Dissenting Report

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Introduction

1.1 The House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation has completed an inquiry into Labour Hire Arrangements and Independent Contracting. The Committee received many submissions and convened a series of public hearings across the country in order to provide the basis of this report to be tabled in parliament. The Committee found common ground in some recommendations enclosed in the report, however, dissenting members considered other recommendations to be ineffective or contrary to the evidence provided to the Committee. In some areas needing immediate attention, the Committee failed to propose concrete solutions to problems associated with the rapid growth of labour hire employment and independent contracting.

Independent Contracting

1.2 In particular, the report fails to properly address the blurring of the line between independent contractors and employees. While clarifying the definitions is not always simple, we received ample evidence to suggest ways to reduce the current confusion. Furthermore, although Committee members recognised the existence of sham arrangements and forms of disguised employment the Committee failed to recommend any concrete solutions to this growing problem.

1.3 It was accepted by all Committee members that there were genuine independent contractors but an inordinate amount of evidence suggested that many workers were being forced to work as so-called independent contractors in order to avoid taxation or traditional employer responsibilities, such as superannuation contributions or workers' compensation insurance.

Labour Hire Arrangements

1.4 The Committee was provided with significant evidence highlighting the extraordinary growth of labour hire employment in the last 15 years. All Committee members accepted the possible benefits of labour hire employment but the Committee failed to accept the intrinsic deficiencies with labour hire arrangements. In particular, the Committee failed to address the extremely high proportion of labour hire workers that are precariously employed. The rate of casual employment in the labour hire industry was anywhere between 75-95 percent, according to the evidence.

1.5 Furthermore, the Committee was provided credible evidence that the triangular relationship, involving the labour hire agency, the host firm and the labour hire worker has led to a blurring of legal obligations and entitlements in a number of areas, such as occupational health and safety and return to work policies. The Committee has identified the need to understand and clearly delineate the respective responsibilities of occupational health and safety requirements. None of the recommendations provide sufficient solutions, however, to ensure host firms and labour hire agencies jointly share the responsibilities of OH&S laws.

Minister's decision to set up his own inquiry

1.6 The Committee's task was made more difficult by the Minister establishing his own closed inquiry along almost identical lines, to be undertaken by officers of his own department. This Ministerial inquiry commenced with the issuing of a discussion paper on labour hire arrangements and independent contractors, was not open to the public and did not involve the parliament. The discussion paper appeared to already state the Government's preferences in this area of public policy and, as a result, had hampered the Committee in investigating matters referred to it without interference. The decision by the Minister to concurrently establish his own inquiry was viewed by some Committee members as pre-empting and prejudicing the process of the Committee and an example of the executive's contempt of the parliament.

Dissenting Recommendations

1.7 Dissenting members have sought to reach unanimity with all Committee members on recommendations but found that this was not possible. As a consequence dissenting members felt the need to reject many Committee recommendations on the basis that they did not reflect the evidence that was provided. Furthermore, dissenting members considered that in some significant areas the Committee failed to recommend solutions to deficiencies in existing laws pertaining to labour hire arrangements and independent contractors. Accordingly, the dissenting members will provide reasons for opposing certain recommendations and propose alternatives. Additional recommendations will be proposed where dissenting members consider the report has inadequately addressed matters relevant to the inquiry.

THE RECOMMENDATIONS

A. The dissenting members have agreed upon recommendations 1, 5, 6, 7, 8, 9, 10, 11 and 13.

B. The following recommendations of the Committee are opposed and alternative recommendations are proffered:

Opposition to Recommendation 2

> "The Committee recommends that the Australian Government maintain the common law approach to determine employment status and distinguish between employees and legitimate independent contractors."

1.8 The dissenting members consider that there is a better approach than relying upon the common law approach to distinguish between employees and independent contractors. Although the courts have sought to clarify the lines between the two forms of employment there remains great confusion. As Professor Stewart submitted to the Committee:

> "The [common law] approach is necessarily impressionistic, since there is no universally accepted understanding of how many indicia, or what combination of indicia, must point towards a contract of service before the worker can be characterised as an employee. In effect, this 'multi-factor' test proceeds on the assertion that the courts will know an employment contract when they see it."

1.9 Moreover, although the Courts are in a position to consider the "totality" of the relationship, they primarily determine the status of the parties by reference to any terms formally agreed between them. This emphasis on form rather than substance has led contracts to be constructed in a manner that would lead courts to conclude that an actual employer/employee relationship is instead a relationship between a principal and an independent contractor.

1.10 The dissenting members therefore considered that the best approach to increasing certainty in this area and removing ambiguity is to offer a comprehensive definition of "employee". Of all the evidence provided to the Committee the most compelling proposal on offer

emanated from Professor Andrew Stewart's submission.[1] Accordingly, dissenting members propose the following recommendation instead of the Committee's Recommendation 2:

Alternative Recommendation 2

The Committee recommends that the Australian Government provide a new definition of "employee" by replacing the current definition of "employee" in s. 4(1) of the *Workplace Relations Act 1996*. It should be expressed in the following form:

(1) A person (the worker) who contracts to supply their labour to another is to be presumed to do so as an employee, unless it can be shown that the other party is a client or customer of a business genuinely carried on by the worker.

(2) A contract is not to be regarded as one other than for the supply of labour merely because:

- **(a) the contract permits the work in question to be delegated or sub-contracted to others; or**
- **(b) the contract is also for the supply of the use of an asset or for the production of goods for sale; or**
- **(c) the labour is to be used to achieve a particular result.**

(3) In determining whether a worker is genuinely carrying on a business, regard should be had to the following factors:

- **(a) the extent of the control exercised over the worker by the other party;**
- **(b) the extent to which the worker is integrated into, or represented to the public as part of, the other party's business or organisation;**
- **(c) the degree to which the worker is or is not economically dependent on the other party;**
- **(d) whether the worker actually engages others to assist in providing the relevant labour;**
- **(e) whether the worker has business premises (in the sense used in the personal services income legislation); and**
- **(f) whether the worker has performed work for two or more unrelated clients in the past year, as a result of the worker advertising their services to the public.**

1 Prof. A. Stewart, *Submission No. 69*, pp. 10-11.

(4) Courts are to have regard for this purpose to:

(a) the practical reality of each relationship, and not merely the formally agreed terms; and

(b) the objects of the statutory provisions in respect to which it is necessary to determine the issue of employment status.

(5) An employment agency which contracts to supply the labour of a person (the worker) to another party (the client) is to be deemed to be that person's employer, except where this results in a direct contract between the worker and the client.

(6) Where:

(a) an arrangement is made to supply the labour of a person (the worker) to another party (the ultimate employer) through a contract or chain of contracts involving another entity (the intermediary), and

(b) it cannot be shown that the intermediary is genuinely carrying on a business in relation to that labour that is independent of the ultimate employer, on the basis of factors similar to those set out in (3) above, the worker is to be deemed to be the employee of the ultimate employer.

Opposition to Recommendation 3

> "The Committee recommends that the Australian Government, when drafting federal legislation, in addition to the common law position, adopt components of the Australian income tax assessment alienation of personal services income legislation tests to identify independent contractors."

1.11 The dissenting members contend that the Committee report has taken the wrong approach in properly distinguishing employees and independent contractors. In particular, the Committee report does not convincingly explain why it is necessary to have a definition of "independent contractor" at all.

1.12 As the overwhelming majority of the Australian workforce comprises employees and there is evidence to show efforts are made to hide employment relationships and not hide independent contractors, it is sensible to start with who is an "employee". By definition, a person who is genuinely running their own business and working as an independent contractor should not be regarded as an employee, and

hence would not be subject to the various laws that apply only to employees.

1.13 We also consider that although the personal services income (PSI) legislation may act as a deterrent to avoid taxation obligations it has many deficiencies.

1.14 Firstly, although the PSI legislation seeks to prevent tax avoidance its effectiveness is unknown, as confirmed by Treasury's evidence that well over 99% of the tax claims in this area are self-assessed. It is therefore not known whether these provisions, weak as they are, are being properly enforced.

1.15 Secondly, there are too many ways to escape the legislation, enabling taxpayers who are not genuinely operating a business to be classed as running a "personal services business". The Committee heard evidence that 75% of those claiming to operate a business were self-assessing and relying upon the "results test".

1.16 This heavy reliance upon the "results test" and extraordinarily high proportion of self-assessing PSI applicants fails to instil any confidence in the dissenting members that the current system is an effective means of distinguishing independent contractors from employees.

Alternative Recommendation 3

The Committee considers that there is no need to define "independent contractor" if the proposed "employee" definition is adopted. The Committee therefore recommends that the Australian Government apply the proposed "employee" definition (which contains components of the PSI legislation). Only those able to distinguish themselves from this definition of employment should be determined to be independent contractors.

Opposition to Recommendation 4

> "The Committee recommends that the Australian Government, in conjunction with State and Territory governments, pursue through the Workplace Relations Ministers' Council national consistency in identifying independent contractors. The Committee recommends that this is achieved by, in addition to the common law position, adopting components of Australian income tax assessment

> alienation of personal services income legislation tests in the drafting of relevant state and territory legislation."

1.17 The Committee received evidence suggesting the preference for national consistency in identifying independent contractors. Dissenting members agree that national consistency would have some advantages but should not be at the expense of overriding State laws and legislation.

1.18 Although State legislation could be improved upon from State to State, there is far more evidence of State governments seeking to uncover disguised employment by the use of deeming provisions and preventing exploitative arrangements than any efforts by the Australian Government. Dissenting members are not confident that the current Australian Government would concern itself with current practices that seek to force employees to accept being described as an independent contractor for wrong, often unlawful purposes when pursuing national consistency.

Alternative to Recommendation 4

The Committee recommends that the Australian Government, with the agreement of State and Territory governments, pursue through the Workplace Relations Ministers' Council national consistency in identifying the difference between employees and independent contractors. The Committee recommends that this be achieved by applying the proposed definition of "employee" as outlined above and placing the onus on those who seek to be independent contractors to establish that they are genuinely running a business.

Opposition to Recommendation 12

> "The Committee recommends that the Australian Government broaden the description used in the *Workplace Relations Act 1996* of an independent contractor and extend it beyond 'a natural person'."

1.19 The Committee heard evidence that there was a need to widen the definition of independent contractor as contained in the *Workplace Relations Act 1996* to ensure it goes beyond 'natural person'. This would for instance enable contractors working through personal companies to bring unfair contract claims.

1.20 We are not opposed to this as such, but oppose the recommendation as drafted simply in order to make it clear that we see no need for any broader or more generally applicable definition of "independent

contractor". Consistent with our proposed definition of "employee", we also believe that a similar approach be adopted with employees.

Alternative to Recommendation 12

To the extent that the *Workplace Relations Act 1996* currently refers to "independent contractors", for example in the unfair contract provisions in ss. 127A-127C, the Committee recommends that workers should be covered by those provisions regardless of whether they contract to supply their labour directly, or operate through a personal company or some other legal entity.

Opposition to Recommendation 14

"The Committee recommends that the Australian Government incorporate the following protections when drafting legislation for independent contractors:

- preserving the legal status of independent contractors as small businesses;
- providing a broad description of independent contractor to cover all forms of small business structures;
- regulating independent contractors as small businesses within a framework of commercial laws and institutions, rather than industrial laws and institutions; and
- providing alternative dispute resolution procedures."

1.21 Dissenting members consider that it is essential that genuine independent contractors are protected from unfair contracts and unfair competition but do not agree for the need to provide a definition given the comprehensive definition of employee proposed earlier. Furthermore, dissenting members consider it necessary that the Australian Government do more to protect small business against unfair trading practices of larger enterprises.

Alternative to Recommendation 14

The Committee recommends that the Australian Government examine ways to improve protection for genuine independent contractors against unfair trading practices, including through access to inexpensive and informal dispute resolution procedures.

Opposition to Recommendation 15

> "The Committee recommends that, if constitutional powers are used to implement a national industrial relations system, then the Australian Government ensure that legislation protects legitimate independent contractor arrangements by providing:
>
> - national regulatory consistency;
> - definitional clarity in relation to working arrangements and responsibilities; and
> - accessible dispute resolution procedures."

1.22 Dissenting members do not consider it appropriate for the Australian Government to seek to implement a national industrial relations system without the consent of State and Territory governments. The only area in which the Commonwealth comprehensively covered the industrial relations jurisdiction of a State was when Victoria referred those powers to the Commonwealth.

1.23 In the event that the Commonwealth successfully implements a national industrial relations system the Australian Government should first clearly define an "employee" by adopting the definition as outlined earlier in this dissenting report. Further more the Australian government should legislate to prevent forms of disguised employment.

Alternative to Recommendation 15

The Committee recommends that if constitutional powers are used to implement a national industrial relations system, it should only be undertaken with the agreement with the States and Territories. If such a national system were adopted then the Australian Government should ensure that legislation protects employees from forms of disguised employment practices by adopting the recommended "employee" definition and properly enforcing the legal difference between employee and genuine independent contractor arrangements. Such a system should also protect genuine independent contractors from unfair contracts.

Opposition to Recommendation 16

> "The Committee recommends that the Australian Government extend jurisdiction of the Federal Magistrates Court to hear cases associated with dispute resolution of unfair contracts for service."

1.24 Dissenting members consider that the most appropriate place for these matters to be dealt with is in industrial tribunals, such as the Australian Industrial Relations Commission (AIRC). The unfair contracts jurisdiction was indeed originally conferred on the AIRC and as the High Court of Australia has found that there is no constitutional impediment to allowing it to hear such cases, dissenting members consider this body (and bodies like it at the State level), are the most cost-efficient and accessible forums in which to expedite proceedings of this kind.

1.25 If, however, this recommendation is not accepted, we would not be opposed to the Federal Magistrates Court being able to deal with disputes regarding unfair contracts for services, as an alternative to the Federal Court

Alternative to Recommendation 16

The Committee recommends that the Australian Government reinstate the capacity of the Australian Industrial Relations Commission with the power to hear cases associated relating to unfair contracts for service. However if this is not accepted, the Federal Magistrates Court should be empowered to hear cases of this kind as an alternative to the Federal Court.

C. Additional Recommendations

Precarious Employment

1.26 The overwhelming evidence provided to the Committee illustrated the disturbing growth in casual employment as a result of the growth in labour hire employment. Labour hire companies and unions alike provided evidence that the proportion of labour hire employees casually employed was far in excess of the Australian workforce at large. The incidence of casual employment remains high even amongst long-term employed labour hire employees. Although the Committee agreed unanimously that labour hire companies can provide employers particular skills and can provide flexibility in the

workplace, there was significant evidence to highlight the plight of such employees being employed indefinitely as casuals.

1.27 Dissenting members acknowledge the increased complexity associated with this area given the triangular relationship of the host firm, the labour hire agency and the worker. It is not reasonable, however, to deny "permanent casuals" the opportunity of more certainty and job security if there are no reasonable commercial grounds against doing so.

1.28 Accordingly, dissenting members consider the following recommendation should be proposed:

Recommendation 17

The Committee recommends that the Australian Government attend to the spiralling increase in casual employment by legislating to confer on labour hire workers the right to request permanent employment by the host firm after twelve months continuous service with the host. The host firm would have to give reasonable grounds why it could not employ such a worker. The Australian Industrial Relations Commission should be authorised to hear any dispute over a refusal to grant such a request.

Employer responsibilities

1.29 The Committee received evidence that suggested that the responsibilities of the labour hire agency and the host firm are vague and not clearly understood, particularly in relation to occupational health and safety. The Committee considered there were deficiencies in this area (see Recommendation 6) but did not address the weaknesses in the current arrangements. Furthermore, all employees should have the right to challenge a termination of employment. Dissenting members therefore propose the following recommendation:

Recommendation 18

The Committee recommend that the Australian Government enact laws that recognise that both the labour hire agency and host firm have a role in respect of employment responsibilities. The Australian Government, with the agreement of the State and Territory governments, should ensure that both agency and host share joint responsibility for matters concerning OH&S. The Australian Government should ensure joint responsibility in any unfair dismissal proceedings.

Transmission of Business

1.30 The Committee received evidence from many witnesses that a primary reason for the growth of labour hire employment was the ability to undercut industrial instruments, such as awards or certified agreements. Many unions submitted that employers seek to outsource functions to obviate industrial awards or agreements and therefore enable labour hire agencies to pay inferior wages and conditions, while the work remains essentially the same. Employer bodies and labour hire companies denied that this was a motivating factor behind using labour hire employment and instead suggested that the driving factors behind the utilization of labour hire employment are that it provides flexibility and access to skills the host employer may not possess.

1.31 If the concern amongst some witnesses is that undercutting conditions was prevalent and this view was not accepted as being the case by other witnesses, then the dissenting members see no difficulty in recommending that it be unlawful for labour hire agencies to undercut the industrial instruments or workplace agreements of the host firm.

Recommendation 19

The Committee recommends that the Australian Government legislate to protect the effectiveness of industrial agreements and awards by prohibiting labour hire agencies from undercutting wages and conditions prescribed within the awards or workplace agreements applying to the host firm.

Representation for Independent Contractors

1.32 The Committee received evidence concerning the proposed plans by the Australian Government to limit unions from representing independent contractors. The proposed amendments included in the Trade Practices Act Amendment Bill 2005 (TP Bill 2005) are supported by dissenting Members insofar as they provide small businesses relief from regulatory burdens in seeking to engage in collective bargaining with larger businesses. The dissenting members, however, are most disturbed that the effect of section 93AB(9) of the TP Bill 2005 would be to deny independent contractors the right to choose a trade union to represent their interests at least if they wanted to benefit from the new arrangements. The Australian Government's intention to limit

the rights of small businesses to choose their agent is anti-competitive and discriminatory. Furthermore, we cannot see why bodies such as the Pharmacy Guild of Australia or the AFL Players Association can have an unrestricted right to represent small businesses but a trade union cannot. We can only surmise that this unreasonable provision is motivated by an enmity towards employee organisations but will have the effect of harming small businesses and trade unions alike.

Recommendation 20

The Committee recommends that the Australian Government remove proposed s 93AB(9) from the TP Bill 2005 and provide independent contractors with the right to choose their representative whether that be a trade union or not.

'ODCO' Arrangements

1.33 Dissenting members do not support the statutory recognition of 'ODCO' arrangements in independent contractors' legislation, if such 'recognition' has the effect of entrenching such arrangements and shielding them from proper scrutiny. Labour hire contractors who are used as a form of disguised employment should be considered to be employees for the purposes for industrial relations and other workplace legislation, as indeed would occur under the proposed definition of employment we have advocated.

1.34 The only specific recognition that should be given to 'ODCO' arrangements is the recognition that they are often used as a form of disguised employment.

1.35 Labour hire workers should be protected by health and safety laws and workers compensation whether they are engaged as contractors or employees.

Recommendation 21

The Committee recommends that the Australian Government recognise that so-called 'ODCO' arrangements are a form of disguised employment and should not be recognised as a legitimate contractual arrangement. The Australian Government should effectively outlaw this practice by adopting the definition of employment set out in Alternative Recommendation 2.

Awards and Agreements

1.36 Dissenting members are particularly concerned about proposals contained in the Ministerial discussion paper that awards and agreements be banned from contain clauses which relate to independent contracting or labour hire. Dissenting members strongly oppose such proposals, as they fail to recognise the modern reality of these forms of work, and the huge impact they have on the lives of both contractors and labour hire workers, and the direct employees that they replace or work alongside.

1.37 Restricting matters that can be in agreements is seriously hypocritical, given this government's constant comments about the need for agreement making between parties without interference. It is also contrary to the objects of the Workplace Relations Act which encourage agreement making between the parties.

1.38 To refuse to allow parties to come to an agreement about matters relating to labour hire or contracting is purely ideological and has no good basis in public policy. It also ignores recent decisions of the Industrial Relations Commission which support the view that such clauses are directly relevant to the employment relationship, such as the Full Bench Schefenacker decision (18 March 2005).

Recommendation 22

The Committee recommends that the Australian Government not seek to prohibit the inclusion of clauses relating to labour hire or independent contracting in awards or industrial agreements.

Registration of Labour Hire Companies

1.39 The Committee received evidence from labour hire companies and unions suggesting the need to register labour hire companies. It was contended that many labour hire companies were not competent to be legally recognised a labour hire companies and therefore it was considered that a register be established to ensure that business conducted by labour hire companies meet an appropriate industry standard.

Recommendation 23

The Committee recommends that the Australian Government establish a mandatory register to ensure that labour hire companies comply with proper employment and business practices.

CONCLUSION

1.40 This inquiry into independent contractors and labour hire arrangements has revealed some disturbing trends in the changing employment arrangements for Australian workers and employers. Although there was evidence to show the value in labour hire arrangements and genuine independent contracting there was comprehensive and compelling evidence exposing unfair practices, disguised forms of employment, and exploitation of employees.

1.41 Submissions and oral testimony asserted that the driving factors behind the shift from employee to contractor include the attempts to avoid taxation obligations and for employers to abrogate their traditional responsibilities, such as superannuation, workers compensation, training and occupational health and safety, by restructuring the employment arrangement to one that is ostensibly a contract between a principal and a contractor. This pattern has placed commercial pressure upon other employers to follow suit.

1.42 Dissenting members recognise that there are genuine independent contractors in the workforce but do not consider that a person's legal status can be determined purely by self-description. There should be a clear divide between contractors and employees and that would best be achieved by defining an employee at the outset and then determining what an independent contractor is by what an employee is not.

1.43 Furthermore, we consider that labour hire arrangements should be properly regulated in order to properly delineate rights and responsibilities between labour hire agencies, host employers and labour hire workers. We consider current deficiencies include the high incidence of "permanent casuals" and the blurring of responsibilities in the area of occupational health and safety. Dissenting members see a place for genuine independent contractors and labour hire arrangements but contend that there are too many deficiencies in the existing Commonwealth laws that have left a growing proportion of Australian workers unfairly vulnerable.

ACKNOWLEDGEMENTS

1.44 The dissenting members would like to thank the Chair and other Committee members for the manner in which the inquiry was conducted. The dissenting members would also like to acknowledge the good work of the secretariat in preparing the Report.

1.45 It was disappointing that the secretariat was not sufficiently resourced to assist members wishing to expressly dissent against all or part of the Report and consider the Australian Government should provide more resources to ensure that the parliamentary committee system works effectively.

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Deputy Chair

Mr Tony Burke MP

Ms Annette Ellis MP

Ms Jill Hall MP