

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

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AUSTRALIAN EDUCATION UNION

SUBMISSION TO THE

**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**

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The Australian Education Union

1. The Australian Education Union (AEU) has a strong commitment to the provision of public education throughout the Commonwealth of Australia, and directly represents, protects and advances the industrial and professional interests of its members in each state and territory.
2. These members, whose number exceeds 165,000, are employed in a diverse range of educational workplaces, most notably in schools, TAFE colleges, early childhood centres and community centres for the disabled. Individually and collectively, they perform a fundamental public service within our society, and their welfare is inextricably linked to any qualitative assessment of the social and educational capital of the nation.

Introduction – a public interest in public education

3. The Australian Education Union opposes both the Bill and the Amendment Bill currently being considered by the Committee. The AEU supports and adopts the submissions of the Australian Council of Trade Unions, and of the Queensland Teachers' Union in relation to the proposed legislation.
4. The industry of public education is critical to the future of the nation. Governments and public commentators have rightly focused on the need for maintenance of high quality, accessible, free education for all. While opinions have differed about the best ways to achieve and maintain such provision, it is common ground that such a system is both desirable and necessary.
5. The AEU submits that any provisions which facilitate or encourage the use of independent contractor arrangements in substitution for direct employment in public education endanger that objective, and should be rejected.
6. The nature of public education requires the education authorities to maintain control over the time and manner in which work is performed. It takes little reflection to determine that, while professional expertise is required and the exercise of professional judgement is essential to the work of educators, it is

entirely inappropriate to contemplate an arrangement in which an educator is entirely free from direction or control by the education authority. In such an industry, Independent Contractor arrangements must necessarily be a sham, disguising an underlying relationship of employer and employee. True independent contractor arrangements would be contrary to the public interest in maintaining public control over public education.

Removal of Safeguards for Vulnerable Workers

7. The AEU notes the inclusion of penalties for employers coercing employees into accepting sham independent contracting arrangements. While this is a positive step, so far as it goes, it draws upon the common law definition of independent contractor and the contract of employment, and does not recognise dependent contracting.
8. Furthermore, the Bill proposes an almost impossibly high onus of proof upon a plaintiff to make out the case that the arrangement is a sham. While the Bill recognises the problem of sham arrangements, in all but the most extreme cases it leaves the worker without a remedy because a defendant employer can simply claim that they believed the contract was genuinely one for services and that they had reasonable grounds for that belief. [This could be remedied if the test were one of fact – is the contract in fact a sham – rather than one of intention – did the employer intend to create a sham]
9. Combined with the removal of the safeguards which have been established in State legislation to protect vulnerable workers where there is in fact an arrangement more reflective of an employment relationship, this gap in the regulation will provide a loophole through which unscrupulous employers may exploit dependent contracting arrangements. By treating all contracting as genuinely independent, without regard to the underlying reality, the legislation thus places vulnerable workers at risk of exploitative practices.
10. Some consequences of such practices are:

- (i) The employer avoids Award/Agreement obligations in respect of wages and conditions and the worker has to make his or her own provision for Leave, Income Protection Insurance, Professional Indemnity and Public Liability Insurance.
- (ii) The individual is denied a remedy in respect of an unfair dismissal on the basis that the jurisdiction is available only for employees.
- (iii) The individual is denied access to minimum employment entitlements designed to protect workers' economic, social and health wellbeing, including a satisfactory work/life balance.
- (iv) The individual can be required to undertake excessive working hours without commensurate remuneration.
- (v) The individual and those they work alongside, and the students they work with, are exposed to a higher risk of workplace injury, and the cost of workers' compensation for periods of injury are shifted to the individual.
- (vi) The employer can avoid responsibility for investment in ongoing professional development.

11. **Children and Youth.** The impact of such practices on school and TAFE students who enter the paid workforce has already been reported by AEU members. Young workers are least knowledgeable about the rights they may forego if they enter into an independent contractor arrangement. They are least able to argue or negotiate for a more favourable contract, or indeed for a direct employment contract. In many cases, AEU members work with students who are, while still at school, being asked to take responsibility for all aspects of their own tax, workers' compensation and training, in order to obtain mundane casual work in areas where the only motive of the employer to use such arrangements is to avoid direct responsibility for those costs. If

dependent contractor arrangements are not caught by the legislation, and if State provisions to do so are removed, then young workers will be more exposed to such exploitation than they already are.

12. **Outworkers.** The proposed overriding of State provisions deeming outworkers to be employees is a terrible step backward in the long struggle to win access to even the most basic working rights for this group of workers. In addition to the points made by other submissions including that of the ACTU, it is important to note that this will also impact on the children and other dependants of outworkers, who are predominantly women with family responsibilities. School children who come home to a clothing production line in the home face particular difficulties in their schooling, and are often drawn into assisting with the work process. If the existing limited protections for such workers are removed, then the educational risks for their children will also be increased.

Recommendation:

THAT the Bills be rejected.