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

Inquiry into Independent Contracting and Labour Hire Arrangements

By Andrew McCarthy and Vera Smiljanic

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Introduction

Job Watch Inc is an employment rights legal centre which, since 1980, has operated as the only service of its type in Victoria. The centre is funded primarily by the Victorian State Government (the Department of Innovation, Industry and Regional Development – Industrial Relations Victoria) and also receives funding from the Commonwealth Office of the Employment Advocate.

Job Watch's core activities are:

- The provision of advice, information and referral to Victorian workers via a free and confidential telephone advisory service[1].
- A community education program that includes publications, information via the internet, and talks aimed at workers, students and other organisations.
- A legal casework service for disadvantaged workers and workers experiencing human rights abuses.
- Research and policy advice on employment and industrial law issues.
- Advocacy on behalf of those workers in greatest need and disadvantage.

Job Watch has a state-wide focus and services a broad range of Victorian workers, who number around 20,000 annually. We have played a vital role in providing advice and assistance about mainstream employment issues to the Victorian workforce since the deregulation of the industrial relations system in Victoria in the early 1990s and subsequent dismantling of the state industrial relations system.

Job Watch maintains a database record of our callers, which assists us to identify key characteristics of our clients and trends in workplace relations.

Our records indicate that our callers have the following characteristics:

- the majority are not union members;
- a large proportion are employed in businesses with less than 20 employees;
- a significant number are engaged in precarious employment arrangements such as casual and part-time employment or independent contracting;
- many are in disadvantaged bargaining positions because of their youth, sex, racial or ethnic origin, pregnancy status, socio-economic status, or because of the potential for exploitation due to the nature of the employment arrangement, for example apprenticeships and traineeships;
- many are job seekers attempting to return to the labour market after long or intermittent periods of unemployment.

[1]The Job Watch advice service has 11 incoming phone lines, including a designated 1800 telephone number which prioritises calls from rural and remote areas of Victoria.

As the above indicates, we have a particular interest and expertise in the conditions of disadvantaged workers and, due to our client profile, we are uniquely placed to comment on the issue of labour hire arrangements and independent contracting.

Job Watch welcomes the House of Representatives Inquiry and the invitation to provide a submission. Our submission will focus primarily on:

- the status and range of independent contracting and labour hire arrangements;
- and strategies to ensure independent contracting arrangements are legitimate.

The case studies contained in the boxes below are based on actual calls to Job Watch.

Labour hire arrangements

Nature of labour hire

Labour hire is the practice of utilising the workers of a labour hire agency to work for a client company, generally for short periods of time. The labour hire agency can engage labour hire workers as casuals or they may be contractors. It is less common for labour hire companies to engage workers as permanent employees.

Regulation of this relationship is sparse, both in terms of legislation and awards or certified agreements.

The essential quality of a labour hire arrangement is the splitting of contractual and control relationships. The 'standard' arrangement is:

- the worker at the site is under the direction or control of the host or client organisation in relation to the performance of work;
- the labour hire firm has responsibility for the wages and other on-costs of the worker and has a direct contractual relationship with them; and
- the client or host pays the labour hire firm for providing the labour and thus has a contractual relationship with the labour hire firm.

Job Watch's callers' experience: statistical and case study analysis

Job Watch over the last five financial years (July 1999 to June 2004) has taken nearly 800 calls from labour hire employees.[2]

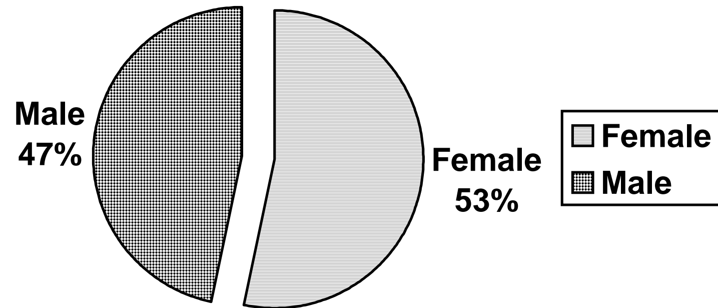
Gender

The majority of labour hire employees contacting Job Watch's telephone advice service were women: 53.3 percent (see Figure 1). This partly reflects Job Watch's caller base, where women are the majority of callers (56 percent).[3]

[2] This figure does not include calls from employees who were: former labour hire employees taken on as permanent or casual staff by the host company; permanent or casual workers asked by their existing employer to move to an agency; or retrenched/dismissed and replaced by labour hire employees.

[3] Job Watch, *2004 Job Watch Annual Report*, Job Watch, Melbourne, 2004, page 7

Figure 1: Gender of labour hire employee, July 1999 to June 2004

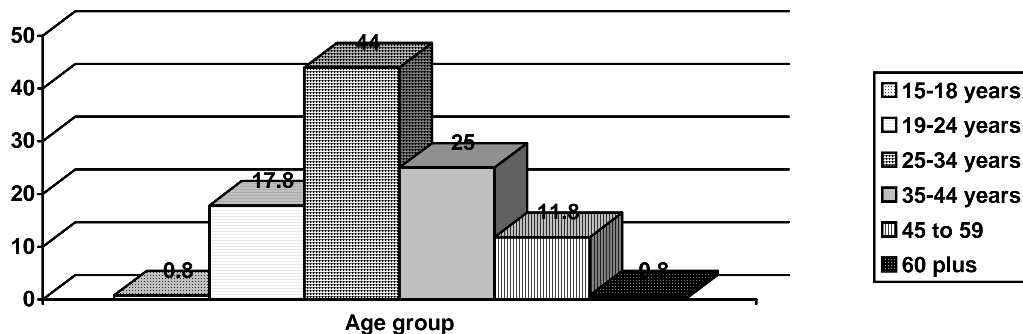


Missing =5 Source: Job Watch database

Age

Most labour hire employees were in the 25 to 34-year age group (45.1 percent) and 35 to 44-year age group (25.7 percent) (see Figure 2). There was minimal representation amongst labour hire employees of those aged 18 years and under, or 60-years plus.

Figure 2: Age group of labour hire employees, July 1999 to June 2004



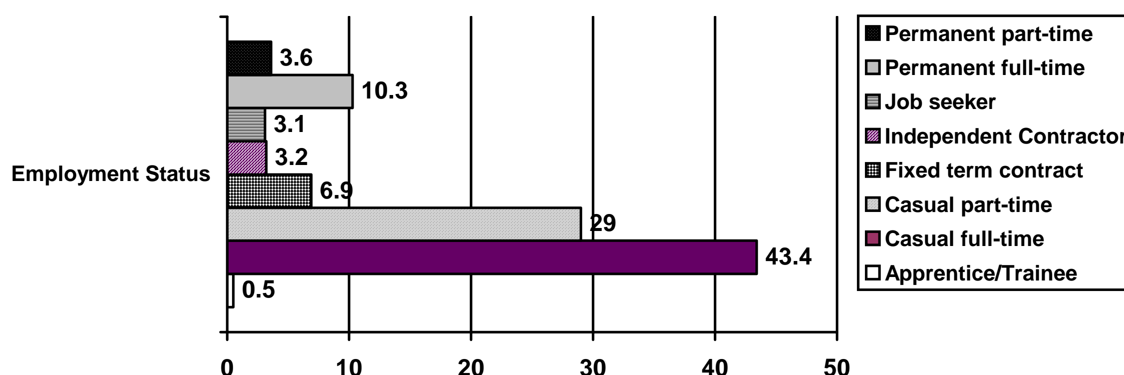
Missing =426 Source: Job Watch database

Employment Status

The vast majority of labour hire employees were engaged under precarious employment arrangements[4]: 83 percent (see Figure 3). The figure of 83 percent is likely to be an underestimation as Job Watch estimates that there would be a percentage of callers who believe that they were permanent employees when they were in fact casual.

[4] Precarious employment includes those employees on a casual full-time or casual part-time basis, on fixed term contracts, engaged as independent contractors or as apprentice/trainees. Those who are engaged under precarious employment arrangements have limited access to protection and entitlements such as unfair dismissal, sick leave and annual leave entitlements.

Figure 3: Employment status of labour hire employees, July 1999 to June 2004



Missing =77 Source: Job Watch database

Industry

The main industries that labour hire employees worked in were property and business services (21.6 percent)[5], manufacturing (19.5 percent), communication services (9.5 percent), health and community services (8.0 percent), and transport and storage (7 percent) (see Table 1).

Table 1: Industry of labour hire employees, July 1999 to June 2004

Industry	%
Accommodation, cafes and restaurants[6]	1.5
Agriculture, forestry and fishing	1.3
Communication Services	9.5
Construction	3.0
Cultural and recreational services	0.7
Education	1.5
Electricity, gas and water	1.2
Finance and Insurance	5.2
Government administration and defence	4.3
Health and Community Services	8.0
Manufacturing	19.5
Personnel and Other Services	5.7
Property and Business Services	21.6
Retail Trade	4.2
Transport and Storage	8.3
Wholesale Trade	4.7

[5] The large representation of property and business services is due to some Job Watch advisors classifying the industry of labour hire callers on the basis of the agency being their employer while other advisors base it on the host business that callers are placed with. Labour hire agencies come under the industry category of property and business services.

[6] The category of agriculture, forestry and fishing was missing from the original design of the database and was introduced as a category on 24/12/01 when the Job Watch database was upgraded.

Total	100.0
(n)	601

Missing =225 Source: Job Watch database

Problems

The main problems that labour hire employees contacted Job Watch's telephone advice service about (excluding general enquiries) related to: unfair and unlawful dismissal (25.6 percent); termination other (10.3 percent); discrimination/equal opportunity (8.7 percent)[7]; contract matters[8] (8.2 percent); and workplace violence (5.2 percent) (see Table 2).

Table 2: Problems of labour hire employees, July 1999 to June 2004

Problem	%
Avoid Award	0.3
AWA – money claims	0.1
Change in hours	0.7
Constructive dismissal	1.2
Contract	8.2
Discrimination/Equal Opportunity	8.7
Employer insolvency	0.1
Freedom of Association	0.1
General enquiry	10.7
Illegal deduction	0.7
Independent contracting arrangements	1.4
Independent contracting non payment	0.3
Maternity	0.5
Meal breaks	0.3
Misleading ads	0.2
Non payment leave	0.3
Non payment notice entitlements	0.3
Non Payment wages	5.0
OHS	2.0
Overpayment	0.2
Privacy	0.1
Probation	0.2
Recruitment	2.0
Redundancy	1.5
Resignation	0.9
Restraint of trade/restrictive covenants	0.7
Separation Certificate	0.1
Stand down	0.2
Superannuation underpayment and non payment	0.2

[7] A significant proportion of discrimination enquiries are in relation to disability discrimination.
[8] This category comprises contract breach, contract change, contract negotiation and contract unfair.

Termination other	10.3
Transmission of business	0.2
Underpayment of wages	4.0
Unfair and unlawful dismissal	25.6
Unfair work conditions	3.6
Unpaid overtime	0.1
Unpaid trial work	0.3
Warnings and procedural fairness	0.6
Workcover issues	3.0
Workplace violence	5.3
TOTAL	100.0
(n)	1030

Source: Job Watch database

Experiences of labour hire employment

The following discussion outlines Job Watch's experience in relation to labour hire workers.

Replacement of directly-engaged staff by labour hire workers

Whilst there is a role for labour hire workers, the experience of many of the callers to the Job Watch telephone advice service is that companies are using labour hire workers to replace their permanent staff, often to avoid award entitlements.

After working as a cleaner for a medical service for nearly five years, Gina was retrenched. Gina's employer told her that she could only stay in her job if she came back as an independent contractor through a local labour hire agency. She was told that the employer was outsourcing all administration and cleaning positions in this manner. Wages and conditions under the labour hire arrangement were significantly lower than those she received under the award.

After eleven years as an accounts officer with a manufacturing firm, Michelle returned from annual leave and was told that her employer had undertaken a performance review. Her employer informed her that the worker from the labour hire agency they had employed while she was on annual leave performed her role more efficiently and was more cost effective. The employer offered her a packing position instead. When Michelle told her employer that this demotion was unacceptable, she was offered five weeks pay in lieu of notice.

Labour hire and unfair dismissal laws

As the above figures show, labour hire workers who contact Job Watch are predominantly casual workers. As with casual employees directly engaged by an employer, labour hire workers with less than twelve months service do not have access to unfair dismissal laws. After twelve months, casual employees with regular and systematic employment are able to apply for unfair dismissal. Those casual workers who work at a host company through a labour hire firm, however, face additional hurdles.

In the experience of our callers, a common scenario is that the host employer requests the labour hire agency to reassign them. If the worker loses their job as a result, the question arises as to whether the host employer or the labour hire company (or both) is responsible for the termination of employment.

In Victoria, federal unfair dismissal laws apply. Under these laws, an employee can only make a claim for unfair dismissal against their 'employer'. In most cases, there is no difficulty in identifying an employee's employer. The situation of labour hire employees, however, poses special difficulties.

1) Action against the labour hire company

As the only entity with which the worker clearly has an employment contract, it follows that an unfair dismissal claim can usually only be made against the labour hire company. Two main difficulties however arise when considering whether to make an unfair dismissal claim against a labour hire company.

The first problem is in determining whether the labour hire worker's employment has actually been terminated in the situation where the worker remains registered with the labour hire agency. To succeed with a claim for unfair dismissal, there needs to be a termination at the initiative of the employer.

When an employee's employment has clearly been terminated by the labour hire company, the second problem that arises is whether or not there was a valid reason for the termination. In many instances, the labour hire company may be able to successfully argue that it has a valid reason to dismiss the employee related to the operational requirements of the business by showing that it terminated the employee because:

- 1) it was acting in accordance with the directions of its client company, and
- 2) it has no other work with which it can provide the employee.

2) Action against the host employer (by itself or in addition to a labour hire company)

Usually it is difficult to establish that the host company is the employer of a labour hire worker (or is a joint employer with the labour hire company). Despite the host company's directions to the worker at its

worksite, the law usually considers that there is no contract of employment between the worker and the host business.[9]

There have been some cases where terminated workers have successfully made unfair dismissal claims against the host employer. For example, in several rulings the concept of 'joint employment' has been recognised.[10] The concept of joint employment may develop into a vehicle to prevent host employers from avoiding responsibility for the unfair dismissal of labour hire employees, however it remains relatively untested and underdeveloped in Australian case law.

In addition, the concept is not a practical option for most employees. At the Australian Industrial Relations Commission (AIRC), if a claim is made against the host employer, then usually there would be a jurisdictional hearing before any substantive issues could be considered. Given the complexity of the law in this area, it is almost impossible for an employee to run a case without legal representation. As many callers to Job Watch are the most disadvantaged workers in the community, this is a serious barrier to justice.

Haji was assigned to a large firm in the finance industry for nearly two years. After Haji commenced working with the host employer, his contact with the labour hire agency was limited to the payment of his wages. The host employers treated Haji no differently to their own employees. Haji worked practically the same hours for the duration of his employment and the host employer informed him of any changes in his roster. For all intents and purposes, the labour hire agency was no more than a payroll service provider. To Haji the position seemed like he was an employee of the host employer.

However, after raising an issue about his workload, Haji was dismissed by the host employer without notice. The host employer claimed that he had answered a telephone call without stating his name. The host employer informed Haji of his termination but no representative from the agency was present. Several days later the labour hire agency contacted Haji and informed him that he had not been dismissed and that they were in the process of finding him another

[9] In *Fox v Kangan-Batman TAFE* the Australian Industrial Relations Commission concluded that, as there was no contract of employment with the host business, the claimant had not been dismissed when her assignment to the host business was ended. Significantly the Commission also stated that the onus of proof lies with the claimant to establish an employment relationship: AIRC Full Bench Dec Print S0235.

[10] In *Misheva v Spicers Paper Ltd* the former Industrial Relations Court of Australia held that a labour hire worker was the employee of <u>both</u> the labour hire agency and the host employer and thus both the agency and the host employer were liable for the unfair dismissal of the claimant (*Elena Misheva v Spicers Paper Ltd trading as "Spicers Paper Australia", "Spicers Stationery", "Spicers Paper" and "Spicers Telelink"* (980033) IRCA 9 October 1998). The Full Bench of the AIRC found that a labour hire company and the host employer were in effect joint venturers in a business operation because of their close business relationship and their apparent joint control of the employee (*Morgan v Kittochide Nominees Pty Ltd* AIRC PR918793 13 June 2002 at 72). In another case, it was held that the labour hire agency merely played the role of a payroll provider. That is, the host company was the 'real and effective' employer and the labour hire agency was not the employer: *Oanh Nguyen and A-N-T Contract Packers Pty Ltd t/as A-N-T Personnel & Thiess Services Pty Ltd t/as Thiess Services* [2003] NSWIRComm 1006 (3 March 2003) Matter No IRC 3826 of 2002.

assignment. The labour hire agency was yet to find Haji another position when he contacted Job Watch, some three weeks after his dismissal from this position.

Given that there had been no termination of employment at the initiative of the employer, Haji's prospects of making a successful unfair dismissal claim would have been extremely limited.

Rebecca had been employed via an agency as a personal carer for a local council. She had been working at the council for nearly 5 years when the Agency rang her up and informed her the Council no longer required her services. Rebecca was told it was because she did the wrong thing. She was upset and angry as she did not have a chance to respond and put her side of the story.

Andrew had worked on a casual full-time basis for a manufacturing company via an agency. He had been there for three years when he was dismissed. Andrew was given no reason or explanation for dismissal by his host employer or his agency.

Due to the situation analysed above, labour hire employees are frequently left with no recourse, even when their dismissal is plainly unfair. They are often denied natural justice that would have been accorded to employees who were directly engaged by the host employer.

For example, if they are terminated for performance reasons, there is effectively no requirement for either the labour hire company or the host company to give them an opportunity to respond to any allegations against them or to provide them with warnings.

If they are terminated because of a discriminatory reason (eg pregnancy, disability), anti-discrimination laws will apply, however these pose their own problems (usually in relation to evidence and the expense of the process).

Job Watch has found that workers are often shocked to find out that they have no or little recourse to unfair dismissal laws. They (not unreasonably) often believed themselves to be employees of the host company. They may have received a payslip with the labour hire company's name on it, but that was the extent of the contact.

Occupational Health and Safety

In Victoria, sections 22 and 23 of the *Occupational Health and Safety Act 1985* (the OHS Act) impose duties on host companies for labour hire workers equal to those of permanent employees.

Section 54 of the OHS Act prohibits discrimination against employees in a number of circumstances including if they make a complaint or provide information about health and safety matters to an inspector or a fellow employee or perform the role of OHS representative or member of the OHS committee.

The definition of employees under this Act confines the meaning of "employee" to "a person employed under a contract of employment or under a contract of training."

Labour hire employees would appear to be excluded from this protection by virtue of the fact that a labour hire employee does not have a contract of employment with their host employer.[11]

A Victorian Parliamentary committee has found that "there should be increased protection for labour hire workers from discrimination and victimisation, particularly with regard to the making of OHS complaints." [12]

> A labour hire agency placed Craig with a warehouse and transport company. Craig was allocated to a job in an area of the client's plant that involved unpacking boxes in an area having asbestos removed. The client issued some of their employees with facemasks to protect them from inhaling dust.
>
> When Craig asked the host employer about the protective equipment, the foreman told him that it was not up to them to provide this equipment to him as he was not their employee and he would have to go and ask the agency about it. After some time one of the host employer's employees lent him a facemask. After his first shift, Craig contacted the agency and asked about the protective equipment. The agency told him that they might be able to find him some, but it was usually their client's responsibility.
>
> After several days Craig again approached the agency about the safety equipment. The agency contacted Craig the next day and told him that the host employer no longer required his services. When Craig contacted Job Watch he was anxious about the effect of his exposure to asbestos.

Other problems for labour hire workers

There is little motivation for labour hire workers to participate in Occupational Health and Safety committees and consultative committees for enterprise bargaining due to their vulnerability to arbitrary dismissal.

There is little chance to establish a relationship within the workplace setting. Labour hire workers sometimes work alongside workers with better conditions.

Callers to Job Watch not infrequently express frustration about the difficulties of getting loans and planning their finances and lives due to uncertain shifts.

Other consequences that affect labour hire workers in particular are the absence of career paths and limited training and skills development.[13]

[11] The new *Occupational Health and Safety Act 2004*, which comes into effect on 1 July 2005, does not appear to change this situation.
[12] Parliament of Victoria, Economic Development Committee, *Interim Report: Inquiry into Labour Hire Employment in Victoria*, December 2004.
[13] Hall, R. *Labour Hire in Australia: Motivation, Dynamics and Prospects*, Working Paper 76, ACIRRT, University of Sydney, April 2002, p6.

Contractors

It may be the case that some people want to run their own business and set up as independent contractors to achieve this. The experience of Job Watch, however is that many workers are not contractors through choice.

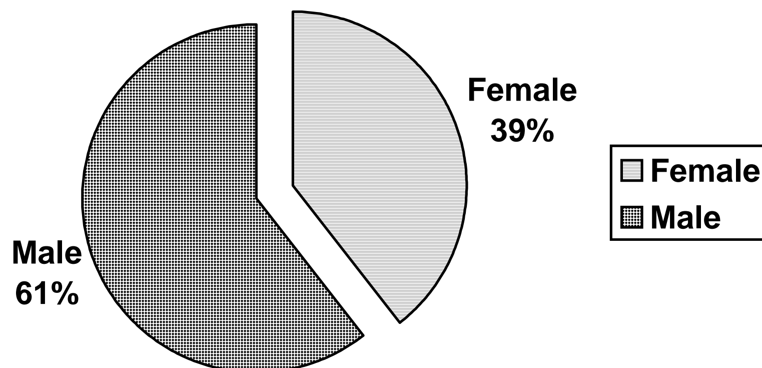
The following outlines Job Watch's experience in relation to contractors.

Job Watch over the last five financial years (July 1999 to June 2004) has received approximately 1800 calls from independent contractors.

Gender

The majority of independent contractors who contacted Job Watch's telephone advice service were men: 60.6 percent (see Figure 4). This differs to Job Watch's caller base, where women are the majority of callers (56 percent).

Figure 4: Gender of independent contractors, July 1999 to June 2004

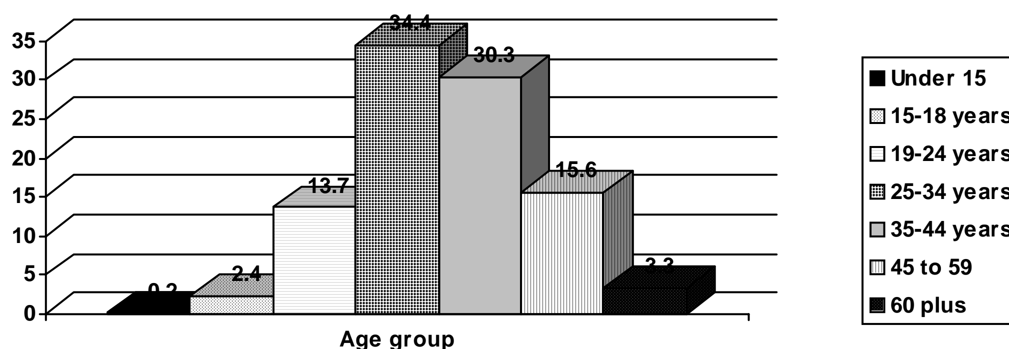


Missing =54 Source: Job Watch database

Age

Most independent contractors were in the 25 to 34-year age group (34.4 percent) and 35 to 44-year age group (30.3 percent) (see Figure 5). There was minimal representation amongst independent contractors of those aged 18 years and under, or 60-years plus. There were two cases of independent contracting involving children under 15 years of age.

Figure 5: Age group of independent contractors, July 1999 to June 2004



Missing =851 Source: Job Watch database

Industry

The main industries that independent contractors worked in were construction (19.8 percent), property and business services (19.5 percent), transport and storage (15.2 percent), personnel and other services (8.8 percent), and communication services (7.6 percent) (see Table 3).

Table 3: Industry of independent contractors, July 1999 to June 2004

Industry	%
Accommodation, cafes and restaurants[14]	1.4
Agriculture, forestry and fishing	1.0
Communication Services	7.6
Construction	19.8
Cultural and recreational services	3.4
Education	3.2
Electricity, gas and water	0.8
Finance and Insurance	2.1

[14] The category of agriculture, forestry and fishing was missing from the original design of the database and was introduced as a category on 24/12/01 when the Job Watch database was upgraded.

Government administration and defence	0.7
Health and Community Services	3.2
Manufacturing	5.2
Mining	0.1
Personnel and Other Services	8.8
Property and Business Services	19.5
Retail Trade	6.0
Transport and Storage	15.2
Wholesale Trade	2.2
Total	100.0
(n)	1359

Missing =432 Source: Job Watch database

Problems

The main problems that independent contractors contacted Job Watch's telephone advice service (excluding general enquiries) related to: independent contracting arrangements (36.9 percent); contract matters (15 percent); independent contracting non payment and recovery of wages (6.6 percent); non payment wages (5.7 percent); and unfair and unlawful dismissal (5.2 percent) (see Table 4).

Table 4: Problems of independent contractors, July 1999 to June 2004

Problem	**%**
Apprentice/trainee issues	0.1
Avoid award	0.1
Cash in hand	0.1
Change in hours	0.2
Constructive dismissal	0.4
Contract matters	15.0
Discrimination/Equal Opportunity	2.0
Employer insolvency	0.4
Freedom of Association	0.1
General enquiry	9.4
Illegal deduction	0.7
Independent contracting arrangements	36.9
Independent contracting non payment and recovery of wages	6.6
Liability to employer	0.1
Long Service Leave	0.1
Maternity	0.1
Misleading ads	1.0
Non Payment wages	5.7
Occ health and safety	0.6
Overpayment	0.1
Privacy	0.1
Recruitment	0.2
Redundancy	0.4
Resignation	0.5

Restraint of trade/restrictive covenants	0.5
Stand down	0.1
Superannuation underpayment and non payment	1.1
Termination	3.6
Transmission of business	0.2
Underpayment of wages	3.1
Unfair and unlawful dismissal	5.2
Unfair work conditions	2.1
Unpaid trial work	0.1
Workcover issues	1.3
Workplace violence	1.6
TOTAL	100.0
(n)	2282

Source: Job Watch database

Experiences of engagement as a contractor

In Job Watch's experience, many so-called 'independent' contractors are not in fact independent because they have little control over when and how they do their work, they work for only one boss, they cannot delegate work to others, and their boss provides most of their tools and equipment. Often the only factors to suggest that these workers are contractors is that their boss calls them a contractor, and they may have an Australian Business Number (ABN). Given this situation, such workers should be receiving the entitlements due to employees, including minimum wages and conditions, and access to unfair dismissal laws.

No real choice

The vast majority of Job Watch's callers who seek information in relation to independent contracting arrangements are job seekers or existing employees being forced into independent contracting arrangements. They are not Australians choosing of their own free will to become independent contractors as part of a culture of 'entrepreneurship'.

In theory employees have the right to refuse to become independent contractors, however in many instances they do not have the bargaining power to do so. Although an employer cannot legally dismiss an employee for refusing to become an independent contractor, many employees do not have access to unfair dismissals, for example because they are on probation or are short-term casual employees. The government's proposals to exclude employees of small businesses from unfair dismissal laws will compound this lack of bargaining power.

Con worked as a concreter on a permanent full-time basis. He received a call from his boss at home one night saying that based on advice from his accountant, he wanted Con and the other employees to become contractors from the next year. Con's boss told him he was paying too much tax to the Government and nothing else would change. Con did not want to become an independent contractor.

Tom responded to an advertisement for an assistant plasterer on junior wages. Tom did one day's trial work and was told he had to get an Australian Business Number (ABN) and become a contractor. If Tom refused to become a contractor and his employment was terminated as a result, he would be excluded from unfair dismissal because he was on a probation/qualifying period.

Rob worked as a delivery driver for a small computer company for 2 years. The Managers of the company put the whole staff on independent contracting arrangements. Rob and the other employees were told that if they did not sign the contracts the company would not pay them so Rob and the other employees signed. The employees were told it was their responsibility to put aside money from their pay for sick leave, annual pay, and superannuation and were given an extra $50 to cover those payments.

Lack of knowledge of rights

Related to the real lack of choice is the fact that in many instances workers are unaware of the implications or repercussions involved in being or becoming a contractor.

Karl finished his apprenticeship as a tiler. Karl's boss told him that he wanted Karl to become a sub-contractor because his accountant had recommended it. Karl's mother, who rang Job Watch, had very serious concerns about the situation for her son if he became a contractor.

Boris started work as a carpenter but was employed under a sub-contracting arrangement. Boris pays his own tax via ABN, used his own tools and invoiced the employer. Super and Workcover were never discussed with Boris when his employer asked Boris to become a sub-contractor. Boris was unaware who paid for super and Workcover.

James worked as a truck driver for a company on a full-time basis. One day his employer told him to change to an independent contractor because, "..it will be in your interest". James did not realise that this meant he would not be paid super, annual leave etc. He found out his employer was deducting tax on his behalf, but was not forwarding it to the Tax Office.

Minimum terms and conditions

Contractors have no entitlement to minimum terms and conditions of employment, including minimum wages.

Tony had been working as a draftsman for a firm of architects. He had worked for over 6 months for the firm and his work was overseen by one of the architects. Tony is paid $13 an hour but if he was an employee he would be entitled to a minimum of $14.41 an hour.

Cathy had been employed as a console operator at a service station on a casual basis and the business changed hands a year later. The new owners of the company made Cathy an independent contractor. As an independent contractor Cathy was earning $11.00 per hour compared to $16.12 per hour when she was a casual employee.

Marion, a single parent of a teenager, works part-time as a bookkeeper. When she got the job she was asked by her employer to get an ABN number. Marion is

paid $12 an hour as an independent contractor by her employer. Wageline told her as a permanent employee she would receive $14.59 an hour while as a casual it would be from $18 to $25 an hour. Marion's daughter recently turned 16 so Marion lost the child benefits she received for her daughter. Out of the $12 she receives Marion has to pay tax directly to the ATO and super.

Jeff and his wife Mary are aged in their 60s, and have worked for 8 years as pamphlet deliverers. They worked for 2 companies and are employed by those companies as independent contractors. Jeff estimates for the 30 hours a week he works he only gets paid $50 a week. He contacted Wageline and found out that the minimum wage for pamphlet deliverers is $42 per thousand flyers. Jeff on other hand is getting $17 for the first thousand flyers and $8 for the second thousand flyers. He and his wife have been told by WorkCover that they are not covered by the companies if they are injured.

Assistance in relation to enforcement of minimum employee entitlements

As the above case studies show, some contractors receive a lower wage than they would receive if they were treated as employees. In most of these examples, given workers' lack of control over how and when their work is performed, the law might regard them as employees, and hence they would be entitled to receive minimum entitlements applicable to employees.

Currently, however, it is very difficult for those workers who are on independent contracting arrangements to ensure that they are treated as employees.

The first option is to seek action by government departments, for example the Department of Employment and Workplace Relations or Workcover. It is Job Watch's experience, however, that government agencies can be reluctant to look behind what the employer/principal has termed the relationship.

If this occurs, then the worker's only option to recover underpayment of wages or conditions as an employee is to initiate legal action at Court.

The law in relation to whether a worker is an employee or a contractor is complex. In addition, workers have the onus of proving that they are not contractors. The complexity of the contractor/employee issue means that often legal advice and representation is essential.

Sophie got a job as a telemarketer at a call centre. Two weeks into the job Sophie was asked to sign a document making her an independent contractor. The original ad was for full-time or part-time positions; it explicitly stated no commission or contract positions. Around 40 people worked for the company, with the average age of the workers being between 18 and 24 years of age. Sophie had not been paid for nearly 5 weeks and a number of other workers had not been paid either. She had contacted Wageline, who said there was nothing they could do as they do not help contractors.

Stewart worked as a delivery driver for a pizza restaurant company under an independent contracting arrangement. He and around 30 other drivers were owed monies from the company; in Stewart's case he was owed $400.

Joan's daughter Angela, who was under 15 years of age, delivered local newspapers to homes in her local area. Angela was not paid for a couple of months by the company she worked as an independent contractor for. Joan tried on numerous occasions to get the money from Angela's employer but without success. Joan faced the prospect of having to take action in either the Magistrates court or VCAT to recover monies Angela was owed.

Peter commenced work as a market researcher. The company told Peter he would have to get an ABN and become an independent contractor. Peter had no control over the work he performed, and had no experience in this type of work before he commenced. He was told he would be paid for training, which he was not. Nor was he paid for the work he did for the company. Peter estimated he was owed $1,450 by the company for unpaid training and work. He contacted a legal firm who informed him that it would cost $2,000 in legal and court costs to recover the monies he was owed.

Unfair termination of employment

Truly independent contractors, unlike employees (although not all), have no statutory protection against unfair or unlawful termination.

In certain circumstances the Australian Industrial Relations Commission (AIRC) may consider contractors to be actually employees for the purposes of an unfair dismissal claim. However, as with enforcing minimum wages and conditions, establishing that a worker is really an employee is difficult. Legal advice and representation at a jurisdictional hearing at the AIRC is virtually essential.

Virginia worked on a full-time permanent basis as a clerk in a transport company for over 6 years. Her employer asked her to become a sub-contractor and told her that she was required to invoice the company and pay her own tax. Virginia worked under the sub-contracting arrangement for the company for 18 months when she was told by the company she would no longer be engaged by them.

Juliana started a job as a mortgage consultant for a finance company. After a 13 week probationary period expired she was asked by her employer to become an independent contractor. She worked for the company for a further 5½ months when she was called into the office and forced to sign a letter of resignation . Juliana was given no explanation as to why.

Hue worked as an owner driver for a transport and storage company. Before he commenced with the company he signed an agreement but as he did not read English he did not know what it said. Hue was told that the contract would be posted to him but it never was. Nearly 12 months into the job Hue's van broke down and was unable to work that day. His employer terminated his engagement. Hue was owed approximately $1,000 in wages but the boss told him the contract had a clause that he would not be paid for 10 weeks if he left the position. Hue was in a desperate situation as he needed the money to buy gas for the van for the new job he had found, to make GST payments and car payments.

Darren was employed as a spray painter on a full-time permanent basis for a number of years. His boss then made Darren get an ABN and work as an independent contractor though the boss provided the equipment and had control of the hours he worked. Darren had a couple of disputes with his boss in relation

to the payment he was receiving. After nearly 10 years Darren was told there was no more work for him.

Accident compensation

A contractor may have to organise to pay their own sickness/accident insurance to ensure protection against loss of earnings and medical expenses. However, the Victorian WorkCover Authority applies its own set of criteria to a particular arrangement and is able to classify a worker as an employee for its purposes, even though they may be called, and treated as a contractor.

Matthew worked as a plasterer in the construction industry. He injured himself at work on a job. Matthew's employer argued that Matthew is a contractor and not covered by WorkCover. Matthew always believed he was an employee and therefore covered by WorkCover.

Tax and superannuation

The contractor may have to organise payment of their own tax and superannuation, although some principals are required to pay super in relation to their contractors.

David worked as a carpenter under an independent contracting arrangement for the same company for 20 years. David spoke to his Accountant who believed the company should have paid him super. After contacting the Tax Office he went back to the company but they could not resolve the issue. The amount of super involved was around $35,000.

Brian got a job as a painter on the condition that he get an ABN and become an independent contractor. He worked for 2 years as a contractor before becoming a permanent full-time employee. Brian discovered no super was paid by his boss during this period and his boss never discussed with Brian that when he became a contractor he had responsibility to pay his own super.

Expenses and liability

The contractor will usually have to pay their own expenses including travel costs, telephone, advertising, work clothing, tools, vehicle and bear the cost of lost or damaged goods.

Ross got a job as a captain on a fishing boat. When he was recruited Ross informed his employer he would only agree to work as an employee and not as an independent contractor. One day there was an accident on the ship resulting in the death of one of the crew. Ross was informed by his employer that he was not an employee but an independent contractor and so liable for the accident. He along with the boss are being sued by the deceased crew member's family. Ross never knew he was an independent contractor. He always believed he was an employee.

Strategies

Job Watch agrees that there need to be "strategies to ensure that independent contract arrangements are legitimate" (as per the terms of reference of the inquiry).

In Victoria there is no authority to review 'independent' contracts for their legality, fairness or the circumstances under which the parties entered into the contract itself. Several other states[15] in Australia contain an unfair contracts jurisdiction, which allows an industrial relations tribunal to review contracts and make determinations about their fairness and make orders appropriately.

In Victoria, the *Fair Trading Act 1999* has some application to contractors. Under this Act, applications can be made to the Victorian Civil and Administrative Tribunal, but only in relation to claims up to $10,000.

Job Watch urges the Committee, in its report, to recommend that methods should be introduced by which contracting arrangements are tested, in a more user-friendly way than at present, to determine whether they are 'legitimate'.

JW also urges the Committee to recommend that such principles should be taken into account when drafting of the proposed *Independent Contractors Bill* occurs. Without suitable protections in the Bill to address some of the problems noted above, the situation of contractors with little bargaining power may worsen.

[15] Queensland and NSW have an unfair contracts jurisdiction. See *Industrial Relations Act 1999 (Qld*) and *Industrial Relations Act 1999 (NSW)*