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

TUESDAY, 26 APRIL 2005

MELBOURNE

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON EMPLOYMENT, WORKPLACE RELATIONS AND WORKFORCE PARTICIPATION

Tuesday, 26 April 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 Brendan O'Connor and Mr Vasta

Terms of reference for the inquiry:

To inquire into and report on:

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

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

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

strategies to ensure independent contract arrangements are legitimate.

WITNESSES

Committee met at 12.58 p.m.

BAILEY, Mr Simon Kenneth, Private capacity

HODGETTS, Mrs Rhonda, Private capacity

ANDERSON, Mr Peter, Director, Workplace Policy, Australian Chamber of Commerce and Industry

BARKLAMB, Mr Scott, Manager, Workplace Relations, Australian Chamber of Commerce and Industry

CHAIR—I declare open this public meeting 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 the request to this committee by the Minister for Employment and Workplace Relations. The committee has received 69 written submissions to date and is continuing a program of public hearings. This is the third day of hearings for the inquiry.

I welcome the witnesses. Although the committee does not require you to give evidence under oath, I should advise you that these hearings are formal proceedings of the parliament. Consequently, they warrant the same respect as proceedings of the House itself. It is customary to remind witnesses that giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The committee prefer to hear evidence in public, but if you have issues that you would like to raise in private then let us know and we will consider your request. Would you like to make a statement in relation to your submission or some introductory remarks before we proceed to questions?

Mr Anderson—The Australian Chamber of Commerce and Industry are pleased to be able to make our submission to the committee and thank the committee for the opportunity to give evidence today in support of our submission. Our submission has been provided to the committee. It is a reasonably detailed submission, so I do not propose in my introductory remarks to go into a great amount of detail. I should indicate that in support of our submission today I have with me Mr Barklamb, who helped prepare the submission in the ACCI secretariat. In particular, though, we also have two industry representatives with us who, following my brief introductory remarks, I will ask to explain the context in which they are here in support of the ACCI submission—Mrs Rhonda Hodgetts and Mr Simon Bailey.

Our submission focuses on the important issues raised by this inquiry. It is an important inquiry for the parliament because of the role and presence of contracting both in our economy and our society, as well as the role and presence of labour hire. These are very significant developments that have occurred in the Australian labour market over the past 15 to 20 years in particular and they are matters which do warrant parliamentary examination.

There is a range of developments occurring with respect to law and policy in this area that the committee, in the course of its inquiry, should look to, and these are referred to in our submission. There are relevant changes in state and territory laws which have been made or which are foreshadowed. There are foreshadowed changes to Commonwealth laws in respect of

contracting. There are ongoing developments in the common law as well—that is, court based decisions—which affect the issues before the committee.

I also draw to the committee's attention the discussion that will be held at the International Labour Organisation in 2006 on contracting. Whilst in one sense that might be seen as a long way distant from here in either time or geography, it is a significant discussion for the ILO—what is called their 'second discussion'—because it is for the purpose of standard setting and there is likely to be an international instrument developed in 2006 which will bear on some of these questions and which would then be open to the Australian government to adopt or not adopt. So, in those ways there are a number of different levels at which contracting is being addressed domestically and internationally.

The submission by ACCI provides a general cross-industry position. In presenting the submission I emphasise that it is a collective submission prepared by Australia's employer organisations. Specific organisations will be putting their own submissions to the committee as needed, particularly those organisations that have a very high incidence of use of contracting in their industry sectors. They will be able to speak about industry-specific circumstances to a greater extent than we can.

Our submission is summarised on pages 5 to 6, so I will not take the committee through that, but the 13 points on those pages are the core issues that we will raise before the committee. In broad terms, we support the status and the legitimisation of contracting in the Australian labour market. We think that a dynamic labour market would have a very good mix of both direct employment labour and contracting for the efficiency of the Australian economy, together with the social benefits that contracting can provide.

We clearly do not support sham arrangements. We did not support sham arrangements in the submissions at an international level that we took to the ILO in 2003. Sham arrangements, where people who are genuinely employees at law but are labelled contractors, are not supported and we make that clear. That distinction needs to be drawn right at the outset. We also do not support some of the legislative initiatives that have been introduced in some state jurisdictions, particularly in relation to deeming employees to be contractors or seeking to have industrial relations laws which were established for the purposes of employment relationships applied to contractors.

As a general proposition, we believe that the general common law relating to contracts should apply to contracting arrangements. There needs to be a body of law which underpins contracting arrangements. The best source for that body of law is the common law, supplemented where necessary by specific legislative provisions. We speak in our submission about the commercial nature of the contracting relationship—and it is in that commercial relationship that the common law should have application—together with the proper role that occupational health and safety law and some other specific laws can have in making sure how contractors operate, with some underpinning obligations that apply more broadly, where that is appropriate.

I might also mention that our submission highlights the diversity of contracting that we now have in the economy. Twenty years ago, the traditional sources of contracting were manufacturing and construction. What we have seen with the growth of the services industry in Australia is a major move towards contracting in the services industry, and that has been

consistent with the change in the nature of the Australian economy and the Australian labour market.

That is a good lead-in to introduce the two industry witnesses I have with me today. They are both from the services industry: Rhonda Hodgetts is from the pharmacy side and Simon Bailey is from the restaurant and catering side. Rhonda has come down here from Ballarat today. She is the manager of human resources with the HealthWise Pharmacy Group. The group operates 14 rural and regional pharmacies in Victoria. It employs about 300 people directly but also engages contractors to supplement direct employment. Rhonda's role specifically has her dealing with the businesses concerned as well as the contractors and so she is in a very good position—a unique position, perhaps—to give evidence to this committee today on the position of businesses engaging contractors and the position of the contractors themselves that she is sourcing labour for. I invite Rhonda Hodgetts to say a few words to the committee.

Mrs Hodgetts—Our pharmacies—there are 14 of them; we have 12 in Victoria and two in Tasmania—are predominantly regional, so Geelong is as big a city as we get into. We are talking about cities like Horsham, Ararat and Warrnambool, so they are quite far away from the metropolitan area. Typically, the smaller pharmacies would employ only one pharmacist and five or six team members and the bigger ones would have four or five pharmacists and 30 or more staff, so they are quite diverse in the size of their staff.

Contractors aside, pharmacists are hard to get. They are a scarce resource in Victoria and in Australia. They are on the Department of Immigration and Multicultural and Indigenous Affairs preferred occupation list for migrants. With permanent pharmacists so hard to get, it rolls on and it is very difficult to get temporary staff. We utilise temporary staff when our pharmacists need annual leave, when they are going to training, when they are sick, when they are on maternity leave—a number of different situations. Across the 14 businesses there are about 32 pharmacists who work either part time or full time for us, so if you extrapolate that to all of them needing four weeks leave, training and other things it means that we have a fairly high demand for people to come in and replace them. The nature of a pharmacist's business and the regulations in pharmacy mean that, if the pharmacist is not there, the business is not open, so we have to replace them. The pharmacist is very much somebody who needs to be there; we cannot just absorb the loss of the pharmacist being on leave or away on other activities.

My role requires me to take instructions from the pharmacists who say, 'I'm going on holidays, Rhonda, in June. Can you get me a locum pharmacist for four weeks?' There are essentially three ways that I can try to fill that need for a pharmacist. My first option is to go to a labour hire company. There are probably three or four primary suppliers in the market: two based in Victoria, one in Sydney and one in Queensland. So we will go to them. The second option is to go out to the people that we know of that we have used in the past, so I use emails or SMSs to people to say, 'I need help,' and it is really saying, 'Hey, I've got a spot,' and then people come back to me. The third option is to hire people as short-term casuals—a direct PAYG employee who comes in for a defined period from point A to point B, or a contracted pharmacist who comes in and does the same thing from point A to point B but says up-front, 'I want to be paid as a contractor and I'll invoice you because I have an ABN.'

It is very rare for us in our regional locations to have somebody close by who can come in and fill a locum spot in a town like Ararat, which has two pharmacies. There are not a lot of

pharmacists floating around the general area, so we are sourcing from all over the country. We have had pharmacists come from Queensland, Victoria or Tasmania to work just for three or four weeks. It is quite a national objective to try to fill the spots. When the locums come in, when we are finding somebody who is available to fill a spot, we are to some degree at their call in terms of how they want to be remunerated, whether it is through a placement agency or whether they want to go PAYG or on contract. Those who come to us, whether it is as a PAYG locum or as a subcontractor, really define what they want. They set their rate. They say: 'I'm available for X dollars per hour. I want a certain standard of accommodation.' I had one recently who was going to Warrnambool but would only go if he had a beach view. Some want to fly; some want to drive. They identify what the key things are for them if they are to come and fill our needs. Our normal answer is, 'Yes, we can do that,' because we need to fill the spot.

In relation to the number of locums around in the industry, we can have at any one time in our 14 pharmacies probably five, six or seven locums. We have to try to keep them all happy to keep the support level there. If you ask, 'What is the typical locum?' the nature of the people who do the locum work tends to be in one of two categories. They can be relatively newly qualified pharmacists who might say: 'I want to work and I want some flexibility. I want to travel and I want to go overseas.' They will come and work for three or four months and then they will disappear, and then they will come back and locum around. Then there are people at the other end of the spectrum who might be older pharmacists who may have owned their own pharmacy in the past, gone into some form of semiretirement but still want to keep their professional hand in and still want to pay something back to the industry that has served them for a number of years. So if you asked, 'What is the typical pharmacist locum?' that is it.

If we were not able to have the subcontracted locums and had to stick only to the PAYG or the labour hire company locums, I would expect that we would see a shift in the market. I think we would see a shrinkage in it. It suits the semiretirees, who usually have some other business enterprise, to meld that together with their locum work. I would expect to see that side of the market shrink a bit, as they decide to go and watch the cows in the paddock. For the younger people, they would not have that option to travel and be picky, so they would come and take full-time jobs and maybe stay for one or two years. So I think we would see a shrinkage in the availability. At this point in time, if that shrinkage hit us, we would be in even more difficulties than we are now. We struggle every week—every week there is angst—trying to pull together locums to come in and give some of our pharmacists the breaks they have organised.

Mr Anderson—I would now like to introduce to the committee Mr Simon Bailey. I have a CV for Mr Bailey, which I can hand up to the committee for the purpose of your records. Mr Bailey is the founder and chairman of a business called Chefs on the Run. He is involved in a number of organisations, but this is one of them. He has built it up into a very significant Australian business which is providing contract chefs to the restaurant and catering industry. I have asked Mr Bailey to outline the key issues that he brings before the committee.

Mr Bailey—Basically I am here today to tell a story about who we are, what we have done and why contracting is important. We run a business that is operating in Melbourne, Sydney and Brisbane. We supply the whole of Australia with chefs—Tasmania from Melbourne, New South Wales from Sydney, and right across the Northern Territory and Western Australia, as is required, although there is not as big a requirement in the smaller cities as there is in the larger ones. We introduced contracting to the hospitality industry in 1990, when we established Chefs on the

Run, largely because we wanted to stop the issue that was there with chefs being unstable, behaving like prima donnas or, alternatively, leaving the industry because they were simply unemployable after a period of time as people had just had enough of going through a whole recruitment path and then losing them. So we set up an organisation with fairly firm standards for the chefs. Initially, all we did was contracting chefs. We just had this bunch of guys around the country. They are predominantly men; there are a few women but they are in much smaller numbers in our industry.

What happened when we did that was that we got a whole lot of camaraderie. We got a whole lot of people to stay in the industry who would otherwise have left. This provided them with a structure which meant that nobody was having their expectations destroyed. They knew the situation when they went in, and of course our industry is very much one of peaks and troughs. An average contractor might be working at four, five or maybe even six sites a week. They may do full weeks if they are filling in for someone, but it is very much about people saying: 'We've got big functions this week; we need somebody here,' 'We've got a big Friday and Saturday,' or 'Our chef's just cut his hand; we need somebody in here immediately'—whatever the story is. It very much suits the nature of our industry and its requirements for that sort of peak-and-trough and emergency requirement. And that is the core of our business; we do not do any full-time stuff.

Having built that side of the business, and because our clients required us to do the one-stop shop thing for them, we moved into the area of other hospitality staff. But we have all of those people as employees. We run them. They are on our books. We put them out to those people as casual and temporary employees. There is a very big distinction between the two categories of people. We have a group of chefs who are contractors and we have some chefs who are casual employees, and they are very different types of individuals.

I think it is important to understand that the contracting chefs are really the cream of the industry. They are much more highly talented and most of them are in a position to stay or leave. They stay because they have the flexibility to work around and to earn far better money while they are contracting. We put a whole lot of safety nets in place for them to make sure that they look after themselves in terms of insurance and those sorts of things—none of which are commercial as far as we are concerned; it is basically to look after them. As a result, we have managed to maintain the presence of these key people in the industry.

In terms of the training that goes on, this system makes no difference. If there is training that has to be done—HASAP and HACC and all the rest of the certifications that are there—everyone does that. Contractors do it and deduct it as a business expense. The employees do it and do the same thing, so there is not a really big difference there. The really critical thing, though, in being able to retain these people in the industry is that they go out on site and they teach things that are not taught in our training regimes or anywhere else in the country at the moment. So it actually works very well.

The bottom line for us is that the really good chefs want to contract and they say, 'I'm here.' We have a number of chefs who do half a season in Australia and half a season in the UK, mostly because it is not worth running a restaurant there in the winter and it is delightful over here, as a rule. That also gives us major skills transfer in a way that works. If we were not able to do that and they were having to go into a normal employee environment where, by and large, the

remuneration is just not sufficient to hold them there—and of course they tend to buy into organisational politics and get into all sorts of trouble—they would leave the industry. When we came into the industry the best prognosis for these guys was to have a mid-40s alcoholic burnout. That was where they were at. We are keeping a lot of them in the industry with this sort of flexibility.

The thing that is critical for me to try and communicate is that this is a mutually beneficial structure. It is one that really works for all the people. Around Australia we supply probably around 3,000 clients. We supply to all of the big people, we supply to all the major caterers in Australia and there are also a whole lot of little mum and dad businesses. We do the whole spectrum—hospitals and the whole bit. All those people have a requirement for this sort of person and, although we do a lot of that with casual employees, if we could not do the contracting thing, we would lose those key chefs, they would lose them and the industry would suffer as a result.

Mr Anderson—That is the end of our opening presentation.

CHAIR—Thank you all very much for your submission and also for those opening comments. It was a good submission and fairly comprehensive. I guess the theme that comes out of your submission is that you do not believe any further regulation is required. The current definitions are quite acceptable and, if anything, we should be preventing any further confusion by allowing various state jurisdictions to introduce their own complexities to the situation.

You make a comment on page 19 which is becoming more and more obvious to me, and that is that you say there is a 'sludge of misinformation and disinformation on contracting' out there and that one of the key challenges for the committee is 'sorting fact from fiction'. That is incredibly true. Part of our problem at the moment is going through all the submissions. You still say that you do not consider the current legal situation to be ill-defined, yet a lot of witnesses that have come to us say that they want certainty, but that there are complexities out there and that the thing they are looking for from the committee and from the government is for them to create that level of certainty and remove the ambiguity.

You believe that that the common law test is sufficient as it is. I know that when we hear from the ACTU and a couple of others later on they will say that the common law is insufficient. My concern—and you also allude to this—is the situation of judges and courts making decisions or judgments that cannot be used for subsequent cases. Unless we create certainty, doesn't this make the problem even more difficult for us?

Mr Anderson—Your question is going to the heart of, perhaps, the primary issue—that is, the definition of 'contracting.' I do not want it to be understood that our submission is solely supporting the common law test. Our starting point is the common law test, for reasons I will explain in a minute. That is the most appropriate basis for general law to determine who is an employee and who is a contractor. But there is scope for some specific tests to be applied where particular pieces of legislation may be of such a character that they really do warrant the degree of certainty that comes with being able to effectively identify in advance what your status is and to protect that status. One of those is, I think, the APSI provisions of the Income Tax Assessment Act, and you will get some submissions on that.

CHAIR—Yes—personal services.

Mr Anderson—We are not opposed to a person who is a contractor within the framework of the APSI definition being able to use that status for general employment purposes. We are not saying they should go through a whole range of other hoops and definitions in order to establish their status. The difficulty though is that if you start applying legislative tests for general purposes then you run into the problem that whilst you may, on the one hand, deliver some certainty, you may, on the other hand, exclude people who at common law are genuinely contractors. In other words, the quality of those legislative definitions becomes very crucial.

It is important in all of this to draw the line between the sham arrangements—between the people who are in truth employees and the people who are genuinely contractors; that is, they are effectively operating their own business. To do that you have to apply facts in each person's circumstance to law, and that is the advantage of the common law—it does allow the facts to be applied. Whilst there are a range of common law tests, the most significant of those tests is the issue of control, which really has withstood the test of time, we would say, as the most fundamental underlying principle that the courts still apply to determine who is an employee and who is a contractor. I think that when you come to some specific areas of law, like occupational health and safety, the approach should not be to say that a person who is a contractor is an employee therefore this act applies to them. The approach should be to say, 'These are the duties of employees and this law applies to them; these are the duties of contractors and this law, or these parts of the law, applies to them.' In other words, do not try and change the status of the people, but say whether or not that piece of legislation should have rights and obligations in respect of contractors.

CHAIR—You have mentioned sham arrangements. Can I ask that you read Professor Andrew Stewart's submission to this inquiry and get back to me with your views on it? Professor Stewart does talk about sham arrangements, he does talk about the current common law definition being insufficient and he goes to this issue of control: that control perhaps no longer should be used as one of those defining points between an employee and an independent contractor; in fact, he presents his own definition of what the employment contract should look like.

Mr Anderson—I have not read Professor Stewart's submission to this inquiry, but I have read some of the professor's previous work on this. I will certainly get back to the committee on his submission.

CHAIR—I understand that he made a submission to the Cole royal commission as well.

Mr Anderson—Yes, and I think he has published on this issue in various journals. But the point I draw about your legislative definitions is that you still have to apply the facts to those definitions. There is always going to be a line that is drawn, whether it is drawn by the common law or legislation. There is always going to be some category of people that fall into a grey area where judgments have to be drawn. I do not think we should assume that a legislative definition is going to eliminate doubt.

CHAIR—You mentioned sham arrangements a couple of times. How do you identify sham arrangements from the genuine arrangement?

Mr Anderson—I think you go to legal tests, whatever those legal tests are. We show that they should primarily be those common law tests.

CHAIR—A good lawyer can always draw up a contract that will fall within the definition of a legal test.

Mr Anderson—The most important principle is what the courts apply, and that is that they are prepared to look behind the label. That is correct. That is the way it should be. For someone who is labelled as a contractor or who is asked to sign a document or who signs a document which says, 'I'm an independent contractor,' that is not going to be, nor should it be, conclusive evidence of the nature of their relationship. The key is to look at what happens in truth, in fact. If all of the relevant indices that are developed by the common law exist, such as control, supply of plant or equipment or the exercise of some independent discretions about the way people go about their business, you can get to the heart of what the sham arrangements are.

Mr BRENDAN O'CONNOR—I suppose it is clear from most observers that there has been a significant growth of independent contractors, and contractors generally, in the Australian employment scene for probably 20 years. Would you concede that? Would you concede that functions that were performed specifically by employees are now performed by people describing themselves as contractors?

Mr Anderson—Yes, there certainly has been that growth.

Mr BRENDAN O'CONNOR—You mentioned that one of the problems you have with attempting to clarify definitions to delineate contractors from employees is that it is too regulatory and too rigid. Do you believe that you cannot improve the clarification of the two sets of definitions by way of legislation? Or are you against the regulation because you want parties to be able to call themselves contractors even if there is some argument as to whether they are or not?

Mr Anderson—It is not the latter. I think that if a person is not a contractor then they should not be called a contractor and the law should not recognise them as a contractor. We certainly do not believe that there should be any basis upon which people who are employees are treated as other than employees. As I said in my opening remarks, it is not that there are not circumstances where you could provide some additional certainty by having a legislative definition, but I think that if you have a legislative definition it needs to be a supplement to the common law. It needs to be something which can operate as an alternative to the common law. The common law tests, in one form or another, will need to be incorporated into the legislative definitions. That is the point. Because those common law tests have been determined by the courts for perfectly valid policy reasons—that is, after investigation and inquiry by many different courts and judges over the years—they have identified what those critical criteria are.

Mr BRENDAN O'CONNOR—But it is not for the courts to determine what definitions will be determined by a parliament. Clearly a parliament can either codify common law, as may be the case in this area, or indeed seek to propose laws that are, in some cases, consistent with those common law principles or contrary to those common law principles. That is the power of parliament, surely.

Mr Anderson—It is. Parliament can codify common law. It can do it as a pure codification or it can codify the common law and, in the process, vary the common law. The point is whether it should do so. We would say that the starting point should be a recognition that the common law provides appropriate definitions. If there needs to be supplementation in an area like the APSI definitions, that certainly does provide contractors with certainty in respect of tax status, which is a very fundamental issue. That is the type of supplementation which is appropriately considered by the parliament.

Mr BRENDAN O'CONNOR—You have had something to say about your concerns about the ACCI's view of taxation deeming. What is your view as to the effectiveness of deeming a contractor, or whatever they are describing themselves as, by placing them either into a PAYE or an independent contractor tax system? What is your view on that?

Mr Anderson—The tax act does need to draw that distinction, because it is such a fundamental starting point for your business management to know what your status is for the purpose of tax laws.

Mr BRENDAN O'CONNOR—Do you accept the definition that is outlined in the tax act?

Mr Anderson—For the purposes of tax laws, generally speaking we do. It applies some of the principles that have come through in the common law—the 80-20 per cent rule and things like that. But the issue is that if that is applied as the test for contracting for all purposes, you have to investigate what those consequences will be. There will be people who may genuinely be contractors but for a large period of time they may be sourcing their business from a particular client or the like and not fall within the framework of that definition. We need to make sure, as policymakers, that the law that is put in place which serves one purpose does not have counterproductive impacts in another area of public policy. That is why I would submit to the committee that the best approach is that, if you do want some regulation of contractors through parliamentary action, you look at what parts of the law should apply to contractors rather than try and extend definitions to include them as employees.

Mr BRENDAN O'CONNOR—We have very little time and I know other members also want to ask you questions, but I need to at least raise a few other matters quickly. You make a broadside attack on many academics who have written on the subject. There seem to be assertions made that somehow they based their evidence on prejudice and misinformation. I am not sure specifically to whom you refer, but ironically there is no evidence in your assertions that they make assertions without evidence. Can you remark upon that?

Mr Anderson—Certainly. Our submission is drawn from the experiences of industry. In an area like this it is important for policymakers not only to have an eye to the theory but also to have an eye to what actually happens in the practical world. It is not difficult—perhaps for some it is—to sit down and draft something in which you say, 'This is the way it should be,' as distinct from saying, 'Will this work in practice?' A lot of the academic work that has been done on the definitions of contractors and employees has been done with an eye to the theory of the law as distinct from the actual operation of those definitions in practice. That is our key point.

Mr BRENDAN O'CONNOR—In your submission you also make the point that you believe unions to be self-serving in many of their attitudes towards independent contractors. Wouldn't it be fair to say that, as a peak employer body, you are also self-serving in your own conclusions?

Mr Anderson—I make the point that while our submission indicates that unions have had some negative attitudes towards contractors, and in some cases those negative attitudes continue, it also acknowledges that some unions have adopted more progressive attitudes towards contracting and so it is not all negativity. Our position is about what is good for the operation of Australian industry and the Australian economy. Those are not mutually exclusive propositions though because, as we have heard from the individuals we have here today as well as from the body of our submission, contracting does drive some mutual benefits, not just for business but also for the individuals concerned.

Mr BRENDAN O'CONNOR—You consider that it would be better for unions to be more constructive in this area and, if they so wish and if the so-called contractors wish them to, to provide services to those contractors?

Mr Anderson—It is important that unions adopt an approach where they can recognise not just the reality that there is contracting but also that contracting is providing some important services. I acknowledge that there has been some substitution of direct employment with contract employment and that it presents some challenges to the union movement to accept that.

Mr BRENDAN O'CONNOR—Rather than attack contractors they should represent the interests of contractors?

Mr Anderson—The representing of contractors is a separate matter. The key thing about representation is what the individuals see. I do not think you can represent contractors as employees. If there is to be representation, whoever does it—whether it is unions, lawyers or whoever does contractor representation—it is a matter of recognising that that is a commercial relationship and that as a commercial relationship it does have some fundamentally different structures from direct employment.

Mr BRENDAN O'CONNOR—I have a final matter. It is a big question and you are a big body so you should be asked this question. There has been concern about the growth of contractors, which has been, in some senses, a growth by virtue of convenience. The convenience is that employers no longer have to pay payroll tax to employees to perform functions now performed by independent contractors and the independent contractors no longer have to pay a higher PAYE tax. So they have managed to avoid some levels of taxation, as does the principal who contracts that arrangement. If that is true, it can lead to a diminution in the collection of taxation by the Commonwealth and the states. Do you believe that is a reasonable scenario?

Mr Anderson—I think the hypothesis in that would need to be tested. I am not an expert in the tax system but, as I understand it, corporate tax rates tend to be higher than individual tax rates, and a lot of contractors who are incorporated will be paying an incorporated tax rate. I am not sure that it is correct to say that there is a lower level of taxation revenue as a result of contracting. That is an area that is outside my immediate expertise and one that others would need to respond to.

CHAIR—That was the proposition put to us in Sydney by Doug Cameron from the AMWU.

Mr BURKE—Mr Anderson, you referred to the fact that if unions are to be representing contractors there are appropriate forums. I take it from that that you are referring at least in part to the collective bargaining provisions of the Trade Practices Act?

Mr Anderson—That is a controversial area. There are a range of different views within industry about whether there should be representation by industrial organisations of people who are bound by the provisions of trade practices law as commercial entities. There are obviously unfair contracts jurisdictions where lawyers and, to a certain degree, unions are involved but I think that is taking it to the next step in respect of trade practices. One view is that properly constituted organisations should be able to represent people freely if it is within the rules of those organisations, irrespective of what area they operate in. The alternative view is that industrial organisations are of a different character and are given special privileges to represent employees at law and that should be the context in which their rules operate. There are those two different views out there in industry.

Mr BURKE—Surely, regardless of the rights of the organisation, the rights of the contractor should be sufficient—that they are smart enough to choose who they want to represent them.

Mr Anderson—The basic principles of choice in this area are powerful but at the same time you need to look at the context in which that organisation is to function. The industrial organisations have rules which are specifically made and approved under registered organisations legislation, federal and state. They are established overwhelmingly, if not exclusively, for the representation of employees in industry. It is certainly arguable that if that is the core business of those organisations it is very much an incidental activity if they are to represent commercial entities.

Mr BURKE—Doesn't that go completely contrary to what you were saying about how they should be out there engaging independent contractors?

Mr Anderson—I think the key thing for industrial organisations in this area is to work hard to isolate the areas where there are sham arrangements. I think that is the most fundamental work.

Mr BURKE—It is not a new thing. I appreciate what you are saying: if it is outside the rules of the organisation, it is outside the rules and there is no disagreement anywhere. If it is within the rules of the organisation, I do not see why a contractor cannot choose whomever they want to represent them.

Mr Anderson—If it is within the rules of the organisation, that is right—it is then a matter of policy as to whether or not the law gives collective bargaining rights to organisations in respect of commercial matters. And that is sort of the next issue.

Mr BURKE—I turn finally to recommendation 4.7 that you have put forward. If a certified agreement or an AWA has a casual rate, for example, and if you do not allow certified agreements and AWAs to include some sort of regulation of the extent to which labour hire or contracting can be used to undercut that casual rate, how does the agreement actually continue to provide protection for existing employees?

Mr Anderson—I do not accept the premise in that question and that is that you should use an industrial instrument or you gauge whether industrial instruments should be entered into depending on the commercial effect that they have for other parties to that arrangement. I do not accept that.

Mr BURKE—No. I am referring to the commercial effect that they have on the casual employee that you have on the books right now.

Mr Anderson—The price of casual labour will be a factor of the market in which that casual labour is sourced in the same way that the price of contract labour will be a factor of the market in which that contract labour is sourced. They are different entities and there are different rights and obligations that flow with respect to casual employment both for the employer and the casual employee compared to the rights and obligations that flow to the principal and the contractor. I do not think it is a fair conclusion to say that in order to have effective casual employment in an AWA or a certified agreement you need to regulate contract labour or the price of contract labour in those agreements. I think that one is not looking at the same types of forms of engagement or labour supply and they are there for different purposes.

Mr BURKE—If the casual rate negotiated is lower, I agree there is nowhere to move. If the casual rate that has been negotiated is a high casual rate, surely there is a huge incentive on the employer to be able to completely undercut that if there is no protection in the agreement and in particular if that protection has actually been put into the agreement because the employee and the employer are both happy for it to be there.

Mr Anderson—I think certified agreements and AWAs need to be instruments that relate to the relationship between the parties to those agreements. It is the agreement between those parties. It should not be an arrangement that regulates the activities of other parties. To go on to say that the relationship between that business and a contractor should be regulated by the industrial instruments that concern a casual employee and the employer is undermining the contracting relationship.

Mr BURKE—It only would go in if the employer agreed to it. Aren't they smart enough to be able to negotiate an agreement they are happy with? Why should we interfere?

Mr Anderson—It is a basic breach of privity of contract because we are talking about a provision—if what you say is correct—whereby three parties would be affected: the employer, the casual employee and the prospective contractors to be engaged by the employer. Yet the AWA and the certified agreement are a relationship between only two of those three parties.

Mr BURKE—Doesn't that render the casual rates meaningless—

Mr Anderson—No, it does not.

Mr BURKE—because of the undercut?

Mr Anderson—It is not a question of whether they are undercut. The award provisions will specify a basic floor for the casual rates so you do not even need an AWA or a certified agreement to employ a casual employee in any industry, provided the award allows for casual

employment. That in itself has not acted as a barrier to casual employment in industry. I think we have heard today that there is both casual employment sourced by employers in service industries as well as contract labour sourced by employers in service industries.

CHAIR—We are going to have to move on from there, Peter—I am sorry about that, Tony—otherwise we will be caught up on some of these things. Mr Vasta will be very disappointed if he does not get to ask a question.

Mr VASTA—It is just a small, quick question. Mr Bailey, you spoke briefly before on how you had labour coming from the United Kingdom and that was helping with occupational health and safety in importing some new techniques. Could you just quickly elaborate on that?

Mr Bailey—Probably it is less of an impact on occupational health and safety, which is pretty well sorted out in the domain, and more about bringing fresh ideas, motivation and creativity into the industry. One of the critical things about this country is that it has this astonishing reputation and it is a melting pot for a whole lot of culinary influences. The more we work with that, the better it is for the entire industry and the entire country. That sort of arrangement that allows them to come in and do that—six months here, six months there and a few restaurants that they will do when they are here—means that we continue to have that going on without having to get into a whole lot of complications that we would otherwise have to.

Mr VASTA—So you can get that not just from England? Do you see that coming out maybe from other parts of Europe as well?

Mr Bailey—Sure. It does. We have a lot of travellers. In fact, one of the things that really benefits a number of people who travel from the whole of Europe—and, to a lesser extent, from Asia—is that they will trip around the country and be able to have an easy way of engaging with various people, within the confines of their visas. They do actually come and do that, and it allows them to travel around the country and pay their way, and of course there is all that skills transfer that takes place while they are in the industry doing their thing.

CHAIR—Mr Anderson, one of the big arguments for further regulation of independent contractors and on-hire employees is the issue of occupational health and safety and the issue that the duty of care is being abdicated from the client organisation or the host employer—whatever terminology you like to use—to the independent contractor. Can you make a comment about that, particularly in the light of the ACTU submission? I will read out what they say, because I know you may not have had a chance to go through the ACTU submission. On page 4, it says:

28. State and federal government should work towards developing consistent health and safety laws, which give joint responsibility to labour hire operators and clients for the health and safety of workers.

29. The allocation of responsibilities in respect of occupational health and safety between labour hire operators and clients should be clearly defined through legislation ...

Can you make a comment on that?

Mr Anderson—The only part of that I might disagree with is what the ACTU might mean by the phrase 'joint responsibility'. Our position is very clear on this. Contractors should have responsibilities in respect of occupational health and safety in all workplaces in which they operate. Occupational health and safety needs to be taken seriously by all persons who provide labour services or who engage for the provision of labour services. The rights and obligations, though, need to be independently held—that is, the employer needs to have their obligations; employees, their obligations; contractors, their obligations; and so on for manufacturers, designers and the like, right through the supply chain. It should not be available for one party to transfer their obligations to another party. So that is where, if 'joint responsibility' means transferring obligations to others or imputing the obligations of one to another, I would not agree with that. But we strongly agree with the idea of mutual and shared responsibilities right through the supply chain. There is no doubt that there are some major deficiencies in Australia's occupational health and safety laws. We will be saying more about that as an organisation later this week, coincidentally. But, in respect of contractors, there should be obligations, and those obligations need to relate to the persons as contractors, not as employees.

Mr BRENDAN O'CONNOR—To be more specific: in relation to labour hire employers and host employers—whatever words you would like to use—and the employees who are employed by the labour hire company, one of the concerns people have is that those employees are quite often sent indefinitely to a workplace, but the host employer, the employer to which they are referring on a day-to-day basis, does not have an employment relationship as such.

I know a number of witnesses—and certainly witnesses yet to be heard—have referred in their submissions to concerns about the lack of responsibility and the lack of duty of care by employers who have really entered into a contract with another body: the labour hire company. So the issue really goes to the possible joint responsibility of the employer who is having the work undertaken and the employer who has employed the labour hire employee, as opposed to a contractor. Here, we are talking specifically about employees. The concern is that these employees sometimes fall between the gaps because there is not a clear understanding as to who is responsible for the day-to-day care of those people—

CHAIR—Particularly when you get to the issue of the contracting out a full service, and part of that contracting out of a full service may involve subcontractors in the chain.

Mr Anderson—I would say, in response to Mr O'Connor's question, that all the parties should have a duty of care under OH&S legislation—both the business that is engaging the labour hire contractor to provide labour to the business and the labour hire company through conducting its own proper investigation of what the business may require and how the business operates and by identifying the type of skill set the individual provides the business with. Each of those is a separate duty of care.

The key in applying OH&S principles to this scenario is to make sure that the duty of care is based on what is reasonable and what is practical in each of those circumstances. Obviously, whilst it is not the direct employer of the individual, the business will still have a duty of care to ensure that the individual employee of the labour hire company working in their premises is working in a safe environment and is not exposed to unsafe systems of work and the like. The business, in practice, has more control over those issues—and it is those issues of control which will affect whether it meets its duty of care. The labour hire company's duty of care is not so

much the company being able to control what happens in the business, but the duty of care has to exist and be met by the company saying to the business, 'This is a person with particular skills and experiences who can safely work in your business.'

Mr BRENDAN O'CONNOR—Should a labour hire company be able to enter into a contract so it is the only provider of labour hire employees with that company?

Mr Anderson—That is a matter for commercial law. I do not think, if a business says, 'We will use you exclusively to provide labour hire services,' and if that is a freely entered into contractual arrangement, that there is a problem in principle. You do not want some sort of restrictive trade arrangements which flow more generally into industry.

Mr BRENDAN O'CONNOR—Are you saying that a labour hire company can enter into an arrangement which would prevent other parties involved from breaking into their contract?

Mr Anderson—No. I am saying that if business says to a labour hire company, 'You are the only company that we will source labour from,' I do not see a problem with that in principle. It is a different scenario if the labour hire company says, 'I am operating in this industry and supplying labour, but I am only going to provide labour to you.'

Mr BRENDAN O'CONNOR—But, if there were an agreement reached, then you are saying there would be nothing wrong provided it was a genuine agreement between the two parties.

Mr Anderson—You would need to make sure that there is not any other breach of the trade practices laws in that respect.

Mr BRENDAN O'CONNOR—I will take that as a given. Provided there were no laws broken, you would not have a concern?

Mr Anderson—In principle, I do not think so.

Mr BRENDAN O'CONNOR—Thank you.

CHAIR—The High Court decision on the case before the Victorian Supreme Court of Appeal, R v ACR Roofing—has that come down yet?

Mr Anderson—No, the High Court decision has not come down, just the Victorian full court.

CHAIR—It was due in March, as I understand it.

Mr Anderson—Yes. I am not aware of any decision having been made.

CHAIR—Thank you very much for your evidence today. Thank you, Mrs Hodgetts, for coming down from Ballarat and explaining how it operates in the pharmacy industry. It is very important for us to hear directly from those who are using contractors, subcontractors and locums. Mr Bailey, it is a very impressive business you have created there, especially in an industry where there is a real shortage of labour, so congratulations to you. We appreciate the time that you have taken to come down and see us. Mr Anderson, if there is any additional

information you would like to share with us at some time, please feel free to contact the secretariat and we will take that into consideration as well.

Mr Anderson—I am happy to provide that, and we will respond to your specific suggestion about Professor Stewart's submission.

CHAIR—Thank you.

[1.59 p.m.]

CAMERON, Mr Andrew Charles, Policy Adviser and Issues Management Consultant, Recruitment and Consulting Services Association Ltd

FRITSCHE, Mr Tony, Member, Recruitment and Consulting Services Association Ltd

SHIELDS, Mr Reginald Charles, Honorary Member, Recruitment and Consulting Services Association Ltd

VEITH, Mr Paul, Life Member and WorkPlace Relations Committee Co-opted Member for Matters of National Importance, Recruitment and Consulting Services Association Ltd

WAKELING, Mr Nicholas, Chair, Victorian WorkPlace Relations Committee, Recruitment and Consulting Services Association Ltd

CHAIR—Welcome. Do you have anything to add to the capacity in which you are appearing?

Mr Cameron—I am also a member of a number of committees of the RCSA.

Mr Wakeling—I am an employee of Adecco Australia as well as a representative of the RCSA.

Mr Veith—I am also a director of IPA Personnel, which is an organisation which is a provider of hired employees.

Mr Fritsche—I am a director of Mint Personnel as well as a member of the RCSA.

Mr Shields—I am a workers compensation consultant and I am here representing the RCSA.

CHAIR—You will be a valuable person for us to talk to this afternoon. Although the committee does not require you to give evidence under oath, I should advise you that these hearings are formal proceedings of the parliament. Consequently, they warrant the same respect as proceedings of the House itself. It is customary to remind witnesses that giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The committee prefer to hear evidence in public, but if you have issues that you would like to raise in private then let us know and we will consider your request. Would you like to make a statement in relation to your submission or some introductory remarks before we proceed to questions?

Mr Cameron—Thank you for the opportunity to present our views on an area that we find has been plagued with misrepresentation and misinformation. We certainly look forward to the opportunity today. In terms of the numbers we have here today, we wanted to ensure that we had representatives of small, medium and larger providers of these services, and Mr Shields is here because of his knowledge of workers compensation statistics and how they can be analysed for the purposes of OHS performance within our industry. The RCSA is the peak industry body representing on-hired employee services. To that extent, we have a range of different categories

of service, covering recruitment services, contracting services and employment contracting services. Intertwined in that are Job Network services.

I will outline some of the points we want to ensure you can understand from our perspective, then I will hand over to Mr Veith, who is a member who has had a length of service within our industry and can indicate to you how the industry has matured over the last 30 years. There are some principal messages we wish to leave you with today. Firstly, the role and function of third-party employment services in the Australian economy is changing, and this is no longer simply a response to the basic and reactive demands and needs of employers and, increasingly, government within Australia.

Secondly, there is a need for precision in our terminology to ensure constructive, meaningful and consistent debate. We at the RCSA feel that unless we are precise about what we are talking about here, we are not going to make much of a move forward. To that end, we have defined within our submission the difference between on-hired employee services and contracting services, and when we look at contracting services we have broken them down into what we call managed project contracting services and independent, or subcontracting, services. We note that the terms of reference have not dealt with the issue of that level of definition, but we think it is critical for today's discussion.

Thirdly, the utilisation of on-hired employee services is appearing to be increasingly strategic rather than reactive. Indeed, in the productivity report Mitsubishi stated that the flexibility allowed by the use of up to 20 per cent of its work force as temporary variable labour has enabled it to respond in a cost-effective manner to the volatile North American export market and provide a fast and efficient reaction to its customer requirements. We see this as being far more a recognition of the strategic approach of the end user as opposed to a reactive approach.

Fourthly, employment services play a crucial role in making the labour market more effective and making it easier to source skills in demand in an increasingly tight labour market. Mr Veith might be able to give some more information on that particular point. We would like to propose that we are very much responding to the needs of the market, and rather than us as an industry being seen as opportunistic in terms of, as some might suggest, using and abusing on-hired employees, it is quite the contrary. We can provide many opportunities to progress better work methods by working with clients and responding to the changing lifestyles needs of employees.

Finally, on-hired employment is providing a genuine solution for those employees who want to achieve a better work-family and work-lifestyle balance. We do admit that there are certain individuals out there, as our survey results would indicate, who would prefer direct-hire employment. We are, however, trying to put the position that increasingly we are responding to the needs of not only business and government but employees or candidates themselves. I will ask Mr Veith to provide a short outline of the change and the movement in the industry and its professionalism over the last 30 years.

Mr Veith—It is a bit of a worry when I am the historian and I am only here because I am the oldest guy and know what was going on in 1970. The reality is that I joined the industry in 1970, and it was certainly a very different industry from the one today. We are involved in the provision of employment services and on-hired services. The nature of the industry back in the seventies was very much that of agencies recruiting permanent staff on behalf of employers and

charging a fee to do that. Then they were told: 'I just have a need to fill a spot because Susie's on holidays,' and they started to get into the temporary business. I make that reference because the use of agency staff has come out of that era, when lots of people ran two- and three-person organisations. You did not have large national and international companies involved in the provision of on-hired employees at that time. In fact, the nursing profession, which is a fairly significant part of our industry, was run primarily by matrons who had retired and would contract out to arrange for nurses to work at hospitals. They actually charged the nurse an agency fee, which was the term they used, of 10 per cent of their salary to provide that service—which of course is both unethical and illegal.

Since the seventies I have seen huge change in the way that our industry works. In the seventies and eighties, even if there was a legal employer-employee relationship, I do not know that the spirit of the relationship projected that, even if legally they took the tax out and paid the workers comp. Today I see an industry that is absolutely and totally different. The spirit of the employer nature of our industry is well and truly accepted to the point where we act in many cases as an educator of smaller employers, particularly in areas of OH&S and so forth, because we understand the responsibilities of the employer and often they do not. We are put in the position sometimes of saying, 'I won't provide staff until you get your OH&S act together.' I am sure many of the larger companies are actually advising organisations and often sit on their OH&S committees to assist in that regard. I have seen the industry move from agency staff, with all care and no responsibility, right through to the situation today where I would consider it to be made up of very responsible employers and controlled mainly by large organisations, not the small organisations that could be seen as fly-by-nights. Do you want to address the issue of supply?

Mr Cameron—You can certainly mention that.

Mr Veith—IPA is also involved in the Job Network. I am fairly passionate about the ability for us to work the two service lines together in that an increasing percentage of the people who are currently unemployed cannot commit to permanent full-time employment. You cannot open a paper without reading about the increased number of sole parents or people on DSP who are required to go back into the work force. We are certainly trying to keep mature age people in the work force as our unemployment rate goes down and supply is drying up. The use of on-hired employment services offers a fantastic vehicle to assist these people to get back into the work force. That could be as a permanent on-hired employee, which many of them prefer so that they can take off the school holidays, or it could be that a mature age person wants to work for six months to save up for a holiday and then not work for six months. Whatever the flexibility they demand, it can by far be best supplied through an on-hire organisation, such as the members of the RCSA. I think that, increasingly, there is going to be a demand for these types of services to meet the needs of employees who do not want to commit to permanent full-time employment.

CHAIR—Thank you very much for your submission. We obviously have not had a chance to read through your supplementary submission. We will go through that, and if you want to talk to that we are happy for you to do that as well. I found your submission quite enlightening, particularly some of the results from the RMIT survey that was conducted a couple of years ago on the motivation by some of the client organisations to engage contractors and labour-hire organisations and also from the perspective or the motivation of the employees to do it as well. Some very interesting stats came out there. I note, though, that a lot of the statistics differentiate

between those who are members of your organisation and those who are not members of your organisation. There was a stark contrast. Could you give me an idea of what types of agencies would be most likely to be your members and what makes your members different from those who are not your members? There is obviously a difference in the result that has come out of there. Is there something about you that instils a certain culture or value system that puts you a little ahead of the pack?

Mr Cameron—We would like to think that the level of professional support and business services provided by RCSA may distinguish those who are members from those who are not members. If I had all the answers as to why many of the parties are not members and how it affects their performance I would probably be earning more than I am at the moment through my contract with RCSA. Having said that, RCSA has a professional code of conduct which from our perspective is relied upon heavily to enforce levels of performance. Indeed, it is admitted that the code of practice is focused on both internal commercial issues and interagency or interprovider issues. But, at the same time, we believe the difference is the business support services provided by RCSA, along with the fact that the more reputable members, as we see it, want to belong to a devoted industry body, not one that is necessarily trying to cover all employers but one that truly understands the unique and varied needs of on-hired employee service providers. I am not sure whether that fully answers the question, but we are making a lot more inquiries and conducting research into exactly what the difference is. We suspect that there are a lot more providers who are nonmembers who are providing what we call contracting services as opposed to on-hired employee services. That may provide some indication as to why there is some variance in the results.

CHAIR—You obviously have a professional code of practice. We often hear from various witnesses about the need for the licensing of agencies and, of course, from the government perspective, we hear about introducing regulation. Do you believe that your code of practice, if it were accepted by this committee as a benchmark, would fulfil some of the concerns held by some of those who oppose contracting? More importantly, what sanctions do you impose on your members who do not abide by the code of practice?

Mr Cameron—I think it is important to again articulate the difference between independent contracting and on-hired employee services. In many regards the code of professional conduct will deal with issues pertaining to on-hired employee services and recruitment services. Whilst it does extend to independent contracting services, that is probably not the main purpose of that particular code. To that extent, we feel that it certainly would address some of the issues that may arise in terms of a potential need to introduce a system of regulation that is industry specific or, indeed, licensing. At the same time we are also prepared to acknowledge that there is room to enhance that further. We are currently going through an internal review to determine whether there is a need for specific schedules to address particular areas, whether it be in employment compliance or otherwise. However, there are a number of issues that arise out of the Trade Practices Act that stand as somewhat of a barrier to that. For those who do not comply with the code there are a range of different sanctions, including requiring undertakings to provide specific levels of performance and issuing requirements for particular companies to enter into training and education. The sanctions do extend to the point of examining whether their ongoing membership is appropriate.

On the broader issue of regulation and licensing, we are of the opinion that we have not seen a proper examination of how the existing legislation—the pure regulation—could be utilised to enforce OH&S, IR or any form of employment law obligation. We think it is premature to look at licensing and regulation at this time when we have not had a proper and complete examination of those particular issues. This also goes to the regulation and licensing of on-hired employee services, contracting services, recruitment services and a whole range of different areas. We are prepared to sit down and look at these issues, but we do not believe that, at this point in time, we have had a sufficiently sophisticated examination of the industry and the services provided to jump into a system of regulation and licensing. I am more than happy to address those issues on a discipline-by-discipline basis if needed.

CHAIR—There is some argument to say that one of the major reasons we have growth in your industry is that organisations are looking at reducing their wage and admin costs. I note that the RMIT survey contradicts that by saying only two per cent of those who responded to the survey use labour hire companies to reduce their admin costs and only one per cent do so as a way of reducing their wages costs. Yet it is out there as one of those truisms, almost, that this is a reason it is happening. Can you comment on that? Perhaps your survey is faulty and does not reflect what is happening out there.

Mr Cameron—We would like to think it is the other way round. I think it suits many of the critics of our industry to run the argument that the principal purpose is to undercut hard-fought wages and entitlements. Rather than going through each and every one of them, given that they are in the submission, I would say that clearly the indication is that the reliance upon our services in this contemporary day and age is far more as a partner. There are issues in terms of reducing administration costs—and there is clearly an element of that there—but people are more reliant upon our capacity to provide staff at short notice. What we really want to get across today are some stories from those who are actually providing the services, rather than from me across the body. I will ask Mr Fritsche to give an indication from a smaller member's point of view, as they tend to cop a lot of the criticism in our industry, as to some of the good work they are doing in responding to the more elaborate needs.

Mr Fritsche—We had a recent industry launch where we relaunched our organisation into the hospitality industry. The honourable minister John Pandazopoulos was present. One of the things that he spoke about was the pleasing way in which we increased the labour rate paid to those employees in our organisation, as we have a number of trainees. Ultimately, the realisation we had to come to very quickly is that if we are going to attract and retain staff in our business we need to pay them the same adult rate that applies across the board. That is a very important factor in the success of our business in on-hired employee services. If we are going to provide people who are going to perform similar work in the work force, they need to have the appropriate level of skill and be compensated and remunerated in the same manner as those in their work environments.

CHAIR—Are the people you are referring to working side by side with others who are performing exactly the same task?

Mr Fritsche—Yes, they are.

CHAIR—In what kind of industry?

Mr Fritsche—In hospitality, in the likes of Crown Casino and stadiums. They are profile locations. As a service provider, I could not afford to be paying anything less than the existing arrangement on the site. I am governed by not only my own agreement in terms of running a traineeship but also the industrial agreements of the workplaces in which they are performing the services. It is a very important part of our business to ensure that they are paid the appropriate rates of pay.

I would argue that I am also spending a lot of money on integrating my services into those of the workplaces that we provide our staff to, because I have equal responsibility with regard to occupational health and safety and training. I have to go over and above when I provide staff to ensure that I perform risk assessments, that I supervise my staff in the work environment, that I comply with all the legislative requirements of being an employer and that we integrate with and work with our clients to ensure that jointly we are managing and fulfilling all our requirements from a legal perspective, from a service perspective, from a training perspective and from a trainee perspective. The regulation imposed upon us is there. We are comfortable to work within that regulation, but certainly if I were to be paying less or using the provision of hired employee services to reduce the cost of labour the reality says I would not get the staff and I would not have a business.

Mr BRENDAN O'CONNOR—There is a proliferation of fly-by-night labour hire companies out there. What is the RSCA view of that? I am talking about small operations, although not all small ones; I do not know how you define that either. But certainly I know there are a lot out there and they are not necessarily applying any regulation.

Mr Cameron—Again, I would be interested if you have statistics to support it in terms of proliferation. Certainly one of the troubles we have as an industry is those that are noncompliant tend to get a lot of attention. They obviously have a wide impact and indeed probably operate in industries where there is a greater capacity to act unlawfully. It is very difficult for us to understand, if they are proliferating, why they are doing so, given that obviously we are focusing on our own membership to some extent. But, to that extent, there is a recognition of some areas of noncompliance out there. One of the questions we ask is whether that is any greater than in the direct or the traditional employment model. Indeed, is it any greater than maybe the noncompliance within general manufacturing, general construction or other areas? We do not have the finer detail as to why that is or is not occurring. We are aware of it, and indeed we are trying to influence it.

Mr BRENDAN O'CONNOR—Do they pose a problem for your members?

Mr Cameron—There is no question that the perception of our industry is a massive issue for us. That is why we are sitting here today trying to give you the stories from the shop floor, so to speak. They certainly do cause some level of concern for some of the major members. But, interestingly, when you dig down into it, it is not that we see massive levels of noncompliance on a regular and ongoing basis. Quite commonly we find that some of the problems arise because of the use of terminology. I will give you one quick example. I sit on the industry stakeholders forum within the Victorian WorkCover Authority. For one of the compliance campaigns they undertook, one of the inspectors came in and said that they were dealing with a particular provider in Ballarat. They operated out of something like a caravan park. In that particular circumstance they were relying on the term 'agency'. That harks back to the issue that

Paul has indicated. They truly thought that they were simply an agency, that they were not employers and they were simply passing individuals on, despite the fact that they might actually be paying tax and acting in other areas. I think a lot of the area is education. It is about precision. The reference to labour hire is not helping anybody in terms of getting a greater understanding as to what their true obligations are. Some of the smaller organisations—what we would like to think are non-RCSA members—are not able to articulate the difference between contracting and employment in many circumstances. I do not know whether anybody else here can add to that.

CHAIR—What you are saying there is that to address that issue is not necessarily through regulation but is through awareness and education of responsibilities.

Mr Cameron—It is so important to us. We have even sat in many of these inquiries in the past, and we are still educating. I am not having a go at anybody other than that to say that at the last one we attended somebody said, 'So you mean to say that in the circumstances where we go through the X-ray machines at the airport, those people might be XYZ personnel and are not necessarily on-hired employees?' We say, 'No. Typically those parties are probably providing contracting services, managed projects and scoped services.' We find that the education is increasingly difficult when we have other parties proliferating less precise terminology. It is not necessarily all the fault of these individuals—let's face it, using the term 'fly-by-nighters' or indeed, as in the Victorian inquiry, 'shonk operators'. We know that there is a large number out there who may be abusing some of the circumstances—

Mr BRENDAN O'CONNOR—It may not be done intentionally, but nonetheless the consequences are the same.

Mr Cameron—Good point.

CHAIR—But—

Mr BRENDAN O'CONNOR—Chair, you have jumped over the top of me again.

CHAIR—I just want to make the point though that the fact that those shonky or sham operators that Brendan is referring to may be labour hire companies does not make them any more liable to be shonky than perhaps just a standard, traditional employer, who also may be a sham employer with sham practices.

Mr Wakeling—Hopefully this will address Mr O'Connor's question too. Part of the difficulty we are in is that when they talk about shonk operators in our industry there is an assumption that in every other industry the level of compliance amongst businesses is high. We are a large employer with 3,000 clients. There are many situations where we are educating our clients not only as to what award applies but, more importantly, what EBA applies, which they are a signatory to. HR departments of organisations negotiate enterprise agreements, but on a shop floor level, the operator themselves often is not aware of what applies.

We had the crazy situation in New South Wales, for example, where state agreements were not accessible to any party except the commission. Federally a labour hire company can gain a copy of an agreement off the net, off WageNet, but for us to obtain a copy we had to go to the commission and purchase one. Fortunately, after dialogue through the minister's office, it

appears now that the minister has established a web site where these agreements are accessible, thus making it easier for labour hire companies to apply the terms of an agreement, which they were wanting to do but were not able to access.

Mr BRENDAN O'CONNOR—I am trying to seek information. I do not think I have said 'shonky' or 'sham' today at all yet. The chair has, but I have not. You were talking about how many of the employees are regulated by either an enterprise agreement or an award. When you talk about members, are you effectively talking about providers of employees?

Mr Cameron—We would be talking about providers of on-hired employees.

Mr BRENDAN O'CONNOR—You are talking about other employers and you are the peak employer body. Is that a fair assessment?

Mr Cameron—Yes.

Mr BRENDAN O'CONNOR—You are not party principal to any instruments?

Mr Cameron—RCSA is not.

Mr BRENDAN O'CONNOR—You refer on pages 4 and 5 of your supplementary submission to the fact that the RMIT survey says that 65 per cent of blue-collar employees, for example, are governed by awards or enterprise agreements. What sorts of awards are they? Do you know the breakdown of that? Would they be union or non-union awards? Would they be industry awards? Do you know any of that information?

Mr Wakeling—Speaking for my own organisation, Adecco are respondent to a number of federal awards. I will use us as an example, as a major employer. With respect to federal awards we are a member of the Australian Industry Group, like a number of employers, and that makes us respondent to a number of federal awards. For those areas where no federal award respondency applies—there are a few awards which we are a named respondent to—the various state awards will apply. We are also party to a number of federally registered enterprise agreements. We are party to a number of state based agreements, particularly in New South Wales.

Mr BRENDAN O'CONNOR—With respect to the enterprise agreements, who would be party to those agreements other than Adecco?

Mr Wakeling—Nobody. As you can appreciate, an agreement can only apply between two parties, so it would normally be a party between ourselves and the relevant union. If we have a client site where they have an enterprise agreement in operation, that is an agreement between that union—and, obviously, assuming it is an LJ agreement—and that client.

Mr BRENDAN O'CONNOR—So Adecco would enter into section 170LJ agreements?

Mr Wakeling—Yes.

Mr BRENDAN O'CONNOR—With the unions?

Mr Wakeling—Yes. To explain the way it would operate, we have two state agreements in New South Wales, one with the NUW and one with the TWU, which require us to reflect the terms and conditions of a client's EBA. The terms of the client's EBA do not bind us, because we are not a party to the agreement.

Mr BRENDAN O'CONNOR—Would Adecco's conduct in that regard differ from that of smaller labour hire organisations? There would be many others that would not become respondents, certainly not to enterprise agreements.

Mr Wakeling—I cannot speak for other companies, but there are similar agreements in place with other providers.

Mr BRENDAN O'CONNOR—Is Adecco ever challenged or undermined by other labour hire companies willing to offer services for lower wages and conditions? Has anyone posed a threat to you? I will not ask you to speak on anyone else's behalf, but are you aware of Adecco at any point being undercut by other labour hire companies?

Mr Veith—I will respond to that because I am probably closer to the day-to-day stuff. That has happened to us as an organisation, but a responsible client will not want to do anything that is inappropriate. If we are going to talk shonkies, the only person that would use a shonky provider of contracting or labour hire services would be a shonky end-user who would do shonkies themselves. If someone tries to undercut us by underpaying, 99 times out of 100 we can resolve that problem by just suggesting that they check what the people are being paid.

Mr BRENDAN O'CONNOR—I ask the reverse: do Adecco's awards or instruments have lower conditions of employment than other instruments in the same industry?

Mr Wakeling—The instruments that we have either require a reflection of the client's EBA or may be a negotiated site-specific agreement with the relevant union. We do not have any LK agreements. There are a number of sites for which we do not have an enterprise agreement to bind us. But we are a major supplier in the logistics industry—the transport industry—and at all of those sites there is a requirement for us to reflect the site's terms and conditions. So, whilst we may not have an enterprise agreement requiring us to reflect the terms and conditions, it is standard practice. I am sure that people in the industry would be aware that the commercial reality is that you supply labour at those site rates. If you were paying award rates in the tight labour market we are in, people would just work elsewhere.

Mr Cameron—An RMIT survey statistic indicated that 60 per cent of RSCA member clients required on-hired employees to be paid on the same general terms of employment as their direct employees. That is not suggesting that the other 40 per cent is undercutting—it is just saying that that is not a requirement of the client. I provide consulting services in IR and ITS to the industry specifically and I can certainly indicate that probably the major requirement for certified agreements arises because of the provider wanting to work in conjunction with both the client and, indeed, the representing union. There is absolutely no interest in anybody going in and trying to undercut that because all you are doing is importing a liability into the client's work environment. Predominantly that is the case.

Mr BURKE—At those workplaces where there might be an EBA in place which says that, if labour hire is to be used, it must not undercut these terms and conditions, do you as an industry see that as an unreasonable constraint?

Mr Fritsche—From our perspective we follow a number of industrial agreements such as awards, enterprise bargaining agreements and AWAs. I suppose we have to reflect the industrial agreements of those workplaces we are providing staff to. Often those agreements refer to on-hire employee services being bound by the same terms and conditions as those working on the site.

Mr Veith—If you want a long-term relationship with the client, you have to have a situation that is not going to lead to any industrial unrest. That is commonsense.

Mr BURKE—But you do not see it as being unreasonable in any way?

Mr Fritsche—No. In fact, it creates a level playing field from a competitive perspective because, ultimately, we are all quoting on the same labour rate.

Mr Cameron—Having said that, one of the biggest issues we have as an industry is the level of complexity that arises in terms of multilayered legislation, regulations, codes and otherwise that apply to us. It is all good and well to say that there should be industry-specific awards and obligations upon clients to ensure in their EBAs that the providers are paying the same terms and conditions, but as soon as you start introducing an obligation placed on a third party where there is no privity of contract, let us say, you are creating issues in terms of compliance. Whilst it may well make best-practice sense to do that, once you start importing it and making it a clause that should be allowed into these agreements, you are starting to impose obligations on parties who are not party to the original contract. It does cause problems, maybe not so much amongst those who are operating at the level of ongoing relationships but certainly where you get to those who may well be moving quite quickly in terms of responding to the needs of services.

Mr BRENDAN O'CONNOR—Let us just say that you have different views on the matter.

CHAIR—Two separate points were mentioned there.

Mr BURKE—On the RMIT survey, on page 24 of your submission you deal with the reasons for using on-hired employee services. When I have been in a situation in a previous life of using similar services, the outsourcing of the admin burden was a huge issue. I am amazed at how low it rates here. Also, at some points in your submission you refer to whether or not something is 'a major motivation' and at other points you refer to whether it is 'the major motivation'. Do you know if the study actually includes stats on what is 'a motivation'? The pie chart you have produced is only your principal reason—that is obviously overrepresented with the line, 'Extra staff needed,' which is also 100 per cent of the pie.

Mr Cameron—Off the top of my head, I do not believe we have gone into clarifying 'the' and 'a'. I am more than happy to provide you with a copy of the full and complete report if that would assist.

Mr BURKE—That would help.

Mr Cameron—As to how we read that, I indicate that there has been a fundamental shift from reliance upon on-hired employee or labour hire services to undercut rates to reliance upon it not only for capacity to provide access to a database at very short notice but also to increase what we call value-add services. As we indicated earlier, we are certainly getting the real feel that many of them are relying upon us as professional employers to partner them as opposed to simply supplementing what they might otherwise do. It is a good question and something I would be happy to follow up on.

Mr BURKE—Towards the end of your submission you say:

Individuals should have the right to enter into commercial arrangements ... so long as they are not sham arrangements ...

How do you define a sham arrangement? What mechanisms do you think there ought to be in place to avoid it?

Mr Cameron—Predominantly—and we are talking independent contracting services now—sham arrangements are those where one day you may well be an employee and the next day you become an independent contractor. So, to that extent, we are certainly not supportive of any of those types of arrangements. We are currently going through a review internally, at a policy level, to understand what the attitudes are to what we might call the on-hiring of contractors—those that are at the unskilled and semi-skilled level. We have never promoted that type of engagement and, indeed, we are looking to formalise and educate our members in that perspective.

When it comes to addressing the issue of sham arrangements, I think there are currently common law deeming provisions. We think there is some advantage in having some consistency in terms of the case law at that level. The inconsistency when it comes to the state based level is probably demonstrated by a recent decision in Western Australia—I am more than happy to provide the citation—where on-hired builders labourers were deemed, on appeal before the Supreme Court, to be bona fide independent contractors. That sometimes creates a level of confusion when we are out there indicating to our members in another state that they would need to be very careful about entering into such arrangements, unless maybe they were through the Odco scheme, which, again, we do not necessarily promote. So, to that end, we believe there may be an opportunity to have not necessarily legislation to address what is bona fide but at least some consistency in the case law. Maybe we could look at the Federal Magistrates Court as a means to getting that consistency; that would reduce confusion, which, again, undermines a lot of the good intentions in our industry.

Mr VASTA—Mr Fritsche, I think you touched on occupational health and safety earlier. How does it occur? Do you go in or do you get your inspectors to go in and inspect the premises or the working environment and then you are able to provide information, say, to the people wanting that contract, to fix up anything that seems or is deemed by you to be unsafe?

Mr Fritsche—I suppose it starts off with the initial discussions about services. As Charles said, they are partnering arrangements and everybody is aware of what their responsibilities are with regards to the legislation on OH&S. It is a topic that is discussed prior to providing services. We place a lot of emphasis on induction and training and we obviously cover off our responsibilities. That only begins with us but it needs to continue into the workplace. We only do

business with those that are happy to support us in that, and all our clients are. We then conduct risk assessments with our clients. We establish processes with our clients, and that is quite important because, for an on-hired employee service provision, I can be providing a couple of hundred staff in somebody else's work environment. I may have people there present but I am not present 24 hours a day; if somebody is injured then how do I get that reporting mechanism to the client? How do I receive it and respond in terms of my obligations? So it is very much a joint process. A lot of my inductions are in partnership with those clients. I will fulfil or touch base on a lot of their responsibilities within my own work environment and then continue that into their workplace with the support of their people as well. It is very much a partnering relationship.

Mr VASTA—Is it possible that you could provide us with some of that information, such as induction information, so that we can see that process?

Mr Fritsche—Yes.

Mr VASTA—I do not want you to mention any specific names of clients or any such thing—we would just like to see that process going through. If you could provide the committee with an induction schedule and information on the way that OH&S is conducted that would be much appreciated.

Mr Cameron—I think it is important to go beyond inductions because what we provide and what we do is so much more than an induction. A suggestion that we simply rely upon the placement is another issue. It would be remiss of me if I did not mention the problem that the legislation is self-defeating in terms of safer work environments within our industry. That point was touched upon in the evidence of ACCI.

It goes fundamentally to the issue that the existing legislation in all states, other than Western Australia, is based upon a traditional employment arrangement. Whilst it does go to the issue of addressing independent contractors, controllers and the like, it does not address the issue of on-hired employment. The problem that clearly arises here is that—and to put a finer point on it—recently, when we asked the Victorian WA why it was that the recommendation of Chris Maxwell QC to address the issue of capacity to control risk was not addressed and imported into the new legislation, it was indicated that maybe other parties would seek to rely upon that to avoid their obligations.

We put it to you that overlapping duties is one of the fundamental problems within our industry. Whilst it all may sound good and well in terms of making sure that there are two parties you can prosecute, we are a big advocate of what we call integrated or interlocking duties. It is absolutely essential that we seek to review OH&S legislation in Australia to determine whether overlapping duties is indeed in the best interests of on-hired employees. Nine times out of 10 when there is overlapping duties and you have small to medium enterprises that maybe do not understand their obligations, when something goes wrong, the other party thought that the other party was doing something about it.

We say that it is far better for us to specifically identify, as far as practicable, what the specific elements of the OH&S process are and whose responsibility it is. It is no good to simply say to an on-hired service provider, 'You must do everything that a host organisation or a client must do,' because there is duplication, it is inefficient and it simply results in confusion. This is a

major issue for our industry, especially when it comes to small to medium enterprises. If you want any more information on that, we can provide it. But please note that Western Australia has recently, as of 1 January, varied their legislation to allow for the raising of issues with regard to what is deemed as the capacity to control. We thank them very much for taking such a progressive approach. This is not about abdication or whatever; this is about us trying to get a far greater articulation as to the specific obligations so we can make sure that it gets done.

CHAIR—Are you saying that the Western Australian legislation is heading in the right direction?

Mr Cameron—They have already implemented a reliance on that. We will be working on a code with them.

CHAIR—Mr Shields, in the brief time that we have, do you want to make any comment about that issue or anything else within your domain, otherwise you may feel that you have come in here and listened very well but you did not have a chance to speak.

Mr Cameron—Probably the issue that Mr Shields is best to address is that of the current reliance upon claimed statistics to give an indication of performance within Australia. We argue that that is not appropriate.

Mr Shields—Five years ago the industry was analysed decisively in Victoria by one of the large carriers of workers compensation—and, in particular, in this market segment—and found that the claims figures used for the industry were grossly misleading in that they included people who were not the providers of labour in the definitions that we have been talking about: the group training schemes, contract labour pools et cetera. As a result of that, a lot of work was done analysing where the claims came from. Further work was done in trying to establish the correct rating regime for this industry, to make sure that they had opportunities for a level playing field in rating one industry against another, where in the past—again, in Victoria—there were only two rates available to such employers. They will now have a full scope of the industry range—something in excess of 500 classifications to rate.

We tried, and we have continued to try, to get information from all of the jurisdictions in Australia—so far without success. Probably the only exception being South Australia, which have given us very complete details of the statistics relating to claims in that jurisdiction. None of the others have been able to, or have been inclined to, provide data that is really meaningful in occupational health and safety performance in Australia. It is a major issue for us because we are just trying to reduce the cost of claims and reduce the incidence of claims by being able to focus on the right areas.

CHAIR—I understand that there are some mooted changes in Tasmania in this regard as well. Do you know anything about that?

Mr Shields—No. I can only say that, in relation to the provision of statistics, the response from Tasmania was somewhat disappointing.

Mr Cameron—In our supplementary submission we have made a note in terms of the legislative issues on OH&S, and we have also referred to two recent compliance reports that

have been conducted into on-hire in both the ACT and South Australia. Both of these came up with final results which indicated that our industry in many regards was approaching best practice. The suggestion that there is fundamental noncompliance in OH&S has to be very much looked into in greater detail, maybe looking at what some of the broader issues creating challenges are, rather than suggesting that it is unwillingness or pure noncompliance.

CHAIR—Thank you very much for that last comment, Mr Cameron. Gentlemen, we appreciate the time you have given us. It was very enlightening. A number of you have agreed to come back to us with further information, certainly Mr Fritsche and Mr Cameron. We look forward to receiving that additional information. Thank you very much.

[2.48 p.m.]

STEWART, Professor Andrew John, School of Law, Flinders University

CHAIR—Welcome. While the committee does not require you to give evidence under over oath, I should advise you that these hearings are formal proceedings of the parliament. Consequently, they warrant the same respect as proceedings of the House itself. It is customary to remind witnesses that giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The committee prefers to hear evidence in public, but if you have issues that you would like to raise in private we will consider your request. Would you like to make an opening statement on your submission or on anything else you would like to refer to?

Prof. Stewart—Yes. You have copies of my submission so I will try and keep the opening remarks as brief as I can, or as brief as any academic is capable of. I am not here to say that there is anything wrong at all with independent contracting. In fact, I have made the point in my submission that it ought to be a basic right of anyone in a society like ours to choose to set up their own business rather than work for someone else. But that should not mean that it is acceptable to disguise what in substance are employment arrangements as independent contracting.

There are a substantial number of Australian workers—how many exactly, we do not know—who hire out their labour purportedly as contractors but, as a matter of practical reality, are employees. They are working for a single 'client' who has substantial control over how they perform their work and, in most instances, has prepared the terms under which they perform that work. These so-called contractors have no business premises. They do not employ or engage anyone else to help them perform their services. They do not advertise their services and work for a range of clients. They have none of the trappings we would normally associate with someone who is running their own business.

The existence and prevalence of these arrangements were confirmed by research commissioned by the Australian Taxation Office in the 1990s. They were the subject of recommendations in the Ralph report on business taxation. They have been partially addressed by the personal services income legislation in 2000. But, while there has clearly been an attempt by governments at both federal and state levels to protect their revenue by addressing this issue as a revenue matter, when it comes to the effect of labour legislation, we are yet to see many reforms, if any. Most workers in this category, if they are characterised as contractors, obviously are not covered by awards or, for that matter, registered agreements. They have no right to leave entitlements and they have no right to expect their employer to make superannuation contributions on their behalf. They have no right to complain of unfair dismissal and they have no entitlement to severance pay and so on.

In my submission I have gone into some detail—drawing on both academic expertise and a considerable amount of hands-on professional involvement through my work as a consultant to a law firm—as to how it is possible to take somebody who, in functional terms, is an employee and have them legally characterised as a contractor. There are two primary methods. One is the

well-drafted contract with the right features. The second is using some kind of an interposed entity like a personal company.

The thrust of my submission, then, is that the integrity of our labour law systems demands that people who in practical terms are employees should be treated as such. The nub of my submission is probably at the top of page 16. If firms want to obtain labour from people who are subordinate and dependent, people who are really working for that firm, then those firms should be prepared to bear the cost of regulation that is associated with employing staff. To say that there is some sort of right to contract out of employment entitlements simply through well-structured arrangements not only defeats the very purposes of that regulation but also puts firms that do employ staff at a competitive disadvantage.

There are clearly some—and this obviously includes the federal government—who believe that our existing labour regulation is inappropriate or inflexible in various ways. But, to me, that ought to be seen as a separate debate. If minimum wage rates are being set too high, if minimum employment conditions are being set too high, if our employment processes generally are too inflexible and are imposing rigidities or excessive costs on businesses, then let us deal with that issue directly. What I do not believe that we should be doing is giving businesses a backdoor way out of that regulation by simply structuring arrangements that make people out to be contractors.

In terms of dealing with that issue, I have set out a fairly detailed proposed statutory definition of employment, which I know has been the subject of some other submissions and dealt with in some other reviews. It was adopted in principle by both the Stevens review into industrial legislation and the Stanley review into workers comp legislation in South Australia. Obviously I am happy to take questions about the background to that proposal and the detail. But I will conclude by saying something briefly about labour hire, which you have just heard about from the RCSA. In many ways, my position does not depart too much from the standard RCSA position. I certainly regard labour hire as a legitimate form of business arrangement. I am not one of the people who think that host firms should be deemed to be employers of labour hire workers whom they engage from a labour hire agency, which is not to say they should have no responsibilities in the occupational health area, for example. There has to be some kind of dual responsibility, though, having heard the tail end of the RCSA submission. I certainly agree with them that in principle there ought to be better ways of delineating those two.

The major point I want to make about labour hire is that it should not be acceptable to use labour hire as a device to avoid an employment relationship, which is something that arrangements sometimes termed ‘Odco’ systems, and other arrangements that are functionally similar, try to do. Hence, in my proposal, there is a provision which you can already find in some state legislation dealing with workers compensation and payroll tax and which effectively says that if you are going to hire out the worker then you have to accept the responsibility of being an employer. That would not affect recruitment agencies, which simply broker contracts; it would only affect those who maintain an ongoing relationship with the workers that they hire out. Of course, it would not affect businesses that want to obtain services from people who are genuinely contractors, because they are still able to deal with those people directly.

Other than that, I hope the submission is fairly clear. The tail end of it is devoted to some of the specific proposals that the government put forward in its discussion paper. I am not sure at

this point whether or not those are matters that the inquiry is going to traverse. Thank you again for giving me the chance to be here.

CHAIR—I note with interest that you talk about some of these legitimate arrangements that are entered into—and perhaps there is some nifty footwork from some lawyers on the drafting of these contracts—but you do say they are not shams in a strict sense. Not being shams and not being illegitimate, you still do not think that we should legally allow them to happen. I do not quite understand why you have this opposition to them if they have been structured in such a way where they are not breaking the letter of the law, as opposed to those who do enter into sham arrangements.

Prof. Stewart—There certainly are sham arrangements out there. The classic example—and I think you heard an example from the RCSA at the tail end of their evidence—is somebody who is an employee one day and the next minute finds that their pay is going into some other entity's account that they have been asked to set up and nothing else has changed. That is a sham legally, but the law takes a very narrow view of what a sham is. Under the law as it stands, it is not a sham for parties to contrive to establish an arrangement that will be legally characterised as a contract for services and which is intended by the parties to be characterised as a contract for services. In the end the law has to operate and has to draw distinctions. We are dealing with a pretty fundamental distinction here. The cases that I am highlighting are cases in which parties are not acting illegally, precisely because the law as it stands outside the area of revenue, and to a lesser extent workers compensation, does not demand that if you are functionally acting as an employee you have to be legally characterised as an employee.

Any lawyer can take any working person in this country and turn them into a contractor simply by requiring them to perform their services through a personal company. As long as that is carefully structured, it is legitimate as it stands. It will not be recognised for tax purposes. The PSI legislation in most cases will consider that that person is really an employee and will still tax them as an employee. It will not get you out of payroll tax responsibilities. In Victoria and New South Wales in particular, it will not get the ultimate hirer out of workers compensation responsibilities.

CHAIR—Therefore, you believe the common law is faulty as it stands at the moment.

Prof. Stewart—I believe the common law is capable of manipulation. There are really two situations that we are looking at here. There is the situation where you have a very carefully structured arrangement and the situation, which perhaps in practice is more common, where the parties have not paid a lawyer or gone really carefully into setting up the right kind of arrangement. In that latter situation the application of the common law test is more mixed. You can find a range of decisions, and in my submission I refer to a handful of recent cases—I could go back years and pull out thousands of decisions—where the parties have not been really careful. Sometimes a court will look at the substance of the arrangement and sometimes it will go predominantly with the label that the parties have attached. Although I have some concern about that, my concern is much more with the bulletproof cases—the ones where you can clearly structure the arrangement so that it is a contract for services regardless of the substance. To that extent, yes, I believe the common law is faulty.

CHAIR—Sure, and you say that in your submission. Your definition of employment is fairly extensive. If we were to adopt that definition as it is, across all industries, what is your assessment of its likely impact on the labour hire and the independent contracting industry itself? At the moment it is a $8.6 billion industry. Do you think that will actually kill it off?

Prof. Stewart—Absolutely not. Let us take labour hire first. My understanding, from looking at works such as the RMIT survey and the Productivity Commission report and talking to some of the major agencies, is that the majority of the agencies operate on an employment basis and therefore would not at all be affected by anything I am proposing. Take a firm like Adecco; a great majority of what the various companies under the Adecco brand do would not be affected. So I think we can put labour hire off to one side right away.

In terms of independent contracting, yes, it would make a difference in some industries in particular. It would make a major difference in security, cleaning, transport and building and construction. Those are some of the major industries where these arrangements have become extremely prevalent. But it would not by any means affect every single contractor. In fact, it would not affect the majority of contractors. There are still a huge number of people out there offering their labour on a contract basis and genuinely running their own businesses. My proposal has no intent to catch those people.

Also, it would not necessarily mean that those workers would find themselves being treated much differently. They would gain some entitlements that they might not have had. The taxation situation is already being addressed through the PSI legislation, although in my submission I express some doubt as to just how rigorously that is being enforced—not, I should say, out of any doubt about the willingness of the ATO to tackle that but simply because we are talking about a huge number of cases and the ATO does not have the resources to audit every single—

CHAIR—We will have an opportunity to discuss that with the ATO and the Treasury.

Prof. Stewart—Yes, it would make a difference to those businesses, particularly in the industries I have mentioned, who are currently relying on escaping some of the costs associated with employing labour by using people as contractors.

Mr BRENDAN O'CONNOR—What evidence do you have that illustrates that companies that operate an employment relationship with workers—an employer-employee relationship—are adversely affected by companies that establish themselves as principal and independent contractors? You mentioned that there were adverse consequences for employers, possibly in the same industry, I guess.

Prof. Stewart—In a sense it is a matter of logic. There has to be a competitive disadvantage. It is significant how many people are being directly employed as security guards or cleaners. They are just two examples of occupations where contracting has become much more prevalent, and it is impossible to avoid the conclusion that the reason for that is that it has become uncompetitive to offer out cleaning or security services if you are employing staff, because it is cheaper to take them on as contractors. It is cheaper often even if you are paying over what the minimum award rate might be for that kind of work.

As for hard and fast evidence, I cannot give you any concrete examples. I can only say that I think it logically follows. I have anecdotal evidence of firms that are, for example, operating courier services and might come to a lawyer and say: 'We need to take these people on as contractors. The people driving for us have to be contractors. They can't be employees because we can't afford to employ them, and no-one in our part of the industry is taking these people on as employees.' So once these contracting arrangements achieve a critical mass in a particular industry, it becomes very hard for firms to do anything else.

By contrast we see that the labour hire industry has thrived despite mostly using employees. Agencies, such as the ones who feature prominently in the RCSA, have been able to take the high road and make the point to their clients that they are adding value by employing staff, by deriving a greater degree of loyalty and indeed by being able, if anything, to educate their clients on employment responsibilities.

Mr BRENDAN O'CONNOR—In these sorts of arrangements where effectively a contract is established between a so-called principal and a so-called contractor, has your research come across evidence that would suggest that employers have effectively gone to their employees and unilaterally proposed arrangements which would effectively change the legal personalities of both? Is that the arrangement? From your understanding of the way in which it has operated, which is the more likely scenario: the two parties come to the idea that they might be able to avoid some taxation obligations or an employer decides they would rather be a principal than an employer?

Prof. Stewart—If you look at the cases which are public and have come before the courts and tribunals, and if I reflect on my professional experience and anecdotal evidence from talking to other lawyers, it is crystal clear that in the vast majority of cases the impetus for these arrangements comes from the party that would otherwise be the employer—which is not to say that the workers involved are always unwilling. Sometimes it is 'take it or leave it'. Sometimes it is a package that is sold as being advantageous.

Of course, before 2001-02, when the PSI legislation came in, there was genuinely a tax advantage to be had because you could deduct a much wider range of business expenses. With that legislation in place, that tax advantage for some has been reduced, and I think that means more than ever that it is not a win-win situation financially. But I also think that that equation was always one where workers were likely to be looking at money in hand and not thinking then about the value of leave entitlements, superannuation contributions, unfair dismissal rights and so on.

Superannuation is an important issue too. The last several governments that we have had have been very strongly committed to ensuring that Australians make adequate provision for their own retirement. The superannuation guarantee scheme is one that has had bipartisan support. It is an important element of that planning. I would have thought these devices are significantly inconsistent with that objective insofar as we are getting a growing number of workers who are being left to set money aside themselves rather than being able to bank on contributions from those who are using their services.

Mr BURKE—There was some discussion earlier today, and in your submission, about how the world would be if awards and agreements could no longer contain clauses restricting the

conditions under which labour hire or contractors could be engaged. It was put to us earlier today that it would be a breach of privity of contract to have an AWA or EBA put a limitation on the rights of a third party, be they a contractor or a labour hire organisation. I am interested in your response to that.

Prof. Stewart—The principle of privity of contract is actually not an old common-law principle. It popped up in the 19th century and has been done away with in many countries, so I would not find persuasive any appeal to that principle on its own. I think the issue here, oddly enough, is one of freedom of contract. If a firm wants to agree with its workers and their union representatives that it will engage labour on a certain basis only, then provided that agreement does not directly seek to impose obligations on third parties—and under our existing legislation it cannot do that anyway—I do not see any great problem in that. I have no doubt that, if these clauses were prohibited from agreements, they would still bob up as side agreements or common-law agreements at many workplaces anyway. Again, you have heard from the RCSA that the major agencies do not find these a huge impediment.

My experience would suggest it is rare for agreements to impose outright bans. Indeed, on one view of the current legal position, agreements cannot do that anyway because of the decision of the High Court in 1967 in the Cocks case. Agreements cannot prohibit the use of outside labour. They can seek to regulate it. I would have thought that that is something that should be a matter for the parties to that agreement to determine.

Mr VASTA—Do you think the origins of the rise in this new type of employment came about by prices for labour being a bit too high so businesses were seeking opportunities elsewhere and that that is the way they used, say, sham arrangements? Do you think the reason was that the cost of labour was too high in the beginning?

Prof. Stewart—Let me quarrel quickly with the term 'sham arrangements'. Again, I would talk about disguised employment arrangements. I am sure that that is one of the reasons, but I think it is a much more complicated story than that. If we go back 100 years or so, there was a lot more contracting than there is today. So these arrangements have been around in some industries for a very long time. Even though, yes, the percentage of the workplace that came to be engaged on employment contracts grew during the 20th century, there was always a proportion of the work force that operated on that basis, and indeed many of them quite legitimately.

What I think we have seen is that in a certain number of industries there have been competitive pressures which have led businesses to seek to cut corners and find whatever savings they have. In some of those cases those industries have been weakly unionised, although that is clearly not the case in building and construction, for example. I also think quite genuinely for a period of time the perceived tax advantages to workers, particularly in building and construction, helped to swell the numbers of people who were prepared to look at doing that.

The driving force now is certainly an economic one. It is about cost pressures associated with regulation. Of course, if you use that as an argument for allowing the kinds of arrangements I am talking about, that is an argument for evading any kind of regulation. No society that has regulatory structures in place in the end can accept the argument that it should be possible to contract out of them by having a clever enough arrangement.

Mr VASTA—I am saying this because sometimes the groups that try to look after the employee may have actually forced the employers to seek a way around it. In fact, they may not have helped the employees as such but rather hindered them because they then miss out on all the other entitlements you spoke of before. They have tried to protect them in some ways by giving them higher wages, but unfortunately in the long run they have actually missed out.

Prof. Stewart—It may well be that there is an element of that, and that is an element of the story—that labour has effectively been priced too high in certain industries—but you might just as well say that tax has been too high or the burden of other regulatory compliance has been too high. It is a complex story. I do not think in the end it is a matter of pointing the finger and saying you have lots of businesses doing the wrong thing. What a lot of these businesses have been doing and what clients of my law firm and clients of other commercial law firms have been doing has been perfectly legitimate and perfectly appropriate under the existing legal arrangements, but that is not to say that that ought to be the case and it is certainly not to say that concerns about the regulatory system itself should be addressed in this indirect way.

CHAIR—We heard from the RCSA earlier on and through their submission that there are a number of motivations for an employee to want to engage as an on-hire labour employee or as a subcontractor. There is flexibility, the ability to control your own time or whatever it may be. If that is what the employees want to do and that is what employees are driving—and this seems to be increasingly the way that the employment market is moving, judging by its sheer size now as an $8.6 billion industry—why should we interfere by saying: 'You are missing out on superannuation and leave provisions. You are missing out on all these things'? Aren't they as mature adults entering into this arrangement freely and of their own choice? Why should we get in the way?

Prof. Stewart—I think there are a number of answers to that. Firstly, it is clear that for a number of them it genuinely is a free and independent decision. I would agree with that. There are some very interesting observations about that in the recent report of the Victorian task force that looked at owner-drivers and forestry contractors in this state. But that certainly is not necessarily representative of everybody. If you are a security guard going for a job and you get handed a contract and told: 'You want to work? This is how you do it,' I am not sure how much mature, free, voluntary autonomy there is in that kind of process. So that is one answer.

CHAIR—So you are saying there are some industries where it does not lend itself?

Prof. Stewart—I think there are many situations where it is not a free choice. Even where it is a free choice and even where workers concerned are genuinely making a free decision and genuinely think they are better off, I would say two things. Firstly, being an employee does not mean to say that you have rigid work practices. A very substantial minority—something like 40 per cent—of the work force are now covered by certified agreements or their equivalent under state legislation. During the last 10 years the dominant trend in those agreements has been flexible work practices and in particular flexible working hours. There are many people now who work as employees who have a great deal of flexibility over how they work. As an academic I would be a classic example, but certainly many skilled employees have that situation. The regulatory systems we have in place do not in most cases demand that it should not be possible to work when you want to. So one answer is that that kind of flexibility and freedom can be obtained even as an employee.

Secondly—and I think in the end this is the fundamental point—with any system of regulation there has to be a limit to freedom of contract. We do not allow mature children to choose to work in certain occupations. We do not allow workers of any age to agree to work in grossly unsafe working conditions. We do not agree to allow people as employees to work for less than award wages. So why is it acceptable for someone to agree to work in functional terms as an employee but on the basis of an arrangement that labels them as a contractor?

CHAIR—Would you say that it becomes far more difficult the more specialised the job is and the scarcer that particular occupation is in the marketplace?

Prof. Stewart—I think it becomes harder in some cases to draw that line between being an employee and being a contractor.

CHAIR—There are people out there who just would not be employees. They would refuse to be an employee because they know that they control supply. I take the point about security guards. That is why I asked whether or not there were some industries in which it was more prevalent than others. We heard earlier today about Chefs on the Run and how chefs really control the supply chain.

Prof. Stewart—If people want to set up their own businesses and they want to operate in that way, why on earth, in our kind of society, would we want to stop them doing that? There is nothing about my proposal that seeks to stop somebody running their own business. If you have got a chef who is able to—

Mr BRENDAN O'CONNOR—I think the witness said, 'a very talented chef', by the way. He was talking about chefs in demand as opposed to chefs generally.

Prof. Stewart—That is right. I was about to say that I am not aware that—

Mr BRENDAN O'CONNOR—I think all chefs are in demand. But that is another matter altogether.

CHAIR—And they have been for over 25 years. That is another matter.

Prof. Stewart—There are some industries—I think the IT industry is probably the major one—where you have highly skilled people who quite genuinely can choose whether to be employees or to hire out their services on a contract basis. Provided they choose to operate in a way that has got the characteristics of running a business, then I have no problem with that and I do not believe regulators generally would or should have a problem with that. But I do have a problem with people who are working for the one client, under that client's control, with very limited autonomy, with no indication that they are offering services generally, with no real capacity to get anyone in to help them to perform the work.

CHAIR—So the control test is critical.

Prof. Stewart—I think it is a control test, but it is a matter of what Justice Gray, in a famous case, called economic reality. As a matter of economic reality you can usually tell whether someone is really an employee or a contractor. Our laws should reflect that.

CHAIR—We are going to be hearing later on from Odco. You have some observations or views about that. Would you like to expand on them in the brief time that you have?

Prof. Stewart—The Odco arrangements arose or became popular after the Federal Court upheld a finding that the building workers hired out by Troubleshooters Available were not employees. There is one school of thought that says that that was a finding that was very particular to the workers concerned, and indeed there have been a number of recent decisions in which workers under very similar arrangements have been held not to be contractors but to be employees. The major exception is the recent Western Australian decision which was referred to at the end of the RCSA evidence and which is referred to in footnote 41 on page 14 of my submission: Personnel Contracting Pty Ltd v CFMEU. The point about that system, as I understand it, is that as long as you hire out somebody who says they are a contractor then they cannot be an employee because the host firm that is using their services has no contract with them and the agency that is hiring them out has no immediate control over what they do. That is an argument that has been seen through by a number of recent courts and tribunals. In the great majority of cases, my view would be that the workers who are being hired out under that system are really employees, again in practical terms.

Take a classic example from a South Australian case, the Slater case. A fruit- picker was hired out under an Odco type arrangement and the argument was that this person was running their own business as a fruit-picker. The South Australian Workers Compensation Tribunal had relatively little difficulty in seeing through that. I find it hard to see what the legitimate basis is for that kind of arrangement. If you are a firm and you want services under contract from someone who is running a business, why do you need an agency to supply those people? Why not just hire them directly? By all means use a recruitment service, but why would you need an agency to supply people who are genuinely running their own business? If they are running their own business, why are they not doing their contracting directly?

CHAIR—Thank you, Professor Stewart, for coming over from Adelaide to address us. Unfortunately we are not visiting Adelaide with this inquiry, so we do appreciate your time and effort to be here to make your submission and also to give us evidence. If you have any additional comments you wish to present to the committee, we are more than happy to hear from you.

[3.32 p.m.]

BURROW, Ms Sharan, President, Australian Council of Trade Unions

DELAVEC, Ms Nada, Industrial Officer, Australian Council of Trade Unions

CHAIR—Welcome. I appreciate that you are not new to these inquiries but I need to go through a preamble with you. The committee does not require you to give evidence under oath, but I should advise you that these hearings are formal proceedings of the parliament. Consequently, they warrant the same respect as proceedings of the House itself. It is customary to remind witnesses that giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. We prefer to hear evidence in public, but if you have issues you would like to raise in private then please let us know and we will consider your request. Would you like to make an opening statement either on your submission or in general?

Ms Burrow—Yes. There are of course many issues raised by these two forms of work, and we are not going to go into all our recommendations, but I will outline a couple of key themes. There are two key issues that cut across both independent contracting and labour hire for us. The first issue is recognising that at times they are both deliberately used to evade employer obligations. The ACTU has submitted extensive evidence of the fact that, where there are disguised employment forms of contracting or labour hire, they are not legitimate and should not be supported by legislation or policy.

The second issue is about the legitimate use of contracting and labour hire. We do recognise that there are legitimate forms of both of these non-standard types of work but, like the employment relationship, those forms of work need to be governed by appropriate policy and legislation. Some will mirror employment obligations; others will need to take into account the unique nature of these forms of work. We believe, unfortunately, that all too many individuals are operating in the disguised areas of those two forms of work. If we could clean that up, that would be of advantage both to the employers and certainly to the employees by any other definition.

The ILO of course recognises that this is a global issue and that these issues require special consideration. It has developed a range of instruments which are consistent with the ACTU's recommendations, and which we think provide some good guidance. We submit that there is no merit in allowing labour hire operators to be able to compete on the basis of lower-level wages and conditions. As a minimum, they should be bound by any relevant awards. If you talk to employers about the minimum standards which guarantee unfair competition protection for them, you will find their interest in awards is about a much more even industrial relations environment. We also believe that it is only fair that labour hire operators pay site agreement rates where they are placing workers side by side with workers covered by collective agreements. The principle of nondiscrimination in the ILO core labour standards covers that issue. This would be assisted by a more relaxed approach to multiemployer agreements in the Workplace Relations Act, and that is a core recommendation from us.

Similarly, transmission of business legislation should be broad enough to cover the contracting out of work to a labour hire operator. There are those amongst you who have had much experience with this area of work. In respect of the issue of joint employment, the ACTU submits that the roles and responsibilities of labour hire operators need to be defined more clearly, particularly for unfair dismissals and occupational health and safety. The Commission should explicitly be allowed to find joint responsibility in respect of unfair dismissals. More broadly, the ACTU supports regulation of this industry through a licensing scheme. In the absence of an agreed federal scheme, we support the development of state based agencies or schemes. We also believe that there is merit in having an industry code of practice developed by the parties which would complement a licensing approach.

A huge amount of so-called independent contracting is simply a means of avoiding taxation and other employment related obligations. There is little evidence that the recently introduced personal services test for income tax is having any effect on this. However, if new laws are more stringently enforced and the definition of employee for the purpose of employment regulation is drawn too narrowly, you could well end up with a situation where a dependent contractor is required to pay income tax but does not get the benefit of award minima or other employment standards. This would be the worst of both worlds for such workers. So any definition of employee must be at least as broad as that used for income tax and it should seek to distinguish those who genuinely carry out their own businesses from those who are working in a dependent or controlled way.

I want to say a couple of things about skills. Policy and legislation also need to recognise the increased risk of skill shortages that go hand in hand with the increased use of contracting and labour hire. Contracting shifts responsibility for training solely onto the individual contractors, who are unlikely to have the resources to ensure proper skills development. Labour hire divides responsibility for training between the labour hire operator and the client, but in many cases this means neither takes responsibility and it is again shifted to the individual. The high rate of casual employment in labour hire, 78 per cent, does not help either given that statistically casuals are less likely to be trained than permanent employees. Given Australia's current skills crisis and the fact that around 1.2 million of our work force are either in labour hire or contracting, you cannot ignore this issue and we plead with you to pay it due regard. This morning we actually had a joint employer-union forum and one of the recommendations that we will work on is what should be the responsibilities of labour hire firms in regard to skills responsibilities.

CHAIR—Sorry to interrupt, but when you say that you had a joint forum do you mean that that was with employer groups?

Ms Burrow—Yes, it was a skills forum with the peak bodies and in fact many individual employers represented by them. It was dedicated to looking at how we can take industry leadership around priorities where we can concur jointly. One of the issues was the decline in the traditional trades and the number of people completing training, because labour hire has taken over a lot of the traditional area of responsibility. So it falls between the client, the employer and the labour hire firm—and it does not happen.

CHAIR—Was ACCI there?

Ms Burrow—Yes. ACCI, the AI group, the BCA and the unions were there. The ACTU submits that instituting reporting requirements for labour hire operators about their training policies and programs is an important step in the right direction. Contracting is a more difficult problem in respect of training, but discouraging the use of sham contracting should assist with this issue. Then you would get people coming through channels with the right skills and qualifications to set up their own businesses. In conclusion, what we are really saying is that you should not have lower standards regarding fair work practices and quality of life for those people engaged in non-standard work arrangements. The fact that work is an integral part of the quality of life of labour hire workers and contractors—as it is for people in traditional employment relationships—needs to be respected. Policy and legislation need to take account of this and protect those workers accordingly.

Ms Delavec—In response to a subsequent and parallel piece of work, which I am sure you are aware of—the departmental discussion paper on the same issues, which perhaps signals where the government is looking to take these issues—we would be interested to hear the committee's view of how those processes will be integrated.

CHAIR—Sure.

Ms Delavec—If and when you are ready. But it is clear from that paper that one of the government's aims, whilst in some way to define contracting, is also to keep contractors out of industrial tribunals and away from union representation and contract review legislation. Obviously the ACTU does not think these are sensible policy decisions. We think that employees should be properly defined and that genuine independent contractors should have rights of redress and avenues for redress and representation. We are also concerned with statements in that document and other statements which suggest that, if a person is ascribed a particular status as a contractor or an employee, that written document or purported status should be given more weight than the reality of the situation. That is of concern to us. It would stand in the way of any useful definition of contracting.

Finally, as has been our consistent position in respect of a whole range of laws, we do not agree with the approach of federal law overriding state and territory laws without the consent and agreement of those states. There have been moves both at state and territory levels to deal with contracting and labour hire in a range of areas, and we welcome that progress. Any harmonisation should be done by agreement at a federal level.

CHAIR—In a short answer to your rhetorical question, I am not quite sure how what we are doing is going to input into the minister's discussion paper. Although our reference was given to us by the minister, our report is to the parliament and our recommendations will be responded to by the ministers who are responsible for the particular policy areas. It could be very well be that our recommendations will go across a number of portfolios. I guess if those recommendations fall within the jurisdiction of the Minister for Employment and Workplace Relations, he will have the choice of whether or not to agree to them and incorporate them into his own considerations for legislation. Unlike the Senate committees, we do not review pending legislation. That is the short of it.

Mr BRENDAN O'CONNOR—That is your answer. Given that the witnesses have raised it, I should say for the record—and it has been said once before—that there are committee members

who are concerned because the minister has referred matters to this committee and then, without the committee properly considering the evidence, has independently set off another chain of events associated with the same matters. I know that not all committee members are happy with the way the minister has chosen to do that. In fact I, as deputy chair, on behalf of the committee members have invited the minister to come to this committee and give evidence so that we can properly consider those matters and then the executive can determine which of the recommendations we make should be incorporated into legislation. There has been some discord between the executive and the parliamentary committee.

CHAIR—That being the case, the way that the recommendations are treated are as I indicated. None of that changes. It is in the standing orders on parliamentary committees.

Ms Burrow—Of course. But presumably the department would provide you with evidence and advice as well, so we would hope that there would be some overlap.

CHAIR—We will be hearing from the department in two weeks time, and we will be making arrangements to hear from Treasury as well, particularly with regard to the PSI. In your submission you state:

> The lack of current regulation of the labour hire industry allows it to be used as a means of reducing wages and conditions. Labour hire is also a contributor to the growth in casualisation in Australia.

My question goes to the issue about the means of reducing wages and conditions. We have heard from the RCSA that from the evidence that has been given to them, based on surveys from their members, that is not actually the case. A very small proportion, maybe one or two per cent, of their members would cite that as a reason for using labour hire organisations. Obviously you have formed this view, Ms Burrow, and it must be formed based on either anecdotal evidence or some other type of evidence. Can you share with us how the union movement has come up with that conclusion?

Ms Burrow—There are several areas of evidence. A lot of it is complaint based and some is anecdotal et cetera. We have more than 50,000 members who are independent contractors and we cover a whole raft of mostly casual workers who are employed by labour hire companies. They know because they work alongside other workers, and unions take direct concerns from them about the conditions and the wages that they are employed under. But I think you have to go beyond our understanding and look to the Productivity Commission. They have just given independent contractors, who effectively are competing for or are dependent on the supply chain relationship with major companies, the right to collective or collusive bargaining. That is because it has been recognised that, in fact, the major companies are driving down the contract rate or the wages and conditions of those contractors, many of whom in a previous decade would have been employed directly by the company. So I think the evidence is there across the spectrum. There is also some ABS data on casual workers and labour hire companies. I do not have that at my fingertips but we could certainly point you in its direction. Nada, do you want to add to that?

Ms Delavec—At paragraph 3.4 of the ACTU submission we point out that there has been academic work done on this by ACIRRT, the Australian Centre for Industrial Relations Research

and Training. That was done by Doctor Richard Hall, who found that cost reduction was a key motivator for the use of labour hire. That paper is referenced in our submission.

CHAIR—Who is he and what organisation is he from?

Ms Delavec—He is an academic from Sydney University working for the Australian Centre for Industrial Relations Research and Training. I do not believe it was a commissioned report. That reference is in our paper. From memory, I think something more than 30 per cent of businesses admitted that cost reduction was one of their key motivators. I suggest that the number who did not admit it was far higher, from my experience.

Mr BRENDAN O'CONNOR—You have made reference to a form of labour hire system that could operate. Can you expand on that and explain why we need a system to regulate labour hire?

Ms Burrow—Labour hire companies are now some of the most significant or largest employers. I think in Australia Skilled Engineering is the largest, but globally Manpower is the largest employer in the world. When you consider that, you now have a regulatory system for company structures that is not replicated in ways that meet the responsibilities of labour hire companies, which are major businesses.

This is the case particularly when you look at the fact that there are no formal licensing requirements that actually go to the detail of responsibilities and therefore no agreements or no process for agreements to be set out about the responsibilities of both the company and the labour hire company, either independently or jointly. So a lot of things are simply falling through the cracks; they are nobody's responsibility. You then have a whole set of questions for the independent contractor or labour hire person, who once may have been a dependent employee, that go to the loss of entitlements. So, overall, we think that unless you start to think about labour hire companies in terms of the massive scale on which they operate and the licensing arrangements that are necessary then we are going to continue to see these problems escalate.

Mr BURKE—There was some discussion earlier today about collective agreements and AWAs that might have a clause in some way limiting the use of labour hire or setting caps on rates for labour hire. I am interested to know what level of protection that provides for existing employees. At one stage earlier today it was put to us that it is irrelevant to existing employees; it is a third party and is nothing to do with them. I am just interested in your take on that.

Ms Burrow—It is enormous protection. The ACTU does not deny that there is always going to be some scope in most industries, and in companies within those industries, for casual work. But casual work has traditionally been work that has been at peak cycle or over a holiday break, depending on the industry—seasonal work and the like. It has not been work that has been part of core employment contract arrangements. So those agreements with the employer go to the unions' respect, if you like, for the employer's circumstance. They say: 'We want a level of security for permanent full-time or part-time workers who are under your direct employment relationship, but we recognise that there are some elements of the nature of this company that would require some casual labour. However, we suggest it should be capped at X.' And that figure is struck by agreement. Those who oppose that can only be serious about cost-cutting or exploitation of workers. If it is an agreement between the company and the unions and it is based

on an understanding of and respect for the company's operations, we believe that to suggest that it is irrelevant is really to say that there is no fundamental rule of law now that respects, even in the context of an agreement, the protection of permanent workers, whether they be full-time or part-time.

Ms Delavec—I just point out that the full bench of the Australian Industrial Relations Commission does not agree with that proposition. There have been a series of cases, starting in October of last year, about what can and cannot be in certified agreements. To put it very briefly, matters can be in agreements only if they relate to the relationship between the employer and employee. You may have covered this. The clauses that cover labour hire and contracting, the means and the rates for which they are covered, were found to relate specifically to the relationship of the employer and its direct employees because they affect the job security of the direct employees. That decision was made only in the last month.

Ms Burrow—There are subsequent arrangements, too, which go to the dignity of the worker in that, even where there is a level of casualisation, there are agreements between unions and employers that the people who will be given a first chance at full-time or part-time employment on a permanent basis will be those who have been employed through the labour hire company on an ongoing basis. There are also agreements that go to the question of training for those casual workers so that they can do the job alongside, and there are clauses about nondiscrimination, as Nada indicated. So all of those bargaining pieces, whether the people are directly employed or not, go to looking after the rights of the casual workers who work alongside. As unions we take that role very seriously, and that is why it should be part of the bargaining process.

Mr BRENDAN O'CONNOR—I am aware of the principles in Europe which are very similar to those to which you refer. In fact, in Europe there are transfers of undertakings. You made reference to the transmission of business and said that people have been involved in that area. Obviously, it has been a complex area in Australian law. Can you see the benefit in Australia applying that basic principle of not being able to undercut? Is that something that could be regulated through legislation rather than through industrial instrument, for example?

Ms Burrow—It certainly could and, as you know, it is in Europe as a baseline in terms of the European directives. However, a lot of work is going on nationally and internationally through two areas. One is the corporate social responsibility area, and the other is conditionality through the World Bank and the like about supply chain relationships and responsibilities. It is no different here to other countries. If you have labour hire firms or corporate structures that are spun off that and effectively part of the supply chain, then what is the responsibility of the dominant or contracting business? There clearly have to be some responsibilities. So codes of practice, licensing arrangements, regulations and bargaining are all relevant, and of course where those principles are enshrined in law they provide a very strong base. Europe-wide, people absolutely understand what it takes to be able to manage both your current employment contract and your supply chain responsibilities.

Mr VASTA—Joint responsibility for occupational health and safety has been raised on a number of occasions today, and there was the WA example. Is there anything you would like to say in relation to Western Australia?

Ms Burrow—I do not have anything in particular to say about Western Australia. I think you have covered the area. But, as that example and many others show, you must have responsibility for training for occupational health and safety somewhere. If it falls through the cracks—if people are not trained and there is not an undertaking about requiring appropriate clothing and protection—

Mr VASTA—I think it was an ambiguity that they were talking about before, and there is clarity now.

CHAIR—You are referring to training. Our considerations include liability and responsibility.

Ms Burrow—Absolutely. I was going to go to that. However, if you do not have those basic things around training and making sure that the regulations regarding protective clothing and the like are absolutely adhered to by the letter of the law, then the question is: who is responsible? As you said, it goes to the ambiguity about whether it is the responsibility of the employer that is taking on a labour hire staff member or of the labour hire company. At the end of the day, we would say both. If there was a case, then it would have to be joint liability, and the only way you can sort those things out is by agreement between the labour hire company and the company in terms of who might do what—and those agreements should be binding.

CHAIR—We heard earlier from some of the labour hire organisations that it is in their best interests when they are signing agreements with client organisations that, if there are industrial agreements, they also should abide by them. There seems to be a ready acceptance of that. You make a recommendation that this should be regulated. Isn't that going to happen anyway through best practice, and those who do not do it will be weeded out?

Ms Delavec—I read a book which suggested that we did not need discrimination law because if you do not hire the person with the best skills your business will fail. I guess you can take that argument in respect of any regulation and suggest that the market will resolve it. That is a very noble and ambitious comment by that labour hire company, and I am pleased to see that they have such a positive view of the industry, but I am sure they would also agree that there are many labour hire companies that do not follow that practice. I know that is one of the concerns of the RCSA.

Ms Burrow—The labour hire companies themselves raise these issues with me all the time on the basis of unfair competition. You would be surprised that, despite all the talk about competition policy, employers that compete in the same market—as they have since we established things like the International Labour Organisation, the Bretton Woods show and the like—are concerned to know what the baseline competitive standard is. So if there is a rule of law—if there are things like awards, agreements, liability for occupational health and safety et cetera—how are they all made responsible? They ask me: 'How can you get the guy down the road to be responsible for such? We are, but they are not, and they undercut us.' It is really a marketplace discussion. It makes sense. Anybody who can afford to pay more or do more and who thinks they are going to get a competitive edge will do it but, if they are all convinced that there is a bottom line and unfair competition cannot undermine them, people live happily enough together.

CHAIR—One of your recommendations is that the government should ratify the ILO convention. Just for clarity, because I am a little confused here, is that convention already up? Is that different to what is being debated at the moment and is going to be presented at the ILO conference in 2006?

Ms Burrow—There are a range of conventions that underpin the general discussion on the employment contract that were developed at ILO 3, the ILO discussion in, I think, 2004. It was the ILO discussion on contracting employment. Some of those conventions, including the convention that I should know—I think it is No. 181, on licensing—

Ms Delavec—Yes, that is right.

Mr BRENDAN O'CONNOR—It was a bit much to ask about the number, but you got it anyway.

Ms Burrow—It was a good guess, I have to admit. We would like to see that convention on licensing ratified and in fact respected, because we think that will go a long way towards solving many of the issues that are before us today. The world changed rapidly on everybody—on unions, on employers—in terms of the labour market, and I do not think anybody foresaw this a decade ago. So that would go to at least establishing a legal base; that would help.

CHAIR—ACCI referred to an ILO convention, No. 96, the Fee-charging Employment Agencies Convention. Is that different to the one that you are referring to?

Ms Burrow—That is a different one, but it is relevant and, again, it is part of that mix of conventions that underpin the employment contract.

Mr BRENDAN O'CONNOR—I have a final question. You—that is, the ACTU—have been talking, over the last few weeks and in fact months, about the skill shortages issue in Australia. I know you have had to raise that concern again publicly. Will skill shortages be compounded by the increase in precarious employment?

Ms Burrow—All the statistics show that—whether it is casual labour or whether it is the fact that people who would normally have got skills from being dependent employers are now dependent contractors but independent by any other definition in our current world. Frankly, they often do not have the resources to invest, not even in maintaining licensing arrangements—which is bad enough—and certainly not in upskilling.

I will not give you a treatise on this, but we, the employers and the ACTU, reaffirmed this morning that you have to separate the issues. You have to separate the issues for entry-level workers from those for existing workers. For entry-level workers, the big question in our minds is completion rates and adequate numbers of places, of course, but for existing workers it goes to all these questions: what is a proper recognition of prior learning and current skills; and who takes responsibility for the training support to upgrade those skills so that existing workers can start plugging the gaps in terms of the skills deficit? It is a huge and complex area, but we know precarious employment is just driving it to the edge in terms of the collapse of our skills base, and it is not going to serve any of us well, really.

CHAIR—I would like an observation from you, Sharan. Hypothetically, if we were to adopt all your recommendations or the recommendations of others who are arguing for greater legislative regulation, are we likely to see even further offshore outsourcing of labour? I know it is a concern of a lot of people that labour is going offshore. Is it likely to happen even more; is there going to be an increase in the prevalence of that?

Ms Burrow—I do not believe so. This is a complex area; we are not suggesting for a minute that we have all the answers. But again, if you have a base of the rule of law and there is certainty, then employers in Australia respond and are able to adapt to it, particularly if it is harmonised across the country. I know many of them would welcome a degree of certainty that just is not there at the moment for the labour hire industry and indeed for employers who are dependent on labour hire workers. They themselves often do not know what their responsibilities are.

So I think you could do us all a service with recommendations that do not simply add layers to the regulatory burden but basically bring it back into line. What we have seen is regulation that has continued in one area and a deregulatory environment that is actually putting both that area and new emerging areas, like skills, at risk. So to bring certainty back into it, to harmonise it across the employment contract arrangements generally and to look at how we go forward in terms of some degree of simplification across Australia—by agreement, I might add, with the states, rather than imposition—would be a very good thing.

CHAIR—Thank you very much for your time. Thank you for your presentation and your submission.

Ms Burrow—Good luck. It is not an easy area.

[4.06 p.m.]

FARY, Mr Geoff, Executive Director, Industrial Relations, Association of Professional Engineers, Scientists and Managers, Australia

RICKARD, Ms Kim, National Information Officer, Association of Professional Engineers, Scientists and Managers, Australia

CHAIR—Do you have any comments to make on the capacity in which you appear?

Ms Rickard—I am Executive Officer of Connect, which is a special interest group within APESMA for independent contractors and consultants.

CHAIR—Although the committee does not require you to give evidence under oath, I should advise you that these hearings are formal proceedings of the parliament. Consequently, they warrant the same respect as proceedings of the House itself. It is customary to remind witnesses that giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. We prefer to hear evidence in public, but if you have issues you would like to raise in private then please ask to do so and we will consider your request. Would you like to make a brief opening statement or speak to your submission? I apologise for this, but, being at the tail end of the day, we have started running out of time. So if you make it brief then we can get into some questions, which is when all the great interest takes place.

Mr Fary—I am conscious of the constraints on your time, and I will try and keep my introductory remarks as brief as I possibly can. Let me say at the outset that we very much appreciate the opportunity to appear before the committee and to share our views with you. To put things in context it might assist if I give you a very brief snapshot of my background. I am relatively new to the APESMA organisation. I have been with it for a little over a year, but I have spent about 30 years in human resource management and employee relations generally, working with both employee organisations, such as APESMA, and industry. I was the director and a board member of a very large publicly listed company in the fast-moving consumer goods industry, and I have worked with a transnational company—in fact, Nestle, the largest food company in the world. Also, I have had stints working with government. Hopefully a bit of that experience has rubbed off and I am able to see things from one or two different perspectives.

Can I also briefly comment on what APESMA is. If you do not mind, I will use our acronym rather than spell out the mouthful, in the interests of time. We are an organisation which has a 50-year history. We are a registered employee association under the Workplace Relations Act. We have in excess of 25,000 members. We cover a range of professions, including engineers, scientists, veterinarians, surveyors, architects, pharmacists, people who work in the IT profession, managers and people who work in the transport industry. I would also like to emphasise that APESMA, in our view at least, has a very well-deserved reputation for being a progressive, forward-thinking and engaged employee association. We are indeed the only association that represents and services exclusively both the industrial and professional interests of that group of professions that I outlined before.

Our association also recognises that the employment landscape in Australia and beyond is changing—and changing rapidly—and that methods of engaging employees are changing. We are not opposed to the use of contractors and we are not opposed to legislation codifying the rights and status of contractors. Indeed, as my colleague Kim Rickard will point out, a goodly percentage of our membership are in fact contractors. The organisation is passionate about the future of the professions that we represent. As part of that passion, we recognise the fundamental need for a flexible and outwardly focused approach to encourage a competitive Australian economy.

I would make one observation, if I may: reading through the various papers that have been presented in preparation for this appearance today, I noticed that there seems to be an assumption underpinning many of those papers that, over the last couple of decades, the tribunals and courts have increasingly been adopting an interventionist approach, seeking to constrain the growth of contractors and other types of employment relationships. I would put it to the committee that that is perhaps putting the cart before the horse. We believe there is a fair bit of evidence to suggest that the tribunals and the courts have in fact been responding to approaches that have been made to them by organisations and individuals who have been concerned that, in some areas, there has been a growth of contracting under the guise of people seeking to avoid their legitimate employment obligations and responsibilities.

We do not think that one has been the cause of the other. In fact, we think in many cases it is the other way around. We are concerned—and I think this flavour is in our submission—that a less than careful loosening of codification could open the possibility of exploitation by some unscrupulous people seeking to avoid their employment obligations by way of contrivances which are designed to place bona fide employees outside a regulatory framework.

I came in on the tail end of your conversation with the ACTU and I noticed that you were talking about skills shortages. That is also a concern that we have, but ours is particularly about a looming shortage of professionals. There has been a lot of publicity—and well-deserved publicity—about shortages in trade skills, but also emerging are massive shortages of professionals, such that we are concerned about the future of some of the industries that we operate in.

I would say that the members of our organisation, by their nature, their disposition and their location in the workplace, are not able to rely upon industrial leverage to pursue their objectives. They rely very much on the regulatory framework. Putting that another way, I think most people would recognise that you do not find members of APESMA being the high kickers on the picket line. It would be a very rare thing.

We are concerned that over the last 15 years or so there has been a marked erosion of the remuneration relativities of the professions that we represent vis-a-vis the work force as a whole. In some cases that is in excess of 30 per cent. We would make the observation that that erosion has coincided with the dilution in the role of the Industrial Relations Commission. We are also concerned—and Kim may well pick up this point—that there is a fair body of evidence suggesting that people who work as contractors or self-employed people do not, for a variety of reasons, get access to the same level of ongoing training and professional development as people who are in more orthodox employment relationships.

I must say, Chair, we are a little confused. There are the processes of this committee, but we have also noticed that the department has released a discussion paper in response to the minister foreshadowing legislation. To our observation there appears to be a bit of a disconnect in the timing of those. I think your committee is due to report after the legislation has been introduced. Is that not correct?

CHAIR—No.

Mr Fary—I am relieved to hear that, because we were a bit concerned about the timing of those two events. I would make the observation that we have been through the department's discussion paper. I do not propose to respond item by item to each of the recommendations that are there, unless members of the committee are particularly interested, and then we would be happy to do so. But we have had a look through the discussion paper, and our comments here capture our observations on that discussion paper.

I conclude my opening remarks by re-emphasising that our association, APESMA, is committed to there being an appropriate balance struck between, on the one hand, the need to facilitate the reasonable activities and operations of contractors in their various modes and their legitimate activities and, on the other hand, the need for industrial regulation tribunals and courts to be able to make decisions about what in some cases are disguised employment relationships. Having said that, I would like to briefly hand over to Kim Rickard to talk particularly about a specialist interest group within our association called Connect.

Ms Rickard—As everyone here is aware and as Geoff has mentioned, a key aspect of change in the employment landscape over the last two decades has been the increasing proportion of those working in non-standard work arrangements. In terms of occupational distribution, professionals are the second largest group of all self-employed contractors, at 18.3 per cent. This group of professionals is diverse in terms of business size, the type of business engaged in, the industry sector in which they operate, the products and services produced, the processes and level of technology used, the specific community and business environment in which they are located and whether they operate in the private or public sector. An increasing proportion of APESMA's membership, currently around 10 per cent, is engaged as contractors or consultants. We expect this proportion to grow significantly over the coming years, particularly in the IT, architecture and consulting engineering sectors of the economy.

The rising incidence of professionals operating as self-employed contractors was reflected in the growth in membership of a special interest group for independent contractors, established in 2001 within APESMA, called Connect. That is the area that I look after. The membership of Connect has risen in the last four years by more than 120 per cent. We now have well over 3,000 independent contractors registered as members. Servicing this segment of the membership has become one of the association's strategic priorities. If it is okay, I will just briefly run through the services that we provide through Connect.

CHAIR—So Connect is a special interest group within APESMA?

Ms Rickard—That is right. To be a member of Connect, you need to be a current financial member of APESMA. That is not to say that people do not join APESMA to access Connect services. Connect offers a range of services to contractors consisting of information and referrals

to assist these people with managing, most often managing the transition from employee to independent contractor. These services include advice on business start-up and business structures, including a guide to getting started in business, which is this document here. I can leave that with the committee or get a copy to the committee. Also included are a guide to writing contracts for service and a standard terms of engagement document; a range of pro forma documents, including a business plan, an intellectual property agreement, a confidentiality agreement and a standard partnership agreement; advice on the PSI issue or the contractor tax; advice on what to charge in the form of contractor hourly rates for professional engineers, chemists and IT professionals; and information on compiling tenders and winning bids. Services also include an online business evaluation tool called Business Diagnostics; guidance on forming strategic alliances, very often between members; information on e-business; and information on business risk management and quality certification, which is of course very important in the current professional indemnity and public liability environment when insurers are assessing a business for appropriate risk management. There is also a quarterly e-newsletter; a professional development scholarship program; an annual awards program to recognise achievement and excellence of a professional consultant, which is called the Successful Starter Award program; an online networking facility called Nexus; competitive professional indemnity and public liability insurance through APESMA Insurance and Superannuation Services; referral to discounted accounting services; and an online business mentoring program. Unless you want to add something to that list, we are happy to take questions from the committee.

CHAIR—To be honest, I am a little confused about the relevance of the special interest group Connect.

Ms Rickard—The bulk of these people operate as independent contractors; they are self-employed contractors. We assist them in managing the transition from employee to independent contractor or starting up their own business.

Mr Fary—What we are saying is that at least 3,000 of our 25,000 or so members are employed as independent contractors of one form or another.

CHAIR—It is good that you are offering service.

Mr Fary—It is also in recognition of the growth of that part of our membership.

Ms Rickard—It is responding to a need.

CHAIR—We often hear that the more skilled or specialised your occupation the greater the power you have in any bargaining arrangement. At face value, one would expect that a lot of your members would be in that position, but are you saying to me, Geoff, that that has not been the case and your members have suffered in terms of a drop in wages and conditions over a number of years compared to the general population?

Mr Fary—That is correct in terms of the formal award rates that apply. We do extensive surveys of market rate salaries. That erosion is evident in market rates but not to the same extent as it is evident in award rates.

CHAIR—I would have thought that a lot of your members would be working under market rates rather than award rates.

Mr Fary—That is correct. Subject to correction of the exact figure, I think approximately 30 per cent of our 25,000 members are solely dependent upon the award. The rest are either contractors, as Kim has mentioned, or are on some arrangement over and above that prescribed in the award.

CHAIR—Are there any particular agencies, organisations—one does not know what to call them these days; we get different definitions from a whole lot of different organisations—or labour hire companies or on-hire companies which specialise in your members?

Mr Fary—Yes. Indeed, APESMA owns ETM Placements Pty Ltd which specialises in placements, including labour hire, in the footprint of the professions that we represent.

CHAIR—Do ETM's engineers go across the board—IT, electrical?

Mr Fary—In truth, our organisation is predominantly engineers—70 per cent of our membership are engineers and the others that I mentioned make up the remainder. The focus of ETM, which is still a relatively new organisation, has been in engineering, which is the majority profession we represent.

Ms Rickard—That is also reflected in Connect's membership—78 per cent of our members are engineers, 10 per cent are scientists and the rest comprises the professional groups that Geoff has mentioned.

CHAIR—One of the reasons you have cited for the erosion of the conditions is the dissolution of the role of the IRC. In what regard has the IRC's role changed over the years, as far as your members are concerned?

Mr Fary—The ability of the commission to adjust award rates outside the market rate has been restricted by successive legislation from as long ago as 1992. So the commission's power is very limited indeed to adjust an award rate based on what the surrounding market rate might be in comparison with other awards.

CHAIR—Why don't they simply enter into particular agreements for their scarce labour?

Mr Fary—Why doesn't the association enter into agreements?

CHAIR—No, your members. Don't they have the power to negotiate their own market rates?

Mr Fary—In certain instances they do; in other instances they do not. Where there are larger concentrations of our members and where they work for bigger organisations, quite often collective arrangements are in place. For those of our members who work for small employers or are more isolated, that is not the case. They are reliant upon other forms of determination of their remuneration and conditions of employment, which in many cases is the underpinning award.

Ms Rickard—We conduct market rate surveys for engineers, chemists, scientists and pharmacists and we equip our members with that market rates information so that they can take that to salary reviews.

CHAIR—I am surprised by this because a few weeks ago, just before parliament rose, a lot of academics from universities—scientists—came into Parliament House to meet with members of parliament and talk about the needs of the Australian scientific community. Overwhelmingly, the message that came through was that there was a scarcity of people in those occupations. I would have thought with that would come certain market power, and that does not come through from the evidence that you are giving.

Mr Fary—No. It is very mixed. I would not be foolish enough to say that across the board in every instance people do not have that market power. For instance, project engineers in the mining industry are, in the vernacular, as scarce as hen's teeth at the moment, and the anecdotal evidence that we have is that when a project engineer leaves employment in the mining industry quite often the employer concerned will have to set a rate which is 20 or 25 per cent higher than what the incumbent was on in order to attract a replacement. We are aware of anecdotal evidence in that industry of very frequent adjustments of packages in order to retain people.

One of our concerns is that people are not being attracted to the professions in the first place. There are a variety of reasons for that—people are not doing maths and science disciplines in secondary schools and some universities have limited or even closed down their engineering faculties due to a lack of demand. It would be our submission that, amongst other things, one of the reasons for that is the relatively low level of remuneration that these young people get after they graduate as engineers compared to what they could get in other callings.

Mr BRENDAN O'CONNOR—I refer you to the body that sits within APESMA, Connect. You mentioned that 3,000 or so of your members out of 25,000 make up this subset of the association. Are they largely former employees that were members of the APESMA who have found themselves having to convert to being an independent contractor, either by going to a new job, by coercion or by a genuine agreement? Is a large part of that 3,000 former employees who are working in the same place as independent contractors?

Ms Rickard—Yes. Our experience has been that, after the downsizing in the nineties, a lot of these people moved from large enterprises where they learnt their specialists skills.

Mr BRENDAN O'CONNOR—Or they were retrenched.

Ms Rickard—They were retrenched because of downsizing. One of our concerns is that the pool of people who will be available with specialist skills will decline in the coming years because there is not the right level of training and professional development going on currently and the size of government departments has been reduced. In answer to your question—yes, our experience has been that Connect is largely made up of people moving from employee status to independent contractor status via downsizing.

Mr BRENDAN O'CONNOR—How do those members bargain for and negotiate their contracts?

Ms Rickard—How do they put together their contracts for service or how do they obtain their clients?

Mr BRENDAN O'CONNOR—If they have a contract or contracts, what role would you play in that?

Ms Rickard—Basically a minimal role. We provide them with a pro forma contract for service and we advise them in relation to issues such as PSI, ABNs and that kind of thing. They could bring their contracts to us for our legal people to check over, but we would not actually write the contract for service for them.

Mr Fary—We provide them with market rate survey data.

Mr BRENDAN O'CONNOR—So they are aware of the benchmarks when they are looking to reach agreement.

Ms Rickard—That is part of the market rate survey I talked about earlier. That is carried out for employees and for independent contractors.

Mr BRENDAN O'CONNOR—In your submission you have recommended that government support the establishment of a tripartite inquiry into the likely impact of labour market deregulation and contracting on projected skills shortages. Can you elaborate on why you believe there is a need for such an inquiry and why you have called upon it in your submission?

Mr Fary—In addition to what we have already said, we believe that there is evidence not only of an existing shortage of skilled professionals but that that shortage is likely to be exacerbated in the future. Here is a graph that shows an age demographic of the membership of our organisation. We believe that that is reflective of the demographics of the professions we represent as a whole. You will see that there is a bulge for people in their late 40s going through to their middle 50s. We are looking potentially at a mass exodus of those people from the professions as they qualify for retirement over the next five years or so.

CHAIR—How would that differ from other occupations, with the ageing of the population?

Mr Fary—I am not going to try to wing that and say I have a comparison; I do not. Certainly, from our data there is a preponderance of people, and I think it is disproportionate to the population age distribution, in the ageing baby boomer category—such as me. They are approaching that time in their lives when they will spend time smelling the roses.

Ms Rickard—To come back to my point, the median age of a Connect member is 49. You are getting that bulge in that particular age group because of the downsizing in the 1990s. Whether people are employees or contractors there will be that decline in the availability of specialist skills through professionals.

Mr Fary—The other thing that is happening simultaneously—it is almost a pincer movement—is that the membership ranks of our organisation are being trawled by international organisations who are offering people who have reached preservation age with their superannuation fund here the opportunities of postings in Europe and North America for

remuneration packages which are substantially in excess of what they are earning here. If you are an engineer with the empty nest syndrome—the kids have grown up and moved away—you have reached preservation age and you have the possibility of working in England for a couple of years on a package of £100,000 per year plus your fares there and back, it is a fairly attractive proposition. That is occurring at a time when the demand for the professions that we represent is about to balloon as a result of infrastructure redevelopment projects and the like.

In response to your question, Mr O'Connor, the whole raft of proposals which are before government at the moment for changes to workplace relations laws promise, if the publicity is to be believed, to bring about pretty fundamental and substantial changes to the regulatory environment we have operated in for the last eight or nine decades. The reason we have made the call we have for an inquiry is that we believe those changes are so far reaching and the potential of them is so great that it is in the interests of our economy that there is a far-reaching inquiry involving all of the stakeholders concerned before we perhaps make changes, the consequences of which we are not certain five or 10 years down the track.

CHAIR—We do not know what all the pending labour deregulation legislation is at this stage, particularly as it relates to the issues before this committee, but I am sure we will find out.

Mr Fary—Maybe then you might be able to tell us. We are waiting with bated breath.

CHAIR—Fantastic. Thank you very much for your submission and for coming in today. We appreciate it.

[4.36 p.m.]

PHILLIPS, Mr Ken, Executive Director, Independent Contractors of Australia

MacRAE, Mrs Angela, Board Member, Independent Contractors of Australia

CHAIR—Welcome. Do you have any comments to make on the capacity in which you appear?

Mrs MacRae—I am an independent contractor myself as well as being a board member of ICA.

Mr Phillips—I am an independent contractor, and one of my clients is ICA and I am their executive director.

CHAIR—Thank you. While the committee does not require you to give evidence under oath, I should advise you that these hearings are formal proceedings of the parliament. Consequently they warrant the same respect as proceedings of the House itself. I remind you that the giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The committee does prefer to hear evidence in public but if you have issues that you would like to raise in private we will consider your request. Your submission is before us. Would you like to make a statement in relation to the submission and any other introductory remarks?

Mrs MacRae—You have the submission there. We have assumed that, for the purposes of today, you are familiar with the contents. We were not going to say too much directly about the submission itself.

CHAIR—You have the opportunity to address issues in relation to your submission—to reinforce points, to elaborate on points. You can do that right now.

Mrs MacRae—Certainly. We have a video that you will be able to view later, which looks at independent contractors themselves. We are a peak body for independent contractors but we have a very large variety in our membership. While we would like to speak for them all today, we know there is a large diversity in our membership. One of the things I wanted to do today was give you a bit of background about why I have chosen to contract. One of the things we are very much aware of in the organisation is that contractors often come under fire. The reason I got involved in ICA is that I am independent contractor now, after having 15 years as an employee. I am very passionate about contracting and the positives that it has given me in my life. I must say it has been extremely positive. My life now is very different from how it operated when I was an employee. I think the committee, from what we have heard already and, I understand, from earlier proceedings today, have heard a lot of negatives about contracting. I am here to talk to some of those positives.

CHAIR—It has not all been negative. There have been some good stuff as well.

Mrs MacRae—Sure. We have only seen a small part of it. I really just wanted to say that, for me, being a contractor is a really positive thing. The first thing is that I am my own boss. I tried extremely hard while I was an employee for 15 years to have some control over my market rates. But it was not the pay that was so much the issue; it was always the other issues that went with that—the working hours, the pressure, the stress and all those things that we read about regularly in the press. In the end I decided that I wanted to work completely on my own terms. How was I going to do that? I thought: I will become a contractor. So in 1999 that is what I did. I have worked that way since that time. I must say I have never been happier.

I have a little 18-month-old daughter, and I have the flexibility to work around my family commitments. I still do work that I love to do, but I now put it second to my family and probably will for a few years. I cannot see how that could possibly have worked under an employment relationship. I have the flexibility that is just not available in any other means of working. Contracting really suits me. The more I look at the society around me, the more I think that one of the reasons contracting has become so much more the norm in the way people work is that flexibility is important to people for all sorts of reasons as well as family. They are the sorts of things we read about a lot in the press. Working from home is another thing I am able to do, and that suits me really well. There are some real pluses of that generally for the economy as well. My costs for doing business now are dramatically cut. I worked for the public sector for many years and then I worked for the private sector as well, and my costs for working from home are a lot lower than they were in either of those places of employment.

The other important thing from my point of view—and I think this is increasingly important for women in society—is that going onto contract work while I have a small child allows me to keep in contact with the work force and the world of work. That is increasingly an issue for women, especially those like me who, as you can probably tell from my greying hair, are having their children later in life. Keeping that contact with the world of work is really important and contracting has allowed me to do that. It has basically allowed me to do that in the ways that I choose to, as well. The people here earlier were talking about the fact that people do not keep up their intellectual capacities and professional development. I can say that at least in my personal experience that has not been the case. Because I have been able to specialise in those areas that I am really interested in and pick and choose the work that I want to do, I am quite happy to pay for my own professional development to make sure that I am keeping up with the pace in those areas where I need to. In some ways that has made me slightly more specialised but it also means that those skills have been honed.

The other issue we have talked about today is the population bulge as people reach the traditional retirement age. Contracting is a natural way for some people to move to part-time work as they age or even just to stay in full-time work. Where traditional employment often seems to shun that sort of person, I think it is a great opportunity for people, particularly in the professions, to move into that sort of work. So increasingly as the population ages I think contracting will become positive as well. I want to make the point here that the downside for contractors is that it can be difficult to know what to charge, how to promote yourself and all those things. To the extent that we can we help our members, and APESMA and others do those sorts of things, so that is a positive. There is no regular pay cheque, so there is that uncertainty. But, again, I think that is a good thing for the market economy.

Regulators are often not aware of the impacts that they impose on contractors. I worked in the tax area for many years and I still work in the tax field, and I know it is very easy to impose what looks like a great policy idea onto thousands or millions of people out there who then have to do the work to implement that policy. From my point of view, I think that to promote contracting and make it a more positive option for more of society we need to try to keep regulation to a minimum. When we make policy changes, rather than just thinking up something that looks like a good government policy at the high level, we need to ask what that actually means in terms of desk work and red tape. What do the forms that people actually have to fill in look like and how hard is that going to be? I was very much involved in the BAS from the outside, rather than the inside, of the public sector. The frustrations with that form, the complications and trying to explain how hard it is for a person who might be working from home on their own to fill in a form like that—those are the sorts of issues that will ultimately make contracting relatively more or less attractive for quite a group in society. Those regulations can be enough to make it unattractive for people to move to contracting, even when it is in their own interests.

To sum up, in terms of what this committee is looking at I think contractors are very important for the economy as a whole. They can be income and work generators, especially for women—both women in my position and women more generally. I think it is the best way to get a work/life balance that works, and that is one of those issues that keep coming up. Contracting gives you much more flexibility in the way that you can make that work. While you can try to specify those things in awards, they obviously vary so much from individual to individual that it is hard to specify them in a way that is going to suit everyone.

It gives you the opportunity to keep up your skills by contracting. I know myself from contracting that you keep quite a strong sense of community and that your network is very important to you. You keep all your contacts because they are all potential sources of future work. I think all of that helps build a cohesiveness within our society. These days there is a lot of talk about that being broken down and people not talking to each other so much. People say that the human touch, the friendliness, has gone out of the workplace. I think in contracting you get a lot of that. There is a lot of informal stuff that goes on. Some questions were raised earlier about how to set up a contract and what sort of negotiations you enter into. Again speaking from personal experience, a lot of my contracting comes from people that I know through my work, but sometimes it is through work private contacts. There is a lot of informal negotiation that goes on. All of that is a very positive thing, I think. You build up good faith and business relationships that can be very positive over time. Ken, do you want to add anything to that?

Mr Phillips—No.

Mr BURKE—I notice that you have three aims as an organisation and that one of them is to lobby on behalf of independent contractors. What sort of formal roles, positions or advisory roles in different government committees, advisory committees or things like that does your organisation hold?

Mr Phillips—We are on one—a home based business tax committee—but other than that, none.

Mr BURKE—On page 15 of your submission you say that the protections for independent contractors are appropriately made available through the Trade Practices Act. I wondered what your reaction was to the current policy that independent contractors should not be able to choose to have a trade union represent them in collective bargaining under the Trade Practices Act.

Mr Phillips—People should have an entitlement to have their grandmother represent them in negotiations. This is a policy area that we have not paid any attention to. Free choice is the issue here.

Mr BURKE—As a peak body representing a wide variety of members, what is your membership?

Mr Phillips—We have not set as our target being an organisation with a large membership. We have several thousand on our email database which people subscribe to. On our subscription base we have several hundred. Because we look across the industry sectors and across the generic issues, our view is that if someone is saying, 'I want to be serviced by an organisation,' we say, 'Go to the organisation that represents you and your industry,' because people will relate in their work to the specific field of work that they are in, so we may refer them to APESMA, one of the IT associations or whatever it is. So for the $50 a year it costs to subscribe to us you are subscribing to an information service. So it is fairly limited and we have not been set up to have a massive membership base. We do not pretend to be.

Mr BURKE—If there is a board, there must be some membership base that elects that board—or is it a shareholder base?

Mr Phillips—We are established under the South Australian corporations act and so we operate under those rules in terms of membership, votes for committee members and that sort of thing.

Mr BURKE—What is your membership?

Mr Phillips—In the hundreds.

Mrs MacRae—What we are really looking to do is to pick up those issues that are common to contractors across all industry sectors. So we are different from APESMA and the IT groups. There are those issues which are much broader and we find that it is helpful if in picking those issues up—

Mr BRENDAN O'CONNOR—APESMA has a thousand-odd members.

Mrs MacRae—We look at picking up issues across all the sectors.

Mr BRENDAN O'CONNOR—I have a question to ask Mrs MacRae. Clearly you are very happy with the shift from employee to independent contractor. What form of work have you undertaken since you have been a contractor?

Mrs MacRae—I basically do three different types of jobs. One of them is doing tax based work, as I used to do as an employee—I did that as a public servant and then worked for a

number of organisations. Basically I do contract work looking at tax policy issues for anyone who is interested in the sort of thing that I am prepared to do. So I work with all sorts of different people. The ICA is an organisation that I do some work for. I also do contract work with the Office of Small Business, for example.

Mr BRENDAN O'CONNOR—Would it be fair to say that you worked in a capacity to advise people with their tax?

Mrs MacRae—No, it was more policy. I do written materials—education and information for accountants and lawyers.

Mr BRENDAN O'CONNOR—For the last 15 years, most of your work has been working with the ICA. Is that right?

Mrs MacRae—No. For the first 15 years I was an employee—

Mr BRENDAN O'CONNOR—No, after you were an employee. I thought you said you had been a contractor for some time now.

Mrs MacRae—For about six years.

Mr BRENDAN O'CONNOR—My apologies.

Mrs MacRae—ICA has only been going for about two years.

Mr Phillips—From about 2000 or 2001.

Mr BRENDAN O'CONNOR—I will explain why I am raising this. I am not trying to intrude into your life but obviously you are a witness in a significant hearing. We have heard evidence about how, clearly, people are very happy with the way they operate, and clearly you are. We are trying to work out whether there is a delineation between the type of function that is performed where people are adequately able to undertake their functions as a contractor and others where people have difficulties. I am trying to get to what type of work or level of work that you undertake. You said that you specialised, and I am trying to work out in what area.

Mrs MacRae—For example, since I have been doing my own contract work, I tend to look at specific GST matters. I do a mixture. I do some very broad tax work, which does not require me to get into any real level of detail. But if it is anything that they want specifics on, I will do GST, because I know the specifics and I have kept up to date with that.

Mr BRENDAN O'CONNOR—So you are providing advice to small businesses who are having to deal with BAS?

Mrs MacRae—More often, I am providing advice to the advisers. So I will write materials for accountants and lawyers, for example. I will provide a tax update to a firm of accountants who then will disburse it. They have a membership of accountants, and they will disburse that to a range of accountants. But, just to be clear, I also do two other very different kinds of work. One is secretarial services for my sister. I do that basically because it suits me, because we can

arrange that I will do some work with her and then she will spend time helping me with my young child. That is an entirely different kind of work that I would not have undertaken in any other situation. I also have a very strong interest in sports, so I got into personal training, fitness training and stuff. I do that very part-time as well. That is something I have got into.

Mr BRENDAN O'CONNOR—At home?

Mrs MacRae—I instruct at venues outside of my home. So I do some relatively unprofessional sorts of work and I do some very professional kinds of work.

Mr BRENDAN O'CONNOR—So you are qualified to provide advice to accountants for accountants to provide advice.

Mrs MacRae—Yes.

Mr BRENDAN O'CONNOR—Does that mean that you are an accountant, a qualified accountant?

Mrs MacRae—I am an FCPA, a Fellow of the Australian Society of Certified Practising Accountants.

Mr BRENDAN O'CONNOR—That is what I was really trying to get to.

Mrs MacRae—Basically, I have an economics degree. Sorry that took so long to get round to. I am not sure I was quite following where you were going.

Mr BRENDAN O'CONNOR—You suggested that it is only because you are an independent contractor that you have this flexibility. Are you not aware of employees who work from home and, on occasions, take leave for up to 12 months for parental care and that sort of thing? Are you not aware of these sorts of flexibilities?

Mrs MacRae—I am very much aware of them, but when I was working for employers in the private sector, and in the public sector as well—and this was probably because I was in departments like the Treasury—I would do my standard powers but it was then expected that I would be there an extra few hours every night. When the budget is on you have to be there. With proofreading before the budget comes out, those couple of months are frenzied. If you are trying to fit things around the fact that your daughter is not very well and needs to be taken to the doctor or whatever—those things are very hard to do as an employee.

Mr BRENDAN O'CONNOR—So you think employees should have more flexibility to undertake family responsibilities.

Mrs MacRae—It is not just family responsibilities. As I say, I have had opportunities to get into other things as well. I think it is very hard to have one size fits all because everyone's needs are so different.

Mr BRENDAN O'CONNOR—You cited the advantage of being a contractor. Would you support the view that employees should have the capacity to balance their family and work in a fair manner as well?

Mrs MacRae—Ultimately they should, but there are trade-offs for that. It was mentioned previously that people's hourly rates seem to go down when they become contractors. But sometimes there is a trade-off for that. My hourly rate probably is not as much as it used to be, but the trade-off for that is that I have a lot more flexibility about how I do my work and when I do my work. That is one of those things. If the person who wants the work done is not prepared to give me that flexibility, I do not take that contract. I go somewhere else.

Mr BRENDAN O'CONNOR—Does most of your income at the moment come from ICA?

Mrs MacRae—Definitely not.

Mr BRENDAN O'CONNOR—Most of your income is coming from small businesses. Are they members or subscribers of ICA?

Mrs MacRae—No. I would say that less than five per cent of my income would come from the ICA at the moment.

Mr Phillips—You were alluding to the issue—and I heard it being raised before—of the level in the work force that independent contractors can apply. I spent eight years—in another life, as one of the many jobs that I have had—running a jobs placement program for the Cambodian community in Victoria. It was run out of the rear of a monk's house in Springvale. I specialised in the refugee community. There was a significant proportion of women and people who did not have an education beyond the very rudimentary—maybe grade 2, if they were lucky. There was an exceedingly high percentage of people without any English at all and certainly no written English. They were often illiterate and most often illiterate in their own language. It was very much the profile of the refugee. During that eight-year period we were responsible for putting well in excess of a thousand people into jobs. We found that one of the big things we used was accessing people through independent contractor arrangements. This gave people toeholds into work and a start into ongoing work. A number of the people that I am still involved with started their own businesses as a result of those sorts of arrangements. So it gave these very important starting points.

Being university educated and from a private school myself, I discovered that it was very humbling to realise that here were people who were refugees, low paid and allegedly uneducated, who were absolutely as sophisticated as I was in negotiating their own arrangements. I have always felt that the accusation that people at the alleged lower end of the job market do not have the skills or the sophistication to negotiate their own arrangements is, frankly, a huge insult to those people. These people go out and buy homes and cars and negotiate their way through life as well as the rest of us and they become upwardly mobile. I do not think we should be making assumptions about their capacity to negotiate contracts and look after themselves that differentiate between a cleaner and a high professional person. To tell the truth, that notion smacks of class consciousness which is just alien to our society now.

Mr BRENDAN O'CONNOR—You would not suggest that there are people who have got less capacity to bargain based on, say, not having particular high-level skills or not having the capacity because they do not have—as you have conceded—literacy in their own language or in English? Are you saying they would not be less capable of negotiating a contract genuinely and fairly than someone who may be a professional?

Mr Phillips—I have met people who have been in highly professional positions who have displayed complete incapacity to negotiate their own contracts. They are bereft of the capacity to do it. And I have met people in the refugee Cambodian community who should be put in charge of these professionals for the negotiation of their contracts. My view is that we should not be making those general assumptions. The capacity to negotiate a contract relates more to business sense than anything else. There is a key issue in terms of contract negotiations and in the idea of unconscionable contracts and so forth which we have embedded into, for example, second-hand car purchase, where a contract must be able to be understood. A contract is not a bona fide contract if the parties have not understood the terms of contract. So those protections—

Mr BRENDAN O'CONNOR—In reality, there is a thing called an 'offer', a thing called an 'acceptance' and a thing called 'consideration'. There are three terms of a contract that need to be done before you can have a genuine contract, and I guess that is where it has come from—English common law. You need to actually know what you are talking about. You need to understand what you are agreeing to. That is why they say that you actually need to know what the contract says before you enter into it genuinely. That is, I guess, where it has come from. That I think explains why they say you need to know your contracts.

Mr Phillips—My point is that the assumption of contracting being dependent upon the class of work that you have is not a valid assumption.

CHAIR—Unfortunately we are running out of time, but I do have one question for you. At page 15 you say that independent contractors should be regulated and offered protection through the Trade Practices Act. What type of protection are you referring to?

Mr Phillips—We are talking there about protection from unconscionable contract—the sorts of things that Mr O'Connor was referring to—and the fact that if someone is entering a contract there should be a demonstration that they have understood the terms of the contract. If there was undue force imposed upon someone to enter a contract that should be illegal. These sorts of protections are sitting there within the common law and within the fair trading acts, and they should be there.

CHAIR—If they are sitting there in common law, why should we introduce regulation codifying them?

Mr Phillips—That is our very point.

CHAIR—Why?

Mr Phillips—The very point is: why? Why introduce further regulation? These people, like me, are—

CHAIR—You are saying that we should have protection.

Mr Phillips—That is what I call protection. It is a matter of how you define the word 'protection'. There are enormous protections built into the Trade Practices Act, the fair trading acts and the common law. We should be looking to those to make sure that they are applied adequately and properly.

CHAIR—If they are already in the TPA then we do not need to offer any further protection.

Mr Phillips—There is a need to maybe review them, and have a look at them, to see if they are working effectively.

CHAIR—Thank you very much for your submission. We appreciate your time; thank you.

[5.02 p.m.]

BOSA, Mr Peter, Chairman, Labour Force Australia Pty Ltd

MEINEN, Ms Judy, Managing Director, Labour Force Australia Pty Ltd

CHAIR—Welcome. We do not require you to give evidence under oath, but we advise you that the hearings are full proceedings of parliament and warrant the same respect as proceedings of the parliament. It is customary to remind you that giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. We do prefer you to give evidence in public but if you want to engage in any sensitive evidence and wish to do so in private, please ask and we will consider your request. Would you like to make an opening statement?

Mr Bosa—I will brief; I know time is short. The prime tenet underlying independent contracting is the free will of the parties, which is something that has been touched on. We do not always get choices in life, but you must choose to be a contractor. You cannot have it imposed on you; you cannot be coerced; you cannot do it unwillingly. You have to make that choice. I suggest that the intentions of the parties must be given great relevance and stature, because when people enter into a contract freely sometimes the laws subvert it and put it aside. The intentions of the parties should be given greater stature.

We are opposed to a reliance on an untested tax act definition. The common law has served us well. There are quite a few elements relying on that PSI definition that we do not agree with. We are opposed to an extra artificial layer of bureaucracy in labour hire. Extra bureaucracy does not create legitimacy—that is what I said in my submission. It would suit established players, like ourselves. It raises the bar for other people to get in. But I cannot see what it would achieve. We would just get another rubber stamp off another government department to say, 'You're all right.' But, if there is a breach and it gets cleared up in a different jurisdiction, a regulatory body will not say, 'You've got all the ticks in the right boxes but you've ripped off this worker here.' I cannot understand (a) what it would achieve or (b) how you would go about it.

Equally, I think a registry for contractors would be pointless. I cannot see that the expense, bureaucracy and reporting will be justified if every time somebody signs a contract they have to send it in to the contractor's registry. I do not understand what it would achieve. What we are looking for is easy redress for the aggrieved parties when people create sham arrangements or breaches. I do not see that either of those would achieve it.

We do agree with the notion of a federal magistrates court. That is an excellent idea, a good place to start. It could have an inbuilt conciliation process, where people could go without cost or representation, as a prime reference. If that does not work then you are in the common law, which is where contracts should be. We are for cutting through the plethora of confusing state laws. Living in Australia is like dealing with seven different fiefdoms. It is not your fault. You are only one government and you are right across the board. If you go from state to state you have got different laws. That is a nonsense. We are for giving contractors freedom from industrial action. As I am also a director of troubleshooters, I know all about industrial action

against contractors. We are for clarifying superannuation. Superannuation is very grey at the moment. There are tax rulings that say you should pay super, but the law says quite clearly that if you make a payment for a contractor then you are not allowed a deduction. That needs to be clarified. As a founding director of Odco, of course I am for enshrining the Odco principles in statute.

Ms Meinen—Our submission was quite short, only three to four pages.

CHAIR—They are usually the best submissions.

Ms Meinen—We hope it was concise and easy to read.

CHAIR—It means everybody reads it.

Ms Meinen—If we have been talked about all day, I do not know how much detail I need to go into as to the background of Labour Force and why it is and what it does.

CHAIR—I will tell you what you can do for me. I am still a little bit unclear as to exactly what is the Odco contracting system that was challenged in the courts. The union movement and Manpower seem to be at one in basically not approving of your system. So what actually is it? How does it differ from the others?

Mr Bosa—I will take the hundreds of clients and the thousands of people who work for our system over Manpower and SKILLED any day, thank you. How does it differ? We hire out contractors, quite simply. It is more innovative. It gives greater freedom and flexibility to both parties. It gives you the opportunity to re-engineer workplaces and to maximise the benefit to both. In simple terms, you cannot get workers, rip them off and then want to get the best out of them. You have to find a way to reward them. You have to find ways to bring that balance into place. We do labour hire. The only difference is that they have employees and we only have contractors.

CHAIR—So on your books you would have a register of all the contractors—people like the previous lady, perhaps, a home based person who has put up a sign saying, 'I'm now a contractor'—whether that be in human resources, engineering, accounting or wherever. You have them on your books. A client comes to you and says: 'We need a contractor for six months or three months. Can you point us in the right direction?' Do they pay you a fee?

Mr Bosa—No, we charge.

CHAIR—You charge who?

Mr Bosa—We have a triangular relationship without one of the legs, if you like. We have a contract with the client and we have a contract with the worker. We charge the client. We pay the worker. We use the neutral term 'worker' because of the troubleshooters years ago.

CHAIR—Do you pay them from your payroll?

Mr Bosa—We pay them whether we get paid or not. We have a contract with the workers, so we guarantee them we will meet the terms of our contract. They work X number of hours—

Mr BRENDAN O'CONNOR—You pay which one?

Mr Bosa—We pay the contractor.

CHAIR—So the contract that you have with a client—

Mr Bosa—Is a separate contract.

CHAIR—could be for X dollars.

Mr Bosa—It could be in a variety—

CHAIR—And it could be for one person or for 100 people in that organisation.

Mr Bosa—Yes.

CHAIR—You have a separate contract with me, and that will be for arrangements that are negotiated between me and you. The fee that we strike up could very well be different to the fee that you strike up between yourself and a client?

Ms Meinen—It has to be.

Mr Bosa—I have to charge more because I have to pay all the—

Mr BRENDAN O'CONNOR—That is where you make your money.

Mr Bosa—Yes. You have to pay off bad debts in the first place, and then you get into—

Ms Meinen—We have to look at all the jurisdictions; we have to look at WorkCover, payroll tax and all those sorts of things.

CHAIR—What level of knowledge do I have, before I sign the contract with you, about what that particular client's employment conditions are for the rest of its work force?

Mr Bosa—There are quite a number of levels to that question, but basically you do not need any knowledge. You just have to have a desire to want to be a contractor and you have to think that the rate you have been offered is acceptable to you. All our rates have been backgrounded against industrial agreements. You cannot pay less than the prevailing award rate because you are just ripping off the workers, and that is not the way the world should be and it is not what contracting is about. That is where you get into all of the negatives. Also, the labour hire regulatory board would not stop people setting up sham arrangements and does not stop people ripping people off. It happens in employment.

CHAIR—You have gone to the High Court; you won your case. You still have other organisations out there that think you should not be doing what you are doing.

Mr Bosa—They are competitors.

CHAIR—Is there anyone else in Australia doing what you are doing?

Mr Bosa—I have 40-odd agencies.

CHAIR—But they are agencies. Are they your licensees?

Mr Bosa—I do not know. It is very hard to estimate imitators, but I would say there is most probably four to five times that number that have our system, or a permutation of our system, and are applying it in some form or another.

CHAIR—Do any particular industries or occupation groups lend themselves more so to what you are doing?

Mr Bosa—We have doctors, dentists, nurses, schoolteachers, bus drivers, meat workers—you name it, the list goes on. Thousands of people work because people have that choice. We live in a democracy; they exercise their choice. Most people generally know what their work is worth. If they have not got many skills, they are not going to get much of a job anyway. They are at the bottom end. But the good thing is that in our country, according to federal legislation, they are protected. You must make sure. One of the principles that Woodward brought up was the contractors, in his terms, did not suffer an economic disadvantage. To my mind, that means you have to have an economic benefit for somebody to be a contractor. They have to have a perceived economic benefit in their relationship. That is part of the consideration.

CHAIR—What is the longest time that one of your contractors has been with a particular client?

Mr Bosa—I was playing golf with one of my clients, and at that stage he had about 90 blokes of ours and about 80 of his own employees. He said: 'We're going to have to give Jim a gold watch. He's been here longer than any of my employees.' He had been there over 10 years as a contractor going to the same place, but he could have changed at the click of his fingers.

CHAIR—That begs the question: why doesn't that employer put that person on as an employee if the person has been there for so long?

Mr Bosa—Because not long after he would have got the gold watch and left anyway. He would have said, 'I've had enough of this place.'

CHAIR—Why doesn't that contractor say, 'I might as well be here officially as part of this organisation.'

Mr Bosa—For the benefits. They actually get better rewards; they have greater flexibility. There is a whole range of controls that contractors have and there is a whole range of benefits that employees get, and one trades the other off. He obviously saw a great benefit to being a

contractor. In fact, most of the people knew they were better off working through the agency because the boss was a bastard. The moment they become the employee, they have a different dynamic and they are not so happy. I will give you another example: years ago a bloke came to me and said, 'Pete, I've been out there for nine months and they want to take me on full time.' I said, 'Okay, Dave, if that's what you want.' He said: 'Yeah, I want to buy a house. It's hard to get loans.' This is nearly 15 years ago. I said, 'All right, Dave.' He was back in three months. I asked him, 'What happened?' He said, 'They sacked me.' I said, 'But you had a full-time job.' He had worked there for nine months as a contractor and three months as an employee, and they sacked him. Why do people stay as contractors? Because if they have not got work with this client, we can get them work somewhere else; we give them greater choice.

CHAIR—Is there anything in the contract arrangements between you and the contractor which prevents or places obstacles in the way of that contractor taking on a full-time job with the host client?

Mr Bosa—There is none with the contractor because they are free to trade. There is with the clients. However, once somebody has been there a while you can negotiate, but there is a finding fee. If I spend a lot of time and money finding somebody really special and you have them there for only a few days, you have not recouped your money. So you have a finder's fee. But with 90-odd people there he would not pay anything.

CHAIR—So it is almost like a recruitment agency in the end, at that particular point in the juncture.

Ms Meinen—It can be in those circumstances, yes.

Mr BRENDAN O'CONNOR—What would be the differences then? You said before that your golfing partner has 170 people working for him, with 90 under some contract relationship that goes through you.

Mr Bosa—He had 80.

Mr BRENDAN O'CONNOR—He had 80 direct employees.

Mr Bosa—His 80 would have dropped down. We have dropped down to about 10.

Mr BRENDAN O'CONNOR—So there have been some chops.

Mr Bosa—It fluctuates, but his employees are down to 30.

Mr BRENDAN O'CONNOR—So there has been turnover there as well.

Mr Bosa—In that workplace the contractors had greater job security—if you can have greater job security being a contractor—than the employees.

Mr BRENDAN O'CONNOR—That is something you have already commented on—that you believe there is better job security.

Mr Bosa—It is a perception. Some people prefer employment. We get people who come along and they do not want to be a contractor and we say: 'Go and get a job as an employee. We only deal with contractors.' There is a difference. Some people perceive the benefit of being a contractor.

Mr BRENDAN O'CONNOR—What makes them a contractor in your view?

Mr Bosa—Their desire, intention and willingness to enter into a contract.

Mr BRENDAN O'CONNOR—Are there any other characteristics which you think are needed? You may not be a legally trained person but you have gone the rounds of the kitchen with the High Court and the like. What other characteristics do you perceive are required to deem someone a contractor?

Mr Bosa—A simple, plain-English contract.

Mr BRENDAN O'CONNOR—You have mentioned an intention.

Mr Bosa—It must be a plain-English contract and very simple.

Mr BRENDAN O'CONNOR—Yes, that is for sure. Certainly the courts have found that there are ways in which to define it—and I know it is based on the facts, so it is not a definition so much as a series of tests. So there are criteria that can be applied to define someone.

Mr Bosa—They are applied post the date. What do we need for somebody to be a contractor? It is a matter of: we are looking for a contractor to fill a position, they are willing to take it, that is the rate we offer and they have the skills we need.

Mr BRENDAN O'CONNOR—Sure. So if they want to work side-by-side with an employee and they have contracted for a lesser amount, is that fair enough? I am not asking if they should not do that, but whether they would.

Mr Bosa—Yes, obviously. If the employee has managed to drive up a deal and is getting an excessive rate of pay, yes. Background that against industrial arrangements and awards. Once you get a contractor up and getting an economic benefit which takes him above the awards, super and all those bits and pieces that an employee would get then, if that employee is getting even more, good luck to the employee. Is a contractor disadvantaged because—

Mr BRENDAN O'CONNOR—Just allow me to ask this question: are there circumstances in which, on a given site—we will use the building industry; although now it could be any area—you could have a so-called contractor, or worker as you would call them, and an employee of the employer working at the site performing the same work but having different conditions of employment?

Mr Bosa—Yes, of course.

Mr BRENDAN O'CONNOR—Has that in your view caused tension in the workplace?

Mr Bosa—No, not in the workplace. Only the union officials talk about it and say that it creates tension. The only time I ever heard that was when Martin Kingham and Bill Oliver gave me a spray about how it creates tension.

Mr BRENDAN O'CONNOR—So you are saying that two workers doing the same work would not normally concern themselves—

Mr Bosa—They normally do not talk that much about it.

Mr BRENDAN O'CONNOR—I suppose the one who is being paid the most would not concern themselves as much as the one who was not.

Mr Bosa—It depends on who spoke first and whether they have a big smile or not. It changes around. I have had labourers out there who have been getting more than the site foreman who was employed by the company. So it goes both ways.

Mr BRENDAN O'CONNOR—Would it be true to say that it is primarily an attempt in the building industry—and I am talking mainly about the construction areas—to avoid site allowances and the like?

Mr Bosa—No.

Ms Meinen—Absolutely not.

Mr Bosa—I started in business in 1973 and have been accused of trying to avoid a whole range of laws, which I have tried to meticulously apply as they have become enacted. I have tried to avoid nothing. You have to obey the laws of the land. We started contracting because I said to my dad: 'Where did these blokes go?' He was building the gantry at Collins Place. I was born into the building industry. I was five years of age when I said, 'Who was that bloke?' He said, 'He's a subbie.' I said: 'What's a subbie? Does he work for you all the time?' I found out. Then I watched the building industry and watched people come and go off jobs and I thought: 'Where do they go? By fitting something in between, they're going to get a better life. They don't have to chase the bucks. They've got a greater amount of work.' More often than not—95 per cent of the time—the people whom we supply are getting paid better than the employees.

Mr BRENDAN O'CONNOR—Leaving aside the conditions of employment, because we could argue forever about them, would your contractors be responsible for their own workers comp?

Mr Bosa—It depends on which state.

Mr BRENDAN O'CONNOR—Let us talk about Victoria.

Mr Bosa—In Victoria, no, it would be deemed. In sections 8 and 9 we pay workers comp for the contract.

Mr BRENDAN O'CONNOR—What do you think about the deeming laws?

Mr Bosa—I think deeming is a nonsense. If you cannot say it in plain English, don't say it.

Mr BRENDAN O'CONNOR—So you are saying that contactors should be liable for their own workers comp?

Mr Bosa—Workers comp is a vexed issue. I believe workers in all areas need some form of insurance or reinsurance. I think the backdrop of legislation does help. I would like to see a common, national system for contactors, with contactors having the ability to opt out, because there are superior private products out there. Recently one of the state's laws changed and we had to change all the people and say, 'Okay, you've no longer got private insurance.' You know who complained? The workers complained because, instead of being covered 24/7—and most of the injuries happen at home—they were back to workers comp. They did not get that extra bit in their pay packet to compensate them for having to get the insurance because the company then had to pay it. So it was all backwards. They did not get the tax deduction. They did make get that extra feeling of benefits.

Mr BRENDAN O'CONNOR—I am not trying to cut you off; I am just trying to get through, because we have so little time. In relation to OH&S requirements, are there different ways in which contractors would be treated compared with employees?

Mr Bosa—For OH&S clearly the end user is the side that has a prime duty to supply a safe workplace. To my mind it is the duty of labour hire companies to make sure that they are not sending people out into hellholes. We do site inspections and safety audits. We do safety inductions with people so that they know what to look for.

Mr BRENDAN O'CONNOR—Who is responsible for imposing a safe workplace in that regard?

Mr Bosa—The end user has the prime responsibility and that is where it belongs.

CHAIR—Do they know that? When you negotiate your agreements is it clear to them that they have prime responsibility, so that if any particular legal action is taken they do not shirk it?

Mr Bosa—Up to a point. But if it is too dangerous we withdraw the labour. If a person has a problem on a site and it is dangerous, they do not have to do it. They report it to us. We inspect it and if it is not safe we do not supply labour there. It is quite simple.

CHAIR—My question is based on what Brendan was getting at in terms of responsibility: have you been party to a case where you have also been drawn into liability?

Mr Bosa—No, I have not. But my understanding of the law—and there have been a couple of cases that have before the courts on OH&S—is that usually the end user is two-thirds liable and the labour hire company is one-third liable. That is in monetary terms. That should give a fairly good economic imperative to labour hire companies to make sure they have very good OH&S practices. Also we have to advocate it for that nonsense of criminal manslaughter. If you are a director of a company and are up on a beach in Queensland when somebody falls down a ditch in Tasmania, how can you go to jail? I mean you have to have a greater degree of liability than

that. When you say to somebody: 'Drive the truck. I'll get the brakes fixed next week,' then you should be liable. It is prime that the occupier of the site has that duty of care.

CHAIR—How does the personal services test, the tax test, apply to your contractors?

Ms Meinen—In most instances it does not. Most of the contractors who work through any of our licensed agencies are sole traders or individuals, so PSI does not come into the equation. PSI is really a tax avoidance issue for businesses that structure into entities and try to divert income that they have earned from personal services through a corporate tax rate.

CHAIR—Are they being paid as PAYG?

Ms Meinen—Yes, and that is the tax law that we have to comply with. When the tax law changed to PAYG in 2000 it specifically included a section for labour hire but did not discriminate whether it was employment or contracting. The tax requirement, as it relates to labour hire, is that PAYG is deducted from individuals and sole traders regardless of whether they have an ABN or GST registration.

CHAIR—So I could be a contractor who comes to you. I have a client that I have established myself but he only occupies two days a week for me. I come to you and say, 'I'm offering my services but I can't accept anything more than two or three days.' If you find me something, I will be having different tax treatments for both clients.

Ms Meinen—You may well. It depends on whether you are structured into an entity or whether you are a sole trader.

CHAIR—What if we come up with an arrangement—

Ms Meinen—We come up with the arrangement that the tax office specifies. That is the truth of it.

CHAIR—whereby I have a client and you place me somewhere and I treat that other person as another client as well? Can we do that?

Ms Meinen—You have to look at how the business is structured.

Mr Bosa—In this world anything is possible. Lots of people do a lot of different things.

Mr BRENDAN O'CONNOR—Is it lawful?

Ms Meinen—I have been in debate with a licensee today on that specific issue, where a contractor has come along and said: 'I've got an ABN. Why do you have to deduct tax?' The response is: 'Here. Read this. This is what the tax office says.'

CHAIR—So 'accept it and move on' is your answer.

Ms Meinen—It is not our rule; it is the tax office rule.

CHAIR—I am glad that we caught up, because now I know what Odco is all about.

Ms Meinen—We are not all two-headed monsters!

CHAIR—How many contractors do you have on your books, across all your licensees?

Ms Meinen—I would estimate it to be 4,500 to 5,000 on any one day. In a year, with the coming and going, the movement of people from various areas and a lot of transitional work—

CHAIR—And that is Australia wide?

Ms Meinen—Yes.

CHAIR—Finally, how do you handle unfair dismissal cases that may be brought against you?

Mr Bosa—Against the agencies?

CHAIR—Or against the agencies, yes.

Ms Meinen—We look at the facts of the case first to see whether the Odco guidelines have been breached and we take it from there.

CHAIR—Say I am your client, you have given me someone and I am not happy with that person. I just do not want to go through the whole dismissal procedure. It is too lengthy. I am paying you a fee. My attitude is: 'You get rid of that guy. I want someone else.' So you get rid of that guy. You pull him out from that client. What do you do with that person?

Ms Meinen—You try to find another spot for him with another client. That is one of the benefits of it. Quite often we see that a difficult worker is able to be moved around. Sometimes they just move on.

CHAIR—What if you cannot?

Ms Meinen—We say that we just do not have anything suitable.

CHAIR—You say you will not have them on your books anymore?

Ms Meinen—They will always be on the books unless something really drastic happens. But it is a matter of finding suitable work to offer.

CHAIR—So I accept that appointment, that contract, with you on the understanding that I could be pulled off a job with a week's notice.

Mr Bosa—Right.

CHAIR—So what security, therefore, do I offer a bank for any loans that I may take out?

Ms Meinen—About as much as if you are an employee in the same situation and the employer wants to part company with you in a few days too.

CHAIR—No, I have a little more security there. I have redundancy payments. I have the ability to take that employer to court.

Ms Meinen—Yes, but you have to be there for a while too.

Mr Bosa—I think finally the banks are starting to see that being a contractor is not necessarily a noose and that it depends on your history. Our contracts are renewable daily, so on any one day you could be off-hired. Our contractors know it. Basically it is about people. Most people want to do a good job, get money in their pocket and have a good life.

Ms Meinen—I think it is also very interesting that there are a whole range of instances around the country where people who are virtually unemployable, for various reasons, can be placed as short-term contractors on the understanding that if it is not working out and you keep up your antisocial behaviour we will not be able to keep you going.

CHAIR—Do you go through a screening process?

Mr Bosa—Yes.

CHAIR—Police checks?

Ms Meinen—Yes, where required.

Mr Bosa—If required, but it is not standard.

CHAIR—Thanks very much. That was very enlightening.

Mr Bosa—Good luck with your deliberations.

Resolved (on motion by **Mr O'Connor**):

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

Committee adjourned at 5.31 p.m.