

COMBINED SMALL BUSINESS ALLIANCE OF WESTERN AUSTRALIA INC.
SUBMISSIONS ON
INDEPENDENT CONTRACTING AND LABOUR HIRE ARRANGEMENTS
to
The House of Representatives Standing Committee on
Employment, Workplace Relations and Workforce Participation

Further to the invitation from the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation (The Committee), the Combines Small Business Alliance of Western Australia Inc. (CoSBA) hereby makes the following submissions to its enquiry on "Independent contracting and labour hire arrangements":

1. CoSBA is a peak small business organisation representing 32 affiliated business associations, local chambers of commerce, industry associations and other incorporated organisations that exist to support and assist small business.
2. Affiliates of CoSBA have a combined membership comprised of an estimated 3,200 employers, with a conservatively estimated annual turnover of \$800,000,000, employing an estimated 16,000 employees.
3. A substantial number of members of our affiliates, with the difficulties experienced with the current industrial relations laws in Western Australia (WA), have opted to engage their employees under the federal Australian Workplace Agreements and Certified Agreement arrangements. Over the years many have sub-contracted out their services, however as a result of the current draconian and repressive WA industrial relations laws together with the move by the federal Government to deregulate the labour market there is currently an increasing incidence of sub-contracting out of services.
4. Whilst sub-contracting out of services is in many respects an attractive option for the members of our affiliates to conduct their businesses, it does come with a number of difficulties and concerns, many of which are not new, and have in the past been addressed to the federal Government, with seemingly little or no outcomes.

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5. In that regard we refer to the recommendations contained in "Time for Business", the report of the small business deregulation task force, November 1996, ("the Bell Report").

6. In the first instance we refer to the question "Who is an employee?" at p.51 of the Bell Report, which states:

"The definition of an employee is a major concern for small business in regulations including PAYE or group tax deductions, pay-roll tax, workers compensation, superannuation and fringe benefits tax.

There are two key issues that business must consider when employing people:

- is this person an employee or a contractor and for which regulatory purpose?; and
- how do I determine the relevant taxes and charges, and what is the base for calculation purposes?

This requires the employer to decide questions of law without the necessary expertise; and increases the risk associated with operating the business. The task is even more onerous where there are employees working in more than one State or Territory.

Increasing numbers of larger businesses require small businesses and independent contractors to incorporate so that those contracting their services are able to avoid the costs that flow from deeming provisions. Where small businesses accede to this requirement, additional compliance obligations are inevitable."

7. With subsequent changes to the Corporations laws that simplify the provisions for small businesses to become corporations, in particular that of the "single director" company, that concern has become a less onerous one. However, other issues have at the same time become much more onerous, in particular those of the definition of contractor/employee and the consequential tax ramifications, notably that, in our circumstances, WA State pay-roll tax, which shall be canvassed further on in our submissions.

8. Also, as many sub-contractors choose not to become corporations and operate as natural persons as a partnership and sole trader, are assisted with the new taxation laws and operating under an Australian Business Number (ABN).

9. The issue that has become of major concern is the definition of contractor/employee or "employee like contractor". In that regard the Bell Report made specific recommendations that, if adopted, we suggest would have to a large extent alleviated the current onerous situation. The Bell report recommended:

“Recommendation 9

That the States and Territories accelerate and intensify cooperative efforts to develop uniform definitions of the payroll tax base, including a common definition of employee, and harmonise legislation and administrative arrangements with the objective of achieving national consistency in the 1998-99 financial year.

That the Commonwealth support and facilitate this process.”

And,

“Recommendation 14

That Commonwealth, State and Territory governments develop:

- a matrix of employer obligations under existing relevant Commonwealth, State and Territory regulation to be made available to small business operators by 1 July 1997; and
- a single objective definition of employee and definition of those groups who will be treated as employees for the purposes of all regulation.

That these definitions be included in relevant legislation during the 1997-98 financial year, and an updated matrix published of employer obligations made available to reflect the new definitions.”

10. Subsequently, the issue of contractor/employee or “employee like contractor” was raised as a concern and addressed in “Under the Microscope – Micro Business in Australia”, the Report of the Micro Business Consultative Group, February 1998, which at pp. 82/3 stated:

“Definition of an Employee

One of the most prominent problems encountered by micro businesses is the different definitions of an employee. The presence of multiple definitions of an employee in the legislation of various states and territories creates particular problems for micro businesses as each definition imposes its own set of obligations and requirements on the employer. If there was one definition of an employee across all areas of the law such as payroll tax, group tax, income tax and superannuation guarantee it would be far easier for micro businesses to understand when tax is required to be deducted, superannuation guarantee contributions made and a range of other responsibilities met.

In this regard, we welcome the Commonwealth Government's initiative to establish a matrix outlining all the definitions of an employee. We also encourage the Government to use such a matrix to develop a common definition of an employee and believe that there should be a commitment to standardising legislative definitions balancing the operational efficiency of a business with the rights and conditions of employees and subcontractors.

An example of the difficulties created by multiple definitions of an employee is in the area of taxation. In certain circumstances, subcontractors may be deemed employees. This is, however a very grey area as to when it occurs and what should be deemed to be the nominal 'normal wage' to apply. The ATO has been instigating cases against employers and the fining both the employer (for being incorrect in the ATO's eyes) and the 'deemed' employee (who, as contractor, has claimed superannuation costs as a self-employed person).

The Group notes that this issue has been addressed by the Small Business Deregulation Taskforce and the *More Time for Business* statement. We encourage the Government to monitor developments in this area to ensure a positive outcome for all businesses, including micro businesses.”

11. Further, the Courts and industrial relations Tribunals have and are continuing to create major problems in defining the nature of a relationship, principal among them is the High Court of Australia Decision in *Hollis v Vabu Pty Ltd* [2001] ALJR 1356 (HC), and in Western Australia the Decision of the Full Bench of the Western Australian Industrial Relations Commission in *Brian Ryder v Beaulieu of Australia Limited* [2003] FBA 2 of 2003 (83 WAIG 1133), which set a significant precedent as the Applicant/Appellant was in fact a corporation.

12. Major problems are also created by the requirements of federal and State taxation laws, as identified at p.51 of the Bell Report which states:

“The definition of an employee is a major concern for small business in regulations including PAYE or group tax deductions, pay-roll tax, workers compensation, superannuation and fringe benefits tax.”

And,

“In these situations the regulations are working against the viability of small businesses and dictating the structure of their business arrangements. To overcome these difficulties governments should agree a common core definition of an employee based on objective criteria. The current common law definition is not a good base as the existing tests developed by the courts are subjective and their interpretation varied. It is unrealistic to expect small business to apply the current common law tests.”

13. Also, the Bell Report, at p.51 in reporting on submissions made the Small Business Deregulation Task Force, records:

“Submissions in relation to payroll tax asked for harmonisation across the States and Territories, particularly the adoption of a common tax base, definition of employee, and an alignment of administrative arrangements. Victoria, New South Wales, Queensland, the Australian Capital Territory and South Australia are already involved in a preliminary review of payroll tax to examine issues such as:

- contractor provisions and the definition of employer/employee relationships;
- the definition of wages;
- employer grouping provisions; and
- administrative arrangements, such as returns.

The Task Force strongly supports these cooperative approaches, and has recommended in this report the adoption of a common core definition of employee across all jurisdictions, Commonwealth as well as State (Chapter 4). The Task Force also recognises that the ability to vary payroll tax rates is an important factor in competition between the different States and Territories to attract business. However, the lack of harmonisation of the base on which payroll tax is levied and its administration is a disincentive to business expansion and imposes major compliance costs on those affected. Small business does not believe that the level or pace of reform in this area is sufficient.”

14. The Australian Taxation Office has produced an “employee like contractor” model/matrix that assists an “employer” to make a judgement as to whether a natural person operating as a sole trader it has engaged or intends to engage, for the purpose of the requirements of the ATO, is an employee or contractor/employee like contractor.

15. Conversely, the State Tax Office of Western Australia (STO), has no model like that of the ATO, and provides no guidelines to businesses as to those that it deems as “employee like contractors”. In fact the current Western Australian Government when first elected in 2001, without the need for any legislative changes whatsoever broadened its interpretation of an “employee”, for pay-roll tax purposes, in order to rope in what it deems to be “employee like contractors” so as to increase its pay-roll tax take, and at the behest of the unions, to discourage “employers” from engaging natural persons operating as sole traders contractor/employee like contractors. The subjective interpretation and application of what constitutes an “employee like contractor” lies solely with the STO and is not subject to appeal.

16. Except, in the area of the changes to the Corporations laws, discussed in ¶7 above, the new taxation laws and operating under an ABN, discussed in ¶8 above, and the ATOs “employee like contractor” model/matrix discussed in ¶14 above, little has changed for the better in the nine years since the production of the Bell Report in 1996, in fact it would be suggested that the situation has become worse, and of a substantial detriment to the flexibility for small business to freely make decisions as to the conduct of business in a market economy.

17. It is therefore CoSBA’s submissions that, in keeping with and the advancement of the federal Government’s policy of labour market reform and deregulation, the recommendations contained in “Under the Microscope – Micro Business in Australia”, and in “Time for Business”, be adopted and legislated without further delay. In particular that which was recommended nine years ago, at p.51 of the Bell, Report which stated:

“In these situations the regulations are working against the viability of small businesses and dictating the structure of their business arrangements. To overcome these difficulties governments should agree a common core definition of an employee based on objective criteria. The current common law definition is not a good base as the existing tests developed by the courts are subjective and their interpretation varied. It is unrealistic to expect small business to apply the current common law tests.”

18. Turning to the issue of labour hire arrangements, as there is a low incidence of the usage of labour hire by members of CoSBA affiliates, concerning which there have been no reported difficulties, we would therefore makes no submissions.

OLIVER MOON

Chief Executive Officer

2 March 2005