

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

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.

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 Government's 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 cases 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 themselves 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 some ways 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.

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 contracts 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 industry¹⁹

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:

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 Employee²⁵**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.

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