

Future for working arrangements

- 6.1 Of topical concern is the future of labour hire and independent contractors working arrangements in Australia. Recent public policy announcements by the Australian Government suggest major changes to the regulation of working arrangements.¹ Some commentators suggest that the use of employees will diminish and contractors will increasingly fill their place to ensure that Australia remains internationally competitive.²
- 6.2 However, recent actions in courts, test cases and collective agreements indicate that the use of casual or non-ongoing employees, such as in labour hire, and independent contractors may be limited to ensure that these workers receive similar conditions to direct employees. Additionally the proportions of types of workers may be regulated depending on business needs and employee demands.³

1 The Hon. J. Howard MP, *Ministerial Statement: Workplace Relations Reform*, House of Representatives Hansard, 26 May 2005, pp. 38-43.

2 Freeman, P., 14 June 2005, *Bulletin with Newsweek*, 'Seize the day', p. 3 citing Mr P. Ruthven, Chairman of IBIS World.

3 Corrs, Chambers, Westgarth Lawyers, Corrs in Brief, *AIRC Full Bench Decision Clarifies "Matters Pertaining" Post-Electrolux*, 29 March 2005, p. 1; NSW Government, *Submission No. 35*, citing *Secure Employment Test Case*, p. 42; *Human resources*, 6 April 2004, 'Casuals cause strong test case'; accessed 1 July 2005, <www.humanresourcesmagazine.com.au/articles/2f/0c01f12f.asp>; NUW, 4 July 2005, Press Release; *After 65 days, resolution achieved in Kemalex dispute - workers return to work*, accessed 5 July 2005, <www.nuw.org.au/articles/vic/MediaReleases/kemalexresolution/view>.

- 6.3 How various governments, workers, representative bodies and businesses respond to these actions will steer Australia's future for at least the next decade.
- 6.4 This chapter examines the future role of labour hire and independent contracting in the Australian economy. It includes labour hire and contracting as complementary staffing strategies to direct employment, and the effect of enterprise bargaining agreements on these work arrangements.

The future role of labour hire and contracting

- 6.5 In a highly competitive global market, flexibility and response times are crucial and as a result, demand from companies for labour hire and contractor placement services has increased.⁴
- 6.6 Around 10 per cent of people in employment in Australia work as self-employed contractors.⁵ From the period of 1978 to 1998, growth of self-employed contractors was around 15 per cent.⁶ However, from 1998 to 2004 there appeared to be a flattening of growth.⁷ Similarly, the number of labour hire workers increased by around 15 per cent a year to 2002. The percentage of employees who are labour hire workers grew from 0.8 per cent in 1990 to 3.9 per cent in 2002.⁸
- 6.7 A recent survey indicated that growth of fixed-term contracts is levelling.⁹ Therefore, the assumption of persistent growth may not be well founded and it is unclear what the future trends are for labour hire workers and independent contractors.
- 6.8 Supporting labour hire and contracting arrangements is essential because of the following trends:
- a shortage of skilled labour in certain industries and occupations;
 - the encouraging of mature age people back into the workforce or to remain in the workforce longer; and

4 Ross Human Directions, *Submission No. 54*, p. 2; Qld Government, *Submission No. 66*, pp. 15-16; DEWR, *Exhibit No. 25*, p. 8.

5 Waite, M and Will, L, 2001, *Self-employed contractors in Australia: incidence and characteristics*, Productivity Commission Staff Research Paper, AusInfo, Canberra, p. x.

6 DEWR, *Exhibit No. 25*, p. 7, citing research by VandenHeuvel, A and Wooden, M, 1995, Self employed contractors in Australia: how many and who are they? *Journal of Industrial Relations*, vol. 37, no. 2.

7 ABS, *Forms of Employment*, Cat. No. 6359.0, November 2004, p. 8.

8 Ai Group, *Submission No. 49*, p. 11; CFMEU, *Submission No. 5*, p. 13; Unions NSW, *Exhibit No. 33*, p. xii.

9 ABS, *Forms of Employment*, Cat. No. 6359.0, November 2004, p. 8.

- the increased global competition for jobs and the need for Australia to compete against large scale outsourcing arrangements in developing countries.¹⁰
- 6.9 From the various responses of submissions, the growth of labour hire and independent contracting has a number of advantages as well as concerns. The relative benefits depend greatly on the view of the role of these working arrangements.

Supplementation or substitution

- 6.10 As discussed in Chapter 3, labour hire arrangements can offer significant benefits to employers and employees. Labour hire employment provides an important source of flexibility that can allow businesses to supplement their core staff with workers to meet peaks and troughs in demand, and to manage staff absences or skills shortages.¹¹
- 6.11 AMWU and UnionsWA suggest some employers seek to use labour hire arrangements to drive down labour costs¹² and avoid meeting employee entitlements and protections.¹³
- 6.12 However, evidence to the Committee has suggested that some employers may use labour hire and independent contracting as a substitute for employees to avoid costs such as superannuation, and to avoid industrial obligations such as OHS requirements. This substitution is not supported by unions and state and territory governments.¹⁴
- 6.13 MBA reported that:
- If labour hire workers are used because of the unavailability of direct workers with the necessary skills, then the two groups may be regarded as complements rather than substitutes.¹⁵
- 6.14 This view of complementarity recognises the legitimate role of all forms of working arrangements. It is less easily to determine how conditions of such working arrangements are managed.

10 Ross Human Directions, *Submission No. 54*, p. 2.

11 DEWR, *Exhibit No. 25*, p. 28; ACTU, *Submission No. 60*, p. 12.

12 AMWU, *Submission No. 46*, p. 26.

13 Ms J. Freeman, UnionsWA, *Transcript of Evidence*, 20 May 2005, p. 48.

14 ACT Government, *Submission No. 34*, pp. 2-3; Queensland Nurses Union, *Submission No. 24*, p. 11.

15 Master Builders Australia, *Submission No. 22*, p. 10.

Enterprise bargaining agreements and awards

- 6.15 A focal point of modern Australian industrial law (in both the federal and state systems) is EBAs. Individual contracts such as Australian Workplace Agreements (AWAs) are being promoted by the Australian Government. Awards now perform a 'safety net' function to underpin bargaining.
- 6.16 It was stated by Ai Group that labour hire employees enjoy a similar level of award protection as other employees. Federal and state awards apply equally to labour hire companies as they do to other companies.¹⁶
- 6.17 However, NUW suggested that labour hire employment is uniquely unsuited to enterprise bargaining. Employees engaged on a casual, temporary or assignment basis, employed remotely at a host employer's operation are in no position to bargain.¹⁷
- In the labour hire sector very few employees are covered by EBAs. Most are covered by basic award conditions only. Those who are not award-covered will be concentrated in highly specialised professional areas such as information technology, and the legal profession.¹⁸
- 6.18 However Ai Group cautioned against assuming that enterprise agreements are uncommon throughout the labour hire sector. Ai Group has seen no evidence that the coverage of labour hire employees under enterprise agreements is lower than the coverage of employees under agreements generally.¹⁹
- 6.19 Insufficient evidence was received to validate either claim.
- 6.20 There were also concerns raised regarding restrictions on the use of labour hire and contracting. DEWR referred to the concern the Australian Government has on the inclusion of limitations of labour hire and independent contractors in industrial agreements.²⁰ Additionally, Ai Group indicated that restrictions on labour hire and

16 Ai Group, *Submission No. 49*, p. 13.

17 NUW, *Submission No. 47*, p. 6. See also CFMEU, *Submission No. 5*, Appendix 13: ACTU Submission to NSW Labour Hire Task Force, p. 17; Mr C. Cooper, CEPU, *Transcript of Evidence*, 27 April 2005, p. 2; Mr G. Hargrave, SKILLED Group, *Transcript of Evidence*, 27 April 2005, pp. 16-17.

18 Qld Government, *Submission No. 66*, p. 22.

19 Ai Group, *Submission No. 49*, p. 13; see also Mr N. Wakeling, member of RCSA (Adecco), *Transcript of Evidence*, 26 April 2005, pp. 24-26 for support of labour hire agreements.

20 DEWR, *Exhibit No. 25*, pp. 9, 10, 29, 30.

- contracting should be treated as 'objectionable provisions' under the WR Act and be prohibited within enterprise agreements.²¹
- 6.21 Recent court and commission decisions have further examined current arrangements relating to labour hire and independent contracting. The High Court decision in the Electrolux case²² in September 2004 found that a certified agreement must only contain provisions that affect the employee/employer relationship and provisions that are incidental or ancillary to their relationship are not valid.
- 6.22 In March 2005, the AIRC full bench found that provisions regulating the engagement of labour hire employees, including limits on the proportion of labour hire workers in an organisation, are valid. AIRC also found that clauses inserted into agreements directing that labour hire workers be paid the same rates as direct employees also pertain.²³
- 6.23 However in July 2005, the AIRC (Commissioner Richards) found that labour hire and contractor provisions that forbid their engagement in a particular circumstance did not pertain to the employee/employer relationship and were not permissible. No judgement was provided on labour hire workers and site rates.²⁴ Therefore, there is still a lack of clarity on these matters.
- 6.24 Professor Stewart submitted that there may be legitimate interest for direct employees in a decision by a host business to obtain supplementary or replacement labour from workers who are not direct employees, because of the potential effect on employee jobs or on the integrity of the terms established for their employment.²⁵
- 6.25 Professor Stewart stated that it would be both legally and industrially acceptable for a firm to agree with its employees that such labour will only be engaged in particular circumstances or on particular terms.
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21 Ai Group, *Submission No. 49*, p. 26.

22 Electrolux Home Products Pty Ltd v Australian Workers Union [2004] HCA 40(2 September 2004).

23 ACTU, *Submission No. 60*, p. 13; DEWR, WageNet, *Workplace Relations Amendment (Agreement Validation) Act 2004*, accessed 28 June 2005, <www.workplace.gov.au/workplace/Category/Legislation/WRAct/WorkplaceRelationsAmendmentAgreementValidationAct2004.htm>; Corrs, Chambers, Westgarth Lawyers, Corrs in Brief, *AIRC Full Bench Decision Clarifies "Matters Pertaining" Post-Electrolux*, 29 March 2005, p. 1.

24 CCH Australia Ltd, 22 July 2005, *AIRC: Clause regulating engagement of contractors doesn't pertain*; accessed 25 July 2005, <www.cch.com.au/fe_news.asp?document_id=62291&topic_code=9&category_code=0&printfriendly=1>; Bundaberg Foundry Engineers Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and another PR96036 (18 July 2005).

25 Prof. A. Stewart, *Submission No. 69*, p. 16.

There is no warrant for the legislature to intrude upon the freedom of employers and their employees to deal with this issue. If firms are prepared to agree on conditions for the use of contract or agency labour, as part of the compromises and trade-offs that mark every enterprise agreement that is a choice that should be respected.²⁶

6.26 ACCI maintain that contracts for services under which work is performed are essentially commercial arrangements. Consequently ACCI consider that, provided the contract is lawful, where persons freely enter into these contracts, they should:

... not have them varied, redefined, reshaped, annulled, downgraded or otherwise interfered with by persons or bodies (including governments, regulators, tribunals or courts) who are not parties to those contracts.²⁷

6.27 However, the DEWR Discussion Paper posed that changes could be introduced as part of the proposed Independent Contractors Act.²⁸

Future arrangements of independent contracting

6.28 Ten years ago, concerns with differentiating between independent contractor and employee status were identified in the media.²⁹ The implications of business structure for tax, payroll tax, superannuation and workers compensation were raised as issues. It was further suggested that there are ways to minimise obligations through documenting contractual relationships, using a company or partnership structure, and using labour hire agencies with specialised experience in the area.

6.29 Today these issues are still current. The Committee recognises the need to structure suitable business arrangements to suit industry and personal needs. However, legislative obligations need to be met, and the Committee does not condone the creation of artificial structures to avoid regulatory compliance by host businesses, labour hire agencies, or principal contractors; or the creation of artificial independent

26 Prof. A. Stewart, *Submission No. 69*, p. 16.

27 ACCI, *Submission No. 25*, p. 5.

28 DEWR, *Exhibit No. 25*, p. 10.

29 Lawson, M, 1995, *Australian Financial Review*, 'Huge financial penalties if contractors deemed employees', 14 February 1995, p. 35, cited in CFMEU, *Submission No. 5*, Appendix 1, Attachment 12: CFMEU's submission to Royal Commission into Building and Construction Industry July 2002.

contracting arrangements to avoid the finding of an employer/employee relationship.

- 6.30 Therefore, investigation services are required to pursue business and employer responsibilities.

Investigations and remedies

- 6.31 There are investigatory services in most states or territories. Federally the Office of Workplace Services (OWS) provides this function or it is outsourced to a state service as a one-stop workplace relations shop.³⁰ DOCEP in WA indicated that they had undertaken investigations associated with employment relationships and independent contracting.³¹
- 6.32 However, investigatory powers and remedies appear to be limited to investigating employment entitlements under federal awards or agreements (OWS), or for Australian Workplace Agreements (Office of the Employment Advocate (OEA)). The OEA only cater for independent contractors' concerns about Freedom of Association.³² Therefore, independent contractors do not appear to be well covered by these services.
- 6.33 DEWR state that workers in disguised employment relationships should have remedies available to them. As discussed, courts perform this role to some extent. However, this involves parties bringing proceedings to recover entitlements or seeking legal remedies.
- 6.34 An option proposed by DEWR is to extend the coverage of workplace relations inspectors appointed under the WR Act, through OWS.³³ This would be further extending the reach of DEWR into possible business relationships, which may not be supported by the business community. An additional option would be to pursue the remedies available under the Trade Practices Act under unconscionable conduct.
- 6.35 There could be a greater role for the OWS to review claims of coercion for workers to accept independent contractor arrangements. There is

30 Australian Government, Wagenet, *Inquiry and Compliance Service*, accessed 2 July 2005, <www.wagenet.gov.au/WageNet/templates/PageMaker.asp?category=Services&fileName=../FactSheets/DataFiles/Employees/advisoryCompliance.html>.

31 DOCEP-WA, *Submission No. 33*, p. 2.

32 Australian Government, Office of the Employment Advocate, *Freedom of Association*, <www.oea.gov.au/docs/flyer-freedom_of_association1.pdf>, *Independent contractor or employee?*; <www.oea.gov.au/docs/contractorvsemmployee.pdf>, accessed 2 July 2005.

33 DEWR, *Exhibit No. 25*, p. 22.

support for this approach from DOCEP who state that there is evidence of such coercion occurring.³⁴

- 6.36 The Royal Commission into the Building and Construction Industry had recommended access to DEWR workplace services for labour only sub-contractors seeking unpaid entitlements.³⁵ However, the ACTU was critical of OWS's ability to pursue complaints, citing instances where OWS has not investigated employee complaints or has not sought to prosecute employers for the breach of an agreement of award.³⁶
- 6.37 The Committee considers that attention needs to be given to determining the appropriate jurisdiction for pursuing independent contracting concerns.

Future strategies

- 6.38 Essentially the strategies recommended are to provide assistance for establishing genuine arrangements, reduce incentives for the establishment of artificial avoidance structures, identify where there may be sham arrangements operating, and introduce penalties.
- 6.39 The Queensland Government states that the introduction of the Commonwealth's PSI has acted to 'tighten the definition' of an independent contractor.³⁷ ATO note that they have seen some evidence of taxpayers returning to wage and salaries.³⁸
- 6.40 The Committee considers that the recommendations it has made in Chapter 4 to incorporate in legislation some components of the taxation approach (tests for personal services business), in addition to current common law, will promote consistency and assist in reducing the incidence of possible sham independent contractor arrangements. However, there is still a need to establish appropriate models and checks for legitimate independent contracting arrangements.
- 6.41 The Committee endorses the introduction of a voluntary code of practice with the labour hire industry, as discussed in an earlier

34 DOCEP-WA, *Submission No. 33*, pp. 1-3.

35 The Hon. T. Cole, 2003, *Final Report of the Royal Commission into the Building and Construction Industry*, Vol. 1, p. 138.

36 ACTU Submission to the Senate Employment, Workplace Relations and Education References Committee inquiry into the Building and Construction Industry, 2003, p. 49, accessed 7 July 2005 <www.aph.gov.au/senate/committee/eet_ctte/completed_inquiries/2002-04/building03/submissions/sub017.doc>.

37 Qld Government, *Submission No. 66*, p. 6.

38 Mr M. Konza, ATO, *Transcript of Evidence*, 16 June 2005, pp. 3, 7.

chapter. A code of practice was recommended by the ACTU and some industry employer bodies,³⁹ and they proposed that labour hire should not seek to place workers on artificial contractor arrangements to avoid employment responsibilities.⁴⁰ The following section considers evidence received regarding a registration system for independent contractors.

- 6.42 The CFMEU suggest a more rigorous system for uncovering sham arrangements be put into place and state that '[s]uch a system must be consistent, that is, once a person is deemed an employee for tax purposes, they should be deemed an employee for all purposes.'⁴¹

Independent contractors – register and/or registrar?

- 6.43 Support for introducing a registration system for independent contracting and the difficulties of such a scheme were presented to the Committee.
- 6.44 A number of strategies were suggested to limit the development of sham or disguised employment relationships. Ross Human Directions supported the proposal for independent contractors to make a statutory declaration that they meet the 'tests' in order to be considered an independent contractor.⁴²
- 6.45 CCF propose a registration process for independent contractors. They suggest a Registration Contractor Number associated with ABNs that could be on delegated authority issued by industry associations and associated with the Australian Securities and Investments Commission.⁴³
- 6.46 The ATO indicates that there may be merit in such a scheme for identifying contractors. However, there are two issues: (i) whether under common law a worker is an independent contractor or an employee; and (ii) for taxation purposes whether as an independent contractor they meet the tests to be a personal services business, rather than be taxed like an employee as receiving personal services income.⁴⁴

39 MBA, *Submission No. 22*, p. 13; ACTU, *Submission No. 60*, pp. 5, 28; Courier, Taxi & Truck Association, *Submission No. 50*, p. 5; Mr S. Ellis, *Submission No. 1*, p. 2; Mrs J. Hunt, *Manpower, Transcript of Evidence*, 31 March 2005, p. 24.

40 ACTU, *Submission No. 60*, p. 28.

41 CFMEU- Mining and Energy Division- Northern Branch, *Submission No. 18*, p. 12.

42 Ross Human Directions, *Submission No. 54*, p. 11.

43 CCF, *Submission No. 15*, p. 9.

44 Mr M. Konza, ATO, *Transcript of Evidence*, 16 June 2005, p. 11. The changes in the tax law states the changes introduced by the PSI in 2000/01 'only affect the treatment of your

- 6.47 The Committee's recommendations in Chapter 4 aligns legislative, common law and taxation approaches to minimise differential treatments and apply more consistent findings to issues of employment status.
- 6.48 The Queensland Government suggests that linking the PSI tests in the taxation regime provides an opportunity to apply these criteria when an ABN is lodged, so that questionable contracting arrangements can be avoided from the outset.⁴⁵
- 6.49 The DEWR Discussion Paper proposes setting up a registrar to determine the nature of the working relationship, rather than wait for adjudication by a court or tribunal.⁴⁶
- 6.50 However, TWU (Federal) states that they would be concerned that this would be an administrative function, rather than what they consider should occur, which is a formal hearing to allow determinations as to rights and an appeal mechanism. TWU considers that the establishment of a low cost tribunal would assist more in establishing the status of employees or independent contactors.⁴⁷
- 6.51 The Victorian Government support the AIRC's involvement to provide a more formal approach, with an appeal mechanism for obtaining a declaration of employee status from the Federal Magistrate's Court or the Federal Court. They suggest that any such process must be fast, informal and low cost.⁴⁸
- 6.52 Professor Stewart suggests that linking with the taxation system would provide an alternative registration system. Seeking a personal services business determination or assessment from the Commissioner of Taxation would become a readily available method of lessening doubt as to the status of an independent contractor.⁴⁹
- 6.53 However, he comments that there would be difficulties in making the determination conclusively binding, at least in relation to federal

personal services income. They do not affect your legal, contractual or workplace arrangements – you will not be treated as an employee as a result to the changes to the tax law.' *Alienation of personal services income: obtaining a personal services business determination*, accessed 24 May 2005,

<www.ato.gov.au/businesses/content.asp?doc=/content/13042.htm>.

45 Qld Government, *Submission No. 66*, pp. 42-43.

46 DEWR, *Exhibit No. 25*, p. 14.

47 DEWR-TWU, *Exhibit No. 64*, p. 33.

48 Vic. Government, *Submission No. 71*, p. 32.

49 Prof. A. Stewart, *Submission No. 69*, p. 12; see also Vic. Government, *Submission No. 71*, p. 32.

matters, due to constitutional restrictions.⁵⁰ This would then require linking to the Federal Magistrate's Court or the Federal Court.

- 6.54 The NSW Government in examining the definition of a worker for workers' compensation purposes, state that there would be difficulties with a registration system for independent contractors.

Many of the common law tests rely on evidence that is unknown or yet to be established at the commencement of a contract, which makes it difficult to determine the contractor's status in advance. Also, a contractor's status cannot necessarily be determined by the terms of the contract, as courts will look at the whole circumstances of the relationship between the parties when deciding whether an employment relationship exists.⁵¹

- 6.55 The Committee views that setting up a registration system may have difficulties, as the changing circumstances and nature of the contracting relationship would create challenges.

Civil penalties

- 6.56 The DEWR Discussion Paper suggests creating a civil penalty applying to parties who enter sham or disguised employment arrangements, as one of a number of measures to discourage the practice.⁵²
- 6.57 Professor Stewart suggests that firms should not be punished by applying additional penalties. Instead it should be ensured that they meet their due employment obligations just as if they had secured labour from persons who in functional terms are their employees.⁵³ Australian Business Limited supports this view, and suggests that if other strategies do not achieve the desired aim, then additional penalties could be introduced.⁵⁴
- 6.58 Ross Human Directions supports a legal avenue that allows a review of contractual arrangements where there is evidence of a lack of legitimacy. This avenue would enable both parties to have penalties

50 Prof. A. Stewart, *Submission No. 69*, p. 12.

51 NSW Government, *Submission No. 35*, p. 43.

52 Vic. Government, *Submission No. 71*, p. 34.

53 Prof. A. Stewart, *Submission No. 69*, p. 19; see also DEWR-KM Associates, *Exhibit No. 80*, p. 9.

54 DEWR-ABL/ABI, *Exhibit No. 47*; pp. 12-13.

applied to them if they are found to have made false statements or coerced the other party.⁵⁵

- 6.59 Ross Human Directions recommend a system whereby independent contractors sign a declaration stating they meet the contractor definition 'tests', (similar to a form proposed for the Workcover scheme in NSW). Penalties should be applied to the contractor for any false statements and there should be the capacity for labour hire companies to recover any employment-related costs incurred.⁵⁶ Others in the labour hire industry also support penalties.⁵⁷
- 6.60 The Committee notes that this issue did not feature prominently in evidence to the inquiry so further examination is required.
- 6.61 Discussion will now turn to ways to support independent contractors in their business arrangements, and the overlap with the workplace relations system.

Variation and constitutional powers

- 6.62 It was reported to the Committee that maintaining some of the states' and territories' unfair contracts and other industrial legislation that 'deems' independent contractors to be employees is required to protect disadvantaged workers. However, the Committee considers that this approach has not achieved consistency, clarity or simplification.
- 6.63 The complex interaction of workplace regulation can be attributed to structural factors, including the interaction of federal and state responsibilities under the Constitution. Efforts to discuss and resolve such issues through the Council of Australian Governments and WRMC and administrative forums should be pursued. However, there has been a recent lack of agreement at these Councils.
- 6.64 Greater definitional clarity and effective dispute resolution procedures are required to provide the appropriate worker protections and business flexibility essential for modern workplaces. The Australian Government has proposed a number of changes to the workplace relations system across Australia.

55 Ross Human Directions, *Submission No. 54*, p. 11.

56 Ross Human Directions, *Submission No. 54*, p. 11.

57 DEWR-Rowley Patrick, *Exhibit No. 66*, p. 3; DEWR-Australian Taxi Industry Association, *Exhibit No. 56*, p. 5.

- 6.65 One approach that has been canvassed is to seek referral of the necessary constitutional power from the states to the Commonwealth. (This was already agreed to by Victoria in 1996.⁵⁸) The other states advised in June 2005 that they will not refer their powers.⁵⁹
- 6.66 The Australian Government has also proposed the possibility of using other powers, such as the corporations' power in the Constitution, to broaden the applicability of workplace relations reform and create a more unitary system.⁶⁰ Such a strategy was included for consideration in the DEWR Discussion Paper on independent contracting and labour hire arrangements.
- 6.67 While Committee members may have party views on the use of the corporations' power, the Committee does not seek to express a view in the context of the Committee report. The concept of a unitary workplace relations system which would take precedence over state and territory systems was not the basis for this inquiry and the Committee did not seek evidence on this issue.
- 6.68 However, given that the Australian Government has signalled its intention to pursue this avenue, the Committee has sought to consider the implications for independent contractors in a potentially changed workplace relations environment.
- 6.69 The following section presupposes that the Australian Government moves to implement a unitary industrial relations system. The Committee reiterates that it is not within its scope to examine this initiative. Consistent with the terms of reference for the inquiry, the Committee comments are confined to strategies to ensure consistent and legitimate use of independent contracting arrangements. Given potential changes in Australian industrial relations, in this last section the Committee has examined strategies in the context of a changed industrial relations system.

Use of constitutional powers

- 6.70 In their stakeholder issues, the DEWR Discussion Paper canvassed whether the proposed Independent Contractors Act should override

58 Victoria ceded the bulk of its industrial relations jurisdiction to the Federal Parliament in December 1996. See *Commonwealth Powers (Industrial Relations) Act 1996* (Vic) and Part XV of the *WR Act 1996* (Cth).

59 COAG, *Council of Australian Governments Communiqué*, 3 June 2005, p. 2, accessed 4 July 2005, <<http://coag.gov.au/meetings/030605/coag030605.pdf>>.

60 The Hon. J. Howard MP, *Ministerial Statement: Workplace Relations Reform*, House of Representatives Hansard, 26 May 2005, p. 42; Mr J. O'Sullivan, DEWR, *Transcript of Evidence*, 12 May 2005, p. 35.

state and territory unfair contracts laws, deeming provisions and other legislation, and seek to cover the field (as far as constitutionally possible).⁶¹

- 6.71 These issues will now be reviewed.
- 6.72 The Commonwealth can only override state laws to the extent its constitutional power will allow; however for the territories, the Australian Government has the full power to regulate employee relations through the federal parliament.
- 6.73 Under consideration is the application of s 51(xxxv) of the Constitution, relating to the use of conciliation and arbitration which involve industrial disputes that spill across state boundaries. This is somewhat limited in applying nationally to workplace relations.⁶²
- 6.74 However, the corporations' power (s 51(xx)) is broader as it applies to foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth. This power is primarily for the regulation of the activities of corporations in Australia, but it may be used by the federal parliament to regulate the workplace relations of corporations.
- 6.75 The corporations' power has been used to support the creation of AWAs and in part to support the making of some certified agreements in the WR Act.⁶³ It has also been sought to be used to 'immunise' corporations from state laws on unfair dismissal and right of entry for example.⁶⁴ The DEWR Paper suggests that:
- Accordingly, if parties wish to avail themselves of the protection of any Commonwealth legislation in this regard, they may need to take some positive action to bring themselves within the jurisdiction of such legislation. For unincorporated parties, this might most easily be achieved by incorporation.⁶⁵
- 6.76 However, it must be acknowledged that there are limitations to the use of the corporations' power.⁶⁶ If the corporations' power is used, it

61 DEWR, *Exhibit No. 25*, pp. 19-21.

62 Prof. A. Stewart, 27 June 2005, CCH Australia Ltd, *A simple plan for workplace regulation?* Accessed 27 June 2005, p. 2,
<www.cch.com.au/feature_story.asp?document_id=61420&topic_code=9&category_code=0>.

63 Wallace-Bruce, N, 1998, *Employee Relations Law*, LBC Information Services, Sydney, p. 18.

64 Prof. A. Stewart, 27 June 2005, CCH Australia Ltd, *A simple plan for workplace regulation?* Accessed 27 June 2005, pp. 2-3,
<www.cch.com.au/feature_story.asp?document_id=61420&topic_code=9&category_code=0>.

65 DEWR, *Exhibit No. 25*, p. 19.

66 Mr J. Smythe, DEWR, 16 June 2005, *Transcript of Evidence*, p. 21.

remains to be seen whether the majority of small businesses will seek incorporation, given the more onerous reporting requirements. It is estimated that, even if the corporations' power is used, a proportion of the community (approximately 15 per cent) would not be covered.⁶⁷

- 6.77 Other powers may also be considered such as the trade and commerce (s 51(i)) and external affairs (s 51 (xxix)) powers among others. However, these would require establishing a relationship with interstate trade or international trade and obligations.⁶⁸

Unfair contracts provisions

- 6.78 In considering whether the proposed Independent Contractors Act should override state and territory unfair contracts laws and seek to cover the field of unfair contracts provisions, a range of views were received.
- 6.79 The AMWU note that proposed changes should not aim to minimise employment conditions, but rather governments should aim at lifting conditions to the same level as other areas in society. While advocating a consistent approach between state and federal jurisdictions, they express concern that federal moves to override state and territory laws may be a substitute for tackling disguised employment.⁶⁹
- 6.80 Other organisations would prefer that, where the over-ruling of state unfair contracts law is necessary, consideration is given to repealing the current provisions in the WR Act (sections 127A – 127C) and including contract review provisions in the proposed Independent Contractors Act.⁷⁰ Business groups, such as ACCI, AIG and Australian Business Limited, support federal moves to over-ride deeming and unfair contracts legislation.
- 6.81 However, the ACT Government strongly oppose the intention that the proposed Independent Contractors Act will override state and territory laws.⁷¹

67 Mr K. Harvey, ASU, *Transcript of Evidence*, 27 April 2005, p. 72; Mr B. Pridmore, DEWR, *Transcript of Evidence*, 12 May 2005, p. 35.

68 Mr T. Hulett & Mr A. Ray, Law Council of Australia – SBWG; *Transcript of Evidence*, 27 April 2005, pp. 60-61; Wallace-Bruce, N, 1998, *Employee Relations Law*, LBC Information Services, Sydney, pp. 17-19.

69 DEWR-AMWU, *Exhibit No. 45*, pp. 7-8.

70 DEWR-ABL/ ABL, *Exhibit No. 47*, pp 11-12; DEWR-Ai Group, *Exhibit No. 50*, p.19; DEWR- MBA-WA, *Exhibit No. 67*, section 3.6.

71 DEWR-ACT Government, *Exhibit 84*, p. 5.

- 6.82 The Textile, Clothing and Footwear Union of Australia are also strongly opposed to the proposal, asserting that it would be a regressive step in respect to some of the most disadvantaged workers in the country. They suggest that the proposal would decimate key aspects of the regulatory system which has been newly developed in a number of states in their particular industry.⁷² This view is also supported by the Queensland Government.⁷³
- 6.83 The TWU Vic./Tas. Branch claim that to over-ride state and territory laws would not be acting in the public interest, as these regulations play a fundamentally important role in preventing unsafe work practices within the transport industry.⁷⁴
- 6.84 There is also some support for using a range of powers for the protection of independent contractors.⁷⁵ MBA support the introduction of the Australian Government's independent contractors' legislation, asserting the importance of the states' industrial relations system of the states not being used to undermine the status of independent contractors.⁷⁶ CCF believes the Australian Government's independent contractor legislation should be the sole legislation nationally to regulate independent contractors.⁷⁷
- 6.85 It is apparent that there are a range of views on the justification and possible benefits of this approach. The Committee's role is not to investigate or comment on this course of action. If the corporation's power is used to over-ride state and territory unfair contracts and deeming legislation, there will still be a need for state systems to cover the remaining workers and small businesses.
- 6.86 The Committee considers that the effect of some state and territory deeming legislation could be to prevent those in legitimate contracting arrangements from exercising their rights to operate a small business. Therefore, a more balanced measure of protections and flexibility is needed for independent contractors. It is noted that there is dissent within the Committee on this recommendation.

72 DEWR-TCFUA, *Exhibit No. 46*, para. 76, p. 28.

73 DEWR-Qld Government, *Exhibit No. 54*, pp. 13-14.

74 DEWR-TWU-Vic./Tas., *Exhibit No. 55*, para. 12.6.1.

75 Mr. D. Hargraves, Ai Group, *Transcript of Evidence*, 30 March 2005, p. 12.

76 MBA, *Submission No. 22*, p. 14.

77 DEWR-CCF, *Exhibit No. 49*, p. 2.

Recommendation 15

The Committee recommends that, if constitutional powers are used to implement a national industrial relations system, then the Australian Government ensure that legislation protects legitimate independent contractor arrangements by providing:

- national regulatory consistency;
- definitional clarity in relation to working arrangements and responsibilities; and
- accessible dispute resolution procedures.

Dispute resolution

- 6.87 The Committee considers that greater accessibility for dispute resolution procedures is essential and the broader description of an independent contractor to include other business arrangements, as suggested in Chapter 5, is re-iterated.
- 6.88 A range of dispute resolution processes in relation to unfair contracts is required. Importantly, there should be scope for mediation and low-level type interventions where confusion or disputes relating to these issues arise.
- 6.89 The ACCC in their *Guide to unconscionable conduct*⁷⁸ indicate that states and territories have included provisions that mirror s 51AC of the Trade Practices Act in their legislative regimes, that is unfair contracts or unconscionable conduct. The guide indicates that by including these provisions in state law, disputes can often be heard in forums other than the courts, for example specialist tribunals. As well as allowing greater access to justice, this can reduce the costs of resolving matters, and may provide more flexible methods of resolving the issue.
- 6.90 The Office of the Mediation Adviser as part of the Office of Small Business provides assistance to franchisors and franchisees to resolve their problems and disputes without going to court.⁷⁹ Additionally the Australian Government is piloting a Small Business Mediation

78 ACCC, 2004, *Guide to unconscionable conduct*, accessed 18 July 2005, <<http://www.accc.gov.au/content/index.phtml/itemId/544299>>, p. 10.

79 OMA, *Resolving Franchise Disputes*, accessed 26 June 2005, <www.mediationadviser.com.au>.

Programme as part of the Australian Industrial Registry in Victoria.⁸⁰ Hence, there are some other options that can be considered on a national level.

- 6.91 Victoria and the ACT have set up Office of Small Business Commissioners to assist with dispute resolution, promoting informed decision-making on retail leases for example.⁸¹ Therefore there is scope at federal, state and territory levels to use commercial contract structures to ensure advocacy of independent contractors as small businesses.
- 6.92 There is argument for access to an associated tribunal as a lesser court to the Federal Magistrates Court to hear unfair contracts disputes. The ACCC provides small business advice on the operation of the Trade Practices Act and protecting small business rights against anti-competitive big business but do not provide individual dispute resolution services.⁸²
- 6.93 As discussed in Chapter 5 pursuit of a commercial approach may have advantages, and is supported by the majority of the business community and independent contracting agencies. The Federal Magistrates Court currently has jurisdiction to hear some matters relating to unfair trade practices as part of the *Trade Practices Act* 1974.⁸³
- 6.94 The objective of the Federal Magistrates Court is to provide a simpler and more accessible alternative to litigation. The court is able to call on a range of means to resolve disputes and there is no automatic assumption that every matter will end in a contested hearing. The Federal Magistrates Court can employ a range of means to consider disputes such as: conciliation, counselling and mediation.
- 6.95 As a minimum, the Committee considers the jurisdiction of the Federal Magistrates Court should be broadened to enable hearing of independent contractor cases associated with such legislation.

80 AIRC, *Pilot Small Business Mediation Programme*, accessed 4 July 2005, <www.airc.gov.au/pilot.pdf>.

81 Office of the Victorian Small Business Commissioner, accessed 4 July 2005, <www.sbc.vic.gov.au/>; ACT Office of the Small Business Commissioner, <www.business.act.gov.au/businessnews/actsbc.html>.

82 ACCC, *ACCC update*, Issue 13, June 2003, p. 13, accessed 4 July 2005, <www.accc.gov.au/content/index.phtml/itemId/349239>; *Small business and the Trade Practices Act*, November 2004.

83 Federal Magistrates Court, 2004, *Jurisdiction of the Federal Magistrates Court of Australia*, accessed 6 May 2005, <www.fmc.gov.au/html/jurisdiction.html>.

Recommendation 16

The Committee recommends that the Australian Government extend jurisdiction of the Federal Magistrates Court to hear cases associated with dispute resolution of unfair contracts for service.

In summary

- 6.96 Labour hire and independent contracting arrangements are expected to continue to provide flexibility and opportunities for both business and workers in the Australian economy into the future.
- 6.97 Some concerns were raised to the Committee that labour hire workers may not experience comparable conditions as direct employees and often do not have access to EBA standards. Future industrial relations reforms affecting direct employees might reduce the comparative advantage to business of labour hire workers and independent contractors. The tightening of the skills market may see the growth of labour hire and independent contracting level out.
- 6.98 However, factors such as international competition may continue to demand increasing productivity, and this will pressure working arrangements to maintain or increase their flexibility to strengthen the use of the labour hire industry and independent contracting arrangements.⁸⁴
- 6.99 One of the major themes in the evidence received for this inquiry is identifying the appropriate treatment of independent contractors when there are questions about their status. Where there is significant management control, and the main features of the relationship are almost indistinguishable to employment, then the response to ensure legitimate arrangements should be through industrial or workplace relations means.
- 6.100 However, as the independent contracting relationship is considered a commercial arrangement, then this requires management as a business to business and the response should be through trade regulation. It is important to ensure that these business relationships are honoured and not subjected to excessive protectionist regulation.

⁸⁴ Unions NSW, *Exhibit No. 33*, p. 36.

Additionally, the Committee notes the challenge of providing appropriate support for those in weaker bargaining positions.

- 6.101 The call for greater national consistency was echoed throughout the inquiry. The Committee considers that, as in so many areas of state and federal responsibilities, where there is overlap a consultative and cooperative approach can be the most productive in achieving harmonisation. The Committee supports efforts in some OHS areas and workers compensation in working towards a national approach.⁸⁵
- 6.102 It was reported to the Committee that maintaining some of the states' and territories' unfair contracts and other industrial legislation that 'deems' independent contractors to be employees is required to protect disadvantaged workers. However, the Committee considers that consistency is not being achieved by this approach.
- 6.103 Therefore, the Committee considers that the recommendations outlined in earlier chapters and those considered here can improve the likelihood of greater clarity and consistency. This will provide improved support for labour hire workers and independent contractors, while ensuring that disguised employment or sham arrangements do not proliferate.

Independent contractors

- 6.104 There is a range of work performed by independent contractors, some of which is highly skilled. The Committee also heard evidence of instances of coercive or artificial contracting arrangements being established that appear to disadvantage, in the main, lower skilled workers.
- 6.105 The Committee recognises the role of legitimate independent contracting arrangements. However, there were divergent views from witnesses, and amongst Committee members, as to whether independent contracting should be considered a commercial or a workplace relations arrangement.
- 6.106 The Committee's concern is to address issues raised in evidence and provide clarity and consistency in definitional approaches to independent contractors, protection from unfair contracts, and freedom to undertake business.

85 Although recent industrial manslaughter legislation does not display such consistency. For a recent overview see *Workplace Info*; 1 July 2005, Industrial Manslaughter rules should be consistent: AMMA, accessed 2 July 2005, <www.workplaceinfo.com.au/registered/alert/2005/050701396.htm?52253.5>.

- 6.107 This can be achieved by:
- increased data on the prevalence of this type of working arrangement;
 - closer alignment of the description of independent contractors across federal legislation with the personal services business tests in the Income Tax Act;
 - pursuing national consistency of definitional approaches to independent contractors across state and territory jurisdictions;
 - improved education for businesses and independent contractors of respective legislative requirements and responsibilities, particularly in regard to occupational health and safety, coupled with compliance and enforcement measures;
 - amendments to the Workplace Relations Act, broadening the description of independent contractors to include other entities;
 - greater provision of information and resources for independent contractors on business, financial and dispute resolution procedures;
 - improving access to alternative dispute resolution procedures for unfair contract issues and reducing the costs of bringing forward such cases.

Labour hire

- 6.108 Labour hire arrangements are found across a wide range of sectors, supplying short term and sometimes more continuing types of employment. While the availability of a flexible workforce is essential to meet some fluctuating work demands, the Committee heard evidence that the triangular nature of the employment relationship may lead to confusion and even evasion regarding legal responsibilities in some areas.
- 6.109 The Committee's concern is to ensure that the use of labour hire: conforms to legitimate employment arrangements and an industry code of professional standards; has greater clarity regarding host business and agency responsibilities; and contributes to skill formation in the Australian workforce.
- 6.110 This can be achieved by:
- increased data on the prevalence of this type of working arrangement;
 - improved education for labour hire agencies, host businesses and workers of respective legislative requirements and responsibilities,

particularly in regard to occupational health and safety, coupled with compliance and enforcement measures;

- improved skill development of workers through greater involvement of labour hire agencies in providing training; and
- the establishment of a voluntary code of practice for the labour hire industry.

Mr Phillip Barresi MP

Chair