
**NFF submission to the DEWR
Discussion Paper on Proposals
for Legislative Reforms in
Independent Contracting and
Labour Hire Arrangements**

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CONTENTS

INTRODUCTION	3
AGRICULTURAL WORKFORCE	5
RESTRICTIONS ON CONTRACTING AND LABOUR HIRE ARE FLAWED	7
NEED FOR COMMONWEALTH GOVERNMENT INTERVENTION	9
RESPONSE TO QUESTIONS RAISED IN THE DISCUSSION PAPER	10

INTRODUCTION

1. The National Farmers' Federation (NFF) seeks to provide a response to the Department of Employment and Workplace Relations Discussion Paper on Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements.
2. NFF strongly supports the ability of the workforce to be coordinated through independent contracting and the use of labour hire firms.
3. While not precisely quantified, NFF believes there is a significant usage by farmers of independent contractors and labour hire firms for work undertaken on Australian farms.
4. The strength of independent contractors and labour hire firms is important for the agricultural industry due to the seasonal nature of the industry.
5. NFF supports the importance of flexibility and independence of contractors and labour hire firms as a viable alternative to direct employment for farmers'.
6. NFF supports the concept of freedom of contract and that actions should not be taken to restrict the principles of freedom of contract.
7. NFF is highly critical of the moves by a number of State and Territory Governments to restrict the traditional role of independent contractors and labour hire firms.
8. NFF supports the concept of an Independent Contractors Act as outlined by the Federal Government during the 2004 Federal

Election as a mechanism to confirm and protect the inherent concepts of independent contracting.

9. NFF considers that the role of an Independent Contractors Act is to acknowledge the common law principles of Contracts and to override the actions taken by any State or Territory jurisdiction to restrict the ability to contract services.

AGRICULTURAL WORKFORCE

10. The most recent figures from the *Australian Bureau of Statistics, Australian Labour Market Statistics, Category 6105.0*, record 313,300 people employed in agriculture as at November 2004.
11. Before the drought agricultural employment was around 390,000 (*Australian commodities, abareconomics* , vol 12, no 1, March quarter, table 10, p 239).
12. In terms of a breakdown of independent contractors and employees of labour hire companies in agriculture, there is insufficient data available other than approximately 14.5% of employed persons in the agricultural industry identify themselves as self-employed contractors (*Productivity Commission Staff Research Paper, Self-Employed Contractors in Australia: Incidence and Characteristics, September 2001*). This would not cover employees of contractors or labour hire firms.
13. It is considered by NFF that since the prolonged drought there is now even greater uncertainty as to the ability of farmers to provide continuity of employment, which is likely to see an increase in the use of independent contractors and labour hire firms in the agriculture sector when labour or specialist services are required on the farm in lieu of direct employment.
14. It is assumed that independent contracting and labour hire employment would be prevalent in all industries in agriculture with tasks covering the full spectrum of agricultural work but can include:
 - ◆ Shearing & wool classing

- ◆ Fruit and Vegetable harvesting & pruning
- ◆ Crop & Cotton Harvesting
- ◆ Chemical Spraying
- ◆ Specialist services such as agronomy and artificial insemination
- ◆ Mustering

15. The agricultural industry has always relied on a well-organised and accessible contracting and labour hire services.

RESTRICTIONS ON CONTRACTING AND LABOUR HIRE ARE FLAWED

16. NFF submits that it is vital for the resolution of labour shortage problems currently being experienced in the agricultural industry are not hampered by unnecessary and flawed restrictions on the traditional way in which independent contracting and labour hire firms have operated.
17. NFF is critical of moves by the State and Territory Governments to introduce legislation to restrict and hinder the growth in contracting and labour hire arrangements.
18. NFF criticism relates particularly to deeming provisions.
19. NFF supports the importance of flexible workplaces that encourage productivity growth either through flexible employment arrangements and/or the ability to establish independent contracts or labour hire arrangements unfettered by regulation. In most circumstances, the restrictions placed on contracting/labour hire by State Governments remove the flexibility so desperately needed in a competitive international industry as agriculture.
20. Business should not be put in a position to defend themselves through an adversarial process to justify the contracting/labour hire arrangements they have put in place.
21. A recent example of the problems faced by the agricultural industry in terms of contracting and its interaction with State legislation is *The Australian Workers' Union, Queensland v Hammonds P/L & oths, No*

B885 of 1999, a decision of the Full Bench of the Queensland Industrial Relations Commission (the Hammond Case). The decision of the Commission is attached and marked A.

22. In the Hammond Case, the inflexibility of the state industrial award placed restrictions on the way shearing could be undertaken. To implement greater flexibility Hammonds P/L coordinated independent shearing contractors to shear and the arrangement was made in such a way that the contractors were not a party to the Award. The matter was disputed by the AWU and a particular issue was whether the arrangement evoked the definition of worker in the Queensland Industrial Relations Act 1999.
23. Hammonds P/L was successful in defending the arrangement, but NFF submits that such a process should not have been required in the first instance particularly when there was no complaint from the workers concerned.
24. A paternalistic approach to contracting/labour hire is simply not appropriate and is inconsistent with the capacity of business to operate in a global competitive environment.

NEED FOR COMMONWEALTH GOVERNMENT INTERVENTION

25. To encapsulate the premise of freedom to contract that enables parties to determine their own arrangements without paternalistic intervention of regulators, there is now a role for the Commonwealth Government to develop legislation to override recent legal developments that frustrate the very nature of independent contract arrangements.
26. NFF supports the proposal of the Commonwealth Government outlined during the Federal Election in 2004 (*Protecting & Supporting Independent Contractors, 26 September 2004*), that is, there is a requirement to introduce an Independent Contractors Act to ensure there is a concise national approach.
27. It seems incongruous that NFF seeks legislative intervention to remove the impediments of other legislative intervention but the importance of contracting and labour hire arrangements is a critical component of reform.
28. While independent contractors have been a traditional part of farming life, the prevalence and growth of labour hire firms is becoming increasingly important. The utilisation labour hire arrangements remove the administrative burdens of the requirements to employ. .

RESPONSE TO QUESTIONS RAISED IN THE DISCUSSION PAPER

29. In general terms, the NFF believes that the introduction of the Independent Contractors Act should be developed on the following principles:
- ◆ A simple legislative instrument that recognises the core components of the principle of freedom to contract;
 - ◆ That common law principles should be retained for the purposes of a definition of an independent contractor in the Act.
 - ◆ The intention of the parties to establish a contract of service is a strong indicator that a contractual arrangement is in existence.
 - ◆ There are no legislative provisions that overlap the contractual relationship with an employment relationship.
30. It is assumed in this submission that the Independent Contractors provisions will be contained in a separate Act and not simply a Bill to vary the Workplace Relations Act. NFF believes it is critical to maintain the separation of the contractual and employment relationships to the extent that regulation covering their operation is contained in separate legislative instruments.

31. In relation to the specific questions raised by the DEWR Discussion Paper, NFF responds accordingly:

Question 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?

Yes – existing provisions are contrary to the freedom to contract

Question 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, for the purposes of both the Workplace Relations Act and the Independent Contractors Act.

There is an opportunity within the Independent Contractors Act to enable a clear intention of the parties to enter into an independent contractual relationship to be deemed prima facie as evidence of a contractual relationship. That is, evidence of intent is a strong indicator that a contractual relationship exists.

Evidence of intention to enter a contractual relationship should be clearly expressed, such as a written contract.

A consequence of this principle is that any proponent questioning the contractual relationship will bear the responsibility to prove otherwise. That is, clear evidence of intention to contract reverses the onus of proof.

Question 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?**

No. There are many instances where independent contracting arrangements exist in the agricultural sector that would not pass the ITAA provisions but are consistent with the common law definition of an independent contractor.

A reliance on the ITAA would add complexity and confusion that should not occur within the Independent Contractors Act. There should be no dependency between these two very distinct legislative instruments.

Question 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 – see above.

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

No. The establishment of a Registrar would be an over-regulatory and cumbersome exercise, which again would be contrary to the freedom to contract.

The costs associated with an Independent Contracting Registrar would be passed onto clients of the contractor, creating a cost to the contractual relationship. Such action is contrary to the pursuit of a policy to reduce the burden upon those entering into an independent contractual relationship.

Question 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?

The object of the Workplace Relations Act must be amended to the effect that there is a clear distinction between an employment relationship and a contracting relationship. As such, the Act should specify that independent contractors must not be subject to industrial regulation. Instead, independent contractors should be subject to the Independent Contractors Act along with commercial and competition regulation.

Question 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?

Yes.

Workers' Compensation:

Existing State and Territory workers compensation legislation are frustrating for both contractors and their clients. In particular, deeming provisions are inconsistent with the principles of freedom to contract and duplicate costs.

The requirement for Workers Compensation coverage for independent contractors should only arise when the contractor as an entity employs people. In those circumstances it is the sole responsibility of the contractor as the employer to arrange workers compensation coverage.

If the contract is with an individual with no employees', insurance coverage for the contractor must be the responsibility of the contractor. That insurance could be either workers compensation or income protection insurance.

Occupational Health Safety:

While acknowledging that farmers are required to ensure that their farms are a safe workplace, NFF submits that contractors should be responsible for the area under their control, which includes their own actions and the actions of their employees (when relevant). This scenario is currently not the case in many jurisdictions leading to onerous and costly obligations on the farmer as the client.

Deeming provisions remove the responsibility from the contractor to the farmer, yet the farmer has no control over the work of the contractor. The current OHS structures in State legislation are contrary to the contractual responsibilities of the contractor.

Anti-discrimination and Equal Opportunity:

NFF does not support any deeming provisions that define independent contractors as employees for the purposes of anti-discrimination and equal opportunity. Such regulation is contrary to the principles of freedom to contract.

Question 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?

Yes. NFF submits that one of the key objectives of the establishment of an Independent Contractors Act is to override State and Territory unfair contract laws and deeming provisions.

The development of unfair contracts laws and deeming provisions in the State and Territory jurisdictions severely restricts the flexibility that exists in independent contracting and is contrary to the freedom to contract.

Question 9: Should the Federal Magistrates Court be given jurisdiction to review contracts?

Yes, with the potential to introduce a small claims style approach to minimise costs to both parties.

Question 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?

Yes— see response to Question 8.

Question 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.

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

No. The labour hire industry is already heavily regulated through existing provisions and will also be subject to provisions in the new Independent Contractors Act.

While acknowledging that there would be some benefits to farmers if the labour hire industry was regulated, there is always a significant cost in such regulation that will be passed onto the client. Hence a cost benefit analysis suggests that the added compliance burdens would outweigh the benefits of regulation.

Not regulating the industry does not preclude industry associations and governments undertaking education campaigns to minimise the potential risks in entering into a contract with a labour hire company.

Education could include the development of written contracts with penalties for a breach of a contract and how to check the bona fides of a labour hire firm.

Question 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.

Yes – as per question 1.

Question 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.

Question 15: Should ‘Odco’ arrangements be statutorily recognised in the Independent Contractors Act?

Yes.