

**Senate Standing Committee on Education Employment and Workplace
Relations**

**QUESTIONS ON NOTICE
Budget Estimates 2010-2011**

Outcome 5 – Workplace Relations

DEEWR Question No. EW0213_11

Senator Abetz asked on 31 May 2010, EEWWR Hansard page 119.

Question

Senator ABETZ—So, these matters cannot be subjected to bargaining in relation to the use of ‘to engage a particular person or independent contractor or to give a particular person or independent contractor particular duties or responsibilities’? Mr Cully—I suppose it would depend on the form that the bargaining takes. The provision is a protection against being coerced, so an actual intent to coerce someone, and so there may be situations in which you could bargain which fall short of coercion. Senator ABETZ—I framed the question poorly and I accept that. You can bargain about ‘a particular person or independent contractor or to give a particular person or independent contractor particular duties or responsibilities’. That is permitted as a bargaining issue? Mr Cully—Provided it falls within the matters that can be bargained under the act, yes. Senator ABETZ—Are these matters that can be bargained for under the act? If you do not know, take it on notice. Mr Kovacic—We will take it on notice, because it is not clear. We think that to take the opportunity to read the question and consider it in detail would be more appropriate.

Answer

Section 355 of the *Fair Work Act 2009* (the FW Act) prohibits a person from organising or taking, or threatening to organise or take, action against another person with intent to coerce the other person, or a third person, to engage, or not engage, a particular independent contractor, or to designate a particular independent contractor as having, or not having, particular duties or responsibilities.

Subsection 172(1) of the FW Act enables employers and employees to make enterprise agreements about permitted matters. These include matters pertaining to the relationship between an employer that will be covered by the agreement and that employer’s employees who will be covered by the agreement.

While the nature of agreement terms would need to be considered in each case, the ‘matters pertaining’ rule would not permit terms of an enterprise agreement that impose a blanket prohibition on the engagement of independent contractors, nor would it permit terms about a particular contractor, or giving that contractor particular duties.

However, terms relating to requirements about engaging contractors may be permitted if those terms sufficiently relate to the relationship between an employer and an employee. For example, a term of an enterprise agreement directed to employees’ job security, which provided that contractors must not be engaged on terms and conditions that undercut employees’ terms and conditions in the agreement, may pertain to the employment relationship.