Opposition Senators' report

It is one of the peculiarities of legislative scrutiny in the Parliament that the merits of legislative policy are very often considered by a Senate committee before debate takes place in either House. The reasons for this have to do with legislative programming, and the convenience to Senate committees of having more time to deal with business. A benefit of this is that the committee's work should, in practice, lead to better informed debate during the formal stages of consideration in both Houses, including policy debate. This report makes judgements on the policy underpinnings of the Independent Contractors Bill, and demonstrates that whether these are agreed to or not, there are serious concerns that the bill, as drafted, will frustrate the Government's intentions, as set out in Minister Andrew's second reading speech.

A procedural 'aside' is relevant at the beginning. The Minister's office attempted, at the time of the bills referral, to restrict the scope of the inquiry by, among other things, preventing consideration of the matter of how 'contractors' and 'employees' would be defined in the bill. This was considered by Opposition and Democrat senators to be such a fundamental issue that it could not be excluded from consideration. The Minister was apparently advised to follow the precedent set in the committee's consideration of the Work Choices legislation in November 2005. However, on this occasion the Senate's adoption of the Selection of Bill's Committee report referring the Independent Contractors Bill set no limitations on its brief. In this respect it differed from the motion of referral on the previous occasion when the Senate agreed to 'terms of reference' which limited the scope of the Work Choice Bill inquiry. So this inquiry proceeded unfettered, contrary to the Government's wishes.

House of Representatives committee inquiry

The Minister, for reasons not disclosed, was anxious to avoid the reopening of issues relevant to independent contracting which were the subject of an inquiry by the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation Committee into independent contracting and labour hire arrangements which was tabled in the House in August 2005. The terms of reference for that inquiry were:

- the status and range of independent contracting and labour hire arrangements;
- ways independent contracting can be pursued consistently across state and federal jurisdictions;
- the role of labour hire arrangements in the modern Australian economy; and
- strategies to ensure independent contract arrangements are legitimate.

The main recommendations in the Government party members' majority report were accepted. They were that:

- the common law definition of employee and contractor be adopted in any legislation to ensure consistency across states and territories, and that the

definition of 'independent contractor' within the Workplace Relations Act extend beyond a 'natural person'.

- matters pertaining to the legal status of independent contractors in respect of their dealings with government, the courts, and the industrial relations system be codified to preserve the legal status of independent contractors as small businesses.

These recommendations drew strong criticism from Opposition members on the committee. The basis of the criticism related to the definition and identification of independent contractors. Opposition members proposed a new definition of 'employee' designed to 'cover the field'. Those seeking to be classified as independent contractors would need to demonstrate that they fell outside the definition of 'employee'. Making a definition of 'employee' would make it unnecessary to make a new definition of 'contractor'.

Opposition members also urged the removal of a ban on unions representing independent contractors during collective bargaining proceedings; curbing the rights of labour hire firms to supply contractors at rates which would undercut wages and conditions won through by enterprise negotiations, and to legislate to ensure that both labour hire firms and their contracting enterprises share responsibility for enforcement of the relevant OHS regime.[1]

Swelling the ranks of contractors

The basic policy aim of the Independent Contractors Bill is to turn as many employees as possible into contractors. In the Government's view, and more particularly in the view of employer organisations close to the Government, industrial relations are greatly simplified by arrangements which put employees onto either Australian Workplace Agreements, or turn them into contractors. Work Choices is intended to encourage the first of these trends, and the Independent Contractors Bill is intended to encourage the latter development.

The committee grappled with the problems of turning employees into contractors in questions to a number of witnesses at its hearings. Both Labor and ACTU policy recognise the importance of contract employment as a necessary component of the workforce and enterprise arrangements. Contractors work across all sectors of the economy. They are a diverse category of workers. The concern of Opposition senators on the committee has been for that segment of the contractor workforce which is made up of *de facto* employees, and designated as contractors for the convenience and financial advantage of employers.

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1 House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, *Making it Work: inquiry into independent contracting and labour hire arrangements*, August 2005, pp.157-172

Do sub-contractors benefit?

The committee was told by Master Builders Australia of the advantages to sub-contractors of negotiating with lead contractors for good rates, taking advantage of the market forces which operate in the building industry. Under questioning, MBA was not able to say how sub-contractors, in what is essentially an employment relationship, were able to maximise their rates through negotiation. The realities of the building industry are that the rate is set by the principle contractor and the sub-contractor can take it or leave it. 'Taking it' means accepting personal responsibility for a workers' compensation premium, superannuation contributions and other expenses which are normal employee entitlements. The majority of building industry employers, no less than employers in other industries, would support this legislation because it gives them more scope to turn their current employee workforce into a contractor workforce and remove their responsibility to make provision for employee entitlements.

Common law protection of sub-contractors

A high proportion of sub-contractors are employees for all intents and purposes. They work exclusively for a single firm in continuous engagement. Opposition senators reject the notion that this bill creates more certainty for sub-contractors who continue to work as *de facto* employees, without the entitlements of employees. The committee received strong evidence of the inadequacy – some would argue the irrelevancy – of provisions in the bill which purport to protect contractors from sham arrangements; that is, disguised employment relationships.

The Government bases its support for a common law underpinning of this legislation, in regard to distinguishing between employees and contractors, on the grounds that the courts have over time developed a multi-factor test to make this determination. As the Explanatory Memorandum to the bill states; 'no single issue concerning control, economic independence or the description of the relationship in a contract will be determinative, however, courts will place greater weight on some matters, in particular, on the right to control the manner in which the work is performed.'[2]

The submission from the New South Wales government quotes opinion from Professor Andrew Stewart to the effect that:

> The fact is that any competent employment lawyer can take almost any form of employment relationship and reconstruct it as something that the common law would treat as a relationship between principal and contractor … thereby avoiding the effect of a wide range of regulation which is typically applicable only to employees, such as industrial awards, registered agreements, leave and superannuation legislation and unfair dismissal laws.[3]

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2 Explanatory Memorandum , p.3

3 NSW Government, *Submission* 24, p.43-44

Professor Stewart states that this could be done by preparing a contract which indicates as many obvious contracting conditions as possible, such as payment by results, notional freedom to work with other clients, powers to sub-contract, self-supply of tools and equipment etcetera. Alternatively, an employer could interpose some form of legal entity between the worker and the client business, such as a labour hire agency. There would be nothing illegitimate in either of these arrangements. Nonetheless, contractors working in such arrangements are 'dependent contractors' and this, in the view of Opposition senators, makes them *de facto* employees, and more than likely to be disadvantaged by their contract arrangements.

The Victorian Government submission made the point that in addition to any civil penalty provisions there should be a simple and inexpensive mechanism for individual workers or employers to seek a declaration from a Court as to their employment status. It recommended that the Federal Magistrates Court be given special jurisdiction to make a declaratory judgement as to whether a worker is an employee or an independent contractor as defined in the Act.[4]

As a NSW Government official appearing before the committee pointed out, the bill as it stands does not allow regulators to tell people with any certainty whether they are a contractor or an employee. That can only be determined by a court, perhaps many years after a worker has started that contracting arrangement. So it is retrospective. That is the difficulty with the bill bringing an end to deeming provisions where workers can be given certainty about their employment status without the need for recourse to the courts. When asked if there would be a likelihood of increased litigation in this area, the NSW official stated:

> I am not sure many people have the time or the capacity to take this sort of litigation through the court system, or as many people as perhaps would need to if we went to this common law definition. Can I just give a very practical explanation? Obviously, the case of Vabu, which was referred to in our submission here, went to the High Court. Through the court system on the way up to the High Court, of course, there were varying positions going one way and the other. So at any stage if the applicant had decided not to press a claim, the outcome would be different from what we now have in Australia in terms of a High Court precedent for Vabu.
>
> But the Vabu precedent only goes so far, so if a contract cleaner or a security guard turns up to one of our office's counters next week and says, 'Am I an employee or a subcontractor?' I can give them the best advice as to what we think, using the Vabu test, but really to find out, they have to press the matter themselves. Whether they will do that or not is a different matter. Whether they will seek to enforce their rights is a matter for the individual.[5]

4 State of Victoria (Industrial Relations Victoria), *Submission* 40, p.3

5 Mr Don Jones, *Committee Hansard*, 3 August 2006, p.22

Opposition senators have no doubts at all about the likelihood of increased litigation. As this report argues in a later section, the chances of an aggrieved contractor taking a business to any court, let alone the High Court, are negligible. Speculation about legal outcomes can, for all practical purposes, be seen as theoretical, and the legal protections in the bill are virtually irrelevant.

Penalties for engaging in 'sham' contracting

The Government has emphasised its determination to protect contractors through the provision of substantial penalties for employers operating sham contracts. Evidence was given that the protection of contractors through penalties against sham contracts would be largely ineffective. Not only are they a doubtful deterrent, but even if a firm or a principal contractor is found to be in breach of the law, it would be of small comfort to an aggrieved contractor. As the ACTU representative told the committee:

> Just because penalties are provided for in legislation does not stop people misrepresenting what the legislation may be about. If it did, life would be a lot easier, I expect. While we welcome the formulation of the provisions with respect to the sham arrangements and the penalties that are imposed on those who would misrepresent the arrangements, one of the concerns in those provisions is the lack of protection of the employee. For example, the provisions that prohibit termination of employment solely for the purposes of turning someone into a contractor actually do not provide any protection for the employee who has their employment terminated in the middle of the process.[6]

Anyone with knowledge and experience in industrial relations knows that individuals attempting to bargain with employers over contracts are placed in a vulnerable position. There are no accessible avenues for grievance assistance set out in the legislation. There is only the remote and very expensive option of taking an employer before the Federal Magistrates Court or the Federal Court. This would be beyond the comprehension of the most vulnerable contractors and outworkers whose interests may previously have been safeguarded by collective agreements or awards. It would also be beyond their means. Advice from Slater and Gordon, a leading industrial law firm, indicates that the cost, at current rates, of taking a matter to the Federal Court would be in excess of $30 000.

Even if the legal case of an individual contractor forced to work for minimal remuneration is taken up, through legal aid being available, the consequences for the individual amount to a pyrrhic victory. A case can be won, and a contracting principal penalised, but there is no guarantee for the aggrieved contractor of the same job at a decent contract price. The contract can be terminated. Nor will a judgement of a court in a particular circumstance necessarily have a deterrent effect on sham contracts generally. As Professor Stewart has implied, the odds are heavily stacked in favour of the principal who drafts the contract and sets the rates of pay, for which there is no

6 Ms Michelle Bissett, *Committee Hansard*, 3 August 2006, p.66

minimum rate in the case of contractors. If a worker needs the job, he or she must take what is offered. Thus, the penalty clauses in the bill are meaningless.

Dependent and independent contractors

During the course of the committee's hearings there was some discussion of the distinction between dependent and independent contractors. The bill does not recognise this distinction, and according to DEWR officials the term 'dependent contractor' has no meaning in law.[7] Yet, when asked whether dependent contractors were covered by the legislation, the same official replied was that there is no simple answer. It is, the committee assumes, a matter for the courts, as it was assured by DEWR of the advantages of leaving this definitional issue in the hands of the court. The common law test allows for the weighing of variable factors in an employment relationship.

Opposition and Democrat senators are most concerned with the plight of contractors who work exclusively or most of the time for a single contracting firm or contractee. Such dependent contractors are vulnerable in their economic dependency and their relatively weak bargaining position. They are without the protection of employment relationships. The vulnerability of such workers has been subject to studies by the International Labour Organisation. These studies indicate that dependent contractors experience many problems arising from disguised employment relationships which either go unnoticed or are subject to ineffective regulation and enforcement of protections.[8] The Opposition notes that the Government has claimed compliance with ILO guidelines in this legislation, presumably on the grounds that there are penal provisions in the bill which purport to warn off peddlers of sham contracts for dependent contractors.

There is little recent reliable data on the numbers of workers who fall into the category of dependent contractors. The Productivity Commission estimated that in 1998, just over 10 per cent of the workforce, or 844 000 workers fell into this category. In 2001 this number was estimated to have dropped to 8.2 per cent, or 740 000 workers. Other researchers put a much lower figure on the estimated number, as low as 200 000.[9] Most independent authorities regard the figure of 1.9 million independent contractors in total, as claimed by Minister Andrews, to be without foundation.

Dependent contractors may not exist at law, but they exist in fact. The committee received evidence of widespread use of labour hired from labour contractors and the use of non-standard work arrangements which are made solely for the purposes of reducing labour costs to businesses. As the evidence given by Master Builders' Australia shows, and as the CEPU submission pointed out, the issue of contracting is often discussed as though the choice of this type of work is entirely voluntary and the

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7 Ms Natalie James, *Committee Hansard*, 4 August 2006, p.57

8 NSW Government, *Submission 24*, p.9

9 ibid., p.11

small contractor was truly independent. In the case of the telecommunications industry this is certainly not the case. As the CEPU submission pointed out:

> The concentrated nature of the industry, especially at the infrastructure level, means that work opportunities are controlled by a relatively small number of companies who are themselves dependent largely on Telstra for ongoing work. In this environment, the sub-contractor is a price-taker. In practice, such workers have found themselves facing increasing pressure on their working conditions and incomes as head contractors bid against one another for Telstra work.[10]

Opposition senators note that the disadvantage suffered by the contracted workforce by this 'race to the bottom' has far wider implications for efficiency in the telecommunications industry, notably in the adverse effects on training, maintenance, customer service, and ultimately, the profitability of telecom companies.

The case of owner-drivers in road transport

Much of the controversy surrounding this bill has to do with measures in the legislation which recognise the peculiar circumstances and vulnerabilities of owner-drivers. The 'exempted' protections for owner-drivers recognise the highly dependent relationship owner drivers often have with their principal contractor and that this dependence leads to inequality of bargaining power and the associated potential for exploitation.

Exploitation of owner-drivers in the transport industry results in industry instability, higher than average rates of bankruptcy and road transport accidents. Principal contractors oppose the exemptions because they limit the potential for exploitation. These basic protections minimise exploitation and ensure that the owner-driver small business model is economically viable and safe.

Submissions made by business organisations oppose the 'concessions' made to owner drivers, presumably because of the government's recognition of special circumstances in the industry. One of these relates to the high proportion of drivers are who are paying off expensive rigs and cannot afford to stay on the road in circumstances of rampant labour cost-cutting. The ultimate victims of such a trend would be consumers *en masse*. This is a rare instance of government pragmatism overriding ideology. After ten years of reassuring market force rhetoric, some government supporters appear to be alarmed at this novel approach to an industrial issue.

Opposition senators make the point that the bill still falls significantly short of delivering assurance for owner-drivers. While the vulnerabilities of owner-drivers have been recognised nationally, the bill as presently drafted ignores this fact. It will have the effect of overriding the operation of the pending WA and ACT laws and preventing any state from enacting future legislative protections. The government thus

10 CEPU, *Submission 10*, p.24

ignores the same needs and vulnerabilities of owner drivers in these states which it has continued to recognise in Victoria and New South Wales.

There is a likely explanation for this anomaly. The Minister has announced a review, to be held in 2007, of the provisions regarding owner-drivers, no doubt in response to well-publicised pressures coming from within the government party room. To say the least, the future of concessions made to owner-drivers is not assured, with opposition senators and owner drivers not being at all surprised if these concessions are removed after the next election.

Outworker protection

Opposition senators note that owner drivers are more evidently protected in the bill than are outworkers in the textile and clothing industries. There are particular concerns in relation to section 7, dealing with exclusion of certain state and territory laws, and in particular, clause 7(2), in subclause (a) (ii). The effect of this clause is to remove the jurisdiction of states and territories in regard to their making laws to vary or amend or set aside certain provisions in contracts on the grounds of unfairness, as defined in clause 9 of the bill.

Currently, state laws commonly include anti-avoidance provisions which protect contractor's rights in the event that a principal will use a legal subterfuge to claw back an award entitlement. Under the provisions of section 7(2)(a)(ii) the protection afforded to contractors by state jurisdictions is lost. This provision is contrary to the intention of Part 2 of the bill which is to preserve state jurisdiction so far as it safeguards the interests of outworkers, who are considered to be especially vulnerable in the textile and clothing industries.

Opposition senators are aware that the enforcement of laws against sweatshops in the clothing industry is nearly always taken by way of anti-avoidance clauses in contracts, rather than through more formal and costly court processes. If unscrupulous employers in the clothing industry find the loop-hole in the bill as it is currently drafted, and which the government denies is a real loophole, then the effects of this bill will be to strip away the state laws which make this low-level compliance regime effective. It is to be hoped that the unanimous recommendation of the committee to tighten protection against the overturning of state anti-avoidance legislation powers will be implemented.

Conclusion

While Opposition members of the committee are pleased that the whole committee has agreed to recommend amendments to ensure the full force of state powers in regard to unconscionable contracts, there can be no doubt of the fundamental objects which the Opposition has to this bill. It is intended to turn natural employees into unnatural contractors. This will put considerable stress as well as hardship on tens of thousands of workers. Entrepreneurialism is to be made compulsory for non-entrepreneurs. There is more than sufficient evidence in the small business sector of

failures in business acumen as things currently stand. The exercise smacks of a readiness to misuse and misdirect labour skills across the workforce, at a time of skills shortage. Apart from the philosophical objections which Opposition senators have to this bill, there is the objection to the inefficiencies that will be created, and the disincentives it creates for the rebuilding of the skilled trades base.

Opposition senators on the committee urge the bill be defeated.

Senator Gavin Marshall

Deputy Chair