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To Secretary
Trade Practices Act Review
C/- Department of Treasury

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The Committee

Independent Contractors of Australia (ICA) seeks both to comment and to forward a submission on an area receiving little attention by the ACCC, but an area nonetheless of emerging significance: namely, the right of independent contractors to access protections offered under the *Trade Practices Act*.

The *Trade Practice Act* governs commercial relationships between entities conducting business through the contract for services, and the regulatory regime is intended to prevent price-fixing and anti-competitive behaviour. The *Trade Practices Act* specifically prevents the ACCC from interfering in the contract of service (employment), presumably because employment regulation is, by design and effect, a regime of price-fixing.

The emergence of working arrangements in which people are not employed but choose to work under a contract for services (commonly called 'independent contractors') is of growing importance. Australian Bureau of Statistics figures suggests that 28 per cent of the private-sector workforce may fall into this category as 'non-employees'. It should be expected that these people would be offered protections through the Trade Practices Act, but the evidence is that the ACCC is failing in this respect.

It is a basic right of individuals that they have the freedom to choose the method of engagement utilised when they work. It is an abuse of the power of the state to limit, deny or inhibit that right.

There are two areas that we request the Committee to consider.

A. Sanctity of the contract for services

Over the last five to six years, there has been a concerted effort in several jurisdictions for labour laws to be rewritten or interpreted in a way that allows employment regulators to enroach into the domain of the contract for services. Yet the ACCC has been silent when this has occurred, and in at least one instance, it actually endorsed the move.

In the first instance, we refer to the legislative provision under section 275 of the Queensland *Industrial Relations Act* that allows the Queensland Industrial Relations Commission to declare persons working under a contract for services to be employees. In Queensland, a corporation has already been declared an employee under these provisions. Section 275 is entirely illogical, because a person cannot be both an employee and not an employee at the same time. Yet, in the creation of this provision and its application, the ACCC has been silent.

In the second instance, the ACCC has provided an exemption from the *Trade Practices Act* to the NSW *Industrial Relations (Ethical Clothing Trades) Act* that, in effect, treats contracts for services between entities as employment contracts, thereby allowing the imposition of price-fixing and anti-competitive arrangements.

Both these instances call into question the capacity of the ACCC to understand and to apply a core function—namely, to protect the sanctity of the contract for services.

B. Effective payment enforcement systems

With the increase in the use of independent contractor arrangements, concerns have arisen over methods of ensuring effective payment for services rendered under contract, for those persons working as independent contractors.

Such concerns are frequently expressed, however, in the context of seeking to extend or expand the reach of employment regulators to the contract for services. This is unacceptable because regulation of contracts *for* services should never seek to set prices or the contract terms. The fixing of prices under a contract is only a function of employment regulation relating to the contract *of* service.

Regulation of contracts for services, however, does and should have a role in ensuring fair, effective and cheap enforcement of payment for services rendered under contracts for services. Generally, the civil courts offer comparatively expensive methods for enforcing payment under contracts for services. Amendments to the *Trade Practices Act* in 1998 and the near mirroring of those changes in the respective State Fair Trading Acts, however, may have created an effective mechanism for securing payments. This may apply particularly for individuals who choose to work as independent contractors.

In this respect, we do not at this point suggest a specific course of action, but we do request the Committee explore this issue. To this purpose a discussion paper is attached.

We appreciate that the *Trade Practices Act* is a creature born out of competitive political, social and economic pressures where self-interest is often at its most naked. Ultimately, however, these pressures must be reconciled in a legal, legislative format administered under clear principles. We submit that the countervailing pressures are most readily reconciled through consistent application of the principles underpinning the common law contract for services. Independent contractors freely choose the contract for services because of the social and economic advantages it delivers in personal and specific ways. The political views of independent contractors have little representation. The *Trade Practices Act* should be a principal protector of independent contractors' rights.

Yours sincerely

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DISCUSSION PAPER

Protecting Independent Contractors

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Changes in government policy across Australia over the last five years appear to be moving independent contractors into the regulatory regimes of industrial relations legislation.

Those promoting this agenda argue that this is necessary because independent contractors are not protected in the same way as employees. Key alleged concerns are the lack of adequate dispute-resolution mechanisms and alleged unfair pricing for those engaged through contracts for services. Regulatory regimes are, however, already available for independent contractors (though largely unutilised), through the *Trade Practices Act* and State Fair Trading Acts.

This discussion paper considers the essential regulatory differences between employment and independent contracting, why those differences are important, and the context for appropriate regulation for independent contractors.

The principles underpinning the paper are:

- People have a right freely to structure their affairs in the manner that suits them when selling their services. That is, they are free to choose employment or independent contracting.
- Efficient regulatory regimes should ensure that contracts of service (employment) are dealt with under employment legislation; that commercial contracts are dealt with under the appropriate commercial legislation; and that there is no crossover between the two.
- Employees and contractors have equal rights to effective protection under the law, but through legal systems suited to their specific status.

Part A Summary of the contract situation.

Part B Some details of the probable application of the *Trade Practices Act* and Fair Trading Acts to independent contractors.

Part A.
SUMMARY OF THE CONTRACT SITUATION

1. Who/What is a contractor?

A contractor is defined at law as a person working under a *contract for services*.

A contractor can be an individual, a partnership, a company or trust. When the entity is an individual, they are variously referred to as an independent contractor, a contractor, a self-employed person, a free agent or other terminology depending on the industry in which they work.

2. Who is an employee?

An employee is an individual who works under a *contract of service*.

3. What is the difference between contracts of service and contracts for services?

The two contract types have clear common-law definitions that are used by the courts.

In broad lay terms:

- *Contract of service is employment.* It is a modified version of the old master-and-servant relationship. Control of the employee's work is exercised by the employer. It is easiest thought of as one person having physical and psychological control over another.
- *Contract for services is the commercial contract.* Control of work is through the terms of the contract. Both parties have an equal right to control the terms of the contract through the process of offer and acceptance.

When the courts are called on to find which contract type exists, they look at all the evidence. Most importantly, consideration is given to the real-life behaviours of the parties and that includes written and verbal statements by the people involved. The courts make a decision based on the balance of the evidence before them. One decision may create precedent, but that does not predetermine the outcome of any other circumstance.

4. How are the two types of contract regulated through legislation and common law?

Contracts for services. These are regulated through both statute and common law. Because the parties to the contract have an equal legal right to control the contract terms, the courts and legislation generally will not interfere with, or seek to stipulate, or pre-determine the contract terms. The courts will not uphold contract terms that are unconscionable or that have been entered into under duress or that require illegal acts. Well-established common law and legislative processes exist to test these matters.

What courts mostly do is to act as a settler of disputes when either or all of the parties approach the courts with a dispute. When this occurs, the courts will study the terms of the contract and make a settlement based on the facts.

Contracts of service. These are regulated through industrial relations legislation and with substantially different processes to commercial contract regulation. Because the employer has a legal 'right to control' the employee, it is taken that at law the employee is legally weak and vulnerable. The ethical reasoning behind industrial relations legislation is that the unequal bargaining power has to be re-balanced by taking from employers their capacity to control the contract terms. Note, however, that control of the contract terms is not delivered to the employee, but rather transferred to instruments of the state, notably the Industrial Relations Commissions (IRC), which hears submissions from authorised employer and employee representatives. The IRC also settles disputes.

In short:

Contract for services = commercial = Equal parties control their contract terms.

Contract of service = employment = Other parties control the contract terms.

5. Why is the difference between the contract types important?

The significance of the *contract for services* is that it delivers to people a basic right to *control the terms* of contracts into which they freely enter. This is the basic legal right that enables commercial activity to flourish.

Legislatures have long recognised the social and economic importance of maintaining the sharp distinction between the two contract types. To regulate the *contract for services* as if it were employment is to undermine business activity and create commercial uncertainty.

6. Is there a grey area between employees and contractors?

The courts have been very clear in their determinations on whether a contract is *of service* or *for services*. A person cannot be both an employee and a contractor or a contractor and an employee. A person is either within the jurisdiction of employment law or in the jurisdiction of commercial law.

The proposition that there is another type of contractor, a 'dependent' contractor is false. A dependent contractor would, in fact, be an employee. However, the argument that there is such a status as 'dependent contractor' is being used to create new legislation that clashes with common-law principles. The primary example is the Queensland *Industrial Relations Act 1999*, which enables a person who is working under a contract for services to be declared an employee.

In the first test case of such legislation [The Hammond's shearing operation in Queensland 2000 (AWU versus Hammond's Pty Ltd No B885 of 1999)] the evidence demonstrated that award controlled employee shearers in the Queensland shearing industry operated in formal terms under the legalities of employment, but perhaps more closely resembled contractors in the way they operated. The test case demonstrated that if the concept of *dependent contractors* were accepted, the idea of *independent employees* would also have to be accepted. In fact neither legal concept is valid. Both concepts breach common-law principles.

7. The shift in workforce engagement and the regulatory challenge

Over the last 20-or-so years, there has been a large increase in the number of individuals working under contracts for services. This is a trend observed in developed economies although the phenomenon is poorly researched.

In Australia

- 23% of the total workforce are classified as self-employed/independent contractors (non-employees).

The growing incidence of independent contracting is evidenced by:

- The rapid rise in franchising, particularly in the retail and services sectors.
- The huge increase in the work-from-home, micro-business sectors.
- The almost exclusive use of agents and free agents in the Tele-service industry.
- The near dominance of contractors and agents in the IT industry.
- The large-scale use of contractors in the courier and road transport industries.
- The emergence of independent contractors in the labour hire industry.
- The escalation of contracting-out.

New areas that may emerge can only be guessed at.

Areas where independent contractors have a long Australian history include:

- The domestic housing industry.
- The farming sector.
- Outworkers in the clothing industry; in fact now a subset of the work-from-home, micro-business sector.

The common legal thread between these activities (where it is present) is that arrangements are organised through commercial contracts for services.

The emergence of strong independent contracting poses challenges for government regulators because, until recently, commercial regulations were thought to be an exclusive business structure-to-business structure issue. Individuals were thought to be regulated almost entirely through employment. With one in five individuals choosing to work under commercial contracts, however, the paradigm of commercial regulation has broadened. But regulators are having difficulty keeping pace with this broadening. Nonetheless, some steps have been made.

In 1998–99, the *Trade Practices Act* was amended to improve protection for small business against unconscionable conduct. The amendments were largely motivated by concerns from small business about the inequity of bargaining positions under retail leases and franchise agreements.

8. How effective are the protective mechanisms for contractors?

Concerns expressed over the effectiveness of protective mechanisms for contractors seem to fall into two major categories:

- That employment contracts are being disguised as commercial contracts to allow employers to avoid their obligations to employees (the ‘sham’ contract argument); and
- That independent contractors do not have the bargaining power to negotiate fair and equitable contracts and as a result enter into unfair contracts.

Employment contracts disguised as commercial contracts

It has been suggested that many individuals work under contracts for services when in fact they should be treated as employees.

The testing of common-law employment is a standard and frequently applied test in all courts and all relevant jurisdictions in Australia. The tests are robust and are carefully applied by the judiciary. The courts reject sham contracts.

- Significant cases where the courts have rejected the existence of a contract for services and found employment include *Mayne Nickless v Santimarinno* (AIRC C No. 80047 2000) and *Konrad v Victoria Police* (Federal Court FCA 988 1999).
- Significant cases where the courts have found the existence of a contract for services include *Vabu Pty Ltd v Commissioner of Taxation* (NSW Supreme Court NSW CA 40206/96) and *Odco Pty Ltd v BWIU* (Federal Court VG 151 of 1988).

It is, however, an onerous and expensive exercise to seek a court ruling on whether a contract is one of employment or is commercial. A judicial test can easily extend over 18 months, particularly if an appeal is involved, and cost each party upwards of \$30,000.

A broad community-awareness campaign about the difference in contracts would:

- Improve understanding;
- Reduce the incidence of inappropriate contracts;
- Inform parties about their obligations; and
- Assist contractors to structure their affairs properly and in the most appropriate manner for their circumstances.

Unfair Contracts

Part B of this paper investigates the avenues available to persons working under contracts for services if they are concerned about the “fairness” of their contract/s.

Part B
FAIR OR UNFAIR CONTRACTS

Some details of the probable application of the *Trade Practices Act* and Fair Trading Acts to independent contractors.

9. Overview

The *Trade Practices Act 1974* is enforced by the Australian Competition and Consumer Commission (ACCC). Part of the objective of the Act is to “reduce deceptive or unfair conduct in business”. To overcome limitations on Federal jurisdiction, State governments have enacted complementary legislation. This ensures that the consumer protection provisions contained in Part IV of the Act apply to unincorporated entities. For the purposes of this discussion paper, the Victorian *Fair Trading Act* is used as an example of State legislation.

10. *Trade Practices Act* (s.51AC)

Part IVA of the *Trade Practices Act* was amended in July 1998 to improve protection for small business in their dealing with large business. Section 51AC prohibits unconscionable conduct in commercial transactions. The concept of unconscionable conduct involves the exploitation by a stronger party of an evident special disability or disadvantage suffered by another party. Unconscionable conduct may occur in relation to either the supply or the acquisition of goods or services.

The provision specifies a number of matters that the courts may take into account to determine whether unconscionable conduct has occurred. These matters include the relative bargaining strengths of the parties, the ability to understand documentation, comparison of prices of a similar good or service, failure of a stronger party to disclose certain information, willingness to negotiate, and the extent of parties acting in good faith. The broad provisions of 51AA codify (but not override) the unwritten or common law where, historically, the courts have been prepared to set aside contracts on the grounds of unconscionable conduct. Items that are considered (among many) include the lack of real choice of the weaker party, evidence of real freedom to negotiate terms, the ability of parties to understand the transaction and to judge what is in their best interests.

The ACCC has power to take either administrative or court action against a party. Some of the orders that may be made under the Act include compensation for loss or damage, declaring part or whole of a contract void, varying a contract and requiring specified services to be performed.

The *Trade Practices Act* does not have jurisdiction over employment contracts.

11. Victorian *Fair Trading Act*

The Victorian *Fair Trading Act* was amended in the late 1990s to reflect the introduction of s51AC of the *Trade Practices Act*, however the Victorian Act only addresses unconscionable conduct in relation to the acquisition of goods, not services.

In addition, the *Fair Trading Act* in Victoria gives the Victorian Civil and Administrative Tribunal (VCAT) powers to resolve disputes between a purchaser or possible purchaser of goods or services and the purchaser or possible purchaser of goods or services in relation to the supply of goods or services. The tribunal has jurisdiction over trader-to-trader disputes as well as consumer–trader disputes.

There is no limit to the amount of the claim and no fees apply for the making of an application to VCAT. Parties present their own case and lawyers are not allowed for disputes below \$10,000. The investigative process involves assessment of the situation based on the facts presented. Types of orders that can be made include payment of money, payment of damages, review or varying of a contract, order to comply with a contract and cancellation of a contract. Actions can be taken by and against individuals, sole traders, partnerships, and companies.

12. Discussion

One issue that has prompted policy-makers to bring independent contractors under employment legislation, is the alleged concern that independent contractors (persons working under contracts for services) do not have access to protective processes.

12.1 Access Problem: Contractors have always had access to common-law processes, at first call, the magistrate's court. However, the time and cost of litigation generally precludes access. For example, the cost of legal representation to undertake action in a magistrate's court could be anticipated at around \$3,000 minimum. Generally, this cost prevents parties exercising their common-law rights. To this extent, the accusation that independent contractors lack protective processes is valid, particularly where disputes are for small sums.

12.2 Small Business resolution: The amendments to the *Trade Practices Act* and *Fair Trading Acts* were born from a recognition of problems faced by small businesses. Principally, the problems involved small retailers in dispute over retail leases and small franchisees in dispute over franchise agreements.

The principles applied in resolution are based on the integrity of the common-law commercial contract for services. That is, that equal parties freely choose to enter a contract over which they both exercise equal control of the terms and that equality of rights is not subverted by the behaviour or position of either party or an inability to enforce rights effectively.

Evidence in the small business sector was that even though common-law rights exist, the ability to exercise rights was weak. The outcome was the clarification and codification of common-law rights within the Act and the introduction of improved administrative mechanisms for the exercise of those rights.

12.3 Trust: Commercial activity in a society is based on trust. People trust that, when they enter a commercial arrangement with someone, the other party will adhere to the arrangement. On most occasions, this is what occurs. But often the trust is breached because of changed circumstances, inadequacies on the part of a party or because of deceit. A key role of the law is to ensure contract integrity and to provide effective resolution of a dispute when trust has failed.

When settlement of disputes is quick, cheap, effective and enforceable, people have greater faith in commercial activity. With effective legal processes, people take greater care in the settling of contract terms, fewer breaches occur and disputes tend to be resolved faster and with less recourse to the courts.

12.4 Common Principles: In amending the *Trade Practice Act* and *Fair Trading Acts* the principles that were considered are the same principles at stake with independent contractors. Independent contractors, however called, are the smallest of small businesses. The *common legal identifier* is that persons are engaged in *contracts for services*.

13. Conclusion

It appears probable that, in addressing the needs of small business, the Trade Practices Act and Fair Trading Acts have addressed the needs of independent contractors. That is, that independent contractors have strong protective mechanisms within those Acts. But inadequate information is at hand.

One weakness in the Victorian *Fair Trading Act* may be the failure to mirror the protection provided under the *Trade Practices Act* for persons supplying services. And, even though the Acts may have the potential to provide good protection for independent contractors, it appears that inadequate implementation of the Acts is causing the protective measures to be underutilised. Further investigation of the Acts, their implementation and possibilities is urgently required.

References

- Publication by the Victorian Civil and Administrative Tribunal. Ph; 03 9627 6111 “Civil Claims Guide”.
- Publications from the Australian Competition and Consumer Commission Ph 02 6243 1149. “ACCC Roles and Functions” “Fair Game or Fair Go?” “Guide to unconscionable conduct in business transactions.” “Retail Flash”