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CONTRACTING OUT BY WESTERN AUSTRALIAN GOVERNMENT  
DEPARTMENTS AND THE LEGAL IMPLICATIONS APPLICABLE TO SAFETY  
AND HEALTH

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Contracting Out By Western Australian Government Departments  
And The Legal Implications Applicable To Safety And Health  
Related Issues

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**ABSTRACT**

This paper explores some of the legal implications of the Western Australian government's initiative to 'contract out' or 'outsource' some of the services and facilities previously provided by state government departments. The paper emphasises the legal implications as they apply to common law, occupational safety and health, and workers' compensation.

# **Contracting Out By Western Australian Government Departments And The Legal Implications Applicable To Safety And Health Related Issues In Western Australia**

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## **Introduction**

This paper will discuss what is meant by contracting out. It will then explain how the current law applicable to negligence, occupational safety and health and workers' compensation applies to a government department's contracting out situation.

## **Contracting out**

The term 'contracting out' has previously been most commonly used in industrial relations terms, when an employer and an employee enter into a contract, where one of the terms of that contract is that they will not rely on or exercise rights under an award or take advantage of the jurisdiction of a tribunal.<sup>1</sup> It is also used in the context of legislation preventing a person from contracting out of their statutory obligations.<sup>2</sup> However, in the context of this paper, the term 'contracting out' refers to the changes being made by government and the public service to contract out peripheral services to the private sector. This has also been termed 'outsourcing'.

These changes have come about as a result of the Hilmer Reforms,<sup>3</sup> the McCarrey Report<sup>4</sup> and the introduction of the Public Sector Management Act 1994 (WA).<sup>5</sup> The practical outcome has been identified in the paper given by the Minister Assisting the Minister For Public Sector Management when describing the role of Chief Executive Officers in the following terms:<sup>6</sup>

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This paper is based on a presentation delivered to a seminar conducted by the Occupational Health Society of Australia (WA) during Occupational Safety and Health Week '95 on 29 August 1995 at the Hyatt Hotel, Perth.

<sup>1</sup>See the definition of 'contracting out' given by *The CCH Macquarie Dictionary of Employment and Industrial Relations*, CCH, North Ryde, 1992 p 81.

<sup>2</sup>See for example section 6 of the *Retirement Villages Act 1992* (WA) No. 34 of 1992.

<sup>3</sup>National Competition Policy: Report by Independent Committee of Inquiry: August 1993, AGPS, 1993

<sup>4</sup>Agenda for reform: Report of the Independent Commission to Review Public Sector Finances, Volume 2, WA Government Printer, August 1993.

<sup>5</sup>No. 31 of 1994.

<sup>6</sup>Hon George Cash JP MLC, Minister Assisting The Minister For Public Sector Management, in 'speech notes' for the 12 July 1995 at the Sheraton Hotel, Perth.

The CEO's Performance Agreement with their Minister or board of management requires them to:

"examine the cost effectiveness and quality of all existing public sector services; identify competition-based options for best value for money services and put in place appropriate processes which will meet the requirements of the State Supply Commission."

CEOs will be most effective in achieving this objective if they have:

- ...
- rapidly focussed their agency's attention on core functions while contracting out peripheral activities;
- established the necessary systems and skilled staff to oversee contracting processes for the delivery of services, while effectively managing risks;
- adapt their organisational structure to facilitate the implementation and better management of contracting; and
- ...

Thus it can be seen that the public sector is embarking on an exercise of arranging for a greater number of services to be done by the private sector, rather than providing those services 'in-house'. There are many examples of the government having previously done this, usually when it does not have the infrastructure to provide such a service and so the practice is not new. What is new is that the government is not now looking for specialist expertise in the private sector, but looking for ways to reduce costs in areas where they have had the expertise.

Arrangements for contracting with independent contractors have been made by the private sector for many years. The management practice of a commercial organisation deciding to bring in a specialist contractor is therefore a direct analogy to explain these new government objectives. This paper will not pursue the apparent trend in the private sector to increase their 'contracting out', as they appear to be motivated for reasons other than those connected with occupational safety and health. These reasons seem to include motivation to: avoid the federal government's new laws dealing with termination of employment; avoiding paying and providing for long service leave; and avoiding the payment of superannuation guarantee contributions.<sup>7</sup>

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<sup>7</sup>The program of a proposed conference and workshop on 'contracting out' to be held in Sydney from 3-6 October 1995, organised by IIR Conferences, indicates that it will consider a number of issues arising out of 'contracting out', including some legal issues that arise.

## Legal implications

What will be considered, are the legal implications associated with occupational safety and health type of issues. This paper will briefly review some of these areas of law that apply to the general area of occupational safety and health, before explaining the legal implications applicable to the management practice of contracting out.

## Employment

Much of the law applicable to safety and health revolves around the concept of 'employment' and the common law courts have long made a distinction between persons engaged as employees and independent contractors. The most important test used by the courts is the control test. Under this test an employee is a person over whom the employer has control over not only what to do but also how to do it. On the other hand an independent contractor is a person over whom the 'entrepreneur' has control over what is to be done but not how it is to be done. For consistency, this paper will refer to the person who engages a contractor as an 'entrepreneur'.<sup>8</sup> The 'control test' is deceptively simple but often difficult to apply, especially to highly skilled workers. As a result this has caused the courts and academic writers to analyse previous reported cases to identify other tests such as the 'integration test' or the 'multi-factor test'. It is not the place of this paper to go over these tests, which are adequately dealt with by other authors,<sup>9</sup> but to indicate that this is a fundamental issue that often has to be determined by the law before the law that is discussed below can be applied.<sup>10</sup>

## Negligence

The common law has long held that employers owe a duty of care towards their employees. This extends to providing a safe system of work, safe premises, safe plant and equipment, as well as providing competent fellow employees.<sup>11</sup>

Employers also have an indirect liability to pay damages to an injured person, in the event that they are vicariously liable for the torts of their employees. Vicarious liability requires the injured person to show that an employee did the

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<sup>8</sup>In *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, Brennan J. used the term an 'entrepreneur' when describing the person who engages an independent contractor to do some work.

<sup>9</sup>See Macken J, et al *The Law of Employment*, 3rd edition, Law Book Co Ltd, Sydney, 1990, Chapter 1; Creighton W.B. et al *Labour Law: Text and Materials*, 2nd edition, Law Book Co Ltd, Sydney, 1993, Chapter 4; and McCallum R.C. and Pittard M.J. *Australian Labour Law and Materials*, 3rd edition, Butterworths, Sydney, 1995, Chapter 2.

<sup>10</sup>The most recent significant High Court case on the issue of whether a person is an employee or independent contractor is *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

<sup>11</sup>Lord Wright in *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57.

tortious action or omission (usually negligence) in the course of the employment. If this established, then the employer is required to pay the damages, even though the employer has done no wrong. Thus the law has imposed heavy burdens on employers to pay for the injuries that result from either their breach of duty or the breach of duty of their employees.

What is not commonly appreciated, is that the High Court of Australia has in recent years opened up the possibilities of entrepreneurs who engage independent contractors, being liable for the consequences of the actions of those independent contractors. Thus in *Kondis v State Transport Authority*,<sup>12</sup> when an employee of the State Transport Authority was injured by the admitted negligence of an independent contractor that had been engaged by the State Transport Authority, the High Court held that the State Transport Authority was liable to pay the damages. This decision was given, even though at the time of the accident the entire supervision and control of the procedure was in the hands of the contractor.

The High Court held that there was a non-delegable duty on the State Transport Authority to take care towards its employees. It went on to hold that the State Transport Authority should bear liability for the negligence of its independent contractors in devising an unsafe system of work.

This is not a case of vicarious liability but rather one of a breach of the employer's direct personal duty of care to provide a safe system of work to its employees. The implications can be summed up by quoting the words of Deane J.:<sup>13</sup>

The obligation of an employer to provide a safe system and conditions of work for an employee is not discharged by mere delegation to an independent contractor any more than it is discharged by mere delegation to an employee.

A case which goes some way to explain the legal obligations of an 'entrepreneur' towards the independent contractors whom the entrepreneur has engaged, is *Stevens v Brodribb Sawmilling Co Pty Ltd*.<sup>14</sup> In that case a truck driver Stevens was injured as a result of the admitted negligence of a 'snigger' named Gray. In this case the High Court held that both Stevens and Gray were independent contractors. Thus unlike the *Kondis* case, there were no employees concerned.

The next point to be decided was whether Brodribb Sawmilling Co Pty Ltd, who carried on the overall operations of cutting and removing timber from a certain logging area was in breach of a general common law duty of care. Mason and Brennan JJ. gave the leading judgements and indicated that there was no reason to confine a duty to take care to employers.

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<sup>12</sup>(1984) 154 CLR 672.

<sup>13</sup>(1984) 154 CLR 672 at p 694.

<sup>14</sup>(1986) 160 CLR 16.



Brennan J. said:<sup>15</sup>

An entrepreneur who organises an activity involving risk of injury to those engaged in it is under a duty of care to use reasonable care in organizing the activity to avoid or minimise that risk, and that duty is imposed whether or not the entrepreneur is under a further duty of care to servants employed by him to carry out that activity.

Brennan J. went on to explain the extent of this duty, which in the context of the topic of contracting out of services govern departments is perhaps the most pertinent.<sup>16</sup>

The entrepreneur's duty arises simply because he is creating the risk (*Sutherland Shire Council v. Heyman* (1985) 157 CLR 424 at p. 479) and his duty is more limited than the duty owed by an employer to an employee. The duty to use reasonable care in organising an activity does not import a duty to avoid any risk of injury; it imports a duty to use reasonable care to avoid unnecessary risks of injury and to minimise other risks of injury. It does not import a duty to retain control over working systems if it is reasonable to engage the services of independent contractors who are competent themselves to control their system of work without supervision by the entrepreneur. The circumstances may make it necessary for the entrepreneur to retain and exercise a supervisory power or to prescribe the respective areas of responsibility of independent contractors if confusion in those areas involves a risk of injury. But once the activity has been organized and its operation is in the hands of independent contractors, liability for negligence by them within the area of responsibility is not borne vicariously by the entrepreneur. If there is no failure to take reasonable care in the employment of independent contractors competent to control their own systems of work, or in not retaining a supervisory power or in leaving undefined the contractors' respective areas of responsibility, the entrepreneur is not liable for damage caused merely by a negligent failure of an independent contractor to adopt or follow a safe system of work either within his area of responsibility or in an area of shared responsibility.

The High Court went on to hold that on the evidence presented at the trial, none of the matters suggested by the appellant Stevens, amounted to a breach of Brodribb Sawmilling Co Pty Ltd's duty to provide a safe system of work.

The case identifies that there is a legal responsibility on the 'entrepreneur' to take care when organising for independent contractors to undertake activities that have been allocated or 'contracted out' by that entrepreneur. On the facts of the case however, there was no breach of that duty.

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<sup>15</sup>(1986) 160 CLR 16 at p 47.

<sup>16</sup>(1986) 160 CLR 16 at pp 47-48.

## Application to government departments

In the explanation of the legal duty given above, a simple substitution of the term 'government department' for the term 'entrepreneur' will identify the legal obligation on that government department when contracting out. Some in government are well aware of some of the legal implications when engaging in contracting out. It is pertinent here to take heed of the view of Dr P. Schapper,<sup>17</sup> where he said:

A further consideration is that there have been a surprising number of instances where agencies have assumed that in contracting out a function they have also contracted out responsibility for the provision of the function. The facilitation role of government inherently reflects a responsibility for service provision. Clearly this responsibility cannot be contracted out. Potential failure by one of an agency's contractors represents a liability for that agency and a requirement for active contract management.

Dr Schapper's sentiments about the perceived effects of contracting out, complements the legal responsibility expected by the High Court in *Stevens v Brodribb Sawmilling Co Pty Ltd*. Thus it is very difficult for a government department to minimise its legal responsibilities, if it wishes to retain any responsibility over the service. In other words contracting out will not relieve the government of the general duty to take care of contractors and others where the government department has a management role

## Occupational safety and health legislation and its application to contracting out situations

What will now be considered is the effect such specific legislation such as the *Occupational Safety and Health Act 1984 (WA)*<sup>18</sup> has on contracting out schemes.

Both section 19 of the *Occupational Health Safety and Welfare Act 1984 (WA)* (soon to be known as the *Occupational Safety and Health Act 1984 (WA)*)<sup>19</sup> and section 30B of the *Mines Regulation Act 1946 (WA)*<sup>20</sup> (soon to be taken over by section 9 of the *Mines Safety and Inspection Act 1994*)<sup>21</sup> provide for general duty obligations relating to safety and health, upon employers. An employer who fails to comply with these duties, commits an offence under the legislation. These obligations are fairly well known and have been the source of most

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<sup>17</sup>Dr P. Schapper, Public Sector Management Office, in his paper 'Speech Notes for Dr P Schapper: Public Sector Management Framework' delivered on 20 July 1995 at Perth Superdrome, Mt Claremont.

<sup>18</sup>No. 101 of 1984.

<sup>19</sup>Future references in this paper will be made to the *Occupational Safety and Health Act 1984 (WA)* on the presumption that the amendments will come into force.

<sup>20</sup>No. 54 of 1946.

<sup>21</sup>No. 62 of 1994. Future references in this paper will be made to the *Mines Safety and Inspection Act 1994 (WA)* on the presumption that the Act will come into force.



prosecutions under that legislation, when employers have failed to take reasonable care towards their employees.

Less well known than the duties that employers have towards employees, are the legal obligations under those statutes, that apply to entrepreneurs who engage independent contractors. There are a number of provisions which have direct application, namely sections 19(4)-(5) and 21 in the *Occupational Safety and Health Act 1984* (WA) and sections 9(3)-(4) and 12 of the *Mines Safety and Inspection Act 1994* (WA). As the provisions in the *Mines Safety and Inspection Act 1994* are substantially similar, at least for the purposes of the legal point that is to be made here, the provisions found in the *Occupational Safety and Health Act 1984* will be addressed.

### Section 19(4) and (5)

For the convenience of the reader, sections 19(4) and (5) are set out below:

19(4)<sup>22</sup> For the purpose of this section, where, in the course of a trade or business carried on by him, a person (in this section called "the principal") engages another (in this section called "the contractor") to carry out work for a principal -

(a) the principal is deemed, in relation to matters over which he has control or, but for an agreement between him and the contractor to the contrary, would have had control, to be the employer of -

(i) the contractor; and

(ii) any person employed or engaged by the contractor to carry out or to assist in carrying out the work;

and

(b) the persons mentioned in paragraph (a) (i) and (ii) are deemed, in relation to those matters, to be employees of the principal.

19(5)<sup>23</sup> Nothing in subsection (4) derogates from -

(a) the duties of the principal to the contractor; or

(b) the duties of the contractor to persons employed or engaged by him.

Subsection 19(4) treats the entrepreneur who engages an independent contractor as the employer, for the purposes of the section. The entrepreneur is also treated as the employer so far as the relationship between the entrepreneur and the employees of the independent contractor are concerned.

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<sup>22</sup>See also section 9(3) of the *Mines Safety and Inspection Act 1994* (WA).

<sup>23</sup>See also section 9(4) of the *Mines Safety and Inspection Act 1994* (WA)

This results in the entrepreneur who engages the independent contractor taking on all the legal duties of an employer found in sections 19(1), 19(2) and 19(3). However, the wording of the section requires either of one of two situations to exist. The first is evidence of control by the entrepreneur over the matters in issue. The second alternative, applies in a situation where there is an agreement between the entrepreneur and the contractor, which indicates that there is no control by the entrepreneur over the matters in issue. In this second situation, there must be evidence that there would have been control by the entrepreneur over the matters in issue, if the agreement was not in place.

It must be stated that the meaning of the words in section 19(4) are not altogether clear. It is quite possible that another meaning could be given to the words in the section, other than that expressed above.

One other matter requires consideration, from the wording in this section. There is no reported case on the point, but the words 'matters over which he has control' referred to in the section, appear to be related to safety and health matters or safety and health responsibilities. If this is the case, any prosecution contemplating using this section against an entrepreneur, would have to show evidence of control by the entrepreneur over such matters. If a wider meaning is given to these words, say management matters, then it would have greater possibilities for prosecution.

In short, the section allows prosecutions to be taken against entrepreneurs who engage contractors, where there is evidence of control over safety and health matters relating to the independent contractor's employees. In the event that there is an agreement between the entrepreneur and the independent contractor identifying there is no control by the entrepreneur over the independent contractor's employees (with respect to the occupational safety and health matters in issue), then the legislation requires evidence that the entrepreneur would have had control, and the contents of the agreement can be ignored.

#### **Application to government departments**

It is submitted that a government department that contracts out certain tasks or activities or services to an independent contractor, may well be caught by this section. It is easy to substitute the term 'government department' for the terms 'principal' or 'entrepreneur' to make sense of this provision.

Thus, if the government department engages the independent contractor to carry out work (the carrying out of tasks activities or services) the government department is deemed by the section to be the employer of the independent contractor's employees where there is evidence of the employer having control over safety and health issues.

In the event that the contractual agreement provides that there is to be no control by the government department over such matters, then the following applies. In this situation, if there is evidence that there would have been control by the government department if it had not been contained in the

agreement, the section still makes the government department the employer. Thus the section is stating that if one ignores the contractual position regarding control, it will look to the evidence other than that contract.

On this view of the section, if a government department can be shown to be controlling safety and health issues, it will find that it is an 'employer' for the purposes of the rest of section 19 of the legislation. If this is the correct interpretation, the government department will find itself with significant legal responsibilities under the Act. These responsibilities include the general duty obligations in sections 19(1) and 19(2) together with the safety and health incident reporting requirements in section 19(3).

In summary therefore, on this view of the legislation, the practice of contracting out of services, in no way diminished the legal obligation on a government department to take care and comply with the section 19 requirements under the legislation.

### **Section 21**

Consideration will now be given to section 21 of the Occupational Safety and Health Act 1984 (as amended by the proposed 1994 amendments) and its implications upon government departments that decide to contract out.

Section 21 itself establishes a number of duties, which are itemised below:

- (i) a duty on employers towards themselves.
- (ii) a duty on employers towards persons who are not employees but where that person is adversely affected as a result of the work done by any of the employer's employees.
- (iii) a duty on self employed people towards themselves.
- (iv) a duty is on self-employed persons towards persons who are not employees but where that person is adversely affected as a result of the work done by any of the self-employed person's employees.

It is the second of these duties that will be discussed in this paper.

### **Application to government departments**

By applying the second of these duties to government contracting out situations, it can be seen that as a government departments is invariably an employer, that the legislation is imposing legal obligations on the government department to take care towards people such as independent contractors or the employees of independent contractors. This is so when they are being affected by the work that is being done by any of the government department's employees.



This section imposes an obligation on government towards independent contractors in situations of 'contracting out', when its employees are doing work that might affect the safety and health of those independent contractors or the employees of such independent contractors.

On its face, the provision being discussed in section 21, does not apply to situations where there is a total contracting out of services and where there is no evidence of interaction between government employees and the independent contractors. That is to say it does not apply to a situation where there is no work being done by any of the government employees. However it is submitted that in practice, this is not always going to be the case and that many situations will involve independent contractors working closely with government employees. This will be the case even if it is merely a situation where the government department sends an employee to 'supervise' or 'check-out' the progress of the service being provided by the independent contractor.<sup>24</sup> These situations may well leave the government department at risk from prosecution under section 21.

## **Workers' compensation**

A discussion of contracting out in the context of safety and health would not be complete without looking at the workers' compensation implications under the *Workers' Compensation and Rehabilitation Act 1981 (WA)*.<sup>25</sup>

There are two main issues that arise that under that Act, that will be considered here. The first concerns the definition of 'worker' in section 5(1) of the Act, and the other concerns the implications of s.175 of the Act.

One of the essential foundations of the *Workers' Compensation and Rehabilitation Act 1981 (WA)* is to require employers to take out insurance policies<sup>26</sup> or become self-insurers.<sup>27</sup> The policy covers situations where the Act makes employers strictly liable to pay compensation, that is to say when a disability of a worker occurs.<sup>28</sup>

## **Worker**

In the context of government departments contracting out, the issue that will be canvassed here, is whether the definition of the term 'worker' extends to cover any independent contractor with whom the government department has made a contract.

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<sup>24</sup>This seems to be contemplated by Dr P Schapper as identified in his speech notes given earlier - see endnote number 15.

<sup>25</sup>No. 86 of 1981.

<sup>26</sup>Section 160.

<sup>27</sup>Section 164.

<sup>28</sup>Section 18 is the main provision of the Act identifying liability.

The definition of the term 'worker' is found in section 5(1) is rather long and involved and commences by explaining who is not a 'worker'. These appear to have little application to contracting out situations. However the words in the definition that follow those list of exceptions are of some relevance to contracting out situations. The words referred to are these:

"worker" ...; but save as aforesaid, means any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise and whether the contract is expressed or implied, is oral or in writing;

Those words are taken to refer to common law employees and would apply to a government department's<sup>29</sup> employees.<sup>30</sup> They therefore only have incidental application to contracting out situations as they do not include any reference to independent contractors or the employees of independent contractors.

The next paragraph of the definition does not have any general application to contracting out situations. However the paragraph that follows is of relevance. It provides:

the term "worker", save as aforesaid, also includes -

- (a) any person to whose service an industrial award or industrial agreement applies; and
- (b) any person engaged by another person to work for the purpose of the other person's trade or business under a contract with him for service, the remuneration by whatever means of the person so working being in substance for his personal manual labour or services, ...

The remainder of the definition provides for the situation of a worker who has suffered a disability and who is dead.

A preliminary issue which requires consideration is a discussion of the use of the word 'and' between the end of paragraph (a) and the start of paragraph (b). This word 'and' was inserted in the definition when the current Act was made in 1981. The former *Workers' Compensation Act 1912*,<sup>31</sup> did not use the word 'and' between similar paragraphs.

One view is that the word 'and' was inserted to require both paragraphs (a) and (b) to co-exist to satisfy the definition. However, the better argument is that the word 'and' should be interpreted as 'or'. There are three pointers that would support this view. First, the introductory sentence uses the term 'includes', second paragraphs (a) and (b) repeat the words 'any person' in each paragraph;

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<sup>29</sup>Note that there is an exception for the Act not to apply to members of the police force.

<sup>30</sup>A discussion of the cases based on these words is found in Guthrie R. *Workers' Compensation Western Australia Annotated Act*, Butterworths, Sydney, 1995.

<sup>31</sup>This applied to the Workers Compensation Act 1912 (WA) No. 69 of 1912, as it was at the time of the introduction of the 1981 Act.



and finally the use of a semicolon before the word 'and' suggests it was an alternative. This paper will continue on the presumption that paragraphs (a) and (b) are mutually exclusive.

### **Industrial agreements and industrial awards**

The first part of the definition, in paragraph (a) appears to say that any person who is covered by an industrial award or industrial agreement, will be a worker for the purposes of the Act.

The definition of the term 'industrial award' covers both employees covered by state or federal awards.<sup>32</sup> The case of *Hole v Lincoln Holdings Pty Ltd*,<sup>33</sup> is an authority that shows that even if a worker does not come under the common law definition of employee because of lack of control, that worker would be covered by the Act if the worker's award conditions were nevertheless incorporated into a contract of performance.

The provision has added significance because some federal awards purport to bind employers with respect to the terms upon which they employ independent contractors.<sup>34</sup> The *Industrial Relations Act 1988* (Cth)<sup>35</sup> also allows for some independent contractors to become members of organisations of employees.<sup>36</sup> Thus if a federal award applies to an independent contractor, the provisions of this definition of 'worker' would appear to indicate that the provisions of the *Workers Compensation and Rehabilitation Act 1981* apply to these people.

The term 'industrial agreement' is defined in section 5 and presumably was originally drafted to include agreements that were sanctioned by either the Australian Industrial Relations Commission or the Western Australian Industrial Relations Commission. However the definition is so wide that it presumably as incorporates workplace agreements under the *Workplace Agreements Act 1993* (WA)<sup>37</sup> and enterprise flexibility agreements and certified agreements under the *Industrial Relations Act 1988* (Cth).<sup>38</sup>

### **Personal manual labour or service**

Paragraph (b) on the other hand refers to a person (the worker) engaged to work for another person (the employer) for the purpose of the employer's trade or business. This must be done by a contract for services, where the remuneration of the worker is in substance for the worker's personal manual labour or services.

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<sup>32</sup>Section 5(1).

<sup>33</sup>(1982) 1 WCR (WA) 262.

<sup>34</sup>See for example *Australian Liquor, Hospitality and Miscellaneous Workers Union v Abergeldie - St Andrew's Hospital Inc* Print L8466, 16 January 1995.

<sup>35</sup>No 86 of 1988.

<sup>36</sup>Section 195(1A).

<sup>37</sup>No. 13 of 1993.

<sup>38</sup>A similar view is expressed by Guthrie R. *Workers' Compensation Western Australia Annotated Act*, Butterworths, Sydney, 1995 at p 34.

It is common knowledge that this provision was inserted to apply to labour only sub-contractors in the building industry.<sup>39</sup> The equivalent provision in the earlier legislation has been considered by the High Court in *Marshall v Whittakers Building Supply Co.*<sup>40</sup> and in two Supreme Court of Western Australian decisions.<sup>41</sup> The provision does not appear to be restricted to the building industry and it seems that the provision could apply to a government department that is contracting out. However, the above cases indicate that for the provision to apply, the contracted services must be for the worker's (the independent contractor's) personal manual labour or services. Thus if the contract allows for the independent contractor to engage other labour to perform the work, then this is not for 'personal' labour or services.

The other constraint appears to be the restriction to 'labour'. It seems the phrase 'labour' would not apply to those that provide '...services which are primarily by way of skilled direction and supervision, clerical work and other activities in which manual operations are casual, merely incidental, or accessory to the main purpose.'<sup>42</sup> It remains to be decided whether the additional words 'or services' overcomes this limitation, but there seems to be a reasonable argument to suggest that the additional words were intended to cover these situations such as those involving supervision or clerical activities.

### **Application to government departments**

On this reading of the definition, it becomes clear that the definition of 'worker' under the Act applies to a government department that makes a contract with another for personal manual labour and quite probably a contract for a person's services where they are personal in nature, but not necessarily manual labour. In other words it covers the individual contract situation. What would not be covered by this definition would be situations where the contract allows for the independent contractor to subcontract or engage other labour. That situation is one that is covered in section 175 of the Act.

### **Section 175**

Section 175 of the *Workers' Compensation and Rehabilitation Act 1981* (WA) imposes the liabilities found in the Act, upon a person or entity that engages an independent contractor, in relation to the workers of the independent contractor. As will be seen below, there are however some other criteria that must be met.

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<sup>39</sup>Knowles J N, 'A Brief Outline of the Main Comparative Differences of the Two Act, Including Transitional Aspects', *Workers Compensation: course*, Law Society of WA, 8-22 March 1983, Perth p 11.

<sup>40</sup>(1963) 109 CLR 210.

<sup>41</sup>*La Macchia v Spera* [1980] WAR 224 and *Tolchard v Mansard Homes* (unreported SC(WA) 4522, 26 May 1982). These decision have been discussed elsewhere by Blaxwell P., 'Principals. Sub Contractors and 'Worker', Crew of Fishing Vessel', *Workers Compensation: course*, Law Society of WA, 8-22 March 1983, Perth pp 2-4 and Guthrie R. *Workers' Compensation Western Australia Annotated Act*, Butterworths, Sydney, 1995 at pp 45-46.

<sup>42</sup>*Marshall v Whittakers Building Supply Co* (1963) 109 CLR 210 per Windeyer J at p 221.

For the convenience of the reader, those subsections of section 175 that will be discussed, are set out below

- (1) Where a person (in this section referred to as the principal) contracts with another person (in this section referred to as the contractor) for the execution of any work by or under the contractor and, in the execution of the work, a worker is employed by the contractor, both the principal and the contractor are, for the purposes of this Act, deemed to be employers of the worker so employed and are jointly and severally liable to pay any compensation which the contractor if he were the sole employer would be liable to pay under the Act.
- (2) The principal is entitled to indemnity from the contractor for the principal's liability under this section.
- (3) The principal is not liable under this section unless the work on which the worker is employed at the time of the occurrence of the disability is directly a part or process in the trade or business of the principal.
- (4) Where the principal and the contractor are jointly and severally liable under this section, a judgment obtained against one is not a bar to proceedings against the other except to the extent that a judgment has been satisfied.
- (5) ...
- (6) For the purpose of this section, where subcontracts are made -
  - (a) "principal" includes the original principal for whom the work is being done and each contractor who constitutes himself a principal with respect to a sub-contractor by contracting with him for the execution by him of the whole or any part of the work;
  - (b) "contractor" includes the original contractor and each sub-contractor; and
  - (c) a principal's right to indemnity is a right against each contractor standing between the principal and the worker.
- (7) Where the disability does not occur in respect of premises on which the principal has undertaken to execute the work or which are otherwise under this control or management subsections (1) to (6) do not apply.

#### **Application to government departments**

This section applies to any government department that contracts out for work, to be done by a contractor. At first blush this would seem to fit the situation of a government contracting out with independent contractors. However, a number of criteria must be fulfilled before the section applies:



- (i) In section 175(1) there must be a contract for the execution of any work by or under the contractor. The term 'work', is not defined in the Act. It remains to be determined how this term will be interpreted by the courts.
- (ii) Under section 175(3) the work on which the worker is employed at the time of the occurrence of the disability must be directly a part or process in the trade or business of the principal. This may raise an issue whether a government department is engaging in trade or business, but the concept of contracting out itself would indicate that this criteria is probably satisfied.
- (iii) The next criteria relates to physical location. The first part of section 175(7) says that it applies in respect of premises on which the government department has undertaken to execute the work. The second part of that section says it applies in respect of premises under the government department's control or management.

If these criteria are met, then the section indicates that the government department (the principal) will have to take out an insurance policy to cover the subcontractor's workers. This is because the compulsory insurance requirements in the Act apply to all employers.<sup>43</sup> Section 175(1) also indicates that the disabled worker will have the choice of taking a claim against either the government department or the worker's employer or, under section 175(6)(b), any of the sub-contractors in between.

Of course a government department may well decide to use its rights in section 175(2), seeking indemnity from the contractor for its liability. However this is not much use in situations where the contractor is either bankrupt or insolvent, and does not have the capacity to pay. The bottom line is that litigation is unlikely to be reduced, just by contracting out.

## Summary

A government department that pursues the current government's encouragement to 'outsource' or 'contract out' may or may not have immediately recognised financial benefits. Whatever the case, the government department is unlikely to be making any financial benefits through its delegation of legal responsibilities. The legal position is that government departments still retain a duty of care towards independent contractors in the areas of common law, occupational safety and health legislation and workers compensation. It may well be possible to argue that in some circumstances the extent of the duty will be reduced in some small way, but as the above discussion has illustrated, government departments are in no way immune from litigation or prosecution merely because they contract out.

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<sup>43</sup>Section 160 provides an offence and penalty that applies to an employer who does not take out such a policy.