to employees of the industry?

Mr Simpson—Not that I can recall.

Mr BRENDAN O'CONNOR—That is what I am trying to understand.

Mr Simpson—If I were a contractor who was working as an employee who wanted to join the HIA, we would be delighted to have—

Mr BRENDAN O'CONNOR—I never asked you that question. I asked you whether in fact you have the capacity to cover employees under your association. You have indicated to me you are not an employer association, and I accept that.

Mr Simpson—I do not understand what you mean by 'cover'. We are not an industrial organisation. The constitution would allow us to enrol contractors who are working as employees.

Mr BRENDAN O'CONNOR—You have impugned a number of witnesses who have come before this committee or at least you have indicated what you think motivates them. Is it the case that it is a self-serving proposition that everybody who is an employee in fact is a contractor. Is it not in your interest to suggest that to the committee?

Mr Simpson—Not at all.

Mr BRENDAN O'CONNOR—You just said in an answer to me that it is more likely that a contractor would be a member of your organisation. Is it not more likely therefore that you would be asserting that employees are contractors in your industry?

Mr Simpson—We are not asserting that employees are contractors; we are asserting that the common law test should be applied. We are not suggesting, for example, that anyone who is an employee should be deemed to be a contractor. I put it to you that people who are giving evidence in a contrary sense are asserting just that: that people who are contractors ought to be deemed to be employees.

Mr BRENDAN O'CONNOR—The Civil Contractors Federation and the Master Builders Association, Australia advocate in their submissions the need for a registration system for independent contractors, suggesting that the use of ABNs is inadequate. What is your response to that?

Mr Simpson—Without wishing to go over the material I put before the committee earlier, we would say that it is an interesting idea, but we see that there are better ways of doing it.

Mr BRENDAN O'CONNOR—You also indicate in your submission that the HIA recommends that the committee support the removal of contractors from the reach of all state legislation applying to employment contractors. Indeed, you indicate that that should also include workers compensation and payroll tax?

Mr Simpson—Yes.

Mr BRENDAN O'CONNOR—How do you think workers compensation should operate for contractors?

Mr Simpson—I do not think it should at all.

Mr BRENDAN O'CONNOR—Could you elaborate on that?

Mr Simpson—If you are an employee, you should be required to have a workers compensation policy taken out over you. If you are a contractor, you are running a business and you should be responsible for your own insurances—you should take out your own accident insurance. At the moment people do not know whether they really have contractor status or not. There is a great deal of deeming. There are people who work for a head contractor and the head

contractor takes out workers compensation policies over them to make sure that they are covered. The contractor has their own personal accident and injury insurance—so they are in fact double-insured—and if they are injured then there is a set-off between the insurers. They are double-insured because no-one can be sure of their status. In our opinion, contractors should arrange for their own insurance. That is what we strongly urge to all of our members. Our contracts make provision for it. We tell our head contractor members, 'Here's a checklist of things you need to ensure that your contractors have,' and one of those is personal injury insurance.

Mr BRENDAN O'CONNOR—In your view, would that option increase the likelihood that people would not be covered or compensated in the event of injury?

Mr Simpson—No.

Mr BRENDAN O'CONNOR—Can you outline exactly how you suggest payroll tax should not apply in the case of contractors? What possible consequences might flow from that?

Mr Simpson—Payroll tax started as a tax on employers' payrolls. In a salami-slicing sort of way, it has been gradually extended by states to throw the payroll tax net wider and wider. Now, in some states such as New South Wales, anyone who works more than 90 days as a contractor is deemed to be an employee for payroll tax purposes. In addition, you have people who claim to be contractors but in the opinion of the Office of State Revenue they are not; they are employees. The OSR would come in, do an audit on the basis of four or five contracts and apply that right across the board to all of the contractors who have worked for this particular company for the last five years, and then say, 'That'll be $5 million in back payroll tax, thanks very much, but we'll settle for $100,000.' That is usually when we get called in to assist our members. We would have an argument and try to cut it back. In some cases, they were clearly employees and they should have been included for payroll tax. In most other cases they were not. We say that it is inappropriate to tax contractors. They are not employees and they should not be treated as employees for any purpose.

Mr BRENDAN O'CONNOR—Should contractors have the right to engage any agent to negotiate on their behalf with their principal?

Mr Simpson—Yes.

Mr BRENDAN O'CONNOR—Does that include the CFMEU?

Mr Simpson—Yes. I take it that has something to do with the suggestion which arose out of Dawson committee. There has been a lot of misunderstanding about that. It has never been HIA's position that contractors were not entitled to be represented by the CFMEU if they so chose. Our position is that the CFMEU should not be entitled to lodge its own negotiating notice and then go around canvassing contractors, asking them to get aboard a union campaign. If a number of contractors band together and say, 'We want to be represented by the CFMEU,' then we would have no objection to it.

Mr BAKER—In your submission you state:

More recently, contractors have become the target for restrictive State legislation which has created commercial uncertainty and competitive handicaps for contractors. In many instances, the undeclared aim is to appease union demands for curbing what they see as undesirable competition for their members from contractors.

Could you expand on that, apart from payroll tax?

Mr Simpson—The best example is probably in Queensland. The AWU sought to have people who were working in the pastoral industry declared employees. The case was Australian Workers Union, Queensland v Hammonds—a case in which HIA intervened and I appeared. It used section 275 of the Queensland Industrial Relations Act. That act allows contractors to be deemed to be employees. Eventually that case failed for a variety of reasons. The president of the commission criticised the legislation. Even though it has not worked very well in Queensland, it has been suggested that the same sorts of provisions should be used in other states. The South Australian Fair Work Bill had similar provisions in it, and it has been suggested for Tasmania. Perhaps we are being a little overly sensitive, but there seems to be some sort of competition between the states as to seeing who can have the most 'progressive' legislation in relation to contractors by deeming them to be employees. We recently had a situation in the ACT, where the ACT Fair Work Contracts Bill proposed to try to set contract rates on the basis of equating them with award rates.

All of these are legal challenges to contracting, whereby parliament is saying, 'We are going to take you out of what you choose to be, a contractor, and force you to work as an employee.' We think that is extremely undesirable, and it does not work very well. To take the analogy of the rooster and duck a bit further, parliament indeed can require everybody to say that a rooster is a duck, but it still cannot make it swim. It just does not work. We are strongly opposed to these. We have opposed them right across Australia. But, Hydra like, heads keep popping up everywhere, and part of my job is to run around the country, trying to explain why it is not such a good idea.

Mr BAKER—Would it be fair to say that you get quite confused, whether you are in Queensland, New South Wales, Tasmania, Victoria, Western Australian or South Australia, about which legislation you are supposed to abide by?

Mr Simpson—It certainly makes it very hard when you are an organisation like ours advising contractors in every state as to what their legal position is. We have a call centre in Brisbane, and training our call centre operators is quite difficult. They cannot give legal advice, but they can give some help to our members. They have to know where you are and what your purpose is. We tell our members: 'Because you're in Tasmania and it's under the Workers Compensation Act, you're an employee for that, but you're not an employee for this. If you want to send somebody to do a job in Melbourne, you'll need to get work cover there because you would be an employee for this.' It becomes extremely complex. Even if there was some injustice involved, it would be far better to have certainty with just a little injustice, rather than what we have at the moment, which is a great deal of uncertainty. To our minds, there is an equal amount of injustice because people genuinely do not know what their rights are and they are getting into an awful lot of trouble.

CHAIR—Thank you very much for your submission and your evidence.

[12.43 pm]

CALVER, Mr Richard Maurice, National Director, Industrial Relations and Legal Counsel, Master Builders Australia Inc.

HARNISCH, Mr Wilhelm, Chief Executive Officer, Master Builders Australia Inc.

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 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 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. We will start off with your introductory comments or you may wish speak to your submission, and then we will move to questions and answers.

Mr Harnisch—Thank you for the opportunity to address the committee today. Just for the record, Master Builders Australia has a longstanding commitment to the protection of the rights of employers to fully engage independent contractors and therefore we strenuously oppose any attempts to further regulate and restrict access to contracting and labour hire arrangements. In that regard, we welcome the government's 2004 election platform whereby it committed to the introduction of an independent contractors bill. We believe that will provide greater certainty for the current situation.

We not only have provided a submission to this committee but also are in the course of finalising our submission to the government on its discussion paper entitled *Proposals for legislative reforms in independent contracting and labour hire arrangements*. We will lodge that submission with the government on 11 May, in two days time. If it assists the committee, we will make this submission available to you.

CHAIR—Thank you.

Mr Harnisch—In terms of our submission regarding this inquiry, our submission outlines the importance of independent contracting to the building and construction industry and the important legal status of independent contractors; the vital role labour hire arrangements play and the necessary but limited reform to this subject area are also discussed in our submission. We note in paragraphs 7.4 and 7.5 of our submission that we support the development of a code of conduct and practice for labour hire firms, albeit in a limited form. We mention that the code should be developed by the Commonwealth following input from labour hire companies and other key stakeholders. It may well be that, following input on the discussion paper I previously referred to, the code could be further developed.

Our submission to this inquiry also outlines the need for the government's proposed independent contractors bill to be underpinned by, amongst other things, a statutory definition of a contractor based upon the common law test. We outline two other underpinnings of the legislation from our perspective. They are at paragraph 9.3 on page 18 of our submission.

In short, Master Builders Australia believes that the workplace relations system should not seek to regulate contracting and that the proposed Commonwealth legislation should operate to overturn those rules which restrict the use of independent contracts in order to facilitate greater efficiency in the economy, particularly for the building industry.

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

Mr Calver—No. We are here to answer questions. We want to say that the submission is quite lengthy—nearly 20 pages—and it contains most of our policies in this area.

CHAIR—I thank you for your submission. It is quite comprehensive. Let me start where you left off—9.3, the Master Builders' view about the legislation and this drafting. It says that the ordinary common law test as established in Stevens v Brodribb Sawmilling should be stipulated.

Mr Calver—Yes.

CHAIR—How does that differ from any other case or common law test?

Mr Calver—It is the case where the judgment of Justice Mason established the boundaries of the common law test. It is the basis from which most other famous cases in this area have proceeded. They have adopted Justice Mason's test in that case.

CHAIR—It is the control test, is it?

Mr Calver—The control test, with all of the adjuncts to it. There are a number of factors that can be set out. The major difference between what Justice Mason put in and what is now the correct legal manifestation of the common law test is that, at the time that Stevens v Brodribb was decided, there was not a self-assessment system for taxation. The extent to which, in the Vabu case—the bicycle couriers case—the self-assessment of the bicycle contractors was taken into account can be argued to be the wrong weight. In other words, they put too much weight on the notion that they were independent contractors for tax reasons, because it was self-assessment. That is one of the reasons that links with some of the other questions you have been asking. One of the other reasons is that we do not believe that, in itself, the personal services business determination test is adequate. We like Stevens and Brodribb. Having regard to the fact that the tax system has moved to self-assessment, the weighting given to Justice Mason in the common law test should be ameliorated, and that is one of the reasons that we do not believe that the personal services business test on its own is sufficient.

CHAIR—Thank you for that. I was going to ask you to make a comment about the HIA's evidence today, which you listened to. In essence, you are in the same industry. You might have different members that you are covering, but you are in the same industry. They seem to be pretty firm about the tax department's ruling being a standard by which to go by.

Mr Harnish—I will start with that one. Like the HIA, we are very much concerned that there is certainty, that there is national consistency in terms of interpretation or giving guidance to subcontractors as to their status, and the attraction of the APSI legislation is that it does that. It is easily understood. There are four simple tests as to whether you fall within the subcontractor status test in terms of tax law. So in that sense we are not different from the HIA in terms of that

safe haven that it provides. Having said that, we also recognise that the common law test should not therefore simply be swept away at the same time, because it does have a role to play in other areas and it does provide certainty if we are to go that way, using Stevens v Brodribb as a benchmark. Our position is clearly that we need certainty. In that sense APSI does provide a strong prima facie case that subcontractors are therefore subcontractors.

Mr Calver—We recognise that on page 18 of our submission in the second dot point at paragraph 9.3 where we say that you take the common law test and then, if there are other external indicators of the status, that reinforces the common law test. One of them is the personal service business determination being in effect. If you use it as an adjunct, it actually strengthens the common law and everybody wins, rather than coming down on one side or the other. I think the HIA have adopted our position, from what they said today.

CHAIR—They said that in their opening comments but as they were getting more and more into the explanation, I became less clear about their position.

Mr Calver—We are absolutely clear. I think there is a little tension in the HIA's position, but we are absolutely clear: we want a negative licensing system with a register. We have not put this in our submission, but subsequently we say that the tax system has a lot of indicators that could be used for a negative licensing system.

CHAIR—Can you explain negative licensing?

Mr Calver—Yes. You do not need a vast bureaucracy, to start with. What you have are criteria by which you can become registered. Then the registrar does not, in every instance, need to look at the substance, because you go to a party who provides the certificate and a statutory declaration. So, in other words, you do not need to create a bureaucracy who scrutinise every last contract, which would just be enormous and not workable. So you start from the basis that you do not have a positive licence issued by a public servant; you have a system where you meet certain criteria and the registrar must issue a certificate. Then you back it up with some things that you can take out of the tax system that are really effective. That is the small but potent audit regime. One of the strengths of our tax system is that it has that audit regime. One of its inefficiencies is its complexity. But the audit regime that backs up self-assessment has a certain potency. So if you want to give the registrar power, you do that by giving them an audit system and people who make false statutory declarations are punished.

CHAIR—I just want to explore this. A couple of witnesses have spoken about the registration process and the authority to do it—not too many, though. You are a bit hesitant about going to some sort of national registrar because of the bureaucracy that might be created. Could it not be done by the Office of the Employment Advocate or perhaps an industry association like yours?

Mr Calver—That is a very good comment. Obviously both of those organisations would have a role to play. We would suggest that the registrar would have a central database that you could access by computer. It could be the Office of the Employment Advocate; it could be any bureaucracy. But Master Builders or a lawyer—people with suitable qualifications—would need to provide the certificate which was lodged with the registrar. People like HIA, us and law firms would be providing certificates for statutory declarations for the registrar to truncate the bureaucratic process, which is a cost to government. Our people would welcome that. They want

certainty and they would be prepared to pay that private sector cost for that certainty. What is told to us most in this whole area is that it is too complicated; it is hard for lawyers to understand, let alone businesspeople. We are told, 'Give us certainty.' We think that system will give them certainty.

CHAIR—That is the consistent message from everybody so far, so there is agreement on that point at least.

Mr Harnisch—Just for the record can I say that the decision in supporting the registrar needs to be done in the context that we apply a number of tests. One is to reduce regulatory burden, because the less regulation that individual contractors have to deal with the better. Another test is that we need certainty, and we are also looking for national consistency. They are some of the key tests. In considering the proposal for a registrar, on balance, while we recognise that it may impose and increase a regulatory burden, it provides certainty and national consistency. More importantly, we believe it provides a safe haven. Therefore, while it may impose that burden, given that it does provide safe haven and given the complexity of the state laws and other workplace relations laws, we believe that this is a far better proposition.

CHAIR—I do not want to labour the point, but I know that the union movement is pretty well of that view as well. But ACCI is not. You are taking a different position from ACCI. It seems to be saying a lot more that there is no need for regulation and there is no need for intervention.

Mr Calver—Sure, we spoke with them.

Mr Harnisch—We are looking at the problem from the building industry, where it is very problematic.

CHAIR—They say that the contract arrangement should remain.

Mr Calver—It is industry specific, as Mr Harnisch says. We spoke to ACCI about this. We believe that their position would be that the building and construction industry, more than any other industry, needs a registry of this kind. Even if it is not arguable in respect of broader industry, it certainly is arguable in respect of our industry.

CHAIR—One of the things that you are arguing for, which HIA also mentioned, is that the response from the government to this whole issue of independent contracting and labour hire might have to be industry specific rather than one size fits all—which makes it very hard for us, of course.

Mr Calver—There are two things we say about that. Firstly, we do not want to be left behind in any reforms—general workplace relations reforms or whatever. If it is going to be industry specific then it needs to take into account that it should be able to move at the same pace as other government reforms. In workplace relations that is particularly the case. Secondly, yes, we would rather have certainty in the building and construction industry, with a register, than not have it and have reforms where that register is not a prima facie indicator of that status. It will not be like Mr Simpson says. In 99.9 per cent of cases people will rely on the register and in that 0.1 per cent it might go to a court. If the statute says that the issue of the certificate by the registrar is a prima facie indication then it will be very rare that the courts will look behind that.

Mr BRENDAN O'CONNOR—Thank you very much for your submission. I want to discuss some parts of your submission, if I could. In paragraph 3.5 you say:

… the growth of the subcontracting system is overwhelmingly a function of market forces rather than a device to avoid the payment of worker entitlements …

Clearly there have been a number of assertions made by other witnesses, and particularly the CFMEU, about efforts to not necessarily evade but on some occasions shift responsibilities from the employer to employees by rearranging the relationship—converting it, effectively, from principal to contractor. It does not have to be a conspiracy, but isn't it possible that if there is a legal capacity to create a different type of relationship, and it is done so lawfully, it would be done so as to reduce costs and, therefore, reduce the obligations under, for example, federal awards?

Mr Harnisch—I will answer that as an economist and Richard will put forward the IR interpretation. Without going into great theory, the subcontracting system introduces efficiencies and, therefore, there are reductions in costs. But the greater efficiencies really come in the way the work is organised in response to the project based nature of the building industry, which is very much house by house and high-rise by high-rise and subcomponents of that. Therefore, the subcontracting system, given that the work is very project specific and very highly cyclical in nature—you might have a lot of work this week but next month absolutely nothing—overcomes the problem of having full-time employees. The way labour is then able to move around and be mobile is very economically efficient and, therefore, with that goes costs. That is a legitimate way of operating rather than any shifting of statutory obligations in terms of other insurances and the like.

Mr Calver—The notion of the manipulation of the relationship is one that you were focusing on. If there is clearly a sham arrangement then that should be punishable. If it is not a sham arrangement then that should be a commercial decision that has been freely reached. If it is a commercial decision that has been freely reached then the union's criticism does not inure. We find that what the union is looking at—that is, some sort of oppression of contractors—just does not operate. We have a skills shortage in the building and construction industry, and people see the opportunity of using those skills for their own advantage rather than for an employer. Part of the reason to move to subcontracting is that if I can engender greater wealth for myself being a contractor, because I can use my skills at a greater level of efficiency—that is, being paid for tasks—then I am going to do that.

That is one of the issues causing a great deal of tension in the traditional model of workplace relations in Australia. Increasingly, people with those skills want to capture for themselves the wealth that those skills generate. The new trend in America is where the new millionaires are plumbers and electricians. Tradespeople are engendering a lot of wealth, particularly in that economy, because their skills are becoming increasingly rare. In the context of a market where there are skills shortages now and predicted shortages for the future, that notion of oppression is much more difficult to encapsulate as a reality because it is not.

Mr BRENDAN O'CONNOR—I accept, and the committee accepts, that under the heading of 'contractor' there are all sorts of people, and some of them seem to be more capable of undertaking all of the functions of a contractor that need to be discharged under law. But there

has been evidence put to us and assertions made about the fact that there are sham arrangements. These are not specific to the building industry; those assertions have been made generally. Clearly, one of the views of the committee would be to try to prevent sham arrangements. We had evidence put to us of situations where apprentices in your industry were required to get ABNs. Whether that is an isolated case and whether it is a fully substantiated assertion are things for the committee to consider. But you are making the point that there are contractors who have the wherewithal to form a relationship with a principal. Is your organisation concerned about sham arrangements occurring, and what role would you play in stamping those out?

Mr Harnisch—That is easy to answer. We have said this on the record before and we will put it on the record again. We do not support sham arrangements; we are working with the government and the tax office to deal with them. I sit on a number of major key committees with the tax office to deal with them. Having said that, the issue is: where do you place the boundaries of what is a legitimate contracting arrangement and, therefore, what is a sham? We are also on the record as agreeing that 99.9 per cent of the time apprentices have to be dealt with as employees. Where there is a black-and-white case of a sham arrangement, we do not support it—but, obviously, as you move towards that murky grey area the difficulty will always be: at what point does it become a sham instead of being in the murky area of what an employee or contractor is?

Mr Calver—That is why we support the register.

CHAIR—What sanctions would you apply on sham arrangements to stop them? One of our references is to promote legitimate arrangements. We are trying to work out how to promote legitimate arrangements and how to punish the sham arrangements. Exposing them is one thing—is that enough?

Mr Calver—There are two things we need to say about that. The first is that the register is obviously part of the answer. If I have to get a statutory declaration—sworn by an independent third party, like a lawyer, and saying that my arrangements are legitimate—before I can get a licence that is issued by the particular authority, then I am going to be very careful because the punishment for false statutory declarations is very high. If a lawyer makes a false declaration, or has anything to do with it, they can lose their livelihood. So that is one issue where the negative licensing system that we are talking about not only does not put a big burden on the public purse but actually increases the compliance that Mr O'Connor has referred to.

The second issue is that in the government's discussion paper they are contemplating an offence regime for this. We will reserve judgment on that until we actually see the nature of the offence and how the regime is structured, so it does not go into the grey area that Mr Harnisch has put on the table. We are saying: 'We deplore dishonesty and sham arrangements. Show us what the offence will look like and we will give you our comments.' Those are the two areas in which we believe that this particular problem can be solved.

Mr Harnisch—There are lots of compliance regimes. The tax office has a range of penalties that depend on the severity of the offence and whether it is, if I can put it this way, an 'honest mistake'. A subcontractor then rearranges his affairs either to make sure he is a legitimate contractor or to return to being an employee, where he is at the margin.

Mr Calver—Absolutely. If it is a real sham, the current system already has some built-in punishments. For example, if it is found that the contractor was truly a worker then you face the financial regime associated with back payment of wages and possible prosecution under a number of state statutes.

CHAIR—There is a range of models there.

Mr Calver—Yes, there is already a range of punishments there, and I think what we would suggest to the committee is, rather than build up the sanctions end, build up the system so that it is more difficult for people to enter into those arrangements.

Mr BRENDAN O'CONNOR—Perhaps I should ask: what would be the best way to delineate employee and contractor? One of the problems that certainly I, as a committee member, have with some of the evidence I have heard to date is the potential cost, time and money involved in a person trying to establish whether he or she is an independent contractor or an employee. Under the judicial system, under common law, it would be very expensive and very difficult indeed. One of the reasons we have a growing area of administrative law is to make it easier for people to determine matters. Wouldn't that be a better approach than having to rely on common law in relation to independent contracting?

Mr Harnisch—As a general proposition I would agree, obviously, to keep it simple. But the reality out in the marketplace is that we have got state governments who have different interpretations and definitions of 'contractor' and 'employee'. Therefore, to get some greater certainty is desirable—but recognising, as I did in my opening comments, that that comes with an increased regulatory burden. That needs to be kept in context as well. On the legal side, as to how you might keep it quite simple, perhaps Richard is better placed to reply.

Mr Calver—That is why we have got our three-stage process. You go to an external party that assesses you against the common-law test, which has been statutorily codified. So the Mason criteria ameliorated for the tax effect are in the statute. You then have a look at other external indicators of the status of contractors, including the personal service business determination. As Mr Simpson said, that is a likely indicator because they have already gone through a test. Then you have an accompanying statutory declaration that says, 'These documents that I've seen indicate that for this time period or this project that person is an independent contractor.' You might have somebody working on a building site as a contractor for 3½ weeks, and then they get a job in Western Australia as an employee. They want to go to Western Australia, and the employer is prepared to pay their airfare, so they take that job. After that 3½ weeks they will be back to being an employee. That happens all the time in the building and construction industry, especially where the projects are short.

Looking from the outside in it is not that simple. But, essentially, as I said before, 99.9 per cent of the time it would be simple. You would go to the Master Builders Association, you would go to the HIA or you would go to your lawyer and say, 'I need the certificate to show I'm an independent contractor.' Then you go through those tests which are codified, get a statutory declaration and lodge it with the registrar. The registrar says, 'On the basis of these documents, for X period or for X project that person is a contractor.' It is simple. While you are swimming in the water and you are the fish, it is very simple for you—it does not matter how complex is the tank in which you are swimming. That is a terrible metaphor, really!

Mr BAKER—You are putting forward the registrar to complete the registration. Why wouldn't you be very keen for the MBA et cetera to actually take control of that, as the Financial Planning Association does for their constituents, as does CPA Australia for accountants et cetera? You talk about reducing bureaucracy. Wouldn't it make sense that your organisation would want to have control and have a hands-on approach?

Mr Calver—The reason we chose an independent registrar was to give it the imprimatur of government and to make that certificate superior, in the lexicon of legal documents. It is much more likely that the government would have a statute where a prima facie certificate by a registrar in a statutory office would be able to be recognised in a court rather than a certificate issued by a private sector organisation. Prima facie we would have no problem taking over a function like that or issuing the statutory declarations, but as an actor in the process it would be much better if there were an independent authority backed up by a strong audit team.

Mr BAKER—I understand what you are saying. But, if it were not done properly from your organisational point of view, you would defeat your own purpose anyway.

Mr Calver—That is true. That model may well be one which our board will accept. We were mostly focusing on a solution to the problem that Mr Simpson put on the table when we suggested an independent third-party registrar, rather than thinking of our own self-interest. That is the other issue: if you come to a government committee and say, 'Look, Master Builders do it,' we did not want to be tarred with that brush. This system would work and maybe the system you are proposing would work.

Mr Harnisch—It is certainly an option we have discounted.

Mr BAKER—One of the major problems about the private sector is that there is a bureaucratic empire here, a bureaucratic empire there and no-one is—

Mr Harnisch—But the registrar wants there to be a registration to the effect that a subcontractor has gone through the process of being classified as a genuine contractor.

Mr BAKER—You could still have the independent process.

Mr Calver—Yes. It is an option we would be happy to talk about.

Mr Harnisch—It is canvassed in our submission.

Mr BAKER—The Deputy Chair touched on the incidence of apprentices being required to gain ABNs and subcontracting as put forward by the CFME. Have you knowledge of these practices?

Mr Harnisch—Yes, we have been made aware of them.

Mr BAKER—At what rate?

Mr Harnisch—Third-hand, in the sense that I was made aware of them through my membership of several ATO committees.

Mr BAKER—A number?

Mr Harnisch—Yes. I sit on about three ATO committees.

Mr BAKER—No—the number of apprentices.

Mr Harnisch—Apprentices, yes, but there have been—

Mr BAKER—How prevalent?

Mr Harnisch—It is not prevalent but I have been made aware third-hand of cases of that occurring.

CHAIR—Is there a particular state jurisdiction where they have them also?

Mr Harnisch—I could not comment but it was an occurrence that would appear generally throughout Australia but perhaps would be more prevalent on the east coast.

Mr BAKER—You have stated that labour hire arrangements do not contribute greatly to skills development as you are putting on apprentices. We know there is a skills shortage. What alternative or proposition can you put forward to encourage these arrangements for apprentices?

Mr Harnisch—Obviously there are a number of measures; there is no one single measure. To clarify, a labour hire firm's role is not to train but basically to maximise the availability of labour in a tight market. There are a few things: obviously builders have to take on more apprentices—there is the Group Apprenticeship Scheme; TAFEs need to free up their delivery systems; the unions, in our case the CFMEU, needs to be far more flexible in allowing young people to enter our industry; and schools have to play a role in better promoting the career prospects of trades, particularly in the building industry. Teachers have been notorious in not understanding that. They keep pushing young children into universities. There is probably a raft of other reforms that need to take place, particularly the ones the government are pursuing and that we are backing. The issue of skills shortage is not singular in its problem and therefore not singular in its solution.

Mr Calver—We say in paragraph 5.9 of our submission that labour hire is an area that needs a great deal more study. The Productivity Commission work that was recently published and that is referred to in our submission is a really good start. It identifies some trends over time which we have not had in the past. What is the role of labour hire in our economy and how can it intermesh better with the training system? We suggest that the Commonwealth should devote resources to that study because it is only the Productivity Commission or a government department that can look at that over time, and some of the studies that have been done in the area of labour hire have been deficient. To answer your question properly we need a great deal more research.

CHAIR—That is an important question that has been asked, because we have had members of the union movement basically saying that one of the reasons for the skilled labour shortage is the growth in independent contracting and labour hire companies. They are putting that up as an

argument as to why there should perhaps be greater control and perhaps a slowing down of the rate of growth of this particular employment sector.

Mr Calver—We say in paragraph 5.7 of our submission that the two can complement rather than substitute for each other. That is the Productivity Commission's research.

Mr Harnisch—I think that that comment simply ignores the current institutional failures of the delivery systems in place, which we believe are in urgent need of reform, particularly in terms of industrial relations for our industry. We have provisions that, for instance, make it very difficult for young people to enter our industry from the school system and for mature age people to enter our industry and, perversely, in this enlightened day, prevents women entering our industry at least on a part-time basis.

Mr Calver—Skills shortage is a multifaceted problem. We outline in our submission four or five areas on which we are concentrating. There is no simple answer, but, just looking at the industrial relations system that we have, where traditional four-year apprenticeships are ingrained, having ways in which you can get different pathways and shorter periods for recognition of skills that might contribute to an ultimate qualification and how those are recognised better in our industry would in itself engender more people coming in. The other thing is that people forget that separating cyclical from structural skills shortages at this time is very difficult, because we have a record number of people employed in our industry—810,000, 8.6 per cent of the labour force. At the moment buildings are still getting built—

Mr Harnisch—But at high costs.

Mr Calver—and separating out those systemic issues from the cyclical issues is one of the very important characteristics. The ageing of the population is going to really show that it is a systemic problem, because in the next five years we are going to lose 80,000 people and they have to be replaced.

CHAIR—Gentlemen, thank you very much for your submission and your evidence here today; I appreciate your time. If there is any other information you want to share with us, please do so. We look forward to getting a copy of the submission that you are presenting to the minister.

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

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

Committee adjourned at 1.23 pm