



General Manager  
Small Business, Competition  
and Consumer Policy Division  
The Treasury  
Langton Crescent  
Parkes ACT 2600

7 April, 2015

Submission by Professional Contractors and Consultants Australia  
(a Division of Professionals Australia)  
in response to the Competition Policy Review Final Report

We write regarding Recommendation 37 of the Harper Competition Policy review in relation to the application of sections 45E and 45EA of the Competition and Consumer Act (CCA).

Professionals Australia recognises, as acknowledged by the International Labour Organisation (ILO), that independent contractors are governed by commercial law, while employees are governed by industrial law. We recognise independent contractors' freedom to operate in the manner they choose where genuine choices exist. We recognise independent contracting as a wholly legitimate form of engagement where fair contract terms are in place, and the right of business to engage contractors where it does not undermine the security of employment of the permanent workforce and where contractors are afforded equivalent rights and protections.

While we recognise this, we also concur with the ILO which noted that while genuine commercial and independent contracting arrangements should not be interfered with, there is a need for mechanisms to ensure that persons engaged under disguised employment relationships have access to the protections they are due at the national level<sup>1</sup>.

In line with our contemporary approach to representing the diverse interests of our membership, supporting workplace flexibility and acknowledging the legitimacy of alternative forms of engagement, Professionals Australia provides information, legal and insurance services to around 2,000 contractors through our Contractors and Consultants special interest group, Professional Contractors and Consultants Australia.<sup>2</sup>

Services include:

- advice on business start-up and managing the transition from employee to consultant;
- review of members' contracts for service by in-house lawyers;
- access to discounted professional indemnity insurance;
- information on the Alienation of Personal Services Income tax rules;
- guidance on working through a labour hire agency as a contractor; and
- a professional development scholarship to assist with expanding and updating skills in the absence of a formalised and permanent employee/employer relationship.

<sup>1</sup> ILO, *The Scope of the Employment Relationship, Report V, 2003*

<sup>2</sup> <http://www.professionalsaustralia.org.au/contractors-consultants/>

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### *Sham contracting*

Sham contracting – the misclassification of workers as contractors who, when assessed against the common law test of employee, are likely to be more appropriately classified as employees – is a significant concern for our members. Sham contracting denies workers their workplace rights and entitlements including avoiding employment costs such as workers' compensation, professional indemnity insurance, leave entitlements, plant/equipment costs (because independent contractors generally supply their own tools and equipment), PAYG tax, superannuation, payroll tax, redundancy entitlements and unfair dismissal protections. Professionals Australia is opposed to changes to competition law which would facilitate unscrupulous employers contriving to place segments of workers outside the framework of standard employment protections, rights and benefits.

Particularly in highly-competitive industries with low barriers to new entrants to the field, unscrupulous employers may attempt to aggressively minimise labour expenses and potentially contravene workplace laws by engaging in sham arrangements. Those who avoid obligatory rates of pay and other entitlements gain an unfair competitive advantage and compromise the level playing field created by a system of basic employment entitlements in conjunction with mechanisms to provide equivalent rights and protections for contractors.

Professionals Australia recognises the changing employment landscape and supports the use of independent contractors for those who are informed about their options and choose to operate under these arrangements whether it be to disperse specialist skills, to cope with peak workloads, or to undertake work which is not of a permanent ongoing nature. We will however continue to oppose the use of contractors where genuine choice does not exist, where individuals are not informed about the consequences of changed work arrangements, where contractors are engaged under less favourable pay and terms than equivalent employees or where the pay and conditions of permanent employees are threatened or undermined.

### *“Jump up” clauses*

Jump up clauses in agreements are clauses which require the employer to afford contractors the same terms and conditions as employees. They are an important mechanism for securing equivalent pay and conditions for contractors and ensuring their engagement does not undermine the pay, conditions and security of employment of the permanent workforce. Under the Fair Work Act, clauses which qualify or restrict the employer engaging contractors are not permitted. However terms that require the employer to consult before engaging contractors and that require the employer to afford contractors the same terms and conditions as employees are permitted. This is a critical mechanism for providing equivalent rights and protections for independent contractors and for protecting the integrity and security of employment of the permanent workforce. Jump up clauses in conjunction with strong sham contracting penalties in the Fair Work Act are fundamental to protecting workers from employers who attempt to use sham contracting arrangements.

These comments mirror those made as part of our submission to the Productivity Commission Inquiry into Workplace Relations. A copy of our submission is available at [http://www.professionalsaustralia.org.au/download/submissions/FINAL\\_Professionals%20Australia%20submission%20PC%20Inquiry%20into%20Workplace%20Relations%20.pdf](http://www.professionalsaustralia.org.au/download/submissions/FINAL_Professionals%20Australia%20submission%20PC%20Inquiry%20into%20Workplace%20Relations%20.pdf).

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### Review recommendations

The Harper Competition Review has recommended making awards and industrial agreements subject to sections 45E and 45EA of the Competition and Consumer Act (CCA).

Section 45E of the CCA prohibits a person (an employer) from making a contract, arrangement or understanding with an organisation of employees that contains a provision restricting the freedom of the employer to supply goods or services to, or acquire goods or services from, another person. Section 45EA prohibits a person from giving effect to such a contract, arrangement or understanding.

The Review found a conflict between the objective of sections 45E and 45EA and the regulation of awards and industrial agreements under the Fair Work Act.

While the ACTU proposed exempting workplace approved under the Fair Work Act from the provisions, employer representatives proposed that sections 45E and 45EA be amended to include awards and industrial agreements.

The Review recommended that sections 45E and 45EA of the CCA be amended in line with employer proposals except to the extent they relate to the remuneration, conditions of employment, hours of work or working conditions of employees (Recommendation 37).

Under the Fair Work Act, clauses which qualify or restrict the employer engaging contractors are not permitted. However terms that require the employer to consult before engaging contractors and that require the employer to afford contractors the same terms and conditions as employees are permitted. In August 2012, a Full Bench of the Federal Court hearing an appeal by the Australian Industry Group in the ADJ Contracting case backed the right of unions to negotiate workplace agreements that afford contractors the same terms and conditions as employees, blocking a third attempt by employers to have the clauses declared unlawful. The form of amendment proposed in Recommendation 37 would be a catalyst for a further round of common law testing through the Courts similar to that which has already occurred in relation to the ADJ contracting case.

Jump up clauses are a critical mechanism for providing equivalent rights and protections for independent contractors and for protecting the integrity and security of employment of the permanent workforce. Jump up clauses in conjunction with strong sham contracting penalties in the Fair Work Act are fundamental to protecting workers from unscrupulous employers who try to avoid their employment obligations.

In our view, making awards and industrial agreements subject to sections 45E and 45EA of the CCA would undermine the level playing field provided by jump up clauses and the strong sham contracting provisions of the Fair Work Act.

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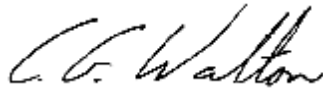
One of the objects of competition legislation is to protect Australians from unfair commercial practices.

Professionals Australia is of the view that exempting awards and industrial agreements from sections 45E and 45EA is a critical mechanism for addressing the power differential of parties involved in commercially-based work arrangements. An exemption would not only protect Australians from unfair commercial practices, but would add to the certainty of genuine commercial relationships, support the major contribution of independent contractors to the dispersal of specialist expertise across Australian industry and maximise their contribution to Australia's economic growth, productivity and competitiveness.

The benefits to the community as a whole of such a restriction clearly outweigh the costs.

We thank you for the opportunity to comment on the recommendations of the Review.

Yours sincerely,



Chris Walton  
CEO

## **About Professional Contractors and Consultants Australia**

Professional Contractors and Consultants Australia is a division of Professionals Australia (formerly the Association of Professional Engineers, Scientists and Managers, Australia). We represent several thousand professional contractors and consultants from a broad range of professions including professional engineers, scientists, IT professionals, architects, pharmacists and translators and interpreters.

Professionals Australia is an organisation registered under the *Fair Work Act 2009* representing over 25,000 members throughout Australia. Professionals Australia is the only industrial association representing exclusively the industrial and professional interests of these groups.

Professional Contractors and Consultants Australia promotes the views of their contracting and consulting members on a wide range of policy issues to government, industry and the community.

We have three objectives:

- to provide a strong voice for professional contractors This includes considering the kind of support, policies and practices at the enterprise and structural levels that will be necessary to create a sustainable permanent and contingent workforce capable of realising optimal levels of innovation, productivity and competitiveness;
- to play a leading role in encouraging dialogue between industry and government about issues affecting contractors and consultants; and
- to promote public understanding of contingent workforce issues and the key role professional contractors and consultants play in ensuring Australia's future. This involves influencing public policy and resource allocation decisions and promoting the value of professional contractors and consultants to decision-makers and the wider community. We seek to highlight the critical role contractors and consultants play in the dispersal of specialist skills and in enabling productivity and innovation and promoting economic prosperity. In doing so, we raise the status of professionals operating under contracting and consulting arrangements.

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