

12 July 2006

The Secretary
Senate Employment, Workplace Relations and Education Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600



Per email: eet.sen@aph.gov.au

Dear Sirs,

INDEPENDENT CONTRACTORS BILL 2006 (IC BILL)
WORKPLACE RELATIONS AMENDMENT (INDEPENDENT CONTRACTORS) BILL 2006

Odco Contracting Systems Australia Pty Ltd (**Odco**) is the licensor of Odco – The Independent Contracting System™ (**the Odco System**) and licenses the Odco System to approximately 40 licensees around Australia. Those licensees engage thousands of contractors on any one day, in a wide range of industries all over Australia.

Odco is therefore vitally interested in the above Bills. Odco, as part of a group headed by the Independent Contractors of Australia, had significant input into making representations to Government on the IC Bill. Odco also made representations independently of the group.

We note that as recently as June this year the ILO created a new labour standard via a Recommendation that employment law should not interfere with true commercial arrangements. This proposed precedential landmark legislation will now have international endorsement.

Odco has now reviewed the Bills in their current format and makes the following submissions to the Committee in regard to each of them:

IC Bill

1. Odco is pleased to see the overriding of State and Territory deeming provisions in Clause 7. In essence, this overriding was the core of the Government's election promise and they have delivered on that promise. The drafting of Clause 7(1) is appropriate and covers the necessary issues.

2. By the same token, Clause 8 and its definition of matters over which there can be no deeming (Clause 8(1)) and those over which there can be (Clause 8(2)) are also appropriate.
3. However, the exclusion in Clause 7(2) of outworkers and owner-drivers is a very disappointing outcome. An independent contractor is an independent contractor. The industry in which they work is irrelevant. If the Government is committed to the rights of independent contractors to not be affected by industrial relations laws and other employment type restrictions, no group should be excluded from the benefits of the IC Bill.

If deeming provisions are nonsense in respect of the legal fictions and anomalies they create, why do they become any less nonsense in a particular couple of industries?

While outworkers and owner-drivers are not areas in which Odco operates, their concern is that any exclusion from the benefits of the IC Bill is the "thin edge of the wedge". It sets a very bad precedent that any industry could be excluded because every industry then becomes potentially a target for exclusion.

It is the big company fleet owner-drivers who (backed by the TWU) are the main force seeking exclusion from the IC Bill. It is Odco's view that those owner-drivers are not independent contractors, but are, at common law, employees. They may be "owner" drivers, but that is only because one term of their engagement is that they own their own truck. The rest of the terms of that engagement all point to employment in that they are told what to wear, where to turn up, when to turn up, what to take and where to take it, cannot take any other work (exclusivity), how to signwrite their trucks, when they can take holidays, all at rates set by the company. They are totally dependent on their companies. Hence, they would most likely be found to be employees. It is therefore pointless to exclude them from the IC Bill when they by their own agreements, are not independent.

Those owner-drivers who seek protection under either the Victorian or New South Wales Acts would receive it in any event as they are employees. The IC Bill would only apply to those who are truly independent.

No exclusions were mentioned in the election promise and the Government should stand by that promise and not exclude any group of independent contractors from the benefits of the IC Bill. Clause 7(2) should be deleted.

4. What is even more insidious is Clause 7(2)(c) where exclusion from the benefits of the IC Bill can be extended to other industries simply by regulation, rather than amendment to the Act. The "thin edge of the wedge" is made even sharper if industries can be excluded by regulation.

The issue of whether a particular industry should be excluded from the operation of the IC Bill will be very contentious. Wide consultation with numerous stakeholders will be essential. Only the preliminary steps to amendment to the Act will suffice to achieve that consultation. Permitting the exclusion of an industry by regulation does not allow the issues to be appropriately discussed. Even if Clause 7(2) remains, at the very least, Clause 7(2)(c) must be deleted.

5. Odco supports the Government's continued use of the common law as the test of who is an independent contractor, Odco is, however, disappointed that the Government has missed a golden opportunity to greatly assist independent contractors and those who deal with them by adding further certainty to the common law tests. Odco made submissions to the Government to this effect.

Odco had proposed to the Government a Schedule to the Bill which, if signed by the parties to a services contract, would raise a prima facie presumption that the contract was a services contract. Other methods of raising the presumption were evidence of contracts, taxation arrangements, invoices, and custom and practice. Odco proposed this in line with the Government's election promise to place the intent of the parties as a priority. A prima facie presumption would reflect intent without overriding common law.

The Government has clearly decided not to interfere with the common law in any way. While Odco understands the reasoning behind that decision, it does leave independent contractors and those who deal with them still in the position in which they have always been that a Court determination is required in each particular case as to their status. This is expensive and uncertain. Odco submits that the business community would rather have at least a signpost to something that is likely to be a services contract, with the common law still being available to overturn that presumption in any particular case.

In Odco's submission, it weakens the usefulness and strength of the IC Bill to leave the vital issue of who is an independent contractor totally untouched.

6. Following on from the above point as to determination of status, Odco is further disappointed that no small claims jurisdiction, dealing specifically with independent contractor issues, has been established by the IC Bill. This is particularly so when the Government has not been prepared to touch the common law tests as to status so that parties have to have that status determined in the traditional Courts.

Odco had proposed to the Government that an "independent contractors' division" of the Federal Magistrates' Court be set up by the IC Bill. This would be a no cost jurisdiction and the Magistrates in the division would quickly gain significant experience in dealing with independent contractor issues, particularly the common law tests as to the status of contractors.

Accordingly, independent contractors and those who deal with them could have the status issue determined quickly and cheaply so that they can get on with business.

If the Government is committed to leaving the common law tests unassisted by other indicators, at the very least, an independent contractors' division of the Federal Magistrates' Court should be set up by the IC Bill.

Odco notes that outworkers are given access to a small claims procedure in Clause 27 of the IC Bill. Why should this not be extended to all independent contractors?

Further, it is noted that Part 3 of the IC Bill dealing with unfair contracts gives jurisdiction to the Federal Magistrates' Court and no costs are applicable (Clause 17). This could be extended to all issues relating to independent contractors.

7. While dealing with the subject of part 3 of the IC Bill, Odco congratulates the Government on removing unfair contracts from the *Workplace Relations Act* and from State and Territory Laws. The critical function of the determining of what is an unfair contract (which Odco supported from the outset) is now in the Federal sphere and away from workplace relations.
8. While this is not a major point, Odco is disappointed that the Government has missed the opportunity to include a section in the IC Bill dealing with interference with services contracts. One of Odco's main concerns is the continual interference on a case-by-case basis with their contracts by Unions. It is very well known that the Union movement is opposed to independent contracting. Union organisers, shop stewards etc "in the field" are continually sniping at services contracts just because they are services contracts, without having any legitimate reason to do so.

Some protection to independent contractors should be offered by the IC Bill. Odco proposed the following section to the Government to deal with this issue:

"SECTION 6 INTERFERENCE WITH RELEVANT CONTRACTS

- 6(1) Any person, trading corporation, Union or employer group who interferes, or attempts to interfere, with a relevant contract by representing to a party or parties to that relevant contract:
- (a) that the contract is a contract of service; or
 - (b) that the contract should be a contract of service; or
 - (c) that the party or the parties to the relevant contract should terminate the relevant contract and replace it with a contract of service, involving the parties to the relevant contract or other parties
- shall be guilty of an offence.

Penalty: 100 penalty units

- 6(2) For the purposes of this section, "representing" shall mean advising, coercing, intimidating, threatening or in any way suggesting, in circumstances where the party or parties to the relevant contract to whom the representation is made have any reasonable concern that financial loss or other industrial consequences may arise if the representation is not acted upon by them.
- 6(3) An offence under this section can be prosecuted in the Court by:
- (a) The Office of the Employment Advocate; or
 - (b) The Australian Competition and Consumer Commission; or
 - (c) a party to a relevant contract.
- 6(4) If an offence is proven under this section, a party to a relevant contract who has suffered loss as a result of the offence, can seek

an order for compensation for that loss from the Court, at the time of sentencing.”

Odco notes that the Government was prepared to include Clause 34 in relation to reform opt-in agreements. In many ways, if that Clause was amended, it would serve the above purpose of a general restriction on interference with contracts, simply by replacing “reform opt-in agreement” with “services contract” and some other small consequential amendments.

Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006 (SA Bill)

9. Odco wholeheartedly supports any move by Government to stamp out sham contracting arrangements. Odco prides itself on the integrity of the Odco System and continually works diligently with its licensees, their clients and contractors, to ensure that their arrangements are truly services contracts.

Many of Odco’s competitors are not so scrupulous, and others who purport to be independent contractors are clearly not. Sham arrangements need to be controlled.

Accordingly, Odco wholeheartedly supports Clauses 900 and 901 of the SA Bill. There are sufficient protections in those sections for those who reasonably believed that a contract was a contract for services.

10. Finally, Clause 904(3)(c) is of great concern to Odco for the following reasons:
 - 10.1 Why should an organisation of employees be able to bring such an application? It is clearly the rights of the individual employee dismissed which are being affected. Why should the eligibility to make such an application be extended beyond the individual affected by the contravention or, at the most, a workplace inspector?
 - 10.2 The government has a right and a duty to enforce its legislation. A party to a contract has rights and obligations. A Union of employees, governed by employment law and not a party to the contract, has no place interfering in commercial arrangements. Allowing Unions to bring these applications is prejudging the issue as to whether there is a sham arrangement. Only if it is proved there is a sham arrangement do Unions have a role to play. They can then be involved in assisting and protecting what has then been found to be an employment arrangement.
 - 10.3 The purpose of this legislation is to remove Unions’ vexatious interference in these commercial arrangements. If Unions are involved in the bringing of this type of application, particularly in a no-cost jurisdiction, Unions can simply bring the application to put the parties to expense in defending their arrangements or put them under commercial pressure to change their arrangements, rather than have the legal expense. Odco has itself been involved in many examples where cases have been brought by Unions alleging sham arrangements which cost very significant amounts to defend. The arrangements were found to be totally legitimate but no costs were recovered.

10.4A claim of a sham contract verges on a claim of fraud even though the penalties in the Bill are civil not criminal. Accusations of sham arrangements would severely damage the good name and reputation of persons and companies being accused. Given the seriousness of such an allegation, the conduct of prosecutions should only be undertaken by an appropriately authorised Government body or the parties themselves.

11. To sum up, Odco's response to the IC Bill & the SA Bill is that they deliver on the Government's key election promise, although the exclusion of outworkers and owner-drivers is extremely disappointing and a dangerous precedent for the future. Further, the IC Bill in its current form has missed various opportunities to further assist independent contractors and those who deal with them in business in a number of concrete ways.

Odco would be happy to further assist the Committee in its deliberations in any area the Committee believes Odco can assist.

Yours faithfully,

Peter Bosa

Peter Bosa
Chairman
Odco Contracting Systems Australia Pty Ltd