INDEPENDENT CONTRACTING AND LABOUR HIRE ARRANGEMENTS—PROPOSED LEGISLATIVE REFORM

Philip Copeland, Partner

Deacons, Brisbane

THE 'NEED' FOR REFORM

More than one million Australians work as independent contractors and sole traders. The Howard government announced during its election 2004 campaign that a re–elected Coalition Government would establish an Independent Contractors Act. The Independent Contractors Bill (ICB), once passed, is proposed to be introduced in early 2006. According to the government, the ICB is needed in order to:

• clarify and protect the status of independent contractors in order to provide for certainty and choice;

• prevent federal awards and agreements from containing clauses which restrict the use of independent contractors (or labour hire workers) or which seek to put conditions on their engagement—for example, prescribing they have the same conditions as employees;

• protect independent contracting arrangements as commercial arrangements, not employment arrangements, under the law;

• address inappropriate state and territory legislation which 'deems' independent contractors to be employees for the purpose of workplace relations regulation, including by overriding that legislation where appropriate; and

• ensure that 'sham' arrangements—which disguise employment relationships as independent contracting arrangements—are not legitimised.

DEFINITION OF INDEPENDENT CONTRACTOR

The government is still considering the definition of independent contractor. The two broad approaches are:

(1) the common law approach; and

(2) the approach taken in the taxation legislation—if you derive a certain proportion of your income from a particular entity, then you're deemed to be an employee rather than an independent contractor.

The minister's inclination is towards the common law approach, which involves the courts looking to the totality of the relationship between the parties, the individual circumstances involved and the substance of the arrangements to determine whether a person is an employee or an independent contractor (Hollis v Vabu (2001) ALR 263; Stevens v Broadribb Sawmilling Co (1986) 160 CLR 16). No single issue concerning control, economic independence or the description of the relationship in a contract will be determinative, but greater weight will be placed on some matters, particularly the right to control the manner in which work is performed.

A multi–factor test has been developed, which involves assessing several indicia to determine if an employment relationship exists, including:

• the degree of control the worker has over the work;

• the degree to which the worker is integrated into, and is treated as part of the hirer's enterprise;

• the degree to which the worker provides his or her own equipment;

• payment for results rather than time worked;

• the degree to which the worker can chose work time and tasks; and

• the right of the worker to delegate to others.

DISCUSSION PAPER—PROPOSALS FOR LEGISLATIVE REFORMS IN INDEPENDENT CONTRACTING AND LABOUR HIRE ARRANGEMENTS

On 30 March 2005, the Department of Employment and Workplace Relations released a discussion paper that outlined the provisions that may be included in the ICB. These include:

(1) Removing limitations in industrial instruments in relation to independent contractors, e.g:

• defining and limiting the circumstances in which contractors may be used;

• placing procedural requirements on the use of contractors;

• requiring contractors to make certain types of industrial agreements; and

• requiring contractors to observe certain behaviour.

(2) Overcoming the different definitions of employee and independent contractor within Commonwealth legislation and between federal and state court and commission jurisdictions.

(3) The government generally opposes state and territory unfair contract and deeming provisions that seek to change the nature of a working arrangement from independent contractor. It is proposed that the ICB override deeming provisions in state legislation by a provision to the effect that persons who are independent contractors at

common law shall not be treated as employees for industrial relations purposes in determining terms and conditions of employment.

The government supports the ODCO form of labour contracting (ie. a labour hire entity transposed between the independent contractor and the user of the contracted services) and these arrangements may need to be statutorily recognised in the ICB.

The government does not support the introduction of the concept of joint employment into Australian law.

WORKPLACE RELATIONS AMENDMENT (WORK CHOICES) BILL 2005 (CTH)

The Workplace Relations Amendment (Work Choices) Bill 2005 (WC Bill) appears to have addressed many of the reforms proposed for the ICB. Therefore, it is unclear as to whether, or to what extent, the Government will proceed with the ICB.

PROHIBITED CONTENT IN AGREEMENTS

The WR Bill provides that any 'prohibited content' in a workplace agreement is void and must be removed by the Employment Advocate (s101K). Prohibited content will be defined by the regulations (s101D), but guidance may be derived from the Work Choices booklet, which states that prohibited content in an agreement includes a provision that restricts the use of independent contractors or on–hire arrangements. The Bill prohibits an employer from lodging an agreement (or a variation) containing prohibited content when the employer was reckless as to whether the agreement contained prohibited content (s101E).

PROHIBITED CONTENT IN AWARDS

The Bill provides that non 'allowable award matters' must not be included in the awards (s116B). Non–allowable matters include:

• restrictions on the engagement of independent contractors and requirements relating to the conditions of their engagement; and

• restrictions on the engagement of labour hire workers, and requirements relating to the conditions of their engagement, imposed on an entity or person for whom the labour hire worker performs work under a contract with a labour hire agency.

A term of an award that is about non–allowable award matters ceases to have effect immediately after the reform commencement (s116L).

FREEDOM OF ASSOCIATION AND INDUSTRIAL ACTION

Under the WR Bill it remains an offence for a person to do or threaten to injure the independent contractor in relation to the terms and conditions of the contract for services for a prohibited reason, or for reasons that include a prohibited reason.

A 'prohibited reason' includes because the independent contractor is entitled to the benefit of an industrial instrument, an order of an industrial body or the Australian Fair Pay and Conditions Standard.

Offences are punishable by a pecuniary penalty, an order requiring the defendant to pay a specific amount or any other appropriate order. The maximum pecuniary penalty is 300 penalty units if the defendant is a body corporate and otherwise 60 penalty units (s268(2)).

UNFAIR CONTRACTS

The WR Bill maintains remedies for harsh or unfair independent contractor contracts where at least one party is a corporation. A 'contract' means:

• a contract for services that is binding on an independent contractor and relates to the performance of work by the independent contractor, other than work for the private and domestic purposes of the other party to the contract; and

• any condition or collateral arrangement relating to such a contract (s352B(1)).

An application may be made to the court to review a contract on the ground that the contract is unfair and/or the contract is harsh (s352B(2)). The court may make an order setting aside the whole or part of the contract; or varying the contract (s352C(2)).

These provisions do not limit current state unfair contract jurisdictions. However, it is anticipated that the ICB will remove the States' jurisdictions in this area.

Philip Copeland's article was previously published in Deacons' News and Insights—December 2005. Reprinted with permission.
