9.

MASTER BUILDERS
AUSTRALIA

Submission to the

Senate Employment, Workplace Relations and Education Legislation Committee

on

the *Independent Contractors Bill 2006*

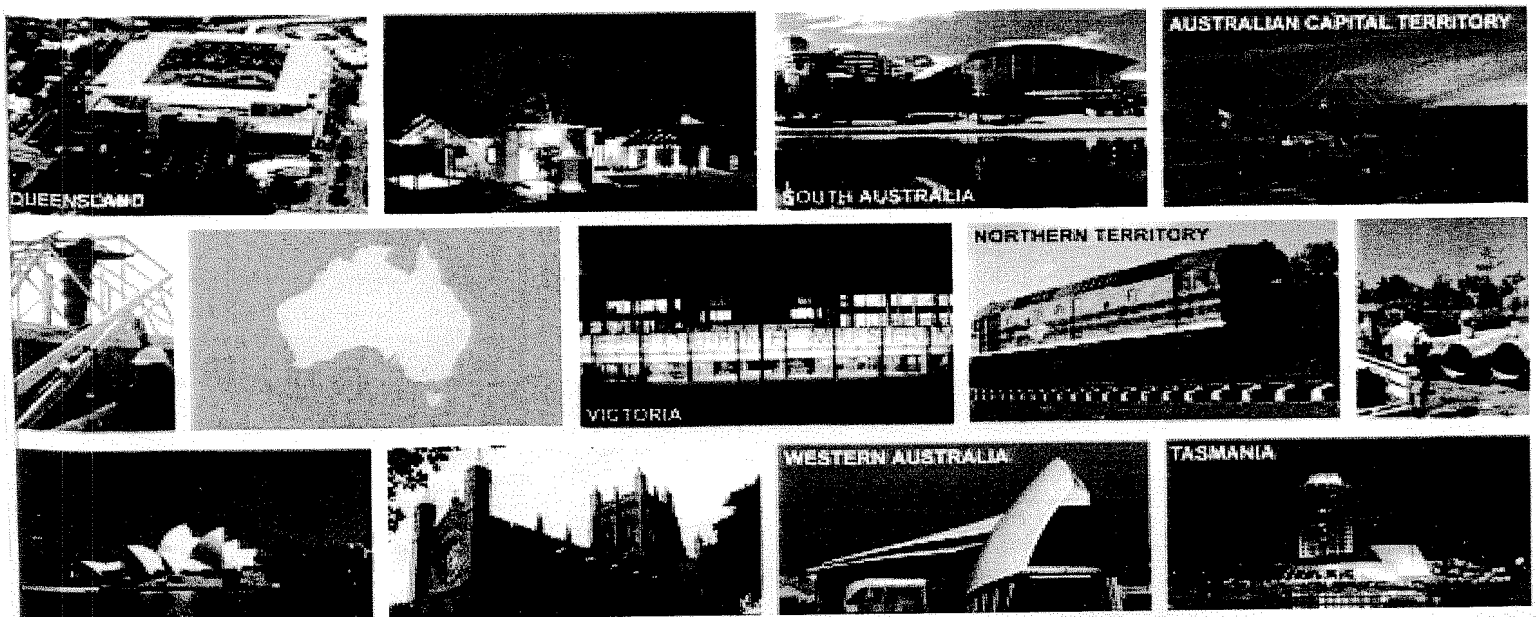
&

the *Workplace Relations Amendment (Independent Contractors) Bill 2006*

July 2006

Master Builders Australia Inc ABN 701 134 221 001

building australia



Index

1 INTRODUCTION

1.1 This submission is made by Master Builders Australia Inc (Master Builders).

1.2 Master Builders represents the interests of all sectors of the building and construction industry. Master Builders consists of nine State and Territory builders' associations with approximately 28,000 members. The building and construction industry is a major contributor to the Australian economy, generating 6.5 per cent of Australia's GDP and representing over 8 per cent of the total workforce.

1.3 Master Builders is a member of the Australian Chamber of Commerce and Industry (ACCI) and Master Builders endorses ACCI's submission to the inquiry.

2 PURPOSE OF THE SUBMISSION

2.1 Master Builders supports the introduction of the *Independent Contractors Bill 2006* (the IC Bill) and the *Workplace Relations Amendment (Independent Contractors) Bill 2006* (the WR Bill). Support for legislation in this area is demonstrated by Master Builders' submissions in 2005 to:

2.1.1 The House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation – *Independent Contracting & Labour Hire Arrangements – Are they Working?* in March 2005 (Master Builders March 2005 Submission); and

2.1.2 The Department of Employment and Workplace Relations (DEWR) on the Discussion Paper *Proposals for Legislative Reform in Independent Contracting & Labour Hire Arrangements* in May 2005 (Master Builders May 2005 Submission).

2.2 Master Builders' support is based upon the notion that the provisions of the IC Bill and the WR Bill (the Bills) secure for all Australians the right to be their own boss, preserving their freedom of contract. Contracting and labour hire are integral working arrangements in the building and construction industry that make beneficial contributions to productivity. These Bills set down provisions that allow flexibility and choice for independent contractors with an underlying mechanism to stop exploitation of the system, such as the sham contracting and unfair contracts provisions. This new system has the potential to ensure that genuine contractors

are in no way prejudiced while those seeking to exploit the system will be prosecuted.

2.3 Master Builders has a long-standing commitment to safeguard the rights of employers to freely engage independent contractors and to oppose attempts to further regulate and restrict access to independent contracting arrangements. In this submission Master Builders urges further steps to reinforce this reform direction.

2.4 This submission outlines the main aspects of the Bills relevant to the building and construction industry with recommendations in each area as follows:

- definition of independent contractors;
- exclusion of state and territory laws;[1]
- unfair contracts;[2]
- sham arrangements;[3]
- position of owner-drivers;[4] and
- industry labour hire codes.

2.5 Prior to dealing with these specific issues, we outline our general position about the importance of contractors, and the economic considerations that have lead to the growth in contractors and non-traditional work.[5] This discussion reveals the basis for Master Builders' policies.

3 IMPORTANCE OF CONTRACTORS IN THE BUILDING AND CONSTRUCTION INDUSTRY

3.1 Independent contractors play a fundamental part in the building and construction industry due to its volatility and fluctuations, increasing labour costs and the move towards specialisation. The Cole Report[6] recognised that contracting is a legitimate, important form of business activity and working arrangement.

[1] Parts 2 and 9 IC Bill.
[2] Part 3 IC Bill.
[3] Schedule 1, Part 1 WR Bill.
[4] Clause 7(2)(b) IC Bill.
[5] For the purpose of this submission, subcontractors and any person who performs work other than as an employee, whether they do that as a sole trader, through a company, partnership, trust or other arrangement or in some other capacity are referred to as 'contractors'.
[6] The Final Report of the Royal Commission into the Building and Construction Industry http://www.royalcombi.gov.au/hearings/reports.asp.

Commissioner Cole also found that "the trend to contracting has been accepted by significant numbers of workers",[7] which accords with industry's view.

3.2 The IC Bill's Explanatory Memorandum stated the following:

> *"Self-employment in the construction industry is common, especially in housing as opposed to commercial construction. The construction industry is sensitive to the economic cycle which means that the demand for labour fluctuates with the peaks and troughs of the cycle. In 1998, almost one quarter of self-employed contractors worked in this industry".* [8]

3.3 The recent Productivity Commission report released in May 2006[9] highlights the positive role non-traditional work plays in the labour market for employers and employees. A warning was made against attempts to regulate and restrict access to non-traditional employment. The Productivity Commission found that the use of self-employed contractors in the construction industry is notable, with almost a quarter of the workforce engaged in this form of work. Non-traditional work fulfils two important roles in the labour market:

3.3.1 it frequently provides a bridge between unemployment and permanent employment for those who prefer permanent employment to non-traditional work; and

3.3.2 non-traditional work provides a means by which people can continue working though they are unable to undertake permanent employment for reasons related to choices about education, child rearing or partial retirement.[10]

3.4 In the building and construction industry, business uses independent contracting arrangements to deliver the following efficiencies:

3.4.1 contractors can enter the industry with very little capital outlay resulting in a very competitive environment, as barriers to entry are low;

3.4.2 the system provides an important opportunity for skilled tradespersons with the necessary motivation to significantly increase their earnings with their income directly related to their efficiency in the actual time they work;

---

[7] Ibid at paragraph 277, Chapter 23, Volume 9.
[8] The Parliament of the Commonwealth of Australia – House of Representatives, *Explanatory Memorandum – Independent Contractors Bill 2006*, June 2006, p 5.
[9] Productivity Commission 2006, *The Role of Non-Traditional Work in the Australian Labour Market,* Commission Research Paper, Melbourne, May, p 62.
[10] Ibid at p xxiv.

3.4.3 the system is administratively simple and reduces supervision considerably as the principal contractor does not incur the administrative overheads of employing staff;

3.4.4 there is an incentive to solve problems which develop on site quickly and effectively, as contractors do not get paid for delays, while employees, on the other hand, have little incentive to solve such problems;

3.4.5 a contractor quotes a price for a job which reflects the situation in regard to work on hand and the market price reflects the level of demand;

3.4.6 results based contracts are generally more efficient than time costed labour working towards the same ends;

3.4.7 the production process requires a variety of tasks that require different skills at different points in time and the completion of these tasks to a certain level of quality can be easily monitored, so it is well suited to the work of contractors;

3.4.8 due to the fluctuations in demand in building and construction, there is much competition between firms and there can be much uncertainty about demand, so many firms prefer to use contract labour;

3.4.9 the current skills shortage in the industry means that contractors are able to mobilise quickly and more efficiently place themselves to meet the needs of companies, projects and the industry at a particular time;

3.4.10 regional variations in prices paid to contractors encourages mobility of those contractors which helps to achieve and improve balance within regional markets; and

3.4.11 the housing sector, which predominately uses contractors, has, unlike all other sectors in the construction industry, not faced any major stoppages or strikes as a contractor is bound by the contract he enters into in respect of the work to be performed and has an incentive to get on with the job.

4 ECONOMIC MOTIVATION FOR ENGAGEMENT OF INDEPENDENT CONTRACTORS

4.1 Master Builders submits that the growth of the subcontracting system is overwhelmingly a function of market forces rather than a device to avoid the

payment of worker entitlements or for any other of the largely spurious reasons proposed by some industry participants. The specialist contract system has consistently been found to be the most efficient and productive method of building. Due to the labour shortage in the building industry, it is possible for an independent contractor to demand more money than they would receive as an employee.

4.2 In the building and construction industry, the types of contractors vary from those who offer their labour to builders and subcontractors, and other contractors who supply materials, plant or equipment. The industry is currently experiencing a skills shortage.[11] People see the skills shortage as an opportunity to use their talents to their own advantage rather for the purposes of their employer. This driver also produces greater efficiency at an industry level as building work is generally organised on a project basis, with work being very specific and highly cyclical in nature with the use of specialised skills that may be contracted.

4.3 It can be discerned, therefore, that the building and construction industry operates on a contract basis for two principal reasons. First, while the nature of construction work is relatively labour intensive, it is also highly specialised. Many of the industry's contractors are sole traders with highly specialised skills focused on one particular aspect of the construction process. Secondly, competing specialist skills in an environment where work is project based naturally create efficiencies through competition. The subcontracting system, by its very nature, is highly price competitive, as just outlined. The move to contracting does not evidence any groundswell of 'sham' arrangements designed to exploit workers or avoid workplace obligations. Instead, as stated in the IC Bill's Explanatory Memorandum:

> *"For the independent contractor, it can provide more freedom to choose working hours, to decide when to take holidays, who to work for and what type of work to undertake. High demand for specialist contractors in particular industries contributes to higher wages and ease of worker mobility. These factors can make independent contracting attractive to many workers. For professional and tradespeople, this may equate to gaining higher pay without the managerial responsibility that tends to accompany higher paying jobs in larger organisations".*[12]

4.4 In addition, many individuals prefer to work as contractors so that benefits do not accrue, and a maximum immediate benefit from payments is made to them for their

[11] Calver R, *Challenging the Apprenticeship System: Skill Needs for the Future*, Skills Solutions Conference, 10 & 11 April 2006.
[12] Note 4 at page 5.

work. Operating as a contractor means that the individual receives the maximum amount of money for their effort in the short-term. Hence, it is often an individual's choice to form a subcontract structure on purely economic grounds, even though this, on the face of it, exposes the individual to greater commercial risk. This freedom of choice with its attendant flexibility should not be circumscribed by regulation and the Bills reinforce these propositions.

5 NON-TRADITIONAL WORK

5.1 The nature of the industry means that there are often mechanisms which are created that are different from the manner in which other industries deal with workplace relations. When those arrangements are formalised and underpin the contract of employment, such as portable schemes for long service leave or centralised redundancy schemes, they increase the costs of engaging employees directly and, ironically, exacerbate the problem of fluctuating economic activity and the maintenance of an ongoing employment relationship. Accordingly, this factor of increased costs for direct employment as a prima facie means of assisting job security, contributes to the growth of contracting and labour hire arrangements in the industry.

5.2 It is often the case that researchers include all non-traditional work arrangements (such as outsourcing and temporary work) with contracting and labour hire and label then as "precarious employment". This is not the case. It cannot be assumed that employees engaged by labour hire companies, or persons who choose to enter into contracting arrangements, are unwilling participants in this style of employment and engagement. That characterisation fails to recognise the changing needs of employees. With an increase in the number of working mothers, part-time workers and older workers, labour hire's flexibility provides a supplementary income where, for example, a person is unwilling or unable to work full-time. Further, engagement as a contractor provides the flexibilities and efficiencies outlined earlier.

6 DEFINITION OF INDEPENDENT CONTRACTOR

6.1 The Bills do not provide a codified definition of "independent contractor".[13] Instead, the common law multi factor test will apply. A number of tests are applied to the specific contract to determine the parties' status. These tests were adumbrated in

[13] Note 4 at p 30.

Stevens v Bodribb Sawmilling Co Pty Ltd[14] by Mason J. The following passage has become widely accepted as establishing the range of tests:

> *"But the existence of control, whilst significant, is not the sole criterion by which to gauge whether a relationship is one of employment. The approach of this court has been to regard it merely as one of a number of indicia which must be considered in the determination of that question...Other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee".*[15]

6.2 Whilst in Master Builders' view this test is not the foundation for the optimum solution, we support the Bills' structure. However, we continue to advocate and remain committed to the notion that the use of external indicators and the registration of independent contractors with a dedicated Commonwealth agency would assist in the determination of the status of a contractor, especially in the building and construction industry. These propositions were outlined in more detail in Master Builders March 2005 submission[16] and address the concern that the absence of a codified definition will cause uncertainty about whether an independent contractor is an employee and entitled to the benefits of employment. This uncertainty may also leave some industry participants open to a contravention of the Bills' provisions and cause further complication in the application of the sham contracting arrangements.

6.3 The status of a contractor is a product of the nature of the relationship that is formed. Hence, a building industry participant may be a worker for a specific period but then enter into a different relationship that provides them with the status of an independent contractor. Hence, the system envisaged by Master Builders was based upon regulation of independent contractors for the purpose of specific projects which linked registration with a Commonwealth agency and the recognition of the contract in a relational and temporal sense.

6.4 The Bills do not answer the question of whether a person is an independent contractor or employee. As stated, this is left to a court in the application of the common law test by reason of the definition of services contract in subclause 5(1)

[14] (1986) 160 CLR 16.
[15] Ibid p24. Note that with self assessment the deduction of income tax should no longer be a "relevant matter".
[16] Master Builders Submission to the House of Representatives Standing Committee of Employment, Workplace Relations and Workforce Participation – *Independent Contracting & Labour Hire Arrangements – Are they Working,* March 2005.

of the IC Bill which relies upon the common law distinction between employees and contractors by defining a services contract as a 'contract for services'.

6.5 Master Builders' position is for the uncertainty that may be encountered by the application of the common law test to be ameliorated by a Government agency that could register contractors on the basis of their status relating to a particular relationship, with a record of its duration.

7 THE EXCLUSION OF STATE AND TERRITORY LAWS

7.1 In Part 2 of the IC Bill, there is an exclusion of State and Territory unfair contract laws which deem an independent contractor to be an employee, impose employment obligations on a contracting relationship and provide for review of a services contract.[17] This provision is fully supported.

7.2 Laws that remain in place deal with issues other than 'workplace relations matters', including superannuation, workers compensation and occupational health and safety (including entry of a representative of a trade union for a purpose connected with occupational health and safety).[18]

7.3 The retention of the workers compensation laws means that a person working under a services contract that comes within the provisions of the Bills, would still be deemed or found to be an employee for the purpose of workers compensation premium calculations. The cost of being deemed or found to be an employee will not be paid by the independent contractor but by the business engaging the independent contractor and it is a major disincentive for a business to engage a person in this capacity. This result conflicts with the outcomes being sort under the Bills and that national scheme being implemented.

7.4 Master Builders is concerned that contractors will be subject to the same union right of entry and inspection that applies to employment relationships on the basis of health and safety considerations. We note that this would be contrary to one of the objects of the IC Bill "to prevent inference with the terms of genuine independent contracting arrangements."[19] The IC Bill goes on to state that these

[17] Clause 7 IC Bill. A 'services contract' must have an independent contractor as a party, relate to the performance of work by the independent contractor and have the requisite constitutional connection: clause 5 IC Bill. To have the requisite constitutional connection, one party must be a corporation, the Commonwealth or a body incorporated in a Territory, the work must be performed in a Territory or the contract was entered into in a Territory.
[18] Clause 8 IC Bill.
[19] Paragraph 3(1)(c) IC Bill.

objects will be achieved by providing rights and liabilities to parties, subject to certain laws. These laws do not include State or Territory laws that impose rights, entitlements, obligations or liabilities commonly associated with the employment relationship. It is our submission that laws relating to union right of entry and inspection are inextricably linked with the concept of employment as unions function to protect the rights of their members who are employees. These laws should not impinge on the commercial arrangements of independent contractors by requiring them to be accountable to union officials when other forms of regulation exist with which they must comply. This notion is reinforced when it is recognised that inspectorates have the fundamental duty of enforcing compliance with State and Territory occupation health and safety laws, not unions. In the building and construction industry the Cole Report documented abuse of occupational health and safety for industrial purposes and the recognition of rights of entry should take this factor into consideration.[20]

7.5 Master Builders continues to advocate cooperation between the Commonwealth, States and Territories to ensure a uniform system of occupational health and safety as required under the following:

7.5.1 the International Labour Organisation's Promotional Framework Convention on Occupation Safety and Health and accompanying Recommendation; and

7.5.2 the International Labour Recommendation on the Employment Relationship.

This intent was echoed recently by the Australian Safety and Compensation Council Chairman Bill Scales who stated, in regard to the work being undertaken by the Council, that the "complete disconnect" between State, Territory and Federal Governments over occupational health and safety and workers' compensation regulation is impeding improvement in this area.[21] Master Builders advocates national consistency in occupational health and safety as a means to reduce regulation in this area of the law.

7.6 The Regulations can also specify any other matter relating to State or Territory legislation that will remain in place or be excluded from operation.[22] This

[20] Note 6 Volume 7, page 189, para 69.
[21] OHS Alert, *Governments have to "make peace" on OHS: ASCC chief*, 30 June 2006.
[22] Clauses 7(2)(c) and 10 IC Bill.

mechanism is supported for the future in case State and Territory Governments seek to introduce legislation to deliberately thwart the purposes of the Bills.

7.7 The IC Bill provides for a three year transitional period for the operation of its terms to services contracts entered into prior to the commencement of the IC Bill that have been deemed employment contracts by State or Territory legislation.[23] These provisions give independent contractors and employers an opportunity to reorganise their affairs as they move from the State or Territory system to the Federal system.

7.8 The transitional scheme will apply to existing contracts, contracts renewed during the three year period[24] and contracts of transmitted businesses.[25] However, new contracts will come under the Federal system. The IC Bill also provides that it is possible to 'opt-in' to the Federal system at an earlier date and there is a prohibition on a person coercing another to opt or not to opt into the Federal system.[26] Due to the complex nature of the transitional scheme, Master Builders advocates that educational programs be run during this three year period to assist businesses to determine the status of their contracting arrangements.

8 POSITION OF OWNER-DRIVERS

8.1 The IC Bill preserves the provisions in regard to owner-drivers in Chapter 6 *Industrial Relations 1996* (NSW), *Owner Drivers and Forestry Contractors Act 2005* (Vic)[27] and instruments made under these Acts. This provision would be reviewed in 2007 with a view "to rationalise the laws and achieve national consistency if possible."[28]

8.2 We note that the *Trade Practices Act 1974* (Cth) does allow small businesses to collectively bargain[29] and therefore the retention of these laws is unnecessary. Further these provisions are inconsistent with the IC Bill's objects, the Government's 2004 Election Policy and the relevant ILO Recommendation. Master Builders submits that it is impracticable to establish a new national scheme,

[23] Part 5 IC Bill.
[24] Clause 35 IC Bill.
[25] Clause 36 IC Bill.
[26] Clause 34 IC Bill.
[27] Subclause 7(2)(b) IC Bill.
[28] Minister Kevin Andrews, *Second Reading Speech – Independent Contractors Bill 2006 & Workplace Relations Amendment (Independent Contractors) Bill 2006,* June 2006.
[29] Note 4 at p 15.

with transitional provisions, while allowing vestiges of the current NSW and Victorian system to continue for at least 12 months.

9 UNFAIR CONTRACTS

9.1 The provisions in the IC Bill create a national unfair contracts jurisdiction for independent contractors.[30] These provisions will apply to all services contracts, except:

9.1.1 contracts for an independent contractor to perform services for the private or domestic purposes of another party to the contract; or

9.1.2 where the independent contractor is a body corporate, unless the work is wholly or mainly performed by the corporation's director or a member of the director's family.[31]

In effect the exclusions will restrict large corporations from bringing claims under the relevant Part of the IC Bill. Master Builders supports the effective restriction of the jurisdiction to small businesses.

9.2 The latter concept referred to in paragraph 9.1 confirms the intended application to small business. The Explanatory Memorandum provides that this clause "contemplates that large bodies corporate would be excluded from accessing this Part as directors would not usually personally perform all or most of the work under their *services contracts*."[32]

9.3 The Federal Court or the Federal Magistrates Court may review services contracts that are unfair or harsh.[33] 'Unfair' and 'harsh' are not defined in the IC Bill and will take their meanings from common law.[34] The Court may look at the following:

9.3.1 the relative strengths or the bargaining positions of the parties to the contract and, if applicable, any persons acting on behalf of the parties; and

9.3.2 whether there was any undue influence or pressure exerted on, or any unfair tactics used against a party to the contract; and

[30] Part 3 IC Bill.
[31] Clause 11 IC Bill.
[32] Note 4 at 38.
[33] Clause 12 IC Bill.
[34] Note 4 at 38.

9.3.3 whether the contract provides total remuneration that is, or is likely to be, less than that of an employee performing similar work; and

9.3.4 any other matter that the Court thinks is relevant.[35]

9.4 The Court must exercise its powers in a way that furthers the objects of the IC Bill as far as practicable.[36] Further the Court may form an opinion that all or part of the services contract is unfair or harsh even though the ground was not canvassed in the application.[37] Master Builders is concerned that these provisions will give too broad a discretion to the Court that may undermine the certainty of contracts and in particular, we advocate that the last overarching criterion should not be part of the relevant assessment.

9.5 This latter concern is particularly relevant in the context of the creation of new jurisprudence that will require court decisions to establish the boundaries of the law. Businesses will be required to wait until the courts wrestle with the new law before certainty prevails. Uncertainty about the status of a contractor could lead to the accrual of contingent liabilities of some magnitude if the contractor is later found to be an employee. This is especially the case for smaller businesses operating on tight margins. Accordingly, the tests to be applied should not be highly discretionary but relate to specific predetermined factors only and the legislation should constrain the Court to determine the matter only on the basis of the statutory factors.

9.6 Where the court finds one of these grounds exist, a three step process may be undertaken. The court will firstly record its 'opinion' (a strange nomenclature),[38] and then it may make an order varying the contract, or setting aside the whole or part of the contract.[39] Finally, enforcement of the order is by injunction or in any other manner the Court finds appropriate.[40] This three step process appears unnecessary. Master Builders advocates that:

9.6.1 the order itself should include the court's decision as to whether the contract is unfair or harsh and it is unnecessary for a separate 'opinion' to be recorded; and

[35] Clause 15 IC Bill.
[36] Subclause 15(5) IC Bill.
[37] Subclause 15(4) IC Bill.
[38] Subclause 15(3) IC Bill.
[39] Subclause 16(1) IC Bill.
[40] Subclause 16(5) IC Bill.

9.6.2 the order is able to be enforced on the making of the order.

9.7 Costs may be ordered where:

9.7.1 a party instituted proceedings vexatiously or without reasonable cause; or

9.7.2 acted in an unreasonable manner in relation to part of the proceedings which has caused the other party to incur costs.[41]

There is hence a limitation on the general powers of the Court to award costs which may engender a greater level of litigation than would otherwise be the case.

9.8 The provisions in the *Building and Construction Industry Improvement Act 2005* and the *Workplace Relations Act 1996* on unfair contracts will be deleted. This step is supported.

9.9 This is substantially new law which provides new, unchartered rights. In this context, Master Builders recommends that the Regulations should provide a monetary cap over which contracts cannot be reviewed and this limitation should be at the least in the terms of section 108A *Industrial Relations Act 1996* (NSW). This section provides that employment contracts can only be reviewed where the remuneration package[42] is less than $200,000. This monetary amount is advocated on the basis that it is at a level where it will protect vulnerable contractors yet will not be open to abuse by larger contractors. This is in accordance with the purpose of Part 3 to protect vulnerable contractors as illustrated by the exclusion of bodies corporate[43] from its terms except in limited circumstances.

9.10 The provisions governing unfair contracts protect vulnerable contractors and offer a remedy to rectify unfair transactions. Contracting arrangements are governed by commercial arrangements, rather than employment law, with the commensurate benefits and constraints. However, the legal concept of freedom of contract and the commercial certainty of contracts should not be undermined in an attempt to draw contractors into arguments based upon considerations relevant to an employment relationship. It should not be the function of courts to re-write

[41] Clause 17 IC Bill.
[42] 'Remuneration package' means the total value of monetary remuneration and employment benefits payable or receivable under a contract of employment. Note that under this Act at present certain independent contractors are deemed to be employees.
[43] Clause 11 IC Bill.

contracts made between two parties freely giving consent, when one party wishes to reopen the terms of the bargain. Accordingly, Master Builders recommends that at the least the criterion mentioned in paragraph 9.3.4 of this submission should be excised from the legislation. Further, we recommend that the provisions of Clause 15(2) not proceed, as this provision would permit courts to assess fairness based on contractual rates payable to other contractors: a notion that offends against the freedom to contract at different market rates.

10 'SHAM ARRANGEMENTS'

10.1 The WR Bill makes it an offence subject to civil penalties to misrepresent an employment relationship (proposed or current).[44] It is a defence for an employer to prove that they could not reasonably have been expected to know that the contract was that of employment rather than services. No explanation or examples are provided in the WR Bill or the Explanatory Memorandum of what "reasonably expected to know" would constitute. This phrase is ambiguous and should be more clearly defined by reference to such factors as size of business; whether the business has a dedicated human resources function and other matters that would protect small businesses.

10.2 Making false statements intentionally to persuade a worker to become an independent contractor is also an offence.[45] Guidelines or examples are needed on how an employer's intention will be established; otherwise this issue will be left to the court's discretion. The WR Bill and the Explanatory Memorandum are not of assistance in regard to this provision. The area seems already to be adequately covered, in any event, by section 52 *Trade Practices Act 1974*, relating to misleading and deceptive conduct.

10.3 The WR Bill also provides that an employer will not be able to dismiss or threaten to dismiss an employee for the sole and dominant purpose of engaging them as an independent contractor to perform the same or substantially the same work, and penalties apply.[46] There is a presumption that this is the employer's sole and dominant purpose unless the employer proves otherwise. There is a concern that this presumption will add to the administrative burden of employers and with the fluctuations of the building and construction industry, this requirement may create

[44] Clauses 900 and 901 WR Bill.
[45] Clause 903 WR Bill.
[46] Clause 902 WR Bill.

difficulties at a practical level. This offence should be removed as it is an undue restriction on the freedom of contract and appears to fly in the face of the methods of operation in the building and construction industry, previously outlined.

10.4 Given that it is a test proposed to be based upon sole or dominant purpose, we would suggest that for clarity the test be for the employer's sole purpose. This will address arrangements that deliberately attempt to circumvent the operation of the law but would still ensure that the test is able to used and applied by employers with certainty.

10.5 Prosecutions for offences in these areas can be brought by a trade union which has the person concerned as a member, by the individual person or by an inspector.[47] Given that there will be a maximum penalty of $6,600 for an individual and $33,000 for a corporation, the reverse onus of proof that is embedded in these offences should not apply. This is especially the case given the uncertainty in the jurisprudence that surrounds this new area of law.

11 VOLUNTARY LABOUR HIRE CODES

11.1 Industry based voluntary codes of practice for the labour hire industry will be developed by the Department of Employment and Workplace Relations.[48] Master Builders supports this development which is in accordance with the recommendation of the House of Representatives Committee. Labour hire is common in the building and construction industry, as specifically stated by Commissioner Cole:

> *"The use of workers provided through labour hire firms has become increasingly common in the building and construction industry. There have been significant issues raised about the use of labour hire businesses as a source of employees in the building and construction industry. These issues include who is the employer of labour hire workers and who is responsible for the safety of their workplace and for the payment of their entitlements. Calls have been made for greater certainty about these issues".*[49]

[47] Clause 904(3).
[48] Minister Kevin Andrews, *Second Reading Speech – Independent Contractors Bill 2006 & Workplace Relations Amendment (Independent Contractors) Bill 2006,* June 2006.
[49] Note 2 at p 88 Vol 8, Chapter 10.

11.2 This issue and a general concern about OH&S responsibilities for labour hire workers led Commissioner Cole to note a specific recommendation for reform of labour hire arrangements. Recommendation 100 of the Cole Report states that:

> *"The Commonwealth initiate, through the Workplace Relations Minister's Council, the development of a Code of Conduct and Practice for Labour Hire in the building and construction industry."*[50]

11.3 As outlined in Master Builders March 2005 submission, we request that this document deal with the three-way relationships founding labour hire arrangements and the associated occupation health and safety responsibilities. Without a document of this description, the area of independent contracting will still remain unclear with a plethora of state and territory legislation governing the area inconsistently.

12 CONCLUSION

12.1 Master Builders supports the thrust of the Bills but advocates adjustments to ensure that the Bills' objectives are correctly implemented (see summary of recommendations on pages 17 and 18 of this submission). These adjustments will ensure that contractors and employees are clearly distinguished and legitimate contracting is not hindered while abuse of independent contracting arrangements is prevented.

12.2 We would be prepared to elaborate upon this submission during the Committee's hearings if required.

★★★★

[50] Ibid.

SUMMARY OF RECOMMENDATIONS

1 Definition of Independent Contractors

- The IC Bill should be amended to include provisions for the registration of independent contractors for a specific project with a dedicated Commonwealth agency.

2 The Exclusion of State and Territory Laws

- Paragraph (d) of subclause 8(2) IC Bill should be deleted. Alternatively, the Regulations to the IC Bill should provide that union rights of entry and inspection do not come within paragraph (d) of subclause 8(2) IC Bill.
- The Commonwealth work with the States and Territories to achieve national consistency in occupational health and safety regulation.
- The Commonwealth establishes educational programs during the IC Bill's transitional period to assist businesses to determine the status of their contracting arrangements under this new legislative framework.

3 Unfair Contracts

- Paragraph (d) of subclause 15(1) and subclauses 15(4) and 15(5) IC Bill should be deleted.
- Subclauses 15(3), 16(1) and 16(5) IC Bill should be replaced by a provision in the following terms:
    - where the Court makes a finding that the whole or part of the services contract is unfair and/or harsh, the Court may make an order:
        - setting aside the whole or part of the contract; or
        - varying the contract; and
    - the order is able to be enforced on the making of the order.
- Clause 17 IC Bill should be deleted and the general powers of the Court to award costs should govern the question of costs.
- The Regulations to the IC Bill should provide a monetary cap of $200,000 over which sum contracts cannot be reviewed.

- Clause 15(2) should be deleted.

4 Sham Arrangements

- The reverse onus of proof in the offence provisions of the WR Bill should not apply; or
- An additional subclause should be added to Clause 900 defining the phrase "reasonably expect to know". This definition would include several factors such as size of business, whether the business has a dedicated human resources function and other matters that would protect small businesses. Alternatively, the *Workplace Relations Regulations 2006* (the WR Regulations) should include a regulation in these terms.
- Clause 901 WR Bill should be deleted; or
- Alternatively, the WR Bill or the WR Regulations should include provisions that provide guidelines or examples of how an employer's intention will be established by the court in order to make out the offence in clause 901.
- Clause 902(3) be amended to remove the words 'or dominant'.

5 Voluntary Labour Hire Codes

- The Department of Employment and Workplace Relations should develop a voluntary labour hire code for the building and construction industry that deals with the three-way relationships founding labour hire relationships and the associated OH&S responsibilities.