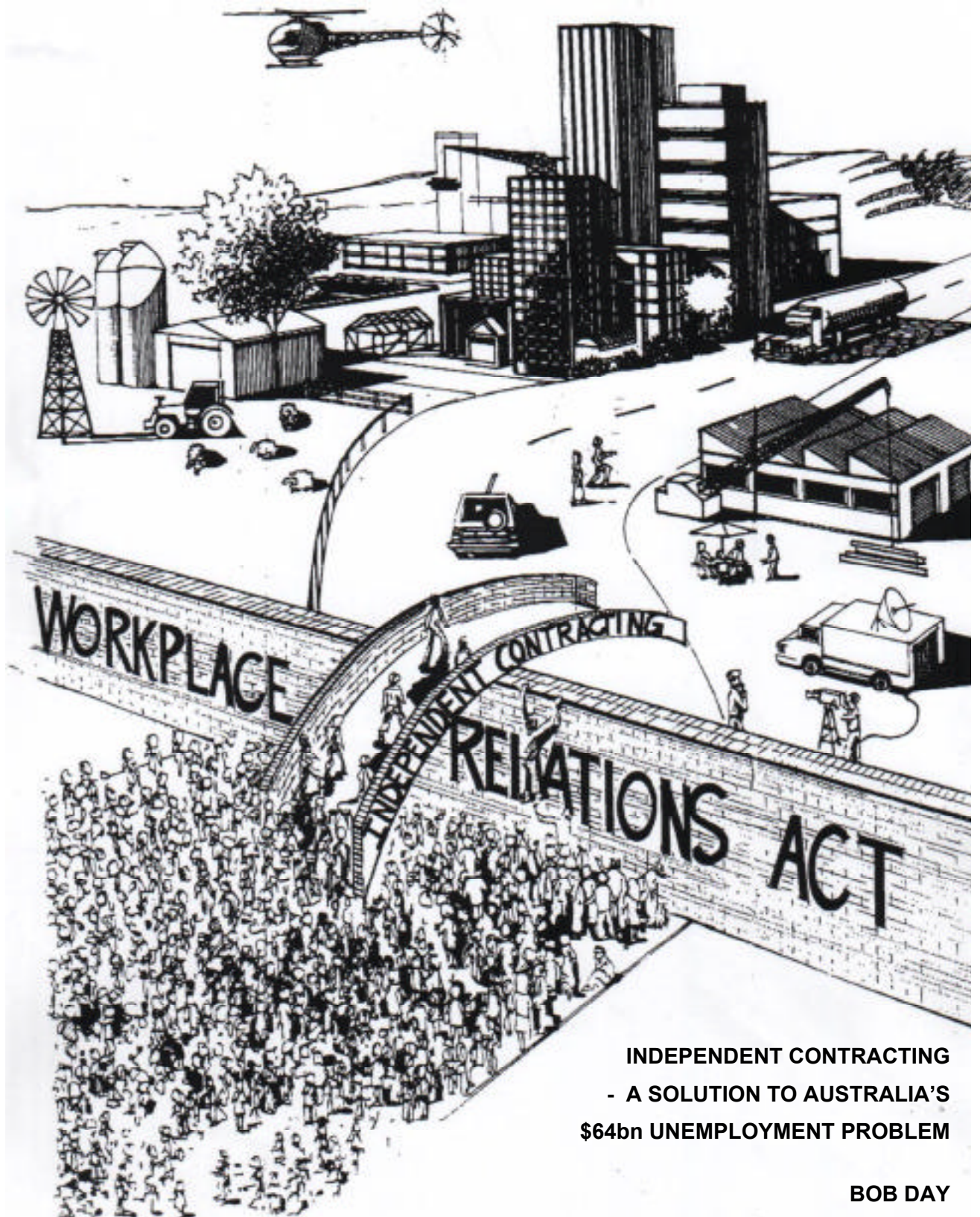


“Contract Bridge”



INDEPENDENT CONTRACTING
- A SOLUTION TO AUSTRALIA'S
\$64bn UNEMPLOYMENT PROBLEM

BOB DAY

PREFACE

“Contract Bridge”, the card game devised by Harry Vanderbilt in 1925 has developed into a social phenomenon unparalleled in the history of card games. The game’s brilliance lies in the principle that “contract partners” are able to work together. Often a partner with few points supports a partner with a much stronger hand. They both equally share the reward by winning the game.

In the world of work, traditional employment – that is, the traditional employer-employee relationship, has become so regulated that it has, in the words of eminent US economist and lawyer Richard Epstein,

“...created a legal edifice of stunning complexity. Protective laws abound on every conceivable aspect of the subject: health, safety, wages, superannuation, unionization, hiring, promotion, dismissal, annual leave, long service leave, retirement, discrimination, access and disability. The volumes of regulation, rulings, and cases on each of these bodies of law would take a treatise to summarize fully. In the face of this mind-numbing complexity, we cannot accord (this edifice) any presumption of legitimacy, which has been created by a set of elaborate legislative compromises and political deals. It has been fuelled by the perception that employers dictate the terms of employment to their workers in their relentless pursuit of the bottom line, but at the same time are so irrational, so subject to whim, caprice and prejudice, that they cannot be allowed to set the employment rules for their own workplaces.”

Australia’s N R Evans continues the charge,

“The economic burden which the ‘Higgins legacy’¹ places on Australia is, first, a burden of huge transaction costs and risks associated with every employment relationship. Second, it effectively excludes from the labour market a large segment of the poorest and least capable section of the community and third, it transfers a large part of the post 15 and 16 year old cohorts from workplace experience, notably apprenticeships, into educational institutions where they waste their time and everyone else’s. No one has asked whether the drug problem, which seems to be getting worse amongst young people, is related to this phenomenon.”²

Independent Contracting offers more than a glimmer of hope in redressing the awful situations described by Epstein and Evans. It is a paradigm shift which has the potential to transform the Australian economy onto a higher level of prosperity and opportunity. Its brilliance lies, as is so often the case, in its simplicity – contract partners working with one another for their mutual benefit.

Over one million people have so far crossed the Contract Bridge.

The firmly entrenched positions of the ALP, the Democrats and the Greens effectively means that the prospect of getting any meaningful reform of the 1996 Workplace Relations Act through the Senate now seems unlikely. This does not bode well for the unemployed, the underemployed, the Budget and Australia's economy in general. This may, however prove to be a blessing in disguise. Sometimes, the only way to achieve a *breakthrough* is to consider a break *with*.

The seemingly impenetrable wall which separates those in need of work and those in need of workers must somehow be scaled. The current Workplace Relations Act has become such an immovable object that it is now time to consider alternatives to reforming the Act in our ongoing quest to reduce unemployment, lift productivity, increase incomes and improve the living standards of working men and women.

Independent Contracting provides that alternative.

Independent Contracting does not break *through* the existing Industrial Relations system – it breaks *with* it. It is a world of work with a culture based on freedom, respect and mutual benefits. It relies on both existing legislation and the common law, and the legal principles upon which it is based have been consistently upheld in a series of recent High Court, NSW Court of Appeal and AIRC judgements³. The Alienation of Personal Services Legislation (APSI) of 2001 also provides the Federal Government (and the Tax Office) with a solid framework within which to recognize bona fide contractual relationships. The Tax Office has, for example, already agreed that trade contractors who use the HIA Trade and Work Order Contracts will comply with all the requirements of the new APSI legislation. Such Federal legislation would also automatically override any attempt by State Governments to “deem” all contracting to be “employment”.

When business owners more fully understand the doctrine of – as former Prime Minister Robert Menzies once put it, “*the sanctity of contract*” and see the determination of the Federal Government to defend those principles, they will realise why such a dramatic increase in independent contracting has occurred in recent years and how they too could equally apply it to their own businesses. Independent Contracting recognizes that people have a God-given right to work as hard as they like, for as long as they like in order to achieve the things they want in life. It is true that, the conditions under which many independent contractors work can be arduous and their hours long, but they prefer the freedom that goes with being their own boss and are not prepared to sacrifice that freedom for the so-called benefits of traditional employment.

Over the past 10 years independent contracting has more than doubled and, when added to the pool of self-employed owner-managers, the non-employee workforce now stands at over 1.5m people, or 20% of the workforce.⁴

Independent contracting offers people a real choice between traditional employment with its familiar contents – annual leave, long service leave, sick leave, maternity leave, superannuation, redundancy payments etc etc, and a new structure which provides a legal mechanism for business owners and self-employed contractors to make arrangements which suit the parties themselves and not something which has been imposed upon them by often heavy-handed, self-interested third parties.

Mutually agreeable contracts allow the parties to jettison all the old compulsory entitlements in favour of all-inclusive remuneration arrangements. They include – again, if both parties agree – the understanding that either party may terminate the contract at any time and for any reason. Unfair dismissal claims, the “legal greenmail” which haunts most small businesses and are a major disincentive to small business proprietors to employ new staff, can simply be taken out of the equation. And it is this small business sector which has the greatest capacity for generating new jobs.

Independent contracting has other benefits too which small business owners are rapidly discovering. It avoids the time-consuming practice of contributing to long service and superannuation schemes and, most importantly, the responsibility to deduct tax. Independent contractors send their own tax payments to the ATO via quarterly BAS statements. The advantage of simplicity in these matters cannot be underestimated and anyone who’s had to do this paperwork (or pay someone else to do it for them) will understand the substantial benefit it offers.

Some of the industries in which independent contracting have been most successful to date include: nursing, farming, construction, forestry, fishing, education, journalism, IT, franchising, couriers, child-minding, window cleaning, mobile mechanics, insurance, contract gardeners (eg Jim’s Mowing), domestic chores, car detailing, mail delivery, pool maintenance and pet grooming. It also provides retirees with tremendous opportunities to re-engage the workplace in circumstances which suit their lifestyles. In fact, over 50% of those aged 60 and over who are still working are doing so in their own businesses⁵. The proliferation of mobile telephones, email and easy to use business management software have given independent contractors the tools and resources they need to manage their businesses cheaply and efficiently. The new tax system (ANTS) is also steadily eroding the informal or ‘black’ economy, and as the demand for outsourcing in the above areas

grows, there will be room for significant growth. And the more clearly the advantages of the contracting alternative are explained, the greater the propensity to embrace this concept will be.

Maintaining the existing Award System – the principle cause of Australia’s consistently high levels of unemployment and all its associated ills (drugs, crime, violence, poor health, teenage pregnancy and even suicide) has been estimated at costing the economy over \$60 billion. As N R Evans puts it, *“The cost of maintaining the Australian labour market regulatory apparatus is significant... and that does not include the cost of maintaining an entire Government Department.”*

A starting point for the Federal Government to address this massive problem could be the active promotion of independent contracting as an alternative to traditional employment arrangements. Public advertising campaigns, targeted information to employers about the legal and commercial basis upon which independent contracting is based and its flexibility as an option which is available to very many Australian workers, should be the first consideration. Promotional campaigns should emphasize the simplicity and flexibility of independent contracting and provide sample contract templates and check-lists (click here for: [ICA’s checklist](#)) to ensure compliance with the legal requirements of the new paradigm. With the active commitment of the Federal Government to such a campaign, a new growth industry would emerge offering independent contractors aggregated services – accounting, insurance, BAS returns, contract management and other advisory services allaying concerns that many of today’s unemployed may not be up to the requirements of running their own business.

The Federal Government should also set an example in its own employment practices and look to independent contracting wherever possible. The USA set such a pattern in the 1970s when it adopted a ‘non-dependency on direct employment’ strategy which proved to be a turning point in American labour relations. US unemployment levels have been consistently lower than Australia’s despite its much higher levels of illiteracy and unskilled labour. If Australia had the same proportion of its working age population employed as in the US we would have another 600,000 people in employment⁶, effectively eliminating our unemployment problem altogether. Australia’s archaic Award System is the primary reason for the disparity. It is hugely complicated (the 1996 Workplace Relations Act comprises 550 pages of rules and regulations and typical awards contain many hundreds of pages), extremely expensive and promotes a culture of antagonism between employer and employee which is both ridiculous and impoverishing.

In an interview with *The Australian Financial Review*⁷, the US’s top international economic official in the US Treasury, Dr John Taylor, the man tipped as most likely to succeed Dr Alan Greenspan as Chairman of the US Federal Reserve said, whilst lauding Australia’s economic management, “I

always worry about unemployment being too high in Australia. I would hope that there would be ways to deal with unemployment. And that has to do with flexibility of the labour markets and laws with respect to wages.”

Dr Taylor went on to say, *“We’ve been fortunate in the US that the unemployment rate has been low in recent years... it got down below 4 per cent. A very flexible, dynamic labour market can be one in which, if people want to move to a different job, it’s a very short period of time when they are unemployed. When kids graduate from school they can get a job quickly.”*

He contrasted the Australian labour market with America’s, *“When people look at the US they mention the flexibility in the labour market and the ability of firms to make decisions about the workforce, to structure pay in ways in which are related to the performance and skills of the workers.”*

In other words, freedom and prosperity go hand in hand.

Independent Contracting provides us with an opportunity already available to address the very problems that Dr Taylor so clearly enunciates.

Such a campaign as described above would undoubtedly spark a major political row with the union movement and the ALP. So be it.

Wolfgang Kasper, Emeritus Professor of Economics, University of NSW best sums up the case for change, *“(Our) freedom to work is now out of step with other aspects of economic freedom. Everyone’s life opportunities are diminished by these restrictions on the freedom to work”*.⁸

NOTES

¹ Henry Bournes Higgins was the 2nd President of the Arbitration Court (1905 – 1921) – the forerunner of the Australian Industrial Relations Commission. He is considered the father of Australia’s system of labour market regulation.

² The Pearl of Great Price – Review Paper, N R Evans 2002.

³ Hollis v Vabu Pty Ltd (2001) HCA44; Vabu Pty Ltd v Federal Commissioner of Taxation (1996) 33ATR537; Dennis William Graham v Mayne Nickless (2001/5368)

⁴ ABS Forms of Employment 6359.0 August 1998; Prod Commission secia Table 5.8 Sept 1998

⁵ ABS

⁶ The Case for the Labour Market De-regulation, Des Moore Nov 1998

⁷ AFR, 8th April, 2002

⁸ W Kasper, Economics Freedom Watch Report No 1 (CIS Feb 2002)