COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON EMPLOYMENT, WORKPLACE RELATIONS AND WORKFORCE PARTICIPATION

Reference: Independent contracting and labour hire arrangements

FRIDAY, 20 MAY 2005

PERTH

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON EMPLOYMENT, WORKPLACE RELATIONS AND WORKFORCE PARTICIPATION

Friday, 20 May 2005

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

Members in attendance: Mr Barresi, Mr Burke, Mr Henry, Mr Brendan O'Connor and Mr Randall

Terms of reference for the inquiry:

To inquire into and report on:

the status and range of independent contracting and labour hire arrangements;

ways independent contracting can be pursued consistently across state and federal jurisdictions;

the role of labour hire arrangements in the modern Australian economy; and

strategies to ensure independent contract arrangements are legitimate.

WITNESSES

Committee met at 9.06 am

BLYTH, Mr Geoffrey Robert, Director, Industrial Relations Services, Chamber of Commerce and Industry of Western Australia

CHAIR—I declare open this public hearing of the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation inquiry into independent contractors and labour hire arrangements. The inquiry arises from a request to the committee by the Minister for Employment and Workplace Relations. Written submissions were called for and over 70 have been received to date. The committee is continuing on a program of public hearings. This is the seventh of the inquiry.

I welcome Mr Blyth from the Chamber of Commerce and Industry of Western Australia. Although the committee does not require you to give evidence under oath, I advise you that these hearings are formal proceedings of the parliament and consequently they warrant the same respect as proceedings of the House itself. It is customary to remind witnesses that the giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The committee prefers to hear evidence in public but, if you have issues that you would like to raise in private, we will consider your request.

We are a small group this morning. We will be joined—perhaps before you have finished your evidence—by one, if not two, other members. Would you like to make an opening statement or speak to your submission?

Mr Blyth—I would be happy to do that. I am assuming that the committee has received a copy of the submission which we had prepared expressly for the purposes of responding to a discussion paper released by the government in March of this year. The paper that we had prepared obviously dealt with the issues that arose specifically out of the government's discussion paper, but we thought it would be useful for this committee to have a copy of that response to the government's discussion paper on the basis that the issues that we canvass in that are, we would say with respect, similar to those matters which are dealt with in the terms of reference for this committee. In the sense, we trust it has been helpful for you.

By way of general observation, there are a number of key points that come out of our paper. I certainly do not intend to take you through it chapter and verse. I am obviously happy to respond to any questions that you might have, but I thought that initially I might just make a number of points about what we see as being key issues.

In considering these matters, the first key point is that whether or not a worker is an employee is, fundamentally, a key question wherever concerns arise about the use of contractors, independent contractors, dependent contractors, whichever title you might apply to someone who is a worker. I use 'worker' as a neutral term to encapsulate a person that might be a worker, being an employee or a worker who might be a contractor. Wherever there is a challenge to the status of a person, as to whether or not they are an employee, we say that the common law tests as they have been developed by the various courts have been and remain an appropriate tool for determining that question.

Whilst we are conscious that in several of the papers that have been provided to this committee, and more generally in the debate about these issues, a lot of people have differing views about the extent to which the common law tests can be applied to determining a person's status, notwithstanding those views the common law test remains an appropriate mechanism. We say that the courts readily apply the criteria that have been developed in the various test cases and can ultimately determine the status of a person who is a worker where that is challenged. We do not see that there is a need to alter that mechanism to determine a person's status as an employee or not.

We certainly, as is clear from the paper that we prepared, take the view that there should be no legislative barrier to a business making a decision as to whether it engages workers as employees or as contractors or under labour hire arrangements. We take the view that that is a matter which is fundamental to a business's right to decide for itself how it best can achieve its business objectives and that there should be no legislative barrier to a business choosing to engage a worker as an employee or, as I say, a contractor or a labour hire person.

From that starting position, clearly the logic that would flow is that workplace relations laws are laws intended to deal with employees and not laws intended to deal with workers who are not employees. It is our very strong view that that should continue to be the case and, to the extent that current workplace laws, whether they be federal laws or state laws, start to deal with the subject matter of contractors and/or labour hire, we would welcome legislative reform to reverse that trend. We say that workplace relations laws must be left to deal with only employees. That is the purpose of workplace relations laws and that is what they should be limited to. The other side of that statement, of course, is that normal commercial law is the law that will deal with someone who is in a contractual relationship which is not an employment contract.

It is clear, I think, from our paper that we take the view that where there are federal and state workplace relations laws at the moment that deal with contractors, engaging contractors and/or labour hire, we would encourage the parliament to make laws which would override those provisions in federal and state awards and/or industrial laws to ensure that provisions in laws, awards and industrial agreements are not enforceable and are not a barrier to a business deciding to engage workers on the basis of being contractors or in the context of a labour hire arrangement.

Mr RANDALL—Can you clarify 'parliament'? Federal or state?

Mr Blyth—At this point we are saying that, in the context of what this committee is considering, the federal parliament should take what steps it can.

Mr BRENDAN O'CONNOR—In the Chamber of Commerce's view it might depend on whether there is a Labor Party or a Liberal Party in Canberra.

Mr Blyth—No. In fact, sir, we would say that regardless of who is in power, the government, and indeed the parliament more broadly, should be encouraged to make laws that are consistent with the position which we put—that is, that the parliament should recognise that these are business decisions, these are decisions for the business proprietor to make, and the parliament at a federal level, to the extent that it can, ought to ensure that there is consistency across the

country, that laws are uniform and that we do not have a hotchpotch of arrangements whereby an employer operating in Western Australia—a constitutional corporation, as it is commonly referred to—can have, through a range of state laws, interference with its capacity to engage workers under contractual arrangements or labour hire.

As you will see in our paper, we take the view that there are indeed some state laws which do not give any reason for us to be concerned that they might in part deal with a worker, whether they are a direct employee of the business or a contractor. We are talking specifically in relation to WA law. We are not commenting on the extent to which laws in other states might be different, because we are conscious that they are. In Western Australia the current status of the Occupational Health and Safety Act, the Workers Compensation and Rehabilitation Act and the equal opportunity legislation, which are three areas which are typically brought into this field of discussion, is such that we are comfortable with them. They have an entirely different purpose to that identified as being the purpose of workplace relations laws—that is, the federal Workplace Relations Act, the state Industrial Relations Act and some others that we mention in our paper.

We do not see the occupational health and safety, workers compensation and discrimination laws as an issue for businesses in deciding whether or not to engage people under arrangements which are employment or arrangements which are not employment. In summary, what we say is that the federal parliament—and indeed we would translate this to the state as well if we were appearing before a state committee on a similar subject—should not interfere with and should not put legislation in place that interferes with a business's capacity to make a decision about how it goes about getting work done. That is a matter which is of vital importance to the proprietor of the business. It is the business owner that is putting his or her money at risk, and legislation should not affect that proprietor's decision about engaging workers.

Those are the primary points that come out of the paper that we have prepared. We encourage the committee to have regard to the full contents of that paper. I will be happy to assist the committee by responding to any questions that might arise or questions in general.

CHAIR—Thank you very much for your opening statement and your submission. I did go through it very carefully the other day and I have questions all over the place. I am not sure we will have a chance to go through it all, but we will start. I am interested in a number of issues there. Starting with the basic definitions, you state that the common law test is appropriate and we do not need to go into any more definition; if we do put a definition of an employee in the Workplace Relations Act, we could very well be opening it up for increased litigation and we will find people going to court and testing that definition. Why would that be any different to what is taking place now? There is litigation that takes place at the moment. Some would say it is far more costly under the current system than if we went through a test of the definitions through the Workplace Relations Act, which would then be assessed by a tribunal or a commission. Can you explain it to me? On one hand you are saying one is going to be costly, but it is already costly if you go through the whole court system and appeal process and the High Court.

Mr Blyth—The position essentially comes down to applying, ultimately, the common law tests. That is frequently challenged in Industrial Commission proceedings, sometimes on the basis of unfair dismissal claims and sometimes on the basis of claims for what are said to be contractual benefits that have been denied. There are a whole range of reasons why various

matters appear before industrial tribunals, both federal and state, where a business owner challenges the jurisdiction of the commission to deal with the matter on the basis that it is not an employment matter and therefore not a matter that is properly before the commission.

As a result of those sorts of matters we see a continuing development of that case law which is the common law on determining whether a person is or is not an employee. Whilst there are some notorious cases around, the number is not huge.

Mr BRENDAN O'CONNOR—Isn't that because people cannot afford to go to court?

Mr Blyth—I will come back to that in a moment.

Mr BRENDAN O'CONNOR—When you come back to it I will ask you a question directly related to the matter the chair has raised.

CHAIR—Mr Stuart Henry is joining us from here in WA. He must have been fighting the traffic to get here this morning.

Mr Blyth—Let me answer the question you have raised. Without question, a person who wants to challenge that they are or are not an employee or contractor will incur some cost.

CHAIR—It is more costly to go to court than the commission?

Mr Blyth—At the moment these people more often than not bring those matters through the commission, testing the claim that they are an employee. In that sense the vast majority of cases that challenge that question of whether a person is an employee or a contractor are dealt with through industrial tribunals. Ultimately some of those matters go on to the appeal courts. In Western Australia we have a system whereby you go, at first instance, to the full bench of the state commission and you can then appear before the Industrial Appeal Court, which is a court made up of judges of our Supreme Court.

That provides a relatively simple mechanism for persons who believe that they are an employee to challenge the status of that question, so there are cases that appear before the WA tribunal. A person currently has access to the WA tribunal to deal with those matters either as an individual or to be represented by a union, for example. In response to your question, Deputy Chair, the current system already provides a relatively low cost mechanism for a person who thinks they are an employee, as opposed to the business saying that they are a contractor, to have that matter resolved.

If you now were to move away from the status quo and introduce new legislation, invariably—and this is our experience—that change to the law will result in a whole round of new litigation whilst everyone goes and tests the boundaries of that legislation. That would be an unfortunate result of introducing legislation. It has not been well identified that there is a problem of such a magnitude that it warrants that sort of legislative reform, given what we say is the expected result of that, being a cost burden.

CHAIR—I can understand your logic there. Perhaps it is our responsibility as legislators to ensure that there is a clear definition. Everything that we pass in parliament is tested anyway.

There is always someone who is testing the boundaries of our legislation. If we were to incorporate a definition of an employee and an independent contractor in a workplace relations act, I understand there would be an increased of number of litigations in the early days or years. But after a while there would be a sense of understanding of what that definition is. If need be, perhaps we could come with amendment upon amendment to tidy up those definitions.

Mr Blyth—I understand the approach that you are putting to me.

CHAIR—You say there is no imperative because the current system is okay.

Mr Blyth—The current system is 'not broke', so it is not necessary. Secondly, to identify a definition which would be acceptable to the community at large is a challenge almost outside the grasp of what you would be able to achieve. You could produce a definition that would satisfy one side of the equation; you could produce another definition which would satisfy the other.

CHAIR—You are not against defining the arrangement through the common law definition, which is the indicia that is currently being used?

Mr Blyth—Our primary position is that it is not necessary. If the committee were to resolve that on balance it thought it appropriate to provide a definition—which is not what we would encourage you to do—if that were the approach, then we would say the approach would be to attempt to codify the common law and not to go beyond that. But we say in doing that, the indicia are so wide and so variable that it becomes problematic as a drafting exercise. Leaving that to one side, we say the issue is that even if you were to present a definition the question becomes: how does that definition then assist somebody?

Of course the circumstance, as you are conscious of from all the cases, is that parties might enter into an arrangement which conforms with that definition today. Next week, next month, next year, the way in which they relate to each other has altered such that they are no longer meeting that definitional objective; so, to the extent that you might see the benefit of a definition, we say frankly it is not likely, in the long term, to help the problem.

Mr BRENDAN O'CONNOR—I understand some of the points you make and I am not trying to interrupt you but we do not have a lot of time and I just wanted to move away from some of the esoteric commentary and perhaps focus more on a practical reality that occurs where workers are forced into so-called independent contracting arrangements where there is a form of coercion at the workplace, compelling workers to take up ABNs and forcing them to call themselves a contractor, otherwise they lose their job. How do we deal with that situation?

Mr Blyth—With respect, I think the law already deals with that situation, because your premise depends on this notion of there being force.

Mr BRENDAN O'CONNOR—Just assume that there is force. What recourse does a worker who makes $20,000 a year, who works in a factory or works in the hospitality industry or anywhere, have? They do not have standing, necessarily, in the commission. They do not necessarily have the capacity to go to a judicial court of determination. What do they do in that circumstance? How do we deal with those problems?

Mr Blyth—Again, I do not accept any of the propositions that you put to me as being factually correct.

Mr BRENDAN O'CONNOR—What do you mean, you do not accept them?

Mr Blyth—I will go back a step. At the point of having a discussion with a business operator the person, whom you are talking about as being the person ultimately said to have been forced into an arrangement, has a simple choice. They are not forced in a real sense to make that decision. They might be presented with choices and they might on reflection say, 'I wish I had more choices,' or, 'I wish I had a different choice.'

Mr BRENDAN O'CONNOR—I am not sure if you understand what I am saying. I will give you a scenario that happens. I am not suggesting it happens all the time. Let us just assume for a moment this happens: an employee on Tuesday is told that by Wednesday he or she will have to be an independent contractor, otherwise they will not continue to work in the workplace. What do we do in those circumstances?

Mr Blyth—Frankly I do not think that the parliament needs to do anything. This comes back to the key issue that we raised in our brief opening: that if a business operator resolves for business reasons that they no longer wish to engage workers as employees and now wishes to engage a work force on arrangements which are contractual or—

Mr BRENDAN O'CONNOR—What if they do not fit under the definition of contractor?

Mr Blyth—With respect, they do.

Mr BRENDAN O'CONNOR—You are suggesting an employer determines whether their employees will in fact be contractors, and they deem it, therefore it is so? Is that what you are suggesting?

CHAIR—Just let him answer.

Mr BRENDAN O'CONNOR—I am just getting a little tired of the circle.

Mr Blyth—I am suggesting to you that it is should be open, it must be open, to a business proprietor to decide for the purposes of running their business whether they wish to do that with a group of persons who are employees or a group of persons who are not employees. That is the fundamental question.

Mr BRENDAN O'CONNOR—I am not trying to press the point, but I just make the point, Mr Blyth: are you suggesting that provided the employer thinks—

Mr Blyth—The business operator?

Mr BRENDAN O'CONNOR—Let us just assume that somebody wants some work. We can argue about contract for or contract of services. In an arrangement where there has been an employment contract, are you suggesting that that employer has the right to terminate the employees and convert them into contractors?

Mr Blyth—I am suggesting that it ought to be accepted by the parliament that the decision to engage its work force as one or the other must rest with the business proprietor and, with respect, we say whether they are good commercial reasons or bad commercial reasons is not for us or for the parliament to worry about.

Mr BRENDAN O'CONNOR—What about outside the common law definition that you defend?

CHAIR—The initial business decision is—

Mr Blyth—Absolutely the business operator's.

CHAIR—Then that should be tested, subsequent to that.

Mr Blyth—Absolutely, and to the extent that they then engage in a discussion with a person that was previously their employee, then we obviously say it is appropriate for that business operator to behave in a proper manner, to properly explain those options to the person and for the person who is the employee to then choose.

CHAIR—How do we then know, or should we know right up-front, whether an arrangement is a sham arrangement? If I can paraphrase, what you are saying is that the initial decision is the employer's.

Mr Blyth—The business operator's.

CHAIR—Then, whatever arrangement they have, it is up to whatever parties to accept it, to not accept it or to challenge it.

Mr Blyth—That is correct.

CHAIR—Shouldn't we at least have some guidelines which will allow someone to say, 'This is outside the common understanding of what an independent contracting arrangement or employee-employer arrangement should be'?

Mr Blyth—I understand the question. What we say is that there is already in place a mechanism expressly for that purpose—that is, the common law test. If a person is one day an employee and the next day is presented with, 'Do you want to continue to work for me? If you do you'll need to enter into a contractual arrangement with me,' and that person is unclear, then that person today has available to them, presumably, being able to trot off to their union and saying, 'Look, this is what's being raised.' The union on that person's behalf might confront the business operator.

Mr BRENDAN O'CONNOR—What about in the unorganised work sites?

Mr Blyth—The unorganised work sites?

Mr BRENDAN O'CONNOR—The ones that are not unionised.

Mr Blyth—Employees then have a range of other options that are available to them.

Mr BRENDAN O'CONNOR—Hire a QC?

Mr Blyth—They could engage an industrial relations adviser. There are a range of them.

Mr RANDALL—Does the chamber provide advice to people? Do you have an advocacy type arrangement in the chamber?

Mr Blyth—The Chamber of Commerce and Industry provides services to businesses who are members of the chamber. We do not provide and do not offer our services to individuals who are employees. That is not our role.

CHAIR—You argue against this in your paper, but isn't it possible, as a way of ensuring that these sham arrangements do not proliferate and there is at least some protection, that we entertain the notion of civil penalties?

Mr Blyth—No. As you will be aware from the paper, we gave some consideration to that and we say that that is not demonstrated to be necessary or appropriate at this point in time. We say that if in a particular case a person whom the employer had been purporting to be a worker was in fact an employee, the penalty that rests on that business is the back payment of wages and entitlements to that person, of itself a substantial penalty because, as you will be aware, people can claim for accumulated entitlements back six years, broadly. We say that any further penalty by way of a penalty specifically for having put in place an arrangement which is not what it was said to be will not discourage operators from putting in place those sorts of arrangements. Establishing at what point in time an arrangement went from one which might have been clearly a contractual arrangement to, at a later stage, one found to be an employment arrangement: the case law frequently identifies that that has been the case, that when a particular person first started working then clearly the arrangements were contractual; but at some stage, because of the view of the way the tests are applied, what has actually been occurring as a matter of fact is that the arrangement ceased to be contractually commenced, being the employment arrangement. Identifying in that context a penalty to be imposed because someone is said to have had a sham arrangement we say is just not practicable.

Mr BRENDAN O'CONNOR—You have said really you do not want to see any form of legislation that may codify the common law or even, indeed, vary the common law definition to clarify it, but you do say, on the other hand, that you would like this legislation to go into narrow industrial instruments. By way of example, I think you would like to see the prohibition of terms of enterprise agreements that would allow for the security of the employment of those employees under that agreement.

Do you see any contradiction? On the one hand you are asking the parliament not to legislate to clarify or establish a definition for employees who are contractors. But, on the other, you wish us to consider legislation that would prohibit parties reaching an agreement pursuant to the Workplace Relations Act.

Mr Blyth—I understand the point that you are making and I suppose the answer to it is relatively simple. I am identifying that what you see as being potentially an inconsistency in our

position is that we are saying that parties should be free to enter into whatever arrangements are between them, except when it is a union agreement. The reason we say that—and we explain it in the paper—is that unions can, through protected bargaining, extract concessions out of employers, so it is not an environment where the employer in the context of enterprise bargaining is free to use litigation, for example, to prevent what would otherwise be unlawful behaviour on the part of the union and the work force which makes a bargain.

Mr BRENDAN O'CONNOR—No-one is talking about unlawful behaviour. I accept that that happens, so leave that aside. I accept there is a situation where matters are unlawful. When an agreement is made genuinely, lawfully, in accordance with the Workplace Relations Act, why would it be that we should interfere? Is it not that the parties should be able to determine for themselves provisions of a contract? It seems, Mr Blyth, you like to talk about the sanctity of contracts. I am just wondering why there is not any sanctity of provisions in an enterprise agreement if it has been genuinely consented to.

Mr Blyth—But the key point that I am seeking to make is that even if that agreement has been achieved in accordance with the Workplace Relations Act as it now is, the Workplace Relations Act as it now is enables so-called protected bargaining.

Mr BRENDAN O'CONNOR—That is not unlawful. You said 'unlawful' before.

Mr Blyth—No, behaviour that, except for the protected bargaining, would be unlawful.

Mr BRENDAN O'CONNOR—So lawful behaviour, yes.

Mr Blyth—What we are saying is that it is lawful now for behaviour which would otherwise be unlawful.

Mr BRENDAN O'CONNOR—It is lawful for an employer to lock out an employee.

Mr Blyth—To lock out an employee, that is right.

Mr BRENDAN O'CONNOR—It seems to me that what you are saying, effectively, is that where there is any organised labour, you want to proscribe the capacity to determine agreements. Where there is an uneven bargaining position—an employer with an employee who is not in the union, for example—you want a laissez-faire approach to relations. Don't you see that it seems that you are looking to legislate to reduce the likelihood of organised labour negotiating an agreement lawfully, but when it comes to an area where there is probably less leverage for employees you seek to prohibit terms of contracts?

Mr Blyth—No, because, as I say, I think you are missing the point that I make, and that is that the so-called bargaining process which is now open under the Workplace Relations Act enables what is referred to as protected action. That enables employees and unions to do things which would otherwise not be lawful.

Mr BRENDAN O'CONNOR—That is nonsensical. You cannot say it would be unlawful except that it is a law. Obviously if it is a law, Mr Blyth, it is not unlawful unless you break the law.

CHAIR—I understand that. The witness has his own views.

Mr BRENDAN O'CONNOR—Black is not white.

CHAIR—We can assess the merits of the views.

Mr Blyth—Perhaps I can summarise?

CHAIR—I still want to give the other members a chance to ask questions.

Mr RANDALL—I am keen for Mr Blyth to finish his answer so that I can withdraw my question.

CHAIR—We will finish this one.

Mr Blyth—Firstly, if you removed the protected bargaining provisions from the Workplace Relations Act, I would have some sympathy for your challenge to our position. We say that the retention of the protected bargaining provisions is a factor which allows for bargaining which extracts and forces agreements that might otherwise not be given. Secondly, it remains our view that the workplace relations law is there to deal with workplace relations matters. There are clearly matters which parties might wish to reach agreement on but to sanctify them under the workplace relations laws is, we say, to lose the plot. The workplace relations laws are not there for the purpose of giving authority to matters which are not what we say is directly related to the employer-employee relationship, and there is debate now in the federal Industrial Relations Commission about the extent to which matters are or are not so related.

Mr HENRY—My apologies again for being a little late. I am not sure whether anyone has asked this question of you before. There are a number of state legislative provisions here that would, in effect, deem independent contractors as employees, and they might even go as far as payroll—certainly long service leave payments in relation to the portable long service leave act effective in the construction industry, and others. You do not support those provisions. Can you enlarge a little in terms of what impact they might have?

Mr Blyth—All of those areas are dealt with in the paper, but in a general sense what we have said is that in Western Australia—and I made the comment earlier that we do not make this as a comment in relation to other states but strictly in relation to Western Australia—our occ health and safety act, the workers comp act and the equal opportunity legislation is legislation which does embrace obligations on workers, whether they are employees or contractors, and obligations on businesses engaging people in either of those arrangements, and we do not see an issue in relation to those three particular areas of legislation because they have different objectives and different purposes. It is that range of other direct workplace relations laws that we say ought to be overridden to the extent that they interfere with contractual arrangements.

CHAIR—Could you just refer to those?

Mr Blyth—The other laws?

CHAIR—Yes.

Mr Blyth—They are dealt with in the paper. The main one is the state Industrial Relations Act. There is also the state Minimum Conditions of Employment Act, the state Long Service Leave Act, and the Construction Industry Portable Long Service Leave Act. That act does not presently cross that border but what we say in the paper is that, given the way in which the state parliament has moved in recent time and given a recent inquiry in the context of the state legislation which we refer to in our paper—the Ford review and the direction that that recommends—we see that there is a likelihood that that will increasingly be the case, that general employment legislation will seek to interfere with contractors, and it should not.

CHAIR—There are a number of individuals who seek to be independent contractors or subcontractors who have gone to some lengths to get legal advice on the development of an appropriate contractual arrangement, yet on occasions in this West Australian jurisdiction and in other jurisdictions they may not be upheld in an industrial commission. Would you like to comment on the vagaries faced by people trying to ensure that they address the issues?

Mr Blyth—We acknowledge that the current system will cause for some people concern as to whether or not they are a contractor and that they will want to have that resolved through the legal processes. Even if there were to be legislative changes which would codify in some way the distinction, that would continue to be the case. Significantly, if you look at the data, the number of those cases in any one year is very small, particularly when you look at the growth—and there does not appear to be any challenge to this—over the last several years in both the use of contractors and in the use of labour hire.

We say there is nothing wrong with that, and the number of reported cases dealing with disputes about the status of a worker has not grown at the same rate as the growth in the use of contractors and labour hire. That is a strong indicator that there is not a problem that needs now some further consideration by the parliament, which would put in place, we say, a whole new set of challenges in order to work through what those new laws then mean.

Mr HENRY—Are you referring to the proposed independent contractors act?

Mr Blyth—To the extent of a question about such legislation including a definition, yes, that is what I am referring to.

CHAIR—I was quite interested in your section on deeming, particularly the point that you make about a deemed object still not being that object and that that, in itself, means that it may not have the protection of the object that it has been deemed to be down the track. I have not heard it expressed that way before. I know it sounds all very convoluted, but I fully understood that for the first time, so thanks for that. There are some moves, of course, in the states for deeming to take place.

Some of the witnesses that have come to us have said that perhaps the fall-back position in terms of definition—and I know we have spent a bit of time on definition today, which is unfortunate—is the ATO test. You are against that, saying that it was not meant to be used for these purposes and it is fraught with danger if we go down that track. Do you want to make any additional comments?

Mr Blyth—I think the elaborating comments really are repeating, to some extent, what was in there, but the significance of it is that the ATO obviously was concerned about the tax revenue that might shift with the shift from employment to contract and saw it necessary to establish a mechanism to ensure that that revenue—

Mr BRENDAN O'CONNOR—To stop tax evasion, I think, was what the ATO was concerned about.

Mr Blyth—If this achieves that objective, then we do not have a difficulty with that. But to use that as a definition and to then say that all persons within that definition are now employees for the purposes of workplace relations laws, we say, misses the point. That definition has nothing to do with the considerations that arise, if it is to be used for that purpose.

Mr BRENDAN O'CONNOR—Do you think that the need for the Treasurer and the government and, indeed, the tax department to rectify laws to capture income revenue highlights that in some instances this conversion from employee to contractor is a method to avoid tax? Is that a legitimate argument in the workplace?

Mr Blyth—If a business operator thought that by shifting its work force from employment to contract it could avoid or minimise some tax obligations—

Mr BRENDAN O'CONNOR—I think 'avoid' is fine.

Mr Blyth—whichever is the language that someone might want to use, we say that that is an entirely different issue. We do not encourage a business to avoid its obvious tax obligations. If a business can identify ways in which it can minimise its tax obligations, we do not have a difficulty with that.

CHAIR—It is hard for us to know that, though, isn't it? The motivation behind a shift is always—

Mr BRENDAN O'CONNOR—I am not suggesting that anyone should pay more tax than they have to. I agree with you on that point. I am asking whether it has led to arrangements which are not entirely proper which have compelled the Commonwealth to respond and ensured that the Treasurer, amongst others, would agree to an amendment to the tax act to prevent people escaping their obligations?

Mr Blyth—It might sound argumentative, but you suggest that it was improper for them to do that.

Mr BRENDAN O'CONNOR—No. I am saying that the government realised that many of the reasons to convert the legal personality of a worker to a contractor were really to, as you say, minimise tax but also to escape obligations and, rather than define 'employee' more clearly, it chose to instead capture revenue by changing the tax act. Do you see that as one of the motives behind the Commonwealth changing the act?

Mr Blyth—I accept that that might have been a motive behind the change in the tax law: to ensure that revenue did not disappear simply because of the shift of workers traditionally from

one arrangement to another. There might also have been a whole range of other factors that influenced a business in making that decision. Tax avoidance or minimisation may well have been an issue, but our experience is that there is inevitably a range of other good reasons, some of which others might challenge as being clever or not. In hindsight, some businesses say to us, 'Look, we went from employment to contract. That has exposed us to a whole range of other outcomes which we now realise are not in our best interests as a business proprietor, so we are going back to employing people.' We say those are fundamental decisions for the business owner. The business owner should not be corralled in a particular direction by legislation.

Mr BRENDAN O'CONNOR—But there are surely two elements to this issue of tax. There is the business entity, such as the agency intending to employ people, and there are the individuals who wish to be independent contractors engaged by that particular business. They have a tax liability and a tax responsibility as well, and there has been evidence given previously by unions that they now have as members a number of independent contractors. I know, for example, in the building construction industry many people will not work unless they are independent contractors because of the benefit to them, whatever that might be. That applies to the transport industry as well.

CHAIR—Mr Blyth, thank you very much for coming in this morning. Thank you for your submission, particularly the submission that you gave to the minister, or to his department. We have a fair idea of some of the responses there and your views on those issues. We thank you also for your personal evidence this morning.

Mr Blyth—Thank you very much.

CHAIR—If there is any other information you want to share with us, please drop us a line, but we are getting close to the end of our inquiry.

[9.54 am]

DAVIES, Mr Paul, Official, Liquor, Hospitality and Miscellaneous Union, Western Australian Branch

CHAIR—I welcome Mr Paul Davies from the Liquor, Hospitality and Miscellaneous Union, WA Branch. Although the committee does not require you to give evidence under oath, I should advise you that these hearings are formal proceedings of the parliament and consequently they warrant the same respect as proceedings of the House itself. I also remind you that giving false and misleading evidence is a serious matter and may be regarded as a contempt of parliament. As you know, we do prefer to hear evidence in public but, if you have issues to raise in private, we will consider your request. Would you like to make a statement in relation to your submission, or any other comments?

Mr Davies—Thank you. Our union did make a written submission and I do not intend to talk to that, but I would like to read a written statement about how this issue affects workers in Western Australia in particular. I also have a statement, if it pleases the committee, from a member of our union who is an independent contractor. She wants to remain anonymous so I will not read her name, but I would like to read into the record the details of her statement.

CHAIR—At the time when you read it, will there be reference to any particular organisations?

Mr Davies—No. It is a statement about the specific situation of this worker in the aged care industry. The LHMU represents around 23,000 workers in Western Australia. Our members work predominantly in low-paid jobs and 75 per cent of our members are women. The jobs are largely casual or part time. A large proportion of our members are from non-English-speaking backgrounds. Our members are cleaners, security workers, hospitality workers, health care, aged care and child-care workers, education assistants, enrolled nurses, zoo keepers, funeral workers, disability workers, home care workers and hospitality workers. We have a very diverse membership.

We are here today to tell this committee how independent contractors make vulnerable and insecure workers and their families more vulnerable and less secure. We want the committee to know that in reality there is no choice for workers when an employer decides to cut costs by engaging so-called independent contractors. We also want you to know that it is our experience that not only are these workers forced into less secure jobs by means of so-called independent contracting but they are also genuinely not contractors. It is our view that in many cases they are employees at law, whose day to day experience in the workplace is no different from the employees whom they work beside.

In particular, we want you to know about the use of independent contractors in the aged care industry, but before I move on to that I should mention that we have direct experience of independent contractors being used in hospitality as kitchen hands and wait staff. Their experience is that they are treated exactly the same as wage staff, except of course they go

without the benefits that employees have. Having said that, I mentioned that we want to talk about aged care so I will move on to that.

There are many profit-making companies, as you know, moving into the aged care industry and particularly into the high-care end of the market where there is more government funding. The use of independent contractors in our experience happens with the for-profit operators in aged care who operate in the most sensitive part of the market, looking after residents who require high care. We think this is a disturbing development and is used to increase their profit margins at the expense of workers, aged people in care and their families, the state and Commonwealth governments and, ultimately, the taxpayers.

We know of at least 120 independent contractors who are engaged to do caring work in Western Australia at the moment. It is our evidence to the committee that these workers are, in every way, employees and not independent contractors. They are directly supervised; they work to regular rosters determined by supervisors; they are employed to do ongoing work, not work for a fixed period or fixed purpose. In almost all the cases that I am aware of, they work at the one facility owned by the one company. In the statement that I will read to you, the case is that one independent contractor has worked her whole career of 4½ years at the one nursing home.

CHAIR—Are you witnessing this with one particular operator?

Mr Davies—We understand there is more than one operator. These workers are, in the words of our members, treated exactly the same as any other employee. The situation provides a free kick to these companies. On top of this, the employees in aged care in Western Australia are among the lowest paid in the country. An experienced care worker, as an employee, will receive only $13.51 per hour. The contract workers, of course, go without public holiday, sick leave, annual leave, long service leave, and are often responsible for their own income protection and public liability insurance, as well as their own workers compensation insurance, although some agencies involved will cover workers compensation for some contractors.

They are also not entitled to employer superannuation contributions. They are required to administer their own tax and superannuation arrangements, if they want to save for their retirement, as we would encourage them to do. The independent contractors that we have spoken to will receive between $18 and $19 an hour. We do not think those sums add up. We know that, because of this low rate of pay, many do not have sufficient insurance. Many contractors are forced to work long hours to compensate for the low rate of pay and, on the other hand, in a low-paid industry such as aged care, contracting employment is often the only way to get sufficient hours of work, so that there is an incentive for workers to shift off secure employment into less secure contract work simply to make ends meet.

The choice of independent contractor employment is an illusion for workers. If you want the job and you want the hours, it is take it or leave it. The only one who can choose is the employer. It is not just the workers who pay for increasing employer profits through less secure work or the residents who pay through threats to the standard of care; governments and taxpayers also pay. For the 120 independent contractors that we know of, we estimate that around $150,000 is lost annually in unpaid payroll tax to the state government and the Commonwealth loses around $300,000 annually in personal income tax receipts.

Through the creation of a growing class of workers who miss out on the nine per cent superannuation guarantee, governments and taxpayers are exposed to more and more people without sufficient retirement funds. This is a class of employment that is growing at a huge expense to the entire community and for the benefit of just a few entrepreneurs who, in the aged care industry, are already getting rich on taxpayer funds.

That is our submission, but I also have a statement from an independent contractor who works in the aged care industry who, for obvious reasons, wishes to remain anonymous. Would you mind if I read that?

CHAIR—For your information, Tony, we are going to have some evidence from somebody who pulled out, so we are having a statement read instead, with names omitted.

Mr Davies—'I am a carer at a nursing home and wish to remain anonymous. I have been an aged care worker, an aged care carer, for 4½ years. I have a certificate III qualification. I have worked for one particular company for four years. I was initially employed upon wages but in December 2002 I asked to become an independent contractor because the wages looked better. I would get $17 an hour as a contractor as opposed to $13 on wages. At the time, I knew that as an independent contractor I would not be entitled to sick leave, annual leave and long service leave, but I did not know how hard it would be. I find it very difficult to manage without paid leave. After only one week's leave for sickness, I found it very hard to keep up with my mortgage payments. I have no savings; I cannot afford to run a car; I have not been able to afford a holiday since I started out as a contractor. I pay my own superannuation because I know that the employer is not paying anything into a super fund for me. I pay public liability insurance but do not know why.

I am treated like everybody else at work. I provide ongoing care to the residents, like every other carer. I am supervised by the same people who supervise the wage workers. I work on the same roster system as the wage workers. My only place of work is the one nursing home. I have also been made responsible for instructing and supervising trainee carers. If they do something wrong, I have been told that I am responsible for it. I have been warned that I can be dismissed at any time. I do not know why they would say this to me, except as a way of keeping me quiet.

Due to the double shifts and staffing reductions that have occurred recently, care standards have dropped dramatically. Residents have more bruises, skin tears and bedsores because they are not turned properly or often enough, or showered and cleaned properly. Because staffing has been reduced from 10 to eight, people have been forced to cut corners.' That is the end of that statement.

CHAIR—Thank you very much for your opening statements and for reading out that statement. Going to that statement, her opening statement was quite telling. She said, 'I asked to be an independent contractor,' so it was her choice. You said in your statement that often these people are forced into less secure jobs. It seems to me that, at the end of the day, the individual can say no and can walk away from working in a particular organisation. I say this because we keep hearing that there is a shortage of labour in the aged care sector. If that is the case, isn't it a supplier's market, that they can pick and choose where they are going to work?

Mr Davies—On the first point, our submission is that there is no substantial choice and that in substantive terms if a worker wants to get by, if they need to accommodate their families, if they need to—as all of us would need to—pay mortgages or rents, run a car, live a normal life, the choice they have in order to get the hours of work required to do all those things quite often comes with the strings attached of becoming a contract worker, not an employee. The rate of pay for employees is much less. On the face of it, it appears as if that is the only way to go. It is not surprising that people are enticed by that rate of pay; but, of course, they learn quickly that it is a hollow promise.

In terms of the shortage of aged care workers, the cause of that is that the rate of pay is so low. In places where the rate of pay has been increased, retention rates are higher and there is no problem with keeping staff and maintaining the care of residents. We say increase the wages for aged care workers and you will have no problem with staffing. You will also have no problem with people feeling they have to work excessive hours at the expense of aged care residents and ultimately at their own expense, the expense of their families and the community.

CHAIR—What would prevent that person, or any other person in that sector, from exerting their bargaining power by saying, 'I will work for more than one aged care provider, more than one location,' rather than—the old story of putting all your eggs in one basket—working for one organisation, where you can be at their mercy? Couldn't that person simply use that power of withdrawing their labour and say, 'I'm only going to be working for you three days a week and the other two days elsewhere'?

Mr Davies—It just makes their life much more difficult to manage. I do not think it is a practical solution to the problem. People want stability and certainty in their employment. They do not want to have to negotiate different agreements with different employers all the time.

CHAIR—Yes, I understand that, but is it simply because of the relative newness in that sector of independent contracting? Other trades and labours have been doing it in other industries for years and years.

Mr Davies—We say that the nature of this work is not one where a worker is given true independence. They are, in fact, directed by supervisors; they are told what to do; they have a duty of care which is delegated through a director of nursing. They are not independent workers.

CHAIR—Even that is just a lack of knowledge as well, because their duty of care, as we have heard a number of times from various witnesses, does not stop with employing, or farming out work to either a labour hire company or an independent contractor. The host employer always still maintains duty of care. I am wondering whether or not there is an educational factor here: that these people, because of their relative newness to the concept of independent contracting, are not aware of their full bargaining power and their full rights and responsibilities. Maybe that is where you come in: to provide that education.

Mr Davies—We certainly seek to represent all workers engaged in aged care but, of course, they do not fall within the industrial relations system, so they do not really have any bargaining power in a typical sense. They are subject to the same inequalities as any individual—probably more subject to the inequality in bargaining power between an employer and an individual employee. They are alone.

Mr BRENDAN O'CONNOR—Thank you for the evidence you gave this morning. We had earlier today Mr Blyth, Director of the Chamber of Commerce and Industry of Western Australia, answer a question I put to him about the potential difficulties of a worker seeking judicial recourse to have themselves defined as an employee rather than a contractor. Could I pose to you the same question: what is the practical likelihood of an employee or a contractor—or this aged care carer—seeking some legal recourse to establish their rights as an employee? What you have really put to us, I would suggest, is not an independent contractor under the common law test. There seems to be no control for that aged care carer and she seems to be entirely dependent upon one principal—or, I would argue, one employer. Why doesn't she just go to the courts and get some relief? I am sorry I cannot ask you that without you laughing, but we need to hear for the record what the difficulty might be for her.

Mr Davies—I think in our member's statement she said that she was threatened with dismissal for no particular reason. By the very nature of her relationship with the employer, she is vulnerable. Her personal situation makes her dependent on the wage. She has no rights to seek redress if she is dismissed. She has no unfair dismissal rights in the way that we know they exist for employees. It would be an incredibly courageous person who would risk the welfare of her family and herself to take on an employer in such an action, let alone to incur the cost of doing that.

Mr BRENDAN O'CONNOR—It was also put to us that unions could take up these matters on behalf of employees that have been converted to an independent contractor status. What are the practical problems for employee organisations seeking to define a person in a judicial court rather than a commission in terms of time, resources and so on? Couldn't you bring every matter to court and have them resolved that way?

Mr Davies—We have 23,000 members in Western Australia. We have countless enterprise agreements to negotiate and administer. We have all of the issues that individual employees among our membership bring to the union on a day to day basis. We are a very busy organisation, administering the general industrial employment instruments that we manage and look after. We have no intention of walking away from any worker, whether they be an independent contractor or not, so we would take on this challenge. It would be a burden, but we would take it on.

There are legal difficulties, of course, in bringing these sorts of workers within the regulation that we are used to working with and seeking to improve their lot. To answer your question, it would be a burden. We would take it on, but there would be significant difficulties.

CHAIR—To get an idea of dimension, how many of your members in the aged care sector are independent contractors? Do you have those figures? Is it growing? Is it significant?

Mr Davies—It is growing.

CHAIR—But still a very small percentage?

Mr Davies—In some places it is much bigger than in others. In the aged care facilities in Western Australia that are expanding and making more money, the use of independent

contractors is becoming more predominant. It is not dominating, but it is becoming a larger proportion of the labour used.

CHAIR—We heard from organisations like Manpower and some of the other large labour hire companies in Melbourne and Sydney that they have from time to time entered into agreements with the relevant unions as part of placing people with employers. Have you done that? Do you have agreements with any agencies or labour hire companies?

Mr Davies—Not that I am aware of. We might in other industries, but I am not aware of that.

CHAIR—What is preventing that from happening?

Mr Davies—This is a new situation for our union in Western Australia. We are seeking to represent these workers and if it means entering into agreements of that sort we will do that. Of course, the primary problem is not the formal arrangements; it is that these arrangements set them up to be vulnerable workers. We do not want to improve their lot on a case by case basis. We think it would be easy to assert what is already the common law and fix it up in that way.

Mr BRENDAN O'CONNOR—Going back to the point I made about the difficulties you would have as an organisation representing workers, it was put to us by the witness for the Chamber of Commerce and Industry of Western Australia that it would be just as possible for non-unionised workers to seek judicial recourse by going to—I think he used this term—an industrial relations consultant. In your experience, what is the practical likelihood of a person who is not a member of a union taking up a matter if they feel that they have been coercively placed into an independent contracting arrangement?

Mr Davies—That would be a very unusual situation. I think it is a completely impractical situation and I cannot foresee that it would arise.

Mr BURKE—You cited $13.51 per hour as the standard employee rate.

Mr Davies—That is a benchmark rate for an experienced carer on the relevant award, yes.

Mr BURKE—Is that for a permanent employee with four weeks annual leave and things like that?

Mr Davies—Six weeks in some cases.

Mr BURKE—Is there an equivalent casual rate?

Mr Davies—There would be. There would be a loading of 15 or 20 per cent.

Mr BURKE—I wanted to compare the casual rate—the independent contractor's rate—that is all.

Mr Davies—We have attempted to do some comparison between the contractor and the waged worker, and it is not as easy as it might be. It is pretty clear that the $5 difference, roughly, does not account for the losses, if that is the point of your question.

Mr RANDALL—Roughly, what is the minimum weekly wage?

Mr Davies—It varies.

Mr RANDALL—Generally, across Australia, what is the benchmark minimum wage?

Mr BRENDAN O'CONNOR—Do you mean the lowest nationally?

Mr RANDALL—Yes.

Mr Davies—Four hundred and eighty-two dollars.

Mr RANDALL—Mr Davies, the example that you cited of a person in the aged care industry on $13 per hour for a 40-hour week, assuming that is the case—

Mr Davies—That is a big assumption. I do not want to interrupt your question, but we know that they typically work about 30 hours a week.

Mr RANDALL—We will vary it, because it is all relative. That is $520 a week. A person on $17 an hour as a contractor earns $680 a week. That is a $160 difference.

Mr Davies—Yes.

Mr RANDALL—These are low-skilled or no-skilled workers, are they?

Mr Davies—No. The person whose statement I read to you has a certificate III qualification from TAFE and is a skilled carer.

Mr RANDALL—But low skilled.

Mr Davies—She is a skilled worker.

Mr RANDALL—She is not a registered nurse or anything like that.

Mr Davies—No.

Mr RANDALL—At the end of the day, the person that you are talking about is well above the average of reasonable remuneration and they have the ability to make choices. Let us take the example of Armidale in my electorate. There are a range of nursing homes, some very much unionised, if you want to put it that way—wage earners—and many of them are on a contract basis. Because of the lack of personnel for aged care, you cannot say that they do not have opportunities to make choices about whether they wish to be employed in an aged care facility that pays wages or one which prefers contracts.

From that point of view, I do not think your argument stacks up terribly well. This is what this whole system is about: endeavouring to provide workers with choices. We have seen this further

expanded in the case of nurses. The nurses union has been quite obvious in some of its action over recent times. They are shifting more and more to agency nursing and contract work.

CHAIR—Are you going to ask a question?

Mr BRENDAN O'CONNOR—Don is giving evidence!

Mr RANDALL—Your real reason for objecting to contracts is because the union has less ability to have jurisdiction over those workers than it does over wage earners.

Mr Davies—No. Our objection is that contract workers are worse off.

Mr RANDALL—That is your point?

Mr Davies—That is the reason why we are involved.

Mr RANDALL—I make the point that I think your argument is garnished to satisfy your own circumstances.

Mr Davies—One of the reasons they are worse off is because they do not have the same rights as employees. They do not have the right to unfair dismissal—

Mr RANDALL—But they make choices.

Mr Davies—They make choices based on the fact that they are low-paid workers.

Mr RANDALL—They are getting more money.

Mr Davies—No, they are low-paid workers. They may have no choice, in effect, if they are offered a job on the basis of a contract—take it or leave it—which is often the case. Our objection is that they have no rights and therefore they are worse off.

Mr RANDALL—They do have rights under the industrial laws of this country.

Mr Davies—I am not sure what laws you are referring to.

Mr RANDALL—We are talking about all of the laws that cover workers in the workplace and we are talking about the jurisdiction of the state industrial courts et cetera—the minimum wage, the terms and conditions of their employment.

Mr Davies—They do not have the same rights as typical employees in our experience. The people who are working in the industries that we look after are genuinely employees. They are used to do the same work as any other worker in aged care and the only reason an employer uses the independent contractors, in our view, is because it costs less and it costs less at the expense of the worker or the employee.

Mr RANDALL—You would not agree that they do it for genuine reasons like greater flexibility in the work force?

Mr Davies—Who does it?

Mr RANDALL—The employer offers a contract because it offers greater flexibility, and greater flexibility—rather than mass regulation, which the unions prefer—leads to greater productivity.

Mr Davies—We know that flexibility for employers is something that the current Commonwealth government is about pursuing but we know that that comes at the expense of workers. We say it also comes at the expense of the taxpayer in this case.

Mr RANDALL—You would not agree that a flexible workplace and choice actually give workers the opportunity to earn more money?

Mr Davies—This is about driving down wages for low-paid workers.

Mr RANDALL—That is the common mantra.

CHAIR—Thanks, Don. You have asked your question. Stewart?

Mr HENRY—Mr Davies, based on the evidence that you have given this morning, it would sound to me as if in most of the circumstances that you have described, particularly in relation to this aged care worker having no control over her role or responsibility in the workplace, most industrial relations commissions or tribunals would find her to be an employee, so why doesn't your union take more action in this regard in supporting your members?

Mr Davies—We are.

Mr HENRY—Particularly where this particular person seems to have made a choice to be an independent contractor and now wants to opt out of that arrangement, are you progressing that through the Industrial Relations Commission?

Mr Davies—We are progressing it directly with the employer.

Mr HENRY—One of the suggestions would be that you would take it to the Industrial Relations Commission to get a definition of their role in the workplace?

Mr Davies—If that is what is needed to be done; but we are hopeful that the employer will see sense in this case.

CHAIR—What are you taking to the employer? Apart from her feeling that she is pressured and she is earning less and perhaps she does not have the money to pay for liability and insurance and sick leave, what actually are you taking to her employer on her behalf? She has not been dismissed, has she?

Mr Davies—No, but the facts of her employment are that she is at law an employee, not a contractor.

CHAIR—But you would not take that to the employer. Wouldn't you take that to be arbitrated by a higher body?

Mr BRENDAN O'CONNOR—No, you negotiate with the employer and say that they are acting unlawfully.

CHAIR—But she is not the only one, is she? She cannot be the only one in that particular place.

Mr Davies—No, she is not.

Mr BRENDAN O'CONNOR—That is why they should talk to the employer directly.

Mr Davies—We negotiate with employers to get outcomes which benefit both the employer and the workers.

Mr HENRY—But part of the evidence as I understand it, and your submission, has been that these people have been coerced into these independent contractor roles, yet the evidence that you have given on behalf of this person in their statement said that they asked to become an independent contractor.

Mr Davies—I did not use the word 'coerced'. I said they have no real choice.

Mr HENRY—'No real choice'. But this person asked the question or put to the employer that they wanted to be an independent contractor.

Mr Davies—She also said that the reason she asked was because it was a higher rate of pay but she did not realise that, through the loss of the other benefits that an employee has, that rate of pay is eroded. There are a whole lot of problems.

Mr HENRY—But, again, she did have that choice.

Mr Davies—There is no denying that, but the choice is no choice if, at the end of the day—

Mr BRENDAN O'CONNOR—Can I just take you on another path. You say you have 23,000 members.

Mr Davies—Yes.

Mr BRENDAN O'CONNOR—How many of those would be independent contractors?

Mr Davies—I cannot tell you.

Mr BRENDAN O'CONNOR—Do your union rules allow for membership of independent contractors?

Mr Davies—Yes, I expect they do.

Mr BRENDAN O'CONNOR—Wouldn't you assert the position though, Mr Davies, that these employees are not independent contractors?

Mr Davies—That is what we have been saying.

Mr HENRY—But your union is saying that you do not want to take individual cases so you are not pursuing these matters?

Mr Davies—No, that was not my evidence. I said that we would take on any case, but if you are taking on cases on the basis of a multitude of individual employment relationships or contracts, it follows that that is a much more onerous task.

Mr HENRY—Moving on to another industry sector, would it also be fair that in the hospitality sector, for example, there are a lot of transient workers? They do not want the benefit of superannuation and all of the other benefits. They would rather have a direct hourly rate, which many of them receive.

Mr Davies—No, I would not concede that.

Mr HENRY—You wouldn't?

Mr Davies—No.

Mr HENRY—You do not believe that a lot of the people in the hospitality industry are transient workers?

Mr Davies—No, you followed on by saying they would not want superannuation. Of course they would.

Mr HENRY—But the fact is that many of them—at least in some cases—have superannuation in three or four different jobs, in three or four different funds, and want to know where the money is.

Mr Davies—I think you underestimate what people's interests are. Of course they would keep track of it.

Mr HENRY—There is sufficient evidence to suggest that there are many funds that have substantial amounts of money that people are unaware of and have not claimed or have not rolled over into other funds.

Mr Davies—Maybe we should simplify the way funds are set up and just have larger industry funds, or portability.

Mr HENRY—Certainly it would suggest that those people are walking away from that money.

Mr Davies—I do not think they are going to walk away from the money.

CHAIR—Going back to this particular case and the company, there are obviously employees in this particular aged care sector.

Mr Davies—Yes.

CHAIR—Are those employees covered by an agreement?

Mr Davies—In some workplaces they are, in others they are not.

CHAIR—In this particular company, with this individual?

Mr Davies—No, they are not.

CHAIR—So we have a situation where this company at this particular aged care centre has independent contractors and employees?

Mr Davies—That is right.

CHAIR—And the employees are not covered by an agreement?

Mr BRENDAN O'CONNOR—Are they paid under an award?

Mr Davies—They are paid under an award, if that is what you mean. The distinction here is between an award or an enterprise agreement. These workers have an award and are about to negotiate an enterprise agreement.

CHAIR—You are party to that award?

Mr Davies—Yes. It is a federal award.

CHAIR—Have you made overtures to set up a specific enterprise agreement?

Mr Davies—Yes, that is what we are doing.

CHAIR—I now understand. Sorry, Tony.

Mr BURKE—A lot has been made of the choice taken by person in the example you gave. Do you believe she had an informed choice?

Mr RANDALL—It is hypothetical really, isn't it?

Mr Davies—I think she might have had an informed choice. I do not think she had any experience about what the choice might entail. It is her evidence that she did not know what the outcomes of her choice would be.

CHAIR—I think she said in her statement that she probably underestimated the benefits.

Mr Davies—That is right—or she overestimated the benefits.

Mr BURKE—Because there have been some differences in the starting point for different members of the committee in terms of what the standard procedures are from the point when a member raises an issue with you to when something may end up with the industrial commission, can you give just a quick outline of the standard steps of grievance procedure that you follow?

Mr Davies—If a member—indeed any worker—approaches the union for advice on a particular issue, having clarified the facts with the worker we will approach the employer either directly or through a workplace delegate, seeking their side of the story, then seeking to resolve it at a workplace level, at whatever level within the workplace is appropriate.

Of course, if that is unsuccessful and there is a need to progress it, we will go through various layers of management. Eventually—if, again, it is not successfully resolved within the company—we will take it to whatever tribunal is open to us to take it to, including industrial relations commissions, magistrates courts or whatever. But, of course, we start where the problem exists and seek to resolve it there at the first instance in all cases.

CHAIR—Do you or can you envisage a situation—and I have to go back to a particular case only because it is nothing more than a point of reference—where you could negotiate an agreement with the employer where there will be two agreements: one for those who accept or want to take on independent contracting arrangements and one for those who want to remain as paid employees? Can you envisage two separate agreements? In other words, you are not really abolishing the organisation's opportunity to have independent contractors, but you may improve the benefits and the conditions for those independent contractors, or is your attempt to bring them all under one umbrella?

Mr Davies—Just to clarify our submission, in this case these workers are employees. It is an illusion or a device.

CHAIR—A sham.

Mr Davies—It is a sham.

CHAIR—Your object will be to bring them all back to employees.

Mr Davies—In this case that is the case. If they are genuinely independent contractors in some other hypothetical situation and there is no sham, then we would seek to represent them in whatever way we could to assist them to improve their situation.

CHAIR—So there could be two separate agreements.

Mr Davies—There could be.

CHAIR—Thank you very much for your evidence.

Mr Davies—Thank you.

CHAIR—I cannot say a submission, because it was not a submission, was it? It was just simply a letter.

Mr Davies—I did read a submission onto the records.

CHAIR—Yes. I will say your evidence.

Mr Davies—And we had a written submission.

CHAIR—Thank you very much for that. We appreciate your time.

Proceedings suspended from 10.36 am to 10.49 am

WIESKE, Mr Peter, Director/Client Services Manager, Personnel Contracting Pty Ltd, trading as Tricord Personnel

CHAIR—I welcome Mr Peter Wieske from Tricord Personnel. Although the committee does not require you to give evidence under oath, I advise you that these hearings are formal proceedings of the parliament and consequently they warrant the same respect as proceedings of the House itself. It is also customary to remind you at this stage that giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. We do prefer to hear evidence in public. If at any stage you wish to give evidence in camera, please request to do so and we will consider it. Would you like to make an opening statement to your submission or any other introductory comments?

Mr Wieske—I have been asked to give a bit of a run-down on the court case we recently had. Leading into that I will give you a quick brief about our company—who we are and where we come from. Tricord Personnel is the trading name of Personnel Contracting Pty Ltd. We are a family business, established in early 2000, on the basis of a high standard of business ethics and transparency and honesty. We saw a need in the construction industry for simple and flexible engagement of contract labour. We began in the housing market and gradually drifted into the commercial market on the recommendation of our services by our clients. Our business grew by word of mouth.

Tricord's services are predominantly administrative. We manage the fluctuating demand for labour from our clients with the supply of contract labour. We reduce the administrative burden by meeting many different legislative requirements that are on both our clients and our contractors. Most of our contractors are satisfied with the agency services that we provide to them. They know the agreed hourly rate that they will be paid and that they will be paid every week for the previous week's work. They know that they will receive their superannuation entitlements; if they are injured at work, they are covered by workers compensation insurance.

The surety of payment of entitlements is not guaranteed in the industry as a whole. I continually hear from clients and contractors that there are both labour hire companies and scores of small businesses in the industry who have the perception that because an individual has an ABN they are relieved of superannuation and workers compensation insurance obligations. Too often workers in the industry are not paid for work done, which is a concern to us. Our company has always engaged contractors, irrespective of whether they are CFMEU or other union members. We do not discriminate on that basis when offering work to contractors.

There has been one exception to this in a case where a work site was considered a union site and we were only able to place union members in that work. I find this type of discrimination—that is, no ticket, no start—immoral and indefensible. Consequently, we typically do not deal with clients in those types of construction sites.

Going to the court case, as Tricord became more involved in the commercial construction scene, we were specifically targeted by the CFMEU, contrary to the report from Mallesons Stephen Jaques Workplace and employment relations law update March 2005, which I believe you have a copy of.

CHAIR—Yes.

Mr Wieske—The CFMEU, as opposed to our contractor, first made a time and wages request of us in July 2003 and then commenced an unfair dismissal claim against Tricord. There was only one unfair dismissal claim, not two as stated in the report. The contractor involved had little idea of what was occurring. This is obvious from the testimony of the contractor. We also know that the same contractor was also involved on behalf of the CFMEU in another industrial dispute a few months prior.

In our case, even had the contractor been an employee, his termination from work was far from unfair. The contractor was placed in work with a client as a steel fixer and was told that he would be looking at one week, possibly two weeks, of work. The client put the contractor to work as a steel fixer and later gave him some formwork and carpentry work.

One day short of his two weeks in the job—that is, he was given four days more than he initially expected—the client advised Tricord that the contractor's services were no longer required. The contractor was contacted and advised that the job was finished and was asked if he wanted Tricord to look for more work for him. The contractor told me—and I made the phone call—specifically that it was not necessary as he had other work from the union. In fact, he had no other work, he had no work at all, but was conscripted again by the CFMEU to testify against Tricord for an unfair dismissal case.

Sadly, that same contractor called me seeking work one month after the Western Australian Industrial Relations Commission hearing. Obviously his use-by date had passed. It was a pretty sad case. He was basically destitute, did not have any work and we could not place him at the time.

As a bit of preamble to the court case, in June 2003—which was one month before the unfair dismissal claim—the CFMEU initiated bargaining for an industrial agreement with Tricord. They were advised that Tricord was not interested in an industrial bargaining agreement and would not bargain. The CFMEU applied to the WAIRC to commence proceedings to force an enterprise order on Tricord, as can be done in this state. This occurred, even though not one contractor working through Tricord had shown an interest in an EBA. The CFMEU targeted Tricord specifically to get at a major client of ours, Hanssen Pty Ltd.

CHAIR—That is a major builder, is it?

Mr Wieske—Yes. The argument of the CFMEU has nothing to do with whether the workers are contractors or employees but has everything to do with gaining control of construction sites in the CBD which are not unionised. We believe it is all about power and money. We fought these cases on principle, and in both cases—this is, the enterprise order and the unfair dismissal—Tricord challenged the jurisdiction of the WAIRC. The commissioner dismissed both applications from the CFMEU for want of jurisdiction; he found that neither of the workers were in an employee-employer relationship.

As is explained in the Mallesons report, the CFMEU appealed to the full bench of the WAIRC. The president called our agreement with the contractors a sham. Arguably, the agreement could have been better, but it certainly was not a sham. It was an honest contract between two

consenting parties. The full bench also put a lot of weight on references in Tricord's documentation to the ability to withdraw its services from an unsafe workplace. Tricord has a duty of care to all contractors and will continue to withdraw its services from unsafe workplaces where the client shows contempt for safety and allows unsafe work practices.

Should Tricord contractors decide to remain on such a site and continue to work, they have the freedom to make that choice. However, it would not be on a contract through Tricord. Accordingly, Tricord does not have any control over the contractors, but will determine which clients it will service and what levels of risk it is willing to take.

The full bench of the WAIRC upheld the CFMEU appeal and Tricord appealed to the Industrial Appeal Court, as summarised in the report from Mallesons. The full bench of the Supreme Court in a two to one decision allowed the appeal and restored the original WAIRC order. Justice Steytler, one of two judges who found in favour of the appeal, said:

> ... there is, in my respectful opinion, little to suggest that the label applied by the parties is a sham (and a good deal to suggest that it is not), it seems to me that the evident intention of the parties should be given effect and the relationship between them should, in each case, be found to be that which they have been at some pains to describe, namely, be that found to be that of independent contractor and principal and not that of employer and employee.

Justice Simmonds said:

> ... the Full Bench erred in concluding that Tricord was an "employer" of each of the two individuals in this case ...

It is questionable why the dissenting judge considered that the obligations for the workers to comply with work safety laws and regulations, follow safe working practices and report any difficulties encountered in the performance of work to Tricord as evidence of an employer-employer relationship. He obviously lacks understanding of the responsibilities that all businesses have in regard to OH&S and equal opportunity in all of those other responsibilities. Any decent contract for work in the construction industry today gives close attention to these types of details, and duty of care demands it.

In concluding, the decision of the Industrial Appeal Court upholds the freedom of choice and determination of workers to work either as an employee or to be a free agent and contract out their services as they see fit. That is my submission.

I will give you one example I had the other day of a plumber that is working for us. I was advising him of some information on the site. He came up to me and said, 'My brother works at the Raffles.' The Raffles is a Multiplex site, a heavily unionised site; try to get on there without a union ticket. 'He said, "I'll get you a job at the Raffles." I said, "I'm not really interested."' He came back to him and said, 'I've got you a job as a plumber at the Raffles.' He said, 'I'm not interested.' 'Why not? It's better money.' It was better money. That being said, our workers are paid very reasonably, contrary to what some of you say. He said, 'I'm not interested. I'm working here. I'm with blokes that love what they're doing. We're doing a great job. We're not getting stabbed in the back. No-one is looking behind to see who's going to stab them in the back. There's no pressure on us; we're just doing our job. We love coming to work; we love going home.' He said, 'I'm not going to leave. I'm happy.' He was not our highest paid plumber. The day I went to speak to him he was given a pay rise but he said he made his decision before

that, so it was quite interesting. We hear that all the time from our contractors. They are very happy to work for us. Mind you, that is on the basis that we have an ethical work practice. We are fair on the guys. We are transparent. We make a big deal of being transparent. We try and act honestly with them. That certainly pays off. Our business has grown accordingly.

CHAIR—Thank you, Peter. Taking you back through some of the factual aspects of your business, how many contractors do you have?

Mr Wieske—It varies. We would vary between 150 and 200 working through our company at one time.

CHAIR—And the average length of employment that they would have with you?

Mr Wieske—They are not employed.

CHAIR—Sorry, the placements.

Mr Wieske—It could vary from half a day here and there, to a couple of years.

CHAIR—What would be your longest serving contractor on your books so far that you have had, even across multiple locations?

Mr Wieske—We have been operating for five years. The longest serving—I am guessing—would be three to four years. A lot of contractors that we have working for us tend to stay with us, as long as we can keep them busy. Some of them go off and work up north, work out in the goldfields, come back and work for us again. It is very flexible. They are free to choose when they want to come and when they want to go.

CHAIR—One of the criticisms that is often levelled at organisations such as yours is that you are not really doing anything to improve the skill base of that particular industry. Do you have any thoughts about that? What kind of training and development or apprenticeship intake do you have?

Mr Wieske—We do not engage apprentices. Our clients do. We are very selective about which clients we service because the ethics of the business of the client that we service determines whether we get paid and determines the approach they have towards workers that work for them. We find that most of our clients are pretty supportive of engaging apprentices and we find that we build up relationships with these apprentices and they often come onto our books as contractors when they have finished their apprenticeships.

Mr BRENDAN O'CONNOR—When you say 'clients' you mean other employers?

Mr Wieske—Builders. Principal contractors.

Mr BRENDAN O'CONNOR—Really, the skill formation that is occurring in the industry, you are saying, is actually done by other people?

Mr Wieske—Our clients engage contractors through us and may have contractors engaged otherwise, or apprentices. We did look at apprentices. Obviously we have a concern about that as part of ethical work practices. Legislative requirements make it very difficult for us to do that and we found that group training schemes do it much better. They do what they do well. We do what we do well.

CHAIR—Having gone through the court process, is there a sense of ease now in your organisation that what you are doing is fair and legitimate and you can now look at your arrangements with a high level of confidence, or do you still have some concern that you may be targeted or that you may have aspects of your business that will continue to come into question?

Mr Wieske—We certainly have a high level of confidence. We are a family business, we saw a niche market, we saw that there needed to be some competition in a niche market, and obviously we were operating on the coat-tails of companies that have gone before us. Having had our own court case obviously gives us greater confidence. The way we think about what we do has not changed. We always believed that we work very ethically, both with our clients and with our contractors, and we have always maintained that high level of ethics, such that, should we ever be targeted, we can stand up, hold our head high and give a fair account of ourselves.

CHAIR—Take me through some of the figures. You said that you pay your people reasonably well. What are your payments? Pick some of the key trades positions that you have, or even labour positions, compared to what it would be out in the industry.

Mr Wieske—I do not want to give away too many of our trade secrets!

Mr BRENDAN O'CONNOR—You are saying you are transparent, remember.

Mr Wieske—That is right. We work a little differently to some of our competitors. We do not have a schedule of rates as such; we just do not have one. We deal with each client individually. Should a new client come to us and tell us what their requirements are, what contractors they require, we will give them an idea of what we believe is a fair rate of pay in the industry as it stands, compared to what we pay our contractors elsewhere. We may get a client who wants to pay more, and that is fine. We have no difficulty with that. We charge out accordingly and we still cover our costs and make our bit on that. We do it on a one by one basis with each client but, because we are in the industry and we know the industry well, we have an idea obviously what workers are being paid, and if we have clients come to us and they want to have labour for nothing, we tell them to go away. We are just not interested.

CHAIR—You are saying to me that I as a plumber, being placed through you, could find myself earning a particular rate with company A, and next week I am working with company B and I have a different rate?

Mr Wieske—That could be possible, but it is your choice as to whether you take that rate, and we also determine that we are happy that the rate we are paying is a reasonable rate for a plumber. If company B does not want to pay a reasonable rate we will not service that company. It is as simple as that. But typically our trades and labourers are paid on pretty much the same basis. Did you want some examples?

CHAIR—I was looking at some particular dollars, yes.

Mr Wieske—I have no problem with that. Our tradesmen in general are paid around $24 to $26 an hour.

CHAIR—In the industry what would it be?

Mr Wieske—If you are looking at awards—

Mr BRENDAN O'CONNOR—No-one is paid under an award in the industry.

Mr Wieske—What was your point, sorry?

Mr BRENDAN O'CONNOR—Were you referring to federal awards? Is that what you are suggesting? What do you mean by 'awards'?

Mr Wieske—I did not finish my statement. No-one is paid under an award, are you saying?

Mr BRENDAN O'CONNOR—No, I am saying no-one is paid on the award—

Mr Wieske—No, but if you are looking at awards, our rates are well above awards. I am not going to give you the award rates, but I have looked at them.

CHAIR—The industry average?

Mr BRENDAN O'CONNOR—It would be 60 per cent above the award.

CHAIR—What is the industry average?

Mr Wieske—It is very hard to give figures like that because—and this is one of the frustrations we have—in the construction industry, people are paid a range of rates and in that payment is a range of things that are included or excluded. I had a carpenter who is on $26 an hour. On top of that he gets superannuation and he is covered with workers compensation, and he is telling me that the guys that were doing his job before were on $30 an hour, so I am scratching my head and thinking, 'Well, this guy isn't going to stay here for very long, is he?' No, of course he is not, because he knows the industry is paying more. I talked to the client and said, 'What's going on? You've got contractors here on different money.' He said, 'Oh no, they're on $30, including GST, pay their own super, pay their own workers comp.' I said—besides it being illegal—'Thanks for the information.' At least I could go back to my contractor and say, 'You're actually on a good rate in comparison, for that job.'

Mr BRENDAN O'CONNOR—Can I just stop you on that point. Even though you have a contractual arrangement with the carpenter, who pays the super?

Mr Wieske—We do.

Mr BRENDAN O'CONNOR—What about insurance and so on?

Mr Wieske—Superannuation is totally different legislation, obviously, and so a definition of what a worker is is different to—

Mr BRENDAN O'CONNOR—Yes, I understand that. Each state is different, by the way.

Mr Wieske—And also there are companies within states that do it differently. I have just heard recently of a company similar to ours who contract out their super, something we have to look into. It is not that I do not want to pay super, but if the worker chooses to—

Mr BRENDAN O'CONNOR—Is it because the definition of 'superannuation' requires your company to pay that person?

Mr Wieske—Beside the many contractors, no argument there, but the definition of a worker under that legislation, as we understand it, requires us to pay it. That was not argued in the courts at all. They were happy to accept that.

Mr BRENDAN O'CONNOR—It is probably the broadest definition of the Commonwealth law at the moment, SGC.

Mr Wieske—Yes. Workers comp is similar, although in this state the company still has to pay workers compensation as of 1 July 2005. It is changing all the time. There is a lot of confusion out there. As I said in my submission—

Mr BRENDAN O'CONNOR—Can you finish what you said. You pay super. You were going to go on and tell us—

Mr Wieske—Insurance, that is right. We pay their super and we cover them for their workers compensation, and that is a criticism of the industry, that companies like ours underpay workers compensation. They may do. We have been audited. We have come out squeaky clean. I am happy to be audited any day of the month, any day of the year. All our workers are covered for public liability insurance. That is their own responsibility, but we have a set-up whereby they can pay it through our system. It is much cheaper.

CHAIR—Just to pick up from what you mentioned there, you are happy to be audited and you are squeaky clean. You have been through the courts, you have come out and you have had a victory. Are you concerned that there are a lot of other organisations out there, or a number of other organisations, who are not performing at the same level as you are—that do not have the same arrangements—and therefore the whole industry is brought into disrepute or is being challenged because of the operations of others? If that is the case, what should we be doing? What should we be recommending, as an inquiry, to ensure that other organisations are on par with what you are doing? Some witnesses say to us we should not be doing anything; just let the marketplace fix it. Others are saying it should be highly regulated. You have had the benefit of going through a court. Not everyone has that benefit, and I use the word 'benefit' loosely. You have had the advantage of going through a court.

Mr Wieske—We have only been in for five years. We are a small player. We are a young player. We are growing. The market is working. Where our competition is not making the mark,

we are taking over their part of the market. However, I believe that there are problems in the industry. Are we talking about the construction industry now or the labour hire industry?

CHAIR—You stick to your own industry.

Mr Wieske—I only know labour hire and construction.

CHAIR—Yes, just your own industry.

Mr Wieske—I think there are problems in the industry. I hear amazing stories from contractors that come and sign up with us, and we find work for them from other players in the industry.

Mr BRENDAN O'CONNOR—What sorts of stories?

Mr Wieske—Just that they have not been paid superannuation; they have been told they have to pay their own insurances; they have not been paid for a week or two. We pay all our workers every week and we guarantee that. That is how I keep my contractors on my books. They keep looking for work through me because they know they get paid. If you know the construction industry, there are many young blokes out there who have done a week's work and have never been paid for it. It happens all the time. We chase the clients and we make sure that they pay us, because otherwise we go broke. Our contractors get paid. It keeps us in business. If we do not have good contractors to send to our clients, we are out of business.

I think there are problems. I do not think regulation is the answer, though. I think there are regulations in place but they are not enforced. I go back to the confusion over what is a contractor. If you go to any of the industry associations, it comes up over and over again: what is a contractor? It is not because people are trying to necessarily rip the system off. I think a lot of people are very naive and get conflicting information. We get it all the time. Different associations we seek information from, different stories all the time about what we should be doing, what we should be paying. Should we be paying super? Should we not be paying super? Should we be covering workers compensation? Should we not be covering workers compensation?

Mr BRENDAN O'CONNOR—Is it because it is confusing, because it is not clear or what?

Mr Wieske—I think it is because the agencies who are responsible for superannuation, taxation and workers compensation are not enforcing the legislation. They do when something goes wrong, but it is too late then. They prosecute and they have big fines. The fines are going up all the time. But that is not the problem. The problem is it should not happen in the first place. We were audited by the insurance company because they did not like that we moved from one insurance company to another. We were not audited by a government body. We invite that; we do not have a problem with that.

We were audited by the State Revenue Department in regard to payroll tax. We have a strong objection to paying payroll tax and we are seeking further legal advice on that, but we were stung big time for that. Work that out. All our workers are contractors and we have to pay payroll tax.

CHAIR—Are you aware of the ODCO style arrangements? Have you been accused of having ODCO style arrangements?

Mr Wieske—I have no problem with that. If that is what they want to call us, that is fine. Now we call it a Tricord arrangement. They can call it whatever they like.

Mr BRENDAN O'CONNOR—What was the appellate court that determined in the end that—

Mr Wieske—Industrial Appeal Court.

Mr BRENDAN O'CONNOR—So it was a three-member court?

Mr Wieske—It went through WA industrial relations, then it went to the full bench and then it went to the full bench of the Industrial Appeal Court, which is the Supreme Court.

Mr BRENDAN O'CONNOR—The Supreme Court?

Mr Wieske—Yes.

Mr BRENDAN O'CONNOR—You read out two judgments. Do you have any idea why the dissenting judge ruled against you?

Mr Wieske—I mentioned that he basically went along the lines of the full bench of the—

Mr RANDALL—Who was the dissenting judge? You read out his reasons before, so it is in evidence.

Mr BRENDAN O'CONNOR—My mistake. I must have been reading your submission while you were doing that. I know you made reference to two justices. I did not hear the second one. Can I ask you why you think it is required that we have a three-party arrangement where a builder, say, seeks to employ a carpenter or a plumber? They are set up as independent contractors. They have their own business. Why is it necessary that there be an arrangement through another party? What is the real benefit for a builder? Why would the builder not just contract with that independent contractor? Why the three-way tango?

Mr Wieske—It is really quite simple. There are many builders out there that require labour but they do not all require the same amount of labour at the same time at the same level.

Mr BRENDAN O'CONNOR—Yes.

Mr Wieske—Building is going up and down all the time.

Mr BRENDAN O'CONNOR—Sure.

Mr Wieske—The labour out there, other than members that leave the work force and members that come into the work force, stays pretty much the same. They are always looking for

work. So there needs to be a movement of labour amongst work sites, building sites, and that means between builders. The administrative hassles and the nightmare of managing all that is just not worth it to the builders. It is much more economical to them to have a separate pool of workers that they can draw from.

For the contractors, obviously we can ask, why be a contractor? But just assuming they are, there is a great advantage in being involved with an agency like ours who can refer them to that work.

Mr BRENDAN O'CONNOR—As a referrer, I can understand it, but if they are a business, effectively—if the 'trady' is set up as a business—is that not just an added cost? They do not have to have set hours but with the fluctuations in the industry I guess the tradies would know the vagaries of the industry, if you like. Why could they not be on the books of the principal contractor or, say, the builder, not having to go through a third party, given that really you would be adding to the costs overall because you would have to get your profit to survive as a business? If they are really not employees and they really are set up to cope with all of the vagaries of clearly what is the building industry, why could they not just do that directly?

Mr Wieske—You are assuming they are set up to deal with all the vagaries, what the vagaries are. That is a big assumption. First of all, acquiring contractors through a company like ours does not cost a builder any more. In actual fact, there are cost savings there because we take care of all the legislative requirements which he has to pay anyway, and the administrative costs that he pays to us, which is our profit margin, it would cost him in administration anyway. In fact, it might even cost him more because he has to spend a lot of time offloading and onloading contractors, whereas what we do is move them from site to site, between work sites and between clients. There is no extra cost to it.

Mr BRENDAN O'CONNOR—Do you have any employees in the company? Are you an employee?

Mr Wieske—We have staff members in the office, yes.

Mr BRENDAN O'CONNOR—Are you an employee or are you paid as an employee?

Mr Wieske—Am I paid?

Mr BRENDAN O'CONNOR—Yes.

Mr Wieske—No, I am a director.

Mr BRENDAN O'CONNOR—Only the administrative staff are employees. Is that right?

Mr Wieske—That is right. The administrative staff and reps.

Mr BRENDAN O'CONNOR—Thank you.

Mr Wieske—Just getting back to the vagaries, anyone who has been in the construction industry knows there are a lot of fluctuations in work, a lot of hassle chasing work. We are in the

industry and we hear it all the time. Young blokes get really keen and do their apprenticeship and they are pretty good tradesmen and they start their own business and go for a year or two and then just give it away. They might even go for 15 years. We have had many guys who have come to us after 15 years and said, 'Mate, it's not worth it, chasing up all the work.' It does fluctuate and there are a lot of hassles in chasing the work. They love working for themselves, they love the freedom it gives them and the choices it gives them. But the administration, the legislative requirements, are just a nightmare. What they do is say, 'Look, you take care of it for me. I'm available for work. Find me some work.' We say, 'We'll do the best we can.' We do not guarantee them work; we cannot guarantee them work. But many guys come to us and say, 'It's great. Love it. I can go when I please, I can come when I please, and yet I don't have to worry about looking for work myself if I don't want to.'

Mr BRENDAN O'CONNOR—Again, given the fluctuations, why could they not just be defined as casual employees?

Mr Wieske—Why would they want to be?

Mr BRENDAN O'CONNOR—Why would they want to be?

Mr Wieske—Yes. I cannot tell you a reason why they would want to be. It does not give them the flexibility they want. When they are contractors they can move about and come and go when they want.

Mr BRENDAN O'CONNOR—And you can as a casual employee. Clearly, in other words, you would call them if there is a demand, and if there was not then you would give them notice that there is no work for that week, but there is with another worker. They could be an employee of four employers, surely.

Mr Wieske—It still does not give them the flexibility—as an employee—that they would have as a contractor.

Mr BRENDAN O'CONNOR—Specifically, why not?

Mr Wieske—Because as a contractor they are running their own business. They determine what—

Mr BRENDAN O'CONNOR—But you just said they allow you to undertake a lot of the—

Mr Wieske—A lot of the administrative requirements we do for them.

Mr BRENDAN O'CONNOR—What do they do then—the actual practicalities—that makes them a small business, compared with an employee?

Mr Wieske—They have their own tools of trade. They look after that side of things. They have their own safety equipment. They determine what sites they work on, what sites they do not want to work on and who they want to work for.

Mr BRENDAN O'CONNOR—But don't you determine that by ringing them and asking?

Mr Wieske—Absolutely not. When we have work come in, we ring them and offer them work on a site, with a client, with a rate.

Mr BRENDAN O'CONNOR—As you could a casual employee.

Mr Wieske—Right.

Mr BRENDAN O'CONNOR—I am not trying to verbal you. I am just trying to see if there is a practical difference. If I were a casual carpenter, why couldn't it be that you ring me up, tell me there is work and, because I am a casual, I can choose to work it or not and you could choose to have me or not? I am not really doing much else in terms of the business arrangements, because I have really given it over to you to help me with the practicalities, whether it is helping me to get the insurance paid, through you, or—I do not know what.

Mr Wieske—We are not doing it yet. We do a certain amount of the administrative work for them. For example, we would make sure that their super is paid and we make sure that their WorkCover is paid, but they do their own tax.

Mr BRENDAN O'CONNOR—The concern is that there would be an attempt—in an industry that fluctuates a lot—to secure those casuals as permanent and that might be a deterrent to builders. That is the thing I am looking at.

Mr HENRY—That is the situation, I think. Where casual employees are carried by people over a period of time I think there are limitations under the awards and that sort of thing. Whilst they may not be directly paid under an award, the award is the underpinning legislation.

Mr BRENDAN O'CONNOR—I am not sure what the answer is.

Mr Wieske—I do not go into the awards. I am not really interested in that. That may be so, and it sounds quite reasonable. We find that when guys are contracting and running their own business and making their own choices, they are a much more effective work force, and we find that is what is working.

Mr BRENDAN O'CONNOR—You talk about the rate of pay. I understand you want to keep workers, but is it driven largely by the market? If there is a skill scarcity and they know the market rate is X, they know they do not have to just suffer.

Mr Wieske—Absolutely. We are in business and the market does determine where the rates are going, as opposed to somebody asking for a 30 per cent pay rise.

Mr HENRY—We have heard from a number of different people giving evidence before us about people being forced into independent contracting status. What is your experience of that in the construction sector where you work?

Mr Wieske—We do not force anyone into independent contracting at all. We make it very clear to them right from the outset. We advertise for work if we are looking for workers. We make it very clear to them how we operate, who we are—that we are not the builder, we are not the principal contractor, we are a contracting agency—and what our services are to them and

what are services are to our client. They understand why we are there and they make sure they are interested in what we have to offer them. Generally speaking, we find there is a very positive response to that. We are in the construction industry, and in that industry we find most workers are very positive about it, and when they come in we give them a bit more detail about how it all works. We give them the choice and we certainly make it very clear to them that they are under no obligation to take work. In fact, we often remind them, 'If you don't take this work, it doesn't mean we won't offer you work in the future. Here is what we've got to offer you. Is it suitable?'

Mr HENRY—We have heard from the CFMEU that a number of their membership are independent contractors. Would that be perhaps the prevailing method of employment or engagement in the industry?

Mr Wieske—The CFMEU and their members being contractors: let me just give you an example about them. I said in my submission that they do not care whether they are employees or independent contractors. When it suits them they will bark about it, but they really do not care. I know of a construction site where all of them had to be CFMEU members. They were all contractors to the bricklayer. I am talking about a large bricklaying team. They had to be members of the union to be on that site and they were all on ABNs. I cannot remember whether they were being paid super and workers comp et cetera, and the union did not care, because it did not suit their political agenda at the time and it was not in the CBD. They did not give a rat's about it. They really did not care. I am not convinced that the CFMEU really care whether they are independent contractors or employees; all they care about is who is controlling the site. That is what it comes down to.

Mr HENRY—Are your guys in the union?

Mr Wieske—Absolutely. In fact, I just placed two carpenters and they are both CFMEU members. They are obviously CFMEU members because they have got it stickered all over their helmets. I do not have a problem with that. That is their business. They are good carpenters—really good. We were having a talk to them on the site to see how it was going. We were talking about rates and I said, 'You know, the reason why you're working here is because this builder doesn't have an EBA. The reason why the builder where you were working is broke is because he had an EBA and they are not workable.' It is not viable. One of them had come from another site in the city and the employer had gone broke. He was more than happy to be a contractor because he was used to being a contractor—as a member or not made no difference. Where he was working, contracting all the time, he was very happy to be there. Obviously rates were an issue because the rates were not the same as the EBA.

Mr HENRY—You mentioned in your presentation about a number of people having been self-employed previously and they were relatively naive about what their obligations might have been, even as employers. Do you want to expand on the complexity of the impacts on people who might be considering being an employer, or going into business?

Mr Wieske—Yes. You get young blokes and, I guess, old blokes—I say 'blokes' because the construction industry is mostly blokes at the moment; it is changing and that is fine—who start off and then realise the complexity of the legislation. There are countless employers out there, young principals of small businesses, which might have two tradesmen and an apprentice or labourer and who do not have workers compensation. They will argue until they are blue in the

face that they do not need it. They do not cover their guys for superannuation. There are countless businesses out there who do not have public liability insurance. They have been contracting as a one-off contractor or in a team running a business, as an employer for years—20 years—and do not have public liability insurance and have no idea that they are required to have it. It is just amazing. It confounds me.

There is very little education on what they are required to have. What is there is very confusing, with very conflicting information, and it is all by bush lawyers and such. Yes, there is a lot of confusion out there and there is obviously a high degree of interest in contracting. People love being free agents. Let us be honest: contracting has been around a lot longer than an employee system, and it works.

Mr RANDALL—One of the previous witnesses said that why employers seek their workers to be on contract rather than to be employed as employees is because it is an agenda to drive wages and conditions down. How do you respond to that?

Mr Wieske—I refute that. I find amongst my clients that that is not at all what they are on about. I am being totally honest and transparent about this. I do not think that is the issue. The issue that is talked about amongst my clients, both builders and principal contractors, is that even contemplating having employees is unaffordable because of the fact that they are unreasonably, in the industry, driving wages and conditions up. That is very unaffordable and that is why my clients will not sign EBAs. The proof is in the pudding. There are some large construction companies who can afford that sort of system. but have a look at their books and see what they are doing. They are breaking even or they are losing on big jobs. You cannot run a business that way. They find that by having contractors, they are not having to underpay them; far from it. If they did, they would not have them. They would not turn up. Guys would not go to work. You tell them a rate and they say, 'I wouldn't get out of bed for that.' People are not silly.

These guys are intelligent tradesmen and they know what they are worth. They know what the industry is paying. It is not just money, either. It is also the conditions, what it is like working on the site. They want to go home at the end of the day and know they have done a good job, not know that they have sat around all day waiting for someone to allow them to start work. We find a lot of guys talking about that more than money. I find that pushing rates is not the agenda at all. My clients are more than happy to pay a fair rate. I often have clients say to me, 'Yeah, that's maybe what other clients pay but I want to pay them this; I want to pay more because I think they're worth it. These guys are good.'

Mr BURKE—First of all, was the case that you referred to an appeal decision? Is that the final stage of appeals in that case?

Mr Wieske—Our court case?

Mr BURKE—Yes.

Mr Wieske—Yes, it is finalised, as I understand it. I have not heard directly but I have seen that the CFMEU has not gone to the High Court. I think they know they will lose.

Mr BURKE—I am interested in the competition between yourself and other labour hire companies. I am interested in where you sit on this. We have heard from different labour hire companies in terms of whether or not there is a concern that it is more difficult in your industry because the award is so much below what the actual market rates are. Are there concerns about the extent to which undercutting goes on and whether or not you start to get a drop in quality with the undercutting of rates from labour hire company to labour hire company?

Mr Wieske—The quality of the contractors?

Mr BURKE—Yes.

Mr Wieske—It is really not a concern for us. I have never once, in the five years we have been operating, tried to undercut one of our opposition. I promoted our business on our service, our fair price to our clients and our fair dealings with our contractors. We have not had to do that; it has not been an experience for us.

Mr BURKE—Have you got any clients who use you exclusively as a labour hire provider?

Mr Wieske—Absolutely. Most businesses will use one labour hire company exclusively because that is all they have ever known. We have slowly and tediously proved to them that there are better companies out there.

Mr BURKE—Do you have an issue with some businesses wanting to reach a contractual relationship with one labour hire company and saying, 'Okay, for the next two years you're the only one we'll use'? Do you see that as a reasonable thing for a business to agree with a labour hire company?

Mr Wieske—Can you give me some context there just as an example? I have not come across that.

Mr BURKE—I have only seen it in other industries, so it may not apply in construction. The principle is where a labour hire company says to the business, 'Okay, we will be the only company you'll seek labour hire from for the next two years.'

Mr Wieske—And give them a special deal for that.

Mr BURKE—Yes.

Mr Wieske—I have not seen it in our industry. I find it hard to believe that a potential client of mine would do that because, as one of my clients reminds me from time to time, I am only as good as the last person I send him.

Mr BURKE—Do you see, in principle, a problem with those agreements if the construction firm and the labour hire company are quite happy with it?

Mr Wieske—I have not really given it fair consideration. I do not think I am in a position to really comment on it. It is not an issue for me. I would not look at entering into an agreement like that myself.

Mr BURKE—Fair call. If you were in a situation where the skills availability was different, so you are actually talking about different market circumstances—and I concede readily none of your workers are about to say this to you—and one of them said to you, 'I'd like to be an employee,' what is your response?

Mr Wieske—Of who?

Mr BURKE—An employee of yours, to work on a casual basis so that you are taking over the tax part of the deal as well instead of just paying the super and the workers comp. You have told us already that you do not expect that is going to happen, so I accept your evidence on that, but if one of those workers said that to you, what would be your company's response?

Mr Wieske—Firstly, in the market at the moment there is so much work out there that they do not have to work for us; they can work for somebody else if they want to. In a market where there was an oversupply of labour they might be at a bit more of a risk by saying something like that. We would just explain to them that we are a contracting agency and that, if they want to seek employment with an agency, they need to see a different style of agency or approach our client directly. It is up to them. We do not cater for that situation, so it is quite simple.

CHAIR—Peter, we are running out of time, but on occupational health and safety can you explain to me what happens in your situation. If one of the people that you place on a site is injured, what are your obligations and what do you actually do, either willingly or by law?

Mr Wieske—It depends who interprets the law. It is a very difficult area. We hear all the time that companies like ours and other businesses do not even pay workers compensation. We do, and what do we do if something happens to one of our workers? I had a case yesterday or the day before where one of our painters, contracting through us to a client, got something in his eye. He went away, went to a pharmacy or something, and got it washed out. He mentioned it to my client, who said, 'Look, go to the doctor and just see if it's right. Just make sure it's okay. Do whatever you feel you need to do.' He went to a pharmacy, and that is fine.

My client rang me to let me know what was going on. We encourage them to let us know what is going on. If I am by legislation required to pay workers compensation, I am going to manage it very carefully because I want to keep my premiums down or else I am out of business. We do that, we manage it very closely, and we basically keep in contact with the contractor.

In this case he was dealt with pretty harshly by the medical facility he went to. He took a day off work and he really needed to be covered for that. We said, 'You need a first medical.' He went back there but they would not give it to him unless we signed that, if it was not workers comp, we would pay for it. We said, 'By law we can't even do that because we can't admit fault.' We sent him to another medical centre where we knew he would get a first medical and we would just take it from there. The guy is back at work today and it is not an issue. Generally, we will work with them to try and get them back to work.

CHAIR—What about rehabilitation? If someone is injured and their full capacity to work has been diminished, do you find them alternative employment where perhaps they only need to use 30 to 40 per cent of their capacity?

Mr Wieske—We work very closely with our insurance company. They give them rehabilitation training and such. We have a relationship with our clients such that we will try and find them positions where they can remain in a position as a contractor working effectively, earning a living and maybe with reduced capabilities until such time as they are up to full strength again. We have had cases where somebody has injured themselves and could not do the job that they were contracted to do. They have gone off and been a traffic controller or a manual hoist operator or something like that.

Mr BURKE—I want to ask a question on occupational health and safety. My understanding is that duty of care applies to everybody on site. In terms of working in an unsafe area, there is a responsibility to everybody.

Mr Wieske—Absolutely. If I walk past a construction site, I have a duty of care if I see something that is unsafe. That is just walking past, let alone if I have contractors on that site and I visit the site from time to time to catch up with the contractors and such. I have a duty of care and I have exercised that duty of care. I have seen dangerous work practices and have brought them to the attention of my client. As I said in my submission, I cannot pull a contractor off a site but I can refuse to have him on that site engaged through my company. I can say, 'Look, it's your choice whether you stay here or not.' I can say to the client, 'I am not willing to provide contractors to you on this basis because you have unsafe work practices,' and I can by rights withdraw my services.

Mr BURKE—You would have a potential liability if you did not exercise a duty of care.

Mr Wieske—Absolutely.

CHAIR—Do you have contractors on sites which are covered by enterprise agreements and are you party to any of those enterprise agreements as an agency?

Mr Wieske—Do I look silly? No, I am not party to any enterprise bargaining agreement. I would be broke if I was. Generally speaking, we do not have contractors on those sorts of sites. It would have to be clandestine if we did.

CHAIR—Thank you very much for your evidence. It was a very useful discussion. If there is anything else you want to share with us, just send it in. We will take a short break while we wait for the next witnesses and the deputy chair.

Proceedings suspended from 11.41 am to 11.45 am

BARKER, Mr Alan, Union Member, UnionsWA

FREEMAN, Ms Janine, Assistant Secretary, UnionsWA

WEBSTER, Mr John, Union Member, UnionsWA

CHAIR—I welcome representatives of UnionsWA. Although the committee does not require you to give evidence under oath, I advise you that these hearings are formal proceedings of the parliament and consequently they warrant the same respect as proceedings of the House itself. It is also customary to remind witnesses that giving false and misleading evidence is a serious matter and may be regarded as a contempt of parliament. The committee prefers to hear evidence in public but, if you have issues to raise and you would like to do so in private, then we will consider your request at the time. Would you like to make an opening statement or any remarks to your submission? Each one of you is most welcome to make an opening statement before we get into questions and answers.

Ms Freeman—Thank you very much. Yes, I will make an opening statement and then also lead into a statement that sets the scene for why I have asked Mr Barker and Mr Webster to come before you today. It is always the case that unions stand up and say, 'This is what happens to workers,' and it is good to actually have workers so that you can talk to them about what happens.

UnionsWA is the peak body for unions in Western Australia and represents 48 affiliated unions and approximately 150,000 union members in Western Australia. I understand there have been a number of submissions made to the inquiry by union bodies. Some of them I have with me today. UnionsWA specifically supports and endorses the ACTU submission to the inquiry and generally supports the positions expressed by other union bodies. Our submission today should be read in conjunction with the material already submitted from the ACTU and our counterparts in other states.

UnionsWA does acknowledge the legitimate existence of labour hire and independent contracting arrangements. However, we do submit that the workers' rights and conditions need to be protected and that these forms of work arrangements should not be used to remove minimum standards by stealth. UnionsWA is extremely concerned about the way in which labour hire and independent contracting arrangements are used sometimes to undermine conditions of employment and basic protection for workers.

I have to admit that I came this morning to watch the LHMU. I have only been at UnionsWA for 2½ months. My prior experience is from the LHMU, where I was an official for 12 years and previously I had worked in the hospitality industry and was a member of the union before that, so I have some knowledge of what Mr Davies was talking about this morning.

UnionsWA is extremely concerned about the ways in which labour hire and independent contracting arrangements are used to undermine conditions of employment and basic protection for workers, and our position is that labour hire has extended far beyond its primary purpose of providing short-term or temporary labour for workers with particular skills and expertise. Many employees are being disadvantaged by the inappropriate use of labour hire arrangements.

Furthermore, labour hire has been a contributor to increasing casualisation in Australia. Workers who should, in fact, be in permanent positions are being casualised by labour hire. That is our position. Mr Alan Barker is one of these workers. He sits next to me today. His case was outlined in the AMWU submission to you at page 26. I will add to that shortly. The primary concern we have with independent contracting is how the arrangement is abused by many employers taking advantage of workers who should be employees. There is often no genuine choice for workers as to whether they are independent contractors or employees. For many jobs, particularly in the building and construction industry and the music industry, the furnishing of an ABN number is a condition of employment. UnionsWA's concern is that independent contracting arrangements are often used to avoid award and statutory obligations and many contractors are not genuinely independent and should, in our submission, be treated as employees.

As I said, you have heard from the LHMU this morning on how independent contracting arrangements are used for workers who, by any other definitional test, should be directly employed. In one instance I am aware of and had some dealings with, a number of restaurants in the state's south-west were getting young workers to work for them as independent contract waiters. They were directed what to wear, provided with the equipment, told when to work, what to do and when to be at work. It was all to avoid basic conditions of employment and to undercut wages. They were only offered employment as contractors.

I understand your question this morning, Mr Henry, was with respect to the itinerant nature of workers. In those cases, the workers and the contracts there were specifically to go underneath the award because there was no longer workplace agreement legislation in Western Australia and they did not want to have to come up to the standard of the no disadvantage test that would have been applied to them had they gone onto Australian workplace agreements. It was particularly for that reason.

In terms of the itinerant nature of the industry, it would be worthwhile to have some discussions with the Western Australian AHA. The union movement, the LHMU and the AHA, have been working for a long time to try and formulate strategies to make it much more of a career in the hospitality industry, because one of the difficulties for many employers in the industry is training staff and keeping good, qualified staff. Many young people go in and do their certificate III qualifications—and some certificate IV—and then use it as a stepping stone for other things. That means there are a lot of good, experienced people lost to the industry.

UnionsWA believe minimum entitlements underpinning contracting arrangements are necessary to ensure workers are not forced into disadvantageous arrangements. Such entitlements should be directly related to relevant awards. There is also, in our submission, consequences for training and the availability of skilled labour due to the growth in labour hire. The Australian National Training Authority impact of the growth of labour hire companies and the apprenticeship system research has shown that labour hire firms primarily rely upon the pool of skilled people in the labour market and are not large providers of formalised training of the type involved in traditional apprenticeships. Certainly when we had a meeting with our affiliated members one of the key issues for affiliated members about labour hire and contracting was difficulties with training and the fact that they relied on skills that were already built up from directly employed workers.

A further issue when considering labour hire and independent contracting is occupational safety and health. Neither of these two arrangements should be allowed to be used to avoid occupational health and safety and workers compensation obligations. In Western Australia there was legislation that recently changed—at the beginning of this year—to ensure that contractors and labour hire and the principal were responsible for the duty of care on site. Previous to that, that was not the case. Mr Webster, in his evidence, will talk about what it is like in the workplace in terms of raising safety concerns.

In terms of workers compensation there is an extended definition of 'worker' in the act, but that usually goes to dependent contractors and some labour hire companies. It is questionable. There was a change to that legislation introduced at the end of last year. That brought in a section of the act for what were called 'working directors' to try and ensure that people who were in arrangements—which were basically employee-employer arrangements—

CHAIR—Sorry. What is a dependent contractor?

Ms Freeman—When you look at the extended definition of 'worker' it says 'contractor' but that contractor has to be very specifically defined in terms of what they do, so the independence to go to other contracts is not there. It is a bit broader. It is a broader area. I cannot remember the definition entirely, but that is what we call it, a dependent contractor.

CHAIR—Keep going.

Ms Freeman—Sorry, I am not very clear on that. It really is a set of tests and primarily those tests are still based on the fact that they are contractors as per someone who does the couriering around town, the driver-couriers, but they work particularly for the same company; they are tagged to the same company; they are supervised by that company and therefore they would come within that extended definition, we would say. It is obviously open to a lot of argument about whether they cross that line of being a dependent contractor and an independent contractor, but that is how it is known in workers comp.

CHAIR—We will get on to that later on.

Ms Freeman—It is just the jargon around town really. At this time, I will take the opportunity to outline Mr Webster's and Mr Barker's experience in their areas. I am not speaking for them but I think it is easier to just give an outline so that they can answer questions on the basis of that.

In November 1993, Alan Barker was employed as a mechanical fitter by a labour hire agency, Steelweld Personnel—and that was in the submission from the AMWU, so I am not outlining anything that was not already on the public record—and placed at Buttercup Bakeries for a specific job for a period of two to four weeks. After that, Mr Barker was retained at Buttercup Bakeries for 11 years but remained in the employ of the labour hire company as a casual employee.

Mr Barker was in every other way a permanent Buttercup employee. He worked regular hours—in excess of 40 per week—and regular shifts. He worked with and trained Buttercup employees and undertook in-house training at Buttercup: boiler attendant qualifications,

restricted space access and he gained a forklift ticket. He was issued with company clothing, had a company locker and was supervised by the Buttercup foremen. At the time of his employment, Mr Barker was 53 years of age. After approximately one year at Buttercup, a position as a fitter became vacant. Mr Barker verbally applied for the position, as was the practice, but it was given to a younger man. As you can understand, Mr Barker was a bit concerned about this, but he was also concerned about his age and his ongoing employment.

Mr Barker was assured by Buttercup that future directly employed positions would be available. Given Mr Barker's age and the status of his employment with a labour hire firm, he was not secure enough in the position to question—although he felt that there had been some issue over his age—whether the appointment of a younger man was discriminatory on the basis of age. When four subsequent positions became available, Mr Barker applied, the last two times in writing, but both times he was not appointed, even though he was the longest serving fitter on the site and his performance had never been questioned. Indeed, Mr Barker maintained that he had been relied upon and used at inconvenient times because he could not decline work, given the precarious nature of his ongoing employment.

It is to be noted that Mr Barker, throughout the 11 years of his employment, never received any paid leave, because his employment contract was as a casual, even though the hours worked and the expectation on his ongoing employment clearly indicate that he should have been a permanent employee. Subsequent to Mr Barker taking a week's absence due to the death of his father, he had his hours reduced without notice.

The precarious nature of his employment was further demonstrated when Mr Barker decided to take action regarding this reduction in hours and questioned whether he had some accrual of long service leave with his employer Steelweld, wherein his hours were reduced further. His financial commitments, coupled with a clear indication from the company that he would not regain adequate work, required him to leave the services of Steelweld. There was some action taken by his union to assist him, but it was difficult. They were able to gain some payment for long service leave. UnionsWA maintains that this is an apt example of how workers are disadvantaged by labour hire arrangements, in particular in removing workers' rights to equal conditions of employment as their coworkers.

Mr Webster works as a trades assistant and has been employed by various labour hire companies since 1994. During this time, Mr Webster has not been able to gain direct employment, with the exception of two positions, the most recent on a construction site, which finished after eight months work in May 2004. Since this time, Mr Webster has taken some leave from the work force and has recently been gaining work through labour hire firms again.

Mr Webster's experience with labour hire employment is that it is insecure work, which makes financial commitments very difficult. Indeed, Mr Webster was only able to qualify for a bank loan to purchase a vehicle during his permanent employment on the construction site. Prior to this, such financing was not available to him, given the casual nature and uncertain income of his employment by labour hire firms.

Mr Webster recalls that in working for one labour hire firm, when they employed him they quoted one figure for payment and then subsequently reduced the amount at the time of employment and reduced it again about a month into the contract. Mr Webster said to me that in

the majority of placements he has been paid less than the directly employed workers, who are paid under agreements or awards.

Mr Webster has constantly experienced the uncertain nature of the employment. Recently he was sent to a position at a metal fabrication shop but after working a few days the company informed him that they did not have any more shifts for him to undertake. He was simply told, without any notice, that there was no more work available. Mr Webster has also experienced how companies manipulate the hiring of labour hire workers so that they do not have to permanently employ them. He recalls working in companies where there was an agreement to employ labour hire workers after periods of three months working on the site. To avoid this, the companies would end the labour hire worker's contract prior to the three months for a week or so and then re-engage them so that they did not have to employ them directly.

Mr Webster's main concern regarding labour hire firms, however, is the incapacity to raise safety matters with the labour hire company or the sponsor company; in particular, his experience seven or eight years ago when he was working at a solar heating manufacturer. He raised with the labour hire firm that the electric cords had not been tagged as per safety requirements. It was not a large safety issue and, one would think, was something that would be quite easy to rectify. The safety officer at the labour hire firm stated that he would follow up the issue, and Mr Webster was then informed that his services were no longer required at the company. Mr Webster is aware, from a further placement at the company years later, that the safety issue was never addressed.

Given this punitive result and the general attitude of labour hire companies towards safety issues, Mr Webster no longer raises concerns regarding safety, preferring to let the placement end when he identifies major hazards. In the time Mr Webster has been employed by labour hire firms, he has never had any skills or safety training, other than when induction training has been required by the sponsor employer and for which there has been no payment. The experiences of Mr Webster demonstrate the uncertain casual nature of employment by labour hire firms and how it undermines occupational safety and health requirements and skills training for workers. On the basis of the ACTU submissions, those areas require looking into with regard to licensing provisions to ensure that labour hire firms are operating in an appropriate manner.

CHAIR—Thank you. Mr Barker, do you want to make any additional comments?

Mr Barker—Not at the moment, no.

CHAIR—Mr Webster?

Mr Webster—No.

CHAIR—I will start with your particular situations and perhaps you can individually answer. I am not sure whether you were here to listen to the previous witness.

Mr Barker—I heard part of it.

CHAIR—What were the circumstances with your placement? Were you required to provide your own insurance?

Ms Freeman—No, these are labour hire people. The person you had before was an independent contractor.

CHAIR—No, he was labour hire.

Mr BRENDAN O'CONNOR—Yes, but he was engaged under a contract. Mr Barker was an employee of a labour hire company.

Ms Freeman—Yes, both of these people were employees of labour hire companies. I gather what the other gentleman does is the ODCO type of arrangement.

Mr RANDALL—On that point, Mr Barker, can I give you an example of a similar occasion in my electorate where a gentleman of a similar age to you has continually had short-term contracts with Alcoa in Pinjarra. He also feels that he may have been discriminated against because of his age, and I wrote to Alcoa about that. However, he could involve himself in a fly-in/fly-out arrangement and be employed for a much longer term in the Pilbara goldfields. His circumstances are almost a template of yours. The only difference is that there is no labour hire company involved, his arrangements being directly with Alcoa.

You are making the point, Ms Freeman, that the problem in this arrangement is the labour hire company, but it does not always follow that because a labour hire company is involved this sort of dysfunctional arrangement occurs. It can occur directly, so it is a very long bow you draw to say that the problems are the labour hire companies.

Ms Freeman—I suppose the only difference is that, if it is an ongoing continual rotational contract with a direct employer, you have the capacity then to take that to the Industrial Relations Commission or, in the first instance, you have the capacity to follow your dispute resolution procedures in your enterprise bargaining agreement. Then you have the capacity, especially at Alcoa, to pursue that and say that these persons are clearly permanent employees because their contracts have not finished by the effluxion of time. To continue that is to construct something that is a proper employment relationship. The difference with a labour hire employee that is working at a host employer for a period of 11 years is that he was directly and long term employed as a casual worker. Was the gentleman you were talking about casual?

Mr RANDALL—Contract.

Ms Freeman—Yes, but he is not being paid the 20 per cent loading. He is getting his sick leave and annual leave for those contract periods of time. In this case what was happening with Mr Barker was that he was a casual worker. He was paid a 20 per cent loading, never allowed any leave.

Mr RANDALL—What is the difference now? You are saying casual rather than contract? Is that right?

Ms Freeman—No, he was a casual worker employed by the labour hire firm, placed at Buttercup Bakery. Your worker you are talking about is on specific contracts of employment but at least he is a permanent worker for those periods of time. There is recourse in terms of that employment with the Industrial Relations Commission whereas I am not—

Mr RANDALL—So you are saying there is no recourse to the Industrial Relations Commission for Mr Barker?

Ms Freeman—Your recourse is very limited unless you have the union that is involved at Buttercup put something into their enterprise bargaining agreement that allows for workers that have been on labour hire placement in a workplace for a period of 12 months to become directly employed. That does happen. I think that runs foul now of Electrolux or in so many ways may run foul of what we have to do in terms of enterprise bargaining agreement. It is certainly a consideration, as I understand, of the present federal government to ensure that agreements cannot have those sorts of provisions in them. That might be some of the difference.

I agree, employers will try and not employ people permanently. I do not understand why that is. I would have thought that they have greater control if they permanently employ people in terms of how they supervise, train, performance manage and all those sorts of things. In this case it was 11 years with the same host and 11 years with the same employer but on a casual basis.

Mr RANDALL—I would have thought that if Buttercup had been the company that you obviously thought they were by staying there so long—you enjoyed your work and you were training other people—that they might have also shown some goodwill towards you after even after a few years, knowing what a good worker you were.

Mr Barker—You would think so, wouldn't you?

Mr RANDALL—You would think Buttercup might have been somewhat responsible as well.

Mr Barker—Yes, you would think that. It did not happen.

Ms Freeman—You would have thought Alcoa would be a more responsible citizen as well. Sometimes you just need to give them a little push, then they become more responsive to how they think they should behave.

CHAIR—Mr Barker, are you currently employed?

Mr Barker—No.

CHAIR—So your last employment was with?

Mr Barker—Steelweld at Buttercup.

CHAIR—What about you, Mr Webster? Are you currently employed?

Mr Webster—No, I am waiting on some work now from a job agency.

CHAIR—So you have your name down with a placement agency or a labour hire company?

Mr Webster—Labour hire company.

CHAIR—A different one from the past?

Mr Webster—No, it is the same one that gave me my last job. They are going to line me up with another job. It is a matter of availability.

CHAIR—What kind of work are you looking for?

Mr Webster—I normally work in the metal industry doing something of some description.

CHAIR—Are you a tradesman or a skilled labourer?

Mr Webster—I have worked as a trades assistant. I am a qualified welder.

CHAIR—I would have thought that welders could just about write their own tickets these days.

Mr Webster—Pretty much, but I have not been welding for quite a few years so my skills have gone down a bit and there is no way of picking them up at the moment. Unless I find a company that is willing to train me back up, I would probably struggle to get a welder's job.

Mr BRENDAN O'CONNOR—Mr Webster, it was asserted I think by Ms Freeman's statement with respect to your matter, and I just want to get you to say it perhaps in your own words as much as you can, that the issue went to reporting a health and safety concern. I think it went that you raised a concern at the workplace in relation to tagging of tools. Is that right?

Mr Webster—Yes, on power cords and stuff.

Mr BRENDAN O'CONNOR—Then subsequently, after making a report, that matter was not rectified but you were removed from that job.

Mr Webster—Yes. That was a fair few years ago.

Mr BRENDAN O'CONNOR—Why did you believe that that was the cause of your loss of employment?

Mr Webster—I spoke to them and just for no reason they took me out of the company. There was plenty of work there.

Mr BRENDAN O'CONNOR—You made the report on one day. Was it a long time after that? How quickly after you—

Mr Webster—I did not get any more work after that day, but they do not actually say they are laying you off because you have argued. They will say there is no work. Quite often, with a lot of companies in labour hire, you go to one section in one company and that particular section has no work for you; they will lay you off. Sometimes within five minutes you will get another phone call and the labour hire company will rehire you in another section of the same company and send you to work in another section of the company. That is what happened. I assumed I was going to get more work when they laid me off but I did not. They just move you round, basically.

Mr BRENDAN O'CONNOR—How long has it been since you have been working in this arrangement, this precarious form of employment where you are working for a labour hire company?

Mr Webster—I have been working for a labour hire off and on for the last two or three months but before that I did not work for quite a while. I just went on holidays. Before that I was working full time for eight months on a construction site but before that I was doing a lot of labour hire work.

Mr BRENDAN O'CONNOR—Was there a time in your work history that you had a permanent full-time job?

Mr Webster—Yes, I have had several permanent full-time jobs. I was working at a company probably about four years ago as a guillotine operator. They were paying the award rate but I found working for the award rate was a bit low. I only got about $40 or $50 less on the dole. I found that I could go on the dole and work a day or two a week on the labour hire company and get a bit more than the dole pay, so I opted to do that. But you do not get any holidays and stuff.

Mr BRENDAN O'CONNOR—How long is it since you have received paid annual leave?

Mr Webster—My last permanent job, which finished on 31 May last year, I received holiday pay and redundancy and all that sort of stuff from that job.

Mr BRENDAN O'CONNOR—Given your qualifications, although you say in some of the areas you need some further training because things change, what do you think your prospects are of getting full-time permanent work in the industries in which you have worked historically? Are there jobs out there for permanent full-time workers?

Mr Webster—There are but there seem to be a lot less of them because a lot of the companies are using labour hire. A lot of the companies I have tried to approach to apply for full-time work have referred me to labour hire companies, to go through them. They seem to take people on from labour hire companies and if they are happy with you after three months, six months, 12 months, whatever it is, they may take you on if you are lucky, but it is getting harder and harder to find full-time jobs.

At the moment, because of the labour shortage, I have just applied to social security for unemployment benefits and I have found that in their system, on their computers and stuff, there are a lot of full-time jobs advertised without labour hire. At the moment, I cannot get into the system because I am not on the social security job network. I have asked the job network members to help me before, to try and stay off the social security system. They will not help you. They will not give you job leads and stuff because they do not get paid for it.

Mr RANDALL—I wish you could have said names.

Mr Webster—I am not sure if I should or not.

Mr BRENDAN O'CONNOR—I was going to say at the beginning, I really commend yourself and Mr Barker coming in because, unlike almost any other witness, you are talking

about your life. That is not necessarily an easy thing to do. There was also a mention in evidence given that there was an impact on your loan, or you were having difficulty getting a loan? Was that you?

Mr Webster—Yes. A few years ago while I was on labour hire I needed a loan to do some repairs to my car so I could continue labour hire, just to earn a living, because I was struggling to get a job. When times are leaner and there is less work around, you have no choice but to take labour hire work. The banks would not have a bar of me.

Mr BRENDAN O'CONNOR—Did you actually try to make application for a loan?

Mr Webster—I applied for a loan and they said no.

Mr BRENDAN O'CONNOR—What were the reasons they gave to you?

Mr Webster—They did not give me a reason. They looked at my wages and they see it is unstable, because they are the ones that see the money going into the bank, so they just did not help me.

CHAIR—That was a few years ago, wasn't it?

Mr Webster—Yes.

CHAIR—I understand the situation has changed a little bit. At least there are some banks now that are willing to provide loans to people who are employed through labour hire companies.

Mr Webster—Yes, but you have to be employed with that labour hire company for quite a long period of time before they will give it to you, from what I understand. There seems to be no way of getting, in a lot of places, from labour hire to a full-time job. It just does not happen in a lot of cases. It has happened to me once, but only once. I got a full-time job through a labour hire company but I could not afford to stay there too long. They were paying the award rate, and the award rate and social security benefits are too close to each other.

CHAIR—Mr Barker, your situation is that you were with the organisation for a period of time and, as you mentioned, you would have thought that with the years of service there would have been at least some loyalty in return. Were there any performance issues involved at the time or immediately before your situation deteriorated?

Mr Barker—I am not quite sure exactly what you mean.

CHAIR—Was there an expression of concern about your level of performance?

Mr Barker—By Buttercup?

CHAIR—Yes.

Mr Barker—No.

CHAIR—Perhaps occupational health and safety claims or anything like that that led to their decision?

Mr Barker—No.

CHAIR—As far as you are concerned, it just came out of the blue.

Mr Barker—More or less, yes. Other things happened, like the cartilage in my knee disintegrated but I could still get around the factory.

CHAIR—Did that reduce your capacity to do the job that you were employed to do?

Mr Barker—No, it did not, except that I could not climb under machinery without spending a couple of minutes more to get down on the floor. Apart from that, no.

Mr HENRY—Mr Webster, you said earlier that you were a welding tradesman.

Mr Webster—I am a vehicle body builder. I was trained by the MTT to fix their buses.

Mr HENRY—And did quite a lot of welding for them?

Mr Webster—A little bit. I have also done extra studies. A few years ago I was unemployed and Job Network sent me to a welding course because they could not get me a job in my trade. The government shut the workshops down.

Mr HENRY—I thought you mentioned that if you had had your skills upgraded there might be employment as a welder. XLT Industrial Training run welding courses and some of those might be funded, although I am not sure about that.

Mr Webster—I did a funded one four or five years ago. I became a gas tungsten arc welder, certificate VII. It was government funded through Job Network but at the end of the course there was no work around.

Mr HENRY—But there is now.

Mr Webster—There is now but, because there was no work around at the time I did the course, I have not been able to use what I have learnt. With welding it is hand and eye coordination.

Mr HENRY—I appreciate that. This may be an opportunity to follow that up. Ms Freeman mentioned in her statement on your behalf that you had no capacity, or no option or opportunity, to raise some safety issues with various employment that you have had; also that you have not had any skills or safety training other than the occasional induction program that you might have undertaken. In those induction programs did they include the safety procedures on the sites and did that provide any direction or detail for feedback on safety issues on site?

Mr Webster—Some do and some do not. It is not always there. Even if there are inductions, I am not going to speak to somebody if I have a safety problem. You run out of work fairly

quickly if you bring up safety issues. That is just the way it is and you are out of looking for another job again.

Mr HENRY—Thank you.

CHAIR—There are no questions from Mr Burke or Mr O'Connor. Thank you very much for coming in today. As the deputy chair said, we do value your presence this morning. We do not always get the people who are affected coming before us.

Ms Freeman—It is usually someone like me.

CHAIR—It is usually a representative body. It is always good when we hear directly from those who are affected, so thank you very much for taking the time to be with us and give evidence. The next meeting will be on Thursday, 26 May at Parliament House at 11 am.

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

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

Committee adjourned at 12.20 pm