

Submission

to

Senate Employment, Workplace Relations and Education
Legislation Committee

**Inquiry into the provisions of the
Independent Contractors Bill 2006 and Workplace Relations Legislation
Amendment
(Independent Contractors) Bill 2006**

Submitter: Secretary

Organisation: Victorian Trades Hall Council

Address: 54 Victoria Street
Carlton South VIC 3053

Phone: (03) 9662 3511

Fax: (03) 9663 2127

Email: bboyd@vthc.org.au

INTRODUCTION

1. The VTHC is opposed to any legislative reform which legitimises and institutionalises the avoidance of obligations to workers. In our view the purpose and effect of the Bills are to do just this. Furthermore, the proposed legislation does nothing to address the real issues caused by the explosion in the employment of so-called "independent" contractors. We endorse the views expressed by the ACTU in its submission.
2. In addition to dealing with the Bills' general effect in this submission, the VTHC endorse the views of the TCFUA in its submission. TCFUA submission focuses primarily on the particular issues faced by outworkers in the TCF industry and the effect of the Bill on these vulnerable workers.
3. While making it easier for employers to use contract arrangements to avoid employment obligations, the legislation does not effectively address wide-spread abuse of this form of arrangement to avoid tax, superannuation payments and workers' compensation.
4. The legislation does not address the serious issue of the application of occupational health and safety standards for independent contractors and labour hire employees, which was the subject of a number of recommendations of the 2005 Inquiry.
5. The retention of the specific protections provided for owner-drivers in NSW and Victoria indicate the Government's selective understanding of the issues faced by contractors who are dependent on one source for their income. The VTHC submits that the right to bargain collectively and to have minimum rates established by an independent body should be available to all "dependent" contractors.

6. The VTHC urges the Committee to recommend that the Bills not be passed unless amended to provide comprehensive rights and protections, including minimum pay and leave entitlements together with collective bargaining rights, for all contractors other than those genuinely running a business on their own account.

INDEPENDENT CONTRACTORS BILL 2006

The definition of “services contract”

7. The Independent Contractors Bill (ICB) does not address the inconsistency and uncertainty in distinguishing between an employee and a self-employed worker or independent contractor.
8. Paragraph 20 of the Explanatory Memorandum confirms that the common law distinction between an employment contract and a services contract, or between a contract of service and a contract for services is to remain operative.
9. While the ICB has not created the uncertainty in distinguishing between an employee and a self-employed worker or independent contractor, it has added to the problem by removing from various classes of contractors the entitlements afforded to them by virtue of the “deeming” provisions to be found in state legislation. **Unfair contracts**
10. The ICB provides that an application for review may be made only by a party to the contract,¹ unlike the current provisions in the Workplace Relations Act, which allow a union or an employer organisation to make an application. In many cases, an individual party to a contract may require assistance from an organisation or, because of fear or reprisal, may wish the organisation to make the application on his or her behalf, an option which will no longer be available.

¹ s12(2)

11. The ICB adds a new requirement for the Court, where it has considered whether remuneration under the contract is less than that of an employee performing similar work, to also consider whether the total remuneration provided under the contract being reviewed is commensurate with other service contracts relating to similar work in the industry.² Where a contractor is receiving less than he or she would as an employee the unfairness is not mitigated if there is a large number of similarly unfair contracts applying in the industry.

Does not protect against sham contract arrangements

12. Proposed amendments to the Workplace Relations Act contained in the *Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006* ("WRIC Bill") give the appearance of protecting all workers against sham contracting arrangements. However, these protections are toothless, because all that the employer needs to prove is that they reasonably believed the contract was not a sham, and they can avoid the penalty.

13. There are no specific protections against sham contract arrangements for outworkers in the IC Bill.

Contract outworkers in the TCF industry

14. VTHC supports the TCFUA proposition that the Committee should be persuaded that the particular regulatory regime which has evolved and continues to evolve in order to address the particular situation of outworkers ought remain undisturbed by the Bills, and that the Bills require amendment in order to achieve that aim.

15. Specific issues for consideration are covered in detail in the TCFUA submission. VTHC notes however, specific inadequacies regarding:

- a. Honouring the federal government commitment to maintaining existing protections for outworkers;

² s15(2)

- b. The creation of a lawful category of “contract outworkers” in Part 4 of the Bill, reducing entitlements to that of a minimum rate of pay and nothing else;
- c. A so-called “contract outworker” under the Bill will not be entitled to any protections maintained through *Work Choices* under the federal law or federal awards, other than an basic minimum rate of pay.

16. A so-called “contract outworker” under the Bill will not be entitled to any of the protections maintained through *Work Choices* under the federal law or federal awards, other than a basic minimum rate of pay. In states which do not have outworker laws, this will be the only protection for outworkers.

Exclusion of Owner-Drivers Legislation in Victoria

17. VTHC is pleased that the Bill will specifically exclude the Victorian legislation from its effect, preserving an easily accessible system of dispute resolution for owner-drivers.

Impact of Independent Contractors Legislation on Occupational Health and Safety

18. The Bill creates a narrower definition of ‘employee’ and thereby creates an increased uncertainty by workers on their employment status and consequently the degree of OHS protection.

19. The Bill will contribute to workers losing Award protection and it should be noted that a recent paper from Elsa Underhill³ points to contractors having ‘less voice’ in workplaces that directly correlates to reduced OHS protection.

³ Underhill, E (2005) “The importance of having a say: Labour hire employees’ workplace voice” in Baird M, Cooper R, and Westcott M (eds) *Reworking Work* AIRRANZ 2005, pp 527 - 536

20. Independent contractors engaged by labour hire agencies are not protected by section 76 of the Occupational Health and Safety Act (Vic) 2004, which provides for protection against discrimination for raising OHS matters in the workplace. Similarly, protection is lost in Part 7 (Representation), s35 and 36 (duty of employers to consult).
21. It raises a question around the impact the Bill will have on placing greater OHS onus on the 'person in control' – shifting responsibility to the worker.
22. A number of recommendations were made in this regard of the 2005 Inquiry by the ACTU.

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

23. The proposed amendments to the WRA impose civil penalties on employers who:
- a. Misrepresent an employment relationship as an independent contracting relationship
 - b. Dismiss an employee in order to re-engage the person as an independent contractor doing the same work;
 - c. Knowingly make a false statement with the intention of persuading a person who has been an employee to enter into a contract for services as an independent contractor, doing the same work.
24. These provisions are likely to be difficult to enforce as they require an element of intention or knowledge by the employer. Although the onus is on the employer to disprove that element, the complexity of the issues means that this will not be difficult. The description of the legal issues above demonstrates that it would be arguable in many different factual circumstances that the employer could reasonably not be

expected to know for certain the true nature of the employment arrangements.

25. The lack of any remedy for the employee who is the victim of this kind of behaviour is another major deficiency. In particular, an employee who is dismissed in order to be re-engaged as an independent contractor has no avenue to challenge the dismissal or seek reinstatement unless it can be shown that the dismissal was because the employee was entitled to the benefit of an industrial instrument.⁴

⁴ WRA s793(1)(i)