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WorkChoices and Independent Contractors: The Revolution That Never Happened

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The contributions that form the centrepiece of this special edition, from Margaret Gardner, Keith Hancock, John Niland and Ron McCallum, offer diverse insights both as to the policy debates that have shaped Australian workplace relations over the past 25 years, and as to the opportunities and challenges that now confront the Rudd Government. But one feature they share is that they have virtually nothing to say about the regulation of work performed outside the confines of the traditional employment relationship. Their focus is unremittingly on employers and employees.

From one point of view, this might seem odd. The 'increasing scope of atypical employment arrangements' to which Margaret Gardner alludes has not just been about employees working part-time, or as casuals, or on fixed term contracts, or away from a traditional workplace. It includes a large number of workers who provide their personal labour as 'self-employed' contractors, rather than as employees in the common law sense (Productivity Commission 2006). There has also been a burgeoning awareness, at least in the labour law literature, of the regulatory challenges posed by forms of work that fall outside the conventional categories of employee and contractor, whether performed by volunteers, franchisees, social security recipients, prisoners, and so on (Gahan 2003; O'Donnell and Mitchell 2006).

Yet the focus of the plenary papers is in another sense entirely justified. The progressive waves of reform that occurred in 1993, 1996 and 2005, as well as the Rudd Government's recently enacted 'transitional' legislation,[1] have all involved amendments to a federal statute whose application remains anchored to the common law conception of a contract of service.[2] Federal awards and workplace agreements can generally deal only with the terms on which employees are engaged. The growing list of minimum entitlements directly established by what is now the *Workplace Relations Act 1996* (WR Act) likewise apply only for the benefit of employees. And while registered trade unions are permitted to have independent contractors or other non-employees as members, at least in

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certain circumstances,[3] the various rights granted to unions under the Act — to enter workplaces, to enforce compliance with industrial instruments, to organise protected industrial action, to appear in tribunal proceedings — have little application to those members.

In the same vein, the public debates and advertising wars that surrounded the Howard Government's contentious 'WorkChoices' reforms were conducted almost entirely by reference to the position of employees. And in responding to those debates, the federal ALP's 'Forward with Fairness' policies were likewise framed in terms of restoring 'balance' to the treatment of employers and employees (Rudd and Gillard 2007a, 2007b). They have nothing at all to say about contractors or other non-employees.

What Might Have Been

But it could easily have been different. In the lead-up to the 2004 election, the Coalition promised to 'legislate to protect and enhance the freedom to contract and to encourage independent contracting as a wholly legitimate form of work' (Liberal and National Parties 2004: 3). For a time, it seemed that what John Howard had in mind was a two-pronged approach to labour market deregulation. Businesses who wanted to escape the 'rigidities' of the award system, not to mention the inconvenience of having to deal with unions, would be given a choice of how to do that. They might use statutory individual agreements to strip away award entitlements and block union representation, either with or without any compensating wage increase. Or, more radically, they might take a worker right outside the scope not just of the award system, but of the various minimum standards set by the WR Act for employees, by the simple expedient of hiring them under a contract that described them as self-employed.

Whether or not that was the intent behind the 2004 policy, however, it is not what eventuated. The Howard Government did indeed introduce the *Independent Contractors Act 2006* (IC Act). This prevented many contractors from being deemed to be employees for the purpose of certain State and Territory industrial laws, and also blocked such workers from having the fairness of their contracts reviewed by State industrial tribunals, especially in New South Wales (Forsyth 2007; Piper Alderman 2007; Riley 2007). But a wide range of State and Territory laws were exempted from the operation of the IC Act. More importantly, it did not seek to prevent courts from using the established common law principles to classify workers as being employees, even in the face of contracts describing them otherwise. Indeed the WR Act was simultaneously amended to impose new sanctions against the use of 'sham' contracting arrangements.

In the result, therefore, the IC Act has done little if anything to encourage a greater use of independent contractors. At the same time, the federal ALP's approach to the issue has undergone, if not a change of heart, then certainly a change in tune. Labor originally opposed the passage of the IC Act and indicated its support for a new definition of 'employee' in the WR Act that would make it harder for businesses to disguise what was in substance an employment relationship as a 'commercial' contract.[4] But by the lead-up to the 2007 election, any suggestion of extending the scope of the WR Act had disappeared from its policies. Instead,

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it had adopted a small business policy that explicitly supported 'the choice of Australians to pursue a career as independent contractors' (ALP 2007: 64).

In the remainder of this short article, I will say a little more about the background to the Coalition's 2004 policy, and explain why the IC Act has been regarded as a disappointing failure of public policy by almost everyone with an opinion on the issue. I will then go on to examine what we might or might not expect from the Rudd Government in this area. First, however, it is useful to reflect briefly on an earlier attempt to address the coverage of the federal industrial statute.

The Hancock Report and 'Quasi-Employees'

In reviewing the industrial relations system of the mid-1980s, the Committee of Inquiry headed by Keith Hancock devoted a section of its report to what it termed 'quasi-employees' (Hancock 1985: 355–66). These were workers who were not 'genuine independent contractors or small businessmen'. Rather they were 'persons who make arrangements to avoid a bona fide employer/employee relationship by entering into a contract or sub-contract with an employer for the service of their labour only or for the service of their labour and equipment to that employer'. Often tying themselves to the same employer, they functioned in a practical sense as employees. The Committee's recommendation was that such workers 'should be subject to the Commission's authority and the definition of employee should encompass them'.

As with many of the Hancock Report's more interesting recommendations, this proposal was not taken up in the legislation that became the *Industrial Relations Act* 1988. But four years later, the Keating Government returned to the issue. It did not seek to broaden the 1988 Act's definition of an 'employee', despite strong support from the ACTU for such a move. But it did propose in the Industrial Relations Legislation Amendment Bill 1992 to confer an express jurisdiction on the Australian Industrial Relations Commission to resolve disputes 'about the use or proposed use of independent contractors, rather than employees, for the performance of work'. The Commission would also be given a special jurisdiction to review certain types of contract involving an independent contractor on the grounds that the contract was unfair, harsh, or against the public interest. A similar power had long been granted to the New South Wales Commission under s 88F of the *Industrial Arbitration Act* 1940. In addition, there were to be provisions clarifying the right of federally registered unions not only to recruit contractors, but to represent them in negotiating the terms and conditions on which they were engaged.

The unfair contracts jurisdiction did survive in the final version of the 1992 Act, and has remained on the statute books ever since in one form or another. But the express right of unions to represent contractors in negotiations was dropped, as was the confirmation that the Commission could deal with disputes regarding contractors. In practical terms, that meant that the Commission's capacity to deal with such disputes would continue to depend on the vagaries of the concept of 'matters pertaining' to employment (see Creighton and Stewart 2005: 102–103).

The main reason for the government's backdown was strong resistance from business groups against the original proposals. The Housing Industry Association (HIA) in particular claimed that the reforms would drive up the cost of building homes. Contracting is of course extremely common in the construction industry (Buchanan and Allan 2002; Royal Commission into the Building and Construction Industry 2002). Some who operate in that way are on any basis running a business: they advertise their services, offer their labour to a range of clients and frequently employ (or subcontract) others. But it is also common to find labourers and other workers purporting to operate on a self-employed basis, with little real evidence they are running a business. By working in this way they are able (subject to what is said below about the PSI rules) to obtain various tax advantages, notably the deduction of a wider range of expenses than can be claimed by employees. Those who hire them, on the other hand, may be able to make cost savings by avoiding the need to make superannuation contributions, or provide annual or personal leave.[5] And merely by requiring workers to supply an invoice and quote an Australian Business Number (ABN), which can be obtained more or less automatically from the Australian Taxation Office (ATO), these businesses can now avoid any need to deduct taxation instalments.

Clearly then, it is in the financial interest of bodies such as the HIA and the builders, manufacturers and suppliers it represents to stifle any moves to have contractors in the industry treated as employees, even where they cannot in any meaningful sense be said to be running independent businesses.

While business groups had a major victory in 1992 in persuading the Keating Government to water down its proposed reforms, they have remained vigilant in blocking attempts to address the issue of disguised employment. In South Australia, for example, they successfully lobbied the Rann Government not to adopt a proposal that would have seen a broader definition of employment inserted into the State's industrial legislation (Stevens 2002: 45–47). In recent years they have been assisted by the Independent Contractors Association (ICA), a body that despite having relatively few members purports to represent the interests of the hundreds of thousands (or according to ICA, millions) of Australians who work as contractors. The ICA has proved a highly vocal and effective lobbyist since being established in 2001 by then HIA President Bob Day. It is committed to promoting the idea of a 'free choice' between the 'powerlessness and bondage of employment' and the 'equality and liberation of shared power under independent contracting' (ICA 2003). It seems to have been especially influential in persuading the federal Coalition to adopt its 2004 policy.

The Coalition's Policy to 'Free Up' Independent Contracting

Prior to the adoption of that policy, the Howard Government had done relatively little to promote the interests of independent contractors, other than to strengthen the protections in what is now Part 16 of the WR Act against various forms of victimisation or coercion of contractors. Indeed its major initiative had been profoundly hostile to the practice of contracting. In 2000, responding to a longstanding concern on the part of the ATO, it introduced the personal services income (PSI) rules as part of its new tax system.[6] These rules effectively require

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contractors to be taxed as if they were employees, even when operating through a personal company, unless they can show that they are genuinely running a 'personal services business'. The rules are particularly aimed at those who receive 80 per cent or more of their income from a single source.

Nevertheless, in September 2004 the Coalition released its new policy, which lauded independent contractors as 'epitomising the spirit of entrepreneurship that is fundamental to Australia's prosperity'. It spoke of the 'freedoms' of independent contractors being 'under attack' from unions and Labor State governments, and of the desirability of legislating to 'prevent the workplace relations system from being used to undermine the status of independent contractors'. It also asserted a need to ensure that contracting arrangements were governed by 'commercial law', not industrial law (Liberal and National Parties 2004).

The immediate targets of the policy were fairly obvious. On top of the many deeming provisions already found in State industrial laws,[7] Queensland had legislated to confer on its Industrial Relations Commission a broad discretion to treat classes of workers as employees where they would not otherwise be so regarded at common law. Similar proposals had been advanced (though not pursued) in other States.[8] And in the manufacturing industry in particular, unions had long sought to resist the spread of outsourcing by negotiating agreements that sought to regulate the use of contract labour. This latter issue was ultimately addressed by prohibiting workplace agreements from dealing with that issue.[9]

But the 2004 policy also spoke of there being a 'view in the community' that in determining a worker's status the courts had 'gone too far', to the point of disregarding and overturning 'the honest intentions of parties'. This was surely a reference to decisions such as that of the High Court in the *Vabu* case, where a bicycle courier was found to be employee despite being purportedly engaged as a contractor.[10] According to the policy, 'a party's freedom to contract must be upheld'. The suggestion here seemed to be that the courts should be prevented from finding a worker to be an employee whenever they had formally agreed to be hired as a contractor. This impression seemed to be strengthened by a discussion paper released the following year, which spoke of government policy being to 'respect the conscious choice of people to be independent contractors' (DEWR 2005: 5).

The Independent Contractors Legislation: Three Kinds of Disappointment

By the time the government moved to implement its policy, however, it had apparently decided to retreat from any intention to make it easier to engage workers as contractors. The IC Act 2006 makes no attempt to redraw the boundary between employees and contractors. Indeed it does not define the term 'independent contractor' at all, other than to confirm in s 4 that a contractor need not be a natural person. Whether a worker is an employee or a contractor is accordingly left to the common law to determine.

Part 3 of the Act maintains the capacity of contractors to challenge the fairness of the terms on which they have been engaged. Otherwise, the main thrust of the statute is in Part 2. It provides that where an independent contractor

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is engaged to perform work in a Territory, or for a trading, financial or overseas corporation, a State or Territory law may not treat that contractor as if they were an employee. But this applies only where that law concerns a 'workplace relations matter' such as wages, hours or leave entitlements. There is no effect on legislation dealing with matters such as discrimination, workers compensation, occupational health and safety, child labour or taxation. Furthermore, specific exemptions are granted in respect of State laws that protect outworkers, and also (perhaps more surprisingly) laws in New South Wales and Victoria that regulate the terms on which certain owner/drivers provide transport services.[11] In practical terms then, the impact of the Act is limited, affecting only a small proportion of the State or Territory laws that regulate contracts for services.

At the same time as this legislation was introduced to Parliament, the Howard Government moved to amend the WR Act to deal with what it described as the issue of 'sham contracting'.[12] Sections 900 and 901 of the WR Act now prohibit a person from knowingly or recklessly misrepresenting an actual or proposed employment relationship as an independent contracting arrangement. These provisions will not catch any business that *successfully* avoids or disguises an employment relationship, by carefully constructing an arrangement that at common law would be treated as a contract for services. But they are capable of applying to some of the more cavalier arrangements that exist in certain industries, where for example a worker is simply asked to supply an ABN and is thereafter treated as a contractor, often without any formal agreement.

Another new provision, s 902, prohibits employers from dismissing or threatening to dismiss an employee where their sole or dominant purpose is to engage the employee to perform the same work as an independent contractor. While there are ways to get round this prohibition, it does potentially create difficulties for an organisation that has decided to shift from employing a group of workers to contracting them instead.

In the result, therefore, any impact that the IC Act may have had in overriding State deeming provisions has to be counterbalanced by the new legal dangers for business created by the sham contracting provisions in the WR Act.

The obvious question to ask is — why? Why did the Howard Government not go further in meeting the needs of the business groups who had lobbied for a greater freedom to engage contractors? Why did it not seek to deliver on its commitment to allow an unfettered 'choice' of status?

One possible explanation is that having unexpectedly gained a Senate majority that allowed it to make the changes it wanted to the WR Act, the Coalition felt that it could provide businesses with the flexibility they were seeking through the workplace relations system, rather than having to rely on the more radical strategy of unrestrained contracting. But it may also be that the government was genuinely persuaded by the weight of evidence as to the imbalance in many contracting arrangements that was presented to a parliamentary committee that examined the matter (House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation 2005).

In any event, it is clear that the IC Act and its attendant changes to the WR Act have been greeted with almost universal disappointment. That disappointment arises from at least three different perspectives.

In the first place, the business lobbyists who pushed for the IC Act not only feel that it does not go far enough, but have been positively alarmed by the sham contracting provisions. When the legislation was passed, the President of the HIA put on a brave face, describing the passage of the Act as a 'victory for HIA lobbyists and members' (Langford-Jones 2007). But a more revealing reaction came from the ICA's chief lobbyist, Ken Phillips, who wrote to Coalition MPs while the legislation was being debated, warning that it would 'seriously undermine the status of independent contractors'.[13]

A second and very different kind of disappointment is associated with the view, now widely (though by no means universally) held in academic labour law circles, that it is time to move beyond the traditional employee/contractor dichotomy. Arrangements for the performance of work are said to lie along a spectrum, with no clear or sustainable distinction between those that involve subordination and dependency on the one hand, and entrepreneurship on the other (Freedland 2003). Indeed it has been argued that in the 'new economy', the variety of arrangements for the performance of work, both paid and unpaid, makes it more sensible to 'adopt the more neutral comprehensive label of "worker" to signify those who are entitled to law's protection' (Owens and Riley 2007: 179). From this standpoint, the IC Act is perpetuating a paradigm that is past its use-by date.

Then, thirdly, there are the those like myself who remain willing to accept the employee/contractor distinction, but who regard the legislation as not doing enough to address the problem of disguised employment. There are simply too many workers who are treated by the law as contractors, when in substance and reality they should be regarded, and regulated, as employees. The 'sham contracting' provisions, while welcome, do not do enough to stem the use of artificially constructed arrangements whose primary purpose is to benefit those for whom the work is performed, not the workers themselves.

Independent Contracting Under the Rudd Government

So if nobody in particular is happy with the new independent contractor laws, what is their fate likely to be under the Rudd Government? The answer, it would appear, is that they seem likely to survive in more or less their current form. As already noted, Labor's small business policy is supportive of independent contracting — to the point indeed where the ICA has publicly lauded its approach. Furthermore, while the policy speaks of the desirability of minimising 'ambiguity and uncertainty regarding the nature of the contractual relationship' (ALP 2007: 64), Labor has reassured the ICA that it has no plans to change the common law definition used in the IC Act.[14] The importance that the Rudd Government attaches to being seen as 'pro-business' on this issue is reflected in the appointment of Dr Craig Emerson as the first ever Minister for Small Business, Independent Contractors and the Service Economy.

This is not to say that there may not be changes to the legislation at some point. Labor's commitment to protecting owner-drivers means that it is likely

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to extend the exemption in the IC Act for State laws protecting such workers.[15] It has also promised to introduce low-cost and speedy procedures for the resolution of unfair contract claims. A further initiative may be the removal of the bar that currently exists on trade unions acting for a group of contractors who wish to engage in collective bargaining without breaching competition laws.[16] But it seems unlikely there will be any initiatives that will put the government at odds with the ICA and its business backers, regardless of the strength of the case for a renewed attack on disguised employment.

In practical terms then, that may throw the spotlight back on the ATO. If there is one move that could make some sort of a difference to the prevalence of contracting arrangements, it would be a vigorous and sustained campaign to enforce the PSI rules against contractors who essentially work for a single employer and have no independent business. But while this might lessen the incentive to workers to operate on that basis, taxing them as employees would still not alter their status for labour law purposes. We are still waiting for a government with the willingness to take a stand on that particular point of principle.

Notes

1. See *Industrial Relations Reform Act* 1993; *Workplace Relations and Other Legislation Amendment Act* 1996; *Workplace Relations Amendment (Work Choices) Act* 2005; *Workplace Relations Amendment (Transition to Forward with Fairness) Act* 2008.
2. See currently the definitions of 'employer', 'employee' and 'employment' in ss 5–7 of the *Workplace Relations Act* 1996. By simply using terms such as 'employ' without elaboration, these expressions are 'construed as intended to import the common law meaning of employee and the associated tests for that status relationship': *Sammartino v Mayne Nickless* (2000) 98 IR 168 at 179.
3. See WR Act Sch 1 s 18B(3)(b),(c).
4. See Commonwealth, *Hansard*, Senate, 1 December 2006, pp. 4–24; and see also House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation 2005: 160–162, where a similar proposal was supported by the Labor members of the committee. In each case, the suggested redefinition of employment was one that I had originally formulated: see Stewart 2002: 268–275. For a different proposal, see Bromberg and Irving 2007.
5. In theory, the superannuation guarantee legislation requires contributions to be made not just on behalf of employees, but anyone who enters into a contract 'wholly or principally' for their labour: *Superannuation Guarantee (Administration) Act* 1992 (Cth) s 12(3). In practice, however, the courts have interpreted this category narrowly: see eg *Vabu Pty Ltd v Commissioner of Taxation* (1996) 81 IR 150. The need to insure against work-related injury, on the other hand, is harder to avoid, since most jurisdictions have deeming provisions in their workers' compensation legislation that treat 'dependent contractors' as if they were employed under a contract of service: see eg *Workplace Injury Management and Workers Compensation Act* 1998 (NSW) Sch 1 cl 2; *Accident Compensation Act* 1985 (Vic) ss 8, 9.

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6. See *Income Tax Assessment Act* 1997 (Cth) Divs 84–87.
7. See eg *Industrial Relations Act* 1996 (NSW) Sch 1.
8. See *Industrial Relations Act* 1999 (Qld) s 275; Industrial Relations Amendment (Independent Contractors) Bill 2000 (NSW); Fair Employment Bill 2000 (Vic) cl 6; Stevens 2002: 52–3 (SA).
9. See WR Act s 356; *Workplace Relations Regulations* 2006 Ch 2 reg 8.5(1)(h). As to the use of 'side' or unregistered agreements to get round these restrictions, see Stewart and Riley 2007.
10. *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21.
11. See *Industrial Relations Act* 1996 (NSW) Ch 6; *Owner Drivers and Forestry Contractors Act* 2005 (Vic). There are also further exemptions for laws dealing with security of payment for building and construction workers: see *Independent Contractors Regulations* 2007 (Cth) reg 4.
12. See *Workplace Relations Legislation Amendment (Independent Contractors) Act* 2006.
13. See 'ICA demands changes to independent contractors legislation to restrain future ALP government', *Workplace Express*, 9 October 2006; and see also 'IC Bill almost friendless, as debate continues in Senate', *Workplace Express*, 29 November 2006.
14. See ICA website, available: http://www.contractworld.com.au/reloaded/ica-alppolicyconsolidated2007.php [accessed 14 April 2008].
15. At present, for example, the exemption in s 7(2)(b) covers the Victorian *Owner Drivers and Forestry Contractors Act* 2005, but not the later *Owner-Drivers (Contracts and Disputes) Act* 2007 in Western Australia.
16. Under Subdivision B of Division 2 of Part VII of the *Trade Practices Act* 1974, a group of contractors may lodge a 'notification' with the Australian Competition and Consumer Commission that, if accepted, renders them immune from certain forms of liability under the Act. But s 93AB prohibits a notification being lodged by or on behalf of a trade union. See further McCrystal 2007.

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