Analysis, Comment and Recommendation on the
Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (The Bill)

Briefing Paper Number One (1)
18 September 2023
On the topic of
Redefining the 'ordinary' meaning of employee and employer
(15AA of the Bill - page 113)

Recommendation and Request

****SEA asks the Senate to amend the Bill to remove clause 15AA from the Bill, as this clause will:**

- Create uncertainty and confusion over the definitions of employee and self-employed, independent contractor.
- Conflict with the High Court.
- Breach ILO Undertakings.
- Create conflict with competition law.

Summary explanation of reasons for request

Core Facts

- Since about World War II, when deciding whether a person is an employee or a self-employed independent contractor, Australian courts have used what is called the '*multi-factorial*' test.
- In February 2022, the High Court (in the *Personnel* case) declared that **if a written contract is clear and comprehensive that the written contract alone should be relied** on.
  However, it also means that if a written contract is not clear or comprehensive, the multi-factorial test continues to apply. (Note that after examining the written contract in the *Personnel* case, the High Court declared that the worker in question was in fact an employee and not an independent contractor.)
- 15AA of the Bill will subvert and is **intended to subvert the High Court** *Personnel* ruling. It will impact ALL self-employed people.

Some detail
It seems that the High Court had observed the confusion, complexity and cost associated with the prevailing legal multi-factorial processes.

The Court sought to create certainty, stating:

> *"… It is the task of the courts to promote certainty with respect to a relationship of such fundamental importance." (Paragraph 58 of the HC Ruling)*
> Australian High Court February 2022 (see below for further excerpts).

Clause 15AA (on page 113) of the Bill:

- will undo the certainty created by the High Court;
- reapplies the multi-factorial test by suppressing the written contract in the process;
- reintroduces uncertainty and confusion;
- Is likely to be rendered inoperative on High Court appeal.

There are other major consequential policy implications that are discussed below, namely:

- Breach of Australia's International Labour Organisation obligations.
- Creation of conflict with competition law, thus raising regulatory jurisdictional conflict.

The clause in the Bill that we recommend and ask to be removed from the Bill reads as follows:

> **15AA Determining the ordinary meanings of *employee* and *employer***
>
> (1) For the purposes of this Act, whether an individual is an ***employee*** of a person within the ordinary meaning of that expression, or whether a person is an ***employer*** of an individual within the ordinary meaning of that expression, is to be determined by ascertaining the real substance, practical reality and true nature of the relationship between the individual and the person.
>
> (2) For the purposes of ascertaining the real substance, practical reality and true nature of the relationship between the individual and the person:
>
> (a) the totality of the relationship between the individual and the person must be considered; and
>
> (b) in considering the totality of the relationship between the individual and the person, regard must be had not only to the terms of the contract governing the relationship, but also to other factors relating to the totality of the relationship including, but not limited to, how the contract is performed in practice.
>
> Note: This section was enacted as a response to the decisions of the High Court of Australia in *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.
>
> (3) Subsections (1) and (2) do not apply to the following provisions of this Act:
>
> (a) Divisions 2A and 2B of Part 1-3;
>
> (b) Part 3-1, to the extent that Part 3-1 applies only because of the operation of section 30G or 30R.

The clause is effectively a re-imposition of the multi-factorial test which will override the certainty that the High Court says is of such importance.

Explanation

"… It is the task of the courts to promote certainty with respect to a relationship of such fundamental importance."

Australian High Court February 2022

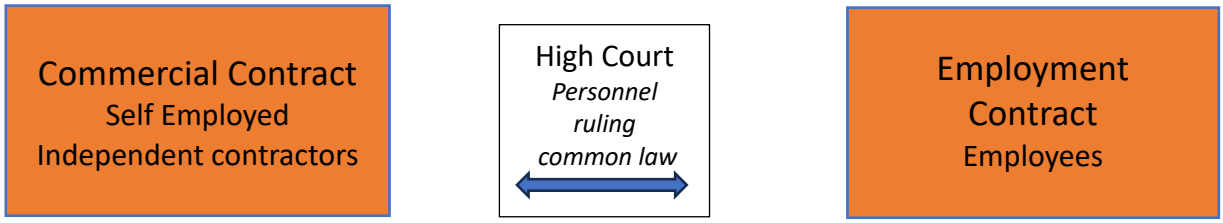
On the employment *vs* self-employment relationship

1. A straightforward explanation:

The defining difference between an employee and a self-employed independent contractor is surprisingly straightforward.

- An **employee** earns their income using the **employment c**ontract.
- A **self-employed independent contractor** earns their income using the **commercial** contract.

Whether the employment or commercial contract is being used is determined at common law through a process decided on by the courts. This is often referred to as the 'ordinary meaning'.



The *employment* contract is regulated through industrial/workplace relations statutes.
The *commercial* contract is regulated through commercial and competition statutes.

The split between the employment and commercial contract permeates, and is critical to, the operation of the Australian economy. This is why the High Court referred to this as a "relationship of such fundamental importance".

Clause 15AA of the Bill (referenced above) seeks to do something never before done under Australian statute. That is, the clause would remove common law (as ruled by the High Court) as the defining difference between the commercial contract and the employment contract for the purposes of federal workplace relations statute/s.

2. Implication – Clash with competition law

The consequences of this are major.

- A contract could readily be declared a commercial contract based on common law and subject to competition and commercial statute and regulation, yet the same contract could be declared 'employment' under 15AA and subject to the statutes and regulation of industrial/workplace relations law.

Competition law and industrial/workplace relations law have fundamentally opposed objectives driving their different processes.

- Competition (commercial) law and regulation are about the prevention of price-fixing and anti-competitive collusion in the economy.
- Industrial/workplace relations are about the implementation of price-fixing (wages) and collusion to enforce that price-fixing.

In other words, self-employed, independent contractors (as defined by the High Court at common law) and the businesses/persons that engage them could (and will) find themselves subject to competition law, yet at the same time be forced or required under industrial/workplace relations laws to breach competition law. This is a scenario that will inevitability occur.

That is, 15AA creates an irreconcilable clash that cannot be resolved. It will create victims who will be caught in a vice between competition and employment regulation.

3. Implication – Breaching ILO obligations

The recognition of the fundamental difference between the commercial and employment contracts motivated and underpinned the declarations made by the International Labour Organisation (ILO) in mid-2006 on the 'Employment Relationship'.

The ILO declared that:

- 'Worker' is a general term.
- 'Employee' refers to a worker in an employment relationship (contract).

And that

- ***Self-employment*** *and independent work based on commercial and civil contractual arrangements are by definition beyond the scope of the employment relationship.*

Further, the ILO declared that: (*Page 77 item 8)*

> *National policy for protection of workers in an employment relationship should not interfere with true civil and commercial relationships…"*

Not long after these ILO declarations were enunciated, Australia became a signatory to them (in 2006) thus creating an obligation on Australia to adhere to and implement them. Australia implemented these obligations through the Independent Contractors Act (2006) and the sham contracting laws (2006)

15AA directly breaches Australia's ILO obligation. . That is, 15AA will directly involve employment regulation under the *Fair Work Act*, thereby interfering with genuine and true commercial relationships.

4. Implication – High Court challenge

15AA Is likely to be rendered inoperative on High Court appeal given the following scenario which we say would inevitably occur at some point.

a) A clear and comprehensive written contract is found to be a commercial (self-employment) contract at common law in (say) a Federal Court ruling. The ruling is consistent with the High Court's *Personnel* ruling.
b) A Fair Work Commission ruling declares that under 15AA the same contract (being a common law commercial contract) is subject to employment regulation based on a multi-factorial test that declares the contract to be an employment contract.

c) The Fair Work Commission's ruling is appealed to the High Court.

Here, then, is the legal question:

> Assuming that the Federal Court ruling is in accord with the High Court's *Personnel* principles, the High Court would have to consider whether the application of the multi-factorial test in the case being considered and ruled on by the Fair Work Commission produced a different outcome (in other words, an employment contract) to that found by the Federal Court.
>
> That is, the High Court would be asked to consider whether the principles it established under *Personnel* were overridden by the multi-factorial test.
> Any outcome is, of course, speculative. But it seems logical that the High Court would more likely find that a multi-factorial test would produce the same result as the *Personnel* principles that the High Court itself established.

Of course, this scenario is speculative. But we say that, given the fundamental assault 15AA presents to the operation of the Australia's commercial economy, it is almost inevitable that 15AA will be subject to a High Court challenge under a scenario such as the one described above.

It would seem logical that on the grounds of consistency the High Court would re-affirm its *Personnel* ruling, thus rendering 15AA inoperative. We say that 15AA is an exercise in futility inviting major legal complexity. What 15AA will do even before it is tested in the High Court is create huge uncertainty that will damage the economy, particularly for self-employed people.

5. Implication – Australian Taxation Office Rulings

The ATO is required to determine tax obligations in the light of whether a person/entity is an employee or self-employed. The principal obligation concerns withholding obligations. That is, which party/s in a payment arrangement/contract must withhold tax and send that tax to the ATO.

Following the High Court *Personnel* ruling the ATO re-wrote its rulings to be consistent with *Personnel*. The two ATO rulings are

- ATO employee or self-employed (2022/D3)
- ATO worker status compliance (2022/D5)

The rulings clarify withholding and other obligations consistent with *Personnel*.

15AA is likely to create considerable confusion. For example, a self-employed person (as defined under *Personnel*) has withholding obligations under the ATO rulings. But if the same self-employed person were to be declared an 'employee' under 15AA for the purposes of the *Fair Work Act*, the self-employed person could well come to believe that they did not have tax withholding obligations, and hold that belief in good faith. That is, they stop sending their required tax to the ATO on a regular basis as would be normally required. This creates the likelihood of significant tax revenue loss and added enforcement requirements for the ATO.

6. Conclusion and request

We repeat our request to the Senate.

- 15AA is a major and radical foray into common law principles and practices that underpin much of how the Australian economy operates.
- **We request that 15AA be removed from the Bill.**

Some additional background/supporting information

7. Additional extracts from the High Court *Personnel* case

In the Judgment on *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 *9 February 2022* P5/2021 (Australian High Court February 2022), the High Court made several critical statements that have a direct bearing on Clause 15AA.

In that decision the High Court unanimously affirmed that the distinction between an employee and an independent (self-employed) contractor is clear and well established.

The High Court said that it is essential that there is legal certainty on this:

> …. It is the task of the courts to promote certainty with respect to a relationship of such fundamental importance. Especially is this so where the parties have taken legitimate steps to avoid uncertainty in their relationship. The parties' **legitimate freedom to agree upon the rights and duties** which constitute their relationship should not be misunderstood. (at 58)

Moreover, such certainty is established:

> Where the parties have comprehensively committed the terms of their relationship to a written contract the validity of which is not in dispute, the characterisation of their relationship as one of employment or otherwise proceeds by reference to the rights and obligations of the parties under that contract. (at 59)

The Court said that that certainty cannot be changed, modified or revisited based on social or psychological concepts because such concepts are not law:

> The **employment relationship** with which the common law is concerned must be a *legal* relationship. It is **not a social or psychological concept** like friendship. There is nothing artificial about limiting the consideration of legal relationships to legal concepts such as rights and duties.
>
> By contrast, there is nothing of concern to the law that would require treating the relationship between the parties as affected by circumstances, facts, or occurrences that otherwise have no bearing upon legal rights. (at 22)

7a. Intention to subvert the High Court

The statement in 15AA below makes it clear that the intention is to subvert the High Court.

Note: This section was enacted as a response to the decisions of the High Court of Australia in *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.

8. The International Labour Organisation (ILO)

The ILO (a division of the United Nations) is the peak global body that considers and makes statements of principle on labour policy to guide national law.

From 1996 the ILO had been engaged in protracted debate on the 'problem of the employment relationship'. That is, it was struggling to come to terms with the conceptual challenge to employment/labour law by the apparent rise of independent contracting. That is, where do workers (who are both worker and boss in one) fit into labour regulation that is predicated on the exclusive assumption that that the worker and boss are separate and institutionally predetermined to be in conflict?

In 2003, after considerable debate, the ILO resolved the definition of 'worker' at its peak global forum on the issue as follows:

> *The **term employee** is a legal term which refers to a person who is a party to a certain kind of legal relationship which is normally called an employment relationship.*
> *The **term worker** is a broader term that can be applied to any worker, regardless of whether or not she or he is an employee.*
> ***Self-employment** and independent work based on commercial and civil contractual arrangements are by definition beyond the scope of the employment relationship.*
> Report of the Committee on the Employment Relationship (page 52)

Then again, in 2006, the ILO Recommended that:

> "National policy for protection of workers in an employment relationship should not interfere with true civil and commercial relationships…" (page 77, Item 8)

The effect of the 2006 Recommendation and the 2003 Conclusion is that the ILO affirms that self-employment operates within commercial legal contracts. This is entirely consistent with the subsequent Australian High Court *Personnel* ruling of 2022.

Following the 2006 ILO Recommendation, the Federal Parliament passed and enacted the *Independent Contractors Act* 2006 which locks in the common law definition of self-employment under statute. The Australian Act conforms with, and is in accord with, the ILO obligations of 2003 and 2006.

15AA would set up two parallel common law tests for employee *vs* self-employed—one being determined by the High Court, the other being determined by statute. This would effectively mean that the statute (Workplace Relations) was intruding into the commercial contract, as determined by the High Court. This would create a breach with the principles established by the International Labour Organisation.

9. Conflict with Competition law – Price fixing and collusion

The ramifications of having industrial relations law intrude into competition law and regulation are major.

The reason that this issue is of such profound importance stems from the basic thesis—namely, the sharp difference between the commercial contract and the employment contract. The two contracts have totally different functions.

As an overview

- At the heart of competition law is the prevention of collusive price-fixing of goods and services.
- At the heart of employment/industrial relations law is a system of sanctioned, legal price-fixing (of wages).

Significantly, competition laws include a specific provision that prevents the ACCC from interfering in employment contracts and the price-setting/fixing that occurs as a normal course of events in industrial relations (employment) matters. This restriction on the ACCC is imposed even though there have been glaring examples where the industrial relations system has been used to mask collusive commercial price-fixing, and the manipulation and rorting of competition.

The ACCC is restricted as follows

Section 51(2)(a) of the Competition and Consumer Act 2010, (CCA) says:

> (2) In determining whether a contravention of a provision of this Part other than section 45D, 45DA, 45DB, 45E, 45EA or 48 has been committed, regard shall not be had:
>
> (a) to any act done in relation to, or to the making of a contract or arrangement or the entering into of an understanding, or to any provision of a contract, arrangement or understanding, to the extent that the contract, arrangement or understanding, or the provision, relates to, the remuneration, conditions of employment, hours of work or working conditions of employees; [Emphases added]

This potential for the rorting of competition law under the guise of industrial relations agreements is not some theory. It has raised the concern of the ACCC in the past.

In 2015, then ACCC Chair Rod Simms gave a major speech on the issue highlighting specific cases where it could be argued that, under the mask of an industrial relations agreement, a business had colluded with unions to create agreements that would damage competitors. Rod Simms mentioned several cases, but one case stood out. That case was the transport company, Toll, who had been exposed as entering an industrial agreement with the Transport Workers Union on the condition that the TWU would conduct aggressive action against named competitors of Toll with the intention of harming the competitors. The effect of such action would be to harm competition. In his speech Rod Simms explained the limitations on the ACCC to stop such arguably anti-competitive behaviour.

The Simms speech is of major importance. We believe it should be studied in relation to 15AA and also the 'employee-like' of the 'Loophole' Bill if the competition implications of the 'employee-like' agenda are to be understood.

Rod Simms said of the Toll case:

> Unions have been given a clear role under the law to represent their members and take action seeking improved wages and conditions. However, this does not give them or businesses cooperating with them a licence to seek to regulate markets. They could take themselves outside the above exemptions if they seek to determine which firms may operate within markets, what prices they can charge or how bids for work will be determined.
>
> In a market economy it should be the market that sets prices and determines who participates and who wins work, not unions or businesses. (page 3)

Using the Toll example (and others) Rod Simms commented on the ACCC's jurisdiction saying:

> The effect of this IR carve out is that the ACCC does not have jurisdiction to deal with agreements, or aspects of agreements, that relate to employment conditions. (Page 4)

As a matter of law, the FWC is currently restricted to employment matters, that is those matters pertaining to contracts of services. The FWC does not currently have jurisdiction over contracts for services. Likewise, the ACCC does not have jurisdiction over contracts of service, as explained above.

15AA is a measure that will ''obliterate' this sharp and necessary regulatory divide between competition and employment. It is a huge leap.

When this sharp distinction between the regime to outlaw price-fixing and the regime to sanction price-fixing is understood, 15AA is seen in a disturbing light.

That is, the implementation of 15AA and the 'employee-like' agenda involves the setting and fixing of commercial prices in a way that is illegal under competition law.