Submission

to

House of Representatives Standing Committee on
Employment, Workplace Relations and Workforce Participation

Inquiry into Independent contractors and labour hire arrangements

Submitter: Peter Anderson
Director – Workplace Policy

Scott Barklamb
Manager – Workplace Relations

Organisation: **Australian Chamber of Commerce and Industry (ACCI)**

Address: Level 4, 55 Exhibition Street, Melbourne

Phone: (03) 9668 9950

Fax: (03) 9668 9958

Email: peter.anderson@melb.acci.asn.au

scott.barklamb@melb.acci.asn.au

ACCI

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House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation

INQUIRY INTO INDEPENDENT CONTRACTORS AND LABOUR HIRE ARRANGEMENTS

March 2005

ACCI

- The Australian Chamber of Commerce and Industry (ACCI) is Australia's peak council of business associations.

- ACCI is Australia's largest and most representative business organisation.

  - Through our membership, ACCI represents over 350,000 businesses nationwide, including:

    - Australia's top 100 companies.

    - Over 55,000 medium sized enterprises employing 20 to 100 people.

    - Over 280,000 smaller enterprises employing less than 20 people.

- Businesses within the ACCI member network employ over 4 million working Australians.

- ACCI members are employer organisations in all States and Territories and all major sectors of Australian industry.

- Membership of ACCI comprises State and Territory Chambers of Commerce and national employer and industry associations. Each ACCI member is a representative body for small employers and sole traders, as well as medium and larger businesses.

- Each ACCI member organisation, through its network of businesses, identifies the policy, operational and regulatory concerns and priorities of its members and plans united action. Through this process, business policies are developed and strategies for change are implemented.

- ACCI members actively participate in developing national policy on a collective and individual basis.

- As individual business organisations in their own right, ACCI members also independently develop business policy within their own sector or jurisdiction.

ACCI and Contracts for Services

- ACCI represents Australian business in all major facets and operations. This is not restricted to addressing only employment regulation, but includes representing:

  - Businesses in their capacities as employers (when they enter contracts <u>of</u> service with individuals as employees).

- Businesses operating as commercial entities wanting to enter commercial contracts for services with other commercial entities[1] to deliver particular tasks and functions (i.e. when businesses enter contracts for services with other businesses as principals).

- Businesses of all sizes operating as commercial entities wanting to take up commercial contracts offered by other businesses (principals) to deliver key tasks and functions (i.e. when businesses enter contracts for services with other businesses (principals) as contractors). This includes, but is not restricted to, representing subcontractors.

- Businesses seeking to use the services of labour hire agencies.

- Labour hire agencies seeking to offer workers (be they contractors or employees) on commercial terms to companies on a short term, contract or project basis as required.

- ACCI therefore represents businesses in all facets of consideration in this inquiry.

ACCI Member Submissions

- A list of ACCI member organisations appears on the final page of this submission.

- Through both state/territory based and industry based membership, ACCI represents some of the major industry users of contractors. This includes the construction, housing, manufacturing and mining industries.

- However, there are also less well understood areas in which contractors make a substantial contribution. This includes for example the important role contractors play in the entertainment industry, and the role consulting contractors play in all industries (e.g. IT, accounting etc).

- Various ACCI member organisations will make their own separate submissions to this inquiry, including in particular from the construction and housing industries.

- We commend the detail of these submissions to the Committee. The submissions of ACCI member organisations should be considered in conjunction with this submission.

[1] Be they operated as individuals, or as complex organisations and employment structures.

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ABBREVIATIONS

ACCC	Australian Competition and Consumer Commission
AIRC	Australian Industrial Relations Commission
CIETT	International Confederation of Temporary Work Businesses (*original in French*)
ICA	Independent Contractors Australia
ICAct	Independent Contractors Act
ILO	International Labour Organisation
PC	Productivity Commission
RCSA	Recruitment and Consulting Services Association

EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

Key Principles

1. A number of key principles should guide the recommendations of this Committee and the development of policy and legislation in this area in the immediate term. These include:

   a. A recognition that the underlying principle of freedom of contract is the basic pillar on which our system of commerce and industry operates;

   b. That persons genuinely and freely entering into contracts for the provision of their personal services as contractors should, provided those contracts are lawful, not have them varied, redefined, reshaped, annulled, downgraded or otherwise interfered with by persons or bodies (including governments, regulators, tribunals or courts) who are not parties to those contracts;

   c. That the common law provides a proper and sufficient basis on which the law should give legal recognition to a contract for services and a proper basis for setting out the necessary elements of a contract for services;

   d. That contracts of employment where employees are labelled as contractors, but where in fact and law they are really employees, are sham contractor arrangements and do not have legal recognition as contracts for services at common law;

   e. That arrangements which are non consensual or which are tainted by coercion or undue influence are not enforceable and do not have legal recognition as contracts for services at common law;

   f. That genuine and consensual contracts for services under which work is performed as principal and contractor are in and of themselves a legitimate, welcome and beneficial form of commercial arrangement that adds value to the Australian economy, and in particular is no less welcome than contracts of employment;

   g. That genuine and consensual contacts for services are not inherently exploitative, unfair or otherwise requiring the attention of consideration of governments, parliaments or regulators;

h. That contracts for services provide a flexibility, efficiency and productivity that is of real value to the parties and the economy and society as a whole;

i. That the values of entrepreneurship, risk taking, investment and choice which underpin contracts for services are values that should be welcomed, encouraged and highly regarded by policy makers.

j. Governments should not be in the business of deciding what working arrangements suit a business or individuals. Regulating independent or dependent contractors as employees is a regulation of entrepreneurship, and not something that even the International Labour Organisation has recommended.

Summary of Key Recommendations

2. Laws regulating contractors, particularly laws which deem contractors to be employees or which provide an unfair contracts jurisdiction, are flawed, counterproductive and should be repealed.

3. An appropriate and natural level of regulation of contract labour is generally delivered through the operation of common law tests in this area. In some limited cases a statutory provision can provide certainty for specific purposes, provided it does not weaken the status of contractors.

4. That the Commonwealth specifically seek to preserve freedoms to contract through legislation that would specifically override and preclude the operation of state laws that restrict freedom to contract (the extent legally available).

5. That such legislation have the effect of:

- Removing deeming of individual contractors as employees from the Australian system of labour law.

- Precluding the operation of state deeming provisions.

- Ending applications to state authorities under state deeming provisions.

- Reversing any previous declarations deeming contractors or classes of contractors to be employees.

- Preclude industrial tribunals or third parties from imposing criteria or restrictions on the use (or otherwise) of contractors.

6. That the Committee recognise the significant, beneficial and welcome contribution the labour hire industry makes to the Australian economy and labour market.

7. That the Committee conclude that the labour hire industry is overwhelmingly characterised by a commitment to best practice, proper employment outcomes and compliance.

8. That the Committee recognise that arguments against labour hiring are generally informed by prejudice and self interest.

9. That the Committee conclude that no case has been made out for additional or dedicated regulation of labour hiring by parliaments. And that all dedicated or directed regulation of labour hiring at the federal or state level should be reviewed.

10. Where there is no demonstrated public policy justification for regulation of contractors it should be overridden and quashed, and the Committee should recommend it be removed. The Committee should recognise that as a specific goal regulation in this area in addition to the common law should be avoided unless strictly necessary.

11. Recommendations in this area need not be restricted to legislative matters. The Committee should consider non-statutory measures to improve contractual understandings between individuals and principals.

12. The Committee should conclude that there is nothing inherently unsafe, exposing, endangering or discriminatory in labour hire and contract work.

13. That the so-called 'protection' of the industrial relations system or of regulators is overwhelmingly not the desire of contractors. An efficient economy will have a dynamic mix of contractors and employees. In recent years the trend has been that many skilled and productive employees continue to participate in the labour market but as contractors rather than employees.

TERM OF REF 1 – STATUS AND RANGE OF CONTRACTING

T1.1 Introduction

The first term of reference for this inquiry is to inquire and report on:

> *…the status and range of independent contracting and labour hire[2] arrangements*[3]

T1.2 Who is an Independent Contractor?

14. At common law the courts look to find if a person is either:

    a. Working under a contract in which they have the right to control the contract terms and hence control their own actions (that is, an independent contractor); or

    b. Working under a contract in which they do not have the right to control the contract terms and hence do not have control of their own actions (that is, an employee).

15. The finding of employment or independent contracting is not some artificial or mysterious legal creation. The courts use a process in which they apply a series of sub tests (listed below) to each set of circumstances. When a dispute occurs, the people in dispute come before a court and give evidence. The court considers the evidence in the light of each sub test. Normally, some behaviour indicates employment and other behaviour points to independent contracting. A court makes a decision based on the 'total matrix' and the balance of the evidence before them.

The Investigative process

16. Judges apply a clearly established set of sub tests designed to investigate 'right to control.' The courts:

    a. Apply the sub tests to each particular circumstance bought before them.

[2] Labour hire is addressed in relation to Term of Reference 3.

[3] http://www.aph.gov.au/house/committee/ewrwp/independentcontracting/tor.htm. Material produced by Independent Contractors Australia provides an excellent summary of these issues, and is in part referenced by ACCI

b. Make a ruling after hearing evidence from the people involved and examining all the circumstances.

c. Only take notice of written contracts to the extent that what is written is reflected in people's behaviour.

d. Make rulings that are specific to the circumstances brought before them. Such rulings do not predetermine outcomes in any other circumstance. But rulings do provide pointers which enable the community to become educated on how to apply the sub tests themselves.

Importance of a contract

17. Before the employment/independent contracting sub tests can be applied, a court must establish that there is a legal contract. This is a separate test. If there is no contract individuals cannot be an employee or an independent contractor. The elements of a contract at common law include matters such as consent, consideration and the absence of undue influence or duress.

The sub tests: their origins and scope

18. The sub tests:

a. Are not found in legislation, but are the product of generations of evolving law reflecting social behaviour.

b. Can and do change slowly over generations and as society changes.

c. Are mostly discovered by reading legal judgements.

19. The sub tests summarised and explained below have been extracted from well-known and well-studied legal cases

20. Here are most of the sub tests:

a. Intent of the parties

b. Remuneration

c. Degree of control

d. Provision of equipment

e. Obligation to work

f. Hours of work

g. Deduction of tax

h. Holidays and leave entitlement

i. Other Regulation

j. Contractual obligations

k. How the work is performed

l. Risk

m. Rectification

n. Expenses

o. Appointment

p. Dismissal/termination

q. Written documents

r. Integration

21. All the sub tests investigate the core 'right to control' issue and look at this from many different angles. In other words:

a. If someone has the 'right to control' you, you are an employee.

b. If you have the 'right to control' yourself, you are an independent contractor.

22. An important sub test is the 'intent of the parties' because people's intent tends to be reflected in all other sub tests. Not all of the tests are used in all legal judgements.

Productivity Commission Definition[4]

23. The term contractor is used in connection with a number of different working arrangements. For example: persons with a set date of completion are often described as fixed-term contractors; and the managers of commercial construction sites are often described as head or principal contractors, and are responsible for the engagement and supervision of sub-contractors.

[4] Productivity Commission (2001) *Self Employed Contractors in Australia: Incidence and Characteristics* – Staff Research Paper. http://www.pc.gov.au/research/staffres/secia/secia.pdf

24. This inquiry focuses on the group of persons known as independent contractors by Australian courts, as earners of personal services income by the Australian Tax Office and as self-employed contractors by researchers (VandenHeuvel and Wooden 1995a). These terms describe essentially the same group of persons. Who are they?

25. As Creighton and Stewart (2000, p. 3) explain, workers can be further categorised into two groups

> For the purposes of regulation, the paid workforce has traditionally been divided into two classes: those who perform work as the employees of another person or organisation; and those who contract out their services without assuming that dependent status.

26. The latter group are known in Australian courts as independent contractors (Creighton and Stewart 2000, p. 202).2

27. '[A]t the simplest level, an independent contractor can be defined as a person who operates his or her own economic enterprise or engages independently in a profession or trade, and is engaged by a firm or organisation for some predetermined "all-inclusive" fee to provide a defined service for a specified period' (VandenHeuvel and Wooden 1995b, p. 4–5).

28. The distinction between employers, defined as the owners of capital, and independent contractors can sometimes be difficult to make. Many contractors own their own tools and/or equipment, and the charge for their services therefore reflects both the costs of their labour or skills, and the costs of their capital. Furthermore, some contractors funnel their income through a company and in the process split the income, for example with their spouse (see the example of tax paid by a contractor in construction in Buchanan and Allan 2000).

29. The distinction between employees and independent contractors is also not always easily drawn, given the variety of factoral situations which arise.

30. This situation prompted VandenHeuvel and Wooden (1994) to adopt the term self-employed contractors for the group labelled independent contractors by Australian courts, and to use the term independent contractor to describe self-employed contractors whose relationship with their client was comparable to the commercial relationship between two firms.

T1.3 Range and Extent of Independent Contracting

31. Contracting is a complex and dynamic phenomenon, touching on a wide and increasing range of areas of the Australian economy. There is also the difficulty of disentangling commercial contracts which may be relevant to this inquiry from those more generally.

32. Contracts for services are utilised in all Australian industries, across each of the ANZSIC code delineations. Some estimate that about 28% of workers in the private sector in Australia are independent contractors.

33. The modern labour market needs to be flexible and competitive to allow businesses to respond to clients, consumers and competitors. Independent contracting may not be for every job or the preference of every worker. However it meets important economic and social goals. Contracting out, outsourcing, independent contracting and labour hire arrangements are daily features of our economy and labour market.

34. These developments are not all the product of demand by industry. Workers themselves today are generally more skilled, more mobile, more individual, more aspirational and one size does not fit all. Preferences over how, where and when to work differ markedly. One worker might want to maximise earnings whilst another will use flexibility to maximise time off for themselves, for family, for parenting, for personal study or simply for leisure. Individuals can have different views on these matters at different points in their own working life.

35. It is also apparent that some in business have engaged contractors as an alternative to direct employment as a consequence of the perceived and real costs and inflexibilities associated with direct employment.

36. Whatever the reasons for its growth, contracting has helped make our businesses more efficient and competitive. It has also helped achieve high rates of participation in the labour market. It has met and is meeting a social demand as well as an economic necessity.

37. Our emerging challenges, such as population ageing are also assisted by flexible forms of work that enable mature aged workers to more easily transition from work into retirement.

Diversity of Independent Contracting

38. The diversity of self employed independent contracting was neatly illustrated by the Productivity Commission (PC) in its report *Self-Employed Contractors in Australia: Incidence and Characteristics.*

Contractors in Construction

39. Self-employed contracting is common in the construction industry, although considerably more so in housing than commercial construction (Productivity Commission 1999; Underhill 1991; Underhill et al. 2000). A range of characteristics of the industry contribute to the use of contract labour (Underhill 1991).

40. The production process comprises a diverse range of tasks (for example, excavation, scaffolding, concrete laying and painting) that require very different skill sets and occur at different points in the process. In addition, completion of the tasks and quality is often easily monitored. Many workers are only required at one point in a project. Production therefore tends to be carried out by a collection of subcontractors under the supervision of a head contractor or builder (Productivity Commission 1999).

41. Demand for housing and commercial buildings is highly sensitive to the economic cycle. The industry contains many small firms that are vulnerable to fluctuations in activity. In addition, competition among these firms can be very strong. These factors contribute to an uncertain demand environment for many producers and encourage the use of contract labour. Small establishment costs for contractors (often only transport and tools) contribute to the supply of contract labour.

42. Fluctuations in employment mean workers enter from other industries during periods of high labour demand. They are 'less committed to employment security, unionism and the maintenance of industry standards than core workers. They are more susceptible to offers of contract work' (Underhill 1991, p. 121). High turnover associated with the cessation of subcontractors' contracts at the completion of a project means that 'building workers tend to place a higher value on short-term remuneration' and therefore opt for contract employment (Underhill, 1991, p. 122)

43. Self-employed contracting in this industry takes several forms. Some individuals 'contract their labour with tools of the trade to builders and building subcontractors' (Underhill 1991, p. 116). Other contractors are supplied by manufacturers with materials like doors and tiles. A less common arrangement involves workers who also supply plant and equipment.

44. The supply of contractors is sometimes brokered through labour hire companies (Productivity Commission 1999). See box 2.1 or Underhill and

Kelly (1993) for more detail on this practice and some of the debate and legal action which it has occasioned.

Contractors in information technology

45. Many Australian organisations hire contractors to provide information technology and computer services including help desk services, hardware installation and system design and maintenance.

46. In some instances, specialist computing skills are only required for short periods and the hiring of permanent employees is therefore not justified by the workload (Probert and Wajcman 1991). The specialised nature of some skills, and the difficulty of hiring employees with those skills because of labour shortages, means that firms can sometimes only acquire needed skills from contractors. Probert and Wajcman (1991, p. 173) argue that, in some instances, contracts structured so that contractors are paid for output completed on time to a specific budget elicit greater productivity than might be obtained from employees. They also cite the circumvention of budgetary constraints on the hiring of employees as an explanation for the employment of contractors. And Probert and Wajcman (1991, p. 188) argue that privatisation has contributed to the use of contractors in the public sector.

47. A skill shortage in computing, and common systems across industries, contribute to high wages and ease of worker mobility. These factors can make contracting attractive to workers. Probert and Wajcman (1991, p. 176) cite evidence from a small survey of computing contractors that showed they also valued the capacity to control their hours of work, choose who they worked for, set their own priorities and their independence. Probert and Wajcman (1991, p. 177) also suggested that contracting represented a means for some computer specialists to gain higher pay without the managerial responsibility that tended to accompany higher paying jobs in large organisations.

Transport industry contractors: owner–drivers and couriers

48. The Australian road transport industry has a long history of contractor involvement. The most common form of self-employed contractors are owner–drivers and couriers. These are self-employed workers who use their own vehicle to deliver goods (Bray 1991).

49. The road transport industry is a highly fragmented industry due to the different distances covered (interstate, local and intrastate), types of goods moved (either general or specialist) and the needs of different transport

operators (in particular the large freight forwarders, fleet operators and owner–drivers).

50. Freight-forwarders are contracted directly by clients to provide the transport of goods at an 'all-in' price. These operators then sub-contract owner–drivers to obtain the transport services at the lowest cost.

51. The transport industry is characterised by strong price competition. This competition stems from the nature of the industry (low barriers to entry, including homogenous and inexpensive technology).

52. Firms utilise transport contractors for a number of reasons. These can be summarised as cost, risk and flexibility. Owner–drivers, as opposed to employee–drivers offer considerable cost savings as the owner–driver is only used when required for a specific task. Additionally, the cost of maintenance and purchase of capital is shifted to the contractor.

53. Owner–drivers are characterised by varying degrees of dependence on their clients. Some owner–drivers are required to follow complex rules of conduct, paint their vehicles in the client's company livery, work only set periods of time for their client and refuse to work for other companies. Others operate on an irregular basis for multiple clients with no set working arrangement for any individual client.

Manufacturing industry contractors: the case of outworkers

54. A variety of contracting arrangements exist within the metals and manufacturing industry. These range from business to business contractors supplying finished parts or components for the production process, to contractors who supply services not directly related to the production process (for example, cleaners, maintenance and distribution), to individual self-employed contractors forming an integrated part of a firm's production (Buchanan forthcoming).

55. The latter category includes contractors who are often described as outworkers (Ellem 1991). These contractors are paid according to the output produced and complete part (and sometimes most) of the production of a good (usually at home and using their own tools or specialist equipment), then return the item to the client for integration into the finished product.

56. Manufacturers use of this form of contracting may have increased since the 1970s, especially in the clothing industry (Buchanan 2001; Ellem 1991). Reasons attributed to this growth have been increasing competitive

pressures on firms to reduce costs (due to cuts in protective tariffs); increases in the labour costs of continuing employees; the need for small product runs (for specialist markets); and a belief that contract labour is better quality than core factory labour (Ellem 1991).

57. Furthermore, there is a belief that outworkers enable firms to achieve greater flexibility of production by restricting the hiring of employees to core activities, and hiring contractors, as needed, for other tasks (Bensen 1991).

Emerging Industries, Technologies and Skills Shortages

58. In considering the range of contracting, it is also relevant to note the contribution contracting is playing to the emergence of new technologies and new industries. Contracting has provided a smooth mechanism for the incorporation of various new technologies and skills into Australian industry. It provides access to such technologies and skills without businesses needing to invest in it directly or for a short term.

59. There is also the issue of skills shortages. Contracting, and labour hiring, offer scope to ensure scarce skills are shared more widely across Australian industries and are not tied up to single employers.

An Ageing and Increasingly Diverse Workforce

60. It is also important to recognise the contribution contracting is making to meeting the needs of a changing Australian workforce.

61. As our workforce ages, businesses are experiencing increasing demands from individuals to work as and when suits them. Leveraging high levels of skills and experience into self employment can provide additional options to remain in the workforce whilst also bridging life style and financial concerns into retirement.

62. This is not just restricted to the higher end of the age distribution. A number of younger and median age employees are leveraging in-demand skills not into employment, but into their choice to work for themselves as contractors. This is the choice of an increasing segment of our knowledge workforce in particular, and offers scope for period of non-work in which the contractor chooses to not seek to enter contracts for services. This in turn can allow for ongoing training, overseas travel, or even periods of paid work alternating with work as a contractor.

63. Perhaps more pressing that a desire to travel is the experience of a growing proportion of employees seeking to juggle working and family

lives. The hours flexibility which contracting and self employment can provide can assist some persons in balancing their working and their family commitments. Contracts may for example allow someone to not work school holidays if that is their wish. Contracting also allows personal study and career development options to be more flexibly pursued.

T1.4 Why Some Interests Frown Upon Contractors and Contracting

64. The key to understanding why contracting is criticised, and much of the discourse in this area is to understand why some interests in this area do not like independent contracting and view it as somehow illegitimate and undesirable.

65. Unions: Many unions are highly opposed to contracting, and are amongst the most vociferous opponents of contracting.

    a. Of course other unions have been smarter, and have successfully sought to represent contractors in their dealings with contracting entities (e.g. those representing owner drivers or those representing some specialist professionals and experts).

    b. Like any area, perceived threat can be made into opportunities. Unions would be far better placed to engage contracting, and consider what services they could offer, rather than blindly opposing it.

66. Whilst independent contracting is regulated by contract law made by the courts (as discussed above) it is also regulated to varying degrees by legislation made by parliaments, or awards made by industrial tribunals. Some trade union officials want to regulate independent contracting through traditional industrial laws, including regulation whereby unions can restrict the circumstances when contractors are used (for example, the 2004/05 NSW Secure Employment Test Case – as yet undecided), or in circumstances where unions could more easily unionise contractors.

67. The traditional labour movement more broadly (largely wrongly) sees contractors in need of their protection (whether the contractors want it or not) and proposes that the industrial relations system regulate persons who are "in employment type relationships" such as dependent and (even) independent contractors. Indeed some in the labour movement argue that government should inform unions of all subcontractors that provide work on government funded projects and for unions to be consulted by the government before any tenders are awarded. These approaches represent a substantial interference by unions in commercial

activities and in the use of taxpayer funds in the construction of national infrastructure.

68. Academia: Some quarters of academia have picked up the union agenda, and undertake research, analysis and comment based on the premise that there is something inherently and necessarily undesirable, covert and exploitative in any shift to contracting. This bias of academia against contracting is manifest in:

a. Hostile comment and analysis, predicted on the assumption that contracting is undesirable and inherently yields poor outcomes to vulnerable persons in the labour market.

b. Analysis based on paradigms of exploitation and coercion, without any evidence.

c. Analysis based on paradigms of exploitation and coercion, without any assessment of the actual views of individuals working as contractors.

d. Research agendas which are shaped by assumptions and prejudices about the impact of contracting and its undesirability. Thus, even where research is undertaken in perfectly legitimate and empirically sound terms, the choice of research question and focus is biased against contracting.

e. Perspectives that deny or ignore any benefits of contracting to principals, individuals, industries and the economy as a whole. Based on the work of many academics, one would believe this is a universally bankrupt notion of no benefit to anyone. It is somewhat strange therefore that individuals and companies continue to expand and experiment with contracting in an ever expanding range of activities.

69. This is exacerbated by the circular nature of academic work. Once these misrepresentations have been presented, they are picked up by others, cited and cited again. They become truisms, and the lack of foundation for the original comment or suggestion is lost in an academic exercise of 'it must be true – everyone says so'.

70. Regulators: Regulators, particularly at the State level have picked up on self serving and biased opposition to contracting, and have used this as the basis for additional regulation and for artificially mutating notions of employment regulation to cover contractors. This leads to poor law, chasing a flawed basis for regulation as outlined below.

71. What this translates into: This translates into the sludge of misinformation and disinformation on contracting which this Committee must navigate to get to the truth on this issue. So much of the discourse on contracting is hostile that there is a danger of biased misrepresentations and partisan conclusions becoming regulatory truisms. This is one of the key challenges for the Committee in this matter – sorting fact from fiction in the areas of contracting and labour hire.

T1.5 Status of Independent Contracting

72. The PC presents the current status of contractors as follows:

> The ill-defined legal situation of dependent contractors in Australia has led to legislative activism in a number of jurisdictions.

73. ACCI does not necessarily consider the legal situation to be quite so ill defined. There are common law tests, and they can be navigated to determine who is and who is not a contractor.

74. However, we do have a situation in which:

a. There is a system of common law tests, which have themselves mutated into a complex web of considerations, and an increasing presumption in favour of contractors being declared employees.

b. Overlaying this is some misguided state regulation which allows for:

i) Contractors to be deemed to be employees.

ii) Contracts to be treated as unfair.

c. Also overlaying this are taxation regulations and approaches, also based on notions of dependence (See PC paper for further detail on this), as well as some specific statutory definitions for presented purposes.

Deeming

75. The PC set out that:

> Deeming provisions are different from common law tests because they are designed to classify groups of workers with for service contracts as employees. Common law tests can only be applied to individuals on a case-by-case basis. In the Queensland legislation, the Industrial Relations Commission can deem employees if it is demonstrated that the contract has been designed to avoid the terms of an award or agreement. The Commission also has to consider the established

> common law tests of the nature of an employment arrangement when making a decision.
>
> At the time of writing (August 2001), there had been little opportunity for the practical effect of the Queensland legislation to be demonstrated. The test case for the legislation (AWU and Hammonds Pty Ltd No. B885 of 1999), demonstrated the reluctance of the Queensland Industrial Relations Commission to apply the deeming provisions contained in S275 of the Queensland Industrial Relations Act 1999. Rather, this case demonstrated the preference for the courts to utilise the already established common law tests to determine the contractual status of groups of workers. However, in a subsequent case (ALHMWU and Bark Australia Pty Ltd No. B 1064 of 2000) the Commission deemed a group of subcontractors to be employees.[5]

76. This notion of deeming has not operated in a satisfactory manner, and could not do so. The notion of deeming erroneously seeks to apply a collective assumption or conclusion (ie that contractors should be treated as something other) in direct opposition to the will of parties in entering into the contract arrangement.

77. It is at odds with the choices and preferences of individuals. It is also at odds with the capacity of businesses to chose to structure their operations around employment within the firm, or based on a model of commercial contracting.

Unfair Contracts

78. The second tranche of hostile government attacks on capacities for contracting comes in the form of unfair contracts jurisdictions at the state level. The PC summarise this as follows:

> An alternative approach to deeming contractors as employees has been the use of provisions to declare contracts void or varied under certain circumstances. For example, Section 106 of the Industrial Relations Act 1996 (NSW) gives the Industrial Relations Commission of New South Wales power to declare void or varied any contract "whereby a person performs work in any industry" if that contract is found to be unfair. Unfair contracts are defined in the Act as harsh or unconscionable, or against the public interest or, if that contract 'provides a total remuneration that is less than a person performing the work would receive as an employee performing the work' (Industrial Relations Act 1996 (NSW), s. 105).
>
> The use of unfair contracts regulation was designed to protect conditions under which work is performed in areas where one party has a greater market power than the other, for example owner-drivers (Bray 1991). Unfair contracts legislation is not restricted to self-

[5] Productivity Commission (2001) *Self Employed Contractors in Australia: Incidence and Characteristics* – Staff Research Paper. http://www.pc.gov.au/research/staffres/secia/secia.pdf , p.13

> employed contractors. Indeed, these regulations apply to a wide variety of commercial operations including franchise agreements, partnerships and commercial leases, copyright agreements and even superannuation agreements (Nomchong 1998).[6]

79. This is a very wide jurisdiction and yields some of the most absurd and objectionable outcomes of any regulatory system in Australia.

Taxation Deeming

80. In recent years, changes in the taxation system have also affected contractors and the businesses which enter contracts with them for services. As set out by the PC:

> The *Alienation of Personal Services Income Act 2000* (No. 86) (Cwlth) legislation affects 'entities that earn personal services income and are not personal services businesses'. In its initial form, the legislation required that any entity that earned more than 80 per cent of its income from one source seek a determination from the ATO of whether or not it was a personal services business (and therefore not subject to the new legislation).
>
> Any one of the following four characteristics was grounds for a determination that an entity was a personal services business (and therefore considered to have a contractor–client relationship and required to pay company tax):
>
> - two or more unrelated clients;
> - one or more employees;
> - separate business premises from their employer/s; and
> - that it was contracted to produce a result, supply its own plant and equipment or tools of trade, and was liable for the cost of rectifying defective work.
>
> Under changes announced by the Commonwealth Government on 9 July 2001 (Treasurer's Press Release No. 51), entities can now self-assess whether or not they are a personal services business, against the criteria listed above.[7]

81. This was a substantial change to Australian taxation law as it affected contractors, and wrought substantial change across various industries.

82. ACCI understands that a number of other submitting parties will address taxation issues affecting contracting in more detail. ACCI does not seek to

[6] Productivity Commission (2001) *Self Employed Contractors in Australia: Incidence and Characteristics* – Staff Research Paper. http://www.pc.gov.au/research/staffres/secia/secia.pdf , p.15
[7] Productivity Commission (2001) *Self Employed Contractors in Australia: Incidence and Characteristics* – Staff Research Paper. http://www.pc.gov.au/research/staffres/secia/secia.pdf , pp.15-16

make detailed analysis or recommendations on the taxation regulation of contractors in this submission.

Status of Contracting

83. There is therefore a contemporary situation in which:

a. There is a clear demand from businesses and individuals for independent contract arrangements, and for alternatives to the traditional employment paradigm.

b. There is a clear recognition that independent contracting offers real benefits to businesses and individuals.

c. There is an increasing mess of legal complexity and regulatory 'speculation' in this area (generally at the state level) which is retarding the capacity of interested parties to enter contracts for services, is creating additional uncertainty and costs, and is doing so with no policy benefit or regulatory justification.

d. The impact of the mess and confusion created by unfair contracts and deeming doesn't just impact on contracts for services with individuals (i.e. the standard conception of independent contracting). It also impacts on other clearly commercial relationships between franchisers and franchisees, contractors and subcontractors, etc. This is poor regulation having a scattered and at large effect. In a misguided attempt to capture labour contracting, the legislation actually creates scope to regulate a massive range of commercial relationships which have nothing to do with labour contracting.

T1.6 International Status of Contracting

84. There is also an international recognition of the legitimacy of contracting.

85. In early 2003, proposals emerged at the International Labour Organisation that would have threatened the right of independent contractors to be independent contractors. Essentially, the proposed agenda and approach was a very familiar one for Australia---namely it assumed that there are persons who are 'dependent contractors' and that there should be obligations to provide employment like remuneration and conditions to them.

86. The International Labour Organisation debated the anti-independent contractor proposals at the June 2003 International Labour Conference.

87. This was one of the rare occasions in which proposals from the ILO bureaucracy did not translate into additional regulation as recommended (itself very telling of the conceptual failures which underpin the dependent contractors notion).

88. In the final ILO statement, the dependent contractor concept was removed from a foreshadowed international instrument. Instead, the ILO issued a statement, developed and supported by unions, governments and employers, which recognises genuine independent contractors and genuine commercial contracts. It also proposes preventing sham or disguised employment by international instrument. ACCI represented employers on the international drafting committee that produced the agreed conclusions of the 2003 International Labour Conference.

89. This ILO exercise was very important. Had the ILO set an inappropriate direction inimical to contractors' rights, this would have created renewed pressure for anti-independent contractor legislation in Australia. This did not occur, and it did not occur because the international community rightly eschewed the notion of dependent contracting in favour of maintaining capacities for contracting. The issue now goes before the 2006 (95th session) International Labour Conference, within the framework of the agreed 2003 conclusions. A discussion paper-style report in advance of that debate was issued by the International Labour Office in early 2005.

T1.7 Myth of Dependent Contracting [8]

90. Self-employed contractors whose work arrangements are 'similar to those of employees' have been labelled as 'dependent contractors' by some commentators and regulators.[9] This is in particular constructed on notions that the contractor is in an effective situation of economic reliance on a principal such that they are rendered akin to an employee, and should be treated as such.

91. Contractors are contractors, whether dependent or independent. ACCI strongly rejects the notion of dependent contracting as a inherently different form of contracting, and the premises upon the distinction is based, and the purposes for which it is made. Contracting is a commercial relationship between commercial parties: no more – no less.

92. Commercial relationships are often ones of substantial dependence and substantial differences in economic size between principal and contractor.

[8] Much of this material is drawn from the ICA.
[9] Productivity Commission (2001) *Self Employed Contractors in Australia: Incidence and Characteristics* – Staff Research Paper. http://www.pc.gov.au/research/staffres/secia/secia.pdf , p.2

A mining contractor may employ dozens of people in a multi million dollar undertaking, however the company can become entirely "dependent" on massive project undertakings.

93. As has repeatedly been made clear[10], if a contract is a sham, the courts are already active and well equipped to investigate and find accordingly. ACCI supports that approach, and the ILC conclusions of 2003 take the international debate in that direction.

94. When courts are called on to investigate the status of a worker (as a contractor or an employee) parties are examined to determine the nature of their real-life behavior and relationship. Any written form of the contract is only part of the evidence. Typically, some behavior conforms to commercial contract and some to employment. The courts have to decide on the balance of the evidence before them whether someone is working as a contractor or an employee.

95. The idea of the 'dependent contractor' as some distinct class for regulatory purposes ignores existing and active legal process, applies subjective assessments of power and ignores the basic legal fact that an employee is dependent and that a contractor is independent.

96. Advocates of separating the notion of dependent contracting claim that contractors who work for one client are dependent because they don't have equality of bargaining power with the single client. The alleged answer is to force contractors into master and servant regulation, thus taking away from contractors any bargaining power they may have by giving all power to the regulators of employment – a regulatory paradigm specifically eschewed by the contracting parties.

97. The dependent contractor argument then is really an attempt to justify the delivery of increased power to employment regulators and to extend their control over the terms of contractual arrangements between all entities in an economy. Perversely, those that draw this distinction do not seem to concern themselves with the intention of the parties or the desire of the so-called dependent contractor to be a contractor and not an employee.

98. Ultimately, the lack of logic inherent in the notion of dependent contracting is illustrated when considering attempts at practical application.

99. How would one determine whether a 'dependent contractor' existed? What period of time is involved? If a contractor had a single client one day

[10] The following is drawn from the work of the ICA: http://www.ipa.org.au/files/news_558.html

but a new client the next day, would this amount to dependency? If a contractor chose to have a single client even when several were available, would this make the contractor dependent or would the free choice to have a single client make the person independent?

100. What if the contractor had skills that were desperately needed by a client who was prepared to better any other bid for the contractor's services? Would this make the contractor dependent on the client or the client dependent on the contractor? This scenario is played out every day in the computer software development industry, which is one of the industries targeted by advocates of the 'dependent contractor' thesis.

101. Where very large fees are involved, should regulators have the power to rectify an alleged imbalance between the 'dependent' contractor and the client by reducing the agreed fees? Should regulators have the power to force the contractor to work for the client so as to ensure that the contractor was clearly economically dependent?

102. What if an independent contractor's only client were another independent contractor? Could dependency arise in such a case? What if the sole client of the independent contractor had less wealth than the contractor? Who would be economically dependent on whom?

103. This list of questions continues to grow the deeper one goes into the dependent contractor theory. It demonstrates why it is inherently dangerous and wrong for the law to consider contracts from the singular perspective of economic dependency as opposed to the totality of actual behavior and intent of parties.

104. The simple truth is that if a contractor is at law a genuine contractor then the dependency or non dependency status at any given point of time should not be the concern of employment regulators. For the law to attempt more than to make such distinctions is to damage the integrity of contracts, and to force people into a state of dependency or non commercial arrangements.

We may need different terms…

105. It therefore appears to ACCI that referring to 'independent' contracting may (as a matter of logic) partially legitimise the inherently illegitimate and misguided concept of 'dependent' contracting. A contractor is a contractor, period.

106. Despite the terms of reference for this inquiry, new terminology may be required. It is probably more accurate and prudent simply to talk about contracting or contracts for services.

TERM OF REF 2 – CONSISTENCY ACROSS JURISDICTIONS

T2.1 - Introduction

> The second term of reference for this inquiry is to inquire and report on:
>
> … ways independent contracting can be pursued consistently across state and federal jurisdictions;.[11]

107. We have seen then that there is:

a. A diversity of regulatory imposts across Australian jurisdictions.

b. A trend, particularly at the state level towards unwarranted regulatory activism and ill-directed legislation.

T2.2 - Where we need to get to

108. As the premise of this term of reference foreshadows, the end point of regulation in this area should be consistent capacities for contracting across states and federal jurisdictions.

109. The Government was elected with various commitments relating to independent contractors:

> The Coalition Government is determined to protect the rights of independent contractors. We will not allow union officials to strip these enterprising Australians of the right to choose how they live and work.
>
> A re-elected Coalition Government will not permit unions, industrial tribunals or State Labor governments to attack the freedoms of independent contractors.

110. In the election policy entitled "*Protecting And Supporting Independent Contractors*", the government indicated it would:

a. Establish an *Independent Contractors Act* to support the status of independent contractors.

[11] http://www.aph.gov.au/house/committee/ewrwp/independentcontracting/tor.htm

b. Ensure parties' freedom to contract is upheld and that there is certainty in commercial relationships.

c. Prevent the workplace relations system from being used to undermine the status of independent contractors.

d. Prevent unions from seeking orders from the Australian Industrial Relations Commission which would impose limits, constraints or barriers on the freedom to contract, the freedom to operate as a genuine independent contractor, or the freedom to engage work through labour hire arrangements.

111. ACCI is strongly supportive of these aims, and in particular of the aim of ensuring Commonwealth and State parliaments cannot limit proper capacities for contracting. Our support is not based on the proposition that genuine contracting need be regulated. Rather it is based on the fact that some governments, parliaments, trade union officials and academics seek to undermine the status of contractors or de-legitimise their commercial arrangements.

112. State deeming and unfair contract legislation is trying (unsuccessfully by and large) to limit capacities for contracting, creating uncertainties and commercial threats and operating to limit the desires of many thousands of Australians. It must be eliminated.

113. In light of the development of state laws in this area during the past 20 years and the absurdities being created by state regulation and interpretations – state by state approaches should be abandoned.

114. Federal legislation clearly preserving capacities for contracting are the only way forward in this area and is the only way to deliver consistency.

T2.3 - How we should get there

Recommendations for Consistency Between Jurisdictions

Recommendation 2.1	The Committee conclude that consistency in capacities for contracting between jurisdictions is a first order priority.
Recommendation 2.2	The Committee conclude that the current competing operation of state and commonwealth law; award, statute and common law; and taxation and labour laws has not yielded acceptable regulatory outcomes.
Recommendation 2.3	The Committee conclude that state laws regulating contractors, particularly laws which deem contractors to be employees or which provide an unfair contracts jurisdiction, are fundamentally flawed and harmful.
Recommendation 2.4	The Committee call on the Government to introduce the foreshadowed *Independent Contractors Act* (ICAct) as a matter of urgency during 2005.
Recommendation 2.5	That any change to the law as foreshadowed not be characterised as 'de-regulation' by any members of the Committee.
Recommendation 2.6	The Committee instead recognise that there is a natural level of regulation of contract labour delivered through the operation of common law tests in this area.
Recommendation 2.7	The Committee recommend that the ICAct specifically seek to preserve freedom to contract.
Recommendation 2.8	The Committee recommend that the ICAct specifically override and preclude the operation of state laws designed to restrict freedom to contract (the extent legally available).
Recommendation 2.9	The Committee specifically recommend that the ICAct have the effect of: - Removing deeming of individual contractors as employees from the Australian system from labour law. - Precluding the operation of state deeming provisions. - Ending applications to state authorities under state deeming provisions. - Reversing any previous declarations deeming contractors or classes of contractors to be employees.
Recommendation 2.10	The Committee specifically recommend that the ICAct have the effect of: - Quashing state unfair contracts jurisdictions under industrial laws (not only for contractors, but also for employees, high income earners, and those engaged

	in purely commercial contracts)[12]. - Ensuring that no state law can provide an avenue to argue the fairness or otherwise of contracts for services, nor to 'look behind' any contracting arrangement other than sham contractor arrangements.
Recommendation 2.11	The Committee specifically recommend that the ICAct have the effect of: - Cover the field in relation to the regulation of contracts for services. - Removing future scope for a state or federal industrial tribunal to make an award or order seeking to regulate independent contracting. - Quashing any existing orders which may have been made. - Ending scope for unions to generate industrial disputation on the issues of contractors, contracting, outsourcing or purported impacts on employed persons.
Recommendation 2.12	Notwithstanding the preceding, the Committee specifically recognise the unique position of clothing industry outworkers, and preserve existing outworkers regulation pending a more general review.
Recommendation 2.13	Any other additional regulation of contracting only ever be applied at any future juncture: - In the most exceptional and unambiguously merited situations (i.e. where proved necessary beyond reasonable doubt). - At a narrowly targeted level to particular sub-industry situations where merited. - Subject to sun-setting / regular review with a presumption towards removal.

[12] This may also require complementary regulation through industrial legislation, being a revised *Workplace Relations Act 1996*.

TERM OF REF 3 – ROLE OF LABOUR HIRE

> The third term of reference for this inquiry is to inquire and report on:
>
> …the role of labour hire arrangements in the modern Australian economy.[13]

115. For convenience, ACCI's submissions on labour hire have been compressed into this section, and the rest of the submission focuses on contract labour.

T3.1 - What is Labour Hire

116. Labour hiring has recently been extensively researched by the Productivity Commission (PC). A major staff working paper entitled *"The Growth of Labour Hire Employment In Australia"* was released on 22 February 2005. (Attachment 3A)

117. The PC paper provides extensive background information on labour hiring, including definitions and descriptions of labour hire arrangements[14].

118. In addition to the PC information, the ACTU defines labour hire as:

> A labour hire arrangement is one whereby a labour hire company or agency provides individual workers to a client or host with the labour hire company being ultimately responsible for the worker's remuneration. These workers may be employed directly by the labour hire company, or independent or dependent contractors.[15]

119. The RCSA define on-hiring as:

> The provision of services by an organisation that provides one or more of their employees to clients to perform work as specified at a place nominated by the client.[16]

120. Queensland is the only state to legislate to specifically define the employment relationship between labour hire companies, host employers and labour hire workers. Under the *Industrial Relations Act 1999* (Qld) labour hire agencies are included in the definition of 'employer'. Section 6 (2) (d) of the Act defines 'employer' in part as:

[13] http://www.aph.gov.au/house/committee/ewrwp/independentcontracting/tor.htm
[14] Box 1.1, p.2
[15] ACTU Submission to NSW Labour Hire Inquiry, www.actu.asn.au/public/papers/nswsub/nswsub.rtf
[16] RCSA member services diagram, www.rcsa.com.au

> a group training organisation or labour hire agency that arranges for an employee (who is party to a contract of service with the organisation or agency) to do work for someone else, even though the employee is working for the other person under an arrangement between the organisation or agency and the other person.
>
> Section 6 (3) defines the term 'labour hire agency' as an entity that conducts a business that includes the supply of services of employees to others.
>
> According to s. 5 (1) of the Industrial Relations Act 1999, an 'employee' is:
>
> (a) a person employed in a calling on wages or piecework rates; or
>
> (b) a person who's usual occupation is that of employee in a calling; or
>
> (c) a person employed in a calling, even though –
>
> (i) the person is working under a contract for labour only, or substantially for labour only; or
>
> (ii) the person is a lessee of tools or other implements of production, or of a vehicle used to deliver goods; or
>
> (iii) the person owns, wholly or partly, a vehicle used to transport goods or passengers; or
>
> (d) a person who is a member of a class of persons declared to be employees under section 275; or
>
> (e) each person, being 1 of 4 or more persons who are, or claim to be, partners in association in a calling or business; or
>
> (f) …
>
> (g) an outworker; or

121. There are a number of different categories of commercial arrangement that are relevant:

a. On-hired Employee Services: The provision of services by an organisation that provides one or more of their employees to clients to perform work as specified at a place nominated by the client.

b. Contracting Services: The provision of services where there is an agreement between a contracting service provider and a client for the production of a specific outcome or result. Contracting services may be supplied via the provision of managed project/contract services or sub-contract services.

c. Recruitment Services: The provision of services where an organisation acts to recruit appropriate candidates that match a desired profile on behalf of a client for employment or engagement by the client.

d. Employment Consulting Services: The provision of services where an organisation identifies and/or responds to client needs regarding workplace issues and implements strategies designed to assist clients to

achieve business success. For example, occupational health and safety, equal employment opportunity, employee relations, human resource management, change management, organisational development and outsourcing.[17]

122. In ACCI's view, it is only 'on-hiring' that may be characterised as labour hiring.

T3.2 - Range and Extent of Labour Hire

Range of On-Hiring in Contemporary Australia

123. A neat summary of the range of on-hiring in Australia is provided by the range of specialisations offered by members of the RCSA. Industry offers on-hired expertise across the range of Australian sectors.

All industry sectors	Admin / office support / payroll, call centres / customer service, library / records management / info. mgt, sales / marketing, science / technology
Manufacturing	Manufacturing, food production, maintenance contracting, publishing / printing, automotive / auto parts
Construction	Construction / trade services, electrical contracting
Wholesale Trade	Storage / distribution
Retail Trade	Retail / fashion, automotive / auto parts
Accommodation, Café's and Restaurants	Hospitality and catering
Transport and Storage	Shipping / transport, travel / tourism
Communications	IT / Telecommunications
Finance and Insurance	Credit control / collections, finance / banking and accounting, insurance
Property and Business Services	Business support, cleaning, engineering / technical / mining, PR / promotions, real estate / property, security, legal services
Government Administration / Defence	Government
Education	Education
Health and Community Services	Health / medical and / pharmacy
Cultural and Recreational Services	Publishing / printing, media / advertising / communications, sport / entertainment

[17] www.rcsa.com.au

Personal and Other Services	Beauty / hair care

124. This is far more diverse and wide ranging than the traditional concepts of secretarial temping, nursing agencies and manufacturing outsourcing. On-hiring is clearly a dynamic and wide ranging part of most, if not all, Australian industries.

At the cutting edge of emerging industries

125. One of the core points to note is that on-hiring contributes not only to changes in traditional industries, but also to emerging areas of our economy. This includes:

a. Call centres

b. A wide range of IT activities.

126. On hiring is a source of supplying often scarce labour to new and emerging areas of our labour market.

Extent of Labour Hire In Australia[18]

127. This is a significant, wide ranging and growing industry, in terms of:

a. Direct employment within on-hiring companies.

b. Numbers of on-hired employees.

c. Levels of turnover and earnings.

Productivity Commission Data

128. The PC found that labour hire employees numbered around 270 000 in 2002, equivalent to about 2.9 per cent of all employed persons.

129. Labour hire employment grew strongly between 1990 and 2002. In workplaces with 20 or more employees:

a. The number of labour hire workers grew from 33 000 in 1990 to 190 000 in 2002, an increase of 15.7 per cent a year.

[18] *Employment Services Australia, 8558,* Australian Bureau of Statistics, August 5, 2003 – from www.rcsa.com.au Flexible Employment Fact Sheets

b. The proportion of labour hire workers among all employees grew almost fivefold, from 0.8 per cent in 1990 to 3.9 per cent in 2002. [19]

130. In industry terms, the PC provided the following data[20]:

Rate of use of labour hire employment, by industry, 2002[21]

Bivariate analysis[22]

Industry	*Rate of use of labour hire*[b]
Agriculture, forestry and fishing	5.4
Mining	3.4
Manufacturing	6.2
Electricity, gas and water supply	ns
Construction	3.9
Wholesale trade	4.1
Retail trade	1.4
Accommodation, cafes and restaurants	1.7
Transport and storage	3.6
Communication services	11.1
Finance and insurance	4.0
Property and business services	6.1
Government administration	2.5
Education	1.1
Health and community services	2.7
Cultural and recreational services	2.1
Personal and other services	ns
Economy-wide average	**3.5**

131. This underscores that labour hiring constitutes a significant but not overwhelming proportion of employment in most industries.

RCSA Data

132. Total income: $9.308 billion was received through on-hired employment (labour hire) in 2001/2002. This can further be broken down into $879 million from permanent placement and $8.25 billion from temporary/contract placements.

133. The top 39 companies generated $4.005 billion or 40 per cent of the total industry income.

[19] Productivity Commission (2005) Staff Research Paper, *The Growth of Labour Hire in Australia,* 22 February 2005: http://www.pc.gov.au/research/swp/labourhire/index.html, p.xii

[20] Productivity Commission (2005) Staff Research Paper, *The Growth of Labour Hire in Australia,* 22 February 2005: http://www.pc.gov.au/research/swp/labourhire/index.html

[21] Population estimates. Reference population includes all employees, including labour hire employees, aged 15–64 (excludes employers and self-employed workers). b This rate is the average rate for all the workplaces in an industry, and does not reflect the intensity of use of labour hire by those workplaces that use it. ns: Estimates for the electricity, gas and water supply and the personal and other services industries are not reliable, due to the likelihood of sampling error.

[22] Source: Laplagne and Glover 2005.

134. The Industry Value Added was $8.867 billion, which is a combination of profit and wages for the industry. The IVA measures the industry's impact on Australia's GDP. At $8.8 billion, the industry contributes 1.3% to the country's GDP.4

135. The employment services industry contributes more to the Australian economy than legal services (1.2 per cent) and accounting (1.1 per cent) .[23]

136. 3,314,500 temporary placements were made in 2003. This was more than 1 million more than 3 years prior

137. In 2003, the highest employing sectors for temporary/contract placements were 1,219,000 placements in health care (ie. nursing) and medical; 881,700 in trade labour and related occupations; 506,300 in clerical and 348,900 in hospitality travel and tourism.[24]

138. RCSA research has found that the biggest markets for on-hire employees are in the nursing and medical sector (97 per cent of RCSA members' placements in this industry were on-hire), followed by education (97 per cent) and blue collar (93 per cent) industries.[25]

139. Significant further ABS data is available on this industry.[26]

140. Any suggestion that this is a marginal or atypical industry need to be re-examined in light of such data. This is a very significant industry, making a major and wide ranging contribution to the Australian economy.

Extent of Labour Hire Internationally

141. Information from CIETT[27], the international representative of the on-hire industry indicates that almost 350 million people work under on-hire arrangements in just 17[28] of the world's major economies[29]. When other major economies are taken into account, the figure is likely to be closer to 400, people working in this sector every day.

142. CIETT indicate that there is a range of industry usage in different economies and cultures:

[23] *Employment Services Australia, 8558,* Australian Bureau of Statistics, August 5, 2003 – from www.rcsa.com.au Flexible Employment Fact Sheets
[24] *Employment Services Australia, 8558,* Australian Bureau of Statistics, August 5, 2003 – from www.rcsa.com.au Flexible Employment Fact Sheets
[25] RCSA Quarterly Survey result, June 2003, from www.rcsa.com.au Flexible Employment Fact Sheets
[26] ABS Cat No 8558.0 *Employment Services Australia.*
[27] www.ciett.org
[28] Argentina, Austria, Belgium, Brazil, Chile, Denmark, France, Germany, Ireland, Japan, Netherlands, Norway, Portugal, Spain, Sweden, UK, USA (Australia not included).
[29] http://www.ciett.org/info/0,000001,en,15,1,statistics.htm

> Participation of the agency work industry in the labour market varies significantly depending on the legal approach to regulating agency work. Percentages of workers employed through agency work range from:
>
> 4.5% in the Netherlands
>
> 3.2% in the UK
>
> 2.5% in France
>
> 0.7% in Spain
>
> A lower % in Italy where the industry was only legalised in 1998[30]

143. This also makes clear that there is no association at all between labour hiring and poor labour market performance / labour standards. These are EU countries, with obligations under EU social policy standards.

T3.3 - What Labour Hire Contributes to the Economy & Labour Market

> *Isn't on-hire employment just away for big companies to cut costs by getting rid of permanent jobs and then using less expensive, more flexible, more compliant on-hired employees?*
>
> There is growing evidence that having a core set of permanent employees supported by on-hired employees improves productivity. Mitsubishi recently stated in its submission to the Productivity Commission that "a flexible labour arrangement with Adecco helped it boost productivity and improve its financial performance by $200 million".[31]

GDP contribution:

144. The preceding sections already outline the level of economic contribution this industry makes to our GDP. It does not simplistically follow that were the industry downsized, that (a) the tasks would translate into employment and (b) this economic contribution would be maintained.

The Productivity Commission

145. The PC report on causes of the growing use of labour hire in Australia during the period from 1990 to 2002, including:

a. Changing industrial relations context: in the period: there was a decline in the proportion of firms with 'closed union shops', a rise in enterprise bargaining, and an increase in the use of human resources managers.

[30] http://www.ciett.org/info/0,000001,en,16,1,publications.htm
[31] http://www.rcsa.com.au/downloads/bbq_responses.pdf

All three changes are likely to have contributed to an increase in the propensity of firms to use labour hire.

b. Rising competitive pressures: trade liberalisation and globalisation put increasing pressure on firms to be competitive. One way for firms to increase competitiveness is to optimise their use of labour. Labour hire employment helped some firms to achieve that objective.

146. Thus, labour hiring is contributing to the optimisation of competitiveness of Australian businesses.

International Understanding

147. CIETT also neatly encapsulates what it sees on-hiring contributing at the national economy level:

> Job Search
>
> The main objective of private employment agencies is to find assignments for their agency workers:
>
> > the agency worker benefits from the fact that the private employment agencies is constantly trying to find him/her a new assignment
>
> An increasing number of the workers who find jobs through agencies are classified in the category defined by the OECD as "outsiders" (long-term unemployed, first time entrants into the labour market, ethnic minorities, disabled workers etc.)
>
> Labour Market Efficiency
>
> Private employment agencies are an essential part of efficient labour markets because they meet the demands of: Employers, Workers & Governments
>
> - by providing flexibility in times of fluctuating production needs
> - by providing the possibility to fill in for employees who are temporarily absent from work
> - by their expertise in matching job descriptions with job applicants[32]
> - by contributing to a good functioning labour market
> - by improving the employability of the workforce

32 http://www.ciett.org/download.php?file=aboutciett2003.ppt&upath=/shared_resources/uploads/info/publications//

- by providing work
- by assisting in the reintegration of disadvantaged people to the labour market
- through the economic value created by the sector

Job Creation

Private employment agencies are responsible for genuine employment creation:

- 17 % of work done through agencies would not have been carried out had this option not been available
- 38 % would have been carried out using other flexibility solutions
- only 14 % of companies using agency work would have hired permanent workers

Participation of the agency work industry in the labour market varies significantly depending on the legal approach to regulating agency work. Percentages of workers employed through agency work range from:

- 4.5% in the Netherlands
- 3.2% in the UK - 2.5% in France
- 0.7% in Spain and a lower % in Italy where the industry was legalised in 1998

What Labour Hire Provides To Employees

148. Labour hire work also offers significant opportunities to employees:

Other categories that benefit from work through private employment agencies are young people, working mothers, and other workers seeking flexibility:

> agency work offers those seeking their first job a low-threshold entry into the labour market and those seeking flexibility the opportunity to adapt their working patterns to their life styles.[33]

33 http://www.ciett.org/download.php?file=aboutciett2003.ppt&upath=/shared_resources/uploads/info/publications//

Private employment agencies are an essential part of efficient labour markets because they meet the demands of workers:

- by providing work security for agency workers

  whereas other so-called 'flexible' employees will be out of work at the end of their contract, an agency worker will have the benefit of having an employer who is pro-actively seeking to ensure that that worker will have work whenever he or she wants

- by keeping workers in touch with the job market, often providing a springboard to longer term employment

- by providing flexible work which can meet the circumstances of many workers; students, retirees, mothers with young children

- by providing temporary assignments to workers who find permanent work mundane or repetitive

- by providing training

Private employment agencies meet a genuine demand for flexible work from workers

- 33% of agency workers have a genuine preference for agency work

- 26 % of agency workers could not find a permanent job

Private employment agencies provide both work opportunities and an excellent portal into the labour market. 40 % of first time agency workers are “outsiders”

Private employment agencies act as a “stepping-stone” to longer-term employment:

- 41% agency workers are in longer-term employment within one year from their agency work assignment

149. Increasingly, participation in on-hired employment is a choice for highly skilled and in demand employees in Australia’s competitive labour market. The RCSA see this as follows:

Aren’t on-hired employees characterised by insecurity and lack of career path?

On-hired employment is often a deliberate employment choice. More and more Australians and New Zealanders are seeking a work/life balance that allows them to either spend more time with young

> children, elderly family members, or to try their hand at new skills or balance work and study. Even Australian Bureau of Statistics show that one in five (20%) Australians are now part of the growing flexible workforce.
>
> The flexible workforce is not totally comprised of blue collar or 'victimised' employees. RCSA members see a growth in the on-hire of professionals such as scientists, accountants, engineers and marketers. These often highly paid and specialised professionals prefer on-hire arrangements which offer them flexibility, diversity and higher pay rates. RCSA research found that of the 73% of Members who provided on-hired employee services 64% provide services for professional roles.[34]

150. The feedback from the RCSA is that there is real employee demand to work in this area:

> The RCSA argues that people are making a deliberate choice to become on-hired employees. The flexible workforce wouldn't exist if there weren't the people to employ. [35]

The Proof Is In the Pudding

151. In a very real sense, the proof is in the pudding in this area.

152. Evidence of the contribution labour hiring is making to the Australian economy and labour market is found in the growth of the industry, and in the growth in numbers of employees wanting to participate.

153. As our economy grows, becomes more internationalised and exposed to competition, it is becoming more complex and innovative. As part of this essential shift towards greater efficiency and optimal economic structuring (the finding of the PC) various employment and investment parameters are becoming more complex and innovative. This is the case for labour hiring.

154. The challenge for policy makers and regulators is to sort fact from fiction in this area and to cut through increasingly outdated understandings and prejudices which continue to be repeated from some quarters.

155. The challenge is to:

    a. Recognise the positive contribution labour hiring is making to the Australian economy and labour market

[34] http://www.rcsa.com.au/downloads/bbq_responses.pdf
[35] http://www.rcsa.com.au/downloads/bbq_responses.pdf

b. Recognise the greater contribution labour hiring can make to the Australian economy and labour market into the future unless unduly hamstrung by misguided regulation.

c. Get past the 1950s era thinking which comes from some unions and academia.

156. The labour hire industry is a significantly internationalised one. Major multinational corporations contribute labour hiring to a wide range of economies, including key competitors of Australia. Australia cannot afford to have our economy and labour operate sub-optimally by restricting without any justification scope for this positive and innovative field of additional employment.

T3.4 - Status of Labour Hire

Most Labour Hire Work is Employment Like Any Other

157. There appears to be somewhat of a myth that labour hiring is necessarily the same as contract labour, a myth which is not diminished by their association in the work of this inquiry.

158. This is not a valid conclusion:

a. A survey cited in the NSW labour hire inquiry found less than 1% of the labour hire industry was working as independent contractors.[36]

b. ACCI understands (without placing a value-judgement on it) that by far the majority of labour hire occurs as employment not contracting, with the employment relationship being between the agency and the person performing the on-hired service in the client premises.

There Is Compliance

159. Labour hiring is generally employment. Where award obligations exist on a common rule, respondency or organisational basis, this will apply to a labour hire agency as will all other employment obligations.

160. Labour hire agencies strive on a daily basis to be properly informed and compliant with their legal obligations in regard to pay, leave etc

161. As the RCSA indicate:

> RCSA members who work in the labour hire sector follow all state and federal awards. In fact, most on-hire contracts mirror the relevant enterprise bargaining arrangement and they are restricted from paying on-

[36] NSW Labour Hire Task Force - Final Report, p.6, Executive Summary.

> hire employees even higher rates of pay because of the EBA already imposed on the site.[37]

162. Any suggestion that this is an industry which is in significant or endemic non-compliance with employment obligations must be refuted in the strongest possible terms.

163. Where problems may exist from time to time, options for investigation, compliance and enforcement exist the same as they do for any other field of employment.

Unions Can Bargain and Organise

164. As labour hire generally employs workers as employees, the full range of bargaining and award options are available to unions (where appropriate). This would include for example the *Nu-Stream Personnel & Labour Hire Pty Ltd Metal and Associated Industries Labour Hire Certified Agreement 2003 – 2006.* There appear to be dozens of such labour hire agreements certified by the Commission, particularly in the construction area. Many certified agreements contain provisions seeking to regulate the circumstances in which labour hiring can be undertaken.

An Industry Committed to Sound Labour Practice

165. The labour hire industry is not the preserve of atypical employment, or the exploitation paradigm that some simplistic, clichéd and self-interested critiques from unions and some quarters of academia may suggest.

166. The Australian Labour Hire Industry, through its association, the RCSA has an industry "Code for Professional Practice" which commits association members to a wide range of ethical, professional and operational standards and behaviours. Specific principles in the Code address:

a. Confidentiality and privacy of employee and client information.

b. Honest dealings with employees and clients.

c. Truth in advertising.

d. Proper disclosure of fees.

e. Proper respect for work relationships with employees and clients.

f. Respect for the law, including employment law.

[37] http://www.rcsa.com.au/downloads/bbq_responses.pdf

g. Respect for OHS, including risk minimisation and scope for actions by employees.

h. Attempts to provide employees with certainty and clarity in terms of their engagement.

167. The Code is enforceable and carries with it organisational sanctions, and more importantly the commercial sanction of no longer being an RCSA member.

168. In the words of the ACCC[38]: the Code for Ethical Conduct outlines a number of professional standards to which RCSA members agree to adhere. They include that members to act honestly in all dealings, respect work relationships, ensure that workers are given details of their work conditions etc.

169. The public benefit being delivered by the RCSA industry code was specifically recognised by the ACCC. The ACCC granted specific authorisation to the RCSA for its Code for Ethical Conduct and procedures for enforcing this code.[39] The competition regulator in Australia has recognised that the public good delivered by the code justify an exemption from any actions on the basis of anti-competitiveness. The ACCC stated that:

> "The ACCC is satisfied that the standards set out in the Code are unlikely to restrict competition in the employment services industry. In addition, the RCSA's enforcement processes appear fair and transparent. Overall, the ACCC is satisfied that potential for anti-competitive detriment to arise from the Code and enforcement processes is likely to be minimal.
>
> "The ACCC is also satisfied that RCSA's Code and enforcement processes generate a public benefit that is more than minimal, although it recognises that it is difficult to predict the precise size of the public benefit at this early stage of the Code's existence. In particular, the Code appears likely to assist in ensuring that businesses operating within the employment services industry act ethically and professionally".

[38] ACCC Media Release, 7 October 2003, http://www.accc.gov.au/content/index.phtml/itemId/383838/fromItemId/2332
[39] ACCC Media Release, 7 October 2003, http://www.accc.gov.au/content/index.phtml/itemId/383838/fromItemId/2332

International Commitments to Sound HR Practice

170. At the international level, as a member of the world confederation of labour hire companies (CIETT), the Australian labour hire industry is also committed to the international CIETT code of conduct.

International Labour Hire Code of Practice[40]

All CIETT Members, National Federations, Corporate Members and Associate Members, endorse the CIETT Code of Practice with which principles they comply

- members shall ensure that agency workers are suitable for the assignment
- members shall protect the security of confidential information obtained from both agency workers and clients
- advertisements for job vacancies must be genuine
- agency workers shall be advised of:
    - the conditions of the assignment & the kind of work
    - the remuneration
    - any changes to the above
- members shall not seek to prevent agency workers from seeking jobs where they wish to do so (including with the user)
- services by (agencies) shall be available to agency workers free of charge

171. CIETT note[41] that the international code of practice closely accords with the most up to date ILO Recommendation on labour hiring[42].

172. Thus, the Australian labour hire industry is not only committed to a strong code of self regulation, but is also part of a wider international ethical commitment by what is an increasingly internationalised/multinational industry.

Employment With Labour Hire Agencies Is Now Internationally Accepted.[43]

173. For some years, the ILO sought to discourage labour hiring. ILO Convention 96 Fee-Charging Employment Agencies Convention (Revised), 1949, sought to eliminate the labour hire business in ratifying states.

174. This was startlingly unsuccessful. During the period since 1949, the labour hire industry has spread throughout the world, and now makes a key contribution to many diverse labour markets and economies.

[40] www.ciett.org
[41] www.ciett.org - 05/12/97 , CIETT comments on Convention 181 and its implementation
[42] ILO Recommendation 188, Private Employment Agencies Recommendation, 1997
[43] Information sourced from CIETT, www.ciett.org

175. This led to a paucity of ratifications from OECD member countries in particular, and to many countries specifically denouncing their obligations under this convention (a rare development in regard to ILO treaty obligations).

176. In June 1997, the International Labour Organisation (ILO)[44] revised the *Fee-Charging Employment Agencies Convention of 1949 (No. 96)*, effectively abandoning its restrictive or prohibitive policy toward labour hire agencies.

177. This change carried forward principles agreed at the 1994 International Labour Conference at which unions, governments and employers concluded that:

a. The former Convention No. 96 no longer corresponded with world labour market realities.

b. Well-functioning labour hire agencies play a positive role in the labour market.

178. With the adoption of the revised *Convention on Private Employment Agencies* (Convention 181), the ILO no longer recommends abolishing or restricting temporary work agencies.

179. The revised text fundamentally modifies Convention 96 to encourage the effective operation of temporary work agencies.

180. The revised convention, Convention 181, introduces the concept of flexibility. 'Being aware of the importance of flexibility in the functioning of labour markets'. (Preamble). Labour hire agencies offer the flexibility both employers and employees look for. Their main objective is to find jobs for temporary workers, ensuring that they have work whenever they want. Both user companies and workers benefit from flexible working arrangements which suit their respective needs.

181. The main objective of Convention 181 is to allow the operation of private employment agencies as well as the protection of the workers using their services within the framework of its previsions. (Article 2). Convention 181 now allows the industry to create employment at the national level, something it was unable to do under the provisions of Convention 96.

182. Whilst Australia ratified neither Convention 96, nor Convention 181, it is clear that there is an international consensus away from the view that there

[44] At the International Labour Conference.

is something inherently exploitative or undesirable in the operation of a labour hire industry in any country.

T3.5 - Sorting Fact from Fiction

183. The PC neatly describes some of the causes of opposition to labour hiring:

> The reported rise in the proportion of workers and firms involved in this form of employment has led to concerns (Hall 2000, 2002; LHTF 2001) about the implications of this expansion for the job security, job safety and job satisfaction of Australian workers. These observers argue that the labour hire work arrangement may be deficient in terms of:
>
> - training, promotion, human capital investment, and career prospects;
> - occupational health and safety and workers' compensation and rehabilitation; and
> - job security and workers' remuneration and entitlements.
>
> Implicit in these concerns is the view that labour hire has grown rapidly because firms see it as a way of reneging on their responsibilities towards their workforce, thus undermining workers' pay and entitlements. Thus, labour hire workers are perceived as *substitutes* for directly employed workers.[45]

184. However this is not the full story. Hostility to labour hiring also stems from:

a. Traditional international union hostility to labour hiring (reflected in the now replaced ILO Convention 96, outlined above).

b. Trade union fears that the labour hire workforce is not easily organised and mobilised, and is less likely to join trade unions. This is particularly acute where on hire employment has replaced traditional blue collar, unionised employment.

c. The inconvenience to trade unions of having to organise employees on -hired to geographically diverse client workplaces (including unionised workplaces and workplaces where other unions hold substantial membership).

d. Quaint ideological concerns from earlier last century, that the labour market must be engineered to ensure that labour is only provided to a single employer and that third parties may not earn any margin or return on labour.

[45] Productivity Commission (2005) Staff Research Paper, *The Growth of Labour Hire in Australia*, 22 February 2005: http://www.pc.gov.au/research/swp/labourhire/index.html, p.1

e. Pejorative prejudices from some academics and commentators.

185. Thus hostility to labour hire either stems from misunderstanding or self interest. This type of thinking has led to:

a. The creation of a veritable cottage industry in inquiring into labour hire at the state level.

b. Pejorative and hostile research and comment from some academics and IR commentators.

c. Misguided, inefficient, and anti employment regulatory proposals at the state level.

186. Properly analysed, there is no evidence for these claims. Ideological opposition against labour hiring is simply not matched with any evidence that the industry is yielding the negative outcomes suggested. For example, the PC found that only 2% of companies pursued labour hire arrangements to attempt to cut labour costs[46].

T3.6 - Threats to Labour Hire

187. Having indicated that there is an unfortunate vocal minority opposing labour hire work in our community (despite the views of employers and labour hire workers), what does this translate into in practice?

188. Unfortunately, it translates into:

a. Unmerited and unnecessary regulation of this sector.

b. Ongoing threats of additional regulatory imposts.

c. An ongoing climate of confusing misrepresentation.

189. It is appropriate to consider the regulatory threats to labour hiring jurisdiction by jurisdiction. The report of the NSW Labour Hire Taskforce (led by ex ACTU President and now federal MP Jennie George) provided a summary of labour hire regulation in various Australian jurisdictions.

190. In drawing this material to the Committee's attention, we wish to be clear that we do not in any way accept the analysis or recommendations of the NSW taskforce. It is in fact one of the core sources of misinformation and misdirection in this area which has done a disservice to employees and employers (and the unemployed) in that state.

[46] Productivity Commission (2005) Staff Research Paper, *The Growth of Labour Hire in Australia*, 22 February 2005: http://www.pc.gov.au/research/swp/labourhire/index.html, p.3

Inquiries

191. The 2003 Parliamentary Library Discussion Paper charts various labour hire inquiries at the state level. Many of these inquiries have led to hostile legislation, and recommendations for hostile additional regulation, as outlined.

192. This is not acceptable. ACCI considers that these inquiries have proceeded based on poor terms of reference and with too little regard to the utility of this industry and the facts in regard to employee rights, capacities and preferences.

Additional Regulation / Legislation

193. This self serving exercise has led to recommendations for additional regulation and additional imposts in this area which are inappropriate, unmerited and prejudicial to the contribution this industry can make to our economy and labour market. These recommendations were in substantial part made despite the clear dissent of employers (where they were even consulted).

194. Such propositions for additional regulation appear endemic in Australian state jurisdictions at present.

195. This is not acceptable. There is no merit for these additional obligations, and they simply operate to exclude employees from job opportunities.

Judicial Interpretations

196. A wide range of federal and state laws are being interpreted hostilely to labour hiring (this is set out in several of the attachments to Section 3).

197. This includes in particular decisions and interpretations which create obligations on principals (host employers) to individuals with whom they have no employment relationship and properly owe no such duties.

198. Particular confusion appears to have been created in regard to:

a. Extended placements with host employers.

b. Termination of labour hire workers when contracts with principles cease, or on the basis of suitability

c. Disparity between the entitlements of labour hire employees and those employed by the host employer.

199. (*Particular issues are raised in regard to OHS, EEO and Harassment which are addressed separately at the end of this submission*).

Flinging Mud Till It Sticks

200. At the heart of much of the regulatory prejudice in this area is the assumption that some commercial entity must be responsible for particular outcomes, and that the interests of employee redress outweigh the fundamentals of contractual or commercial arrangements.

201. It is this type of thinking which leads to assumptions that host companies must be liable for outcomes in addition to, or where more advantageous in place of, the actual employer (the labour hire company).

202. It is also this type of thinking which can lead to the finding of the existence of contracts of employment between individuals and host employers, despite the existence of the actual employer (the labour hire agency) and no mutual intention of third parties to enter contractual relations (even worse still are possible moves towards the concept of multiple employers to the one contract).

203. These conclusions are unacceptable. There is an unacceptable trend towards activist contractual implication of employment obligations against host companies under a fractured mismatch of federal and state employment laws.

204. This uncertainty works in the interests of those who are ideologically opposed to labour hiring and whose thinking remains mired in previous decades. Not only does it discourage companies from directing tasks into labour hire (even where this is optimal and efficient), but the uncertainty self-servingly creates an incentive for activist additional regulation to "sort things out". This is not acceptable – decisions feeding on regulatory uncertainty, and then further regulation being spurred by additional decisions.

Conclusion

205. We therefore have a situation in which:

a. Labour hiring is subject to a climate of public attack and some hostile commentary.

b. Labour hiring is subject to a complex environment of sub-optimal, inefficient and costly additional regulation at the state level in particular.

c. Labour hiring is being hamstrung by unnecessary regulatory obligations.

206. This is just not good enough. There is a clear consensus from users of labour hiring that it can make a genuine contribution to efficiency, productivity and competitiveness. There is an international consensus that it should no longer be treated as pariah employment and should be accepted as making a very real contribution to the operation of national labour markets (noting however that the 2003 ILC did not resolve the issue of 'triangular employment').

207. Australia cannot afford to unduly restrict the efficiency of our labour market by denying ourselves the opportunities and options labour hiring can provide.

T3.7 - The Red Herring of Industry Training

208. One of the key charges levelled at the labour hire industry is that it does not participate sufficiently in industry training, and in particular does not contribute to trades and skills development through apprentice training.

209. These charges against on-hiring stem in no small part from the nature of some of the functions which have been outsourced from major traditional, highly unionised blue collar enterprises into the on-hire industry. This includes in particular changes to the extent to which maintenance and repair functions in manufacturing and transport are performed by employees, or are referred to expert staff which move from enterprise to enterprise.

210. The RCSA rejects the charge that on-hired employees have less training and skills development as follows:

> This is not the case. There are several RCSA members who undertake their own training and apprenticeship programs. In other cases, an on-hire firm may partner with the host employer as we have seen in the telecommunications sector where the on-hire employee service provider and host employer trained an employee to a particular certificate level required of the worksite. Likewise, many people seek on-hired employment and associated flexibility so they can undertake professional training or skill development outside of their employment.[47]

211. At odds with clichéd and self interested attacks at on-hiring from some quarters, Skilled Engineering appears to make a significant financial, operational, industry and community investment in providing training

[47] RCSA FAQ Sheet, http://www.rcsa.com.au/downloads/bbq_responses.pdf

and skills development. Skilled provides significant public information on its education and training activities, indicating in April 2004 that:

> SKILLED currently has 550 Apprentices and Trainees who are in training or have recently completed a national qualification. This year SKILLED will also support the Victorian Training Awards 'Apprentice of the Year Award' and will sponsor the gala dinner and presentation evening at the 2004 TASTA (Tasmanian Training Authority) Training Awards. In 2001, SKILLED launched Operation TECH – 'Trades Employer of Choice', a pro-active program aimed at attracting, retaining and training the trades people of today to ensure a sustainable workforce for the future.[48]

212. The RCSA also offers significant training to recruitment and on-hiring practitioners in key areas of regulatory compliance and commercial operations. Again, this is consistent with the commitment of the industry to ensuring sound outcomes and good practice in dealings with on hired persons (employees and contractors) and with clients.

T3.8 – Conclusion / Recommendations

Recommendations on Labour Hiring

Recommendation 3.1	The Committee recognise the significant contribution the labour hire industry makes to the Australian economy and labour market.
Recommendation 3.2	The Committee conclude that this is an industry characterised by a commitment to best practice, proper employment outcomes and compliance.
Recommendation 3.3	The Committee recognise that arguments against labour hiring are informed by prejudice and self interest.
Recommendation 3.4	The Committee conclude that no case has been made out for additional or dedicated regulation of labour hiring.
Recommendation 3.5	The Committee recommend that all dedicated or directed regulation of labour hiring at the federal or state level be reviewed.
Recommendation 3.6	Where there is no demonstrated public policy justification for this regulation it should be overridden and quashed, the Committee should recommend it be removed.
Recommendation 3.7	The Committee recommend in particular that models of registration of employment agencies be abandoned as a waste of money and time. To the extent possible any state obligations for

[48] SKILLED Launches Apprentice & Trainee Awards, April, 2004: http://www.skilled.com.au/about-us/awardsprogram.aspx

	registration should be overridden.
Recommendation 3.8	The Committee should recommend that the ICAct identify and specifically preserve rights to enter into labour hire arrangements.
Recommendation 3.9	The Committee should recommend that the ICAct specifically preclude additional regulation in this areas as has been recommended in NSW, South Australia and Victoria.
Recommendation 3.10	The Committee recommend that the ICAct be extended to preserve freedoms to engage labour hire companies, regardless of any previous history of employment or industrial regulation.

TERM OF REF 4 – STRATEGIES TO ENSURE LEGITIMACY

The final term of reference for this inquiry is to inquire and report on:

strategies to ensure independent contract arrangements are legitimate[49]

T4.1 – Contracting and Hiring Are Inherently Legitimate

213. Contracting and labour hiring (together with direct employment) are inalienably legitimate parts of a modern efficient labour market and a diverse economy and society. Where commercial activity is founded in the notion of freed to contract. They are each naturally legitimate.

214. Any challenges to the legitimacy of such arrangements must be made out on the basis of clear evidence. Rights to enter contracts freely should not be disturbed lightly.

215. Properly analysed the existing basis for concluding contract arrangements are not legitimate, and for disturbing freely entered contractual relations, is insufficient and flawed.

216. Particularly at the state level, Australian jurisdictions have reached conclusions on the illegitimacy of contracting which are flawed and which are based on biased and unreliable research.

217. These poor evidentiary and conceptual foundations have led (as they must) to poor law or policy proposals. As we have outlined in the preceding sections, notions of deeming and unfair contracts are fundamentally flawed, such that they must be eliminated from Australia's regulatory framework.

T4.2 – Need Strategies to Ensure Utility, Accessibility, Simplicity and Confidence

218. On this basis, ACCI has addressed this term of reference as not so much one of ensuring contract arrangements are legitimate (they are anyway), as one of strategies to ensure independent contract arrangements:

    a. Are not open to challenge by hostile interests.

[49] http://www.aph.gov.au/house/committee/ewrwp/independentcontracting/tor.htm

b. Are able to freely be entered and operate without the threat of being translated into some other set of obligations by outside interests, and for after the fact recasting at odds with the intention of parties.

c. Are able to be accessed simply and with confidence by parties.

219. This is the key to the recommendations set out at T2.3 and T3.8. It is also the key to the additional recommendations set out below.

T4.3 – Conclusion / Recommendations

Recommendations on Ensuring Contract Arrangements Are Accessible, Stable and Efficient

(In addition to the recommendations under Terms of Reference 2&3[50])

Recommendation 4.1	The Committee find that contracting and labour hire are inherently legitimate modes of having services delivered (and of offering employment to the extent relevant).
Recommendation 4.2	The Committee conclude that any conclusions against contracting and labour hire can only be based on firm evidence and proof. This can be the only legitimate basis for regulation in this area, and has not been proved in Australia to date.
Recommendation 4.3	The Committee recognise that as a specific goal regulation in this area in addition to the common law should be avoided unless strictly necessary.
Recommendation 4.4	The Committee demand that any regulation affecting contract work and labour hiring be of a best practice nature. It should be clear, effective, targeted and only regulate to the extent genuinely warranted.
Recommendation 4.5	There should be a single source of regulation for any regulation of either contracting or labour hiring (including where this legislation is designed to guarantee scope for contracting and labour hire).
Recommendation 4.6	In addition to the recommendations for the ICAct outlined in T2.3, the Act should also have additional effect.
Recommendation 4.7	Certified agreements and AWAs should be precluded from seeking to regulate the use of contracting and labour hire by the employing company.
Recommendation 4.8	The ICAct should preclude state or federal anti-discrimination or other laws being used to subvert freedoms to contract or use labour hire.

[50] Sections T2.3 and T3.8, above.

OHS, EEO, AND HARASSMENT

Introduction

220. This submission has focussed on the regulation of work primarily in terms of wages, remuneration, employment entitlements. That is, the intersection of labour hiring and traditional industrial relations considerations.

221. There is however a further intersection between labour hiring and contracting, and employment law.

222. There are other laws impacting on employers and on those responsible for workplaces which have application on on-hired and contract workers. This includes:

a. Occupational Health and Safety (OHS) Law, and in particular obligations to provide safe workplaces.

b. Sexual harassment laws.

c. Anti Discrimination / Equal Employment Opportunity (EEO) Law.

Unique considerations

223. The preceding sections have emphasised freedoms to contract and liabilities only being those which properly attend to those with an actual employment relationship and restrictions on the liabilities of principals.

224. These other areas of regulation raise different concerns. Issues of harassment, discrimination and safety may unavoidably transcend the model of a clear delineation of responsibilities (such as for example duties of care in sexual harassment).

225. However, there must still be limits and clarity in the application of these things.

Principles

226. Whilst there are differences between these areas of regulation and the regulation of wages, conditions etc, a number of general principles do appear important to these areas of regulation:

a. Avoid emotive misrepresentation: Unfortunately these areas have been misused as part of more general opposition to contracting. This is of no service to contracting nor to safe and protective outcomes for individuals of whatever status.

b. There is nothing inherently unsafe, endangering or exposing in labour hire and contracting. The Committee should conclude that there is nothing inherently unsafe, exposing or endangering in labour hire and contract work

c. Avoid subversion of reform: Not withstanding the preceding, these areas of law should not be used to subvert or avoid the operation of reforms contained in the foreshadowed ICAct. To the extent that OHS, discrimination or harassment laws may be manipulated to subvert the intentions of the ICAct, the ICAct should be amended to avoid this occurring.

d. Clear liabilities: The overwhelming goal at all times for these areas of regulation should be clarity and guidance to all parties as to where responsibilities and liabilities actually lie. It is not good enough that there be a scatter gun of responsibility in the event of an incident to ensure someone is responsible. Responsibilities should be able to be clearly (and exhaustively) identified and understood upfront.

e. Transferring responsibilities should be minimised: Transferring the legal responsibilities of one party to a separate legal entity (for example labour hire companies and host employers) should be avoided wherever possible. Regulation should have the aim of ensuring entities are only responsible for what they realistically should be responsible for. This does not mean that some responsibilities should not be equally imposed – rather, that one's responsibilities cannot and should not be imposed onto another.

f. We must be willing to accept self-responsibility: The system must be able to accept that individuals in business for themselves should accept their safety and conduct responsibilities. If an individual is capable of entering into business and financing that business, they should be capable of being responsible for the consequences of their actions.

g. Control is important: A realistic assessment of control and forseeability must guide liabilities and responsibilities in these type of areas, particularly in regard to the responsibilities of host employers, contract principles. Where you make someone responsible for a particular

function or service they should broadly assume the attendant responsibilities of doing so.

OHS

227. This section of the submission merely highlights the current issue and interpretation of some courts with regard to independent contractors and occupational health and safety obligations.

228. A fundamental occupational health and safety issue impacting on employers and person's in control of workplaces who engage contractors and labour hire arrangements is 'who has the primary duty of care' to provide a safe workplace? The 'duty of care' for employers or those persons in control of the workplace varies between jurisdictions in terms of responsibility for contractors and/or employees of contractors and jurisdictions have differing approaches to the issue of deeming contractors to be employees under OHS law.

229. Whilst the various OHS Acts provide coverage for contractors, the interpretation varies and the industry practice to comply and to provide adequate protection for all parties is generally interpreted and accepted to include:

230. Workers Compensation: The employer or principle contactor has a responsibility to:

a. Provide workers compensation coverage for their own employees.

b. Ensure that contractors and sub-contractors are covered by workers compensation insurance extending to their employees.

231. Individual contractors themselves are covered under workers compensation (although State laws differ ion the detail).

232. Occupational Health & Safety: The employer or principle contactor has an OHS duty of care to:

a. Provide a safe workplace for employees.

b. Provide a safe workplace to any contractors they engage.

c. Ensure contractors are trained in the requisite skills, have undertaken risk assessments for their work activities, have all the necessary permits to undertake their work and the like.

233. A recent decision in the *Victorian Supreme Court of Appeal R v A.C.R. Roofing Pty Ltd* 1 December 2004 VSCA 215 changes the traditional understanding of the OHS obligations at the workplace site and has a potential impact on the management of contractor safety in Victoria creating possible ripple effect in the other states and territories. A.C.R. Roofing Pty Ltd plan to challenge the decision and have recently lodged an application with the High Court of Australia to hear the matter in March 2005.

    a. In this decision, whilst it is recognised that the principal contractor has a duty of care to its employees and the employees of sub-contractors, it has in the past been understood that where the sub-contractor has contracted sections of the work to another party because they do not have the skills or equipment to undertake the work, then the employer-employee OHS obligation passes to the sub-sub contractor (and its employees) undertaking the work (with the head contractor retaining its own separate responsibility for OHS).

    b. The decision changes that relationship calling for a reconsideration of contractors 'duty of care' obligations. The decision also raises issues of 'deeming' that is contractors, sub contractors, sub-sub contractors etc are automatically bestowed employee status for the purpose of fulfilling occupational health and safety obligations by employers.

234. It should be noted that:

    a. OHS should be a shared responsibility, but liability of one person should not be transferred to another.

    b. Occupational health and safety laws are predominately in place to provide and maintain a safe workplace.

    c. Deeming creates a more onerous responsibility on employers towards fulfilling occupational health and safety obligations.

235. The question remains if the status of contractors is deemed to be that of employees, yet contractors undertake their work as defined under common law, that is have control over their own activities and engage specialist sub-contractors to fulfil an aspect of work, then where does the shared ownership of health and safety duties come in to play? How is this predominately providing and maintaining a safe workplace?

236. All parties have, and should have appropriate OHS responsibilities. Deeming removes responsibilities from contractors, sub contractors etc to

fulfil occupational health and safety duties, instead encouraging a health and safety culture of 'shirking responsibilities' thus creating heavy burdens on the employer.

237. The current practice which does not include the deeming of contractors as employees is a core fundamental issue, particularly in the construction industry, and the appeal of the A.C.R. Roofing decision highlights the importance of the implication to deeming for employers.

Conclusion / Recommendations

Recommendations Relating To Non-Industrial Employment Law Obligations

(E.g. OHS, Sexual Harassment, EEO, etc laws)

Recommendation 5.1	The Committee should conclude that there is nothing inherently unsafe, exposing or endangering in labour hire and contract work.
Recommendation 5.2	The Committee should recommend that any measures in the IC Act to modify or override the application of State and Territory law specifically preclude state OHS, sexual harassment, anti-discrimination and like laws.
Recommendation 5.3	The Committee should recommend a review of the operation of these non-IR based employment laws at the state and commonwealth level with the goal of ensuring efficiency and clarity of regulation and of business responsibility.
Recommendation 5.4	The Committee should recommend that, if appropriate, based on the review, the operation of state OHS, sexual harassment, anti-discrimination and like laws be addressed through future amendments to the ICAct.

And another thing…

Recommendation 5.5	Recommendations in this area need not be restricted to legislative matters. The Committee should consider non-statutory measures to improve contractual understandings between individuals and principals.
Recommendation 5.6	The Committee might consider reiterating the importance of written contracts between principals and contractors in an effort to avoid uncertainty as to outcomes, obligations and liabilities.
Recommendation 5.7	As a complement to the ICAct, government could provide online resources to contractors and principles (including for example model clauses etc) comparable to those made available to employers and employees within the employment stream.
Recommendation 5.8	For the labour hire industry, no major regulatory change need be recommended. The RCSA appears to already be pursuing ongoing industry improvement and promoting professional standards. The Committee need do no more than recognise this in its report and encourage the spread of such improvements into the future.

ACCI MEMBER ORGANISATIONS

STATE/TERRITORY ASSOCIATIONS

ACT and Region Chamber of Commerce and Industry

Australian Business Ltd

Business SA

Chamber of Commerce and Industry Western Australia

Chamber of Commerce Northern Territory

Commerce Queensland

Employers' First ™

State Chamber of Commerce (New South Wales)

Tasmanian Chamber of Commerce and Industry

Victorian Employers' Chamber of Commerce and Industry

NATIONAL INDUSTRY ASSOCIATIONS

Agribusiness Employers' Federation

The Association of Consulting Engineers Australia

Australian Beverages Council

Australian Consumer and Specialty Products Association

Australian Entertainment Industry Association

Australian Hotels Association

Australian International Airlines Operations Group

Australian Made Campaign Limited

Australian Mines and Metals Association

Australian Paint Manufacturers' Federation

Australian Retailers Association

Housing Industry Association

Insurance Council of Australia

Investment and Financial Services Association

Master Builders Australia

Master Plumbers and Mechanical Services Association Australia

National Electrical and Communications Association

National Retail Association Limited

NSW Farmers Industrial Association

Oil Industry Industrial Association

Pharmacy Guild of Australia

Plastics and Chemicals Industries Association

Printing Industries Association of Australia

Restaurant and Catering Australia

Standards Australia Limited

Victorian Automobile Chamber of Commerce