Government Senators' report

Rationale behind the amendments

This legislation delivers on a 2004 election pledge, in which the government promised to recognise the special status, and growing importance, of independent contractors, who constitute an increasing proportion of the workforce.[1] The government's policy position is that parties which choose to enter independent contracting arrangements should not be prevented from doing so by laws which elevate industrial relations principles over commercial considerations. The Independent Contractors Bill 2006, together with the associated amendments to the Workplace Relations Act (WRA), recognise independent contracting for what it is; a commercial business enterprise upon which it is inappropriate and harmful to inflict unnecessary interference, such as the state and territory deeming regime. Minister Andrews put the argument this way during his second reading speech:

> State deeming laws have become so absurd that they can result in completely arbitrary distinctions—an independent contractor who drives a bus can be deemed an employee, while a taxi driver is not; or a person who packages goods under a contract for services is deemed to be an employee if they do so at their home, but not if they do so on business premises; a blind installer is deemed to be an employee but a plumber is not. The existing regulation of independent contracting across many of the states is a regulation of entrepreneurship. It is job destroying.[2]

Defining independent contractors

The bill provides that the definition of independent contractor will be the common law meaning, and in doing so circumvent the various definitions adopted by the state and territory governments. Under the proposed amendments, a state or territory law pertaining to a services contract will be excluded to the extent that it deems a party to be an employee for the purposes of a workplace relations matter. Such a law will also be excluded to the extent that it imposes on a party rights, entitlements, obligations or liabilities in relation to matters that would be considered workplace relations matters if the parties were in an employment relationship. A workplace relations matter is essentially any matter that relates to employers and employees under the WRA or a state or territory industrial law. Importantly, state and territory deeming provisions in relation to superannuation, workers' compensation, occupational health and safety and taxation will not be affected by the amendments, as they are not defined as workplace relations matters.

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1 For details, see Department of Employment and Workplace Relations, *Submission* 44, p.2

2 Hon. Kevin Andrews MP, House of Representatives Hansard, 22 June 2006, p.6

The common law test

Where the amendments operate to exclude state or territory law, employment status will be determined by the courts. In the Government's view, this is the simplest and best approach. In contrast to the overly prescriptive state and territory regimes, the common law relies on a multi-factor, or indicia, test to make the distinction between employment and independent contracting. The courts have come to a decision about the nature of a working relationship by examining the totality of the relationship between the parties, including any written contract and any implied terms, as well as the conduct of the parties. Relevant factors will include, for instance, the level of control the employer has over the worker, the economic independence of the worker, the place of work, and whether taxes are paid by the employer on behalf of the worker, or by the worker directly. The courts have also demonstrated a willingness to look at the true nature of the working relationship rather than at any 'label' the parties may affix to it.[3]

Transitional arrangements

A three year transitional period will apply to workers who are, at the commencement of the new arrangements, independent contractors deemed to be employees, or who are afforded employee-type entitlements under state or territory law. In such cases, the relevant state or territory laws will continue to operate for up to three years. This is designed to give parties time to arrange their commercial affairs. In the interim, parties can make the change through the settlement of a new contract, or by written agreement, otherwise known as an opt-in agreement.

Outworkers and owner drivers

Although the Government's policy is to minimise imposition of industrial relations laws on independent contractors, it does recognise that many outworkers in the textile, clothing and footwear (TCF) industries are vulnerable to exploitation and require unusual protection. The WRA sets minimum pay and conditions for employee outworkers across Australia, whereas in the case of contracted outworkers, the Act covers only those in Victoria. Contracted outworkers in states and territories other than Victoria therefore rely on protections at state level. At a minimum, states and territories have enacted provisions under which contracted outworkers are deemed to be employees, thus giving access to applicable award protections.

As described in the main report, the committee initiated a monitoring oversight of negotiations between FairWear and DEWR officials. Government senators urged the redrafting of provisions in the bill to ensure the continuing protection of outworkers under the new arrangements. While advice from the Department suggested that

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3 Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006, Explanatory Memorandum, p.5. The pre-eminent cases in relation to the indicia test are *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) CLR 16 and *Hollis v Vabu Pty Ltd (Crisis Couriers No. 2)* (2001) 207 CLR 21.

outworkers would have been adequately protected under the legislation as tabled, Government senators have solidly supported the committee's successful efforts to minimise any remaining uncertainty on the part of outworkers and their representatives.

Similarly, the government senators acknowledge the vulnerability of owner drivers in the New South Wales and Victorian road transport industry, due in part to the very large borrowings most are required to make to pay for their vehicles, and the tight margins under which they operate.

Unfair contracts

Unfair contracts provisions are concerned with providing redress for those who find themselves performing work which is harsh, unconscionable or against the public interest. The federal, Queensland and New South Wales jurisdictions all have specific unfair contracts legislation in force as part of their respective industrial relations laws. The New South Wales provisions, in particular, are very broad in their coverage. At present, the NSW Industrial Relations Commission is empowered to review any work contract in any industry, including contracts relating to independent contractors. In addition to the grounds described above, the Commission may set aside or void all or part of a contract under which a contractor is paid less than an employee would have been paid, or which is determined to avoid the provisions of an industrial instrument.

In contrast, federal provisions require a Court to examine the relative bargaining position of the parties, the presence or otherwise of undue influence, and whether the contract provides for remuneration that is less than that of an employee performing similar work.[4]

Federal provisions have been limited in their application, mainly due to constitutional restrictions. Currently, they apply only where the independent contractor is a natural person and where that person is contracting with a constitutional corporation and/or the work addresses itself to financial trading or foreign corporations, international or interstate trade or commerce, or is connected with a territory.

These multiple schemes increase uncertainty and confusion for those establishing and maintaining working relationships. These amendments seek to provide a national scheme for the settling of contractual disputes which involve services contracts. The new arrangements will also see the inclusion of some incorporated independent contractors, whereas previously only natural persons were covered. Jurisdiction will apply to the director of a body corporate or their family where those people perform most or all of the work under the contract. This will bring smaller family companies within the protection of the national regime.

4 DEWR, *Submission* 44, p.11

Protecting against sham arrangements

These amendments provide for a number of significant civil penalties designed to address three main circumstances. The first of these is applicable where an employer seeks to avoid responsibility for the payment of legal entitlements due to an employee by disguising the employment relationship as an independent contracting relationship, or by recourse to so-called 'sham' arrangements.

A person will contravene these provisions if they offer a potential worker a contract they know to be an employment contract while representing it as an independent contracting arrangement. The potential employer may claim a defence if they did not know, or ought not reasonably to have been expected to know, that the contract was one of employment. It will be incumbent on the employer to make out a defence in order to escape liability. A derivative penalty may be applicable where a person provides a false or misleading statement to a person in order to persuade them to enter an independent contracting arrangement.

The second circumstance covered by the penalty provisions is where an employer dismisses or threatens to dismiss an employee for the sole or dominant purpose of re-engaging them to perform essentially identical work, but under an independent contractor arrangement. Again, the onus of proof is on the employer to show that the dismissal took place for a reason other than re-engagement as a contractor to perform the same or similar duties. The onus of proof is designed in this way because the employee would have substantial difficulty is proving, even to a civil standard of proof, that the employer possessed the necessary knowledge to prove the case. On the other hand, it is easier for an employer to show that dismissal took place for a reason other than the proscribed, because an employer has particular knowledge in the circumstances. This is the reason for the reversal of the usual onus of proof.

Finally, anti-coercion provisions have been included to protect either party to an independent contracting arrangement being unduly pressured into dispensing with the transitional period, described above. Under the provisions, a person may be fined for taking or threatening any action (including any inaction) with the intent to coerce another person to enter into a reform opt-in agreement.

Conclusion

The Independent Contractors Bill may be regarded as complementary to the 2005 Work Choices amendments to the WRA. Its provisions are intended to encourage labour force efficiencies and freedom of choice which are inherent in the government's workplace reform policy, while also protecting vulnerable workers such as outworkers. The new arrangements properly reflect the need for independent contracting laws to have their focus on commercial rather than industrial relations considerations. This is to be achieved through the streamlining of work arrangements for the increasing number of independent contractors and the businesses that employ them. The affirmation of common law as the pre-eminent arbiter of the employment

relationship is consistent with the emphasis on flexibility of work arrangements, and on maximising free choice within contractual arrangements.

Government senators commend this legislation to the Senate.

Senator Judith Troeth

Chairman