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UNIONS NSW SUBMISSION TO THE SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION LEGISLATION COMMITTEE INQUIRY INTO THE INDEPENDENT CONTRACTORS BILL 2006

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Introduction

Unions NSW submits that any workplace and worker regulation must strike an appropriate balance between measures that promote a productive economy, and fair and reasonable incomes and working conditions for people working in the economy.

The Independent Contractors Bill (the Bill) will make it easier for employers to use contract arrangements to avoid employment obligations and limit the opportunities of workers who have been treated unfairly and seek to remedy exploitative situations through the court system.

Unions NSW believes such a law will not enhance the productive capacity of the Australian economy and will result in a reduction in income and living standards for a large proportion of the Australian workforce, particularly those workers who lack bargaining capacity when it comes to negotiating working arrangements. Further, such a law will encourage numerous forms of tax evasion and result in decreasing revenue to government. We strongly oppose any law that seeks to encourage the growth of independent contracting as an alternative form of work to the traditional employer / employee relationship.

Excluding State and Territory Laws

Unions NSW submits that the provisions in Part 2 of the Bill that seek to exclude the operation of the New South Wales Industrial Relations Act (NSW IR Act) are unfair and extreme.

Unfair Contract

Section 106 of the NSW IR Act permits the Industrial Relations Commission to consider whether a contract is unfair, harsh or unconscionable; or is against the public interest; or provides remuneration less than the person performing the work would have received as an employee; or is designed or does avoid the provisions of an industrial instrument. If such characteristics are present then the Commission is empowered to vary the contract or declare all or part of it to be void.

Such provisions ensure that persons who lack bargaining capacity in negotiation of income and conditions associated with work are not unfairly exploited by employers in the engagement of such persons in performing work. This is highlighted by the case of *Masri v Nenny Santoso and Anor (2004)*[1] A copy of this decision is appended and marked "A". The decision form part of this submission.

The facts in this case are quite shocking. Miss Masri, a young Indonesian woman, with next to no proficiency in the English language was brought to Australia by Mr and Mrs Santoso to work as a maid at the couple's Yowie Bay

falsified passport. When working for the respondents Miss Masri's duties included cooking, cleaning, washing, tidying, laundering, gardening and attending to other personal errands for the respondents, nannying the couple's three young children, performing other tasks relating to the cleaning and tidying of the respondents' office in Hurstville. Miss Masri worked 12 to 15 hours per day, 7 days per week with an occasional break of one or two hours in the middle of the day. She was not permitted to leave the house other than for purposes of shopping or cleaning the respondents' office. Miss Masri was paid approximately $250 per month for this work. She worked for the respondents for approximately four years between 1995 and 1999. During this time Miss Masri taught herself English.

Eventually Miss Masri ran away to the next-door neighbours. Some time later she brought proceedings under Section 106 of the NSW IR Act. In determining this matter Justice Haylen found that the particular award relevant to this type of work did not apply to Miss Masri's work with the respondents. There was no definitive employment relationship between the parties but he did find that their was some form of contractual arrangement. Further, he determined that the contract between Miss Masri and Mr and Mrs Santoso was unfair from the time it was entered into and during the course of the contract because of the conduct of the respondents. He declared the contract between Miss Masri and Mr and Mrs Santoso void. The respondents were ordered to pay an amount of $95,000 in connection with the contract which was declared void.

In determining this matter Justice Haylan stated that:

> *"the arrangement rendered the applicant 'a slave or prisoner' in the house of the respondents with no independent means to leave that situation."*

Further, he found that

> *"the first respondent obviously had in mind at this time that amounts of money would be paid but was using her superior bargaining position and the lure of living in Australia to entice the applicant to accept the arrangement and to then inform her without discussion or negotiation when they arrived in Australia that she would in fact be paid a pittance. On any view of the evidence in this matter the contract was unfair."*

Unions NSW submits that this case demonstrates need for appropriate regulation to ensure that unscrupulous employers do not place workers on contracts that are unfair and exploitative. The unfair contract provisions in the IR Act provide an appropriate balance between a productive economy and the rights of workers to fair and reasonable income and conditions. They should not be excluded in the manner proposed in the Bill.

Whilst part 3 of the Bill may provide for the review of a contract by a court section 13 of the Bill limits the circumstances in which such an application may be made through yet to be published regulations.

Deemed Employees

Schedule 1 of the NSW IR Act also contains provisions that deem certain workers to be employees in any determination of their legal status. The groups of employees covered by these provisions are in occupations that traditionally are characterised by workers from a non-English speaking background, women, young workers, and working in precarious employment situations. Because such workers lack a reasonable bargaining capacity in negotiating their income and conditions with employers, this regulation is necessary to ensure that such workers are not exploited in terms of the income they receive and the conditions under which they perform work.

The overriding of such provisions by the Bill may render such employees subject to third world employment conditions.

Although Part 4 of the Bill provides that outworkers in the textile clothing and footwear industry are required to receive the minimum rate of pay under State or territory legislation or the Workplace Relations Act, there is no protection of entitlements such as annual leave, sick leave and other employment benefits. The effect of these reforms will leave such workers much worse off compared to the protections they currently enjoy under the NSW IR Act.

Conclusion

Unions NSW submits that the Bill will result in a reduction in living standards for many workers in the economy, especially the most vulnerable. Also there is no evidence that the Bill will enhance the productive capacity of the Australian economy. Everyone except unscrupulous employers loses if this Bill is enacted.

We urge the committee to recommend amendments to the Bill that provide comprehensive protection of the rights of workers who may be declared independent contractors and vulnerable at work. Such amendments should provide minimum pay and leave entitlements, the right to collective bargaining for conditions and proper rights to claim unfairness in relation to a contract with appropriate remedies.