

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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**Submission by the Civil Contractors Federation
to the Senate Employment, Workplace Relations
and Education Legislation Committee
in relation to the
Independent Contractors Bill 2006**

1. Summary

- 1.1 *The Civil Contractors Federation is the largest employer association dedicated to the civil construction industry.*
- 1.2 *The civil construction industry is characterised by operators who perform the construction work as independent contractors. The decision by governments and principal contractors to use the services of independent contractors in the civil sector is not only a rational approach, but also makes for a highly efficient sector.*
- 1.3 *CCF supports the general thrust of the Bill which is to protect the status of independent contractors.*
- 1.4 *It is inappropriate that the Industrial Relations Commission of New South Wales (the NSW Commission) regulates the engagement of independent contractors through instruments made in the form of Contract Determinations or for them to be reviewed by the Victorian Civil and Administrative Appeals Tribunal (the Victorian Tribunal) or by the Contracts of Carriage Regulation Tribunal established under Chapter 6 of the Industrial Relations Act 1996 (NSW).*
- 1.5 *Contract Determinations in NSW should be “frozen” in so far as they regulate contracts to which a corporation is a party. If the NSW Commission varies a Contract Determination the variation would not apply to such contracts and the Contract Determination would become irrelevant over time.*
- 1.6 *Neither the Courts nor the various Parliaments have developed a precise definition of what constitutes an independent contractor that can be applied with precision. “Taxation Ruling TR2000/14 – Withholding Payments From Employees” in Appendix B, which sets out the features of an independent contractor – contract for services, provides an appropriate basis for a legislative definition.*
- 1.7 *It is important that there be a legislative definition which answers the question of whether a person is an independent contractor or not with precision rather than be a generalised definition so that commercial relationships and responsibilities are clear.*

2. The Civil Contractors Federation (CCF)

- 2.1 The CCF on behalf of its eight State and Territory Branches and its Members makes this submission. CCF is the peak industry body for all civil construction contractors, demolition contractors and industry related suppliers. These companies play a significant role in building construction projects and infrastructure development throughout Australia.
- 2.2 CCF is a national organization with an office in each state and territory of Australia and has a membership in excess of 1700 civil construction companies. CCF's membership includes civil construction companies ranging from small and medium to large civil construction, excavation and demolition companies, many of which are subcontractors.
- 2.3 The Civil Construction sector is distinctly different from the commercial building sector and the residential sector of the building and construction industry.
- 2.4 Civil contractors employ staff with specific civil competencies and use sector specific (heavy) earth-moving equipment.
- 2.6 The civil construction sector primarily constructs roads, railways, tunnels, bridges, dams and other major infrastructure projects. The sector is also engaged in continuous maintenance and repair of these structures. The sector overlaps with the commercial building sector primarily on building sites where excavation is required prior to the construction of buildings, or in the housing sector where preparation of subdivisions including roads, drainage and utilities are required.
- 2.7 The industry accounts for some \$9 billion of works annually, collectively employs some 50,000 people and owns around 40,000 items of heavy equipment.
- 2.8 Typically civil contractors are the first onto a building or infrastructure site, but tend also to be at the end of the supply chain of clients, principals and head contractors, specialist and subcontractors etc.

3. Industrial Regulation of Contracts

- 3.1 As a result of a series of truck blockades of New South Wales by independent contractors/owner drivers, the State Parliament gave effect to an earlier report by the then President of the NSW Commission. Beattie J had said that owner drivers were contractors and it was not appropriate to deem them to be employees. The NSW Commission should however have the power to fix minimum conditions in certain areas. The NSW Government amended the then Industrial Arbitration Act 1940 (NSW). These provisions remain, with some expansion, in the current NSW IR Act.
- 3.2 The NSW Commission now makes contract determinations which set and adjust minimum rates payable to owner-drivers in various transport sectors on a common rule basis. It can also make contract determinations dealing with superannuation and contract determinations ordering the reinstatement of an independent contractor. Increasingly in New South Wales, owner-drivers are moving closer to employee status.
- 3.3 In Victoria, it is proposed that the Owner Drivers and Forestry Contractors Act 2005 (the Victorian Act) will continue to apply.
- 3.4 The Victorian Act provides for the regulation of persons who transport goods in a vehicle. Rates and cost schedules are developed, there are minimum notice periods where termination occurs and jurisdiction is conferred on the Victorian Tribunals to make orders similar to those which could have been by the NSW Commission under section 106 of the Industrial Relations Act 1996 (NSW).
- 3.5 CCF opposes the continued intrusion into the commercial relationship between owner drivers and those they contract with in NSW and Victoria. The intrusion is unnecessary given that owner drivers will have access to the Federal Magistrates Court and the Federal Court in the case of a contract which may be unfair.
- 3.6 Contract determinations in NSW require special attention. Resulting from *WorkChoices*, State Awards became Notional Agreements preserving a State Award. The conditions in them were preserved as they stood at 27 March, 2006, for companies covered by them. Contract Determinations could be “frozen” as they currently stand in relation to constitutional corporations and, over time, they would become irrelevant. Any variation to them by the NSW Commission would not apply to a contract to which a corporation was a party. This would apply to virtually all contracts.

4. Definition of Independent Contractors

4.1 The terms and conditions under which independent contractors are engaged are determined by the terms of the commercial contract with the principal contractor. As with many commercial arrangements the independent contractor often obtains work by responding to a call for tenders for a specific project.

4.2 Whether a person is an independent contractor or an employee has been the subject of judicial consideration over many years. The ‘control test’ which examined the degree of control and supervision that was exercised over a person (*Zuijs v Wirth Brothers Pty Limited (1955) 93 CLR 561*) no longer applies though it can form an important part of the examination. The current test is that “the totality of the relationship between the parties must be considered” (*Stevens v Brodribb Sawmilling Pty Limited (1986) 160 CLR 16; per Mason J at page 29*) however this is not a formula with any mathematical certainty.

4.3 There are some operators who may genuinely believe that, because they have an ABN number, they are an independent contractor for this reason alone. It is acknowledged however that some operators who are not independent contractors claim to be such purely to obtain a taxation benefit. Minimising or avoiding taxation is often the principal incentive to claim to be an independent contractor and a comprehensive formula in the Taxation legislation that proof that certain requirements have been met may remove or reduce this incentive.

4.4 In Attachment B to “Taxation Ruling TR2000/14 – Withholding Payments From Employees” the Australian Taxation Office (ATO) sets out a summary of the indicators that a person performing work is an independent contractor.

Briefly stated they are:

- . The contract is for a given result and the contractor works on his/her account;
- . The contract is for a specific task or tasks and the contractor has a high level of discretion and flexibility about how the work is performed;
- . Performance of the task may result in a profit or a loss and the contractor bears the risk and may carry insurance;
- . The contractor provides assets or equipment;
- . The contractor sets his or her own hours;

- . Employee entitlements such as annual leave sick leave and the like are not included in the contract;
- . Payments are subject to the contract being performed;
- . The contractor incurs expenses;
- . The contractor advertises their services to the public;
- . The principal contractor can only terminate the contract where its terms are not fulfilled; and
- . The contractor may delegate tasks to others and engage others.

CCF reiterates its view that Taxation Legislation should be used as the basis of a definition of the term "independent contractor."

4.5 CCF considers the ATO criteria appropriate and that it provides a basis for a comprehensive legislative definition.

July 2006

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