The Senate

Employment, Workplace Relations and Education Legislation Committee

Provisions of the Independent Contractors Bill 2006 and the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006

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Report of the Whole Committee

1.1 The Independent Contractors Bill 2006 (the principal bill) and the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006 (the amendment bill) were introduced into the House of Representatives on 22 June 2006 and referred to this committee by the Senate on the same day.

1.2 The committee's inquiry attracted a high degree of interest from affected parties. Some 55 submissions were received. Included among these were four from state governments, and a range of views were put by peak employer organisations, contractors associations, trade unions and individual contractors. Public hearings were held over two days in Parliament House, and the committee sought additional information about current negotiations between clothing industry workers and the government, a process which will be described later in this chapter. Lists of submissions, and witnesses appearing at the hearings, are to be found in the appendices to this report.

1.3 The committee has agreed to report on these bills in a way which is different from the usual run of EWRE Legislation Committee reports. This chapter reports the unanimous views of the committee as they relate to aspects of the bill dealing with the regulation of outworkers. This is a subject of long-standing interest to the committee, and this report describes the ultimately successful process of ensuring that the legislation effectively addressed some of the concerns of outworkers in the clothing industry, within the current workplace policy framework. Other reports which follow in this volume express the particular and opposing views of parties in relation to other aspects of the legislation.

What the bills do

1.4 The principal bill, the Independent Contractors Bill 2006, seeks to exclude state and territory laws which deem as employees many independent contractors entering commercial agreements with employers. In the Government's view, these state laws interfere with rights, entitlements, obligations and liabilities of parties to genuine independent contracting arrangements. Most of the other measures contained in the principal bill are qualifications to the overriding provisions. These include the introduction of transition arrangements for those workers previously deemed by state and territory laws to be employees but who would now be independent contractors, and the retention of existing protections for outworkers and road transport owner-drivers. The principal bill also enables application to be made to a federal court for the review of services contracts on the grounds that they are harsh or unfair.

1.5 The amendment bill provides consequential amendments to the Workplace Relations Act (WRA), especially in relation to textile, clothing and footwear (TCF) outworkers, and to unfair contracts. The amendment bill also introduces a new provision relating to the prevention of deceptive misconduct by employers or contract

principals in relation to their employers or contractors. The provisions prohibit the misrepresentation of an employment relationship as one of independent contract, of knowingly making false statements to a worker with the intention of persuading or influencing the worker to become an independent contractor, or dismissing or threatening to dismiss an employee for the purposes of re-hiring that employee under an independent contract to engage in similar work. The amendment bill also contains provision for penalties where these provisions are breached.

Protection of the employment conditions of outworkers

1.6 While members of the committee differ on the philosophy which underpins the Independent Contractors Bill, all agree that the increasing prevalence of independent contracting, which these bills seek to regulate, brings with it a possible danger for those workers most vulnerable to unscrupulous employers and to extreme forces in particular markets. The committee was reassured by the government's undertaking to protect outworkers and owner-drivers by maintaining existing state and territory regimes which set relevant awards as the minimum level at which pay and conditions for these workers may be awarded.

1.7 The issue of owner drivers is taken up in other chapters of this report. The committee considers outworkers to be more vulnerable to changes resulting from this legislation. At its hearings on 4 August, the committee heard from representatives of workers in the textile, clothing and footwear (TCF) industry, of which outworkers form a large part, that protections contained in the Independent Contractors Bill were inadequate. One concern in particular was taken up by the committee. That related to provisions which deprive state jurisdictions of the power to legislate to set aside unfair provisions in contracts, particularly necessary anti-avoidance laws, which currently exist in state legislation, and which are contained in clause 7(1)C of the bill. Other objections to the legislation were also outlined by FairWear in their submission, but the committee was particularly concerned with this matter.

1.8 At the hearings on 4 August, the committee agreed, after hearing from FairWear, to monitor negotiations, at that time were in their beginning stages, between FairWear, a combined union and community TCF interest group, and the Minister for Employment and Workplace Relations, the Hon Kevin Andrews MP. Should differences not be resolved within a week, the committee resolved to convene a private meeting at which representatives of the Department of Employment and Workplace Relations and the TCF industry could continue negotiations, with the committee acting as a facilitator.

Contract outworker protection in Victoria

1.9 That meeting was held on 17 August, at which parties reported to the committee that substantial progress had been made in relation to one area in dispute, resulting in an in-principle agreement by both parties to the removal of Part 4 of the primary bill, dealing with protection of outworkers in the TCF industry in Victoria The committee notes the advice it received from the Minister for Industrial Relations

in Victoria that Victorian legislation contained comprehensive and appropriate protection for outworkers. The Victorian Government would support the excision of the provisions in Part 4 of the bill, so as to avoid unnecessary and confusing duplication of laws. The committee is also reassured by strong indications from the Department that the removal of Part 4 is likely to be agreed to by the government. Finally, in view of assurances from FairWear of its firm support for the removal of Part 4, the committee recommends that this be done.

1.10 It was clear to the committee that disagreements over two other issues; the regulation making provision in the bill, and the provisions in relation to sham contracts and penalties for such offences, were too fundamental to the purposes on the bill to be subject to negotiation.

The contentious clause 7(1)C

1.11 Most of the discussion conducted by the committee on 17 August with FairWear representatives and DEWR officials had to do with the contentious clause 7(1)C. The committee noted that the purpose of this clause was to give effect to the government's intention to create an exclusive unfair contracts regime in the Commonwealth jurisdiction. FairWear representatives argued that its inclusion in the bill was expressly contrary to the Minister's stated policy of preserving state powers to protect outworkers, because the clause had the effect of removing existing state anti-avoidance protections. The committee noted the Department's draft of an amendment to the bill to accommodate objections, and heard from FairWear representatives about their continued objection.

1.12 Departmental officials argued that exclusion of the provision would be inconsistent with Work Choices, and that the operation of state laws would be unaffected by its retention. The Department suggested that there were drafting possibilities which would serve to put the matter beyond doubt in regard to judicial interpretation. The committee understood that the Minister wanted agreement on this point, and that it was the Department's firm intention to find a drafting solution to the problem identified both by FairWear and expressed also by Senator Andrew Murray at a private meeting of the committee. It was believed that the inclusion of a clause directly excepting outworkers from the relevant provisions, or a legislative note or appropriate entry in the explanatory memorandum would be a way of making clear the government's intention to preserve anti avoidance provisions.

1.13 The committee's resolution to involve itself in processes of negotiation between interested parties to this legislation was highly unusual, and for this committee, probably without precedent. The value of this process will be seen in the amendments which the government is likely to make to the legislation.

Recommendations

The committee believes that Part 4 of bill serves no useful purpose and **recommends** that it be omitted.

The committee remains firmly of the view that the issue of state powers in relation to anti-avoidance legislation for the protection of outworkers be put beyond doubt in the drafting of the bill. The committee **recommends** the bill be amended accordingly.

Senator Judith Troeth
Chair

Senator Gavin Marshall
Deputy Chair

Senator Andrew Murray

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

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

Australian Democrats' Minority Report

The Independent Contractors Bill 2006 is the principal Bill (the Bill) and is accompanied by the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006 (the Amendment Bill).

The Bill seeks to exclude state and territory laws which deem as employees many independent contractors entering commercial agreements with employers. The Government's view is that these state laws interfere with rights, entitlements, obligations and liabilities of parties to genuine independent contracting arrangements. The contrary view is that state laws are trying to resolve the difficult public interest and legal issues surrounding the nature and definition of employment, and to 'cover off' important social obligations (such as standards of employment) that would otherwise be avoided.

The Bill includes the introduction of transition arrangements for those workers previously deemed by state and territory laws to be employees but who would now be independent contractors, and the retention of existing protections for outworkers and road transport owner-drivers in NSW and Victoria. The recognition that outworkers and (some) owner-drivers need to continue under the protection of state laws is an explicit confirmation that The Bill will not adequately protect these sorts of workers and contractors.

With respect to the outworkers, as the Report outlines, after concerted and admirable advocacy by outworker representatives considerable progress was made in resolving concerns arising from the Bill. The consequential amendments expected to be moved by the Government are welcome. The Chair is to be congratulated for her efforts in this regard, in conjunction with the Committee members.

The Bill also enables application to be made to a federal court for the review of services contracts on the grounds that they are harsh or unfair. While this is a useful and necessary safeguard, it must be noted that access to courts rather than industrial tribunals invariably swings the advantage to those with deep pockets and resources. This is because court processes, costs and slowness mean access to justice or timely resolution of disputes is often harder than in specialist tribunals.

The amendment bill provides consequential amendments to the Workplace Relations Act (WRA), especially in relation to textile, clothing and footwear (TCF) outworkers, and to unfair contracts.

The amendment bill introduces a new provision relating to the prevention of deceptive misconduct by employers or contract principals in relation to their

employers or contractors. The provisions prohibit the misrepresentation of an employment relationship as one of independent contract, of knowingly making false statements to a worker with the intention of persuading or influencing the worker to become an independent contractor, or dismissing or threatening to dismiss an employee for the purposes of re-hiring that employee under an independent contract to engage in similar work. The amendment bill also contains provision for penalties where these provisions are breached.

These are useful and necessary protections, but it would have been better if these were less necessary than I expect they are going to be. That would have been so if the employment relationships were better defined in the Bill in the first place.

Summary of the Democrats' main concerns

The Australian Democrats have long been concerned at the inconsistent ways in which the employment relationship has been determined in state and federal law and jurisprudence. Greater certainty is indeed necessary, both from an economic and social perspective.

We recognise that it is highly desirable in the private interest and in the public interest to be able to readily determine when a person or a business is subject to laws of employment or the law of contract. Previous federal efforts in this area have been poor, with the best effort to resolve the matter, at least for income tax purposes, being the alienation of service income legislation, which allows the tax office to decide whether a person is an employee or contractor.

We agree that national legislation is needed to deal with the complex issue of employment and contracting. However this bill is regarded as hostile by a number of state governments and concerned organisations, and is not the consequence of consultation agreement and negotiation with the key players – being the states, business, the unions and key representative bodies.

In a federal system, national legislation that is unilaterally constructed is far less likely to survive than legislation that has broad support by state governments and affected interest groups. While it is not clear whether (once enacted) the Bill might be challenged on constitutional grounds, it seems likely that a change of federal government in the future would result in this Bill being repealed or substantially amended. A hostile federal legislative move has therefore little to recommend it in the medium to longer term.

Our second main concern is with the lack of an acceptable statutory definition of employment. Surprisingly, at least to the casual observer, this is a very difficult legal area to resolve. Contractors may be independent or dependent,

employees can be both contractors and employees, and that can be with respect to a number of different working relationships in the same tax year.

The Democrats themselves have tried to have an employee definition accepted into federal law, which was rejected by the government. At heart we share widely-held views that the common law is manifestly inadequate for resolving a definition of employment, and jurisprudence in this area is badly in need of buttressing through statute. This too is the position adopted by state governments.

The Bill does little to meet its stated objectives and is more about preventing the states from protecting what they view as vulnerable groups of workers and also dealing with the issue of disguised employment. The Bill actually fails to tackle the issue of who is a genuine contractor, and inter alia, who is a genuine employee.

Our third main concern is with the public cost of employees being wrongly determined to be contractors. The Democrats strongly support the right of Australians to determine whether they want to be in business for themselves, or to work for someone else as an employee. However, we believe that someone who is in business for themselves also has a duty to meet the universal obligations that are imposed on employers in the public interest.

These obligations imposed on employers are not just the requirements to withhold income tax or to provide for appropriate occupational health and safety, but to provide for employees' futures through insurance against injury (workers compensation) and superannuation. An employee wrongly treated or classified as a contractor shifts the cost of injury and retirement onto the public as a whole, unless that person makes specific and genuine provision for these matters. Fortunately the Bill may not have the effect of preventing state governments from deeming contractors to be employees for the purposes of workers compensation.

I have checked with academics in this field, and remarkably, there does not appear to be any research which attempts to quantify the extent or effects of this cost shifting. Because cost shifting of this sort may well involve hundreds of millions of dollars of costs shifted to the taxpayer, in our view the government has been negligent in failing to close the cost-shifting hole. The Bill needed to be part of a package also requiring contractors to provide for superannuation payments, for injury, and for income insurance, and for such provisions to be capable of verification (perhaps through annual tax returns).

Turning to genuine contractors, it is not at all clear that the Bill will do anything much to further benefit existing contractors. If anything, the evidence is that it will disadvantage many independent contractors whose existing remedies under state laws will be overridden by new and much weaker national

laws. It also seems likely (for instance in NSW), that the Bill will result in an increase in cost to genuine contractors who seek a review of a contract they consider unfair.

I have heard the (new) WRA described as 'insanely complex.' The Democrats are concerned that for many businesses, with this Bill it will now seem even easier to hire Australians as contractors not employees, not just for cost savings, but because it will save them having to cope with the complexity and flaws of the new federal industrial relations system. That is hardly desirable if the consequence is that wages and conditions are seriously and detrimentally affected and if superannuation workers compensation and income insurance will no longer be covered by employers, when previous employees move into contracting arrangements.

What is a genuine contractor and who has genuine choice?

The objectives of the Independent Contractors Bill are:
to protect the freedom of independent contractors to enter into services contracts;

- to recognise independent contracting as a legitimate form of work arrangement that is primarily commercial; and
- to prevent interference with the terms of genuine independent contracting arrangements.

The Democrats support these stated objectives, but the Bill fails to achieve these objectives in any meaningful way. The Bill does little to meet its stated objectives and is more about preventing the states from protecting what they view as vulnerable groups of workers and also dealing with the issue of disguised employment. The Bill actually fails to tackle the issue of who is a genuine contractor, and inter alia, who is a genuine employee. What is more, through the title of the Bill and the definition, it sets up a potential legal conundrum as to whether an independent contractor is the same as a dependent contractor.

The fundamental problem here is that many of the states believe (and the Democrats would agree) that there are a large number of vulnerable groups who they believe are disguised contractors and should be treated as employees. Rather than deal with the complex problem of who is a genuine contractor and who is a genuine employee, the States have sought to deem groups of workers/contractors as employees. The critics argue that as a result some deemed employees are genuine contractors and therefore are being denied a choice and freedom to contract.

Rather than the Federal Government deal with the complex problem of who is a genuine contractor and who is a genuine employee, they have instead chosen to

appease the critics by overriding the states deeming and other laws that treat certain groups of workers as employees. This is the primary outcome of the Bill.

There are losers on both sides

The Democrats believe there is a fundamental distinction between being an employee and being a genuine contractor, where essentially an employee works for someone else, while a contractor operates their own business. We also support the democratic right that every person should have the freedom to choose to operate their own business rather than working for someone else.

However, if the government is opposed to the notion that genuine contractors can be deemed employees, it needs to do far more to convince us that it is equally concerned at genuine employees being forced by employers to style themselves contractors.

The Democrats support protecting the freedom of a worker to choose to be an employee rather than a contractor and that if a person does work as an employee they are entitled to the benefits of laws established for their protection. As Professor Andrew Stewart in his submission to the House of Representative Inquiry into Independent Contracting and Labour Hire notes:

> Those laws [employee protection] are premised on a recognition that most workers in most situations are at a fundamental disadvantage when dealing on an individual basis with an employer. In most cases (though not always) they lack the skills, information or available alternatives that would enable them to negotiate freely..…It does not mean that there cannot or should not be a role for individual contracting. It merely requires that there be some degree of intervention by the state to guard against some of the anti-social outcomes that can be expected from an unregulated labour market, which may include excessively low wages, excessively high working hours, dangerous working conditions, discriminatory treatment, and so on. Such intervention can be justified as promoting efficiency and productivity in the labour market, quite apart from the more obvious appeals to equity and social justice.[1]

The Independent Contractors Association in their submission argued that the Bill should be drafted in line with the June 2006 ILO recommendation, in particular subclause 8:

> National policy for protection of workers in an employment relationship should not interfere with true civil and commercial

[1] Professor Andrew Stewart, *Submission 69*, to the House of Representatives Inquiry into Independent Contracting and Labour Hire, p.2.

> relationships, while at the same time ensuring that individuals in an employment relationship have the protection they are due.[2]

The ICA also noted the importance of clause 4(b):

> National policy should at least include measures to … combat disguised employment relationships…noting that a disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his true legal status as an employee….'[3]

The Democrats support both of these clauses; we do not believe they are at odds. What the clauses again draw attention to is the need for a statutory definition of employment to distinguish between 'true civil and commercial relationships' and employment relationships'.

According to Professor Stewart - who I should point out is not only an academic researcher in labour law, but also a labour law consultant to a national law firm that advises and acts for business - the problem is that it is common for Australian firms to seek to obtain labour from 'dependent contractors' (a person who works solely for one employer). They are, or may then in effect be, disguised employees.

Disguised employees have all the appearance of employees, except that they are not entitled to the range of protections provided by labour laws, and because of that they are much cheaper to hire. Stewart notes that:

> By engaging a contractor, a firm may be spared the cost of providing leave and superannuation entitlements, of observing any award obligations, and perhaps too of insuring against work related injury. They may also be relieved of any exposure to unfair dismissal claims or severance pay in the event of terminating the arrangement and a contractor is far less likely to belong to a trade union. Even if higher nominal pay is provided than would be the case for an employee performing the same work, the firm is likely to end up ahead….. if the firm can find a way to hire someone who in practical terms works only for the firm and is under its (more or less) complete control, yet who is legally characterised as a contractor, the firm has the best of both worlds.[4]

The ACTU and others noted in their submission the increasing number of disguised contractors. The ACTU estimate that that between 25 and 41 per

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[2] ICA, *Submission 30*, p.7.

[3] ibid. p. 8.

[4] Professor Andrew Stewart, *Submission 69*, to the House of Representatives Inquiry into Independent Contracting and Labour Hire, p.3.

cent of contractors are dependent contractors.[5] The APESMA submission noted a recent study that found up to 40,000 workers currently classified by the Government as independent contractors actually do all their work for the one employer.[6]

The Bill claims that one of its objectives is to recognise independent contracting as a legitimate form of work arrangement that is primarily commercial, but in fact the Bill offers no solution as to who is a genuine contractor or employee or who is a disguised contractor or employee. Indeed the Bill only includes a very minimal definition of an independent contractor. Instead it defers to the common law definition, which in any case is subject to change over time as jurisprudence advances. Many, including the Democrats, believe relying on the common law definition of employment is fraught with problems.

The common law definition of an independent contractor is not a definition as such, it is a set of principles, and it is not about 'defining' who is an 'independent' contractor, but defining who is not an employee. The common law approach relies on a test which involves the consideration of a number of court established factors or indicia. This means effectively, a case-by-case approach, which is an unsatisfactory way to proceed with employee/contractor definitional disputes that affect many hundreds of thousands of Australians.

Stewart rightly argues that such a common law test is unreliable:

> The balancing exercise is necessarily impressionistic, since there is no universally accepted understanding of how many indicia, or what combination of indicia, must point towards a contract of service before the worker can be characterised as an employee. In effect then, this 'multi-factor' test proceeds on the assumption that the courts will know an employment contract when they see it![7]

Stewart also argues that it can result in different outcomes depending on the adjudicators' starting point:

> If a judge (whether consciously or subconsciously) starts with the assumption that a relationship is one of employment, and looks for factors that suggest otherwise, they may well reach a different conclusion to one who proceeds from the opposite direction. It is this, more than anything else, which I believe explains how the same

[5] ACTU, *Submission 11*, p. 11.

[6] APESMA, *Submission 11*, p. 6.

[7] Professor Andrew Stewart, *Submission 69*, to the House of Representatives Inquiry into Independent Contracting and Labour Hire, p.5.

> facts can be viewed so differently by judges apparently asking the same questions and applying the same basic principles.[8]

Of concern is Stewart's assertion that any competent 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 much industrial legislation.[9] Stewart also refers to another and even surer method of avoiding an employment relationship:

> …to interpose some form of legal entity between the worker and the client business, since in the absence of a direct contract between the two there cannot be an employment relationship……that entity might be a personal company, or a partnership constructed for the purpose between two or more workers, or some kind of family trust. Whether or not the worker is technically an employee of the interposed entity, they cannot and will not be an employee of the ultimate user of their services.

In a purely legal sense there is nothing 'illegitimate' about either of these arrangements…. As the law stands it is quite lawful to set out about creating a relationship that is not one of employment. They are not 'shams', in the very strict sense of that legal term. It is only a sham when parties construct what they would both understand to be an employment relationship and then try and disguise it as something else by adopting an arrangement that does not genuinely reflect their intentions.

Nonetheless, for the reasons advanced at the beginning of this submission, it should not be lawful to contract out of labour regulation by exploiting these possibilities.

For an increasing number of contractors the notion of independence is a myth, and any choice and flexibility in their arrangements have been constructed for the benefit of those who hire them, not their own.

So not only does this legislation not define what a genuine independent contractor is it also does not prevent business from exploiting loopholes in the common law that allow workers to be classified as contractors, when for all practical purposes they are employees.

As Stewart notes, various approaches can be and have been adopted by legislators to bring 'employment- like' arrangements within the scope of particular legislation.

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[8] ibid.

[9] Professor Andrew Stewart, *Submission 69*, to the House of Representatives Inquiry into Independent Contracting and Labour Hire, p. 5.

As mentioned earlier, the states have used deeming provisions, which deem workers in various occupations or circumstances as employees. As already noted, one drawback is the broad brush nature of 'deeming' where some genuine contractors may get caught up in such provisions. The flip side to this, as Stewart points out, is that business can avoid the deeming provision by rewriting a contract and an employee can be converted into what a common law test would regard as a non-employee.

Stewart also points to some state payroll tax statutes which he considers very effective in identifying employment characteristics but notes that the drafting is so convoluted that only the most dedicated lawyers can make sense of it.[10]

In 2000 the federal government introduced the alienation of personal services income legislation (PSI), which amended the tax laws to ensure that contractors were taxed as if they were employees, unless they satisfied certain tests showing they were genuinely running a business.

I note that the report of the House of Representatives Inquiry into Independent Contracting and Labour Hire *Making It Work* noted the difficulties with the common law distinction between employee and independent contractor.

The Report also analysed other possible distinctions that could be used to distinguish an employee from an independent contractor. In particular, the Report looked at the possibility of relying on the test used in the Australian income tax assessment alienation of personal services income legislation. The Report in the end recommended that the Government maintain the common law definition and adopt components of the PSI legislation tests, to identify independent contractors. However, the Bill does not implement this recommendation.

In his second reading speech the Minister explained that the Government decided not to include aspects of the PSI legislation as it is 'easily manipulated'. In their submission to the House of Representatives inquiry into Independent Contractors, the Civil Contractors Federation identified how tax laws are being manipulated and the need for them to be tightened.

There are some operators who may genuinely believe that, because they have an ABN number, they are an independent contractor for this reason alone. It is acknowledged however that some operators who are not independent contractors claim to be purely to obtain a taxation benefit. Minimising or avoiding taxation is an incentive to claim to be an independent contractor and a

[10] ibid., p. 8.

comprehensive formula in the Taxation legislation that proof that certain requirements have been met would reduce this incentive.[11]

The Democrats would agree with the Minister that the PSI is still problematic and is unlikely to fully address the problem. However it is ironic that while the Government was quick to protect its revenue back in 2000, it made no attempt then, and is making no attempt now, to ensure that workers who are taxed as employees are also treated as employees for other regulatory purposes.

The Democrats support Stewart's assertion that a more effective approach is to tackle the problem at source – the common law 'definition', and define employees in legislation. The aim would be to draw a more realistic boundary between the two categories of genuine contractor and employee and reduce the ease with which hirers can presently disguise employment arrangements.

On 11 August 2003 and again on 22 March 2004, I moved an amendment to the *Workplace Relations (Termination of Employment) Bill No. 1* and *2* respectively, to define an employee in an attempt to bring precarious and atypical employment into the unfair dismissal system (see attachment 1). The Democrats drew heavily on Stewart's work in drafting the definition.

I noted in my second reading speech to the *Workplace Relations (Termination of Employment) Bill No. 1:*

> One would assume that the federal government would support such an amendment [definition of employee] as the federal system has always supported access to genuine employees, so the government should have no objection to provisions that ensure genuine employees—and I stress `genuine' employees—are captured by the unfair dismissal system. To further make the point: you cannot at one level deem an employee for tax purposes and then for workplace relations purposes exclude them. We have made it quite explicit in our suggested amendments that any person who is categorised as an employee for tax purposes will also fall under this act for unfair dismissal purposes.

Neither the Government nor the ALP supported the amendment on either occasion.

The irony of the Democrats original attempt to insert a definition of employee in the WRA so as to bring precarious and atypical employment into the unfair dismissal system, is that thanks to the WorkChoices legislation very few employees are now protected by unfair dismissal law. And while the WorkChoices reforms have paved the way for business to engage workers on

[11] Civil Contractors Federation, *Submission 15*, to the House of Representatives Inquiry into Independent Contracting and Labour Hire, p. 5.

fewer minimum standards and benefits – especially the vulnerable - this legislation will basically legitimise the engagement of disguised employees where even the minimum standards are missing.

In his submission to the House of Representatives Inquiry into Independent Contracting and Labour Hire, Stewart outlined a proposed redefinition of employment similar to the Democrat-Stewart amendment (see attachment 2).

The Democrats recognise that this is a complex area, but believe that the current situation is unsatisfactory, and that ***a*** definition of employee is the best solution. The Democrats recognise, as does Stewart, that the definition does not have to be universal and that there may be particular policy arguments why a particular type of worker should or should not be covered, for example owner-drivers. Stewart also notes that there will always be a case for saying that certain kinds of law — for example, discrimination legislation — should apply to all arrangements for the performance of work, whether by employees or entrepreneurs.[12]

I am pleased that in their dissenting report to the House of Representatives Inquiry into Independent Contracting and Labour Hire the ALP have come out in support of a slightly amended version of the definition as recommended by Professor Stewart in his submission to the same inquiry.

The Democrats also believe that that title and reference in the Bill to 'independent' contractors is a misnomer and incorrect. Given the Bill does not define an independent contractor there is no reference as to who this Bill actually covers. For example there was evidence to this inquiry that there are a class of contractors referred to as 'dependent' contractors - are they covered by this Bill? It is worth noting that the common law determination of 'independent' contractor does not in fact determine if the worker is an 'independent contractor', but instead determines if the worker is a non-employee. Perhaps genuine contractor is a better and more accurate description.

Potential losers

As touched on above, there are differences between common law definitions of 'independent' contractor and for tax purposes which could potentially disadvantage workers forced on to contracts. The Association of Professional Engineers, Scientists, and Managers, Australia (APESMA) in their submission stated:

[12] Professor Andrew Stewart, Submission 69, to the House of Representatives Inquiry into Independent Contracting and Labour Hire. p. 9.

> The legislation also represents a potential 'double whammy' to many professionals. By moving across to contractor arrangements, professionals will lose employment entitlements such as annual leave, workers compensation, superannuation and professional indemnity cover, and at the same time, because the ATO is narrowly interpreting the Federal Governments PSI legislation, these contractors may be denied the opportunity to claim legitimate deductions for the business expenses they incur. This issue remains unresolved while potentially thousands of professionals may be moving across these working arrangements while being unaware of their twice disadvantage status.[13]

The Democrats believe that a definition of employee and tightening of the PSI criteria is needed to overcome this problem.

Shifting private costs to the public

The Democrats are concerned that the Government has failed to address the inevitable cost shifting that will occur from private to public when you take people out of the employment system where superannuation, workers compensation and income protection is dealt with, into the contract system where in many case there is no mandatory requirement to be protected.

The obligation of contractors to make their own provisions was confirmed by Mr Geoff Fary from APESMA:

> Yes, indeed. The other legislation that you speak of applies to employees. Contractors by definition are not employees and therefore have to make provision for their own health insurance, their own workers compensation, their own income protection and their own superannuation arrangements.

However, very few submissions, dealt with the issue of responsibility and onus of contractors failing their obligations.

The ACTU in its submission to the inquiry noted the potential risk to society:

> The Federal government policy ignores the fact that shifts in the labour market have consequences for broader social and economic policy. The tax base, compulsory retirement savings, skills development and the management of risks involved with illness and injury at work are all linked to traditional employment relationships. The proper governance of these matters is jeopardised by the

[13] APESMA, Submission No. 11, p. 3.

> erosion of employment as the primary means of purchasing an individuals work.[14]

When asked about whether this Bill should deal with contractor obligations to provide for superannuation and insurance, Mr Anderson from the Australian Chamber of Commerce and Industry argued that it was more appropriate to deal with this in issue-specific law, which the Democrats are not opposed to, but note the Government has failed to table cognate bills to achieve this.

> **Senator MURRAY**—I put a question earlier in the day, and it still concerns me, that with respect to genuine contractors, I do not think the tests or the requirements are strong enough. I am one of those who think greater obligations should be put on contractors. For instance, they should be able to prove that they are putting aside superannuation. They should be able to prove that they are self-insuring for injury, because if they do not do those two things, that cost shifts to the state in the future when they are old or when they get injured. I do not think you qualify to be a contractor unless you at least cover those two things off; and there is the tax issue as well. To me, the motivation for the Bill is questionable—I am not personally resolved in my own mind about that—and it does not solve the problem, which essentially is to have a flexible marketplace where individuals can choose to be employees or to work for themselves as contractors and are entitled to take the risks and engage in the market reflective of that. I am not content that the Bill covers off all the problems which I have seen exist.
> **Mr Anderson**—. To the extent that there are other problems in terms of the rights and obligations of contractors—and you mentioned superannuation, insurance and the like—the Bill does not deal with those. We would argue that the Bill does not need to deal with those.
> **Senator MURRAY**—What about superannuation?
> **Mr Anderson**—Superannuation and the superannuation obligations of contractors should be determined by superannuation law. They should not be determined by creating the artifice of placing onto that contract the status of employee so they pick up superannuation obligations from employment.
> **Senator MURRAY**—So where is the cognate Bill with this which says, 'If you are a contractor, you will pay superannuation'?
> **Mr Anderson**—That begs the policy question that has to be answered: should there be a cognate obligation on contractors to set aside moneys for superannuation purposes in the way that there is on an employer to set aside money for an employee's superannuation? The Bill does not answer that policy question, it does not seek to answer that policy question, and, I would argue, should not answer that policy question, and certainly not while the Bill is being put forward.

[14] ACTU, Submission 11, p.9.

> **Senator MURRAY**—It is germane, because at the moment the deeming provision says, 'You will, on behalf of society, have superannuation paid for you.' If you are deemed an employee, that is what happens.
> Superannuation is put forward, in the national interest, into a scheme for later on. If you cut people off from that, the risk shifts to you and me; it shifts to society. It does not shift to the individual in the short term.
> Surely, if superannuation is accepted as a national policy, which it is, if you are going to take people out of the superannuation system, you should ensure that that element at risk is at least covered off. That is why I think it should be a cognate bill, as an example.
> **Mr Anderson**—If you follow the logic of that proposition, you end up saying that this Bill should deal with the obligations of contractors not just to pay super but to pay workers compensation insurance; to pay tax.
> **Senator MURRAY**—That is right.
> **Mr Anderson**—Those issues are not dealt with in a Bill of this character. They are dealt with in legislation that is specific to those subject matters; I think that is the better place to do that. Your analysis of cost shifting is a fair analysis but you then have to ask the question: should a contractor have imposed on them by the state the obligation to set aside a percentage of their income for superannuation purposes?
> **Senator MURRAY**—Absolutely.
> **Mr Anderson**—That is a policy question. That is not a policy question that should be decided by reference to whether they are an employee or not; it should be decided by reference to whether or not the state should place that obligation on an individual who has established themself as their own businessperson.

This is an instructive exchange but the Democrats were disappointed with Mr Anderson's final point made above, that the issue of responsibility should not be dealt cognately with the issue of who is an employee and who is a contractor. We would strongly disagree - if not here then where and when?

Mr Sutton from the CFMEU acknowledged the cost shifting that would occur, and that it would be a problem that would come back to government to deal with.

> **Senator MURRAY**—Reading through all these submissions, they frequently refer to—with which I agree—where someone is a sham contractor and not genuine, that risk is essentially being shifted to that person. But I also think as big an issue, perhaps even bigger, is that risk is shifted to the state, because if a person should be an employee and is not having their superannuation paid, the state is going to have to pick that up in the future.
> **Mr Sutton**—That was your third leg that I forgot to mention.

Senator MURRAY—If the person is not self-insuring and should be covered by workers compensation as an employee, that is a risk for the state. I have not seen, incidentally, anyone do the sums—and I wish somebody would—to calculate what the cost of this practice is to society, if I can put it that way. What I have been looking for and thinking about with respect to independent contractors for a long time is how you find tests which very clearly delineate the dividing line between the two. Of course, I am aware of how complex it is. I have read all of Stewart's stuff; I have read acres of the stuff. But to me it comes back to this point: there still is not an easy measure which can be determined without going through the costly process of accessing the courts or tribunals and all that sort of thing. This Bill does not provide for that.
Mr Sutton—No, indeed, it is a very complex area. I have had a long experience in this area. In fact, I did a university thesis on it. I have been working on this area for some 30 years, so I almost regard myself as an authority in this area. I regard the 80-20 rule, as first proposed by Costello, coming out of the Ralph report, as the best recipe I have seen. To reinforce your point, there are hundreds of thousands of Australians, particularly in my industry, who are breaking their back, being paid inferior money, whose bodies are ruined by their mid-40s, and who are extremely hard-working Australians. They work enormously long hours and are not being covered at all for superannuation; people who need superannuation. They are not covered for workers compensation when their bodies break down, as they do. For the long hours that they are working, if you divide them up and compare them to a unionised worker on a union project under a union EBA, they are greatly underpaid. These are all the reasons. Of course, they pay substantially less tax.

A carpenter under the circumstances I have mentioned, who is working in the housing industry doing carpentry, compared to one working as an employee under a union agreement in commercial construction— just focusing on their tax—doing similar work, one of those Australians pays a great deal less tax than the other one. You know which one it is: it is the one who is characterised as a subcontractor. That is another blow to revenue. That is another reason why John Ralph said that the hole that has been opened up in what was then the PAYE tax take by the fraudulent mischaracterisation of people as contractors, when they are not, is a serious problem to our tax base. They are the words. That is paraphrasing the words of John Ralph. So you are right to say that there are a great deal of problems coming back and revisiting the government and the general taxpayer because of the spread of abuses that are going on out there.[15]

[15] Mr John Sutton, CFMEU, *Committee Hansard*, Thursday, 3 August 2006, pp. 52-52

In their submission to the House of Representatives Inquiry into Independent Contractors, the Civil Contractors Federation identified the importance of genuine contractors demonstrating that they have insurance. [16]

The Government have in someways dealt with the issue of workers compensation by not excluding state and territory deeming provisions for the purpose of workers compensation, which I find a little ironic.

The *Superannuation Guarantee Act 1992* does not require contractors to have a superannuation fund. It does however suggest that workers under a contract should be paid superannuation, but as Stewart notes the provision is weak:

> s 12(3) of the Superannuation Guarantee (Administration) Act 1992 contains a much simpler provision, obliging employers to make superannuation contributions not only in relation to employees, but also those working under any contract that is "wholly or principally for the labour of the person to whom the payments are made". In interpreting this formula, however, the courts have held that a contract for services falls outside its scope if the principal aim of the contract is to "produce a given result". Since virtually every contract to provide labour can be so characterised, especially if the contract is drawn up in the right way, the interpretation has robbed the provisions in question of any effective content.[17]

In the Democrats view corresponding legislation needs to be introduced to mandate that independent contractors take out insurance and pay superannuation contributions. This should have been done cognately with this Bill.

The Democrats acknowledge that the issue of implementation and compliance would have to be considered. The Civil Contractors Federation suggests a Registered Contractor Number (RCN), which would expire at the end of each year and for renewal would require things like insurance and perhaps proof of superannuation contributions. The Government should examine this issue before the Bill is passed.

Unfair contract provision

Contractors seeking a review of a contract they consider unfair must make an application to a court themselves. They cannot have a union or any other association make it on their behalf.

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[16] Civil Contractors Federation, *Submission 15*, to the House of Representatives Inquiry into Independent Contracting and Labour Hire. p. 5

[17] Professor Andrew Stewart, *Submission 69*, to the House of Representatives Inquiry into Independent Contracting and Labour Hire. p.9.

This is similar to the anti-choice provision in the Government's Bill to amend the Trade Practices Act to prevent a union for bargaining on behalf on collective groups of businesses.

The Democrats tend to agree with the CEPU's observation in their submission that:

> Such provisions appear to us to have little to do with protecting the interests of contractors, who may legitimately wish to seek the assistance of a union in work related matters, and more to do with the Governments determination to quarantine all such workers for the industrial relations system.[18]

The ACTU notes that the Bill adds:

> a new requirement for the Court, where it has considered whether remuneration under the contract is less than that of an employee performing similar work, to also consider whether the total remuneration provided under the contract being reviewed is commensurate with other service contacts relating to similar work in the industry. Where a contractor is receiving less than he or she would as an employee the unfairness is not mitigated if there are a large number of similarly unfair contracts applying in the industry[19]

Other concerns are that there is no express power to order compensation directly. Instead the process inserts an additional and costly step in the enforcement process.

The Bill precludes, on the face of it, the making of orders after the contract has come to an end, which has implications for goodwill claims.

As noted by the TWU:

> there is no power in the Bill to make an order in circumstances where unfairness has arisen by virtue of the conduct of a party or parties or through the operation of the contract or some other reason.[20]

APESMA in their submission argued that the:

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[18] CEPU, *Submission 36*.

[19] ACTU, *Submission 10*, p. 5.

[20] TWU, *Submission 42*. p. 33.

> …drawback of this mode of redress are its expense with applicants potentially subject to costly order, its timelessness, and the extent of complex legalistic argument required to argue these matters.[21]

The Democrats are concerned about the costs and weakness of these provisions.

Sham contracting

Both the ACTU and the CFMEU note in their submissions that the sham contract provisions that accompany the Bill are weak and will be ineffective in stamping out sham arrangements:

The ACTU note that although the onus is on the employer to disprove the element, the complexity of the issue means that this will not be difficult. The ACTU and CFMEU argue that the employer could reasonably argue not to be expected to know for certain the true nature of the employment arrangements. As the CFMEU stated:

> It would not be difficult for a crafty person to plead ignorance or fabricate an excuse for having misrepresented an employment relationship as an independent contract arrangement.[22]

This is another reason why a definition of employment should be devised and legislated to make it clearer to employers the 'true nature' of the work arrangements.

The CFMEU also note that a contravention only occurs:

> If an employer's sole or dominant purpose in dismissing or threatening to dismiss an individual is to engage the individual as an independent contractor, a well advised employer would have little difficulty in putting up other reasons for a dismissal or threat in circumstances where the real reason is simply to engage the employee as a contractor on inferior rates and conditions.[23]

The ACTU also argue the lack of remedy for the employee who is the victim:

> In particular, an employee who is dismissed in order to be re-engaged as an independent contractor has no avenue to challenge the dismissal or seek reinstatement unless it can be shown that the

[21] APESMA, *Submission 11*, p. 6.

[22] CFMEU *Submission 20* p 14.

[23] ibid.

> dismissal was because the employee was entitled to the benefit of an industrial instrument.[24]

The Democrats believe that the sham provisions are weak and should be amended.

Conclusion

In summary, the Democrats believe that the Bill is likely to mean further uncertainty. An increase in disguised contracting, greater reliance on common law litigation, reduced protection for the increased number of contractors, and shift costs from private to public. The Democrats will move amendments to the Bill.

Senator Andrew Murray

[24] ACTU, *Submission 11*, p. 6.

Attachment 1 – Democrat amendment to Workplace Relations (Termination of Employment) Bill No. 2

170CBB Definition of employee

(1) For the purposes of this Division, a person (the worker) who contracts to supply his or her labour to another person is to be presumed to do so as an employee, unless it can be shown that the other person is a client or customer of a business genuinely carried on by the worker.

(2) In determining whether a worker is genuinely carrying on a business, regard must be had to those of the following factors which are relevant in the circumstances of the case:

(a) the substance and practical reality of the relationship between the parties, and not merely the formally agreed terms;

(b) the objects of this Division;

(c) the extent of the control exercised over the worker by the other party;

(d) the extent to which the worker is integrated into, or represented to the public as part of, the other party's business or organisation;

(e) the degree to which the worker is or is not economically dependent on the other party;

(f) whether the worker actually engages others to assist in providing the relevant labour;

(g) whether the Australian Taxation Office has previously made a personal services determination in relation to the worker pursuant to Subdivision 87-B of the *Income Tax Assessment Act 1997*, in connection with work of the kind performed for the other party;

(h) whether the worker would be treated as an employee under the provisions of any State law governing unfair dismissal which, but for this Act, would otherwise apply to the worker.

(3) A contract is not to be regarded as one other than for the supply of labour merely because:

(a) the contract permits the work in question to be delegated or subcontracted to others; or

(b) the contract is also for the supply of the use of an asset or for the production of goods for sale.

(4) An employment agency which contracts to supply the labour of a person (the worker) to another party (the client) is to be deemed to be that person's employer, except where this results in a direct contract between the worker and the client in relation to that labour.

(5) Where:

(a) an arrangement is made to supply the labour of a person (the worker) to another party (the ultimate employer) through a contract or chain of contracts involving another entity (the intermediary); and

(b) it cannot be shown that the intermediary is genuinely carrying on a business in relation to that labour that is independent of the ultimate employer, on the basis of the

factors set out in subsection (2); the worker is to be deemed to be an employee of the ultimate employer.

(6) For the purposes of this section, ***employment agency*** means an entity whose business involves or includes the supply of workers to other unrelated businesses or organisations, whether through a contract or a chain of contracts.

Attachment 2 – Professor Andrew Stewart proposed Definition of Employee[25]

A Proposed Redefinition of Employment

The following standard definition of employment is proposed:

(1) A person (the worker) who contracts to supply their labour to another is to be presumed to do so as an employee, unless it can be shown that the other party is a client or customer of a business genuinely carried on by the worker.

(2) A contract is not to be regarded as one other than for the supply of labour merely because:

(a) the contract permits the work in question to be delegated or sub-contracted to others; or

(b) the contract is also for the supply of the use of an asset or for the production of goods for sale; or

(c) the labour is to be used to achieve a particular result .

(3) In determining whether a worker is genuinely carrying on a business, regard should be had to the following factors:

(a) the extent of the control exercised over the worker by the other party;

(b) the extent to which the worker is integrated into, or represented to the public as part of, the other party's business or organisation;

(c) the degree to which the worker is or is not economically dependent on the other party;

(d) whether the worker actually engages others to assist in providing the relevant labour;

(e) whether the worker has business premises (in the sense used in the personal services income legislation); and

(f) whether the worker has performed work for two or more unrelated clients in the past year, as a result of the worker advertising their services to the public.

(4) Courts are to have regard for this purpose to:

(a) the practical reality of each relationship, and not merely the formally agreed terms; and

(b) the objects of the statutory provisions in respect to which it is necessary to determine the issue of employment status.

(5) An employment agency which contracts to supply the labour of a person (the worker) to another party (the client) is to be deemed to be that person's employer, except where this results in a direct contract between the worker and the client.

(6) Where:

(a) an arrangement is made to supply the labour of a person (the worker) to another party (the ultimate employer) through a contract or chain of contracts involving another entity (the intermediary), and

(b) it cannot be shown that the intermediary is genuinely carrying on a business in relation to that labour that is independent of the ultimate employer, on the basis of factors similar to those set out in (3) above, the worker is to be deemed to be the employee of the ultimate employer.

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[25] Professor Andrew Stewart, *Submission 69*, to the House of Representatives Inquiry into Independent Contracting and Labour Hire. pp.10-11.

Appendix 1
List of submissions

1. Confidential
2. ODCO Contracting Systems Australia
3. Melton Roofing
4. CLC Couriers
5. Stephen Barnett
6. Queensland Government
7. Australian Entertainment Industry Association
8. Australian Institute of Employment Rights
9. Master Builders Australia Inc
10. ACTU
11. APESMA
12. Victorian Trades Hall Council
13. Australian Education Union
14. Civil Contractors Federation
15. Australian Industry Group
16. Australian Manufacturing Workers' Union

16a. Australian Manufacturing Workers' Union

16b. Australian Manufacturing Workers' Union

17. Australian National Couriers
18. Australian Chamber of Commerce
19. Unions NSW

19a. Unions NSW

20. CFMEU
21. Trades and Labour Council of WA (Unions WA)
22. ITCRA
23. Confidential
24. New South Wales Government
25. Owner Drivers Australia
26. NSW Teachers Federation
27. Master Plumbers and Mechanical Services Association of Australia

28. Rio Tinto Limited
29. Australian Rail, Tram and Bus Industry Union
30. Independent Contractors of Australia
31. NSW Road Transport Association Inc
31a. NSW Road Transport Association Inc
32. Queensland Teachers' Union of employees
33. Confidential
34. Liquor, Hospitality and Miscellaneous Union
35. National Farmers' Federation
36a. National Farmers' Federation
35b. National Farmers' Federation
36. Communications, Electrical and Plumbing Union (CEPU)
37. Textile, Clothing and Footwear Union of Australia
38. FairWear Australia
39. Recruitment and Consulting Services Association
40. Victorian Government
41. Brotherhood of St Laurence
42. Transport Workers Union of Australia
43. Courier and Taxi Truck Association
44. Department of Employment and Workplace Relations
45. Submission withdrawn
46. South Australian Government
47. Post Office Agency Association Limited
48. UnitingCare NSW.ACT
49. Victorian Forest Harvesting and Cartage Council
50. Australian Workers' Union
51. The Allied Express Group of Companies
52. Uniting Church in Australia, Justice and International Mission Unit
53. Victorian Transport Association
54. Western Australian Government
55. ACCER

Appendix 2

Hearings and witnesses

Thursday, 3 August 2006, Canberra

Communication, Electrical and Plumbing Union of Australia (CEPU)

Mr Colin Cooper, *National President, Communications Branch*

Ms Ros Eason, *Senior National Research Officer*

NSW Road Transport Association

Mr Hugh McMaster, *Corporate Relations Manager*

Mr Bob Mackenzie, *Member*

NSW Government

Mr Don Jones, *Assistant Director-General, Office of Industrial Relations*

Ms Rebekah Stevens, *Assistant Director-General, Office of Industrial Relations*

Mr George Petrovic, *A/Principal Analyst, Analysis and Review Branch, Office of Industrial Relations*

Australian Industry Group (AiG)

Mr Stephen Smith, *Director, National Industrial Relations*

Mr Ron Baragry, *Legal Counsel, Workplace Relations*

The Association of Professional Engineers, Scientists and Managers Australia (APESMA)

Mr Geoff Fary, *Executive Director, Industrial Relations*

Ms Kim Rickard

Australian National Couriers

Mr James Taylor, *Director*

Courier and Taxi Truck Association

Ms Kathy Robertson, *CEO*

Mr Peter Reichmann, *Director, Direct Couriers*

Construction, Forestry, Mining and Energy Union (CFMEU)

Mr John Sutton, *National Secretary*

Australian Chamber of Commerce and Industry (ACCI)

Mr Peter Anderson, *Director, Workplace Policy*

Mr Daniel Mammone, *Advisor, Workplace Relations*

Australian Council of Trade Unions (ACTU)

Ms Michelle Bissett

Friday 4 August 2006, Canberra

Master Builders' Association

Mr Wilhelm Harnisch, *CEO*

Mr Richard Calver

Independent Contractors of Australia

Mr Ken Phillips, *Executive Director*

Transport Workers' Union (TWU)

Mr Tony Sheldon, *A/Federal Secretary, NSW State Secretary*

Mr Michael Kaine, *Assistant Federal Secretary, TWU Chief Legal Officer*

Mr Brendan Johnson, *TWU VIC/Tas Industrial Officer*

Mr Don Orrock, *Transport Industry Small Business Advisor*

Ms Thi Thu Hong Ly, *outworker*

Mr Paul Dewberry

Mr Michael Evans

Mr Jeremy Kemplen

Mr Tony Matthews

FairWear Australia

Ms Debbie Carstens

Ms Rose Nguyen, *outworker*

Ms Bich Thuy Pham, *outworker*

Victorian Government

Mr Brian Corney, *Director-Private Sector, Industrial Relations VIC*

Ms Andrea Lester, *Senior Policy Analyst, Industrial Relations VIC*

Mr Philip Lovel, *CEO*, *Victorian Transport Association*

Textile, Clothing and Footwear Union of Australia (TCFUA)

FairWear Australia

Mr Barry Tubner, *NSW Branch Secretary, National President*

Ms Michele O'Neil, *VIC Branch Secretary, National Assistant Secretary*

Ms Kathryn Fawcett, *National Industrial Officer*

Civil Contractors Federation

Mr John Higgins, *National Industrial Relations Advisor*

Mr Craig Long, *Executive Director, NSW Branch*

Department of Employment and Workplace Relations

Mr Finn Pratt, *Deputy Secretary, Workplace Relations*

Ms Natalie James, *Chief Counsel (Acting), Workplace Relations Legal Group*

Mr John Kovacic, *Group Manager, Workplace Relations Policy Group*

Appendix 3
Tabled documents and answers to questions on notice

Tabled documents

3 August 2006

Independent Contractors ACT
- Confidential Questionnaire

4 August 2006

Ken Phillips
- Letter to ICA network

Independent Contractors
- Summary of recommended amendments

TCFUA
- Inquiry into the impact of Commonwealth Workchoice Legislation (Uncorrected Transcript)
- Letter from Jeff Woodgate

Independent Contractors Australia
- Information about ICA

Australian Chamber of Commerce and Industry
- Schedule of amendments Sought by the Chamber

Answers to questions on notice

11 August 2006

Office of Minister for Industrial Relations, Victoria

14 August 2006

Australian Industry Group
NSW Department of Commerce
TWU

15 August 2006

Victorian Minister for Industrial Relations, Rob Hulls MP

Appendix 4

Correspondence from DEWR

Correspondence from FairWear

Australian Government
Department of Employment and Workplace Relations

National Office
GPO Box 9879 CANBERRA ACT 2601

Senator the Hon Judith Troeth
Chair of the Senate Employment, Workplace
Relations and Education Committee
Parliament House
CANBERRA ACT 2600

Dear Senator Troeth

I am writing to follow up on our discussion with the Committee on 17 August 2006 with the representatives of FairWear and the Textile, Clothing and Footwear Union of Australia (TCFUA) regarding the treatment of contract outworkers in the Independent Contractors Bill 2006 (the IC Bill) and the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006 (the Amendments Bill).

These discussions took place with the approval of the Minister, and with the primary purpose of ensuring that the bills achieved the Government's objective to preserve existing protections for outworkers under State and Territory laws, thus reflecting the approach taken in the Work Choices legislation, and doing so in a manner which is consistent with the Government's broader policies with respect to independent contracting. The Government had also agreed to the Department discussing with the TCFUA and FairWear the detail of draft amendments to make the preservation of existing State outworker laws as clear and effective as possible.

I am pleased to be able to advise you that the Department has now finalised draft amendments in consultation with FairWear and the TCFUA. These amendments are attached.

I am confident that these proposed amendments achieve the Government's policy in relation to the protection of outworkers without compromising the overall intention of the legislation. I note, however, that these proposed amendments are yet to go through final internal Government approval processes.

I would be pleased if you could circulate this information among the other members of the Senate Employment, Workplace Relations and Education Committee (the Committee). However, I would appreciate it if the text of the amendments could remain confidential at this stage, given the formal approval processes are yet to occur.

The attached document sets out each of the key issues we have discussed with the Committee in response to the TCFUA and FairWear concerns.

I would be pleased to provide you with further information if it would assist the Committee in its deliberations.

I have copied this letter to the TCFUA and FairWear for their information.

Yours sincerely

Natalie James
Chief Counsel (a/g)
Workplace Relations Legal Group
24 August 2006

Senator Judith Troeth
Chairperson
Senate Employment, Workplace Relations and Education Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

By email transmission: c/o John Carter, Secretary, john.carter@aph.gov.au

24 August 2006

Dear Senator,

Inquiry into the provisions of the *Independent Contractors Bill 2006* and the *Workplace Relations Amendment Legislation (Independent Contractors) Bill 2006*

We write to inform you, and other members of the Committee, of the outcome of discussions between representatives of the Department of Employment and Workplace Relations and members of FairWear and the TCFUA regarding protections for outworkers in the Bills which are the subject of this inquiry.

Firstly, we would like to sincerely thank you, and the Committee, for encouraging and facilitating these discussions. This committee has a long history of advocating for protections for outworkers, which we, and the outworkers we represent, greatly appreciate.

Secondly, we are pleased to report that as a result of the discussions, a joint position has been reached with DEWR regarding the desirability of a number of amendments to the Bills, to be complemented by clarification of the government's intention through the accompanying Supplementary Explanatory Memorandum and relevant parliamentary speeches. We believe these measures will go a significant way to addressing FairWear's concerns about the impact of the Bills on outworkers.

We have been provided with a copy of a letter, summary of issues, and confidential draft amendments sent by DEWR to the Committee today. We confirm our support for the draft amendments provided to the Committee. We have set out some additional comments in relation to each of the issues canvassed in DEWR's correspondence, including where differences remain, in the attached document. We hope this clarifies our position.

We understand that DEWR will communicate with us in the coming days and weeks regarding the confirmation of the proposed amendments and the content of the supplementary explanatory memorandum and relevant parliamentary speeches.

Again, we wish to thank the Committee for its support for outworkers and for helping to address the exploitation they experience on a daily basis.

Yours faithfully,

Debbie Carstens
FairWear
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