

**Submission to the House of Representatives
Employment, Workplace Relations and Workforce
Participation Committee**

**Inquiry into the use of independent contracting and labour
hire arrangements in Australia**

**Department of Consumer and Employment Protection
(Western Australia)**

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1. The Department of Consumer and Employment Protection (DOCEP) refers to the invitation of the House of Representatives Employment, Workplace Relations and Workforce Participation Committee to provide a submission for the Inquiry into the use of independent contracting and labour hire arrangements in Australia. DOCEP understands that the Federal Government intends to enact legislation to “protect” independent contractors, as outlined in its document titled “Protecting and Supporting Independent Contractors”.
2. At this stage, DOCEP does not have any detailed information as to how the proposed legislation is to operate. However, DOCEP submits that any legislation should be carefully drafted in order to ensure protection for all workers, but especially those who are most vulnerable. In this context, vulnerable workers who require additional protection would include those with poor literacy or numeracy skills and those who have little experience in the labour market.
3. DOCEP submits that any legislation with regard to independent contractors should have provision for people to challenge their status as independent contractors. This provision is imperative to prevent a proliferation of sham arrangements. In such sham arrangements, a genuine employment relationship may exist but is obscured by the existence of an agreement to state that the parties do not have an employment relationship. There should be no allowance at law for a true employment relationship to be deemed anything other than an employment relationship.
4. It has been DOCEP’s experience that there is a high level of independent contracting within Western Australia, particularly in the building and construction industry. In this industry workers tend to be aware of the implications of working in an independent contracting relationship and are content to work in this manner. Also, given the current levels of labour supply and demand in this industry, contractors have sufficient bargaining power to negotiate wages that are greater than or equal to those prescribed by awards. Further, in this industry, there is no evidence to suggest a high incidence of sham arrangements.
5. A trend that has become apparent to DOCEP is the increasing number of complaints that are received regarding sham arrangements in service industries such as hospitality, retail, aged care, clerical and security. In these industries it is difficult to envisage scope for true independent contracting arrangements. Subsequent investigation has revealed evidence suggesting that, in these cases, true employment relationships existed but were concealed under the guise of independent contracting.
6. It has been the experience of DOCEP that some employers convert their employees to contractors in an effort to avoid their legal obligations. These legal obligations do not simply comprise award wages but also superannuation, workers’ compensation, occupational health and safety, unfair dismissal and child welfare. This may be acceptable where people are informed of the implications of working in an independent contract arrangement and make a conscious decision to work in such an arrangement. However, evidence gathered by DOCEP shows that many people are not aware of the practical implications of working in an independent contract arrangement. This may hinder their ability to make that informed choice.

7. Even when people are provided with information regarding their status as independent contractors, this does not automatically mean they are able to make an informed choice. DOCEP has received numerous complaints from workers in service industries regarding a complex contracting arrangement commonly known as 'Odco'. While workers were provided with information regarding the arrangement and were able to repeat statements they had been told by their manager or Odco licensee, they had little or no true understanding of the arrangement. This lack of understanding was compounded by the fact that some of the workers were children, and that many of the workers had previously been employees and had been 'transferred' to the new system.
8. As noted above, children may have less understanding than an adult of a contract that they enter into. For this reason, common law protects people under the age of 18 by making contracts they enter into enforceable by them but not against them. Exception is made to this rule with regards to contracts of employment. However, it is unclear as to whether the same exception would apply with regard to independent contracting arrangements. DOCEP submits that minors are more vulnerable than adults and, as such, should be protected from entering into independent contracting arrangements that are not in their best interests.
9. In one case that DOCEP investigated (and there is no reason to believe that this was an isolated incident), children as young as 14 years were engaged in the hospitality industry under the title of 'independent contractor'. If these children were deemed to be independent contractors, they would fall outside of the scope of the *Child Welfare Act 1947 (WA)* with regard to their work. This Act prohibits children under the age of 15 being employed to work during school hours or at night. This is another piece of legislation that employers may try to circumvent by the use of contracting arrangements.
10. DOCEP has examined three situations in which employers have transferred their core workforce from employees to independent contractors. This was done by terminating the entirety of their core workforce and telling employees they would have to become independent contractors in order to retain their positions. In these situations, employees were not offered a choice between contracting and employment, but only between contracting and unemployment. The element of coercion that is evident in these cases is clearly unsatisfactory and should not be encouraged, either directly or indirectly, through the enactment of federal legislation.
11. DOCEP submits that, not only is the element of coercion an issue in the situations as described above, but also the subsequent nature of the relationship does not conform to that expected in true independent contracting. In investigations DOCEP has found that, where the workforce has its employment contracts terminated and the same workforce is then rehired on an independent contract basis, the intrinsic nature of the relationship remains the same. Given that a genuine employment relationship existed prior to termination, it is difficult to conceive that the same relationship could then be a genuine independent contracting relationship purely by virtue of the workers having signed agreements to that effect.
12. In an example investigated by DOCEP that illustrates this point, the employer in question called all employees of a company, including the receptionist, to a meeting. At the meeting, the employer told the employees that, from now on,

they would be employed on an independent contract basis. Subsequent to the meeting, there was no change in how, when or where the receptionist performed her work, how she was remunerated for her work, or the level of control that her manager exerted over her. In fact, the only thing that did change was that the worker was given a new contract. This 'contractor/subcontractor agreement' was identical to her 'employer/employee agreement' save that the words 'employer' and 'employee' had been substituted with the words 'contractor' and 'subcontractor' respectively.

13. DOCEP submits any legislation that is to be enacted should not deem employees to be independent contractors in situations such as the one described above. Where a person is working in the manner of an employee, they should not be deemed an independent contractor solely by virtue of them having signed an agreement to that effect. Rather, employees should have the right to access their statutory entitlements as employees, regardless of the title their employer gives them.