



LABOUR CONTRACTING AND ON-HIRING POLICY

INTRODUCTION

Contracting (also referred to as independent contracting or labour contracting) refers to a range of arrangements in which individuals (contractors) work under a contract for services whereby they provide services in the form of the provision of labour to another business (principals).

It includes circumstances where individuals choose to contract their vocational, professional or trade occupational knowledge, experience and skills to business. This is in contrast to a contract of service in which an individual becomes an employee, and the employing entity becomes an employer with all the attendant liabilities and obligations.

On-Hiring (also referred to as labour hiring or agency employment) is generally an arrangement whereby a labour hire entity or agency provides individual workers to a client or host with the labour hire entity being ultimately responsible for the worker's remuneration. These workers may be employed directly by the labour hire entity, or be contractors to that entity.

POLICY PRINCIPLES

Importance of freedom to contract: The underlying principle of freedom of contract is one of the basic pillars upon which our system of commerce and industry operates.

Choice for businesses: Businesses should be free to make commercial and operational decisions on whether to undertake operational functions through direct employment, through contracting, or through on-hiring.

Choice for individuals: Individuals should be free to offer their services either as employees or as they choose, as contractors or through labour hire agencies.

Contracting and hiring make a significant contribution: Contracting and on-hiring make a significant contribution to the Australian economy and labour market, particularly through scope for innovation, availability of skills and experience and the creation of additional work opportunities. This positive contribution can only increase into the future if law and policy serves to properly encourage and support capacities for contracting and on-hiring.

Contracting is inherently legitimate: Genuine and consensual contracts for services under which work is performed as agreed between principal and contractor are in and of themselves an inherently legitimate, welcome and beneficial form of commercial arrangement that adds value to the Australian economy and is no less legitimate than contracts of service/employment.

On-hiring is inherently legitimate: On-hire working is also an inherently legitimate part of the Australian labour market. On-hiring offers productive and effective capacities to undertake essential operational functions which would not be possible under narrow strictures of traditional direct, ongoing employment.

Contracting encourages innovation: The values of entrepreneurship, risk taking, investment and choice which underpin contracting should be welcomed, encouraged and highly regarded by policy makers.

Contracting and on-hiring should be encouraged: Governments should not be in the business of deciding what working arrangements suit a business or individuals, nor of seeking to override personal choices and agreements. Regulating contractors as employees is a regulation of entrepreneurship and is not a legitimate part of Australian law. Seeking to regulate on-hire arrangements into some other arrangement is also not legitimate.

The chosen form of contract/work should be paramount: There should be no scope to transform contract work into employment, save by the express mutual intention of the parties to abandon a contract for services, in favour of a contract of service.

Third parties and regulators should not seek to impose employment relationships and obligations on parties who did not agree to or intend to enter such relationships.

On-hiring is at all times a commercial arrangement: Employment obligations in on-hiring must be restricted to those between labour hire agencies and their employees. Host companies in which the employees of on-hire companies work should not be asked to assume any employment-based obligations for these workers.

Sham contracts are not acceptable: Arrangements where employees are labelled as contractors, but are in fact and law employees, are sham arrangements and do not (and should not) have legal recognition as contracts for services at common law.

Sham on-hiring is not acceptable: Similarly, arrangements which purport to be ones of on-hiring but which are not legitimately of that nature do not and should not enjoy legal recognition as labour hiring.

Coercion is not acceptable: Arrangements which are non-consensual or which are tainted by coercion or undue influence are not enforceable and do not have legal recognition as contracts for services at common law, nor should they.

POLICY OBJECTIVES

Core Objectives

1. The freedom of business to engage contractors and to on-hire must be enshrined and protected at law.
2. Freedom of choice in relation to the manner in which individuals and businesses wish to structure their relationships must be promoted and respected.
3. Unwarranted third party/external interference in genuine contractual relationships must be removed.
4. The legitimacy of and positive role of contracting and on-hiring must be recognised and must inform policy making.
5. The strengths of the traditional common law regulation of contracting should be recognised.

General Objectives

Inform rather than regulate: Rather than seek to regulate contracting, regulators should focus on providing additional information resources, advice and assistance to both principals and contractors to better inform them of their rights and capacities.

Legislation should encourage and protect contracting and on-hiring: Trends to regulating and discouraging contracting and on-hiring should be reversed. Legislation should serve to encourage contracting and hiring and protect the legitimate agreement of parties from reversal, hostile re-interpretation or attempts to turn contracts into something never intended by the parties.

- Legislation and regulation which has the effect of discouraging or rendering contracting or on-hiring complex, costly, inaccessible, or uncertain should be reviewed and removed.

Regulation must reflect best-practice: Any regulation affecting contract work and on-hiring must be of a best practice nature. It should be clear, effective, targeted and only regulate to the extent genuinely warranted/essential.

Choice should be paramount: Persons genuinely and freely entering into contracts for the provision of their personal services as contractors should, provided those contracts are lawful, not have them varied, redefined, reshaped, annulled, downgraded or otherwise interfered with by persons or bodies (including governments, regulators, tribunals or courts) who are not parties to those contracts.

- This is also the case for on-hiring. All businesses should be free to enter into on-hire arrangements for any function or role, notwithstanding any previous history of direct employment, pre-existing industrial or regulatory coverage, or any other matter.
- There should be no scope for a company entering into an on-hire arrangement (the host company) to assume the legitimate obligations of the labour hire company in regard to its employees/workers.

Regulation must be clear and accessible: Any regulation affecting contracting and on-hiring should be clear, unambiguous and ideally contained in a single source or instrument.

Regulation must deliver certainty: A specific goal of regulation affecting contracting and on-hiring should be providing greater clarity and certainty for all those entering into and affected by such arrangements.

Consistent laws are vital: Consistency in capacities to enter into labour contracting and hiring arrangements between jurisdictions should be a first order policy priority. A federal law preserving and enshrining scope to contract and on-hire may be the best mechanism to deliver this consistency.

Regulate only based on merit/proof: Any dedicated, directed or additional regulation of contracting or on-hiring should only be considered where solid merit foundations exist and be based on reliable evidence of a clear and demonstrated need for regulation. The form of any regulation should also be based on sound research and evidence. Regulation based on speculation, unfounded understandings, or prejudicial inquiries is not acceptable or legitimate.

Regulate within strict boundaries: Any additional or directed regulation of contracting only ever be applied at any future juncture:

- In the most unambiguously merited situations.
- At a narrowly targeted level to particular sub-industry situations where merited.
- Subject to sun-setting/regular review with a strong ongoing presumption towards removal.

POLICY FRAMEWORK

Contracting

- Regulation should encourage and support scope for contracting, rather than seek to regulate, retard or control it.
- Existing common law tests for delineating contract arrangements from employment have been developed over many years and represent an appropriate primary basis for delineating contracting from employment (to the extent such a determination is required).

- Contractors who have established their status under taxation laws derive certainty from that approach and should be able to use that status as conclusive evidence of their standing as contractors for the purpose of other laws (whether under statute or the common law).
- No contractor who is a contractor at common law should be denied that status by legislation.
- Scope for the deeming of contractors as employees contrary to the intentions of parties should be removed from Australian law.
- There should be no scope to declare contractors of a specific type, or working a specific industry, as employees. This is inherently contrary to the contractual intentions of parties and is inimical to proper freedoms to contract.
- So called ‘unfair contracts’ jurisdictions should be precluded from attempting to regulate the work of contractors. Such jurisdictions should be removed from Australian law entirely not only for contractors, but also for employees, high income earners and those engaged in purely commercial contracts.
- There should be no additional or dedicated employment law avenue to contest the fairness or otherwise of contracts for services, nor to ‘look behind’ any contracting arrangement other than sham contractor arrangements. Ordinary commercial law and the courts can adequately protect contract parties.
- There should be no scope for any industrial tribunal to make an award, order or other instrument seeking to regulate independent contracting, nor to attach additional obligations and liabilities to any contracting party.
- Existing laws which have been made inimically to contracting should be reviewed and unless good reason exists not to do so, they should be quashed.
- Neither agreements nor awards, nor any other industrial instrument or compact should be capable of being used to sign away future rights to enter contract labour arrangements or labour hire arrangements. Unless sound reason exists to the contrary, labour contracting and labour hiring should not be matters capable of being regulated in an industrial agreement or award.

On-Hiring

- Labour hire agencies are employers and assume the legal obligations and liabilities of employers. There is no legitimate basis to seek to share and join to these responsibilities additional obligations on host employers entering contracts with labour hire agencies.
- The ongoing merit and utility of all dedicated, directed or additional regulation of on-hiring at the federal or state level should be reviewed.
- Where there is no demonstrated public policy justification for the regulation of on-hiring, it should be removed in favour of generally prevailing employment and contract law.
- General or economy wide registration of employment/labour hire agencies is unnecessary. To the extent possible any state obligations for registration should be removed or overridden. Industry-specific proposals should be examined on their merits.

Regulating Contracting and On-Hiring

- Where it is necessary and appropriate to extend regulatory obligations and responsibilities to contractors or companies hosting on-hire employees, this should not be achieved through any attempt to:

- turn the contract or hiring arrangement into something other than was intended by the parties;
 - deem the contract or hiring arrangement as something other than was intended by the parties; or
 - share or extend the legitimate obligations of parties onto other parties (e.g. to host employers through the concept of joint or dual employment).
- Instead, regulation should be based on (only as appropriate and strictly necessary):
 - extending obligations to work per se, regardless of whether performed under a contract for services or a contract of service (for example making a company liable for anyone undertaking work on its premises regardless of their status as contractors, agency staff or employees); and
 - expressly extending regulatory obligations to nominated classes of workers, which could include employees, contractors and/or employees of labour hire companies working within an enterprise.

Skills and Training

- Contracting and on-hiring are contributing to improving the skills and the training of Australians.
- Contracting and on-hiring offer additional scope to widely share available skills and experience in our community and provide additional options for individuals to remain within the workforce.
- Training and skills formation mechanisms should be sensitive to the changing nature of the Australian workforce and to the growth of both contracting and on-hiring. Education and training opportunities for contractors and agency staff should be incorporated into future education and training policy.
- Additional consideration should also be given to future vocational training arrangements that utilise both traditional and new apprenticeships and group training opportunities to enable the sustainability of occupational contractors and labour on-hiring.

For further information:

Peter Anderson
Director, Workplace Policy
Telephone: 03 9668 9950
Facsimile: 03 9668 9958
Email: peter.anderson@acci.asn.au