The Secretary
Standing Committee on Employment, Workplace Relations and Workforce Participation
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INDEPENDENT CONTRACTING AND LABOUR HIRE ARRANGEMENTS

The Small Business Development Corporation (SBDC) welcomes the opportunity to make a submission to the inquiry into independent contracting and labour hire arrangements.

The SBDC is a Western Australian statutory government agency incorporated under the Small Business Development Corporation Act 1983. The SBDC provides advice and assistance to new and existing small businesses in Western Australia. The SBDC also monitors and comments on policies and legislation that impact on the growth and development of the small business sector in this State. In addition, the Corporation supports a network of 35 independent Business Enterprise Centres across the State.

The SBDC is concerned that some proposed changes in state government policies in recent years appear to be intent on moving independent contractors into the regulatory regimes of industrial relations legislation and forcing independent contractors within the ambit of employee-oriented occupational health and safety regimes.

It appears that the jurisdictions involved share concerns that the separate status of independent contractors, whether contracting to labour hire firms or pursuing their own direct sub-contract arrangements, will somehow have adverse impacts in terms of Occupational Health and Safety (OHS), Taxation and Insolvency legislative and regulatory requirements.

There have also been suggestions that because independent contractors are not protected in the same way as employees, particularly because of a claimed lack of adequate dispute resolution mechanisms and alleged unfair pricing for their contracts, they need the protection of ‘employee’ status to redress the perceived imbalance.

Essentially, the SBDC believes that the status of independent contractors is 'under attack' because some State Governments perceive that:

1. Recognising that independent contractors are not employees might create uncertainty about the application of OHS laws and leave independent contractors exposed to workplace hazards because it is not clear who directly owes a duty of care towards them.

2. Independent contractors are not adequately protected under insolvency laws when a prime contractor or client fails and they would be better off as 'employees' when it comes to receiving a share of 'wages' and other entitlements from the insolvent firm.

3. According independent contractors the right to commercial and taxation-type treatment, particularly for labour hire firms, might impact adversely on governments' capacity to maximize payroll tax revenue.

4. Independent contractors are at a disadvantage in negotiating fair rates with clients and do not have easy access to contract dispute resolution mechanisms.

The SBDC does not agree with these perceptions and strongly believes that people must be free to choose what arrangements best suit their needs, whether that is independent contracting, labour hire firms or employment.

Regulatory regimes should ensure that contracts of service (employment) are dealt with under employment legislation and that commercial contracts are dealt with under appropriate commercial legislation, with minimal overlap between the two systems. In that way, independent contractors and employees can be afforded effective legal protection through systems appropriate to their specific status.

Over the last 20 years there has been a large increase in the number of people working as independent contractors under contracts for services, to the point where about 23% of the Australian workforce is classified by the Australian Bureau of Statistics as being self-employed or independent contractors.

The increase in independent contracting can be seen particularly in business sectors such as:

- home based businesses and work from home arrangements;
- independent contractors in the labour hire industry;
- contracting in the Information Technology (IT) sector;
- contracting in the road transport and courier industries;
- franchising in the retail and service sectors; and
- contracting-out by government and the private sector.

Distinguishing Independent Contractors From 'Employees'

The common law definition has traditionally been the starting point for determining independent contractor status and the SBDC believes that the definition is clear and relatively comprehensive.

A contractor is defined as a person working under a contract for services in the capacity of an individual, partnership, company or trust. The terminology for an individual entity can vary, depending upon the industry involved, and terms such as independent contractor, contractor or self-employed are often interchanged to describe business arrangements.

Labour hire arrangements, on the other hand, typically involve at least two contracts. A user of labour (the client) contracts with a labour hire firm for the provision of labour of a specified kind. The labour hire firm does not contract to perform the work; it merely contracts with the worker and pays the worker. The worker is not an employee of the client and there is no contract between the worker and the client. The worker may or may not be an employee of the labour hire firm.

By contrast, it is clear that an individual working under a contract of service, where control of the person's work is exercised by an employer, is an employee. This is the essence of an employment contract and is quite distinct from a contract for services which is a commercial contract where control of the work is exercised through the terms of the contract and both parties have an equal right to control the terms through the offer and acceptance process.

Both types of contract are comprehensively regulated through statute and common law. Courts and legislation generally are unlikely to interfere with or pre-determine terms for contracts for services. It is also unlikely that courts would uphold contract terms that are unconscionable, have been entered into under duress or involve illegality. Independent contractors are able to protect their rights by taking disputes to court or tribunals for settlement and the SBDC believes that the remedies available are, in the main, adequate for the purpose without trying to shift disputes into the realm of industrial relations (employees) law.

It is evident that employees rights under contracts of service are relatively well protected through industrial relations legislation, based on the premise that employees are vulnerable at law because of the control exercised over them by employers. Industrial relations law seeks to redress the unequal bargaining power that employers might otherwise enjoy through their capacity to control all the employment contract terms. An employee is also normally under the control of a sole employer whereas an independent contractor typically is engaged under multiple contracts, sometimes undertaking more than one at the same time.

Governments have traditionally recognized the social and economic importance of maintaining the distinction between the two contract types, particularly the contract for services which promotes commercial activity. Regulation of parts of contracts for services as if they were employment contracts could undermine business activity and lead to commercial uncertainty.

Proposed Changes In Other Jurisdictions

The SBDC is concerned that some jurisdictions in Australia might seek to subvert the right of independent contractors to business-type tax and legal treatment by artificially forcing them into employee-type tax and legal treatment arrangements.

The SBDC considers that this is unnecessary and could set unfortunate precedents for other states to follow, based on an incorrect set of assumptions that independent contractors would somehow be better off.

The SBDC is aware that jurisdictions in South Australia and Queensland are moving towards changing the way businesses in sectors such as Information Technology (IT) operate. Proposed South Australian industrial relations legislation would appear to restrict the widespread use of sub-contracting.

For example, where a major computer or telecommunications company is contracted to perform work and then puts out work to other firms on a sub-contract basis, and these sub-contractors in turn further sub-contract some of their work, there could be resultant uncertainties about traditional independent contractor status.

Under the proposed South Australian legislation, if there are contractual problems or disputes at the lower levels of the sub-contracting chain the principal company that issued the prime contract can be held responsible. This essentially ignores the separate legal status of the sub-contractors throughout the chain as independent contractors, with access to a full range of common law remedies to address whatever the contractual dispute or issue might be.

In Western Australia, for example, the Construction Contracts Act 2004 provides for a rapid adjudication process for independent contractors in the building and construction sector. An experienced and independent adjudicator can review a claim for payment, and where satisfied that some payment is due, make a binding determination for money to be paid at any point in the sub-contract chain, thereby recognizing each independent contractor as a distinct legal entity.

New South Wales and Victoria had previously introduced legislation similar to the proposed South Australian model which confined its application to the textile, clothing and footwear industries. The legislation is claimed to have impacted adversely on the legal status of sub-contracting in those industries.

The SBDC understands that South Australia also intends to give courts the power to declare a company or a trust as an employee in order to give increased protection to independent contractors for OHS coverage and to overcome perceived problems for contractors to negotiate appropriate rates for their services and have access to dispute resolution procedures.

The Independent Contractors of Australia Association (ICA) believes that this would create great uncertainty in a wide range of small business areas and has argued that the government is likely to breach International Labour Organisation (ILO) requirements and common law if it proceeds. The ICA further contends that the housing, construction, IT, home-based business and accounting sectors would be particularly adversely affected by this 'deeming' provision.

The South Australian legislation intends to insert a new definition of 'outworker' which could also be seen as an attack upon the status of independent contractors and the certainty of commercial contracts. The definition of 'outworker' would apply to a wide and potentially unrestricted group of self-employed people working from home or in any premises not that of a business client. The definition would cover all IT professionals working from home, accountants, bookkeepers, work-from-home salespeople and anyone defined as doing "clerical work" or processing or packing articles or materials. Consequently the definition would encompass many existing types of independent contractors.

NSW and Victoria also have 'outworker' legislation but it is specifically directed towards outworkers in the clothing manufacturing industry. The South Australian 'outworker' provisions represent a significant departure from the 'outworker' legislation in the other states.

The SBDC is concerned that broadening the 'outworker' classification could adversely impact on the freedom of independent contractors to structure their own work arrangements to best suit their circumstances. It could also cause problems if picked up by other jurisdictions.

The essential element of being an independent contractor is that the person, operating as an individual or through a corporation or trust, undertakes work through the commercial contract and has protection through the commercial contract. 'Outworker' provisions such as proposed in the South Australian legislation would remove those protections for independent contractors who fall within the 'outworker' definitions and might cause them to be denied access to potential clients.

The SBDC believes that governments seeking to improve commercial contract security could do this more appropriately through other commercial regulations rather than seeking to achieve regulatory outcomes through industrial relations type legislation.

Payroll Tax Issues

The SBDC is concerned that some governments might be tempted to restrict the rights of independent contractors, particularly labour hire firms, to commercial and taxation-type treatment because it could impact adversely on governments' capacity to maximize their payroll tax revenue.

In most states, small businesses with wages bills of between a $500,000 and $1 million threshold are exempt from payroll tax. Victoria and NSW currently have legislation such that when a small business uses labour through a labour hire organization the $500,000 limit still applies. The ICA claims, however, that the Victorian government believes that it can raise significant additional revenue by applying the $500,000 limit to the labour hire firm, not the individual enterprise.

NSW is understood to have taken a different approach, allegedly as a result of staff in major labour hire firms starting their own businesses to establish many small labour hire companies to take advantage of the payroll tax limit. Tasmania, by contrast, is said to have the highest number of labour hire firms per head of any state.

The SBDC understands that most states have been gradually increasing payroll tax thresholds, with a view to eventually removing the tax (subject to satisfactory Commonwealth/State revenue arrangements), or at least ensuring that its impact is confined to very large enterprises.

Accordingly, the SBDC believes that it would be self-defeating were governments to seek to maximize payroll tax revenues through artificial constraints that effectively penalize the activities of labour hire firms and reduce the significant contributions to economic activity and contracting efficiency that labour hire arrangements can deliver.

Occupational Health And Safety (OHS)

The SBDC believes that changes could be made to OHS laws to better accommodate and protect independent contractors without seeking to diminish the status of independent contractors by deeming or treating them as 'employees' to conform with current legal conventions about the nature and responsibilities of the 'duty of care' owed to people at work.

OHS laws tend to be structured around 'employment language' and are currently the subject of review in some jurisdictions, including Victoria and South Australia. OHS legislation almost universally identifies 'controllers' of worksites by describing them as 'employers' and describing the persons to whom 'employers' owe a duty of care as 'employees'. To include others who are not employees, legislation generally attempts to describe contractors and others under 'employment deeming' type language.

The ‘employment deeming’ approach creates potential confusion about the duty of care, its scope and to whom it is owed. Particular types of persons may be overlooked in OHS legislation. For example, the identification of the ‘employer’ as being in control of the worksite means that others who are not employers, but who exercise some form of control over a worksite, may escape their duty of care.

It is necessary that OHS laws recognize the changing nature of how work is organized in society, particularly the emergence of a growing independent contractor sector. It would be preferable for government jurisdictions to try to understand the changing work environment and to work towards amending legislative and regulatory requirements accordingly.

The SBDC believes that general OHS practices could be aligned with the so-called ‘Robens principles’ (developed in the United Kingdom in 1972) such that:

1. A general duty of care is imposed on those having control over aspects of the workplace, backed by detailed regulations and codes of practice.

2. A principal OHS Act codifies the duties of care owed under common law, such that the duty is imposed on employers, the self employed, owners, occupiers of premises and suppliers. The duty is owed to both employees and others (workers other than employees) that may be affected by the worksite activity or equipment. Workers have obligations not to put others at risk and to obey the reasonable instructions of their employer in relation to OHS.

The SBDC is, consequently, opposed to a trend in some jurisdictions for independent contractors to be bundled within the generic description of ‘precarious’ or ‘contingent’ employment, with the inherent suggestion that worker injury under ‘precarious employment’ is higher than under full-time permanent employment. ‘Precarious employment’ is also understood to incorporate temporary and on-call workers plus labour hire or fixed-term contract workers.

The use of the term ‘precarious employment’ to describe independent sub-contractors is misleading because it suggests there are significant OHS disadvantages for the nearly 49 per cent of the workforce who are not in permanent full-time employment, as accepted under the common law definition. Governments following this logic assume that all people engaged in ‘precarious employment’ need to be protected within the ambit of OHS laws applicable to employees.

The SBDC does not support this view. Neither does the International Labour Organisation (ILO) which recently concluded that self-employment (independent contractors) is not within the definition of employment and hence by definition not appropriately classified as 'precarious employment'. The ILO stated that "self-employment and independent work based on commercial and civil contractual arrangements are by definition beyond the scope of the employment relationship".

The SBDC also does not support concerns raised about labour hire system to the extent that workers in labour hire arrangements are said to:

- sustain more serious injuries or are less willing to lodge minor injury claims;
- be unlikely to speak out against breaches of OHS law; and
- have limited access to training and few opportunities for skills development.

The ICA believes that due to the difference between employment and independent contracting, independent contractors have a higher responsibility at law and in managerial terms to adhere to OHS and consequently should produce better OHS outcomes than employees.

The Productivity Commission recently noted that the National Research Centre for Occupational Health and Safety Regulation concluded that there is a need for OHS regulators to pay greater attention to work relationships outside the traditional employment relationship – 'regulators should develop standards, guidance material, inspection programs and enforcement strategies that accommodate sub-contracting, labour hire, home based work and franchise arrangements'.

The SBDC accordingly endorses the view that accommodating the new work arrangements is more likely to improve OHS outcomes than seeking to ignore the reality and extend the coverage of employee-based regulations. Terminology in OHS legislation should therefore not be employment-dependent but drafted in language consistent with OHS principles, that is to keep all workers safe.

The Queensland Department of Industrial Relations has suggested that one possible solution to avoid the complexity of 'deeming' independent contractors as employees is to "abolish the concept of imposing an obligation on an 'employer' and substitute instead the notion of placing an obligation on all 'persons' to ensure the health and safety of the person's workers in the concept of the person's undertaking". The SBDC supports this approach.

The SBDC also believes that the conceptual approach used by the Tax Office (ATO) under the Pay as You Go (PAYG) tax system could provide scope to resolve some of the confusion and inconsistencies coming into OHS legislation.

Changes to the tax rules in 2001 were intended to clarify and create higher levels of certainty in tax treatment for people who earn their incomes as a small business. The new levels of clarity are predicated on three tax categories or definitions:

- business;
- personal services business; and
- personal services income earner.

The new tax rules to modernize the income tax withholding system addressed a major issue where the trend away from employment to small business independent contracting in the 1980s and 1990s blurred the line between business tax treatment and employee tax treatment – with the result that some people were unfairly advantaged through being able to pay less tax than others in 'similar' situations.

Essentially, the tax reforms were designed to recognize the new forms of work arrangements presented through independent contracting. Rather than fitting independent contracting into existing 'employment related' tax rules, the new PAYG system used legislative and administrative changes to accommodate the new work forms by imposing withholding obligations in three ways:

- Where there is 'traditional' employment, the obligations for withholding apply to the employer. Under employment labour hire, where the labour hire business is the employer, the withholding obligations apply to the labour hire employer.

- Where there is direct independent contracting, the obligation for withholding rests with the independent contractor when the contractor supplies an ABN to the client. Where no ABN is supplied, the client has withholding obligations.

- Where independent contracting occurs through labour hire, the independent contractor does not require an ABN and withholding obligations apply to the labour hire company.

The PAYG system resolved the legislative problems the ATO faced without distorting new forms of work arrangements and used employment-neutral terminology. Under PAYG the 'general duty' is the withholding obligation, under OHS presumably the 'general duty' is the prevention of workplace injury. The ATO dealt with the problem by recognizing other work arrangements, rather than simply 'deeming' employment status, under its PAYG rules.

The SBDC believes that OHS regulators should consider the ATO approach to achieve appropriate and consistent regulatory design, without being limited to using the concept of 'employment' as a cover all approach. The OHS regulatory environment should look to its specific and particular objectives and seek to take account the new forms of work arrangements represented by labour hire and independent contracting and align these arrangements with the specific regulatory objectives.

It would be appropriate if jurisdictions around Australia could review OHS legislation in line with the ATO approach of recognition and accommodation, rather than the 'deeming' of employment relationships into situations that are inconsistent with traditional employer/employee arrangements

Insolvency Laws

Most independent contractors are in the position of being unsecured creditors when faced with clients that become insolvent. It is likely that independent contractors will increasingly be faced with becoming creditors of insolvent firms, given the trend towards contracting in the Australian workforce.

Where independent contractors are faced with non-payment of an account, or a contract dispute, they would normally seek redress through commercial legal avenues, but certainly never through 'industrial relations' avenues. When considering the impacts of insolvency on individuals, the independent contractor is always in a different situation to employees because independent contractors usually have the status of unsecured creditors and are not entitled to the special arrangements sometimes afforded to employees to guarantee their wages and other entitlements.

There is a perceived lack of equity in this situation, particularly in circumstances where some government jurisdictions seem intent on bringing independent contractors within the ambit of employee-based OHS and industrial relations legislation – for everything except fair treatment under insolvency laws.

The SBDC understands that there are proposals to extend employees' rights over the residual funds of insolvent companies by giving employees more priority over other creditors than is currently the situation. This could create further inequity for the treatment of independent contractors.

The SBDC, however, does not support the view that this situation could or should be remedied by shifting independent contractors into the position of employees, thereby giving them greater claim over the remaining funds of the insolvent company, but at the same time adversely impacting on the ability of independent contractors and labour hire firms to structure their business operations as they see fit.

In this respect there is a fundamental difference between contractors, who in many instances are able to spread risks and losses over several contracts, and employees, who are financially dependent on a single employer and therefore more vulnerable in an insolvency situation.

Workers' Compensation

The issue of workers' compensation for independent contractors and labour hire workers is a matter that requires the application, and if necessary development, of clear and certain guidelines, across all jurisdictions in Australia.

In Western Australia, it is compulsory for all workers to be covered by workers' compensation insurance. Under the Workers' Compensation and Rehabilitation Act (the Act), the definition of "worker" includes not only fulltime workers on a wage or salary and a range of casual/seasonal workers, but also working directors – people who have some ownership of the company and are also "workers" as defined under the Act and can therefore be insured under the workers' compensation system. This brings independent contractors within the ambit of the Act and allows them to take out workers' compensation insurance for themselves, if they so choose. Labour hire workers are also covered for workers' compensation under the Act.

Independent contractor's workers are covered under the Act (section 175) where both the principal and the contractor are liable to cover any workers the independent contractor may employ. Both parties are jointly and severally liable to cover the contractor's workers so each must have a workers' compensation policy. If the contractor in turn sub-contracts the work to a sub-contractor, then all parties, including the principal, the contractor and the sub-contractor are liable to cover any workers the sub-contractor may employ.

Under WA's "no fault" workers' compensation scheme, employers are protected from claims for injuries incurred by workers in the workplace. As the workers' compensation legislation extends the definition of "worker" to include independent contractors and labour hire workers, public liability claims for injuries can only be brought against a company if the worker can prove negligence by the employer. Consequently public liability claims by labour hire workers is not an issue in Western Australia.

The SBDC believes that the WA workers' compensation system offers certainty for independent contractors and labour hire workers such that it is generally clear cut who is responsible for workers' compensation if a contractor is working on site or through a labour hire company. These principles should be common through all Australian jurisdictions.

In conclusion, the SBDC believes that the Australian Government should take the lead, if necessary through legislation and at a minimum through a process of education and guidance, to ensure recognition of the basic legal status of independent contractors (and labour hire firms) and also guarantee that their status is not eroded by state jurisdictions seeking to force independent contractors into becoming employees.

The SBDC also believes it is in the national interest that independent contractors across all jurisdictions enjoy the same basic rights that include:

- determination of their status as workers under 'contracts for services' only by independent court rulings drawing on common law and current ILO conventions; and
- commercial-type tax and legal treatment as applicable to all entities working under contracts for services and not being forced into employee-type tax and legal treatment.

The SBDC appreciates the opportunity for input into the Committee's inquiry and looks forward in due course to its report and outcomes. Should you wish to discuss these issues further please contact Juliet Gisbourne, Director Policy and Business Liaison on (08) 9220 0204.

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