CHAPTER 11

INDEPENDENT CONTRACTORS

Introduction

11.1 Schedule 16 of the Bill would repeal sections 127A, 127B and 127C of the WR Act, which allow the Federal Court to review contracts engaging independent contractors to perform work, other than private or domestic work. The provisions provide for a party to the contract, or their union, to make application to the Federal Court to review a contract on the grounds that the contract is unfair or harsh.

11.2 This proposal was put forward by the Government in its proposed amendments in 1996. The Democrats did not agree to the proposal then, and it was not part of the Act that passed. The Democrats, in their minority report in 1996 canvassed an alternative option, which we consider briefly at the end of this section.

Evidence

11.3 The Committee did not receive a great deal of evidence supporting the proposed changes. 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'. However, the Committee was also presented with evidence citing specific cases where the Federal Court had reviewed contracts under sections 127A, 127B and the remainder of 127C. The outcomes of these decisions were not subject to appeal on the grounds of constitutional invalidity, so it may be safely assumed by the Committee that the remaining provisions are sound.

11.4 The Australian Chamber of Commerce and Industry also did not express a strong opinion on the proposed repeal, but pointed out that the impact of the repeal 'is significantly diminished given the availability of review powers in other Federal and some State legislation'.[2] However, Labor Senators note that alternative review is not available in many State jurisdictions.

11.5 Other employers, on the other hand, did not support repealing sections 127A-C. For instance, 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.[3]

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1 *Re Dingjan; Ex parte Wagner* (1995) 19\83 CLR 323

2 Australian Chamber of Commerce and Industry, Submission No. 399, p 118. 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.

3 John Ryan, Australian Catholic Commission for Employment Relations, Evidence, Melbourne, 8 October 1999, p 142

11.6 The Labor Senators note unions were strongly opposed to these amendments, particularly those representing employees in the transport and textile, clothing and footwear industries. 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.[4]

11.7 The Transport Workers' Union also provided a specific example of where the Federal Court had used the provisions to review an unfair contract:

> …in *Buchmueller v. Allied Express Transport Pty Ltd* (1999) 88 IR 465…the Court found that the contract under which the owner driver worked was unfair and harsh because it provided for total remuneration less than that of an employee performing similar work…Dowsett J. made the following comments…'*there were no factors sufficient to offset the substantial financial disadvantage incurred by the applicant. To some extent, this disadvantage was contributed to by the applicant's inexperience, but the bulk of it was attributable to the unfairness of the contracts'*.[5]
>
> The Court awarded Mr Buchmueller $13,080.00 as compensation. It is to be noted that Mr Buchmueller had been retained in a situation where his remuneration was $13,080.00 less than the minimum award safety net.[6]

11.8 There is also a significant safety issue that arises from the operation of unfair contracts in the road transport industry, which by its very nature has potentially devastating implications for drivers and other road users:

> In the case you refer to, the WRB Transport case, we are talking there about an employee who was driving Adelaide to Sydney without stopping and without proper rest breaks… Having regard to the fact that the employee was being paid by trip money, the incentive was there to keep doing trips until such time as he fell over, and in this situation was involved in a very great tragedy. The other leg of that argument goes to the fact that some employers require our people to do that, otherwise they do not retain their employment.[7]

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4 Transport Workers' Union of Australia (Victorian & Tasmanian Branch), Submission No. 93, p 8

5 *Ibid*, pp 8-9

6 Transport Workers' Union of Australia, Submission No. 447, p 9

7 William Noonan, Evidence, Melbourne, 7 October 1999, p 101

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

> I would like to address the removal of the right for independent contractors to seek remedy in the Federal Court against an unfair contract. Employers tell outworkers that they are independent contractors which means that they then have none of the rights of employees. Currently, even some factory workers are being told by their employers to accept independent contractor status or no job. This bill will mean that they cannot seek justice when they find themselves being paid $2 an hour. They will not be able to seek recourse in the Federal Court…The fact is that exploitation happens because the industry can get away with it.[8]

> The proposed changes…regarding independent contractors will serve to further disadvantage vulnerable groups within the community especially young workers and more especially young migrant workers. These proposed changes fly in the face of the work done by the fair wear campaign to ensure legislative protection for outworkers.[9]

11.10 Other concerns were raised 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.[10]

> It is all right for the likes of me as a barrister and for the likes of highly skilled tradespeople and others who have been able to organise themselves into properly functioning businesses to work as independent contractors, but it is an entirely different matter for people who are typically employed as cleaners, security guards or in some very lowly paid vocation to suddenly find themselves without any rights at all because they have been characterised by an employer—or, in this case, a principal—as a non-employee. So, to that extent, the modest protections that are provided by the award system are denied them because they have lost, by dint of really a legal technicality, their status as employees.[11]

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8 Pamela Curr, Fair Wear Campaign, Evidence, Sydney, 26 October 1999, p. 356

9 Australian Young Christian Workers Movement, Submission No. 166, p. 6

10 Redfern Legal Centre, Submission No, 369, p. 3

11 James Nolan, Barrister, Evidence, Sydney, 26 October 1999, p. 415

11.11 Even the Club Managers' Association Australia, an organisation representing well paid executive employees, who do not have access to award or agreement terms and conditions expressed serious reservations about this proposal:

> At present, legislative provisions exist to protect people such as Club Managers who are not covered by awards or agreements. It is entirely appropriate that provisions contained in the current legislation that allow the Federal Court to cancel or vary unfair contracts be maintained. Should such provisions be repealed by the (Bill) our members could be seriously disadvantaged.[12]

Conclusions

11.12 The Government is hard pressed to find any support for these amendments. Employer support is at best lukewarm, and many employers were uncomfortable with the proposals to repeal sections 127A-C. Witnesses from community groups, churches, law firms, State Governments and unions resoundingly rejected the amendments as an unfair attack on some of the most vulnerable employees in Australia.

11.13 The Labor Senators do not believe that sections 127A-C should be repealed. Evidence presented to the Committee demonstrates that workers are often forced into unfair contracts which pay significantly less than they would be entitled to under awards or agreements which pass the no-disadvantage test. In this regard, the Committee notes the outcome of the case *Buchmueller v. Allied Express Transport Pty Ltd*, where the Federal Court awarded more than $13,000 to an employee being underpaid as an independent contractor.

11.14 Removing the ability of the Federal Court to review contracts for 'work' would simply open up a loophole for unscrupulous employers to avoid the terms of employment established under awards and agreements, by artificially contracting out work normally performed by employees.

11.15 The Labor Senators also note that the Government Senators have recommended that sections 127A-C be repealed because the Government is now taking steps to crack down on employees who work as independent contractors as part of the implementation of the Ralph recommendations.

11.16 But, for this reason, it is imperative that the sections of the WR Act allowing the Federal Court to vary or cancel unfair contracts are not repealed.

11.17 Without protection from unfair contracts vulnerable workers could be forced to accept contracts with employment conditions below those of a normal PAYE taxpaying employee, but be forced to pay the same amount of tax as a PAYE employee.

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12 Club Managers' Association Australia, Submission No. 426, p. 2

11.18 Finally, we note the recommendation of Senator Murray in the 1996 Report of this Committee, which was quoted approvingly by the TWU in both their written and oral submission to this Committee:

> It is recommended that the Government give consideration to establishing a new low cost dispute resolution procedure for independent contractors under the Trade Practices Act, based on the NSW model.[13]

11.19 We also note the commitment of the ALP at the last election that 'the protections of the industrial relations system should be extended beyond a narrow definition of employees to include those in employment-type relationships'. This issue was also canvassed in the earlier chapter on job security.

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[13] Supplementary Report on Consideration of the Workplace Relations and Other Legislation Amendment Bill 1996, p354