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Official Committee Hansard

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON EMPLOYMENT, WORKPLACE RELATIONS AND WORKFORCE PARTICIPATION

Reference: Independent contracting and labour hire arrangements

WEDNESDAY, 27 APRIL 2005

MELBOURNE

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON EMPLOYMENT, WORKPLACE RELATIONS AND WORKFORCE PARTICIPATION

Wednesday, 27 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 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 9.12 a.m.

COOPER, Mr Colin, Divisional President, Communications Division, Communications, Electrical and Plumbing Union

EASON, Ms Rosalind, Senior Research Officer, Communications Division, Communications, Electrical and Plumbing Union

IRONS, Mr David John, Senior Industrial Officer, Communications Division, Communications, Electrical and Plumbing Union

CHAIR—I declare open this public hearing of the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation inquiry into independent contractors and labour hire arrangements. The inquiry arises from 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 forth 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. I remind you 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 Cooper—Firstly, we would like to thank the committee for the invitation to discuss these matters with you and to put forward our views and, in particular, our suggestions about remedies. In general, the CEPU do support the position put by the ACTU—I do not know if they have been before the committee yet—and we see what we say here as being largely in support of their contentions and suggestions. We have had considerable experience with new forms of employment or non-standard forms of employment in recent times. We believe those experiences do require certain issues to be addressed, particularly in relation to the legal rights of employees and matters that should address what we feel are anomalies that occur within the mixed work force that we now have in Telstra.

In essence, I think the value of our submission is that, if we look at Telstra as it was in the mid-nineties, where we largely did have a permanent, full-time work force, there were elements of casual workers who were generally employed directly by the company itself to provide flexibility, and a lot of the work was done in house. The union claim that a lot of that was because of successful advocacy and campaigning by the union—that a lot of work was done, we believe very successfully, by full-time Telstra employees.

In its earlier forms and more recent forms up until the mid-nineties, Telstra also provided extensive training and skills development for its work force. As it was the major provider of telecommunication and communication services in the country, I believe it served a great need for skill development. One of our concerns, which we have raised in our submission, is that that

no longer happens and that the industry is largely feeding off the advantages of having that great skill base that Telstra established in its earlier forms. It is one of our great concerns that that base is diminishing, particularly because of the age of the work force in this area. Nobody, in our view, has a real commitment to skill training. Employers who have done it have usually found that the staff they trained were poached or moved away, and that has been a discouragement for them to undertake that work.

Our submission is fairly straightforward. I will go through the remedies that we have put forward. One of the great concerns of recent times has been the use of subcontractors or individual contractors. We believe there should be an ability to organise those people collectively for collective negotiations. That does seem to be in contrast with the position that government holds, but we think it is essential for fairness—that in many ways individual contractors or subcontractors are only employees by another name, with very few rights. To us, they are terribly disadvantaged. We have had some experiences trying to work with those people—albeit with a very limited ability to work with them, because a lot of them were members of our organisations who found themselves in circumstances they would rather not be in and limited in the ability to protect themselves.

We think that labour hire workers—where they are true labour hire workers, a little different from the subcontractors or individual contractors—should be able to enter into collective agreements and awards without any difficulty. There is discouragement of that happening, usually by labour hire firms—although not all of them—but we think it should be a clear right of labour hire employees to be covered by the industrial instruments available in this country that deal with collective agreements.

We believe also that there should be a strengthening of the laws in relation to the transmission of business. We have had some experiences with that, where work has been transmitted out of Telstra, and we find people working under inferior conditions and arrangements doing essentially Telstra work. I will not go into the detail, but we find there are great weaknesses in the current transmission of business laws. The one I basically refer to is the case of Stellar, where the CEPU and the CPSU were involved. We are joint unions, and we lost the advantages of that on an appeal to the full bench of the arbitration commission.

We also think that employers—we say larger employers in our submission but maybe we should just leave it as employers in general; mainly we deal with larger employers—should be encouraged to try to meet their flexible working requirements, and we acknowledge that there is at times a need for employers to have flexible requirements from within their own resources. We think that is of benefit to employers and we have had some recent experience in Telstra. An understanding was reached in the last enterprise agreement negotiations where we introduced what we call the supplementary worker or flexible worker, which is basically a part-time employee of Telstra guaranteed 500 hours of employment. We think that was largely a success. The employers argue that they need more flexibility in the work force. We think it can be done from within their work force. There is a bit of history in Telstra that proves that and even some recent history where there are advantages for the employers. The major advantages are that they are not paying the high margins to people outside to find them staff and there is a lack of turnover and a greater commitment to the organisation, particularly in a competitive environment, because they are Telstra employees. We think there should be more examination of that so that employers are encouraged to do that.

I will finish there. David Irons has had greater experience day to day with outsourcing and the introduction of non-standard work practices in our operator area, which was predominantly made up of women. They were the operators that worked all across this country and now they do not exist very much anymore. To us they provided a great source of jobs for people, particularly in rural areas. That is one of the things that has been a great tragedy. That work has largely been outsourced to labour hire and for us it has not been a great success from either the union's or the employer's point of view. David can elaborate on that a little.

Mr Irons—The main area I want to go to is mentioned briefly in case study (3), which is to do with health and safety. The other parts of the submission cover the number of people who have been outsourced, but I would like to expand on health and safety. Most of the people we represent in Telstra have special rest breaks to give them a break away from the type of work that they do, which is high-pressure keying of, in some cases, directory assistance and, in others, fault reporting. Those rest breaks are only given to people who are Telstra employees. The people who work for the labour hire companies do not get those same breaks. They sit alongside them. In some instances they get one break a day in addition to their lunch and in a couple of cases they get two breaks. Under the award the people who are permanent employees of Telstra get an additional five breaks per day. They never have to work longer than 70 minutes without having a break away from that high pressure keying process that they have to go through.

Mr BRENDAN O'CONNOR—Can you explain exactly what the employee is doing in that operation, just to underline the constancy of the work and why the breaks are required?

Mr Irons—When they are on duty they have calls dropping in constantly. The call acceptance just keeps rolling in. For example, if someone presses a key so they are not taking calls they are immediately set upon. They are monitored and anybody who is in 'not ready' for any more than 90 seconds—it could be because they are writing a report or they want to run to the toilet or whatever—has a supervisor asking them why they are not taking calls. The monitoring process is quite invasive. With that sort of pressure you need to have regular breaks away from the work and one of the reasons, in my view, that there is a high turnover of labour hire people is because they are not getting those sorts of breaks. They are sitting alongside someone that gets a break every 70 minutes, and in their case they do not get those breaks.

Mr BRENDAN O'CONNOR—How long does that break last for?

Mr Irons—In this case they get two 15-minute breaks and three 10-minute breaks per day. Four of those breaks are for people to do whatever they want—that is, they can go and have a cup of coffee, stretch their legs outside or whatever; but one of those breaks per day can be used for training purposes as long as it is away from the keying. That opportunity is denied to labour hire people who are working alongside the Telstra people in the Telstra call centres. Similar conditions apply at Stellar, which Mr Cooper mentioned before, and at the skill centre at Burnie which handles Telstra traffic. Neither of those centres provide for the same sorts of rest breaks that the Telstra employees get.

CHAIR—Ms Eason, do you have any comments to make?

Ms Eason—Only very broadly, just to reinforce what Mr Cooper said. The thrust of our submission was to try to demonstrate to the committee that the idea that people voluntarily

choose these forms of employment is not an adequate response to the phenomenon we are seeing in our society of the spread of these new forms of employment. Some people do choose them; we do not deny that. But if you look at the industry where our members work, it is quite clear that the scale on which these forms of employment have arisen is as a result of the employment choices and commercial imperatives of the large companies, particularly Telstra. That is what we have sought to demonstrate in our submission.

Therefore, a response which is driven by, frankly, an ideological kind of agenda which says: 'We support the honest individual contractor who wants to be a small contractor and does not want to be an employee' or 'We want to work as casual employees because that gives us more freedom of action,' will not address the real needs of these people and it will not address other issues that are flowing from the prevalence of these forms of employment, such as our skills crisis.

CHAIR—Yesterday, we had a very valuable contribution from the Recruitment and Consulting Services Association. They were able to clearly differentiate the various arrangements for labour hire and independent contractors. What strikes me from reading your submission and listening to you this morning is that one of the reasons for the difficulties faced by those working for labour hire companies for Telstra is that there has been wholesale contracting of a service as opposed to individual positions. The entire service has been outsourced—and we are talking about quantum numbers rather than simply small numbers. The organisation's actual functions and responsibilities to its customer base have not diminished and it has been looking at alternative ways of meeting that. Surely the contracting of a service in itself is not the problem. Isn't it more a problem of the initial agreement struck between those who are providing the service and the organisation's management? If some employees are not getting the same rest breaks and pay condition as those sitting next to them, it gets back to the agreement that has been struck rather than the actual decision to outsource.

Mr Cooper—I would not see it that way. I think what comes through in our submission is that, in our view, this was a deliberate device established by Telstra to have a competitive work force. They provided the contracts and they control the contracts and the contractors. We did not make this point in our submission, but we believe that one of the reasons for the large number of redundancies was to give these people a trained and experienced work force. Unfortunately, a lot of people did not stay in the industry. We actually had fairly frank discussions with Telstra. That is what they did—they made a large number of people redundant so that there was a work force out there for their contractors to use.

CHAIR—My brother was one of them, I understand.

Mr BRENDAN O'CONNOR—Maybe we should get your brother in to give evidence.

Mr Cooper—A lot of people were so upset by the way it all occurred that they just did not want anything to do with the industry. A lot of people actually thought they would be treated better than they were and became very disheartened. There were some fairly tragic cases. Again, to me it was a strategy designed in some cases to subcontract out the whole thing—for example, building services. In my view it was a total disaster, but they would never admit that. In some cases it was different—for example, when you want to get something fixed and you ring Telstra. I know of someone who rang Telstra about their Foxtel service the other day. A person turned up

with one contractor's sticker on one side of their shirt and another contractor's on the other. I think the person was expecting a Telstra worker. I do not think that helps the company's image. So in my view it is about just providing a cheaper alternative and pushing the price down as far as you can—it has nothing to do with providing a better service.

CHAIR—I understand. The question I was trying to raise is: have the problems that you are seeing emerged because of the actual agreement struck between Telstra and the organisation providing the service? We saw that in some of your cases where you talked about Adecco, Visionstream and the SKILLED Group Ltd—who have perhaps come closer to meeting the levels that you would expect.

Ms Eason—I think what we also tried to demonstrate in our submission is that that is a structural problem in an industry such as ours which is highly concentrated. Therefore the subcontractors or the people taking on those services are price takers. In that circumstance you are always going to have uneven kinds of bargains. Telstra are in a position to dictate the prices to their head contractors, and they then push down the effects of that sort of price reduction onto their subcontractors. If you look at the history, which we have tried to trace, of the contracting out of the fieldwork—the maintenance or fix and fit work—you can see Telstra quite deliberately structuring the industry to their maximum advantage. They have tried various ploys—for example, they set the number of head contractors. They found that that has or has not worked. They then call them all in and tell them that they are going to do it differently and they have looked to see what the optimum industry structure is in terms of the contracting-out process from their point of view.

If those subcontractors could say, 'Well we're walking away from this work unless you give us X,' your proposition would hold, but that is not the reality of the power structure for a whole range of reasons. At one level that is because of the concentrated nature of the industry. Another reason is, when you get down to the subcontracting level, the difficulties that subcontractors have in organising to fight back to protect their wages and conditions.

CHAIR—I have an organisational question. David talked about some of the pressures on the people at these call centres. You said that there is a 90-second time frame in which to answer a phone call. Do these call centres specialise in certain calls only or can a call to Telstra from anywhere in Australia go to that location? How is that then different to a call centre in another state?

Mr Irons—Using the example of the fault-recording area, they have a number of sites around Australia and they take calls from all around Australia. The traffic can be diverted to any place. Quite often, when they started to make people redundant, they were closing centres in one place in Australia and moving them to another. There was a very small fault centre in Launceston and two very large ones in Melbourne.

Mr BRENDAN O'CONNOR—In your view, what was the main reason to transfer the function geographically?

Mr Irons—By doing that they would bring in a whole group of new staff in that area and, as new employees, most of those people would have ended up on AWAs rather than on award conditions. They would also have put a lot of labour hire staff into that centre.

CHAIR—If the Launceston operators of that fault centre are flat chat, will a phone call get diverted to a fault call centre elsewhere?

Mr Irons—That is correct.

CHAIR—So there is some flexibility in the service that a centre can provide—if a call centre is down two or three people then another call centre will pick it up?

Mr Irons—That is certainly the case. The people are not dealing with faults from their own state; they are dealing with faults from around the country all the time. If you lived in Launceston, you would very rarely come up with an operator from Launceston.

CHAIR—I understand. I guess I was referring more to the demand side. If there is excess demand in one centre, it will flow through to another centre.

Mr Irons—Yes, but these days you have a national roster rather than an individual roster for a centre. That national roster allocates shifts to each of those centres.

Mr Cooper—Maybe Telstra will have a different view, but I understand that in times of high fault-reporting, such as storms or whatever, the calls can go through to another centre to be answered—to a centre that I would say cannot really help the customer such as the sales centre out here at Burwood, which knows nothing about faults. In their view at least they meet their commitment that the customer has been answered, but they actually cannot do anything to help them. They can move the calls around to satisfy their customer commitment, but the customer is not actually getting helped. That is one way they move it around, and sometimes it can go to a contracted call centre that takes the overflow from that centre.

CHAIR—SKILLED will appear next, but we are going to extend your time because we started late. You referred to how Telecom New Zealand went through their outsourcing and said that they did not experience the problems that we have experienced in Australia. What was the difference between the two?

Ms Eason—We did not intend to imply that they did not experience problems. In fact, I think they experienced considerable service problems. Certainly employees, or former employees, experienced very similar problems to those we have seen in Australia. They had various experiments in contracting out the work and they have extensively contracted out the work. We have implied that Telstra looked quite closely at the Telecom New Zealand model, which was internationally one of the first telecommunications companies which really drastically restructured itself to outsource large amounts of its functions. We have argued that Telstra looked at that and decided, particularly in the case of the operator area, to move more slowly.

We would argue that that was probably largely for political reasons in the end, although there were probably other factors too in looking to see what the impacts were and what degree of control the company wanted to keep over those functions. But the outcomes have been pretty much the same in the end. That is, in the operator area, as Mr Cooper said, virtually the whole function now has been outsourced and is performed by labour hire staff or agency staff in the main or, in the case of work that has gone to companies like Stellar, by employees of those new organisations and SKILLED.

Mr BRENDAN O'CONNOR—Clearly Telstra is one big case study on the way in which work has changed over the last 20 or so years. Witnesses yesterday asserted that the intention of labour hire companies, certainly the large ones, is to maintain comparable or at least similar employment conditions to those they have replaced. What is the experience of the CEPU in relation to the way in which labour hire companies have come into a form of contract with Telstra and then employed staff who, on many occasions, work side by side with existing direct employees of Telstra?

Mr Cooper—Firstly, it is news to me that that is the attitude of labour hire companies, because my experience has been quite the opposite. The intention is to drive down conditions and argue that they can provide labour cheaper than the companies themselves; it is not about meeting comparable conditions. If that is what they say, that is not my observation of what they do.

CHAIR—Adecco was one of them yesterday.

Mr BRENDAN O'CONNOR—We had Adecco before us yesterday, so could you perhaps refer specifically to the way in which Adecco operates.

Mr Cooper—I believe that Adecco did try to do that, and that is one reason they lost the contract: they would not do that and could not do that. I think they do have a bit more principle involved with their employees, and they could not keep the contract. Telstra has control of this.

Mr BRENDAN O'CONNOR—So you are saying that it is one of the better labour hire companies, if I can put it that way. Once Adecco went in, clearly replacing permanent staff of Telstra, they tried to give undertakings that they would maintain a comparable level of conditions of employment to those that preceded them. Why did that fail? If they intended to do that and entered into a contract with Telstra, why could they not maintain that work?

Mr Irons—I was involved in a lot of the negotiations with Adecco when they first came into Telstra. They are the only labour hire company that I have had any dealings with over the last eight years that have attempted to have conditions comparable to Telstra. They wanted to flow on an increase in salary that the Telstra employees had received in 1999, but Telstra made it very clear that if they did that it would have to come out of their margin. The margin that some of the labour hire companies work under is not exactly high. If you take four per cent out of that—

Mr BRENDAN O'CONNOR—It could be half the take.

Mr Irons—Yes. So that is one of the reasons behind Adecco not wanting to renew their contract with Telstra.

Mr BRENDAN O'CONNOR—Which contractor replaced Adecco?

Mr Irons—The SKILLED Group.

Mr BRENDAN O'CONNOR—Did they come in at a lower rate than Adecco?

Mr Irons—I am not sure. When they came in they just took over the Adecco staff and continued to pay the same salaries being paid at that time. In other words, those staff did not get the increase. There was no increase for some time with SKILLED. The negotiations that we had with SKILLED to try to get an agreement on the conditions of employees were all centred around having a much lower salary and different penalty rates, and getting rid of some of the health breaks.

Mr BRENDAN O'CONNOR—What difficulties confront the CEPU in establishing an agreement or creating an award with the labour hire companies? Do you have agreements at this point, and what difficulties do you confront if you have or if you have not?

Mr Cooper—We did have an issue about our right to cover people in the private labour hire companies. That has now been settled, but only in recent weeks. We did talk to them and work with them.

CHAIR—Resolved in what way, Colin?

Mr Cooper—We now have coverage of those people. We always maintained that we did, but there was some doubt and that was used against us.

Mr BRENDAN O'CONNOR—So there were arguments on constitutional grounds as to whether the CEPU had coverage?

Mr Cooper—That was one issue but the basic problem we have, particularly with SKILLED, was that they wanted us to enter into an agreement which considerably lowered Telstra conditions. At the time, we found it difficult to sign an agreement that lowered conditions for people working within Telstra places because, in our view, we had spent so many years building those conditions up. Other people did not have the same problem, which we found difficult. That was one of our problems—entering into an agreement with an employer that provided staff to Telstra under lower conditions than Telstra had provided. I still find that a problem.

CHAIR—If you had not entered into the agreement, what would have been the alternative? If you had followed that course of action, what would have happened?

Mr Cooper—What did happen is that they entered into an agreement with another union.

CHAIR—So someone was willing to take it up.

Mr Cooper—Someone else was, yes.

Mr BRENDAN O'CONNOR—Clearly, in attempting to apply comparable conditions, you look to provisions of the Workplace Relations Act. Did you experience any deficiencies in attempting to apply the no disadvantage test and therefore trying to enforce conditions of employment?

Mr Cooper—Which no disadvantage test?

Mr GAVAN O'CONNOR—I guess the no disadvantage test in the Workplace Relations Act—this may be more of a technical question and can be answered by any of the witnesses—that only compares conditions with an award rather than with certified agreements. Your direct employers will be regulated by certified agreements, wouldn't they?

Mr Cooper—Yes. Telstra has a proliferation of AWAs in this area because you can only be employed as a new employee if you sign an AWA. They will not employ, by policy, a new employee on an award EA.

Mr BRENDAN O'CONNOR—So they do not provide the prospective employee choice in which agreement—

Mr Cooper—Not for a new employee, no.

Mr BRENDAN O'CONNOR—There is very little time left and we have not really touched much on independent contractors or so-called contractors. As I understand it, Telstra has also managed to convert employees into so-called independent contractors by all sorts of bands. Has the union a view as to how its members have found themselves one day an employee and another day a so-called independent contractor? Has that been prevalent? How does that occur? Would they make an employee redundant and ask them to come back as a contractor, or would they actually seek employees to become contractors in the field? Is that something you have experienced?

Mr Cooper—I do not know the personal experiences of the individuals who have been made redundant but there was a policy that made some of that difficult at Telstra. A contractor could not employ an ex-Telstra employee to undertake Telstra work for two years. We had a look at that under restraint of trade and got lots of legal advice. The problem is getting people to be witnesses and giving the evidence. It was very difficult for us to pursue, despite the fact that we had advice that there were some problems with the Trade Practices Act.

What happened—I have followed some of the case histories, particularly of people who stayed a bit close to the union because we were pursuing unfair dismissals—was that they eventually got an offer of a job with a contractor. That was their skill base. That is where they learnt. They eventually got a job with a contractor because they really had no option. There were some notable exceptions to this but they were not generally told: 'You finish here Friday. If you turn up Monday, someone will give you a job as a contractor.' In fact, there was a bit of a problem with that because of this two-year prohibition. You could work on anything else. You could work for Optus, as contractors did, but you were not to work for Telstra.

Mr BRENDAN O'CONNOR—If you took redundancy you were not to come back within that period?

Mr Cooper—Yes. They have now modified that to 12 months but it is an internal policy. It is not negotiated with us.

Ms Eason—I think the example we give in our submission, of a large group of workers more or less being told that from now on they are going to be subcontractors, relates to Visionstream. That is at one remove from Telstra. Visionstream was established by Telstra, then it was sold to

Leighton's. It then subcontracted back to Telstra. At a certain point in that broad restructuring that we describe, and with the pushing down of contract prices by Telstra, Visionstream decided that its preferred way of doing business was to transform its permanent employees into subcontractors. So in that case a whole work force was more or less told, 'Today you are a permanent employee; tomorrow we strongly advise you to take up this offer and become subcontractors.' However, I think the more common experience with our field work force is that they have been made redundant and then, at a certain point, that labour pool has been reabsorbed into the industry in some sort of way but on very inferior conditions.

CHAIR—Is that an Odco style arrangement for Visionstream? It has been mentioned to us that there are Odco style arrangements. Odco is a particular organisation that employs subcontractors, but it is not a labour hire company. It simply places subcontractors with a client organisation. Or are these subcontractors genuine employees of Visionstream?

Ms Eason—I believe that, at least in the initial arrangements, they were genuine employees. In our view, they remain in effect employees of Visionstream, but they were made or invited to sign individual contracts which defined them legally as subcontractors, with the appropriate tax arrangements and so on.

CHAIR—So they would have provided ABN numbers and things like that?

Ms Eason—The arrangement would have been: you will provide this and that, and we will provide you with a certain number of jobs or not—

Mr BRENDAN O'CONNOR—Are you suggesting that there was an element of coercion or a take it or leave it attitude in that?

Ms Eason—If you look at the presentations that were made to the employees at that time, it is fairly clear that there was not a great future for them as permanent employees.

CHAIR—Thank you very much. You provided us with a very extensive submission and good case studies, particularly, as Brendan mentioned, regarding Telstra being one of Australia's largest employers. I think they still are. Would they still be one of Australia's largest employers?

Ms Eason—They have tried to be a smaller one as far as we are concerned.

CHAIR—It is important for us to hear the history and the current situation, so we appreciate the time you have given to us.

[9.54 a.m.]

BASSETT, Mr Kevin, Group Occupational Health and Safety Manager, SKILLED Group Ltd

BIEG, Mr Ken, Company Secretary, SKILLED Group Ltd

FITZGERALD, Mr Ray, Industrial Relations Director, SKILLED Group Ltd

HARGRAVE, Mr Greg, Managing Director and Chief Executive Officer, SKILLED Group Ltd

McBETH, Ms Julie Ann, Corporate Affairs Manager, SKILLED Group Ltd

STAPLETON, Mr Brian, Chief Human Resources Officer, SKILLED Group Ltd

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that these hearings are formal proceedings of the parliament and consequently they warrant the same respect as proceedings of the House itself. I remind witnesses that giving false or misleading evidence is a serious matter and may be regarded as contempt of parliament. We prefer you to give your evidence in public, but if you have issues you would like to raise in private, we will consider your request. I do not know what your planned format is for your presentation, but every one of you is welcome to make a comment.

Mr Hargrave—Thank you. I have a presentation to make—and I hope all members of the committee have received one of those—and then we may go to questions. We have subject matter experts here as well. Today we are going to talk about the SKILLED Group itself, the subject of labour hire, the benefits of labour hire and the casualisation of the work force and mention some further things about the labour hire industry as a whole. We will then give a summary and our recommendations.

CHAIR—And you are referring to this document?

Mr Hargrave—I am referring to the presentation document. SKILLED Group Ltd is an Australian publicly listed company, established over 40 years ago to hire skilled tradespeople and hire those tradespeople out to industry. Our revenue is circa $850 million. We have around 80 offices nationally employing approximately 15,000 people each week and 40,000 on an annualised basis. We have a diverse work force encompassing trades people, production and distribution people, semi-skilled workers, industrial workers, nurses, engineers and professionals et cetera. We have over 6,000 clients across a broad section of Australian industry. These include 150 of Australia's largest manufacturers and 250 of Australia's largest 1,000 companies. SKILLED is proud of its substantial achievements in occupation health and safety and is the only national labour hire company in Australia to be accredited under AS/NZS 4801. We have very few independent contractors—to go to that question earlier—with less than one per cent. On average, 52 per cent of our work force are members of a trade union. As we know, that percentage is much larger than the industry average.

With regard to labour hire itself, we want to clarify the relationship between SKILLED, our employees and our client base. Importantly, the people who work for SKILLED are our direct employees and, as such, they are entitled to and paid all their employment entitlements, including annual leave, public holidays, sick leave and long service leave where applicable. They are provided with protective clothing and equipment. They select their own shop stewards where appropriate. They have employee social clubs et cetera in all states. We have a legal and moral obligation to them, and they have a legal and moral obligation to us. The employees work for us, SKILLED Group, and we provide labour to the client. There is no such thing in our industry as the concept of a 'host' employer, a term that is often used. There is in fact no employment concept of a host employer; it is a misnomer. Our employees work for us, we are responsible to them for their employment and we on-hire those people in the form of services to our clients in a range of forms.

I will talk a little about the benefits of labour hire to our clients. It provides flexibility, specialist skills and access to skills not normally employed by a client, which can overcome things such as current skills shortages and cyclical skills shortages. It covers peaks in businesses, seasonal production and others; it covers outsourcing of non-core areas of activity; it covers staff illness and leave; and it can manage key areas of expertise for an organisation such as ours such as occupational health and safety.

There are benefits of labour hire to employees. SKILLED conducted a survey of over 1,000 tradespeople across Australia late last year which showed employees chose to work in the labour hire industry because they were engaged by one employer and received the following benefits: variety and diversity of work; flexibility of working hours; flexibility in choosing jobs; multiskilling through broad experience; on-the-job training; superior wages and working conditions; and excellent occupation health and safety policies, including rehabilitation and return to work activities.

I will talk a little about the industry as a whole. It is a very fragmented industry, to state an obvious truth. Over the past 40 years SKILLED, which pioneered the labour hire industry in Australia, has witnessed significant change. The labour hire industry is estimated to have a total revenue of $10 billion to $12 billion, and perhaps to $14 billion. Because the barriers to entry are low it is difficult to estimate the number of labour hire companies working in Australia. In 2001-02 an Australian Bureau of Statistics survey showed that there were 2,704 organisations in the employment services sector. However, this is likely to be a conservative estimate; the WorkCover submission to the Victorian labour hire inquiry said that approximately 1,200 employers in Victoria alone are classified as labour hire companies. It is a very fragmented industry.

We see the industry as being broken broadly into three tiers. Tier 1 is large reputable companies that have good cash flow, excellent occupational health and safety standards and industrial relations, workers compensation policies, registered EBOs and/or follow award rates for pay and conditions. Tier 2 is medium sized companies which might provide some of those things but are unable to fund other activities. Tier 3 is the fly-by-night operators with questionable business practices. Many of these enter the industry for a short time and then depart. We would obviously classify SKILLED as a tier 1 company that meets all of its financial and ethical obligations to its staff, employees and the wider community. Some of the other players, the tier 3 players, can set up shop with an office and a phone and might not adhere to all

current legislation regarding occupational health and safety, IR, tax, workers compensation et cetera.

We see these factors as potentially tarnishing the industry's image. SKILLED is particularly concerned about the failure to distinguish between the three tiers of operators. There is a perception that some labour hire operators have been delinquent in their responsibility to their employees. Ethical operators such as SKILLED might be incorrectly included in this grouping. This has resulted in a negative image of the labour hire industry through broad-brush statements by some unions and academics, often with little substantiated evidence. SKILLED welcomes the federal government's industry inquiry and the opportunity to clarify some misconceptions about labour hire.

SKILLED's current objective in relation to occupational health and safety is zero injuries. A key business value of the company is that each of our employees returns home safely each and every day. Our commitment starts with leadership from the boardroom, and that permeates the entire organisation. SKILLED is the only national labour hire company in Australia to be occupational health and safety accredited under AS/NZS 4801. SKILLED is also the recipient of numerous awards for occupational health and safety performance. We work with our clients to help them improve their workplace standards and to provide a safe working environment for our employees and, indeed, for their own. SKILLED continues to commit resources for continuous improvement and the achievement of best practice in occupational health and safety. It is committed to the principle of providing fair and equitable compensation to employees injured at work. Rehabilitation and return to work is an integral part of our occupational health and safety philosophy.

We do have a slide that details SKILLED's industry history to December 2004. The graphics speak for themselves. From June 1997 when we probably had the industry standard of 79.7 LTIs in a year, we reduced that to 2.2 by the December 2004 half.

CHAIR—I am sorry to interrupt, but is that a reflection of the type of industry that you are now operating in?

Mr Hargrave—How do you mean? Our industry sectors have not changed.

CHAIR—They have not changed at all?

Mr Hargrave—No. Our main business is in the industrial space. The bulk of our business is manufacturing, mining, resources, energy, transport and logistics. Certainly, if we find particularly unsafe work sites and our clients will not adhere to our safety standards, we will remove our employees from sites. So obviously in small instances things will improve because we will not allow our employees to work in unsafe environments.

If we make a comparison of industry standards using independent statistics, we see that in October 2003 the average claim cost for SKILLED was 56 per cent less than the average claim cost for employees with a remuneration greater than $1 million. That is across all employee groups, including banking and finance, which are obviously much less dangerous environments than the environments that we typically work in.

SKILLED's average lost days is five times less than the average of large employers. SKILLED's percentage of claims that are greater than 12 weeks duration is also five times less than the average of large employers. Again, this is taken from insurance industry standard data. These figures are representative of SKILLED across Australia. By using this sort of data, we could say that, as an average, employees are five times safer working for SKILLED than they are for general industry. It would not be surprising, I might add, to find that a number of tier 3 companies do not pay workers compensation and bear no responsibility for occupational health and safety performance.

SKILLED's commitment to industrial relations. SKILLED is committed to best practice industrial and workplace relations policies and procedures and operates within statutory requirements regarding rates of pay and other terms and conditions of employment, including federal award respondency. We have over 20 negotiated certified agreements applicable throughout Australia. As we said, about 52 per cent of our employees are union members. SKILLED has a team dedicated to industrial relations. Anecdotal evidence, such as business lost on price indicates to us that some of our competitors are failing to even adhere to award conditions and pay award rates.

SKILLED's commitment to training and apprenticeships: the current skill shortage now recognised by both government and industry has been of concern to SKILLED for many years. We have witnessed a reduction in the pool of skilled workers in Australia, particularly in the technical trades. SKILLED's strong, ongoing commitment to training apprenticeships over past years has been paid off by the fact that it now has more than 550 new apprentices on a national basis. This includes 146 four-year trades apprentices nationally.

Last year SKILLED launched a telecommunication traineeship program with Telstra. This program is designed to educate more than 300 young people in telecommunication skills across Australia over the next two years. In addition, the SKILLED Trades Foundation was launched in July last year in honour of skills founder, Frank Hargrave, originally an electrician, and his contribution to the industry which he founded over 40 years ago. With $1 million of funding, the foundations activities will include education and encouraging young people to gain trade skills.

In 2004, SKILLED also launched Operation TECH—Trades Employer of Choice, to address job satisfaction amongst our current trades employees and to win back to industry those who have left the trades completely. This program also aims to stimulate and promote the importance of apprenticeships and traineeships in Australia today.

Skilled supports the raising of industry standards. SKILLED supports the introduction of measures to lift the bar and raise the standards of the labour hire industry, thus ensuring that employees engaged in labour hire are fully protected in their chosen careers and work environments and paid their full employment entitlements. SKILLED strongly supports industry regulation and the establishment of licensing regime as one possible approach, as recommended by the New South Wales inquiry into labour hire in 2000. SKILLED would support the establishment of a working party made up of representatives from all stakeholders to determine the detail of a licensing agreement, as recommended in the interim report into Victorian labour hire released in December 2004, or some other form of regulation.

In summary, the labour hire industry has an estimated total revenue of $10 billion to $14 billion. It supports Australian businesses, particularly the manufacturing industry, and contributes to their efficiency and indeed survival in this highly competitive world. Labour hire today is an integral part of all Australian public and private sectors. The labour hire industry in Australia, however, is highly fragmented and has low barriers to entry. This has resulted in some unscrupulous operators. SKILLED supports industry regulation and the establishment of a licensing regime or other forms of regulation as one possible approach to combat this. Thank you. We welcome any questions from the committee.

CHAIR—Thank you for a very comprehensive presentation. We have heard from other organisations that have presented evidence to us that licensing agreements and further regulation are not necessary and why should they be handicapped by more bureaucracy and more paperwork. You are obviously at odds with some of the other labour hire companies and others who hire. Why have you come to your decision? Surely the marketplace would decide if you were not that good. Obviously it sounds as though you are good in your practices and occupational health and safety, and you will win out in the end with employers and those who are seeking a job saying, 'Let's go to SKILLED.' Those tier 3 organisations would simply be blown out of the water.

Mr Hargrave—Perhaps. You could say that about the real estate industry and a whole range of other industries. Unfortunately, this is the third or fourth inquiry and others are going on. There is a reason for these inquiries: obviously the industry's image is being tarnished by unscrupulous operators. Regulation that simply consists of more bureaucracy and potential revenue raising for the government is obviously not of benefit to industry at all. But regulation that actually sets proper standards that are properly policed we think is a positive. We continue to prosper and continue to grow because we provide better outcomes to our key customers: (1) our employees and (2) our clients. Without seeing them both as customers we cannot win this game, because there are continuing skill shortages, and that will continue with demographic changes for many years to come. So we have to be very focused on delivering the best outcome to our employees.

We will continue to prosper, but what distresses us and is unfortunate is the tarnishing of the industry image that unscrupulous operators bring. We being a highly scrupulous organisation would like to see that change. We do not like having to come to these inquiries to defend the industry that we are very proud of. We have hundreds of staff members and thousands of employees who are proud of what we do. This tarnishing we do not take lightly.

Obviously some people will have a response to seeing extra bureaucracy, but if there is a serious attempt to clean up aspects of the industry we see that as a positive. In a competitive environment, the reality of this is that it creates unlevel playing fields. We play on one field where we follow all regulations and have scrupulous standards. None of these people here make me a dollar; all of these people and the teams that work for all these people are there to support our organisation. They are extra costs that we build into our organisation to uphold high standards. Smaller operators do not need any of these people.

Mr BRENDAN O'CONNOR—I am sure you did not mean that about them.

Mr Hargrave—They understand that. They must understand that they do not produce the money and that we have to deliver an outcome to our employees and to our organisation.

CHAIR—So you increase the money by having a good reputation.

Mr Hargrave—That is part of it, and by providing good services.

CHAIR—Credibility.

Mr Hargrave—We do those sorts of things. What we face are many small operators that fundamentally fly under the radar. They are small and put incredibly low pricing into the market because they do not pay proper award conditions and often do not classify proper WorkCover, and in some cases they do not even pay WorkCover. We see this unfolding and we think something should be done about it.

CHAIR—Who would administer this licensing agreement?

Mr Hargrave—Licensing is one term that has been thrown around. If there is a serious concern at a social or political level that we need to do something about this industry, and the investment that is going on in the range of inquiries around the country says that there is, we should put together the stakeholders in the industry to determine what sorts of things we need. There is a range of regulation. The WorkCover authority is one. You are asking a question at a level where we have a federal system, in which we have federal governments, state governments and national players. We have issues about training, safety—

CHAIR—I do not want to continually interrupt you, but I know the other committee members want to ask questions. Just before you arrived we heard from the CEPU about Telstra, about how a number of labour hire companies went into Telstra and that some had to walk away because they could not meet the conditions which permanent Telstra employees were getting. How are you able to fulfil your obligations? You are in Telstra at the moment; is that right?

Mr Hargrave—Yes.

CHAIR—How were you able to fulfil those requirements, where others have not been able to do so?

Mr Hargrave—I do not know the particular requirements there, so I cannot answer that question specifically. We work across a range of industries. We meet the requirements by having all the proper employment arrangements in place, and meeting all those standards.

CHAIR—The conditions, the pay, the benefits, and all those sorts of things—how are you able to do that? One of the other organisations had to walk away. We heard that Adecco had to walk away from Telstra.

Mr Stapleton—That probably refers to a number of internationally owned operators in the call centre space. There have been some recent cases where they have been unable to agree on commercial terms with Telstra, both in terms of service delivery and the commercial terms upon which the commercial agreements were agreed. One of those companies was Teletech

International, which I am very familiar with. That was firmly based on commercial terms and service delivery—not so much on the issue of labour rates. Obviously, there are issues of attracting and retaining skill. That particular company was paying under the TSI award—the telecommunications services industry award. SKILLED, on the other hand, would be paying under the terms of negotiated enterprise agreements, with particular unions. Again, it is a multilayered issue from a Telstra perspective, as is our understanding.

CHAIR—You say you have about 20 certified agreements out there. Would your agreements reflect the specific agreement which the client organisation has with its other permanent employees—site allowances and other things?

Mr Fitzgerald—Not always—in some areas, yes. In the construction area that would reflect those things but in manufacturing, not necessarily so. There are benefits such as travelling to work and so on, because they are moving around. Those sorts of things would be out of kilter with the client. Rates of pay generally reflect the industry. We have jump-up provisions, if you like. If there is a discrepancy in the rates for a particular classification the rates are adjusted accordingly for those particular sites.

Mr BRENDAN O'CONNOR—In relation to those tiers that you have outlined, you place yourself squarely in tier 1. In relation to your proposal to support some form of regulation to remove unscrupulous labour hire companies from staying in the industry, how would you, if it is possible, break down the two second tiers—that is, tier 2 and tier 3? Clearly you are saying that in some cases medium sized companies do not satisfy what you would see as a proper standard, and some maybe just get there. Tier 3 is abhorrent to SKILLED's view of a proper standard. But what proportion of labour hire companies could be knocked out if indeed you regulated it? Is it easy to sum that up?

Mr Hargrave—No, it is not easy to sum it up. The tiering is kind of arbitrary along the lines of size. You will, in all honesty, find very small operators that are very scrupulous. That is the point. There will be mid tier operators that also undertake activities that would be less than scrupulous at times. Whereas when we look at what we consider the tier 1 operators, which are the major players—and we know their work fairly well—we are fairly confident they abide by all. Their standards might not be as high as ours, and their safety standards might not be as good, et cetera, et cetera, but they do abide by strong standards. There needs to be an onus on both the clients and the providers to set certain standards around occupational health and safety and award payments and those sorts of things—something that can be checked and policed—

Mr BRENDAN O'CONNOR—So just being a good employer.

Mr Hargrave—A good operator, and that will throw out the differences.

Mr BRENDAN O'CONNOR—Has SKILLED experienced some of these other operators by various means undercutting your conditions?

Mr Hargrave—Yes.

Mr BRENDAN O'CONNOR—Can you cite any particular examples for the committee?

Mr Hargrave—No, I do not think we can cite particular examples.

Mr BRENDAN O'CONNOR—Can you expand upon that?

Mr Hargrave—Sometimes you can actually get to the truth of it and find out what rate they are paying certain employees. We have seen many cases where we go in at award rate for a certain classification and a small competitor will go in at a much lower rate, at a charge rate that is lower than the pay rate.

Mr BRENDAN O'CONNOR—Are you saying that it is even lower than the federal minimum?

Mr Hargrave—It can sometimes be even lower than the award rate. We have come across other cases over time where they miss classifications of employment so they can get a lower work cover levy. We have seen small organisations go under, and when we have proposed to take out employees we have found that these organisations have not been paying their employees' superannuation entitlements—a whole range of activities below the radar. We do not spend our time watching and investigating small operators. The situations are anecdotal and it is constantly at the fringes, but from a pricing point of view it is a constant pressure. We see it as tarnishing the industry so that employees who might be caught in a situation then have a negative view of labour hire, and we see that as a negative for us.

Mr BRENDAN O'CONNOR—I understand your frustration there. Would it be comparable for companies or for direct employees of companies to see you as a threat? Whilst you might, for example, regulate yourselves lawfully in relation to entering into industrial instruments pursuant to, say, the Workplace Relations Act, you still find ways and means, even through some form of regulation, to undercut the conditions of employment of direct employees when you seek to enter into a contract with their employer.

Mr Hargrave—Typically not. We provide flexibility. When we outsource maintenance activities, the only condition we might change is to expect a high level of productivity from our employees.

Mr BRENDAN O'CONNOR—That is a good thing; no-one would argue against that.

CHAIR—I do not think that is what Greg needs to be referring to.

Mr BRENDAN O'CONNOR—Can I just keep going with this, Chair. I accept what you are saying—that you would support the improvements in productivity. Anybody involved in this area should. You are suggesting that your intention certainly is not to undercut labour costs?

Mr Hargrave—I am suggesting our primary service to our clients is not to provide a work force at a lower charge rate or pay rate than their work force.

Mr BRENDAN O'CONNOR—On that basis and given the fly-by-nighters that you referred to, would SKILLED support a transmission of business provision that would provide for an even playing field? If it is the case that SKILLED is a professional outfit, a very large employer and a

good employer that invests in its employees, would you then feel confident to compete at a comparable level with the direct employees that you may be replacing?

Mr Hargrave—Most of the time we do not replace them. Most of them join our organisation and—

Mr BRENDAN O'CONNOR—I think you know what I mean. Let us say there is a function of a company that may be outsourced—and you have every right to bid for that work and you may be successful in doing so—given your standing as an employer, certainly as you assert today, and given the fact that you have outlined to the committee that you are not about reducing employment conditions, why wouldn't you support a transmission of business provision?

Mr Hargrave—Because a lot more things come with transmission of business than simply employment conditions.

Mr BRENDAN O'CONNOR—Would you agree that there should be an undertaking by employers who want to overtake a particular function of a company, employ the employees directly themselves and enter into a contract with that other company, that they should not be looking to undercut employment conditions to do so?

Mr Fitzgerald—Generally, from SKILLED's point of view, conditions are not undercut and in many cases people are better off in their take-home pays.

Mr BRENDAN O'CONNOR—Should they be allowed to be worse off is the question.

Mr Fitzgerald—It depends upon what you mean when you say 'worse off'. In many companies, things have happened over time with bargaining so that a person in one manufacturing plant may be enjoying conditions way above those enjoyed by someone in a similar manufacturing plant across the other side of town. It is very hard, except to say that you could always be getting a transmission of the greatest benefits which are not reflective of the real going rates.

Mr BRENDAN O'CONNOR—Finally, what proportion of your work force is casual? I accept the view you have asserted that casual is not a dirty word. There are clearly people who want to be casual for a particular time in their working lives. What proportion do you have as casual? You mentioned the fact that where appropriate people are paid holiday leave and the like. What proportion of your work force would be paid that?

Mr Hargrave—As opposed to a casual loading?

Mr BRENDAN O'CONNOR—Yes.

Mr Hargrave—I could not give you that number, but I am happy to come back to you with it.

Mr BRENDAN O'CONNOR—I would appreciate that.

CHAIR—Greg, you have mentioned a number of times that you have two customers, your clients and your employees. You have clearly identified that group as your employees several

times and you have taken on industrial responsibilities like occupational health and safety. Take me through the process that you would go through and your responsibilities and obligations when you are dismissing someone, if that happens. As an organisation, how do you handle dismissals, terminations and redundancies?

Mr Hargrave—Ray normally goes through the detail.

CHAIR—Have you been party to an unfair dismissal claim?

Mr Fitzgerald—Yes.

CHAIR—A direct claim against you or a claim against you as a joint employer with a host or client organisation?

Mr Fitzgerald—We have situations where a client for some reason may not be happy with somebody that we have sent out there. That does not necessarily mean—

CHAIR—I understand that. In that sort of situation you would withdraw the person. That is why I was very specific about termination.

Mr Fitzgerald—Yes. We try to find them alternative work in those circumstances.

Mr Hargrave—We have been involved over many years in many unfair dismissal claims. We have thousands of employees and that is the nature of Australian industry. Unfair dismissal claims do occur.

CHAIR—I understand that. I am just talking about the employer-employee relationship. You have clearly stated that these people are your employees.

Mr Hargrave—Yes, indeed.

CHAIR—In some other situations there is often a greying of responsibility.

Mr Hargrave—Not in our world. There is no greying of responsibility. The responsibility is ours. It is not the client's responsibility to dismiss our employees and it is not the client's responsibility to call our employees and ask them to come to work for them without our knowledge; it is none of those things. The relationship is with us. In dozens of situations we have on-site representation. Our field operators are constantly going to client sites where our employees are to talk to and deal with our employees, provide them with fresh overalls, provide them with their safety equipment and talk about their issues and problems. They are our employees. We have dozens of people dedicated to safety and the whole rest of the organisation is dedicated to safety. They are our employees. One of the greatest misnomers and one of the things in the language of this industry that has distressed us the most over the last five to 10 years is the spurious concept of a host employer. I will admit that some players in our space—some of the less scrupulous operators—have been happy to encourage that because they have wanted to transfer their responsibility for their employees to their client, and we are dead against that. Not only that but we do not like our employees being poached by our clients, because they are our employees.

CHAIR—I have got that message loud and clear: they are your employees.

Mr Hargrave—I am very passionate about that. It does distress us. They are our employees.

CHAIR—Therefore, given that they are your employees, what responsibilities do you have for WorkCover premiums and occupational health and safety? I saw the material that you put in there and the track record of injuries per hours worked, and that is all very impressive. But once again it is about the delineation of responsibility. There would be some clients who would be more than pleased to handball their obligations, their duty of care, to a labour hire organisation. In your mind, how would this work genuinely for the industry?

Mr Hargrave—A client has a duty of care for the work site. It is their work site, so they have a duty of care for the environment. They have a range of duties of care around that. Direct duty of care for our employees is ours. We do not expect our clients to be unlawful in their activities in dealing with our employees or any of those sorts of things, but at the end of the day it is our responsibility. We do a safety inspection of every site that we send our employees to. We do job inspections of the activities they undertake. We do constant tool box talks, which is when we go out to sites as both managers and safety professionals within the organisation and take 10 or 15 minutes with employees to talk about safety and other issues. We record near misses and all of those things. We work with our clients and we do regular presentations to them on safety education.

CHAIR—You are still missing my point, though, which is the legal obligation of paying the WorkCover premiums. Who pays for that?

Mr Hargrave—We pay the WorkCover premiums.

CHAIR—So you have your classifications running through?

Mr Hargrave—Yes. We pay WorkCover and superannuation. All of that is ours.

CHAIR—I have to get this on the record—that is all. It is important for that to happen.

Mr Hargrave—We pay superannuation and WorkCover—all the entitlements. They are our levies. We are self-insured in South Australia. We are looking at the same in New South Wales, because unfortunately we have a better industry—

Mr BRENDAN O'CONNOR—The chair thinks he is talking to a tier 3 labour hire company, obviously!

CHAIR—No, not at all. The other thing is: are you members of the RCSA?

Mr Hargrave—Yes.

CHAIR—The other day they presented the committee with their code of professional conduct. That is their particular members' code of conduct; you obviously have your own code as well. Why not simply have the industry regulate itself?

Mr Hargrave—Yes, it has failed. The problem is that the RCSA represents two groups of constituents. One is individual people who work in the recruitment industry as a professional body or organisation. That is a big part of its focus: providing training, networking and those sorts of things. They pay fees. An organisation survives because people pay fees. A large part of their fee base comes from just individual recruiters. The other large part of this group is a lot of small operators and so forth. Obviously, when you are representing 3,000, 4,000 or 5,000 individual constituents, you want low levels of regulation. The point is that, as Ken said, it has obviously failed up to this point. Things have changed over the last decade. Safety and all these things are so much more paramount to Australian industry. This is a very large employment sector and we would be happy for greater work cover, but with proper regulation. The unfortunate thing with simple regulation without policing is that they just go to the big operators like us and say, 'Are you doing everything right?' We say we are, they check that and say, 'Fine,' because that is easy. They are not going out and identifying the unscrupulous operators and there is no onus on the client to check if they are dealing with a scrupulous operator.

CHAIR—I thank you all for the presentation and the supplementary information.

Mr Hargrave—Thank you. Obviously, if there is anything else, we are happy to provide information.

[10.36 a.m.]

DUFFIN, Mr Linton Robert James, Federal Legal Officer, Transport Workers Union of Australia

JOHNSON, Mr Brendan John, Industrial Advocate, Transport Workers Union of Australia

NOONAN, Mr William George, Branch Secretary, Victoria Tasmania Branch, Transport Workers Union of Australia

CHAIR—The committee does not require you to give evidence under oath, but I advise you that these hearings are formal proceedings of the parliament and consequently warrant the same respect as hearings of the House. I also remind you 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 that you would like to raise in private we will consider your request. Would you like to make an opening statement or give some introductory remarks to your submission?

Mr Duffin—We had a discussion amongst ourselves this morning and decided that I would go first. I noticed the way SKILLED approached things, but I do not intend to read through our submission in any detail. I just wanted to highlight four points that we particularly wanted to bring out of our submissions. They do not in any way derogate from the rest of the submission; we merely intend to provide certain aspects that we think need to be addressed. The first issue is in relation to the proposed amendments to the Trade Practices Act which were, as I understand it, pushed through the House of Representatives. We are particularly concerned by the nature of those amendments—and I wish to be a little bit provocative about this. Clause 93AB(9) says:

A notice given by a corporation under subsection (1) is not a valid collective bargaining notice if it is given, on behalf of the corporation, by:

(a) a trade union; or

(b) an officer of a trade union; or

(c) a person acting on the direction of a trade union.

That, to us, is just a perverse piece of legislation. We can demonstrate the extent to which it is perverse by inserting the words ‘a person of an Italian background’ or ‘a person of an Irish Catholic background’ instead of the words ‘trade union’ That would demonstrate just how discriminatory that provision is. It is even worse in one sense in that by capturing trade unions—and I understand that there are two members from Victoria here—it would allow a person such as Carl Williams to provide such a notice but a trade union not to. That seems to me to be a most pernicious piece of legislation.

I have read a number of the submissions which have been provided to the committee. Statements are repeatedly made that dependent contracting is not something that the committee

ought to pay much regard to and that it is not a concept that exists at law and therefore ought to be ignored. To me and to the union that is a misreading of how dependent contracting operates in the transport industry in particular but also generally. Partnerships, for example, are not legal entities either, but they are quite clearly understood. It is a little bit like the example which the committee will have seen on numerous occasions in relation to ducks and roosters. We can all recognise what a dependent contractor is. Whether that leads to regulation, and we say that it does in some circumstances, is a matter which is different to that of a genuine itinerant independent contractor.

The third issue that we would raise with the committee is that—and this goes back to all questions of policy—there is the potential for the law of unintended consequences to arise from any work done by independent contractors. Impacts on taxation, superannuation, retirement incomes policy and, in particular, public safety in relation to the road transport industry are all matters which will be impacted by any attempts to alter the arrangements which exist on a state by state basis.

The last issue that we wanted to raise is that there are—and Mr Noonan will deal with this in relation to the Victorian situation—various models that have been pursued by different state governments. We understand the committee's approach to these things. Each of those address specific issues. The most obvious, in one sense, of specific issues is the way the Tasmanian government has approached the regulation of log truck drivers in Tasmania. They have two large corporations, one in particular, which every log truck driver is essentially a dependent contractor to, and the models that have been applied there are quite different to the model that applies in Victoria, which is quite different to the model that applies in New South Wales and so on. Those are the four points that we think needed to be drawn from our submission. In our view they are issues which the committee must address.

Mr Noonan—My submission is about our contribution, but I am indebted to Mr Johnson for helping me draw it together. As opposed to the previous group, he does make us a dollar, generally by making me look good.

CHAIR—Well done, Brendan.

Mr Noonan—From the Victorian and Tasmanian branch perspective, we have a current and longstanding representation of and involvement with owner-drivers. In my own case, it probably goes back something like 35 years. We think we can say that we have a legitimate role of providing representation and encouraging safe and sustainable remuneration and conditions. I think we must keep coming back to the word 'safe'. Safety is an issue in our industry.

We also say in our submission that we have a role similar to that of professional associations and employer groups. We currently have legitimacy under our registered rules and are accepted by people like the Victorian Transport Association and the Bus Association of Victoria as a legitimate organisation to deal with. As long as I can remember in my industry we have had collective bargaining on behalf of owner-drivers. Companies like TNT, Toll and Linfox have adopted policies over the years that take the collective approach rather than the individual approach. Simple structures for owner drivers are a fixed variable and labour cost. I am sure you have heard about all those matters from other witnesses.

Significantly, it is most important when we are thinking about independent contractors—owner-drivers—that we have regard for the concept of tendering, which inevitably runs to a 'race to the bottom' concept, where owner-drivers are compromising maintenance, and things like driver fatigue become part of the equation. In our submission, we talk about the need to ensure that owner-drivers earn no less than an employee performing similar work. I guess we have an old-fashioned view that there really needs to be a fair go all round for the people who work in our industry.

I will not go through all the other matters in our submission, but there is one matter I want to touch on because if I do not get to it straightaway it could be too late. You have heard a little this morning about labour hire and the tiers in it—I think tiers 1, 2 and 3 were mentioned. A month or two ago we made a submission in this very room to the Economic Development Committee of the Victorian parliament, which grew out of the Maxwell report. Maxwell talked about labour hire work being precarious employment—and I just wanted to say to the committee that it is particularly precarious employment in the transport industry. We have invested an enormous amount of time, energy and work regulation training into workplace safety around forklifts and that sort of activity.

We have also put an enormous amount of work into the road transport industry through groups like the VicRoads Advisory Board, the Road Freight Advisory Council and the Transport Industry Safety Group, which is a group that meets at the Coroner's Court and comprises all the associations. All of those activities are really about a public safety approach in that our industry operates on the road system on a day-to-day basis. We certainly have our own place of work—where we report for work—and the other places we deliver to and pick up from, but of course we then have the road safety situation. Indeed, we have been running annual seminars—and we will have one at Moonee Valley on 16 July—about the application of the new Victorian Occupational Health and Safety Act and its impact on the road transport industry. You cannot have a safe road transport industry with the complete deregulation of the people who work in it. It is a simple fact of life, and I am prepared to challenge it. We probably do not have time today to debate that but, if you think it through, it seems very necessary to have a structure in place.

Last but not least, I refer you to clause 61 at page 22 of our submission, where we quote from Professor Michael Quinlan's report:

> It creates a strong inducement to use subcontracting and shifts in employment status as a means of gaining a competitive advantage. This might be acceptable in some industries but not in the highly competitive road transport industry where efforts to remain viable by owner/drivers and transport firms often lead to compromises on safety, that, in turn, pose a serious risk not only to drivers but other road users.

I would be most concerned if, at the end of this inquiry, we found ourselves in a situation where people in our industry were working completely deregulated and without the training, skills and control that are really necessary to operate on the public roads a 65-tonne truck travelling at 100 kilometres an hour.

I might just touch on one other matter in our industry. For the last three years, we have run the Health Break program in conjunction with WorkSafe Victoria and the Transport Accident Commission to try to do something about the problem of sleep apnoea in our industry. We have found that about 24 per cent of our people who are driving heavy vehicles have either a high

degree of sleepiness or excessive sleepiness, brought about by the problem of sleep apnoea. For all those reasons, we are very concerned that we might get to the point where our industry is operating in a deregulated state and all the work that has been put in over a number of years is lost to us.

CHAIR—Brendan, do you want to make any other comments?

Mr Johnson—No, I am happy to support the submission that has been made to the committee.

Mr Duffin—I will just say one other thing in relation to that. We have the same quote in our submission at paragraph 76. It is noteworthy that your colleague Mr Baldwin made similar comments in the House in March when he stated:

At the moment, the price of freight has been driven down so low that most operators, particularly small operators, are operating at a loss. Unfortunately, some people take short cuts in maintenance, registration or insurance, but at the end of the day the person who pays the price is the driver trying to compete and stay in business.

CHAIR—We understand those pressures. Perhaps I can kick off by picking up from that point. You heard the SKILLED Group a moment ago talk about the three tiers, about the people being their employees and how they are responsible for occupational health and safety, training, workers comp and all those sorts of things. Are there labour hire companies—I do not know what the term would be in your particular industry, whether it is principal contractors rather than subcontractors—who are exemplary and who you do not have a concern with in terms of some of the things you have raised?

Mr Noonan—We have reasonable relationships with a couple of labour hire companies—for example, Australian Personnel Solutions. We know that they will not send anyone into a workplace unless they go first to ensure that the host company—they use that term, as opposed to skilled—have an occupational health and safety program in place. They then continue to monitor that. Indeed, they have regular visits. It ranges from that level to the level that the previous people were talking about.

CHAIR—Are you happy to work with that level of organisation?

Mr Noonan—It is a small group that we can work with and they have some regard for the people that they engage, but it tapers away to a fairly low standard.

CHAIR—The point I am trying to make is that if that was a benchmark then there would be an element of satisfaction from your point of view as a union.

Mr Noonan—I think we have to have commonsense in our industry. We have members in the bus industry, freight industry, airline industry and armoured car industry. We are a service industry that has peaks and troughs. In my 40 years of membership we have always had periods of casual work in our industry. Where companies used to have their own casuals they now generally bring in labour hire people. So we are not averse to having people who are casually engaged in our industry. We say that there is a real need for people when they walk into the workplace to have someone put their arm around them—because it is generally five o'clock in

the morning—and say: 'This is where the dangerous goods are stored. I'm the occupational health and safety rep. This is where the first aid kit is. This is where the support lifts run. This is how you don't get killed in this yard.' So it is a combination situation.

CHAIR—It is becoming increasingly obvious from listening to you guys and also to those up in Sydney—compared to some of the other witnesses we have had—that your particular industry is unique. I hate to use that word because everyone would perhaps like to think that they are unique but it is simply because of the sheer number of owner-drivers who are out there. That brings me to the point about Victoria. Is it impending legislation or has the legislation gone through making owner-drivers small businesses and therefore making them able to access small business commissioners to represent them with regard to various conditions and disputes?

Mr Noonan—The second reading speech was made last week by Minister Hulls.

CHAIR—So it has not gone through parliament yet?

Mr Noonan—No, not yet.

CHAIR—Do you support that legislation?

Mr Noonan—Absolutely. It has got total industry support from both the principal employers of the Victorian Transport Association and ourselves.

Mr BRENDAN O'CONNOR—I just wanted to allow the witnesses to expand on the concerns raised particularly by Mr Duffin in relation to the bill before the House of Representatives. I think you are aware there has been a first reading. It has not yet been fully debated in the House.

You draw analogies between yourselves in representing independent contractors and the rights of other organisations to do likewise. You make references to—I am not actually referring to all of the witnesses here—the AMA, the Australian Dental Association and even the Australian Football League Players Association and the fact that they are able to represent what are in effect independent contractors in many cases. Can I ask you to again go to that matter. I do not mind who does this; it can be a number of witnesses. Also would you explain the consequences. If in fact a law was to be passed by the Commonwealth that would proscribe the TWU from representing owner-drivers, which they have historically represented, what would be the impact on those people and the organisation of the TWU itself? I hope that is not too broad a question.

Mr Duffin—We indicate in our submission that about a quarter—between 20 and 25 per cent—of our membership is owner-drivers. We have been representing owner-drivers in matters for probably the greater part of the history of the organisation. I look at Mr Noonan in saying that.

Mr Noonan—I was here in 1904, when we started!

CHAIR—Were you an owner-driver back then!

Mr Noonan—My horse died, so I had to become a union official!

Mr Duffin—Fundamentally we have immense expertise in representing them. We have been doing it, and doing it well—to praise ourselves.

Mr BRENDAN O'CONNOR—They are members, and I guess that is the prima facie case.

Mr Duffin—That is the best indication. The alternative for these people is to, presumably, engage some sort of external figure to represent them but probably still receive advice, directions and negotiations on many of these things from us, which creates a bizarre situation. Let us not be silly about it. The union will seek to look at ways to get around any provision that is based on that. It is a nonsense, in our view.

CHAIR—That is why I asked the question about the Victorian legislation. Are you able to get around this, in one way—let us put the owner-drivers' interests front and centre here—by being able to access the Small Business Commissioner, who would represent them on these issues where you may feel that you are being shut out?

Mr Duffin—Brendan will answer that from a Victorian perspective. It might be best if he does that first. There are some points I want to make on how it operates elsewhere.

Mr Johnson—Fundamentally we are talking about different areas. We see these owner-drivers essentially as small businesses. My understanding of the bill as it presently exists before the Victorian parliament is that it is based on the existing fair trading laws that are currently in place and apply across the board to businesses on a business-to-business basis. That is the basis upon which this bill has been drafted. It is also based on—you may be familiar with it—the Retail Leases Act and the various codes associated with that. It is not necessarily dealing with the issue of independent contracting versus employee, or anything to do with that. It is merely providing some sort of mechanism for dispute resolution for what are essentially small businesses. We are talking about operators who have the same issues to do with income and revenue, outgoings, expenses, fixed and variable costs, factoring in labour costs and profit and actually at the end of the day making sure that they have access to an adequate means of existence.

One issue that I would point to in our submission is the ACIL Tasman report. It is on pages 13 and 14 of our submission. One of the conclusions drawn from that, which drew from ABS data and other material, is in the second last and last points:

- The average profit before tax in 1999-2000 of these businesses was $20,637 which was lower than the average earnings paid to employees in the lowest paid segment of the employed business group.
- In order to earn that income, the own-account workers (owner drivers) averaged 51 working hours a week, with small employers working an average of 58 hours a week.

We are talking about small businesses that are suffering. It is not necessarily an issue of the independent contractor verses employee debate, but merely providing a mechanism for the resolution of disputes.

CHAIR—If this is the situation, and I do not dispute that, why would someone engage as an owner-driver? This goes to motivation.

Mr Duffin—I can answer that question, but I would not mind answering the previous one first.

CHAIR—Okay, finish that one off and then take this one on notice.

Mr Duffin—Brendan has addressed the issue in relation to small businesses in Victoria. The New South Wales branch, for example, whom you have already seen, would not disagree with anything he has said. They see themselves as small businesses as well; they just have a different model of regulation. The contract determination system is in one sense fundamentally based on operating costs and setting an appropriate figure in that sense. It is done in a different way but they would still see themselves as small business people. It is no different in Queensland and South Australia; it is just that there are fewer people engaged in owner-operating.

In relation to your second question, there is a decision of the Federal Court in Buchmueller v Allied Express, which was a decision based in Queensland using section 127—the current section is 127A to C of the federal act. Justice Dowsett in Brisbane essentially asked those same questions in his decision. He essentially said that he could not understand how anyone can run a business in this way. But, for many working people, truck driving is a skill they can gain. It does not require a four-year apprenticeship. As a result of that there are fundamentally very low barriers to entry. People can come into the industry, they can lose a lot of money and they can get out again if they need to. Those who make a lot of money—the Lindsay Foxes of this world—show very high levels of business acumen but not everyone does.

Mr VASTA—We heard from the TWU in Sydney. There was an owner operator who said that he had just spent $250,000 buying a brand-new rig and doing just that. I see the profit margin—I know it is for 1999-2000. Has the average gone up since that time or has it decreased or stayed constant?

Mr Duffin—There are no formal statistics. I would be terribly surprised. That sum of money is not unusual as an operating expense. The Victorian-Tasmanian submission has indicated that it is quite usual for owner operators to carry debts of $300,000 in terms of purchasing their capital. And the banks are still okay to give them that money.

CHAIR—It is an asset they can retrieve.

Mr Noonan—I want to answer Mr O'Connor's question about the practical application of us not being able to represent owner-drivers. It would become a nonsense, quite frankly. If you went to TNT's Laverton yard where you might have 300 people working, 50 of them would be owner-drivers tied to TNT, painted in TNT's colours, not working anywhere else and reporting there everyday. We represent them on a common law agreement basis. They fit into the normal workplace. TNT Express have won awards from the Victorian Transport Association for industrial relations. There is an occupational health and safety awards structure in the place. The operation works as one, irrespective of whether people are employees or owner-drivers. If the union was excluded from representing those people it would become a nonsense. I suggest that if you approached the company and asked them that question they would say that they prefer the current regime.

Mr BRENDAN O'CONNOR—Do you have a view as to what TNT's position would be on the proposed legislation before the House of Representatives? Is that something they have expressed at this point?

Mr Noonan—Quite frankly, no. My feeling is that it is perhaps not as widely known as it ought to be—

Mr BRENDAN O'CONNOR—No, it is not.

Mr Noonan—that the legislation proposes to exclude trade unions from representing owner-drivers. I think that if it was as widely known as it ought to be there would be some concern about it, to be frank.

Mr BRENDAN O'CONNOR—We will hear a lot more about it, I think.

CHAIR—Are you saying it excludes owner-drivers?

Mr Noonan—I think the legislation is setting out to exclude us from representing our current membership. I think that that would come as a bit of a surprise to some of the people we currently deal with.

CHAIR—My last question goes to motivation again, but this time from the company's point of view. Let us take the TNT example. Why would an organisation that has 70 per cent of its drivers as employees and perhaps another 30 per cent subcontracted as owner-drivers do that? Why not just simply put on those extras? If we are talking about flexibility and being able to roster people for different periods, why not simply put them on as casual drivers—company casuals?

Mr Noonan—In the first instance, the majority of the employee drivers would be permanent. They would be covered by an enterprise bargaining agreement that would be negotiated. The reason that they put them on as permanent, quite frankly, is that they want to hold on to them because the industry is bereft of workers. The last thing that the industry wants is for people to be floating around, having choices as to whether they work for TNT today, Toll tomorrow or Lindsay Fox the next day. When TNT go out and buy themselves $1 million worth of trucks and they have all this freight that they want move, they want to continue with their employment structure.

CHAIR—The point you made was that there are owner-drivers whose trucks are decked out in the company colours.

Mr Noonan—I will explain it to you. You often find that express companies have employees on the long-haul freight, the larger truck freight or the bulk freight, and they will have a group of owner-drivers who will do the express pick-up and delivery during the course of the day. That is how TNT operate. However, Star Track Express, out near Tullamarine, where there are 400 Transport Workers Union members, are a complete employee fleet. So there is a choice made by the company as to whether they own all or most of their trucks.

Mr Duffin—If you look at the history of the transport industry, you see that it swings from very high levels of permanent employees and small numbers of contractors to larger numbers of contractors. It is a constant cycle. It makes sense, given the nature of the road industry. Everything just goes around and around and backwards and forwards.

Mr Noonan—If you went back to 1970—I know it is a bit of history—you would find that the transport industry suddenly expanded, and companies like IPEC expanded with it by engaging owner-drivers. It saved them from making a capital expenditure. The last 30 years have seen a gradual swing back.

CHAIR—So it is mainly about the capital expenditure—not having that extra asset of trucks on their books.

Mr Noonan—These days it is very important to control.

CHAIR—Thank you very much for your submission. It certainly adds to the evidence that we heard in Sydney from your New South Wales counterparts. We thank you for that. It took me a while to get my mind around this whole issue of contract determination. I am still not sure that I fully understand it, but at least it only operates in New South Wales.

Mr Noonan—If there is any other information we can provide the committee, we certainly will do that.

CHAIR—We would be happy to receive it. Thank you very much. More importantly, thank you for your patience this morning.

[11.15 a.m.]

BLAKE, Mr Nicholas, Federal Industrial Officer, Australian Nursing Federation

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that these hearings are formal proceedings of parliament and consequently warrant the same respect as the proceedings of the House itself. I also remind you 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 at any time you wish to give evidence in private we will consider your request. Would you like to make on opening statement or talk to your submission?

Mr Blake—I have not prepared a lengthy statement but I want to raise some of issues we covered in our submission to this inquiry, and I appreciate the opportunity to be here today. First of all, there are over 240,000 nurses employed in Australia today and, of those, over 145,000 are members of the Australian Nursing Federation. They are employed in a range of different settings but the vast majority of them are employed to provide nursing care in both public and private hospitals in the states and territories.

Whilst it is difficult to obtain detailed information on the extent and nature of contracting and labour hire arrangements, we do know that there are examples in the nursing industry of independent contractors such as independent midwives and independent nurse practitioners employed to provide services in medical clinics and general practice facilities. To the best of our knowledge, the largest user of independent contractors, strangely enough, is the Commonwealth Department of Defence who employ around 500 nurses on what they claim to be independent contracting arrangements to provide nursing services to Defence Force personnel in the various establishments they run.

In terms of labour hire agencies, we estimate that at any given time up to five per cent of the nursing work force is employed by them. We wish to make the point that we recognise and do not oppose the existence of labour hire firms in the nursing industry. We recognise that they provide an important and sometimes vital role in placing labour in often unfamiliar work places, and the health and community services sector could not continue without this important function.

The Australian Nursing Federation have the view that the role of labour hire firms is to provide labour often on an urgent or a short-term basis to assist employers to provide for unplanned absences such as sick leave. We do not support the situation that grew during the 1990s where labour hire firms were providing labour on an ongoing regular basis to hospitals for various reasons. Historically, labour hire nurses have received wages and conditions of employment superior to those employed by hospitals on a direct basis. In the 1990s this spiralled out of control and a situation existed where in some circumstances labour hire nursing staff were being paid up to three times as much as people employed directly by hospitals working side by side with them, doing the same work and having the same levels of responsibility. In other extreme circumstances, labour hire firms were providing nurses to residential aged care facilities for one or perhaps two hours per day to dispense medication. We do not support those types of practices.

Although the situation has stabilised to some degree, in our submission we refer to a decision by the Victorian government to seek the approval of the ACCC to establish a cartel of labour hire nursing agencies with a view to controlling the cost of nursing labour and the extent to which nursing labour could be provided to hospitals. In what we believe was a unique decision of the ACCC, they granted that application and, in doing so, stated that in their view it would not only reduce the costs to the Victorian government and of course to the taxpayer but also improve the levels of nursing care.

We are concerned that if there is a further expansion of the use of independent contractors or labour hire without due regard for the public interest, and in health there is a significant public interest test to be overcome, this could further reduce or lead to a reduction in levels of patient care and further fragmentation of the nursing work force.

We say in our submission—and we seek to repeat it here today—that whilst we support labour hire we do believe that they should be subject to the relevant industrial tribunals. They should be covered by awards and collective agreements negotiated on their behalf by our union, and they should be able to join the union and participate fully in its activities. That is essentially my opening statement, thank you.

CHAIR—Thank you very much. Just for clarification, did you support the Victorian government's support of the application to the ACCC?

Mr Blake—Yes.

CHAIR—So you are happy with that arrangement?

Mr Blake—Yes, we are happy with that arrangement; it has worked quite well. The Victorian government took a number of steps. The first step they took was to place a cap on the number of nursing hours that hospitals could provide through agency labour. The next step they took was to make an application to the ACCC for that exemption. That has led to a situation where hospital management is now required to use nursing labour from agencies for unplanned absences.

CHAIR—And this is only in public hospitals?

Mr Blake—Public hospitals in the Melbourne metropolitan area, yes.

CHAIR—Okay, metro only. Has it reduced the number of labour hire companies out there?

Mr Blake—I am unable to say whether or not that has been the case, but certainly during the ACCC public hearings the claim by their associations was that it would drive a number of nursing agencies out of business.

CHAIR—Where do you see growth taking place in the placement of nurses through labour hire; are there any particular sectors in the health and allied services?

Mr Blake—There has been, for a number of reasons, a fragmentation of the wages and conditions of employment for nurses. Consequently, the residential aged care sector has found it difficult to engage and retain qualified nurses. They rely very heavily on labour hire firms to

provide the nursing labour that they are required to have under the regulations set by the federal government. I see that as a growth area, given that we all know that the average age of the population is increasing. Demands on residential aged care facilities, and the acuity of the residents, are increasing all the time. They are now quasi-hospitals, in effect, and they require nursing labour.

CHAIR—Yes. One of them has set up in my electorate. Are the labour hire companies who provide nurses also providing home and community care—some of the CAC packages?

Mr Blake—Yes, they are. They are very active in that field.

CHAIR—So as an individual with an invalid father I could just go to a labour hire company direct?

Mr Blake—Normally the arrangement, as I understand it, would be that an aged care facility or a local government would contract with a labour hire firm who would then provide that labour directly to you.

CHAIR—So I would still have to go through the established organisations, whether it be the council or the local aged care centre?

Mr Blake—Yes, that would be the case.

CHAIR—It is interesting that in your evidence you mention that labour hire nurses have superior wages to those who work directly in the sector—up to three times as much, you stated. That really is at odds with just about everything we have heard from labour hire organisations; you are unique in that regard. Why is that?

CHAIR—Yesterday we heard from engineers. Would this be the case with other scarce—

Mr BRENDAN O'CONNOR—Well let him speak on behalf of nurses, perhaps, and give us a reason for that.

CHAIR—Let me finish my question. From your understanding, is this unique to industry or do you know anecdotally that it is happening in other sectors as well?

Mr Blake—In respect of the nursing industry, and the health sector generally, it is perhaps unique. Whether it is the public or private sector, governments through health service agreements or public health funds, there are demands that hospitals provide levels of services. They are either punished or rewarded on the basis of those services that they provide. They can only provide those services by accessing nursing labour. The situation in the late-1990s was that labour hire firms exploited that and were able to use the community and funding agency demands, and the need for hospitals to have levels of throughput, to their advantage. Consequently nurses got a benefit through that. Certainly in health there are other professionals that would be in the same situation but I am not able to say outside that sector.

CHAIR—Is it a situation predominantly in the public sector or does it also take place in the private sector?

Mr Blake—No, it certainly takes place in the private sector as well. Health funds are clearly as aggressive as public sector facilities about getting their hospitals certain levels of throughput and meeting their targets in order to access money to run the hospital.

Mr BRENDAN O'CONNOR—It is true to say that from all the evidence we have now heard through a number of hearing days we have not heard about too many labour hire employees being paid the same—certainly not in excess of—as direct employees. You were explaining the reason for that. In terms of the assertion that you made about being paid more than three times more, is that in terms of a rate or a penalty? What form of employment arrangements have led to such an extraordinary increase?

Mr Blake—It was essentially the rate of pay that was increased. Labour hire firms are required to match the general conditions of employment that apply to the direct employees. But they were offering significant increases in the base rate to attract nurses on very short-term, ad hoc arrangements. I used the example of the aged care facility where, because medication is required to be dispensed by a nurse, labour hire firms were providing nurses to facilities on a one or two hours per day basis to fulfil that function. Similarly, hospitals were able to bring in theatre nurses, for example, for a set period of operations or procedures, have them in for a few hours and then out again—a situation we believe was not in the public interest and was not sustainable over the long term. Our views were subsequently found to be correct. That is not the situation today. But in a circumstance where it is totally deregulated, the demands on health facilities continue to grow and the market determines the rate, that is what happens.

Mr BRENDAN O'CONNOR—Is the RDNS an agency as you said?

Mr Blake—No.

Mr BRENDAN O'CONNOR—So how does that work, given that it provides nurses into home care arrangements, for example, you have royal district nursing?

Mr Blake—They are directly employed. Royal District Nursing Services provide their services through councils.

Mr BRENDAN O'CONNOR—Are the agency employees primarily members of the ANF?

Mr Blake—Yes, definitely. For a number of reasons, but one of the key reasons is that they are often required to provide their own levels of professional indemnity insurance. We provide that to nurses as part of their membership.

CHAIR—One of the things that has been announced is general practice nurses. Is that playing out already with labour hire organisations getting involved directly with general practitioners?

Mr Blake—The role of general practice nurses is probably in its formative stages. Certainly there has been an increased demand for general practice nurses and an acceptance that they will progressively pick up some of the role that is traditionally carried out by doctors. Consequently they will be more important in generating revenue for practices, so I expect that the labour hire firms would look closely at being able to package their offers to general practices to provide nurses. To the best of my knowledge, that is not extensive at the moment.

CHAIR—How prevalent, if at all, are independent contractors amongst your membership?

Mr Blake—That is a difficult question to answer, because I do not believe there is a clear definition of an independent contractor. The example that I use is in respect of the Commonwealth Department of Defence, which engages people under independent contract arrangements. To the best of my knowledge it is simply a contrived arrangement, for reasons that we do not understand. These people work five days a week in hospitals in defence establishments and are no different from a nurse working in a normal hospital. But for some reason they are classified as independent contractors. We are in discussion with the department about those arrangements.

CHAIR—Are you saying that they are employed on an individual basis?

Mr Blake—Yes. They are required to have ABNs and to put in invoices for the work they do, but they actually are working nurses in hospitals, providing care for defence personnel.

Mr BRENDAN O'CONNOR—And they are working for one employer, or they would say for 'one principal'.

Mr Blake—Yes, they certainly are. They are not through an agency; they are providing services directly to the defence establishment.

CHAIR—Is this throughout the defence department, or only at particular barracks?

Mr Blake—I think it is throughout their establishments. We are looking closer at that at the moment. We understand that the department is looking at changing its practices, which I think arises from an adverse decision they had in the Industrial Relations Commission regarding the unfair dismissal of a radiology employee.

Mr BRENDAN O'CONNOR—I would not want to take that matter to court, that's for sure.

Mr Blake—Apart from that example, independent midwives are a growing area of independent contractors. Nurses are also often engaged to provide services to a number of facilities in a particular demographic area. They would work independently and provide services to, say, half a dozen aged care facilities.

CHAIR—But at the same time they might also be part of the labour hire organisations.

Mr Blake—Yes.

Mr BRENDAN O'CONNOR—Are there circumstances in which you see members of the ANF, or potential members of your coverage, being able to genuinely set themselves up as a business, like midwives? Do you distinguish the way some might operate as opposed to the bulk of your membership?

Mr Blake—One of the initiatives of the federal government has been to look closely at how they can utilise nursing skills, particularly in remote and rural areas where there is a clear nursing shortage. Nurse practitioners are an example of that, and they promote the employment

of nurse practitioners. They are now provided with a provider number. They provide primary care and, to all intents and purposes, we would consider them to be independent small business operators.

CHAIR—Is it your view that that is okay in those situations?

Mr Blake—We would support that. But we do believe that they should have the same rights as an employee in their ability to join unions, participate in their union and, if they so wish, have their union represent them in terms of their employment conditions.

CHAIR—Is there any evidence that your union has that they are dropping off in their membership when they engage in that kind of employment arrangement?

Mr Blake—No, we do not believe they are dropping their membership. I would like to make one point. I did listen to part of the submission of the SKILLED Group. Labour hire firms in the nursing industry are not as I understand the operation of SKILLED to be. They are a conduit to supplying labour to hospitals. They are not active in providing training or dealing with occupational health and safety issues. They keep a register of nurses that they can provide to hospitals, but the hospital or the client is the entity that provides all of those areas of responsibility other than the payment of the wages, WorkCover, I suppose, and superannuation.

CHAIR—Basically, they are operating as an agency?

Mr Blake—Yes; simply as a conduit supplying labour.

CHAIR—In that situation, would those nurses have their own ABNs?

Mr Blake—No.

Mr BRENDAN O'CONNOR—So they are employees of SKILLED, are they?

CHAIR—What I am sensing here is that this situation is almost like the Odco situation. They have a register of available labour, including nurses, and they get a call from wherever it may be—perhaps Box Hill Hospital or Royal Melbourne—saying, 'We need some nurses,' and they place them.

Mr BRENDAN O'CONNOR—But they are employees, not contractors.

Mr Blake—They are employees of the labour hire firm.

CHAIR—No, they are employees of the hospital.

Mr Blake—No.

Mr BRENDAN O'CONNOR—What I understand Mr Blake is saying is that SKILLED employees who go into hospitals are not provided with training and the like from SKILLED but—using the term they hate to use—from the host employer.

Mr Blake—Yes.

CHAIR—But nurses who are placed through organisations other than SKILLED are being placed on an agency basis?

Mr Blake—Yes, and they are employees of the agency.

CHAIR—So there is a clear differentiation between the way SKILLED operates and the way some of these other nursing agencies operate.

Mr Blake—Which is understandable given—

CHAIR—Is SKILLED one of the preferred suppliers, based on the Victorian government's application to the ACCC?

Mr Blake—I cannot answer that, I am sorry. I do not know if that is the case. It makes sense in terms of nursing care that the host agency has some control over the level of care and the continuity of care of patients.

CHAIR—Thank you very much for giving us another perspective. It is different in terms of the results that your members are receiving through being part of a labour hire organisation. We thank you for your time and patience this morning.

[11.37 a.m.]

LYONS, Mr Tim, Senior Advocate, National Office, National Union of Workers

THOW, Mr Antony, Assistant Secretary, Victorian Branch, National Union of Workers

CHAIR—Welcome. The committee does not require you to give evidence under oath but I 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 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 that you would like to raise in private please ask to do so and we will consider your request. Would you like to make an opening statement or speak to your submission?

Mr Lyons—I will speak very briefly. The committee is obviously traversing some ground that many people have been over before, including many of your state parliamentary colleagues. In fact, by our calculation, virtually all state parliaments have been over at least some of this ground in the last few years. Much of the published material comes to a similar conclusion, in our view. The way we characterise it is that there is a dangerous addiction to labour hire arrangements and in some circumstances contractor arrangements in the Australian economy. Looking at some of the material we put in our report, particularly that coming out of the research paper by the Parliamentary Library, we think that if you compare us to comparable countries there is a massive overuse of, in the broadest sense, flexible forms of labour in this economy. There is nothing that we are aware of that says there is anything structural about the nature of our economy that means we should be doing this. There is nothing special about our industries or anything else that should lead to that conclusion.

We think that some industries in particular have become addicted to putting all of the flexibility onto the people they engage—and that is whether they are agency casuals or labour hire contractors. We say that that has a number of consequences which are detrimental. First of all, it means that almost all of the flexibility is being thrust from the employer onto the employees. They are bearing the costs of that flexibility. They are bearing the costs in the disruption of their environments and home lives. In the case of the people that the TWU represent, they are bearing the capital costs of the enterprise in some cases.

There is a whole group of working Australians who are really bearing this flexibility in silence, and this is invisible to the general public. As we said in our submission, in our view the Australian people would no longer tolerate having lines of people out the front of factories of a morning standing in line and waiting to see who will get work for the day. We are much more civilised now. Now those people are waiting at the end of a phone or mobile phone line waiting for a call from an agency to see whether they have been called in for one, two, three or 10 hours of work that day. It is all done out of the public gaze, but the effects of that on people's lives are very significant.

In part of the public rhetoric about this there seems to be a view that people actually want to participate in these arrangements, that people want to be casuals because they want the

flexibility and that it suits them. I have to say that in our experience the exact reverse is true. When you deal with people at work sites, you never have people come up to you and say: 'Do you know what I'd like to be? I'd like to be a casual. I'd like to be able to be put off at the boss's whim. I'd like to be called in at the boss's whim. I'd like to be sent home at a moment's notice.' If they work for a host company such as SKILLED, for example, what they ask the union delegate or organiser—or the host boss if there is no union there—is: 'Is there any chance of a permanent job? Is there any chance of getting on the company's books?' They understand that if they are left on those agencies' books they are open to exploitation on an ongoing basis.

We approach agency labour and contractors with a basic test: if it is adopted for the purpose of avoiding forms of regulation established by the Commonwealth or the state parliaments, it is illegitimate—full stop. If the reason it is done is to avoid occupational health and safety laws and responsibilities, to avoid obligations under awards or certified agreements or to avoid the payment of certain forms of taxation, it is illegitimate and in our view it ought not to be supported by any form of government. Appropriate steps should be taken to ensure that those sorts of illegitimate arrangements are stamped out.

We have a good relationship with a number of major labour hire providers in our industry, which is a broad one—there are a number of types of manufacturing and also warehousing and distribution. There are not a lot of independent contractors but there is a great use of labour hire. We have a good relationship with a number of the agencies. The ones we do not have a good relationship with are the ones that market themselves as being cheap—that is, they try and pay people less—and the ones that are unsafe or that treat their people without the proper respect that would be afforded to a company employee. If agencies meet those tests then we generally have a good relationship with them.

In all states, however, there is a group of bottom dwellers in agencies. Because the start-up costs and the market barriers to entry to being a labour hire agency are so low—you need no more than an ABN, a phone and fax machine; you need no skills, no experience and no capitalisation—there are a number of people who set up with entirely the wrong objectives. They are in there to be bottom dwellers. If the Victorian parliamentary committee is any guide then a number of what I would describe as reputable agencies would have come before you or may intend to come before you to complain about that process. I did not hear the SKILLED evidence, but I suspect that was part of what they were suggesting to you.

In relation to contractors, I had the advantage of hearing some of the questions put to the TWU. In our experience, where contractors are used, they are used often for three purposes: firstly, to avoid collective bargaining, either as a concept or specifically in the form of existing certified agreements or awards; sometimes, to transfer capital risk to employees; and, thirdly, to absolve host companies of other compliance costs associated with taxation, health and safety. In our industries the contractor arrangements, where we see them, are generally a farce. When you look at them, you can see they are a farce. For example, if you are working in a factory and you attend that factory every day at the time the boss tells you to attend and you run the machine in the way the boss tells you to run it and you make what he tells you to make, you are indistinguishable in any meaningful sense from an employee. Yet, the current status of the law is that, if people have been cunning enough and used enough sophistry with their paperwork, they may be able to get away with describing that as a contractor arrangement.

The last matter that I want to raise in my opening statement addresses the terms of reference of this committee but it also arises out of the discussion paper published by the Department of Employment and Workplace Relations. This concerns whether or not there should be a prohibition on awards and agreements dealing with the question of independent contractors or agency labour. The international position is that, when you have a collective bargaining agreement of any form or any sort of collective instrument, it is binding on anybody who comes into that workplace to do the same work. There are clearly good policy reasons for that, and we go through them in our submission.

The alternative is that employers are able to make a contract with their employees in the form of a collective bargaining agreement and walk away from it the following day. To take an analogy: if a business contracts with another to buy $1,000 worth of widgets, it is not free to turn around the next day and buy those same widgets from somebody else for a lower price. However, if a collective bargaining agreement, for example, is not protected in an appropriate way, the employer is simply free to agree with our members to pay them, say, $20 an hour and then turn around tomorrow and get somebody to do it for $15. If we support the sanctity of contract, which I think we should, then our members' contracts with their employers should be no less sanctified than any other form of contract in the economy.

CHAIR—Mr Thow, do you want to make any comments?

Mr Thow—I might just draw on a concrete example where we have faced some of the issues that Mr Lyons has talked about. We have submitted two statements to the inquiry. One, I think, names the companies—and you would have a record of that—but for the purpose of today's hearing I would like to refer to the other submission that we have given you where we have referred to companies as company A, B, C or D. In particular, I would like to talk about company D, which is a case study involving a situation where a number of our members are employed on independent contractor arrangements.

Mr Chair, I know you asked other people who made submissions today to talk about the extent to which independent contractor arrangements apply to industries. I can report that, out of the approximately 2,000 companies where we have members of the National Union of Workers, this is the only company where we have come across an example of independent contractor arrangements. So it is new to the industries where we have membership and it is quite a unique example—as I think you can see in the submission before you.

Company D is a plastics manufacturer in Dandenong. It supplies automotive components to the car industry. It is a very competitive industry. The wages our members draw from the company are slightly above the federal minimum award rates. We do have a collective, registered enterprise agreement with the company, but it would be fair to say that the wages are just slightly above award wages. Shortly after we reached agreement with this company, we found that the company had made a conscious decision not to employ anybody under the terms of the certified agreement. That occurred immediately after we had reached agreement with them. We had statements from the owner of the company saying that he would no longer employ a full-time employee; everyone who came onto the plant would be what he deemed to be an independent contractor.

Slowly but surely, their numbers grew from one to two to approximately a dozen across three shifts. These so-called independent contractors work under the direction of the company. They work side-by-side with the employees covered by the enterprise agreement and they do exactly the same work. In layman's terms, I think they would mostly be seen as employees. It was not long before persons who were engaged under these arrangements came to the union, and many have joined us and want to be union members.

To support what Mr Lyons has said in his statements, everyone who has approached us has approached us on the basis that they would like a full-time job with the company. These are good people. They want work. They want to work full-time. A lot of them are single mothers and new migrants to Australia, and they were desperate to get work. When an independent contract arrangement was put in front of them, they were keen to sign it, to get an ABN and to try to get into the factory. But, when they work side by side with colleagues and see the terms of an enterprise agreement that provides annual leave, sick leave, and access to a very small redundancy package in the event that the company were to have redundancies, they say, 'We would like an opportunity to work under those arrangements.' They have approached us and we have approached the employer on many occasions on their behalf. We have also spoken to the provider of the independent contract arrangements. To this day, we have not been able to have one of those persons placed onto the certified agreement terms and conditions.

I was talking to a gentleman at 6.30 this morning who has said that he would like to go on annual leave. He has been with the company for over 12 months. He has practically worked six days a week for that period of time. He wants to go on annual leave to visit relatives overseas, but he is fearful that when he comes back he may not have a job. These are some concrete examples of how it affects people.

Another problem that has appeared on the site is access to overtime. The company have made statements to me that they like having the independent contractors available because, if a full-time employee takes sick leave during the week, they think it is appropriate to offer extra work on the Saturday, which would be overtime, to the independent contractor first, as a consequence of the full-time employee taking sick leave. The employer has said to me personally that it is appropriate to maintain that and not deal with it through any registered instrument, because 'I like the flexibility if my full-time employee takes sick leave to then utilise an independent contractor for the extra work.' I think that is a form of punishment in anybody's language. So it is a concern.

It has created industrial tension at the workplace. In this factory there has been no industrial tension for the time that we have been involved, which is close to 20 years. It has created a lot of concern amongst our membership and we are certainly concerned about where it is going forward. We are trying to solve the matter through our enterprise bargaining negotiations. Unfortunately, we have reached an impasse and there is some protected industrial action being to try to resolve some of these matters for our full-time employees. So it is a concern to us and I hope it is also of concern to the committee. I thought it would be useful to explain a little bit further some of the issues that came out of the example of company D. I am more than happy to expand on some of the other case studies where I have had some direct involvement.

CHAIR—I will kick off from where you finished off, with the protected action that you have in the organisation at the moment. How do you see that panning out? I was going to ask a

question about the sanctions that you as a union have where there are labour hire companies or independent contractors.

Mr Thow—As I highlighted, this is a unique set of circumstances for me personally and I think for the union in Victoria. We are very hopeful that we can try and resolve it through some negotiations, but up to this point some very strong words have come from the employer. I have some direct quotes but I will just refer to them. I do not want to misquote him. He stated to me that the current contractors cannot have a choice at this stage as to whether they go to a full-time job, and he does not want to provide a choice to them. He has the view that, as the factory expands—and we hope it does expand and become a larger employer in the region—every future job offer would be through the form of an independent contractor arrangement. No more full-time employment will be offered at this stage.

CHAIR—Have those independent contractors sought your representation?

Mr Thow—They have.

CHAIR—You obviously have members in that organisation that you are representing. As a union, is there a fear that, if you take protected action as a result of having those two types of employees working side-by-side, the employer may very well say, 'Fine, we're not coming up to an agreement, I'll just employ more independent contractors'?

Mr Thow—I think that is a legitimate fear. I think long and hard about what the motivation is for the employer. Through enterprise bargaining discussions, I have tried to get a better understanding about the motivation. We try to take a very open approach to enterprise bargaining. I like to engage with employers in a professional and open manner. It is not a situation in which we yell at each other; we both try to understand the competitive pressures in which we operate. With regard to this particular individual, I have talked at length about why he has chosen to go down this path and I have had him concede that it is not an economic reason. There is no economic advantage in doing what he is doing by employing only independent contractors for the future. I have then pressed the point and asked what the motivation is, at which point he does not have a justification and explains to me, 'I'll do what I want because that's what I want to do.' I understand that. He used an analogy about his relationship with his wife to further justify his points, but it is a bit hard to go any further in a meaningful sense when those sorts of justifications are the used.

CHAIR—It is an issue of control from his point of view, but you did say in your opening statement that that location did not have a history of industrial unrest, so it is a bit hard to understand what that motivation is.

Mr Thow—What I was leading to—and I will conclude very quickly after I get to the point I was going to make—is that, when I try to think about what the motivation is, I think it is the same point that Mr Lyons made. I do not think he wants to collectively bargain with the union in the future; I think he wants to create a situation in which he may have 60 so-called independent contractors and will therefore not have to reach a collective agreement with those 60 independent contractors. I think that is the motivation. I have not been able to get him to confirm that, but that is what I think it is motivated by.

CHAIR—I will take another angle. You said that there was no economic benefit to him. What about from a competitive point of view? Does he have a competitive edge with regard to alternative suppliers to the automotive industry that perhaps some other suppliers do not have?

Mr Thow—At the moment, he is probably the lowest payer in the industry. To use his words, he sees no economic advantage in employing people under independent contractor arrangements. He said it is not an economic decision for him to do so.

CHAIR—Is it giving him an edge with the automotive organisations?

Mr Thow—No, he has not used that as motivation at all and he has not said that in the discussions with me. At the moment, he would have a competitive edge because his enterprise agreement—

Mr Lyons—And the contract arrangements.

Mr Thow—Yes, but his enterprise agreement and the wage rates contained would give him a competitive edge because they are not high rates of pay. In fact, if you were to look at the enterprise agreement rates and look at the take-home pay of our members, you would wonder how people do survive, because it is a very low rate of pay and it is a competitive environment.

CHAIR—You are saying that that is an Odco style arrangement?

Mr Thow—That is correct.

CHAIR—Through an Odco agency?

Mr Thow—Yes.

Mr Lyons—Yes, through a service company. That is one of the prominent service companies and it has been the subject of a fairly extensive litigation in the federal courts and in Industrial Relations Commission. It is one of the celebrity service companies. I would like to pick up very briefly something you said about the unions' rights in terms of protected action. We do not take that lightly and one of the things that strikes us about this circumstance is that there is a very narrow balancing act because people are not, in some senses, sure exactly where their rights stop and start. Our rights of protected action are limited by subject matter—that is, it has to be about a matter pertaining to the employment relationship. The employer's contractor arrangements may or may not be bullet-proof and you will have been taken to some of the case law about that. People run off to the Federal Court and there is no guaranteed way of predicting what His or Her Honour might say about that. There is an enormous cost in all of that, which is borne collectively, in the end, by the parties to those arrangements. A simpler set of devices would reduce the cost by giving a lot more certainty to people and an understanding that if there is, for example, a collective bargaining agreement, that is what applies to these arrangements. But having people run off to the Federal Court to test these questions is not in the interests of businesses, the unions or individuals.

Mr BRENDAN O'CONNOR—Aren't you confident that if you were to take such a matter to a judicial court that a court would find that those arrangements are clearly sham arrangements?

Are you not confident that the common law would clearly conclude that, in this case, the employer has effectively disguised an employment relationship?

Mr Thow—We have certainly looked at that as a way of going forward but as a first step we would like to try and negotiate with our employer and avoid lengthy litigation in the courts.

Mr BRENDAN O'CONNOR—And the cost, I assume?

Mr Thow—Precisely. So we try to work it out in a meaningful, easy way that both parties can live with. I have put to this person who owns company D that a simple choice would suffice. A way forward would be to provide a choice to these individuals and that would be a way forward which we could live with.

CHAIR—If it is an Odco arrangement, it has already been through the High Court, hasn't it?

Mr Thow—Well, we have not tested it yet.

CHAIR—Is it Odco or is it not?

Mr Lyons—It claims to be an Odco arrangement but the term 'Odco' is used pretty loosely. I am familiar with one service company out there that puts 'our system endorsed by the High Court' on its letterhead—and seeing is believing. You are familiar with the case law. It all turns on fairly arcane facts about the wording of particular devices, the application of indices about control and other matters, and specific things about the individual relationship. So it would be a brave employer who said 'We have pulled down whatever volume it is of the Australian Law Reports and we have followed that so we're right,' because the experience in the tribunals and in the courts has been that that often does not hold up.

Mr BRENDAN O'CONNOR—Isn't that clearly underlying the point that has been made by a number of witnesses to date, that you do not have a situation where there is a clear, definitive interpretation of what is a contractor and what is an employee—and in fact each matter turns on the facts and therefore it is very litigious to define ultimately each particular case?

Mr Lyons—Indeed, it is worse than litigious. It is difficult to predict the outcome because it turns on the facts, which makes litigation not only expensive but difficult to predict in terms of outcome.

Mr BRENDAN O'CONNOR—Could I just turn to labour hire because we have focused—and quite rightly—largely on the concern you have expressed about the independent contractor? You have said that you have some relationships with labour hire companies and I suppose you would rate them based on their professionalism and their capacity to look after their employees. Given your experience with labour hire companies, what level of regulation exists in your industries with labour hire employees? By way of example, do you have agreements and awards with labour hire companies?

Mr Lyons—In each state we pursue a common-law agreement with agencies which essentially binds them: if they send people to a workplace where an award or a certified

agreement of the NUW applies to the work that they are sending the people to do, they will pay no less than the wages and conditions set out in that agreement.

Mr BRENDAN O'CONNOR—So you enter into a common-law contract which includes the terms and conditions that they would have to meet?

Mr Lyons—It adopts them by reference. Whatever work site they send them to, if there is a certified agreement there they agree to apply it. When I describe it as a common-law agreement, there may be a real question about the enforceability. They are gentlemen's agreements, in essence. If you are familiar with the Homfray Carpets decision of the Victorian Supreme Court, just such an arrangement, a common-law arrangement, between a union and the employer to pay a redundancy agreement was thrown out by the Court of Appeal because it did not meet certain technical requirements of a contract. So we may have some difficulty enforcing those, but we rely on them for our present purposes.

Mr BRENDAN O'CONNOR—But you could not instead be a respondent, for example, to a particular certified agreement or award with the labour hire company? Isn't that another option?

Mr Lyons—We have adopted that in respect of the largest agencies. For example, in the state of Tasmania, SKILLED is a very large employer of people, including at call centres and other things. We have a certified agreement with them, adopting site rates and conditions. But because we are a general workers union the Victorian branch would have hundreds of enterprise agreements in the state of Victoria; in fact it is probably pushing 1,000 operative agreements.

Mr BRENDAN O'CONNOR—It is a salt-and-pepper union, as it was once described.

Mr Lyons—Indeed. And it is simply impossible for us to chase down and know every place Adecco has people, because these are major multinational businesses that might have thousands of clients in an economy the size of, particularly, New South Wales, Victoria and southern Queensland. So we need some sort of rule of general application, which is that they will not send people there on lower rates.

Mr BRENDAN O'CONNOR—Even in circumstances where you have entered into arrangements with large and perhaps more professional labour hire companies, is it the case that those arrangements fall short of conditions that you might have at other sites? In other words, are there situations where you feel compelled to enter into arrangements that are still lower than the conditions that may be experienced by a direct employee with another employer?

Mr Lyons—We do not think there is any meaningful sense in which you can bargain as a labour hire employee. All we attempt to do is ensure that whatever deal applies to the host applies to the agency. To do otherwise has the potential to cause disputes on a site, for a start, if you have people working side by side being paid different money. It is also a transparent mechanism, where the host employer understands the agency's cost structure et cetera and so does not think someone is skimming an unreasonable profit margin off the top.

Mr BRENDAN O'CONNOR—To what extent do labour hire companies attempt to undercut the conditions of employment and how many employers would pick that up? I guess it is difficult to say for a unionised site because it is more likely to be policed in a way that would be

brought to the attention of the union, and there would be more negotiations. But are you aware of non-unionised sites where that might occur, whether it is undercutting of the conditions or wages?

Mr Thow—I think a good example is the poultry industry example in our submission. There was a company that went about trying to tout for business throughout the poultry industry, providing boners. Each enterprise agreement and the poultry award in Victoria have a classification for boners; it is level 5, the more skilled rate of pay. This particular company thought it would be good business to undercut every rate of pay in the industry and provide boners at $8 to $12 an hour on a cash basis. If you read the facts about company A I think you would be quite shocked by how they went about it.

It was a deliberate attempt to undermine the rates of pay for boners in the poultry industry, and they became the key supplier—not overnight, but it was a very quick transformation from a very small operation to a very large operation which fundamentally changed the nature of how boners were provided in the industry. They said, 'We don't want to supply to you at enterprise bargaining rates of pay and award rates of pay.' We do know that cash incentives were offered so that persons could continue to receive Centrelink payments. Very quickly, they became the key supplier to the poultry industry in Victoria for boners. It was a very dramatic example of how an unscrupulous labour hire company could change the way an industry employed skilled workers.

Mr Lyons—The short answer, Mr O'Connor, is that if there is no-one there to police it, people will not pay any more than they absolutely have to, in our experience. That is basic market economics, I suppose.

CHAIR—Yes, except that SKILLED basically said the opposite to that. They said, 'It's because of who we are and because we have agreements and treat our people with respect. We take on all these responsibilities and pay the going rate.' They are saying it is an issue not of policing but of the credibility of the organisation and its own values.

Mr Lyons—That is true, but you cannot rely on all participants in the industry to have values that we all agree are good ones and that they are going to treat everybody well.

CHAIR—Unless you have a licensing arrangement where you have very codified standards of practice.

Mr Lyons—Which is one of the recommendations in our paper and which we made to the Victorian committee. We support that wholeheartedly. We think that would be a way of getting some of the 'bottom dwellers', as I would describe them, out of the industry.

Mr GAVAN O'CONNOR—SKILLED said the same.

Mr Thow—And we would not disagree with some of those comments made by SKILLED. But, as we said in our submission, not everyone behaves like that.

Mr Lyons—Lest it be thought that we are only supporting large agencies, there are reputable smaller agencies as well. I do not want it thought that we are here bashing the small bloke.

CHAIR—We got that message from the others as well, so it is not an issue of size. You made mention, in your submission, about there being in the United States statutory recognition of the obligations of host employers to agency workers via the notion of joint employment. Professor Stewart and others are saying that the concept of joint employment could work where we are dealing with issues such as occupational health and safety, rehab—perhaps, return to work and those sorts of things. But there may be confusion if you extend that into the broader industrial relations areas. What is your view about that?

Mr Lyons—If we wait for the common law to gradually do it it would cause confusion—I think that is absolutely right. But, in the same way you can have deeming provisions in occupational health and safety law, it is easy to do that in industrial law as well. You can deem a person to be bound by, for example, a certified agreement if they are sending people to do that work. It is a minimum—they can pay more if they want—but it simply establishes a floor. I think the uncertainty would come if this became judge-made law and evolved over time. It really is something that I think parliaments need to grapple with and make a decision on, rather than rely on a gradual evolution. That is the case in the United States. The National Labor Relations Act defines joint employment for certain purposes, fundamentally the application of collective bargaining agreements and certain types of termination proceedings, particularly for what we call an unlawful termination proceedings—so discrimination or sacking for union activity or something of that nature.

[12.15 p.m.]

McCARTHY, Mr Andrew, Solicitor, Job Watch Inc.

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that these hearings are formal proceedings of the parliament and warrant the same respect as parliament itself. I also remind you 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 at any time you wish to provide evidence in private, please ask to do so and we will consider your request. Would you like to make an opening statement or some remarks to your submission.

Mr McCarthy—I would like to speak briefly to my submission. Job Watch is a community legal centre which provides advice and assistance in relation to employment law for workers in Victoria only. We have a telephone advice service which takes about 19,000 to 20,000 calls a year on all types of issues relating to work from various types of workers, including employees, contractors and labour hire workers. Our submission is based on calls to that telephone advice line and on the experience of our legal case work service, which I am part of. We keep a database of calls to our advice line, which is the basis of the statistics contained in our submission and also for the case studies.

As noted in the submission, we took about 800 calls from labour hire employees and about 1,800 calls from callers who were treated as contractors in the five years to June last year. Given the nature of our service, these calls necessarily relate to problems at work. We are unable to estimate what proportion of labour hire workers and independent contractors have problems; however, the number of calls we have received and the number we were unable to get to—because we get so many calls—suggest that there are some recurring themes which can be identified in relation to a reasonable proportion of those workers.

As a brief summary of our submission, in our experience the main problem for labour hire workers—as I have noted in the submission—is termination without due process. Due process is what those workers would receive or should receive if they were engaged directly by a host employer. Many more workers directly engaged by their employer rather than through a labour higher agency are at least able to challenge their dismissal under unfair dismissal laws. This vulnerability of labour hire workers to dismissal means that they have less incentive to participate in the workplace—for example, in relation to raising occupational health and safety issues.

We have heard numerous stories of employees being told that they will be contractors, with no real choice in the matter or any understanding of the implications of becoming a contractor. As noted in our case studies, some workers receive less remuneration as contractors than they would if they were engaged as an employee, which makes it hard to conclude that they have genuinely agreed to the arrangement or that they want to be in such an arrangement.

Many of our clients do not appear to be truly independent contractors. They are not running their own business. They cannot delegate work to others. They have very little control over how

and when they do their work. Their tools are supplied by their boss. There is one example in our submission of a console operator at a service station being treated as an independent contractor. I do not quite understand how he could possibly be a contractor in that situation.

Although it is theoretically possible for those who are treated as contractors to challenge their status in court or in the Industrial Relations Commission, the complexity of the law in this area, as you would well know, is very complex. It means that legal action for most of the people who call us is just not a practical option.

It was interesting to listen to the union people who were here this morning. Most of our callers are non-union members. They do not have representation at all, so they have less chance of negotiating with their employer or taking legal action to challenge their status.

Finally, I note that one of the terms of reference is about strategies to ensure independent contract arrangements are legitimate. We have not suggested specific proposals, but we support that there does need to be some way in which sham contracting arrangements are overridden so that those who really should have the entitlements of employees receive those entitlements without having to launch expensive and complex legal action to achieve that. In relation to labour hire employees, we would support regulation of the industry of some sort. While there may be legitimate reasons for labour hire employment in certain situations, we believe it should not be used as a means to avoid terms, conditions and laws that would apply if the employee were directly engaged by the host employer.

CHAIR—Thank you for your submission and for your comments. Let us go to the question of the joint employment responsibility. You heard my question that I asked of the National Union of Workers, and I will ask it of you: do you think the notion of joint employment responsibility has any merit beyond, as I said, occupational health and safety?

Mr McCarthy—I think it does, especially in relation to dismissal of labour hire workers. As I noted, that is probably the main problem we identify. If the host business has a problem with a labour hire worker's performance, that may be genuine, but if you are directly employed then usually you get an opportunity to respond to any allegations of poor performance. However, if you are from a labour hire agency, the host employer just has to say to the labour hire agency, 'We don't want this person any more,' and suddenly there is no opportunity to respond. In that situation, some type of joint employment arrangement might enable labour hire employees to receive procedural fairness, as they would if they were a—

CHAIR—But wouldn't labour hire companies still have to engage in procedural fairness if they were striking that person off their books? What they are saying to us is that, when they get these complaints that a person is not working out, they withdraw that person and find them alternative employment. Isn't that a fair situation? I can understand if, all of a sudden, they said: 'You've been through the mill. This is now the fourth placement that we have given you and have had to withdraw. You are now off.' I can see that that is a termination by the labour hire organisation, but the others are not. Just simply redirecting the labour could actually be to the benefit of the individual.

Mr McCarthy—There are a couple of situations, as noted in our submission, where there are added difficulties when a labour hire agency is involved. In our experience, we often find when

speaking to a caller that there is no indication that the labour hire agency is going to place them in other employment. It seems that the only reason they are with that labour hire agency is to work with the host employer. The only way that that caller, our client, can get the job is by going through the labour hire agency. Once the host employer does not want them any more, the labour hire agency does not appear, in my experience, to do much about finding them alternative work. And that leads to another difficulty in relation to unfair dismissal laws, in that you cannot make a claim for unfair dismissal unless there has been a termination by the employer. In the situation where the labour hire agency just says, 'You're still on our books,' there is a jurisdictional issue that is very hard to get over. So it is very hard to challenge the dismissal just on the fact that you do not have any work.

CHAIR—The SKILLED Group would say—and as they said over and over again to us this morning: 'They are our employees. They are not the employees of our client. Our client is our client; these people are our employees. We take full responsibility for them.' I am just wondering if you got that kind of approach—by a reputable organisation, mind you—how a joint responsibility would ever take place. I have asked the question and I will not labour on it. I might ask that of our lawyer friends after lunch to see what they have to say.

I want to go back to the question of unfair dismissal to clarify what you are saying from the evidence that is given to you by those who ring you. Are you saying that there are labour hire people out there who turn a blind eye to occupational health and safety issues for fear of being dismissed or withdrawn from that work force?

Mr McCarthy—Yes. The employees will not raise occupational health and safety issues for fear that, if they do so, the host employer will ask the labour hire agency to dispense with their services.

CHAIR—Is that really prevalent? I find that really hard to understand, especially in these days of litigation. If that person is noticing it, it must be pretty obvious and having an effect on the business as well.

Mr McCarthy—That is true, but sometimes if there an occupational health and safety issue raised, it might mean that the employer has got to spend money on whatever the OHS issue is. Not a lot of employers are like that, but there are some shonky operators out there who are not particularly safe, and if their employees raise those things it is not taken too kindly.

Mr BRENDAN O'CONNOR—Because of the nature of your organisation—a community legal practice with state and federal funding—it is not surprising that you are able to explain to us a number of the problems that arise. The main thing for complainants would be getting the courage to actually make a call, because it is not necessarily an easy thing for a person to do.

You referred in your submission to the conversion of employees to independent contractors and suggested that there was no genuine consent by those workers to convert themselves from an employee into a small business person. Can you explain, as expressed to you by some of these complainants, how that has occurred?

Mr McCarthy—Usually the employee will have been working directly for the employer for some time and then, for whatever reason, the employer thinks that there might be certain tax

advantages, or maybe they are under the pump a bit financially, or their accountant has thought it was a good idea, and they will come to the employee and ask them to get an ABN. Sometimes there is not even an explanation of why they want them to do that. Sometimes they will say that they want them to be a contractor, but there is no explanation of how that will have any effect on them as far as work cover, superannuation or OHS. Those employees are caught between a rock and a hard place. Of course, they have the right legally to refuse to become a contractor. Some of those employees might be excluded from unfair dismissal, however. So if they are in a probation period or if they are a short-term casual, if they are terminated for refusing to become an independent contractor, they cannot challenge that dismissal. So it is either: do they keep the job by becoming an independent contractor or do they reject it and risk being sacked and not being able to do anything about it.

Mr BRENDAN O'CONNOR—From your experience, in the event that people accede to the request by the employer, what happens in relation to what was once a guarantee of a minimum superannuation by the employer? Effectively unless SGC is in receipt of nine per cent of their income, all of a sudden there is no requirement now for the employer to pay that income.

Mr McCarthy—If you are asking if, as a contractor, does the principal have to pay superannuation, in certain circumstances they do. I am not aware of the exact detail, but in certain situations—maybe if you work for mainly one employer—your principal will have to pay your super.

Mr BRENDAN O'CONNOR—Are most of these cases where they are with one employer? Is your experience that most people who have contacted Job Watch have worked mainly for one employer?

Mr McCarthy—That is right, overwhelmingly. They might be a courier or a driver of some sort, delivering in the metropolitan area, and that is the only employer they have. They do not approach their employer. They do not have any desire to set up and run their own business. It is their employer who has approached them to become a contractor.

Mr BRENDAN O'CONNOR—To your knowledge, what advice is provided to such employees about taking out their own workers compensation?

Mr McCarthy—We do not really give much advice on workers compensation—

Mr BRENDAN O'CONNOR—Not by you. Leaving aside for a moment the legality of this arrangement, are you aware of whether employers have provided proper information to these so-called independent contractors for them to take out their own workers compensation?

Mr McCarthy—Again, this is fairly anecdotal, but I do not think the callers we get usually say much about the implications of being a contractor. It is just that you will be paying your own tax. They might say, 'You will have to contact WorkCover,' or something like that, but the people I have spoken to do not tend to get much explanation of what being a contractor involves.

Mr BRENDAN O'CONNOR—I guess you would have a relatively finite budget, like all community legal agents; a very limited budget.

Mr McCarthy—Yes, we do.

Mr BRENDAN O'CONNOR—What are you able to do in the circumstances? I do not know whether you are overladen with requests, but you must have a way in which you prioritise whom you can assist. You provide advice. What else is in your charter?

Mr McCarthy—Probably most of our work is our telephone advice line. We have a small legal practice with three solicitors. We do both casework and lobbying submissions, as you can see. As you say, we do not have huge resources. We have to make decisions as to which cases have the most merit and which will make the most change in the law. We do not want our time being spent too much on one particular issue at the expense of other clients. Making a claim in relation to an independent contractor at the Industrial Relations Commission, for example, sometimes is not worth our while. Of course, if we cannot help them, often there is nobody else who can unless they can afford a solicitor themselves.

CHAIR—Do you provide advice to small employers as well?

Mr McCarthy—No, we do not. We are only funded to provide advice to employees, so we have to refer employers on.

Mr BRENDAN O'CONNOR—You are funded by the Employment Advocate of the Commonwealth department, aren't you?

Mr McCarthy—We are, yes.

CHAIR—And the Victorian department. So, if I am setting up a small, home based business and I want to expand and put on two more people, I cannot come to you for some advice on my legal obligations?

Mr McCarthy—No.

Mr VASTA—You probably heard the representatives from the union before. They were talking about a specific example, company D. They said that it was not economically viable for this guy to put all his work force onto independent contracting. Do you think that if the law were changed to get away from the unfair dismissal laws these kinds of employees would then become company employees? Would you see a shift away from the focus on independent contracting if the unfair dismissal laws were dissolved?

Mr McCarthy—As I said, unfair dismissal is the main issue that comes to us but there are other economic reasons why labour hire employees or independent contractors are engaged. We have some examples of contractors being paid less than the minimum award rates. That would still happen, even without unfair dismissal laws.

Mr VASTA—So you do not think it is going to make much of an impact if the unfair dismissal laws are dissolved?

Mr McCarthy—I do not think getting rid of unfair dismissal laws is going to reduce independent contracting or labour hire, no.

Mr VASTA—What kind of test should we have? How do we identify the sham arrangements? You say a method should be introduced by which contracting arrangements are tested. What test do we apply? We already have a common law test.

CHAIR—We have the alienation of personal services income test. Is there something else there?

Mr McCarthy—I do not think I can go too much into actually changing the test. It is more the way that the test is applied. Going to the courts is expensive and complicated for all concerned. If there were some tribunal or some way to determine whether an arrangement was for an independent contractor or an employee without going through the courts—something that was quicker and less expensive—that would probably be better than what we have now. I do not think the current test is necessarily wrong. The control test is probably the main thing that has to be looked at, but it is how that is applied and how you get someone to decide whether you are an employee or a contractor that is the issue.

CHAIR—It is about timely enforcement.

Mr McCarthy—That is right.

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

Proceedings suspended from 12.36 p.m. to 1.29 p.m.

HULETT, Mr Tony, Member, Small Business Working Group, Business Law Section, Law Council of Australia

RAY, Mr Andrew, Chair, Small Business Working Group, Business Law Section, Law Council of Australia

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

Mr Ray—I am also an elected executive member of the Business Law Section, and the Business Law Section has been appointed by the Law Council to represent it before you people.

Mr Hulett—I am also a member of the Business Law Section of the Law Council of Australia and appear in that capacity.

CHAIR—Although the committee does not require you to give evidence under oath, I advise you that these hearings are formal proceedings of the parliament. Consequently, they warrant the same respect as proceedings of the House itself. I also remind you 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 to raise in private then please ask to do so and we will consider your request at the time. Would you like to make a statement or other introductory remarks to your submission?

Mr Hulett—Thank you for the opportunity to appear before the committee. Our submission focuses upon independent contractors, although much of what we say may equally apply to labour hire arrangements. Since we prepared our submission, the Commonwealth has released its discussion paper on proposals for legislative reform in this area. This probably makes it appropriate to speak to our view about Commonwealth proposals to legislate to the exclusion of the states. In principle, we do not believe or recommend that the Commonwealth should act unilaterally, as it does not have full constitutional power to cover the field, and the prospect of a period of uncertainty with numerous constitutional challenges will not be good for business generally.

The discussion paper canvasses a number of options in broad terms whilst indicating policy preferences. In terms of practical application and effect, it is only precise legislative proposals that can readily be assessed and the implications determined. On the basis that a bill will be introduced in due course, we recommend that any bill be released for public comment for a reasonable period of time before the introduction to parliament. We presume it will be an independent contractors bill which would contain the proposed amendments to the Workplace Relations Act.

We wanted to draw the committee's attention to two developments of which you may not be aware. First is in New South Wales. In January this year WorkCover NSW issued a discussion paper about the definition of a worker, which deals with the application of that definition to dependent contractors, labour hire workers and outworkers. It is a paper we have not had the opportunity to assess, but submissions were due, I believe, by 5 March. As far as we are aware there is no resulting legislation. In Victoria, only last week, some proposed legislation dealing

with owner-drivers and forestry contractors was introduced into parliament, the Owner Drivers and Forestry Contractors Bill. It has yet to be debated, although I understand that parliament sits again next week for quite a number of sitting days in May, when I presume it will be debated. We have also not had the opportunity to assess that. The bill is some 69 pages in length, with some 35 pages of explanatory memorandum. It does not deal with status specifically but provides some regulation of owner-drivers and forestry contractors as small businesses. We only draw the committee's attention to this because we believe it demonstrates the breadth of the issues involved and, unfortunately, the fragmented approach that seems to be adopted.

CHAIR—We were made aware of the Victorian legislation. We had an opportunity to ask the TWU their views about it. Do you understand what the basis of that bill is?

Mr Hulett—Yes, I do.

CHAIR—It is about making owner-drivers able to access small business commissioners for mediation and other disputes. That is a concept. Do you believe that is at least heading in the right direction?

Mr Hulett—Without having had an opportunity to assess the bill, I would be reluctant to form a concluded view. Whilst that is the intention, definitional issues may arise because I think the two terms are defined, so you would need to be somewhat careful. The Small Business Commissioner as a mediator is already used in retail tenancy situations in Victoria and his jurisdiction is presently limited to that. This will widen that jurisdiction considerably.

CHAIR—I understand that. We also, as a federal government, passed legislation to have small business commissioners or mediators attached to the Industrial Relations Commission. Are you aware of that situation?

Mr Hulett—No, I was not aware of it.

CHAIR—I think it was advertised in the paper about two weekends ago.

Mr Hulett—No, I did not see it. We are aware that small business commissioners or similar bodies have been set up in quite a number of the states.

CHAIR—What is the history of independent contractors accessing those types of mediators and what is the success of that contact?

Mr Hulett—As far as I am aware, in Victoria the Office of the Small Business Commissioner was established within the last two years, and this was the first time I believe that mediation services had been available to small business albeit in the limited area of retail tenancies. As far as mediation generally concerning small business or in the guise of independent contractors, it may have been used in industrial forums before today or it might even have been used in a general private contractual sense where there had been a contract and that contract provided for mediation. These are not the sorts of issues that generally become public.

Mr Ray—Also, it is used in a number of jurisdictions as a prerequisite to a court hearing. In the case of litigation in Victoria there is a very strong push to have compulsory mediation or some other form of ADR so-called as a prerequisite to a court hearing.

CHAIR—Have you had a chance to read through some of the other submissions that have been made to the committee?

Mr Hulett—To be honest, no.

CHAIR—Professor Andrew Stewart from Flinders University presented to us yesterday and he raised the issue of the whole definition of: who is an employee, what is an employer and the entire employment relationship. He raised that and offered his own definition to provide clarity. I say that because there have been a number of submissions where the issue of joint employment responsibility has been raised. Do you as a law council have a view about joint responsibility, how that would apply and the difficulties that we may encounter in trying to impose such a responsibility?

Mr Ray—The whole definitional question that is raised in terms of what is an independent contractor as against what is an employee is an issue that has come up in a considerable number of areas. To take it back to taws, the definition of what is a small business is an issue that has attracted much vexed attention over the years. Certainly, the Law Council as such is concerned about—I hesitate to use the term 'collateral damage'—unintended consequences, I think is the expression, on those issues Tony raised. The reason we have drawn them to your attention is that when there is a fixed focus on some particular piece of legislation where somebody thinks, 'Here's a good definition that suits our purposes,' the splashover more generally can be very wide reaching. We would certainly be interested to have a look and see what Professor Stewart had to say. If it is a public submission, we will certainly do so.

CHAIR—The New South Wales government submission also refers to joint employment responsibility. There are a number of other organisations that have referred to it and, while we can understand that concept being used for occupational health and safety, there is some concern about its application in the broader employment relationship. I am trying to get the legal eagles' view on this.

Mr Ray—The Tax Commissioner has the same concern about whether a person is an employee or an independent contractor and the question of joint liability. As you know, over the years the tax man has taken a fairly frosty view.

CHAIR—Can you shed some light for us on how we can define this even better than it is defined now? Is a common-law test sufficient? Obviously the APSI, the Alienation of Personal Services Income Act, is very limited in its application and it is only for tax purposes. There must be some other way. If we had to make a recommendation on providing clarity—that is what people out there are saying; they just want clarity and consistency of definition—what would be your suggestion to us?

Mr Hulett—We are generally of the view that the common-law control test works well in most circumstances. Probably in the majority of cases the situation is quite clear cut. It is only not clear in these perhaps borderline cases where relationships might have been established that

are not entirely bona fide or in complicated circumstances. I would have very grave concerns about any concept of joint employment because it seems to me that it would raise far more difficulties than solutions to problems. In a sense it is a problem in the occupational health and safety area, where unfortunately all the states seem to be going their own way. The Victorian parliament late last year enacted a new occupational health and safety act following a report by Chris Maxwell QC which dealt at some length with the concept of independent contractors and labour hire. That legislation will come into force on 1 July. It attempts to deal with it in very broad terms, but basically it concerns those who have responsibility for a workplace.

CHAIR—You have some difficulty with the concept of joint responsibility. Yet we hear that the United States has regulated such a responsibility in a very defined way and confined to labour hire arrangements rather than anything beyond that. We have not seen that; we have just been referred to it.

Mr Hulett—It is referred to the end of the Commonwealth discussion paper. I must admit I have not come across it before, but I would have to say that some experience leads me to be very wary of importing concepts from the United States into Australia.

Mr Ray—If it would help the committee, we would be happy to look at it. Did you mention Professor Stewart's paper?

CHAIR—He has come up with a definition, but, if you also would like to have a look at this whole issue of joint responsibility, I would be interested in your council's perspective on.

Mr Hulett—Certainly.

CHAIR—It is important from our point of view, particularly if we are trying to come up with some sort of definitional clarity.

Mr BRENDAN O'CONNOR—We have had sufficient evidence today and at previous hearings to suggest that there have been efforts by employers to coerce employees into converting themselves into independent contractors. A number of assertions have been made that people who were employees yesterday have become independent contractors by virtue of being provided with an ABN number. There were at least assertions that this was a coercive practice in some circumstances. What is the Law Council of Australia's view on that?

Mr Hulett—I suppose it depends upon the circumstances of each case. In a number of industries it is quite common for there to be a requirement that independent contractors be incorporated. This is particularly the case in the transport industry. A basic principle of law is that a company cannot be an employee, although I am not so sure that that is as rigid a principle these days as it might have been a few years ago. I have not come across any circumstances that you might call coercive, at least in the absolute sense.

Mr BRENDAN O'CONNOR—Let us assume that that has occurred for the purposes of the next series of questions. If an employee were placed by their employer in the circumstance of having to take or leave—by 'leave' I mean leave their employment—the option of taking up an independent contracting status, under the current law what redress would that employee have to establish that he or she was an employee and not a contractor?

Mr Hulett—I stress that I am not an employment lawyer. It would depend upon the jurisdiction. They would have access to some industrial tribunals in various jurisdictions or perhaps the more general courts in others.

Mr Ray—Again I am not an employment lawyer, but I would expect for a start that the employee might have a wrongful dismissal type right.

Mr BRENDAN O'CONNOR—The reason I ask is that some of your contentions in your submission have been to not interfere much with the common-law principles that apply to this area of law. But we have heard evidence that suggests that, particularly for the unorganised work force, it would be very timely and costly for them to seek redress in a judicial court. I am asking you to contemplate your recommendation not to allow a speedier way to establish whether a person is an employee or not, in light of the fact that many people just do not have the wherewithal to take a matter before a judicial court.

Mr Ray—In most states the industrial tribunals are intended to be easy to access and low cost, as I understand it. So there are not quite the same financial, emotional or other concerns you would have, say, in launching a Federal Court or a Supreme Court action.

Mr BRENDAN O'CONNOR—Not to suggest for a moment that it is a simple area, but if there is uncertainty—and certainly witnesses have said there is uncertainty or ambiguity in relation to this area—why would you come before a parliamentary committee and indicate that is not preferable that a parliament clarify the law, codify the common law where it agrees and clarify areas of uncertainty that have been left by the High Court and junior courts?

Mr Ray—I think what Tony was saying was that we find it quite doubtful that the Commonwealth has constitutional power totally over this area. If the Commonwealth purports to act, it really will not effectively clarify this situation because there will then be massive disputes. If we want to draw an analogy, the Commonwealth acquired for itself substantially wider powers in relation to the Trade Practices Act by using a combination of carrots and sticks with the states—the biggest carrot, of course, being the competition payments under the national competition policy. As far as I am aware there has been no constitutional challenge to that. In this area, we would foresee considerable constitutional challenge to a Commonwealth act that purported to cover the field.

Mr BRENDAN O'CONNOR—Is your concern that it would go only as far as the corporations power would allow?

Mr Ray—Presumably the Commonwealth would try to join all their heads of power, as they used to with some other acts. There is the corporations power and the telecommunications power—

Mr Hulett—Trade and commerce.

Mr Ray—The trade and commerce power and the international treaties power—as you know, there have been some suggestions in the past that the Commonwealth will enter into an international treaty to give itself a head of power.

Mr Hulett—There is also the arbitration power. The issue is somewhat complicated because it applies to a number of areas: occupational health and safety, workers compensation, taxation and the superannuation guarantee charge. It goes on and on, so a simple solution is not necessarily available.

Mr BRENDAN O'CONNOR—There is no simple solution. As we know, these matters have been before many parliamentary committees at the state level in particular. That would not prevent, for example, a federal government in collaboration with the state governments looking at covering the field and creating certainty in this area.

Mr Hulett—That goes to part of our recommendation that said we did not agree with the Commonwealth acting unilaterally and that it ought to do so in cooperation with the states. I am not sure that anyone seriously argues that a uniform system is not preferable to a fragmented one. Nevertheless, if there is a cooperative means of settling the issue by a common definition which would apply across a range of statutes then, subject to the definition being appropriate, that would be a worthwhile solution.

Mr Ray—Certainly, the business law section of the Law Council take a strong view in support of uniformity in these areas and we agree with all your comments about the removal of uncertainty. We are thoroughly in support of the removal of uncertainty. We are not suggesting that some of our members would not do a lot better out of uncertainty.

Mr BRENDAN O'CONNOR—That is an honest admission, I guess. This committee has to consider what recommendations it makes to the Commonwealth. Given the areas of uncertainty that seem to be present—and this is contrary to your submission—there is a strong argument to suggest that we should codify areas of common law and, where there is uncertainty, there should be legislation to make it clearer and simpler for all parties.

Mr Hulett—Without being precisely sure what areas of uncertainty have been identified, I go back to your example of the coercion from employee to independent contractor. That does not go to the issue of the definition; it goes to the issue of coercion and redress.

Mr BRENDAN O'CONNOR—It does. At the moment, an employee who was transferred unilaterally—coercively asked to take up an ABN number and so on—would be in a position to have to seek redress judicially. As I said earlier, if they were not in a unionised workplace, where would they get the wherewithal to take an employer on to seek a definition of their employment status? There must be simpler and cheaper ways to allow people to seek redress than having to go to the courts of the land to do so, given the growth of contractors, and indeed labour hire employees, in our economy.

Mr Hulett—Again, I think that example goes to the issue of coercion, not to the issue of status. It is quite clear that someone can be an employee one day and an independent contractor the next if it is done properly.

Mr BRENDAN O'CONNOR—If indeed the characteristics are there to suggest or dictate that they are an independent contractor. I am suggesting to you that there are situations in which employees are called independent contractors erroneously and they do not have redress. They do not have the wherewithal to seek redress judicially. They do not have the money to do so.

Mr Ray—Coming back to the point we made before—neither of us are expert labour lawyers, so it may be something you will need to inquire into—I would have thought the first port of call for an employee in that boat would be the local industrial tribunal, however called in different states, on the grounds that there is a constructive wrongful dismissal. That is not a matter that involves substantial cost and expense. I imagine in New South Wales that section 88F of the industrial act would apply as well.

Mr Hulett—It is also the case that most of these industrial tribunals provide a great deal of assistance to people in those circumstances.

Mr BRENDAN O'CONNOR—If they have standing in the commission.

Mr Hulett—I do not think that is usually an issue. The issue you raise about access to the courts applies not only in this area; it is a general issue.

Mr Ray—The whole question of access to justice is something that has concerned the Law Council for many years. The absence of legal aid is an issue.

Mr VASTA—What are your thoughts on the Odco style of arrangements in labour hire?

Mr Hulett—Again, it is not an area in which I have had any experience at all. I have had a great deal of experience particularly with subcontractors in the transport industry but I have never been in a circumstance where I have had to deal with a labour hire arrangement other than the circumstance where I might have hired staff from an agency on a temporary basis. All I can say about the Odco decision is that I have read it. That arrangement was upheld. It seemed to me, just from a purely personal point of view, to be a rather complicated structure, but it was upheld.

CHAIR—You are a bit wary of deeming being used—

Mr Hulett—Yes.

CHAIR—compared to some other of the witnesses we have heard from. Why is that?

Mr Ray—Scar tissue.

CHAIR—Is it because it comes in such a hotchpotch of responses?

Mr Hulett—It does. It is a very difficult thing to deem something to be that which it is not. You are asking for trouble. I think one of the leading texts on employment law says as much. We refer to that in our submission. It is one of the few words of wisdom I have ever come across in a legal textbook, I think.

CHAIR—Perhaps Professor Stewart is right—we should be looking at definitions first rather than trying to put on bandaids by having various responses such as deeming.

Mr Hulett—Definitions have their own problem. They have to be good. It can be very difficult to draft something that picks up all circumstances.

Mr BRENDAN O'CONNOR—It is very hard for lawyers to argue in favour of certainty anyway, isn't it?

Mr Hulett—Certainty is a very difficult thing.

Mr BRENDAN O'CONNOR—There is something self-serving about keeping things unclear.

Mr Ray—Can I just give a public service message for the Law Council? The Law Council is constructed of what we lovingly call the state 'con bods'—that is, the state law societies and bar associations. So we are the federal body with as many complications as any other Australian federal body. But we are not concerned to the same extent with rations and discipline or what I might loosely call trade union issues of the state bodies. We like to think, particularly in the business law section, that we take a slightly broader view. We have argued innumerable times in innumerable areas for certainty and for clarification of the law. I have been involved with the BLS for many years. Time after time, we have made submissions that say, 'We don't think the government should do this at all but if you are going to do it then do it this way or make these changes to remove uncertainties and make for a better piece of law.' We have a very strong philosophy that the laws that we comment on should not provide work for our members at the end of the day. The best law is like the best agreement—the one you put in the bottom drawer and never look at again.

Mr BRENDAN O'CONNOR—I appreciate the pressures you must be under with that competing tension.

Mr Ray—There is no tension for the federal body.

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

Mr Ray—Would you like us to go back to Professor Stewart's material.

CHAIR—Yes, and also that question of joint responsibility. Thank you.

[1.59 p.m.]

SLAPE, Mr Paul Kenneth, National Secretary, Australian Services Union

HARVEY, Mr Keith, Assistant National Secretary, Australian Services Union

CHAIR—I know you are no strangers to parliamentary committees, but I will go through the preamble anyway. 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. I also remind you that giving false or misleading evidence is a serious matter which may be regarded as the contempt of parliament. The committee prefers to hear evidence in public, but if you have issues to raise and you would like to do so in private we will consider your request. Would you like to make a statement in relation to your submission or to make any other introductory remarks?

Mr Slape—I would. We appreciate the opportunity to make this submission. We know that your time is limited. We have put a submission in. I will make a few statements and then we will be happy to answer any questions that you have. Keith Harvey put the submission together and I am sure he will be able to assist me in answering any questions that you have.

In our submission we have outlined details of the Australian Services Union, so I will not go through that again. Suffice to say, it is a relatively large organisation. Our members are employed in a wide variety of occupations and industries. Some of our members do in fact work as independent contractors or the equivalent and others work as labour hire employees. The union prepared its submission to the committee on the basis of our understanding of the terms of reference given to the committee by the minister but also with our understanding of the government's policies on these matters as articulated in the coalition's policy statements.

The union is also aware that the government has recently released a discussion paper on options for change with regard to these matters. The union will respond directly to this discussion paper, but I think that it is fair to say that the discussion paper confirms our view about the concepts behind the present inquiry, and we believe that we have attempted to address these in our present submission. However, the discussion paper confronts some of these issues directly and succinctly and it provides an opportunity for stating where the union disagrees with some of the current thinking about independent contracting. For example, the discussion paper says that government policy has been to respect the conscious choice of people to be independent contractors. The ASU has no difficulty with the existence of genuine independent contractor arrangements; however, in our experience there is often no free choice to be had to be or not to be an independent contract. Many employees are forced into sham contracting arrangements when they are clearly in fact and at common law employees and, given the choice, would clearly want to be an employee, not a contractor.

We believe that the government has too rosy a view of what motivates people to become contractors. Since writing our submission and publicising the fact that we have done so to members, we have been contacted by members working as a so-called independent contractors or in labour hire. The example of one such member was instructive. In writing to us—and I am

reading verbatim from his initial email, withholding only his name and that of the company he works for—he said:

I work in the IT industry under a personnel service contract, this was not a deliberate choice of mine but a need to have some sort of income. In brief the contract states there is no employer/employee relationship but we have set hours, a roster and are directed by a shift leader and a site manager to what duties we will perform on a daily basis. A business shirt is provided to us to wear. Even though there is nothing within the contract to say we have to wear the shirt it is made very clear (verbally) that the shirt is to be worn. We also have to apply for leave and advise when we are sick. There is no annual leave, no sick leave, no penalties for nightshift, weekend work or public holidays. In other words a flat rate of $17 per hour. From the $17 there was a deduction of 9% for super and this was claimed as salary sacrifice/employer extra unbeknown to me by the company. As soon as I was made aware that salary sacrifice could only be deducted by mutual agreement I cancelled the deduction. Now no super is being paid on my behalf. ... If you can use this in your submission to the federal government about the impact of these outrageous contracts please do ... If you want a copy of the contract please advise me and I would be more than happy to get a copy to you. I am a member of the ASU but I don't have my membership details on me at the moment as I'm at work. (Easter Sunday)

Further discussions with this member since he sent the email reveal that he works for one company which has a contract to provide labour to a second company which, in turn, provides outsourced services to a third, very large, Australian enterprise. Our member effectively worked at the direction of the third employer and in that employer's premises.

This member's experience has elements of both independent contracting and labour hire as well, since he is allegedly working as an independent contractor for an employer which is effectively a labour hire provider. This member worked as an IT media officer, which is not an unskilled job. I note that the $17 per hour included statutory superannuation, which means that, in effect, his rate was about $15.50 per hour. The current minimum wage under a federal award is $467.40 or $12.30 without superannuation. If this member worked as a casual at just the federal minimum award rate, his hourly rate would be $15.38 per hour for a standard week with a typical 25 per cent casual loading. That loading is designed to compensate for lack of annual leave, public holidays and sick leave, which this member does not receive. With penalties for the unsocial hours he is clearly working, the rate would be much higher. In other words, this member is working for less than the minimum wage.

The rate for a grade 3 clerk, a skilled worker, in our common rule Victorian minimum rates award is $561.20 or $14.76 per hour for a standard week, $19.68 as a casual for standard hours and much higher if the penalties for work outside of normal hours are included. If this member's hourly rate of pay was included in an agreement, even in an AWA, it would clearly fail the no disadvantage test. This person is working as a contractor but in reality is an employee and is being short-changed by the system. He is not working in this way by choice but because this was the only sort of job he could find. We believe that it is no remedy to say that he can enforce his rights via commercial law. His contract is clearly an unequal treaty between parties of unequal bargaining power which has been forced upon him.

The government says that no longer is it appropriate that one size fits all in employment. The fact is that there is no one size even being attempted to fit all. All, or nearly all, awards and agreements that the ASU is party to provide a range of employment options: full-time employment, part-time and casual work as well as temporary or fixed term work. There is also a place for genuine independent contractors, and many employers utilise such workers. Employers

also have at their disposal a number of options for regulating employment: awards, collective agreements and even individual agreements, as long as they pass the no disadvantage test. Labour hire is also available as an option for many employers. We have said in our submission that labour hire has a place but should also be subject to certain minimums, particularly with respect to minimum rates of pay and house rates set by agreement making.

We have said in our submission that there is no place in employment for the undercutting of community standards and expectations by the putting in place of either contracting arrangements or labour hire arrangements, which pay less than socially set minimum rates of pay and conditions of employment. We see little point in the provision of bargaining and an agreements stream in industrial relations regulation and then limiting what parties can bargain about. In the union's experience, labour hire is becoming increasingly prevalent and not just for temporary or short-term workers. In our experience, many employees in the communication and call centre industry are employed through labour hire arrangements—up to 40 per cent in the view of our Victorian private sector branch. We take the strong view that labour hire arrangements, whether genuine independent contractors or employees of the labour hire company, should meet the same tests as other industrial arrangements, such as awards or agreements. Labour hire workers should not be at a disadvantage compared to other types of workers.

CHAIR—Mr Harvey, do you want to make any comments?

Mr Harvey—No, not at this stage.

CHAIR—Thank you very much for those opening comments. Let us go back to one of the points that you raised about motivation. I think you made the point that the willingness for someone to enter into an independent contracting situation is overstated. What in your view, therefore, is the motivation for some of them to become independent contractors, putting aside the group that you have identified that you believe is there in a forced situation? Is there a role there for those who genuinely want to enter into independent contracting arrangements?

Mr Slape—I think we say in our submission that there is a role for independent contractors, as long as they are treated equally, it is not a forced situation and they enter into it voluntarily.

CHAIR—Was that case you mentioned on an Odco arrangement? It sounded like it to me.

Mr Slape—Yes, I suppose.

CHAIR—Are you aware of it?

Mr Harvey—Yes, we are aware of Odco.

CHAIR—I know you are aware of Odco, but are you aware of whether or not that was a similar arrangement?

Mr Harvey—Given that he was said to have no employment relationship, that he was working for a company that was effectively a labour hire company providing services to another—so he was working as an independent contractor for somebody who was providing

labour hire services to a third party—and that he was said not to be an employee, then I guess it lines up with an Odco-type arrangement.

CHAIR—If it is not an Odco arrangement, then wouldn't that person have the ability to challenge that employment relationship using the common law control test as a basis for the dispute?

Mr Slape—It is expensive.

Mr Harvey—I think the answer is yes, but it is expensive. We heard at least the end of the exchange with the previous witnesses—

CHAIR—The boys are telling us that it is easy these days.

Mr Harvey—Again, I do not want to confuse the issues too much but the suggestion is that independent contracting arrangements should be treated as normal commercial law arrangements. But the implication from that is that you have to go off to an appropriate court and assert your rights, and we think that that is complicated, expensive and simply not an option for many people in this situation.

CHAIR—Outline to me what is a genuine contract and not a sham. In your view, or from the union's perspective, what would be a genuine contract that you would accept?

Mr Slape—Someone who is not a genuine employee.

CHAIR—I guess I am trying to get some definition around about.

Mr Slape—We find it hard to define that. The contractors we deal with—our company-type contractors coming into local governments—employ their people directly.

CHAIR—Perhaps I can offer you an answer to my question. Would it be along the lines of the ACTU's submission or the things that they want included?

Mr Harvey—I do not have those right in my mind.

CHAIR—You kind of have. You were talking about the safeguards that you need. That is partly there.

Mr Harvey—If I could elaborate a little, I think a genuine independent contractor is an individual who is working for a multitude of people with a contract. That would be one of the things that I would say. It is not somebody who just goes to X, Y or Z company and works there five days a week, or whatever it is, indefinitely; it is somebody who can genuinely hire themselves out as an independent contractor to a range of people looking for the service. I think an independent contractor is somebody who effectively runs their own business For example, if you ring up and say, 'I want these services provided,' they would have the right to say, 'I'll provide it myself or I'll get somebody else to provide it for you on that day,' et cetera.

The distinction for the 'effective employee', the example that Paul mentioned that turned up after our submission, or the one we mentioned in the submission, the employee of Oceania Aviation, is that they did not work for a multitude of people. They worked for one organisation, and they wore the company uniform. So they were not at liberty to go out and work for other people; although technically the Oceania Aviation person was. They are on a roster, they have to apply for annual leave, they have to report in when they are sick et cetera. It basically means one individual working for one company. So we understand the distinction at common law.

CHAIR—So you basically accept the taxation definition?

Mr Harvey—I am not expert in tax law but, having looked at a number of decisions of industrial relations tribunals and other courts, I know that there are a range of things. I suppose the taxation definition is a fairly good approximation, but there are at least eight or nine different factors to be considered in coming to it. That is why it is a complicated business, and perhaps that is why you could say it is one of those rigidly defined areas of doubt and uncertainty in current law in Australia.

CHAIR—You must have quite a lot of dealings with labour hire organisations through your union. I am not asking you to name names, but are any of them exemplary, and what is it about what they are doing which other should perhaps be adopting?

Mr Slape—We will have an agreement with them, and they will apply—

CHAIR—So there is a union-labour hire company agreement?

Mr Slape—Yes. They will provide services to municipal councils and others.

Mr Harvey—There are a number of examples of that. As I think we mentioned in our submission, for a long time one of our two branches in New South Wales had an award with labour hire agencies in the clerical and administrative area—which has obviously been a feature of Australian employment for a long time. But the terms and conditions of people working for labour hire agencies in that way were well regulated. The other aspects of a really good labour hire company are that it takes occupational health and safety issues seriously—and that has been considered, as I am sure you are aware, in a Victorian inquiry—and train its workers.

As a union, we are interested in covering our labour hire people in a number of areas—from straight clerical and administrative employment through to, as Paul mentioned, the local government area. We have attached to our submission a case study of one individual in South Australia who was working as a labour hire person for the state government. She effectively said in her evidence to the South Australian commission that she felt it difficult to take annual leave and things like that, and worked for two years with really only a short break. One of the defining things about good labour hire companies is how they look after their employees in a pastoral sense—making sure that they are taking leave—and whether they train them, which had not been a feature of labour hire practices.

Dr John Buchanan from ACIRRT in Sydney talks about the concept of employee development or just deployment. Lots of labour hire companies just want to deploy fully trained staff for a host employer. That is good if they can do it, but Dr Buchanan talks about putting time into

developing employees on the job, and some labour hire companies do not do that. We are told around the tables at the ACTU for example that there are one or two labour hire companies which have lifted their game dramatically. They are not companies that we deal with in particular, but there are one or two examples of labour companies who are looking more seriously at training and occupational health and safety issues.

CHAIR—I have one last question. You mentioned that a feature of a good labour hire company is one where there is an agreement between the labour hire company and the union. Do you have any agreements with any labour hire companies where their employees or on-hire people—or if you like to call them that—their clients are working side-by-side with others in a client location and their conditions and pay are less than those who work directly for the company?

Mr Slape—I am not sure. There used to be a labour hire company in Victoria that we had an agreement with, but they were very similar rates of pay and conditions.

CHAIR—So from your knowledge, whatever agreements you have with labour hire companies totally reflect the agreement that would be in place with the client organisation.

Mr Slape—Sorry, could you ask that again so that I am clear of what you mean?

CHAIR—We hear of a number of examples where labour hire employees are working side-by-side with permanent direct employees. I imagine that the direct employees would be working under some sort of AWA or certified agreement. You have an agreement with a labour hire company—what I am trying to get at is whether or not your agreement is equal to any certified agreement or AWA that the permanent employees are working under or has there been a trade-off in your agreement making and there are less conditions and wages?

Mr Harvey—I am not sure that we actually have any agreements with labour hire companies at the present time, we may be on a slightly wrong wavelength. We have agreements with a whole range of individual employers, some of whom use labour hire. So our approach to the problem to date is to try and require the host employer to provide—

CHAIR—It is a totally different story then, I understand that. It is just that we heard from SKILLED Engineering today that they have at least 20 certified agreements that they have negotiated.

Mr Harvey—If you had pressed me, I was going to mention that SKILLED Engineering is getting a good reputation from our end; they may be an exception.

Mr BRENDAN O'CONNOR—There have been so many inquiries in this area. I noticed that an attachment of yours refers to the Chair of the Economic Development Committee of the Victorian parliament. I was looking through the submission here in relation to OH&S and I have come across a paragraph in relation to labour hire and OH&S. I want to read it and ask if it has changed. It says:

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

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

I have two questions: is it still the case that training is provided and could you hypothesise on what would have happened if the union had not been present in that situation? Clearly, it says here that you have taken up a role in training OH&S to those employees that are employees of a labour hire firm, rather than a labour hire firm training those employees. To your knowledge is that still continuing and what would have occurred in the event that there was an absence of a union?

Mr Slape—I think it is still continuing in our Victorian branch. Obviously, if it was not continuing there would be more injuries.

Mr Harvey—This is from the submission prepared by our Victorian authorities and services branch.

Mr BRENDAN O'CONNOR—Sure, I accept that.

Mr Harvey—We believe that that is the situation and that it is continuing. It might be useful if we could supply you with that information just to be absolutely sure.

Mr BRENDAN O'CONNOR—That would be helpful.

CHAIR—Can I just clarify that. Are the people to whom this is referring working side by side with direct permanent employees in councils?

Mr Slape—Yes, they are.

Mr Harvey—I would imagine so, but we—

CHAIR—I would then be concerned as to why a council would be issuing protective equipment to its own employees and not to labour hire.

Mr BRENDAN O'CONNOR—Because it is not the employer.

CHAIR—Yes, but they are paying for the people.

Mr BRENDAN O'CONNOR—That is what happens, Phil.

Mr Slape—That is right, yes. They bring them in from outside.

Mr Harvey—Would it be helpful if we drilled down a bit further with the branch?

CHAIR—That would be very good; thank you very much.

Mr BRENDAN O'CONNOR—I know we have not touched upon this matter, but it is a significant proportion of your submission and, potentially, it goes to up to 13,000 workers—so-called family day carers—in Australia. As I understand it, family day carers are people who undertake the care of children in their own homes, and they are defined as independent contractors. Clearly the union has had some history in this. What levels of payment per hour do these people receive? To your knowledge, why haven't they become defined as employees if they are only working for one provider of the service and they are undertaking the care of children? What has allowed them to continue being independent contractors?

Mr Harvey—I am not sure what the answer is on the exact amount per hour—but, again, we can find out and provide that to the committee.

Mr Slape—It is per child.

Mr Harvey—Do you know more about this?

Mr Slape—No, keep going.

Mr Harvey—We will find out the answer to that question and provide that to the committee. But there is a reason that this matter has fallen between two stools, as it were. It is important to distinguish, because there are a number of family day care workers who are actually employees. In some cases they may actually be employees of the council—only in limited cases, but some councils consider their family day care workers to be employees. In some cases, they may be working for a community organisation which is providing family day care services, but there is a whole range of other people, as has been mentioned, who provide family day care in their own homes. We are not necessarily saying that they are independent contractors, but we have to say that their status is unclear. For example, the local council does not consider them to be an employee of the council, and the Commonwealth government makes it quite clear under its guidelines for the family day care program that they are not employees of the Commonwealth. So, if they wanted to be an employee of somebody, the question would be: whose employee are they?

We might argue—if we had the lawyers who were previously here, who wanted to make some money—that they might be employed by the individual parents for whom they are providing the family day care services. That may actually be the case, but they are unlikely to have served a log of claims on those employers and got an award. The issue is that, because you cannot identify who the employer is in the particular case or because there are so many individuals who are the employer, there is no practical possibility at the moment of establishing an award or some sort of agreement coverage for those employees.

On the other hand, their income is totally determined by the payments that can be made to them under the Commonwealth's family day care scheme. Their right to work is determined by the council, because if they are struck off the list of approved providers they do not get paid and they do not work anymore. But they have unfortunately fallen down between the two stools, because they are not clearly defined out there as one group or another. One of the things I think you would have to say—and this is obviously an important issue to our members—is that, even

if the Commonwealth moved in and took over the whole field of industrial relations by using the corporations power, it would not help them either, because they are not employed by corporations.

Mr BRENDAN O'CONNOR—I will leave it at that. I understood that they were paid as little as less than $3 an hour under the contract arrangements and that their employment was entirely governed by councils, not commissioned by them. I suppose that is why I raised the spectre of why they would not be defined as employees.

Mr Harvey—They have to be on the local council's register, as I understand it, to be able to provide the services. If for any reason they were struck off, they would have a problem. But, yes, they are not defined as a council employee or as anybody else's employee, so they are on their own.

Mr Slape—And they cannot go looking for other work, because they can only go to the council that is within the council boundaries they live within.

Mr BRENDAN O'CONNOR—If they are a contractor, they should be able to provide services to others.

Mr Slape—It is because that council provides services within its boundaries.

CHAIR—In that particular case, would you see that the deeming provisions would apply?

Mr Harvey—That is one very practical and, to us, very important example of where we could perhaps use the deeming provisions if they were widely available. They are available in a number of states.

CHAIR—You equate them with the owner-drivers. We heard about the owner-drivers from the TWU. Because of the breadth of the types of occupations and industries that your union represents, would you be able to give me a list of the various occupations that would perhaps fall through the cracks of any common approach to defining an employment relationship?

Mr BRENDAN O'CONNOR—Do you mean whether they have a mixture of employment in the same occupation?

CHAIR—Obviously the owner-drivers miss out. I am trying to get a feel for what other occupations there are, just to see how big the problem really is.

Mr Harvey—There would certainly be a view in the IT industry, but we can write up a list.

CHAIR—A comment from some of the employer organisations would be that we should allow the free and open contract negotiations to take place, that the Commonwealth test or control should apply, and that if there are any gaps they are minor in the larger scheme of things. I want to know what other occupations are out there that we should be alerted to.

Mr Harvey—We would be happy to look at it from our own point of view and come up with such a list.

CHAIR—We have run out of time, gentlemen. Mr Slape and Mr Harvey, thank you very much for your time and your submission.

[2.32 p.m.]

WILLIAMS, Mr Douglas, Chief Executive (National), Civil Contractors Federation

STEVENSON, Mr Geoff, National IR Manager, Civil Contractors Federation

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that these hearings are formal proceedings of the parliament and consequently they warrant the same respect as the proceedings of the House itself. I also remind you that the giving of 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 would like to raise issues in private we will consider your request. We thank you for making the time to be with us today. Mr Williams and Mr Stevenson, would you like to make any opening comments?

Mr Williams—I would like to make some brief opening remarks. Because we have also proposed a specific model for a registration arrangement, we will close with the remarks of my colleague, Mr Stevenson, if you will allow us to. The Civil Contractors Federation, as the peak industry organisation for the civil construction centre, welcomes the opportunity to reiterate its position on construction industry arrangements. In our view the Australian community should reasonably expect world-class and cost-effective infrastructure and, in turn, this requires an efficient and competitive supply chain.

CCF evidence to the Cole royal commission and the commissioner's findings demonstrated that this is patently not the case. The experience of the building industry task force further shows that little has changed. In short, taxpayers and private equity providers are obtaining poor value and less infrastructure for every dollar. This state of affairs is the result of deeply entrenched behaviours, ranging from unlawful to aggressively adversarial, and the building and construction sector has not responded to general reforms and, in short, past efforts at reform have achieved nothing of consequence.

It is time for a sea change. Nothing short of a new set of rules, if you like, will suffice, and there is no more critical time for reform than now. The forward need for infrastructure—roads, rail, and water and sewage pipelines—is well documented and immense. All governments, both federal and state, have recognised the situation and are now responding. By way of example, the road transport task alone will double in the next decade. It is imperative that scarce finances are maximised to ensure Australia's continued prosperity and for the sake of coming generations of Australians. This is also essential to Australia's competitiveness in attracting and retaining investment, especially foreign investment. It is also reasonable to expect that school leavers, including women, see the construction sector as providing cogent and rewarding careers rather than a last resort for those strong enough to withstand the law of the jungle. To do nothing will substantively worsen the looming skills crunch in this sector, as baby boomer plant operators retire in the next five years or so.

Like the building and construction sector, civil construction relies on contractors to provide specialist expertise and related plant, to maximise competitiveness and smooth structural cycles, and to deal with regional and project variations. Civil contractors are typically small businesses

with an annual turnover of around $10 million, 20 or so employees and a similar number of heavy earthmoving machines. They are frequently family businesses. As the principal employers in the sector and with heavy sunk capital, they face heavy commercial and project risks. Profit margins are slim on typical projects. Margins are eliminated by a few days disruption and, similarly, cascading project contractual arrangements and the spread of building agreements to civil contracting sites undermine risk management options for civil contractors. Independent contractors, in short, are a key means of risk management.

The imperative requirements as CCF see them are that, firstly, the maintenance of contractors is an essential and integral element of construction supply capability; and, secondly, a clear definition of an independent contractor be inserted in the tax act, consistent with tax office rulings based on the common law. At a second level, further reforms we suggest include nationally uniform security of payment arrangements based on a best practice model, uniformly applicable trade practices requirements and, specifically, application of the unconscionable conduct section 51AC provisions of the Trade Practices Act to all levels of public sector organisations—federal, state and local. Registration of contractors should also be considered, administered either by peak industry associations or government agencies.

My concluding comment, just before I hand over to my colleague Mr Stevenson, is that the opportunity is available to make a difference to Australia's prosperity and to the prospects for current and future Australians. It requires a choice to be made between confronting entrenched anticompetitive behaviours or continuing to acquiesce to self-interest.

Mr Stevenson—Mr Chair, thank you again for giving us the opportunity to speak to you today. The submission that the CCF has put forward outlines some of the issues which were obviously in the committee's terms of reference. We have also added that one of the issues, one of the core requirements, is that there be a clear definition of an independent contractor, and that is something that will be very helpful to the industry. The proposal that we have included in our submission is basically one that covers the registration of contractors, and we think it has some merit and should be considered. We welcome you to question us about it today.

In a nutshell, the proposal is that people who can front up and put their bona fides on the table, showing that they are an independent contractor under the common law definitions or the multiple factor test that the tax office currently uses, should be able to get some sort of up-front registration or recognition that they are in fact contractors. So when they commence a contract it is clear from the outset that they are an independent contractor, not an employee. They do not have to make a declaration saying that they are an independent contractor; it has already been assessed at a micro level by some organisation or instrumentality.

We have made a suggestion that peak industry bodies like the CCF or government agencies could be used to do that micro assessment. We have also proposed that a registration system with a registered contractor number could be used. The submission highlights some of the problems raised in the Cole royal commission in relation to the use of ABN numbers and the confusion that causes for all parties—sometimes not only the person claiming to be an independent contractor but also the person engaging them. It is obvious from the royal commission that it is not the only thing that you look at. You look at all the other factors when determining whether somebody is in fact a true independent contractor or not.

This confusion obviously flows through to the courts, usually after there is a workplace accident and after there is some revisiting of the contract. So it is not surprising that there has been a lot of action in the courts over the years to determine what a contractor is, and those common-law principles should be applied. One of the recommendations is that some sort of points system be used at this micro level and it be implemented in a cost-effective, efficient way rather than simply issuing an ABN number. I will not go any further; I leave it open for questions.

CHAIR—I look at your proposal for the RCNs with great interest. If we were to adopt your system, what effect would that have on the employment relationship for labour hire organisations that are simply placing contractors on client premises? Would that affect their ability to maintain their client base and will there be opposition to your proposal because of it?

Mr Stevenson—I think one of the problems is that the parties need to recognise whether they are independent contractors or whether they are being portrayed as independent contractors. If a labour hire company puts forward people as if they are employees but in fact they are independent contractors, somebody is confused. It would be more efficient for the industry if all parties, including the person doing the work, had a very clear idea of whether they are an independent contractor or not. They may prefer to be an independent contractor, and why shouldn't they as long as they are not being put forward by an independent third party as if they were an employee. The sorts of labour hire companies that you are talking about may not be the common ones, but obviously it is an area that you are looking at. They may simply be the organiser of other independent contractors.

CHAIR—The reason I ask is that it seems to me—and I could have it totally wrong—that if we were to adopt your system then the Odco type arrangement would have greater legitimacy in the community, because that is what they do: they simply have a register of contractors. If these people had gone through your process, they would just take that register in their names and farm them out to their client organisations, whereas other labour hire organisations that treat the contractors almost as employees would be in a different situation.

Mr Stevenson—The way we framed our submission is that, in our industry, you have small businesses that often own expensive plant and often the owner of the business is also one of the operators of that plant. He tenders for contracts, wins a contract and needs some extra labour. Our proposal is more designed for the sort of member of the Civil Contractors Federation who from time to time needs to engage other people, either as employees or as independent contractors if they are coming with their own plant or as an individual entity. That model is really for the efficiency of the industry and the flexibility of both parties. Jobs come and go. Someone might want to work for more than one company because one company might not be able to provide them with consistent employment as an employee, whereas if they are an independent contractor they can work for more than one company if the work runs out.

We have not framed that proposal in relation to the Odco type arrangements. It is a valid question to ask us but we have not really given those sorts of arrangements too much thought. We have really put it forward more for the small business that needs extra labour from time to time. There are a number of individuals out there who want to work as independent contractors. Sometimes they hassle a company to engage them on an ABN or some other arrangement, and companies are nervous about how to engage them correctly. If they are engaged as an employee,

that comes with all the extra administrative issues. Sometimes if the person who wants to be engaged does not get the arrangement they want they walk away with their skills until they find another company that will engage them as an independent contractor.

Mr Williams—Let me come at it from a risk management point of view. If you think about the whole supply chain, it is really about who manages which risks. Knowing who you are contracting with is a key element to knowing what risks you are responsible for managing. The registration arrangements that were proposed could be a simple, efficient, cost-effective mechanism—as it needs to be in a small business based sector, because otherwise the overheads are disproportionate to the businesses. It is hard to envisage a situation as you have evidenced where labour hire companies could see this as onerous or disadvantageous. If you look at it as I am suggesting in a risk management context then you should always know who in the supply chain you have a business arrangement with.

CHAIR—And you propose that the management, the issuing and the control of these RCNs would be done by the various industry associations?

Mr Stevenson—If you are going to do an assessment at the microlevel and look at whether somebody owns a vehicle or tools, how much capital they have at risk and what sorts of arrangements they have in place—they may have a proprietary limited company in place or they may simply be in a partnership with their spouse—that microassessment really needs to be done on an industry by industry basis by people who understand the industry that the work is going to be done in. I think the employer associations are in the best position to do that. There may be some industries where the industry associations do not want to take on that role, and the government may be able to step in there, but certainly we are used to dealing with people who come in for training and for all sorts of other needs. If they need to be assessed as to whether they meet the multiple indicia test it is pretty easy to do that in 15 minutes.

The other part of the submission was that there should be some sort of check that they have a form of accident insurance. Obviously if they are engaged as an independent contractor they may not be covered by workers compensation insurance, and that is where most of the litigation comes from. This way, they would not registered unless they had proof of that accident insurance. Again, both parties would know before the contract starts—before they have even tendered for a contract—that they are covered in the event of an accident. That may have some benefits generally for the industry and the rate of workers comp premiums.

CHAIR—While I can see their merits in your industry and that there would be employers who would see this as being advantageous, do you envisage that in other industries there will be employers who will see this as actually limiting their ability to put people on, because, by their very nature, if you have an RCN and a subcontractor they may lose their independence by being assigned to a particular organisation?

Mr Williams—I think what we are proposing is that where peak industry associations can do it, why not? It is cost effective; it is cheap. Where they cannot do it, then you can have the fallback of a government agency who does it, by way of example.

CHAIR—I am not talking about the issuing of RCNs; I am talking about taking someone on as a worker. At the moment you have situations where you have labour hire organisations that

are putting people out there to a client organisation. The client rightly or wrongly has a high degree of control over that labour. If we move to the situation that you suggest, does a client organisation lose such control?

Mr Stevenson—Obviously control is not the only determinant for being an independent contractor. It is one of the factors that is taken into account. But, for instance, in our industry safety is a very important issue. The principal contractor needs to have strict rules about safety which flow through to all the contractors and subcontractors that work on a project. That control has to remain even though the payment for the work done may be done in a different way. I think in our industry the benefits far outweigh the disadvantages. There may be other industries where it is not as well suited, but we do not speak on behalf of them.

CHAIR—I guess that is what I was trying to get at. I was trying to extrapolate your model to other industries, and perhaps that is where it is falling down in terms of my understanding. I can certainly see its application within the construction industry and perhaps the housing market industry or the building industry.

Mr BRENDAN O'CONNOR—It is interesting that you sought to make more certain the notion of independent contractors so you are not forever questioning the legal personality of an organisation or an individual. Independent Contractors of Australia said yesterday: 'We're opposed to regulation; we're opposed to reform of licensing.' Why is it that other bodies in the contract industry have different views in relation to this matter? I suppose that is in line with the chair's comments about having different features in different areas.

Mr Williams—I think that what you are typifying here is that industry is not homogenous. The commercial arrangements are not homogenous. One size fits all is going to be a difficult proposition in the construction sector. It is an industry that is subject to structural and economic cycles. It is an industry that has a complex and layered supply chain. You need to be able to fill gaps that occur either from structural or economic cycles or from dips in expertise. Independent contracting is key to that. But, equally, it is an industry that operates with very significant risks, and you need to be able to understand what the commercial relationship is to understand and manage those risks. We can only relate to our experience with the construction sector. In the construction sector we can only strongly advocate such an approach, because it is central to equipping small businesses with the ability to understand and manage risks and therefore maintain the integrity of supply capability in the industry.

Mr BRENDAN O'CONNOR—Would Independent Contractors of Australia be in a position to speak on behalf of the construction and civil industry?

Mr Williams—It is not for me to comment on Independent Contractors of Australia, but let me say in a non-prejudicial way that very few people who do not work in construction actually understand the nature of construction supply arrangements. I further make the observation that generally when we hear construction being referred to, people typically think of building construction—vertical construction—which increasingly these days is an assembly operation, almost an outdoor manufacturing process.

Civil construction, or infrastructure construction, is very project based. Every project has unique characteristics, uses different company structures with different equipment and different

expertise, and uses people with different competencies who are generally required to make running judgments on the project that they are working on. If people really understand the inherent character of the civil or infrastructure construction industry, how can one body be assumed to understand the great breadth of contracting arrangements? I do not know them; and in their area of expertise there may be no problem with their proposition, and I would have no reason to disbelieve it. It is not one we share for the construction sector.

Mr Stevenson—In relation to regulation, three things are really needed. One is some simplicity in how this operates so it is not as difficult as working out under the common law whether you are a contractor or not.

Mr BRENDAN O'CONNOR—You still never know until there is a determination under the common law. You do no know unless it is tested.

Mr Stevenson—That is right. And in terms of the efficiency of the industry obviously we do not want so much regulation so that there is no efficiency in increasing the costs of that regulation. But—and this is the third point—that certainty is the most important point for all parties: for the person performing the work and the person engaging the other person to perform the work. I think the benefit of that outweighs a lot of the disadvantages of a little bit of extra regulation.

CHAIR—Have you shopped around your view on this with other industries—the Master Builders, the HIA and perhaps the construction and forestry union and the CEPU? Have you had a chance to discuss your proposition with those players, both the union and other related employer associations?

Mr Stevenson—We have had a little bit of general discussion, but we have hardly met to discuss these issues. We put this forward and we knew that they would see it.

Mr BRENDAN O'CONNOR—Who are 'they'? The chair has mentioned employers and unions in the same breath.

Mr Stevenson—We have a dialogue with other industry associations in the construction industry, including the Master Builders Association and the Australian Industry Group, and it varies from state to state.

Mr BRENDAN O'CONNOR—Do your members work mainly with the AWU or the CFMEU?

Mr Stevenson—Both.

Mr BRENDAN O'CONNOR—With civil engineering I guess there are a lot of AWU sites and so on.

Mr Stevenson—Yes. The majority of the building sector is covered by the CFMEU, and there is a fair bit of overlap with our employees. The AWU do cover roads and railways, which is the civil—

CHAIR—So the answer is: not directly.

Mr Stevenson—Not directly.

Mr VASTA—Are you familiar with Professor Andrew Stewart's definition?

Mr Stevenson—No, I am not.

Mr VASTA—We might make that available and get some comment on that.

Mr BRENDAN O'CONNOR—I might be paraphrasing, but you mentioned a disincentive for employers to employ employees because of unfair dismissal laws. I think you also asserted that you support the government's position on exempting small businesses, businesses of fewer than 20 employees, from any right for employees to redress what they see as an unfair dismissal. What laws would you suggest should exist for employees who have been terminated? You have said that you do not support the law; what do you support?

Mr Williams—We support the government's policy on unfair dismissals in the act which the government proposes to enact in relation to unfair dismissal.

Mr BRENDAN O'CONNOR—So you do support unfair dismissal laws for organisations of 20 employees and above?

Mr Williams—At the moment the only proposition that is on the table is the policy that the government is proposing for unfair dismissals for businesses with 15 employees or fewer, and we do support that. Today we have not come equipped to talk to you about broader IR or workplace relations arrangements that are not within what we saw—perhaps mistakenly—as the remit of this inquiry.

Mr BRENDAN O'CONNOR—I am not trying to be incidental to the matters before the inquiry, but you mentioned that there is a disincentive to contract direct labour and therefore they consider having labour hire placed employees or they consider entering into contracts with independent contractors. One of the reasons that you assert for that is that an employer does not want to have employees who have any security of employment in the form of redress if they are terminated. I suppose what I was trying to assert is that you agree with removing the rights of employees to seek relief if they are terminated by small employers and I was just wondering what your view was about the laws that protect employees in medium and larger organisations.

Mr Stevenson—Our submission is that the unfair dismissal laws work as a disincentive to some of our smaller members in employing people directly because of what they can get caught up with if there is an argument and the employee leaves and they have to go through an unfair dismissal case. I personally represent a lot of members in those types of matters, and the fault can lie on either side—and it does. We are not really putting forward a submission in relation to the virtues of the unfair dismissal laws. I think that is probably a different submission that we need to consider and put. There are also unfair contract laws in some states which regulate contractors in the same way. That would probably be a disincentive to take on independent contractors in the same way as unfair dismissal laws are perhaps a disincentive to take on

employees. But at some stage small businesses have to bite the bullet and employ people if they want to grow larger than owner-operators or family companies.

Mr BRENDAN O'CONNOR—Just returning to the most substantial matter in your own submission, would I be correct in saying that, in regulating independent contractors, you would seek in the main to rely upon the ATO definition—although not necessarily as exhaustive as the definition itself—and that that would be a good starting point to attempt to determine who is a contractor? Am I getting the right interpretation of your submission if I assert that?

Mr Stevenson—Yes. We are saying that the tax office's approach, which is to use the common-law tests, the multiple tests, is the appropriate way to go. We are saying that a pre-assessment of people meeting that test, prior to engaging in contracts, is a preferable system than making a declaration that they are—which is untested—or finding out later that there is a dispute.

CHAIR—It is interesting you say that, because you would be about the only witness so far who has categorically said that the alienation of personal services income test is sufficient. Everyone else has seen it as a guide but has actually referred to the common-law control test as a principle—that is, lending themselves more so to the common-law control test than to the APSI.

Mr Stevenson—I do not think I am trying to say that any particular part of the test is the absolute test. As I said, there needs to be some micro assessment of each individual and what they are bringing forward or what they are holding themselves out to be. They may have a lot of capital at risk but be completely under the control of whoever is taking them on. As Doug has said, it is the management of that risk. There has to be some fairness there in the contract, obviously.

Mr BRENDAN O'CONNOR—A lot of other witnesses wanted to be more prescriptive than you did, I can assure you—and not just employer bodies. There were many who thought it was not prescriptive enough, so I found your comments were pretty much in the middle of the debate. From my point of view, I would just make that point.

CHAIR—Thank you very much, Mr Williams and Mr Stevenson. We appreciate your time.

Proceedings suspended from 3.04 p.m. to 3.14 p.m.

JACKSON, Mr Neil Gordon, Chief Executive Officer, Building Service Contractors Association of Australia

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that these hearings are formal proceedings of the parliament and they warrant the same respect as proceedings of the House itself. I also 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 prefers to hear in 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 or add further remarks to your submission?

Mr Jackson—Thank you for the opportunity to make a submission and to appear here today. In the introductory comments from you, we read that entrepreneurship in Australia is part of our culture. We agree with that concept. Also in those remarks there were statements concerning independent contracting and the importance of making sure those arrangements were legal and proper. I am here today to talk to the committee about issues in our particular industry, which is the building services industry, primarily contract cleaning. It is not a glamorous industry by any definition but we think it is very important given that every building in this country is cleaned by some of our members. The industry represents about 6,000 contractors employing about 150,000 people. At the lower end of the scale, which is perhaps where we are in the food chain amongst some of the submissions you have received, we are probably, in an industry sense, more vulnerable than some others. It is some of those issues I would like to talk about today.

CHAIR—Thank you very much. You talk a lot of your concern about the proliferation of illegal subcontracting and cash-in-hand payments. How widespread is this in your industry?

Mr Jackson—We are seeing more evidence of cash in hand, and its growth, probably in Queensland in terms of high rise. There have been some major issues. We have been partnering with the LHMU, our industry union, to try to sort out those issues. In New South Wales, the issue of what we would think is sham or illegal subcontracting is certainly becoming a significant issue to the point where some of our members in that state would describe it as 'industry in crisis'. I do not think it is quite to that point, but certainly the cost pressures and the issues in that state are very significant for us and we think there is the potential for that to go elsewhere within the industry sector.

Mr VASTA—Are they foreign workers?

Mr Jackson—In parts there are some strong allegiances with various countries, in New South Wales in particular. There has been some publicity about those areas in terms of shopping trolleys and areas where whole groups of people have come together and engaged in basically sham arrangements. That has been a major problem. We as an association are holding an industry forum on 15 July to readdress some concerns there. It is a problem for us. Certainly there has been an issue of, as you say, migrants.

Mr VASTA—I imagine the industry lends itself to anyone calling themselves a contractor. Very little upfront investment is required in capital equipment.

Mr Jackson—The barriers to entry are negligible. I can set up tomorrow with a mop and bucket—dress ourselves up and away we go. That is good in one sense, because a number of people have moved out of other vocations, such as banking and others, and have come into our industry. That is good but, equally, anybody who is displaced or unemployed can start up. That is no issue and no problem, but thereafter that causes all sorts of cost pressures and issues in terms of, to be frank, cleaning. We think it is extremely important, but the owners, managers and builders see us as not a balance sheet item at the end of the day but a straight cost. So over the last 10 years the pressure is just downward pressure. They say, 'It is just cleaning. Cut the costs; cut the costs; cut the costs.' You have got 6,000 contractors throughout Australia trying to hang on to a job. So they look to the award system and they look outside and beyond the award system for how they can hold onto those contracts and maybe win a bit. At the end of the day, that is where part of the problem arises.

The majority of the people that we employ are from the migrant population, with low-level English language skills, so if there were a directive that they may be changing their employment status from employee to contractor they do not have a lot of resources behind them to consider whether that is a good or bad idea. At the end of the day, it is about feeding the table. That is where our problem lies, because of the nature of our industry. It may not be the same in civil contracting and construction, but in cleaning, when someone has a job and they are directed by the contractor, 'This is the best way for us to go forward to hold the contract,' they are more than likely to say that they will do it, no matter what the consequences. That is what we fear is part of the process in our particular industry sector. I am not saying it is across the board in contracting—maybe there are lots of other reasons that would not happen. I am here today at the bottom of the food chain in regard to the basic function of the form, the low capital barriers to entry, the 150,000 we employ and the likelihood of them being converted into subcontractors to keep their work.

CHAIR—What other types of occupations would your association have as members, apart from cleaners?

Mr Jackson—At the mid to large end of the scale, security comes into our scope. There is also grounds maintenance and carpet cleaning—all those things that service a building. There are other associations we have alliances with, such as pest control and trade waste, and our members engage with those sorts of contractors. If we are here in 35 Spring Street, whatever has to be done in the cleaning and maintenance sense comes within our ambit.

Mr VASTA—And outside you have, say, window cleaning?

Mr Jackson—Window cleaning absolutely comes within our scope.

CHAIR—Basically all those occupations which have lent themselves more and more over the years to subcontracting arrangements.

Mr Jackson—Absolutely.

CHAIR—How would you propose that we control this?

Mr Jackson—From our perspective, if it was just to continue unfettered, without some framework or rules—and we support flexibility in arrangements in the workplace and proper contracting—we would see that there probably would be a continuation of this subculture of sham arrangements in our industry. I have read some of the 69 submissions, and they all point to the issues that we know about in tax, occupational health and safety, WorkCover and those areas that will be avoided. That is our concern.

We are not for regulation and the cost of regulation, but in our industry sector I think it is going to hurt government and others in one way or another. At the other end of the scale, some form of registration or quasi-registration to us might provide an opportunity to at least put a framework around the model. We look at the federal government and Australian workplace agreements. We know there are lots of arguments about how they are administered, but there is a framework. We look at franchising and we see the Australian government again imposing, through the ACCC, some will about structures about franchising. We think that, with contracting and some sectors, although maybe not all—ours is particularly vulnerable—some sort of registration or mandatory statement that a contractor would have to make to say, 'I am what I am,' is what we would be looking to in the most limited form. But it would be something as opposed to nothing.

In regard to our situation, the LHMU submission talks about the Endoxos case in Canberra, which is quite clearly is the classic example, where an employee was told to become a subcontractor and was without the wherewithal to defend that situation. We would hope that perhaps there is some way to have some framework, as a way that is proactive rather than reactive—that is, allowing people to make decisions to become contractors or employees and to allow the courts or the common rule to address those issues of abuse. We think that being proactive and having something in place would be a better way to go for the good of our industry sector.

CHAIR—I want to put a proposition to you. It is probably not correct but let me put it to you anyway. Perhaps what your industry may also suffer from is that the decision maker in a client organisation which is employing the services of your members is perhaps more prone to look at cost cutting as a motivator than other organisations and industries. You are dealing with management levels in those organisations that perhaps are not very senior and who perhaps are looking at cost cutting as a performance criterion. This is a huge proposition I am putting, by the way. Perhaps in general labour hire arrangements the decision may be made at a human resources or personnel management level where they do have an eye for rights and responsibilities. I am not saying they get it right; obviously they do not, as otherwise we would not have so many witnesses. But there is a differentiation in the focal point in the organisation where that decision is made.

Mr Jackson—Mr Bruce, if you want my job you can have it, because your statements encapsulate exactly what happens in our industry sector. Our problem and our issue is that cleaning is seen as a cost rather than an investment. We all spend a third of our lives in a building like this and the air quality and the cleaning of the toilets and the carpet, we think, has a long-term effect on the general environment in which we work. But unfortunately at the end of the day it is just seen as a cost and not an investment. Our endeavours to deal with our client base are a major issue for us in terms of trying to educate them. It always comes down to price.

It is the lowest common denominator. We are probably seen and treated that way—not in all cases but as a general statement. That is the problem.

If that is the issue and is the starting point, then any decisions made by our members or people in the industry are always going to be about hanging on to the contract. Then we look to the award structure, which is up here, and we see opportunities to go into franchising legally or into subcontracting in whatever way and to move outside and around the award system. That clearly is an opportunity for people. In survival terms—and that is what a lot of them face—that is precisely what they do.

Mr BRENDAN O'CONNOR—Who then does your company or your organisation represent? Can you give me an example of the nature of the membership?

Mr Jackson—Sure. Like most associations—or perhaps not—we have the major players in the industry. In our case, we have 500-odd members out of 6,000. That seems like we do not represent a lot but I would say that we represent 85 per of the industry.

Mr BRENDAN O'CONNOR—The big contractors.

Mr Jackson—The big contractors. That is only a handful, but they are the major ones. Then there are the medium-size single-state or dual-state contractors. The majority—the other 85 per cent—are small- to medium-size contractors.

Mr BRENDAN O'CONNOR—So are you saying that 15 per cent of your membership actually covers 85 per cent of the industry and 85 per cent of your members cover a negligible amount of the industry?

Mr Jackson—Yes.

Mr BRENDAN O'CONNOR—So 85 per cent of the members of your organisation are effectively single operations?

Mr Jackson—No. They would have up to 25 to 50 employees.

Mr BRENDAN O'CONNOR—Okay. So they are small operations.

Mr Jackson—Yes. We have issues with definitions and it sounds like employing 25 or 30 people means you are a reasonable size. But when 70 per cent to 75 per cent of the value of your contract is labour, that in fact redresses the issue and means you are really not a major business.

Mr BRENDAN O'CONNOR—I seem to be getting some almost contradictory comments from you. I will explain—and I am not trying to be in any way offensive. For example, you talk about the fact that you are not a big supporter of regulation, but then you say that there is a real need for certainty and a real need for a framework. I am not sure which it is.

Is it the case that this industry has worked in a very deregulated way for such a long time that effectively there has been a race to the bottom in terms of cost cutting? There has been downward pressure on labour costs as a result of the lack of regulation. It was also a result of

converting what are really employees into independent contractors, to avoid obligations. Is that contributing to some of the problems that you have expressed today, or should we continue to allow that sort of practice?

Mr Jackson—I wish this inquiry had been held 14 or 15 years ago and we had had the opportunity to say we would prefer to have some form of regulation in terms of the structure. The fact that that did not happen continues to create issues. We are for independence in terms of free trading and opportunities in the marketplace, but on this contracting issue we would be in favour of some form of licensing or some structure, not just an open slather approach.

Mr BRENDAN O'CONNOR—I am trying to get a feel for what has happened, so tell me if I am wrong. As I understand it, the cleaning industry has gone through enormous change. Obviously, there were always contractors, but there was also a large proportion of employees working for contract companies at given sites. There were efforts to de-unionise the industry by all sorts of people. That has led to massive growth in subcontracting or the conversion of employees to contractors. The unions have taken some time to respond, but they have, and now there are increasingly more relationships with the larger employers in your industry. But, other than the large employers, the large contract companies, that are entering into arrangements with unions or indeed with people as employees, a lot of small operators are undercutting those larger companies because they have less regulation or they have less of an obligation. Am I wrong or right, or am I half wrong or half right?

Mr Jackson—Maybe half right. We are talking about the unions now, and you have talked about the relationship there. Our industry union is the LHMU. If you look at bare capability when you talk about 6,000 contractors Australia wide—and our general union coverage would be less than 20 per cent—they do not have the strength on the ground to impose their will, in the good or the bad sense, on regulation and enforcement that perhaps they did 20 years ago, and it is less and less so. That is certainly an issue. So, yes, in the CBD of Melbourne, Brisbane or Sydney there is a union presence and a union relationship with more of the major employers, but outside of that there is also a large market which is free flowing and unregulated, and that is where these sorts of arrangements would flow.

Mr BRENDAN O'CONNOR—How do you deal with conflicts that may arise between, on one hand, your members that are smaller contractors seeking to compete against larger bodies and, some would argue in some cases—not in every case, because size is not the only criterion—more professional larger bodies and, on the other hand, those larger bodies? How do you deal with the conflicts that may arise within your membership?

Mr Jackson—We are a democracy, so at the larger end of the scale the companies are interested in more structural issues, industrial issues; at the smaller end it is more to do with training and promotion and how they can break loose. The four largest companies in our association and indeed in the whole industry all started at the kitchen table and have grown to be massive companies. So again our processes try to encourage those small companies and show them the way to grow that way. So there is no conflict; it is just that there are different interests within the association.

Mr BRENDAN O'CONNOR—In your industry is there evidence of people being converted from employee to so-called independent contractor overnight? One minute they are an

employee, the next day they have received an ABN and now they find they are a small business. What is the prevalence of that within the cleaning contract industry?

Mr Jackson—I cannot reel out reams and reams of situations, but the intelligence we have for New South Wales—and we have had a lot of discussions with the union and our own body there—is that it is rife in New South Wales and it is moving elsewhere, because it is so easy to do with these cost pressures.

With common rule in Victoria, we are all of a sudden again seeing a number of contractors who were outside of the federal award come into the federal award and have huge problems with their client base in terms of being able to process those higher costs. I read recently that the Victorian government has allocated another $16 million for schools cleaning because of exactly that reason. New South Wales is the hotbed to us for reasons that we were talking about before. We see that growing elsewhere because it is a matter of survival. It is relatively easy to do and hard to prevent without some structure—that is, speak to your people: 'You have got two choices. We need you to become a subcontractor or we must move on—

Mr BRENDAN O'CONNOR—Or terminate.

Mr Jackson—Yes. We should have some structure behind that termination process. It should be brought to account if indeed the contractor said, 'I do not fit the definition.'

Mr BRENDAN O'CONNOR—I want to be clear on this: you are saying that is driven as much by the economic pressure to compete than by any ill-intent by the parties to convert people into, say, lesser conditions. Is the driving force behind that the competitive pressures to maintain contracts?

Mr Jackson—Absolutely.

CHAIR—Mr Jackson, thank you very much for your time.

Mr Jackson—Thank you.

[3.37 p.m.]

HASTINGS, Mr Ian, Private capacity

FRASER, Mr Duncan Alistair, Private capacity

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

Mr Hastings—I am from Ouyen in Victoria. I have been asked by the National Farmers Federation to appear here today. I suspect I am here as a farmer-contractor: my business is as a farmer and I also run a contracting business in broadacre spraying.

Mr Fraser—I am from near Hay in the western Riverina of New South Wales.

CHAIR—Thank you for coming all the way.

Mr Fraser—I chair the National Farmers Federation's workplace relations committee, but I am here in a personal capacity as a farmer and a small business employer. We are both here in our personal capacities, not as representatives of the NFF.

CHAIR—That is important. Although the committee does not require you to give evidence under oath, I 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 also customary at this point to remind witnesses that giving false or misleading evidence is a serious matter and may be considered a contempt of parliament. We 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 at that stage. Would either or both of you like to make any opening statements or remarks? As we do not have a submission, we are basically going to have a chat based on what you are going to say to us.

Mr Fraser—Thank you for the opportunity to address this inquiry. As I said, we are here in a personal capacity as rural employers and contractors—and therefore that is the position from which we will be listening to and endeavouring to answer your questions—to talk about the issues and problems, from our perspective and from our experience, that are currently confronting employers in the rural sector of Australia, at both a state and a national level, to do with the employment of permanent, casual or contracted workers and the use of labour hire companies.

CHAIR—Do you have a farm?

Mr Fraser—We both do.

CHAIR—How large is your farm?

Mr Fraser—10,000 hectares.

CHAIR—What do you grow on it?

Mr Fraser—We are trying to at the moment, heading into our fourth year of the drought. We have sheep, some cattle and cropping—I grow rice and wheat.

CHAIR—How many permanent employees do you have?

Mr Fraser—None.

CHAIR—So they are all seasonal workers?

Mr Fraser—Yes.

CHAIR—Mr Hastings, would you like to make any opening comments?

Mr Hastings—I will just lay out our business. We also run a farm in Victoria. It is quite an average or medium sized farm—only 1,200 hectares in our case—and it is a dryland cropping enterprise.

CHAIR—Mr Fraser's back paddock, is it?

Mr Hastings—Probably not even the full back paddock!

Mr Fraser—I wouldn't mind Ian's place.

Mr Hastings—There is a bit of a difference in rainfall between the two. In our spray-contracting business, we employ people part time. We are at the moment in consultation with Patricia, who is helping us to set up a workplace agreement for a full-time employee, but it is not easy under our requirements and the employee's requirements. So that is one of our concerns at the moment, but in that business we employ up to seven people, mostly on a casual basis.

CHAIR—What do you grow on your farm?

Mr Hastings—Dryland cereal production.

CHAIR—Are most of your labourers seasonal workers?

Mr Hastings—In the spray business, yes. On our farm we do it ourselves.

CHAIR—What are the issues and your concerns with contracting, labour hire organisations and independent contracting? Do you have any particular issues of concern or are there directions in which you believe we should be heading to make it easier for people such as you on the land?

Mr Fraser—I suppose I can speak from a historical perspective as I have been in the Hay area for 25 years. Originally, my family came from between Ballarat and Melbourne. In fact, I still have family members there. We always employed permanent labour on our mixed farm. When

we bought the property in the Riverina area, the intention was that we would employ permanent labour up there also, but we did not take into account factors like isolation, the state of transport and the roads, and accommodation or the provision of accommodation. Initially we relied on the use of contractors and casual labour when we needed it, and that is the way it still is today. The trend generally in the rural industry is a push for flexibility by the use of casual labour. Obviously if it is not available you are in a bit of a pickle, but it has actually become more available over the years as people who used to work in permanent jobs prefer to go out to work as contractors to give them the flexibility of working when and where they want to. That has been a trend I have noticed over the years.

CHAIR—Putting aside—and by saying this I by no means want to diminish the size of the issues—the scarcity of labour in rural and regional areas, the isolation issues and the transport issues to get there, are there any industrial impediments or legal impediments to your taking on contractors or people from labour hire organisations?

Mr Fraser—No, not really. Obviously there has got to be an appreciation by the farmer that there is still a degree of responsibility with the property owner having contractors on the place. There are problems with the interpretation of state and federal issues, say to do with the whole definition of what a contractor is. For instance, the definition of a contractor is different for the Australian tax office and WorkCover NSW. That leads to a lot of confusion for rural employers in New South Wales. That is just one issue at the state and federal levels.

Mr Hastings—Our concern with our spraying business is that operators of our units need quite a lot of training to be capable to operate the units. It is very hard to provide them with full-time employment in this business, because it is very much 'rain to rain' rather than even season to season. It is: 'Work two days this week, and we may need you next week. We won't know until Monday.' So it is very difficult to have permanent employees. Getting casual employees who are available when we need them and who have the required skills is very difficult. An option that we have looked at a number of times is using people who have the ability to have the training, and therefore that skill, as a component of being a subcontractor to us. We provide the equipment and the work, and they could be a subcontractor. We are under the impression, at this point in time, that that is not feasible.

We are constantly training people to work for us on a casual basis, and we pay them as casuals on a performance basis. In other words, they get cents per acre that they achieve. Our input is to ensure that the equipment is in good operating condition and give them the work and all the rest of it. We provide all the backup and support. What they need to do is work hard when they are on the job, and they can achieve very good results in terms of income for their hour's work. But we are finding more and more that we have to have a huge number of people trained up so that we can have people available when it rains and therefore there is work the following day, whereas if we had people who were able to have that skill and provide that skill to us on a subcontract basis we think it would be far easier to have those people available to us. We find that is quite a big issue. Getting people to, firstly, get the qualifications and, secondly, be available when we require them is a very difficult problem for us.

CHAIR—Are there any labour hire organisations or agencies in rural Australia to which you could pick up the phone and simply say, 'We need three or four contractors out here'?

Mr Hastings—I cannot answer no, but we certainly have tried and not found people available.

CHAIR—That would overcome your problem, wouldn't it, if someone else had a responsibility for the subcontractors and you could call them as you needed them?

Mr Hastings—Yes, it would. However, we have to realise that we are probably 200 to 500 kilometres from the nearest labour force, and they are not going to be available tomorrow morning when the wind stops blowing at seven o'clock.

CHAIR—The concern I have is that if we adopt your suggestion—while you may have a unique situation because of your isolation, seasonality and, as you say, rainfall—it opens up an opportunity for other organisations to exploit that employment relationship.

Mr Hastings—I cannot comment. Our philosophy is to pay people well to drive our vehicles, because not only are they driving a vehicle and working for us but they have to be our ambassadors. We are prepared to pay them well to do that, but our problem is getting them to be available when we need them.

CHAIR—I sense just by listening to you that you have also breached the common-law control test by doing so.

Mr Hastings—I am not familiar enough with that to be able to comment.

CHAIR—That is why we are here: to look at options. I am actually surprised that there is not an agency out there that you could call upon.

Mr VASTA—They cannot fly employees out to you?

CHAIR—I can see the problem. Say you hire someone who comes out there and it starts pouring down with rain. What do they do? Do they hop in their car and drive for four hours back to Wagga or Melbourne or wherever it may be?

Mr Hastings—The nature of our work is that we may have a job that we expect to do the next day and the weather forecasting at this point in time is so poor in terms of being able to forecast wind in particular, which is a big issue for us, that we effectively need those people to be living locally so that they can get up in the morning, check the wind and access the weather information. It is then a 'yes' or a 'no' as to whether they go to work. If we were to talk about flying them in, who would pay for them to sit around for the next one, two or three days while we waited for the conditions to be right? That would be an issue that we could not cope with in the way that we are dealing with it.

CHAIR—Mr Vasta comes from Queensland, where there are big distances involved.

Mr VASTA—I still don't have an aeroplane waiting for me after this.

Mr BRENDAN O'CONNOR—I think it is important for the record to make it clear that, from my point of view—and I think it is shared by all the committee members—we understand that in your industry you have always needed seasonal workers, however expressed: whether as

contractors or employees or whether as shearers, sprayers, pickers or whatever. Clearly that need comes around at certain times of the year and you have always needed that flexibility. There is no argument about that. My understanding of what you have to put us today is that you have difficulty because of the vagaries of the weather and the seasons and, in some circumstances, because of the remoteness of the farms—certainly the farms to which you have referred. I am also wondering if it is to do with a skill shortage. I am not sure if that is the case. You have mentioned the problem of not having sufficient training for enough people.

I accept that you really do need the flexibility because of the nature of your business, and I think that has always been understood across the spectrum in the parliament. Isn't it the case though that, not just in rural areas but even in certain other industries, there are vagaries as well? There are fluctuations that occur in demand and so on, and you have to factor that in to your management. I understand that that is one of the risks. The weather is an imponderable thing and it is always a real burden for you guys when it goes wrong. But it is a blessing when it goes fantastically right for you. Isn't that one of the things that you just have to factor in when you work the farm? I am not sure how else we can have someone sit there indefinitely until the wind stops, for example.

Mr Hastings—Certainly. I think it needs to be understood that I did not come here saying that the current situation is unworkable and that we should change to this system. I am purely and simply pointing out some of the things that we have discussed in our business over time as being of concern to us. We feel that, if we had a subcontractor dedicated to the job who set themselves up to operate within an area and could guarantee their amount of work, it may be easier than our current situation. I am looking at it being easier both for them and for us. I am not being selfish about this in any way.

Mr BRENDAN O'CONNOR—To that extent I would have thought the market would govern that. If it is indeed the case as you say, and I have no reason to believe otherwise, that the remuneration is there and that people are well rewarded for being there and performing a hard day's work—as you made it clear, the return is a very good one—would that not then precipitate people to arrive, to stay and to factor in their own losses if they are not able to work? In other words, wouldn't the market dictate that there would be a supply of labour, if the reward is so good?

Mr Hastings—It is rewarding only when they are working, and that is the difficulty. It is very much a fragmented workplace, if that is the right term. We may work almost for days on end, given a week or even two weeks where there is ample work for us to do. There may not then be anything for a fortnight. There then may be work for two days and nothing for 10 days. It is so dependent on events which occur just a few days ahead of us with not enough time.

Mr BRENDAN O'CONNOR—You said it may be easier under a contract arrangement. I know many employees working in rural industries have been seasonal or casual anyway and no-one has ever tried to impose upon them. If they have, they must have been somewhat mad to impose upon an employer a permanent employee for a year if there is no work there for two-thirds of that year. I am not sure why there is a need for the distinction. Clearly, if a person is a casual or seasonal employee and the work is there, why wouldn't that be as viable a prospect as an independent contractor? I am not suggesting that there is anything wrong with a genuine

contractor doing the work, but I do not understand the reason for the difference in this circumstance.

Mr Hastings—You may well be right. It is not something that I am able to prove. Our assumption is that if somebody sets themselves up to be dedicated in one line on a casual basis they are more likely to be available and be concentrating on it, and that is our issue. We train casuals who then decide that there is something else that they want to get involved in and go and do that and when we next want them they are busy doing something else which they have gone to because there was no work. We feel that, if somebody were more dedicated to being a subcontractor to us, then they would ensure that that was their main line of income.

Mr BRENDAN O'CONNOR—Would it be easier if a group of employees or an independent contractor had a multitude of functions? There might be things that cannot be done on a given day because of a number of factors. Wouldn't it be easier to attract somebody, some people or an entity, to a location if they or he or she had a number of things to do when other work was not able to be undertaken? Is that something you have contemplated?

Mr Hastings—It is certainly something we are investigating very seriously at the moment. We are investigating how we can have one employer—in our case, our spray business—and allow an employee to work elsewhere when they are not busy in our spray business. It is possible, we believe, but it—

Mr BRENDAN O'CONNOR—You have not worked it out yet—

Mr Hastings—We are working on the detail.

CHAIR—On a similar line of reasoning, is it possible, if it does not already happen, that a group of farmers in that region could get together and actually employ a given number of people? Is that not possible?

Mr Hastings—Yes, it is possible, but when I want to go spraying so do all the others. It is one of the problems of all forms of contracting in our type of area where the same weather conditions are on all of the neighbouring farms and so everybody wants a spray driver. That is the biggest issue with sharing equipment and manpower in those sorts of communities.

CHAIR—So what you are saying is that what you would like us to consider on behalf of the farming rural community is a situation where you could employ people and take them on on a contract basis where they would be dedicated to you? They would have their own ABN numbers, their own legal entity—perhaps incorporated—and they would be dedicated to working on your particular farm.

Mr Hastings—Yes. I must admit I am a bit careful about going into too much detail here because I do not know it myself. But, as I understand it, to be a contractor to me and then drive our equipment for our business they have to bring equipment with them or they have to provide in the vicinity of 50 per cent of the equipment. We own all of the equipment.

CHAIR—That is one of the tests, yes. They do need to provide the tools of trade, but that is only one out of four or five tests.

Mr BRENDAN O'CONNOR—It is one of the big ones, though, currently.

Mr Hastings—I did not mean this to be the focal point of the reason for coming here, I have to say—it was an issue I wanted to raise.

CHAIR—What is the focal point you want to raise with us?

Mr Hastings—I did not have another focal point. I wanted to come and just have a general discussion about the issues. The skills that our drivers require are to me their tools of trade, if I can use that distinction. We do put quite a lot of effort into ensuring that they are very well qualified to do the job, and they do have a number of skills.

CHAIR—It is not the truck, it is the ability to drive the truck.

Mr Hastings—That is all that they would bring, because we own the equipment—the truck.

CHAIR—That is what you are saying is important to you—

Mr Hastings—Yes.

CHAIR—Their ability to drive the combine harvester.

Mr Hastings—Yes, to drive that equipment, whatever it might be.

CHAIR—So that is what you are buying, not the actual combine harvester that comes with them.

Mr Hastings—Yes. The tools of trade in this case are not only the ability to steer it and push the buttons but to be capable of being an ambassador for the business in terms of the people that they work for and so on. So there is quite a deal of skill required to do it.

Mr BRENDAN O'CONNOR—Clearly, there is all sorts of other work that you undertake throughout the course of the year. I am not sure whether it is a family business or there is a combination of employees who work all the time—

Mr Hastings—To qualify, this spraying business is a stand-alone business which we run separately from our farming enterprise.

Mr BRENDAN O'CONNOR—I was going to ask whether there is a role for the peak employee body—NFF or VFF—or the Industry Training Board to create, if they have not done so already—a particular course and have locals undertake the course. Rather than having to get people to come in, people within the vicinity with the particular training could do it. That way you do not have a problem about trying to get them at the right time. You have probably pursued this but I am just trying to find a way through.

Mr Hastings—Yes, the training ideas are currently rattling around and, in the case of Victoria, the Grains Industry Training Network is looking at developing a course. Going back to the issue of local, the day that there is spraying for me to do there is spraying for every other local that is

capable. That is the issue; we just do not have spare people sitting waiting. We need to have people dedicated or trying to survive in the area who are capable of doing this job. If we had someone who was really dedicated and that was their main line then they would be presumably set up and waiting for the time—watching the weather and being available when there is a job to do. That was my point.

CHAIR—I have another point, which might affect you, Mr Fraser, more than Mr Hastings: has the regional migration program been of any assistance in meeting labour shortages?

Mr Fraser—Do you mean the harvest trial?

CHAIR—Yes.

Mr Fraser—It is getting more popular and more regions are registering with it and getting onto the circuit, so to speak. It is just one tool in a range of things that we need to develop further to overcome this issue of shortages at peak periods. You will hear from the NFF next week in Canberra. They are putting together a labour action plan in conjunction with governments, industry and unions to address these issues. That is one plank of it. Probably as much a problem as harvest labour is the shortage of skilled workers. That is a longer term issue that is developing. That is one of the other key planks in the labour action plan.

CHAIR—That is being announced next week, is it?

Mr Fraser—The plan is in draft. It is to be discussed at committee level of the NFF and then it will go to the executive for ratification. We will pursue that from June onwards.

CHAIR—Does anyone have any closing comments?

Mr Fraser—In relation to the definition of independent contractors, there is concern out in the rural areas that there may be a push to close up on the definition of contractors to try to force farmers to employ permanent labour again. We are not sure but there is a concern. That is why we are seeking a more consistent definition of contractor at state and federal levels.

CHAIR—What you are saying is right. Witnesses we have had so far, whether it be those seeking far greater regulation or those wanting to see things freed up, are basically saying, 'At least give us clarity about the definitions.' That is fairly consistent. It is an easy request but it is going to be hard.

Mr BRENDAN O'CONNOR—To concur with the chair, not one witness has asserted that people in your industry should have imposed upon them new permanent employment relationships. There is a very good understanding that there is a need for seasonal or casual capacities even if you decide to enter into an employment relationship rather than a principal-contract relationship. I make that point as a Labor member of the committee.

CHAIR—Thank you for coming to see. We do appreciate the time you have both given us today.

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 4.05 p.m.