AUSTRALIAN MANUFACTURING WORKERS' UNION

SUBMISSION TO THE SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION COMMITTEE

INQUIRY INTO THE PROVISIONS OF THE INDEPENDENT CONTRACTORS BILL 2006 AND WORKPLACE RELATIONS LEGISLATION AMENDMENT (INDEPENDENT CONTRACTORS) BILL 2006

JULY 2006

INTRODUCTION

[1] The Australian Manufacturing Workers' Union (AMWU) welcomes the opportunity to make submissions to the inquiry by the Senate Employment, Workplace Relations and Education Committee (the Committee) into the Independent Contractors Bill 2006 (the ICB) and the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006 (the WRLAICB).

[2] The full name of the AMWU is the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union. The AMWU represents approximately 135,000 workers in a broad range of sectors and occupations within Australia's manufacturing industry. The union has members in each of Australia's states and territories.

[3] The AMWU strongly opposes the unfair and unnecessary provisions of the ICB and WRLAICB. Furthermore, the AMWU condemns the missed opportunities these Bills represent for addressing the genuine structural disadvantage of contractors in the Australian workforce. The AMWU urges the Committee to recommend that the Senate block the passage of these Bills for the following reasons:

- the Bills will introduce further unfairness and inequity into the Australian industrial relations system;
- the Bills continue the unsustainable and often false distinction made by the common law between workers who are defined as employees and those defined as contractors;
- the Bills fail to take account of well-documented and internationally-recognised disadvantage experienced by workers whom the common law finds to be contractors by removing State and Federal industrial law protections from these workers;
- the Bills fail to take the opportunity to address the deleterious economic and social effect of the spread of independent contracting throughout the Australian workforce;
- the Bills fail to take account of widely-available evidence as to the impacts of the spread of independent contracting on wages and conditions of all Australian workers, on occupational health and safety across Australian workplaces, on training and skill formation and on Government revenue; and
- the Bills unnecessarily and inappropriately override State legislation.

[4] The AMWU made comprehensive submissions to the House of Representatives Employment, Workplace Relations and Workforce Participation Committee Inquiry into Independent Contracting and Labour Hire Arrangements in March 2005. Following detailed discussion, those submissions made seventeen recommendations to that Committee to address the manner in which labour hire and independent contracting arrangements undermined the employment relationship and employment protections for Australian workers, as well as, inter alia, concomitant effects on occupational health and safety and the integrity of the taxation system. This Bill does nothing to address the concerns expressed in those submissions, nor reflect at all the recommendations made in those submissions. Nevertheless, the submissions remain relevant and salient to any consideration of independent contracting in Australia, and we have attached them for reference as Appendix 1 to this Submission.

[5] The AMWU notes the submissions of the Australian Council of Trade Unions (ACTU) to this inquiry, and supports those submissions. We also wish to make specific submissions with regard to certain aspects of the ICB and the WRLAICB.

Encouragement of Independent Contracting

[6] The Federal Government openly seeks to promote independent contracting as a form of engagement for Australian workers. As tools of this promotion, these Bills ignore the structural disadvantage with which a worker is encumbered when they are engaged as an independent contractor. Even the diminished avenues for redress and protection currently provided by the *Workplace Relations Act 1996* are denied to workers engaged as independent contractors.

[7] The Bills maintain the problematic common law distinction between employment and independent contracting, without attention being given to either the uncertainty of the operation of that common law, or the disparity between the often fictitious legal line that is drawn between contractors and employees and the situational and bargaining disadvantages they share as workers.

[8] There is no attempt to address the difficulties that the common law has wrestled with, often with inconsistent outcomes. In our submission attached at Appendix 1, we have previously addressed the farcical outcomes of the "common law approach" now wholeheartedly adopted by the Government[1] and promoted by this legislation. The current "multi-indicia test" is examined at Chapter 7 of those submissions – where the uncertainty of a workers status may ultimately be decided by whether or not they wear a uniform, or pay for their own tools. Indeed, no better example is that highlighted by the ACTU in their submissions to this Committee, where a comparison of two common law decisions showed the relevant difference between a courier who is a contractor and one who is an employee may be that one drives a car and the other rides a bicycle![2] The work is not different, the level of autonomy may not be different, but the mode of transport draws the line between someone who leaves the house to engage in a commercial enterprise and someone who goes to work. That this Government maintains that these Bills should be passed in order to promote such "choice" is farcical.

The implications of maintaining the legal fiction

[9] Our previous submissions detailed the detriment which the spread of independent contracting has had for the Australian workforce and economy. Without repeating those submissions, note should be had of:

- the impact on wages and conditions of Australian workers (see Chapter 3);
- the implications for occupational health and safety of Australian workers (see Chapter 4);
- impacts on training and skill formation (see Chapter 5);
- impacts on Government revenue (see Chapter 6).

[1] Andrews, The Hon. Kevin James, 'Second Reading Speech: *Independent Contractors Bill 2006*', Commonwealth, House of Representatives, *Hansard* (22 June 2006) at pp.4-5.
[2] Comparing *Vabu Pty Ltd v Commissioner of Taxation* (1996) 81 IR 150 and *Hollis v Vabu Pty Ltd Crisis Couriers (No 2)* (2001) 207 CLR 21.

These impacts affect all Australian workers - whether they fall on the contractor or the employee side of the legal division.

[10] The impacts on training and skill formation are highly significant given the current skills crisis throughout the Australian economy and workforce. In this context, it is revelatory that these Bills continue to promote independent contracting as a boon for Australian workers and the Australian economy. This Government continues to promote the denigration of the Australian skills base. The Government prefers to ignore the impact of contracting on skill formation in the Australian workforce – which renders the spread of contracting as ultimately unsustainable – and instead allows the further undercutting of Australian wages and conditions by importing workers on temporary work visas. The implicit outcome of these Bills is not to set workers free from legislative burdens, but to again cut their wages and conditions and their bargaining power over their work arrangements.

[11] The impact on Commonwealth revenue from the promotion of independent contracting over direct employment is also detailed at Appendix 1. A risk to revenue of up to $14.38 billion per annum, or $13,897 per non employee in industry is demonstrated, as a result of tax evasion and tax avoidance, facilitated by the "contracting" model of engaging workers.[3]

[12] This risk is made clear by the Minister's own Second Reading Speech for the ICB and WRLAICB. The Minister attempts to explain the Government's acceptance of the common-law test for contractor or employee in these Bills, rather than the test used by the Government in its taxation legislation to identify independent contractors. In doing so, he belittles the Government's own tax legislation as follows:

> *"It is a self-assessment test and is easily manipulated to achieve the desired outcome if a worker is seeking to be classified as an independent contractor rather than an employee."*[4]

There are a number of unarguable implications of the Minister's views:

- If there is such a problem with the test in taxation law, then the risk to the revenue outlined in our previous submissions is manifest;
- If there is such a problem with the test in taxation law, why is it that his Government allows it to persist?
- If the common-law test is so clearly preferable, why did the Howard Government not adopt it in its own personal services income legislation in 2000?[5]

Nowhere does this Government explain why there should be a disjunction between the two tests.

[13] There is an additional implication, and it is again to the detriment of a worker who is defined as a contractor under the common law, and thus under this legislation. Despite the Minister's apparent contempt for the Treasurer's taxation laws, the

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[3] Australian Manufacturing Workers' Union, *Submission to the House of Representatives Employment, Workplace Relations and Workforce Participation Committee Inquiry into Independent Contracting and Labour Hire Arrangements* (March 2005) at paragraph 169, attached at Appendix 1.
[4] Andrews, supra at note 1, at p.5.
[5] See the *Income Tax Assessment Act 1997*.

disjunction between the taxation law and ICB tests can easily lead to a worker satisfying the multiple-indicia test under the ICB, but not satisfying the test in taxation law for a contractor. This is especially easy where the so-called contractor is engaged for more than 80% of the time for one employer. The ATO would never be satisfied that this worker is a contractor – so the contractor is left to pay higher personal tax rates.[6] Nevertheless, in the scheme proposed by these Bills, the worker must be satisfied that they are enough of a contractor that they should be excluded from any protections of industrial law. They pay tax as a worker, but engage in work on entirely a commercial legal basis. The hypocrisy is devastating – and the worker is the loser.

Dependent Contractors

[14] As noted in our submissions at Appendix 1, the International Labour Organisation (ILO) has recognised the problem of disjunctions between the legal description of an employment (or contracting) relationship, and the reality of that relationship. It has identified the following class of persons:

> *"Midway between self-employment and dependent employment, there are "economically dependent workers", who are formally self-employed but depend on one or a few "clients" for their income."*[7]

This class of workers may be described as a "dependent contractor" – one who satisfies common law tests to be a contractor rather than an employee, but on all the facts is nevertheless dependent on one major employer (or a few) in a situation objectively akin to an employee.

[15] To address this phenomenon the ILO has issued the recommendation attached to this submission at Appendix 2. This recommendation was adopted by the General Conference of the ILO in March 2006. Inter alia, the recommendation provides that:

> *"4. National policy should at least include measures to:*
>
> *(a) provide guidance for the parties concerned, in particular employers and workers, on effectively establishing the existence of an employment relationship and on the distinction between employed and self-employed workers;*
>
> *(b) combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status, noting that a disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee, and that situations can arise where contractual arrangements have the effect of depriving workers of the protection they are due;*

And that:

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[6] House of Representatives, *Explanatory Memorandum to Independent Contractors Bill 2006*, at p.12.

[7] International Labour Organisation, "Report V: The scope of the employment relationship,", International Labour Conference - 91st Session, Geneva, 2003, at p.28.

> *"9. For the purposes of the national policy of protection for workers in an employment relationship, the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties.*
>
> *10. Members should promote clear methods for guiding workers and employers as to the determination of the existence of an employment relationship."*

[16] In the face of these recommendations, however, the Government has chosen to ignore the ambiguities and difficulties of the common law in coming to grips with the distinction between contractors and employees. Again, this is to the detriment of the legally-defined contractor, whose working relationship is objectively most akin to an employee.

[17] Instead of dealing with this problem, these Bills impose upon dependent contractors:

- an exclusion from any protections of Federal industrial law;
- the stripping of any rights they may have enjoyed under State legislation deeming them as employees; and
- importantly, does not bring dependent contractors within the purview of the supposed protections against "sham contracting" provisions. This sham contracting test in the WRLAICB depends entirely on the preservation of inadequate common law distinctions preserved by the ICB.

[18] The ILO has pointed to the prevalence of dependent contracting throughout economic sectors, giving the following examples:

> *"Economically dependent workers are found in the most diverse sectors, depending on the country, and include transport workers; doctors and other health professionals working for health centres; skilled homeworkers using new technologies; non-exclusive insurance agents; sales representatives (selling in a workplace or from home); lottery ticket sellers; itinerant vendors of products for direct consumption; hourly-paid service workers; newspaper distribution workers; rural route mail couriers; owners of coffeebars or mini-shops in schools or enterprises; former employees turned into independent workers of the former enterprise; poor pseudo-independent rural workers apparently associated with the landowner, including under "two-party" arrangements; taxi drivers and drivers of other small vehicles; certain construction workers, car mechanics, forestry, farm, retail and other service workers, and small-scale manufacturing workers; technicians and professionals (independent technicians, communications technicians), television performers, editors, professionals working in research and consultancies, for professional fees and partnership prospects; health professionals and sole traders (formerly employees or who subsequently returned to employee status); quasi-workers in Japan, such as franchise holders or managers of a grocery store; teleworkers, especially women, not recruited as employees; members of care centres for the elderly ("silver*

centres") who work as independent assistants, generally without remuneration, although they have been awarded remuneration in various court cases."[8]

[19] The only concessions granted to dependent contractors in these Bills – the only cases where dependent contractors may have clarity over their status – is where the ICB makes special provision for clothing outworkers (at Part 4), or deigns to allow certain NSW and Victorian laws to continue to operate, with respect to owner drivers (s.7(2)(b)). The Government makes justification for these concessions based on characteristics the ILO has found common to dependent contracting across industry sectors:

- they are vulnerable because they lack bargaining power in relation to their rights and entitlements;
- they may come from non-English speaking backgrounds, with limited formal education;
- they have difficulty pursuing their entitlements through corporate veils of contractors and subcontractors;
- they may work for only one principal;
- there are tight business margins;
- contractors require a steady income to meet capital costs;
- there are risks to occupational health and safety from being forced to work long hours to stay in business;
- contracting businesses may fail because of lower remuneration rates.[9]

However, nowhere does the Government establish why the above characteristics of dependent contractors *only* apply to clothing outworkers or owner drivers. In particular, the Federal Government has not attempted to justify why it deems these groups of contractors worthy of special concessions, when the ICB strips State Governments of the same rights to determine which contractors in their States should be protected as "deemed employees". These groups of workers continue to experience the same structural disadvantage which led to their State Governments making special legislative provision for them, but they are now exposed to the higher costs and lower protections of commercial law, rather than industrial law, merely at the whim of the Federal Government.

[20] Those workers who share the disadvantage of owner drivers and clothing outworkers, but who do not benefit from the Government's whim include, in NSW:

- milk vendors;
- cleaners;
- carpenters, joiners or bricklayers;
- painters;
- bread vendors;
- timber cutters and suppliers;
- plumbers, drainers or plasterers;
- blinds fitters;
- council swimming centre managers or supervisors;
- ready-mixed concrete drivers;

[8] International Labour Organisation, supra at note 7, at p.29.
[9] House of Representatives, *Explanatory Memorandum to Independent Contractors Bill 2006*, at pp.13, 15.

- RTA lorry drivers; or
- others prescribed by the regulations;

in Queensland:

- outworkers;
- apprentices and trainees;
- persons engaged on piece rates; and
- workers in the security industry who are engaged by Bark Australia Pty Ltd;

in South Australia:

- drive a vehicle that is not registered in the employee's name to provide a public passenger service (even though the contract would not be recognised at common law as a contract of employment), but not a taxi;
- carry out personally the work of cleaning premises (even though the contract would not be recognised at common law as a contract of employment; and
- carry out work as an outworker (even though the contract would not be recognised at common law as a contract of employment);

and in Tasmania:

- outworkers,
- apprentices; and
- trainees.

The detriment to these dependent contractors is common with clothing outworkers and owner drivers. Their treatment by the ICB is not.

[21] In contradistinction to ILO Recommendations, no guidance is given to establish employment relationships or distinguish between contractors and employees. Disguised employment relationships are not "combated", they are preserved for all but the few. As we noted in our previous submission, under the current common law, it appears that an employment contract can effectively be disguised as an "independent contractor" arrangement by either:

- The addition of a clause describing a worker as an independent contractor together with a clause granting an unqualified right of delegation; or
- The interposing of a legal entity between a worker and their employer.[10]

Neither of these criteria would deny the dependence of the "contractor" upon an employer, but the common law still excludes them from being classified as an employee.

[22] To this end, we draw the Committee's attention to the definition of an employment relationship which was provided to the Building and Construction Industry Royal Commission by Professor Andrew Stewart. We continue to support the definition as a useful attempt to address problems of evasion of the rights and

[10] Australian Manufacturing Workers' Union, supra at note 3, at p.74 – attached at Appendix 1.

obligations which attach to the employment relationship. This definition can be found at pp.75-76 of our previous submission at Appendix 1. Unlike this useful definition, we note the proposed Bills go no way towards addressing disguised employment relationships or the structural disadvantages of dependent contractors. The reliance on problematic common law definitions instead reproduces the disadvantage endemic to those definitions.

Unfair Contracts

[23] Queensland and NSW, until affected by the operation of these Bills, maintain statutory regimes which protect those engaged in work contracts from unfair, harsh or unconscionable dealing – regimes which go some way to addressing the structural disadvantage experienced by contractors, regardless of their common law legal status. Whilst maintaining the confusion over their legal status of workers, these Bills again undermine existing protection of those workers by denying these States their ability to provide unfair contracts laws.

[24] The ICB takes the lowest common denominator of currently available unfair contract regimes – the Commonwealth model in the *Workplace Relations Act 1996* – and then undercuts that model further. At s.12(2), provisions allowing application by a union on a worker's behalf have been removed (former s.832(3)(b) and (c) of the *Workplace Relations Act 1996*). At s.15(2), the court is now to compare the unfairness of a relevant contract with other contracts across an industry – regardless of whether, for example, that industry is characterised by widespread unfair work contracts. Again, provision for objective fairness for a contractor is undermined.

[25] Harmony between unfair contracts regimes need not be a lowest common denominator. This Government has chosen to deny workers who find themselves on the contractor side of the common law equation the statutory remedies their State Governments have provided for them. For this federal Government, harmony is again pursued to the worker's disadvantage.

Conclusion

[26] The AMWU must urge the Committee to recommend that the Senate block the passage of these Bills. For the reasons above, and those enunciated in our previous submission, this Bill maintains the often false common law dichotomy between employee and contractor, when both of these types of workers are often burdened with the same structural disadvantage. Especially with regard to dependent contractors, this Bill rejects the overtures of international bodies such as the ILO – exposing what are effectively "disguised employees" to the harsh and expensive context of commercial law, instead of the protections available under industrial law.

[27] The Government has let slip the opportunity to define the employment relationship so as to protect workers, not expose them to an unforgiving commercial environment Once again this Government is out of step with international evidence and practice. Once again, this Government has missed an opportunity to create fair and effective industrial legislation. Once again Australian workers pay the price.