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Submission to Productivity Commission Workplace Relations Review:

- Conflicting application of the Independent Contractors Act by government agencies
- Superfluous, onerous and counter-productive superannuation for contractors
- Massive project cost blow-outs driven by misapplication of Greenfields Agreement provisions

Good morning!

- Conflicting application of the Independent Contractors Act by government agencies

I operate as an independent industrial relations consultant in Mackay, Queensland, and represent clients throughout Australia, but primarily in the Central Queensland region. I advise a couple of hundred mostly small businesses, many of which operate as sub-contractors. My bigger clients have hundreds of employees, the great majority have less than 100 employees.

I have identified that a major impact on the productivity of many small contractors is the conflicting information coming out of the Department of Employment in relation to the Independent Contractors Act, and the totally conflicting approach on the same Act, being pursued by the ATO and FWO.

I have communicated with these three departments. The ATO and FWO confirm that they will not shift from their view, that they have the right to decide whether parties to a contract “should be” contractor/sub-contractor, or employer/employee, including vetoing contracts which have been in place for years, and retrospectively treating them contrary to the clear intention of the parties and their contracts. The ATO and FWO say that is clearly laid down in the Act. The Department of Employment (which is responsible for administering that Act) stated in reply to my inquiry, (copy attached) that:

“Neither the Fair Work Ombudsman nor the Australian Tax Office has the power to “veto” contracting relationships or assert that someone “should” have been engaged as an employee.”

Yet this is precisely what the FWO and ATO have consistently done for years, and continue to do. I believe both agencies are in breach of the Independent Contractors Act, which both seem to regard as irrelevant. Rather than repeat the whole debate, my full communication to Senator Abetz follows, and his reply to that is attached. The problem of course is that the various agencies have opposing views, and there appears no concern with that sad state of affairs, or any intention to correct it. Meanwhile people can enter genuine contracting arrangements, and years later the ATO can arrive, make their own assessment of various criteria, and decide that the parties “should be” employer and employee. They then prosecute the “employer” for failing to

comply with PAYG and superannuation requirements, and rescind tax deductions the “employee” was not entitled to.

You will note in the Minister’s reply it queries whether I have information of the Tax Office wrongly prosecuting people for “sham contracting”. They don’t prosecute for “sham contracting” they prosecute for entering a contracting relationship when the parties “should have been” employer and employee.

The approach contended by the Tax Office is entirely unworkable, thoroughly debatable and subjective. It creates massive uncertainty and potential jeopardy for parties wishing to enter contracting arrangements and is clearly a disincentive to doing business.

Importantly, because they fail to acknowledge the context of the court decisions on which their “criteria” are based the ATO relies on a very narrow set of cases which never considered the fundamental issues at all. None of the cases dealt with “what was the intention of the parties” or “what does the contract say” because the view of the ATO is that neither of these crucial aspects is actually relevant.

- Superfluous, onerous and counter-productive superannuation for contractors

I also highlighted the ridiculous provision that requires contractors to pay superannuation for sub-contractors who are paid “for labour only, or substantially for labour only”. The Minister’s reply notes that this was intended to ensure that businesses would not pressure individuals to become contractors rather than employees so the employers could avoid superannuation obligations.

Any business which is going to pressure someone into being a contractor in order to avoid paying super, is not going to just say “fair enough” and make them an employee. They are going to utilize the very debatable aspects of this legislation to engage them as contractors, and not pay super, by arguing that “they are not engaged for labour only”. I posed the question, if someone is engaged to do data entry, is that “labour only”? If they supply a vehicle and/or an amount of materials or consumables, when does that cross the line from one to the other? If they have a qualification, licence, endorsement etc without which they cannot undertake the work, can that be “labour only”?

So the upshot of it is that all the reputable businesses are penalized by having to pay and administer employment superannuation entitlements for someone who is not even an employee, while the shonks escape unscathed. There is legislation to curtail “sham contracting” in both the Fair Work Act and the Independent Contractors Act, and that is the way to deal with this issue, not dumping cost and pointless red tape and administration on businesses who arguable engage contractors “for labour only, or substantially for labour only.”

All the current approach says is that the government has no faith in the existing sham contracting provisions, or else they are not prepared to enforce them. Meanwhile they make it harder for small contractors to obtain work, because they bring an added cost and administration burden with them, or potentially another liability to the principal.

Aside of debating the question of “labour only”, there are numerous ways out for businesses to avoid paying super for contractors, and the first and most common, is for them to insist that the subbie form an actual incorporated business, rather than working as a sole trader or partnership. That practice is rife and unchallenged, and entirely effective in allowing those who would avoid

their obligations to do so. Flogging everyone else was not just naïve and poorly thought-out, it was pointless, and should be revoked. An employer should only be required to provide superannuation for people who actually are employees.

- Massive project cost blow-outs driven by misapplication of Greenfields Agreement provisions

I have to agree with the Minister that much of the current cost impacts are driven by the very people who complain about them – those at the top of the market. Case in point: I had a number of clients preparing to undertake work on Curtis Island. Each had a current Enterprise Agreement in place. Each was required to “pre-qualify” with the relevant principal contractor, which included providing extensive information on their staff, including experience and qualifications, and the attributes they would bring to the project.

Then my clients were advised that in order to be considered for the job, they had to take out a Greenfields Agreement as negotiated by the principal with certain unions. Obtaining a Greenfields Agreement requires that the employer currently not employ anyone who will be engaged on that project, and swear an affidavit to that effect.

Problem one: they have already given a list of current employees who will work on the project, to the principal, so they cannot legally enter a Greenfields Agreement, nor should the principal be requiring it. But the Greenfields Agreement will keep the union at bay and avoid illegal industrial action, and if you want the job Only my clients already have current Enterprise Agreements in place, so they are already protected from illegal industrial action.

Any Greenfields Agreement they enter will be invalid due to having an Enterprise Agreement already in place, and not legally being entitled to enter a Greenfields Agreement due to already having those employees on board. So while the unions that were party to the Greenfields Agreement may well be happy, other unions have an open range and nothing to stop them pulling the whole thing down – ask Rio what happened in the Pilbara when agreements were overturned as illegal years after they were put in place.

The primary problem is that the sponsor of any major project – be it Arrow, Adani, Santos etc all indulge in the same fetish – they insist on putting a rock-solid completion date in, with substantial penalties if the project goes over time. So a union that is prepared to take illegal action knows that the company may have ten million in bonuses at risk, the legal system can't operate to effectively stop them, and if they demand an extra five million the company will accept it as a commercial reality. They are set up for blackmail from day one and it keeps paying off and they keep playing the same game.

So in order to ensure the sacred finish date is met, they lock in Agreements to ensure no illegal action will occur, the date will be met and bonuses paid. In the process they massively inflate the cost of the project:

My clients were ready to put guys to work on Curtis Island on a base rate of \$24 - \$26 an hour, (including trade, tool and industry allowances) plus penalty rates and overtime. No income protection insurance, no daily travelling money (living on the island in a compound next to the work) no attendance bonus (they're already there) no redundancy fund payments (they are existing and ongoing employees). My clients are then advised by the principal that the entitlements they are required to pay on site are:

Base rate:	\$43 - \$46 plus overtime and penalty rates
Trade Allowance	\$2 - \$3 per hour
Tool allowance	\$30 per week
Industry allow.	Varies
Travelling:	\$40 per day
Attendance	\$40 per day
“Island Living all.”	Now \$40 per day
Redundancy fund	\$82 per week
Income Protection	1.3% of salary

With “trade, tool, industry allowances” added, the “base rate” becomes more like \$56 an hour for some, plus an additional \$120 a day just for walking through the gate. So an employer who could have put willing workers onto site is paying more than double what they need to. That problem does not come about because of penalty rates or any other inflexible work practices; it comes about because of the intractable attitude of those calling the shots.

Then the market retracts and the principals pressure the contractors for rate cuts because the project is costing too much. But no cuts to wage rates or sundry entitlements – the employees’ deal is as sacred as the target finish date.

It is patently clear that the industrial umpire is also asleep at the wheel – or are we to believe that the predominant position in all major projects is that the companies involved all start their entire workforce from scratch with every project they undertake?

Following is my correspondence to the Minister on the first two issues, and attached is a copy of their response.

Best regards,

Craig Joy
 Craig Joy Workplace Consulting
 7th March 2015

Senator Eric Abetz
Minister for Employment
Parliament House
Canberra 2600

Dear Senator,

I work as a private industrial relations consultant in Mackay, and met you to discuss issues in company with George Christensen some time back. There are two issues that I believe require urgent rectification.

The first issue: Your Department administers the Independent Contractors Act 2006, and in correspondence with your officers, primarily Timothy Johnson, we are in agreement that the purpose of that Act is not to define who “should be” an independent contractor, and who “should be” an employee, but to protect the rights of people to make and abide by their own choices in that respect.

The Tax Office and the Fair Work Ombudsman’s office are most definitely of the view that they are entitled to determine the “true status” of the relationship between parties, regardless of the wishes or intent of the parties, and despite any contract between them. I have communicated to those other offices the view of your department as to the application of the Act, and they remain of the view that they have it right, which obviously means they believe your Department has it wrong.

The Tax Office had suggested that they were willing to liaise with your office to resolve this issue, but I have heard nothing more on that. The FWO concede that the material on their web site is highly misleading, but propose to leave it as it is, because “it’s just a guide”.

Without labouring the detail, Mr Johnson has the specifics on that so I won’t repeat it all here. In essence, I contend that if I am intent on working as an independent contractor and enter a contract as such, I should be protected in my right to do so, by the Independent Contractors Act. The Tax Office says that we have to apply the criteria from various court cases, to determine whether I am permitted to be a contractor. Their site also includes the contention that certain roles or occupations “can only ever be an employee”. I have attached a separate document with a scenario which illustrates me working as a contractor, where the Tax Office would veto that.

The Tax Office claims that the previous court cases “define” what an independent contractor is, and by that you can determine what relationship “should” be created. In fact none of those cases were about what relationship “should” exist. They were all about how the courts determined how they should categorise particular relationships in the face of conflict between the parties on that issue. None of those cases relate to situations where both parties were settled in the view that a contractor relationship existed.

The Act actually provides its own definition of “independent contractor” which goes no further than providing that it is not limited to a natural person. The cases in question do not provide a definition at all, but a set of criteria on which to make a subjective decision which will always be debatable. Nevertheless, the Tax Office propose that those cases constitute the “definition”

under the Act. Given that the Act actually contains a definition, that proposal is clearly flawed. Given that the definition in the Act makes no mention of referencing any other sources, makes that proposition laughable.

The Act provides for the existing common law to have effect. That common law can only have effect in the context in which it was made, which was the context of resolving disputes between the parties, not in determining what relationship they “should have” created in the first place.

It is inconceivable that the intent of the legislators was that parties considering entering a contracting arrangement, should sit down together, read a stack of court decisions, then apply the reasoning behind those to determine what relationship they were “allowed” to enter. That notion is totally unworkable, and clearly contrary to the stated object of the Act, being:

(a) to protect the freedom of independent contractors to enter into services contracts;

Even if the parties went through that process and determined they could enter a contracting arrangement, the Tax Office believes it is entitled to review the relationship, reach a different conclusion, and rule the contract invalid. That flies in the face of the Act which provides that only a party to the contract can challenge it. Clearly the Tax Office is challenging that contract.

What follows is that the Tax Office prosecutes the parties under various provisions because the principal has not met its obligations as an “employer” of the erstwhile contractor. Companies routinely get slugged significant amounts of money for these “breaches”. It is my view that in fact it is the Tax Office that are in breach of the Independent Contractors Act, and that they have been so since 2006.

The stance taken by the Tax Office creates massive uncertainty, highly debatable outcomes, proposes an entirely unworkable regime for establishing contracting arrangements, and results in massive productivity and competition implications.

This is a major issue for the protection of the rights of people like me who genuinely seek to work as a contractor, and for the entities that engage them. It clearly creates a massive bureaucracy within the Tax Office, to review and prosecute parties who “should not be contractors” and it creates a ludicrous burden on business justifying or defending the choices that, under the Independent Contractors Act, they are supposedly free to make.

I mentioned there were two issues: the second is the ridiculous requirement that a business which hires a contractor for “labour only, or substantially labour only” has to pay Superannuation for that person. How does it make any sense to anyone, to be paying Superannuation for someone who is not an employee? Under the legislation that person becomes an employee for the purpose of superannuation, but not for any other purpose. Again this creates additional unwarranted burden and jeopardy on the principal, and makes it harder to the sub-contractor to obtain work.

Again this is an area where the Tax Office is free to make subjective judgments – starting with whether a particular situation amounts to “substantial” or not. And what is “labour”? Is someone doing data entry “labour”? Arguably so, but maybe not.

I believe the clear intent of the Independent Contracts Act is that people can be independent contractors if they wish, and no bureaucrat should be able to saunter in and redefine their life for them, let alone commence prosecutions on the basis of what the bureaucrat believes “should

have” been the arrangement. Massive bureaucratic waste is occurring because of this, and having various government departments free to go their own different ways on the one issue cannot be tolerated, particularly where departments are choosing to ignore the view of the department that actually has carriage of that Act.

As for superannuation legislation, it clearly requires simplification and elimination of the requirement to pay superannuation for people who are not actually employees.

The “scenario” I mentioned follows.

Yours sincerely,

Craig Joy

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CONTRACTING SCENARIO:

Issue: The debate is about whether it is a contract for service, or a contract of service. Essentially an employee is engaged on a contract of service, and a contractor is engaged on a contract for service/s.

The difference between the two is that an employee can typically be required to undertake other tasks which are within the skill competence and training of the employee, and which it is safe to undertake. A contractor is within their rights to only undertake the tasks specifically agreed.

Scenario: I am determined to operate as a contractor, not an employee. I approach a local company and advise that I will undertake their cleaning so long as I can do it as a contractor, not an employee. They agree, but there are stipulations: I have to do the work at night and between certain hours to fit in with other activities. I have to wear their uniform, abide by their code of conduct and the security access they provide me is specifically for me, so I can't send anyone else in my stead. They provide the cleaning equipment and products. They happen to be my only client.

Based solely on the noted common law criteria the Tax Office would veto my "independent contractor" status, regardless of my wishes or intent, or the wishes or intent of my client. They say that the contract we have written is meaningless and they can over-rule it.

Now one night I arrive at work and the boss says "Our night switchboard operator is off sick, so you can sit on the switchboard". If I'm an employee, the boss has the right to require me to undertake that work. As a contractor I have the right to decline it, and do the work I have contracted to do. That is actually what defines the relationship. It is not defined by balancing various criteria about whose shirt I'm wearing, or who sets the hours. The first and foremost deciders of whether it is a contract for service are the intent of the parties and the wording of the contract – neither of which count at all, according to the Tax Office and the FWO.

To take it a step further, if I now go out and get another couple of clients and work the same way with them, suddenly I will become an independent contractor again. Or I might be judged to be a contractor to one and an employee of another, depending on who is making the assessment that day. If I am assessed as being a contractor with three clients, then lose two clients, although my relationship with the remaining client hasn't changed, the Tax Office will now consider me an employee, when my situation with that client is exactly the same as it was last week.