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20 July 2006

Mr John Carter
Secretary
Senate Employment, Workplace Relations and Education Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Carter,

Re: Inquiry into the provisions of the Independent Contractors Bill 2006 and Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006

Attached please find the submission of the ACTU to the above inquiry.

The ACTU would welcome the opportunity to appear at the public inquiry into the Bill to expand on those matters we have raised in the submission.

I can be contacted on 03 9664 7340 or at lrubinstein@actu.asn.au.

Yours sincerely

Linda Rubenstein
Industrial Officer

ACTU SUBMISSION

Senate Employment, Workplace Relations and Education Legislation Committee

INQUIRY INTO THE INDEPENDENT CONTRACTORS BILL 2006 AND THE WORKPLACE RELATIONS LEGISLATION AMENDMENT (INDEPENDENT CONTRACTORS) BILL 2006

D No: 4/2006 July 2006

INTRODUCTION

1. The ACTU submits that the proposed legislation does nothing to address the real issues caused by the explosion in the employment of so-called "independent" contractors, while stripping them of access to the protection, however limited, available under state legislation.

2. The ACTU submission to the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation 2005 Inquiry into independent contracting and labour hire arrangements sets out comprehensive recommendations for ensuring proper regulation of contract employment. The ACTU asks that the Committee consider that submission, which is attached, as forming part of the ACTU submission to this Inquiry.

3. While making it easier for employers to use contract arrangements to avoid employment obligations, the legislation does not effectively address wide-spread abuse of this form of arrangement to avoid tax, superannuation payments and workers' compensation.

4. The legislation does not address the serious issue of the application of occupational health and safety standards for independent contractors and labour hire employees, which was the subject of a number of recommendations of the 2005 Inquiry.

5. The retention of the specific protections provided for owner-drivers in NSW and Victoria indicate the Government's selective understanding of the issues faced by contractors who are dependent on one source for their income. The ACTU submits that the right to bargain collectively and to have minimum rates established by an independent body should be available to all "dependent" contractors.

6. The philosophy behind the legislation is that contractors should be regulated solely through the Trade Practices Act, as if individuals earning their income primarily through their own labour and frequently from one source should be prevented from protecting their interests as workers. Individuals in this position are indistinguishable in practice from employees and should not be subject to laws designed to apply to corporations and other businesses.

7. While the legislation claims to maintain and extend protection for outworkers – some of the most exploited workers in the country – the reality is that it significantly reduces protection by overriding relevant state laws.

8. The ACTU urges the Committee to recommend that the Bills not be passed unless amended to provide comprehensive rights and protections, including minimum pay and leave entitlements together with collective bargaining rights, for all contractors other than those genuinely running a business on their own account

INDEPENDENT CONTRACTORS BILL 2006

The definition of "services contract"

9. The Independent Contractors Bill (ICB) does nothing to address the inconsistency and uncertainty which attaches to the issue of distinguishing between an employee and a self-employed worker or independent contactor.

10. Paragraph 20 of the Explanatory Memorandum confirms that the common law distinction between an employment contract and a services contract, or between a contract of service and a contract for services is to remain operative.

11. Although the House of Representatives Committee recommended, in its August 2005 report *Making it work: Inquiry into independent contracting and labour hire arrangements*, that the common law distinction be retained, it also recommended that efforts be made in co-operation with the states to pursue consistency through adoption of components of the income tax assessment alienation of personal services income legislation tests in the drafting of federal legislation. This recommendation has been completely ignored and while, as the Minister said in his Second Reading Speech, the PSI test is "easily manipulated", the answer is surely to establish a stronger test. A model for such a test can be found in the recommendations of the dissenting members of the Committee.

12. The courts have determined that the distinction between employee and contractor is based on a number of "indicia" which, in an individual case, will be weighed and balanced to determine on which side of the self-employment ledger the worker falls. The relevant criteria have been set out by the High Court in *Stevens v Bodribb Sawmilling Co Pty Ltd*[1] and *Hollis v Vabu Pty Ltd (Crisis Couriers No. 2)*[2] and do not require repeating here.

13. As legal academics have observed, the approach taken by the courts tends to ignore the economic reality of the relationship between parties to a services contract so that:

> *"..with a modicum of care and ingenuity it remains possible for businesses to obtain work from individuals who are virtually indistinguishable from employees, in terms of their close connection to the organisation and subordinating to its managers and supervisors, yet whom the common law does not characterise as 'employees'. This can in most instances be achieved simply through a well-drafted contract that is designed to look as much like a client/contractor agreement as*

[1] (1986) 160 CLR 16
[2] (2001) 207 CLR 21

possible. Especially if it includes an unqualified right of delegation, few judges will be prepared to look behind its terms."[3]

14. In practice, it can be difficult to predict how the courts will apply the test to a particular fact situation. For example, in one case concerning Crisis Couriers in Sydney the NSW Court of Appeal held that its couriers were contractors for the purpose of applying the Superannuation Guarantee,[4] while in another, the High Court determined that the couriers were employees for the purpose of determining the company's vicarious liability for an accident involving one of its couriers.[5] What were the differences between the two cases? The only significant factual difference between the two cases was that the latter involved bicycle couriers, involving lesser capital expense than the vans provided by the couriers in the earlier case. It could also be that the court was keen to ensure that the plaintiff injured by the company's courier should have a means of recovering damages, which would not have been the case were they to have been found to be independent contractors.

15. While the ICB has not created this uncertainty, it has added to the problem by removing from various classes of contractors the entitlements afforded to them by virtue of the "deeming" previsions to be found in state legislation. Inevitably, there will be disputes about whether or not an employment contract exists, involving costly litigation to resolve. One only needs to consider the example of Michael the bread deliverer, set out at paragraphs 30 and 33 of the Explanatory Memorandum. In light of the two decisions concerning Crisis Couriers set out above, it would seem that whether or not Michael was truly an independent contractor would depend on whether he used a van or a bicycle for his deliveries, a fact not disclosed in the example. How can this be a rational way to determine a worker's entitlements to annual leave, sick leave and similar award or legislative entitlements?

Exclusion of state and territory laws

16. The purposes of Part 2 of the ICB are, first, to strip contractors of any entitlement they might have under state legislation to conditions such as annual leave, sick leave, minimum rates of pay and other forms of remuneration and, second, to override the jurisdiction of industrial relations tribunals in New South Wales and Queensland in relation to unfair contracts.

17. The uncertainty arising from the difficulties associated with distinguishing a services contract from an employment contract has been referred to above, as has the fact that a contract which on its face meets the criteria established by case law will be held to be a valid services contract irrespective of the reality of the actual relationship between the parties.

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[3] Creighton B & Stewart A *Labour Law* 4th edition The Federation Press 2005 p293
[4] *Vabu Pty Ltd v Commissioner of Taxation* (1996) 81 IR 150
[5] *Hollis v Vabu Pty Ltd Crisis Couriers No. 2)* (2001) 207 CLR 21

18. The direct result of the overriding of the deeming provisions will be to leave many vulnerable workers, including cleaners, delivery workers and some tradespeople, without basic entitlements to pay and leave.

19. Although the ICB does provide a process for review of a services contract on grounds of unfairness, this is significantly more limited than that applying under state legislation, particularly in NSW, where the Industrial Relations Commission is able to find that a contract became unfair subsequent to being entered into because of the conduct of a party.[6]

20. Much criticism has been made of the NSW jurisdiction as an avenue for highly paid executives, while ignoring the benefit to many contractors who have suffered gross exploitation. The Explanatory Memorandum is quite misleading in that it highlights the 2000 decision in *Canizales v Microsoft*[7] which awarded an executive $14 million worth of share options, while also reporting the 2002 amendments to the NSW Industrial Relations Act limiting remedies to contracts providing remuneration of less than $200,000 per year.

21. The NSW jurisdiction has not been solely the preserve of senior executives and celebrities; it has been successfully accessed by a repairer of showers,[8] a storeman/forklift driver[9] and many other ordinary workers.

Unfair contracts

22. The transfer of the unfair contracts review provisions from the *Workplace Relations Act* (WRA) to the ICB and providing jurisdiction to the Federal Magistrates Court does not compensate for the overriding of the unfair contracts provisions of state legislation which are stronger in a number of aspects.

23. The ICB provides that an application for review may be made only be a party to the contract,[10] unlike the current provisions in the WRA and in NSW and Queensland which allow a union or an employer organisation to make an application. In many cases, an individual party to a contract may require assistance from an organisation or, because of fear or reprisal, may wish the organisation to make the application on his or her behalf, an option which will no longer be available.

24. The ICB adds a new requirement for the Court, where it has considered whether remuneration under the contract is less than that of an employee performing similar work, to also consider whether the total

[6] *Industrial Relations Act 1996* (NSW) s106(2)
[7] (2000) 99 IR 426
[8] *Faraci v The Leak Shop Pty Ltd* [2003] NSWIRComm 169 (29 June 2003)
[9] *Cornell v Titley* [2002] NSWIRComm 326 (3 December 2002)
[10] s12(2)

remuneration provided under the contract being reviewed is commensurate with other service contacts relating to similar work in the industry.[11] Where a contractor is receiving less than he or she would as an employee the unfairness is not mitigated if there are a large number of similarly unfair contracts applying in the industry.

Outworkers in the TCF industry

25. While paragraph 7(2)(a) of the ICB purports to preserve state laws protecting outworkers, it completely fails to do so and will result in protections for these vulnerable workers being generally unenforceable.

26. Outworkers are deemed to be employees under industrial relations legislation in NSW, Queensland, South Australia and Tasmania, meaning that they are entitled to all the benefits which attach to being an employee even if they are employed under a contract for services. The ICB largely overrides these deeming provisions.

27. Further, the extension of the "contract outworkers" provisions from Victoria to the other states has the effect of significantly weakening the entitlements of outworkers, recognised as the most vulnerable and exploited sector of the Australian workforce, and will legitimise the avoidance of industrial laws by unscrupulous operators in the TCF industry.

28. These contract outworker provisions require the payment only of the minimum rate of pay applicable in each state or territory or, where no such rate of pay is provided, the minimum rate of pay under the WRA.

29. The effect of this change is that outworkers covered by these provisions will lose their entitlements to annual leave, sick leave and all other employment benefits resulting from the deeming process, and are left with only the bare minimum hourly rate of pay, a significant loss.

30. The ICB also ensures that state governments will be unable to legislate in the future to improve the conditions of outworkers and, even more importantly, to ensure that their rights are properly enforced.

31. There can be no doubt that the ICB significantly worsens the conditions of this already very vulnerable group of workers in the guise of a sham attempt to protect them.

[11] s15(2)

32. The proposed amendments to the WRA impose civil penalties on employers who:

- Misrepresent an employment relationship as an independent contracting relationship;
- Dismiss an employee in order to re-engage the person as an independent contractor doing the same work;
- Knowingly make a false statement with the intention of persuading a person who has been an employee to enter into a contract for services as an independent contractor, doing the same work.

33. These provisions are likely to be difficult to enforce as they require an element of intention or knowledge by the employer. Although the onus is on the employer to disprove that element, the complexity of the issues means that this will not be difficult. The description of the legal issues above demonstrates that it would is arguable in many different factual circumstances that the employer could reasonably not be expected to know for certain the true nature of the employment arrangements.

34. The lack of any remedy for the employee who is the victim of this kind of behaviour is another major deficiency. In particular, an employee who is dismissed in order to be re-engaged as an independent contractor has no avenue to challenge the dismissal or seek reinstatement unless it can be shown that the dismissal was because the employee was entitled to the benefit of an industrial instrument.[12]

[12] WRA s793(1)(i)

ACTU SUBMISSION

House of Representatives' Standing Committee on Employment, Workplace Relations and Workforce Participation

INQUIRY INTO INDEPENDENT CONTRACTORS AND LABOUR HIRE ARRANGEMENTS

The Committee has been requested 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.*

D No: 06/2005 March 2005

Contents

TERMS USED IN THIS SUBMISSION

Non-standard work arrangements	Includes labour hire, dependent contracting and independent contracting.
Traditional employment relationship	Involving an employment contract between one employer and one employee.
Labour hire operators	Entity which pays the labour hire worker. Sometimes called 'labour hire agency'.
Client or client firm	Entity for which labour hire workers perform their work. Sometimes called 'host' company or employer.
Principal	Provider of work to a dependent or independent contractor
AIRC	Australian Industrial Relations Commission
WRA	Workplace Relations Act 1996 (Cth)

EXECUTIVE SUMMARY

Non-standard work arrangements are increasingly being used to undermine the employment relationship and the protections attached to it. The growth of these forms of work has also contributed to the lack of skills development and has serious implications for the management of occupational health and safety.

This trend cannot be allowed to continue unchecked.

Innovative approaches to this issue by the States and Territories should be respected and built upon with national policy and regulation.

Policy and legislation in respect of non-standard work arrangements must both:

- ensure that non-standard work arrangements are not being used to evade employment rights and responsibilities, by ensuring that the regulation of work extends to those non-standard work arrangements that are simply 'disguised employment'; and

- ensure that non-standard work arrangements that are not operating as disguised employment are adequately regulated and considered in policy making. As non-standard work arrangements mirror many features of traditional employment relationships, it is logical that they share some of the same laws and standards. Legal and policy frameworks should also take account of the unique aspects of non-standard work arrangements, which may require the development of different laws and standards than those that apply to traditional employment relationships (such as the licensing of labour hire operators).

These principles are supported by ILO instruments.

Labour hire

Labour hire has expanded far beyond its primary purpose of providing short term or temporary labour, or workers with particular skills or expertise. The lack of current regulation of the labour hire industry allows it to be used as a means of reducing wages and conditions. Labour hire is also a contributor to the growth in casualisation in Australia.

Labour hire seeks to shift much of the responsibility for being an employer to a third party - the labour hire operator. The true allocation of responsibilities between the labour hire operator and the client must be clarified in range of areas.

Contractors

The misuse of contracting is the most common form of disguised employment. It is used in this way to avoid employment obligations and taxation. More realistic definitions of employment are needed to address this issue.

Genuine contracting should be protected with decent minimum standards and avenues for redress, as well as access to collective bargaining and union representation.

RECOMMENDATIONS

1. Non-standard work arrangements should only be accepted as a legitimate part of our modern economy if they meet community expectations about fair work practices, and recognise the central role of work in most Australians' quality of life.
2. Non-standard work arrangements are not legitimate, and should not be supported, where they are used to avoid or undermine the employment relationship and the core principles associated with the employment relationship, including that:
   - workers are able to freely associate and collectively bargain with their employer to negotiate their terms and conditions of their work;
   - workers are entitled to a fair and decent minimum standards of wages and conditions of work;
   - workplaces are safe and free from harassment and unlawful discrimination; and
   - workers are equipped with the skills and training required to enable them to meet our society's social and economic needs.
3. Legislation and policy should recognise that many forms of non-standard work are disguised employment and are designed to avoid these and other employment obligations. Legislation and policy should prevent disguised employment from achieving this aim by ensuring that rights and obligations attach to work on the basis of the true nature of relationships, rather than simply the stated nature.
4. Legislation and policy should take into account the unique nature of non-standard work relationships, which may require the development of different or additional laws and standards than apply to traditional employment relationships.
5. Contractors should not be:
   - denied protection from unfair or unsafe work practices,
   - denied access to representation by unions, or
   - denied access to courts or tribunals which can assist them.

INCIDENCE OF NON-STANDARD WORK ARRANGEMENTS

6. The federal government should conduct another AWIRS survey to ensure that thorough, current and accurate information is available about the incidence of non-standard forms of work.

LABOUR HIRE

7. Labour hire should primarily provide short term or temporary labour, and workers with particular skills or expertise that complement (rather than replace) an existing workforce.

Wages and working conditions

8. Labour hire operators should be bound by appropriate awards.
9. The WRA should be amended to allow certified agreements to cover all employers which operate at a particular workplace, without the need for any special certification requirements, and to allow multi-employer bargaining on this basis.
10. Labour hire contractors who are used as a form of disguised employment should be considered to be employees for the purposes for industrial relations and other workplace legislation.

Joint employment

11. Legislation and policy should recognise that both the labour hire operator and the client have a role in respect of employment responsibilities.

12. The allocation of employment responsibilities between the labour hire operator and client should be clearly set out either by express agreement, or in the absence of agreement, in accordance with an industry code of practice[1].

13. Joint responsibility should be explicitly recognised in respect of occupational health and safety[2] and unfair dismissal proceedings.

14. In considering unfair dismissal applications by labour hire employees, the AIRC should have the capacity to join a labour hire operator or client to the proceedings and allocate joint responsibility for the dismissal where appropriate.

Labour hire and casualisation

15. Labour hire operators and clients should give casual employees who work with one client on a long term, regular basis, the opportunity to become permanent employees of the client firm. This can be encouraged through a code of practice and through appropriate award provisions.

Transmission of business

16. Transmission of business provisions in the WRA should be amended to ensure that they cover the contracting out of all or part of the activities of a business to a labour hire operator.

CONTRACTING

17. Contracting in the form of disguised employment should not be permitted to be used as a mechanism to avoid taxation, superannuation, occupational health and safety, workers compensation or employment obligations.

18. The definitions of employee and employer should reflect the true situation of their relations, and should include dependent contractors. These definitions should seek to distinguish those workers who genuinely carry out their own business, from those who are working in a dependent or controlled way for another firms. Such definitions should be broadly consistent across different jurisdictions and legislation to maximise certainty about the nature of employment obligations.

19. Statements or documents which purport to allocate a particular status to a worker should be given no special weight and should not be able to override a proper determination of such status. That is, simply calling a person a contractor should not make it so if it is simply a form of disguised employment.

20. The AIRC should be given the capacity to conciliate and arbitrate disputes over the definition of employee, and to deem persons to be employees.

Minimum standards and contract review

21. State or territory legislation which provides remedies or assistance to contractors should be supported.

22. The federal contract review provisions should be reviewed with a view to making them more user friendly and accessible.

23. The AIRC should be given the capacity to recommend to government areas or industries where the setting of minimum standards for contractors is warranted.

1 See recommendation 35.
2 See also recommendations 27-30.

Collective bargaining

24. Unions should not be prevented from representing contractors in respect of collective bargaining in any forum.

SKILLS AND TRAINING

25. Labour hire operators should be required to report on their training policies and programs. A code of practice should include a commitment to minimum levels of training, including apprenticeships.

26. The government should investigate new ways of assisting contractors to maintain and develop their skills.

OCCUPATIONAL HEALTH AND SAFETY AND WORKERS COMPENSATION

Labour hire

27. Labour hire workers should be protected by health and safety laws and workers compensation whether they are engaged as contractors or employees.

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

29. The allocation of responsibilities in respect of occupational health and safety between labour hire operators and clients should be clearly defined through legislation, with the capacity for some matters (such as the provision of protective equipment) to be agreed between the parties.

30. Client firms should share responsibility with labour hire operators for providing return to work pathways to those labour hire workers injured at their workplace.

Contracting

31. Occupational health and safety and workers compensation legislation should include a standard definition of employee which includes dependent contractors, consistent with that currently in place in Queensland.

POLICY RESPONSES TO NON-STANDARD WORK ARRANGEMENTS

International principles

32. The federal government should ratify the ILO's *Private Employment Agencies Convention* and support and respect the *Private Employment Agencies Recommendation* and the *Resolution concerning the employment relationship*.

33. The federal government should particularly note the international recognition of the following principles:

    - Labour hire workers should not be denied the right to freedom of association or collective bargaining.
    - Labour hire workers should be protected in relation to a range of matters, including minimum wages, working time and other working conditions and access to training.
    - Labour hire operators should not provide workers to replace workers who are on strike.
    - Labour hire should not result in a lack of protection to the detriment of the employee. Mechanisms are needed to clarify the relationship between the various parties in order to allocate responsibilities between them.
    - Governments, employers and workers should take active steps to guard against disguised employment through the inappropriate use of civil and commercial

arrangements. They should work to combat disguised employment which has the effect of depriving dependent workers of proper legal protection.

- It is essential that employers and workers have easy access to fair, speedy and transparent mechanisms to resolve disputes about employment status.
- Collection of statistical data and undertaking research and periodic reviews of changes in the structure and patterns of work at national and sectoral levels should be part of a national policy framework.

State and Territory legislation and inquiries

34. The measures taken by State and Territory governments to address non-standard work issues should be supported. Moves toward greater harmonisation of such laws should be investigated but changes should only occur with the agreement of the States and Territories.

Code of practice for labour hire and contracting out

35. A code of practice for labour hire and contracting out should be developed in association with unions and adopted by labour hire operators, peak employer groups and governments. It should be based on the following principles:

    (1) Labour hire should primarily be used to supplement rather than replace existing labour.

    (2) Labour hire operators should not seek to place workers on artificial contractor arrangements to avoid employment responsibilities.

    (3) Labour hire as a form of cost reduction should not be supported. Labour hire workers should receive rates of pay and conditions of employment equivalent to their non-labour hire counterparts.

    (4) Labour hire work should be covered by appropriate awards and agreements.

    (5) Labour hire operators should provide access to training and skills development for their workers.

    (6) Labour hire operators and clients should share responsibility for occupational health and safety obligations.

    (7) Labour hire operators should ensure that their workers are able to not accept work for the purposes of sick leave, family leave or recreational leave without adverse consequences or discrimination.

    (8) Labour hire workers should be given the opportunity to raise concerns about their work with the client or the labour hire operator, or both.

    (9) Labour hire operators should ensure that all legal employment obligations are met in respect of their workers.

    (10) Work that is contracted out, whether to a labour hire operator or another employer, should be subject to the same rates of pay and conditions as well as consultation with affected employees.

Licensing scheme for labour hire operators

36. Licensing schemes should be established at the state and/or federal level to ensure that all labour hire operators are subject to the same regulatory framework, and to minimise unfair competition on the basis of substandard provision of wages, conditions, training and other matters.

37. Any licensing scheme should include requirements for initial accreditation, subsequent regular reporting, professional standards, referral of matters to appropriate compliance authorities and penalties for non-compliance with licence conditions.

38. Labour hire operators should be required to report on the following matters as part of any licensing scheme:

- Wages and entitlements: Labour hire operators should:
  - specify which, if any, awards apply to workers engaged by them, and should commit to observance of those awards;
  - advise of their payment or non-payment of 'site rates' - ie. rates equivalent to those provided to equivalent non labour hire employees at a client firm;
  - advise of their policies in respect of workers not accepting shifts for the purposes of sick leave, family leave or recreational leave; and
  - advise of their payment of taxation, superannuation and workers compensation premiums.
- Training: skills development and safety training programs.
- Occupational health and safety: risk assessment strategies, induction, provision of personal protective equipment and return to work plans, and policies to ensure that all injuries are reported.
- Discrimination: compliance with anti discrimination laws.
- Code of practice: adherence to an agreed industry code of practice.

1. INTRODUCTION

1.1 Paid work has both economic and social purposes. Working provides individuals with an income, but is also most adults' primary means of connecting to society and providing a sense of purpose and identity. Time spent in paid work, in turn, limits the capacity of individuals to engage in other aspects of society, such as community and family life.

1.2 The regulation of paid work recognises the central role of work in the quality of modern life. As a result, our community expects that legislators and policy makers will ensure that:

- workers are able to freely associate and collectively bargain with their employer to negotiate their terms and conditions of their work;
- workers are entitled to a fair and decent minimum standards of wages and conditions of work;
- workplaces are safe and free from harassment and unlawful discrimination; and
- workers are equipped with the skills and training required to enable them to meet our society's social and economic needs.

1.3 The regulation of paid work has traditionally assumed a bilateral employment relationship with a contract of employment between an employer and an employee.

1.4 The effectiveness of the laws that regulate paid work is being eroded by the growth of non-standard work arrangements which fall outside this bipartite employment relationship, such as contracting and labour hire. While some form of contracting and labour hire has been evident in Australia for many decades, the last two decades have seen a significant expansion in both the incidence and forms of these non-standard work arrangements. This is further discussed in chapter 2.

1.5 The expansion of non-standard work arrangements gives rise to two related policy challenges:

- **Disguised employment**: The first challenge is to ensure that non-standard work arrangements are not being used to evade employment rights and responsibilities. This challenge is met by ensuring that the regulation of work extends to those non-standard work arrangements that are simply 'disguised employment'.
- **Solutions specific to non-standard work arrangements**: The second challenge is to ensure that non-standard work arrangements that are not operating as disguised employment, are adequately regulated and considered in policy making. As non-standard work arrangements mirror many features of traditional employment relationships, it is logical that they share some of the same laws and standards. Legal and policy frameworks should also take account of the unique aspects of non-standard work arrangements, which may require the development of

different laws and standards than those that apply to traditional employment relationships (such as the licensing of labour hire operators).

1.6 The ACTU accepts that there is a legitimate role for non-standard work arrangements in circumstances where the traditional employment relationship is not able to meet the changing labour needs of workplaces.

1.7 The ACTU submits that non-standard work arrangements are not legitimate, and should not be supported, where they are used to avoid or undermine the principles outlined in paragraph 1.2.

1.8 The government's policy in respect of independent contractors, as stated at the 2004 election is as follows:

> *As a result of the ever-increasing contribution that independent contractors make to our growing economy, the Coalition recognises the need to establish separate legislation which will enshrine and protect the status of independent contractors.*
>
> ***Accordingly, a re-elected Coalition Government will introduce the Independent Contractors Act.***
>
> *The Independent Contractors Act will legislate to protect and enhance the freedom to contract and to encourage independent contracting as a wholly legitimate form of work.*
>
> *The Independent Contractors Act will also prevent unions from seeking orders from the AIRC which would impose limits, constraints or barriers on the freedom to operate as a genuine independent contractor.*
>
> *The Coalition Government is determined to protect the rights of independent contractors. We will not allow union officials to strip these enterprising Australians of the right to choose how they live and work.*

1.9 This policy does not take account of:

- the incapacity of many contractors to negotiate a fair contract,
- those contractors who are simply disguised employees, and
- contractors who would appreciate access to a tribunal such as the Australian Industrial Relations Commission (AIRC) to assist them with issues that arise in respect of their work arrangements. There have been many cases taken to state and federal industrial tribunals and courts by contractors about their work arrangements[3]. This hardly suggests that all contractors wish to remain free of *"limits, constraints or barriers on the freedom to operate as a genuine independent contractor"*.

1.10 Limiting the jurisdiction of the AIRC to traditional employment relationships ignores the reality of modern work practices, in which the distinction between employment-based work and other forms of work is increasingly blurred.

1.11 The AIRC and state industrial tribunals have, for over 100 years, played a constructive role in ensuring that the regulation of work balances acceptable community standards against economic imperatives. There is no justifiable

[3] See, for example, the numerous cases taken by contractors discussed in Creighton, B & Stewart A, *Labour Law: An Introduction*, chapter 7.

policy reason why this role should not apply to work arrangements that may fall outside the traditional employment relationship.

1.12 The federal government's policy also ignores the fact that shifts in the labour market have consequences for broader social and economic policy. The tax base, compulsory retirement savings, skills development and the management of risks involved with illness and injury at work are all linked to traditional employment relationships. The proper governance of these matters is jeopardised by the erosion of employment as the primary means of purchasing an individual's work.

RECOMMENDATIONS

1. Non-standard work arrangements should only be accepted as a legitimate part of our modern economy if they meet community expectations about fair work practices, and recognise the central role of work in most Australians' quality of life.
2. Non-standard work arrangements are not legitimate, and should not be supported, where they are used to avoid or undermine the employment relationship and the core principles associated with the employment relationship, including that:
   - workers are able to freely associate and collectively bargain with their employer to negotiate their terms and conditions of their work;
   - workers are entitled to a fair and decent minimum standards of wages and conditions of work;
   - workplaces are safe and free from harassment and unlawful discrimination; and
   - workers are equipped with the skills and training required to enable them to meet our society's social and economic needs.
3. Legislation and policy should recognise that many forms of non-standard work are disguised employment and are designed to avoid these and other employment obligations. Legislation and policy should prevent disguised employment from achieving this aim by ensuring that rights and obligations attach to work on the basis of the true nature of relationships, rather than simply the stated nature.
4. Legislation and policy should take into account the unique nature of non-standard work relationships, which may require the development of different or additional laws and standards than apply to traditional employment relationships.
5. Contractors should not be:
   - denied protection from unfair or unsafe work practices,
   - denied access to representation by unions, or
   - denied access to courts or tribunals which can assist them.

2. INCIDENCE OF NON-STANDARD WORK ARRANGEMENTS

2.1 It is widely accepted that there has been significant growth in the areas of both labour hire and contracting work in recent years. Around 1.2 million Australians are currently working in labour hire and/or contractor arrangements – over ten per cent of our workforce.

2.2 More detailed analysis of the incidence and nature of non-standard work arrangements would be assisted by a new AWIRS survey[4].

Labour hire

2.3 ***Labour hire*** can include a variety of work arrangements, which may be either employment and contracting based. The common element of these arrangements is that an individual works at a host or client but is paid by labour hire operator. In some industries labour hire is known as 'temping', 'agency work' or 'on hired work', but the term 'labour hire' is the most commonly used and understood.

2.4 The Productivity Commission recently estimated that the number of labour hire workers in Australia has increased from 33,000 in 1990 to 190,000 in 2002 – a rate of growth of 15.7 per cent a year[5]. Assuming this rate of growth has remained constant, a conservative estimate is that there are currently around 250,000 labour hire workers in Australia.

2.5 Labour hire is most prevalent among less skilled workers, such as labourers and production workers[6].

2.6 The Productivity Commission report also found that firms are more likely to use labour hire if they:

- are taking measures to cut costs,
- have not introduced technological change in the previous two years,
- have existed less than five years,
- employ more than 20 people.

2.7 Labour hire workers are three times more likely to engaged as casuals than non labour hire workers: 78 per cent of labour hire employees are casual, compared to 26 per cent of non labour hire employees[7].

4 The last Australian Workplace Industrial Relations Survey was conducted in 1995.

5 Laplagne, P, Glover, M and Fry, T, *The Growth of Labour Hire Employment in Australia,* February 2005, Productivity Commission; p 4.

6 Ibid; p 22.

7 ABS 6559.0, 2001.

Contractors

2.8 ***Contractors*** are workers who *"conduct their own business or enterprise"*[8] and are engaged to perform work under a commercial contract rather than an employment contract[9].

2.9 The ABS term of 'own account worker' is defined as *"A person who operates his or her own unincorporated economic enterprise"*.[10] The number of own account workers increased from 646,000 in November 1984 to 936,000 in November 2004[11]. This does not account for those contractors who work within an incorporated structure.

2.10 A contractor arrangement does not normally attract the rights and responsibilities of an employment relationship. A range of criteria are considered by courts and tribunals to establish whether a worker is an employee, or is genuinely operating a business as a contractor.

2.11 The distinction between contractors and employees is increasingly blurred, with the terms ***independent contractor*** and ***dependent contractor*** used to distinguish between those contractors who clearly run their own business in an independent manner, and those who are contracted to supply their labour to a particular principal in a controlled or dependent manner.

2.12 It is estimated that between 25 and 41 per cent of contractors are dependent contractors[12].

RECOMMENDATION

6. The federal government should conduct another AWIRS survey to ensure that thorough, current and accurate information is available about the incidence of non-standard forms of work.

8 *Damevski v Giudice* [2003] FCAFC 252, Merkel J, para 172
9 O'Donnell, A, *Non-Standard Workers in Australia: Counts and Controversies,* (2004) 17 AJLL 89, p 107
10 ABS 6105.0
11 ABS 6291.0.55.001
12 O'Donnell, A, *Non-Standard Workers in Australia: Counts and Controversies,* (2004) 17 Australian Journal of Labour Law 89, p 110

3. LABOUR HIRE

3.1 The ACTU recognises that there is a legitimate role for labour hire operators, particularly in the provision of short term or temporary labour, and to provide particular skills or expertise.

3.2 Key areas of concern in respect of labour hire arrangements are:

- the use of labour hire to reduce or avoid wages and conditions of employment;
- recognition of joint employment;
- labour hire and casualisation; and
- transmission of business issues when a client's operations are contracted out to a labour hire operator.

3.3 The ACTU's concerns and recommendations are based on the principle that labour hire should be contained as far as possible to the provision of supplementary labour. The law should not encourage the use of labour hire to replace all or part of an existing workforce.

Wages and working conditions

3.4 The ACTU's primary concern with labour hire arrangements is that they are used as a means of reducing or avoiding wages and conditions, and reducing the capacity of workers to bargain collectively. Cost reduction is a key motivator for the use of labour hire, and many employers also admit that they use labour hire to reduce union influence[13].

3.5 Labour hire operators are usually not subject to the same awards and agreements that apply to their clients, allowing them to pay lower rates of pay and conditions than apply at the client firm. Labour hire firms also frequently classify and pay employees at the lowest classification level, regardless of the skills and experience of their employee or the complexity of the jobs they are performing.

3.6 Many labour hire operators, particularly smaller operators, do not abide by award rates of pay and conditions at all, even when they are legally expected to do so[14].

3.7 This absence of regulation not only results in workers receiving low wages, it also impacts on health and safety and social policy issues such as ensuring that proper breaks are taken, sick leave and annual leave are available, and hours of work and leave take account of family issues.

3.8 Our system of collective bargaining and awards is based on the core principle that employers should not be able to unilaterally set wages and conditions of

13 Hall, R, Labour Hire in Australia: Motivation, Dynamics and Prospects, ACIRRT Working Paper No 76, April 2002, p 10

14 DIR, NSW Labour Hire Taskforce Final Report, 2001, p 33

employment. Wages and conditions are either negotiated with employees or set by tribunals in awards. Employers have to manage their business, and seek to attain efficiency and productivity, in the context of these negotiated or set conditions.

3.9 If unchecked, labour hire effectively overrides these principles, by giving employers the capacity to shop around for a labour hire operator with the preferred level of wages and conditions. The client employer may seek an award-free labour hire operator, may engage a labour hire operator that pays below award rates, or may simply use a labour hire operator who abides by the relevant award but not the higher agreement rates paid at that site. The client may not wish to breach awards in respect of its direct employees, but may be willing to turn a blind eye if its labour hire operator does so.

3.10 In some workplaces where employees have strong bargaining power, they have been able to obtain the agreement of their employer to only engage labour hire employees on terms and conditions equivalent to those of its direct employees. However, this type of arrangement remains the exception rather than the rule.

3.11 The Full Bench of the AIRC recently affirmed the legitimacy of such arrangements. It found that a clause in a certified agreement which limits the use of labour hire employees and requires that they be paid site rates did pertain to the employment relationship as it *"directly concerns the security of employment of the employees covered by the agreement"*[15].

3.12 The current limitations in the Workplace Relations Act (WRA) on multi-employer bargaining fail to take account of the prevalence of labour hire arrangements. It makes logical sense for enterprise-based agreement negotiations to include all known employers – including labour hire operators – who engage employees at that workplace. This would allow all issues related to that workplace to be negotiated together in the same bargaining round. Labour hire operators who came to a site during the course of an agreement could become party to the agreement that applies at the workplace. This is not recognised under the current provisions of the WRA.

3.13 The problems associated with labour hire are exacerbated when workers are engaged by labour hire operators under contractor arrangements, usually as dependent contractors[16]. Under these circumstances there are ostensibly no relevant minimum wages or conditions. This form of disguised employment has recently been identified as a problem by the New South Wales government, which is proposing to extend workers compensation coverage to all labour hire workers, regardless of whether they are engaged as employees or contractors[17].

15 *Re Schefenacker Vision Systems Australia Pty Ltd, AWU, AMWU Certified Agreement,* PR 956575, Full Bench 18 March 2005, para 83.

16 Unless specified, this submission assumes an employment labour hire arrangement rather than a contractor labour hire arrangement.

17 WorkCover NSW, *Definition of a Worker,* Discussion Paper, January 2005

3.14 However, if the worker is not truly engaged as a contractor - and the matter is challenged in court - then the usual employment protections will apply, as the Full Court of the Federal Court found in the case of *Damevski v Giudice*[18].

3.15 In that case, Mr Damevski (a cleaner) was engaged as an employee by Endoxos before being forced to resign and accept new arrangements as a contractor with a labour hire company. However, the court found that the new arrangements were a sham and that there continued to be an employment relationship between Mr Damevski and Endoxos. The labour hire company did nothing more than pay Mr Damevski's wages, while Mr Damevski continued to the directed by Endoxos, provided Endoxos with his time sheets, and wore an Endoxos uniform.

Joint employment

3.16 In most cases it is reasonably clear that the labour hire operator is considered to be the employer and that the employee is placed to work with a client firm.

3.17 Nevertheless, in most circumstances the roles and responsibilities traditionally held by an employer are allocated between the client and labour hire agency as follows:

Labour Hire Agency	*Client*
Payment of wages, superannuation and other entitlements	Selection of particular employees to work on site
Hiring, firing and disciplining employees	Direction of day to day duties
Payment of workers compensation	Determining how much work is available for labour hire workers at the site
Payment of payroll and other taxes	
Joint responsibility for occupational health and safety	

3.18 In other cases, like *Damevski*, the division of responsibilities is not so clear and client and labour hire operator may 'share' more of the employment responsibilities. This can cause confusion and buck passing, especially in respect of dispute resolution, health and safety issues and training. In such cases it is more difficult to determine whether the labour hire operator or the client is the true employer.

3.19 The issue of joint employment is particularly pertinent if a client no longer wants a labour hire employee to work at their site. Without recognition of joint employment, the client can simply convey a message to the labour hire operator that a person is no longer required without having to give any reason. The actual reason for this decision by the client may - if there were a direct employer-employee relationship with the employee - otherwise be considered unlawful, such as an unfair dismissal or discrimination on the grounds of race, gender or other unlawful grounds. Following this rejection by the client, the labour hire operator may not be in a position to offer that

18 See note 6.

employee any other work. As a result, an unfair or otherwise unlawful decision of a client can directly lead to the dismissal of an employee - but the employee may have no avenue for redress against the client.

3.20 The recent South Australian *Fair Work Bill* initially included provisions which recognised this problem and would have given the Industrial Relations Commission discretion to join a client as a co-employer where the employee has worked for the client for at least 6 months. However, these provisions did not survive passage of that Bill through parliament.

3.21 Australian courts have been reluctant to find joint employment responsibility, but have acknowledged that it is possible conceptually[19].

Labour hire and casualisation

3.22 The growth of casual employment has been attributed in part to the growth of the labour hire industry. Less than a quarter of labour hire employees are engaged as permanents.

3.23 One of the 'paradoxes' of casual employment generally is that, despite the casual loading, casuals often earn the same or less than their permanent counterparts[20]. The prevalence of casuals in labour hire arrangements contributes to this. Labour hire employees tend to be paid less than their non labour hire counterparts, both because they are not subject to the same awards and agreements, and because they may not be properly paid in respect of the awards that do cover them.

3.24 Casual conversion clauses in awards and agreements (which give casual employees a right to elect to become permanent after a specified period of regular employment) are of limited use to labour hire casuals. In most cases, labour hire casuals who have been at the same client workplace for a long time do not wish to become permanent employees of the labour hire operator, they wish to become permanent employees of the client. Becoming a permanent employee of the client provides a stable job and a known workplace - becoming a permanent employee of the labour hire operator means that the employee is assured of a steady stream of work, but has no control over the type of work or its geographic location.

Transmission of business

3.25 The current transmission of business provisions in the WRA fail to ensure that terms and conditions of employment are adequately protected when work is contracted out to a labour hire operator.

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19 Eg: *Morgan v Kittochside,* PR918793, Full Bench, para 76: *"we would incline to the view that no substantial barrier should exist to accepting that a joint employment relationship might be found and govern effect for certain purposes under the Act."; Bianchi v Staff Aid Services,* PR937820, 12 September 2003, Lewin C, para 73: *"Had I not arrived at the conclusion above, in accordance with the decision in Morgan v Kittochside, I would have been compelled to find that there was a shared responsibility for an employment relationship as between Staff Aid Services and Coles Myer."*

20 Buchanan, J, *Paradoxes of significance: Australian casualisation and labour productivity,* ACIRRT Working Paper No 93, August 2004, p 13

3.26 Recent High Court and Federal Court cases have narrowly interpreted the transmission of business provisions in the WRA, refusing to find that a transmission occurred in a number of cases, even where employees of previous and subsequent employers performed exactly the same duties[21].

RECOMMENDATIONS

7. Labour hire should primarily provide short term or temporary labour, and workers with particular skills or expertise that complement, rather than replace, an existing workforce.

Wages and working conditions

8. Labour hire operators should be bound by appropriate awards.
9. The WRA should be amended to allow certified agreements to cover all employers which operate at a particular workplace, without the need for any special certification requirements, and to allow multi-employer bargaining on this basis.
10. Labour hire contractors who are used as a form of disguised employment should be considered to be employees for the purposes for industrial relations and other workplace legislation.

Joint employment

11. Legislation and policy should recognise that both the labour hire operator and the client have a role in respect of employment responsibilities.
12. The allocation of employment responsibilities between the labour hire operator and client should be clearly allocated either by express agreement, or in the absence of agreement, in accordance with an industry code of practice[22].
13. Joint responsibility should be explicitly recognised in respect of occupational health and safety[23] and unfair dismissal proceedings.
14. In considering unfair dismissal applications by labour hire employees, the AIRC should have the capacity to join a labour hire operator or client to the proceedings and allocate joint responsibility for the dismissal where appropriate.

Labour hire and casualisation

15. Labour hire operators and clients should give casual employees who work with one client on a long term, regular basis, the opportunity to become permanent employees of the client firm. This can be encouraged through a code of practice and through appropriate award provisions.

Transmission of business

16. Transmission of business provisions in the WRA should be amended to ensure that they cover the contracting out of all or part of the activities of a business to a labour hire operator.

21 Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd [2005] HCA 9 (9 March 2005); Stellar Call Centres Pty Ltd v CEPU [2001] FCA 106 (21 February 2001); PP Consultants Pty Ltd v Finance Sector Union [2000] HCA 59 (16 November 2001).

22 See recommendation 35.

23 See also recommendations 27-30.

4. CONTRACTING

Independent contractors, dependent contractors and employees

4.1 Regardless of the stated nature of a work arrangement, Australian courts and tribunals have tended to look to the true nature of the work relationship to determine whether a so called contracting arrangement is actually an employment arrangement:

> *"[Parties do not have] the legal capacity to determine the nature of their contractual relationship by the use of labels that do not accord with the real substance of that relationship."* [24]

4.2 A wide range of indicia are considered to identify whether workers are truly employees or independent contractors, aimed at encompassing all key matters relevant to each individual case[25]:

- Does the hirer control the way in which the worker's work is done?
- Is the worker integrated into the hirer's organisation?
- Does the worker supply or maintain tools and equipment?
- Is the workers paid according to task completion rather than wages based on time worked?
- Does the worker bear risk or loss or have a chance of making profit, from the job?
- Is the worker free to work for others?
- Can the worker subcontract or delegate the work to others?
- Does the worker wear the hirer's uniform or display other materials that suggest they are part of the hirer's organisation?
- Does the worker have a separate place of work or advertise their services to the world at large?
- Does the worker receive paid holidays or sick leave?
- Does the work create goodwill or saleable assets?
- Does the worker spend a significant proportion of remuneration on business expenses?

4.3 These indicia are all means of determining:

> *"whether it can be said that, as a practical matter, the individual in question was or was not running his or her own business or enterprise with independence of in the conduct of his or her own operations as distinct from operating as a representative of another business with little or no independence in the conduct of his or her operations."*[26]

4.4 Where a worker appears from a number of these criteria to be dependent on the principal contractor is a manner similar to an employee, this is sometimes called a ***dependent contractor***. However, this term is something of an oxymoron. If a person ostensibly engaged as a contractor is considered 'dependent' on the basis of the criteria in paragraph 4.2, then that person will probably be considered an employee in the eyes of the law.

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24 *Damevski v Giudice,* Merkel J, para 172

25 Stewart, A, *Redefining Employment? Meeting the Challenge of Contract and Agency Labour*, (2002) 15 AJLL 235, p 243; *Damevski v Giudice,* ibid, para 136; Munro, PR, *Pertaining to relations between employers and employees: who decides about an employment relationship, and why?*, paper for the Queensland Industrial Relations Society, 23 July 2004

26 *Abdalla v Viewdaze Pty Ltd*, PR927971, Full Bench, 14 May 2003, para 34

Avoidance of taxation and other employment related obligations

4.5 Dependent contractors should attract the same responsibilities as employees in respect of taxation, superannuation and some workers compensation and occupational health and safety laws. Some of these laws specifically extend their reach to dependent contractors, by including them within their definition of employee or worker. The public interest imperatives of ensuring governments' revenue and retirement funds, and having safe workplaces are obviously seen to legitimately outweigh the implied benefit of freedom to contract on any terms.

4.6 The evasion of taxation is one of the main motivators for the use of contracting to disguise employment. Although there have been recent changes to the taxation system (which seek to tax income from personal services in the same manner as wages) there is no evidence that these changes are having any impact on this form of tax evasion. In reality, it appears that contracting is still widely used to evade taxation, superannuation and other obligations.

4.7 In respect of industrial relations legislation, some states– recognising that there is also an important public interest imperative in ensuring that employment obligations are observed.

- New South Wales - The *Industrial Relations Act 1996* provides an expanded definition of employee and includes a list of persons deemed to be employees (eg. outworkers, milk and bread vendors, timber cutter and supplier).
- Queensland - The *Industrial Relations Act 1999* provides an expanded definition of employee and gives the Full Bench of the Industrial Relations Commission the power to declare persons to be employees or employers.
- Western Australia - The *Industrial Relations Act 1979* provides a definition of employee that includes a person who is the lessee of any tools, or vehicles used in the transport of goods or passengers.

4.8 The federal industrial relations system, and other federal laws, should recognise that many forms of ostensible contracting are not genuine, and ensure that such provisions are well enforced. Contract arrangements that are forms of disguised employment should be treated as such.

4.9 Expanded definitions of 'employer' and 'employee' should be inserted into the WRA to encompass dependent contracting arrangements. The AIRC should also be given the capacity to deem persons or classes of persons to be employees.

Minimum standards and contract review

4.10 Even where contractors are genuinely in an independent contracting arrangement and are not working as disguised employees, they may still be entitled to some of the minimum standards that apply to employees.

4.11 The most significant examples of this are road transport contractors in New South Wales, who are covered by minimum conditions set by the New South Wales Industrial Relations Commission, and workers compensation legislation in some states covering dependent contractors.

4.12 The capacity to review unfair contracts also exists in New South Wales, Queensland and in the WRA. One of the matters considered in determining whether a contract is unfair is whether it provides rate of pay comparable to award rates of pay. Unreasonably long hours of work with little return can also be considered unfair.

4.13 The contract review mechanism provided in the WRA, however, is expensive to access and largely ineffective as it is never used.

Collective bargaining

4.14 Many dependent and independent contractors find themselves with little or no individual bargaining power when negotiating the terms of their engagement with their principal contractor or client. Providers of work to contractors often issue standard contracts to their contractors on a 'take it or leave it' basis, and contractors have as much chance of negotiating the terms of such contracts as a consumer has in negotiating a credit card contract with a bank.

4.15 In response to such unfair competitive advantage, in some industries contractors have achieved exemptions under trade practices legislation and have been able to collectively bargain more reasonable terms and conditions with their principal.

4.16 The federal government has recently introduced amendments to the *Trade Practices Act* to make it easier for contractors to obtain such exemptions. However, the amendments specifically prohibit unions or representatives of unions from being able to make such applications. This prohibition is completely illogical and ideological. Unions, by their very definition, are simply collectives of people. If contractors wish to be represented by unions then it is nonsensical to stop that as part of legislation which seeks to give contractors the capacity to act collectively. Contractors should not be prevented from being able to be represented by already established unions, which are experienced in representing collectives of workers.

RECOMMENDATIONS

17. Contracting in the form of disguised employment should not be permitted to be used as a mechanism to avoid taxation, superannuation, occupational health and safety, workers compensation or employment obligations.

18. The definitions of employee and employer should reflect the true situation of their relations, and should include dependent contractors. These definitions should seek to distinguish those workers who genuinely carry out their own business, from those who are working in a dependent or controlled way for another firms. Such definitions should be broadly consistent across different jurisdictions and legislation to maximise certainty about the nature of employment obligations.

19. Statements or documents which purport to allocate a particular status to a worker should be given no special weight and should not be able to override a proper determination of such status. That is, simply calling a person a contractor should not make it so if it is simply a form of disguised employment.
20. The AIRC should be given the capacity to conciliate and arbitrate disputes over the definition of employee, and to deem persons to be employees.

Minimum standards and contract review

21. State or territory legislation which provides remedies or assistance to contractors should be supported.
22. The federal contract review provisions should be reviewed with a view to making them more user friendly and accessible.
23. The AIRC should be given the capacity to recommend to government areas or industries where the setting of minimum standards for contractors is warranted.

Collective bargaining

24. Unions should not be prevented from representing contractors in respect of collective bargaining in any forum.

5. SKILLS AND TRAINING

5.1 Australia is facing a serious skills crisis. Skills shortages are emerging in a wide range of areas and employers cannot be relied upon to take responsibility for training their workforce to meet Australia's future skills needs.

5.2 Casual and labour hire employees are less likely to receive training than their permanent counterparts[27]. The contribution of the growth of these forms of employment to Australia's skills shortages must be acknowledged.

5.3 In addition to labour hire operators not providing adequate training, particularly in the area of apprenticeships, client firms are also abrogating their responsibility for training by relying on the workers provided by the labour hire operators, and expecting them to come fully trained. The result is commonly that – as neither the labour hire operator nor the client provide training - responsibility for training is shifting to the individual worker. This places an unfair burden on the individual, and increases the risk of inadequate training, as individual workers simply do not have the resources available to self-fund comprehensive, broad based training.

5.4 Some larger, more established labour hire operators do provide their workers with training and contribute to skills development. This can be more readily acknowledged if labour hire operators report on their commitment to train their workers as part of a licensing system or code of practice. This would also allow those who are not providing training to be targetted for assistance or encouraged to alter their practices.

5.5 Shifting the responsibility for training on to the individual is even more of a problem for contractors, whose apparently independent contractual status leaves them with no support system at all for the provision of training.

5.6 Ironically, in some areas the current skills shortage has also been a contributor to the growth of labour hire. For example, in nursing, where there is a shortage of labour supply, nurses have commanded high rates of pay through labour hire companies and health providers have been compelled to use labour hire to access the staff they need.

RECOMMENDATIONS

25. Labour hire operators should be required to report on their training policies and programs. A code of practice should include a commitment to minimum levels of training, including apprenticeships.
26. The government should investigate new ways of assisting contractors to maintain and develop their skills.

27 Parliamentary library research note, No 53, 24 May 2004; Victorian Economic Development Committee, *Interim Report: Inquiry into Labour Hire in Victoria,* December 2004, p 65

6. OCCUPATIONAL HEALTH & SAFETY AND WORKERS COMPENSATION

6.1 The common element between both labour hire and contracting in respect of health and safety is that neither conforms to a traditional employment relationship and both diffuse the direct control and responsibility of employers/principals towards these workers.

6.2 Occupational health and safety standards are assisted by a direct employment situation, which attracts clear rights and obligations. The employer not only has an obligation to protect the health and safety of its employees, but it is also in its interests to do so, as an injured employee cannot contribute to the employer's business. In most cases the employer will continue to have an obligation to the injured employee, either through sick pay or workers compensation arrangements.

6.3 However, in labour hire and contracting a client or principal is less likely to have any ongoing obligation to an injured worker, or any sense of responsibility towards that worker. This transfer of risk to the worker or labour hire operator for health and safety matters is an incentive for the use of these forms of non-standard work arrangements.

Labour Hire

6.4 In a labour hire situation, the client simply asks the labour hire operator to replace the injured employee with one who is not injured. This massively reduces the responsibility of the person directing the worker (ie the client) for the health and safety of the worker.

6.5 The labour hire industry has a poorer record in respect of health and safety than other industries. In many cases, labour hire workers are reluctant to report injuries as they fear they will be removed from that workplace and denied further work.[28]

6.6 In some jurisdictions (eg. Western Australia, Victoria) labour hire operators and clients are expressly given joint responsibility for the occupational health and safety of labour hire workers.

6.7 The current New South Wales review of the definition of worker for workers compensation proposes to clarify that labour hire operators must cover all their workers for workers compensation, whether they are employees or contractors. This approach is already in place in Western Australia and is supported.

6.8 In most cases the client has no responsibility to assist with the provision of return to work plans, making it difficult to rehabilitate injured labour hire workers. Even where there is expressly stated joint responsibility for health and safety, the roles of each of the labour hire operator and client can remain unclear[29].

28 Victorian Economic Development Committee, *Interim Report: Inquiry into Labour Hire in Victoria,* December 2004, pp 35-43

29 Ibid, p 39

Contracting

6.9 A contractor is unlikely to have any access to sick leave or recompense from a principal if injured at work, outside the principal's general obligation to provide a safe workplace[30].

6.10 The New South Wales government is currently conducting a review of the definition of worker for the purposes of workers compensation, which is due to report on 30 June 2005[31]. The review proposes to adopt a definition of worker which is based both on the existing common law criteria and on the definition used by the Australian Taxation Office[32], which seeks to encapsulate the criteria for determining whether a worker is genuinely conducting their own business:

> Any person who works for another person under a contract (regardless of whether the contract is a contract of service) will be considered a worker unless:
>
> · the person is paid to achieve a specified result or outcome, and has to supply the plant and equipment or tools of trade needed to perform the work and is liable for the cost of rectifying any defect in the work performed; or
>
> · the person does not receive more than 80 percent of their income from a single client and;
>
> · the person engages employees or subcontractors to perform at least 20 percent (by market value) of the work or has engaged an apprentice for at least half of the year; or
>
> · the person undertakes work for two or more clients who are not associated with each other or the person; or
>
> · the person maintains business premises at all times during the year that meet *all* the following criteria:
>
> - owned or leased by the entity
>
> - mainly used for the contract work
>
> - used exclusively by the entity
>
> - physically separate from the private residence of the individual doing the contract work and their associates
>
> - physically separate from the business address of the entity's clients and their associates.

6.11 These reform measures are welcomed as they recognise that definitions of employee for the purpose of workers compensation can no longer simply rely on the traditional contract of service approach.

RECOMMENDATIONS

Labour hire

27. Labour hire workers should be protected by health and safety laws and workers compensation whether they are engaged as contractors or employees.

[30] Employers may have direct responsibility for the health and safety of dependent contractors through the definition of "employee" in some jurisdictions: NSW, Qld, Vic

[31] WorkCover NSW, *Definition of a Worker,* Discussion Paper, January 2005

[32] This definition is also broadly consistent with the approach being considered by the Heads of Workers' Compensation Authorities for a nationally consistent definition of worker.

28. State and federal government should work towards developing consistent health and safety laws, which give joint responsibility to labour hire operators and clients for the health and safety of workers.
29. The allocation of responsibilities in respect of occupational health and safety between labour hire operators and clients should be clearly defined through legislation, with the capacity for some matters (such as the provision of protective equipment) to be agreed between the parties.
30. Client firms should share responsibility with labour hire operators for providing return to work pathways to those labour hire workers injured at their workplace.

Contracting

31. Occupational health and safety and workers compensation legislation should include a standard definition of employee which includes dependent contractors, consistent with that currently in place in Queensland.

7. POLICY RESPONSES TO NON-STANDARD WORK ARRANGEMENTS

International principles

7.1 The International Labour Organisation has considered the issue of non-standard employment and has adopted a range of responses.

7.2 The *Private Employment Agencies Convention*[33] recognises *"the role that private employment agencies play in a well functioning labour market"* but seeks to provide some protection for workers using the services of such agencies. The articles in the convention seek to ensure that:

- workers recruited by agencies are not denied the right to freedom of association or the right to bargain collectively (Article 4);
- agencies treat workers without discrimination on the basis of race, colour, sex, religion, political opinion, national extraction or any other form of discrimination such as age or disability (Article 5);
- agencies do not charge fees or costs to workers (Article 7);
- member states prevent the abuse of migrant workers or use of child labour by agencies (Articles 8 and 9);
- measures are taken to ensure protection for workers employed by agencies in relation to a range of matters, including minimum wages, working time and other working conditions, access to training, occupational health and safety, compensation in the case of injury or insolvency, and parental leave and benefits (Article 11); and
- the respective responsibilities of agencies and user enterprises in respect of the matters referred to in Article 11 are determined and allocated (Article 12).

7.3 This Convention has not yet been ratified by Australia.

7.4 The Convention is complemented by the *Private Employment Agencies Recommendation*[34], which contains a number of additional proposals, including the following:

- workers employed by agencies should have a written contract of employment;
- agencies should not provide workers to replace workers who are on strike; and
- a range of proposals to ensure anti-discrimination and appropriate use of employees' private data.

[33] Convention 181, adopted 19 June 1997
[34] Recommendation R188, adopted 19 June 1997

7.5 The ILO also subsequently adopted a number of conclusions in its *Resolution concerning the employment relationship*[35], including that:

- All workers, regardless of employment status, should work in conditions of decency and dignity.

…

- Disguised employment occurs when the employer treats a person who is an employee as other than an employee so as to hide his or her true legal status. This can occur through the inappropriate use of civil or commercial arrangements. It is detrimental to the interests or workers and employers and an abuse that is inimical to decent work and should not be tolerated. False self-employment, false subcontracting, the establishment of pseudo cooperatives, false provision of services and false company restructuring are amongst the most frequent means that are used to disguise the employment relationship. The effect of such practices can be to deny labour protection to the worker and to avoid costs that may include taxes and social security contributions. There is evidence that it is more common in certain areas of economic activity but governments, employers and workers should take active steps to guard against such practices anywhere they occur.

…

- In the case of so-called triangular employment relationships where the work or services of the worker are provided to a third party (the user), these need to be examined in so far as they may result in a lack of protection to the detriment of the employee. In such cases, the major issues at stake consist of determining who the employer is, what rights the worker has and who is responsible for them. Therefore, mechanisms are needed to clarify the relationship between the various parties in order to allocate responsibilities between them.

…

- Dispute resolution machinery and/or administrative procedures for determining the status of workers is an important service which should be provided by the appropriate agency. Depending upon the national industrial relations systems, such machinery may be tripartite or bipartite. It could have general competence or it may be limited to specified sectors of the economy. It is essential that employers and workers have easy access to fair, speedy and transparent mechanisms and procedures to resolve disputes about employment status.

…

- To better assess and address the various issues relating to the scope of the employment relationship, governments should be encouraged to develop a national policy framework in consultation with their social partners. As stated in the common statement adopted by the Meeting of Experts on Workers in Situations Needing Protection (Geneva, May 2000), such a policy might include but not be limited to the following elements:
  - providing workers and employers with clear guidance concerning employment relationships, in particular the distinction between dependent workers and self employed persons;
  - providing effective appropriate protection for workers;
  - combating disguised employment which has the effect of depriving dependent workers of proper legal protection;
  - not interfering with genuine commercial or genuine independent contracting;
  - providing access to appropriate resolution mechanisms to determine the status of workers.

- Collection of statistical data and undertaking research and periodic reviews of changes in the structure and patterns of work at national and sectoral levels should be part of this national policy framework. The methodology for the collection of data and for undertaking the research and reviews should be determined after a process of social dialogue. All data collected should be disaggregated according to sex, and the national and sectoral level research and reviews should explicitly incorporate the gender dimension of this question and should take into account other aspects of diversity.

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7.6 The *Resolution concerning the employment relationship* also emphasises the importance of effective compliance authorities.

7.7 The ACTU strongly supports the principles contained in the ILO Convention, Recommendation and Resolution relevant to this inquiry. The ACTU's proposed recommendations are consistent with the principles contained in these documents.

State and Territory legislation and inquiries

7.8 New South Wales held an extensive inquiry into labour hire in 2000 and is currently inquiring into the definition of 'worker' in workers compensation. As part of this review the government is proposing to require that workers compensation be paid in respect of all labour hire workers, whether employees or contractors, and to extend the definition of employee to include dependent contractors. Its industrial relations legislation provides for the deeming of contractors, unfair contracts determination and the regulation of conditions for road transport contractors.

7.9 Victoria is currently holding an inquiry into labour hire. Occupational health and safety legislation currently gives labour hire operators and clients joint responsibility. Employers have the same occupational health and safety obligations to contractors (and employees of contractors) as they do to employees.

7.10 Queensland had a major review of its industrial relations laws in 1999 and included an expanded definition of employee and provisions for the deeming of contractors as employees. Workers compensation coverage extends to dependent contractors.

7.11 South Australia recently sought to amend its industrial relations legislation to include contractor deeming provisions and the scope for joint responsibility in respect of long term labour hire host employers, but these provisions were deleted during the passage of the amending legislation.

7.12 Western Australia expressly includes labour hire operators within the definition of employer in its industrial relations legislation. In addition, contractors are treated as employees in OHS legislation and labour hire operators and clients share responsibility for the health and safety of labour hire workers (whether they are contractors or employees).

7.13 Tasmania's *Workers Rehabilitation and Compensation Amendment (Miscellaneous) Act 2004* enabled the prescription of certain classes of persons or organisations to be in a relationship of worker and employer.

7.14 Australian Capital Territory has a bill currently before its Legislative Assembly (*Fair Work Contracts Bill 2004)* which will establish a new tribunal system to ensure that fair and equitable wages and working conditions are extended to dependent contractors working in the ACT.

7.15 Northern Territory health and safety and workers compensation law includes a definition of worker that extends to most types of contractors.

Code of practice for labour hire and contracting out

7.16 The ACTU strongly supports the development of a code of practice governing contracting out and the use of labour hire.

7.17 An agreed code of practice should be adopted by labour hire operators, peak employer groups and governments.

7.18 A code of practice should be based on the following principles:

(1) Labour hire should primarily be used to supplement rather than replace existing labour.

(2) Labour hire operators should not seek to place workers on artificial contractor arrangements to avoid employment responsibilities.

(3) Labour hire as a form of cost reduction should not be supported. Labour hire workers should receive rates of pay and conditions of employment equivalent to their non-labour hire counterparts.

(4) Labour hire work should be covered by appropriate awards and agreements.

(5) Labour hire operators should provide access to training and skills development for their workers.

(6) Labour hire operators and clients should share responsibility for occupational health and safety obligations.

(7) Labour hire operators should ensure that their workers are able to not accept work for the purposes of sick leave, family leave or recreational leave without adverse consequences or discrimination.

(8) Labour hire workers should be given the opportunity to raise concerns about their work with the client or the labour hire operator, or both.

(9) Labour hire operators should ensure that all legal employment obligations are met in respect of their workers.

(10) Work that is contracted out, whether to a labour hire operator or another employer, should be subject to the same rates of pay and conditions as well as consultation with affected employees.

Labour hire licensing scheme

7.19 Labour hire is a divided industry. At one end of the spectrum there are large, established labour hire agencies that tend not to evade payment of their workers' legal entitlements and even take some responsibility for training their workers. At the other end of the spectrum are the 'anything goes' labour hire agencies. These agencies operate with little regard for the safety, training or legal entitlements of their workers and threaten to and succeed in undercutting more reputable agencies.

7.20 The ACTU has previously supported the establishment of licensing schemes at the state level with the aim of providing greater scrutiny of the labour hire industry, bringing all labour hire operators under the same regulatory spotlight and creating a fairer and safer industry.

7.21 The ACTU supports a national licensing scheme which shares this aim and includes comprehensive reporting requirements.

7.22 Any licensing scheme should require reporting from labour hire operators on a range of matters, include at least the following:

- Requirements for initial accreditation, and subsequent regular reporting: Following initial accreditation, labour hire operators should be required to provide annual reports to ensure that they are continuing to meet the standards expected of them.
- Professional standards: Adequately trained staff, and adequate resources and capital to undertake a labour hire business.
- Wages and entitlements: Labour hire operators should:
  - specify which, if any, awards apply to workers engaged by them, and should commit to observance of those awards;
  - advise of their payment or non-payment of 'site rates' - ie. rates equivalent to those provided to equivalent non labour hire employees;
  - advise of their policies in respect of workers not accepting shifts for the purposes of sick leave, family leave or recreational leave; and
  - advise on their payment of taxation, superannuation and workers compensation premiums.
- Training: Labour hire operators should report on their skills development and safety training programs.
- Occupational health and safety: Labour hire operators should be required to report on their risk assessment strategies, induction, provision of personal protective equipment and return to work plans, and policies to ensure that all injuries are reported.
- Discrimination: Labour hire operators should report on their compliance with anti discrimination laws.
- Penalties: Financial penalties and capacity to revoke or suspend licences if the conditions of a licence, or compliance with workplace obligations or laws, are not fulfilled.

7.23 The ACTU submits that any labour hire licensing system should also include the capacity to pass on relevant information to appropriate state or federal compliance authorities. That is, if it appears that labour hire operators are not meeting their occupational health and safety, workers compensation, superannuation, anti-discrimination, wages and conditions or other obligations, then this information should be passed on to the appropriate authorities for further investigation and enforcement where warranted.

RECOMMENDATIONS

International principles

32. The federal government should ratify the ILO's *Private Employment Agencies Convention* and support and respect the *Private Employment Agencies Recommendation* and the *Resolution concerning the employment relationship*.
33. The federal government should particularly note the international recognition of the following principles:
    - Labour hire workers should not be denied the right to freedom of association or collective bargaining.
    - Labour hire workers should be protected in relation to a range of matters, including minimum wages, working time and other working conditions and access to training.

- Labour hire operators should not provide workers to replace workers who are on strike.
- Labour hire should not result in a lack of protection to the detriment of the employee. Mechanisms are needed to clarify the relationship between the various parties in order to allocate responsibilities between them.
- Governments, employers and workers should take active steps to guard against disguised employment through the inappropriate use of civil and commercial arrangements. They should work to combat disguised employment which has the effect of depriving dependent workers of proper legal protection.
- It is essential that employers and workers have easy access to fair, speedy and transparent mechanisms to resolve disputes about employment status.
- Collection of statistical data and undertaking research and periodic reviews of changes in the structure and patterns of work at national and sectoral levels should be part of a national policy framework. State and Territory legislation and inquiries.

34. The measures taken by State and Territory governments to address non-standard work issues should be supported. Moves toward greater harmonisation of such laws should be investigated but changes should only occur with the agreement of the States and Territories.

Code of practice for labour hire and contracting out

35. A code of practice for labour hire and contracting out should be developed in association with unions and adopted by labour hire operators, peak employer groups and governments. It should be based on the following principles:

    (1) Labour hire should primarily be used to supplement rather than replace existing labour.

    (2) Labour hire operators should not seek to place workers on artificial contractor arrangements to avoid employment responsibilities.

    (3) Labour hire as a form of cost reduction should not be supported. Labour hire workers should receive rates of pay and conditions of employment equivalent to their non-labour hire counterparts.

    (4) Labour hire work should be covered by appropriate awards and agreements.

    (5) Labour hire operators should provide access to training and skills development for their workers.

    (6) Labour hire operators and clients should share responsibility for occupational health and safety obligations.

    (7) Labour hire operators should ensure that their workers are able to not accept work for the purposes of sick leave, family leave or recreational leave without adverse consequences or discrimination.

    (8) Labour hire workers should be given the opportunity to raise concerns about their work with the client or the labour hire operator, or both.

    (9) Labour hire operators should ensure that all legal employment obligations are met in respect of their workers.

    (10) Work that is contracted out, whether to a labour hire operator or another employer, should be subject to the same rates of pay and conditions as well as consultation with affected employees.

Licensing scheme for labour hire operators

36. Licensing schemes should be established at the state and/or federal level to ensure that all labour hire operators are subject to the same regulatory framework, and to minimise unfair competition on the basis of substandard provision of wages, conditions, training and other matters.

37. Any licensing scheme should include requirements for initial accreditation, subsequent regular reporting, professional standards, referral of matters to appropriate compliance authorities and penalties for non-compliance with licence conditions.

38. Labour hire operators should be required to report on the following matters as part of any licensing scheme:

- Wages and entitlements: Labour hire operators should:
  - specify which, if any, awards apply to workers engaged by them, and should commit to observance of those awards;
  - advise of their payment or non-payment of 'site rates' - ie. rates equivalent to those provided to equivalent non labour hire employees at a client firm;
  - advise of their policies in respect of workers not accepting shifts for the purposes of sick leave, family leave or recreational leave; and
  - advise of their payment of taxation, superannuation and workers compensation premiums.
- Training: skills development and safety training programs.
- Occupational health and safety: risk assessment strategies, induction, provision of personal protective equipment and return to work plans, and policies to ensure that all injuries are reported.
- Discrimination: compliance with anti discrimination laws.
- Code of practice: adherence to an agreed industry code of practice.