Status and Range of Independent Contracting and Labour Hire arrangements

The current status of independent contracting can best be described as confusing. This confusion arises as a result of the differing definitions of what constitutes an employment relationship, and hence the definition of employer and employee. In five of the major areas of workplace regulation; industrial relations, workers compensation, public liability, taxation and superannuation there are different definitions that can apply. As a result there is a very real possibility that a single contract in this area can have the following characteristics;

1. For the purposes of Taxation, the individuals are deemed to be independent contractors.
2. For the purpose of payment of the Superannuation Guarantee Levy, the individuals are deemed to be independent contractors.
3. For the purposes of industrial relations the individuals are deemed to be employees.
4. For the purposes of payment of Workers Compensation Premiums, and other benefits associated with workers compensation, the individuals are deemed to be employees.
5. For the purposes of public liability, the individuals are deemed to be employees.

This particular situation has been found to exist in the area of bicycle couriers as contracted/employed by Vabu Pty Ltd, trading as Crisis Couriers. A brief explanation of the legislative schemes and the interpretations of Various Courts with respect to Vabu is included below.

The 'Vabu' Scenario

Industrial Regulation and Public Liability

The major piece of legislation that covers employment in industrial regulation is the *Work Place Relations Act 1996* (Cth). This Act, at s.4(1) provides the following definitions for an employer and an employee;

employee *includes any person whose usual occupation is that of employee, but does not include a person who is undertaking a vocational placement.*

employer *includes:*

(a) a person who is usually an employer; and

(b) an unincorporated club.

This Act does not provide for a definition of independent contractor, and nor should it given that its task is to regulate the employment relationship, other than to say;

'*an independent contractor is confined to a natural person.*' (s.4(1A))

The result of this is that the differences in definition for employer, employee and independent contractor have in effect been left to the courts.

At the time of writing, the current test to determine whether or not a person is an independent contractor or an employee for industrial relations is found in *Hollis v Vabu*. Vabu Pty Ltd traded as Crisis Couriers in relation to this matter. The High Court in this matter found that there are a range of indicia to be used to determine whether or not a person should be considered an employee or an independent contractor.

This decision reinforced the shift from the old industrial relations test of one based upon the control and supervision test, to examining 'the totality of the relationship between the parties' by using a range of indicia including, but not limited to the control test. These other indicia include freedom of contract, including the right to subcontract the work, provision of tools, representation and bargaining over the rate of remuneration.

The High Court in this matter found that Vabu had a vicarious liability for the actions of one of its couriers, because the courier was deemed by the High Court to be an employee. This employee was engaged as an independent contractor, paid tax according to the (then) Prescribed Payment System, did not have superannuation contributions made on his behalf, provided his own bicycle and was responsible for the maintenance and upkeep of that bike.

These indicia, although fine for determining whether there is a contract for service or a contract of service in terms of industrial regulation run into difficulties when compared with the same definitions under Superannuation, Workers Compensation and Taxation legislation. Relevantly the following definitions apply under the relevant headings

Superannuation and Taxation

The primary piece of legislation that regulates superannuation is the *Superannuation Guarantee (Administration) Act 1992* (Cth) (SGC Act). This Act provides inter alia for the payment of compulsory superannuation by an employer to an appropriate fund to the benefit of an employee. Employers and employees are relevantly defined at s.12 of the SGC Act.

*12 Interpretation: **employee, employer***

*(1) Subject to this section, in this Act, **employee** and **employer** have their ordinary meaning. However, for the purposes of this Act, subsections (2) to (11):*

(a) expand the meaning of those terms; and

(b) make particular provision to avoid doubt as to the status of certain persons.

(2) A person who is entitled to payment for the performance of duties as a member of the executive body (whether described as the board of directors or otherwise) of a body corporate is, in relation to those duties, an employee of the body corporate.

(3) If a person works under a contract that is wholly or principally for the labour of the person, the person is an employee of the other party to the contract.

(4) A member of the Parliament of the Commonwealth is an employee of the Commonwealth.

(5) A member of the Parliament of a State is an employee of the State.

(6) A member of the Legislative Assembly for the Australian Capital Territory is an employee of the Australian Capital Territory.

(7) A member of the Legislative Assembly of the Northern Territory is an employee of the Northern Territory.

(8) The following are employees for the purposes of this Act:

(a) a person who is paid to perform or present, or to participate in the performance or presentation of, any music, play, dance, entertainment, sport, display or promotional activity or any similar activity involving the exercise of intellectual, artistic, musical, physical or other personal skills is an employee of the person liable to make the payment;

(b) a person who is paid to provide services in connection with an activity referred to in paragraph (a) is an employee of the person liable to make the payment;

(c) a person who is paid to perform services in, or in connection with, the making of any film, tape or disc or of any television or radio broadcast is an employee of the person liable to make the payment.

(9) A person who:

(a) holds, or performs the duties of, an appointment, office or position under the Constitution or under a law of the Commonwealth, of a State or of a Territory; or

(b) is otherwise in the service of the Commonwealth, of a State or of a Territory (including service as a member of the Defence Force or as a member of a police force); is an employee of the Commonwealth, the State or the Territory, as the case requires. However, this rule does not apply to a person in the capacity of the holder of an office as a member of a local government council.

(9A) Subject to subsection (10), a person who holds office as a member of a local government council is not an employee of the council.

(10) A person who is a member of an eligible local governing body within the meaning of section 221A of the Income Tax Assessment Act 1936 is an employee of the eligible local governing body.

(11) A person who is paid to do work wholly or principally of a domestic or private nature for not more than 30 hours per week is not regarded as an employee in relation to that work.

The key difference with these definitions is the deeming of certain types of people as employees regardless of whether or not they are employees in the industrial relations sense. In the *Vabu* decision referred to above, the High Court left intact an earlier decision concerning Vabu, namely *Vabu Pty Limited v Commissioner of Taxation*, in which the Supreme Court of NSW sitting as the Court of Appeal determined the same bicycle couriers, engaged to perform the same duties as in the High Court were in fact independent contractors for the purposes of Superannuation and Taxation.

The result of these two binding but different decisions is that Vabu is to treat the bicycle couriers as employees for the purposes of industrial regulation. That is for such issues as tortious liability, termination

of employment, remuneration according to Industrial instruments etc. At the same time they are entitled treat these same group of couriers as independent couriers for the purposes of superannuation contributions and taxation.

Workers Compensation

For the purposes of comparison of the regimes of what constitutes an 'employer' and an 'employee' the following definitions from the *Workers Compensation Act 1987* (NSW) have been included.

*"**worker**" means a person who has entered into or works under a contract of service or a training contract with an employer (whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed or implied, and whether the contract is oral or in writing). However, it does not include:*

(a) a member of the Police Service who is a contributor to the Police Superannuation Fund under the Police Regulation (Superannuation) Act 1906 , or

(b) a person whose employment is casual (that is for 1 period only of not more than 5 working days) and who is employed otherwise than for the purposes of the employer's trade or business, or

(c) an officer of a religious or other voluntary association who is employed upon duties for the association outside the officer's ordinary working hours, so far as the employment on those duties is concerned, if the officer's remuneration from the association does not exceed $700 per year, or

(d) except as provided by Schedule 1, a registered participant of a sporting organisation (within the meaning of the Sporting Injuries Insurance Act 1978) while:

(i) participating in an authorised activity (within the meaning of that Act) of that organisation, or

(ii) engaged in training or preparing himself or herself with a view to so participating, or

(iii) engaged on any daily or periodic journey or other journey in connection with the registered participant so participating or the registered participant being so engaged, if, under the contract pursuant to which the registered participant does any of the things referred to above in this paragraph, the registered participant is not entitled to remuneration other than for the doing of those things.

*"**employer**" includes:*

(a) the legal personal representative of a deceased employer, or

(b) a government employer, or

(c) a former employer.

Without limiting the meaning of the expression, an employer can be an individual, a corporation, a firm, an unincorporated body of persons, a government agency or the Crown.

As well as these definitions, this Act also allows for the deeming of certain classes of contractors as employees for the purposes of Workers Compensation. This is a de facto recognition that some or all of these deemed workers are more akin to being independent contractors as the nature of their engagement is in the form of a contract for service. The difficulties that arise in this scheme, where there is a definition of worker, and then some 19 different categories of deemed workers has resulted in the New South Wales State Government instituting its own inquiry so as to find an appropriate definition of worker. We believe that this definition needs to be based upon the difference between a contract for service as opposed to a contract of service.

WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT 1998 - SCHEDULE 1
SCHEDULE Schedule 1 - Deemed employment of workers
(Section 5)
*1 **Workers** **lent or on hire***
(cf former Sch 1 cl 1) If the services of a worker are temporarily lent or let on hire to another person by the person with whom the worker has entered into a contract of service or a training contract, the latter is, for the purposes of this Act, taken to continue to be the employer of the worker while the worker is working for that other person.

*2 **Outworkers and other contractors***
(cf former Sch 1 cl 2)
(1) Where a contract:

(a) to perform any work exceeding $10 in value (not being work incidental to a trade or business regularly carried on by the contractor in the contractor's own name, or under a business or firm name), or

(b) to perform any work as an outworker, is made with the contractor, who neither sublets the contract nor employs any worker, the contractor is, for the purposes of this Act, taken to be a worker employed by the person who made the contract with the contractor.

(2) In this clause:
*"**outworker**" means a person to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished or repaired, or adapted for sale:*

(a) in the person's own home, or

(b) on other premises not under the control or management of the person who gave out the articles or materials.

(3) A person excluded from the definition of "worker" in section 4 (1) because of paragraph (d) of that definition is not to be regarded as a worker under this clause.

3 ***Rural work***

(cf former Sch 1 cl 3)

(1) This clause applies to the following work:

(a) The work of supplying timber, if the timber is obtained, or is to be obtained, from trees felled, or to be felled, by a contractor (whether the trees are the property of the principal or the contractor or any other person).

(b) The work of felling or ringbarking trees, or cutting scrub, or hauling or loading timber.

(c) The work of clearing land of stumps or logs.

(d) The work of cutting sugar cane.

(e) The work of erecting, constructing or demolishing or assisting in the erection, construction or demolition of:

(i) fences, or

(ii) yards or enclosures for horses, cattle, sheep or other animals,

on farms, orchards, vineyards or agricultural or pastoral holdings.

(f) All classes of work normally carried out or performed by derrick operators in or in connection with the transport of sugar cane to a mill.

(g) Any other class of work prescribed by the regulations.

(2) If:

(a) any person (in this clause referred to as "the principal") in the course of, or for the purposes of, the person's trade or business enters into a contract, agreement or arrangement with any other person (in this clause referred to as "the contractor") under which the contractor agrees to carry out work to which this clause applies, and

(b) the contractor:

(i) does not either sublet any part of the work to be carried out, or employ a worker, or

(ii) (although either subletting part of the work or employing a worker) actually performs some part of the work himself or herself, the contractor and any worker so employed by the contractor are, for the purposes of this Act, taken to be workers employed by the principal, and a worker so employed by the contractor is, for the purposes of this Act, other than this clause, taken not to be a worker employed by the contractor.

(3) If the principal has given or offered the contractor the option to or the opportunity to so supply timber if the contractor so desires, then, for the purposes of this clause, the contractor is taken to have agreed to supply timber.

(4) This clause does not apply to or in respect of a contract, agreement or arrangement to haul or load timber if the timber has been subjected to a manufacturing process as defined by the Factories, Shops and Industries Act 1962 in a factory as defined by that Act.

(5) All the principals by whom a person is taken to be employed under this clause at the time of an injury to the person are liable to contribute to any compensation payable under this Act in respect of the injury in such proportion as, in default of agreement, the Commission determines.

(6) For the purposes of this Act, a notice of injury given by a person employed by the contractor is taken to be given to the employer if it is given either to the contractor or the principal.

(7) The contractor must, on request, inform a person employed by the contractor of the name and address of the principal.

(8) In this clause:

*"**timber**" includes sleepers, piles, poles and logs.*

4 ***Timbergetters***

(cf former Sch 1 cl 4)

(1) If any person (in this clause referred to as "the principal") advertises or otherwise notifies that he or she will accept timber delivered or supplied in accordance with the advertisement or notification, any person who gives notice to the principal that he or she will deliver or supply the timber or any part of the timber is, for the purposes of this Act, taken to be a worker employed by the principal.

(2) Notice of intention to deliver or supply timber:

(a) must indicate the nature of the actual work to be undertaken, and

(b) must be given prior to injury.

(3) All the principals by whom a person is taken to be employed under this clause at the time of an injury to the person are liable to contribute to any compensation payable under this Act in respect of the injury in such proportion as, in default of agreement, the Commission determines.

(4) In this clause:

*"**timber**" includes sleepers, piles, poles and logs.*

5 ***Salespersons, canvassers, collectors and others***

(cf former Sch 1 cl 5)

(1) A salesperson, canvasser, collector or other person paid wholly or partly by commission is, for the purposes of this Act, taken to be a worker in the employment of the person by whom the commission is payable, unless the commission is received for or in connection with work incidental to a trade or business regularly carried on by the salesperson, canvasser, collector or other person or by a firm of which he or she is a member.
(2) All the employers who engaged any such salesperson, canvasser, collector or other person at the time of an injury to the salesperson, canvasser, collector or other person are liable to contribute to any compensation payable under this Act in respect of the injury in such proportion as, in default of agreement, the Commission determines.

6 ***Tributers***
(cf former Sch 1 cl 6) A tributer working in connection with any mine (as defined in the Mining Act 1992) and also any workers employed by any such tributer are, for the purposes of this Act, taken to be workers employed by the person with whom the tribute agreement was made by the tributer.

7 ***Mine employees***
(cf former Sch 1 cl 7) Any person usually employed about a mine or in connection with the operations of a mine whose remuneration is provided wholly or partly by the workers employed at the mine is, for the purposes of this Act, taken to be a worker employed by the person by or for whom the mine is being worked.

8 ***Mines rescue personnel***
(cf former Sch 1 cl 8)
(1) For the purposes of this Act:
(a) a member of the New South Wales Mines Rescue Brigade engaged in mine rescue work, or undergoing training, in accordance with Part 4 of the Coal Industry Act 2001 is, while so engaged or undergoing training, taken to be a worker employed by the mines rescue company, and
(b) a place at which such a member is so engaged or undergoing training is taken to be a place at which the member is employed.
(2) A member of the New South Wales Mines Rescue Brigade who receives an injury while journeying between the place from which the member was required to attend for the purpose of engaging in mine rescue work or of undergoing training and a place referred to in subclause (1) (b) is, if the journeying was exclusively and genuinely for that purpose, entitled to receive compensation in accordance with this Act from the mines rescue company.
*(3) In this clause, "**mines rescue company**" means the mines rescue company within the meaning of the Coal Industry Act 2001 .*

9 ***Jockeys and harness racing drivers***
(cf former Sch 1 cl 9)
(1) A person who:
(a) is engaged to ride a horse for fee or reward at a meeting for horse racing conducted or held by a racing club or association, or
(b) drives a horse at a meeting for harness racing conducted or held by a racing club or association and at which betting is allowed, or
(c) is engaged in riding work in connection with horse racing (but not harness racing) on the racecourse or other premises of a racing club or association, is, for the purposes of this Act, taken to be a worker employed by the racing club or association.
(2) Subclause (1) does not apply to a racing club or association having its headquarters in a town with a population not exceeding 3,000 people if:
(a) the meetings of the racing club or association are conducted or held within a radius of 8 kilometres from the town, and
(b) the profits derived from the operations of the racing club or association are applied for charitable purposes.
(3) For the purpose of assessing the compensation payable to a person to whom this clause applies, the "average weekly earnings" of the person are:
(a) to be calculated in such manner (if any) as may be prescribed by the regulations, or
(b) if the person was not working under contract of service—to be calculated in such manner as the Commission considers to be reasonable in the circumstances.
(4) The regulations may make provision for or with respect to the exemption of any class of persons from the operation of subclause (1) (b).

10 ***Drivers of hire-vehicles or hire-vessels—contract of bailment***
(cf former Sch 1 cl 10) A person engaged in plying for hire with any vehicle or vessel, the use of which is obtained by that person under a contract of bailment (other than a hire purchase agreement), in consideration of the payment of a fixed sum, or a share in the earnings or otherwise, is, for the purposes of this Act, taken to be a worker employed by the person from whom the use of the vehicle or vessel is so obtained.

11 ***Caddies and others employed through club***
(cf former Sch 1 cl 11) A person (not being a person excluded from being a worker by reason of paragraph (d) of the definition of "worker" in section 4 (1)):
(a) whose employment is of a casual nature, and
(b) who is employed otherwise than for the purposes of his or her employer's trade or business, and
(c) who is employed for the purposes of any game or recreation, and
(d) who is engaged or paid through a club,
is, for the purposes of this Act, taken to be a worker employed by the club.

12 ***Shearers' cooks and others***
(cf former Sch 1 cl 12) Any person employed in connection with a pastoral or agricultural occupation, as cook, cook's help or hut-keeper, whose remuneration is provided wholly or partly by the employees in any such occupation is, for the purposes of this Act, taken to be a worker employed by the person by or for whom the work in any such occupation is undertaken.

13 ***Fire fighters in fire districts***
(cf former Sch 1 cl 13)
(1) A person who (without remuneration or reward):
(a) voluntarily and without obligation engages in fighting a bush fire in any fire district constituted under the Fire Brigades Act 1989 with the consent of or under the authority and supervision of or in co-operation with:
(i) any volunteer fire brigade within the meaning of that Act, or
(ii) the Director-General or any officer of New South Wales Fire Brigades or any member of a permanent fire brigade, or
(b) is undergoing training for the purposes of fighting bush fires in those circumstances, is, for the purposes of this Act, taken to be a worker employed by the Director-General of New South Wales Fire Brigades.
(2) For the purposes of assessing the compensation payable to a person to whom this clause applies, the "average weekly earnings" of the person are:
(a) if the person was working under a contract of service immediately before fighting the bush fire—to be computed according to the earnings of the person under that contract of employment, or
(b) if the person was not working under a contract of service immediately before fighting the bush fire—to be such amount as the Commission considers to be reasonable in the circumstances.
(3) In this clause:
*"**bush fire**" means a fire burning in grass, bush, scrub or timber and any fire arising from such a fire.*
*"**fighting**" , in relation to a bush fire, includes any reasonable act or operation performed by the person concerned at or about the scene of or in connection with a bush fire, which is necessary for, directed towards or incidental to the control or suppression of the fire or the prevention of the spread of the fire, or in any other way necessarily associated with the fire.*

14 ***Workers at place of pick-up***
(cf former Sch 1 cl 14) Where any person is ordinarily engaged in any employment in connection with which persons customarily attend certain prearranged places at which employers select and engage persons for employment, any such person is:
(a) while in attendance at any such place of pick-up for the purpose of being so selected, or
(b) while travelling thereto from his or her place of abode, or
(c) where the person is not so selected, while travelling from such place of pick-up to his or her place of abode,
taken to be a worker employed by the employer who last employed the person in his or her customary employment.

15 ***Boxers, wrestlers, referees and entertainers***
(cf former Sch 1 cl 15)
(1) A person engaged for fee or reward to take part:
(a) as a boxer, wrestler or referee in any public boxing or wrestling contest in a stadium or place to which the public is admitted on payment of a fee or charge, or
(b) as a boxer, wrestler or referee in any boxing or wrestling contest in or on the premises of a club registered under the Registered Clubs Act 1976 , or
(c) as an entertainer in any public performance in a place of public entertainment to which the public is admitted on payment of a fee or charge, or
(d) as an entertainer in any performance in or on the premises of a club registered under the Registered Clubs Act 1976 , is, for the purposes of this Act, taken to be a worker employed by the person conducting or holding the contest or public or other performance.
(2) A person who takes part in a genuine amateur contest or performance conducted or held by a person who holds or is taken to hold an authority granted under the Charitable Fundraising Act 1991 , is not, for

the purposes of this clause, taken to be engaged for fee or reward only because a trophy or certificate is offered or awarded as a prize in the contest or performance.
(3) A person excluded from being a worker because of paragraph (d) of the definition of "worker" in section 4 (1) is taken not to be a person referred to in subclause (1) (c) or (d).
(4) If 2 or more persons conduct or hold a contest or public or other performance, those persons are liable to contribute to any compensation payable under this Act for the injury in such proportion as, in default of agreement, the Commission determines.

16 ***Voluntary ambulance workers***
(cf former Sch 1 cl 16)
(1) A person who (without remuneration or reward) voluntarily and without obligation engages in any ambulance work with the consent of or under the authority and supervision of or in co-operation with the Health Administration Corporation constituted by the Health Administration Act 1982 is, for the purposes of this Act, taken to be a worker employed by that Corporation.
(2) For the purposes of assessing the compensation payable to a person to whom this clause applies, the "average weekly earnings" of the person are:
(a) if the person was working under a contract of service immediately before engaging in the ambulance work—to be computed according to the earnings of the person under that contract of employment, or
(b) if the person was not working under a contract of service immediately before engaging in the ambulance work—to be such amount as the Commission considers to be reasonable in the circumstances.
(3) In this clause, "ambulance work" means work in or in connection with the rendering of first aid to, or the transport of, sick or injured persons.

17 ***Ministers of religion***
(cf former Sch 1 cl 17)
(1) The regulations may declare that persons within a specified class are ministers of religion of a specified religious body or organisation.
(2) A person within such a class is, for the purposes of this Act, taken to be a worker employed by a person specified in the regulation as the employer of persons within that class.
(3) A regulation relating to a religious body or organisation may not be made except at the request of that body or organisation.
(4) An order under section 6 (14E) of the former 1926 Act, continued in force by clause 17 of Schedule 1 to the 1987 Act and in force immediately before the commencement of this clause has effect as if it were a regulation under this clause (but may be revoked by any such regulation).

18 ***Ministers of religion covered by policies***
(cf former Sch 1 cl 17A)
(1) For the purposes of this Act, if a policy of insurance covers a minister of religion, that minister of religion is taken to be a worker and the person insured under the policy is taken to be the minister's employer.
(2) A minister of religion is considered to be covered by a policy of insurance if the policy provides (whether on its own terms or in some other document recognised by or referred to in the policy) that the coverage provided by the policy extends to the minister or to ministers of a class of which that minister is a member.
(3) A religious body or organisation, and any official of the body or organisation, is taken to have an insurable interest for the purpose of enabling the body, organisation or official to obtain and maintain in force a policy of insurance that covers a minister of religion of that body or organisation.
(4) If there is a conflict between the operation of this clause and clause 17 in respect of a particular minister of religion, this clause prevails.
(5) In this clause:
*"**official**" of a religious body or organisation includes a person or body who or which holds an office or position, or exercises official functions, within the religious body or organisation.*

19 ***Participants in training programs***
(cf former Sch 1 cl 18)
(1) The regulations may:
(a) declare a specified training program that includes the provision of workplace based training and involves the provision of Commonwealth funding to be a declared training program for the purposes of this clause, and
(b) specify a class of payments as payments that are taken to be wages in respect of a participant in a declared training program.
(2) A person who is a participant in a declared training program is, for the purposes of this Act, taken to be a worker employed by the person who provides the workplace based training during any time that the person participates in the declared training program after the person who is to provide the workplace based training has entered into an agreement to provide the workplace based training.

(3) A payment that is declared by the regulations to be wages in respect of a participant in a declared training program is, for the purposes of this Act, taken to be the participant's wages in the employment by the person who provides the workplace based training.
(4) Except to the extent that the regulations may otherwise provide, this clause does not apply in respect of participation by a person, or an injury received by a participant, in a training program before the training program became a declared training program for the purposes of this clause.

This long list of 'deemed workers' considerably increases the scope and application of this legislation. In the case of Vabu, it is clear that section 5 *Salesperson, canvassers, collectors and others* deems the independent contractors that Vabu uses for the purposes for carrying out its business as employees.

This example simply reinforces the problems of defining what constitutes employment and what is a genuine independent contractual relationship. It is our submission, that a new definition of what an employee is, and what an independent contractor is, needs to be included in identical terms in the relevant Commonwealth legislation. This new definition, it is submitted should be based upon the differences between a contract of service, and a contract for service.

An example of the changes that can be made to one of these deemed categories of employment is in relation to category number 12. Shearers' cooks and others. This deemed provision is based upon the premise that a shearers cook is an independent contractor, engaged by the shearing contractor on behalf of the mess (the shearers, shed hands, wool classes). The mess has the power to dismiss the cook[1], the mess also pays the cooks wages, in that an amount is deducted from each employees wages to pay the cook. This relationship is properly constructed as a contract for service in its traditional sense. However if it is more appropriate to consider this class of contractors as employees, it can be achieved simply by requiring the employer (ie the shearing contractor) to pay for the cooks wages and to be singly invested with the power to dismiss the cook.

Range of Independent Contracting Arrangements

We do not have expertise in the area of determining the prevalence or otherwise of independent contractor relationships in the broader Australian economy. We note that there is often doubt where an individual contracts with a firm to provide service, with the intention of being an independent contractor, and we refer to the comments above. Further, we acknowledge that there are a wide variety of independent contractor arrangements that have been designed to explicitly exclude the employment relationship. Examples of these types of arrangements include the ODCO system, (see *Building Workers' Industrial Union of Australia and Others vOdco Pty Ltd* 99 ALR 735) and the Impulse system (see *Chuck C. Blake & Anor v Sitefate Pty Ltd & Anor; Paul H. Jackson & Anor v Airwarm Pty Ltd & Anor; Brian McCarthy & Anor v Impulse Airlines Pty Ltd [1997] 782 FCA (30 July 1997)*) These are just two types of engagement that have been found, across a wide variety of industries, to be in the form of independent contractors for the purposes of industrial regulation, however they may still be employees for the purposes of Workers Compensation.

Labour Hire in the Australian Context

There are essentially two types of labour hire companies in Australia, external labour hire companies such as Select and internal labour hire companies. Internal labour hire companies are generally employment companies within a larger group of companies that are incorporated to provide labour to another company within the structure.

Although both of these structures are distinct, in that the traditional labour hire company may contract to provide labour to a wide variety of enterprises, the internal labour hire company may usually only provide labour to a single enterprise.

Labour hire is the contracting between a principal enterprise with a second enterprise, for the second enterprise to provide labour to the principal enterprise. Labour hire is a system of employment where the principal enterprise is not the employer. The employer is the second enterprise, whose business is the provision of labour to the principal enterprise. There is a contract of employment between the second enterprise and the labour, and a contract for service between the primary enterprise and the second enterprise.

Labour Hire companies may provide an entire workforce, key personnel, or supplementary labour or a mixture of any of these three. There are issues relating to transmission of business, redundancy and alternate employment, occupational health and safety, workers compensation, the vicarious and direct liability of the prime enterprise to the public for the actions of the employees of the labour hire company. There are also issues relating to industrial action and secondary boycotts, issues relating to whether or not

[1] This is a traditional power of the mess, however during the section 89A review of the *Pastoral Industry Award* this provision was excised as it did not relate to the employment relationship between he shearing contractor(s) and the other employees

the labour hire company is the employer or whether the prime contractor is really the employer. These issues also arise with respect to independent contractors.

Transmission of Business and Labour Hire

The legislative scheme for what happens to the industrial coverage of employees when a transmission of business occurs is set out in ss.149, 170MB, 170MBA and 170VS of the *Workplace Relations Act 1996*. s.149 provides for Award coverage as well as coverage for successors, 'to or of the business of an employer who was a party to the industrial dispute.' s.170MB provides for the transference of the conditions contained in a certified agreements, from the first employer to a successor employer subject to the provisions of s.170MBA. s.170MBA provides for an application to the AIRC to determine whether or not a certified agreement binds a successor etc. in a transmission of business situation and to what extent it does. s.170VS provides that an AWA's provision are binding on a successor, so long as the successor to the first business meets the statutory requirements for having an AWA approved. The relevant provisions are quoted below;

149 Persons bound by awards

(1) Subject to any order of the Commission, an award determining an industrial dispute is binding on:

(a) all parties to the industrial dispute who appeared or were represented before the Commission;

(b) all parties to the industrial dispute who were summoned or notified (either personally or as prescribed) to appear as parties to the industrial dispute (whether or not they appeared);

(c) all parties who, having been notified (either personally or as prescribed) of the industrial dispute and of the fact that they were alleged to be parties to the industrial dispute, did not, within the time prescribed, satisfy the Commission that they were not parties to the industrial dispute;

(d) any successor, assignee or transmittee (whether immediate or not) to or of the business or part of the business of an employer who was a party to the industrial dispute, including a corporation that has acquired or taken over the business or part of the business of the employer;

(e) all organisations and persons on whom the award is binding as a common rule; and

(f) all members of organisations bound by the award.

170MB Successor employers bound

(1) If:

(a) an employer is bound by a certified agreement; and

(b) the application for certification of the agreement stated that it was made under Division 3; and

(c) at a later time, a new employer becomes the successor, transmittee or assignee (whether immediate or not) of the whole or a part of the business concerned;

then, from the later time:

(d) subject to any order of the Commission made under subsection 170MBA(2), the new employer is bound by the certified agreement, to the extent that it relates to the whole or the part of the business; and

(e) the previous employer ceases to be bound by the certified agreement, to the extent that it relates to the whole or the part of the business; and

(f) subject to any order of the Commission made under subsection 170MBA(2), a reference in this Part to the employer includes a reference to the new employer, and ceases to refer to the previous employer, to the extent that the context relates to the whole or the part of the business.

(2) If:

(a) an employer is bound by a certified agreement; and

(b) the application for certification of the agreement stated that it was made under Division 2; and

(c) at a later time, a new employer that is a constitutional corporation or the Commonwealth becomes the successor, transmittee or assignee (whether immediate or not) of the whole or a part of the business concerned;

then, from the later time:

(d) subject to any order of the Commission made under subsection 170MBA(2), the new employer is bound by the certified agreement, to the extent that it relates to the whole or the part of the business; and

(e) the previous employer ceases to be bound by the certified agreement, to the extent that it relates to the whole or the part of the business; and

(f) subject to any order of the Commission made under subsection 170MBA(2), a reference in this Part to the employer includes a reference to the new employer, and ceases to refer to the previous employer, to the extent that the context relates to the whole or the part of the business.

(3) This section does not affect the rights and obligations of the previous employer that arose before the later time.

170MBA Commission may make order about extent to which successor employer bound by certified agreement

Application and terminology

(1) If:

(a) an employer is bound by a certified agreement; and

(b) another employer becomes at a later time, or is likely to become at a later time, the successor, transmittee or assignee (whether immediate or not) of the whole or a part of the business of the employer referred to in paragraph (a);

then, for the purposes of this section:

*(c) the **outgoing employer** is the employer referred to in paragraph (a); and*

*(d) the **incoming employer** is the employer first referred to in paragraph (b); and*

*(e) the **business concerned** is the whole or that part of the business; and*

*(f) the **transfer time** is the time at which the incoming employer becomes the successor, transmittee or assignee of the business concerned.*

Commission may make order that certified agreement does not bind incoming employer

(2) The Commission may make an order that the incoming employer:

(a) is not, or will not be, bound by the certified agreement; or

(b) is, or will be, bound by the certified agreement, but only to the extent specified in the order.

The order must specify the day from which the order takes effect. That day must not be before the day on which the order is made or before the transfer time.

(2A) The Commission shall not make an order under subsection (2) unless:

(a) the parties to the certified agreement and the incoming employer agree to the proposed order; or

(b) the Commission is satisfied that the majority of employees who are covered by the certified agreement and who would be affected by the proposed order agree to the proposed order; or

(c) the Commission is satisfied that either:

(i) the proposed order does not disadvantage employees in relation to their terms and conditions of employment; or

(ii) the proposed order is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the transmitted business.

In this subsection, a proposed order disadvantages an employee or employees in relation to their terms and conditions of employment, if, on balance, its approval would result in a

reduction in the overall terms and conditions of employment of that employee or those employees.

(2B) In making an order the Commission must take into account:

(a) the proposed new terms and conditions that the employee would be subject to and the effect of any loss of conditions; and

(b) the length of time remaining on the certified agreement.

(3) Without limiting paragraph (2)(b), the Commission may make an order under that paragraph that the incoming employer is, or will be, bound by the certified agreement but only for the period specified in the order.

When application for order can be made

(4) An application for an order under subsection (2) may be made before, at or after the transfer time.

Who may apply for order

(5) Before the transfer time, an application for an order under subsection (2) may be made only by the outgoing employer.

(5A) In determining an application made by an outgoing employer under subsection (5), the Commission must take into account the terms and conditions of employment that apply, or will apply, to employees of the incoming employer.

(6) At or after the transfer time, an application for an order under subsection (2) may be made only by:

(a) the incoming employer; or

(b) an employee of the incoming employer whose employment is subject to the certified agreement; or

(c) an organisation that:

(i) is bound by the certified agreement; and

(ii) is entitled to represent the industrial interests of employees referred to in paragraph (b) in relation to work that is subject to the agreement.

Paragraph (c) has effect subject to subsection (7) (which makes special provision for organisations bound by section 170LK agreements).

(7) An organisation that is bound by a certified agreement made in accordance with section 170LK may only apply under paragraph (6)(c) for an order under subsection (2) if the organisation has at least one member:

(a) who is an employee of the incoming employer and whose employment is subject to the agreement; and

(b) whose industrial interests the organisation is entitled to represent in relation to work that is subject to the agreement; and

(c) who requested the organisation to apply for an order under that subsection.

Applicant to give notice of application

(8) The applicant for an order under subsection (2) must take reasonable steps to give written notice of the application to the persons who, and organisations that, may make submissions in relation to the application (see subsections (9) to (13)).

Submissions in relation to application for order

(9) Before deciding whether to make an order under subsection (2) in relation to the certified agreement, the Commission must give the following an opportunity to make submissions:

(a) the applicant;

(b) before the transfer time—the persons and organisations covered by subsection (10);

(c) at and after the transfer time—the persons and organisations covered by subsection (12).

Submissions—before transfer time

(10) For the purposes of paragraph (9)(b), this subsection covers:

(a) an employee of the outgoing employer:

(i) whose employment is subject to the certified agreement; and

(ii) who is employed in the business concerned; and

(b) the incoming employer; and

(c) an employee of the incoming employer whose employment may become subject to the certified agreement at or after the transfer time if the order is not made; and

(d) an organisation that:

(i) is bound by the certified agreement; and

(ii) is entitled to represent the industrial interests of employees referred to in paragraph (a) or (c) in relation to work that is subject to the agreement.

Paragraph (d) has effect subject to subsection (11) (which makes special provision for organisations bound by section 170LK agreements).

(11) An organisation that is bound by a certified agreement made in accordance with section 170LK is covered by subsection (10) only if the organisation has at least one member:

(a) who is an employee referred to in paragraph (10)(a) or (c); and

(b) whose industrial interests the organisation is entitled to represent in relation to work that is subject to the agreement; and

(c) who requested the organisation to make submissions in relation to the application.

Submissions—at and after transfer time

(12) For the purposes of paragraph (9)(c), this subsection covers:

(a) the incoming employer; and

(b) an employee of the incoming employer whose employment is subject to the certified agreement; and

(c) an organisation that:

(i) is bound by the certified agreement; and

(ii) is entitled to represent the industrial interests of employees referred to in paragraph (b) in relation to work that is subject to the certified agreement.

Paragraph (c) has effect subject to subsection (13) (which makes special provision for organisations bound by section 170LK agreements).

(13) An organisation that is bound by a certified agreement made in accordance with section 170LK is covered by subsection (12) only if the organisation has at least one member:

(a) who is an employee referred to in paragraph (12)(b); and

(b) whose industrial interests the organisation is entitled to represent in relation to work that is subject to the agreement; and

(c) who requested the organisation to make submissions in relation to the application.

170VS AWA binds employer's successor

(1) If:

(a) an employee who is a party to an AWA becomes an employee of a new employer because the new employer is a successor to the whole or any part of the previous employer's business or undertaking; and

(b) at the succession time at least one of the following applies:

(i) the new employer is a constitutional corporation;

(ii) the new employer is the Commonwealth;

(iii) the employee's primary workplace is in a Territory;

(iv) the new employer is a waterside employer, the employee is a waterside worker and the employee's employment is in connection with constitutional trade or commerce;

(v) the employee is a maritime employee and the employee's employment is in connection with constitutional trade or commerce;

(vi) the employee is a flight crew officer and the employee's employment is in connection with constitutional trade or commerce;

then the new employer replaces the previous employer as a party to the AWA from the succession time.

(2) The succession does not affect the rights and obligations of the previous employer that arose before the succession.

(3) In this section:

***successor** means a successor, transmittee or assignee.*

Despite the legislation, the whole issue of when a transmission of business occurs and what happens when there is a transmission of business is an area of labour law that is still very much a grey area. Recent decisions in the High Court in the *Amcor* and *Gribbles* decisions have reinforced the criteria found in *PP Consultants*, and particularly in Gribbles have added an extra requirement when determining whether or not one business has succeeded to another

The key determinants in deciding whether or not the business has been transmitted, as against just the employment have been formulated by the High Court in *PP Consultants* are as follows;

- The identification of the character of the transferred business activities in the hands of the first employer
- The identification of the character of the transferred business activities in the hands of the new employer
- Compare the two. If, in substance, they bear the same character, then it will usually be the case that the new employer has succeeded to the business or part of the business of the previous employer.

The decision handed by the High Court in *Gribbles*, whilst dealing with a succession of a business determined that simply identifying the character of the first business, and the character of the second business, and then comparing them is not enough to determine that there has been a succession. There needs also to be a succession of the assets from the first business to the second business for a succession to take place. It is not enough that both employers are engaged in identical businesses, if there has been no transfer of some type of asset whether that is a tangible good (physical stock etc) or an intangible good (such as goodwill).

The additional point found in *Gribbles* is;

- "It is the assets used in that way that can be assigned or transmitted and it is to the assets used in that way that an employer can be a successor."

The provisions relating to transmission of business and the resultant 'flow on' affect of the in place industrial regulations is a fundamental concern to labour hire companies and to businesses who engage labour hire companies.

The issue is hugely relevant as external labour hire companies face the possibility of employing the same people under a very wide variety of industrial instruments. A possibility to avoid this, is for a labour hire company to develop its own federal Award in the industry of Labour Hire. However even where such an Award is developed and made, there is a very real possibility that it will not cover the field, especially where it is deficient in comparison with the existing site regulation. In cases such as this, there is a very real danger that the Australian Industrial Relations Commission (AIRC) or the Courts, will find that there has been a transmission of business, and that the relevant industrial regulation for the labour hire company is the site regulation, as it provides a greater benefit to the employees.

<u>Redundancy, Alternate Employment and Labour Hire</u>

Where a company makes a decision that it no longer wishes any person to perform a function, then that function has been made redundant. The employee who performed that function, may be entitled to severance pay in accordance with the scheme contained in their industrial regulation. The High Court, has in the *Amcor* decision determined in a much clearer way when an employee is entitled to severance payments where a position has been made redundant.

This area of redundancy obligations is crucial to both the internal labour hire provider and the external labour hire provider. The *Amcor* decision decided the following;

Where a reorganisation results in the transfer of employment from one company to another, and there is a continuance of the employment contract, with the attending obligations vis-a-vis continuity of employment for leave calculations etc. then, even though there has been a genuine redundancy, the employees are not entitled to severance pay.

This issue is vital, in that it acknowledges that businesses have a right to alter the employment contract in such a way as to remove themselves from being the employer, so long as the employee is not affected in terms of their employment benefits.

For example, it now seems possible that a company can make a determination that it no longer wants to employ any of the people on its widget factory. They approach an external labour hire company, such as Select Industrial, contract with Select for the provision of labour services, on the proviso that the pre existing employees are continued in their employment. The Widget manufacturer indemnifies Select with respect to the preserved benefits of their former employees, and both parties (the new employer and the former employer) inform the employees of the new contractual arrangement. In a case like this, there is no severance payment to be made to the employees due to redundancy. The result being that the widget manufacturer no longer is an employer. The obligation it has to its former employees, is limited to its obligations under relevant Occupational Health and Safety Schemes.

This decision has the possibility of opening up the Australian Labour market to a variety of labour hire schemes, whether they are internal labour hire providers, or external labour hire providers. It is our submission, that this freeing up of labour may improve the ability of the Australian labour market to shift skilled labour to areas of greatest need.

By this we mean that in the scenario featured above, the skilled widget makers are now, as employees of a labour hire company, part of a larger organisation that may provide opportunities to migrate to areas where their skills are valued higher. This has the potential to increase labour market flexibility in an era of increasing demand for labour skills.

This increased flexibility is potentially possible, without the added burden to employers of making severance payments to its employees where the original employer no longer wishes to be in the business of employing people.

<u>Occupational Health and Safety and Labour Hire</u>
OH&S is generally covered by State based legislative regimes. In NSW the *Occupational Health and Safety Act 2000* provides the legislative framework in which OH&S is regulated. This Act at s.8 provides;

8 Duties of employers

(1) Employees An employer must ensure the health, safety and welfare at work of all the employees of the employer. That duty extends (without limitation) to the following:

(a) ensuring that any premises controlled by the employer where the employees work (and the means of access to or exit from the premises) are safe and without risks to health,

(b) ensuring that any plant or substance provided for use by the employees at work is safe and without risks to health when properly used,

(c) ensuring that systems of work and the working environment of the employees are safe and without risks to health,

(d) providing such information, instruction, training and supervision as may be necessary to ensure the employees' health and safety at work,

(e) providing adequate facilities for the welfare of the employees at work.

(2) Others at workplace An employer must ensure that people (other than the employees of the employer) are not exposed to risks to their health or safety arising from the conduct of the employer's undertaking while they are at the employer's place of work.

The affect of this, is that an employer has a positive obligation to its employees and to other users of its workplace. In a recent decision in the NSW Industrial Relations Court, Hitchcock Haulage was found guilty of a breach of the OH&S Act when one of its long haul drivers was killed in a head on truck accident. The Commission in Court session finding that the truck and the highway was a place of work and that the company had a duty of care to other road users including the other truck involved in the incident. This broadening of the definition of workplace beyond the physical borders in which the work is performed, potentially has large ramifications for labour hire companies, and for users of labour hire.

Other aspects involved with this issue relate to the obligation of the employer to its employee for a safe worksite. The courts have found that this is a non-delegable duty of care. The courts have also found that where a company has a role that is analogous with being an employer, that is the company who has engaged the labour hire company, then they also have the responsibility for the provision of workplace that is safe from harm.

Conclusions

We acknowledge and agree with the studies completed by the Productivity Commission with respect to the growth of labour hire employment in Australia. We note that this increase in the use of alternate employment relationships has assisted in the increase in real labour productivity and that there is a requirement for even further freeing up of the labour market. With this in mind, we believe that the following areas need to be addressed to ensure that these alternatives are kept as viable labour providers.

1. A new definition in identical terms to be inserted in relevant Commonwealth legislation for an employee. This definition to be based upon the common law definition of a contract of service.
2. A new definition in identical terms to be inserted in relevant Commonwealth legislation for an independent contractor. This definition to be based upon the common law definition of a contract for service.
3. That relevant legislation is passed to ensure that the spirit of the High Court decisions in *Gribbles* and *Amcor* are preserved. We believe that it is essential to the future of the Australian economy, that labour market transfers are as unfettered as possible whilst at the same time protecting an employee's rewards for the labour that they provide.

We are available to provide further detail in any of these areas if so required.

IR Australia Pty Ltd