NATIONAL UNION OF WORKERS

SUBMISSION TO

INQUIRY INTO`INDEPENDENT CONTRACTING AND LABOUR HIRE ARRANGEMENTS

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

March 2005

Submitted by:

CHARLES DONNELLY
GENERAL SECRETARY
NATIONAL UNION OF WORKERS

NUW National Office
552 Victoria Street
North Melbourne 3051
P 0392871850 F 0392871818

Organising for Power

This submission has been prepared by the National Union of Workers for the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation inquiry into independent contracting and labour hire arrangements.

*The **National Union of Workers** (NUW) is one of the Australia's largest unions. We represent workers in a range of key industries in metropolitan and regional areas including:*

- *Warehousing, distribution and logistics*
- *Cold storage*
- *The dairy industry,*
- *Food manufacturing,*
- *Poultry processing*
- *Pharmaceutical manufacturing,*
- *The oil and petrochemical industry,*
- *Automotive components,*
- *Rubber and plastics manufacturing, and*
- *Market research and commercial sales.*

INTRODUCTION

While labour hire arrangements and independent contracting are not a new feature of the Australian workplace, the current trend in all States and Territories is for an increase in the use of third party provided labour by business. The purposes for which such labour is engaged has also altered dramatically. The effects on employees has generally been a negative one.

The traditional form of **labour hire employment** was the provision of "temps" particularly in lower-skilled occupations and largely for the purpose of covering leave and seasonal peaks. In the modern Australian economy the role of third party labour is dramatically different. Increasingly, employers are seeking to fill their ongoing, permanent, full-time labour requirements by use of third party employment, generally as casuals.

Australia now has the second highest level of casual employment in the OECD[1], indicating that some Australian businesses are addicted to casual employment. There is no structural feature of the Australian economy justifying this dubious distinction. It comes at a social cost, with employees stuck in temporary and casual employment disproportionately bearing the costs of "flexibility" without benefiting from an appropriate share of economic prosperity and security.

Similarly, the use of **independent contractor** arrangements has changed from meeting specialist skills needed from time to time (for example licensed electricians) to employers engaging their entire permanent full-time workforce on sham contractor arrangements. This process involves a deliberate attempt by a business subvert the public policy intent behind state and federal laws. The spread of "*ODCO*" [2] style independent contractor arrangements has the potential to exploit employees and seriously erode the PAYE taxpayer pool and disproportionately increase the tax burden on the remaining employees.

By way of analogy, is easy to anticipate the outcry of the public (and competitors) if a manufacturer passed industrial waste for disposal to a third party for the express purpose of avoiding obligations under environmental laws. A company marketing itself as offering a way of subverting such laws would be a pariah. No less an outcry is justified where the laws being subverted are industrial.

The fair and consistent application of government regulation is crucial to the functioning of a market economy. Where third party labour arrangements are adopted to avoid regulations that apply to business in general, such behaviour warrants legislative intervention and correction.

Tim Lyons
Senior Advocate NUW

---

[1] "OECD Economic Surveys: Australia", OECD, 2003
[2] See *BWIU & Anor. v Odco Pty Ltd* (1991) 99 ALR 735

RECCOMENDATIONS

1. That the Commonwealth and the States establish a licensing regime for labour hire providers administered by a statutory authority.

   That the following matters be included in any licensing regime:

   - A demonstrated capacity to manage the employment and placement of staff.
   - Minimum capitalisation requirements.
   - Registration by industry sector and / or occupation.
   - Payment of an annual fee to fund the operation of the licensing authority.
   - Payment of a fee to fund an employee entitlements scheme to meet the entitlements of employees lost due to insolvency.

   The following factors would be included as grounds to revoke or suspend a licence:

   - Failure to pay employees wages and entitlements as and when they fall due.
   - Breach of OH&S standards.
   - Non-compliance with Awards and Certified Agreements.
   - Non-compliance with the *Workplace Relations Act 1996* (particularly in respect of freedom of association)
   - Immigration and taxation offences

2. That the *Workplace Relations Act 1996* be amended to provide that any Awards and Certified Agreements binding on a host employer apply to the employment of labour hire workers performing work within the scope of those Awards and Certified Agreements.

3. That the *Workplace Relations Act 1996* be amended to provide that a claim for unfair and/or unlawful dismissal can be made by a terminated employee against a host employer and an agency as joint respondents if other jurisdictional requirements are met.

SUMMARY OF CURRENT SITUATION

The current use of labour hire and independent contracting arrangements (third party labour) has the following characteristics[3]:

- A massive increase in the number of labour hire providers (big and small) and increasing activity by major international body hire agencies in the Australian economy.
- Growth in the incidence of labour hire (both as a proportion of total enterprises and as a proportion of employees).
- The use of third party labour to meet ongoing permanent labour requirements and to fulfil core business functions rather than seasonal or temporary demands.
- The use of third party labour to provide an entire workforce.
- The engagement of employees via third parties for extended periods.
- Employers terminating an existing workforce of direct employees and "converting" them or their positions to third party labour.

The facts of the labour hire industry in Australia are now well known. Most Australian jurisdictions have conducted inquiries into these and related issues in the last few years. Unfortunately, the legislative response of State and Federal Governments has been poor or non-existent. Too often, Governments have been reluctant to wrestle with the $10 billion a year gorilla in the corner of the room[4].

While there are complex issues (including constitutional issues) to address when considering legislation to regulate labour hire, these should not be an excuse for inaction. A co-operative State and Federal government response is required.

The principle case for greater regulation of labour hire and independent contractors rests on the existing range of legislation (State and Federal) that already governs the workplace. Too often labour hire and contractor arrangements are simply transparent attempts to avoid or subvert the letter or spirit of existing laws, particularly in the following areas:

- Industrial and Employment law (including the Award safety net and the enterprise bargaining system)
- Occupational Health and Safety & Workers compensation
- Taxation (for example payroll tax, income tax and the Medicare levy)
- Retirement incomes (superannuation).

---

[3] Recent useful summaries of available data and estimations on labour hire employment can be found in "*Labour Hire; Issues and Responses*" Research Paper No. 9 2003-04, Australian Parliamentary Library and "*The Growth of Labour Hire Employment in Australia*" Productivity Commission Staff Working Paper, February 2005, (Laplagne, Glover & Fry).

[4] The ABS estimates that labour hire was a $10 000 000 000 industry in 2002 see *ABS Cat 8558.0 and 6359.0*

LABOUR HIRE

The centrepiece of modern Australian industrial law (in both the Commonwealth and State systems) is enterprise bargaining. Awards now perform only a "safety net" function to underpin bargaining. 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.

Secondly, the *Workplace Relations Act 1996* (Cth) creates a structural incentive for employers to use agency labour: agency employees are outside the reach of the Awards and Certified Agreements that otherwise apply.

A system that allows the subversions of both minium Award standards and collective agreements is deeply flawed. Where an employer has made a certified agreement with its employees its should not be allowed to avoid the wages and conditions of that agreement by hiring labour externally. If the certified agreement provides for a wage rate of $19 an hour for a forklift driver, why should an employer be able to engage labour to perform the same task through an agency for less?

Businesses also use labour hire arrangements to avoid responsibility for terminations. Under current laws, a labour hire employee can be engaged at a host employer full time for a period of years and can be terminated from that position by the host simply notifying the agency that the worker is no longer required. The worker has no recourse against the host employer, even if the worker is immediately replaced or the termination is for what would be an unfair or unlawful reason in the case of a direct employee. A claim against the agency is defeated if the employee remains "on their books" as an employee seeking work, regardless of whether work is actually offered . Even if it is offered, there is also no requirement for the work to be similar, at an appropriate location and at a comparable level of remuneration.

Like all industries, the labour hire business has good and bad corporate citizens. Many agencies take their obligations to employees seriously, and seek to be good employers. Many of these agencies ensure that employees placed at a workplace covered by Awards and Agreements are paid the applicable site rates.

Unfortunately, these employers are routinely "underbid" by agencies who observe no minimum standards and treat employees appallingly. The NUW supports competition based on efficiency, service and quality. Much of the competition in the industry is, however, based on a race to the bottom, a contest about how low a level of wages and conditions can be paid.

At present, all that is needed to establish a labour hire business in most States is a phone number and an ABN. With the structural barriers to entry into the industry so low, many unscrupulous operators exist at the margins and use unethical practices to compete against reputable agencies that take their obligations as employers seriously. This urgently needs to be addressed via an appropriate licensing regime in co-operation with the States. (**See Recommendation 1**)

In practice the much trumpeted "flexibility" is all one way. The business can call in and dispose of labour no questions asked – the employee is reduced to waiting for a phone call to be offered work. Modern Australia would not tolerate a 1950's style spectacle of workers queing at a factory gate each morning seeking a days work. Today we are more civilised - the waiting is done out of public gaze at the end of a phone line.

Members constantly complain to the NUW about the disruption caused to personal lives by the need to be on-call at all times and to accept work offered. These agency employees say they are never offered work again if they are ever unavailable for an assignment.

Unlike most OECD countries, Australia has virtually no regulation of the labour hire industry. Regulation in other like economies includes:

- Minimum and maximum terms of engagements
- Limitations on the categories of work that can be performed
- A maximum number of successive contracts
- Mandatory coverage by any collective bargaining agreements applying to the host employer.

In the United States, there is a statutory recognition of the obligations of host employers to agency workers via the notion of **joint employment**. A recent full Bench of the Australian Industrial Relations Commission considered this issue and found no substantial barrier to its adoption under Australian law:

> *"The doctrine of joint employment, or of joint employers, is well established in labour law in the United States. It appears to have been a response to the use of labour hire arrangements by employers in circumstances that* ***conduced to an avoidance of labour regulation and employee protections****"* [5] (Emphasis added)

Statutory recognition of "joint employment" in Australia would relieve many of the problems experienced by employees of labour hire. An effective solution would be amendments to the *Workplace Relations Act 1996* (and equivalent state laws) to ensure that Awards and Certified Agreements binding on host employers apply to the employment of labour hire workers performing work within the scope of those Awards and Certified Agreements. Similarly, host employers who effectively dismiss agency workers should be required subject to unfair and unlawful dismissal laws in the usual way. (**See Recommendations 2 & 3**).

Labour hire plays a legitimate role in the modern Australian economy and is used responsibly by many employers. For example, it is used to meet genuine short term and seasonal requirements. Many businesses also use agency labour to reduce the administrative costs of advertising for, screening and selecting staff and use agency engagement as a form of probation prior to directly engaging an employee.

Recommendations 1, 2 & 3 in this submission address the misuse of agency labour but would not effect its legitimate use.

[5] *Morgan v Kittochside Nominees Pty Ltd* (PR918793) see Para74ff

INDEPENDENT CONTRACTORS

Distinguishing between legitimate independent contractor arrangements and mere shams designed to avoid obligations and pass commercial risk onto employees needs to be determined on a case by case basis. Such a determination is appropriately performed, in the circumstances of a dispute, by a specialist employment law tribunal (ie the Australian Industrial Relations Commission) and/or a court with employment law jurisdiction (ie the Federal Court of Australia). So much is recognised currently by Section 127A of the *Workplace Relations Act 1996*.

Suggestions that the parties to an alleged "independent contract" would benefit from being quarantined from the existing system of workplace relations law are misguided. In such a circumstance, any dispute involving the contract (rather than being subject to a relatively simple and inexpensive system of conciliation and arbitration) is directed to the ordinary court system, with its excessive costs, delays and legalism. It is in the interest of all parties to such a contract to have access to a reliable, inexpensive and independent dispute settling mechanism.

As the case studies set out in this submission indicate, there are examples of the non-genuine use of independent contractor arrangements. In such circumstances, the real purpose of their adoption is to subvert other laws of the Commonwealth and the States.

Many of the "independent contractor" arrangements demonstrate the following characteristics indicative of the arrangement being non-genuine:

- The "contractors" themselves are previously employees and were "converted" to contractors
- The contractors perform work also performed by direct employees (often side by side).
- The "contractors" are subject to the "control" of the host employer in the same manner as employees.
- The contractors perform work for no other "client".
- The contractors have no control over how, when or by whom the work is performed.
- The work performed is semi-skilled or low-skilled.

The experience of the NUW indicates that service companies are marketing sham contractor arrangements to businesses for the express purpose of avoiding obligations under industrial law and to transfer risks and costs to employees. A review of the case law indicates that there is a transparent and deliberate attempt by service companies and businesses to artificially create, on paper at least, the kind of relationship considered in the *Odco* authorities.[6] The NUW is aware of one service company that included the words "*Our System Endorsed by the High Court*" on its letterhead.

[6] See for example *Fox v Kangan Batman TAFE*, Print S0253

Thankfully, the Courts[7] and various tribunals[8] have shown a willingness to consider the real nature of the relationship by looking past the thin veneer of the paper contract. Nevertheless, recourse to expensive and time consuming litigation as the only means to settle such matters as not in the interests of any party. Justice in these circumstances is available only to those with resources. The decisions can also be inconsistent between jurisdictions or, as the cases generally turn on narrow sets of facts , apparently inconsistent within them. This creates uncertainty and costs for business and employees.

The NUW endorses the recommendations made by the ACTU in respect of independent contractors.

[7] See for example the High Court in *Hollis v Vabu Pty Ltd.* (2001) 207 CLR 21 and the Full Court of the Federal Court in *Damevski v Guidice* (2003) 202 ALR 494

[8] See a Full Bench of the AIRC in A*bdalla v Viewdaze Pty Ltd trading as Malta Travel*, (2003) 122 IR 215, the NSW IRC in *Oanh Nguyen v A-N-T Contract Packers Pty Ltd and Thiess Services Pty Ltd* (2003) 128 IR 241, the Full Bench of the South Australian Workers Compensation Tribunal in *Country Metropolitan Agency Contracting Services v Slater,* (2003) 124 IR 293.

CASE STUDIES – LABOUR HIRE

These case studies are intended to demonstrate the very real prejudice suffered by employees at the hands of agencies and host employers who engage in unethical and unlawful activities in an attempt to avoid their obligations.

"Company A"

Company A was a company that supplied labour hire workers to a large percentage of the poultry processing facilities in Melbourne and Sydney. In Melbourne, the single biggest contract they had was to supply approximately 200 workers a day to the large poultry processing facility run by a major Australian owned poultry processor.

Company A paid its workers in cash, ranging from $8 per hour to $12 per hour, depending on the pace of the worker. This was despite the fact that they were respondent to a Federal Award that compelled them to pay higher wages. Because the workers were paid "under the table", there were no records to search, and thus no underpayment of the Award to prosecute the company over. Company A actually claimed they employed only twenty some workers. Further to that, representatives of Company A threatened the lives of people looking into and gaining evidence of their "under the table" operation, producing a culture of fear when it came to giving evidence "on the record" about the operation.

Almost all of the workers were recently arrived immigrants. Some of the workers were illegal immigrants. But most of the workers were also receiving Centrelink payments. Company A encouraged this and provided documentation for the workers if they were ever caught by Centrelink, which they told the workers would get them off the hook with Centrelink officials. Part of the incentive they provided to prospective workers was that if they kept their Centrelink payments, and also gained the "under the table" income from Company A, they would be earning a decent wage.

The host companies claimed, in unison, ignorance of the activities of Company A. The common response to the facts laid out before them was that it was not their concern, it was a matter for Company A – they didn't employ these people, Company A did.

The main incentives for the host companies to use Company A were that their WorkCover premium was massively reduced, and that their payroll was massively reduced. Because these people were paid "under the table", there was no employment record for WorkCover purposes. Because they were not employed directly by them, they could and did claim ignorance of the wage breaches.

The host employer's factory was raided by a joint taskforce set up between DIMA, the AFP, Centrelink and the ATO. Ten illegal immigrants were sent off to Maribyrnong Detention Centre, 95 workers had their Centrelink payments suspended after being caught at the facility.

"Company B"

Company B is a labour hire company which supplies labourers primarily for the loading and unloading of shipping containers. However, they have also branched into other areas of the workforce connected to the loading and unloading of shipping containers. Their main contracts are at major Melbourne cold stores.

According to their website, the host employers that will benefit the most from using labour hire provided by Company B are employers:

"Who are subject to penalty rates

With concerns about unfair dismissal and redundancy payments

With high work cover claims history

With Workplace Health and Safety obligations (in particular those with more than 20 employees) "

They state that, when using labour hire from Company B, the employer can gain:

"No more disputes or drama from unfair dismissal

No more penalty rates, overtime loading or Award minimums or maximums

No more Workplace Health and Safety issues"

They state that the host employer will save:

"In administrative costs, reducing unit labour costs, Workplace Health and Safety compliances, keeping up to date with endless employment law changes and will reduce management responsibilities."

And, finally they also say:

"You direct the workers and are in total control, unsatisfactory workers can be returned with no implication."

Apart from these statements, employers in this industry have found that dealing with Company B is extremely profitable because it involves allows them to outsource their WorkCover premium to another company. In practice this means that the most hazardous jobs (for example container packing by hand) are the ones outsourced to Company B first.

At a major Melbourne Cold Store, the minimum hourly rate a worker engaged casually could be paid under their Enterprise Bargaining Agreement was $21.31. By not employing these people directly, by using Company B, they are able to pay the Award rate of $17.09, a saving of $4.22 per hour. Multiplying this over an average daily supply of seventy some workers, this works out as a saving of approximately $2,500 in wages daily, or close to $1 million annually. However, the real cost saving would come in a massively reduced WorkCover insurance bill.

"Company C"

This particular example demonstrates the severe injustice caused to employees where employers used labour hire to meet long term labour needs. In 2004, the NUW was in dispute with a major food manufacturer concerning employees at its Melbourne biscuit and cake warehouse. These employees were almost all employed through an agency, Company C. There was a certified agreement applying to the work that bound the food manufacturer, but none on Company C. Many of the employees involved had worked at the food manufacturer over several years on a full time basis. They had

moved sites when the food manufacturer had moved, and had changed between agencies when it decided to use a new agency. In 2004, the food manufacturer decided to close the site. Despite the certified agreement including a redundancy agreement that provided for payments to regular casuals, these employees were paid nothing. The food manufacturer completely denied any responsibility for the workers who had been with them for many years.

The NUW ran a case in the AIRC concerning the issue, seeking redundancy pay for the employees based on the certified agreement. The Commission dismissed the claim for want of jurisdiction on a technicality and the employees where left with no compensation.

CASE STUDIES – INDEPENDENT CONTRACTORS

These case studies are intended as illustrations of "sham" contractor arrangements entered into to avoid workplace regulations. The NUW contends that the "contractors" are properly considered employees based on any meaningful use of that term.

The "independent contractors" are not subject to any Award safety net (including the minimum wage). They do not receive superannuation, paid leave or other benefits. Their earnings are not subject to PAYE income tax deductions. They are responsible for providing their own public liability insurance, protective clothing and (in some states) workers compensation insurance.

"Company D"

Company D is a plastics manufacturer in Dandenong, Victoria. Company D operates a factory and has a number of employees employed under the *Rubber Plastic and Cablemaking Industry Award* (an Award of the AIRC) and a certified Agreement made with the NUW.

Company D also engages "independent contractors" to perform the same work, in the same way, in the same factory as the employees covered by the Award and the Certified Agreement. Company D has, from time to time, offered to "convert" employees to independent contractors. The employees have declined but "new hires" are in the form of independent contractors.

The "independent contractors" work in the factory like the employees and perform the same work. They are required to attend in the same manner as employees. None of the employees have any control over when or how their work is performed – ie they "work as directed" in the same manner as employees and are under the control of Company D None of the employees perform these functions for any other business. They are indistinguishable from permanent employees of Company D.

Company D has a relationship with a "service company"[9] which contracts with the independent contractors. The generic information provided to prospective contractors by the service company demonstrates a deliberate attempt to artificially create a paper relationship within the narrow confines of the *Odco* authorities. They admit as much: "*[Service Company] is an administrative agency supplying independent contractors under the principles of the "Odco" judgements.*" The service company describes the basis of the arrangement as follows:

> *"In working though [Service Company] Pty Ltd you are operating under Australian High Court, Federal Court and Industrial Relations Commission rulings known as "Odco" judgements. Your legal status is referred to as being an "Odco®" independent contractor."*

Apart from studiously avoiding the use of terms like "employer" or "employment" the description of the obligations of the contractor are barely distinguishable from employment contracts used by major labour hire agencies.

---

[9] The system described by a Full Bench of the AIRC in *Fox v Kangan Batman TAFE*, Print S0253, 25/10/1999 matches that used by Company A and its service company.

"Company E"

In 2003 a large multinational, shut its tea packing factory located in Mulgrave, a South Eastern suburb of Melbourne. The production employees (who were engaged as employees under a Certified Agreement made with the NUW) were made redundant. Most of the work is now performed in Asia.

A management employee of the multinational secured a contract from it to pack special line (herbal and blended) tea bags. This work was previously performed at the Mulgrave factory of the multinational. This business, Company E, acquired some of the tea packing machines from the factory of the Multinational and opened in new premises in Melbourne. Company E offered work as "independent contractors" to some of the retrenched employees of the multinational under an *Odco* arrangement

These persons perform essentially the same work for Company E as they did for the multinational. They work in a factory like any other and are required to attend in the same manner as employees. None of the employees have any control over when or how there work is performed – ie they "work as directed" in the same manner as employees and are under the control of Company E None of the employees perform tea-packing functions for any other business – again they are "contractors" with one client.. They are indistinguishable from permanent employee of Company E. Company E has a relationship with a "service company" which contracts with the independent contractors.