

# *Independent Contractors of Australia*

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## **Submission to the Royal Commission into the Building and Construction Industry**

### **Response to the 13<sup>th</sup> Discussion Paper 15/11/02**

Independent Contractors of Australia (ICA) made a submission to the Cole Commission in September 2002. In that submission, ICA put the view that independent contractors should be able to look to the *Trade Practices Act* (TPA) for the delivery of fundamental protections available under commercial contract law.

Subsequent to the ICA's submission, the Commission released an additional discussion paper (the 13<sup>th</sup>) that canvasses the appropriateness or otherwise of the TPA being legislatively restricted from applying competition law to "employment" matters. The 13<sup>th</sup> discussion paper goes into considerable detail on the legislative clauses that restrict the scope of the TPA to non-employment matters.

Given ICA's interest in the TPA for independent contractors, ICA has prepared this additional submission which covers some of the issues raised in the Commission's 13<sup>th</sup> discussion paper.

#### **1. *Trade Practices Act* and the construction industry. General comment.**

ICA reiterates the view that independent contractors should be regulated and offered protections through the *Trade Practices Act* and State Fair Trading Acts.

Our observation of the commercial construction industry is that independent contractors are denied the right to work on construction sites through mafia-like enforcement of employment as the sole contract type available to workers. This is unjust and independent contractors suffer from this injustice on a daily basis.

This employment enforcement should be illegal, but is made legal, in part, because of the legislative constraints imposed on the TPA referred to in the discussion paper. The TPA limitations impose heavy constraints on a very specific aspect of competition, namely, the right of workers to choose the type of work contract under which they are engaged (employment or independent contracting). The two contract forms should be allowed to compete in all sectors of the economy and workers should have the freedom to choose between the two.

This freedom operates in the housing construction industry where both independent contractors and employees exist side by side. However, thuggery prevents the same competitive freedom occurring in the commercial construction industry and the artificial restrictions on the TPA stop commercial legal avenues being used to constrain the thuggery.

ICA supports a review of the TPA with a view to allowing the TPA to extend to those areas of employment activity where “employment” is used as a cover to restrict freedoms available under competition law.

## **2. Labour as a ‘commodity’.**

The discussion paper refers to arguments by the CFMEU that labour is not and should not be treated as a commodity. The CFMEU appears to be suggesting that if labour were to be subject to the TPA, this would turn labour into a commodity. ICA offers an alternative perspective.

An essential feature of a ‘commodity’ is that someone owns ‘it’, that ‘it’ does not have control of ‘its’ destiny and that ‘it’ can be traded, and ownership changed without ‘it’ having any say in the trade. When a commodity is an innate object, this trade is of little consequence to the object. For people, however, the consequence is enormous, because treatment of a human as a commodity in this sense is slavery.

On this issue the legal nature of contracts is important. People who sell their labour under the employment contract find themselves in a similar situation to a commodity. They enter a contract where their right to control themselves has legally been transferred to another. With the employment contract, the legal possibility exists that a person can be ‘traded’. In fact, under Australian industrial relations law this occurs. For example, Simplot in Tasmania ‘traded’ their employees to the labour hire firm Manpower without reference to the employees and the industrial relations commission approved the transaction. This is a common occurrence. The fact is that, in legal terms, ‘employed’ people are treated as types of commodities and the industrial relations system regulates the trade that occurs.

Independent contractors are not commodities—either legally or in reality. Independent contractors cannot be traded precisely because the legal nature of the contract they have, being based on offer and acceptance, gives them control of their destiny. Freedom from being a commodity is one reason why independent contracting is attractive to so many people.

From this perspective, the CFMEU seems to misunderstand the “labour-commodity” argument. They appear to infer that to subject labour to the *Trade Practices Act* would amount to turning labour into a commodity. The reverse is the fact. The regulation of labour under the TPA is an important legislative tool which releases people from being treated as a commodity. This is why the TPA is important to independent contractors.

Employees already suffer from being treated and regulated as commodities. It is possible that by making employees subject to the *Trade Practices Act* this may diminish the capacity of employees to be treated as commodities.

## **3. ILO conventions.**

The CFMEU also argues that the bringing of pattern-bargaining within the anti-competitive provisions of the TPA would be against labour law conventions. The International Labour Organisation (ILO) creates and oversees internationally accepted labour conventions. ICA believes that comments from the CFMEU regarding anti-competition law and labour conventions need to be kept within the perspective of the constitutional objectives of the ILO.

The ILO operates under its constitutional aims and objectives—created at the Declaration of Philadelphia in 1944—and in which justice on labour issues was seen as one part of a total process needed for securing peace, justice and prosperity in the post-WW2 period. The ILO constitution links labour justice to the achievement of economic growth and free international trade. There is nothing in the ILO constitution that suggests that the embracing of labour issues within competition law would work against its objectives. In fact, the ILO objectives of free trade and economic growth suggest that the application of competition law to labour issues could well be in accord with ILO objectives.

The bringing of pattern-bargaining within the anti-competitive provisions of the TPA may well work to enhance ILO objectives. Further, the experience of independent contracting is that labour justice is comparatively more achievable through commercial contract law than it is through employment contract law.

#### **4. Dependent Contractors.**

ICA reiterates the objections raised in our first submission to the idea of ‘dependent’ contractors. The concept is a legal nonsense. A person cannot be both a contractor and “dependent”, just as an employee cannot be both “independent” and an employee.

To accept the concept of dependent contractors within regulatory regimes is to pose a serious threat to independent contractors.

#### **5. Construction Industry Agreements.**

ICA expresses concerns with the construction industry agreements referred to in the discussion paper. In particular, clauses that prevent “all in payments” and “productivity schemes” create severe disadvantage for independent contractors because they lock independent contractors out of the industry and deny workers possible increased remuneration that may come from schemes that deliver bonuses for achieving productivity and profit targets.

In addition, it is clear that industry agreements (together with many EBAs) do not deal exclusively with issues of employee remuneration and work conditions, but extend beyond legitimate employment issues to embrace critical contract and management issues covering the commercial functioning of the industry. This is one vehicle by which employment is given a legal mask which enables a cross-over into commercial areas that should be the preserve of the TPA.

ICA views the industry agreements mentioned in the discussion paper as institutionalised legal sanctioning of anti-competitive practices operating to the detriment of independent contractors.

#### **6. EBA income rates.**

The discussion paper refers to allegations made before the Commission that EBAs deliver higher wages and working conditions than are otherwise available in the industry. ICA questions the validity of this assertion.

Independent contractors have a history of receiving higher incomes than employees. This is, in part, due to the lower transaction costs associated with remunerating independent contractors with ‘all-in payments’. Further, independent contractors have the opportunity to negotiate incomes to the maximum level that their clients can afford. This is not available to employees. Such market-based opportunity does not guarantee independent contractors wealth, but it does afford maximum opportunity to realise comparative individual potential.

By comparison, observation of how EBAs operate in the commercial building industry suggests that EBAs create a fixed maximum pay level, thereby denying workers the opportunity to realise higher possible remuneration. EBA employees do not know if they could earn additional income and are denied the opportunity ever to discover if they are worth more than that available under EBAs.

### **7. Security of payments for independent contractors.**

The discussion paper raises the issue of security of payments for sub-contractors. In every society charlatans and thieves are always ready to prey on the weak—particularly where the rule of law is not strong. ICA believes that security of payment under agreed contract terms is a critical issue for independent contractors.

It is frequently alleged that non-payment under contract is frequent and a problem in the commercial construction industry. What is not often observed is that non-payment is not perceived as a major problem in the housing construction industry.

ICA suggests that non-payment is a problem for the commercial construction industry precisely because the rule of commercial law is rorted in that sector; whereas in the housing sector, the rule of commercial law is more vigorously alive.

ICA submits that attempts to address security of payments through industrial relations regimes in the commercial construction industry run the risk of compounding the corruption of competition and further complicating payments problems. In ICA’s earlier submission we argued that independent contractors have access to small claims processes in the Fair Trading Acts of the States, although the processes are not frequently used.

ICA submits that resolution of security-of-payments issues in the construction industry should be addressed through commercial law and not industrial relations law.

### **Specific Points**

- ICA strongly objects to suggestions that independent contractors should be removed from the provisions of the TPA. This would begin a process where independent contractors could be treated as commodities and denied the protections under contract law that should be offered to independent contractors through the TPA.
- ICA submits that serious consideration should be given to allowing the TPA to have power over “employment” issues where employment regulation and behaviour oversteps its legitimate jurisdiction and intrudes into commercial areas.