

## Productivity Commission Inquiry – Workplace Relations Framework

### Issues Paper 5 Independent Contractors

This submission is made by Norton Rose Fulbright Australia, a commercial legal practice, in response to the Productivity Commission public inquiry into the performance of the workplace relations framework (**Inquiry**). These submissions address the issues that our employment and labour law practitioners consider to be the most significant regarding Section 5.6 of Issues Paper 5 regarding Independent Contractors to be in a position to provide clients with clear and practical advice. It is not a comprehensive submission addressing all issues canvassed in the terms of reference and issues papers for the Inquiry.

The changing nature and demands of the modern, globalising Australian market are leading to an increasingly flexible workforce. In some circumstances, businesses and workers alike desire the flexibility of an independent contractor relationship as opposed to an employment relationship.

However, the legal environment does not engender certainty, leaving a degree of risk that a putative contractor could be deemed to be an employee – with consequent risks of accrued employment entitlements, revenue enforcement by authorities and penalty enforcement for sham contracting.

## 1 The Problem of Characterisation of Working Relationships

- 1.1 ***The current practical-legal tests of whether a worker is an employee or independent contractor are unclear and create uncertainty for business and workers.***
- 1.2 The common law has developed a number of key characteristics which indicate whether a worker is a contractor or an employee. Many of these factors, as outlined in section 5.6 of Issues Paper 5, are settled. These factors provide a degree of certainty.
- 1.3 However, the subjective administrative application of those characteristics to individual cases has led to inconsistency and confusion. This increases risk and costs for business, and in some cases holds genuine contractors out of the market.
- 1.4 An example of this is the Australian Taxation Office (**ATO**) “Employee/Contractor decision tool”. This tool considers a limited range of factors, which change depending on the answers given. While a useful starting point, our submission is that ***this tool (deliberately) provides a simplistic analysis, does not consider the full range of factors which are considered by the common law, and consequently provides simplistic outcomes.*** Further, anecdotal evidence suggests the ATO’s staff use this tool in determining whether to grant an Australian Business Number to individuals. ***This approach can preclude genuine contractors who have not satisfied the simple test.***

## 2 Characterisation by Statute?

- 2.1 The *Fair Work Act 2009* (Cth) (**Act**) has nothing to say on the criteria as to which workers are employees, and therefore covered under the Act, and which are independent contractors.
- 2.2 Similarly, the *Independent Contractors Act 2006* (Cth) has nothing to say on the criteria as to which workers are independent contractors, and therefore covered under the Act, and which are employees.
- 2.3 In these statutes, the Parliament has nothing to say on the distinction.

- 2.4 Section 5.6 of Issues Paper 5 raises a number of questions regarding Alternative Forms of Employment. For relevance, we propose to address the following questions.
- (1) *Are there any impediments in the current legislation [Fair Work Act] to the efficient mix of independent contractors and ongoing workers?*
  - (2) *What are the advantages and disadvantages of creating a statutory definition of an 'independent contractor'?*
- 2.5 This submission contends that **a statutory definition of "independent contractor" should not be introduced. As there is no real alternative to a common law test, the continuing application of a common law test as the basis for legislation is the correct approach.**
- 2.6 While a definition on its face would reduce ambiguity, we hold this view for three key reasons:
- (1) First, were a statutory definition to be created, it would likely amount to a series of factors – some mandatory, and some optional, with weightings applied. In doing so, this approach would have circled back to a common law test.
  - (2) Second, this approach would likely re-create a new basis for subjective interpretation, in this case of the statutory definition, by regulatory bodies and their staff, and would suffer from the same problems as the interpretation of the common law.
  - (3) Third, the legislative process may not be able to keep pace with workplace developments (for example, if amendments to the definition cannot be passed through the Parliament). A statutory approach may therefore result in the codification of old factors, frozen in time.

### **3 A Proposed Solution - Practical Administrative Assistance**

- 3.1 In our submission, **there is no real alternative to the practical problem of characterisation being left to the parties**, with effective judicial and sham contracting enforcement oversight.
- 3.2 The risk of workers pursuing claims alleging employment and enforcement authorities prosecuting sham contracting operate to modify the approach taken by business.
- 3.3 **This practical-legal reality is more sustainable for the parties if certain guidance can be provided by an administrative approach.** The problem of "borderline" classification could be properly resolved earlier by proactive and certain administrative guidance.
- 3.4 **This submission proposes the use of a survey-based test based on the common law factors, providing outcomes that are certain, accessed using an online portal.** This test would be hosted by a department or agency of the Commonwealth. The test could be regularly reviewed by a tripartite review team with legal support to ensure consistency with the developing common law. It would ensure all relevant common law factors are considered, and these factors are updated as the common law changes.
- 3.5 The pre-existing online tools available at present are the ATO Tool and the Independent Contractors Decision Tool provided by the Commonwealth Department of Industry. As outlined above, the ATO tool deliberately does not consider the full range of factors which are provided by the common law. It therefore is not adequately equipped to support the administrative decisions for which it is presently used.



- 3.6 The Department of Industry Independent Contractors Decision Tool, while considering a greater range of factors, provides deliberately cautious outcomes which arguably do not reflect everyday business practice. For example, it concludes that it is “unclear whether a worker is a contractor or employee” because **one** answer is that the business directs **where** the worker performs the work, pointing to an “Employer” outcome, despite **all other** answers suggesting “Hirer”.
- 3.7 ***We submit that an effective online system is required which enables business to accurately characterise working relationships, and contractors to be certain of their status.*** How the outcome received by a person under the system could be relied upon by that party to provide certainty in their ongoing business arrangements could be the subject of an expanded submission.

#### **4 An example of an online tool is Norton Rose Fulbright’s ContractorCheck.**

- 4.1 The tool assists businesses in determining whether the workers they are engaging are correctly characterised as independent contractors (or alternatively whether they should be engaged as employees).
- 4.2 The benefit of using ContractorCheck is that results are weighed to give particular importance to key characteristics of the employee/independent contractor dichotomy, synthesising the case law. The online nature of the tool means that this is kept up to date.
- 4.3 The outcome of completing the test is an immediate screen result indicating level of risk.
- 4.4 We would be pleased to meet with the Productivity Commission or provide further material regarding how ContractorCheck could be used as part of an administrative support solution to provide greater certainty for business and workers on this issue.

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