Submission No. 59

Law Council
OF AUSTRALIA

22 March 2005

Mr John Carter
The Secretary
Standing Committee on Employment, Workplace Relations and Workforce Participation
Parliament House
CANBERRA 2600

Dear Mr Carter,

Inquiry into Independent Contracting and Labour Hire Arrangements

Thank you for the opportunity to make a submission and for the extension of time in which to do so.

This submission is made by the Small Business Working Group ("the Group"), which is part of the Business Law Section of the Law Council of Australia. The Group was formed in 2004 to ensure that the specific interests of small business are reflected and represented within the general work of the Business Law Section.

Please note that this submission has been endorsed by the Business Law Section. However, owing to time constraints the submission has not been considered by the Council of the Law Council of Australia.

Independent contractors are, in the main, small businesses. The Group has less knowledge and experience of labour hire arrangements, although it is aware that there are some large businesses operating in this field.

In the time available this submission is less detailed than we would prefer and our aim is to draw the Committee's attention to some key issues within the four Terms of Reference.

In the Group's experience, it is not always appropriate to distinguish between businesses, small, medium or large, when considering the application or implementation of laws generally. Uniformity of application is a matter of good policy.

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Regulatory burden is a well-accepted issue for small business. The Group emphasises that it only supports exemptions or specific legislative protection or regulation where good policy supports such treatment.

The status and range of independent contracting and labour hire arrangements

In announcing the Inquiry, the Group notes that the Committee referred to some Australian Bureau of Statistics data which identifies independent contractors as comprising around 12% of the workforce and growth in labour hire arrangements by over 30% in the 1998-2002 period.

The figure for independent contractors, at least, is an approximation. The Group recommends that the Committee look at the issue of more precise data and how it might be obtained.

Whatever the figures, it is clear that independent contractors and labour hire arrangements are significant within the Australian economy.

The Group emphasises that independent contractors and labour hire providers are subject to the same laws as are companies or businesses which use their services.

There are several industries in which independent contractors are common, transport, information technology and building, in particular.

The status of independent contractors has been subject to judicial scrutiny for a number of years. In brief terms a "control" test is used to establish the existence of an employment relationship. The Group draws the Committee's attention to some key High Court decisions:

> *Humberstone v Northern Timber Mills* (1949) 79 CLR 389
> *Stevens v Brodribb Sawmilling Pty Ltd* (1986) 160 CLR 16
> *Hollis v Vabu Pty Ltd* (2001) 75 ALJR 1356

In the Group's view, this "control" test is a well-established and efficient method of determining the true relationship. It is a test that has evolved over time to deal with changing circumstances. It is established law that, in determining the true nature of any relationship, a court will construe it according to its true meaning and effect, not any characterisation the parties give it.

It is also established law that a company or partnership cannot usually be classified as an employee. In the transport industry, for example, it is common practice for owner-drivers to be incorporated.

In talking about status, the use by any company or business of independent contractors or labour hire arrangements is lawful and not prohibited under

Commonwealth or State law. The courts have always recognised that it is appropriate for arrangements to be structured so as to avoid the creation of an employment relationship.

Ways independent contracting can be pursued consistently across state and federal jurisdictions

This is an open-ended issue. The greatest problem that most businesses face is the difference in laws operating at and between Commonwealth and State level.

The issue of classification is relevant in areas such as:

- Commonwealth income tax, superannuation guarantee charge and GST legislation
- State payroll tax legislation
- State workers compensation legislation
- State occupational health and safety legislation
- Commonwealth/State industrial legislation dealing with wages, termination and redundancy issues

Some of these statutes operate by a definition of "employee" or "worker" which essentially relies upon the common law definition. Some "deem" those to be employees who are not employees at common law. The authors of a leading text on employment law refer to the "perils attendant on this course": Macken, O'Grady, Sappideen and Warburton, *Law of Employment*, Lawbook Co 2002, 20

In South Australia, the *Industrial Law Reform (Fair Work) Bill 2004,* released for public comment in December 2003, proposed to give the Industrial Relations Commission the power to declare independent contractors and labour hire providers as "employees", effectively ignoring common law principles. Following submissions, the *Industrial Law Reform (Enterprise and Economic Development – Labour Market Relations) Bill 2004*, was introduced into Parliament in November 2004 and following substantial amendment, passed through the Upper House as the *Industrial Law Reform (Fair Work) Act 2005*, on 3 March 2005. The Group understands that the power referred to was dropped during debate, but the Group has been able to consider the terms of the final Act, which is awaiting proclamation.

The Group believes that removal of this power is appropriate on the grounds of good policy. It is against the standard principle of construction whereby relationships are construed according to their true meaning and effect. Artificial characterisation is not good policy.

The proposal by the Commonwealth for a uniform industrial relations system, which the Group believes may deal with the classification issue for independent contractors and labour hire providers, raises key issues. Whilst, in principle, the Group supports uniformity, we would not support any move by the

Commonwealth to enact legislation on available heads of constitutional power without the cooperation or approval of the States.

The Group does not consider that the available heads of constitutional power would enable the Commonwealth to enact legislation dealing with the status issue which would cover the field.
Clearly, independent contracting can only be pursued consistently across state and federal jurisdictions on a cooperative and agreed basis.

With the range of statutory coverage over all jurisdictions the Group is unsure how this might be achieved.

The role of labour hire arrangements in the modern Australian economy

This is an area upon which the Group is not able to comment in any detail. However a number of points the Group has already made apply here.

The issue of labor hire arrangements came the Federal Court at first instance in 1989 and on appeal in 1991. The Full Federal Court held that workers supplied to builders by a company known as Troubleshooters Available were not employees of either the builders or the company but independent contractors. See *Building Workers Industrial Union & ors v Odco Pty Ltd* (1991) 99 ALR 735.

More recently the Court of Appeal of the Supreme Court of Western Australia has held that 2 workers supplied by Personnel Contracting Pty Ltd (trading as Tricord Personnel) to a client of Tricord were independent contractors. See *Personnel Contracting Pty Ltd t/as Tricord Personnel v The Construction Mining and Energy Union of Workers* [2004] WASCA 312.

Strategies to ensure independent contract arrangements are legitimate

The Group's submission has already covered many of the matters it considers relevant to this Term of Reference. The Group assumes that "legitimate" in this context means that independent contract arrangements are, as a matter of law, properly construed as such.

In most cases, this will not be in issue. In the Group's submission, such arrangements should be construed according to their true character and not given an artificial construction either way.

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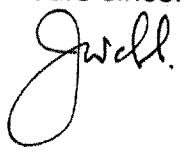
If the Committee would like further information or clarification about any aspects of the Group's submission, the Group would be pleased to provide such. The Group confirms that it would be available to attend and appear before the Committee at any public hearing.

Yours sincerely,



Peter Webb
Secretary-General
March 2005.