

## CHAPTER 2

### CONTRACT EMPLOYMENT IN THE ABC

#### Introduction

2.1 The Committee draws attention to the distinction that is made at law between two types of employment contracts: the contract of service, and the contract for service.

2.2 To avoid confusion, and to avoid drawing constant attention to the distinction between the two types of employment contract, in this Report contracts of service will be referred to as contracts of employment. ('Contract employment' is used as a general term concerning both types of contract.)

2.3 A contract of employment is usually between an employer and an individual who enters such a contract in his or her personal capacity. A contract for service usually exists when an independent contractor, which is often a company, contracts to provide services, which are often those of an individual. Where an organisation (rather than an individual) is being engaged, such an arrangement necessarily does not constitute a contract of employment.

2.4 Included in the general powers of the ABC under the Australian Broadcasting Corporation Act 1983 is a general power to enter into contracts. A further specific power exists to engage persons to perform services for the corporation (section 25).

## Contract employment in the ABC

2.5 The Committee sought the views of the ABC, unions with members employed by the ABC, and relevant ministers about contract employment.

2.6 The Committee first asked whether statutory authorities should have the general right to employ people under contract whether by individually negotiated salary or remuneration packages or by contracts for service.

2.7 In its reply, the ABC said that it was currently expected to carry out its statutory functions in a commercially competitive environment. As a result, while it did not consider itself a 'commercial' authority, it competed with commercial broadcasters and other organisations for the services of actors, producers and artists such as musicians. It therefore had to compete for the services of 'personalities' like Ms Doogue. If such people had popularity or 'image', which enabled them to demand greater remuneration and conditions than those allowed by award conditions, the ABC had to negotiate more generous remuneration and terms of employment than normally offered.<sup>1</sup>

2.8 The ABC said that the use of contract employment was, in fact, not common in the organisation. Contract employment was used when the person engaged was to work for either a fixed period, such as one year, or was to undertake a specific task. Ms Helen McKenzie, the ABC's Head of Employee Relations, Television, told the Committee during evidence that:

The ABC is not attempting to achieve anything through use of contract employment, other than to have the particular services of the individuals that we want.<sup>2</sup>

2.9 The ABC staff unions which made submissions to the Committee held differing views on the use of contract employment by the ABC. The Australian Journalists' Association [AJA], Actors' Equity, the ABC Senior Executives' Association and the Musicians' Union generally acknowledged the need for contract employment by the ABC.<sup>3</sup>

2.10 Mr Neal Swancott of the AJA told the Committee that, while the AJA had no objection in principle to contract employment, it pointed out the difference between relatively long-term award employment conditions, and employment conditions providing for specific over-award allowances in lieu of penalty payments. The competitive nature of current affairs journalism, for example, meant that flexible terms of employment had been historically important to journalists who enjoyed popularity.<sup>4</sup> Mr Swancott also pointed out that any contractual arrangements should include appropriate minimum award conditions and that 'in effect the contractual component must be over and above the award minimum protections'.<sup>5</sup>

2.11 The ABC Staff Union maintained that, to properly discharge its functions, the core of ABC employees should be tenured staff. It disputed that most of the functions performed by existing ABC staff could be performed either more economically or more effectively by contract employment.<sup>6</sup> The ABC should therefore limit contract employment

... to circumstances which cannot be satisfied by established staff; for example, performance of special functions not normally required by the organisation, and replacement of established staff for temporary fixed terms.<sup>7</sup>

The Staff Union acknowledged that in the competitive media context, the hiring of 'personalities' did, however, require resort to contract employment.<sup>8</sup>

2.12 Another matter raised by the staff unions was the effect of contract employment on the service provided by the ABC. Mr Aarons of the ABC Staff Union noted that:

... one of the problems with contracts is that you might get quality in the individual but, if contracts become some form of substitute for that type of recruitment, training and development, then I think it is not only the ABC which is going to suffer but ... the whole broadcasting industry in Australia.<sup>9</sup>

2.13 Mr Swancott of the AJA supported the view that contract employment in the ABC may reduce the level of professionalism in ABC journalism.<sup>10</sup>

2.14 The Committee sought the views of the Minister for Communications (as Minister responsible for the ABC), the Minister for Finance (as Minister responsible for public service matters) and the Minister for Employment and Industrial Relations (as Minister responsible for the observance of industrial awards and agreements by Commonwealth agencies).

2.15 The Committee received replies from the Minister for Communications and the Minister for Employment and Industrial Relations. The Minister for Finance told the Committee that he believed he could not add to the views put to the Committee by his colleagues, and was satisfied that the views of his colleagues would comply with the Committee's requirements.

2.16 The Minister for Communications told the Committee he generally had no objection to statutory authorities, including the ABC, employing people on contract. The Minister said:

... I believe that statutory authorities should have the general right to employ people on contract. I see no reason for a differentiation between outright contract

employment and individually negotiated remuneration packages. In fact, the difference between the two types of contract is regarded as being marginal since either form must clearly take into account wages and salaries of the persons performing the work of the contract.<sup>11</sup>

The Minister also noted that statutory authorities were established to carry out a variety of functions not appropriate to Departments of State. The way in which authorities carried out these functions may require the power and capacity to engage necessary personnel resources. The Minister also noted:

I would expect, however, that by far the majority of personnel resources would be employees. It would only be in special circumstances where management would need to offer contract employment.<sup>12</sup>

2.17 The Minister for Employment and Industrial Relations told the Committee that a range of factors such as 'the nature of the work, the skills involved, the length of the engagement, and the functions and powers of the employing authority' were relevant to the exercise of a statutory authority's power to employ under contract.<sup>13</sup>

2.18 As a further question, the Committee asked whether any distinction should be made between contract employment by commercial and other statutory authorities.

2.19 After considering the replies it received, the Committee does not see it as necessary to distinguish between commercial authorities and other statutory authorities. As the ABC competes with other organisations for the services of certain categories of people with special skills or talents, it must occasionally, and in special circumstances, employ on contract as a means of efficiently carrying out its functions and managing its workforce. However, for normal full-time

employment the Committee does not believe the ABC should either encourage prospective employees to seek employment on contract or automatically agree to requests for employment on contract. Use of contract employment should be restricted to the engagement of persons to perform a particular task or for limited employment.

#### Guidelines and policy on contract employment in the ABC

2.20 The Committee asked each of the parties whose views were sought during the inquiry whether guidelines or a specific policy should exist to govern contract employment by statutory authorities.

2.21 The ABC told the Committee that it did not currently have any fixed guidelines for contract employment as industrial award conditions constituted adequate principles, and that any 'codification of these principles might not be able to accommodate the infinitely variable and constantly changing circumstances of broadcasting'.<sup>14</sup> The ABC submitted that this approach was particularly relevant when applied to people in areas of the organisation involved in program making and presentation. For employment not directly associated with program making (e.g. the engagement of some management executives), the ABC's view was that 'fixed term contract employment makes possible a degree of flexibility and responsiveness to changing conditions which cannot be achieved by a rigid 'public service' employment system'.<sup>15</sup>

2.22 In evidence to the Committee, the ABC stated that the practice of contract employment by the ABC was necessary because a greater degree of flexibility than normal was required by the ABC in coming to mutually acceptable arrangements with particular individuals. Such an approach was subject to a policy

followed by the ABC which ensured that certain minimum conditions and entitlements were extended to all people engaged, both under normal award conditions and under contract.

2.23 As noted in Chapter 1, in the early stages of its inquiry the Committee asked the ABC to provide it with a representative sample of employment contracts entered into during recent years. The Committee believed it should be aware of the variations in such contracts, considering the differences in periods of employment, remuneration and other provisions resulting from the ABC's engagement of people with a range of skills and abilities. The Committee told the ABC that neither the names of the other parties nor the sums payable under the contracts were of interest and could be deleted. Nine contracts were sent to the Committee by the ABC, and were incorporated in Evidence.<sup>16</sup>

2.24 Of the nine contracts, eight were contracts of employment between the ABC and individuals. One contract for service, between an incorporated company and the ABC, required the provision of the services of an individual to the ABC.<sup>17</sup> Payments made to the contracting company in this contract were payable in gross, making the company liable for the payment of taxation and certain other outgoings, such as insurance, normally the responsibility of an employer.

2.25 The ABC said that prior to any negotiation on possible engagement by the ABC some individuals had arranged their affairs to take advantage of a special legal status suggested to them by their financial advisers. As Ms McKenzie of the ABC put it:

... particular individuals have their own legal status, that they have determined for their own private purposes, whether with their accountants or for whatever reason, and that status is something that they present to

us as something that we have to co-operate with. If that individual did not have that status, the ABC would not need a contract either.<sup>18</sup>

2.26 The Committee was concerned to learn that the ABC might enter into contracts of any sort which may facilitate the avoidance of liability for income tax.

2.27 ABC officers were asked whether contracts for service, such as the sample contract provided to the Committee, facilitated tax avoidance. Mr Curtis Berry, then the ABC's Controller of Human Resources, told the Committee that the ABC rejected such a view:

There is a great difference between tax avoidance and tax minimisation. If those individuals have some scheme which they are working on, as long as they are a properly registered company, we take the view that they can enter into that arrangement. However, I would also say that in the last nine months or so we have actively counselled people against going on company contract, for some very obvious reasons which were mentioned earlier by Mr Swancott, but in the end it is a matter between those individuals and the Taxation Commissioner. That is a matter for the individual to resolve.<sup>19</sup>

2.28 When asked whether the ABC, as a Commonwealth statutory authority, had some responsibility not to be a party to such arrangements, Mr Berry said:

We do. Short of conducting a full-scale investigation into the particular company, it is very difficult for us to be satisfied about those arrangements one way or another. If the only way that that individual will be employed is under a company arrangement, and if we need that individual's services - as was pointed out by the Senators we are in the market to obtain the best possible services - then we would have to proceed on that basis.<sup>20</sup>



2.29 The Committee was advised that at the time of the Committee's hearings there were approximately 40 to 50 contracts for service.<sup>21</sup> The total ABC staff is 6960.

2.30 Ms McKenzie also advised that, if a company provided the services of an individual, the ABC believed it was not necessary to examine the taxation arrangements made by the company:

... our concern is that provided the contract is providing the ABC with what it wants, that it is a genuine contract insofar as what is expressed to be provided is what the parties are providing, then we do not see that it is our role to inquire further as to what the taxation situation may be of either the company or of the company's employees.<sup>22</sup>

2.31 By comparison, ABC staff unions favoured clear guidelines for contract employment. The AJA specifically advocated that employment contracts must incorporate the relevant applicable award terms and conditions and that authorities should

... be under a standing direction - either statutory or administrative - to guard against contrived partnership or company arrangements which artificially disguise the "employment" nature of the contract, or any other arrangements which lack bona fides.<sup>23</sup>

2.32 Mr Neal Swancott reiterated this view in his evidence to the Committee, stressing the AJA's view that statutory authorities should be directed that contracts for service must be distinguished from contracts of employment in any employment policy, because of the undesirable result contracts for service can have on observance of industrial awards.<sup>24</sup>

2.33 The ABC Staff Union said that it recognised the occasional requirement for the ABC to be able to employ people under contract, but believed the ABC should develop clear guidelines which were not to the detriment of the ABC's primary functions. At the time of the Committee's hearings, the Staff Union was conducting negotiations on such guidelines with ABC management.<sup>25</sup> Mr Tom Molomby (who is a current member of the ABC Board of Directors, as well as an officer of the Staff Union) told the Committee that the Board of the ABC had not, to date, addressed the broad question of employment policy.<sup>26</sup>

2.34 Both the Minister for Communications and the Minister for Employment and Industrial Relations believed that the management of each authority should adhere to the employment policy of the Government in engaging employees in preference to contractors, but that the employment guidelines developed by authorities should be reasonably flexible to allow for the specific and unique requirements of each authority.<sup>27</sup>

#### The ABC employment profile

2.35 It was apparent from evidence at the Committee's hearings that precise details of the contract employment profile of the ABC was unavailable, and that the details that were available were incomplete and confusing.

2.36 For example, at the Committee's first hearing, the number of contract employees currently engaged by the ABC was unclear, a figure of approximately 350 being given.<sup>28</sup> In later material provided to the Committee, the ABC advised that there were approximately 285, and that this figure did not take account of short term contracts, or a wide range of contracts for the provision of musical works, standard-form contracts with actors and writers, overseas artists (concerts) and touring artists (concerts).<sup>29</sup>

2.37 The ABC Staff Union also commented to the Committee that this apparent lack of detailed knowledge on the ABC's part resulted in difficulties in discussion between it and the ABC on development of an ABC contract employment policy.<sup>30</sup> The Committee believes that the ABC needs to have accurate knowledge of the numbers and types of employment contracts that are current, so as to ensure that the problems revealed in this inquiry can be avoided in the future.

2.38 Mr Neal Swancott of the AJA also gave the Committee views on the possible long term effect of a lack of clear ABC policy on contract employment. He considered that the contractual arrangements that the ABC had negotiated, particularly in the area of current affairs journalism, might lead to the proliferation of contract employment at the expense of other employees, and to unnecessary division of the ABC's work-force, and a reduction in the professional standards of the ABC.<sup>31</sup>

2.39 An aspect of the confusion over contract ABC employment policy was also highlighted by the use of 'R form' contracts, which are contracts designed for the service of individuals who once only, occasionally, or periodically perform specific jobs for the ABC (for example, short radio talks). The Staff Union indicated that these contracts were 'being used on a continual basis to employ people for months and years on end'.<sup>32</sup> The Staff Union also maintained that such a system meant that people who were performing the services of employees could effectively have their services terminated by refusal of the ABC to allow them to sign another R-form with no due processes.<sup>33</sup>

2.40 The ABC told the Committee at the first hearing that the use of R form contracts had caused confusion in personnel administration. Ms McKenzie told the Committee:

We recognise that people have been signing the wrong forms for years, probably for various historical reasons, but that should not deprive them of their employment entitlements.<sup>34</sup>

2.41 In written evidence to the Committee the ABC advised the following details of R form contracts for 1984-85:<sup>35</sup>

- Average number of payments per week	926
- Persons/companies paid on more than 12 occasions during the year	711
- <u>Multiple</u> payments with <u>total</u> payments in excess of \$5000 for the year	380

2.42 The Committee was told that a review of contract employment had been going on for several years. Ms McKenzie's assessment to the Committee was that the improvement and revision of the ABC's administration in the area (and attaining standardisation of contractual procedures) would require considerable time.<sup>36</sup>

2.43 The Committee has noted its attitude to contract employment by the ABC in general earlier in this Chapter. The fact that the ABC is reviewing its policy on contract employment is welcome but the Committee believes that implementation of better controls and standardisation of contractual arrangements should be effected as soon as possible to avoid the difficulties raised during this inquiry.

## Conclusions

2.44 In general, the Committee does not disapprove of contracts of employment by a statutory authority, particularly when it will facilitate and improve the functions and

responsibilities of the authority. However, the Committee believes that contract employment should not be used for normal full-time employment and that contracts, limited to contracts of employment, should be used only for limited employment or for the engagement of persons to perform particular tasks.

2.45 The ABC has been given the power to enter into employment contracts by the Parliament and the Committee believes that the ability to engage people under contract on occasions allows the ABC to obtain the services of people from specialised areas or for fixed terms.

2.46 There are several aspects of the current ABC policy on contract employment which need to be reviewed by the ABC. For example, the Committee believes that contracts should be used with discretion. A contract should not be entered into merely because it is demanded by the person whose services are sought by the ABC. All other options should be considered before the ABC agrees to enter a contract.

2.47 The Committee believes that contracts for service are not a desirable form of arranging employment. The Committee believes that contracts for service can distort the normal employment relationship and may allow a person whose services are obtained under a contract for service to gain a number of tax and other financial advantages not available to salaried employees, or those engaged under contracts of employment. The facilitation of such arrangements by a Commonwealth authority is undesirable.

2.48 In the Committee's view, it is necessary for the ABC to introduce clear guidelines on contract employment which address these matters as soon as possible.



#### ENDNOTES

1. Evidence, p. 4.
2. Evidence, p. 158.
3. Evidence, pp. 8, 13, 18 and 91.
4. Evidence, p. 100.
5. Evidence, p. 101.
6. Evidence, p. 88.
7. Evidence, p. 89.
8. Evidence, p. 89.
9. Evidence, pp. 123-24.
10. Evidence, p. 103.
11. Evidence, p. 17.
12. Evidence, p. 18.
13. Evidence, p. 22.
14. Evidence, p. 4.
15. Evidence, p. 4.
16. Evidence, pp. 59-87.
17. Evidence, pp. 76-78.
18. Evidence, p. 158.
19. Evidence, p. 159.
20. Evidence, p. 159.
21. Evidence, p. 159.
22. Evidence, p. 164.
23. Evidence, p. 9.
24. Evidence, p. 98.
25. Evidence, p. 89.
26. Evidence, p. 126.

27. Evidence, pp. 18 and 22.
28. Evidence, p. 159.
29. Evidence, pp. 195-96.
30. Evidence, pp. 135-37.
31. Evidence, pp. 103-04.
32. Evidence, p. 137.
33. Evidence, p. 139.
34. Evidence, p. 162.
35. Evidence, p. 197.
36. Evidence, pp. 240-41.