

INDEPENDENT CONTRACTING AND LABOUR HIRE ARRANGEMENTS

A submission by the Australian Industry Group and
Engineering Employers' Association, South Australia to the
House of Representatives Standing Committee on Employment, Workplace
Relations, and Workforce Participation



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1.0 Background

About Ai Group

The Australian Industry Group (Ai Group) is one of the largest national industry bodies in Australia, representing employers, large and small, in every State and Territory. Ai Group represents employers in manufacturing, construction, automotive, transport, printing, information technology, telecommunications, labour hire, call centres and other industries.

Ai Group has a large number of labour hire companies as members and we have represented this sector in numerous Federal and State Industrial Commission cases, inquiries and other forums over recent years. Ai Group also has a large membership in industries which utilise labour hire and independent contractors extensively.

This submission is made by Ai Group and also on behalf of its affiliated organisation, the Engineering Employers Association, South Australia.

The Importance of Preserving Flexibility

Australian industry is now, more than ever before, competing in a globally connected world economy characterised by high levels of competition and intense pressures on prices. Australia's prosperity in this marketplace is dependent upon organisational structures and management practices being efficient, productive and highly flexible.

The industrialisation of China presents a mammoth challenge to Australia's manufacturers, as does India to Australia's information and communication technology (ICT) companies. Over the next 10 years, two countries, each over sixty times our size are set to rapidly grow and massively expand their export activities. Australia's success in this environment will depend on its adaptability.

To remain efficient and globally competitive, businesses need to have the flexibility to engage the forms of labour which they need. The following forms of labour (amongst others) are all legitimately deployed by organisations:

- Full-time employees;
- Casual employees;
- Part-time employees;
- Fixed term employees;
- Fixed task employees;
- Seasonal employees;
- Labour hire; and

- Independent contractors.

Many unions pursue a strategy of endeavouring to force companies to “agree” to restrict their use of labour hire and independent contractors through enterprise agreement clauses. The unions have also been pressing Governments, particularly at the State level, to introduce new legislation to impose further regulatory requirements upon labour hire and independent contractors. Further, the unions have pursued a number of cases in Federal and State Industrial Commissions to impose restrictions on labour hire and contracting out (eg. the NSW *Secure Employment Test Case*).

The unions’ strategies are short-sighted because if industry is unable to maintain sufficient labour flexibility, the effect will be to simply drive lower employment levels, more companies out of business and more decisions to shift company operations off-shore.

It also needs to be recognised that employers are not the only parties seeking greater labour flexibility – in many cases employees want more flexibility. The workforce is becoming increasingly diverse and employees have a wide variety of different needs and preferences. Many people prefer to work as independent contractors, or to work for labour hire companies, because it suits their lifestyle or income preferences.

2.0 Labour Hire

Introduction

The labour hire industry has operated in Australia since at least the 1950s. In recent years there has been substantial growth in the labour hire industry and today the industry constitutes a significant component of the Australian labour market and provides tens of thousands of jobs.

A key reason for the growth is the rapidly changing work environment. The following factors have had a particularly important influence:

- Corporate restructuring;
- The need for increased flexibility to meet work fluctuations;
- Greater competitive pressures as a result of globalisation;
- Outsourcing in both the private and public sectors;
- Extended hours of operation;
- Fast changing technology;
- The trend for companies to concentrate on their core business; and
- Growth in new industries.

There are four layers of companies within the labour hire industry. In the top layer there are seven to eight large companies which have the dominant share of the market. Some of these are Australian organisations (eg. Skilled). Others are large global organisations (eg. Adecco and Manpower). The second layer of companies consists of medium sized organisations – a combination of Australian owned and international companies. The third layer of labour hire companies are either niche businesses which cater for a specific industry (eg. information technology) or small labour hire companies that cover a range of industries. The fourth layer comprises organisations which have their core business in a particular industry sector and which hire out either frequently or infrequently their own labour to other organisations.

The labour hire industry has unfairly been the subject of adverse publicity in recent times. Trade unions in particular have traditionally had a very emotional and philosophical opposition to labour hire. This opposition seems to be based on the largely incorrect belief that:

- Labour hire reduces full-time employment;
- Labour hire employees are in precarious employment;
- Labour hire employees receive low benefits, and are not protected by industrial instruments;
- Labour hire employees receive inadequate protection regarding OHS, workers' compensation and rehabilitation;
- Labour hire employees receive inadequate training.

The above traditional union view is not in keeping with the characteristics of modern Australian industry and contemporary workplaces.

In more recent times there has been an acceptance by most unions that the labour hire industry is legitimate and here to stay. This acceptance is evidenced by the high number of certified agreements which exist between unions and labour hire companies and the fact that labour hire companies are amongst the largest employers of union members in Australia.

Defining the Labour Hire Industry

Defining the labour hire industry with precision is difficult. The term “labour hire” is used in Australia but other terms such as “contract labour”, and “temporary help” are used overseas.

The ILO describes three categories of contract labour:

- Job contracting (contracting out of work);
- Labour only contracting; and
- Direct contracting (ie. independent contractors).

In the Australian context, the typically labour hire arrangement involves the following elements:

- The worker performing his/her work at the client company’s site, and under the practical day-to-day direction of the client company. The worker uses the client company’s tools and equipment and in many cases wears the client company’s uniform.

- The worker is paid by the labour hire company and has a direct employment or contractual relationship with the labour hire company;
- The client company pays a contract fee to the labour hire company for the provision of the worker's labour and, accordingly, the client company has a contractual relationship with the labour hire company.

Many people fail to recognise the different categories and type of work performed in the labour hire industry. Labour hire traditionally has been associated with short-term casual employment. The industry is, however, far more complex.

A study carried out by RMIT University (sponsored by the Recruitment and Consulting Services Association) entitled “*On-hired Workers in Australia: Motivations and Outcomes*”, identified five distinct categories of services supplied by labour hire companies, as set out below.

On-hired employee services	The on-hire of employees by a company to a client (the host organisation) to meet the organisation's production or service requirements (eg. labour hire / temporary use of employees).
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On-hired contractor services	The on-hire of contractors (with ABNs) to a client (the host organisation) to meet the organisation's production or service requirements.
Recruitment services	The sourcing, and placement of candidates on behalf of a client (the host organisation), where the candidates are then employed directly, by the client. For example, permanent placement, "search and selection" and Job Network Services.
Employment consulting services	The provision of advice and services by a consulting company to assist a client with employment services. For example, HR consulting, organisational development consulting, employee relations consulting, outsourcing services, OH&S, training and testing.
Managed project / contract services	The provision of services to a client on a project or contract basis where the client has outsourced defined operational functions. The provider directly engages employees, contractors and other service providers to ensure satisfactory completion of the contract. For example, contract maintenance, engineering, security, catering, project IT, construction and outsourced call centres.

The Importance of Labour Hire to the National Economy

The labour hire industry is an integral part of the national labour infrastructure and contributes greatly to the national economy. The Australian Bureau of Statistics has valued the employment services industry at \$10.2 billion for 2001-2002¹. The employment services industry increased its total income by 30.8 per cent over the three years to 2002². Labour hire constitutes a major part of the employment services industry.

The labour hire industry features a number of large companies, which have the dominant share of the market. The impressive growth and turnovers of these companies highlights the important contribution which the labour hire sector makes to Australian industry.

The Growth of Labour Hire

In February 2005, the Productivity Commission released a report entitled *“The Growth of Labour Hire Employment in Australia”*³ which examined the extent of, and the reasons for, the increase in labour hire employment in Australia. Some pertinent statistics cited in the report are:

¹ Parliamentary Research Paper No. 9 2003-2004, 8 March 2004. “Labour Hire: Issues and Responses”, p.4.

² Australian Bureau of Statistics, 2003. Employment Services 2001-02. Cat no. 8558.0, 5 August 2003 cited in “The Economic Development Committee Inquiry into Labour Hire Employment in Victoria”, January 2004, p.8.

³ “The Growth of Labour Hire Employment in Australia”, Productivity Commission Staff Working Paper, February 2005.

- In 2002 the total number of labour hire employees was 270,000 which was equivalent to about 2.9 per cent of all employed persons;
- Between 1990 and 2002, in workplaces with more than 20 employees:
 - The number of labour hire workers⁴ grew from 33,000 in 1990 to 190,000 in 2002 which represents an increase of 15.7 per cent a year;
 - The proportion of labour hire workers among all employees increased from 0.8 per cent to 3.9 per cent over the period, representing a fivefold increase.

The report noted that there are various reasons for the rapid growth in labour hire. The Productivity Commission concluded that the following changes in the operating environment have led to an increased use of labour hire:

- The changed industrial relations context, including a decline in “closed shops”, a rise in enterprise bargaining and an increase in the employment of HR Managers;
- Rising competitive pressures, including trade liberalisation and globalisation.

The report cites a recent survey⁵ of Australian firms’ which found that the main reasons why companies use labour hire were:

- To source additional staff (30 per cent);

⁴ “Labour hire workers” refers to “employees and (self employed) contractors supplied by a labour hire agency to a client firm. Also referred to as temps, on-hired workers and agency workers.”

⁵ Brennan, Valos and Hindle cited in “The Growth of Labour Hire Employment in Australia” Productivity Commission Staff Working Paper, February 2005.

- To replace temporarily absent employees (17 per cent);
- To outsource the administrative burden of employment (11 per cent);
- To improve recruitment (11 per cent); and
- To overcome skill shortages (9 per cent).

In oral submissions to Victoria's Economic Development Committee, Ai Group gave the following evidence in relation to cost and efficiency motivations for employers using labour hire arrangements:

*"As the pressures of international and domestic competitiveness impact on business in Australia, companies look for more time and cost effective solutions. There are a number of things that labour hire companies are able to offer in terms of solutions. Firstly, they can offer better response times as they have access to a larger range of people. Secondly they have the technological support and infrastructure which facilitates easier identification of people who have the requisite skills and experience. Thirdly, they have specialist staff who have more highly developed interview skills and better and more developed selection procedures and practices. Fourthly, they have knowledge of the local market and where to look for people who have the requisite skills and what you need to pay them in terms of market rates to be able to attract them."*⁶

⁶ Mr David Hargraves, Australian Industry Group, cited in Interim Report, "Inquiry into Labour Hire Employment in Victoria", Economic Development Committee's, December 2004, p.15.

Industrial Regulation

The vast majority of labour hire companies are reputable in their employment practices and they comply with relevant laws and regulations.

The labour hire industry is facing claims from some parts of the community that there should be a greater degree of regulation. This claim is often based on a misunderstanding of the regulatory arrangements which are already in place.

Awards

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.

Enterprise Agreements

Enterprise agreements under Federal and State legislation are common 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. In fact, given the large number of enterprise agreements which exist in the labour hire industry and the fact that virtually all of the large labour hire companies have enterprise agreements, it is likely that a higher proportion of employees in the labour hire industry are covered by an enterprise agreement.

The NSW Secure Employment Test Case

The NSW Labor Council has made a test case application to the Industrial Relations Commission of NSW to vary State awards to include clauses relating to 'secure employment'. Specifically, the unions' application contains the following elements:

- *Contracting Out*
 - A prohibition on contracting out work if the conditions of employment of the other company are inferior to those of the original company or if the purpose of the contracting out is to reduce union influence;
 - A requirement to consult with unions if contracting out is being considered and a prohibition on contracting out until the consultation process has been exhausted.

- *Labour Hire*
 - A prohibition on the use of labour hire, except for work that is temporary and cannot reasonably be done by employees of the company;
 - A requirement for companies to offer permanent employment to employees of labour hire companies which have been working within their business for six months;
 - Labour hire employees would be entitled to be paid no less than the terms and conditions being paid to employees in the company in which they are engaged;

- Companies would have increased OHS and rehabilitation obligations towards labour hire employees engaged within their business.
- *Casuals*
 - Casuals who have worked for six months with one employer would have the right to elect to convert to permanent employment.

The unions "secure employment" claim has far reaching implications and is being vigorously opposed by Ai Group. It potentially affects all NSW employers with employees under State awards and if it succeeds it would severely impede the ability of companies to manage their businesses. Hearings in the case are continuing.

Occupational Health & Safety

Whilst the law is complex in relation to OH&S as it applies to the labour hire industry, a series of recent cases have clarified the legal responsibilities of labour hire companies and host firms. These cases demonstrate that labour hire companies and host firms have a joint responsibility under OH&S legislation to ensure the safety and health of labour hire workers.

The recent cases have had a significant impact on the labour hire industry. Substantial education programs have been initiated by Ai Group and other organisations. If the law was not understood by some companies, we are confident in saying that this is generally no longer the case.

Views of Labour Hire Employees

In a survey by RMIT University of Melbourne entitled, *“On-hired Workers in Australia: Motivations and Outcomes”* (sponsored by the RCSA) which was tendered as evidence in the Secure Employment Test Case, the views of on-hired workers were canvassed. It was found that on-hired employees are generally treated similarly to the employees of the client companies and are generally paid award rates or higher. The labour hire workers involved in the study believed that they derived benefits from non-permanent employment such as work diversity and balanced lifestyles and did not believe they were significantly more likely to be injured than direct/permanent employees.

In 2001, Ai Group commissioned ANOP Research Services to conduct research into the changing nature of employment in five industries – one of which was labour hire. As part of the research, focus groups of labour hire employees and employers were conducted. Some of the many benefits of working in the labour hire industry are cited in this exact from ANOP’s report:

- *“Working as a labour hire employee means you can be exposed to a variety of companies, tasks, environments and people. And this variety is often viewed as a key benefit of working in the industry.*

“There’s a good variety of work, especially in my game. Up in Newcastle it was good ’cause they’d send you to all these great jobs and you’d run into the same guys you worked with six months ago.” (employee)

"The benefit was the variety of work and the skills that you obtained or gained from one place to another doing different work. I used to love it." (employer)

"You've got the flexibility of going different places and meeting different people." (employee)

- *As labour hire employees are a mostly casual workforce, they get an hourly pay loading. Many also say they are offered the overtime that is often denied to full-time workers. For some, this means the money makes it more attractive to remain a "temp", rather than moving into fulltime employment.*

"They offered me a full-time job as an employee of Foxtel in the call centres with the customers, but why should I take a drop in pay? I make more money temping." (employee)

"When I started working, I was in a situation where I preferred money over holidays. You find yourself in that situation where money is more important than taking time off. If you are a fulltime employee, they make you take your holidays. If you work through Easter and Christmas, at the end of the year you end up with a lot more." (employee)

"25% pay loading, casual loading. Yeah, casual loading's good." (employee)

- *Working in the labour hire industry also means you can "try out" employment situations. There is the opportunity to experience different industries, and companies, while not feeling committed to having to stay if it doesn't work out. The*

labour hire industry also allows employees to build up experience on their CVs, which can help them if and when they try to find full-time employment.

"If you don't fit somewhere, it's not like being in a permanent job, where you get in there and feel terrible. You just put your hand up and say "Hey, I don't like this situation, it doesn't suit me", or " I'm having a personality conflict with the boss or something" – and they'll move you without having a horrible big black mark jammed against your name." (employee)

"You're not trapped in a career ... You can give it a time period where it's manageable, and you can say to yourself 'well in 6 months time, I won't be doing this, so I can deal with how boring it is'." (employee)

- *Being in the position of a casual worker with no real obligation to the company you are working within, often means reduced responsibility. Some labour hire employees say they like the fact they can leave at the end of their shift, and not worry about it, or 'take their work home'. There are no obligations to stay back, or to "corporately socialise". Some employees report that attitudes among the 'temps' are often much more positive than among the 'permanents' – in part due to feelings of less responsibility.*

"One of the advantages of temping I find is that with the perms - there's a lot of pressure to socialise after hours and to go to functions etc. But a temp you can say see you later." (employee)

"There's not a lot of responsibility put on you. You can have the benefit of saying that I can do this to a certain extent, but I can get up and leave if I don't like it." (employee)

- *Some labour hire employees state that the flexible hours are a benefit of working in the sector – that as casual employees, they have the ability to choose to take days or weeks off when required. Also, often being the first to be offered overtime, means working hours can be increased when required.*

"We put our hand up for all the overtime that's there. It's flexible but we were doing 60 hours a week." (employee)

3.0 Independent Contractors

Defining an “Independent Contractor”

In its 2001 Report *“Self-Employed Contractors in Australia: Incidence and Characteristics”*, the Productivity Commission defined an independent contractor as a *“person employed on a commercial contract and with work arrangements inconsistent with them being an employee.”* In contrast, a dependent contractor was defined as a *“person employed on a commercial contract but with work arrangements consistent with them being an employee.”*

The Productivity Commission found that there has been significant growth in independent contracting arrangements in Australia over the past 20 years.

Heuvel and Wooden describe an “independent contractor” in the following way:

“At the simplest level, an independent contractor can be defined as a person who operates his or her own trade, and is engaged by a firm or organization for some predetermined “all-inclusive” fee to provide a defined service for a specified period.”⁷

An “independent contractor” is an individual who performs work under a contract *for* service, rather than under a contract *of* service. That is, an independent contractor is not an employee, but an individual providing services pursuant to a commercial rather than employment relationship. This distinction is not always clear-cut and can be subject to judicial scrutiny.

⁷ Vanen Heuvel and Wooden, 1995, ‘Self employed contractors in Australia: how many and who are they?’, 37 JIR 263-80

Tests Used by the Courts to Determine Whether Individuals are Independent Contractors

The distinction between a contract *for* service and a contract *of* service is not always straightforward. The Courts have produced a number of tests over time to correctly classify individuals as contractors or employees. The most significant of these tests are set out below:

1. ***The Control Test***

In applying this test, the level of the employer's control over a worker is measured to determine whether the worker is an employee or contractor.

2. ***Multiple Indicia Test***

The High Court decision of *Stevens v Brodribb Sawmilling (1986) 160CLR 16* provided a list of factors (or an indicia test) to assist the determination of whether or not a worker is a contractor. The Court said that a 'weighing process' is required. The factors included:

- Control;
- Mode of remuneration;
- Provision of maintenance of equipment;
- Hours of work;

- Intention of the parties;
- Terms of contractual engagement;
- Provision of holidays;
- Use of tax invoices;
- Ability to delegate work;
- Creation of goodwill/saleable assets;
- Exclusive service;
- Nature of work;
- Expenses;
- Termination

3. Allocation of Risk Test and Opportunity for Profit Test

This test involves assessing where the assumption of risk and opportunity for profit lie.

4. Integration or Organisation Test

This test involves determining whether or not the worker is “part and parcel” of the organisation.

5. Economic Dependence Test

This test involves an assessment of the practical realities of the relationship, rather than an analysis of the contractual terms. The test goes beyond the contract itself and is based on what actually occurs in the relationship. If in reality a worker is “in business on their own account” then it is likely that no employment relationship exists.

Recent Cases

The High Court’s decision in *Hollis v Vabu (2001) 207 CLR 21* is relevant when assessing whether an independent contractor relationship exists. This case involved a bicycle courier. The High Court considered whether the courier was an employee or contractor. The Court gave weight to the following factors in concluding that the courier was in fact an employee. The Courier:

- Did not supply skilled labour;
- Had little control over the manner of performance of their work;
- Was required to be at work at a certain time and to work in accordance with a roster;
- Was presented to the public as a representative of the company;
- Was required to wear a uniform bearing the company’s logo;
- Was subject to dress and appearance requirements imposed by the company; and
- There was no scope to bargain with the company with respect to the rate of remuneration.

The above factors lead the Court to conclude that the courier was an employee despite the existence of a written contract headed “contract for service”. The case of *Hollis v Vabu* demonstrates that irrespective of the contractual intentions of the parties, a relationship of “independent contractor” must meet the tests set down by the Courts.

More recently, the decision in *Personnel Contracting Pty Ltd t/a Tricord Personnel v CFMEU [2004] WASCA 312* handed down by the Western Australian Supreme Court of Appeal emphasised that in analysing the purported contractual relationship, it is necessary to look at the “totality of its incidence” rather than focusing on one particular test to the exclusion of another.

Statutory Tests and Deeming Provisions

Despite the fact that an individual may, under common law, legitimately be an independent contractor, Federal and State Governments have enacted legislation which deems certain independent contractors to be employees for particular purposes.

Deeming provisions exist under the following legislation, amongst others:

- *Industrial Relations Act 1996 (NSW)* - See s.5(3) and Schedule 1. “Deemed employees” include milk vendors, cleaners, carpenters, joiners, bricklayers, painters, bread vendors, outworkers in the clothing trades, timber cutters and suppliers, plumbers, drainers, plasterers, blinds fitters, Council swimming centre managers, ready-mixed concrete drivers and RTA lorry drivers.

- *Industrial Relations (General) Regulations 2001* – See 41 and 42. “Deemed employees” include security industry workers.
- *Long Service Leave Act 1955* (NSW) - See s.3. Persons “deemed” to be employees under the *Industrial Relations Act 1996* (NSW) are deemed to be an employee under this Act;
- *Workplace Injury Management and Workers’ Compensation Act 1998* (NSW) - See s.5 and Schedule 1. “Deemed employees” include taxi drivers, share farmers, domestic servants, fencers, out-workers, jockeys, harness racing drivers and sales persons;
- *Accident Compensation Act 1985* (Vic) - See ss.6, 7 and 11. “Deemed employees” include timber contractors, drivers of passenger vehicles and certain contractors;
- *Industrial Relations Act 1999* (QLD) - See s 5. A person who “wholly or partly owns a vehicle used to transport goods or passengers” is deemed to be an employee;
- *Superannuation Guarantee (Administration) Act 1992* (Cth) – See s.12(3) of the Act which provides that if a person works under a contract that is wholly or principally for the labour of the person, the person is an employee of the other party to the contract.

Whilst it can be argued that some statutory provisions concerning “independent contractors” are appropriate, in Ai Group’s view the “deeming provisions” which currently exist in New South Wales represent an unreasonable intrusion upon the freedom of parties to enter into contractual arrangements. Also, unions are consistently lobbying State Governments and political parties at the Federal level to support legislative amendments to extend “deeming” arrangements.

4.0 Proposed Reforms

In a recent submission to the Federal Government on workplace relations reform, entitled *Making the Australian Economy Work Better – Workplace Relations*, Ai Group outlined a number of proposed legislative amendments aimed at ensuring that companies retain their ability to manage labour in a flexible and productive manner. The proposals included the following:

- Provisions relating to different forms of employment should be removed from awards (except casual loadings and relevant exemptions, eg. from redundancy pay and notice of termination) allowing flexibility for these issues to be determined at the enterprise level;
- The Australian Industrial Relations Commission (AIRC) should not have the power to issue orders or make or vary awards which restrict the engagement of different forms of employment, or of contractors or labour hire.
- Enterprise agreement provisions which prohibit the engagement of contractors or labour hire or impose unreasonable restrictions on such engagements (eg. a requirement that the contractor pay “site rates”, or that the contractor have an enterprise agreement with the relevant union, or that the company provide a list of all contractors being used to the union) should be “objectionable provisions” under the *Workplace Relations Act* and unable to be contained within enterprise agreements.

Under s.298Z(5) of the *Workplace Relations Act*, the following provisions in certified agreements are currently defined as "objectionable provisions":

- Provisions which require or permit conduct that contravenes the freedom of association provisions of the Act; and
- Provisions that require payment of a bargaining services fee.

Objectionable provisions are deemed by the Act to be void and certain parties (eg. the Employment Advocate) can apply to the AIRC to have these provisions removed from certified agreements.

In addition to the above proposed Federal legislative reforms, if State Governments are not willing to implement similar legislative reforms the Federal Government should give consideration to using relevant Constitutional Powers to prevent State awards and the provisions of State legislation imposing unreasonable constraints on labour flexibility and unnecessary restrictions on labour hire and independent contracting arrangements.

The Federal Government has announced its intention to introduce an *Independent Contractors Act* to:

“...prevent unions from seeking orders from the Australian Industrial Relations Commission which would impose limits, constraints or barriers on the freedom to contract, the freedom to operate as a genuine independent contractor, or the freedom to engage work through labour hire arrangements.”⁸

Ai Group strongly supports this aim of the *Independent Contractors Act* but is of the view that broader legislative reforms are necessary to prevent unreasonable and unnecessary constraints being placed on labour hire and independent contractor arrangements, as set out above.

⁸ “Protecting and Supporting Independent Contractors”, Liberal Party election policy document, September 2004