

Submission to:

Workplace Relations Framework
Productivity Commission

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By email to: workplace.relations@pc.gov.au



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To the Commission:

Workplace Relations Framework: Issues Paper 5 - Alternative Forms of Employment

The Information Technology Contract and Recruitment Association Limited (**ITCRA**) makes these submissions with respect to Section 5.6 (Alternative Forms of Employment) of the Productivity Commission's Workplace Relations Framework Issues Paper 5.

ITCRA is the professional body for the ICT contracting and recruitment sector in Australia and New Zealand. ITCRA Members supply and/or manage white collar professionals on behalf of their clients for permanent and flexible roles, including contracting, across Australia and New Zealand as well as multiple international markets.

This submission reflects the outcomes of: one on one interviews with the elected Directors of the Association, discussions and subsequent papers from the Association's CEO's Circle as well as Member surveys and forums over recent years.

The ICT industry

ICT refers to a wide range of services, applications and technologies, using various types of equipment and software, and often running over telecommunications networks¹. The importance of ICT is not the technology as such, but rather its role as an enabler for accessing knowledge, information and communications, which are increasingly important elements in today's economic and social interactions between people, firms and nations².

The relationship between ICT and productivity is well established in overseas research. A number of US studies have found ICT to have a significant impact on aggregate productivity, with the falling ICT prices being identified as a key underlying factor³. Although Australian evidence is perhaps less compelling⁴, a 2006 study from the Centre of Law and Economics at the ANU found that ICT investment and spillovers were major drivers of productivity growth in Australia and other OECD countries in recent years⁵. Similarly, Australian micro-economic studies have shown significant productivity impact from ICT at a firm or enterprise level, with ICT conferring informational, strategic, transactional and transformational benefits⁶.

However, in comparison with other OECD countries, Australia produces very little ICT hardware itself and thus has not shared in the very substantial gains in ICT equipment manufacturing experienced in those economies which are significant ICT producers⁷. In order for Australia to capitalise on the

¹EC (2001), *The Role of ICTs in EC Development Policy*. Communication from the European Commission to the Council and the European Parliament, Brussels
EC 2001

² Telstra 2009, *ICT as a Driver of Productivity*, Melbourne, January

³ Ibid; Jorgenson, D., (2001). *Information Technology and the U.S. Economy*, American Economic Review, 91: 1-32

⁴ Grattan Institute (2011), *Australia's Productivity Challenge*,

⁵ Barker, G., Waverman, L., Fuss, L., and Tooth, R., (2006) *ICT networks and Productivity: Australia in perspective*, a paper prepared for DCITA, 2006

⁶ Telstra 2009, *ICT as a Driver of Productivity*, Melbourne, January

⁷ Grattan Institute (2011), *Australia's Productivity Challenge*,

significant productivity gains ICT has to offer to the Australian economy, it is vital that Government policy supports, rather than hinders, the industry. In particular, we submit that our Members 'contractors' are the enablers of a more effective ICT contribution to the Australian economy by providing the professionals that give effect to the hardware and software applications throughout Australia. Our Members 'contractors' work in private sector, government and not for profit.

A changing workplace and workforce

Consistent with an industry at the forefront of innovation, the ICT workplace must be able to adapt and respond to a rapidly changing and increasingly globalised sector. An example of such adaptation is the prevalence of non-traditional employment arrangements. A significant number of ICT workers are engaged as independent contractors, with a recent ITCRA study revealing that 88% of roles are contract based⁸. This figure reflects the nature of many of the ICT infrastructure projects, coupled with ongoing changes in government tendering arrangements and the business models of those clients partnering with ITCRA Members.

The overwhelming feedback from ITCRA Members is that the prevalence of independent contracting in the ICT labour market is candidate driven; the vast majority of ICT professionals choose to work as independent contractors because it affords them flexibility, recognition and diversity, whilst facilitating the maintenance of a current skill set in a rapidly changing profession. ICT is a younger workforce, with a high proportion of ICT professionals aged between 25 and 44 years of age (67.8 per cent compared with 45.5 per cent for all occupations⁹). Amongst this demographic there is a relatively higher level of professional optimism and confidence in being able to attain work elsewhere; as a result, job security is often not considered a priority.

These workers are highly skilled professionals, with the sophistication and knowledge to understand the relative advantages and disadvantages of the various methods of engagement, and to make an individual decision based upon their own personal circumstances.

Accordingly, ITCRA supports the free and informed choice of both individuals and businesses to decide upon the optimal work engagement model for them both, rather than having a model imposed upon them.

The Association does, however, recognise that it has a pivotal role to play in ensuring that no party is exploited and workers receive a fair rate of pay that is equal to or exceeds the statutory minimum for employees performing similar work.

Independent contractor vs. employee- understanding the distinction

ITCRA recognises that labour laws have traditionally drawn a distinction between work performed in a subordinate and dependent capacity, as an "employee", and work undertaken by an "independent contractor" who is supplying services under what is essentially conceived as a commercial contract¹⁰.

⁸ ITCRA, 2014, ITCRA Trends Report and SkillsMatch Dashboard Snapshot, Q4

⁹ Australian Workforce and Productivity Agency (2013), *ICT Workforce Study*, July

¹⁰ Roles, C., and Stewart, S. (2012), *The reach of labour regulation: Tackling sham contracting*, Australian Journal of Labour Law pp258-283

A quick survey of case law reveals that the common law test for whether an employment relationship exists is by no means straightforward¹¹, with many variations developing and evolving over the decades. Indeed recent authorities have demonstrated that the courts have moved away from the traditional control test towards a focus on business organisation and entrepreneurial tests; the “emphasis on various matters has shifted in response to the changing way work, and society in general, is organised”¹².

The task of navigating the authorities has led many commentators to argue for a simple and clear statutory definition, which explains the distinction between an employee and an independent contractor.

However it is precisely this evolutionary and iterative nature of the common law test that makes the introduction of a single statutory definition unwise; it would lack the flexibility and adaptability required to respond to the changing workplace.

Whether an advocate or opponent, few people would argue that the way we work is changing, and with globalisation and advances in technology it will continue to do so. Attempting to create a single statutory definition of “independent contractor” or “employee” would risk creating an overly rigid regime, with its currency and capacity to respond to the changing workforce reliant upon the capricious process of statutory amendment.

Vulnerable workers

Despite the importance of independent contracting as an alternative form of engagement in the modern workplace, ITCRA nonetheless recognises that this model can be exploited by unscrupulous hirers, seeking to avoid the minimum benefits and protections afforded to employees under labour laws. Accordingly, ITCRA considers that certain vulnerable workers require heightened protection under labour laws when entering into an independent contracting relationship, such as those contained within ss357-359 of the Fair Work Act 2009 (*Cth*).

As explored above, many individuals freely choose independent contracting as their preferred method of engagement. However, despite the relative benefits this model provides, there are undeniably disadvantages, including lack of many employment benefits and adoption of increased risk. It is therefore vital that an individual understands and accepts their rights and obligations, and the options available to them.

When determining the question of whether an employment relationship exists, the Federal Court recently focused more on the economic reality of the relationship, holding that “*it is increasingly necessary that parties conduct themselves...in accordance with a correct appreciation of the nature of their relationship, not just as it may suit them*”¹³. Where such “correct appreciation” is lacking, contractual terms or any statement by the parties about the character of a relationship may not be determinative of the true legal status of the relationship.

¹¹ See e.g. *ACE Insurance Ltd v Trifunovski* (2013) 295 ALR 407 for a summary.

¹² *ibid*

¹³ *ibid*

However if the Court can be satisfied that an individual, with a “correct appreciation” of their rights, obligations and options, has made a freely informed choice, should the parties’ intentions not be more determinative of the matter?

It follows that heightened protection should be afforded to those workers less able to understand, or those who are less likely to be in a position to freely choose their mode of engagement. Such workers may include:

- Individuals under the age of 18
- Unskilled workers
- Low income earners
- New entrants to the market (for example ICT graduates seeking their first professional ICT job)

Focusing any increased regulatory protection on certain classes of vulnerable workers would protect those most at risk of exploitation, whilst allowing genuine independent contractors, and their hiring entities, the capacity to operate without the fear of unintentionally breaching sham contracting laws or being exposed to deemed employment, which rely upon a rigid and overly simplistic definition of independent contracting.

A high fee threshold?

Similar to the pitfalls involved in a statutory definition of “independent contractor”, ITCRA recognises that defining who is a “vulnerable worker” will also have its challenges. Similarly, identifying whether an individual has made a freely informed choice may be difficult (although perhaps facilitated by the introduction of a “Fair Engagement Checklist”, as explored below).

The Association therefore proposes adopting a high fee threshold as a determinative factor for ensuring that genuine and non-coercive independent contracting relationships are not restricted under legislation such as the *Fair Work Act 2009*.

The exclusion of higher paid individuals from the reach of certain protections has been an accepted feature of unfair dismissal laws since the late 1980s. It has also been a feature of some awards as well. It recognises that such individuals are more likely to be able to negotiate appropriate contractual arrangements to protect themselves from unfair dismissal and may also be able to negotiate over-award rates of pay which compensate for the non-payment of certain penalties and loadings.

Similarly, evidence from ITCRA Members suggests that independent contractors who earn at least the equivalent of the high income threshold can reasonably be expected to possess the level of sophistication and bargaining power necessary to ensure they are able to make a freely informed choice regarding their mode of engagement. As such, ITCRA proposes that such independent contractors be excluded from making claims of deemed employment or sham contracting.

ITCRA Members submit that the Commission should consider providing protection to engaging parties (professional, hirer and host organisation) from arguments of deemed employment, sham contracting and the like where such professional earns \$85 per hour or more for the provision of the labour/intellectual property component of their charge rate. This rate has been calculated by converting an annualised salary of \$130,000 to an hourly rate of pay and then multiplying it by 1.3 to account for the loss of permanent employment style benefits.

A Fair Engagement Checklist?

ITCRA also proposes the development of a “Fair Engagement Checklist” to ensure the formation of genuine and non-coercive independent contracting relationships. The checklist would not only provide a useful tool for businesses to ensure compliance with legal obligations when engaging workers, it could also be relied upon as evidence of the willingness of parties to enter into an independent contracting arrangement, similar to the Small Business Fair Dismissal Code. ITCRA have developed a draft checklist for potential use by consultants and managers which engage ICT professionals in a non-employment capacity and would be happy to share this document with the Commission to provide further detail of how the checklist would work in practice.

Furthermore, and in addition to a Fair Engagement Checklist, ITCRA proposes the development of a Fair Engagement Statement which must be provided to vulnerable workers, as defined by legislation. This Fair Engagement Statement would operate in a similar way to the Fair Work Statement, which must be issued to new employees, and would provide information on rights and methods of engagement being proposed, along with government agencies which can provide further information. This statement would provide further evidence of an informed decision to engage in genuine independent contracting.

Increased regulation – a final thought

Freedom of contract is a fundamental tenet of our legal system, and the notion that individuals should be free to contract for the provision of their services in different ways is far from new. Similarly, a business should be able to adapt its workplace to a rapidly changing technological and economic environment, and ensure it can attract, maintain and support the skilled workers it will rely on in the future.

It is ITCRA’s position that the protection of workers from exploitation and the protection of an individual and business’ freedom to contract as they choose are not mutually exclusive; heightened protections for those most vulnerable to exploitation are required to maintain a high standard of conduct and ensure the formation of genuine, non-coercive independent contracting relationships.

The ICT industry in particular is a global workforce that is seeing an increased demand for the right people at the right time. In order for Australian business and government to compete in the global market and capitalise on the significant productivity gains available in the sector, the regulatory framework must promote simplicity and minimise administrative burdens and thus cost of compliance. Failing to remove such burdens, with suitable protections for the vulnerable, risks stifling the productivity and effectiveness of Australian industry, and Australian business in general.

Yours faithfully,

Julie Mills

ITCRA CEO



SkillsMatch is a monthly reporting program of data from ITCRA Members systems that includes: position title and requirements, available positions, salaries offered, placements made and time-to-fill for ICT contract and permanent roles. The data is released to

ITCRA by participating Members on a set day each month so ongoing analysis of market trends is available. With more than ten years of information available, SkillsMatch is a unique, comprehensive dataset of ICT recruitment, employment and remuneration trends.