

# PROTECTING AND SUPPORTING INDEPENDENT CONTRACTORS ?

## Or Just More Howard Govt Anti-Union Hypocrisy ?

A submission concerning Independent Contractors and Labour Hire

**By Marcus Anderson**

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### **Terms of Reference**

This is a submission for the **Inquiry into Independent Contractors and Labour Hire Arrangements** by the **House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation**, by way of responding to the **Department of Employment and Workplace Relations Discussion Paper, *Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements.***

## About the Author

Marcus Anderson is a worker in the computer industry and has nearly 30 years of experience as an Information Technology (IT) employee and IT contractor, for what has been ostensibly and primarily the provision of nothing more Labour Hire in Information Technology.

## A Short History of Recent Industrial Reform

It is noted that the Government's Workplace Reform agenda has been forever tainted by unresolved accusations against former Minister *Mr Peter Reith* of deceit in lying to the Australian People over the so called "Children Overboard" affair, and his subsequent immediate voluntary departure from political life to "take the heat" over that matter for the Howard Liberal Government.

Consequently, this submission is made in full knowledge of the current Government's lack of any credibility whatsoever in Industrial Relations, its poorly hidden secret agenda in this Inquiry to dismantle worker entitlements and the unions that represent them, and its absolute power in both Houses to do '*whatever it damn well likes*', so to speak. One might rightly ask then "Why make a submission at all?" Indeed, why have an Inquiry at all? Are we just going through the motions?

Perhaps the Inquiry can answer the latter question, however I do not, for my part, intend to let the Governments Industrial Relations hypocrisy go unchallenged.

And it is quite clear that one of the most effective ways in which the incumbent Government can fulfil its aggressive and completely deceitful Industrial Transformation agenda is by freeing up the area of Independent Contracting, which is unfortunately, an area that also affects the author.

It is also noted that at least one of the submissions to the Inquiry published on the Internet has come from an organisation that is outwardly an association of "**Independent Contractors**", but which is in fact run by employers or persons promoting the interests of employers.

Consequently, it is evident that the Inquiry is already being subjected to propaganda from bogus groups appearing to represent the interests of Independent Contractors as workers, but which are more about promoting the interests of employers as parties to Independent Contracts. These groups conspicuously approve of reform to "**free**" Independent Contractors by removing employee entitlements, and simultaneously deplore reform to "constrain" Independent Contractors by giving them employee rights.

*Caveat Inquisitor!* (Inquirer Beware)!

# Summary

*Summary of responses to List of proposals and issues on which submissions are sought:*

- 1. The WR Act should be amended to provide that awards and agreements cannot contain clauses which restrict engaging independent contractors or impose conditions or limitations on their engagement.**

Disagree.

- 2. Should the current common law definitions of independent contractor and employee be retained for the purpose of the WR Act, with courts determining the question using established common law principles?**

Yes.

- 3. Should the personal services business test under the Income Tax Assessment Act 1997 be adopted as the sole definition of 'independent contractor' for the purposes of workplace relations regulation?**

Yes. Any law is only obfuscated by giving the same phrase different meanings in different places.

- 4. Should the personal services business test under the Income Tax Assessment Act 1997 be adopted as part of the definition of 'independent contractor' for the purposes of workplace relations regulation?**

No. If defined at all, 'independent contractor' must be clearly and universally defined to remove all ambiguity. Independent Contractors should pay company tax rates, not personal income tax rates.

- 5. Should an 'Independent Contracting Registrar' be established to make declarations about employee/independent contractor status applying the appropriate tests?**

No. Status is a dynamic (ie variable) attribute measured at given time which cannot be in the future. Status is a fact determined by immediate or past indicators, not by predetermination in a declaration.

- 6. Should an object be added to section 3 of the WR Act to the effect that the status of independent contractors should be upheld and subject to minimal industrial regulation?**

No. But then the Howard Government's mind is made up on this one. See their election policy.

- 7. Are there any State laws other than workplace relations laws (such as workers' compensation, anti-discrimination or OHS laws) containing independent contractor provisions which the Commonwealth should consider overriding?**

No. In general, and at the very least, the Commonwealth is a signatory to the International Covenant On Civil And Political Rights and must observe its obligations under that convention. Laws established under cardinal principles of justice and fairness must not be interfered with.

**8. Should the proposed Independent Contractors Act override State and Territory unfair contracts laws and seek to cover the field (as far as constitutionally possible) for unfair contracts provisions?**

No. Again, as in point 8, laws established under cardinal principles of justice and fairness must not be interfered with.

**9. Should the Federal Magistrates Court be given jurisdiction to review contracts?**

Yes.

**10. Should the proposed Act seek to override State 'deeming provisions', which draw independent contractors into the net of workplace relations regulation, as far as constitutionally possible?**

No. 'Deeming provisions' provide lower paid employees protection from exploitation in unfair contracts, and allow the exercise of judicial discretion at the more informed local state level where it belongs. The notion that employees have "the right to negotiate conditions of work that suit their own individual needs" is a fantasy, out of touch with reality, and an invention of employers for the benefit of employers. Employees do not have any such "right", nor have any power to demand it even if they did. Without Union won legal protections to help them, Independent Contractors have even less power to assert "rights" in contract negotiations.

**11. Should a civil penalty provision be introduced in the WR Act applying to hirers who deliberately attempt to avoid employer responsibilities by seeking to establish a false independent contracting arrangement?**

Yes. Perversely, the Commonwealth Government IT sector is a worst offender in this, particularly Government Agencies, which are the least accountable. Neither the Commonwealth Government nor its Agencies can be allowed any exemption from such a civil penalty provision.

**12. Should the labour hire industry be regulated to ensure high standards are met by all players?**

Yes.

**13. The WR Act should be amended to provide that awards and agreements cannot contain clauses which restrict engaging labour hire workers or imposing conditions or limitations on their engagement.**

No. This is a very dangerous proposal. The Election 2004 policy extract cited in the Discussion Paper is Employer rhetoric simply and blindly parroted by the Howard Government. The policy's assertion that employees rights are under threat from State Labor Governments is paranoid rubbish, and reflects the highly political bias this Act has to favour Employers, rather than being representative of the needs of Independent Contractors or Employees.

No Independent Survey or Study has been done or is offered to support the assertion that Court tests to uncover "sham" independent contractor arrangements "have gone too far". On the basis merely of the suggestion of "a view in the community" the Howard Government has decided to use its absolute power in Government to make good its threat to install an anti-Union Independent Contractors Act, predetermined to favour Employers, completely void of any research into the facts,

and with total disregard to the actual needs of Independent Contractors to have protection and compensation from the myriad of unscrupulous businesses that exploit them.

Indeed as mentioned the Commonwealth Government and its Agencies are among the **worst offenders** in exploiting Independent Contractors to avoid employee obligations.

***14. Should the WR Act be amended to include in the definition of 'employer' a labour hire agency that arranges for an employee (who is a party to a contract of service with the agency) to do work for someone else even though the employee is working for the other person under a labour hire arrangement?***

Yes.

***15. Should 'Odco' arrangements be statutorily recognised in the Independent Contractors Act?***

Yes, as being **unlawful** or **prohibited**.

I understand 'Odco' is in fact a Tradename. If so, proposed use of this Tradename in the Act demonstrates perfectly the extent to which the Law is being abused to force blind Liberal Party policy on Independent Contractors, such that the Employer friendly bias even extends to promoting a Commercial Product in an Act of Parliament. The mind boggles at the very thought!

## Submission

The author's principle submission is that claims of Independent Contractors wanting "**freedom**" as in "freedom to choose" or "freedom to contract" are Liberal Party propaganda and totally bogus. Independent Contractors want more **protection**, not more "freedom". In fact the word "freedom" seems to be a code word Liberal Party hacks now use in blind support of the proposed Independent Contractors Act.

Disturbingly, "Independent Contractor" groups have been established by Employer and Liberal Party interests for political purposes to create (among other Employer focussed agendas) a false impression that Independent Contractors want the right to sign away existing rights, including inalienable rights at Common Law and fundamental Human Rights established under International Conventions to which the Commonwealth is a signatory.

There is a desperate need (in the IT Industry at least) to "clean up" the area of Independent Contracting, but not the way the Liberal Party want to do it, which further legally isolates the already isolated contract worker from seeking redress from the Principal. Significantly, Independent Contractors must have the right to sue Principals for compensation by

- recognising the tripartite (or more) nature of Independent Contracts, and thus
- recognising the Principal has a vicarious liability to the Contractor.

However, the Liberal Party Election 2004 policy to establish the proposed Independent Contractors Act was mooted by Employer interests not Independent Contractors. The Liberal Party policy propaganda claims in high praise of itself that:

***"Employers and employees covered by the Workplace Relations Act 1996 enjoy the freedom to tailor their workplace arrangements to meet their particular circumstances."***

and later proclaims in gobbledegook, doublespeak and damning testament against the above that:

***"A party's freedom to contract must be upheld and there must be certainty in commercial relationships".***

thus bearing witness against themselves that the Reith Workplace Relations reforms of 1996 do not uphold freedom to contract (whatever that means) or provide certainty in commercial relationships (whatever that means)! No evidence is provided either, that Independent Contractors need or want any such "freedom to contract". In any case, market forces dictate that Labour Hire workers do not have any power of themselves to negotiate whatsoever.

In practice, Independent Contractors have even less negotiating power than employees. The contract is simply put on the table by the Agent as "our ***standard contractor agreement***" and if the worker doesn't sign it the Agent will be quite happy to never trouble them again for work.

Historically, the whole point of Unions has been to protect the interests of the worker. It seems the Howard Government now wishes to ignore history, and the Unions, and the Labor Party, as if their contribution is worthless. Surely this is turning back the clock ?

Independent Contractors already have the “freedom to contract”, and, one would have thought, quite obviously.

Independent Contractors do expect the freedom to **negotiate better conditions and enforce compliance**, but are being misled into accepting worse conditions with no Government provided Industrial protection against breaches.

Apart from being permitted by the proposed Independent Contractors Act to avoid the last remaining Industrial law rights, it seems Independent Contractors will also be permitted by this Act to avoid (among other things) their community obligation to contribute to their own superannuation. This imposes future pension burdens on the rest of the community and allows (at least some) Independent Contractors to effectively “double dip” in retirement. Yet the Liberal Party want to enshrine and protect the right of Independent Contractors to avoid superannuation and take the pension!

Independent Contractors want a minimum standard of same or similar conditions of employment, with the right to amend by negotiation some of the terms, but not inalienable rights. Independent Contractors want higher pay as an incentive to take on temporary employment, self education, specialised skills, greater risk (etc). These things are self evident and obvious.

Independent Contractors **do not** want the Liberal Party / Employers brand of “freedom”, which is the “freedom”:

- to avoid payroll tax,
- to avoid superannuation obligations,
- to avoid protection at Equal Opportunity law,
- to avoid protection at Occupational Health and Safety Law,
- to avoid the right to seek a Principal’s compliance with a contract under Industrial law,
- to avoid the right to negotiate better terms,
- to avoid the right to sue for compensation from the Principle, not the Agent, for breach of contract.
- (etc)

Those are things Employers want to avoid.

Independent Contractors do not want to avoid any of the above. Independent Contractors very much want all of the above. Again, these things are self evident.

Is it not therefore, quite obscene that the Liberal Government now has absolute power, and yet is completely incapable of sufficiently registering the implications of that fact to want to find out, or to know, or to deliver, what the key stakeholders actually want? Power corrupts, and absolute power corrupts absolutely.



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**Disclosure:** Professional Affiliations: APESMA, IEEE  
Political Affiliations: Independent Candidate, 2004 Federal Election, Seat of Stirling