SUBMISSION:

LABOUR HIRE AND CONTRACTING

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Executive Summary

Submission to Federal Inquiry on Labour Hire and Contracting

Over the past 20 years there has been a steady emergence of non-traditional working arrangements including temporary and marginal workers such as casual and part-time employees, and a substantial increase in the use of contracting and labour hire.

Categories include self-employed contractors and subcontractors (including many mobile or home-based workers), temporary (including on-call), leased (or labour hire) and short-term fixed contract workers.

The Qld Government supports the use of genuine independent contracting. However, it has grave concerns about the use of 'sham' or artificial contract arrangements to hide a genuine employment relationship for the following purposes:

- to undermine employment conditions
- to remove workers out of the PAYE system
- to remove employers' obligation for worker's compensation and public liability coverage.

The **Committee's terms of reference** are to inquire and report on:

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

Part 1 Definitions and statistics – What proportion of people in the Queensland workforce are operating as contractors or are leased through labour hire agencies?

1.1 Contracting

The Australian Bureau of Statistics (ABS) defines a contractor as anyone who operates their own business or engages independently in a profession or trade, either with or without employees, and provides a service for a specified period of time. The major difference between contractors and other types of self-employed persons is that the work of contractors mainly revolves around the **provision of services** to other businesses.

Own-account contractors can be divided into two broad groups, those who are independent (providing services to more than one organisation) and those dependent on the hiring business (providing services to one organisation).

Dependant contractors are most closely aligned to disguised wage workers on the basis that they receive the majority of income from one business and have a dependant relationship on the hiring business.

There is limited statistical data available in Queensland and nationally which tracks the numbers, types and trends around contracting arrangements.

However, all recent research has concluded that **contract employment has risen as a share of total employment in recent history both nationally and in Queensland.** Since 1978 the number of owner/managers of incorporated enterprises, which includes contractors,

more than quadrupled in Australia (Productivity Commission 2001). The actual number of contractors has increased by 11.9 per cent (13,200 persons) from 1998 to 2004 (ABS Cat. No. 6359.0).

1.2 Labour Hire

Labour hire arrangements involve a relationship between three parties in which the services of a worker are on-hired by a labour hire agency to a host company. Under these arrangements the on-hired worker may be an employee of the labour hire agency or a self employed contractor whose services are hired to the host employer. In Australia, most labour hire employees are engaged as casual employees and there is no obligation on the part of the labour hire agency to guarantee continuity of engagements or to pay wages or any other benefits between engagements.

Labour hire arrangements range from the traditional use of labour hire workers to cover temporary vacancies and staff shortages during periods of peak demand to the replacement on a permanent basis of sections of the host company's workforce.

Recent statistics indicate that the labour hire sector is growing rapidly, both in Queensland and Australia. The latest statistics from the Productivity Commission indicate that:

- labour hire employees represented 2.9 per cent of all employed persons in 2002; and
- in workplaces with 20 or more employees, labour hire employees grew from 0.8 per cent in 1990 to 3.9 per cent in 2002.

Part 2 Issues for Government (Problems):

In a climate of economic growth and technological change, the growth of independent contracting and labour hire arrangements are legitimate responses to meeting global challenges and competition both for the business and the worker.

Problems arise with those arrangements that:

- **disadvantage** those working under contracting or labour hire arrangements compared to employees in the same sector; and/or
- result in **unsafe work practices** compared to employees in the same sector; and
- are **artificial contracts** to hide a genuine employment relationship.

2.1 Disadvantaged working arrangements:

In a comparison of contractors, the Productivity Commission (2001) found that workers in lower skilled occupations are more likely to fit into a dependent contractor category:

- 72 per cent of independent contractors were in skilled occupations
- 72 per cent of dependant contractors were in the lower skilled occupations of plant machine operators and drivers.

While independent contractors are doing well in skilled occupations at the upper end of the labour market, this is not the case for workers in dependant type contracting arrangements, who are on low wages, with little job security and low job autonomy, and who need the protection of the industrial relations system.

A comparison of median weekly income in Queensland between 1996 and 2001 reveals that the incomes of self-employed engaged in full-time work are lower than that of employees in the majority of industry sectors, except for finance and insurance (in 1996 and 2001), government administration and defence and construction (in 2001). The inequality gap for the

Transport and Storage industry widened in that time, suggesting a growing trend by employers to employ people on contract to minimise their costs.

Under **labour hire arrangements,** between 20-25 per cent of all labour hire workers are contractors (Brennan, Valos and Hindle 2003), with the same potential for disadvantaged working arrangements identified for dependant contractors. The majority of labour hire employees (approximately 75 per cent) are engaged on a casual short-term basis resulting in reduced income during gaps in engagements. Problems arise in the case of disputes over employment rights about who is the responsible employer, the host or the hiring company. In Queensland, Labour Hire agencies are included in the definition of employer under the *Industrial Relations Act 1999* (the IR Act).

2.2 Unsafe work practices:

There is increasing evidence that the replacement of employees by contractors, particularly in the construction industry, is having detrimental effects on the occupational health and safety of workers.

This is principally because:

- contracting is a 'payment by results' system which is based on the amount of work, not the time required, thereby encouraging contractors to minimise time in order to maximise profit;
- contractors are, or work for, small businesses, which are less likely to have health and safety resources, knowledge or information;
- contractors often engage in horizontal and vertical contract relationships in which responsibilities, tasks, levels of supervision and communication processes are more inclined to become disorganised or confused and 'allow' occupational health and safety responsibilities to be avoided; and
- contractors are not well covered by employment regulations or union negotiated collective agreements and retain minimal bargaining power.

The competitive pressures that induce businesses to adopt contracting arrangements also encourage corner-cutting on OHS by underbidding on contracts, the use of cheaper or inadequately maintained equipment, reductions in staff levels, speeding up production, work intensification and longer work hours. These organisational forms, particularly those that involve introducing third parties to work arrangements and creating multi-employer worksites, result in fractured, complex and disorganised work processes, weaker chains of responsibility and 'buck-passing', and a lack of specific job knowledge (including knowledge about OHS) among workers moving from job to job. They also make it more difficult for worker interests in OHS to be effectively represented.

Higher rates of injuries have also been identified among labour hire employees compared to general employees. A number of reasons are cited including:

- higher proportion of semi/unskilled workers
- higher proportion of younger workers
- tendency of employers to outsource more dangerous tasks.

In response, the Queensland Government expanded general duties under the *Workplace Health and Safety Act* to protect people other than employees.

In addition, the definition of worker in the *Workers' Compensation and Rehabilitation Act 2003* was amended to introduce a 'results test' which determines who is a worker and who is an employer. The 'results test' closely aligns with the Commonwealth's ***Alienation of***

Personal Services Income 2000 Act and was introduced to ensure consistency in the determinations made by the ATO and WorkCover Queensland as to who is and who is not a worker.

2.3 Artificial contracting arrangements

There is evidence to demonstrate that a proportion of contracting arrangements have been developed solely to minimise tax or on-costs and to outsource risk from corporations to individuals, including vicarious liability. The practice of people moving income out of the PAYE system when they were not legitimately operating a business was challenged by the Commonwealth's ***Alienation of Personal Services Income 2000 Act*** which tightened the definition of an independent contractor.

The practice of disguising employment type arrangements under artificial or 'sham' contracts is still a common one. The Queensland Industrial Inspectorate has identified a number of arrangements used in Queensland to avoid the employee/employer relationship, including:

- Tertiary Beneficiary Trust: Under this arrangement, workers are not offered employment in the usual manner. Instead they are offered work as Tertiary Beneficiaries of a company trust and paid dividends rather than wages.
- Partnership arrangements: In this instance, a company enters into a partnership arrangement with one individual to provide services (usually labour only) to client businesses
- Franchisees: Under this arrangement, an enterprise allows another person to use its trademark product, but the franchisee has financial obligations to the franchisor who exercises control. The Industrial Inspectorate has cited one example of an employer alleging a retail shop manager was an agent or franchisee of his business. The Department was successful in establishing an employment relationship and obtaining an order for payment of wages.

In other examples reported to the Department, young workers in marginal employment, such as shopping trolley collection, are required to sign agreements to become contractors transferring responsibility from the employer to the individual worker for:

- payment of tax
- payment of superannuation
- payment of workers compensation insurance
- payment of public liability insurance effectively making them liable for any damage to property

In such cases, the on-costs borne by the young worker far outweigh any over-award payment, and underlies the difficulties of comparing weekly incomes to measure disadvantage of contractors dependant on employment type arrangements.

The federal government has challenged the practice of people moving income out of the PAYE system when they were not legitimately operating a business through the introduction of the Commonwealth's ***Alienation of Personal Services Income 2000 Act*** which tightened the definition of an independent contractor.

Part 3 How arrangements are dealt with under legislation - What has been done so far?

The increasing move away from the conventional employee/employer relationship towards workers engaged under labour hire arrangements and under dependent contractor status,

has effectively taken these workers outside of the industrial relations system and the benefits and protections associated with being defined as an employee under relevant industrial laws.

In Australia and Queensland industrial relations regulation identifies employees narrowly as those in an employment relationship under a contract of service, separate from those who are self-employed and work as independent contractors, contracting their services out to a number of clients. Where there is a difficulty in differentiating between the two groups, these matters are left to the courts to determine on the basis of various common law tests and criteria.

Other regulatory areas of labour law in Queensland do not rely on the dividing line between employees and contractors, for example:

- Occupational health and safety legislation imposes duties beyond the traditional concept of the employment relationship.
- Workers Compensation legislation applies to certain workers under a contract for service.
- Discrimination legislation applies to both contractors and employees.
- Payroll tax covers contractors performing work other than pursuant to a trade or business which they carry on and do not subcontract to anyone else.

In addition, the federal Government introduced the ***Alienation of Personal Services Income 2000 Act*** to tighten the definition of independent contractor and to reduce the practice of sham contractors moving out of the PAYE system.

The Queensland Government recognised that this narrow definition of the employment relationship did not cover the 'grey' areas of artificial or 'sham' contracting arrangements and introduced sections 275 and 276 of the *Industrial Relations Act 1999,* which gave the Queensland Industrial Relations Commission (QIRC) the power to declare persons to be employees (employee deeming) and to amend or declare void unfair contracts.

Section 275 of the IR Act has not been used excessively or capriciously and is not a threat to proper independent contracting arrangements. It has been applied in a moderate and effective manner. An example of this approach was the Full Bench decision to dismiss the application under AWU v Hammonds (B885 of 1999) which looked at whether contract shearers engaged by Hammonds through a labour hire agency operating Odco style contracts should be treated as employees.

In ALHMWU v Bark Australia Pty Ltd, on the other hand, the Commission found that the nature of the relationship between Bark and the workers had many of the characteristics of an employment relationship and hence had little difficulty in declaring that they should be considered to be employees of Bark and treated and paid as such. In this instance a security company engaged security workers as putative contractors. The workers had previously been employees of a company that had formerly been engaged to carry out the security work.

Section 276 of the IR Act has been used more frequently with the Commission handling unfair contract applications from all industry sectors, particularly in the transport, retail and building industries. The other applications were made by workers in a wide range of industries, including communications, finance, aged care, security, manufacturing, real estate, education, and farming.

Whilst important mechanisms, these provisions rely on legal proceedings to determine whether contracts are unfair which imposes costs on the applicant and deters individuals from pursuing remedies through the Commission.

The growth in new types of working arrangements such as contracting and labour hire, have been met with similar responses in other state jurisdictions. Most jurisdictions explicitly include outworkers in the definition of employee as well as apprentices and trainees. The NSW legislation also includes a broad range of specific occupations that are deemed to be employees, power to deem others to be employees by regulation, a system of contract determination and a process to test if employment contracts are unfair.

Queensland and West Australia have provided protection for labour hire workers by the specific inclusion of labour hire companies in the definition of "employer".

Part 4 Options for consideration

In addressing the Committee of Inquiry's terms of reference, concerning (1) ways in which independent contracting can be pursued consistently across state and federal jurisdictions and (2) strategies to ensure independent contracting arrangements are legitimate, the following issues need to be considered:

- whether the current definition of employee in industrial legislation adequately reflects the variety of employment arrangements and complementary legislation in the labour market today;
- the extent to which the different definitions of employee across different jurisdictions covering taxation, superannuation, workplace health and safety, worker's compensation and industrial relations are currently preventing the consistency and complementarity being examined by the Committee in relation to independent contracting;
- the importance of broadening the definition of employee as an effective mechanism to adequately remove artificial or illegitimate contracting arrangements under contractual or labour hire agreements;

Some options for consideration in relation to contracting include:

- **Giving a tribunal or government an ongoing power to deem** workers including dependant contractors to be employees similar to the **275 and 276 provisions** of the Queensland *Industrial Relations Act 1999*.
- Strengthening the **ATO test of genuine contracting status** by imposing more stringent tests when an application for an ABN is made.
- **Aligning the different definitions of the employment relationship** to provide consistency in relation to artificial or illegitimate contracting arrangements.
- Establishing institutional processes and mechanisms to deal with the issue of who is an employee or a contractor.

Some options for labour hire include:

- **Inclusion of labour hire companies** in the definition of employer as in the Queensland and West Australian legislation.
- Developing higher standards through mechanisms such as the adoption of a **Code of practice** for the industry to provide clear direction as to preferred industry practices that would not only cover practices for employees but also influence the contractor sector as well.

SUBMISSION: LABOUR HIRE AND CONTRACTING

Over the past 20 years there has been a steady emergence of non-traditional working arrangements, including temporary and marginal workers such as casual and part-time employees, and a substantial increase in the use of contracting and labour hire. While there is an ongoing debate about what constitutes contingent work or precarious employment, there is a wide consensus about the inclusion of some categories. These include self-employed contractors and subcontractors (including many mobile or home-based workers), temporary (including on-call), leased (or labour hire) and short-term fixed contract workers.

Labour hire is a small sector of the workforce but it is growing rapidly and has some unique issues within it. Independent contracting is larger and also rapidly expanding. The Qld Government support the use of genuine independent contracting. However, it has grave concerns about the use of sham contract arrangements to hide a genuine employment relationship for the following purposes:

- to undermine employment conditions
- to remove workers out of the PAYE system
- to remove employers' obligation for worker's compensation, superannuation and public liability coverage.

The Committee's terms of reference are to inquire and report on:

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

Part 1. DEFINITIONS AND STATISTICS

1.0 Contracting in Queensland

1.1 Definitions

A **contractor** is defined as anyone who operates their own business or engages independently in a profession or trade, either with or with out employees[1], and provides a service for a specified period of time. The critical difference between contractors and other types of self-employed persons is that the work of contractors mainly revolves around the **provision of services** to other businesses. The broad term 'contractors' include own account workers who are owner managers of their own unincorporated enterprise[2] or engage independently in a profession or trade, and hire no employees.

Own-account workers can be divided into two groups, those who are **independent contractors** (providing services to more than one organisation) and those who are **dependent contractors** (providing services to one organisation). Dependent contractors are comprised of the following groups:

[1] The ABS defines an employee as a person who either: works for an employer and receives remuneration in wages, salary, a retainer fee by their employer while working on a commission basis, tips, piece-rates, or payment in kind; or operates their own incorporated enterprise with or without hiring employees.

[2] Owner managers of unincorporated enterprises are persons who operate their own unincorporated enterprise, including those engaged independently in a trade or profession (ABS Cat no. 6359.0). This excludes people who say they work in their own business but have characteristics more like employees. In an unincorporated enterprise the owner is legally liable.

- Self-employed persons whose employment mainly involves the provision of services to one or primarily one business;
- Persons who classify themselves as employees but do not pay tax on a PAYE basis;
- Employers[3] who employ only family members and whose work mainly involves the provision of services to one or primarily one business; and
- Persons who classify themselves as employees by who are actually employed by their own business, which has no other employees or only employs family members, and whose work mainly involves the provision of services to one or primarily one business.

By definition, contractors are self-employed and do not receive a wage or salary which puts them in the 'owner/manager of unincorporated enterprises' category of contractors according to the FOES methodology. Nevertheless, not all owner/managers of unincorporated enterprises are contractors. This suggests that the number of contractors should equal the number of owner/managers of unincorporated enterprises who provide services to other businesses. Unfortunately, an estimate based on this assumption is likely to be understating contractor numbers because of problems in the way individuals classify their employment status, such as:

- self-employed contractors who viewed themselves as wage and salary earners, because the fee for their services was being paid on a regular basis; and
- could have been classified into the employees with leave entitlements; or
- self-identified casuals and other employed persons categories.

There is a lack of suitable data around contract employment in any of the ABS data sets. The broad definitions around contractors and employees normally used for ABS statistics lack detail which has troubled labour market analysts for some time (see for example Burgess 1994). The *Forms of Employment Survey* (FOES) (ABS cat. no. 6359.0), published in February 2000 and September 2002, identified five different forms of employment (Table 1). Self-employed contractors are potentially located in all of these FOES categories.

1.2 Incidence

With limited comparable data available for Queensland, some of the analysis provided below was based on **owner/managers** rather than self-employed contractors. This was done to overcome most of the data limitations and also, as previous research suggests, a majority of self-employed contractors are within the owner/manager category. Using data from the 1998 FOES, the Productivity Commission (2001) estimated that almost 80 per cent of self-employed contractors in Australia were classified as owner/managers. The Department of Industrial Relation (DIR)'s own analysis of the 1998 FOES showed this was also the case in Queensland.

Some researchers have tried to identify contractor numbers in Australia using other sources of data such as employer responses to the Australian Workplace Industrial Relations Survey (AWIRS) or through surveys of employees and employers. All this has resulted in a range of estimates of the share of self-employed contractors derived from different and not directly comparable definitions of contractors. Nevertheless, all researchers concluded that contract employment had risen as a share of total employment in recent history (Table 2 summarises previous research on contract work in Australia using non FOES data).

- Since 1978 the number of owner/managers of incorporated enterprises[4], and the share of this group in total employment, more than quadrupled in Australia (Productivity

[3] An employer is a person who operates their own unincorporated enterprise or engages independently in a profession or trade, and hires one or more employees (ABS).

Commission 2001). In 1978, 110,700 persons (or 1.8 per cent of total employed) worked as owner/managers of incorporated enterprises. By 2000 it had risen to 660 100 (or 7.6 per cent of total employed).

Self-employed contractors

- Using self-employed contractor estimates derived from the 1998 FOES, over 30 per cent of own-account workers, just fewer than 24 per cent of employers and 3 per cent of employees were identified as self-employed contractors in Queensland. Assuming the proportion of self-employed contractors in each type of employment remains relatively constant over time, their share in total employment in 1998 was about 7.1 per cent (Table 3).
- Table 3 shows that the actual numbers of self-employed contractors have risen between 1998 and 2002, growing by 7,100 persons (or 6.4 per cent in the four year period). The majority of the growth came from own-account workers (up 4,800 persons, representing 67.6 per cent of total growth).
- The most current LFS data available (June 2004) shows that self-employed contractors currently represent 6.7 per cent of total Queensland employment, (a 5.2 per cent decrease since 1998).
- The actual number of contractors has increased by 11.9 per cent (13,200 persons). Also, there was growth in the share of employment accounted for by industries in which self-employed contractors are more commonly found. Therefore, it is likely that self-employed contracting as a share of employment has in actuality increased between 1998 and 2004.
- Total self-employed persons as a proportion of total employment in Australia grew from 16.6 per cent in 1978 to 19.4 per cent in 1997 (Chapman 1998).

Dependent contractors

The estimates derived from FOES indicate that in 1998, 3.3 per cent of employed persons worked as dependent contractors in Queensland. Productivity Commission's estimates ranged from 2.6 per cent to 4.2 percent for Australia in 1998, making the Queensland estimate on par with Australia.

1.3 Profile

This section examines various aspects of self-employed contractors to identify how changes in particular groups of contactors have differed from the aggregate changes of self-employed contractors and if changes examined in the previous section (total self-employed) are reflected in contractor trends.

Occupation

The distribution of self-employed contractors by occupation reveals the occupational diversity of this employment type.

- Self-employed contractors are found in every occupation type, although in 2001, 29.7 per cent worked as tradespersons and related workers and a further 17.4 per cent worked as intermediate production and transport workers.
- However, self-employed contractors are more likely to be employed in high-skilled occupations.[5] Around 63.6 per cent work in these occupations.

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[4] Owner managers of incorporated enterprises operate their own incorporated enterprise, including those who drew a wage or salary for their work in their own business (ABS Cat no. 6359.0). An incorporated enterprise is a legal entity that is given separate legal status and limited liability so shareholders and officers are protected from personal claims.
[5] High-skilled occupations are defined as ASCO categories 1 though 5.

Between 1998 and 2001 the occupational mix of self-employed contractors in Queensland experienced significant changes.

- Proportions of highly-skilled occupations such as professionals and associate professionals increased by 1.8 and 3.2 percentage points respectively, while advanced clerical and service workers decreased by 7.9 percentage points.
- Also proportions of low-skilled occupations increased over the three year period, with intermediate production and transport workers and elementary clerical, sales and service workers recording substantial increases of 3.9 and 3.2 percentage points respectively (Table 4).
- Looking at workers within different occupational groups, associate professionals and elementary clerical, sales and service workers were the only two occupation groups that experienced growth between 1998 and 2001, up 1,000 persons (or 15.2 per cent) and 1,800 persons (or 50.0 per cent) respectively.
- The greatest falls occurred in the advanced clerical and service workers (down 9,400 persons or 82.5 per cent), tradespersons and related workers (down 7,600 persons or 23.5 per cent) and managers and administrators (down 5,900 persons or 43.7 per cent) (Table 12). With 85.8 per cent of the decline in contractor numbers occurring in the high skilled occupations the data suggests that being employed as a contractor is less advantageous for skilled people presumably on high incomes.

Industry

Self-employed contractors are relatively concentrated within a number of industries.

- In 2001, over a third (34.6 per cent) of self-employed contractors worked in construction and a further 18.4 per cent were employed in property and business services (Table 5).
- Transport and storage (9.0 per cent) and manufacturing (8.3 per cent) also had higher concentrations of self-employed contractors.
- In all, over 70 per cent of all contractors were employed by those four industry sectors in 2001.

Between 1998 and 2001, the distribution of self-employed contractors by industry experienced significant changes in Queensland, with the major trend being that self-employed contracting had become less centralised between 1998 and 2001.

- In 1998, 78.6 per cent of all self-employed contractors were concentrated in just four industries; by 2001 the same four industries (which still had the highest concentrations of self-employed contractors) represented only 70.3 per cent of the total.
- It is interesting to note that, only one of the top four industries actually increased its relative share of total contracting employment in the three year period. Transport and storage increased its proportion by 4.2 percentage points to 9.0 per cent, representing the largest increase of any industry sector in Queensland.
- Other industries increasing their shares of total self-employed contractors included; personal and other services (up 2.8 percentage points), health and community services (up 2.7 percentage points) and cultural and recreational Services (up 1.0 percentage point). These industries also experienced increased incidence of self-employed contractors (Table 5).

Another point of interest is that, in 2001, communication services, cultural and recreational services and personal and other services only accounted for 4.2, 2.4 and 4.4 per cent respectively of self-employed contractors.

- Self-employed contracting is relatively common in communication services, with an incidence of self-employed contractors of 13.8 per cent.

- Likewise, construction (20.7 per cent), transport and storage (9.3 per cent) and property and business services (9.3 per cent) also had higher than average incidence levels of self-employed contracting.

2.0 Labour Hire in Queensland

2.1 Definition

Labour hire workers are employees and (self-employed) contractors supplied by a labour hire agency to a client firm (also referred to as temps, on-hired workers and agency workers). Labour hire is generally described as a triangular relationship that comes about when the services of a worker are on-hired by a labour hire agency to a host company. Work is performed for a client by a person, but that person is paid by and is frequently an employee of the contracting agency or labour hire firm (see Hall 2000). In a labour hire arrangement the worker will usually work at the host company's premises and work under the control and direction of the host company.

Labour hire arrangements range from the traditional use of labour hire workers to cover for temporary vacancies and staff shortages during periods of peak demand to the replacement on a permanent basis of sections of the host company's workforce.

Under labour hire arrangements the on-hired worker may be an employee of the labour hire agency or a self employed contractor (labour hire contractor supplied by a labour hire agency to a client firm)[6] whose services are hired to the host employer. In Australia, most labour hire employees are engaged as casual employees and there is no obligation on the part of the labour hire agency to guarantee continuity of engagements or to pay wages or any other benefits between engagements.

The distinctions between traditionally used labour force categorisation concepts of employer, self-employed and employee seem to blur in the case of labour hire workers because the triangular relationship splits control of the work done and payment for the work done (Brennan, Valos and Hindle 2003). This in turn leads to difficulties in measuring the incidence of labour hire workers through employee based surveys. Some labour hire workers may see themselves as employees of the company that they provide to work for, instead of the agency they are paid by. Some labour hire workers may see themselves as being self employed, particularly if they work for more than one company.

2.2 Incidence

The labour hire sector is a small part of the general labour market covering somewhere between two and three per cent of the labour force in Queensland. However, while small, it is growing rapidly. It would appear that the demographics of the labour hire sector in Queensland are broadly similar to Australia as a whole.

The Australian Bureau of Statistics has only recently developed a collection methodology, in the *Forms of Employment Survey* (FOES), which captures labour hire workers. The FOES survey was run in 1998 and 2001 and was conducted again in November 2004. Results are expected to be released in May 2005.

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[6] Invoices are made to either the labour hire agency or the client firm for services rendered and Pay-As-You-Go tax is not deducted from payments.

- As Table 6 indicates, the FOES data recorded that, in 2001, labour hire workers accounted for 1.8 and 2.2 per cent of the work force in Queensland and Australia respectively.
- Although the number of these workers was relatively small, the data showed a dramatic increase in the number of labour hire workers between 1998 and 2001.
- In Queensland, the number of labour hire workers recorded by FOES more than doubled between 1998 and 2001 to 23,359.
- For Australia, the number almost doubled in the same time period.

The Productivity Commission (2005) released a paper on the growth of labour hire in Australia which supports claims of a rapid expansion in labour hire employment over the 1990s and early 2000s. Findings are as follows:

- There were 270,000 labour hire employees in 2002, equivalent to about 2.9 per cent of all employed persons.
- The number of labour hire workers in workplaces with 20 or more employees grew from 33 000 in 1990 to 190,000 in 2002, an increase of 15.7 per cent per year.
- Further, the proportion of labour hire workers among all employees of these workplaces grew almost fivefold, from 0.8 per cent in 1990 to 3.9 per cent in 2002.

Another important source of information on labour hire workers in Australia is the Household Income and Labour Dynamics Australia (HILDA) survey. HILDA is a household-based panel survey, which aims to track all members of an initial sample of households over an indefinite life. The first wave of the survey was conducted in the second half of 2001. The HILDA dataset provides a much higher estimate of the number of labour hire workers in Queensland. It suggests that there are almost 44,000 such workers in Queensland.

Data on labour hire workers is not entirely consistent between FOES and HILDA. One of the causes of these inconsistencies is in the way questions were framed by the surveys. For example, the FOES Survey asked labour hire workers who paid them, while the HILDA survey asks who employed the respondent. In both FOES and HILDA, labour hire workers are those employees who identify as being paid by a labour hire firm or agency. Only populations of employees are able to identify as labour-hire workers (owner-managers of incorporated enterprises and owner-managers of unincorporated enterprises are excluded from this data item). The difference in the estimates between the two surveys indicates how difficult it is to collect data on labour hire workers.

2.3 Profile of labour hire employees

Both FOES and HILDA data sources show that labour hire in Australia is dominated by young men (mostly aged between 20 and 34) working full time (i.e. between 35 and 40 hours per week) with 60 percent employed on a casual basis. Apart from these distinguishing features of labour hire in Australia, the trends in labour hire in Australia are broadly similar to those identified for temporary agency workers in other countries. The industries where labour hire workers are likely to work are predictors of the demographic characteristics of labour hire workers in Queensland and Australia.

FOES data indicates that labour hire workers are more likely to be employed by employers operating in property and business services, electricity, gas and water supply, and mining, (and for Australia as a whole, in communication services) (Table 7). It is important to note that the industry data in this table reflects the industry in which their employer operates and not necessarily the industry in which the employee works. HILDA data shows concentrations of labour hire employees in mining, manufacturing and construction (Table 8).

Occupations where the majority of labour hire workers were employed include Intermediate clerical sales and service workers, Intermediate production and transport workers and Labourers and related workers (Table 9). HILDA data shows that in addition labour hire workers were also more likely to be Tradespersons and related workers, and Advanced clerical, sales and service workers (Table 10).

FOES data from 1998 and 2001 showed that in Queensland, the average period of time that the labour hire worker had been with the current employer was 4.1 weeks (4.9 weeks for labour hire workers across Australia) and 3.4 per cent of labour hire workers do not expect to be with the current employer in 12 months time (5.0 per cent for Australia). Consistent with the short-term nature of their placements, most labour hire workers do not receive paid leave entitlements (such as paid annual leave or paid sick leave).

3.0 Reasons for growth in contracting and labour hire

The material above seeks to illustrate the incidence and growth in recent years of self-employed contractors and labour hire workers in Queensland and Australia. In order to inform future policy development, it is also necessary to examine why the various parties look to make the shift toward contracting and labour hire arrangements, rather than the traditional employment relationship.

It is suggested that there are two important trends in the Australian labour market which may have impacted on individuals' and businesses' labour market choices with respect to contract employment. Firstly, in the 1980s and 1990s unemployment reached 11 per cent and has only recently fallen to under six per cent. Against this background, self employment is sometimes seen as a possible employment option for some of the unemployed or potential unemployed (Burgess, 1990 and Covick, 1984). Secondly, the proportion of the employed labour force facing high marginal tax rates has increased, thus the incentive for individuals and businesses to seek business structures that provide opportunities for tax minimisation has concurrently risen.

The literature provides a general overview looking at demand (employer-driven) and supply (employee-driven) factors to examine why there is a shift towards contracting and labour hire arrangements. The prevailing view in the literature is that employers receive most of the benefits from having a contracted or labour hire workforce and it is management employment strategies that are a major causal factor in the growth of contracting.

3.1 Employer-driven factors

A significant reason for employers to use contracting and labour hire arrangements is to gain a more predictable cost structure, because the employer or the client pays only for the work to be done at a specific time, rather than paying for each hour or day worked.

Ability to respond to fluctuations in demand

There is evidence that organisations may be reducing core staff numbers and using labour hire to cover peak demands. Magnum, Mayall and Nelson (1985) reported on the development of a dual internal labour market known as a 'core/periphery' model whereby employers concentrate on a core group of permanent (skilled) workers in the workplace and use other work arrangements on the periphery to respond to fluctuations in demand. These arrangements can include casual employees, temporary agency workers or employees on contract or labour hire. This allowed employers to avoid the issue of retaining the non-core

staff and avoid many of the incentives that are used to retain permanent employees such as fringe benefits.

Reduction of the risks associated with employment or "outsourcing risk"
Contracting and labour hire arrangements provide an employer with the opportunity of avoiding many of the risks, responsibilities and many of the costs associated with recruiting and employing staff. The client has no further obligations to the contractor after the work has been done and avoids paying overtime, leave entitlements, redundancy payments and compliance with industrial awards and agreements. Of particular note is the ability of labour hire arrangements to remove problematic or underperforming staff from the workplace without the attendant risk of facing an unfair dismissal claim. When employees are engaged through labour hire agencies the employer has the ability to test out an employee in the workplace without the need to dismiss if they are unsatisfactory. If they are satisfactory then they are transferred to the permanent workforce of the host employer. Brennan, Valos and Hindle (2003) show that around 20 per cent of labour hire employees eventually are placed permanently with the host employer.

Cost reduction through all-inclusive fee to labour hire agency
Burgess, Rasmussen and Connell (2003) report that labour hire agencies are increasingly offering a wide range of services that mediate between the job seekers and job providers. These include recruitment services, payroll administration and staff appraisal services. Such a service enables employers or labour hire agencies to avoid compliance with employee superannuation, taxation and workers compensation costs. Hall (2002) suggests that cost saving also involves lower investment in training.

Specialist skills
In certain industries with specialist skills, there may also be particular features which encourage contracting and labour hire forms of employment. For instance, the IT industry is an area where specialist skills may only be required for a short period, and there is the advantage of paying for labour on an 'as needs' basis. The construction industry is a specialist area where the production process comprises a diverse range of discrete tasks, and certain workers may only be required at one point in a project.

Tool to remove presence of trade unions from workplaces
Because unionisation levels are generally very low among labour hire workers, the presence of union members in the workplace will be low, hence the influence of unions on industrial relations issues will be reduced. In a limited survey of labour hire workers in Victoria, Underhill (2004) found some evidence that firms were using labour hire as a means to remove the presence of trade unions from key areas of their organisations.

3.2 Employee-driven factors

Own choice
The move towards self-contracting arrangements may be explained by the fact that workers are making their own free, informed choices to work on a self-employed basis. This is in terms of workers exercising their desire for independence and control over their working lives, as the Independent Contractors Association of Australia (ICA) argues. This is supported by survey research in the UK that showed that 78 per cent of those who identified themselves as self-employed preferred to work in that way.

Tax advantages
More specifically, the attractions of self-employment may include tax advantages. In the 1998 paper, Gregory attributed the increase in the self-employed in incorporated enterprises

to the persistent increase in the previous 20 years in the after tax disadvantage for wage and salary earners. The incidence of high marginal tax rates and the increasing proportion of individuals subject to high tax rates generated pressure for the self-employed to incorporate their business activities.

Flexibility
Self-employment may appeal as a more flexible form of labour market activity for some. The Gregory paper, for example, found that the presence of dependents has a significant effect on the probability of self-employment, with a child aged under 5 years being a critical determinant for women and self-employment. The UK survey research also found that greater control over working time to meet outside commitments was a major reason for adopting non-standard working arrangements.

Cultural reluctance
There may be a cultural reluctance in some areas for workers to become an employee, particularly in areas that historically have not been subject to award regulation. For example, many owner-drivers are strongly individualistic with a desire to be viewed as running their own business rather than be seen as an employee. Similarly, previous surveys of taxi drivers conducted by the Department of Industrial Relations indicate that two thirds of drivers did not wish to be classed as employees.

Incentives in certain skill areas
Gregory found the nature of certain industries and skills of workers contributed to the probability of self-employment. The skills shortages in the IT sector four or five years ago created an environment of high wages and increased mobility and contracting became an attractive option for many workers. The road transport industry has been characterised by a number of self-employed workers and this has been attributed in part to the low barriers to entry in the industry and the relatively easy access to finance. Also, there are some niche areas of labour hire such as nursing (Underhill 2004) and the computer industry (Hall 2000; Burgess Rasmussen & Connell 2003) where there are strong incentives and benefits for employees to work as labour hire rather than as direct hire employees.

Part 2. PROBLEMS

Problems arise with those arrangements that:

- **disadvantage** those working under contracting or labour hire arrangements compared to employees in the same sector; and/or
- result in **unsafe work practices** compared to employees in the same sector; and
- are **artificial contracts** to hide a genuine employment relationship.

4.0 Disadvantaged working arrangements

4.1 Contractors

4.1.1 Inequality between employees and contractors

The ABS does not collect wage/income data on employed persons, hence to identify any inequality that may exist between the self-employed and employees, income data collected from the ABS Census of Population and Housing is used. This analysis is restricted to the 1996 and 2001 census data to make the data directly comparable across time.

It is likely that the self-employed have different incomes to employees. Analysis of data in Table 11 reveals the following trends. In 2001, median weekly incomes of self-employed

engaged in full-time work were lower than that of employees in all industry sectors with the exception of the finance and insurance industry, government administration and defence and construction. The largest inequality seems to occur within the mining and education industries. In the transport and storage industry, the inequality gap has widened between 1996 and 2001, suggesting that there might be a growing trend by employers to employ people on contract to minimise their labour costs.

While independent contractors are doing well in skilled occupations at the upper end of the labour market, this is not the case for workers in dependant type contracting arrangements, who are on low wages, with little job security and low job autonomy, and who need the protection of the industrial relations system. These may include, for example, workers who are not entitled to minimum conditions of employment under industrial laws because they are engaged as contractors, not employees, despite wearing a company uniform, driving a company vehicle, and being told when to start, finish, and how to perform their work. Even for those contractors who are getting the benefits, for example, of decreased tax liabilities and some extra autonomy, this may not make up for the employment benefits being foregone.

Workers in lower skilled occupations are more likely to fit into a dependent contractor category. For example, the Productivity Commission (2001) found that among workers it classified as independent contractors, 72% were in skilled occupations. This compares to 46% of dependent contractors who were in skilled occupations. This general pattern was reflected also in research from VandenHuevel and Wooden. Within the group of self-employed contractors, it found that, by occupation, 93.4% of tradespersons were classified as independent contractors, while in the lower skilled occupations of plant machine operators and drivers, most (72.6%) fell into the dependent contractor category.

When comparing income levels between employees and contractors, the additional on-costs borne by the contractor must be taken into account which include:

- payment of tax
- payment of superannuation
- payment of workers compensation insurance
- payment of public liability insurance effectively making them liable for any damage

In such cases, the on-costs borne by the contractor far outweighs any over-award payment, and underlies the difficulties of comparing weekly incomes to measure disadvantage of contractors dependant on employment type arrangements.

4.2 Labour hire

Labour hire presents a number of issues for industrial relations regulators. An analysis of the literature shows that labour hire employees are generally paid less than non-labour hire employees and receive inferior conditions of employment (Nienhuser and Matiaske (2004)).

Much of the material used to promote labour hire contractor arrangements is based on the fact that these arrangements allow employers to avoid labour market regulation. These concerns are sufficient for regulators to realise a small but significant proportion of the workforce may be disadvantaged and that this issue needs to be addressed. This has resulted in calls for increased regulation of labour hire to ensure that workers are receiving entitlements and that they are not being exploited. There are also concerns that labour hire has resulted in lowering of standards in occupational health and safety and has been used to undermine rates of pay and conditions of employment (see for example Underhill (2001),

(2002) and (2004), Hall (2002), Campbell, Watson and Buchanan (2001) and the final report of the NSW Taskforce (2001)).

4.2.1 Contractors in Labour Hire

A complicating factor in any investigation of labour hire is the incidence of labour hire "contract" workers. In the 1980's a number of companies developed a strategy of engaging their workers as "contractors" rather than employees. The purpose of this practice appears to have allowed labour hire providers to avoid responsibility for employee entitlements and for workers to access potentially lower rates of taxation. For the labour hire provider, if its workers were not "employees" then it was not liable for any entitlements that may accrue to employees such as leave, superannuation, workers compensation insurance and so forth.

Brennan, Valos and Hindle (2003) provide an estimate of the proportion of contract workers for Recruitment and Consulting Services Association (RCSA) members and non-RCSA members. RCSA New Zealand also provided an estimate of the number of contractors placed with employers. From these data it would appear that around 20 to 25 per cent of all labour hire workers are "contractors". Based on the FOES data this would put the number of labour hire contract workers in Australia at around 40,000 to 50,000. In Queensland the number would be between 6000 and 8000 workers. If the higher estimate contained in the HILDA survey are used, there would be between 10,000 and 12,000 labour hire contractors in Queensland.

The issue of the use of contractors in labour hire arrangements came to the attention of the Courts in the "Odco" cases in the 1980's. Odco supplied labour on building and construction sites. In the late 1980s and early 1990s it was involved in a number of court actions that tested the legitimacy of its use of labour only contractors to supply labour to building sites.

It is no coincidence that this particular battle was fought in the building and construction industry which is dominated by sole trader sub-contactors. The novelty was that Odco included labourers as well as tradesmen in the contract workers it had available for hire.

Since the early 1990's the "Odco system" for contract labour hire has been widely adopted and applied to a variety of industries. Its attraction to labour hire operators is obvious as it involves a shifting of the risks associated with employment from the labour hire provider to the worker.

The Odco case established the legitimacy of viewing certain labour hire workers as "contractors". The legal arguments in this country have been informed by a number of important cases including the Vabu cases and Stevens v Brodribb that have established the legal basis of the distinction between employment and contract work. The Forstaff case has attempted to argue that even if a person can be shown not to be a contractor, in the labour hire context they may not necessarily be considered to be "employees" at law. The application failed because the NSW Supreme Court found that the workers involved were employees.

4.2.2 Casual employment in the labour hire sector

Among labour hire employees there is clearly a very high incidence of casual employment. This raises issues, particularly where the employees are engaged for extended periods in a regular and systematic fashion. While this is also an issue in the broader community, the very high incidence of casual employment makes it a more pressing issue in the labour hire sector.

In the general workforce, around 27 per cent of employees are reported to be casual employees (ABS 2001). However, in the labour hire sector, the vast majority of labour hire employees are employed on a casual basis. According to the FOES data around 75 per cent of labour hire employees Australia wide and 64 per cent of labour hire employees in Queensland are casual (ABS 2001). The HILDA data for Queensland shows a similar incidence of casual employment (65 per cent of labour hire employees). According to Brennan et al. (2003) the figure could be much higher as they report that only 16 per cent of labour hire employees are permanent employees of the labour hire agency.

The use of casual employment for labour hire appears to be appropriate for the traditional concept of labour hire, that of the use of labour hire workers to fill short term temporary vacancies in the host company. For labour hire employers, the engagement of workers as casuals provides them with the ability to shed staff swiftly and without the requirement to make redundancy or other payments on termination of employment and without the fear of facing unfair dismissal proceedings. The maintenance of a pool of available workers provides labour hire employers with the ability to respond rapidly to a client's needs to increase or decrease labour supply. The use of casual labour also allows rapid adjustments to be made to the length of the working week of employees without incurring penalties under the award.

It is clear, however, that the use of casual employment in labour hire goes beyond the engagement of temporary short term employees. For example in the cases of Staff Aid Services Pty Ltd v Josie Bianchi in the AIRC (PR945924 AIRC 5 May 2004) and Oanh Nguyen v A-N-T Contract Packers Pty Ltd and Theiss Services Pty Ltd in the NSW IRC (3 March 2003 NSWIRC Matter No IRC 3826 of 2002) both employees had been employed on a regular and systematic basis over an extended period of time. These were employees who were engaged as part of the regular workforce of the host company via the agency of a labour hire provider.

Furthermore, Brennan et al. (2003) report that around 50 per cent of labour hire employees are employed continuously by immediately being placed in another assignment at the conclusion of their current assignment. This is in spite of the fact that the average length of single engagements is around 6 weeks according to evidence presented by the RCSA to the NSW Taskforce (DIR 2001). Employees who move from one engagement to the next without a break would appear, for all intents and purposes, to be ongoing employees of the labour hire agency. In addition to this, Brennan et al. (2003) also report that around 35 per cent of employees are placed for assignments that exceed 6 months duration.

While there are clear benefits to labour hire employers to engage staff on a casual basis, for employees, there are clearly negative implications that flow from casual employment. According to Pocock, Prosser and Bridge (2004) 75 per cent of casual employees surveyed would rather have permanent employment. In addition 71 per cent of the employees they surveyed felt that the casual loading did not adequately compensate them for the negative impact of casual work. In their survey of the labour hire industry, Brennan et al. (2003) stated that 64 per cent of labour hire casual employees surveyed reported they would trade their casual loading in exchange for paid leave entitlements. This is in spite of the fact that the monetary value of leave entitlements is less than the casual loading.

There is also evidence in Pocock et al. (2004) that casual work is, for many, not a bridge to permanent employment. However, it should also be noted that Brennan et al. (2003) record that labour hire employers report that around 20 per cent of labour hire employees go on to become permanent employees of the host organisations in which they are placed.

The Queensland *Industrial Relations Act 1999* offer some benefits for casual employees that are not seen elsewhere including protection for casual employees from unlawful dismissal and access to parental leave for long term casuals. In addition, casuals are able to access long service leave.

Attempts by other states to improve conditions for casuals are as follows:

- Casuals in NSW are also able to access long service leave.
- In Victoria, casual employees with more than 12 months service with their employer have won access to make-up pay for jury service ensuring that casuals selected for jury service are not disadvantaged.
- The federal Metal Industry Award provides casuals with the opportunity of seeking permanency after six months continuous employment with an employer.
- In the NSW Secure Employment Test Case, the NSW unions are arguing that employees engaged for more than 6 months in regular and systematic employment should be given the opportunity of converting to permanent employment, with either the host employer or labour hire provider.

Should such provisions become widespread in awards or should enabling legislation be passed, this would affect the 50 per cent of labour hire employees that are effectively in continuous employment due to receiving back to back placements and the 35 per cent who are in placements that exceed six months. For those employees for whom casual employment is not a preferred mode of employment, it would offer a genuine choice to improve their level of employment security.

4.2.3 Identifying employers

There is frequently argument over the identity of the employer of labour hire employees (Brook Street Bureau (UK) Ltd v Dacas [2004] EWCA Civ 217). In the USA during the 1940's the doctrine of "joint employment" developed which has, over the years successfully dealt with the difficulties in determining the identity of the "employer" in situations where more than one potential candidate is present. The US Supreme Court set out the basis of the law in three landmark cases from that time. These were Rutherford Food Corp. v McComb 331 US 722 (1947), National Labor Relations Board v Hearst 322 US 111 (1947) and United States v Silk 331 US 704 (1947).

In Rutherford Food Corp.v McComb, weight was placed on the nature and degree of control exercised by Rutherfords over the work to be done and by the fact that the workers involved were integrated into the business of Rutherfords.

In the other two decisions of the Supreme Court (NLRB V Hearst and US v Silk) the Court placed emphasis on the economic realities of the parties which enabled it to go beyond the simple issues of control and look at the broader relationship between the parties. This concept has informed the decisions of the Supreme Court on questions of joint employment since that time. Even when parties have a clear intention to enter into an independent contract arrangement, the US Courts have held that the economic realities of the situation will override the express terms of the contract and the intent of the parties to the contract (see for example Real v Driscoll Berry Farms US Court of Appeals, 9th Circuit 1979.

The High Court of Australia in Amalgamated Metal Workers Union of Australia and Others; Ex parte The Shell Company of Australia and Others (1992) 174 CLR 345 found that non-employers can be parties to an industrial dispute. While this finding falls short of a finding of joint employment, it has the potential to create obligations for non-employers with respect to employees of a related company.

The AIRC has applied the principles in Shell in a number of contexts including labour hire situations (see for example Communications Electrical, Electronic, Energy, Information Postal, Plumbing and Allied Services Union of Australia v IES Australia Pty Ltd and others. PR940441 AIRC, 13 November 2003). In that case, IES supplied labour to another company, Australian Steel Company (Operations) Pty Ltd. Applying the principles in *Shell* the AIRC was able to find that, although the host company was not the employer of the employees involved it could still be a party to the dispute between the union and IES and could still face obligations in relation to the employees involved.

In both Qld and WA the statute law states that once a labour hire worker has been found to be an employee, then the labour hire agency is the employer. This is by virtue of the fact that both the Queensland and WA legislation has included labour hire agencies as employers in its definition of employer. The effect of this provision was recently demonstrated by the outcome of the Tricord case (Construction Forestry Mining and Energy Union of Employees v Personnel Contracting Pty Ltd trading as Tricord Personnel, 2004 WAIRC 11445 (12 May 2004)) in WA. In that case the WAIRC determined that the employer of a group of labour hire employees was the labour hire agency and not the host employer.

4.2.4 Inequalities in conditions of employment between labour hire and direct employees

The development of the enterprise bargaining stream since the 1980s has resulted in a bifurcation of the labour market into those who are covered by enterprise bargaining agreements (EBAs) and those who are not, with EBAs providing rates of pay and conditions of work that are superior to awards.

In the labour hire sector very few employees are covered by EBAs. Most are covered by basic award conditions only. Those who are not award-covered will be concentrated in highly specialised professional areas such as information technology, and the legal profession.

There have been assertions that labour hire employees receive substandard remuneration (see the NSW Taskforce Report (2001) Hall (2002) Underhill (2004). However, there is a lack of strong evidence on labour hire employee earnings. Nevertheless, the Brennan, Valos and Hindle (2003) data showed that only 51 per cent of labour hire employees thought their pay rate was fair and only 38 per cent stated that they received negotiated pay increases. There were six per cent of labour hire employees in that study who stated that they had received below award rates of pay.

Because awards provide the base on which EBAs are built, it stands to reason that any comparison between the earnings of employees who are covered by awards only and those who are covered by EBAs will show lower earnings for award only employees.

Searches of the agreement databases of both the Australian Industrial Registry and the Queensland Industrial Relations Commission show that only a small proportion of labour hire companies have EBAs for their employees. It is generally only the very large operators such as Adecco, Skilled Engineering, Drake and Julia Ross that have agreements. The majority of these are agreements made with unions and by far the largest proportion of these are within the construction and manufacturing sectors.

In Queensland, as of March 2005, there were only ten labour hire employers with State certified EBAs that were still within their nominal terms. All of these were in the building and construction industry.

In the federal jurisdiction, agreements covering labour hire employees are frequently site specific, covering employees who are placed with a particular host employer. In most cases the agreement appears to be intended to formalise the flow-on rates and conditions at the host company to labour hire employees who are placed there. In the recent decision of the AIRC in the Ballantyne Case Ross VP held that a provision in an agreement that required a flow on of the terms and conditions of a certified agreement to employees of labour hire providers and contractors was a matter that "pertained to the employment relationship" and hence could be included

The Brennan, Valos and Hindle (2003) survey reported that 60 per cent of host employers require labour hire companies to flow on rates and conditions of the host company to labour hire employees. They also found that, according to labour hire employers, around 75 per cent of labour hire employees employed by RCSA members receive equivalent rates and conditions to host company employees. However, fewer than 50 per cent of employees engaged by non-RCSA members received equivalent rates.

5.0 Unsafe work practices

5.1 Workplace Health and Safety Performance of Contractors

Occupational health and safety (OHS) problems caused by contracting arrangements

The growth of flexible work arrangements, labelled as precarious employment or contingent work in industrialised countries and the developing world, pose a serious challenge to occupational health and safety (OHS).

The construction industry, in particular, has experienced a decrease in employee numbers and a rise in the number of small businesses that rely on outsourced work (Mayhew, Young, Ferris & Harnett 1997). On most building and construction sites, for instance, a 'principal contractor' hires a series of subcontractors (either dependent or independent) to complete certain aspects of the production process (Mayhew 1995).

There is increasing evidence that these work organization and labour market changes are having detrimental effects on the occupational health and safety of workers (Quinlan, Mayhew & Bohle 2003).

It has been argued that contracting gives rise to negative occupational health and safety outcomes (Mayhew, Quinlan & Bennet 1996a; Mayhew, Quinlan & Ferris 1997). This is principally because:

- contracting is a 'payment by results' system which is based on the amount of work, not the time required, thereby encouraging contractors to minimise time in order to maximise profit;
- contractors are, or work for, small businesses, which are less likely to have health and safety resources, knowledge or information;
- contractors often engage in horizontal and vertical contract relationships in which responsibilities, tasks, levels of supervision and communication processes are more inclined to become disorganised or confused and 'allow' occupational health and safety responsibilities to be avoided; and
- contractors are not well covered by employment regulations or union negotiated collective agreements and retain minimal bargaining power.

Specific studies in this regard have been undertaken in Australia in the residential building industry (Mayhew & Quinlan 1997a), the road transport industry (Mayhew & Quinlan 1997b) and the clothing industry (Mayhew & Quinlan 1999).

It is alleged that the competitive pressures that induce businesses to adopt the above-mentioned work and organisational arrangements also encourage corner-cutting on OHS, underbidding on contracts, the use of cheaper or inadequately maintained equipment, reductions in staff levels, speeding up production, work intensification and longer work hours. These organisational forms, particularly those that involve introducing third parties to work arrangements and creating multi-employer worksites, result in fractured, complex and disorganised work processes, weaker chains of responsibility and 'buck-passing', and a lack of specific job knowledge (including knowledge about OHS) among workers moving from job to job. They also make it more difficult for worker interests in OHS to be effectively represented.

Finally, it is also alleged that OHS regulation, which traditionally has assumed factory work by full-time male workers in a continuing employment relationship governed by the contract of employment, has been slow to adapt to these new work patterns and organisational forms.

The Evidence

Statistics on OHS seldom use a categorisation that enables a precise association between contracting and OHS. Nevertheless, available Australian and overseas data does indicate that there is a link between contracting and OHS problems. Most of this statistical evidence does not measure the association of contracting and OHS directly but links OHS to the closely related category of self-employment.

United States

Evidence in Quinlan (1997) supports the hypothesis that contracting and self-employment are related to higher incidences of serious injuries and fatalities. United States data for 1993 reveals that the self-employed were more than twice (12 persons per 100 000) as likely to be killed at work than wage and salary earners (5 persons per 100 000). The same survey found that the construction industry accounted for 16 per cent of fatalities but only six per cent of total employment (Toscano & Windau 1994).

In its 1994 census of occupational fatalities in the USA, the Bureau of Statistics (1995) found that three of the four occupations with an especially large number of fatalities (truck drivers, farm workers and construction labourers) were occupations where contracting and self-employment were pervasive. The same applied to three of the five industry groups (agriculture, forestry and fishing, construction and transportation) with large numbers of occupational fatalities.

United Kingdom

A study in the UK by Dawson, Willman, Clinton & Bamford (1988) found that fatal and major injuries among the self-employed and other non-employees had increased by 26% between 1981 and 1985 and argued that while this growth might partly be attributable to better reporting it was also clearly linked to the growth of self-employment and loose forms of subcontracting.

A comparison of United Kingdom fatal incident rates over five years from 1994 showed that the self-employed consistently recorded higher fatality rates than employees (Revitalising Health and Safety 1999).

Australia

Available Australian evidence indicates a similar situation, although the evidence is more fragmentary (Mayhew, Quinlan & Bennet 1996b). An early research project based on coronial records for 1982 in Harrison, Frommer, Ruck and Blyth (1989), found that three groups of occupations (mining and quarrying; transport and communication; farming, fishing, hunting and timber getting) had an incidence of work-related fatalities far in excess of other occupations. While the study does not distinguish fatalities by employment status it can be noted that, with the possible exception of mining and quarrying, these are all occupations where the level of self-employment is significantly above that found in the work-force as a whole.

A more specific study of work-related road fatalities in Australia between 1982 and 1984 in Harrison, Mandryk and Frommer (1993) found that these accounted for 39 per cent of all work-related fatalities and 24 per cent of those occurring in the course of work (as distinct from travelling to and from work). Fifty-six percent of the at-work cases were road transport drivers and articulated vehicles accounted for 41 per cent of the at-work cases. The study found an especially high incidence of fatalities among drivers of semi-trailers outside the metropolitan area on long distance runs. This seems to accord with the US data and earlier studies in Australia (Harrison et al. 1993)[7]. Again, although the study does not break fatalities down by employment status, it can be noted that owner-drivers make up a high proportion of those involved in interstate and long distance road transport – the high risk category group.

Further, a more detailed study of work-related agricultural fatalities in Australia revealed a pattern of risk factors similar to that found for the self-employed categories of workers already discussed (Erlich, Driscoll, Harrison, Frommer & Leigh 1993).

In addition to broad statistical indications of a higher incidence of OHS problems among self-employed workers or in industries where self-employment is especially significant, there have been a number of more specific studies. Lewin-Epstein and Yuchtman-Yaar (1991) found that self-employed workers had higher levels of exposure to hazards and an increased risk of injury or illness. Obesity, high levels of work-related stress and a desire not to regularly visit a health practitioner were also characteristic of the self-employed.

With regard to the US petrochemical industry, Rebitzer (1995) pointed out that between 1986 and 1990 an increasing proportion of explosions and fires involved contract workers, culminating in an explosion at the Phillips 66 chemical complex in Pasadena, Texas on October 23, 1989, killing 23 workers and injuring 232 others.

The Queensland Response

Commentators recognise that the Queensland legislation imposes flexible and wide-reaching duties on all persons who engage any form of labour (Johnstone, Quinlan & Walters 2004). In addition, specific provisions are made for the building and construction industry.

(i) General safety obligations

When it comes to regulating non-employment relationships, the main strength of the *Workplace Health and Safety Act 1995* lies in the scope of the general duties that reach beyond the employment relationship to protect persons other than employees. Although originally envisaged as protecting members of the public, the obligation to non-employees

[7] See those cited in Harrison et al, 1993: p.449. Likewise, a study of occupational fatalities in NSW that occurred in 1984 found that 28% of work-related fatalities involved trucks, most of them travelling long distances: A. Hopkins, "Truck Deaths: Causes and Policy Responses" Unpublished Paper, Department of Sociology, Australian National University, 1991.

does not make any distinctions as to how persons come to be involved in the undertaking or come to be at or near the workplace.

Johnstone (1999) argues that the Queensland provisions protect contractors, sub-contractors and franchisees and their employees and contractors.

The extent of this public safety obligation is identical to the traditional duties owed by employers to employees. The scope of application of the public safety obligation extends beyond the workplace to encompass activities which form part of the conduct of the broader concept of an employer's or self-employed person's "undertaking".

Categorisation of persons as workers or contractors is, therefore, largely unnecessary due to the all-embracing nature of the so-called "public safety" obligation (or, obligation to "non-employees") [ss.28(3) and 29(2)], which explicitly extends the applicability of the duties established at common law as being owed by employers to employees beyond the traditional employment relationship.

In addition, amendments in 2003 to extend legislative protection to emerging and contingent work arrangements introduced S29A, which requires persons who conduct a business or undertaking to ensure that every person who performs a work activity for the purposes of the business or undertaking is not exposed to risks to their health and safety.

It is suggested in Johnstone et al. (2004) that the importance of s.29A of the Queensland legislation becomes more apparent in relation to multi-tiered or pyramidal sub-contracting found in industries like clothing (Nossar, Johnstone & Quinlan, 2003), long-haul transport (Quinlan, 2001) and construction. Here, s.29A imposes a hierarchy of overlapping and complementary responsibilities on the different levels of contractors and subcontractors.

(ii) Principal contractor provisions in the building and construction industry

Additional specific provisions are made for principal contractors in the construction industry. This provision was introduced in 1989 in response to the predominant use of contractors and sub-contractors in the industry and to deal with the problem of construction sites having more than one employer, and is meant to facilitate compliance by contracting parties at a construction workplace. The provision is designed to identify a single party who, in addition to the obligations imposed on employers and self-employed persons, is responsible for overarching health and safety at a construction workplace.

The principal contractor (PC) has the following obligations at a construction workplace:

- ensure orderly conduct of all work;
- ensure persons at the workplace are not exposed to risk;
- ensure workplace activities at the workplace are safe and without risk to members of the public at or near the workplace;
- provide safeguards and take safety measures prescribed under regulation; and
- direct any employers or self-employed person to comply with their obligation, or to stop work.

For every construction workplace, a PC must:

- appoint a workplace health and safety officer (WHSO);
- prepare a workplace health and safety plan before construction work starts and ensure it is kept current;
- provide a site-specific workplace health and safety induction to those persons who come onto the site to do *construction work*;

- ensure every person who comes onto the site to do *specified work* has undergone a general workplace health and safety induction;
- obtain a copy of every sub-contractor's workplace health and safety plan for *specified work*); and
- maintain a register of hazardous substances used at the workplace.

Continuing Issues/Problems – Impact on Worker Representation

The OHS statutes have built the principal institutions for workplace participation – occupational health and safety representatives and occupational health and safety committees – around the presumption of an identifiable and relatively stable group of employees located together or in very regular contact, and working for a single employee. Many contingent work arrangements break this nexus or weaken it to the point where it would be extremely difficult for these mechanisms to be used effectively.

5.2 WHS performance of the Labour Hire Industry

A number of authors have asserted that the workplace health and safety record of labour hire workers is not as good as that of direct hire employees (see for example Hall (2002) Campbell, Watson and Buchanan (2002) and the NSW Labour Hire Taskforce Report (DIR (2001)). Evidence in support of these assertions can be found in work that was undertaken by Elsa Underhill (2002). In her study, Underhill examined the evidence from international literature sources which supported a thesis that labour hire workers would be more likely to suffer injuries and that the injuries suffered would be more likely to be severe injuries.

She then tested the thesis against evidence gleaned from records of workers compensation claims made in Victoria over a seven year period. From these data Underhill was able to establish that the Victorian records showed that labour hire employees, on the whole suffered more injuries and more severe injuries than non-labour hire employees. Furthermore, higher levels of injury were found in all industries and occupations. There was evidence that the injury rate was increasing at a greater rate than the rate of increase in employment among labour hire workers.

By analysing the types of injury Underhill is able to offer some explanations for the reasons for the high rates of injury among labour hire workers. Not surprisingly the reasons are complex and numerous. However, a number of factors stand out. One is that work which is inherently dangerous is frequently the sort of work that is outsourced to labour hire providers. This includes manual handling tasks. This will naturally result in higher rates of injury. Secondly, there has been a shift in the composition of the labour hire population away from tradespersons and related workers to semi-/unskilled workers. These latter employees are generally at higher risk of injury in the workplace. Labour hire workers are also generally younger than the general workforce which also contributes to the higher risk of injury.

The types of injuries sustained by labour hire workers indicated that labour hire workers were less likely to be well trained in the tasks that they undertook. As evidenced by the high incidence of repetition strain injuries among female labour hire workers, this deficiency appears to include training in safe systems of work.

It should be noted that a potential weakness with the study is that it only deals with workers compensation claims by employees. It is unable to deal with the issue of injuries among the self-employed who make up an important part of the labour hire industry. Further, because of the precarious nature of labour hire employment, there may well be incentives for labour

hire employees not to make formal workers compensation claims when they are injured. Both these factors would imply that the Underhill study may understate the actual situation.

Underhill points to evidence from European literature that labour hire employees are very much more likely than non-labour hire employees to be injured during the first few weeks of a placement with a company. This may well be due to the different expectations by the host employer of labour hire workers as opposed to direct hire employees. It is possible that, in taking on labour hire workers the host employer would expect these workers to be able to operate in a fully functional fashion as soon as they enter the workplace. Direct hire employees would be given a transition period into the job to learn the intricacies of the job and avoid potential hazards.

The nature of the employment relationship in labour hire reduces the ability of workers to access training which leaves them vulnerable to the risk of injury at work.

One of the drivers of labour hire is a desire by employers to reduce the risks and costs associated with the direct employment of staff. The report of the NSW Taskforce into Labour Hire (DIR 2001) indicated that there was a wide diversity of views as to the nature and extent of training provided by labour hire companies. It was claimed by a number of the larger labour hire firms that they expended significant resources on ensuring their staff were properly trained to undertake assignments. However, they also pointed out that because workers in labour hire may be itinerant and that profit margins in the industry are low, there is no guarantee of a return on the investment in training (DIR 2001 p25). These factors would tend to mitigate against labour hire firms investing in training.

The view that labour hire firms do not invest in training is reinforced by the findings of the Brennan et al. (2003) study. This showed that only about 50 per cent of labour hire employers surveyed provided any training to their employees. Furthermore, only 48 per cent of labour hire employees stated that they had received structured training from their employer. Brennan et al. (2003) also showed that the labour hire industry does not invest in trade training with 88 per cent of labour hire employers surveyed stating that they rarely or never engaged apprentices.

5.3 Rehabilitation of injured workers

Together with workplace health and safety performance another important and related factor is the rehabilitation of injured workers. It is reasonable to assume that, where an employer has outsourced employment by means of labour hire, it is unlikely that the host employer would provide investment in the rehabilitation of injured workers. Instead, this will be considered to be a responsibility of the labour hire agency. However, because of the diversity and number of workplaces to which they provide workers, and the limited duration of engagements, it is unlikely that labour hire agencies would have the resources to devote to comprehensive rehabilitation programs, including retraining of injured workers and staged return to full duties. As pointed out by Hall (2002) there is often a lack of clarity as to which entity has legal responsibility for the rehabilitation of injured workers.

As Underhill states in a recent paper based on her 2002 analysis:

> "injured labour hire workers may have difficulty re-entering the labour market post-injury, especially if injury is severe. Host companies are unwilling to pay for labour hire workers on lighter duties, whilst their employers rarely have scope for injured manual workers to perform lighter clerical jobs – tasks often perceived by the labour hire employer as the only return to work option. Both the placement process and the post-

> injury process require much greater attention before the OHS challenge of labour hire workers can begin to be met."
> Underhill (2004)

This position is supported by the submissions to the NSW Taskforce by the NSW WorkCover Authority. The Taskforce Report states that, according to NSW WorkCover, labour hire firms frequently do not have the resources or facilities to effectively fulfil their obligations with respect to rehabilitation of injured workers (DIR NSW 2001 p66).

This view was reinforced by evidence from employers and the RCSA (ibid p67). The NSW Taskforce recommended that the NSW Government should investigate whether the existing legislation could be amended such that, in labour hire situations, both the labour hire agency and the host company can be held jointly liable for the rehabilitation and return to work of injured employees. To date no such legislation has gone before the NSW Parliament. This may be due in part to practical difficulties that may arise when a worker receives an injury on a short term assignment and then faces a period of rehabilitation that is in excess of the duration of the assignment.

5.4 Workers' Compensation

As of 1 July 2003, the definition of worker in the *Workers' Compensation and Rehabilitation Act 2003* was amended to provide greater protection to workers across all industries in Queensland.

A 'results test' was introduced to determine who is a worker and who is an employer. Under this three-part test, a person is considered to be a 'worker' unless:-

(1) the person is paid to achieve a specified result or outcome; and
(2) has to supply the plant and equipment or tools of trade needed to perform work; and
(3) would be liable for the const of rectifying any deficit in the work performed.

The importance of the change is that it requires the satisfaction of the three tests irrespective of whether or not a contract of service exists or can on the evidence be found.

The results test closely aligns with the Commonwealth's ***Alienation of Personal Services Income 2000 Act*** and was introduced to ensure consistency in the determinations made by the ATO and WorkCover Queensland as to who is and who is not a worker.

6.0 Artificial working arrangements

6.1 Artificial contracting arrangements

There is evidence to demonstrate that a proportion of contacting arrangements have been developed solely to minimise tax or on-costs and to outsource risk from corporations to individuals, including vicarious liability. A particular concern is the increase in the number of 'dependent contractors', a category of workers that are ostensibly self-employed but with working arrangements that are closer to those of an employee, rather than a genuine independent contractor.

The argument is that some employers are seeking to avoid their obligations under labour laws by hiring workers as contractors, while disguising the reality that these workers remain in employee-like situations of dependence and sub-ordination. The concern doesn't apply to all contractor-client relationships. The issue is with those working arrangements which in substance place workers in a position of sub-ordination and economic dependency, more

akin to employees, but which are constructed so as to move the worker out of the conventional employment relationship, and therefore outside the reach of industrial regulation.

The practice of disguising employment type arrangements under artificial or ‘sham’ contracts is still a common one. A typical example reported to the Department relates to young workers in marginal employment, such as shopping trolley collection, required to sign agreements to become contractors transferring responsibility from the employer to the individual worker for:

- payment of tax
- payment of superannuation
- payment of workers compensation insurance
- payment of public liability insurance effectively making them liable for any damage to property

In such cases, the on-costs borne by the young worker far outweighs any over-award payment, and underlies the difficulties of comparing weekly incomes to measure disadvantage of contractors dependant on employment type arrangements.

The problems do not necessarily lie only with cases of false self-employment where there is intent to conceal an employment relationship in order to avoid regulatory obligations. The literature talks also of cases of borderline self-employment or objectively ambiguous relationships, where there is genuine doubt about employment status because of the nature of the working relationship. Examples may be where self-employed tradespersons or IT professionals gradually enter into permanent arrangements with a single client, or where persons are recruited and work at a distance without fixed hours or days, have special payment arrangements, but still follow instructions and are subject to control.

While some degree of uncertainty is unavoidable, there is a concern about the substantial numbers whose status is unclear at present. Workers who fall into this unclear status can form a sizeable minority. Survey research in the UK which posed a series of questions on a person’s working arrangements to help identify employment status found that 64 per cent of those surveyed were clearly employees, five per cent were clearly self-employed, and 30 per cent had elements of uncertainty.

Methods by which employers can avoid an employment relationship include:

- Manipulating the indicia of employment

This involves drawing up a contract between hirer and workers in such a way as to persuade a court or tribunal that the worker is not an employee. A UK study describes this approach as ‘status denying’ - altering the terms of the contract to lead the courts to classify a relationship as one of contract for services, thus denying it the status of a contract of employment.

For example, if a worker is an employee then the employee is legally obliged to deduct tax, and pay workers’ compensation. The employment contract could stipulate otherwise to support an impression the contract is not one of service. Similarly, an employee could require a worker to supply their own tools or equipment, or to submit an invoice in order to be paid.

- Hiring Labour through an agency

This involves the practice of outsourcing labour requirements rather than engaging workers directly. This puts a legal entity between the workers and the person they are performing work for, thus avoiding the employment relationship.

- Interposing another kind of entity

Another way to avoid the employment relationship is to require the worker to establish a personal company or form a partnership. The hirer or employer then contracts to obtain the services they need from the company or partnership.

The Queensland Industrial Inspectorate has also previously identified a number of arrangements used in Queensland to avoid the employee/employer relationship, including:

- Tertiary Beneficiary Trust: Under this arrangement, workers are not offered employment in the usual manner. Instead they are offered work as Tertiary Beneficiaries of a company trust and paid dividends rather than wages.
- Partnership arrangements: In this instance, a company enters into a partnership arrangement with one individual to provide services (usually labour only) to client businesses
- Franchisees: Under this arrangement, an enterprise allows another person to use its trademark product, but the franchisee has financial obligations to the franchisor who exercises control. The Industrial Inspectorate has cited one example of an employer alleging a retail shop manager was an agent or franchisee of his business. The Department was successful in establishing an employment relationship and obtaining an order for payment of wages.

The federal government has challenged the practice of people moving income out of the PAYE system when they were not legitimately operating a business through the introduction of the Commonwealth's ***Alienation of Personal Services Income 2000 Act*** which tightened the definition of an independent contractor.

6.2 Artificial labour hiring arrangements

As already demonstrated, concerns have been expressed that labour hire has resulted in the lowering of standards in occupational health and safety and has been used to undermine rates of pay and conditions of employment (see for example Underhill (2001), (2002) and (2004), Hall (2002), Campbell, Watson and Buchanan (2001) and the final report of the NSW Taskforce (2001)). Problems also arise in the case of disputes over employment rights about who is the responsible employer, the host or the hiring company. In Queensland, Labour Hire agencies are included in the definition of employer under the *Industrial Relations Act 1999*.

Campbell, Watson and Buchanan (2002) report that over the past few years there has been a fundamental change in the nature of labour hire with a move away from supplementation of labour to substitution of labour. In the past, they argue, the principal focus of labour hire was to supplement labour during times of peak demand or to cover for absences of staff. However, more recently, labour hire has been increasingly used to replace direct employees of the host company on a permanent basis. They argue that this strategy makes permanent employment more precarious as it is exposed to the threat of being replaced by labour hire workers. Further, the replacement workers are seen as expendable as they are not direct employees of the host but engaged through the agency of the labour hire firm.

In association with this trend, there is some evidence that labour hire may have been used as a tool to reduce union influence (see Underhill (2004)). There have been accusations that employers have outsourced areas of high unionisation to labour hire firms that have low levels of unionisation. It is possible that this may be a deliberate strategy but it may also be the consequence of outsourcing of areas that are seen as "troublesome" by employers.

Part 3. HOW ARRANGEMENTS ARE DEALT WITH UNDER LEGISLATION

7.0 State/ federal jurisdictions

7.1 Dependant/independent contracting in State/Federal jurisdictions

7.1.1 Queensland

In Queensland and Australia, industrial relations regulation has traditionally been based around the relationship between employees and employers (and their representatives). The definition of employee is narrowly based on the common law notion that there is a distinction between employees, who are in an employment relationship under a contract of service, and those who are self-employed and work as independent contractors under a contract of service, contracting their services out to a number of clients. Where there is a difficulty in differentiating between the two groups, these matters are left to the courts to determine on the basis of various common law tests and criteria.

The increasing move away from the conventional employee/employer relationship towards workers being engaged under labour hire and under dependent or independent contractor status, has effectively taken these workers outside of the industrial relations system and the benefits and protections associated with being defined as an employee under relevant industrial laws

While workers operating as genuine independent contractors on a self-employed basis are not problematic, it is argued that many dependent contractors have similar characteristics and obligations to employees but with few of the entitlements. For instance, many owner-drivers in the courier and taxi-truck industry fall into this category of dependent contractors.

The underlying basis for focusing industrial relations or labour law protection on employees is that there is seen to be an inherent inequality in bargaining power in the employment relationship between employer and employee.

Labour law, essentially, is designed to counteract this inequality. This is done by providing employees with access to various employment rights, such as protection from unfair dismissal, and leave entitlements, which an employer is obliged to provide in return for their control over that labour. By contrast, those working on their own account under contracts for service are responsible for such matters themselves, and their working conditions are a matter of commercial contract law with their clients.

The definition of employee is therefore of central importance as it forms the basis for access to and coverage under the formal industrial relations system. Access to employment rights depends directly on whether an individual is defined as an employee. However, there is a view that the current arrangements for defining employees do not match the realities of the modern labour market and that this has diluted the protective function of industrial relations regulation.

Other regulatory areas of labour law in Queensland do not rely on the dividing line between employees and contractors, for example:

- Occupational health and safety legislation imposes duties beyond the traditional concept of the employment relationship.
- Workers Compensation legislation applies to certain workers under a contract for service
- Discrimination legislation applies to both contractors and employees.
- Payroll tax covers contractors performing work other than pursuant to a trade or business which they carry on and do not subcontract to anyone else.

***Worker's Compensation and Rehabilitation Act 2003*,** applies a 'results' test to determine who is a worker and who is an employer irrespective of whether or not a contract of service exists or can be found to exist.

***Workplace Health and Safety Act 1995*,** section 11, refers to a "worker". A person is a worker if the person does work, other than under a contract for services, for or at the direction of an employer. In Queensland "worker" includes people who are not paid. The definition uses the common law term "contract for services" to apply to independent contractors who are not workers for the purposes of the Act**.**

The Anti-Discrimination Act 1991, does not define "employee" but defines "work" as including in a relationship of employment (including full-time, part-time, casual, permanent and temporary employment); and under a contract for services (which would not ordinarily be considered to be an employee under common law), being remunerated in whole or in part on a commission basis, or work on a voluntary or unpaid basis, or under a statutory appointment, under a vocational placement or work experience arrangement, or work in a sheltered workshop (paid or unpaid) and work under a guidance program, apprenticeship training program or other occupational training or retraining program**.**

The Building and Construction Industry (Portable Long Service Leave) Act 1991, refers to an "eligible worker", which is defined as an individual who, for the majority of the person's ordinary hours of work, performs or usually performs building and construction work-

(a) under a contract of employment for which a rate of pay is fixed by a building and construction industry award or agreement; or
(b) under a subcontract to provide services of labour only, or substantially for labour only, that would, if performed under a contract of employment, be work for which a rate of pay is fixed by a building and construction industry award or agreement; or
(c) under a contract of employment as a foreperson or like position.

The definition goes on to particularise who is not an "eligible worker".

Pay-roll Tax Act 1971, as a definition of "wages" meaning any wages, salary, commission, bonuses or allowances paid or payable (whether at piecework rates or otherwise and whether paid or payable in cash or in kind) to, or in relation to, an employee as an employee, or applied for the employee's benefit, and it then goes on to define what is included.

Industrial Relations Act 1999

The definition of employee under the *Industrial Relations Act 1999* (IR Act) is quite wide and includes categories of workers who traditionally (at common law) may not have been considered to be employees. These include employees who ordinarily may have been classified as subcontractors or self employed such as people working under a contract for labour only, or substantially for labour only; a lessee of tools, other implements of production, or of a vehicle used to deliver goods; or those who own, wholly or partly, a vehicle used to transport goods or passengers. Under the Act, the definition of employees also includes outworkers, trainees and apprentices and the definition of employer includes labour hire companies.

Section 275 of the *Industrial Relations Act 1999*

In attempting to deal with some of the negative issues associated with contracting, the Queensland Government gave the Queensland Industrial Relations Commission (QIRC) the power, in section 275 of the *Industrial Relations Act 1999* (IR Act), to declare "a class of persons who performs work in an industry under a contract for services to be employees" (section 275(1)(a). The declaration may only be made if the full bench of the QIRC "considers the class of persons would be more appropriately regarded as employees" (section 275(2)).

Section 275 of the IR Act provides the QIRC with the tools necessary to examine contractor situations and to determine whether the workers should be more properly dealt with as if they were direct employees. This provision has not been used excessively or capriciously and is not a threat to proper independent contracting arrangements. It has been applied in a moderate manner.

This section of the IR Act was tested in AWU v Hammonds (B885 of 1999) which looked at whether contract shearers engaged by Hammonds through a labour hire agency operating Odco style contracts should be treated as employees. The decision of the QIRC first established that the workers involved were genuinely contractors and not employees of Hammonds. They then looked as the circumstances of the workers and whether they should be more appropriately treated as employees. The Full Bench found that there was no evidence that the workers were being disadvantaged by the arrangements, even though the working arrangements (including undertaking shearing work on weekends) were at odds with the terms of the award. As a result the application was dismissed.

A different outcome was achieved in ALHMWU v Bark Australia Pty Ltd. In this instance a security company engaged security workers as putative contractors. The workers had previously been employees of a company that had formerly been engaged to carry out the security work. The QIRC found that the nature of the relationship between Bark and the workers had many of the characteristics of an employment relationship and hence had little difficulty in declaring that they should be considered to be employees of Bark and treated and paid as such.

Section 276 of the *Industrial Relations Act 1999*

Section 276 allows the Industrial Relations Commission to amend or declare void a contract for services (or an employment contract for a non-award employee) if the contract is unfair.

An unfair contract means a contract that:

- is harsh, unconscionable or unfair; or
- is against the public interest; or

- provides, or has provided, a total remuneration less than that which a person performing the work as an employee would receive under an industrial instrument or this Act; or
- is designed to, or does, avoid the provisions of an industrial instrument.[8]

Factors that the QIRC may consider in deciding whether to amend or void a contract include the relative bargaining position of the parties and whether any undue influence or pressure was exerted, or any unfair tactics were used against a party to the contract.

In total, between 1999 and 2004 there were 153 unfair contract applications. Over half the applications were made by persons in the transport industry, with significant numbers from the retail industry and the building industry. The other applications were made by workers in a wide range of industries, including communications, finance, aged care, security, manufacturing, real estate, education, and farming.

Over this same period, 25 of the applications were made on the basis that the contract was designed to, or did, avoid the provisions of the relevant award. The majority of these applications were in the transport industry.

In a comparison of three cases, it can be seen that section 276 has been effective in protecting disadvantaged workers in a variety of industry sectors:

- In Massart AND Kentlands P/L T/A Bluebird Taxi Trucks (B464/00), the contract was held to be unfair by the Commission because the remuneration was less than the industry standard. In this case, the applicant bought a truck advertised as providing a 'permanent account' with work available five days per week earning $40-45,000 a year for a client of the company engaging him. The company then severed its relationship with the client, leaving the applicant without work.
- In DETIR v Foster (B981 of 2000), the Commission varied a contract to reflect an award when they found that an agreement between a farm worker and a farmer, and then the farmer's son, over many years was not a valid. The worker had been paid only a token wage and was allowed to live in the house rent-free. The Commission held that the son of the farmer and the farm worker intended to create a legally enforceable obligation evidenced by the fact that the worker expected to be paid and the son expected work performed. The Commission held that the relationship between the parties was a contract of service rather than a contract for service.
- In PGEU V Pacific Coast Plumbing Pty Ltd (B 95/2002), the Commission held that the applicant's contract was unfair because it provided less remuneration than the relevant award and that he had signed the contract under duress.

This provision is used more frequently than section 275, particularly in relation to rates and conditions for owner/drivers in the transport industry. Of the 27 cases dealing with section 276 since it came into existence, none dealt specifically with labour hire contracting.

Whilst important mechanisms, these provisions rely on legal proceedings to determine whether contracts are unfair which imposes costs on the applicant and deters individuals from pursuing remedies through the Commission.

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[8] Section 276(7) *Industrial Relations Act 1999*

7.1.2 Other state jurisdictions

The growth in new types of working arrangements such as contracting and labour hire, have been met with similar responses in other state jurisdictions. Most jurisdictions explicitly include outworkers in the definition of employee as well as apprentices and trainees. The NSW legislation also includes a broad range of specific occupations that are deemed to be employees, power to deem others to be employees by regulation, a system of contract determinations and a process to test if employment contracts are unfair.

7.1.3 Federal jurisdiction

The federal jurisdiction relies on the common law distinctions that a worker is either an independent contractor or employee as sufficient on the basis that the courts will determine into which category a worker falls in the case of a dispute. The Federal Government considers that individuals should have the freedom to enter into contractual relationships, other than traditional employment relationships and that remedies exist in the legislation and common law for workers who are coerced into 'sham' arrangements.

However, revenue pressures resulted in the tightening of the definition of independent contractor under taxation legislation to remove the practice of people moving income out of the PAYE tax system when they were not legitimately operating a business. The ***Alienation of Personal Services Income 2000 Act*** established a number of tests to determine if a person was an employee or contractor. Establishing that a contractor was running their own personal services business could be established in any one of three ways.

The first possibility is that less than 80 per cent of personal services income in that year has been obtained by the contractor from a single entity (or associates of that entity) and one of three tests is satisfied

(a) the unrelated clients test – services have been rendered to two or more entities that are not associated (either with each other or with the contractor), as a result of the services being offered or advertised to the public; or

(b) the employment test – at least 20 per cent of the contractor's principal work has been performed by one or more other persons or entities engaged by the contractor and not associated with them; or

(c) the business premises test – the contractor performs work throughout the year from premises of which the contractor has exclusive use, and which are physically separate from any premises belonging to a client of the contractor or used by the contractor or their associates for private purposes.

Secondly, even if 80 per cent or more of personal services income in a given year is received from a single source, the contractor may obtain a personal services business determination from the Commissioner of Taxation, based on being able to satisfy either the employment test or the business premises test (but not the unrelated clients test).

Thirdly, and regardless of the proportion of income derived from any one source, a contractor will be a personal services business if they can satisfy the results test. For this to apply, the contractor must derive at least 75 per cent of their personal services from contracting to produce a result rather than to supply labour, provided they also supply their own tools and equipment for the purpose and are obliged to rectify any defective work. The results test was not part of the personal services income provisions as originally enacted, but was added with retrospective effect after lobbying from business groups.

It should be noted that the legislation was designed as a revenue measure. The legislation itself did not make that person an employee but its effect is to tax that person as if they were an employee, regardless of their employment status under other legislation.

7.1.4 Overseas experience

Issues concerning the distinction between employees and contractors have arisen across a number of countries. The ILO Meeting of Experts in 2000 raised the issue that changes in the nature of work were leading to situations in which the legal scope of the employment relationship does not accord with the realities of many working relationships. This perceived gap between the scope of the law and economic reality creates uncertainty about the status of many workers. Different countries have developed different approaches to the issue as follows:

- In New Zealand, the Employment Relations Act 2000 provides a definition of employee that is based primarily around the traditional notion of a contract of service i.e. any person who is bound by a contract of service is deemed to be an employee. Significantly however, the Act also gives the relevant tribunal or court the power to determine employment status and investigate the real nature of the link between the person doing the work and the entity commanding that work.

- In the UK, the current approach is to give the Government the power to adjust the scope of employment protection under the legislation. Under section 23 of the *Employment Relations Act 1999*, the Secretary of State may determine if individuals are party to an employment contract and consequently award them employment entitlements, regardless of the manner in which the relationship has been defined by the parties. The Act also enables the Government to determine who should be regarded as their employer.

- In **Ontario, Canada**, the *Labour Relations Act 1995* includes dependent contractors in its definition of employee as follows:

  - "dependent contractor" means a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor; ("entrepreneur dépendant")

  - "employee" includes a dependent contractor; ("employé")'

  - A number of tests are used to determine the employment status of a contractor, with a focus on the reality of the relationship, rather than its legal form. The tests include whether the person was employed under a contract of employment; provision of tools, vehicles, equipment, machinery, material etc; compensation/reward on terms and conditions which place the contractor in a position of economic dependency; and whether the contractor is under an obligation to performs duties for the other person more closely resembling the relationship of an employee than that of independent contractor (Productivity Commission 2001, p.14).

- In **Ireland,** to prevent employees from being falsely categorised as self employed a tripartite employment status group was established to create a uniform definition of 'employee.' To assist parties in accurately determining employment status the group established a voluntary code of practice outlining the criteria to distinguish between employees and the self-employed.

- In **South Africa**, under both the *Basic Conditions of Employment Amendment Act 2002)* and the *Labour Relations Amendment Act 2002*, there is a broad presumption in favour of employee status.

  Under these Acts seven criteria are used to determine employment status. If one of the seven criteria is present a person is presumed to be an employee. Criteria used include whether the person is subject to the control of another in relation to the manner in which he/she works or the hours worked; whether the person is economically dependent on the other person; whether tools/equipment are provided; whether the person works solely for one other; if the person works for an organisation whether that person is part of the organisation; if the person has worked an average of at least 40 hours per month for the last three months with that organisation/person.

7.2 Labour hire arrangements in state/federal jurisdictions

Queensland

An important protection for labour hire workers is the specific inclusion of labour hire companies in the definition of "employer" in section 6 of the *Industrial Relations Act 1999.*

The provision was inserted into the *Act* to ensure that there was clear coverage of labour hire employees. At the time the *Act* was drafted it was recognised that labour hire was one of a number of emergent "atypical "employment arrangements. The triangular nature of the employment arrangement between the labour hire employer, the host company and the employee required recognition in the legislation.

This provision on its own is not a protection for labour hire workers who have been engaged as contractors. However, when the provision is viewed in conjunction with section 275 (discussed above) the Industrial Relations Commission can:

- examine the relationship between a labour hire worker and an employer;
- declare the employer to be the employer of the labour hire worker; and
- determine that the employee will remain an employee of the employer even when on-hired to another employer.

This means that the Commission has the power to go behind the mask of "contract" engagement and look at the true nature of the relationship even where the relationship meets the normal common law requirements for contracting. If these arrangements are found to be manifestly unfair then the unfairness can be remedied.

NSW

The NSW Labour Hire Taskforce looked at this definition and recommended that the NSW *Industrial Relations Act 1996* be amended to include specific mention of labour hire employers and group training companies in the definition of "employer". The proposed amendment mirrored the Queensland provision.

West Australia

The Western Australian *Industrial Relations Act 1979* also now contains a definition of "employer" that draws heavily on the Queensland *Act*. This provision was considered in detail recently in a decision of the Full Bench of the Western Australian Industrial Relations Commission (The Construction Forestry Mining and Energy Union of Workers -v- Personnel Contracting Pty Ltd Trading as Tricord Personnel – WAIRC 12 May 2004).

The WAIRC found, in that case, that the explicit inclusion of labour hire companies in the definition of employer ensures that, once a worker has been found to be an employee of a labour hire company, the worker will remain an employee of the labour hire company when on-hired to another company. This provision reduces the scope for confusion as to which entity is the employer in such circumstances.

South Australia

In South Australia, section 51 of the *Industrial Law Reform (Enterprise and Economic Development—Labour Market Relations) Bill 2004* covers the labour hire arrangement by defining a host employer as follows:

"a person will be taken to be a host employer of an employee engaged (or previously engaged) under a contract of employment with someone else if the employee has:

- performed work for the person for a continuous period of six months or more, or
- performed work for the person for 2 or more periods which, when considered together, total a period of 6 months or more over a period of 9 months and
- the employee has been, in the performance of the work, wholly or substantially subject to the control of the person.
- The fact that a person is to be taken to be a host employer under this Part does not affect any obligation of another person as an employer under a contract of employment."

Significantly, it explicitly excludes group training arrangements.

US law of joint employment

In the US, the concept of "joint employment" has been in existence for a number of years and is enshrined in some State and federal labour laws. The Courts have interpreted the federal *Fair Labor Standards Act 1938* to cover joint employment in circumstances where:

- there is an arrangement between the employers to share the employee's services, such as an agreement to interchange employees;
- one employer is acting directly or indirectly in the interest of the other employer(s) in relation to the employee;
- the employers share control of the employee.

Joint employment is primarily used to establish liability at law for benefits or entitlements for employees in circumstances where an employer is unable or unwilling to pay the entitlements. Under these circumstances if another entity can be found to be a "joint employer" then recovery action can be taken against that entity.

European Union Directive

The issue of the flow-on of host employer rates to labour hire workers has also been considered by the European Union and is a major plank of the European Union Directive on Temporary Agency Work. It should be noted that the question of "comparability" has been

one of the major stumbling blocks to the finalisation of the European Union's Temporary Agency Workers' Directive (Jones (2002)). Information from a survey conducted in 2003 by the Manpower agency in the UK, showed that, 45% of agency workers received the same remuneration as host company employees, 23% received greater remuneration and 27% received less.

Part 4. OPTIONS FOR CONSIDERATION

8.0 Complementarity between State and federal jurisdiction

The Queensland Government considers that it has developed labour laws which have responded effectively to the issues relating to labour hire and contracting arrangements identified in this submission. It has developed a comprehensive legal system which respects the role of genuine independent contractors and labour hire employees in contributing to the Queensland economy while providing effective impediments to the operation of artificial contracting arrangements used to avoid taxation regimes.

The Queensland labour laws have been developed with the full support of employer associations and unions through a comprehensive consultative process and have demonstrated its capacity to balance the need for strong economic and employment growth in Queensland with the protection of the rights and interests of all parties under its labour laws system.

In its options for consideration, the Queensland Government believes that complementarity across state and federal jurisdictions is essential in establishing a regime that is effective in removing the irregularities in contracting and labour hire arrangements that are not conducive to good economic and taxation policy. An effective state/federal agreement can only be established through a consultative and cooperative approach between all parties.

In addressing the Committee of Inquiry's terms of reference, concerning: (1) ways in which independent contracting can be pursued consistently across state and federal jurisdictions and (2) strategies to ensure independent contracting arrangements are legitimate, the following issues need to be considered:

- whether the current definition of employee in industrial legislation adequately reflects the variety of employment arrangements and complementary legislation in the labour market today;
- the extent to which the different definitions of employee across different jurisdictions covering taxation, superannuation, workplace health and safety, worker's compensation and industrial relations are currently preventing the consistency and complementarity sought by the Committee in relation to independent contracting;
- the importance of broadening the definition of employee as an effective mechanism to adequately remove artificial or illegitimate contracting arrangements under contractual or labour hire agreements;

As we have seen, these issues have been explored across all jurisdictions within Australia and overseas producing a range of policy and legislative responses. It is essential that the Commonwealth adopt a harmonious approach to its deliberations so that complementarity between states and federal jurisdiction can be achieved through consultation and cooperation.

Some options for consideration in relation to contracting include:

- Giving a tribunal or government an ongoing power to deem workers including dependant contractors to be employees similar to **275 and 276 provisions** of Queensland's *Industrial Relations Act 1999*.
- Strengthening the **ATO test of genuine contracting status** by imposing more stringent tests when an application for an ABN is made.
- **Aligning the different definitions of the employment relationship** to provide consistency in relation to artificial or illegitimate contracting arrangements.
- Establishing institutional processes and mechanisms to deal with the issue of who is an employee or a contractor.

Some options for labour hire include:

- **Inclusion of labour hire companies** in the definition of employer as in the Queensland and West Australian legislation.
- Developing higher standards through mechanisms such as the adoption of a **Code of practice** for the industry to provide clear direction as to preferred industry practices that would not only cover practices for employees but also influence the contractor sector as well.

8.1 Contracting

8.1.1 Giving a tribunal or government an ongoing power to deem workers, including dependant contractors to be employees

This option proposes to include a category of employees or a sector that would not ordinarily be included in the legal definition where there may be some ambiguity as to their status.

This process is called deeming and is already implemented in Queensland under section 275 of the *Industrial Relations Act 1999* which allows for the Full Bench of the Queensland Industrial Relations Commission to declare a class of persons who perform work in an industry under a contract for services to be employees.

The New South Wales legislation directly deems certain occupations, which are set out in schedule 1 of the Act, to be employees. The Schedule sets out definitions for each occupation and allows for some excluded persons. Clause 1(m) of the Schedule also authorises the making or regulations to provide for additional categories of deemed employees and their deemed employers. This regulatory power has been used to deem security industry workers as employees.

In New South Wales the Minister may also deem, by regulation, other occupations to be employees and this power was exercised in 2001 when security contractors were added to the long list of deemed employees in New South Wales.

As discussed above the UK legislation allows for the Secretary of State to determine if a worker is an employee.

This ongoing power is one strategy for attempting to ensure that legislation remains relevant and up to date and overcomes some of the shortcomings of a rigid definition.

However, to ensure that this method provided certainty for employers and employees an appropriately transparent process for determining what categories of workers should be deemed to be employees would need to be followed.

8.1.2 Aligning the different definitions of the employment relationship to provide consistency in relation to artificial or illegitimate contracting arrangements.

This option proposes the adoption of a new standard definition of employee to deal with those disguised employment situations where a contractor is wholly or substantially dependent on one organisation for their work, but excludes the truly independent contractors who clearly run their own business and service a range of clients. This option is similar to that proposed by Professor Andrew Stewart to the 2002 review of the South Australian Industrial Relations system conducted by former South Australian Commissioner, Greg Stevens

The Stewart definition commences with the assumption that the person is an employee until otherwise shown. The definition then sets out in a very logical and helpful way the common law tests across the different jurisdictions. This proposed definition is wide-ranging, incorporating the standard common law tests such as control and integration, as well as considerations of the economic reality behind the contractual relationship, and also picking up the tests that form part of the Commonwealth taxation regime.

The benefit of this option is that it extends complementarity to many statutory regimes with broader definitions of workers other than employees including:

- Statutes dealing with discrimination of various kinds which apply to both employees and to independent contractors;
- The taxation regime which extended its powers to tax a person as an employee under the ***Alienation of Personal Services Income 2000 Act*** regardless of their employment status under other legislation; and
- The Superannuation Guarantee (Administration) Act 1992 (Cth) which extended compulsory contributions by employers.

Overseas examples include the United Kingdom definition of worker in the *Employment Rights Act 1996.*

8.1.3 Strengthening the ATO test of genuine contracting status by imposing more stringent tests when an application for an ABN is made.

Under the ***Alienation of Personal Services Income 2000 Act,*** the ATO established a number of criteria to test if a person was a contractor or an employee. These criteria included:

- the income test (less that 80 per cent of income from a single entity);
- unrelated clients test (services provided to two or more entities);
- the employment test (at least 20 per cent of principal work is conducted by employees of contractor);
- the business premises test (contractor operates from separate premises from clients); or
- the results test (75 per cent of personal services from contracting to produce a result rather than supplying labour).

At this stage, these tests are applied by the ATO after the contracting arrangement has been established. A simpler and more effective system would be to apply these criteria once an

application for an ABN is lodged, so that illegitimate contracting arrangements can be avoided at source.

8.1.4 Establishing institutional processes and mechanisms to deal with the issue of who is an employee

In Ireland, a tripartite committee was established which developed a set of criteria to determine the difference between an employee and an independent contractor. The criteria are contained in a Code of practice which all groups involved in labour law matters must take into account.

Instead of the question of whether or not a worker is an "employee" arising as a jurisdictional point in some other matter before a court or tribunal, in South Africa parties to an employment relationship can apply to the Commission for Conciliation, Mediation and Arbitration to determine the person's employment status. This is also the case in Ireland.

8.2 Labour hire industry

While there is some good data on labour hire in Queensland, there are aspects that require further research. Of particular interest is the rate of injuries within the sector. Based on data from Victoria and internationally, it would not be surprising if the workplace health and safety performance of this sector in Queensland is poorer than the general community. However, at this stage this information is not available. Clearly this is an area for further research. Should it transpire that the workplace health and safety performance of the labour hire sector in Queensland is significantly worse than that of industry generally, then it will be necessary to determine the potential causal factors involved and develop appropriate responses both in terms of policy and regulation.

Options for consideration include:

8.2.1 Inclusion of labour hire companies in the definition of employer as in the Queensland and West Australian legislation.

8.2.2 Developing higher standards through mechanisms such as the adoption of a Code of practice for the industry to provide clear direction as to preferred industry practices that would not only cover practices for employees but also influence the contractor sector as well.

9.0 APPENDIX

Table 1 **Employment types used in the Forms of Employment Survey**

Employment type	***Definition***
Employees with leave entitlements	Persons who (a) were entitled to receive both paid holiday and sick leave, and (b) worked in someone else's business or worked in their own unincorporated business but did not invoice clients for own payment and paid PAYE tax.
Self-identified casuals	Persons who (a) were not entitled to receive both paid holiday and sick leave, (b) considered their job to be casual, and (c) worked in someone else's business or reported that they worked in their own unincorporated business but paid PAYE tax and did not invoice clients for own payment.
Owner managers of unincorporated enterprises	Persons who operated their own unincorporated enterprise, including those engaged **independently** in a trade or profession.
Owner managers of incorporated enterprises	Persons who operated their own incorporated enterprise, including those who drew a wage or salary for their work in their own incorporated enterprise.
Other employed persons	Persons who (a) were not entitled to receive both paid holiday and sick leave, (b) did not consider their job to be casual, and (c) worked in someone else's business or reported that they worked in their own unincorporated business but did not invoice clients for own payment and paid PAYE tax.

Source: ABS (*Forms of Employment*, Cat. no. 6359.0).

Table 2 **Previous studies on the extent of contracting arrangements**

Source	**Results**
Australian Workplace Industrial Relations Survey 1990 and 1995	VandenHeuvel and Wooden (1994, 1999) concluded that employment on a contract basis accounted for 3.3 per cent in 1990 and 3.6 per cent in 1995. Suggesting a relatively marginal increase over the 5 year period.
Population Survey Monitor, 1994	VandenHeuvel and Wooden (1995) concluded that self-employed contractors constituted 7.5 per cent of non-agricultural workforce. The difference between this figure, and the 3.3 per cent derived from AWIRS, was attributed to growth in the number of self-employed contractors between 1990 and 1994; the exclusion of workplaces with less than 20 employees from the AWIRS estimates; and poor quality of the AWRIS data.
Australian and New Zealand survey of employment trends 1995	Brosnan and Walsh (1998) concluded that 4.2 per cent of the Australian labour force was employed as contractors/ consultants. This low result might be due to the vague definition of contractor used by Brosnan and Walsh and the research was unclear as to how employees of contractors were classified.

Table 3 **Estimates of self-employed contractors from the LFS using FOES**

Employment type	Estimates of self-employed contractors				
	DIR Estimate from FOES 1998	LFS Queensland Persons '000			
	% of total employed	1998	2000	2002	2004
Employees	3.0%	39.0	41.1	42.9	46.4
Employers	23.8%	18.3	17.0	16.7	17.0
Own-account Worker	30.2%	53.5	55.9	58.3	60.5
Total self-employed contractors	**7.1%**	**110.8**	**113.9**	**117.9**	**124.0**
Total Employed	**n.a.**	**1579.9**	**1652.4**	**1717.8**	**1842.5**

Source: DIR estimates derived from FOES derived from unpublished data ABS Cat. No. 6359.0.

Table 4 **Contractor proportions by occupation from the FOES, 1998 and 2001**

Occupation	**1998**	**2001**	**Difference**
Persons			
Managers and administrators	12.2%	9.1%	-3.1
Professionals	11.5%	13.3%	1.8
Associate professionals	6.0%	9.1%	3.2
Tradespersons and related workers	29.2%	29.7%	0.5
Advanced clerical and service workers	10.3%	2.4%	-7.9
Intermediate clerical, sales and service workers	6.1%	4.2%	-1.9
Intermediate production and transport workers	13.6%	17.5%	3.9
Elementary clerical, sales and service workers	3.2%	6.5%	3.2
Labourers and related workers	7.9%	8.1%	0.2
Total	**100.0%**	**100.0%**	**0.0**

Source: DIR estimates derived from unpublished data from ABS Cat. No. 6359.0.

Table 5 **Contractor proportions by industry from the FOES, 1998 and 2001**

Industry	1998	2001	Change
	Proportion of total casual employment		
Agriculture, Forestry and Fishing	4.8%	2.4%	-2.4
Mining	0.0%	0.0%	0.0
Manufacturing	11.4%	8.3%	-3.1
Electricity, Gas and Water Supply	0.0%	0.0%	0.0
Construction	41.8%	34.6%	-7.2
Wholesale Trade	1.6%	2.5%	0.9
Retail Trade	4.8%	4.7%	-0.1
Accommodation, Cafes and Restaurants	0.0%	..C	..C
Transport and Storage	4.8%	9.0%	4.2
Communication Services	4.4%	4.2%	-0.2
Finance and Insurance	0.6%	1.3%	0.7
Property and Business Services	20.6%	18.4%	-2.1
Government Administration and Defence	0.0%	0.0%	0.0
Education	..C	2.4%	..C
Health and Community Services	1.9%	4.6%	2.7
Cultural and Recreational Services	1.4%	2.4%	1.0
Personal and Other Services	1.6%	4.4%	2.8
Total	**100.0%**	**100.0%**	**0.0**
	Incidence of Casual employment		
Agriculture, Forestry and Fishing	6.8%	2.5%	-4.3
Mining	0.0%	0.0%	0.0
Manufacturing	6.8%	3.8%	-3.0
Electricity, Gas and Water Supply	0.0%	0.0%	0.0
Construction	35.6%	20.7%	-14.9
Wholesale Trade	1.9%	2.6%	0.7
Retail Trade	2.2%	1.4%	-0.8
Accommodation, Cafes and Restaurants	0.0%	.. C	.. C
Transport and Storage	7.3%	9.3%	2.0
Communication Services	19.3%	13.8%	-5.6
Finance and Insurance	1.5%	2.5%	0.9
Property and Business Services	15.1%	9.3%	-5.7
Government Administration and Defence	0.0%	0.0%	0.0
Education	.. C	1.6%	.. C
Health and Community Services	1.3%	2.3%	1.0
Cultural and Recreational Services	4.2%	5.1%	0.9
Personal and Other Services	2.9%	6.0%	3.0
Total	**7.1%**	**5.0%**	**-2.1**

Source: DIR estimates derived from unpublished data from ABS Cat. No. 6359.0.

Table 6: **Persons employed by a labour hire agency, 1998 and 2001**

	Queensland			Australia		
	Employed By a Labour Hire Agency	Not Employed By a Labour Hire Agency	Employed By a Labour Hire Agency	Employed By a Labour Hire Agency	Not Employed By a Labour Hire Agency	Employed By a Labour Hire Agency
2001	23,359	1,677,719	1.4%	161,818	9,058,481	1.8%
1998	9,779	1,559,023	0.6%	84,330	8,395,773	1.0%
Change (Number)	13,580	118,696		77,488	662,708	
Change (%)	138.9%	7.6%	122.0%	91.9%	7.9%	77.8%

Source: ABS, *Forms of Employment Survey* (Cat. no. 6359.0) 1998 and 2001

Table 7: **Labour hire workers by industry, Queensland and Australia, 2001**

	Queensland		Australia	
	number	%	Number	%
Agriculture, Forestry and Fishing	-	-	2,058	1.3
Mining	1,036	4.7	2,829	3.6
Manufacturing	3,690	2.1	25,176	2.6
Electricity, Gas and Water Supply	1,281	8.5	2,802	4.1
Construction	980	0.7	9,209	2.6
Wholesale Trade	1,186	1.5	5,424	1.5
Retail Trade	1,145	0.4	6,062	0.5
Accommodation, Cafes and Restaurants	..C	..C	987	0.3
Transport and Storage	1,247	1.5	7,807	2.4
Communication Services	..C	..C	5,138	3.7
Finance and Insurance	..C	..C	9,285	3
Property and Business Services	9,834	6.0	56,596	7.9
Government Administration and Defence	..C	..C	6,121	1.6
Education	..C	..C	5,765	0.9
Health and Community Services	..C	..C	13,072	1.6
Cultural and Recreational Services	-	-	1,309	0.7
Personal and Other Services	-	-	2,178	0.8
Total	**23,359**	**1.8**	**161,818**	**2.2**

Source: ABS, *Forms of Employment Survey* (Cat. no. 6359.0) 1998 and 2001
Notes: C Confidentialised data
- Null or zero cells, includes cells that rounded to zero.

Table 8: **Labour hire workers by industry, Queensland, 2001**

	number	%
Agriculture, Forestry and Fishing	945*	2.6
Mining	2,222	6.9
Manufacturing	9,567	6.3
Electricity, Gas and Water Supply	nr	nr
Construction	3,937	4.5
Wholesale Trade	730*	1.2
Retail Trade	4,036*	1.9
Accommodation, Cafes and Restaurants	3,125	3.6
Transport and Storage	1,648	2.2
Communication Services	656	1.7
Finance and Insurance	0**	0**
Property and Business Services	798	0.8
Government Administration and Defence	0**	0**
Education	0**	0**
Health and Community Services	3,926	2.5
Cultural and Recreational Services	0**	0**
Personal and Other Services	1,220*	2.2
Total	**43,867**	**3.1**

Source: Melbourne Institute, Household Income and Labour Dynamics Australia Survey, 2001.
Notes: * figures should be used with caution due to high relative standard errors
** figures unreliable due to high relative standard errors
nr Not Reported. The HILDA data showed an implausibly high proportion of labour hire workers in this industry.

Table 9: **Characteristics of labour hire workers, Queensland and Australia, 2001**

	Queensland		**Australia**	
	number	%	Number	%
Sex				
Males	14,516	1.6	95,404	1.9
Females	8,843	1.2	66,414	1.7
Age group (years)				
15 to 19	2,262	1.6	14,006	2.1
20 to 24	5,048	2.8	32,988	3.3
25 to 34	8,537	2.2	49,506	2.3
35 to 44	4,680	1.1	33,340	1.5
45 to 54	2,269	0.6	21,516	1.1
55 to 59	..C	..C	8,454	1.4
60 to 64	-	-	1,555	0.6
65 and over	-	-	..C	..C
Full-time or part-time status				
Full time	19,868	1.7	121,631	1.8
Part time	3,491	0.7	40,187	1.6
Hours worked				
0 to 19 hours	24,488	1.3	177,921	1.7
20 to 34 hours	4,452	1.7	45,969	2.5
35 to 40 hours	8,318	1.8	57,366	2.3
41+hours	6,692	1.2	36,333	1.3
Occupation of main job				
Managers and administrators	-	-	835	0.1
Professionals	2,909	1.1	27,050	1.6
Associate professionals	..C	..C	8,262	0.8
Tradespersons and related workers	4,373	2.0	24,935	2.1
Advanced clerical and service workers	1,765	2.5	8,058	2.2
Intermediate clerical, sales and service workers	5,193	1.8	35,884	2.3
Intermediate production and transport workers	3,335	2.1	21,166	2.7
Elementary clerical, sales and service workers	..C	..C	6,023	0.7
Labourers and related workers	4,647	2.6	29,603	3.8
TOTAL	**23,359**	**1.8**	**161,818**	**2.2**

Source: ABS, *Forms of Employment Survey* (Cat. no. 6359.0) 1998 and 2001

Notes: C Confidentialised data

\- Null or zero cells, includes cells that rounded to zero.

Table 10: **Characteristics of labour hire workers, Queensland, 2001**

	Number	%
Sex		
Males	27,080	3.6
Females	16,787	2.5
Age group (years)		
0 to 15	0**	0**
16 to 18	7,621	8.2
19 to 24	8,119	3.8
25 to 44	15,479	2.2
45 to 64	12,648	3.3
65+ years	0**	0**
Occupation of main job		
Managers and administrators	0**	0**
Professionals	3,246	1.3
Associate professionals	695*	0.5
Tradespersons and related workers	1,138	0.7
Advanced clerical and service workers	0**	0**
Intermediate clerical, sales and service workers	13,376	4.9
Intermediate production and transport workers	7,140	5.4
Elementary clerical, sales and service workers	3,942	2.4
Labourers and related workers	4,329	2.6
Hours worked in main job last week		
0 to 20 hrs	6,517	2.5
21 to 34 hrs	9,649	4.7
35 to 40 hours	21,947	4.4
41+ hours	5,766	1.3
Whether has leave entitlements in main job		
Without leave entitlements	28,564	6.4
With leave entitlements	15,303	1.6
Total	**43,879**	**3.1**

Source: Melbourne Institute, Household Income and Labour Dynamics Australia Survey, 2001.
Notes: * figures should be used with caution due to high relative standard errors
** figures unreliable due to high relative standard errors

Table 11: **Median weekly incomes by industry by employment type, Queensland, 1996 and 2001**

Median Weekly Income (Full Time)	**1996**	**2001**
	Difference between weekly income of Own-account workers and Employees	
Agriculture, Forestry and Fishing	-$128	-$130
Mining	-$511	-$366
Manufacturing	-$152	-$124
Electricity, Gas and Water Supply	-$65	-$81
Construction	-$35	$2
Wholesale Trade	-$137	-$103
Retail Trade	-$138	-$133
Accommodation, Cafes and Restaurants	-$134	-$119
Transport and Storage	-$104	-$189
Communication Services	-$152	-$169
Finance and Insurance	$19	$19
Property and Business Services	-$59	-$6
Government Administration and Defence	-$96	$49
Education	-$267	-$339
Health and Community Services	-$158	-$170
Cultural and Recreational Services	-$164	-$162
Personal and Other Services	-$175	-$246
Non-Classifiable Economic Units	-$83	-$74
	Own-Account Worker Weekly Income Levels	
Agriculture, Forestry and Fishing	$261	$359
Mining	$585	$956
Manufacturing	$367	$507
Electricity, Gas and Water Supply	$574	$792
Construction	$521	$686
Wholesale Trade	$401	$523
Retail Trade	$310	$404
Accommodation, Cafes and Restaurants	$314	$407
Transport and Storage	$471	$537
Communication Services	$495	$616
Finance and Insurance	$594	$740
Property and Business Services	$527	$701
Government Administration and Defence	$536	$820
Education	$441	$545
Health and Community Services	$386	$496
Cultural and Recreational Services	$366	$470
Personal and Other Services	$359	$452
Non-Classifiable Economic Units	$389	$484

Source: Unpublished data, ABS, Census of Population and Housing 1996 and 2001.

10.0 REFERENCES

Australian Bureau of Statistics. 1998 and 2001, *Forms of Employment Survey, Cat. no. 6359.0,* ABS, Canberra.

Australian Bureau of Statistics. 1998 and 2001, *Forms of Employment Survey, Cat. no. 6359.0,* Unpublished data, ABS, Canberra.

Bureau of Labour Statistics. 1995, *National Census of Fatal Occupational Injuries, 1994*, United States Department of Labour, Washington.

Brennan, L., Valos, M. & Hindle, K. 2003, *On-hired Workers in Australia: Motivations and Outcomes*, RMIT.

Burgess, J., Rasmussen, E. & Connell, J. 2003, *Temporary Agency Work in Australia and New Zealand: Out of Sight and Outside the Regulatory Net*.

Campbell, I., Watson, I. & Buchanan, J. 2002, "Temporary Agency Work In Australia: A Basic Profile and a Few Questions*", Paper presented to International Perspectives on Temporary Work and Workers*, Newcastle, March.

Dawson, S., Willman, P. Clinton, A. & Bamford, M. 1988, *Safety at Work: The Limits of Self-regulation*, Cambridge University Press, Cambridge.

Erlich, S.M., Driscoll, T.M., Harrison, J.E., Frommer, M.S. & Leigh, J. 1993, "Work-related agricultural fatalities in Australia, 1982-1984", *Scandinavian Journal of Work Environment and Health*, vol. 19, pp.162-7.

Department of Industrial Relations New South Wales, 2001, *Labour Hire Taskforce – Final Report*, December.

Hall, R. 2002, "Labour Hire in Australia: Motivation, Dynamics and Prospects". ACIRRT Working Paper 76, April.

Harrison, J.E., Frommer, M.S., Ruck, E.A. & Blyth, F.M. 1989, "Deaths as a result of work-related injury in Australia, 1982-1984", *Medical Journal of Australia*, vol. 150, pp.118-125.

Harrison, J.E., Mandryk, J.E. & Frommer, M.S. 1993, "Work-related Road Fatalities in Australia, 1982-1984", *Accident Analysis and Prevention*, vol. 25, no. 4, pp.443-451.

Health and Safety Executive, 1999, *Revitalising Health and Safety: Consultation Document*, HSE, United Kingdom.

Johnstone, R.S. 1999, "Paradigm Crossed? The Statutory Occupational Health and Safety Obligations of the Business Undertaking", *Australian Journal of Labour Law,* vol. 12, p.73.

Johnstone, R.S., Quinlan, M. & Walters, D. 2004, "Statutory OHS Workplace Arrangements for the Modern Labour Market" *National Centre for Occupational Health and Safety Regulation Working Paper No. 22*, National Research Centre for Occupational Health and Safety Regulation, ANU, Canberra.

Jones, E. 2002, “Temporary Agency Labour: Back to Square One?” *Industrial Law Journal*, vol. 31, no. 2, pp.183 – 190.

Kentucky fatality Assessment and Control Evaluation Project, 1994, *Farm Tractor-Related Fatalities – Kentucky*, KY FACE.

Laplagne, P., Glover, M. & Fry, T. 2005, “The Growth of Labour Hire Employment in Australia”, *Productivity Commission Staff Working Paper*, Ausinfo, Canberra.

Lewin-Epstein, N. & Yuchtman-Yaar, E. 1991, “Health Risks of Self-Employment”, *Work and Occupations*, vol. 18, no. 3, pp.291-312.

Magnum, G., Mayall, D. & Nelson, K. 1985, “The Temporary Help Industry: A response to the dual internal labour market”, *Industrial and Labor Relations Review* vol. 38, no. 4, pp.599 – 611.

Mayhew, C. 1995, *An Evaluation of the Impact of Robens Styles Legislation on the OHS Decision-Making of Australian and United Kingdom Builders with Less than Five Employees*, Griffith University: Brisbane.

Mayhew, C. & Quinlan, M. 1997a, “Subcontracting and OHS in the residential building sector”, *Industrial Relations Journal*, vol. 28, no. 3, pp.192-205.

Mayhew, C. & Quinlan, M. 1997b, “Trucking Tragedies: Why Occupational Health and safety Outcomes are Worse for Subcontract Workers in the Road Transport Industry”, *School of Industrial Relations and Organisational Behaviour Working Paper No. 114*, University of New South Wales, Sydney.

Mayhew, C. & Quinlan, M. 1999, “The effects of outsourcing on occupational health and safety: a comparative study of factory-based and outworkers in the Australian clothing industry”, *International Journal of Health Services*, vol. 29, pp.83-107.

Mayhew, C., Quinlan, M. & Bennet, L. 1996a, *The Effects of Subcontracting and Outsourcing on Occupational Health and Safety*, Industrial Relations Research Monograph, University of New South Wales: Sydney.

Mayhew, C., Quinlan, M. & Bennet, L. 1996b, “The Effects of Subcontracting/Outsourcing on Occupational Health and Safety” *UNSW Studies in Industrial Relations Report No 38*, Industrial Relations Research Centre, University of New South Wales.

Mayhew, C., Quinlan, M. & Ferris, R. 1997, “The effects of subcontracting/outsourcing on occupational health and safety: survey evidence from four Australian industries”, *Safety Science*, vol 25, no. 1-3, pp.163-78.

Mayhew, C., Young, C., Ferris, R. & Harnett, C. 1997, *An Evaluation of the Impact of Targeted OHS Interventions on the OHS Behaviours of Small Business Building Industry Owners/Managers/Contractors*, NOHSC: Sydney.

Nienhuser, W. & Matiaske, W. 2004, *The Effects of the “Principle of Non-Discrimination” on Temporary Agency Work: Compensation and Working Conditions of Temporary Agency Workers in 15 European Countries*, Unpublished paper Essen University.

Nossar, I., Johnstone, R.S., & Quinlan, M. 2003, "Regulating Supply Chains to Address the Occupational Health and safety Problems Associated with Precarious Employment: The Case of Home-Based Clothing Workers in Australia", *National Centre for Occupational Health and Safety Regulation Working Paper No. 21,* National Centre for Occupational Health and Safety Regulation, ANU, Canberra.

Pocock, B., Prosser, R. & Bridge, K. 2004, *Only a Casual…: How casual work affects employees, households and communities in Australia*. University of Adelaide.

Quinlan, M. 1997, "The Implications of Labour Market Restructuring in Industrialised Societies for Occupational Health and Safety", *School of Industrial Relations and Organisational Behaviour Working Paper No. 116*, University of New South Wales: Sydney.

Quinlan, M. 2001, *Report of Inquiry into Safety in the Long Haul Trucking Industry*, Motor Accidents Authority of New South Wales, Sydney.

Quinlan, M., Mayhew, C. & Bohle, P. 2003, "The Global Expansion of Precarious Employment, Work Disorganisation and Consequences for Occupational Health: A Review of Recent Research", *International Journal of Health Services*, vol. 31, no. 2, pp.335-414.

Rebitzer, J.B. 1995, "Job Safety and Contract Workers in the Ptrochemical Industry", *Industrial Relations*, vol. 34, pp.40-57.

Stewart, A. 2002, "Redefining Employment? Meeting the Challenge of Contract and Agency Labour", *Australian Journal of Labour Law*, vol.15, pp 1–42.

Toscano, G. & Windau, J. 1994, "The changing character of fatal work injuries", *Monthly Labour Review*, vol. 117, no. 10, pp.17-27.

Underhill, E. 2001, *Changing Work and OHS: The Challenge of Labour Hire*. Deakin University.

Underhill, E. 2002, *Extending Knowledge on Occupational Health and Safety and Labour Hire Employment: A literature review and Analysis of Victorian Workers Compensation Claims*, Worksafe Victoria.

Underhill, E. 2004, "Working Under Labour Hire Arrangements: The experiences and views of Victorian labour hire employees", *Report prepared for the Victorian Trades Hall Council*, January.

Vandenheuval, A. & Wooden, M. 1995, "Self-employed contractors in Australia: how many and who are they?" *Journal of Industrial Relations*, vol. 27, no. 2, pp.263-280.

Waite, M. & Will, L. 2001, "Self-employed contractors in Australia: Incidence and characteristics", *Productivity Commission Staff Research Paper*, Ausinfo, Canberra.

Wooden, M. 2001, "How temporary are Australia's Casual Jobs?" *Work, Employment and Society,* vol. 15, no. 4, pp 875 – 883.

Cases Cited

Amalgamated Metal Workers Union of Australia and Others; Ex parte The Shell Company of Australia and Others (1992) 174 CLR 345

ALHMWU v Bark Australia [2001] QIRComm 22 (28 February 2001); 166 QGIG 254

Australian Workers Union of Employees Qld v Hammonds Pty Ltd (No B885 of 1999) QIRC 15 November 2000

K L Ballantyne & National Union of Workers (Laverton Site) Agreement 2004 PR952656 AIRC, 22 October 2004

Brook Street Bureau (UK) Ltd v Dacas [2004] EWCA Civ 217

Communications Electrical, Electronic, Energy, Information Postal, Plumbing and Allied Services Union of Australia v IES Australia Pty Ltd and others. PR940441 AIRC, 13 November 2003

Construction Forestry Mining and Energy Union of Employees v Personnel Contracting Pty Ltd trading as Tricord Personnel, 2004 WAIRC 11445 (12 May 2004).

Forstaff & Ors v The Chief Commissioner of State Revenue [2004] NSWSC 573

Hollis v Vabu Pty Ltd (2001) 207 CLR 21

National Labor Relations Board v Hearst 322 US 111 (1947)

Oanh Nguyen v A-N-T Contract Packers Pty Ltd and Theiss Services Pty Ltd 3 March 2003 NSWIRC Matter No IRC 3826 of 2002

Rutherford Food Corp. v McComb 331 US 722 (1947)

Staff Aid Services Pty Ltd v Josie Bianchi PR945924 AIRC 5 May 2004

Stevens and Gray v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16

United States v Silk 331 US 704 (1947)