CHAPTER 14

SCHEDULE 16 – INDEPENDENT CONTRACTORS

Outline of proposed amendments

14.1 Schedule 16 repeals sections 127A, 127B and 127C of the WR Act. These sections currently allow the Federal Court to review certain contracts engaging independent contractors to perform work, other than private or domestic work. Under the provisions, a party to the contract (or their representative) may apply to the Federal Court for review on the grounds that the contract is unfair or harsh.

14.2 The Court, when reviewing the contract, can have regard to: the relative strength of bargaining positions of the parties; whether any undue influence or pressure was exerted on any of the parties, or unfair tactics used by a party; and whether the remuneration paid under the contract is less than that paid to an employee performing similar work.

14.3 If the Court establishes that the contract under review is unfair or harsh, the Court may make an order varying the terms of the contract or setting aside the whole contract or part of it.

Evidence

Repeal of the unfair contract provisions

14.4 The Business Council of Australia noted that paragraph 127C(1)(b) had been held by the High Court to be constitutionally invalid[1], leaving the rest of the provisions 'constitutionally uncertain'. The BCA also pointed out that other federal and State legislation may provide a mechanism for reviewing unconscionable contracts, including the *Trade Practices Act 1974*.[2]

14.5 The Australian Chamber of Commerce and Industry pointed out that the impact of the repeal 'is significantly diminished given the availability of review powers in other Federal and some State legislation'.[3]

14.6 The Australian Catholic Commission for Employment Relations, as an employer of independent contractors, said that it supported these contractors having the ability to access to review of their contracts in the Federal Court.[4]

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1 *Re Dingjan; Ex parte Wagner* (1995) 1983 CLR 323

2 Submission No. 375, Business Council of Australia, vol. 12, pp. 2646-7

3 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, p. 3384. The relevant legislation is: *Trade Practices Act 1974 (Cth)*, ss 51AA, 52 & 87; *Fair Trading Act 1985 (Vic)*, s 11; *Industrial Relations Act 1996 (NSW)*, s106; *Industrial Relations Act 1996 (Qld)*, ss275 & 276.

14.7 Unions, particularly those representing employees in the transport and textile, clothing and footwear industries, opposed the amendments. The Transport Workers' Union gave evidence that many of their members, who are 'owner drivers' of trucks, would be adversely affected if the provisions were repealed.

> The union has made application to the Court under sections 127A-127C on numerous occasions over the last few years, usually on behalf of owner driver members whose contracts have been terminated unfairly. In such cases, the provisions have proven to be a useful means of obtaining a more satisfactory outcome for the owner drivers concerned, usually through settlements achieved after proceedings have been issued. Only rarely have cases brought by the Union under sections 127A-127C proceeded to a full trial and determination by the Court.[5]

14.8 There were concerns expressed by unions, churches and community groups about the impact of the amendment on outworkers in the textile, clothing and footwear industry:

> Most outworkers are considered by their employers to be independent contractors rather than employees so that they do not come under an award. Removing the power to scrutinise contracts is fundamentally unfair and there can be no doubt that this will further marginalise outworkers.[6]

14.9 Other witnesses raised more general concerns about unfair contracts being used to disadvantage vulnerable groups within the community, such as women and people from a non-English speaking background, or employees of small businesses:

> It is of some concern that the new laws will repeal provisions allowing the Federal Court to cancel or vary unfair contracts. Many of the employment contracts brought to the Centre are amazingly one sided and bad. Employment contracts do not evolve naturally from a fair bargaining position in the first place. This means employers can contract workers with vastly unfair conditions without any fears of redress.[7]

14.10 Senator Murray raised the issue of parallel developments to prevent people who are in reality working as employees from being classified as independent contractors:

> The Ralph tax reforms…have indicated that the personal service area needs tightening up in terms of people avoiding PAYE provisions by incorporation. Although they have not gone to the extent of wiping it out completely, the proposed narrow definition would deliver something like

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4 Evidence, Mr John Ryan, Melbourne, 8 October 1999, p. 142

5 Submission No. 93, Transport Workers' Union of Australia (Victorian and Tasmanian Branch), vol. 2, p. 289

6 Submission No. 442, Rev Tim Costello, vol. 21, p. 5200

7 Submission No. 369, Redfern Legal Centre, vol. 12, p. 2517

> $500 million, according to the estimates, to revenue. It has attraction to the Treasury. It also has the attraction of moving persons who are really employees back into the employee sector.[8]

14.11 The Government, during the course of the preparation of this report, has announced that it will be implementing this particular Ralph recommendation.

> The Government will adopt measures recommended by the Review to contribute to the fairness and equity of the tax system. These include: Restricting the ability of individuals to reduce tax by diverting the income they earn from their personal services to an entity (a company, trust or partnership). Known as the 'alienation of personal services income', this undermines the income tax base and raises significant equity issues. The proposed approach will treat the income of an entity that is earned through the provision of personal services as the income of that individual for tax purposes…This measure will commence from 1 July 2000.[9]

Conclusion

14.12 A majority of the Committee believes that the measures to be implemented by the Government in the next six months to ensure employees are not inappropriately classified as independent contractors will considerably alleviate the need for sections 127A-C of the WR Act.

14.13 In general, the evidence demonstrates that it is normally more vulnerable workers who would require the protection of these provisions (for example, outworkers). Under the Government's new arrangements, it will be much more difficult for people who are not genuine contractors to work as independent contractors. Genuine independent contractors have more bargaining power and would be less likely to need or want Federal Court intervention to review the terms of their contracts.

14.14 A majority of the Committee also notes that there would continue to be remedies available for cases of unconscionable or misleading conduct under the *Trade Practices Act 1974*, and other review mechanisms are available to independent contractors in some State jurisdictions.

Recommendation

14.15 That sections 127A, 127B and 127C be repealed.

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8 Evidence, Senator Andrew Murray, Canberra, 1 October 1999, p. 40

9 Treasurer, Press Release No. 074, 'The New *Business* Tax System: Stage 2 Response', 11 November 1999