

# House of Representatives

Standing Committee on Employment, Workplace Relations  
and Workforce Participation

## **Inquiry into Independent contractors and labour hire arrangements**

*Submission by the*

**Australian Municipal, Administrative,  
Clerical & Services Union**

---

*March 2005*

# 1 Introduction

## 1.1 Terms of reference and introduction

The Committee has been requested by the Minister to inquire into:

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

Independent contracting and labour hire has been an increasingly significant factor in the Australian economy for some time, although the exact extent has been subject to some debate.

The Australian Services Union (the ASU) believes that both employment practices have a legitimate role to play in a modern economy, but both must be subject to safeguards to protect the workers involved from discrimination and exploitation, particularly with respect to levels of remuneration and conditions of employment, but equally with regard to occupational health and safety as well as training and skill formation.

The ASU believes that a wide and appropriate range of flexible employment options are available to Australian employers and employees. Labour hire is being increasingly utilised with significant consequences for employees that should be addressed in the public interest.

Independent contracting is a legitimate form of service delivery, but must not be exploited by employers seeking to avoid the application of industrial awards and instruments, other industrial and employment law and taxation and other social obligations. The ASU believes that there are currently insufficient protections for workers engaged as independent contractors, especially where those workers are in fact dependent contractors or quasi- or actual employees in fact and in law.

Federal legislation must be strengthened to prevent bogus contract arrangements and State provisions maintained to cover workers not covered by Federal industrial law.

The ASU has welcomed initiatives taken in State jurisdiction with regard to both labour hire and independent contracting over recent times.

**The ASU supports the establishment and maintenance of a fair set of minimum terms and conditions of employment for all workers (employees and dependent contractors) through collective awards and agreements. Such protection via a social safety net should extend to all employees and workers whose work is of the nature of an employee and should be maintained via independent tribunals.**

## 1.2 The Australian Services Union

The Australian Services Union was created in 1993. It brought together three large unions – the Federated Clerks Union, the Municipal Officers Association and the Municipal Employees Union, as well as a number of smaller organisations representing social welfare workers, information technology workers and transport employees.

Today, the ASU has more than 100,000 members in a wide variety of industries and occupations and especially in:

Local government (both blue and white collar employment)  
Social and community services  
Transport, including passenger air and rail transport, road, rail and air freight transport  
Clerical and administrative employees in commerce and industry generally  
Call centre employees  
Electricity generation, transmission and distribution

Higher education (Queensland and SA)

The ASU has had considerable experience with regard to a number of the issues being considered by the Committee. It represents employees and other workers covered by both State and Federal Awards and by no awards. The ASU's rules allow it to enrol independent contractors as members of the Union.

The ASU has established an extensive network of safety net awards and enterprise agreements in both State and Federal Jurisdictions.

The awards and agreements to which the Union is a party generally allow for a range of forms of employment: full- and part-time employment, casual employment, as well as provisions allowing for temporary and limited term contract employees. These provisions give both employers and employees a range of flexible employment options and patterns of work.

The ASU is not aware of any general or specific employer demand for increased flexibility in respect to awards and agreements to which the ASU is a party. In the ASU's submission, employers have a flexible range of employment options available to them which meet current needs and circumstances.

This is not to say that there is not tension between employer objectives to reduce the cost of employing labour and the ASU's intention to maintain fair minimum terms and conditions of employment which properly reward workers for the hours in which they work. However, there are no unreasonable limitations on the forms of employment available to employers and employees under the Union's awards and agreements.

Awards, of course, have been established either by consent or by arbitration and reflect either agreement or a fair outcome as determined by an independent arbiter. Agreements arise from the processes of agreement making set out in Federal and State legislation and reflect compromises satisfactory to the parties.

The ASU has been prepared to negotiate flexibility agreements within awards and enterprise agreements as reasonably appropriate to the circumstances of each award and agreement and has done so for many years.

#### **ASU principles for the regulation of all forms of work.**

**The ASU supports a range of work practices which meet the needs of both employees and employers, but these must be based on the principle of fairness to all, not to employers only.**

**ASU supports the regulation of terms and conditions of employment by collectively determined awards and enterprise agreements as the only system which brings the bargaining power and rights of employer and employee into a relatively balanced situation. Individual contracts of employment and independent contracting frequently involve the creation of 'unequal treaties' which favour the employer at the expense of the worker and his or her family. Individual employees rarely have an equality of bargaining power with their employer, although there are some exceptional cases where independent contractors have equal bargaining power.**

Federal law currently allows employers to enter into individual agreements with employees through Australian Workplace Agreements. While the ASU does not support AWAs as an effective or fair method of setting wages and conditions (since the bargaining power is not balanced), the Federal AWA provisions do at least require that individual agreements pass the same no disadvantage test as applies to collective agreements, both union and non union.

**While the "no disadvantage test" could be strengthened, the ASU believes that this is an important principle that must be maintained. Since Federal awards now set down only a *minimum safety net of terms and conditions of employment*, there is no argument that such award minimums should be allowed to be undermined by employment via independent contractor arrangements. The ASU believes that where work is carried out by persons who are effectively employees (whether called contractors or not) the work, and any contracts for its performance, should not be allowed to fall below the minimum standards set by awards for the performance of that work by employees.**

This is an important principle behind the Queensland and NSW unfair contracts legislation which should, to the extent possible, be enshrined in any Federal law dealing with independent contractors.

**The ASU believes strongly that recognition of the rights of workers with family responsibilities cannot be based on an unregulated system of part-time, casual, temporary employment or bogus contract work. Such a system of precarious employment does not provide, in many cases, access for employees to the stable, sufficient income levels that allow for family or relationship formation, home ownership and other fundamental features of Australian life.**

Australia cannot pay lip service to the preservation and promotion of family life and its international commitments while at the same time failing to provide families with the means to create financially stable home environments.

## 2 Independent Contractors

The ASU is aware of the debate within some academic and other research circles about the extent and rate of change in the amount of non traditional forms of employment.<sup>1</sup> While the precise extent and rate of growth of contract employment is best left to other contributors to discuss, it is clear that there has been a continuing growth in the amount of non traditional employment in Australia (to levels that are amongst the highest by world standards) including significant growth in independent contracting, which includes numbers of workers who are, in fact, dependent contractors or quasi-employees.

The best known example of independent contractors in the Federal system are, of course, owner drivers, who can under Federal law be members of a registered trade union and for whom terms and conditions of employment may be set.

In areas of work covered by the ASU, the use of independent contractors is not as prevalent as elsewhere in the Australian economy. However, there are some examples of this form of work in areas covered by the ASU which have raised issues of importance to the ASU and its members:

The most significant example relates to family day care workers, details of whom are given below in section 2.1. A large proportion of this group of workers have been unfairly treated and their issues should be dealt with in their own right, but their example also throws up significant policy and legal issues relating to protection for independent contractors, or workers said to be independent contractors, in the federal system.

In addition to family day care workers, the ASU is aware of other common instances of contracting, for example among information technology workers, where the ASU has coverage and membership. In many cases however independent IT contractors are genuine contractors with a number of clients and reasonable bargaining power. Other examples of contractors are some TAB agents and charity collection workers (in some cases).

However, the ASU is also aware from time to time of abuse of contracting by employers and an example of this in the aviation industry is given at section 2.2.

### **Unfair contracts – State and federal power**

Legislation relating to independent contractors in Australia is limited, leaving aside normal commercial law.

The Federal Workplace Relations Act has an unfair contracts provision at s127A and following sections. This has been little used and appears to be of limited effect. It is based on the Commonwealth's constitutional powers with regard to corporations, the trade and commerce power, the territories power and the Commonwealth authorities power (see s127C of the Act).

Despite being modelled in some respects on similar state powers, this section of the Act has had little work to do. Some of the reasons for this are:

- Limited constitutional basis
- Limited powers on remedy

The Act provides that an application may be made for the review of a contract on the grounds that a contract is either unfair or harsh. The applicant may be a party to the contract or an authorised association of employees or employers.

The Act provides a number of grounds on which the contract may be reviewed, including:

- The relative bargaining strength of the parties
- Whether undue influence or pressure was exerted or unfair tactics were used
- Whether the contract provides total remuneration that is or is likely to be less than that of an employee performing similar work.

There is a very limited body of case law developed in respect of the Federal WR Act unfair contracts provision, much of which relates to legal and constitutional questions. The Act has not been much used to resolve contractual issues, for the reasons noted above.

**The ASU supports the extension and use of the Federal Workplace Relations Act Unfair Contracts provisions, assisted if necessary by an educational and information campaign to make contractors aware of their rights under the law.**

By contrast to the Federal position, NSW has a well developed unfair contracts provision in State industrial law where work involved in an industry is concerned.<sup>2</sup> The section is considerably used and an extensive body of case law has been developed.

Unfairness in NSW relates to any contract which is “unfair, harsh or unconscionable”. A contract may also be unfair on the grounds that it is against the public interest.

The NSW Commission is empowered to make an order declaring wholly or partly void, or varying, any contract whereby a person performs work in an industry if the Commission finds that the contract is unfair in that it is designed to or does avoid the provisions of an industrial instrument.

In addition, the NSW Commission may, by order, prescribe the minimum rate of remuneration of persons under contract to perform building work, door-to-door handbill delivery work or door-to-door sales work where the Commission has found that the contract is unfair.

The Queensland Commission also has a similar power to void or vary unfair contracts. Among the factors to be considered is any industrial instrument applicable or provisions of the Queensland Act or the Queensland minimum wage. The definition of an unfair contract is similar to that of NSW and includes whether it provides less remuneration than a person performing the work as an employee would receive under an industrial instrument or the legislation or is designed to or does avoid the provisions of an industrial instrument.

The Queensland Act also has strong deeming provisions, which can deem certain contractors to be employees so that they can benefit from the minimum standards and terms and conditions of employment provided by the Queensland Act.

**The ASU strongly supports the retention and use of strong unfair contracts provisions such as those that apply in NSW and Queensland. Genuine independent contracting is an appropriate form for the performance of work in many instances. However, there is no reason why such contracts should not be subject to the same tests as either individual or collective agreements under federal or state law. This is especially the case where dependent contractors are concerned. Any federal legislation regarding contractors should provide that contractors should have no less favourable terms and conditions that that applying to employees.**

The principles of “a fair go all round” must also apply to contracting. There is no justification for the creation or maintenance of a system of second or third class citizens or workers forced to work as so-called independent contractors at rates of pay or under conditions which have been determined a fair minimums for other Australian workers.

**The limitations of the Federal system have meant that the Federal provisions have been little used. Equity demands that State unfair contracts laws must be retained.**

## **2.1 Case studies:**

### **2.1.1 Family Day care providers – Australia’s forgotten workers**

Family day care is part of the Commonwealth child care assistance program. It is funded by the Commonwealth Government and administered by local agencies, usually local government (in South Australia the State Government is the sole provider of FDC).

Family day care can be provided in a number of ways, by organisations and associations but also through individual workers: referred to as “sole traders and/or owner operators”. These workers provide child care in the home of the carer, rather than in a purpose built child care centre. Homes used for this purpose must meet certain safety and other standards. Carers can provide care for a specific number of children only. There are approximately 13,000 family day carers in Australia, according to the Department of Family and Community Services’s 2002 Child Care Census, not all of them ‘sole traders’ or ‘owner operators’.

Carers must be registered or licensed by the administering authority, usually the local council. The administering authority employs FDC co-ordinators to administer the service, supervise carers and act as a contact between the parents seeking child care places and the carers. The administering authority may also pay the child carer but fees may also be paid directly to the carer.

The provision of family day may be provided in a number of ways, eg through non profit organisations, charities and the like but is frequently provided by “sole traders and owner operators”, in the most part, individuals working and providing care in their own home. This part of the submission refers to individuals working as sole traders or owner operators, not those employed by a corporate entity or association.

The Commonwealth Government funds the program but the Government’s Guidelines clearly state that family day carers are not employees of the Commonwealth.<sup>3</sup> Nor are these carers normally considered to be employees of the administering authorities, although the co-ordinators are.

The Australian Services Union represents workers who are employees of local government and related bodies as well as contractors to local government. The ASU has sought to provide industrial regulation for family day carers by way of awards and agreements, without success in the case of those individuals not employed by an employing body.

The ASU sought a federal dispute finding to provide the basis for award regulation, but the Australian Industrial Relations Commission ruled that no dispute could be found since the workers concerned were not, in the main, employees of the organisations with whom the dispute was sought, namely local government authorities, despite the close working relationship between the two.<sup>4</sup> The ASU had sought a dispute finding between it and local councils in Victoria and Tasmania regarding the wages and conditions of employment of family day care workers.

A Full bench of the AIRC determined, on appeal, that FDC workers were not, in the main, employees of the local councils administering the scheme (except where those Councils explicitly acknowledged such a relationship, which some did). The Commission did not specifically determine their status to be that of independent contractor or licensee only that they were not Council employees. Thus a dispute could not exist and no award could follow. Since family day carers are also not considered to be employees of the funding authority either (the Commonwealth), workers in this category have no status as employees.

[Some Awards for family day care workers have since been made, in the ACT, West Australia and Queensland, but only in respect of day carers employed by associations.]

The Family Day Care Guidelines require that carers who are sole traders and/or owner operators must in effect be a business and have an Australian Business Number or State equivalent and operate as a business. Currently, these types of family day care workers have no rights as employees or workers under any industrial award or agreement in any part of Australia.

These family day care workers may be considered to be the equivalent of owner drivers (or as outworkers), in that they provide their tool of trade (an appropriate house) but otherwise provide only their labour and their skills. Family day carers must be licensed to operate and must obviously meet all the requirements of the program guidelines and the administering authority and in effect are subject to the detailed control of the program administrators and standards imposed by local councils, including in relation to the house itself.

While their status is not 100% certain (employees, dependent or independent contractors, licensees, etc) it is clear that in practice they have virtually no control over important aspects of their working lives, including pay and conditions of work. They have fewer rights than truck drivers. They are a group of workers who have almost completely been left out of the minimum standards and the “fair go” provided to other Australian workers.

‘Sole trader’ family day carers have no control over their wage or income, which is set by the funding authority. They cannot take a case to any arbitral tribunal seeking an increase in payments. They are covered by no award or agreement. They have no control over the supply of clients.

Income levels for family day care workers are low. Most of them are women and although they are skilled and caring workers have relatively low levels of formal qualifications.

Carers can be deprived of their income by administrative decisions of the administering authority, who can take action to de-licence carers. Except in one jurisdiction, there is no appeal against such decisions.

In NSW, one of the ASU’s NSW Branches, the United Services Union, has campaigned for more than three years to introduce some limited rights for day care workers who have been de-licensed or otherwise affected by decisions of FDC administering authorities (local government in NSW).

This campaign was successful in late 2004 when the NSW Government amended the Children and Young Persons (Care and Protection) Act 1998 and gazetted amendments to the Children Services Regulations.

These amendments now provide ability for family day carers to appeal decisions by administering authorities (licensors) to reduce the number of children in care or to suspend or revoke their licence. The Regulations provide that such decisions may be reviewed by the NSW Administrative Decisions Tribunal (ADT), by way of an appeal by the family day care provider.<sup>5</sup>

The ASU/USU welcomes this step forward for family day care workers. The Union believes that this is the first and only review mechanism available to sole trader FDC workers anywhere in the country. Decisions to suspend or revoke licences of FDC workers is, in effect, decisions to temporarily or permanently end a carer’s ability to earn income as a carer. It is the equivalent of suspension or dismissal of an employee, but hitherto there has been no means of appeal of such decisions.

The Union believes that this NSW process should be extended to similar carers in other states and finds it extra-ordinary that a State government must act to provide some limited rights to workers under a scheme funded by the Commonwealth and (largely) administered by local authorities.

However, the NSW amendments are only a small step forward for carers who need access to a full range of entitlements such as those enjoyed by most other Australian workers. Specifically, all FDC workers should have access to:

- Award or agreement rates of pay and conditions where sought by carers
- A dispute settling procedure regarding all aspects of their work

Family day care workers highlight a fundamental problem facing all workers who are or who are said to be independent contractors in Australia. Since they are not in the most place considered to be employees, they have no award or agreement protection and no protection against unfair termination of their means of livelihood.

It is no response to say that since such workers have entered into an arrangement as a contractor or like worker that they can enforce any rights they have as contractors in the ordinary courts. FDC workers, in particular, have little or no control over the program in which they operate. They are unlikely to be able to fund a challenge to the decision of any administering authority, let alone the Commonwealth.

In the absence of any simple and inexpensive review mechanism such as that recently adopted in NSW, these independent contractors have no effective means of redress of decisions which impinge on them in a major way.

Nor do they have any mechanism whatsoever for addressing issues such as levels of payment and other issues of importance to employees or contractors, other than through the political process.



Under current legislation federally, there appears to be no avenue of redress for these FDC workers. Since they are deemed not be employees of the Commonwealth nor of local government, they cannot obtain an award. Despite the fact that they are clearly very dependent contractors and, in effect, have more characteristics of employees than of contractors, there is no provision for them to make an agreement with whoever their employer or contractor may be.

Other contractors, such as owner drivers, do have access to some protection. For example there are unfair contracts provisions of the Federal Workplace Relations Act - s127A. However, this section of the Act depends for its constitutional validity on the corporations power, the trade and commerce power, the territories power and the power to regulate Commonwealth authorities. None of these apply to sole trader FDC workers.

For example, owner drivers may be employed by a corporation and could (and have) utilised the unfair contracts provisions of the Federal Act. However, as contractors, FDC workers do not appear to be contractors to any constitutional corporation (although who they may contract to is unclear) and do not have any access to s127A.

It may be argued if FDC workers were employees they may be considered to be employees of the parents whose children they care for (but this is not certain, either). In any event, parents are not constitutional corporations. Nor does it seem likely that an industrial dispute could be created between the carers and the parents. While it is possible to have a dispute with an individual who is an employer (such as a parent, in this case) the practical difficulties with creating and administering such a dispute and resulting award would render this course of action impossible.

Thus, there does not appear to be any Federal remedy to the situation of FDC workers. As noted above the NSW remedy to provide some rights of appeal to carers had to be found in State Acts and Regulations.

## Remedies

In the Union's submission, the remedy for the situation in which FDC workers find themselves lies in the realm of State legislation including State IR legislation.

The Queensland jurisdiction has two provisions of relevance to this situation:

1. The Deeming provisions, which provide that dependent contractors who effectively have the status of employees, can be deemed to be employees and thus enjoy the benefits of the Queensland IR relating to employees, including minimum wages
2. The Unfair Contracts provisions which provide, inter alia, that contractors can apply to either have their contract amended or declared invalid.

See below for a description of the Queensland provisions. Suffice to say that either or both of these provisions could be utilised to provide protections of family day care or similar workers. These remedies can lie only in State jurisdictions at the present time, given the Commonwealth's limited constitutional powers.

Thus these State avenues must be maintained, and utilised if FDC workers are to retain the limited protection they have in NSW or access the protection afforded by the Queensland Act.

Any attempt by the Commonwealth to limit the use of State laws would be detrimental. For example, if the Commonwealth sought to 'cover the field' in industrial relations by using its constitutional powers over corporations, family day workers, whether contractors or employees, would still miss out on coverage.

They, and similar workers like them, would continue to fall between the cracks in Australia's IR system and would continue to be Australia's forgotten workers. State legislative powers must therefore remain.

**In the existing State/Commonwealth legislative framework, the following appears to be the only possible remedies for FDC workers to obtain access to a fair set of minimum terms and conditions of employment:**

- **Creation of State common rule awards covering FDC if considered to be employees**
- **Use of deeming provisions like those of Queensland to treat dependent contractors as employees for the purpose of wages and conditions and unfair termination of contract**
- **Use of a State unfair contracts jurisdiction.**

**Any Commonwealth legislation which purports to deal with independent contractors must address these issues if it is to provide a fair go for such workers.**

## **2.1.2 What's in a name? Employees or Contractors in the aviation industry – the case of Oceania Aviation**

Determining whether a worker is an employee or a contractor is not a straightforward matter. A range of authorities, including the Australian Taxation Office and a number of courts and tribunals have issued rulings and guidelines to assist employers and employees on this matter.

One common feature of the case law on this matter is that it is not determined by what the relationship is called by either or both parties but on the facts of the actual relationship in each case. Moreover, no one factor – such as the traditional 'control' test – is determinative of the nature of the relationship. A number of indicators must be examined to determine the real nature of any relationship. These have been set down in a number of decisions and are not repeated in this submission.

These matters were brought into sharp focus by an unfair dismissal case brought by a member of the ASU against Oceania Aviation, a company that provided ground handling services at Coolangatta Airport for two airlines. The Union's member took an action for unfair dismissal following the termination of her services by the employer.

The employer challenged the action on the grounds that the member was an independent contractor, not an employee. While no written contract had been signed, the employer alleged that a verbal contract was in place. The 'contractor' was required to obtain an ABN number and submit invoices from time to time on which she was paid. The employer deducted no taxation from the 'contractor's' remuneration.

These indicators usually show the relationship of an independent contractor. However, a close examination of the facts of the case led the Queensland Industrial Relations Commission to conclude that the worker concerned was not a contractor but was, in fact, an employee.

For example, the contractor/employee:

- Worked in accordance with the Company's practices and policies at the direction of the employer at the employer's place of business
- Wore the Company uniform
- Provided no equipment other than an invoice book and otherwise outlaid no money for clothing equipment
- Worked in accordance with a roster
- Did not advertise her services to other potential clients
- Could not delegate her work to others in the true sense of the word; could not sub-contract or employ others to do the work
- Bore no commercial risk
- Had nothing to sell upon termination of the contract (i.e. goodwill).

The Commission found that despite any intentions the parties had at the beginning of the contract (which was in some dispute) that the worker could not be classified as a contractor on the basis of the balance of indicators set out above.

The Commission ruled that the person was an employee and entitled to take an action for unfair dismissal (in which she was successfully in arguing that she had been unfairly dismissed).

The Commission noted:

*The evidence in this case has revealed great confusion as to the nature of the employment relationships entered into by the witnesses who were employed by Oceania Aviation. Even Mr Brand the Executive Director showed confusion and ignorance of the nature of a contract for services. Whether an employee is engaged pursuant to a contract for services is often a vexed question about which lawyers cannot agree and the confusion expressed by the witnesses is understandable.*

*Evidence by these non-lawyers as to the classification of their employment relationship can carry no weight as to the true nature of that relationship because it is an opinion based on a question of law or a mixed question of law and fact for which they hold no qualification to express. But the evidence has revealed that the employees appear to have been employed under various contracts, some under contracts for services, some under fixed term contracts and some under ordinary verbal contracts of service. Some employees are paid what is in fact a salary per annum, some are paid per week and some are paid per aircraft turnaround. Most employees think they are retained under a contract for services. What is evident is that the respondent Company seems to have gone to great lengths to avoid the operation of Awards and rules applicable to employees in general. The Taxation Legislation appears to have been ignored in some cases, perhaps through ignorance. [emphasis added]<sup>6</sup>*

This case is not indicative of the need to provide certainty of operation of independent contracting. While the employer in this case may have genuinely intended to create a contractor relationship with this and other workers it engaged, it appears, if the findings of the Commission are sound (as they appear to be), that the intentions of the employer were not bona fide. In other words, the purported engagement of workers as contractors could be seen not as a result of the needs of the business or the circumstances in which the work was performed, but to **“avoid the operation of awards and rules applicable to employees in general”**.

In addition, taxation laws were not observed, since they require tax to be deducted from the earnings of employees.

In this case, the designation of certain workers as contractors was bogus. They were not in law or in fact, contractors. The designation of such workers as contractors should not be legitimised by any law to be passed by the Australian Parliament. Protection of independent contracting should be limited to genuine relationships and contracts and not be available for relationships which are, in reality, employment relationships, especially where the purpose is primarily or partly to evade the operation of employment and other law.

It is also apparent from this case that this ‘contractor’ was dependent on one employer and could not be viewed as an independent contractor working for a range of clients. Where employers seek to create such working arrangements, the workers concerned should have access to a court or tribunal to have their status determined and, if appropriate, be deemed employees.

**Given the uncertainty surrounding some of these relationships (even with the best of intentions), equity demands that workers should have access to ‘deeming’ provisions such as those in the Queensland Industrial Relations Act at s. 275.**

**This provision is as follows:**

#### **INDUSTRIAL RELATIONS ACT 1999 - SECT 275**

##### **275 Power to declare persons to be employees or employers**

(1) The full bench may, on application by (1) an organisation, a State peak council or the Minister, make an order declaring--

- (a) a class of persons who perform work in an industry under a contract for services to be employees; and
- (b) a person to be an employer of the employees.

(2) The full bench may make an order only if it considers the class of persons would be more appropriately regarded as employees.

(3) In considering whether to make an order, the full bench may consider--

- (a) the relative bargaining power of the class of persons; or
- (b) the economic dependency of the class of persons on the contract; or

- (c) the particular circumstances and needs of low-paid employees; or
- (d) whether the contract is designed to, or does, avoid the provisions of an industrial instrument; or
- (e) whether the contract is designed to, or does, exclude the operation of the Queensland minimum wage; or
- (f) the particular circumstances and needs of employees including women, persons from a non-English speaking background, young persons and outworkers; or
- (g) the consequences of not making an order for the class of persons.

(4) In this section--

"contract" includes--

- (a) an arrangement or understanding; and
- (b) a collateral contract relating to a contract.

"industrial instrument" includes an award or agreement made under the Commonwealth Act.

**The ASU supports the retention of this provision and the enactment of similar provisions in other State legislation and in the Federal Workplace Relations Act to the extent constitutionally possible.**

**In the Union's submission, deeming provisions provide the best opportunity for certainty in employment relationships where the facts can be illuminated and determined.**

### 3 Labour Hire

The ASU has had extensive experience with labour hire issues, in a range of industries and occupations, including in clerical employment, in local government employment and in call centres.

Labour hire has long been used as a supplement to standard clerical employment. The “office temp” has been a common phenomenon for many years before the use of temporary labour became common in other industries and in blue collar occupations in particular. Clearly, the use of labour hire employees to fill temporary demand for employees and to supplement workforces on a short term basis, where on going employment is not available, is unexceptionable, assuming certain conditions are met.

Those conditions should include payment of “on site” rates of pay to labour hire employees, plus appropriate loadings, such as casual loadings, where appropriate. However, long term engagement as labour hire ‘casuals’ is not appropriate in the Union’s submission.

In the Union’s experience, labour hire has continued to grow in traditional areas and has expanded into other areas for reasons set out below.

Labour hire has extended into industries where it was not previously used. For example, labour hire has become a feature of employment in local government, where direct employment was traditionally the norm, as a result of competitive tendering, for example, in both Victoria and NSW. In Victoria, compulsory competitive tendering was Government policy for much of the 1980s under the Kennett Government. Labour hire in local government has involved ongoing and core functions of local government, not simply to meet short-term needs.

In some parts of the energy industry, particularly in call centres, there has been an excessive use of labour hire workers for employment of staff. In some cases, following intervention by the ASU and as a result of discussions, it has been acknowledged by employers that labour hire employees do not always match the requirements of the job. The insecurity of the employment relationship for labour hire employees means that many opt for more secure employment arrangements when it becomes available. This contributes to a high level of turnover of labour hire employees.

Secure, employment encourages long term employment and thus significantly enhances a return on investment in training. In industries such as the electricity industry, employment duration averages above 15 years and investment in long term employees represents a good return to the employer and the economy.

Labour hire has been increasingly used as on going form of employment by some employers. In some cases, employers are seeking to avoid externally imposed ceilings on the number of permanent employees by recruiting staff via labour hire companies. The Union is aware, for example of a major international manufacturing company which had staff ceilings set by the overseas parent but which circumvented these limitations by using labour hire. Some government departments have also used labour hire employee on a long term basis for various reasons.

Some government authorities have also traditionally used labour hire to avoid staff ceilings and to avoid being seen to be increasing staff numbers. Such practices are artificial and offer no long term solutions to real service needs.

In other cases, employers simply seek to minimise their exposure to permanent employees by engaging staff via labour hire agencies in the belief that these staff are more easily disposed off in a downturn or for other reasons or may simply be hired at a cheaper rate of pay, despite loadings that may need to be paid and agency fees. In these cases, investment in training and knowledge is often wasted.

#### **Award and agreement coverage**

In clerical employment, wages and conditions of clerical employees generally have been set by State based common rule awards which apply commonly to all employees engaged in a particular class of work.

The exception to this has been NSW, where a particular award covering the use of temporary clerical employees has been in place for many years.<sup>7</sup> Thus clerical work performed through labour hire companies must be performed at the same rates of pay and conditions as that of other clerical work generally, although

there still may be a differential if the work at a particular location is covered by an industry or employer specific award or certified agreement.

The NSW USU Branch of the Union has recently moved to apply to set aside the specific temporary clerical work award and to bring this work back under the general clerical award in that State.

An exception to this rule has also been, until recently, in Victoria where until this year common rule awards did not exist. Victorian Federal awards applied only to named respondents and clerical labour hire companies were not so named. With the agreement between the Victorian and the Commonwealth Government to allow for common ruling of Victorian awards, the general clerical and administrative award has now been common ruled and will apply to almost all clerical work performed in Victoria.

The major exception to this is employees of contract call centres, who are, for the time being excluded from coverage of the Victorian common rule award. This is a significant exception since many call centres hire a significant proportion of employees via labour hire companies.

The Union's Victorian Private Sector Branch estimates that up to 40% of employees in some call centres are labour hire employees.

In any case, common rule awards do not eliminate the entire disadvantage suffered by employees of labour hire companies.

As the Committee may be aware, a Committee of the Victorian parliament has been enquiring into the use of labour hire in that State. There is little purpose in repeating or attempting to summarise all the evidence received by the Committee. The Committee's Interim Report is available and a final report will be issued later.

Both Branches of the Union in Victoria made written submissions or statements to the Victorian Committee. These summarise the views of the Union in Victoria as to the extent of the use of labour hire in Victoria, both in private sector clerical employment as well as in local government.

Extracts from these submissions are attached for the information of the Committee. (Appendix A and B)

In NSW, the NSW Labour Council (now Unions NSW) has commenced a test case in the NSW Industrial Commission on the use of casual and labour hire employment in that State. The Union's NSW United Services Union Branch has provided evidence for the case with regard to the use of labour hire in NSW, both in private sector clerical employment and in local government.

An extract from the affidavit of Mr Brain Harris, General Secretary of the USU, is attached for the information of the Committee. (Appendix C).

The South Australian/Northern Territory Branch of the ASU was successful in 2002 in obtaining rights for casual employees employed under the terms of the Clerks (South Australia) Award who had been employed by the one employer for 12 months or more to elect to become a permanent employee of that employer and that the employer could not unreasonably refuse to allow the conversion.<sup>8</sup>

These provisions apply to casual clerks employed by labour hire agencies. The Branch campaigned for the rights of a number of these casual employees to be made permanent, which was opposed by a number of labour hire agencies. Labour hire companies were not excluded from the terms of the original decision granting conversion rights to casuals.

However, it was noted that the number of labour hire casuals who might benefit from the provision was very small since the overwhelming majority of engagements were of a very short duration.

However, the Union's case was pressed in the case of two casuals who had been employed by one labour hire firm and placed with the one employer for three and six and a half years respectively. A Commissioner of the SA Industrial Commission, having heard all the evidence, agreed that it was unreasonable for the employer, the labour hire firm, to refuse to agree to the request to convert to permanent employment.<sup>9</sup>

Clerks involved in the case (originally 37) provided witness statements giving evidence of the nature of their experience as casual labour hire employees. One such witness statement is attached in full. (Appendix D). In this, and other witness statements provided for this case, the following experiences are related:

- It was common for labour hire employees to take no actual annual leave during the period of the placement – this witness worked for 2.5 years at one stage without leave
- Labour hire employees found it difficult to take sick leave or leave to care for dependents
- Labour hire employees have fewer opportunities for advancement than permanent employees
- That despite the fact that labour hire casuals were paid a loading they still earned less than their permanent counterparts, because, in this case, the permanents were State government employees and paid under an award with better minimum rate than the labour hire casuals who were paid under the minimum rate common rule award
- The labour hire company had attempted to get their employees to sign AWAs (presumably to avoid the new obligations under the award, although this was not stated)

Taken together the appendices highlight the following problems with labour hire as a form of employment, as well as some examples of how labour hire can work to the advantage of both employee and employer. This evidence is not repeated here, but the issues can be summarised as:

- Payment of lower wages and conditions to labour hire employees, especially where specific industry awards and enterprise agreements apply at a particular workplace
- Occupational health and safety issues: less training in OHS applied to labour hire employees or provision of safety gear. Note reference in Appendix B to death of a labour hire worker.
- Superannuation: less superannuation paid compared to specific industry and enterprise agreement rates.
- De-skilling of workforce: less training provided to labour hire employees.
- Lack of access for labour hire employees to sick, annual and long service leave due to the nature of placements and lack of continuity of service – in some cases a labour hire employee can work with different LH agencies for the same employer and have no access to accumulated benefits
- Lack of protection for labour hire employees from unfair dismissal due to short term work arrangements and nature of contract between the labour hire firm and the client.
- Unwillingness of labour hire employees to raise issues or grievances with their employers or undertake representational roles – such as OHS representatives – due to employment insecurity
- Lack of career development opportunity

**The ASU supports the use of labour hire in appropriate circumstances and subject to the use of safeguards to protect employees against the disadvantages inherent in this form of employment.**

**Regulation of labour hire based employment may require various forms and these have been pursued by the Union to ensure a fair safety net of minimum terms and conditions of employment for labour hire employees. This should include:**

- **Common rule awards to apply to all labour hire employees**
- **Provisions that require labour hire employees to be paid “house” terms and conditions of employment to avoid discrimination against such employees and the undermining of award and agreement terms and conditions**
- **Licensing of labour hire firms, particularly with a view to improving training, especially OHS training for labour hire employees to improve safety standards**
- **Provision for accrual and portability of sick leave, annual leave and long service leave for labour hire employees**
- **Protection for long term labour hire employees from unfair termination of a contract of work.**
- **Operation of labour hire to be governed by an agreed Code of practice, based on ACTU policy.**
- **Opportunity for labour hire employees to be made permanent after a period of continuous employment with the one employer, including the labour hire companies themselves.**
- **Provision of training opportunities for labour hire employees to avoid skill shortages**

## 4 Conclusions

In summary, the ASU believes that Independent contractors (or arrangements alleged to be such) should be subject to:

- Deeming provisions, where appropriate, in both Federal and State law to the extent constitutionally possible
- Unfair contracts legislation, along the lines of that available under NSW and QLD industrial law
- Minimum standards as to wages and conditions as for workers under awards

Labour hire should be subject to:

- Licensing, with particular regard to health and safety, training
- Covered by awards and agreements as appropriate, providing for minimum standards of wages and conditions, or 'house rates' where applicable
- Labour hire workers must be entitled to portability of accrued benefits, including sick, annual and long service leave.
- A code of practice to be developed and endorsed by the Federal and State governments.



## **5 Recommendations**

### **5.1 Contractors:**

- 5.1.1 The Commonwealth should use the corporations and related powers to set minimum terms and conditions for dependent contractors and ensure that any legislation relating to genuine independent contractors excludes dependent contractors**
- 5.1.2 The Commonwealth should use available powers to establish deeming provisions in the Workplace Relations Act similar to those in s275 of the Queensland Act**
- 5.1.3 Commonwealth to extend its unfair contracts jurisdiction for genuine independent contractors engaged by employers covered by federal awards or agreements or AWAs to provide powers and remedies similar to those available in NSW and Queensland.**
- 5.1.4 State laws relating to unfair contracts and deeming must be retained.**
- 5.1.5 All family day care workers must have access to awards setting minimum terms and conditions of employment and to other rights enjoyed by employees.**

### **5.2 Labour hire:**

- 5.2.1 Labour hire firms to be licensed by an appropriate Government authority with special consideration for occupational health and safety issues**
- 5.2.2 Labour hire firms to be governed by an agreed Code of Practice**
- 5.2.3 Employees engaged under labour hire arrangements to be covered by common rule awards as a minimum safety net and by industry or enterprise specific Awards and agreements where they exist so that 'house' rates apply and have the same rights as other workers performing the same kind of work.**
- 5.2.4 That labour hire employees have access to a scheme which provides for the accrual, taking and portability of sick, annual and Long Service Leave.**
- 5.2.5 That labour hire employees be protected from unfair dismissal or termination of engagement.**
- 5.2.6 That labour hire employees have the opportunity to be made permanent employees after six months employment with a particular employer or with the labour hire firm, at the initiative of the employee.**

## 6 Appendices

- A. Victorian Private Sector Branch
- B. Victorian Authorities and Services Branch
- C. NSW USU Affidavit of Brian Harris
- D. Witness statement of Carolyn McPherson

## ***Appendix A***

**Extract from ASU Victorian Private Sector Branch  
submission to Victorian Labour Hire Inquiry**

## Appendix A



**A•S•U**

**Australian Services Union  
Victorian Private Sector Branch**

### **Background Information to the Economic Development Committee Inquiry into Labour Hire**

**11 October 2004**

#### **1. Background**

The Australian Municipal Administrative Clerical and Services Union (known as the Australian Services Union – ASU) covers clerical, administrative and customer service employees in the private sector.

The ASU has members in a range of industries including but not limited to:

- Armoured Transportation;
- Road Transport, Freight & Logistics;
- Airlines and Related Industries;
- Call Centres;
- Manufacturing;
- Pharmaceutical;
- Gaming & Wagering;
- Non-profit Organisations;
- Retail;
- Legal Services;
- General Clerical & Administrative

The vast majority of ASU members employed in the above industries have their employment conditions regulated by Federal Awards and/or Certified Agreements in the Federal jurisdiction.

#### **2. Labour Hire in ASU Industries**

The ASU had input into the VTHC submission to this Inquiry.

ASU members employed under labour hire arrangements in the call centre sector participated in the research prepared by Elsa Underhill for the VTHC, through both focus groups and surveys.

The ASU, as a white-collar union in the private sector, has been exposed to labour hire arrangements for many years. In the traditional office environment the 'temp' has been an established method of hire by companies for over 20 years.

Consistent with the data across industry the use of labour hire and agency temp arrangements in the past decade has increased significantly in the union's coverage area.

It has been the experience of the ASU that labour hire arrangements undermine permanent employment, job security and employment conditions if there is no mechanism to limit and/or regulate its use.

In the ASU's experience it is common for labour hire or agency temps to be placed with host employers for protracted periods of time and remain employed 'by the hour'.

It has been the practice of the ASU to seek provisions within certified agreements that may include:

- Consultation and agreement over the use of labour hire;
- Ensuring labour hire workers enjoy the same wages and conditions as employees of the host employer and that they are covered by the provisions of the Award and/or Certified Agreement;
- Seeking to ensure that labour hire arrangements have a specific purpose or life eg: a special project or seasonal requirement.

Notwithstanding this approach it is still very difficult to ensure that labour hire arrangements do not undermine permanent work and industry employment standards.

Even with Federal Award and Certified Agreement regulation all too often labour hire workers slip through the gaps and many employers argue that labour hire workers are employed by a separate company and therefore not their responsibility.

It may be that common rule provisions of the *Workplace Relations Act* currently being implemented in Victoria will improve this situation in respect to access to a safety net of employment conditions for labour hire workers placed in particular industries covered by Common Rule Award declarations.

### **3. Impact of Precarious Employment on Workers**

The impact of precarious employment on labour hire workers has been well documented in research and submissions to this Inquiry.

The ASU concurs with the submissions of the VTHC and the research conducted by Elsa Underhill as it mirrors the issues labour hire workers raise with the union consistently.

In particular the following issues are prevalent amongst the labour hire workers the union organises:

- Lack of job and income security;

- Long periods with one host employer without access to annual, long service or sick leave entitlements;
- Fear of raising work and OHS concerns;
- Lack of training;
- Lack of career opportunity;
- Sometimes poorer wages and conditions than the host employer;

#### **4. Labour Hire in Emerging Industries**

In many of the industries that the ASU has membership and industrial regulation, the level of labour hire and casualisation is lower than in some of the less unionised sectors that the union covers and organises within.

The Contract Call Centre sector as a relatively new and growing sector is a stark example of this.

In the experience of the ASU labour hire arrangements in this sector are far more prevalent and represent a much higher proportion of the workforce than in other sectors the union has coverage and organises within.

It is not uncommon for a contract call centre to employ 40% or more of its workforce on labour hire arrangements. More often than not labour hire workers are not covered by the industrial instruments in place at the host employer. This practice effectively creates two classes of workers within the same company.

Many employers in this sector will argue that the fixed term nature of commercial contracts necessitate flexible employment arrangements such as labour hire. This is hard to reconcile when labour hire workers can remain for significant periods of time within one call centre and be subject to all the same performance and/or sales targets as permanent employees but have none of the benefits of permanent employment.

In some instances these labour hire employees are subject to the host company's performance appraisal system and have reviews conducted on them by supervisory staff of the host employer. With these sorts of practices in place the line between directly and indirectly employees can become very blurred.

Difficulties can arise when a long-term labour hire placement ceases without explanation. The ASU has sought to help numerous labour hire workers who have been unable to get an explanation from either the host employer or the labour hire agency as to why their placement has been terminated. There is no access to proper dispute resolution procedures when a labour hire worker is in this situation and there are little to no legislative rights available to the worker.

The extent of the use of labour hire arrangements in the contract call centre sector is a worrying trend in the view of the ASU. All of the problems associated with precarious employment are prevalent as a result.

#### **5. Proposed Solutions**

The ASU concurs with the remedies put forward in the VTHC submission and the solutions proposed by the labour hire workers that participated in the research conducted by Elsa Underhill.

In summary the ASU supports the following initiatives in Victoria:

- Registration and licensing of Labour Hire companies;
- Access to permanent employment through labour hire companies;
- Setting maximum placement times and conversion to permanent employment status with the host employer;
- The establishment of a safety net for all Victorian workers, including labour hire workers, through the common ruling of existing Federal Awards.

The ASU thanks the Committee for the opportunity to address these issues.

## ***Appendix B***

**Extract from ASU Victorian Authorities and Services Branch  
submission to Victorian Labour Hire Inquiry**



15<sup>th</sup> February 2005

The Hon. Tony Robinson MP  
Chairman, Economic Development Committee  
Level 8  
35 Spring Street

MELBOURNE VIC 3000

Dear Mr Robinson,

### **Inquiry into Labour Hire Employment in Victoria**

#### **ASU - VAS Branch response to Interim Report**

I write to advise that the ASU Victorian Authorities & Services Branch fully endorsed the VTHC submission into this important inquiry. Our branch was directly involved during the VTHC process including workshops and the survey carried out.

My branch also offers the following comments on our experience in labour hire (LH) in local government.

#### **a) Extent and breadth of labour hire in Victorian local government**

During the 1990's with the implementation of council amalgamations and in particular Compulsory Competitive Tendering (CCT), there was a dramatic growth in the use of the LH staff. This was caused by the priority appearing to be more about cutting as many staff as possible rather than retaining sufficient staff to meet community needs.

Councils and contractors to local government started to look towards LH firms to provide backup staff. In many cases, staff provided had little or no experience. Line management was willing to take anyone without questioning skills and experience, in most cases all they were interested in was getting the work done to meet CCT compliance requirements that also applied to successful in-house bids.

#### **Employment status**

Our experience was that most staff employed by LH companies were casual employees, some were regular casuals picking up between 3 – 5 days per week, others appeared to be irregular casuals. We assume the irregular casuals had other work elsewhere.

In some cases we had members employed in local government, who were working for LH companies on RDO's and while on paid leave including sick leave, a practice not supported by the ASU.

The ASU strongly opposed this and made it clear to LH companies, they would not be supported by the union as a LH provider in local government unless the practice ceased. We were concerned about the amount of hours our members may be working as well as the misuse of award provisions and the potential for them to lose their permanent jobs if caught.

### **Application of industrial relations**

Many LH companies were paying very low wages compared against what council workers received. This created animosity between workers with permanent staff seeing LH staff as being a threat to their jobs due to their low wages.

Only two companies had agreements with the union, others applied AWA's or similar agreements. This led to the union pursuing local government employers through enterprise bargaining for wages paid to LH staff to be no less than what was to be applied to council employees performing similar functions.

We also sought clauses requiring an annual review of the number of LH, Temporary and Casual staff employed by each council being reported to the Consultative Committee. The aim being to ensure that there was some sort of monitoring process across each council's various departments.

Many LH staff were employed in higher risk areas without any real check as their skills and ability to perform the job. If they did not perform satisfactorily or complained about safety issues, the employer just pressured the LH company to provide other staff.

### Occupational Health and Safety & Workers Compensation

The provision of personal protective equipment to LH staff was virtually non-existent. This led to compromising of OHS requirements in many councils as the councils were not prepared to provide such equipment to LH staff so a "blind eye" was often turned to this issue.

OH&S training was limited, only one company provided OH&S training to local government staff and this was only after a death and two serious injuries occurring involving inexperienced LH staff. The union then became involved in providing OH&S induction training for all future staff.

Our experience with Workers Compensation was that in many LH staff claims were being disputed by either the insurer and/or employer. This was mainly due to their casual employment status, so unless it was an obvious physical injury witnessed by others, claims were often disputed.

In the case of the death referred to earlier, (which was subject to a Coroners Report), the employee was through the LH company as an experienced worker in the area of waste management operations when in fact he had no experience. He was killed instantly when he fell under the rear wheels of a garbage compactor reversing out of a street.

#### Superannuation for LH Staff

The LH company had also failed to file the necessary superannuation forms with their superannuation provider. They had been filled out on commencement but remained at the LH office in a file rather than being forwarded to the SG Superannuation Provider

The Provider then denied any liability owing to the employee not being registered with them.

This has caused further unnecessary stress to the deceased employee's family as they had to seek advice and assistance from lawyers and local State and Federal MP's.

The issue of ensuring LH staff are immediately registered with the SG Provider must be addressed as part of the inquiry, while we accept that payments only have to be made quarterly, registration forms should have to be forwarded immediately when employment commences.

#### Access to Recreation Leave

The ASU also experience many regular LH staff had worked consistently for up to 3-4 years without any recreation leave. The low wages and the fear if they did take breaks (usually unpaid) they may not have a job to come back to.

### **b) The consequences of using labour hire employment in local government**

#### **De-skilling of Council workforce**

In addition to the issues referred to in a) above, the major consequence of using LH staff was the de-skilling of existing employees that occurred. Council employees were not being given the opportunity to act in higher positions to enhance their skills. For example, if the employer wanted a truck driver they would not promote a labourer to drive the truck and hire a labourer, they would bring in a driver from a LH company.

#### Increasing of casualisation

There is no doubt that in local government the use of LH increased the casualisation of employment. The union is addressing this matter through enterprise bargaining by seeking an annual review of each department of the number of LH staff, casual and temporary employees used.

We believe that in many cases, due to the turmoil caused by amalgamations and CCT, councils were content to continue the growth of these positions at the expense of permanent staff. In many cases, council employees were willing to let this happen as under CCT work area agreements, against the wishes of the

union, councils offered employees “profit share/gain share” arrangements. This led to staff being more receptive to LH staff as they did not have to share any profit/gain made with them.

We see that with the implementation of Best Value, the “tide is turning” more towards permanent employment with some councils’ ceasing to use LH staff completely and many minimising the uses of LH staff.

... ..

If further information is required on any of the above matters, I can be contacted on either 03 9342 3405 or 0428 566 409 or by email [dcochrane@asuvic.com](mailto:dcochrane@asuvic.com).

Yours truly,

**DARRELL COCHRANE**

*6.1.1.1.1 BRANCH SECRETARY*

## ***Appendix C***

**Attached as PDF file**

## ***Appendix D***

**Attached as PDF file**

## Endnotes:

---

<sup>1</sup> See for example: *Self-Employed Contractors in Australia: Incidence and Characteristics*, Staff Research Paper (authors Matthew Waite and Lou Will), Productivity Commission, 2001.

<sup>2</sup> Sections 105-116 of the NSW Industrial Relations Act 1996

<sup>3</sup> *Family Day Care Handbook*, Department of Family and Community Services, Commonwealth Child Care Program, section 2.5

<sup>4</sup> Print J7218

<sup>5</sup> Gazetted NSW Government Gazette, 17<sup>th</sup> December 2004.

<sup>6</sup> *Kennedy v Oceania Aviation Services Pty Ltd* [2003] QIRComm 405 (5<sup>th</sup> September 2003); 174 QGIG 196

<sup>7</sup> *CLERICAL AND ADMINISTRATIVE EMPLOYEES IN TEMPORARY EMPLOYMENT SERVICES (STATE) AWARD*

<sup>8</sup> *Clerks (South Australia) Award Casual Provisions Appeal Case* [2002] SAIRComm 39

<sup>9</sup> *Re Clerks (South Australia) Award, s 202 Dipsute*: [2004] SAIRComm 4