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ECONOMIC DEVELOPMENT COMMITTEE

Inquiry into Labour Hie Employment in Victoria

Melbourne — 7 March 2005

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Mr C. Fenwick, Director, Centre for Employment and Labour Relations Law, University of Melbourne; and

Professor H. Glasbeek, Professor Emeritus and Senior Scholar, Osgoode Hall Law School, York University, Toronto.

The CHAIR — We welcome Colin Fenwick, director of the Centre for Employment and Labour Relations Law at the University of Melbourne. He has brought with him an esteemed colleague, I am told — Professor Harry Glasbeek. Is that right, Harry?

Prof. GLASBEEK — Absolutely.

The CHAIR — And you are a professor of law as well who spends some time in Melbourne and some time in Canada?

Prof. GLASBEEK — I have been put out to pasture. I am retired. I am a professor emeritus at Osgoode and a visitor at Melbourne.

The CHAIR — You are very welcome here today.

Prof. GLASBEEK — Thank you.

The CHAIR — Colin and Harry, you would be aware that today we are holding a public hearing into labour hire employment in Victoria. This was a reference given to this committee about 18 months ago. We had delivered an interim report to the Parliament, which I think you would have seen, Colin — —

Mr FENWICK — Yes.

The CHAIR — And we are in the process of receiving comments on that and also exploring a handful of other issues that we said we would comment on in the final report. Ours is an all-party committee, and we are due to make our second report to the Parliament by 31 May. Because it is a public hearing proceedings are being recorded by Hansard, and a transcript will be produced which you will be welcome to correct in the next 10 days or 2 weeks. We invite you to do that and return it to us. The committee will then decide to make that transcript publicly available as evidence and advertise that on our web site. Proceedings at public hearings of committees like this are subject to parliamentary privilege, so anything you say today is protected, but, of course, that protection does not extend beyond the door. I need to make you aware of that — not that we necessarily expect you would be in need of the protection — but we do need to point that out.

Colin, we might start with you. We have been given some background of what you have done. We note that you have worked for the International Labour Organisation, which we will be visiting very shortly, and also you have worked as a senior associate editor of the *Australian Journal of Labour Law*. I think you came to prominence, if you were not prominent already, in the aftermath of the Troubleshooter decision. I have to confess that I do not think any of us on the committee have actually read that article, but we are assured that it is an excellent article. I think Kirsten may have read it. That is why we hired Kirsten — so she can read the articles. Would you like to give us a few minutes of introduction, Colin and Harry, and then we will fire questions at you?

Mr FENWICK — Absolutely! I thank the committee for giving us the opportunity and for sending us the report. I am a senior lecturer in the law school at the University of Melbourne, and I am the director of the Centre for Employment and Labour Relations Law, which is Australia's first and only dedicated research centre on labour law issues. It was formed in 1994 by Professor Richard Mitchell, who relinquished the role of director in August last year. It came to me, although Professor Mitchell remains with us. We are a bunch of lawyers in the law school at the University of Melbourne who are interested in labour law in a variety of ways, which means our research is directed in that area and our teaching is largely carried out in that area. We have expertise in Australian, international and comparative labour law. My own work has included time working at the Victorian Occupational Health and Safety Authority, as it then was in 1994 and 1995 as a prosecutor of health and safety offences. I have also carried out research on the application of the Dangerous Goods Act, which is allied legislation to the Occupational Health and Safety Act. Perhaps while not burningly relevant to labour hire — although very possibly it is, because there would be labour hire workers in all sorts of major hazards facilities, potentially — I think what is more relevant about that for present purposes is with the committee's evident focus on health and safety issues in the interim report adds to what I know about how the authority functions and how the legislative framework is implemented in practice, and I think that is one of the most important things.

I have received the report from Dr Solomon, and I have endeavoured to get my colleagues to focus on the issue and come along. I am happy to be joined by Professor Harry Glasbeek, who is emeritus professor of law at Osgoode Hall at York University in Toronto, but formerly of the law school at the University of Melbourne and a regular

extended visitor to the Centre for Employment and Labour Relations Law, and who has recently written on Victorian health and safety law, having published a working paper with us on the not-passed crimes, workplace deaths and serious injuries legislation. I have prepared some written comments. We received a copy of the report and an invitation from your executive officer to provide those by 18 February, which I conspicuously failed to do, having emailed them about 45 minutes ago. They are there for your edification. In them I have chosen to focus on health and safety because, whilst I have done a little bit of work on the general issue of labour hire employee, independent contractor — although I would hasten to say I have never come to prominence for that reason or any other — health and safety is an area about which I know something, because I continue to teach that in our graduate program and will be doing so in a month or two, and it is what you have focused largely on in the interim report. So most of my remarks in there, and most of what I would be most comfortable talking about today, are the health and safety implications of labour hire and independent contractor, although I have touched on a few broader issues as well. Did you want to say anything by way of introduction, Harry?

Prof. GLASBEEK — No.

Mr FENWICK — Would you like me to say a few things about what I said in the submission, and then field some questions? Is that how you would like to do it?

The CHAIR — Sure.

Mr FENWICK — One of the key issues, I think, is whether it is necessary to have legislative change to improve the occupational health and safety outcomes in the area. You have made some recommendations in your interim report, and, of course, at the same time Mr Maxwell has delivered his report and legislation has gone through the state Parliament, and that will come into effect in a couple of months. Whether there is political scope for more legislative change is not my expertise, but I suspect not. In any event, however, my basic view is that the answer to the problems in relation to health and safety outcomes in the industry to which you point is probably not more legislation, but different and better use of the legislative tools that are already available. There is one exception to that general proposition — and that is this: as you know, section 21(3) of the existing act and of the incoming act has the effect of extending the employer's general duty to employees of an independent contractor. So when Drake Personnel or Skilled Engineering or somebody like that sends an employee into your workplace, provided they are an employee of the labour hire company, they are also covered.

The omission is that situation to which you point in your report, where the labour hire worker is not an employee of the labour hire company. Now if they are in fact at common law an independent contractor to their labour hire company, then the deeming provision will not catch them. Now that does not mean that they are totally unprotected, because the general public safety provision in the legislation still applies. The provision that is now section 22, and will be section 23, also operates. In a sense that is the provision that is supposed to ensure that somebody who walks past the building site does not get a large piece of concrete dropped on their head, but it does not apply any less to persons who are present in your workplace at your invitation and for your purposes. So the independent contractor to the labour hire company who is present in your workplace is a person other than an employee to whom the employer owes a duty. It is not as though there is an absence of protection for these workers. I guess that is one of the themes of what I have to say in that submission and will today — that I really do think there is plenty of law in there. There seem to be some difficulties, from what you found, in implementing the duties. What you had to say in your interim report and what Mr Maxwell had to say in his report suggests that there is a certain amount of confusion about the implementation of the overlapping duties which are provided for in the Occupational Health and Safety Act, and that what is happening is that, instead of everybody piling on and doing as much as they can to improve health and safety, there is a bit of pointing in both directions and them saying, 'It is your responsibility', 'No, it is your responsibility', and people are falling between two stools.

Plainly enough, the legislative design has not changed; the Parliament has just made a new act re-enacting the basic concept. So we have to assume, I think, for present purposes that this layering of general duties will remain the regulatory framework. For myself, I do not think that is necessarily a problem. I think if everybody is focused on the full extent of their own responsibilities, it is unlikely that people will fall between two stools. That is why I have said in the submission that I think some of the things you have already suggested in your interim report are the sorts of things that would adequately address the situation.

The Victorian WorkCover Authority has a wide variety of regulatory tools at its disposal, and it uses the full spectrum of those tools all of the time. Whenever there is a health and safety problem, the answer is not necessarily

to go out prosecuting companies, and it does not. Frequently it issues guidance notes, frequently it promulgates codes of practice after consultation with the industry, frequently it engages in education campaigns, and from time to time it prosecutes where it is necessary. In your suggestion in the interim report for a registration system for labour hire companies you point to a number of those possibilities in support of your suggestion, although I have to say that I beg to differ about the usefulness of that. I will come back to that in a minute. But in general I think the things that are in the existing framework for health and safety are capable of being made operational to achieve better outcomes.

At one point in your report you refer to data provided from WorkCover on claims made under workers compensation legislation and the relatively poor outcomes, the amount of money that is being spent and the times that it is taking people to get back to work, and so on. That is precisely the sort of data that the WorkCover authority regularly uses in order to target its enforcement activity. I would expect that, if they have not already, then perhaps having Mr Maxwell inquire and then having you ask questions might spur their minds to thinking about how best to approach this particular area of activity in the future. I mean, where there is a problem, that is where they direct their enforcement activity. Building is traditionally seen to be a very hazardous area, so there is a lot of activity there; farming is another one; and there are others. They target particular hazards — falls from height and into depths is a traditional one, although it is a bit harder to find where that specific hazard arises, because it can arise in all sorts of places.

That is the basic view I have. I think some of the things that are coming in the new legislation might help to improve things. I think the concept of the multi-employer designated work group is one that offers some scope, because if the labour hire worker who is in your workplace is in fact an employee of Drake Personnel, or Skilled Engineering and so on, then what you have present are your employees and the employees of another employer — Drake or Skilled, and so on — so a designated work group can be formed which includes those labour hire employees, whereas under the existing provisions that would not be possible. The deeming provisions in the new consultation obligation, likewise, expand the scope of the employer to consult the employees of the independent contractor. But again, you run up against this limitation in that the labour hire worker who is an independent contractor to the labour hire agency will not be covered by these obligations.

There are a couple of specific matters which you raised in your interim report and which Dr Solomon asked us to think about. One of them is: what happens about reporting poor OHS performance? So if a labour hire company becomes aware that the client has bad OHS practices, what does it do? Does it say anything to the Victorian WorkCover Authority? If it withdraws its labour hire employee or independent contractor and sends them off to another assignment, it has probably discharged its obligation to that worker as best it can, because it has taken them totally away from whatever the hazard and the risk is. But it does not do much for the other workers, obviously, in the workplace of the host employer. My feeling is that a special obligation on labour hire companies to report is not necessary. It is not an obligation of any employer to report poor workplace safety practices of any other employer, generally speaking. I think you would need to identify a special reason, in the case of labour hire companies, why they should acquire this obligation that other employers do not have. There is an obligation to report things to the Victorian WorkCover Authority from time to time. If you have an incident in your workplace, then you must report that, and that is the type of thing where there is a specific identified reporting obligation. While it now appears in regulations, that will now appear in the legislation itself from 1 July. So the significance of that sort of reporting is more prominent now in the legislation. But I am not sure whether effectively making labour hire companies the policers of the workplace safety problems of other employers would fit with the regulatory scheme generally. It would probably be bad for their business, too, although that may be less of a concern for the committee. So I would not necessarily support that.

You also raised the specific issue of the lack of protection for labour hire workers who make OHS complaints. Again, this is an area in which we fall short where the labour hire worker is an independent contractor to the labour hire company, and perhaps we fall short if they are an employee to the labour hire company. In either case it is clear that there is not specific protection against that sort of discrimination. But it is not as though there is a complete absence of protection, because if the situation is in fact a breach of the Occupational Health and Safety Act, if there is a failure to comply with a general duty, that failure subsists, and the Victorian WorkCover Authority is able to take action. Of course the action that it takes, if any, would be against the host employer; it would not be a form of prosecution or complaint about the discrimination. But it is not as though there is a complete absence of regulation there. What to do about the specific situation of the labour hire worker who is unable, they feel, to complain about their circumstances, I do not know. It might be that what is required is a type of whistleblowing provision, but there

already is such a thing, is there not? What you are really talking about is: how do you protect these workers? And the answer to that, I do not know.

What else did you talk about that I wanted to say something about? Registration. In its interim report the committee has recommended the possibility of a registration system for labour hire companies within the Victorian WorkCover Authority. As I say, I do not necessarily think that is what needs to be done. If WorkCover wants to focus on what is happening in this industry, it can do so with the range of tools available to it to identify people. My other concern with this proposal is you point in the interim report, and I presume will in the final report, to a range of other problems that are caused by labour hire arrangements, triangular relationships and so on. While health and safety is a large part of your focus in this report, it is certainly not the only issue which arises for workers. In a sense I would say if you are going to think about recommending a registration system for labour hire companies or a regulation model, then it ought to cover all of the issues, not just health and safety. I do not know how that would work, whether you would create some sort of special authority or not. The Victorian WorkCover Authority has a remit for health and safety and that is fine, but there is a bunch of other issues that you might want to have a look at that would not really be within the normal experience and expertise of the VWA.

I point in the paper to the distinction between labour hire companies and private employment agencies: I point to a bit of literature on that which talks about how private employment agents are regulated, in this state by the Fair Trading Act and in New South Wales there is an Employment Agents Act and so on. It may be that there is some scope for a little bit of investigation as to what sort of registration and regulation there is. It seems to be a fairly basic sort of good character test in order to operate in the industry, and so on. I would wish to see a recommendation for a registration system to be more fully fleshed out in terms of what you would require of an applicant, what matters would have to be pursued in order to retain registration, what sort of records would need to be kept for what purposes, who is going to oversee it and who is going to inspect it. I would not say I was opposed to it in all circumstances but a specific one for OHS purposes seems to me to run the risk of missing some of the issues that you may wish to address more broadly in your final report as being relevant to the labour hire industry.

Ms MORAND — Can I just stop you at that point to explore what other matters would you have as part of a registration scheme, beyond OHS?

Mr FENWICK — I do not really do a lot of work in this area and I do not know a lot about the labour hire industry generally. I certainly know about the basic proposition that it is possible to manipulate the distinction between an employee and an independent contractor and that the use of labour hire is related to that, and that this has, from one point of view, the possibility to create adverse consequences for workers because you are not covered by certain protections in legislation. If you assume that labour hire is a part of a broader picture in which an identifiable and perhaps growing spectrum of the work force is being excluded from the working conditions we think they ought to have, then a registration system might address some of those concerns. It might look at wages issues, it might look at hours issues and casualisation issues. Some of the other phenomena in the labour market to which you point as being related to labour hire might be the sorts of things that you want to cover in a registration system. What do we want to know about labour hire companies? Do you want to know how many people they have? Do you want to know how much work they are giving them?

Ms MORAND — How much they are getting paid.

Mr FENWICK — How much they are getting paid, and so on. Those might be some of the other issues that ought to be covered if you were going to have a registration system. I have had a brief look at some of the work that is being done by the International Labour Organisation in this area and I have referred to that — I think I have brought it to Kirsten's attention in the past so I am sure the committee is aware of it. The ILO is in the process of working its way towards some sort of international standard to address the fact that the employment relationship is something that is changing around the world; there will be a conference discussion next year about that. However, in my quick look through the reports they have published I have not been able to find examples of registration systems in other places. Indeed, the work I have pointed you to in relation to private employment agents suggests that while they are traditionally regulated, labour hire tends to fall outside and not to be regulated specifically. That is not a reason not to — indeed there are all sorts of reasons for it perhaps needing to be regulated in some ways — but it may make it more difficult to identify a model that you want to tinker with and modify so you can be the trailblazers.

The CHAIR — Can I just respond in part? I want to let Harry have a say and there are probably some other issues we need to talk to you about. The reason we recommended a registration system was for the very reason you touched on earlier — that is, the VWA does not strike us as an organisation which has devoted sufficient attention to the higher than acceptable injury rates within the labour hire sector. We had the VWA come in, we had Elsa Underhill come in, and we concluded that regardless of counterclaims the injury rate is too high and has to be lowered. We acknowledge that while the VWA does tackle problem areas, it does not do it consistently. It will do a little bit of work in the labour hire sector and then it will move on into the food manufacturing sector, the meat industry or whatever. Really the purpose of the registration system that we proposed is to allow it to focus consistently on the labour hire industry, and registration is a means of doing that. We do not discount that there are other issues but we felt that in the time we looked at this subject that the OHS issues were the most pressing. That was the context in which we made that recommendation. We are still to have a discussion with the VWA as to how all of this will work, although from the discussions we have had previously we believe it is achievable.

I want to go back to one thing you said regarding labour hire companies becoming aware of a workplace which is unsafe to the extent they will not supply labour. This came to our notice through a survey RMIT conducted for the Recruitment and Consulting Services Association — it drew it to our attention. They were making the point that they are not interested in simply securing work at all costs; they acknowledge that there are unsafe workplaces. I think the statistic was that 49 per cent of their members at the time they were surveyed reported they had at some point refused to provide labour to a given worksite. What struck me at the time was that was a very high number. It is a very high number and we simply cannot tolerate a situation in which you have a large number of instances where people potentially providing labour are refusing to provide it in these workplaces. The corollary of it is, where are workers being sourced for those workplaces? I do not believe in 49 per cent of cases the host companies say, 'What a revelation! We will change our work practices.' You would be a mug to think that.

I can accept the argument that placing labour hire firms under a mandatory reporting-type obligation may seem excessive, but I am keen to think of a way of dealing with the problem — that is, if there is a large number of instances where companies are being asked to provide labour to workplaces which they regard as unsafe, God help us. If we are going to be proactive about occupational health and safety, we have to find a way of drawing attention to this before we have workers going in there and exposing themselves to unacceptable risks. I do not know whether the companies themselves ought to be saying, 'No, here is a pro forma certificate we have to give you that says we are not providing labour because of our concerns about occupational health and safety'. Some obligation needs to arise on someone out of that type of situation. That is what we will spend the next couple of months working on. I understand what you are saying but from our point of view it is happening too often; there are too many unsafe workplaces around.

Mr FENWICK — I guess it is a question of how you capture that information for enforcement purposes. That is what you really want to do. At the moment you are finding that the place that information is kept is out there among the labour hire companies — the ones who are not putting workers into situations which they think are unsafe. Some sort of link between that information and the authority is what you need to create. Whether it is a compulsory reporting sort of obligation I am not sure. If you were going to establish a registration system, then a record-keeping requirement about that on the labour hire company, with the authority able to inspect the records from time to time and then draw conclusions about things, might be a way of achieving it. It is maybe doing by the back door that which I am saying you perhaps should not make them do by the front door. If what you are looking at is solving the problem, then it seems to me that the link between that information and that agency is what you want to create. However, in the end the lack of workplace safety in the scenario is in the particular workplace. If you just approach that as a workplace, how does the inspectorate ever become aware of the circumstances in any workplace? There is a whole range of ways. They find out because unions ring up, they find out because workers make complaints, they find out because passers-by make calls. They find out because former employees like me ring up and say, 'I have seen this terrible situation. You better do something about it. I happen to know it is a breach of the legislation'. They say, 'Thank you very much', and I never hear back from them. There is a whole range of ways they find out about things. Whether making the labour hire company a specific source of that information is the right thing to do, I do not know.

The CHAIR — What is your sense as to how — I think I am right in understanding this — the common law would fall, the law of negligence? In the situation where a labour hire company says to an employer, 'We are not providing labour, it is simply too dangerous'; a competing company does not understand this and provides labour and there is an injury with resulting damages; could you hold the first company which rejected the

opportunity to provide labour in any way liable at common law? They knew that was a dangerous situation but they said nothing to anyone else.

Mr FENWICK — Better you should ask that question of a tort lawyer. Working from first principles, I would say in most cases no. In general terms your obligation under negligence law is to a person who is referred to in the jargon as your neighbour. Who is your neighbour? It is someone who is close enough in some way. There has to be some sort of link or relationship. If I refuse to place Harry, for example, into an unsafe workplace and then three days later you place Kirsten into that workplace and we have never met, and Kirsten meets with some unfortunate circumstance in the workplace — God forbid this should happen — then if we have never met and we have never had the opportunity to explain to each other, there is no way in which Kirsten could sue me for failing to do anything about it. If Kirsten said to me, 'I have work with Tony Robinson Pty Ltd', or that she had work at this, that or the other place and somehow a relationship was formed, even one by happenstance, that is a different circumstance. In the ordinary course of things I would have thought no.

Prof. GLASBEEK — I think part of the difficulty here and with much of what you are looking at is that the legal understandings in our system start off with the proposition that we never have a positive duty towards anyone; we have negative duties only. Classically law teachers explain it to their students by saying if you find a little child upside down in a pool of water drowning, you can let it drown and you will have done no wrong. You have done all sorts of moral wrong but you have done no wrong legally. There is no requirement to act unless you are a police person or a parent as they already have a positive duty. It is the same here. That is why the registration thing would present instinctive political difficulties for everyone. It would be mandating a positive duty — which we do from to time — and it is unusual. On the common law question, to begin with that, the answer is no, it is most unlikely that the person who originally had knowledge and told no-one would have any obligation in the absence of a positive legislative duty to do anything about that.

Colin has already mentioned that there are many things in the books and the records that we could use if we wished to, and you might have a common law action against the second person who sent somebody out and did not take enough care to check whether it was safe — they just let somebody loose into a dangerous circumstance. That might be a plausible argument. It depends on how serious it was, how obvious it was and all these kinds of factual issues. I do not want to interrupt Colin's flow and the discussion. As I said, these difficulties all stem from the fact that you are assuming, as you must — I understand that — that this is just another industry, that this is normal, that there is no way of asking questions about whether it should exist. But as you know, better than I do, that is relatively recent. For whole periods of our history we have never had anything like labour hire firms; and if we needed that kind of work done we tended to get government to do it, to link employees up with employers as they needed them. This is a relatively new thing. For many years it was outlawed in parts of the world, so there is nothing normal about it. It is this lack of normalcy that creates the difficulties for you. That is what the report is about; you are dealing with something that is abnormal in our market economy and our liberal notions of a market economy, and pretending it is a normal liberal market set of actors.

You have to remember how you describe it in your work, which is very good I think. You describe it as the difficulty being for the entitlements being available to the worker when the worker clearly ought to have them. In our belief, having provided them as public policy, there are certain minima that every worker should have. The difficulty with that is this notion of a contract between the labour hire firm and the person who will actually do the work and the contract between the labour hire firm and the hirer who wants the work done. The question you want to ask yourself is: what does the labour hire firm actually do? The one thing it does not do — that is the most important cause of the difficulty — is to produce goods or services. Unlike the person it serves, it does not produce a good or a service. The only thing is produces is something for sale; and it is something that is bought. It has bought partly the capacity of the worker. It is that capacity which it sells for a short time or a long time to a hirer — and that is what the difficulty is.

I am very interested in the fact that health and safety is such a strongly held concern of yours. I note just near the end of the interim report you have a bit on antidiscrimination legislation and how it has to apply regardless of how abnormal the situation is. In other words, you are not going to brook any interference with that, it is so fundamental. I think you feel the same way about health and safety. You probably do not feel as strongly about the vacation pay, long service leave, minimum pay — all these other entitlements. They all seem to disappear in the essential question about the registration and difficulties that are not so universal in our value system. But they are all of the same kind, of course. So you are willing to go the extra mile for health and safety and antidiscrimination and do things which are unusual in this abnormal situation because you just want them to be available; you do not care

very much about that situation. All I want to suggest to you is that you look at the normal jurisdictions where they deal with this kind of problem — not this one in particular but this kind of problem — a little differently. I do most of my work in Canada — or I do not do any work at all actually! The advantage of being retired is that this is sort of like work. In Canada we treat avoidance systems, because that is what the labour hire firm is from a labour perspective — it is an avoidance system of cost. Once you realise that this could be done by any sensible set of computers — you could link people with people — then a person who does it for money and profit and just sells those capacities is, as it were, an extra in the whole set of arrangements that we have in the market. They are not absolutely essential, so it is not practically efficient. They do link people up — that is an efficiency, that is a good market function — but anyone can do that for profit or without profit.

So why should it be for profit? Because they are particularly efficient? No, because they can create this bipartite relationship in tripartite situations. That allows avoidance of health and safety, discrimination law, minimum wages. I am not saying they are evil but that is their function. That is where the efficiencies come in, especially for the hirer. That is what the efficiencies really are. That is where the cost savings come from. If that is where the cost savings come from, what they are doing is externalising the costs that the government has already decided by public will should be imposed on producers of goods and services as part of hiring people. They are externalising those costs and placing them back on workers — the very opposite of the public policy design that you are seeking to defend. That is a problem. That is why I mentioned it. I think it is a real problem if you do not give it any thought.

What they do in some jurisdictions is to say, 'When that happens we should forget the odder aspects of law and, for the purposes of this set of public policies, treat these situations differently'. Colin has already mentioned what they do in Canada — and, by the way, the centre does splendid work on who is an employee, what is an employment relationship and the difficulties about independent contractors, dependent contractors and employees, all these difficulties that you are well versed in. They are very difficult from a lawyer's perspective. But when a hirer actually hires a person to perform work and manages to keep it outside the boundaries of form by a legal device, you can say that hirer is no longer producing that good or service; somebody else is. It is not a profit centre, a truly independent body, and that is just a contractual relationship. Alternatively, it is really part and parcel of that firm; it only looks as if it is not. That is the difficulty, right? That may be a dependency contract or an actual contract of employment, and you can get into all sorts of definitional arguments. We do the same thing when a employer decides that he does not want the cost of potential liabilities for a worker to perform work for him and just gets rid of them. I am looking at a High Court of Australia case that came out last year where Brambles got rid of all its truck drivers. It just said, 'You are sacked. But if you want to work, because we like you, just form a corporation and the corporation can have the work and you can do the work just like you always did.' Brambles put a legal entity between itself and the worker, changing the legal relationship but not the functional one in any sense whatsoever. It did not mean to do that.

The labour hire firm is very close to that. In the first two cases in Canada we treated the dependent contractor for labour law purposes — not for any other purposes, not for tax purposes and not for torts purposes, but for labour purposes. We say if a person is truly dependent on another we are not going to question who has control or who has not. We ask, 'Could this group of people who are dependent benefit from collective bargaining if they are employees for the purposes of collective bargaining?' We do not care if they are for any other reason. They are employees for collective bargaining and you cannot externalise that cost. We do the same thing with minimum wages and entitlements and the like, and collective bargaining. Where a bunch of entities has been formed like the Brambles case or like James Hardie or the Patrick Corporation — any of these group organisations where workers are shuffled around to create different entity relationships — we treat each one of those entities and individuals involved as the employer. It does not matter which one. If of course they have done the wrong thing and are therefore subject to a liability of one kind or another, all the others in that related group will be equal. So you could not have had the MUA case in Canada. It could not have been done legally. It might have been done, but not legally, just by that simple device. Nothing changed the law — all these corporations are still separate, they still pay separate taxes, have separate accounts — everything is the same, except for that legal purpose. This is too late, I know, but I suggest that you might want to think about the labour hire firm in that way.

In an analogical situation what you have there is the labour hire firm saying: 'We have hired this person but we do not want him to work for us. We have a contract; use him.'. But you do not have to pay the entitlements. You have tried in lawful ways, and very cleverly, so I believe — Colin has alluded to that — to make them responsible for health and safety here, and you will make them responsible in that way. But I am suggesting that these are just versions of these related employer arguments that I have just made to you. These are just simply versions of that,

saying these are related just simply because of the hirer. He uses a labour hire firm to produce workers who will perform the work. It does not mean that the producer of the goods and the service is not part of the team recruiting the worker. Just because the labour hire firm does not actually produce the goods and services does not mean it is not part of the team that is actually producing the goods and services. They are integral to each other. They are complete.

The difficulty with the labour hire firm is that it is not associated with just one employer, like my related group in Canada, but to hundreds, maybe thousands of employers to whom it is are supplying ad hoc workers. So it is difficult, but that is only a difficulty of logistics; it is not a difficulty of concept. They can be related to each and every one of them. I was absolutely appalled by the size of some of these larger firms you describe in your report because I am not sure that they serve a useful function, and I am not sure they should be treated as a normal industry. So I think it is a matter for concern that they have got so large and so influential, and so obviously profitable. You can treat them as being related and therefore responsible, and you can see signs of that.

Colin just described the Maxwell report, and he is talking about multi-employer responsibilities about health and safety. It is another way of saying that related employers should be responsible. We do not care which one of them is. Notice what happens if you are truly market believers, because that is what this is based on. You should believe in the market, otherwise you would not have this at all. If you are really market believers that will mean that the cost will be internalised to one or the other — the hirer or the labour hire firm. Presumably that will be reflected in the price of supplying labour, one way or the other — that is, the market will settle how the cost will be allocated. But what would be best is that the workers will not bear it. They will sort it out. Incidentally, if they sort it out and the market works as it should, all those little guys that you seem to be worried about who are lepers, according to the larger ones, will disappear.

The CHAIR — Harry, how in your model do we account for the multitude of industrial instruments and how do they manifest themselves in pay rates where you may have a company where people in the metal trades — this is quite common — are on substantially above-award entitlements and the labour hire company will come along and say, 'We are paying them the award', but in fact it is 10 per cent below that which effectively operates in the company. How then do we say the worker will not miss out, because technically the labour hire employees in that case are not missing out, they are being paid what is a legal entitlement; but it is 10 per cent below what everyone else is getting because that is an above-award entitlement?

Prof. GLASBEEK — I do not think you can get at that through this mechanism, through my model or indeed through your model either, because all this can provide are safeguards that the legislation provides already. Where people get in the market by themselves, which is what the over-award payment is, it is impossible to protect because that is the result of voluntary bargaining over and above the provided minimum, and that is unprotectable. What is protectable is where there is some kind of deception. But if they believe they are over award and they are not, that is all, because then you have a question of arms-length relationship and good faith relationship issues. I do not believe, at least the way I try to model the thing in my head, that that is protectable. If that is one of your concerns then I have no answer for that.

Mr FENWICK — I am not sure that is so impossible because one of the things I have said in the preliminary observations here, although most of this is about health and safety, is that there are serious attempts, as Harry said, in Canada. The idea of the dependent contractor and certain circumstances in which one overrides the common law status has been done here with the outworkers improved protection legislation and so on. Andrew Stewart, a professor of law in South Australia who is the author of the Fair Labour Bill, which is in the South Australian Parliament at the moment, has proposed a different test, as have other labour law academics in the past. You figure out who is an employee by a different means. In essence we cleave to the idea that an employee is somebody who should be protected in a certain way, and an independent contractor is some sort of entrepreneur; and even people at the most extreme end of the spectrum — those who say, 'We must protect workers' —usually still concede that there is something out there called an entrepreneur, which is not an employee and ought to be allowed to operate independently. So instinctively we have that idea, but as Harry said there are all sorts of circumstances in which you might want to override this interposition of third parties, as in the Brambles example or other situations.

I do not know that it would be so difficult to deal with the receipt of over-award payment situation to which you point, because all you would have to do is have some sort of mechanism in which, as a state, Victoria says, 'Look, for this range of purposes, these categories of people are deemed employees' or you just say, 'Workers are entitled

to x' and a worker is a person who provides work to another person pursuant to a contractual arrangement. A 'contractual arrangement' is an expression broad enough to cover contract of employment or contract for services, and then you only have to identify the range of work conditions, call them work conditions and define them as such, and they could include over-award payments.

The difficulty with the over-award payment is that it is usually going to appear, if it appears in any sort of agreement, in some sort of collective agreement that is not enforceable in common law, but in that sense the regular employee in that place who is getting the over-award payment is in no better position than anyone else anyway; they are only protected by the industrial muscle of the AMWU or whatever union they belong to. I do not know why it would not be possible to address that issue. You have just got to come up with some sort of conception of who is a worker. As Harry said, public policy has said, 'Here is a minimum set of standards — wages, discrimination, health and safety.' Fine. The question then is, 'Who should be getting those things?' Go back to first principles. We have worked at least since after the Second World War with the paradigm of the employee, but that comes out of a period when we had full employment for a long period. The labour market was not like that to a large extent I suspect before the Second World War, and it is now breaking down. That does not mean we cannot relatively easily identify people who need protection in some sense, and we can argue at the margins about who needs protection and who does not; but the basic concept still holds good.

Mr ATKINSON — I would like to make a point in this session because it is all being recorded by Hansard, and it is: not all of us were excited about registration. We have reached, if you like, a consensus position for the sake of the report, but not all of us are absolutely delighted by the prospect of registration; I see it as a bit more bureaucracy. Certainly on the issue of over-award payments, I would argue that we need to be careful about approaching those as well, from the point of view that over-award payments in a particular workplace compared to a labour contractor might well be a reflection of the loyalty of that employee and skills acquisition. In other words, the over-award payment reflects the fact that those workers have been in that employ longer and have acquired skills and are therefore worth securing for that workplace. Indeed, one of the interesting things that has come out of the comments that were made before about the reasons why people use this process of employment is that the focus was on cutting costs, and I do not even accept that argument entirely. No doubt some people are pursuing that as an option. I cannot help thinking that for most employers at the end of the day, once you add back in the margin of the entrepreneur, if you like, or the contractor from the labour hire firm, once you add back in their profit margin and administration margin, you are probably back to about where you started from with the cost of your employee on the floor anyway.

Ms MORAND — I disagree with you on that one.

Mr ATKINSON — It is interesting. Take the nursing one, for instance: those nursing agencies are making an absolute squillion, and basically the hospitals are paying a lot more over the odds than they would have to if they employed the employees direct; so that is my case in point. The issue more is the issue of skills and the fact that these companies in some cases argue that one of the key reasons for labour hire is not actually to cut costs but to bring skills into the organisation, or at a particular point in time to meet, as it were — and this is a villain of many things — 'seasonal influences.' An SPC/Ardmona type company, which has to bring in the fruit and process it in a fairly short production period, might well look at an opportunity to top up its work force. It has the opportunity, clearly, to direct employ casuals for that period, and that company probably does, to a large extent; but it also has an option of getting an outside supplier to provide people for that seasonal aspect of their business. At the same time others might have a skills shortage in their business and be looking to try and fill that skills shortage. So there is another equation there and I am interested in whether or not you would support that or have a view on that particular position.

Prof. GLASBEEK — Regretfully I do not have an empirical view — I do not have evidence. Like you, I have anecdotal information but nothing I could rely on usefully. However, I agree with you in principle that there is a function that you can attribute to the labour hire industry — if that is what we are going to call it — and that is putting people together with the right skills in the right numbers for the right amount of time. That is the position in the market, and that is what they do.

What I began by saying was that they do that and they do it for profit and your point is that they cost quite a lot to do that. I am saying they are not particularly essential to the market operation because that function could be performed as well by non-profit governmental organisations. The advantage that they really bring and that a government could never bring is to actually void some of these external obligations that are imposed on a

workplace. That is the advantage they can bring; but by simply saying, 'We are hiring them, you are not' and, 'We are not actually making them work, you are' creates that lacuna you are addressing in the interim report. That is what they all bring. Some of them are no doubt very good at putting the right people together for the right amount of time and finding each other much more quickly than a bureaucracy run by a government could — that could be true. However, to take the only Australian example I know of, during the Second World War it was all run through what was the forerunner of the CES. It was simply not allowed. The hire firms, such as they were, just disappeared because you had to advertise any kind of vacancy or job through the national system because that was considered far and away the most fruitful way of getting employers and employees together for high productivity reasons at that time.

I am saying that that is always plausible and possible at any one time; so the question is: what is the extra they bring? The extra is the tripartite situation that allows that gap to appear, and that is what government cannot and should not be allowed to bring. Empirically you may well be right that there are many labour hire forms that perform useful efficient functions. I would not debate that.

Mr ATKINSON — Interestingly, in historic terms the agrarian circumstances are such that labour hire has probably been with us a lot longer than we define because when people were bringing in their harvest there were forms of contract established that involved neighbours and so forth, and it has probably been with us a lot longer than we might think. I would like to ask Colin, in the context of the occupational health and safety legislation that we passed in Parliament's spring session and perhaps even before but particularly the revised legislation that comes into effect later this year, do you see a situation where, in fact, an employee could fall through the gaps under that legislation because they were employed by a labour hire contractor as distinct from a direct employment model? Do you think it is possible under that legislation for somebody to fall through the cracks?

Mr FENWICK — Only if it is misunderstood and poorly applied. The overlapping duties that existed in the 1985 Act are all there in the 2004 Act. The employers have duties under section 21 to their employees and they are extended by section 21(3) to employees of an independent contractor, so provided the worker from the labour hire company is an employee of that labour hire company, then they are covered. If they are not, then you still have the subject public safety provision which means that the host employer has obligations towards those other persons in their workplace who are not employees, whether direct or deemed employees.

The problem is not, it seems to me, in the range of duties that are there; it is in whether people understand the relationship of the overlapping duties and profit from that, and how it is enforced. Earlier that was covered by Maxwell in his report, and it is something to which the committee adverted in its interim report. I have put a fair bit of time, in my submission, into addressing that issue. Suffice to say, the concept of control to which both Maxwell points and you point is very well understood by the courts, very flexibly applied, both in this context and in the context of determining, for example, who is an employee.

One of the classic cases in determining who is an employee concerned a circus worker, a trapeze artist, who could not possibly be directed specifically in the performance of their work; nevertheless the higher court held there was legal capacity to control their work, and that was sufficient control to find that they were an employee.

If you look at the Victorian case, a decision of Justice Byrne in *Stratton v Van Driel* to which I refer, you will find that His Honour gives us a broad idea of what 'control' means for these purposes. There is also a South Australian decision. There are a bunch of decisions that tell us what control means, and it could mean anything. There is a very recent decision of the Court of Appeal in *R. v ACR Roofing Pty Ltd*, which talks about the interpretation of section 21 (3), which gives it a very wide operation. I do not think the problem is in the scope of legislation; I think it is in who is pointing the finger at whom and who is refusing to fulfil their obligations from the sound of things, and how that is addressed by existing regulatory activity.

Ms MORAND — Just to summarise part (b) of Mr Atkinson's question, do you not agree with Maxwell's recommendation to clarify control in the act?

Mr FENWICK — As I read what he recommended, it was that control should be one of the factors, is listed as being relevant to determining what is reasonably practicable. Up until 30 June we have 'practicable' defined by section 4. Maxwell does not like that, so now we have, instead, 'reasonably practicable' and we have a

definition in section 20 which basically reiterates the factors that were in the section 4 definition of the 1985 Act, but do not include 'control'.

I am not sure that that is a big problem for a court interpreting the definition of 'reasonably practicable' because 'reasonably practicable' is an expression that is used in other health and safety legislation around the place. It has been interpreted in the case to which Maxwell referred — *R. v Associated Octel* — as including the concept of 'control', so the first time somebody wants to have a legal argument about the meaning of 'reasonably practicable' and runs it up to the Supreme Court or the Full Court, one of the places they are going to go — seeing as Australian common law courts work this way — is to the decision in *R. v Associated Octel* and say, 'Well, we have got this new provision in our legislation. What do we think it means? It probably means the same as the English provision means'. And then the Court of Appeal has said it includes the extent to which you have control over something, so let us interpret it the same way here. The only way that will not happen is if somebody can persuade the Full Court that the Parliament must not have intended it to include control because Maxwell suggested it but it is not in the legislation; but I would have thought that that went beyond normal interpretive principles because they will go first to the explanatory memorandum, and they will go to the minister's second reading speech.

Going back to what the recommendations of the Maxwell inquiry were to determine the meaning of' reasonably practicable', I would not have thought they would do.

Prof. GLASBEEK — Colin is absolutely right. It is what old lawyers like me call 'weasel words'. They are all based on the same concept. As we change the words we pretend we are changing an approach to the concept. We hardly ever do because the fundamental problem remains the same. So, for instance in every employment relationship — I am using that term loosely now, as we try to determine any kind of relationship of hirer and worker — there is, you will find, a duty to obey. It is implied in every relationship of that kind. So every reasonable demand by the hirer must be abided by the worker, otherwise the worker may be disciplined or let go and so forth. We know that. How much more can we talk about control than that? The argument when we talk about whether a person is truly an independent entrepreneur always rests on the fact of whether one person has the capacity to determine not simply how the work is to be done — like the circus artist; we cannot tell a circus trapeze guy how to do his circus trapeze thing — but whether they have control over the enterprise as such and determine its policies, purposes, goals and outcomes in a general way. That is what we always mean. We break that down, because we cannot talk like that when we look at a particular case before us, but that is what is always the issue.

Mr BOWDEN — At previous hearings we have been exposed to some interesting comments in relation to the concept of — —

Prof. GLASBEEK — Unlike today!

Mr BOWDEN — Including today! We have been exposed to some interesting concepts, including today. One of them is the hold-harmless clause. Some of us have interpreted it as antisocial, difficult or having other explanations. It could be implied that it refers to a host employer trying to offset obligations back onto the labour hire supplier, and it is more of a purchasing pressure point rather than referring to some employment situation. I would appreciate your thoughts on aspects of hold-harmless clauses, and perhaps you could suggest whether or not you think there should be some legislative control to the extent of legislating to make them illegal.

Prof. GLASBEEK — I should preface my remarks by saying that I am not up to date with things on this. But from my perspective, after having read the report and thinking about the hold-harmless clause, it is just as you described it. What it means to me is this: that the host, the hirer or whoever wants the work performed is actually doing what the market permits him to do — that is, what you call purchase power. He is passing that cost, if it should be imposed on him, back to the labour hire firm.

Again that goes to my first principal argument — what the host wants the labour hire firm for is to avoid loss, cost and liabilities; it wants to avoid these extra things that come with having work performed. If the labour hire firm finds this too costly, it will either start charging the host more, get some kind of cost subsidisation or get out of the business. The market will adjust that. They will have to do that if they are related employers. If you treat them that way, they must have some kind of arrangement, and they will do it again, but they will not call it hold harmless, they will call it a contract.

It is an insurance clause. It is the same kind of insurance as may be involved if I am going to manufacture something for you and you want it by date X. If I do not deliver it by date X, I will have to pay you extra, or

alternatively you may have found some insurance in case it did not get delivered. That is, we measure the cost, we take the risk of that cost and we spread it between us as free market actors. The hold-harmless clause is the host, and the labour hire firm works that out for itself. That is an example of neither of them wanting to bear the cost that public policy requires to be borne.

Mr FENWICK — To the extent that I understand them, which is not very well, it seems to me that anything that circumvents the mechanism in the assessment of policy premiums is not a good thing. The basic concept is that in workers compensation your premium rating changes depending upon your performance, and if you can circumvent that, you are not responding properly to the incentive in the legislative scheme to do better in your workplace health and safety outcomes. Therefore, to that extent, it is a bad idea.

The CHAIR — Can I ask Harry another question? I would be interested in getting your view as well, Colin — I know we do not have much time. In Europe labour hire practice is far less prevalent. I think up until 15 years ago or so it was more or less illegal. Why in your observation has labour hire and casualisation taken off so much more in Australia than in other parts of the world?

Prof. GLASBEEK — Much of what I have said is unfounded, and this will be even less founded! Instinctively, I would argue that what has happened here — you know this much better than I do; I grew up here, and when I was working in labour law and labour relations in Australia we were dominated by the conciliation and arbitration mechanisms. Basically the marginalisation of that scheme together with free trade and technology, which we always throw into that mix, meant that we changed the labour market. What we intended to do and did do was change security of employment. That has what has really changed. It was quite shocking to an old guy like me when I came back. I used to tell people in Canada how much more secure Australians were! There has been a change, whether good, bad or indifferent. The change has been that there has been a tremendous freeing up of the market, where people are expected to compete not just for wages but for jobs. The Australian system has largely taken competition for wages out of the system, as much as any country ever did. Yet that was what created income equality.

Australians, until the late 1970s, had the greatest income equality — not wealth equality — of any of the OECD countries, but it now has the second worst. In a very short time, from the late 1970s onwards to now, there has been a dramatic, radical change in the relationship between employers and employees through the freeing up of the job market under what I think people now call industrial relations reform. People are becoming dependent on individual bargaining. It is a cultural thing — there is a far greater self-reliance here than you find, say, even in Canada, which is a very similar country. Australia is much more like the United States than Canada. It is certainly much more like the United States than any European country in terms of self-reliance. What you have here is tremendous self-reliance for security, with old-age security being pushed onto the individual. The notion is that the individual must provide for his or her own security by buying her or his own pension funds, as we call them, superannuation or other schemes of one kind or another. So there has been a push — I do not know whether it is conscious or unconscious — towards individualisation in agreement making, advancement and security.

Again, that is for good or for bad, depending on your political perspective. I think that is what has happened, and in that context all government intervention is seen as an obstacle. That is quite clear. All government intervention is seen as an obstruction that interferes with the individual in the market: the sovereign and autonomous individual. They are things like minimum guarantees of wages, vacations, sick pay, maternity leave or whatever the issue might be, and they vary across the board. All of them are seen as obstructions to the goal of freeing up the market, and that is why you get the attacks on how many allowable matters should be in an award and so on. That is what the debates are all about. So the labour hire firm — from my perspective, the way I have put it to you — plays a crucial role. It allows it to emerge because it allows an avoidance of what remains of that protective system. It is yet another part of the same system as we move from conciliation and arbitration to more individual bargaining within the Workplace Relations Act at the federal level — and, of course, Victoria handed it over at one stage to the federal level.

Moving on from that, the labour hire firm is a very low level aspect of the same movement of individualising the relationship between employers and employees, and by 'individualising' I do not mean just one on one, I mean that government is left out as much as possible. That is why you are so concerned about health and safety. That is really your instinctive reaction to health and safety — because that should not be just left to individual management.

Mr ATKINSON — Could not another factor be Australia's isolation as an economy from the rest of the world and the fact that the tyranny of distance means the mobility of skilled labour available for Australian production is fairly tight compared with other places like Europe? Germany, for instance, is able to access Turkey, and France certainly accesses northern African nations and so forth, and within Europe there is a movement of a skilled work force around countries depending on availability of work. For Australia it is a lot harder to bring people because of that distance. I wonder whether that is not a key factor as well.

Prof. GLASBEEK — I honestly cannot say yea or nay. It may well be an important factor, although instinctively to me again the argument seems to be that if we are saying that Europeans can attract from each other, we are not that far from Asia, and there must be lots of people there with various skills. But you may well be right. That may be important.

The CHAIR — We are going to have to finish, I am afraid, unless, Colin, you want to say something.

Mr FENWICK — I was just going to go back to the issue of having some sort of registration system. As the hour or so has worn on I have begun to understand the logic of suggesting it — although I hear what you say, Mr Atkinson, about not everybody being all that excited about it. I would have expected with a bipartisan committee of the Parliament that not everybody would be equally excited. It seems to me from what you are saying that you are looking for a hook to ensure that the VWA takes action. If you issue a final report with a recommendation in it that says, 'It would be a terribly good idea if the VWA issued a code of practice for the labour hire industry' — which would be a very good idea — but nothing more substantial than that, it would remain open to the to-and-fro of the political process, if you like, for that to happen. That is different from some sort of legislative or regulatory requirement to create something. But if you want to recommend that something be created, it has got to be something that does the good things that you want to do. You want to get that source of information about what is happening in the industry in there for enforcement purposes, but you do not want to over-regulate the industry either because — leaving aside what Harry says about whether it should be treated as an industry; for most purposes it is — people are out there making money, and you do not want to be in the business of stopping people from making money. You do not want to stop those workers who enjoy the flexibility, like the agency nurses for example. They usually work that way. I have sisters who work that way and make a killing — they make more than I do, and I am not a nurse! I have seen from your report that you have heard from the workers compensation side of the Victorian WorkCover Authority. I wonder whether you have also heard from the health and safety prosecuting enforcement side of things.

Ms MORAND — The CEO is representing both WorkSafe and WorkCover.

The CHAIR — Your comments today have whetted my appetite. We ought to go deeper into that well.

Mr FENWICK — One of the things I have mentioned here — and Maxwell averts to it in a very polite way in his report when he says that the inspectors jealously guard their independence — that is a very polite way of describing how some of the inspectors go about their jobs. It is a very decentralised enforcement mechanism, and that is for many purposes a very good thing. Going back to your idea of why a labour hire company should not report the host employer, my reaction is: why are the inspectors not out there finding out what is going on? After all, that is their job. The answer may be that there are an awful lot more workplaces than there are inspectors. But if you give an inspector a specific tool, like a code of practice, then over time it makes it possible to take enforcement activity around the code of practice. You can develop it through the consultative mechanism that I gather already exists — the liaison forum or whatever it is called. You might want to think about a model similar to the one in the Outworkers Protection Act and the Ethical Trade Council; so industry has 12 months to figure out a code of practice for itself, otherwise it will be developed through a consultative council, and so on. But the more I think about it, the more I understand why you want to go a step higher than saying to the Victorian WorkCover Authority, 'Why don't you do something about this? But it might be of interest for you to speak to some of the people in the health and safety enforcement side rather than in the claims compensation side.

Prof. GLASBEEK — Colin has put it very gently. Nothing works as well for health and safety as direct enforcement.

The CHAIR — Harry and Colin, thank you very much for your time today. I would like to keep going but we have other commitments and we all have to race off. It has been stimulating. We will not have the chance of

calling you again in this sort of forum, but there may be issues we want to pick your brains about informally between now and the time when we have to finalise our next report.

Mr FENWICK — Harry will be in the jurisdiction for another couple of months, but I am here ad infinitum.

The CHAIR — Thank you for your contribution. We will read with interest what you have submitted to us in writing.

Committee adjourned.