ECONOMIC AND FINANCE COMMITTEE

LABOUR HIRE INDUSTRY INQUIRY

Balcony Room, Parliament House, Adelaide

Thursday, 17 March 2016 at 9:35am

(OFFICIAL HANSARD REPORT)

PARLIAMENT OF SOUTH AUSTRALIA

WITNESS

MEMBERS:

Mr L.K. Odenwalder MP (Presiding Member)
Hon. P. Caica MP
Hon. A. Piccolo MP
Hon. J.M Rankine MP
Mr S.K. Knoll MP
Mr D.J. Speirs MP
Mr V.A. Tarzia

WITNESS:

HARBORD, GRAHAM, Managing Director, Johnston Withers Lawyers

632 The PRESIDING MEMBER: Thank you for appearing before the committee today. I have a quick rundown to go through. You have appeared at parliamentary committees before, I understand?

Mr HARBORD: Yes, I have.

633 The PRESIDING MEMBER: This committee is a standing committee of the Parliament of South Australia. Its functions and powers are set out in the Parliamentary Committees Act 1991. As you know, we are inquiring into the labour hire industry and aspects thereof. Have you seen the terms of reference of the inquiry?

Mr HARBORD: Yes, I have.

634 The PRESIDING MEMBER: Excellent, thanks. I bring your attention to sections 28 and 31 of the Parliamentary Committees Act, which set out the privileges, immunities and powers of this committee and the protection afforded to you as a witness. Section 26 of the act provides that members of the public may be present during the examination of witnesses unless the committee resolves otherwise, but may not be present during our deliberations. We also have the option to live stream, which, unless you have any objections, we are doing right now throughout the parliamentary precinct.

Mr HARBORD: Yes.

635 The PRESIDING MEMBER: If there is any matter which you wish to be taken in camera, please let us know and we will consider that as we go. For the record, could you please introduce yourself, including your title, and then proceed with any presentation you have. We will keep it reasonably informal and we will ask questions as we go, if that's okay?

Mr HARBORD: Thank you. My name is Graham Harbord. I'm the managing director of Johnston Withers Lawyers. Our firm has been in existence for 70 years now. We primarily represent employees in employment matters and also workers compensation matters, but we also represent employers from time to time. I have almost 40 years' experience in various aspects of employment law, including policy advice to government, and I have also been a conciliator and arbitrator in the workers compensation tribunal, as well as a lawyer.

The aim today is to provide a brief overview of the law affecting labour hire agencies and the workers and businesses they deal with. These can be complex legal issues, particularly with the ever evolving ways in which labour arrangements are made out in the marketplace.

I have provided a handout. I will refer you to the first page of that handout, which is a diagram that sets out different types of labour structures and arrangements. If you could look at that, I have slightly amended the page which I sent through by email yesterday. The first two examples are labour hire arrangements. The second two examples, numbers three and four, are not

labour hire arrangements, but are often confused with those. Let me just briefly talk you through the diagrams.

The typical labour hire agency employs employees under a contract of employment, it pays their wages and taxes, etc. It places those employees with a host firm under contract between the labour hire agency and the host firm, and the host firm then pays a fee to the agency. The employee is then placed with the host firm and works for the host firm, but there is no direct contract between the employee and the host firm.

As you can see there, I have solid lines for where there is a contract. There's a contract between the labour hire agency and the employee; there is a contract with the host firm, that's a fee contract; but there is no contract between the employee and the host firm. In practice, the employee is working for the host firm and is subject to day-to-day directions given by a supervisor in the host firm.

636 The Hon. A. PICCOLO: It's just like temp staff, or nursing staff, that sort of thing?

Mr HARBORD: That's correct, yes. The second example is what is commonly known as the Odco arrangement, and that follows the name of a case which I'll describe to you shortly. It is a similar arrangement but, in fact, the labour hire agency contracts with subcontractors and not with employees. So, there is a contract between the subcontractor and the labour hire agency, and again there is a contract between the labour hire agency and the host firm, but those subcontractors do not have any contract with the host firm themselves.

Again, as with employees, subcontractors are placed with the host firm, and they are often subject to detailed directions from a supervisor. The main difference between examples one and two is that the subcontractor pays their own tax, insurance, etc., and are not subject to the same control that you might expect from an employer/employee relationship, as in the first example.

637 The PRESIDING MEMBER: Is it fair to say then, Mr Harbord, that most of the 'dodgy' operators who have instigated this inquiry fall into that second category—the Odco category?

Mr HARBORD: No, I don't think it is. Often they fall into the first category whereby the labour hire agency will engage workers on a casual basis, not pay them the correct wages—

638 The PRESIDING MEMBER: They are responsible for paying their tax and that sort of thing, but they simply don't.

Mr HARBORD: They don't, yes. They are responsible for doing so, but then sometimes there have been cases where they don't pay WorkCover levies, they don't pay payroll tax, and then when they are found out they simply close up the agency and move onto another agency, leaving the employees and government without getting the payments that they are entitled to.

The third example is not a labour hire arrangement, but it is often confused with a labour hire arrangement, and that is where a contractor contracts with a firm to undertake specific work for an agreed price. For instance, you might have a building site and a contractor is engaged by the builder to install windows in a block of flats. That contractor then engages subcontractors. They come on site, they fix the windows, but there is no contract between the subcontractor and the builder.

There is a contract between the contractor and the subcontractor and between the contractor and the building firm, but that is not a labour hire arrangement; that's an arrangement whereby the contractor is engaged for a price to do certain tasks, and provides its own subcontractors to do that. It's not, in other words, simply supplying labour to a host firm.

639 The Hon. P. CAICA: We see that in the domestic dwellings construction area, don't we?

Mr HARBORD: Yes.

640 The Hon. P. CAICA: That example?

Mr HARBORD: Yes, that's right. The fourth example I have given here is that of a recruitment or employment agency, and again that is not a labour hire company. Here, the

recruitment agency has a contract for a fee with a firm and that is to introduce candidates to it, but it is the firm that then employs or engages the preferred worker.

So, there is then a direct contract between the employee or subcontractor and the firm, but there is no contract between the recruitment agency and the employee or subcontractor, usually. There might in some cases be an obligation on that employee to pay a certain fee to the recruitment agency, but generally it is the firm that pays once they engage a successful candidate.

641 The Hon. A. PICCOLO: What you call your headhunters come through.

Mr HARBORD: That's right, yes. Of course, they are covered by state legislation; they are required to be licensed.

642 The Hon. A. PICCOLO: The last group?

Mr HARBORD: The last group, yes. It is the—I will get the correct title—Employment Agents Registration Act. The issues which might arise in relation to these different relationships, and particularly in relation to labour hire companies, often involve the labour hire company using casual workers, and at times they can be workers who are quite vulnerable, such as youth, migrants, and there have of course been situations where such workers have been exploited. As I understand, that was raised in a *Four Corners* program which has led to this committee inquiry.

You can have a similar situation with independent contractors, so example two. To some extent, the subcontractors in those situations are in a vulnerable situation, too. They are required to pay their own insurance and taxes. Usually they are paid a flat fee for the work they do, and again, to some extent they even have less protection than employees do in those situations.

643 The PRESIDING MEMBER: What do you understand their WorkCover protections to be if they are in that situation?

Mr HARBORD: The WorkCover legislation does cover certain subcontractors in the building industry, providing that there is a very low capped limit for the amount of materials they might provide. So, it does depend on the situation. A subcontractor could potentially come under the WorkCover legislation themselves. Generally, they would not, and they would be required to carry their own insurance.

The other issue that can arise is the situation where there has been an unfair dismissal. Often in those cases you find that both the host firm and the labour hire agency are trying to handball the responsibility to the other party. I have had personal experience of that with clients. That itself can be a cause for concern.

The Odco arrangement I have referred to is named after a fairly famous or infamous case, depending which way you look at it, which was between the Building Workers Industrial Union (as it was known at that time) and a company called Odco. This was a full Federal Court decision. Odco carried on a business called Troubleshooters Available, which supplied labour to builders and contractors in the building industry. Odco alleged that the union had threatened industrial action against any builders who engaged labour through the Troubleshooters agency.

The union argued that the subcontractors were actually employees of either the builder or the labour hire organisation, so the union submitted that by paying a relatively lower flat fee to its subcontractors, Odco were undermining the award and employment conditions of employees on the site who were doing similar work to the labour that was brought in by Troubleshooters.

The full Federal Court, at the end of the day, upheld the arguments of Odco in this case. The court said that the labour supplied by Odco were truly independent contractors. Neither Odco nor the builder were employers of those workers, so in that case the subcontractors were simply paid a flat fee, but had to supply their own tools and equipment, and there are various other indications that they were independent contractors, but it was a blurred line.

644 The Hon. P. CAICA: Pay their own tax as well?

Mr HARBORD: They were, yes.

645 The Hon. P. CAICA: Self-insurers?

Mr HARBORD: Yes. So, the Federal Court, as a result, held that the union was liable to Odco for breaches of the Trade Practices Act. So, this is a classic example of how the issue of labour hire agencies is often bound up with a question as to whether the labour used are actually employees or subcontractors. The Fair Work Act, both state and federal (but in particular the federal act), applies primarily to employees. The commonwealth Fair Work Act is, of course, the main piece of legislation covering private sector employees.

However, the act itself does not define the term 'employee': it simply says that 'employee' has its ordinary natural meaning, whatever that is. In substance, it simply refers the definition back to the courts to decide. Of course, the Fair Work Act provides a range of protections for employees, both in terms of wages and conditions of employment. There is no such comprehensive protection for subcontractors, either at a federal or state level.

This issue of employees and subcontractors continues to trouble the courts. If you go to page 2 of my handout, I referred very briefly to some of the issues that arise here. First, I have spoken about the fact that there are a number of different types of relationships in the workplace. It could include employees and independent contractors, and they are the main two I am talking about. You could also have apprentices, who generally are employees. You can have voluntary workers in a workplace. You can have a partnership, and you can have other arrangements, such as a family relationship, where there is no intention to form a contractual relationship between the family, the family just simply runs the business.

646 The Hon. A. PICCOLO: By 'voluntary worker' do you mean volunteers?

Mr HARBORD: Yes. The courts will examine the facts of each case where there is a dispute, by reference to a range of what they call indicia or facts that may indicate one or other type of relationship. An employment relationship could be indicated by a principal having a right to exercise detailed control over the way work is performed. In some cases the principal may not actually exercise detailed control, it simply has the right. For instance, you have a highly skilled computer technician, the principal does not know anything about computers, but has the right to exercise detailed control over that worker.

The worker is paid according to time worked, generally, rather than a specific result or outcome. The worker is integrated into the business, may be required to wear a uniform, for instance, taxation must be deducted by the principal and payroll tax and workers comp levies are paid. Of course, the worker is paid employment entitlements, such as paid sick leave, annual leave, etc.

On the other hand, an independent contractor arrangement may include situations where the worker is paid according to the completion of a task, rather than receiving regular payments based on time worked. The worker uses his or her own equipment and tools, the worker is free to work for others at the same time and can delegate or subcontract the work to other persons. A subcontractor is generally required to maintain his or her own insurance against work-related injury, and to pay his or her own tax.

Essentially, it's seen that the subcontractor is running their own business but, again, there can be quite a blurred line between employment and subcontractors. As I said before, the issue of subcontractors and employees is separate to that of labour hire agencies, but they are often bound up together, and there can be some confusion when you are talking about these two concepts.

One further concept that I will raise is that of sham contracting. The federal Fair Work Act, sections 357 to 359, prohibit sham contracting. That is essentially defined as an arrangement whereby a person—let's say the employer that employs or proposes to employ an individual—must not represent to that individual that the contract of employment under which they are working is actually a contract for services or an independent contract.

I will take you to a case in a little while of the High Court that has recently come out that explains that more fully, but it is an offence under the Fair Work Act to make out that an employment relationship is an independent contract relationship. However, the devil is in the detail as to each particular situation and it is hard for employers at times to clearly delineate between the one or the other.

There is a wide range of legislation that applies to labour hire agencies, workers and employers across Australia, both at a federal level and a state level. I have attached at pages 4 and 5 some of the key pieces of legislation that might apply. One of the issues here is that different acts treat labour hire agencies, independent contractors and employees in different ways. The legislation is patchy, both within jurisdictions (within the state and within the federal jurisdictions) and often, on same subject areas, between state and federal legislation.

I have set out there that the Fair Work Act deals mainly with employees. We have the Fair Work Act at the Commonwealth level and the Fair Work Act at the state level. South Australia was the first to use the name and the commonwealth stole it, I think, and attached it to their legislation.

The work health and safety legislation is very important in this area. In fact, whereas the fair work legislation covers mainly employment relationships, the work health and safety legislation is very broad and specifically applies to both employers, labour hire companies and host companies. Section 7 of the Work Health and Safety Act refers specifically to labour hire companies and their employees, in the definition of a worker.

The duties required of those persons in a workplace are broad and encompass both labour hire companies and host companies to ensure the safety of workers. That is one piece of legislation which is comprehensive and applies across the board. A host employer can't simply escape its responsibility under this legislation in relation to workers who are in its premises, for instance.

647 The PRESIDING MEMBER: If there's insufficient documentation, if there's some question about it, then it falls back to the host employer. Is that what you're saying?

Mr HARBORD: Yes. You would look at what happened in relation to an accident. Let's say an accident happens at a worksite, then it's the obligation of the host employer who owns that worksite, as well as the employer, who may be the labour hire agency who is in some office somewhere else. The Return to Work Act generally applies to employees.

As I said before, certain contractors may be deemed to be workers under the regulations, but these scopes are very tight and limited. You might have some cleaners, some musicians, etc., but the definition provides a very limited cap on, let's take cleaners: the cost of the materials that they can use per month is very limited, so if it goes over that cap whereby it's seen that they're actually using a few hundred dollars worth of cleaning materials, then they're deemed to be an independent contractor and not a worker under the workers' compensation legislation. Generally, most independent contractors would not fall under the Return to Work Act.

Discrimination: the various acts concerning discrimination at the federal level, such as sex, racial, age and disability, do have provisions referring to contract workers in certain cases, as does the Equal Opportunity Act, which refers to discrimination against an agent or independent contractor, but again, you have to pick your way through the legislation to see exactly what situation might apply to an independent contractor as against an employee, and there aren't uniform definitions in that respect as to the circumstances that might apply.

There is, of course, a range of other legislation. There is the Independent Contractors Act at the commonwealth level, but that has a very limited scope and was primarily set up to try to prevent state legislation from treating contractors as employees for the purposes of industrial regulation. A number of unions were trying to pull contractors into awards, and the federal Liberal government at the time brought this act to try to stop that. It has limited scope, this act.

648 The PRESIDING MEMBER: Would that act, which I'm not aware of, prevent state governments from further restricting the activities of labour hire companies in terms of registration and licensing and things like that?

Mr HARBORD: No, I don't think so.

Of course, you have the Training and Skills Development Act concerning apprentices and trainees.

The Migration Act: often issues relating to labour hire companies involve migrant workers, who are particularly vulnerable. I am sure you have heard examples of this: workers who were brought out here, who are underpaid, they owe the person who brought them out here money,

they're housed in appalling conditions. That's a whole other area in itself, but again, the Migration Act is really limited to provide any protection at all for those situations.

I mentioned before the Employment Agents Registration Act. The definition of employment agent does not extend to labour hire companies. In my diagram I have pointed out the difference there. One of the further concepts, however, that I have added to my list is that of joint employer. There is no concept of joint employer in Australian law. There have been a couple of cases on this, but generally the Australian law has said, 'Well, there can only be one employer.'

In the US, however, it's different. The Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act both contain definitions of and specifically recognise that an employee can have two or more employers, and that the employers can be jointly liable for employment conditions. In my view, this is a concept that's well worth looking at in the Australian context.

Essentially, what it recognises is that the host company is the company that really has the economic power in any situation, and that's the one that makes the real decisions. It recognises, in the US, that that company should be jointly liable with a labour hire company. In my view, there is a need to have some form of registration of labour hire agencies.

649 The PRESIDING MEMBER: Where would you see that sitting? Would you see that within the Employment Agents Registration Act, for instance?

Mr HARBORD: I would see that as being either an extension of that or as separate legislation with separate licensing requirements.

If you turn over the page, I have given some case examples of some of the issues that can arise, and I will run briefly through these. The first case is very well-known and is currently the definitive case in terms of independent contractors as against employees. It's a High Court decision that came down in 2001.

In that case, bicycle couriers were paid according to the number of successful deliveries, so on a results basis, but they were required to wear company uniforms. They supplied their own bike. They were told when to work and how much to charge. They were told, and it was specifically written in an agreement with each courier, that they were independent contractors. A courier suffered a serious injury, and that's how it came before the court. The court found that, taking account of particularly the level of control exercised by the principal over the courier drivers, they were in fact employees.

I mention another case there—Baker v Markellos, which is a South Australian Supreme Court decision—where a fishing boat skipper was paid simply a percentage of the proceeds of the catch, not paid on an hourly basis, but he was prohibited from delegating the performance of his work without the owner's consent, and he was held to be an employee.

Another case, Australian Air Express, is very similar to the case in Hollis v Vabu except that the courier here supplied quite an expensive truck to perform duties and was able also to substitute another driver with the delivery company's approval. His was held to be an independent contract so, again, that highlights the different nuances between the two arrangements.

650 The Hon. P. CAICA: What was the genesis of that decision there? What prompted that?

Mr HARBORD: I am not sure, Paul. I would need to go back and have a look at that again.

651 The Hon. P. CAICA: The point I will make, Graham, if I can, is that we were talking earlier about perhaps just scratching the surface of how widespread some of the things that relate to these various forms of employment are. I make the point that a lot of these decisions here give good guidance as to what's going on in the industry, but you will only ever represent someone if they have been injured and you find out about that or they have reported underpayment. It becomes a difficult exercise for us to determine, outside of decisions like these or circumstances like these, how widespread it might be. That's just for interest because we are grappling with it.

Mr HARBORD: That's quite right, yes.

652 The Hon. J.M. RANKINE: In relation to your definition of how the situation sits, you have got people being engaged as a subcontractor under the Odco arrangement and others where the labour hire agency employs people who have a contract of employment and pays their wages, etc. We've heard evidence that some people are, in fact, paid wages, so there is a set amount, whether it's $25 an hour or whatever. They are paid an hourly rate; others are paid by volume.

Mr HARBORD: Yes.

653 The Hon. J.M. RANKINE: Where do they sit? How do they sit? I would, on your definition, say, in fact, that they were subcontractors but they don't have choice, and so if they get paid per volume there are many days where they can't work and therefore get nothing. We did hear evidence that they are put to work weeding. I don't know whether they can find a rate per bucket of weeds. That was one question that produced some comment before. How do they sit? Are people, in your experience, more exploited by being paid per volume rather than by wages, like a per hourly rate?

Mr HARBORD: It depends on each particular circumstance. Many years ago, as a uni student, I did a lot of fruit picking and went to Victoria, Shepparton, and around there. You would pick pears, fill up a box and you'd get paid for the box. The sugar cane workers would come down from Queensland. They would be picking in that season because they weren't cutting the cane. They are seasonal workers—that's the term often used—and they are still employees. They are paid per result, but in those cases usually they are employees and the employer will pay tax and workers comp, etc.

That is usually the case, although sometimes that is one of those blurred lines. Sometimes the farmer might try to set up an arrangement where those people are responsible and deemed to be independent contractors, but generally, in those cases, because the individual is simply supplying their own labour, they are not supplying any tools and are not really running their own business, they would be considered to be employees and usually they are casual workers, of course, as that's the nature of it.

654 The Hon. J.M. RANKINE: Generally, in that category, which is what we are looking at rather than the temp office staff, the reason they are engaged is that, rather than go to the bother, if you like, of having to engage people, pay them, do their tax or the bookwork and be responsible, the host employer, the apple grower, the grape grower, or whatever, wants people coming and doing the job and they just want to pay one bill and not be bothered with any of those things. How do you think they'd react to a joint employer legislation, where they were actually held responsible, because I think the whole purpose of engaging a labour hire company is so they are not responsible?

Mr HARBORD: They wouldn't like it. As you said, the whole purpose is so they don't have to take on those responsibilities. In terms of a licensing arrangement, you could take one step back from making them actually a joint employer by saying that at the very least the host company could be found liable if there is underpayment of wages, for instance, or those workers are not getting the proper conditions. That would mean that the host employer really has to open their eyes and make sure and ask the question of the labour hire company: what are these people being paid? Is it according to the award? I need assurance about that because otherwise I am going to be exposed potentially as well.

655 The Hon. J.M. RANKINE: We did talk to one firm who appeared to be very diligent in auditing the paper trail—

Mr HARBORD: Yes.

656 The Hon. J.M. RANKINE: —around the labour hire people who come into their company. But the one thing they couldn't assure us of was that the money actually went to the worker. They had never actually thought of checking. The labour hire company says, 'Here, this is what we pay—this much. Here are the time sheets,' all that sort of stuff, but there is never any evidence of actual payment.

Mr HARBORD: Right, okay. Well, I would have thought it would be relatively simple to say that the host company needs a copy of every pay slip for a start.

657 The PRESIDING MEMBER: From Jennifer's point, that's still from the labour hire company's end. They show you a piece of paper—

Mr HARBORD: That's the pay slip—

658 The PRESIDING MEMBER: —that doesn't demonstrate anything.

Mr HARBORD: —and it's not, yes.

659 The PRESIDING MEMBER: But I'm not sure how you get around it.

660 The Hon. J.M. RANKINE: How do you make sure? A lot of them are non-English speaking.

Mr HARBORD: Yes.

661 The Hon. J.M. RANKINE: So, you can even say, 'Sign it, or you won't have a job.'

Mr HARBORD: Yes.

662 The Hon. J.M. RANKINE: I think there has to be some trail to see the money actually goes into someone's account—

Mr HARBORD: Yes.

663 The Hon. J.M. RANKINE: —that matches what they say they are paying them.

Mr HARBORD: Yes. Any contractual arrangement between the host company and labour hire agency can require the labour hire agency to produce its books at any time in relation to those workers to the host company. There are various mechanisms like that whereby the host company can check up.

664 The Hon. P. CAICA: And we are not suggesting in these circumstances that because they were both a reputable labour hire company and a—

665 The Hon. J.M. RANKINE: Diligent employer.

666 The Hon. P. CAICA: —diligent employer or producer, but it was just a gap in the understanding between the two groups.

Mr HARBORD: Yes.

667 The Hon. J.M. RANKINE: Which could be further exploited by dodgy operators, yes.

668 The Hon. P. CAICA: Which could definitely be exploited by dodgy operators because we were given examples of, 'Here's your pay slip,' and there's an envelope with money in it.

669 The Hon. J.M. RANKINE: With nothing on it.

670 The Hon. P. CAICA: Yes, no records; things like that.

Mr HARBORD: Yes. At the end of the day, as I said, the US has seen fit to have this concept of joint employer in its legislation, and it's particularly both in its general Fair Labor Standards Act but also the Migrant and Seasonal Agricultural Workers Protection Act, because that's where a lot of the problems have arisen.

671 The Hon. P. CAICA: Again, it's not so much a dilemma we are grappling with, but I like the idea of ensuring that we have better mechanisms by which labour hire companies are registered. In addition to that, too, the work that I think we'll need to do is to ensure that the workers themselves are better prepared for an understanding of what they are doing that will see that it will work.

Mr HARBORD: Yes.

672 The Hon. P. CAICA: This work is very important in many parts of Australia.

Mr HARBORD: Yes.

673 The Hon. P. CAICA: But I think we need to have a better managed workforce as well that is properly protected, not only just by the law but by various industries that understand that it is a joint responsibility to have these workers better understand their rights and obligations.

Mr HARBORD: Yes. Again, though, you are talking about workers who are very vulnerable: they don't have the language; they don't have the cultural understanding. Yes, it's difficult for them.

674 The Hon. P. CAICA: For example, Graham, what was the name of the company, the not-for-profit organisation that provides employees?

675 The PRESIDING MEMBER: MADEC.

676 The Hon. P. CAICA: MADEC, yes. They undertake an induction of all the workers; they are provided with a card.

Mr HARBORD: Yes.

677 The Hon. P. CAICA: But I can see an extension of that process by which all seasonal workers will need to have some form of registration that provides them with many things but, more importantly, an opportunity for them to be properly monitored as to how their work conditions are.

Mr HARBORD: Yes.

678 The PRESIDING MEMBER: Would it then be a better system to, as Paul says, register the individual worker rather than register these contract arrangements, which may phoenix at any time? If you have individual workers registered and licensed in some way, would that be a better safeguard for those workers?

Mr HARBORD: You could do both; I mean, that's an interesting concept. Yes, the difficulty is, though, these are casual workers who come and go. Just maintaining a registration system like that would be quite complicated, I would have thought.

679 Mr KNOLL: They said they covered about 80 per cent of workers, currently.

Mr HARBORD: Yes, that's working quite well in that microcosm.

680 Mr KNOLL: And tended to be the ones who didn't participate for a reason.

Mr HARBORD: Yes. Of course, at the moment, under the Fair Work Act, every new employee is required to be given a fair work statement about their entitlements and employment conditions. Potentially that could be extended as to what is given to a worker. It needs to be given in the appropriate language and there needs to be a clear statement on that as to who they can contact if they have a complaint. So, that fair work statement could certainly be extended as well.

681 The Hon. P. CAICA: There's a joint responsibility everywhere, isn't there? We bring them over here either on visas or they are on working holiday visas, so we know who they are, where they're coming, all those type of things. I'm not saying we need to inundate the process with red tape, but surely there are some mechanisms we can have in place that better protect both the host employers and the workers, and the industry as a whole.

Mr HARBORD: Yes.

682 The Hon. P. CAICA: I don't think, Graham, we will ever stop the small blockies having a sign out the front of their place that says, 'Workers required'. That will always be the case, but from an industrial perspective, I think we can do a lot better here.

683 The PRESIDING MEMBER: Just picking up Paul's point of view about the small grower using dodgy labour, we are talking about chains here, so we are talking about host employers having certain responsibilities and rights. How far up the chain do you see that responsibility going? Do you see it ending up with the big retailers, for instance? Is there a responsibility as employers?

Mr HARBORD: If we are talking about a retailer who is taking the products from a farm which is using labour hire workers—

684 The PRESIDING MEMBER: That is I guess what I'm saying.

Mr HARBORD: Potentially, that could be. In the US, when they talk about this concept of joint employer, they talk about vertical integration and horizontal integration. Vertical integration means that there might be a number of different employers, and it's not just necessarily one host company, but there might be a few employers who are responsible at the end of the day.

You might have the labour hire agency, the host company and then there is another company on top of that company who is getting the benefits of that labour.

By horizontal integration, what they mean are companies which are related, so you might have an employee who, say, works in a chain of restaurants which are owned by related companies, so it would be different employers. All those employers—there might be two or three different companies—are jointly responsible for the employment conditions of that worker. There is a lot that has been done in the US on these concepts that hasn't reached Australia.

685 The PRESIDING MEMBER: They're using that to crack down on Uber as well I think, that concept of the joint employer. They are using that in relation to Uber and prosecuting Uber in some cities.

Mr HARBORD: I'm not sure about that, but I will take your word for it.

686 The Hon. A. PICCOLO: To what extent can we as a state government legislate, given, if you like, the regulation of labour is a shared responsibility in this country, and move in this area apart from licensing and registering the labour hire companies? To what extent can we go further to regulate the employees given that they would be covered theoretically by federal law?

Mr HARBORD: I think that's a difficult question. The state has, of course, referred its powers to the commonwealth, so the commonwealth now, under the Fair Work Act, covers all private sector employees. There would certainly be some difficult constitutional issues about simply trying to lay down laws to cover employees of companies, etc., who come under the Fair Work Act. A licensing arrangement, for a start, would be much simpler to at least get some more reasonable control over what is happening.

687 The Hon. A. PICCOLO: With licensing arrangements, because we actually require them to do certain reporting, for example?

Mr HARBORD: Yes. Obviously it would be much better if you had a national framework and state, such as for instance that which applies to childcare agencies, where you have your state legislation that attaches as a schedule to the federal legislation, licenses the childcare bodies, requires reporting, has regular inspections and can cancel the registration if the certain conditions, which are extensive, are not complied with.

688 Mr TARZIA: Mr Harbord, I found your summary of cases and explaining the ratio of the cases very useful, thank you. If we want to delve a little more into labour arrangements and a discussion of what is the current state of the commonwealth, what cases would you direct us to at a federal and state level as being the most recent, where we could delve into these issues a bit more thoroughly? Are there any cases in particular?

Mr HARBORD: There are cases constantly coming out. Again, it depends on the issue you are looking at. If you are looking at independent contractors as against employees, that is one issue, or if you are looking at concepts of sham arrangements there are no specific cases that I am aware of particularly recently that have dealt specifically at a federal level with labour hire agencies, but again I have not done the research on that. Sorry, it would need a bit more research to do that. I am sure you have capable research people here or, if you want me to, I could go back further and look at that.

Perhaps I might just finish up very briefly on some of the cases I have referred to. I explained a bit about the ODCO decision. Compare that with the decision in South Australia of Slater against WorkCover, which was very much based on the ODCO arrangement, in fact set up to follow the ODCO arrangement. Here the applicant was a tomato picker engaged by a labour hire company as a supposed independent contractor, but the South Australian Workers Compensation Tribunal and the Full Tribunal held that she was really an employee and entitled to workers compensation as a result of that.

689 The Hon. P. CAICA: An employee of the labour hire company?

Mr HARBORD: An employee of the labour hire company, that's right, yes. So, compare that with the Supreme Court decision in the state of Mason & Cox against McCann. McCann was the worker employed by a labour hire company called Somebody Sometime. He was placed at a foundry run by Mason & Cox and he suffered an injury there. Under the state workers compensation

legislation a worker, an employee, is barred from taking a common law action against the employer. So, in this case you had Mason & Cox, paradoxically, seeking to argue that they were in reality the employer of this employee for the reason that they would therefore not be subject to a case of negligence against them. That appeal was dismissed, and it was held that McCann was in fact employed by the labour hire company.

Again, you have these different situations where both the host and the labour hire company are trying to duck and weave, depending on the circumstances and on what issue is that they are facing. I have referred to a further case that is very recent of the Fair Work Commission, that just came out a month ago, where Adecco, a major labour hire company, was found to be responsible for unfairly dismissing a worker who had been placed at Nestlé. In that case the worker, who had been there for at least a couple of years, was accused of not clocking off properly, and in fact I think for clocking off for someone else.

Nestle therefore said, 'We don't want her here any more,' and, 'See you later.' Adecco then said, 'Look, you're still on our books but we can't find anything for you,' leaving the worker in limbo as it was, and not getting paid of course. I have come upon a number of cases like this in my experience with clients. In this case it was found that the allegations against the worker were completely wrong, and it was explained. Notwithstanding that, Nestle still said, 'We don't want her back,' and often there's ego involved in these sorts of things.

Adecco sought to argue that, because she was still on their books, she was still employed by them, so there was no dismissal. Effectively, if they had succeeded, the worker would be in limbo there. In fact, the commission found that, no, Adecco was the employer and they were ultimately responsible for the unfair dismissal, and there was a dismissal at the initiative of the employer because she had been given no further work. That is quite a significant case, but that's just at the first instance, and I don't know whether that is going to be appealed.

Finally, I have put a case in there which was a recent High Court decision concerning sham contracting, where you had cleaners employed by Quest. They were employees. Quest then entered an arrangement with a labour hire agency, which purported to engage the cleaners as independent contractors and then provide their services back to Quest. The Fair Work Ombudsman took the case against Quest and it was found by the High Court that this was a sham arrangement, but only after the Federal Court had found that it wasn't, again demonstrating sometimes the difficulty of these cases.

As I said before, I think that registration of labour hire agencies would certainly go some way to controlling the situation, and I don't see any reason that the state can't do that at the moment. At least those agencies would be more closely monitored and there would, you would expect, be a set of standards required of those agencies. In particular, it could also single out those individuals who are responsible for phoenixing, who shut down a company simply to move on and set up another, because they could be banned from having a licence in a personal capacity.

Such legislation, if it was brought in, would probably be fairly heavily reliant on bodies such as the Fair Work Ombudsman at a federal level to do a lot of the policing, bringing cases up, so there would at least need to be some cooperative arrangement between the two. However, as I said before, clearly a cooperative federal-state framework is the ideal.

690 The Hon. P. CAICA: I think so. In addition, they are doing a review in Queensland and Victoria, aren't they, the state jurisdictions? Obviously the Commonwealth are doing something as well, because they would not have been very happy with the *Four Corners* report either. So it does gives us an opportunity as a committee to consider in our recommendations a tightening up of the respective state legislation for which we are responsible, to engage with our colleagues interstate about their state legislation and then jointly approach the Commonwealth with some form of recommendation as well.

Mr HARBORD: Yes, but I do also think that the host company, which has the real economic power in a situation—there should be an investigation of ways in which that could be made more accountable, but that may require amendments to the federal legislation, too. The whole issue that this committee is grappling with is not just relevant to Australia; it raises its head in other countries as well, and there is continually evolving different forms of labour arrangement.

One of the real issues in the European Economic Community, for instance, is the way in which labour is moved around to come in and compete against countries such as Sweden where there are high wages. Lower wage countries bring in their labour, pay them different rates of pay, undercut the wages of employees in those countries.

691 The PRESIDING MEMBER: Based on another company.

Mr HARBORD: That's right, but because of the European union arrangements, you can't ban those companies from coming in and doing that. I know that's been a real issue in Europe.

692 The PRESIDING MEMBER: I am going to have to cut you short on this, Mr Harbord. We're running out of time, sorry.

Mr HARBORD: I've mentioned about the concept of a joint employer. I think that's well worth more investigation. At the very least, that concept could be embraced in relation to unfair dismissal cases involving labour hire agencies and host employers, but again that would have to involve the federal legislation.

693 The PRESIDING MEMBER: Thank you, Mr Harbord. Are there any other pressing questions for Mr Harbord? Thank you very much; that was extremely interesting and certainly made things a lot clearer to me. I appreciate your time.

THE WITNESS WITHDREW