SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION LEGISLATION COMMITTEE

2005-2006 BUDGET SENATE ESTIMATES HEARING
30, 31 MAY and 3 JUNE 2005

EMPLOYMENT AND WORKPLACE RELATIONS PORTFOLIO

QUESTIONS ON NOTICE

Outcome 2: Higher productivity, higher pay workplace

Output Group: 2.1 – Workplace Relations Policy and Analysis

Output: 2.1.1 – Workplace Relations Policy Advice

Question Number: W289-06

Question:

Senator Campbell asked at *Hansard* page 106:

In relation to court or tribunal decisions which could be said to have erected barriers to the freedom to contract and engage workers through labour hire arrangements, could the Department provide the following:

(a) examples of those decisions;

(b) explain how it believes they have erected barriers of the type referred to;

(c) elaborate on the specific economic effects of such barriers and limitations;

(d) explain how current laws, such as New South Wales unfair contracts jurisdiction and current deeming provisions, create barriers to the freedom to contract and the freedom to engage workers through labour hire arrangements?

Answer:

(a) This question was asked in the context of the DEWR discussion paper, *Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements* (the discussion paper).

The paper identifies constraints to the engagement of independent contractors in a number of areas, including certified agreements and awards. For example, DEWR's report *Agreement Making in Australia under the Workplace Relations Act 2002 and 2003* found that 34 per cent of agreements certified in 2002 and 2003 contained provisions restricting the use of contract labour. Provisions restricting the engagement of contract labour are not common in federal awards; the *Municipal Employees (Western Australia) Turf Club Award 2000* is one example. They are, however, more

common in state awards. In NSW awards, examples include: the *Elura Mine Enterprise (Consent) Award 2001*; the *Barter Enterprises Steggles Foods Products Pty Limited Beresfield Site Operations AMIEU Integrated Award 2002 – 2005*; and the *Westfield Design Construction Pty Ltd Parramatta Shoppingtown Project Award*.

The discussion paper identifies 'a number of sources of law which have or could potentially have an impact on the use of labour hire arrangements: limitations imposed in industrial instruments on the use of labour hire; changes proposed in state jurisdictions; and court and commission decisions affecting the status of labour hire workers.' Limitations on the engagement of labour hire workers appear in state awards. Some examples from NSW include the *Fresh Start Bakeries Australia Pty Limited (NSW) Enterprise Award 2004*, the *Dairy Farmers TWU Enterprise Award 2002* and the *Daracon Engineering Pty Ltd Newcastle BHP Steelworks Enterprise Consent Award*. Pages 30 and 31 of the discussion paper set out various proposals being considered in state jurisdictions that could have an adverse impact on the ability of employers to engage labour hire workers. The most significant recent court decision affecting the status of labour hire workers is the Federal Courts *Odco* decision, discussed on page 25 of the discussion paper.

(b) In relation to awards, which could be considered to be 'tribunal decisions', the discussion paper raises (at page 4) the proposal that "[t]he Workplace Relations Act should be amended to provide that awards and agreements cannot contain clauses which restrict engaging labour hire workers or impose conditions or limitations on their engagement."

The discussion paper explains how existing clauses might purport to restrict workers through labour hire arrangements. An award might seek to 'prevent respondent employers from contracting out work except on condition that the work be performed on terms no less favourable than those in the award' (at page 9) or 'contain a clause providing that labour hire could only be used in particular circumstances or subject to specific conditions' (at page 30).

(c) It is difficult to quantify the economic costs of barriers to engaging contractors, or labour hire workers, rather than direct employees. Some indication of the magnitude of the effects can be gained from the cost savings yielded by contracting out in the Australian public sector. From the mid 1980s, Australian governments have made very significant changes to the structure of publicly owned trading enterprises. Many have been privatised. Most of those that remained in government hands, or were corporatised before sale, contracted out many of their non-core activities. These processes generated cost savings of between 7 per cent[1] and 20 per cent[2] of total costs. In the late 1990s in the Australian private sector, PA

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[1] Paddon, M. 1991. *The real costs of contracting out: reassessing the Australian debate from UK experience*, Discussion Paper No. 21, Public Sector Research Centre, University of NSW, Sydney. Hodge, G. 1999. 'Contracting out and competition'. *Journal of Economic and Social Policy* 4(1):105-.

[2] Domberger, S., Meadowcroft, S., and Thompson, D. (1986), 'Competitive tendering and efficiency: The case of refuse collection', *Fiscal Studies* 7(4), 69–87. Domberger, S., Meadowcroft, S., and Thompson, D. (1987), 'The impact of competitive tendering on the costs of hospital domestic services', *Fiscal Studies* 8(4), 39–54. Domberger, S., Meadowcroft, S. and Thompson, D. (1988), 'Competition and efficiency in refuse collection: a reply', *Fiscal Studies* 9(1), 86–9.

Consulting has estimated an average cost reduction for outsourcing contracts (outside the IT area) of 10 per cent.[3] Correspondingly, preventing employers from contracting out activities that can be performed more efficiently by other firms can, over time, impose additional costs on the same scale.

(d) As stated in the discussion paper (at page 15), the Government 'opposes laws which impinge on freedom of choice for employers and employees, particularly laws with the potential effect of dragging contractors into being regulated by workplace relations laws against their will', through the application of unfair contract and deeming provisions.

Unfair contracts

The discussion paper notes that unfair contracts provisions such as those in s106 of the *Industrial Relations Act 1996* (NSW) create a barrier to the freedom to contract as 'a contract which was made fairly and was fair in its terms could later be held to be unfair' (page 15). This creates the potential for contractual and commercial uncertainty for parties as their initial intentions can be remade during the life of the contract.

This has attracted judicial comment. For instance, Sheldon J in *Davies v General Transport Development Pty Ltd*[4] noted that s88F of the *Industrial Arbitration Act 1940* (on which current section 106 is based) 'certainly plays havoc with the classic principles relating to contracts' in that a contract can be remade 'either by omitting parts and retaining the rest or by adding new terms'.

Current deeming provisions

There are a number of States which deem workers to be employees, regardless of the arrangements under which they are engaged. Schedule 1 of the *NSW Industrial Relations Act 1996*, for example, deems 13 disparate categories of workers to be employees, including carpenters, plasterers and bread deliverers, regardless of their preferences or actual circumstances. In effect, people in occupations covered by deeming provisions cannot be engaged either directly, or through a labour hire agency, as independent contractors.

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[3] PA Consulting Group. (1997), *Strategic Sourcing Survey 1998: Australia in the International Context*. Melbourne: PA Consulting, cited in Hodge *op. cit.*

[4] (1967) AR (NSW) 371