



To be truly radical is to make hope possible, rather than despair convincing - Raymond Williams No. 75 – Monday 6 February, 2017

Branch News No 75 – Special Edition

Inquiry into Corporate Avoidance of the Fair Work Act 2009

Dear Comrades

Please find attached a submission by the Queensland Branch to the relevant Senate Committee investigating the above.

David Greene and I burnt the midnight oil putting this together. David's work is simply outstanding. All Queensland Officials and Organisers had input and I especially thank Jason Miners for assisting in getting delegates together to assist with vital information. Fellow workers, Bob Barnes and Laurie Horgan deserve special mention.

These partnership agreements are poison in the towage area and are spreading to sections of the offshore as well.

We have outlined the problems and David has also put forward a possible remedy.

As a knock about Painter and Docker's Leader, Ray 'the pig' Winning, said to me 30 plus years ago, 'Bobby there is no problems only solutions.' Unique man but that's another story.

I hope everyone finds it of interest.

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6 February 2017

Committee Secretary
Senate Education and Employment Committees
PO Box 6100
Parliament House
Canberra ACT 2600

By email only: eec.sen@aph.gov.au

Dear Committee Secretary,

CORPORATE AVOIDANCE OF THE FAIR WORK ACT 2009

1. We refer to the above inquiry.
2. On 23 January 2017, the Committee agreed to an extension of time to 3 February 2017 for receipt of our submission in relation to the above inquiry.
3. We take pleasure **enclosing** herewith our submission for the Committee's attention. We would be pleased to make ourselves available to the Committee if our attendance at a hearing would be beneficial.
4. If you have a query about anything raised in this letter or our submission, please contact David Greene in the first instance on (07) 3395 7215, or by email to david.greene@mua.org.au.

Yours faithfully,

Bob Carnegie
Branch Secretary, Queensland Branch
MARITIME UNION OF AUSTRALIA

David Greene
National Legal Officer
MARITIME UNION OF AUSTRALIA

Encl. Submission of 3 February 2017 by the Queensland Branch of the Maritime Union of Australia to the Senate Standing Committee on Education and Employment in relation to an inquiry into the incidence of, and trends in, corporate avoidance of the Fair Work Act 2009.

SUBMISSION

Submission of 3 February 2017 by the Queensland Branch of the Maritime Union of Australia to the Senate Standing Committee on Education and Employment in relation to an inquiry into the incidence of, and trends in, corporate avoidance of the Fair Work Act 2009.

A. Introduction

1. The Queensland Branch of the Maritime Union of Australia (**the Branch**) represents the industrial interests of approximately 2,000 workers in the Australian Maritime Industry.
2. The Branch is focused on protecting the wages and conditions under which all members are employed, and to foster the best interests of our members.
3. We aim to improve industrial relations in the maritime industry, to provide legal assistance to our members, to protect members from any infringement of their rights, and to secure or assist in securing legislation for safety in or in connection with the maritime industry and for the general and material wellbeing of members.

B. The Inquiry

4. Whilst the Branch is concerned about attempts generally by certain employers and employer associations to circumvent¹ the provisions of the *Fair Work Act 2009* (Cth) (**the FW Act**), and undermine workers' terms and conditions of employment, this submission relates solely to the issue of sham partnerships.
5. The membership of the Branch is concerned by certain employers utilising sham partnerships, established under State Law², in the place of an employed workforce as a means and method to undermine the terms and conditions of workers, and circumvent the provisions of the FW Act.
6. We consider that our membership's concern in this regard falls squarely within the ambit of your inquiry, and relates to the use of contracting arrangements that affect workers' pay and conditions³.

C. The Sham Partnership Model

7. Many of our members and former members have been adversely affected, either by the loss of employment, or by the elimination of legally protected terms and conditions of employment, from the introduction of partnership arrangements to replace the traditional employment relationship in the operation of tug boats at certain ports in Australia.
8. The arrangements arise in the context of a change of tender-holder used in the operation of tug boat services. By way of illustration, when Company A loses the tender for the operation of a tug boat service, it usually makes its workforce redundant. The new tender-holder, Company B, then refuses to hire workers to operate the tug service, and insists that the tug service must be operated by "partners" in a partnership agreement contracting with Company B, through a service or management agreement, for the provision of labour in the operation of the tug boat service.

¹ See for example the issues raised by the MUA in *The Maritime Union of Australia v MMA Offshore Logistics Pty Ltd t/a MMA Offshore Logistics*; *The Maritime Union of Australia v DOF Management Australia Pty Ltd*; *The Maritime Union of Australia, v Smit Lamnalco Australia Pty Ltd* [2017] FWCFB 660 (1 February 2017)

² For example, the *Partnership Act, 1891* (Qld)

³ Refer section (a) of the Terms of Reference

9. Company B, the new tender-holder, would traditionally have employed the workforce directly, and would therefore become amenable to the transfer of business provisions in the FW Act⁴. If not for the new tender-holder's insistence on the use of partnerships, the "partners" would otherwise have become employees with the benefit of the applicable industrial instrument, and the protections afforded by the FW Act.
10. The "partners" in such partnerships are not required to buy into or invest in the partnership, but must enter very prescriptive partnership agreements, usually drafted at the behest of the new tender-holder, and which usually contain stringent confidentiality terms prohibiting the "partners" from discussing anything contained within the agreement, or arising upon the partnership relationship, with any person.
11. In at least one of the arrangements we have seen, the method of remuneration was based on hourly rates for work performed by the "partners" for the new tender-holder, which was at rates substantially below what would have been paid had that person been an employee remunerated under the applicable Modern Award.
12. The common theme in such arrangements is that the relevant tender-holder has completely shifted the burden for insurance, workers' compensation, maintenance of the tug vessel, superannuation, and payment of income tax to the partnership and the traditional employees.
13. The individual "partners" lose any entitlement under the National Employment Standards, or any other terms and conditions of employment mandated by the FW Act. The "partners" do not have access to personal leave, annual leave, long service leave, community leave, maternity or paternity leave, or to any allowances or penalties which would traditionally arise under an applicable industrial instrument.
14. The usual arrangement requires the "partners" to supply alternative labour, at their own cost, should they need to take any time off from their role with the tender-holder.
15. In some of the arrangements we have seen, a "partner" can be dismissed from the partnership without recourse to any remedy such as an unfair dismissal remedy under the FW Act. Tellingly, such dismissals do not enliven any rights under the partnership agreement for the partner to demand the taking of a general account or the dissolution of the partnership as would typically arise in a genuine partnership.

D. Scope of the Current Prohibition on Sham Arrangements

16. Sections 357 to 359 of the FW Act deal with sham arrangements and attempts by employers to use contractual arrangements to undermine terms and conditions of employment, and/or circumvent the FW Act.
17. The current prohibitions are limited in scope, and prohibit:
 - a. an employer misrepresenting to an employee or prospective employee an employment arrangement as an independent contracting arrangement (s.357);
 - b. an employer dismissing or threatening to dismiss an employee to engage that employee as an independent contractor to perform the same or substantially the same work (s.358); and

⁴ Part 2-8 of the FW Act

- c. an employer from engaging in misrepresentation against an employee or former employee to persuade or influence that person to enter a contract for services for the provisions of the same or substantially the same work as that person performed as an employee (s.359).
18. Section 12 of the FW Act does not define 'independent contractor', other than to note that an independent contractor 'is not confined to an individual'.
 19. The High Court has recognised that the purpose of section 357, within the scheme of Part 3-1 of the FW Act (in which section 357 sits), is to 'protect an individual who is in truth an employee from being misled by his or her employer about his or her employment status.'⁵
 20. The current prohibitions do not extend beyond actual or proposed independent contracting arrangements between an employee, former employee, or prospective employee (as the case may be), and a particular employer.
 21. Having regard to section 12 of the FW Act, the prohibitions could extend to groups of such affected employees, former employees, or prospective employees.
 22. Under Part 3-1 of the FW Act, independent contractors have limited workplace rights, including being protected from adverse action, coercion and abuse of freedom of association. They can also apply to court for an order setting aside a contract if such a document were found to be harsh or unfair under the *Independent Contractors Act 2006* (Cth).

E. The Legal Concept of 'Sham'

23. "Sham" is an expression which has a well-understood legal meaning. It refers to steps which take the form of a legally effective transaction but which the parties intend should not have the apparent, or any, legal consequences.⁶
24. The oft-relied upon passage of Windeyer J, in *Scott v Federal Commissioner of Taxation*⁷, describes the legal considerations applying to any scheme or arrangement which has been impugned as a sham:

On the other hand, if the scheme, including the deed, was intended to be a mere facade behind which activities might be carried on which were not to be really directed to the stated purposes but to other ends, the words of the deed should be disregarded ...

A disguise as a real thing: it may be an elaborate and carefully prepared thing; but it is nevertheless a disguise. The difficult and debatable philosophic questions of the meaning and relationship of reality, substance and form are for the purposes of our law generally resolved by asking did the parties who entered into the ostensible transaction mean it to be, and in fact use it as, merely a disguise, a facade, a sham, a false front - all these words have been metaphorically used - concealing their real transaction.⁸

25. A "sham" has been said to be, for the purposes of Australian law:

something that is intended to be mistaken for something else or that is not really what it purports to be. It is a spurious imitation, a counterfeit, a disguise or a false front. It is not genuine or true, but something made in imitation of something else or made to appear to be something which it is not. It is something which is false or deceptive.⁹

⁵ *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] HCA 45, 17

⁶ *Equuscorp Pty Ltd v Glengallan Investments* [2004] HCA 55, 46

⁷ *Scott v. Federal Commissioner of Taxation* (No. 2) (1966) 40 ALJR 265

⁸ *Ibid*, 279

⁹ *Sharrment Pty Ltd v Official Trustee* [1988] FCA 179; (1988) 18 FCR 449, 16

26. In the context of the FW Act, the comments of the High Court in *FWO v Quest*¹⁰ are instructive about the overall intention of the prohibition on sham arrangements as being to ‘protect an individual who is in truth an employee’.

F. Sham Partnerships

27. It is the Branch’s submission that the supplanting of a traditional employer/employee relationship with a partnership/management agreement is a sham designed for the sole or dominant purpose of avoiding the provisions of the FW Act, and consequently, to adversely affect the terms and conditions of employment of traditional employees. There are collateral benefits for the tender-holder, including the reduction of cost, and the transfer of risk from the traditional employer to the traditional employee.
28. Traditionally, partnerships have been the preserve of the professional classes – principally lawyers and accountants. Common to such partnerships is cooperation for the advancement of mutual interest, with a mutuality of rights, interests and obligations.
29. In determining whether a genuine partnership exists, the Australian Taxation Office consider the intention and conduct of the parties involved. Per the ATO ‘the essential element for a partnership to exist is the genuine intention of all the parties to act as partners. This intention must be demonstrated by the conduct of the parties.’¹¹
30. The sham partnerships forced on tug boat workers cannot be genuine because they do not meet the indicia of a typical partnership in that (without limitation):
- a. they are not truly entered with a genuine intention to advance mutual interests, but rather under the threat of the loss of continued employment;
 - b. the “partners” do not invest in any business or enterprise;
 - c. the “partners” can be dismissed almost at will, and do not automatically have an entitlement under the applicable partnership agreement to call for a general account to be taken or to force the winding up of the partnership; and
 - d. the arrangement is designed for the sole or dominant purpose of avoiding the provisions of the FW Act, and to transfer risk from a traditional employer to a traditional employee.

G. Addressing Sham Partnerships

31. It is the considered view of the Branch that the most appropriate way to remedy the legal lacuna presented by sham partnerships would be to insert new provisions into the FW Act designed to prohibit any scheme or arrangement which has as its sole or dominant purpose the avoidance of the FW Act.
32. An example of how such a scheme might operate is provided by the anti-avoidance rules applicable in revenue law as set out in Part IVA of the *Income Tax Administration Act 1936* (Cth).
33. The FW Act ought to prohibit any scheme or arrangement which has the sole or dominant purpose of avoiding any provision or protection afforded by the FW Act. Any such protection should operate as a civil remedy provision, and enable affected persons and employee organisations to apply to a Court for declarations in respect of the scheme or arrangement.

¹⁰ Supra, 4

¹¹ ATO Taxation Ruling TR94/8

34. We consider that any such additional provisions inserted into the FW Act should sit within Part 3-1, Division 6.
35. We are willing to be heard or make further submissions on the form or substance of any amendment, including an amendment in the form suggested, to deal with the issues raised in this submission.
36. There is a real risk that unless concrete steps are taken to address this issue, sham partnerships will spread outside the operation of tug boat services to other areas of the maritime industry, and indeed to other industries.

Respectfully Submitted.

3 February 2017