The Honourable Tom Barton MP
Member for Waterford

Queensland Government

Minister for Employment,
Training and Industrial Relations
and Minister for Sport

14 JUL 2006

Mr John Carter
Secretary
Senate Employment, Workplace Relations and Education Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Carter

On 28 June 2006, the federal Government announced an Inquiry to be held by the Senate Employment, Workplace Relations and Education legislation Committee into the *Independent Contractors Bill 2006* and the *Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006*.

Given the very short framework to respond to the Bill, the Queensland Government has decided to resubmit our original submission to the Department of Employment and Workplace Relations (DEWR) in response to its discussion paper on the proposed *Independent Contractors Act*.

The attached submission constitutes the Queensland Government's official position on the Independent Contracting legislation.

If you require further information on this matter, Ms Cath Rafferty, Senior Policy Officer on (07) 3227 6301 will be pleased to assist you.

Yours sincerely

TOM BARTON MP
Minister for Employment, Training and Industrial Relations and Minister for Sport

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Federal Department of Employment and Workplace Relations Discussion Paper on Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements.

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Introduction

Over the past 20 years there has been a steady emergence of non-traditional working arrangements including temporary and marginal workers such as casual and part-time employees, and a substantial increase in the use of contracting and labour hire.

Categories include self-employed contractors and subcontractors (including many mobile or home-based workers), temporary (including on-call), leased (or labour hire) and short-term fixed contract workers.

The Queensland Government supports the use of genuine independent contracting. However, it has grave concerns about the use of 'sham' or artificial contract arrangements to hide a genuine employment relationship for the following purposes:

- to undermine employment conditions
- to remove workers out of the PAYE system
- to remove employers' obligation for worker's compensation and public liability coverage.

The Queensland Government is committed to the removal of irregularities in these arrangements that are not conducive to good economic and taxation policy and has introduced sections 275 and 276 into the Queensland *Industrial Relations Act* as corrective measures which enable investigations into allegations of unfair or "grey" areas of contractual agreements.

At the same time, the Queensland Government believes that complementarity across state and federal jurisdictions is essential in establishing a regime that is effective in supporting the role of genuine independent contractors and the labour hire industry whilst providing certainty around the coverage of workers by labour laws.

Currently, the status of independent contractor and labour hire is subject to different tests across different jurisdictions including:

- the industrial relations jurisdiction which distinguishes between an employment relationship under a **contract of service** and a self-employment arrangement under a **contract for service** with 'grey' areas determined by common law tests;
- the taxation regime which extended its powers to tax a person as an employee under the ***Alienation of Personal Services Income 2000 Act*** regardless of their employment status under other legislation;

- the Superannuation Guarantee (Administration) Act 1992 (Cth) which extended compulsory contributions by employers;
- the *Workers' Compensation and Rehabilitation Act 2003* in Queensland which was amended to introduce a 'results test' to ensure consistency in the determinations made by the ATO and WorkCover Queensland as to who is and who is not a worker;
- discrimination legislation which applies to contractors as well as employers and employees.

The Queensland Government believes in the need to develop consistency in definitions across state and federal jurisdictions. In response to the issues identified in the discussion paper, the Queensland Government believes that consideration be given to the adoption of the 'results test', as applied by the *Workers' Compensation and Rehabilitation Act,* for the purpose of defining an independent contractor. In the event that a broad definition of independent contractor was adopted, it may be possible for jurisdictions to re-examine their industrial relations legislation to determine the ongoing relevance of additional remedies.

1. *The Workplace Relations Act (WRA) should be amended to provide that awards and agreements cannot contain clauses which restrict engaging independent contractors and impose conditions or limitations on their engagement.*

Prescribing the content of awards and agreements in the *Workplace Relations Act* (WRA) is problematic at a number of levels. Firstly, using legislation to impose conditions on awards and agreements detracts from the Commonwealth's own objective of empowering employers and employees in workplaces to determine their own employment arrangements, including the nature of employment. In the same way, if the content of awards is proscribed by legislation rather than arbitrated through industrial tribunals, the powers of the parties to the award are reduced accordingly. In addition, legislation restricting the use of industrial contractors in agreements is unnecessary given the Electrolux decision and cases decided since.

Secondly the WR Act has limited constitutional coverage over agreements which will prevent the implementation of any legislative provisions over agreements covering unincorporated workplaces. In addition, the corporations' power may not support the scope of this provision.

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?*

While there may be some advantages in retaining the common law definitions in that the courts and commissions can respond to individual situations, the common law test can be circumvented by artificial contracting arrangements. There is evidence to demonstrate that a proportion of contracting arrangements have been developed solely to minimise tax or on-costs and to outsource risk from corporations to individuals, including vicarious liability. The practice of people moving income out of the PAYE system when they were not legitimately operating a business was challenged by the Commonwealth's ***Alienation of Personal Services Income 2000 Act*** which tightened the definition of an independent contractor.

The practice of disguising employment type arrangements under artificial or 'sham' contracts is still a common one. The Queensland Industrial Inspectorate has identified a number of arrangements used in Queensland to avoid the employee/employer relationship, including:

- Tertiary Beneficiary Trust: Under this arrangement, workers are not offered employment in the usual manner. Instead they are offered work as Tertiary Beneficiaries of a company trust and paid dividends rather than wages.

- Partnership arrangements: In this instance, a company enters into a partnership arrangement with one individual to provide services (usually labour only) to client businesses
- Franchisees: Under this arrangement, an enterprise allows another person to use its trademark product, but the franchisee has financial obligations to the franchisor who exercises control. The Industrial Inspectorate has cited one example of an employer alleging a retail shop manager was an agent or franchisee of his business. The Department was successful in establishing an employment relationship and obtaining an order for payment of wages.

While workers operating as genuine independent contractors on a self-employed basis are not problematic, it is argued that many dependent contractors have similar characteristics and obligations to employees but with few of the entitlements. For instance, many owner-drivers in the courier and taxi-truck industry fall into this category of dependent contractors.

The current arrangements for defining employees do not match the realities of the modern labour market and relying solely on common law has the potential to dilute the protective function of industrial relations regulation.

There is also criticism of the associated common law tests. There is no one single test for distinguishing employees from independent contractors and some of the tests can be difficult to apply to the modern work environment. For example, the control test was based on the traditional notion that independent contractors had control over their own work, provided they met their contractual obligations to provide a set product in a set time, while employees were under the direction and control of the employer. In practice, the distinctions are not so clear. Many employees, particularly in skilled occupations, will have significant control over their own work, while contractors in 'dependent-style' situations may be working with little discretion.

There is also a view that while the scope of the law may be adequate, the interpretations placed on them by the courts can be too narrow. Professor Andrew Stewart, for example is critical of the courts for focusing too much on the terms of a contract, rather than the economic reality of a relationship ("*Redefining Employment - Meeting the Challenge of Contract and Agency Labour*", *Australian Journal of Labour Law*, vol.15, pp 1–42, 2002). By determining employee status according to the strict terms of the contract, this can provide greater scope for lawyers to reconstruct employment relationships to avoid the effect of regulation, for example by requiring the worker to get an ABN number and stipulating there is no obligation for the parties to provide or accept work.

Other regulatory areas of labour law in Queensland do not rely on the dividing line between employees and contractors, for example:

- Occupational health and safety legislation imposes duties beyond the traditional concept of the employment relationship.
- Workers Compensation legislation applies to certain workers under a contract for service
- Discrimination legislation applies to both contractors and employees.
- Payroll tax covers contractors performing work other than pursuant to a trade or business which they carry on and do not subcontract to anyone else.

The Queensland Government recognised that this narrow definition of the employment relationship did not cover the 'grey' areas of artificial or 'sham' contracting arrangements and introduced sections 275 and 276 of the *Industrial Relations Act 1999,* which gave the Queensland Industrial Relations Commission (QIRC) the power to declare persons to be employees (employee deeming) and to amend or declare void unfair contracts.

In the Queensland Government submission to the recent federal Inquiry into independent contracting and labour hire by the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, it was proposed that the committee consider the following option:

"Aligning the different definitions of the employment relationship to provide consistency in relation to artificial or illegitimate contracting arrangements".

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?*

The Queensland Government believes that complementarity across state and federal jurisdictions is essential in establishing a regime that is effective in removing the irregularities in contracting and labour hire arrangements that are not conducive to good economic and taxation policy. In this regard, the ATO personal services business test imposes a more stringent test than the common law test in that it establishes a number of specific criteria that have to be met rather than a general checklist.

The ***Alienation of Personal Services Income 2000 Act*** established that a contractor was running their own personal services business in any one of three ways.

The first possibility is that less than 80 per cent of personal services income in that year has been obtained by the contractor from a single entity (or associates of that entity) and one of three tests is satisfied:

(a) the unrelated clients test – services have been rendered to two or more entities that are not associated (either with each other or with the

contractor), as a result of the services being offered or advertised to the public; or

(b) the employment test – at least 20 per cent of the contractor's principal work has been performed by one or more other persons or entities engaged by the contractor and not associated with them; or

(c) the business premises test – the contractor performs work throughout the year from premises of which the contractor has exclusive use, and which are physically separate from any premises belonging to a client of the contractor or used by the contractor or their associates for private purposes.

Secondly, even if 80 per cent or more of personal services income in a given year is received from a single source, the contractor may obtain a personal services business determination from the Commissioner of Taxation, based on being able to satisfy either the employment test or the business premises test (but not the unrelated clients test).

Thirdly, and regardless of the proportion of income derived from any one source, a contractor will be a personal services business if they can satisfy the results test. For this to apply, the contractor must derive at least 75 per cent of their personal services from contracting to produce a result rather than to supply labour, provided they also supply their own tools and equipment for the purpose and are obliged to rectify any defective work. The results test was not part of the personal services income provisions as originally enacted, but was added with retrospective effect after lobbying from business groups.

At this stage, these tests are applied by the ATO after the contracting arrangement has been established. A simpler and more effective system would be to apply these criteria once an application for an ABN is lodged, so that illegitimate contracting arrangements can be avoided at source.

The Queensland Government believes that there should be a strong link between the definition of independent contractor under the Income Tax and Assessment Act 1997 and any definition applied for employment law purposes. This will ensure that engagements have applicable tax and superannuation categories applied at the commencement of the engagement and will help prevent any unforseen back-payments, which may arise if employment law definitions differ from the Australian Tax Office definitions.

The Queensland Government in its submission to the recent federal Inquiry into independent contracting and labour hire by the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, proposed that the committee consider the following option:

"Strengthening the ATO test of genuine contracting status by imposing more stringent tests when an application for an ABN is made".

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?*

This proposal is wide-ranging, incorporating the standard common law tests such as control and integration, as well as considerations of the economic reality behind the contractual relationship, by adopting the tests from the Commonwealth taxation regime.

The benefit of this option is that it extends complementarity to many statutory regimes with broader definitions of workers other than employees including:

- The taxation regime which extended its powers to tax a person as an employee under the ***Alienation of Personal Services Income 2000 Act*** regardless of their employment status under other legislation;
- The Superannuation Guarantee (Administration) Act 1992 (Cth) which extended compulsory contributions by employers.
- The *Workers' Compensation and Rehabilitation Act 2003* in Queensland which was amended to introduce a 'results test' to ensure consistency in the determinations made by the ATO and WorkCover Queensland as to who is and who is not a worker.

The Queensland Government believes in the need to develop consistency in definitions across state and federal jurisdictions and considers that the adoption of the 'results test', as applied by the *Workers' Compensation and Rehabilitation Act,* would provide certainty around the coverage of independent contractors across all jurisdictions.

In the Queensland Government submission to the recent federal Inquiry into independent contracting and labour hire by the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, it was proposed that the committee consider the following option:

"Aligning the different definitions of the employment relationship to provide consistency in relation to artificial or illegitimate contracting arrangements".

5. *Should an 'Independent Contracting Registrar' be established to make declarations about employee/independent contractor status applying the appropriate tests?*

The registry would be taking on a role that is currently provided by the Queensland Industrial Relations Commission (QIRC) through the application of the deeming provisions under section 275. As an autonomous body, independent from the legislative and administrative arms of Governments, the decisions of the QIRC have both legal and independent status.

In their paper "*Working to curtail rights*', David Peetz and Mark Mourell argue against the trend by the Commonwealth to bypass independent tribunals and replace them with administrative controls regulated by Government. They identify the conflict of interest issues resulting from the dual responsibility exercised for example by the Office of the Employment Advocate (OEA) in both regulating and promoting Australian Workplace Agreements (AWAs).

According to the authors, this conflict prevented the OEA from defending freedom of association issues against firms using AWAs to de-unionise "thus the OEA has been silent in many Federal Court cases when it was claimed AWAs were being used to de-unionise workplaces on the waterfront, in banking and in mining" (Courier Mail, 14 April 2005).

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?*

The purpose of an additional object covering independent contracting in the WR Act would appear to be contradictory if the intention is '"that independent contractors should not be regulated by workplace relations law, but by commercial law" as they are covered by commercial contractual arrangements, not employment arrangements' (*Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements* DEWR Discussion Paper, p5).

Again, in order to insert an object in the WR Act upholding the status of independent contractors, the Commonwealth would need to use its limited

constitutional powers to override state laws, resulting in patchy legislation. In addition, a number of corporations have themselves sought flexibility in the application of commercial regulation, with submissions to the Australian Competition and Consumer Commission (ACCC) for permission to introduce quasi-industrial instruments into commercial contract arrangements.

A significant issue which should be considered by the Commonwealth is the impact that a policy of encouraging independent contractors to the detriment of training a core of skilled workers can have on major building and maintenance projects. In the current market of sustained high demand and shortage of skills in the road design and construction sector, moves to increase the attractiveness of independent contractors may be detrimental to the industry resulting in lower levels of upskilling and training and increased costs.

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?*

The *Workers' Compensation and Rehabilitation Act 2003* establishes a workers' compensation scheme for Queensland which provides benefits for workers who sustain injury in their employment, and encourages improved health and safety performance by employers.

The width of the employment relationship covered by the definition of worker and employer in the Act reflects a policy approach which seeks to provide for the most appropriate compensation of persons injured while performing work, whilst providing certainty of coverage and premium payment obligations across all industries.

The relationship looks beyond the contractual arrangements and considers the context and overall nature of the work relationship. Consequently it is not limited by the bounds of contracts of service. Other contract types, including contracts for service, may exist where by an "employment" relationship will be found for the purposes of workers' compensation coverage. However the Act adopts a results test or the attainment of a "personal services business determination" under the *Income Tax Assessment act 1997 (Cwlth)* as factors which narrows the scope of the relationship by removing persons who clearly perform work outside the scope of the Act.

The definitions of worker and employer have received industry support within Queensland.

A potential consequence of any change to the current workers' compensation relationship in Queensland would result in more contractors choosing to take action against their principal under civil liability laws.

The *Workplace Health and Safety Act 1995* establishes a framework which has as its objective the prevention of a person's death, injury or illness being caused by a workplace, by workplace activities or by specified high risk plant.

It imposes obligation on self-employed persons to ensure that they and other persons are not exposed to risks to their health and safety arising out of the way they conduct their business or undertaking (s.29). In addition, a more general obligation in the Act (s.29A) imposes an obligation on all persons who conduct a business or undertaking to ensure that each person who performs a work activity for the purposes of the business or undertaking is not exposed to risks to their health and safety. These provisions apply to both contractors and labour hire agencies.

The Government considers that the extension of coverage of the definition of employer and worker to include traditional independent contractors under the workers' compensation scheme, and the coverage of the obligations under the workplace health and safety scheme as appropriate for their policy objectives. The overriding of these definitions would be inappropriate and not supported.

Indeed, there is increasing evidence that the replacement of employees by contractors, particularly in the construction industry, is having detrimental effects on the occupational health and safety of workers. This is principally because:

- contracting is a 'payment by results' system which is based on the amount of work, not the time required, thereby encouraging contractors to minimise time in order to maximise profit;
- contractors are, or work for, small businesses, which are less likely to have health and safety resources, knowledge or information;
- contractors often engage in horizontal and vertical contract relationships in which responsibilities, tasks, levels of supervision and communication processes are more inclined to become disorganised or confused and 'allow' occupational health and safety responsibilities to be avoided; and
- contractors are not well covered by employment regulations or union negotiated collective agreements and retain minimal bargaining power.

Higher rates of injuries have also been identified among labour hire employees compared to general employees. A number of reasons are cited including:

- higher proportion of semi/unskilled workers
- higher proportion of younger workers
- tendency of employers to outsource more dangerous tasks.

In response, the Queensland Government expanded general duties under the *Workplace Health and Safety Act* to protect people other than employees.

In addition, the Queensland workers' compensation scheme through the *Workers' Compensation and Rehabilitation Act 2003* "deems" that in **labour hire arrangements** the employer of a worker (regardless of whether a worker

under a contract of service or other contract) is the labour hire agency. Any change which resulted in labour hire contractors being excluded from the scheme may result in contractors taking action against their principal under civil liability laws.

The *Anti-Discrimination Act* also has a broader coverage over people in the workplace and applies to contractors and those under labour hire arrangements as well as to employers and employees. The purpose of the Act is to eliminate discrimination and sexual harassment from the workplace and to provide a remedy for those who experience offensive behaviour of this kind from any person at work, whatever their relationship to the workplace. Under the Act, the employer is vicariously liable for any offensive behaviour covered by the Act that takes place in the workplace. The Anti-Discrimination Commission considers that this Act has been highly effective in raising awareness about discrimination and sexual harassment and in reducing the incidence of this behaviour in the workplace. The Queensland Government would be strongly opposed to the Commonwealth overriding the Anti-Discrimination legislation.

The DEWR discussion paper does distinguish between the legitimacy of those laws which apply to independent contractors for the purpose of protecting working lives from those which change the nature of common-law non-employment contracts. The paper argues that "it is important to distinguish these laws (OHS, Workers Compensation, Anti-Discrimination and taxation laws) from laws which regulate workplace relations per se. They differ from 'deeming' provisions because they do not change the *nature* of common law non-employment contracts." (*Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements* DEWR Discussion Paper, p19)

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?*

In exploring the issue of unfair contracts, the paper points out that section 127A of the WR Act provides a remedy for independent contractors in relation to unfair contracts within constitutional limitations. Despite the fact that the Commonwealth proposed the removal of these provisions in 1996 and 1999, the paper proposes that the new Act provide additional protection against unfair contracts, which could override State and Territory unfair contracts laws.

The Queensland Government Taskforce, which represented key employer and union stakeholders, identified the issue of 'artificial' contracting arrangements as problematic and recommended that the new *Industrial Relations Act* in 1999 include provisions to deal with unfair contacts.

Section 276 allows the Industrial Relations Commission to amend or declare void a contract for services (or an employment contract for a non-award employee) if the contract is unfair.

Under Section 276(7) *Industrial Relations Act 1999,* an unfair contract means a contract that:

- is harsh, unconscionable or unfair; or
- is against the public interest; or
- provides, or has provided, a total remuneration less than that which a person performing the work as an employee would receive under an industrial instrument or this Act; or
- is designed to, or does, avoid the provisions of an industrial instrument.

Factors that the QIRC may consider in deciding whether to amend or void a contract include the relative bargaining position of the parties and whether any undue influence or pressure was exerted, or any unfair tactics were used against a party to the contract.

The Queensland Government would oppose the overriding of state provisions, which were the result of extensive consultation and consensus reached by business and industry represented on the Taskforce. In the event that a broad definition of independent contractor was adopted it may be possible for jurisdictions to re-examine their industrial relations legislation to determine the ongoing relevance of additional remedies. This approach, which could be achieved by harmonising Commonwealth and state provisions, would enable the Commonwealth to achieve its purpose more effectively. Any attempt by the Commonwealth to adopt new provisions which override state legislation are likely to be patchy, due to constitutional limitations, and less effective.

Under section 276, there have been 153 unfair contract applications between 1999 and 2004. Over half the applications were made by persons in the transport industry, with significant numbers from the retail industry and the building industry. The other applications were made by workers in a wide range of industries, including communications, finance, aged care, security, manufacturing, real estate, education, and farming.

Over this same period, 25 of the applications were made on the basis that the contract was designed to, or did, avoid the provisions of the relevant award. The majority of these applications were in the transport industry.

In a comparison of three cases, it can be seen that section 276 has been effective in protecting disadvantaged workers in a variety of industry sectors:

- In Massart v Kentlands P/L T/A Bluebird Taxi Trucks (B464/00), the contract was held to be unfair by the Commission because the remuneration was less than the industry standard. In this case, the applicant bought a truck advertised as providing a 'permanent account' with work available five days per week earning $40-45,000 a year for a

client of the company engaging him. The company then severed its relationship with the client, leaving the applicant without work.

- In DETIR v Foster (B981 of 2000), the Commission varied a contract to reflect an award when they found that an agreement between a farm worker and a farmer, and then the farmer's son, over many years was not a valid. The worker had been paid only a token wage and was allowed to live in the house rent-free. The Commission held that the son of the farmer and the farm worker intended to create a legally enforceable obligation evidenced by the fact that the worker expected to be paid and the son expected work performed. The Commission held that the relationship between the parties was a contract of service rather than a contract for services.
- In PGEU V Pacific Coast Plumbing Pty Ltd (B 95/2002), the Commission held that the applicant's contract was unfair because it provided less remuneration than the relevant award and that he had signed the contract under duress.

In the Queensland Government submission to the recent federal Inquiry into independent contracting and labour hire by the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, it was proposed that the committee consider the following option:

"Giving a tribunal or government an ongoing power to deem workers including dependant contractors to be employees similar to **275 and 276 provisions** of Queensland's *Industrial Relations Act 1999*".

As an alternative option for consideration, the Queensland Government proposes that:

"the Commonwealth give consideration to the adoption of the 'results test', as applied by the *Workers' Compensation and Rehabilitation Act,* for the purpose of defining an independent contractor. In the event that a broad definition of independent contractor was adopted, it may be possible for jurisdictions to re-examine their industrial relations legislation to determine the ongoing relevance of additional remedies."

9. *Should the Federal Magistrates Court be given jurisdiction to review contracts?*

In Queensland, industrial tribunals have responsibility for reviewing contracts. While the Federal Magistrates Court has the advantage of a presence in each state and territory, industrial tribunals have a number of advantages in retaining this jurisdictional function. The Queensland Industrial Relations Commission (QIRC) has more experience in determining industrial matters, which will be pertinent to any review of unfair contracts, it is not a costs

jurisdiction and it is more accessible to the parties since the QIRC goes on circuit to the regions.

While there may be advantages in the Federal Magistrates Court having joint jurisdiction with the industrial tribunals, the disadvantages of the Federal Magistrates Court adopting sole responsibility include the following:

- it is a costs jurisdiction;
- legal advice and representation are necessary since the rules of evidence apply which makes any action in this jurisdiction more expensive;
- the current lack of resources experienced by the Federal Magistrates Court will intensify resulting in increased delays;
- lack of accessibility for parties in the regions.

The proposal to shift hearings on unfair contracts from a lay tribunal to the formal courts will mean that resolution for parties in Queensland will result in increased formality of proceedings, increased costs and time delays.

10. Should the proposed Act seek to override the state "deeming provisions", which draw independent contractors into the net of workplace relations regulation, as far as constitutionally possible?

The Queensland Government Taskforce, representing key employer and union stakeholders, investigated the problem of 'artificial' contracting arrangements and recommended that the Queensland Industrial Relations Commission (QIRC) be given the power, in section 275 of the *Industrial Relations Act 1999* (IR Act), to declare "a class of persons who performs work in an industry under a contract for services to be employees" (section 275(1)(a). The declaration may only be made if the full bench of the QIRC "considers the class of persons would be more appropriately regarded as employees" (section 275(2)).

Section 275 of the IR Act provides the QIRC with the tools necessary to examine contractor situations and to determine whether the workers should be more properly dealt with as if they were direct employees. This provision has not been used excessively or capriciously and is not a threat to proper independent contracting arrangements. It has been applied in a moderate manner.

Section 275 of the IR Act was tested in AWU v Hammonds (B885 of 1999) which looked at whether contract shearers engaged by Hammonds through a labour hire agency operating Odco style contracts should be treated as employees. The decision of the QIRC first established that the workers involved were genuinely contractors and not employees of Hammonds. They then looked as the circumstances of the workers and whether they should be more appropriately treated as employees. The Full Bench found that there was no evidence that the workers were being disadvantaged by the

arrangements, even though the working arrangements (including undertaking shearing work on weekends) were at odds with the terms of the award. As a result the application was dismissed.

A different outcome was achieved in ALHMWU v Bark Australia Pty Ltd. In this instance a security company engaged security workers as putative contractors. The workers had previously been employees of a company that had formerly been engaged to carry out the security work. The QIRC found that the nature of the relationship between Bark and the workers had many of the characteristics of an employment relationship and hence had little difficulty in declaring that they should be considered to be employees of Bark and treated and paid as such.

The growth in new types of working arrangements such as contracting and labour hire, have been met with similar responses in other state jurisdictions. Most jurisdictions explicitly include outworkers in the definition of employee as well as apprentices and trainees. The NSW legislation also includes a broad range of specific occupations that are deemed to be employees, power to deem others to be employees by regulation, a system of contract determination and a process to test if employment contracts are unfair. In addition, the federal Government introduced the ***Alienation of Personal Services Income 2000 Act*** to tighten the definition of independent contractor and to reduce the practice of sham contractors moving out of the PAYE system.

As stated previously, the Queensland Government would oppose the overriding of state provisions, which were the result of extensive consultation and consensus reached by business and industry represented on the Taskforce. In the event that a broad definition of independent contractor was adopted it may be possible for jurisdictions to re-examine their industrial relations legislation to determine the ongoing relevance of additional remedies. This approach, which could be achieved by harmonising Commonwealth and state provisions, would enable the Commonwealth to achieve its purpose more effectively. Any attempt by the Commonwealth to adopt new provisions which override state legislation are likely to be patchy, due to constitutional limitations, and less effective.

Removing 'deeming' provisions from the IR jurisdiction may result in determinations on contract authorisations being made by bodies such as the ACCC which could potentially be used to shore up dependent contracting arrangements.

In the Queensland Government submission to the recent federal Inquiry into independent contracting and labour hire by the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, it was proposed that the committee consider the following option:

"Giving a tribunal or government an ongoing power to deem workers including dependant contractors to be employees similar to **275 and 276 provisions** of Queensland's *Industrial Relations Act 1999*

As an alternative option for consideration, the Queensland Government proposes that:

"the Commonwealth give consideration to the adoption of the 'results test', as applied by the *Workers' Compensation and Rehabilitation Act,* for the purpose of defining an independent contractor. In the event that a broad definition of independent contractor was adopted, it may be possible for jurisdictions to re-examine their industrial relations legislation to determine the ongoing relevance of additional remedies."

11. Should a civil penalty provision be introduced into the WR Act applying to hirers who deliberately attempt to avoid employer responsibilities by seeking to establish a false independent contracting arrangement?

The DEWR discussion paper does acknowledge that:

'Decisions about whether an arrangement is one of employment or independent contracting can involve unravelling complex factual situations. Courts and tribunals need to 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.' (*Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements* DEWR Discussion Paper, p22)

The application of penalties rely on an inspectorate which is well resourced to investigate cases which can be argued successfully in the courts which alone has the power to impose a civil penalty.

The interaction of the proposed Independent Contractors Act with the *Workplace Relations Act* and equivalent state legislation could be confusing, expensive and resource intensive. For instance, if an applicant takes a case under the proposed Independent Contractors Act and is found to be an employee, then the applicant would have to seek a remedy under the WR Act.

The Queensland Government holds the view that such matters are most appropriately dealt with in the QIRC as is currently the case.

12. Should the labour hire industry be regulated to ensure high standards are met by all players?

Labour hire presents a number of issues for industrial relations regulators. There are concerns that labour hire has resulted in lowering of standards in occupational health and safety and has been used to undermine rates of pay and conditions of employment (see for example Underhill (2001), (2002) and (2004), Hall (2002), Campbell, Watson and Buchanan (2001) and the final report of the NSW Taskforce (2001)). European data shows that labour hire employees are generally paid less than non-labour hire employees and receive inferior conditions of employment (Nienhuser and Matiaske (2004)). Much of the material used to promote "Odco" style labour hire contractor arrangements is based on the fact that these arrangements allow employers to avoid labour market regulation.

A number of authors have asserted that the workplace health and safety record of labour hire workers is not as good as that of direct hire employees (see for example Hall (2002) Campbell, Watson and Buchanan (2002) and the NSW Labour Hire Taskforce Report (DIR (2001)). Evidence in support of these assertions can be found in work that was undertaken by Elsa Underhill (2002).

The view that labour hire firms do not invest in training is reinforced by the findings of the Brennan et al. (2003) study. This showed that only about 50 per cent of labour hire employers surveyed provided any training to their employees. Furthermore, only 48 per cent of labour hire employees stated that they had received structured training from their employer. Brennan et al. (2003) also showed that the labour hire industry does not invest in trade training with 88 per cent of labour hire employers surveyed stating that they rarely or never engaged apprentices.

Workplace Express reported that the Skilled Group, in its submission to the Federal Inquiry into Independent Contractors and Labour Hire arrangements, has proposed the introduction of a rigorous national licensing system for the labour hire industry. They argue that "the recruitment industry now has virtually no barrier to entry, and "small players can set up shop with an office and a phone and may not adhere to all current legislation regarding OH&S, IR and taxation". (*Workplace Express,* News in brief, April 4, 2004)

In the Queensland Government submission to the recent federal Inquiry into independent contracting and labour hire by the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, it was proposed that the committee consider the following option:

"Developing higher standards through mechanisms such as the adoption of a **Code of practice** for the industry to provide clear direction as to preferred industry practices that would not only cover practices for employees but also influence the contractor sector as well".

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.

As outlined under proposal one above, prescribing the content of awards and agreements in the *Workplace Relations Act* (WRA) is problematic at a number of levels.

Firstly, using legislation to impose conditions on awards and agreements detracts from the Commonwealth's own objective of empowering employers and employees in workplaces to determine their own employment arrangements, including the nature of employment. In the same way, if the content of awards is proscribed by legislation rather than arbitrated through industrial tribunals, the powers of the parties to the award are reduced accordingly. In addition, legislation restricting the use of industrial contractors in agreements is unnecessary given the Electrolux decision and cases decided since.

Secondly the WR Act has limited constitutional coverage over agreements which will prevent the implementation of any legislative provisions over agreements covering unincorporated workplaces. In addition, the corporations' power may not support the scope of this provision.

In addition, if federal Government initiatives result in loss of protection for labour hire workers, this could generate increased disputation for states and territories including the Queensland Government and Government Owned Corporations (GOCs).

The Queensland government is a major employer of apprentices and sets the regulation of apprentice employment within the state. It is noted that a high proportion of apprentices are hired out to industry by group training schemes and provisions in the Queensland *Industrial Relations Act* protecting the entitlements of apprentices and trainees should be adopted by the Commonwealth. These provisions relate to both training obligations and coverage by the relevant industrial instrument.

Labour hire firms (group training schemes) meet a need in the industry to service the 10% apprentice training requirements written into Queensland Government construction contracts. Group training schemes are subsidised by government. Apprentices with group training schemes exhibit a higher completion rate than apprentices placed directly with employers.

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?

In both Qld and WA the statute law states that once a labour hire worker has been found to be an employee, then the labour hire agency is the employer. This is by virtue of the fact that both the Queensland and WA legislation have included labour hire agencies as employers in their definition of employer. The effect of this provision was recently demonstrated by the outcome of the Tricord case (Construction Forestry Mining and Energy Union of Employees v Personnel Contracting Pty Ltd trading as Tricord Personnel, 2004 WAIRC 11445 (12 May 2004)) in WA. In that case the WAIRC determined that the employer of a group of labour hire employees was the labour hire agency and not the host employer.

An important protection for labour hire workers is the specific inclusion by the Queensland Government of labour hire companies in the definition of "employer" in section 6 of the *Industrial Relations Act 1999*.

The provision was inserted into the *Act* to ensure that there was clear coverage of labour hire employees. At the time the *Act* was drafted it was recognised that labour hire was one of a number of emergent "atypical" employment arrangements. The triangular nature of the employment arrangement between the labour hire employer, the host company and the employee required recognition in the legislation.

This provision on its own is not a protection for labour hire workers who have been engaged as contractors. However, when the provision is viewed in conjunction with section 275 (discussed above) the Industrial Relations Commission can:

- examine the relationship between a labour hire worker and an employer;
- declare the employer to be the employer of the labour hire worker; and
- determine that the employee will remain an employee of the employer even when on-hired to another employer.

This means that the Commission has the power to go behind the mask of "contract" engagement and look at the true nature of the relationship even where the relationship meets the normal common law requirements for

contracting. If these arrangements are found to be manifestly unfair then the unfairness can be remedied.

In the Queensland Government submission to the recent federal Inquiry into independent contracting and labour hire by the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, it was proposed that the committee consider the following option:

"**The inclusion of labour hire companies** in the definition of employer as in the Queensland and West Australian legislation".

15. Should 'Odco' arrangements be statutorily recognised in the Independent Contractors Act?

A complicating factor in any investigation of labour hire is the incidence of labour hire "contract" workers. In the 1980's a number of companies developed a strategy of engaging their workers as "independent contractors" rather than employees. The purpose of this practice appears to have been for labour hire providers to avoid responsibility for employee entitlements and for workers to access potentially lower rates of taxation. For the labour hire provider, if its workers were not "employees" then it was not liable for any entitlements that may accrue to employees such as leave, superannuation, workers compensation insurance and so forth.

A significant reason for employers to use contracting and labour hire arrangements is to gain a more predictable cost structure, because the employer or the client pays only for the work to be done at a specific time, rather than paying for each hour or day worked. The Queensland Government supports the use of genuine independent contracting. However, it has grave concerns about the use of 'sham' or artificial contract arrangements to hide a genuine employment relationship for the following purposes:

- to undermine employment conditions
- to remove workers out of the PAYE system
- to remove employers' obligation for worker's compensation and public liability coverage.

Examples of "Odco" contracts can disguise genuine employment or dependant contractual arrangements and can be in conflict with the personal business test under the ATO. Legitimising these marginal arrangements through statute would undermine the attempt to regulate artificial or sham contracts through unfair contacts provision and the ATO personal business test.

A statutory definition of 'Odco' arrangements would need to include a working definition of independent contractor which is currently the subject of a common law test. That definition will need to clearly differentiate genuine independent contracting arrangements from artificial or illegitimate contractual agreements.

In addition, the interaction of the proposed Independent Contractors Act with the *Workplace Relations Act* and equivalent state legislation could be confusing, expensive and resource intensive. For instance, if an applicant takes a case under the proposed Independent Contractors Act and is found to be an employee, then the applicant would have to seek a remedy under the WR Act.

The Queensland Government holds the view that such matters are most appropriately dealt with in the QIRC as is currently the case.

Conclusion

The Queensland Government proposes the following options for consideration that:

- the Commonwealth give consideration to the adoption of the 'results test', as applied by the *Workers' Compensation and Rehabilitation Act,* for the purpose of defining an independent contractor. In the event that a broad definition of independent contractor was adopted, it may be possible for jurisdictions to re-examine their industrial relations legislation to determine the ongoing relevance of additional remedies;
- the ATO strengthen it's test of genuine contracting status by imposing more stringent tests when an application for an ABN is made;
- the Commonwealth develop higher standards for the labour hire industry through mechanisms such as the adoption of a Code of practice for the industry to provide clear direction as to preferred industry practices that would not only cover practices for employees but also influence the contractor sector as well;
- the Commonwealth include labour hire companies in the definition of employer as in the Queensland and West Australian legislation.