

Submission No. 1

Scott Ellis

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Committee Secretary
Standing Committee on Employment, Workplace Relations and Workforce
Participation
House of Representatives
Parliament House
CANBERRA ACT 2600
AUSTRALIA

Dear Sir

Inquiry into Independent Contracting and Labour Hire Arrangements

I wish to make the following submission to the Committee.

Summary

The status and legitimacy of independent contracting and labour hire arrangements (ICLHA) would be enhanced by the use of appropriate dispute resolution mechanisms.

An appropriate dispute resolution mechanism would be:

- mediation; and
- if, and only if, all parties agree, an informal determinative model should be provided as an alternative to litigation.

Submissions

It is the experience of the writer, gained from a number of years practice as a lawyer in the employee relations field, that ICLHA are used for the purpose of avoiding a number of the inflexibilities associated with the employment relationship (amongst other reasons). The use of ICLHA enables businesses to obtain additional short term resources to meet short term demand. Particular issues with the employment relationship are the possibility of protracted unfair dismissal claims and associated claims for redundancy entitlements.

While there is a legitimate need for this flexibility, it should be recognised that the individuals who participate in ICLHA may be harshly dealt with by either the principal to whom labour is provided or the agency through which the labour is

arranged. The contractor/labourer is frequently a small business or an individual for whom unfair treatment may have significant implications.

It is suggested that the recognition that disputes will arise and should be resolved professionally are signs of a mature industry, rather than a shonky, fly by night, industry.

In this context, an informal and inexpensive mechanism for resolving disputes should be a feature of ICLHA. It is suggested that mediation would generally be the most appropriate mechanism in the context. The advantages of mediation as a first line dispute resolution mechanism have been apparent for some time. Mediation is particularly appropriate in this context for the following reasons:

- Mediation is informal and inexpensive. Parties generally participate without the need for legal representation.
- Mediation is consensual and does not prejudice the legal rights of the parties to the dispute, unless an agreement is reached.
- Mediation is consensual and so is the form of dispute resolution which is best suited to preserving an ongoing working relationship.

There may, however, be circumstances, in which a determinative dispute resolution mechanism may be advantageous as a "short circuit" to the litigation process, if mediation is not successful. A dispute about payment calculations may, for example, be suitable for determination if the parties cannot reach agreement. A determinative process should only be permitted if both parties agree to that process and on the basis that no order can be made for the payment of legal costs. The procedure adopted by ACAS in the UK for arbitration of some disputes may be an appropriate model for this purpose¹.

The mechanism for implementation of dispute resolution procedures would depend on the overall approach to reform of this area. Alternatives which suggest themselves are:

- 1 The adoption of an industry code of practice requiring the use of appropriate dispute resolution procedures. It is noted that a similar approach has been adopted in relation to the Franchising Industry. The resolution of franchise disputes is supported by the Office of Mediation Adviser.
- 2 The enactment of legislative "minimum" conditions. A similar approach operates in respect of the resolution of disputes which arise in Australian Workplace Agreements (see section 170VG(3) of the *Workplace Relations Act, 1996*, Regulation 30ZI(2) of the *Workplace Relations Regulations, 1996* and Schedule 9 to the Regulations.

If I can be of further assistance, please do not hesitate to contact me.

Yours faithfully,



Scott Ellis.

¹ See "The ACAS arbitration scheme for the resolution of flexible working disputes, A guide to the Scheme", Appendix 3, page 23, <http://www.acas.org.uk/publications/pdf/flexibleworkingscheme.pdf>, accessed 3 February 2005.