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ECONOMIC DEVELOPMENT COMMITTEE

Inquiry into Labour Hire Employment in Victoria

Melbourne — 11 October 2004

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Ms Z. Bytheway, Executive Director; and

Ms L. Dickinson, Senior Solicitor; Job Watch.

The CHAIR — The committee welcomes Zana Bytheway and Louisa Dickinson from Job Watch. Zana is executive director and Louisa is a senior solicitor. Welcome to the Economic Development Committee's public hearings into labour hire employment in Victoria this afternoon. You have seen the terms of reference and you understand what the committee is doing. We will prepare a report by the end of the year. You were kind enough to make a fairly detailed submission earlier this year. We thank you for that and your attendance today. Because it is a formal hearing it is being recorded by Hansard so your comments will be recorded and transcribed. We will send you a copy of those in about a week or a week and a half. You will be able to make some corrections and send them back to us. That forms part of our public evidence. Anything you say in the course of your submission today is covered by parliamentary privilege. Any documents you want to make available to us will at the committee's discretion be considered for incorporation as submissions to the inquiry and therefore made public. If that is a problem for you just let us know before you make that submission. What we normally do here in the time available — and we have you down until 3 o'clock — is that we allow our witnesses to make presentations for 10 minutes or so and then we just go backwards and forwards with questions and answers. It is now over to you.

Ms BYTHEWAY — Firstly, Job Watch welcomes this much anticipated inquiry. We thank you for the opportunity to make our contribution. We will probably not go for the full hour, but that is dependent upon your questions because our submissions were made and they are fairly straightforward from our perspective. Given that we have made recommendations, I would like to start with giving you an insight into the work of Job Watch because that will ultimately give you a better understanding of what our interest is in this particular inquiry.

Job Watch is a specialist community legal centre which provides information and assistance to Victorian workers about their rights at work. One of our core functions which has enabled us to come and provide the submission is the provision of our free and confidential telephone information service. That basically means that our telephone advice staff take about 20 000 calls per annum from Victorian workers about their workplace issues. Of the calls received from July 1999 to June 2003, 600 were related to labour hire inquiries. Basically they were pure labour hire inquiries. Of those labour hire employees who called our service, most of them called about unfair and unlawful dismissal and that constituted about 27 per cent of the calls.

Because of the calls to Job Watch and our ability to record the data, it means basically that Job Watch is in a unique position to comment on the experiences of labour hire employees. We are not suggesting for a moment that 600 callers is an exhaustive analysis of what is happening, but it is certainly a good indication of some of the problems raised.

Job Watch is motivated by what we see as a need to curb the worst features of the labour–hire industry as conveyed to us by our callers. We do accept that there is a place for labour hire and we welcome it when it is done well. But as I said, the worst aspects come to us because they are usually in the form of complaints. With regard to our submission, as I indicated earlier, it is relatively short and straightforward. There is nothing technical or mind boggling about it, and it is basically about workplace justice and equity. Our point is simply this: from our experience labour hire employees do not enjoy the same rights as permanent employees and on that basis we feel that that is unjust and inequitable. Because we have obviously raised some issues with you and have gone the extra step of putting in recommendations — and with the benefit of hindsight, I wonder whether that was such a good thing, because it is not an easy matter to remedy — I will start with recommendation 1, which has two components, and as I said, I will summarise those briefly.

The first part of recommendation 1 is about ensuring that labour hire employees receive terms and conditions of employment that are equal to that of federal awards. With the passing of the Workplace Relations Amendment — (the Improved Protection for Victorian Workers after 2003 — and the operation of awards declared common rule, which will be operative after 1 January 2005, it is anticipated that much of this recommendation shall be addressed. The second part is a bit more compelling in that we want employees to be able to access unfair dismissal laws and we want them to be afforded procedural fairness if terminated after completing an assignment which exceeds three months. Predominantly we seek to elevate the status of labour hire employees to that of permanent employees because generally the calls that we receive reflect that they are in fact permanent employees disguised as labour hire employees.

Recommendation 2 is fairly straightforward. It concerns the amendment of section 54 of the Occupational Health and Safety Act. Basically we are asking that discrimination of labour–hire employees who make a complaint about occupational health and safety matters be prohibited, meaning that they be able to do that free of any repercussions.

Recommendation 3 deals with unfair contracts and the need to set up an unfair contracts jurisdiction which would enable a tribunal to review the contracts and make determinations about their fairness. There is some provision in the Fair Trading Act and the Workplace Relations Act, but we would like better protection than that.

Recommendation 4 seeks a broader definition of employee to include labour hire workers and independent contractors. Of course, this is not a new concept, and is one we have been pushing for quite a while in respect of independent contractors.

Recommendations 5 to 10 inclusive deal with what I shall broadly refer to as apprentices, because the language is a bit different now. I know that issues concerning apprentices are not strictly within the specific terms of reference of the committee, but we believe that it is relevant that we raise the issue of apprenticeships because when apprentices are hired by group training companies and assigned to host employers for training we believe that the employment structure is not dissimilar to that of labour hire workers. In particular our interest with apprentices is that they are young, inexperienced and of course they need the added protection as we have seen in the past, from bullying and work place violence. It is for this reason that we have included this aspect in the submission, which I do accept is probably outside the terms of reference.

Recommendation 11 is ambitious to say the least, but the idea of a one-stop specialist shop dealing with the complex issues of labour hire is appealing. To bring the concept to a more pragmatic level we could perhaps say that the centre would exist primarily to deal only with the first steps of the dispute resolution process, which include conciliation and mediation, given that arbitration and those more extensive aspects of dispute resolution are well and truly covered.

Keeping it brief, as I said, I would like to conclude by saying that it is the Job Watch case studies, some of which we have provided to you, highlighting the experiences of the everyday Victorian worker which best illustrate the inequity of the labour hire arrangements as they exist today. In particular, there is a reference to the case of O'Neil on page 25, which highlights some of those difficulties. As I said, I wanted to give you a brief outline, and I have done so. We welcome any questions.

The CHAIR — Terrific. Thank you very much for that, Zana. I want to start off by asking, has Job Watch done any work looking at the 600 calls from labour hire employees over the past four years? Is there any longitudinal work or some equivalent that looks at what happens with people in a labour hire-type situation if they are dismissed? What happens to their career prospects after that?

Ms BYTHEWAY — The simple answer is no. In respect of the 20 000 calls we receive per annum, we would like to know what happens to each of the callers that we get. So many of the calls relate to dismissal and we would more than welcome the opportunity to find out what happens to them after they have spoken to us and we have given them information and referral. However, resources and the scope of our work do not permit that. We will, and we anticipate embarking upon such an exercise in the near future when perhaps our funding is better consolidated in a two or three-year funding agreement.

The CHAIR — Just on the statistics, Job Watch receives 20 000 calls per annum. If I break those stats down, 2000 a year would be from labour hire employees. That would be 1 per cent of the annual calls. That seems rather light if we accept earlier evidence that labour hire employees make up I think somewhere between 4 and 10 per cent of the work force. Is there any reason that that would crop up as a less than average statistic?

Ms BYTHEWAY — Yes, I accept that. Probably one of the responses I would have to that is that in the whole scheme of things, while Job Watch does a fantastic job, I would have to say that in terms of the 20 000 callers that we reach, we would only get to less than half of them. In terms of analysis of our data base we had calls of about 56 000 to Job Watch. We just cannot reach all of them. We believe that there are so many workers out there not being able to reach us. Given the precarious nature of their employment and where they are and the casualisation of it, they are not going to ring up and complain, or inquire about it. They often seem to put up with things, in particular I suppose when it comes to young workers and apprentices. That has been our experience; people are loath to come forth and inquire or make complaints about these issues.

Ms DICKINSON — I might just add to that, to note that some of the people who contact us are not actually aware that they are labour hire employees because they have no ongoing relationship with the labour hire company. A payslip comes through with a name on it of a proprietary limited entity, but they understand themselves to be employed by a host employer and often are quite shocked when they realise they have been

terminated and they have no recourse against the host employer. In their mind, to all intents and purposes, even based on the control test and everything else, the host employer is their actual employer in their mind.

The CHAIR — Okay.

Ms BYTHEWAY — That's the case, and just to add to it, the terminology used is often the complicating aspect of it. You would know that just in terms of the terminology of labour hire and all of those it is very difficult for people to gauge that. Some of our callers that ring do not know the fundamental aspects of their employment that are less complicated than labour hire, such as which award they are under or is there a certified agreement. We are dealing with callers with very finite knowledge of their working arrangements.

The CHAIR — Sure. I want to ask one more question before we go around the table. With your recommendation 1, that the Victorian government legislate to ensure labour hire agencies in Victoria are responsible for workers' wages, leave entitlements and other terms and conditions of employment, then you have gone on to talk about it being commensurate with federal awards and say you note the rise of common rule and hope that that side of it will be dealt with. But I would have thought that already at law in Victoria, labour hire agencies were responsible for workers' wages, leave entitlements and other terms and conditions of employment, whether they were on state awards. So they are already?

Ms BYTHEWAY — Yes.

The CHAIR — You have framed that around the need to really get common rule up and get the federal level — —

Ms BYTHEWAY — Yes. In fact in looking at that, I broke it into the two tiers that you suggested. We are basically saying, 'Yes we understand that they are responsible but we want the same equal arrangements that we hope common rule will address'.

The CHAIR — All right. I understand.

Ms MORAND — What is your view on the concept of a licensing regime? What do you think it should consist of?

Ms BYTHEWAY — That is a very difficult question in terms of our limited knowledge in relation to the licensing regime. Are you specifically referring to the more progressive labour hire arrangements where they have a particular set-up with their — —

Ms MORAND — Some of the submissions have suggested that all labour hire firms should be registered in some way, with the issue of a licence to make sure they provide minimum standards in occupational health and safety and things like that.

Ms BYTHEWAY — Yes. It is an absolutely essential requirement that they be registered. That would of course help in terms of the regulation and we would applaud such an initiative.

Mr PULLEN — Who finances Job Watch?

Ms BYTHEWAY — Effectively we are predominantly funded by the Victorian state government and we receive some funding from the Office of the Employment Advocate, which is a federal body.

The CHAIR — What is the breakdown in terms of dollars per year? Roughly.

Ms BYTHEWAY — It is $902,000 from the state government and $105,000 from the Office of the Employment Advocate.

Mr PULLEN — My concern with casuals is the problem which they have in obtaining home loans. Do you have many complaints on your service in relation to that, or not?

Ms DICKINSON — Not home loans per se, but often people find it difficult because they would like to have some mechanism for requiring their employer to provide information as to the status of their employment or a commitment to ongoing employment, and there seems to be a reluctance in some circumstances, whether it is a

labour hirer or a host employer, to make that commitment that it will be ongoing employment. That often seems to be in response to a fear that after 12 months that would bring them within the unfair dismissal jurisdiction, if they have been given a basis for expecting regular and ongoing employment. So yes, some people do, and are frustrated that they cannot get documentation to support them in that way.

Ms BYTHEWAY — But even if the calls do not particularly address that, there is always that underlying aspect and we do have specific calls relating to that issue. We do, like you, have very serious concerns about the nature of casual employment being prohibitive in that way, because there is no security and they have nothing to rely upon.

Mr PULLEN — I might have the exact recommendation wrong, so please help me on this. I think it was part 2 of recommendation 1, where after three months the same rights or ability to have the benefits of a permanent employee was your suggestion?

Ms BYTHEWAY —Overall we were saying we would like labour hire workers to obviously have access to unfair dismissal laws as that provided to long term casuals. That is once they are beyond the 12 months continuous and systematic service that they can enjoy those rights. The other aspect, which is probably missing at the moment, is just some straight procedural fairness which seems to be denied to labour hire workers in respect of just basically having nobody put to them or say to them, You are no longer required because of X, Y and Z. What do you say to that? To simply be removed without any opportunity of natural justice, is an area of concern. So it is a two-pronged thing. Number 1 is better access to unfair dismissal legislation and that in itself brings problems about definitions of termination and who in fact is the employer.

Mr PULLEN — That would be the three-months time frame in the employees' relationship with the labour hire company, not a host employer? Can you clear that up for me? I am not sure whether you mean on the books of the labour hire company for three months, or actually at a host employer's premises for three months. I would just like clarification of that.

Ms DICKINSON — I think what is intended is if it is on a specific assignment with the host employer. We did not actually write this submission ourselves, so we are assuming that what was meant was situations where people more appropriately would be characterised as permanent employees, as there is certainly recognition by the Australian Industrial Relations Commission that there are circumstances where people are called casuals, when in fact their employment has all the hallmarks of permanent employment. Just really to say, after three months, if they really are permanent employees, they are named casuals to avoid unfair dismissal. If they are really permanent employees who were replacing an outsourced function for example, they would have the same rights as they would have if they were actual employees of the company in those circumstances.

Mr PULLEN — So that is related to the host companies and not the labour hire company?

Mr ATKINSON — You, Zana, are the director of Job Watch?

Ms BYTHEWAY — Yes, that is right.

Mr ATKINSON — And you, Louisa, are the solicitor for Job Watch?

Ms DICKINSON — Yes, that is right.

Mr ATKINSON — I understood you to say that you did not actually write this submission.

Ms DICKINSON — Some other staff members at our workplace actually authored it. Sorry, what I meant by that, in terms of the phrasing, that is what we understand was the intention of the submission.

Mr ATKINSON — Has it been discussed by a sort of board at Job Watch?

Ms BYTHEWAY — No. Effectively, what we are trying to say in terms of the actual specific language is that while we had discussions about the general nature of labour hire and how we would address it and the issues that were of concern, when couching those particular concerns the language was not specifically ours but certainly the intent and purpose of what we want to address is exactly the same.

The CHAIR — I have a couple more questions. Firstly, the relationship between the Office of Workplace Relations and an agency like Job Watch — Victoria is unusual in that since the mid-1990s there has not been any state government department that fills that sort of labour and industry role for investigating complaints by people on state awards typically. One of the concerns I have had as a local member having dealt with the Office of Workplace Relations three or four years ago on an employment matter was that they seemed to be very unresponsive. Their powers were quite limited and things took a very long time to be responded to. I gather you fill that role of what the Department of Labour and Industry used to do in Victoria. How do you work with the Office of Workplace Relations? What is the relationship like?

Ms BYTHEWAY — It is a very healthy relationship, and it is very supportive of the role of Job Watch because I suppose there is a duplication in terms of what we do already — that is, to deal with issues arising out of the Workplace Relations Act. They obviously want to know about that, so we are reporting on issues such as that, and reporting to them on matters of Australian Workplace Agreements as well. So they have certainly been very supportive of our role. They certainly have not in any way inhibited any of the research that we have undertaken and submissions that we have put forth. It has been a very fruitful association — in particular, as I say, because of our dealing with issues surrounding the Workplace Relations Act and then reporting to them. It is a win-win for both of us.

The CHAIR — In the circumstances where someone would be working in a schedule 1A situation and there is a problem with their entitlements, does the office of workplace relations have sufficient power under its act now to thoroughly investigate? I ask that because three or four years ago when that issue was raised and we were pursuing someone for unpaid moneys, they actually wrote back to us and said 'We are sorry, we cannot take it any further because our own act does not allow us to'.

Ms DICKINSON — That has largely been rectified by the amendments commencing 1 January this year, which was when some additional protection for Schedule 1A workers was introduced. That was when the Workplace Relations (Improved Protection for Victorian Workers) Act came into effect, which effectively gave the commonwealth government the power to prosecute breaches of Schedule 1A for the first time. This somehow had been lost in the referral of powers at the end of 1996. That has been largely rectified.

The CHAIR — For eight years it was lost?

Ms DICKINSON — That is right, from the commencement of the Workplace Relations Act at the start of 1997.

The CHAIR — You do not have to comment, but it seems it has taken a long time to realise it was lost, something as significant as that.

Ms DICKINSON — I think it was realised when Peter Reith tried to introduce amendments to the Workplace Relations Act in 1999 with the so-called 'second wave'. Within that package of reform were measures that included an improvement in those rights. But because these aspects could not be severed, some of the good things were thrown out with the overall rejection of the total package of reforms. It certainly has been apparent for a long time, but luckily now it has been rectified. I might say that in recent years in our legal practice we have undertaken a number of Magistrates Court wage-recovery proceedings on behalf of Victorian workers who were referred from the commonwealth department when they had effectively reached the end of their powers and the end of the process. We have been taking action in the Magistrates Court for those employees at no cost, so we have been able to fill that role in some circumstances.

The CHAIR — In your recommendations you have not actually — maybe you have missed the opportunity here — asked that Job Watch's funding be boosted to allow you to play more of a watchdog role; did that inadvertently get left off my submission?

Ms BYTHEWAY — We just did not consider that was appropriate in this context. I think our focus was more on what was happening with labour hire rather than with our own funding. We hope that we will continue to have that discussion with the state government, and hope it does increase our funding especially with the application of common rule that will take effect next year and which will see us inundated with calls. I suppose, too, that the election results on Saturday will see some serious discussion or perhaps serious repercussions in respect of the industrial relations legislation that will ultimately go through next year.

The CHAIR — Were you factoring in — prior to the federal election result — with common rule an increase in your workload.

Ms BYTHEWAY — Yes, we have. Late last year — and we have been negotiating with the government — we put in a submission to the government to say, 'We need to address what we perceive as a greater number of phone calls coming in to Job Watch in respect of the application of common rule because people will ultimately be confused. They will not necessarily go to their union or Wageline, but will come to us, which has been our experience in the past, so we expect an influx in calls.

The CHAIR — Just to clarify in my own mind, the office of workplace relations has its own inquiry line and all of that where common rule flows from changes which have been made in state and federal level — the federal government has agreed to it — and you are going to pick up the tab for what is essentially people moving into federal awards. This seems to be a little anomalous. How does that work?

Ms BYTHEWAY — It is the case even now that when it comes to the straightforward aspects of contacting the federal body, Wageline, people do, and they make their inquiries in respect of which awards, or what they can do regarding recovery. But our service is different to that of Wageline and often the caller needs more information. We speak to the caller, ascertain the issues that have surfaced in the call, such as possibly discrimination, the possibility of constructive dismissal, and therefore we explore things in a different way. It is not a 2 or 3 minute call whereby they address the issues, and they go. Often if they have made that call, to Wageline firstly, they may not be totally satisfied in respect of what they need to know, and secondly, Wageline refers them to us anyway.

The CHAIR — Your recommendation no. 2 says:

> That section 54 of the Occupational Health and Safety Act be amended to ensure that discrimination or less favourable treatment of labour hire employees is also prohibited.

Does that provision or its equivalent exist in other states?

Ms BYTHEWAY — I am not sure about that in terms of it existing anywhere else, but it just seemed to be a very opportune time to be able to say, 'Look, because the Occupational Health and Safety Act at the moment prohibits discrimination against employees and the definition of employees under this act is a very confined one excluding labour hire employees, it should be amended, I cannot comment on what the situation is in terms of other states. I would believe though that the definition would be fairly confined as well.

Ms DICKINSON — . In section 21 of that same piece of legislation in the definition of "employee" for the purpose of that section which talks about the duties of employers essentially to provide a safe system of work and safe workplace, they specifically in subsection (3) of that section, the Act provides for an "employee" to be someone not directly engaged by the employer, but be engaged by a contractor. So it is funny in section 21 there is that express intention to include labour hire or other peoples engaged by an independent contractor in the definition of 'employee'. It just seems to be — whether it is an omission or something else behind it — for the sake of completeness it would be a better protection against, say, victimisation. We have certainly had calls from employees engaged by labour hire companies who have raised their own health and safety concerns (whether there is an effect on their own health or a system of work) and have subsequently had their employment terminated for that very reason. We currently have a complaint that has been lodged with the Human Rights and Equal Opportunity Commission. It was on behalf of an older worker in the transport industry who had developed a form of asthma whilst based with the host employer, and when he complained about that his employment was terminated.

The CHAIR — I understand that problem and that has been reported to us at a number of points in this inquiry, and it is a problem for two reasons: one, because workers ought to be allowed to comment on OHS and ought not be penalised because they have spoken up about a safety issue; and two, when they get the chop the safety problem continues — it is still not addressed. So I understand that. I want to just see if that has worked anywhere else. Kirsten, we might just follow that up with the other jurisdictions to see if we can track it down.

The other point that I wanted to raise with your third recommendation which says:

> That the Victorian government legislate to include specific jurisdiction in relation to unfair contracts based on the NSW model and framework contained in the Industrial Relations Act of New South Wales.

Would that New South Wales provision more directly apply to people on New South Wales state awards? Is there a distinction here between being employed under a federal award where I, for example, already have some rights under the commonwealth act if something is unfair?

Ms DICKINSON — I was just considering that this morning, and primarily it seems to me — and I have not been able to find any source for this — that that residual power held by the states is not subject to the referral to the commonwealth. Just going through the various provisions of the Commonwealth Powers (Industrial Relations) Act, there are very specific powers that were referred, including most recently the common law power. But the power to declare contractors to be employees, on my analysis of it, is a residual power resting with the state. In terms of the declaration of conditions or the capacity to vary a contract or amend it or order specific performance or payment, there is, as Zana briefly mentioned in her introduction, under the Victorian Fair Trading Act, provision under section 107 or section 108 for independent contractors to go to VCAT, but that jurisdiction cuts off at $10 000. It is not a power to declare someone to be an employee rather than a contractor; there is the power though to make various orders with regard to the terms of an independent contractor's contract.

The CHAIR — So there may be some circumstances involving labour hire employees who would have avenues of redress under the New South Wales legislation that they do not have here. Your point is that the Victorian Parliament still has the residual power to make that provision here.

Ms DICKINSON — Yes, and where it was thought appropriate, VCAT might be a mechanism.

The CHAIR — We might explore that a bit further — that is another one for Kirsten to make a note of. Can I ask you about hold harmless clauses? Do you have anything to say on those. Sometimes labour hire firms will be in a negotiation with clients, and the client will say, 'We will accept your services, but we want a hold harmless clause, so that if we suffer any loss later on you will indemnify us for that loss through OHS. Is that something you are familiar with?

Ms BYTHEWAY — Not in terms of the course of the work that we do, no.

Ms DICKINSON — In terms of that liability issue we just had a call this morning from a man who had damaged a van. He was a labour hire employee and he damaged a van he was driving for the host employer. The labour hire company paid him his wages as it is required to; the host employer then sought to indemnify itself against the costs from the labour hire organisation and he has now not being paid for later work that he has done.

The CHAIR — He is paying for the damage to the truck?

Ms DICKINSON — He is paying for the damage to the van. The labour hire company in the first instance was prepared to keep paying him his wages, but then the host employer sought to have a reimbursement for the cost, and the issue was, 'Where does he go from there, and what was his obligation?' Our advice was prima facie his obligation is to be paid his wages. If there is any issue of negligence, that is a matter of counterclaim by the employer, but unless there was some gross breach of duty on his behalf, it would appear that it is a matter between the labour hire company and the employer. It is not a matter for him.

The CHAIR — That is a good example. It would be a good example for us to get some more information on if you are able to provide it. You do not have to give us specific names, but I think that would be a nice one for us to look at.

One further question about recommendation 11 is where you have said that you introduce a dispute resolution centre for labour hire workers and apprentices. To the extent of what you have said in the preceding recommendations between recommendations 5 and 9 dealing with apprentices and bullying and those sort of things, do you think a dispute resolution centre would be something perhaps that the Victorian WorkCover Authority could run? Do you think that would be a good place for it to work from?

Ms BYTHEWAY — That has always been an interesting argument as to where it should belong, but it has always been our view that they would be very well placed to handle that. I do not know as to the logistics of how you would set that up, but certainly you could put that responsibility there, and it could be properly dealt with in that area.

The CHAIR — Because one of the questions is, as you would understand, the issue of registration and licensing. We have generally had people in the industry saying, 'Yes, they think a registration would be warranted', but, of course, the devil is in the detail here. A number of people have made the point that what is really required is for the current obligations which are imposed by a range of authorities be properly enforced. That might be a way of dealing with some of the problems that are raised rather than creating a whole new bureaucracy. It just seems to me that we need to be conscious that where initiatives like this are suggested we ought to be looking at the administrative framework and saying 'Where is the basis for them to exist rather than at all times insisting that it be an entirely new authority of some sort'. It might complicate things as much as it would simplify things.

Thank you both for your time. We may come back to you at some stage seeking some further clarification, but that will probably be via Kirsten or Russell through phone calls. If there is anything else you want clarified by us, feel free to give us a call.

Witnesses withdrew.