Australian Government

Department of Employment and Workplace Relations

DISCUSSION PAPER:

Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements

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ABBREVIATIONS & GLOSSARY

ABS	Australian Bureau of Statistics
Commission	Australian Industrial Relations Commission
FOES	*Forms of Employment Survey* (an ABS publication)
hirer	includes both employers and principals
host business	the business to which labour hire workers are provided
labour hire	a tripartite arrangement where a labour hire agency provides workers to a host business
Odco arrangements	a legally recognised form of independent contracting arrangement in the labour hire industry where no employment relationships are created
OHS	occupational health and safety
outworker	workers who perform work at premises which are not businesses or commercial premises
worker	includes both employees and independent contractors
WR Act	*Workplace Relations Act 1996*

MAKING A SUBMISSION

How to make a submission

Written submissions are sought on the issues and proposals raised in this paper. The closing date for submissions is **11 May 2005**. Submissions can be provided electronically to the following email address**:** **contractinglabourhire@dewr.gov.au**. While electronic submissions are preferred, submissions may also be mailed to:

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This paper is available on the internet at http://www.dewr.gov.au/ministersAndMediaCentre/andrews/discussionpapers/DP_options_legisreform_ic_lh_details.pdf.

If you have difficulties in accessing this paper online, please contact David Denney on (02) 6121 7912.

List of proposals and issues on which submissions are sought

1. The WR Act should be amended to provide that awards and agreements cannot contain clauses which restrict engaging independent contractors or impose conditions or limitations on their engagement.
2. Should the current common law definitions of independent contractor and employee be retained for the purpose of the WR Act, with courts determining the question using established common law principles?
3. Should the personal services business test under the *Income Tax Assessment Act 1997* be adopted as the *sole* definition of 'independent contractor' for the purposes of workplace relations regulation?
4. Should the personal services business test under the *Income Tax Assessment Act 1997* be adopted as *part of* the definition of 'independent contractor' for the purposes of workplace relations regulation?
5. Should an 'Independent Contracting Registrar' be established to make declarations about employee/independent contractor status applying the appropriate tests?
6. Should an object be added to section 3 of the WR Act to the effect that the status of independent contractors should be upheld and subject to minimal industrial regulation?
7. Are there any State laws other than workplace relations laws (such as workers' compensation, anti-discrimination or OHS laws) containing independent contractor provisions which the Commonwealth should consider overriding?
8. Should the proposed Independent Contractors Act override State and Territory unfair contracts laws and seek to cover the field (as far as constitutionally possible) for unfair contracts provisions?

9. Should the Federal Magistrates Court be given jurisdiction to review contracts?
10. Should the proposed Act seek to override State 'deeming provisions', which draw independent contractors into the net of workplace relations regulation, as far as constitutionally possible?
11. Should a civil penalty provision be introduced in the WR Act applying to hirers who deliberately attempt to avoid employer responsibilities by seeking to establish a false independent contracting arrangement?
12. Should the labour hire industry be regulated to ensure high standards are met by all players?
13. The WR Act should be amended to provide that awards and agreements cannot contain clauses which restrict engaging labour hire workers or imposing conditions or limitations on their engagement.
14. Should the WR Act be amended to include in the definition of 'employer' a labour hire agency that arranges for an employee (who is a party to a contract of service with the agency) to do work for someone else even though the employee is working for the other person under a labour hire arrangement?
15. Should 'Odco' arrangements be statutorily recognised in the Independent Contractors Act?

INTRODUCTION

Purpose and scope of this discussion paper

The Government's 2004 election policies included creating a new Independent Contractors Act to enshrine and protect the status of independent contractors and encourage independent contracting as a wholly legitimate form of work.

These policies reflect the Government's position that independent contractors should not be regulated by workplace relations law, but by commercial law. This is consistent with the true nature of independent contracting arrangements as commercial contractual arrangements, not employment arrangements.

The Government supports a workplace relations framework that maximises choices for workers and businesses and minimises regulatory constraints and interference by third parties. It also supports the harmonisation of workplace relations laws nationally.

The Government's policy has been to respect the conscious choice of people to be independent contractors. For some time there have been calls for changes to the current arrangements. The "one size fits all" approach which has dominated in the workplace relations arena is no longer appropriate to modern conditions where people increasingly seek flexibility in their working arrangements. The Government believes we need a system which recognises and validates the choices people make to be either employees or independent contractors.

The Government recognises that there may be people who are attracted to some aspects of independent contracting (particularly the freedom to contract about one's own terms and conditions without being restricted by workplace relations regulation) but who would prefer to be employees. This has led some to suggest there should be a third choice of working arrangement: being an employee, but being free to contract without current restrictions imposed by legislation and industrial instruments. While the Government considers that this concept is worthy of further consideration, this proposed third category is beyond the scope of this paper.

This discussion paper canvasses some options for legislative reform to prevent unreasonable workplace regulation of independent contractors, including the removal of constraints and barriers on the freedom to contract and the freedom to engage workers through labour hire arrangements. It is intended to provide a basis for consultation on possible reforms in this area.

This paper will also address labour hire employment arrangements as well as labour hire contracting arrangements. Current laws place constraints on the engagement of labour hire employees, an issue closely related to barriers faced by independent contractors.

The main areas of reform this paper addresses are:

- reviewing definitional issues regarding 'independent contractor', 'employer' and 'employee';
- preventing federal awards and agreements from containing clauses which restrict the use of independent contractors or labour hire workers, or which seek to put conditions on their engagement (for example, prescribing they have the same conditions as employees);
- protecting independent contracting arrangements (including 'Odco' arrangements) as commercial arrangements, not employment arrangements, under the law;
- addressing inappropriate State and Territory legislation which 'deems' independent contractors to be employees for the purpose of workplace relations regulation, including by overriding that legislation where appropriate;

- ensuring that 'sham' arrangements are not legitimised; and
- preventing State and Territory legislation from impacting negatively on labour hire and contracting arrangements.

Other inquiries into independent contracting and labour hire

Many States and Territories are reviewing these areas, reflecting the growing importance of independent contracting and labour hire arrangements in the Australian workforce. Also, the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation is presently conducting an inquiry into independent contracting and labour hire.

Details of these inquiries are outlined at *Appendix 1*.

PART 1 : INDEPENDENT CONTRACTOR ISSUES

A. Extent of independent contracting and the range of industries in which independent contractors work

Extent and nature of independent contracting in Australia

According to estimates by the Productivity Commission in 1998, around 10 per cent of people in employment in Australia worked as self-employed contractors. In 1998, this equated to approximately one million people operating outside the traditional employer-employee relationship.[1]

The ABS *Forms of Employment Survey* (FOES) is the most recent study undertaken relating to self-employed contractors, and also permits more accurate estimates of the prevalence of self-employed contractors than employment status reports from workers or employers. According to the FOES data published in 2000, self-employed contractors accounted for 10.1 per cent of all employed persons in Australia.[2]

Estimating the growth of independent contracting over time is subject to a number of measurement problems, so the following figures should be taken as indicative only.[3] However, using data from ABS surveys on different categories of employment, VandenHeuvel and Wooden found that the share of self-employed contractors in total employment rose from about 7.3 per cent in 1978 to 8.4 per cent in 1998 - a 15 per cent increase over the twenty years.[4]

Industry distribution

Self-employment in the construction industry is common, especially in housing as opposed to commercial construction.[5] The construction industry is sensitive to the economic cycle which means that the demand for labour fluctuates with the peaks and troughs of the cycle. In 1998, almost one quarter of self-employed contractors worked in this industry.

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[1] Various competing definitions present problems when trying to obtain statistical data on trends in independent contracting. For example, the ABS labour force categories of own account workers and owner managers have been used as a proxy for independent contractors. There are similar difficulties associated with reconciling the various estimates of the number of labour hire workers available from ABS employee and employer-based surveys.

[2] This is higher than estimates from other research reports, which may reflect growth in the incidence of contracting, and/or differences in measurement methodology. Because the FOES did not include information that would allow a closer comparison with the methodology used in VandenHeuvel and Wooden's analysis, any further discrepancies in estimation are unable to be explained.

[3] The most informative research studies completed in Australia are: the Australian Workplace Industrial Relations Survey of 1989-90 and 1995 (AWIRS); the *Labour Force Survey* published quarterly by the ABS since 1978 (LFS Cat. No. 6203.0); the *Survey of Employees and Earnings* also published by the ABS (Cat. No. 6248.0); the Population Survey Monitor created by VandenHeuvel and Wooden in 1995; the Forms of Employment Survey (FOES) published by the ABS as a supplement to the LFS in 2000 (Cat. No. 6359.0); the Productivity Commission Research Paper, 'Self-employed Contractors in Australia: Incidence and Characteristics', Ausinfo, Canberra, 2001.

[4] This statistic is thought to be lower than the real number of people working as self-employed contractors because it was derived under the assumption that the share of self-employed contractors in each of the standard ABS employment categories had not changed between 1994 and 1998.

[5] This section draws on Productivity Commission Research Paper, 'Self-employed Contractors in Australia: Incidence and Characteristics', Ausinfo, Canberra, 2001.

Computer services such as help desk services, hardware installation and system design and maintenance are often contracted out to skilled workers in Australia. This industry accounts for 19.7 per cent of all self-employed contractors in the workforce.

The most common type of independent contractors in the transport services industry is owner-drivers. Owner-drivers are workers who supply their own vehicle to deliver goods for a client. In 1998, 5.4 per cent of all self-employed contractors worked in the transport and storage industry.

There are several different types of contract workers in manufacturing, ranging from business-to-business relationships (where the contractor supplies finished parts or components for the production process), to contractors whose input is not directly related to the finished product (for example, cleaners and maintenance), to the self-employed contractors who are paid according to their output and produce part, if not most, of the finished good. In 1998, the manufacturing industry accounted for 8.6 per cent of self-employed contractors.

Occupational distribution

Tradespersons and related workers are by far the largest group of self-employed contractors: 27 per cent of all self-employed contractors are from this occupation.[6] Tradespersons and related workers account for only 11.9 per cent of all employees, a considerably lower proportion.

Professionals are the second largest group of all self-employed contractors at 18.3 per cent. The proportion of professionals who work as employees is similar to those who work as self-employed contractors (18.9 per cent).

Collectively, the occupational categories of intermediate production and transport, and labourers and related workers make up 10.6 per cent each of the total amount of self-employed contractors in the Australian workforce. The proportion of employee labourers and related workers to all employees is also 10.6 per cent. The proportion of intermediate production and transport workers who work as employees is 9.6 per cent.

The role of independent contracting in the Australian economy

The flexibility that contractors provide is essential to Australian business. Businesses that use contractors are able to focus on their core business more effectively and use specialist contractors for a range of non-core activities, as needed. This can enable business to compete more effectively in Australian and international markets and to adapt to changing economic conditions.

For the worker, it can provide more freedom to choose working hours, to decide when they take their holidays, who they work for and what type of work they undertake. High demand for specialist contractors in particular industries contributes to higher wages and ease of worker mobility. These factors can make independent contracting attractive to workers. For professionals and tradespeople, this may equate to gaining higher pay without the managerial responsibility that tends to accompany higher paying jobs in large organisations.

Limiting or denying business the choice of engaging the use of independent contractors to undertake particular functions could diminish productivity, international competitiveness and employment. This would have a flow-on effect for the rest of the economy.

[6] The statistics in this section are derived by the Productivity Commission from unpublished FOES data.

It is fundamental to the ongoing success of the Australian economy to ensure that workplace relations arrangements encourage flexibility and give employers and employees the main responsibility for determining matters affecting their relationship, by agreement, at the workplace level.

Contracting out, and particularly the flexible arrangements afforded by independent contractors can generate reductions in costs to the economy as a whole because:

- a significant proportion of the employer's total labour resources may not be needed all the time – it can reduce the need for 'labour hoarding' or for requiring existing employees to undertake excessive overtime during periods of increased production;
- by giving the employer the flexibility to adjust processes more quickly, it can provide additional scope for finding better ways of doing things;
- the contractor may be able to reap the benefits of specialisation in the particular activity where the employer is not able to do so; and
- it can allow greater flexibility of labour use, particularly where the content of particular jobs in a firm has become fixed by detailed and rigid descriptions.

Independent contracting can also contribute to the dynamic efficiency of the economy. If individuals are willing and able to start up microbusinesses in response to rapidly emerging business opportunities, the economy as a whole is more responsive and flexible, and better able to meet the needs of consumers.

B. Options for minimising current limitations on independent contracting

As discussed, independent contractors constitute an important source of flexibility and productivity in the Australian labour market. The Government considers that inappropriate and unduly complex workplace relations regulation of independent contractors should be minimised to the greatest possible extent. Laws currently limit independent contracting arrangements in a number of ways. Examples of this include:

- industrial instruments that purport to impose limitations on the use of independent contractors;
- unfair contracts provisions; and
- State provisions affecting independent contractor status, including 'deeming' provisions.

These limitations are discussed below.

Removing limitations that industrial instruments impose on independent contractors

Some certified agreements and awards contain provisions that purport to restrict the use of independent contractors, especially in the building and automotive industry. For example, an agreement might require that an employer only engage independent contractors where there are no suitable internal resources available, or an award might seek to prevent respondent employers from contracting out work except on condition that the work be performed on terms no less favourable than those in the award.
Provisions in agreements may constrain the use of contractors in a number of ways, for example, by:

- defining and limiting the circumstances in which contractors may be used (eg 'where it is determined there are no suitable internal resources available', 'to meet peak workloads', 'to

perform specialist functions where the employer does not have the requisite skills', 'as relief after permanent drivers have all been offered overtime', 'during periods of dispute the number of contractors engaged on site will not be increased');

- placing procedural requirements on the use of contractors (eg 'the use of external contractors requires prior negotiation with the unions');
- requiring contractors to make certain types of industrial agreements (eg 'all contractors will be required to negotiate an Enterprise Agreement with the relevant union(s) that is party to this Agreement within one month of obtaining the contract'); and
- requiring contractors to observe certain behaviour (eg 'any work bans imposed by tradespeople will be observed by contractors').

The Government is opposed to these kinds of clauses which limit flexible working arrangements and are an inappropriate incursion by unions on employers' ability to run their businesses according to their own preference and in the most competitive and productive manner.

The Government sought amendments to the WR Act in 2001 to prevent awards and certified agreements from restricting the use of independent contractors in the Workplace Relations and Other Legislation (Small Business and Other Measures) Bill 2001. This Bill proposed that:

- the Commission have the power to vary an agreement to remove provisions restricting the use of contractors. Decisions to vary or not vary in this way would have been appealable to the Full Bench of the Commission;
- the Commission ensure that awards do not contain provisions that restrict employers from entering into contracts for services or including particular terms or conditions in contracts for services, but textile clothing and footwear award provisions were an exception to this;
- the Commission would be unable to certify an agreement with restrictive provisions; and
- existing or future restrictive provisions would be rendered void.

The Bill lapsed without being passed. These provisions could be reintroduced as part of the proposed Independent Contractors Bill.

Proposal : The WR Act should be amended to provide that awards and agreements cannot contain clauses which restrict engaging independent contractors or impose conditions or limitations on their engagement.

In addition, State awards and agreements also contain restrictive clauses which constrain employer choice. For example, the NSW Labor Council is seeking a variation of awards in the Secure Employment Test Case, currently before the NSW Industrial Relations Commission. One of the variations proposed is that employers consult with unions before contracting out work which could be done by employees and that the terms and conditions of contractors be not less than those of the employers' direct employees. Also, common law agreements, such as deeds, are sometimes used to try to restrict the use of, or impose conditions on, independent contractors or labour hire employees. The Government is opposed to these kinds of restrictive practices.

Court and Commission determinations affecting independent contractor status

Introduction

The Australian Industrial Relations Commission sometimes needs to determine whether a person is an employee or an independent contractor in order to determine whether certain laws

will apply to them. For example, if a person is an employee, they will be entitled to minimum benefits under awards and agreements and may have access to legal remedies, including in termination of employment cases. The Federal and High Courts also consider these cases when they are appealed.

The common law has traditionally maintained a distinction between 'employees' and 'independent contractors'. Employees are engaged under a contract *of* service (an employment contract), whereas independent contractors are engaged under a contract *for* services. Historically, independent contractors have been perceived as running their own business and working under commercial, not employment, contracts. In contrast, employees have been seen as subject to control and direction.

The Courts have adopted a multi factor test to determine whether a person is an employee or independent contractor. This test is best explained by the High Court cases of *Hollis v Vabu Pty Ltd*[7] and *Stevens v Broadribb Sawmilling Co*[8]. The High Court has taken an approach which involves looking at the totality of the relationship between the parties. No single issue concerning control, economic independence or the description of the relationship in a contract will be determinative, however, courts will place greater weight on some matters, in particular, on the right to control the manner in which the work is performed. A full list of the sorts of factors the Courts consider is at *Appendix 2.*

Some commentators use the term 'dependent contractors' to mean a person who is legally an independent contractor, but provides a service to just one entity. This term is not recognised at common law. A person must either be an employee or a contractor, they cannot be both, or a hybrid of both. There may sometimes be 'grey areas' where the relationship is more difficult to categorise because it has traits of both employment and contracting, but the courts will use well established tests to determine the issue if required.

How can genuine independent contracting arrangements be better protected under the current Federal system?

Definitions in the WR Act and other federal legislation

Subsection 4(1) of the WR Act uses the common law meaning of employee, although it expressly excludes someone undertaking a vocational placement for the purposes of the WR Act. 'Employer' has its common law meaning but is expanded to include an unincorporated club. 'Independent contractor' takes its common law meaning in subsection 4(1A) of the Act but is limited to natural persons except in regard to the freedom of association provisions in Part XA of the WR Act.

The different definitions of 'employee' and 'independent contractor', both within Commonwealth legislation and between federal and state jurisdictions, raise complex issues and are the subject of long-standing concern. The Small Business Deregulation Task Force Report examined this issue in 1996 in relation to small business concerns. The Government responded to this report with *Unravelling the Threads – Who is or is not an Employee*, a comprehensive guide on some of the most common areas of Commonwealth, State and Territory legislation which cause confusion to employers.

The common law definition has been criticised because the application of the multi-factor test can lead to outcomes which are not uniform. It has been suggested that the lack of a clear, objective distinction between employee and contractor status results in significant compliance

[7] (2001) 181 ALR 263
[8] (1986) 160 CLR 16

costs for businesses engaging a diverse workforce. However, this is not a universal view. Some sectors of the independent contracting industry have publicly submitted that differentiating between employment and genuine independent contracting arrangements should be determined only by courts using the well established common law principles discussed earlier. It is argued it is not these principles which lead to what can be perceived by aggrieved parties as subjective outcomes, but the complex factual situations to which they apply.

The Government has previously adopted the position of retaining the common law definitions, as the common law appropriately maintains the distinction between employment and independent contracting arrangements. Unlike many statutory definitions, it does not 'deem' classes of workers to be one or the other, but looks to the individual circumstances involved. It does not recognise the 'half-way house' notion of 'dependent contractors' which can serve to blur the distinction between commercial relationships and employment relationships. The common law affords greater flexibility than legislation and provides an effective mechanism to address 'sham arrangements'. If a statutory definition were adopted, it may be possible to subvert the legislature's intention using legal artifices. In contrast, a common law based approach will look to the substance of the arrangement.

The employment relationship has become a platform around which a range of statutory and common law rights and obligations are granted or imposed. Areas involved include: tax; superannuation; workers' compensation; occupational health and safety; vicarious liability obligations; minimum labour standards; collective bargaining rights; and employment termination regulation.

Where legislation governs the operation of a particular aspect of the employment relationship, the way in which an employee, employer or the employment relationship is defined will differ depending on the policy objective of that legislation. For example, Commonwealth legislation conferring protection from certain forms of discrimination, such as the *Racial Discrimination Act 1975,* the *Sex Discrimination Act 1992,* the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004* defines 'employment' to include work under a contract for services, that is, independent contracting arrangements. The width of this definition reflects a policy approach which seeks to provide protection from discrimination to all people in the course of their work (as well as in other spheres) without the need for hirers to differentiate between employees and independent contractors.

The Government considers that workplace relations regulation is appropriate for employment relationships, and commercial regulation (such as the *Trade Practices Act 1974*) is appropriate for independent contracting relationships. The common law definition of employee excludes independent contractors and so meets this policy objective.

Stakeholder issue : Should the current common law definitions of independent contractor and employee be retained for the purpose of the WR Act, with courts determining the question using established common law principles?

Adopting a statutory definition of independent contractor based on taxation laws

One approach which has been suggested to clarify independent contractor status is to define a person as an independent contractor if they are currently recognised as a personal services business under the *Income Tax Assessment Act 1997*. This Act provides that certain independent contractors are to be taxed as employees (though the legislation makes it clear that they do not thereby become an employee for other purposes). However, they will not be

taxed as employees if they are found to be running a personal services business, which will be the case if any of the following applies:

- they satisfy the 'results test', that is:
- they work to produce a result(s);
- they provide the tools and equipment necessary (if any) to produce the result(s); and
- they are liable for the cost of rectifying any defective work;
- none of their clients pays them 80 per cent or more of their personal services income in a year of income and they have 2 or more unrelated clients (who were obtained as a result of making offers to the public at large or to a selection of the public);
- none of their clients pays 80 per cent or more of their personal services income and:
- they engaged an individual(s) or an unrelated entity(ies) to perform 20 per cent or more (by market value) of the principles of work (i.e. the work that generates the personal services income; or
- they have an apprentice for at least half a year; or
- none of their clients pays 80 per cent or more of their personal services income in a year of income, and they exclusively use business premises that are physically separate from their home, or from premises of the person for whom they are working.

This test could be adopted as the sole definition of independent contractor for the purposes of workplace relations regulation. This would be arguably clearer than the common law definition. The taxation definition has similar elements to the common law approach (for example, providing one's own tools, capacity to delegate work and so on). However, it would be narrower than the current common law approach, resulting in people who are currently independent contractors at law becoming employees for the purpose of workplace relations regulation. For example, a person working under a properly executed Odco contract would be considered an independent contractor at common law, but may not pass the personal business taxation test. Further, the personal business test relies substantially on the degree to which an independent contractor works for one hirer, echoing notions of 'dependent contracting' which is not accepted at common law. In effect, this definition would create a third category of worker who would be an independent contractor under current common law, but not fall within the proposed statutory definition.

This also illustrates the difficulty in transposing definitions from one sphere to another. Taxation policy objectives are driven by issues of equity and revenue collection. Workplace relations policy objectives are driven by notions of workplace flexibility, productivity and choice, and ensuring individual workers are afforded appropriate entitlements and protections in their working life.

Stakeholder issue: Should the personal services business test under the *Income Tax Assessment Act 1997* be adopted as the *sole* definition of 'independent contractor' for the purposes of workplace relations regulation?

An alternative would be to make the personal services business test part of the definition of 'independent contractor'. For example, a definition could be developed to the effect that an independent contractor includes but is not limited to, a person who falls within the personal services business test. This would give some certainty to independent contractors who fall within the test, but would not exclude those who do not fall within it, but who would be considered as independent contractors at common law.

A disadvantage of this approach is that the definition would be less simple and clear, particularly if the remainder of the definition relied on the common law distinctions.

Stakeholder issue: Should the personal services business test under the *Income Tax Assessment Act 1997* be adopted as *part of* the definition of 'independent contractor' for the purposes of workplace relations regulation?

A registrar for independent contractors

An alternative proposal is that a public official could apply the common law tests to make declarations about a person's status as an employee or independent contractor. It is argued that it would not be helpful for legislation simply to set out the common law tests or some variant of them, without going the further step of having a public official apply those tests to individuals on request. It is argued that this is because different individuals applying the same tests to the same facts can come to different conclusions as to status.

A counter argument to this could be that public officials, namely courts and tribunals, already do this, so there is no need to have a special Independent Contracting Registrar to undertake this task. Also, courts and tribunals have legal powers to compel the giving of evidence and powers with regard to perjury which are necessary to enable a proper inquiry as to the true nature of the relationships. Further, while appeal rights flowing from the Registrar's decisions could be circumscribed, the courts' capacity to review decisions would not be removed altogether. In this sense, the creation of a registrar could be seen to add a step to the process rather than simplifying it. It could also add to 'red tape' by effectively making parties feel compelled to seek a declaration just 'to be sure' in cases where the nature of the relationship is quite clear.

The notion of making a declaration which hirers could rely on for any future dispute also fails to recognise that working arrangements can change and, in turn, change the characterisation of the relationship. A better approach might be to encourage and assist hirers to be clear at the outset of engaging workers about the nature of the working relationship and, if in doubt, seek expert legal advice to ensure this is clearly established. This will minimise the potential for future court action if the relationship is not clearly defined.

Stakeholder issue: Should an 'Independent Contracting Registrar' be established to make declarations about employee/independent contractor status applying the appropriate tests?

Adding a statutory object to the WR Act regarding independent contractor status

Another option to protect the status of independent contractors would be to add an object to section 3 of the WR Act to the effect that the status of independent contractors should be upheld and subject to minimal industrial regulation. Section 15AA of the *Acts Interpretation Act 1901* provides that in interpreting legislative provisions a construction that would promote the object of the Act shall be preferred to a construction that would not promote the purpose of the Act. In finely balanced cases, a court could have regard to this object in deciding whether a person is an employee covered by the WR Act or an independent contractor.

Stakeholder issue: Should an object be added to section 3 of the WR Act to the effect that the status of independent contractors should be upheld and subject to minimal industrial regulation?

State and Territory provisions affecting independent contractors

Introduction

The Government's Election 2004 policies raised concerns about State provisions seeking to treat independent contractors as employees, saying that one of the purposes of the proposed Independent Contractors Act would be to prevent this.

A threshold issue is whether the proposed Independent Contractors Act should seek to override:

- only those State laws which seek to regulate independent contractors in the workplace relations context (that is, provisions in the various States' industrial relations Acts); or
- laws in the broader arena (such as workers' compensation, occupational health and safety and discrimination laws).

Both types of laws are separately discussed below.

Laws concerning workplace relations regulation

The kinds of State workplace relations laws affecting independent contractors' status broadly fall within two categories:

- unfair contract provisions; and
- provisions which 'deem' independent contractors working in particular industries as 'employees' and therefore subject to workplace relations regulation.

The Government opposes laws which impinge on freedom of choice for employers and employees, particularly laws with the potential effect of dragging contractors into being regulated by workplace relations laws against their will. It considers that the duplication and variation of workplace relations laws must be minimised as these confusing and competing systems of regulation act as a brake on a substantial proportion of the workforce.

New South Wales

Unfair contracts

Section 106 of the *Industrial Relations Act 1996* ('the NSW IR Act') allows the NSW Industrial Relations Commission to review 'any contract whereby a person performs work in any industry' which includes independent contractor arrangements. The Commission can consider whether the contract is unfair, harsh or unconscionable; or is against the public interest; or provides remuneration less than the person performing the work would have received as an employee; or is designed or does avoid the provisions of an industrial instrument. If any of these characteristics is identified, the Commission may vary the contract or declare all or part of it to be void. The Commission can also make orders for the payment of money. In 2002, provisions were introduced to limit this jurisdiction to contracts which have a remuneration package of less than $200,000.

The Commission is not confined to considering the content of the contract nor the process of its making, but can also look at a contract which has become unfair as the result of one party's conduct under the contract. This adds to uncertainty as a contract which was made fairly and was fair in its terms could later be held to be unfair.

The NSW unfair contracts jurisdiction has been criticised for its breadth of coverage and the generosity of its payouts. The broad nature of the provisions was noted by Sheldon J in *Davies v General Transport Development Pty Ltd*[9], referring to section 88F of the *Industrial Arbitration Act 1940* on which current section 106 is based:

[9] (1967) AR (NSW) 371

> *It is true, however, that once it has been confined within its proper industrial context, s 88F acts with drastic and pervasive effect. It certainly plays havoc with the classic principles relating to contracts. In general, unless a contract is vitiated by duress, fraud or mistake, its terms will be enforced though unreasonable or even harsh and unconscionable…Moreover in the ordinary case the court will not remake a contract; unless in the special case where a contract is severable, it will not strike out one provision as unenforceable and enforce the rest…But s 88 F has no such inhibitions; for it not only proscribes transactions which directly undermine awards… As to remaking contracts, this can be done either by omitting parts and retaining the rest or by adding new terms. Thus destruction, dilution, renovation and patching are all weapons in the section's arsenal. Nor does it tolerate argument on such nice questions as whether the contractual relationship has been perfected. It is sufficient that there be an 'arrangement' and, for good measure, 'conditions and collateral arrangements' are also included. Moreover, there is no loophole available in transactions, so dear to those allergic to awards, under which the working party is not an employee but an independent contractor. Unlike some other sections in the Act, s 88 F does not transmute contractors into employees; it takes the contract as it finds it but imperils both its continuance and its prior operation. In the result when deciding actual cases under this section, to seek assistance from authorities on the general law of contract is an arid exercise, for if ever a law was intended to stand on it own feet it is this one.*

The NSW Commission has used s106 to vary contracts in a variety of ways including varying share option plans in the much publicised case of *Canizales v Microsoft Corporation*[10], where a former Microsoft executive was allowed to exercise share options worth $14 million. In this decision, Peterson J said:

> *It is difficult on the facts of this case to see how the applicant is a person who could be said to have been bargaining under some restraint or inequality or who was being oppressively exploited. It appears that the past earnings of the applicant, apart from those claimed in this case and taking into account share options already exercised, are of the order of more than $10 million. For income at that level to be earned between the ages of approximately 21 to 31 years hardly suggests unfairness.*

However, Peterson J found he was bound by the terms of the provision and previous authority to consider 'money benefits of this lavish kind'.

The NSW Commission may also make 'contract determinations' in relation to bailment (this primarily relates to driving taxis) and contracts of carriage under Chapter 6 of the NSW IR Act. Contract determinations are the equivalent of awards for contract bailees or carriers. With respect to contracts for bailment, contract determinations can deal with remuneration for bailees, annual leave, sick leave, long service leave or payments instead of such leave, and minimum hours of work. With respect to contracts of carriage, contract determinations can deal with remuneration of the carrier and any condition under a contract of carriage.

Deeming provisions

The NSW IR Act defines an employee as a person employed in any industry, whether on salary or wages or piece rates, or any person taken to be an employee under Schedule 1 which lists people deemed to be employees. Schedule 1 covers work in industries including cleaning, transport, construction, milk and bread vending and clothing outwork.

[10] (2000) 99 IR 426

Queensland

Unfair contracts provisions

Queensland also has specific unfair contract provisions. Section 276 of the *Industrial Relations Act 1999* ('the Qld IR Act') gives the Queensland Industrial Commission power to investigate contractual remedies. It covers both contracts of service not covered by an industrial instrument and independent contracting arrangements. In determining unfairness the Industrial Commission is to have regard to the relative bargaining strength of the parties, the minimum wage and whether undue pressure or unfair tactics were applied against a party to the contract. The Commission may vary or void a contract either from its commencement or its later application. Orders may be made for payment of amounts for contracts amended or declared void. The Queensland cap on the unfair contracts jurisdiction is $81,500.

Deeming provisions

The Qld IR Act extensively defines an employee to include workers who might not normally be regarded as employees under the common law tests including outworkers, lessees of equipment or vehicles, drivers wholly or partly owning their vehicles and persons working as partners in a business or association.

In addition, section 275 of the Qld IR Act allows the Commission to declare a class of contractors to be employees, based on the following criteria:

(a) the relative bargaining power of the class of persons; or

(b) the economic dependency of the class of persons on the contract; or

(c) the particular circumstances and needs of low-paid employees; or

(d) whether the contract is designed to, or does, avoid the provisions of an industrial agreement; or

(e) whether the contract is designed to, or does, exclude the operation of the Queensland minimum wage; or

(f) the particular circumstances and needs of employees including women, persons from a non-English speaking background, young persons and outworkers; or

(g) the consequences of not making an order for the class of persons.

To date, only a handful of s275 applications have been brought, all by unions. The President of the Queensland Industrial Relations Commission, President Hall, has criticised the utility of the provisions.

South Australia

The *Industrial and Employee Relations Act 1994* definition of 'employee' includes common law employees and covers certain classes of work 'even though the contract would not be

recognised at common law as a contract of employment', including outwork and contract cleaning.

The Industrial Law Reform (Fair Work) Bill 2004 proposed amendments to allow the Full Bench of the Commission to deem classes of workers to be employees, having regard to specified criteria, including indicia used at common law. These provisions were removed by the Legislative Council when the Bill passed the upper house, an amendment agreed to by the House of Assembly.

There are no unfair contracts provisions in the Industrial Law Reform (Fair Work) Bill 2004.

Victoria

Victoria has referred its workplace relations powers to the Commonwealth and so is covered by the federal legislation which includes unfair contracts provisions (discussed below). The WR Act has no deeming provisions. However, the *Workplace Relations Amendment (Improved Protection for Victorian Workers) Act 2003* provides some protection for clothing industry contract outworkers. This legislation does not 'deem' outworkers as employees. Rather, it provides for minimum pay entitlements for contract workers to be the same as for employee outworkers under Schedule 1A of the WR Act or any relevant common rule award. Schedule 1A provides minimum wage rates for Victorian employees who are not covered by an award or agreement.

Tasmania

The *Industrial Relations Act 1984* specifically incorporates outworkers in its definition of employee. It currently contains no deeming or unfair contracts provisions. However, the Tasmanian Government released a discussion paper last year which would add these kinds of provisions. It was proposed that the Tasmanian Industrial Relations Commission would be given the power to deem as an employee a person engaged through labour hire arrangements or as an independent contractor. These provisions are based on section 275 of the Qld IR Act discussed above. It also proposed introducing unfair contracts provisions based on those in NSW.

Western Australia

The *Industrial Relations Act 1979* expands the common law definition of employee to include labour hire arrangements and piece workers. There is no unfair contracts jurisdiction applying to contracts for services in WA.

The Australian Capital Territory and the Northern Territory

Both the ACT and the NT are covered by the WR Act and so are not subject to deeming provisions.

The ACT Legislative Assembly recently introduced the Fair Work Contractors Bill 2004. If passed, this Bill will confer an unfair contracts jurisdiction on the ACT Consumer and Trader Tribunal (the Tribunal). This jurisdiction would have similarities to the unfair contracts jurisdiction currently applying in NSW. The Tribunal would be given the jurisdiction to review contracts where remuneration under those contracts does not exceed $200,000. Further, the Tribunal would be empowered to vary, set aside or reinstate contracts found to be unfair with the stated intention of placing the parties in a position which avoids the unfairness. If passed, the provisions of the Bill will commence on 1 July 2006.

Laws beyond workplace relations containing independent contractor provisions

Other State laws containing independent contractor provisions include anti-discrimination, OHS, workers' compensation and taxation laws. These laws are not 'deeming' provisions which change the nature of the common law relationship between the hirer and worker. Rather, these laws often use the term 'employment' as a definitional device to describe the classes of people to be covered for that legislative purpose. The breadth of the definition will depend on the policy objective of the legislation is question. For example, OHS and discrimination laws have generally been drafted to apply to workers generally, irrespective of whether they are hired as employees or independent contractors. This is because the purpose of these laws is to seek to protect people in their working lives generally and this may be the reason they are framed broadly.

It is important to distinguish these laws from laws which regulate workplace relations per se. They differ from true 'deeming' provisions because they do not change the *nature* of common law non-employment contracts.

Stakeholder issue: Are there any State laws other than workplace relations laws (such as workers' compensation, anti-discrimination or OHS laws) containing independent contractor provisions which the Commonwealth should consider overriding?

Overriding States' unfair contracts and deeming laws

Unfair contracts

The Commonwealth can only override State laws to the extent its constitutional power will allow (but for the Territories the Commonwealth has full plenary power). State laws may not be excluded entirely, but they could be excluded to a significant extent. In order to override State provisions, the Commonwealth could itself seek to regulate the terms and conditions of independent contractors in the proposed Independent Contractors Act, primarily relying on the corporations power. Accordingly, if parties wish to avail themselves of the protection of any Commonwealth legislation in this regard, they may need to take some positive action to bring themselves within the jurisdiction of such legislation. For unincorporated parties, this might most easily be achieved by incorporation.

Section 127A of the WR Act provides a remedy for independent contractors in relation to unfair contracts. Section 127A allows a party to a contract to apply to the Federal Court of Australia on the grounds that the contract is unfair and/or harsh. The provision applies to a contract for services that is binding on an independent contractor and relates to the performance of work (other than private or domestic work). The remedy is limited to an independent contractor who is a natural person. Reflecting constitutional limitations, it is also required that one of the parties be the Commonwealth, a Commonwealth authority, or a financial trading or foreign corporation; alternatively, the contract must relate to work in international or interstate trade or commerce, or to matters that take place in or are connected with a Territory (s 127C).

In reviewing a contract, the Court may have regard to the parties' relative bargaining power, whether any undue influence or pressure was exerted or unfair tactics were used against a party, whether the contract's remuneration provision is less than for an employee performing similar work and any other matter the Court considers relevant.

Amendments to the WR Act to remove its unfair contracts provisions in section 127A-127C were proposed but not passed in separate Bills in 1996 and 1999. The removal of these provisions would be consistent with the Government's policy that independent contracting arrangements should be regulated by commercial law, not workplace relations law. Independent contractors

would have recourse to provisions of the *Trade Practices Act 1974* to regulate their commercial relationship.

However, more recently, the Building and Construction Industry Improvement Bill 2003 sought to apply these provisions in the context of that industry. The Government intends to reintroduce this Bill in this Parliament. Section 176 of the Bill would enable applications under section 127A of the WR Act in relation to unfair contracts for the performance of building work to be made to the Federal Magistrates Court as well as the Federal Court. Currently the WR Act only allows applications to be made to the Federal Court.

The proposed Independent Contractors Act could, within constitutional limits, provide that independent contractors' terms and conditions are to be governed primarily by the terms of their contract. However, some additional protection could be incorporated. The proposed Act could seek to provide one scheme for unfair contracts, overriding States' unfair contracts laws to the extent of its constitutional power. This approach of largely having one scheme nationally aligns with the Government's objectives to harmonise Australia's workplace relations laws to the greatest extent possible.

Stakeholder issue: Should the proposed Independent Contractors Act override State and Territory unfair contracts laws and seek to cover the field (as far as constitutionally possible) for unfair contracts provisions?

If this approach were adopted, this would provide an opportunity to revise the unfair contracts provisions in line with the Government's policy objectives. The starting point would be the premise that parties should be free to decide their working arrangements according to their own needs and genuine preferences. For example, if an independent contractor wished to increase a client base by initially competing on price with others in the market, they should be free to do so. However, this may need to be balanced with the need to ensure 'fair play' by the parties involved. This would include protection against 'sham' arrangements (discussed more fully below) and ensuring that in making the contract there was no undue influence or pressure exerted on, or unfair tactics used against, a party to the contract. However, the existence of such is often in the eye of the beholder. What one party considers undue pressure may merely reflect commercial reality. The main problem with seeking to legislate in this area is the difficulty in defining what is unfair.

Currently the factors a court may have regard to in reviewing contracts under the WR Act are set out at subsection 127A(4) as follows:

- the relative strength of the bargaining positions of the parties to the contract and, if applicable, any persons acting on behalf of the parties; and
- whether any undue influence or pressure was exerted on, or any unfair tactics were used against, a party to the contract; and
- whether the contract provides total remuneration that is, or is likely to be, less than that of an employee performing similar work; and
- any other matter that the Court thinks relevant.

Currently unfair contracts reviews are undertaken by the Federal Court, which can be costly and time-consuming. Consideration could be given to conferring this jurisdiction on the Federal Magistrates Court as is proposed in the Building and Construction Industry Improvement Bill 2003.

Stakeholder issue: Should the Federal Magistrates Court be given jurisdiction to review contracts?

Deeming laws

The Government generally opposes 'deeming provisions' which seek to change the nature of a working arrangement from independent contractor to employee, and thereby draw independent contractors into the net of workplace relations regulation. Deeming provisions have the effect of invalidating individual choice and flexibility in choosing working arrangements. They infringe on individuals' freedom to choose from a diversity of workplace relationships, including their right to negotiate conditions of work that suit their own individual needs. Further, deeming provisions undermine the legitimate desire of many employers to increase efficiency by allowing for a flexible workforce they can augment or restrict to meet their requirements.

Deeming provisions can also result in arbitrary distinctions. For example, under the SA *Industrial and Employee Relations Act 1994*, driving a bus makes an independent contractor an employee, but driving a taxi does not. Cleaning premises makes one an employee but cleaning cars does not. A person packing goods under a contract for services is an employee if they do so at their home, but not if they do so at a business's premises. Such an approach makes it almost impossible to maintain a principled distinction between employees and independent contractors. The ultimate outcome of such an ad hoc approach is illustrated by Schedule 1 of the NSW IR Act which deems 13 disparate categories of workers to be employees including milk deliverers, carpenters, plasterers, blind installers, bread deliverers, swimming pool supervisers and the drivers of ready-mixed concrete. The inevitable result is dragging independent contractors into the workplace relations regulation net regardless of their preference or actual circumstances.

Deeming provisions were similarly criticised in the occupational health and safety context:

> *The deemed inclusion of a diverse range of workers, represents a potpourri of examples without any single defining principle, apart from some inchoate notion that they represent socially desirable areas of coverage.*[11]

It is proposed that the Independent Contractors Act override State laws deeming provisions which draw independent contractors into the net of workplace relations regulation. The Act could contain a provision to the effect that persons who are independent contractors at common law shall not be treated as employees for industrial relations purposes of determining terms and conditions of employment. The law could 'define out' other kinds of laws as considered appropriate.

Stakeholder issue: Should the proposed Act seek to override State 'deeming provisions', which draw independent contractors into the net of workplace relations regulation, as far as constitutionally possible?

Protections against 'sham' arrangements

Decisions about whether an arrangement is one of employment or independent contracting can involve unravelling complex factual situations. Contracts are not always clearly written and they do not always reflect the real relationship between the parties. Courts and tribunals need to

[11] A Clayton, R Johnstone and S Sceates, 'The Legal Concept of Work-Related Injury and Disease in Australian OH&S and Workers Compensation Systems', April 2003, ANU National Research Centre for OHS Regulation

examine carefully all the evidence against the settled multi factor test in coming to a decision about the true nature of the particular relationship. They are required to balance the need to uphold and protect the parties' rights in genuine independent contracting arrangements with the need to protect workers from sham arrangements. This is a delicate balance and inevitably courts and tribunals face criticism from both sides of the debate that they have gone too far or not far enough in making these decisions.

A 'sham' transaction was described by Lockhart J in *Sharrment Pty Ltd v Official Trustee in Bankruptcy*[12] as:

> *something that is intended to be mistaken for something else or that is not really what it purports to be. It is a spurious imitation, a counterfeit, a disguise or a false front. It is not genuine or true, but something made in imitation of something else or made to appear to be something which it is not. It is something which is false or deceptive.*

Sham arrangements can occur where hirers seek to cloak relationships to appear as independent contracting arrangements in order to avoid responsibility for some legal entitlements payable to employees.

The Courts have held that in these circumstances, the documented characterisation of the relationship will not be determinative: 'The parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck' (*Re Porter)*[13].

Similarly, Marshall J in *Damevski v Guidice*[14] said: 'There is no legitimacy in arrangements which merely attempt to exploit difficult areas of law and create vehicles designed, inter alia, to enable employers to avoid their award and statutory obligations'.

Workers in disguised employment relationships should have remedies available to them. As discussed, courts perform this role to some extent. However, this involves parties bringing proceedings to recover entitlements or seeking legal remedies.

In order to deter unscrupulous hirers from setting up sham arrangements, the WR Act could be amended to provide a civil penalty for hirers who deliberately attempt to avoid employer responsibilities by seeking to establish a false independent contracting arrangement. The provision would have to be very carefully framed to ensure that legitimate forms of independent contracting, such as Odco arrangements, were not proscribed. This provision could be enforced by workplace relations inspectors appointed under the WR Act. The Office of Workplace Services currently investigates claims about entitlements under federal awards or agreements.

Stakeholder issue: Should a civil penalty provision be introduced in the WR Act applying to hirers who deliberately attempt to avoid employer responsibilities by seeking to establish a false independent contracting arrangement?

Another option to avoid sham arrangements in terms of the labour hire industry would be to regulate that industry. This could take the form of external regulation or self-regulation and may involve the adoption of a Code of Practice. Regulation of the industry has had some support from sectors of the industry itself. The disadvantage of such an approach is that it could add further red tape to the way business is conducted.

[12] (1988) 18 FCR 449 at 454
[13] (1989) 34 IR 179
[14] [2003] FCAFC 252

Stakeholder issue: Should the labour hire industry be regulated to ensure high standards are met by all players?

PART 2 : LABOUR HIRE ISSUES

A. Definition of labour hire

Terminology

In Australia, 'labour hire' is generally used to refer to tripartite arrangements where a firm provides people to work on a client company's premises under the general supervision and control of the client (though the labour hire agency always retains the ultimate right to control their employees). The agency receives a fee from its client in return for its services. Such arrangements are also sometimes referred to as 'on-hire services'. This paper will use the term 'labour hire'.

The firm providing the workers is variously referred to as a 'labour hire agency', 'labour hire firm', 'on-hired service provider' or 'employment agency'. This paper will use 'labour hire agency'. Labour hire agencies frequently also perform other types of work such as employment consulting in areas like occupational health and safety or outsourced project work where a client outsources an entire function, such as payroll.

The firm to which the worker is on-hired is called the 'host business', 'host employer' or 'client'. This paper will use 'host business'. Workers in labour hire arrangements may be employees of the labour hire agency or independent contractors. This paper will use 'labour hire worker' to cover both types of worker and 'labour hire employee' or 'labour hire contractor' when referring to one type only.

Definition

An expansive definition of labour hire can include organisations such as agencies which provide recruitment and consulting services, and apprentice pooling organisations (or 'Group Training Companies'). Labour hire agencies could also include 'umbrella companies', or companies that pool independent workers into tax effective work groups in return for a commission. This paper, however, will focus on arrangements under which a triangular relationship between the worker, the labour hire agency and the host business is maintained throughout the worker's placement with the host business.

There are two broad categories of labour hire arrangements:

- those where the labour hire worker is an employee of the labour hire agency – the employee services model; and
- those where the labour hire worker is engaged by the labour hire agency under a contract for services – the contractor services model.

The courts can determine whether a labour hire worker is in an employment or independent contracting arrangement using the multi-factor test described earlier in this paper.

Employee services model

Under the employee services model, the labour hire agency establishes an employment relationship with the worker and hires him or her out to work for a host business. The labour hire agency pays the worker, usually on a weekly basis, and withholds income tax deductions. The worker may be employed: casually (the majority), permanently or for a fixed term; full-time or part-time; or as a trainee or apprentice. This is the most common method of labour hire.

Who is the employer under this model?

Under this model it is fairly well settled at common law that the labour hire business will be found to be the employer of the worker rather than the host even though the general day to day control over the worker's performance rests with the host. This is because in a genuine labour hire arrangement, there is no contract between the host and the labour hire worker and therefore there cannot be an employment relationship between them. Further, ultimate control rests with the labour hire entity as the actual employer.

Contractor services model

The contractor services model is based on 'Odco' arrangements which are independent contracting arrangements in the labour hire industry. These kinds of arrangements were upheld in a Full Federal Court decision, *Building Workers Industrial Union of Australia v Odco Pty Ltd*[15]. Odco arrangements create independent contracting arrangement where the workers are neither employees of the labour hire company nor of that company's clients.

In this case, the Odco workers signed an agreement that stated that they were not employees. The workers were paid on a weekly basis according to the work they performed. The workers themselves were responsible for deducting their own tax. The Court decided that the workers were not legal employees on the basis that there was no expectation of continuing employment and the contracts between the agency and the workers expressed genuine intent to achieve independence. The Court also found that the client with whom they were placed was not their employer.

Odco arrangements operate in a range of industries. Independent contractors working under this system include farm hands, doctors, secretaries, personal assistants, child care workers, fishermen, salespeople, cleaners, security guards and building workers.

When considering cases involving labour hire contractors, the courts or the Commission look behind contracting arrangements to ensure they are not being used as a device to avoid entitlements due to employees. For example, in the *Damevski v Guidice*[16] case the Federal Court found that a worker remained an employee of a host business despite the host business's attempt to end the employment relationship and deal with the worker as an independent contractor through a labour hire agency under an Odco style arrangement. This case did not undermine the status of independent contractors under genuine Odco style arrangements as the bench found the facts of this case were quite different. As Marshall J observed:

> *It is apparent from the information pack that MLC was attempting to replicate the arrangement discussed in Odco. Labour hire agencies that rely on Odco to legitimise particular activities should bear in mind that the existence of a contractual relationship and employment relationship, in any given set of circumstances, is ultimately a question of law. When attempting to replicate the arrangement discussed in Odco, it is not sufficient to give lip service to it.*

Similarly, Wilcox J distinguished the cases:

> *Counsel for Endoxos placed much reliance on the Full Court decision in Building Workers Industrial Union of Australia v Odco Pty Ltd (1991) 29 FCR 104. I was a party to that decision. I do not resile from anything there decided. However, as both my*

[15] (1991) 29 FCR 109
[16] [2003] FCAFC 252

colleagues point out, the facts of that case were significantly different from those of the present case.

The Court found, based on the particular facts of the case, that the host was the true employer.

B. Extent of labour hire arrangements in Australia, the range of industries involved and the advantages of labour hire arrangements

Number of labour hire workers

While data relating to the number of labour hire workers in Australia is quite limited, the data that is available consistently suggests that labour hire workers in Australia constitute between 1.7 and 3.1 per cent of employees.[17]

The latest data from the HILDA 2002 survey indicates that labour hire workers make up 2.9 per cent of total employment (including employees, employees in own business, employers/self-employed and unpaid workers in family business or farm). This is equivalent to 270,000 labour hire employees.[18] The Productivity Commission estimates that between 1990 and 2002, the average annual rate of growth in the number of labour hire workers stood at 15.7 per cent in workplaces with 20 or more employees.[19]

Gender distribution

Labour hire workers make up 2.9 per cent of female employees and 3.8 per cent of male employees.

Industry distribution

Labour hire workers are most prevalent in communication services (11.1 per cent of employees), manufacturing (6.2 per cent of employees), property and business services (6.1 per cent of employees) and wholesale trade (4.1 per cent of employees).[20]

Occupational distribution

Labour hire workers are involved in a combination of high-skilled, medium-skilled and low-skilled occupations.[21] Just over a quarter (25.5 per cent) were in more highly skilled occupations[22] and 18.2 per cent were tradespersons. Around 38 per cent were in the intermediate clerical or

[17] Data relied upon is available from ABS publications: *Forms of Employment Survey* (*FOES*; ABS Cat. No. 6359.0), the *Employment Services Survey* (*ESS*; ABS Cat. No. 8558.0) and the *Survey of Employment Arrangements and Superannuation* (*SEAS*; ABS Cat. No. 6361.0).
[18] Household, Income and Labour Dynamics in Australia. The survey is conducted for the Department of Family and Community Services by the Melbourne Institute of Applied Economics and Social Research.
[19] Productivity Commission Staff Working Paper '*The Growth of Labour Hire Employment in Australia*' February 2005.
[20] All these figures are weighted up to represent the Australian population. Caution should be exercised in interpreting the industry level figures because the numbers in each industry in the survey are small.
[21] *FOES*, November 2001; ABS Cat. No. 6359.0
[22] i.e. Managerial, Professional, Associate Professional or Advanced Clerical.

intermediate production occupations. Less than a quarter (21.5 per cent) were in skilled labouring or elementary clerical occupations.[23]

Characteristics of labour hire workers

The large majority of labour hire workers are casual employees. Compared with casual employees in general however, labour hire workers tend to be employed in higher skilled occupations, be better educated and are more likely to be in the 24 to 44 years age group.[24] The majority of labour hire workers are not on fixed term contracts. A high proportion have been with the same employer for between one and five years, and the majority work full-time.

Gender

In Australia, 58.7 per cent of labour hire workers are male, 41.3 per cent female.

Age

Labour hire workers tend to be older than persons in other forms of employment: 52.0 per cent of labour hire workers are aged between 25 and 44 years and 16.7 per cent are aged over 45 years.

Educational attainment

Around 70.0 per cent of employees in Australia that are paid by a labour hire firm and on-hired through that firm have completed the highest level of secondary education or have another form of post-school qualification.[25]

Full-time or part-time status

According to *FOES* 2001, 77.5 per cent of employees in Australia who were paid by a labour hire firm and on-hired through it were working full-time.[26]

Advantages of labour hire arrangements

Labour hire employment provides an important source of flexibility in the Australian labour market.

Labour hire arrangements can allow businesses to engage staff to meet peaks and troughs in demand, and to manage staff absences or skills shortages. Labour hire helps businesses manage the risk and costs of recruitment by engaging labour without entering into formal contracts of employment.

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[23] By comparison, 38.3 per cent of all employees in Australia and 16.7 per cent of self-identified casuals were in more highly skilled occupations. Around 11.2 per cent of all employees in Australia were tradespersons along with 6.7 per cent of self-identified casuals. Approximately 21.6 per cent of all employees in Australia were in less skilled Labouring or Elementary Clerical occupations along with 45.2 per cent of self-identified casuals.

[24] *FOES* 2001 provides data on the characteristics of labour hire workers and the nature of their working arrangements. The group of labour hire workers examined are those that were 'being paid by an employment agency or labour hire firm and had found a job through them'.

[25] Figures are from *SEAS* 2000 April to June; ABS Cat. No. 6361.0. By comparison, 65.2 per cent of all persons in Australia aged 20 years and over had achieved similar levels of education attainment: ABS. Education and Work, May 2003. Cat. No. 6227.0. Other qualifications include basic or skilled vocational qualifications, associate or undergraduate diplomas or bachelors or other degrees.

[26] Approximately 71.7 per cent of all employees in Australia were working full-time at this time, along with 29.8 per cent of all self-identified casuals.

Workers can also benefit from labour hire arrangements. Labour hire offers workers – including the unskilled, re-entrants to the labour market, and mature aged workers – the opportunity to gain a broad range of skills, experience and exposure to different working environments. It gives those who wish to work on a casual basis due to family or study commitments the opportunity to do so. Similarly, it can help young people gain entry to the labour market, and provides a method for ageing workers to phase their withdrawal from the workforce.

The role of labour hire arrangements in the Australian economy

Labour hire arrangements offer significant benefits to employers and employees. Labour hire employment provides an important source of flexibility in the Australian labour market.
Labour hire arrangements can allow businesses to engage staff to meet peaks and troughs in demand, and to manage staff absences or skills shortages. Labour hire helps businesses manage the risk and costs of recruitment by engaging labour without entering into formal contracts of employment. As research has shown, concerns over the risks arising from unfair dismissal regulation, act as a major disincentive when businesses consider employing more staff.[27]

Australian businesses operate in an environment of rapid technological change and increasing global competition. If they are to survive and prosper in this environment, it is essential that the workplace relations framework supports efficient, flexible and competitive business operations.

The prime attraction of labour hire arrangements to employers is flexibility, and that labour hire allows business to:

- access a large supply of suitable labour to meet peaks and troughs in production;
- outsource for specialist skills that may be needed from time to time;
- cover staff on leave; and
- assess individuals before offering permanent employment.[28]

Research by RMIT found that meeting short-term business needs remains among the principal motivators for businesses to use labour hire workers.[29] According to the survey, the four main reasons given by the 150 respondent host businesses for using labour hire workers were to:

- meet additional staffing requirements;
- cover absences of their employees;
- ensure a thorough recruitment process; and
- overcome skills shortages.

Other reasons commonly cited by the surveyed businesses for using labour hire workers were: speed of availability; short-term overload; convenience; difficulty with filling positions; and guarantees of performance. The survey found that reducing staffing costs by paying less was not a strong motivator for using labour hire workers, with only 2.2 per cent of surveyed businesses citing this as one of the reasons for using labour hire workers.

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[27] Harding, D. 2002. '*The Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses*'. Melbourne Institute of Applied Economic and Social Research.
[28] NSW Labour Hire Taskforce. 2001. *Final Report*, p15.
[29] Brennan, L. Valos, M. and Hindle, K. 2003. *On-hired workers in Australia: Motivations and Outcomes*. RMIT Occasional Report. Melbourne: School of Applied Communication, RMIT University.

The RMIT survey found that 76 per cent of surveyed businesses using labour hire workers considered that labour hire contributed to the businesses' productivity and competitiveness. The study also listed a number of motivations for employees to undertake labour hire work including:

- not having to take work home or do unpaid overtime;
- a better balance between work and family life;
- the diversity of work performed; and
- a match of skills with employment demands.

With respect to workers engaged in labour hire arrangements, a number of factors that have contributed to growing employee interest in labour hire employment include the fact that skilled workers such as tradespersons and professionals do not have the responsibility for finding work, with that responsibility falling on the labour hire firm. There are also benefits associated with not having to complete as much paper work and other administrative responsibilities as would be associated with self-employment. Additionally, labour hire arrangements offer workers – including the unskilled, re-entrants to the labour market, and mature aged workers – the opportunity to gain a broad range of skills, experience and exposure to different working environments. They give those who wish to work on a casual basis due to family or study commitments the opportunity to do so. Similarly, they can help young people gain entry to the labour market, and provide a method for ageing workers to phase their withdrawal from the workforce.

C. Options to minimise current limitations on labour hire arrangements

Introduction

There are a number of sources of law which have or could potentially have an impact on the use of labour hire arrangements:

- limitations imposed in industrial instruments on the use of labour hire;
- changes proposed in State jurisdictions; and
- Court and Commission determinations affecting status of labour hire workers.

These are examined in turn below.

Removing limitations imposed in industrial instruments on the use of labour hire

This issue directly parallels limitations placed on independent contractors discussed earlier in this paper. The Government's view is that there should be no restriction on business's choices of workforce arrangements. This is included in the Election 2004 policy which states:

...the Independent Contractors Act will prevent unions from seeking orders from the Australian Industrial Relations Commission which would impose limits, constraints or barriers on the freedom…to engage work through labour hire arrangements.

Any proposed amendment to the WR Act to prevent limitations and restrictions on independent contracting would of course have direct effect for the labour hire workers who are independent contractors. However, these suggested amendments would need to be extended to afford the

same protection for the freedom to engage labour hire workers who are employees. An example of an award which imposes limits on labour hire would be one containing a clause providing that labour hire could only be used in particular circumstances or subject to specific conditions.

Proposal: The WR Act should be amended to provide that awards and agreements cannot contain clauses which restrict engaging labour hire workers or imposing conditions or limitations on their engagement.

State provisions affecting labour hire workers

Existing provisions

There are few existing provisions in State workplace relations legislation concerning labour hire. Victoria, the ACT and the NT are covered by federal workplace relations legislation which does not contain labour hire provisions. Workplace relations legislation in SA, Tasmania and NSW similarly do not contain labour hire provisions.

The two remaining jurisdictions, WA and Queensland, have virtually identical legislative definitions of 'employer' which refer to labour hire arrangements. The relevant sections are section 6 of the Queensland *Industrial Relations Act 1999* and section 7 of the WA *Industrial Relations Act 1979* which provide that a labour hire agency that arranges for an employee (who is a party to a contract of service with the agency) to do work for someone else is the employer of that employee. The legislation provides that this is the case even though the employee is working for the other person under a labour hire arrangement. These provisions essentially restate the common law position that in the absence of a sham arrangement, a labour hire agency will be found to be the employer, not the host. This position has historically been supported by the current federal Government.

Consideration could be given to amending the WR Act to include a similar provision to the WA and Queensland sections. This would amount to statutory recognition of the current common law position.

Stakeholder issue: Should the WR Act be amended to include in the definition of 'employer' a labour hire agency that arranges for an employee (who is a party to a contract of service with the agency) to do work for someone else even though the employee is working for the other person under a labour hire arrangement?

Reforms which have been proposed in State jurisdictions

As discussed earlier in this paper, there are a number of State inquiries which have proposed reforms concerning labour hire. The Federal Government takes an active role in making submissions to these inquiries.

New South Wales

The NSW Industrial Relations Commission is hearing an application from the NSW Labor Council to vary a number of awards relating to labour hire including by effectively setting minimum wages and conditions and by enabling workers to elect to become employees of the host after working with them for six months.

The Federal Government considers that the imposition of these conditions on the use of labour hire arrangements would limit the flexibility that labour hire can provide and would inevitably

reduce employment. To this end the Federal Government successfully sought leave to make submissions to the NSW Commission. These submissions address the negative impact the Labor Council's proposals would have on the Australian economy.

Victoria

In June 2003, the Economic Development Committee launched an inquiry into labour hire employment in Victoria. The Committee's terms of reference required it to consider the consequences of using labour hire arrangements.

On 20 December 2004, the Committee released an interim report which focused mainly on workplace health and safety. The Committee identified this as the most serious issue confronting the industry in Victoria and made 16 recommendations, including the establishment of a registration system for labour hire agencies which would help to lift safety standards within the industry.

The Committee is due to release its final report on 31 May 2005.

Tasmania

The Tasmanian government is currently reviewing the *Industrial Relations Act 1984*. One of the proposed amendments concerned giving the Tasmanian Industrial Relations Commission the power, upon application, to deem a person engaged through a labour hire arrangement to be an employee.

The Federal Government has submitted that such amendments would be likely to cause greater interference in the affairs of labour hire workers and those businesses which chose to engage them. In the Government's view, interference with this relationship would be damaging to the flexibility offered by labour hire arrangements and would promote an ad hoc prescription regime, similar to the one existing in NSW under schedule 1 of the *Industrial Relations Act 1996*.

South Australia

The Industrial Relations Reform (Fair Work) Bill 2004 proposed to give the Industrial Relations Court of SA the power to declare persons to be an employee. These provisions were removed from the Bill by the Legislative Council.

The Bill also contemplated the joining of a host business to an application for unfair dismissal. These provisions were also removed by the Legislative Assembly and the amendment confirmed by the House of Assembly. The Government does not support the joining of host businesses to such actions because it implies an employment relationship where none ever existed. The employment relationship in a labour hire arrangement is between the labour hire worker and the labour hire agency. As such, the host business has no legal interest in the proceedings and should not be joined as a party to them.

Court and Commission determinations affecting status of labour hire workers

Odco

Arguably, the most legally significant Court determination on labour hire in recent years was in the *Odco* decision described earlier in this paper. The Court's approval of a form of arrangement which allows labour hire agencies to supply independent contractors to hosts has been subsequently upheld by the judiciary, but has faced criticism in some quarters. The Government supports choice in employment arrangements, including the Odco form of labour hire contracting. Consideration could be given to statutory recognition of this aspect of the common law in the proposed Independent Contractors Act.

Stakeholder issue: Should 'Odco' arrangements be statutorily recognised in the Independent Contractors Act?

Joint employment

The concept of joint employment allows an employee to be employed by more than one employer at the one time. Increasingly, this concept has been raised in cases where a party is attempting to portray a labour hire worker as an employee. Despite these attempts, the concept is yet to be recognised as forming part of the common law in Australia.

The concept had its origins in the United States where it was introduced in the 1930s as a statutory response to labour hire arrangements being used to avoid collective bargaining laws and employee entitlement protections. Despite the concept forming part of American industrial law for almost 75 years, the approach to determining whether an employee is jointly employed still appears unsettled and will depend on the type of job performed by the relevant employee, the statute being interpreted and the court in which the question arises.

The closest that the Australian law has come to recognising the concept of joint employment was the case of *Morgan v Kittochside Nominees Pty Ltd*[30]. This case did not find that the employee in question was jointly employed.

Acceptance of the concept of joint employment raises issues concerning the manner in which an employer's obligations should be divided between the joint employers. For instance, the following questions are raised:

- payment of the employee – in what proportion is each joint employer liable to pay the employee's wage?
- payment of taxes – which employer is responsible for payment of PAYG and GST federally and the payment of payroll tax at a state level?
- liability for insurance – which employer is to be held vicariously liable for the actions of the employee?
- payment of superannuation – in what proportion is each joint employer liable to remit superannuation contributions?
- dispute resolution – how are disputes resolved where they affect both of the joint employers?
- discrimination law – which employer is responsible if the employee harasses another person in the workplace?
- workplace health and safety – where does a joint employer's responsibility for workplace health and safety cease and become the responsibility of the other joint employer?

[30] (2002) 117 IR 152

- copyright, patents and designs – which joint employer will own the work generated by the employee?

In addition, joint employment raises issues for the employee. In particular, it becomes unclear as to which employer the employee owes duties of good faith and fidelity. It is also unclear what employees should do if they received conflicting directions from both of their joint employers.

The Government does not support the introduction of the concept of joint employment into Australian law, and would use its powers to override any State or Territory attempt to legally recognise joint employment.

APPENDIX 1

Other inquiries into Contracting and Labour Hire

Commonwealth

The House of Representatives Committee on Employment, Workplace Relations and Workforce Participation is conducting an inquiry into the use of independent contracting and labour hire arrangements. The Committee's terms of reference cover:

- the status and range of independent contracting and labour hire arrangements;
- the ways independent contracting can be pursued consistently across State and federal jurisdictions;
- the role of labour hire arrangements in the modern Australian economy; and
- strategies to ensure independent contract arrangements are legitimate.

Submissions are due to the Committee by 11 March 2005. The Committee is due to report by mid-2005.

New South Wales

In August 2003, the NSW Labour Council filed an application for a 'Secure Employment Test Case' in the NSW Industrial Relations Commission. If this application is successful, it will affect independent contracting and labour hire by:

- restricting the use of labour hire arrangement by requiring host businesses to offer permanent employment to labour hire workers after 6 months regular engagement;
- prohibiting contracting out for the purpose of evading obligations or weakening union presence;
- requiring host businesses to provide occupational health and safety training to labour hire workers and/or contractors; and
- requiring host businesses to pay the equivalent amount in wages and conditions had those workers been direct employees of that host business.

The Australian Government has made submissions to the NSW Commission opposing this application.

Victoria

The Victorian Parliament's Economic Development Committee is currently conducting an inquiry into labour hire employment in Victoria. Its terms of reference relate to the extent of labour hire employment in Victoria and the consequences of the use of labour hire employment. In December 2004, the Committee released an interim report dealing primarily with occupational health and safety standards in the labour hire industry. The Committee recommended that a registration system for labour hire agencies be established and linked to a code of practice setting out safety standards. The Committee is due to release its final report by 31 May 2005.

Queensland

Following a review of selected legislation beginning in 1989, the Queensland Government, in 2002, amended the *Private Employment Agents Act 1983* by providing for its expiration on 26 April 2005. The Department of Industrial Relations is currently assessing issues such as a

draft code of conduct for the future regulation of private employment agents after the expiry of the Act. The review is to ensure that any future regulatory framework for private employment agents in Queensland accords with National Competition Policy.

There has also been reform concerning outworkers. On 8 March 2005, the Queensland government introduced the Industrial Relations and Other Acts Amendment Bill 2005. This Bill proposes to allow clothing outworkers to recover unpaid wages and superannuation contributions from an 'apparent employer' in the chain of contracting out work. The Bill contemplates provisions similar to those in force in New South Wales and Victoria.

South Australia

The SA Government commissioned a review into the SA industrial relations system which was completed in October 2002. The review made 16 recommendations relating to independent contractors and labour hire arrangements. Many of these recommendations were incorporated into the Industrial Law Reform (Fair Work) Bill 2004. Recommendations relating to contractors and the labour hire industry included:

- broadening the definition of 'employment' to compass 'dependent' contractors, labour hire workers and outworkers;
- providing for the deeming of classes of workers to be employees;
- allowing the SA Industrial Relations Commission to determine fair work contacts for classes of contractors; and
- providing for the SA Industrial Relations Commission to determine fair contract rates for classes of contractors.

The Bill has been amended to address the concerns of stakeholders, particularly the business and industry sector, with regards to contracting and labour hire arrangements by removing most of the review recommendations included in the original Bill. In particular, the Legislative Council removed from the Bill the power of the SA Industrial Relations Commission to declare the employment status of employees and those provisions allowing host businesses to be joined to unfair dismissal cases. However, the Bill does include an extended protection regime for outworkers which is designed to make a `responsible contractor' (a person who initiates an order for relevant work) more accountable for the remuneration of such workers.

Tasmania

In July 2004, the Tasmanian Government issued a discussion paper calling for comments regarding proposed amendments to the *Industrial Relations Act 1984*. Proposed amendments include providing the Tasmanian Industrial Commission with the power to deem contractors to be employees as well as the power to void labour contracts found to be unfair.

APPENDIX 2

The multi factor test for determining the nature of employment relationships

In determining whether a person is an employee or an independent contractor, the Court will consider factors such as:

- the degree of control the worker has over the work – for example, is the worker subject to direction on how the work will be done, not just what the job is;
- the degree to which the worker is integrated into, and is treated as part of the hirer's enterprise – for example, if the worker wears the hirer's uniform and represents the hirer's enterprise to the public, this supports the worker being an employee;
- whether the worker is making a significant capital contribution (such as by using his or her own motor vehicle and carrying the maintenance and running costs) to the enterprise – if the worker is doing this, it supports finding an independent contractor arrangement exists. If all the worker brings, on the other hand, are the ordinary tools of his or her trade, this is not likely to be a significant factor;
- how the hirer pays the worker – for example, by results or on an hourly basis. If the worker is paid by the results achieved, it supports finding an independent contractor arrangement exists;
- whether the worker has an obligation to work – if the hirer has the right to dictate hours of work and the worker cannot refuse tasks, this supports the worker being an employee;
- the provision of leave, superannuation and other entitlements – these usually apply to employment and not to an independent contractor;
- the place of work – if the worker works at his or her own premises, this supports the worker being an independent contractor;
- whether the worker has the right to delegate the work to others – if the worker can employ other people to do the work (that is, 'subcontract the work out'), this supports the worker being an independent contractor;
- whether income tax is deducted by the hirer - this supports the worker being an employee;
- whether the worker provides similar services to the general public – eg if a worker advertises his or her services to the public or tenders for work, this supports an independent contracting arrangement;
- whether there is any scope for the worker to bargain for the rate of remuneration – if there is no scope, this supports a finding that the worker is an employee;
- whether the worker is providing skilled labour or labour that requires special qualification – if so, this supports an independent contracting arrangement; and
- whether the issue of deterrence of future harm arises – for example, where the hirer is in a position to reduce accidents by efficient organisation and supervision, this may support the worker being an employee, particularly in cases concerning vicarious liability.