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CFMEU

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION
CONSTRUCTION & GENERAL DIVISION

Submission to the Senate Employment, Workplace Relations and Education Legislation Committee

INQUIRY INTO THE INDEPENDENT CONTRACTORS BILL 2006
and the
WORKPLACE RELATIONS LEGISLATION AMENDMENT (INDEPENDENT CONTRACTORS) BILL 2006

21 July 2006

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

A national approach to the employee/contractor issue

In our submission in response to the DEWR discussion paper [2005] the CFMEU said that the union is not opposed to *genuine* independent contracting or *reputable* labour hire agencies *per se*.[1] That continues to be our position.

We agree with the following statement contained in the IC Bill *Explanatory Memorandum*:

> 'A workplace relations framework is needed which recognises and validates the choices people make to be either employees or independent contractors.'[2]

Employment and independent contracting are primarily workplace relations issues, and workers should be entitled to make a free, informed choice between the two systems.

Contracting cannot be treated as if it were a form of work unrelated to traditional employment. As the recent Productivity Commission Paper states, 'the line between an employee and a self-employed contractor is not always an easy one to draw, given that they both perform work for someone else'.[3]

The CFMEU supports an appropriate national policy for the protection of all workers in the building and construction industry, whether they be employees or self-employed. We note the Recommendation of the International Labour Organisation of June 2006 entitled *'Protection for Workers in an Employment Relationship'*, and we urge the Australian Government to follow that Recommendation.

It has been said that 'supporters of the proposed Independent Contractors Act will legitimately be able to argue that the proposed Act is consistent with and has endorsement from the ILO'.[4] An examination of the IC Bill and the ILO Recommendation does not support that view. This can be seen from

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[1] re *Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements - Submission of CFMEU 1.2*
[2] p.10
[3] *The Role of Non-Traditional Work in the Australian Labour Market [May 2006]*, p.18
[4] Independent Contractors of Australia website

the Table appended to this submission. Not only is the IC Bill inconsistent with the ILO Recommendation - the Workplace Relations Act also falls far short of the protections recommended by the ILO for all workers.

Whilst the objective of the ILO Recommendation is to protect workers *in an employment relationship*, the Bill is mainly concerned with the protection of independent contracting *per se*. The principal objects of the Bill are:

(a) to protect the freedom of independent contractors to enter into services contracts; and
(b) to recognize independent contracting as a legitimate form of work arrangement that is primarily commercial; and
(c) to prevent interference with the terms of genuine independent contracting arrangements.[5]

There is no mention here of protecting the freedom of a worker to choose to be an employee rather than a contractor. Yet there is a growing list of abuses surrounding the issue of bogus contracting, and there has been much recent publicity about the practice of employers dismissing employees and re-engaging them on commercial contract arrangements at lower levels of remuneration.

On the other hand, there is no evidence that genuine contracting in Australia is under any form of attack. The number and proportion of self-employed contractors does not appear to be linked to any of the factors mentioned in the principal objects of the IC Bill. The Productivity Commission Research Paper certainly does not point to any external assault on this form of work. The paper states:

> 'the number of self-employed contractors can be estimated to have fallen in both absolute and relative terms between 1998 and 2001. Between 2001 and 2004, self-employed contractors became more numerous, but their share of the workforce remained constant'.[6]

The PC paper concludes that this outcome 'is likely to be the product of changes affecting the supply of, and demand for, non-traditional work, relative to ongoing employment'[7] and that self-employed contracting 'might be more supply side driven.[8] If that is the case, the IC Bill will not give any further impetus to independent contracting. Indeed, the Bill is unlikely to provide independent contractors with any greater protections than currently exist.

The CFMEU believes that the Government should do more to prevent the exploitation of genuine contractors and employees alike. That is particularly desirable in the building and construction industry, where

[5] Section 3
[6] Overview, p.XXI
[7] p. 23
[8] p. 48

official figures indicate that the prevalence of self-employed contractors is about 25 per cent of the workforce.[9] This is a complex and imprecise topic because, within that 25% figure, the extent of genuine independent contracting (as opposed to dependent or bogus contracting) has not been gauged.[10] There can be no doubt that the prevalence of genuine independent contractors in the building and construction industry workforce is significantly less than 25 per cent. Whatever the real figure may be, there is certainly widespread exploitation of genuine and bogus contractors.

In the building and construction industry there is ample evidence that disguised employment relationships are being used to circumvent the entitlements and protections which the law affords to employees. There are numerous examples of builders' labourers and apprentices purportedly working as independent contractors. It would be extraordinary if the vast majority of these workers were in anything other than an employment relationship. Indeed, the very essence of an apprenticeship is constant supervision, guidance and control by an employer.

It is pointless for legislation to focus on protections against imaginary threats. The real threat to independent contractors is their lack of bargaining power in a globalised market, and the inability of many to provide themselves with adequate retirement incomes. The main barriers to independent contracting are lack of capital and lack of entrepreneurial skill.

The real problems facing independent contractors need to be addressed. At the same time, there should be greater protection for workers who do not freely choose to become independent contractors. If the Commonwealth intends to legislate on independent contracting, it should not seek to displace relevant State/Territory legislation which currently provide significant protections for genuine contractors and employees alike.

Existing State/Territory laws

According to the *Explanatory Memorandum*, the "problem" that the IC Bill seeks to address is State laws *'which create barriers to the use of independent contractors in Australian workplaces'*.[11] The Memorandum asserts that:

> 'contracting relationships continue to be dragged into the sphere of employment law by virtue of State deeming provisions which determine certain independent contractors to be employees. This distorts flexibility and choice and interferes with the intention of the parties to the original contract'.[12]

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[9] PC Paper, p.62
[10] See CFMEU's submission to Cole Royal Commission for discussion of this issue at length.
[11] EM p.6
[12] ibid, p.6

Over-riding of State deeming provisions is the key element of the Bill, yet there is no evidence that these provisions have had any deleterious effects. Indeed, very little appears to be known about the impact of the deeming provisions. The *Explanatory Memorandum* states:

> 'Overriding State deeming provisions could increase the number of independent contractors, and inversely decrease the number of employees in relevant States. However, there is also the possibility that, because deemed employees have been working under 'employee' like arrangements, that they will continue to be employees once deeming is removed. It is difficult to predict how previously deemed employees would be considered by the courts once they are no longer deemed. It is impossible to quantify the numbers of people affected as we do not know how many employees are currently 'deemed' under State laws'[13] (underlining added).

This hardly provides a justifiable basis for interfering with the State laws. A number of State and Territory governments have sought to address the problem of disguised employment relationships by means of legislation which this Bill now seeks to over-ride. There is no evidence that the State legislation has prevented anyone from becoming and remaining a genuine contractor. Nor is there any indication that such legislation fails to recognize that contracts for service and contracts of service are equally valid systems for organizing work.

For example, the Queensland IR Act (s.275) gives the QIRC power to declare persons to be employees or employers. Apparently, there have been very few applications made under that section. In the leading case (*AWU v Hammonds Pty Ltd 2000)* a Full Bench of the QIRC found that a group of shearers and support workers were independent contractors, and dismissed an application that they be declared employees. That is a reliable indicator that the State IR Act is not 'dragging' genuine contracting relationships into the sphere of employment law.

We note that the Employer Vice-Chairperson of the ILO Employment Relationship Committee referred to deeming provisions of the Queensland IR Act.[14] The ILO Report states, inter alia:

> 'He described an example of another solution: the choice made by independent contractors in Queensland, Australia, who had been brought within the purview of the Industrial Relations Act only to struggle against that imposition in the courts, at considerable expense, before winning the right to remain independent contractors outside of the coverage of legislation.'

If that is a reference to contract shearers, the "struggle" was in fact conducted in the QIRC, probably at far less expense than if it had taken

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[13] p.13

[14] *Report of the Committee on the Employment Relationship* [2006] par 43

> 'The proposed changes would benefit small business as a result of effectively deregulating the contract relationship. Small businesses which engage contractors would be freed of obligations imposed on them by industrial legislation through deeming provisions. ... [s]mall business operators would no longer be responsible for superannuation, taxation deductions, provisions of leave and any other obligations which apply to employees'.[16]

The last three lines of the above passage accurately describe the *real* reasons why many small (and not so small) business operators seek to replace employees with independent contractors. It is all about defraying costs and responsibilities down the line to the small people in the commercial chain. It has very little to do with improving efficiency and productivity. It is a measure that favours those who contract with independent contractors, not the independent contractors themselves.

Superannuation

Furthermore, the *Explanatory Memorandum* is misleading where it suggests that small business operators would no longer be responsible for superannuation if they engaged contractors rather than employees.[17] In fact, employers are responsible for superannuation contributions for a wide range of self employed contractors.

Under the *Superannuation Guarantee (Administration) Act 1992* (SGAA), the test for 'who is an employee?' is potentially wider than the common law test, although it has been applied with strange results (e.g., by NSW Court of Appeal in *Vabu Pty Ltd v Commissioner of Taxation*).[18]

The ATO has made a Ruling (SGR 2005/1) which explains when an individual is considered to be an 'employee' under section 12 of the SGAA. The Ruling clarifies which persons are employees under the extended definition and also considers the circumstances in which an individual who may otherwise be an employee is specifically exempted from the scope of the SGAA. It also provides the ATO view on the implications of the alienation of personal services income measures contained in the *Income Tax Assessment Act* for deciding whether an individual is an employee within the meaning of the SGAA. It further considers whether an individual who holds an ABN can be an employee for the purposes of the SGAA. Whilst ATO Superannuation Guarantee Rulings do not have the force of law, they are nevertheless an authoritative indicator as to how the law is applied. Clearly, a large proportion of self-employed contractors are 'employees' for the purposes of the SGAA.

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[16] p.25
[17] p.25
[18] (1996) 81 IR 150

Nevertheless, there is a perception amongst employers that, by simply engaging a self-employed contractor, the employer is no longer responsible for making superannuation contributions. The failure to make superannuation contributions in accordance with the SGAA is widespread in the building and construction industry, in respect of both employees and contractors. The problem is certainly not confined to this industry, nor to the private sector.

For example, even the Commonwealth has failed to provide superannuation contributions for many of its contractors and consultants. ANAO Audit Report No.13 (2004-05)[19] states that, of the contracts tested in the audit sample, superannuation obligations had been met in 25 instances out of a total of 78 contracts. These contracts were considered to be wholly or principally for labour.[20] These are instances where there was a statutory obligation for the Commonwealth to provide superannuation contributions for the contractors and consultants.

The private sector is even less likely to be meeting its obligations. Existing enforcement measures are weak, and there is little doubt that vast amounts of superannuation contributions have been withheld by employers. Much of this would be in respect of contractors.

Even in those cases where the employer is not legally responsible for making superannuation contributions, ongoing superannuation savings are merely a dream for many self-employed workers. In theory, such contractors are able to make their own superannuation arrangements. However in practice, if a contractor is operating under thin margins (as most are in the building and construction industry), superannuation savings become a luxury item, rather than an essential provision for the future. This will have serious financial consequences for the contractors and the national economy.

The end result is that the Government is presently taxing independent contractors at a lower rate than employees, and is giving contractors access to a much wider range of deductions than employees, but will ultimately be required to provide retired contractors with the maximum level of income support. Unless a practical and enforceable scheme of compulsory superannuation savings is introduced for independent contractors, many will be forced to rely on Centrelink payments when they are no longer able to work, and there will be a significant impost on the public purse.

Taxation

The Productivity Commission's Research Paper *'The Role of Non-Traditional Work in the Australian Labour Market'* [May 2006] raises concerns about the equitable treatment of taxpayers and the preservation of the taxation base:

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[19] *Superannuation Payments for Independent Contractors working for the Australian Government*

[20] ibid, par 8

> 'Concern in these areas centres on those self-employed and labour hire contractors who, depending on their professional circumstances, are regarded either as independent businesses or as employees by the Australian Tax Office (ATO). The former are able to access a wider range of tax minimization instruments than the latter. Changes to the taxation arrangements governing self-employed contractors and consultants were introduced by the *Alienation of Personal Services Income Act 2000,* and were designed to achieve parity of treatment with employees. Despite these changes, there is evidence that the Australian Government is still losing tax revenue because some self-employed contractors who are in reality employees are benefiting from tax concessions to which they are not entitled.'[21]

The *Final Report of the Royal Commission into the Building and Construction Industry* [2003] states:

> 'The evidence, including evidence provided by the Australian Taxation Office, establishes that there is significant evasion of income tax by persons and entities in the building and construction industry. Since 1998, the Australian Taxation Office has recovered over $370 million in unpaid tax in the industry. In the case of the detection of phoenix company activity, for every $1 spent by the Australian Taxation Office between 1 July 2001 and 30 June 2002, $8 in revenue was raised and for every $1 spent on general building and construction matters $6 in revenue was raised. While the legislation governing the administration of income tax applies to the entire community, there are aspects of taxation law, particularly the Alienation of Personal Services Income legislation, the Australian Business Number System and matters relating to fraudulent phoenix company activity, of particular relevance to the building and construction industry.'[22]

The CFMEU's experience of phoenix operators is that they are usually involved in sham contracting arrangements. The ATO loses revenue from both the phoenix company and the employees who are put onto bogus contracts by such companies. Forcing workers into bogus contracting has the effect of creating large numbers of tax evaders. Weak legislation and enforcement creates an incentive for tax evasion.

The Royal Commission Report also states:

> 'There appear to be justified concerns about the use of Australian Business Numbers in the building and construction industry. There are suggestions that Australian Business Numbers are misused to justify the treatment of persons, who hold Australian Business Numbers but who are employees, as contractors.'[23]

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[21] pps.4-5
[22] Vol 1, p.122
[23] Vol 1, p.123

This has long been a serious problem in the industry. The CFMEU has constantly urged the ATO to more closely scrutinize the issuing of Australian Business Numbers, because the misuse of ABNs is usually associated with bogus contract arrangements. Although the ATO has made various efforts to strengthen ABN integrity, ABNs continue to be issued inappropriately - for example, to labourers and apprentices who could not possibly be in a genuine commercial contracting arrangement.

At the Tax Office Building & Construction Industry Forum, ATO staff regularly report that apprentices are requiring ABNs for employment. While some apprentices may be undertaking weekend work, this income is not being reported on their income tax return. This puts ATO staff in a dilemma, where they have a young person who needs an ABN for work, but legally the entitlement to an ABN does not exist.[24]

Employment sections of newspapers are full of advertisements stating that applicants for building and construction jobs must have their own ABN. Such workers are being systematically denied the right to work as employees on proper wages and under conditions of employment prescribed by awards and collective agreements.

At the centre of the problem is the tax advantage inherent in declaring oneself a contractor for the purposes of employment, and obtaining an ABN. Such workers are not subject to the PAYG system in the same way as employees, and are able to take advantage of the Alienation of Personal Service Income provisions of the 'New Tax System'. These provisions replaced the old PPS system and were put in place in an attempt to crack down on tax evasion. However, the final legislative arrangements were an unnecessary compromise on recommendations of the Ralph Review. In particular, the criteria laid down to establish eligibility for this type of tax-related characterization were far too lax.

By taking advantage of these lax provisions, contract workers are able to significantly reduce their tax liability, and their employers are able to reduce their labour on-costs and avoid various other statutory obligations. It is the interaction of cost savings for employers and tax savings for workers within a weak regulatory regime that allows sham contracting to flourish. The result is a taxation 'black hole', with billions of dollars of public revenue lost on account of these contrived contractual arrangements.

The joint operation of the Results Test, the 80 per cent rule and additional tests, the Unrelated Clients Test, the Employment Test and the Business Premises Test, creates too many variables and opportunities for misrepresentation and fraud. The CFMEU has long advocated the adoption of a simplified and strong 80:20 test whereby, if 80 per cent of a contractor's personal services income is derived from the one source, then

[24] Forum meetings of 27 October 2005 and 30 May 2006

the contractor is deemed to be an employee and is therefore subject to the PAYG taxation system.

As well as eroding the taxation base, the preferential treatment of independent contractors (both genuine and bogus) results in a tax inequity. Employees who, for all practical purposes, are performing the same functions as contractors, are required to pay significantly more tax.

It is a fair question to ask why employees should be required to pay more tax than contractors who perform the same functions. There is no evidence that contracting is intrinsically more productive or efficient than employment. The *Explanatory* Memorandum asserts that 'the flexibility that independent contractors provide is essential to Australian business'.[25] However, that conveniently overlooks the fact that other forms of non-traditional employment, such as true casual employment, also provide flexibility.[26]

It is generally accepted that those individuals who genuinely choose to become self-employed contractors, do so for purely personal reasons. The Productivity Commission Research Paper [2006] refers to studies which suggest that this form of employment 'fulfils a desire for autonomy and independence in workers'.[27]

Some proponents of unfettered contracting have hailed the monograph of Benz and Frey, which states that the opportunity to 'be your own boss' is an important source of happiness at work.[28] However, the authors also state that *'an observed correlation between self-employment and job satisfaction does not necessarily reflect causality.'*[29]

Benz and Frey note that *'If anything, self-employment thus seems to be associated with inferior material outcomes'*.[30] If this study is valid for Australian conditions, it confirms the fact that contractors are working for inferior remuneration, and that the ATO is subsidizing them for doing so. The only real beneficiaries from that situation are those for whom the contractors work.

According to the *Explanatory Memorandum*, 'there is anecdotal evidence that independent contractors generally tend to be paid more to compensate them for having to take responsibility themselves for remitting tax and contributing to superannuation.'[31] That has certainly not been the experience in the building and construction industry, where union EBA employees generally enjoy significantly higher earnings than self-employed contractors. The industry also has a high level of bankruptcies of self-

[25] p.5
[26] see Productivity Commission Research Paper of May 2006
[27] p.48
[28] Swedish Economic Policy Review 11 (2004) p.98
[29] ibid, p.104
[30] ibid, p.103
[31] p.12

employed contractors, which suggests not merely a lack of business acumen, but that their earnings are insufficient to maintain their viability.

Preferential taxation treatment is clearly the major reason why workers choose to become self-employed, or at least accept a contractual arrangement which has been forced upon them. The Productivity Commission Research Paper of May 2006 found that 'Taxation considerations can make it more profitable for people to work as self-employed contractors than as employees (box 3.4)'.[32] Box 3.4 relevantly states:

> 'Buchanan and Allan (2000) illustrate a situation where a self-employed contractor who is paid less than an employee can earn a higher after-tax pay. This arises because of differences in the tax treatment between an employee and an independent contractor. Some work related expenses, that cannot be claimed by ongoing workers, are acceptable deductions for self-employed contractors. The net effect of such deductions usually halves the average rate of tax payable (Buchanan and Allan 2000, p.51).'[33]

However, for many self-employed contractors, these taxation advantages are illusory. As mentioned above, the only real beneficiaries are those for whom the contractor works. In other words, the tax benefits compensate for inferior pay rates, while the real beneficiary is the person or corporation that uses the contractor.

The CFMEU does not begrudge self-employed workers their taxation arrangements. We simply say that all workers should be treated equally, irrespective of their form of employment, and that there is no economic reason why employees should subsidize the earnings of contractors through the taxation system.

Sham contracting in the building and construction industry

The CFMEU, along with other organizations and individuals, has long argued against sham contracting arrangements and rogue labour hire operations in the building and construction industry.

The starting point for any discussion about sham contracting is the legal distinction between an *employee* and a *contractor*. The courts have determined that the fundamental distinction is:

> *'between a person who serves his employer in his, the employer's business, and a person who carries on a trade or business of his own.'*[34]

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[32] p.44
[33] p.45
[34] *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 at 217 per Windeyer J

Sham contracting arrangements are designed to muddy that distinction, and to circumvent the law, with the result that:

- the workers involved usually receive lower levels of overall remuneration;
- employers who comply with the law by engaging employees and genuine subcontractors are undercut by unscrupulous operators; and
- services to the Australian community suffer as the Government loses taxation revenue.

Under sham contracting arrangements, workers are often given no freedom of choice. They either sign the contract or do not get the job. In essence, one party seeks to change the nature of the relationship simply by stipulating that the contract does not create an employer/employee relationship. Very few workers who enter into these arrangements are properly advised. Even fewer would have the resources to obtain relief in a court of law.

The illegitimate use of sub-contracting arrangements is widespread in the building and construction industry worldwide. One of the main reasons why it occurs is that it facilitates the movement of cost and responsibility from larger employers to smaller employers. In turn, many smaller employers seek to move cost and responsibility onto their workers by disguising employment relationships as contracting arrangements. Thus, many employers (often with the support of employer organizations) use and abuse the individual subcontract system in order to avoid their legal obligations and responsibilities.

Wherever this goes unchecked by regulators (governments and/or unions) the industry deteriorates until remedial steps are taken. This deterioration is manifested by the large number of bankruptcies and "phoenix" operators, reputable employers being squeezed out of the industry, loss of skills as experienced workers leave in disgust, and the failure to adequately train new workers for the industry. Typical remedial steps in Australia have included:

- deeming certain workers to be employees for the purposes of industrial legislation;
- promoting collective bargaining amongst quasi-contractors or dependent contractors;
- legislation providing minimum standards and outlawing unfair contracts;
- ATO initiatives to gather lost taxation payments;
- trade union campaigns to educate such workers.

Sham arrangements - WRLA (Independent Contractors) Bill 2006

We note that the *Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006* has been introduced in tandem with the *Independent*

Contractors Bill 2006. This amends the WR Act 1996 by inserting a new Part 22 covering sham contracting arrangements. In particular, it deals with misrepresenting an employment relationship as an independent contracting arrangement, and the dismissal (or threat of dismissal) of an employee for the purpose of engaging that person as an independent contractor.

Clearly, it is essential that this type of conduct be prohibited. However, the enforcement provisions of the WRLA Bill are weak, because they are predicated upon a person's belief or state of knowledge as to the true situation.[35] It would not be difficult for a crafty person to plead ignorance or fabricate an excuse for having misrepresented an employment relationship as an independent contract arrangement.

Likewise, a contravention occurs only if an employer's *sole or dominant purpose* in dismissing or threatening to dismiss an individual is to engage the individual as an independent contractor.[36] A well advised employer would have little difficulty in putting up other reasons for a dismissal or threat in circumstances where the *real* reason is simply to engage the employee as a contractor on inferior rates and conditions.

These escape clauses mean that the legislation has no "teeth", and sham contracting arrangements will continue to flourish in the building and construction industry and in many other industries where abuses are rife.

Migrant workers

Migrant workers are particularly vulnerable to sham contracting arrangements. The ILO Recommendation states:

> 'In framing national policy, a Member should, after consulting the most representative organizations of employers and workers, consider adopting appropriate measures within its jurisdiction, and where appropriate in collaboration with other Members, so as to provide effective protection to and prevent abuses of migrant workers in its territory who may be affected by uncertainty as to the existence of an employment relationship.'[37]

It is doubtful whether there is any effective protection against such abuses under the IC Bill or current federal laws. The problem is being exacerbated by the easy availability and misuse of Temporary Business (Long Stay) visas (subclass 457). The *Migration Regulations 1994* require the sponsor of an applicant for a 457 visa to undertake various obligations, including "compliance by the applicant with all relevant legislation and awards in relation to any employment entered into by the applicant in Australia".[38]

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[35] WRLA (IC) Bill 2006, ss.900(2) & 901(2)
[36] ibid, s.902(1)(b)
[37] *1. National Policy of Protection for Workers in an Employment Relationship, par.7(a)*
[38] Reg 1.20(2)(ii)

Unfortunately, when the sponsor is an employer whose intention is to exploit "guest" workers, these requirements are simply ignored.

More and more cases involving the misuse of subclass 457 visas are being brought to the attention of the CFMEU. These guest workers know nothing about their rights under Australian law, and would not know the difference between a *contract of service* and a *contract for services*. The IC Bill should expressly exclude a subclass 457 visa holder from being a party to a services contract.

Terminology

There is a proliferation of definitions of employees and contractors. The glossary of terms used in the Productivity Commission Research Paper of May 2006 includes the following:

> *Employee:* A person who works in someone else's business for a wage or salary, excluding unpaid family workers.
>
> *Independent Contractor:* A self-employed contractor who is usually not dependent on a single client for business.
>
> *Labour Hire Contractor:* A self-employed contractor who uses a labour hire agency as a means of obtaining work. Also known as an 'Odco contractor'.
>
> *Labour Hire Employee*: An employee of a labour hire agency, who works at the work site of a client firm, usually for a short period.
>
> *Own Account Worker:* A person who operates his or here own unincorporated business or engaged independently in a profession or trade and hires no employees.
>
> *Owner manager:* A person who works in his or her own incorporated or unincorporated enterprise.
>
> *Self-employed:* An employed person who operates his or her own business without employees and supplies labour services on an explicit or implicit commercial contract basis.
>
> *Self-employed contractor:* A person who provides his or her own labour services by way of a commercial contract.
>
> *Worker:* Any person, including contractors, who provides his or her labour in return for remuneration.

That last definition puts the whole question of workplace arrangements into proper perspective. For it is the *worker* who needs to be protected, rather than any particular *form of work*. Union efforts to combat sham contracting arrangements are not an attack on the system of genuine contracting. In

fact, these efforts protect genuine contractors against unfair competition from sham operators.

In the building and construction industry, the distinction between 'employee' and 'self-employed contractor' is often highly artificial. It is made purely for reasons of cost reductions (by the employer) and taxation advantages (for the worker).

The *Final Report of the Royal Commission into the Building and Construction Industry* referred to uncertainty about the meaning of 'employee' in this industry:

> 'The traditional common law definition of the term 'employee' has been affected by statutory definitions adopted for various purposes. This has led to uncertainty, particularly in the building and construction industry where there is a significant group of labour-only contractors. Working arrangements constantly raise the question of whether a person is an 'employee'. There have been calls for a uniform definition of 'employee'. Whilst a definition for all purposes is impractical, a uniform definition for employee entitlement purposes would be of assistance in the building and construction industry in which major contractors operate nationally.'[39]

This matter was not addressed in *Building and Construction Industry Improvement Act 2005*, and 'employee' in this industry has the same definition as 'employee' under the WR Act. Therefore, the uncertainty mentioned by the Royal Commissioner continues.

The Independent Contractors Bill defines a "Services contract" as a contract for services:

(a) to which an independent contractor is a party; and
(b) that relates to the performance of work by the independent contractor; and
(c) that has the requisite constitutional connection (i.e., at least one party to the contract must be a constitutional corporation, or a Commonwealth authority, or a body corporate).

The term "independent contractor" is not limited to a natural person.[40]

The IC Bill (and the complementary *Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006*) import the common law meanings of employment and independent contracting. This is spelt out in Schedule 1 of the WR Amendment Bill, which notes that the common law relies on the multi-factor (indicia) test to make the distinction between employment and independent contracting. The Schedule refers to the leading HCA authorities, and states:

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[39] p.140
[40] s.4

> 'The indicia test operates by looking at the totality of the relationship between the parties, including, not only any written contract between the parties, but also implied terms and the conduct of the parties. The courts have also demonstrated a willingness to look beyond the "labels" parties may apply to their contracts in determining the true nature of the relationship.'[41]

Accordingly, the Bill does not change the current meanings of employee and contractor, as interpreted by the courts. That is fair enough, provided the courts do not re-interpret the boundaries of contracting and employment. Every time the courts have shifted the boundaries, employers and their advisers have set out to devise ways and means of excluding more workers from the entitlements afforded to employees. The current multi factor test is an appropriate one when consistently applied, and it would be undesirable to encourage any extension of sham contracting by watering down the test.

The ILO Recommendation [2006] states that members should consider the possibility of defining in their laws and regulations, or by other means, specific indicators of the existence of an employment relationship.[42] Inclusion of the indicia test in the Bill is desirable, as it would provide greater certainty and stability, and would assist potential contracting parties to avoid unlawful arrangements. At the same time, the *Income Tax Assessment Act* should be amended to include a stronger personal services income test in relation to alienation of personal services income.

Settlement of disputes

The ILO Recommendation [2006] states:

> 'The settlement of disputes concerning the existence and terms of an employment relationship should be a matter for industrial or other tribunals or arbitration authorities to which workers and employers have effective access in accordance with national law and practice.'[43]

This is an area where the existing State legislation is clearly superior to the IC Bill. As previously mentioned in this submission, specialist industrial tribunals have a more intimate knowledge of working arrangements than the courts. Workers and employers have easier access to an IR tribunal, and it is generally less expensive. For many participants in the building and construction industry, this will determine whether or not they are able to ventilate their disputes over contracts. If workers have to go to court, with all the attendant delays, representational requirements and costs, most will choose to 'cut their losses and run'.

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[41] WR Legislation Amendment (Independent Contractors) Bill 2006, Schedule 1, par 3.
[42] *II. Determination of the Existence of an Employment Relationship*, par 13
[43] *II. Determination of the Existence of an Employment Relationship*, par 14

If the Government really wants to provide contractors with greater protection from exploitation, then the IC Bill should provide for disputes arising from contracts or purported contractual arrangements to be dealt with a low cost, easy access federal tribunal. Relevant State/Territory laws should continue to operate to ensure blanket protection for all contractors.

Security of payments

The *Final Report of the Royal Commission into the Building and Construction Industry* refers to the payment problems faced by many subcontractors in the industry:

> 'Security of payments was raised with the Commission during the public hearings, in meetings that I held with interested parties. In interviews conducted by Commission investigators, and in submissions to the Commission. It quickly became apparent that it is an issue that critically affects the ability of participants in the industry to make a living, and to be rewarded for work that they have performed. During the course of their investigations, Commission investigators were repeatedly told of the suffering and hardship caused to subcontractors by builders who are unable or unwilling to pay for work from which they have benefited. The subcontractors who experience payment problems are often small companies or partnerships. Frequently they do not have the expertise or resources to enforce their legal rights, because enforcement would require protracted litigation against much better resourced and more sophisticated companies. Consequently, subcontractors that have operated profitably and well for many years can be forced into liquidation through no fault of their own, often with devastating consequences for the owners of these businesses, their families, their employees and their creditors.'[44]

The Royal Commissioner recommended that the Commonwealth enact a Building and Construction Industry Security of Payments Act in a form appended to its Final Report.[45] The Government has not acted on that recommendation. Whilst the CFMEU does not necessarily agree with the terms contained in the Royal Commissioner's draft Act, that draft clearly demonstrates the need for comprehensive legislation to protect independent contractors from the abuses which persist in this area.

It is apparent that the Independent Contractors Bill will do nothing to improve the security of payments for contractors in the building and construction industry. Enforcement requires 'protracted litigation against much better resourced and more sophisticated companies.' Subcontractors in this industry simply do not have the time, let alone the resources, to pursue legal remedies for non-payments. They do not have 'effective access' to the law, as contemplated by the ILO Recommendation [2006].

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[44] p.115
[45] Volume 8, pps 263 & 269

Rogue employers know this, and deliberately set out to take advantage of the contractors. Prior to the introduction of draconian penalties against workers for taking industrial action, many overdue payments to which contractors were legally entitled were promptly secured by the action of ordinary employees who sympathized with the contractors' plight. Now, the only avenue available to independent contractors is expensive, protracted litigation.

Representational rights and collective bargaining arrangements

Independent contractors should be free to choose any person or organization to represent them in matters arising under this Bill and other relevant legislation.

As in most employer/employee relationships, larger businesses have far greater bargaining power than the contractors who provide services to them. For some years small businesses have (in theory) had the ability to bargain collectively. However, that involves an expensive and time-consuming authorization process under the Trade Practices Act, and no authorizations appear to have been issued to self-employed contractors in the building and construction industry.

In 2003 the Government released the Dawson Committee's review of Part IV of the *Trade Practices Act*. The Government accepted most of the Committee's recommendations, which included recognition of the unique nature of small business by allowing the sector to collectively bargain using a streamlined procedure. The *Trade Practices Amendment Bill 2004* provided that third parties could make a collective bargaining notification on behalf of a group of businesses.[46] There were no restrictions on who that third party could be.

However, the *Trade Practices Legislation Amendment Bill 2006* provides that a collective bargaining notice is not valid if it is given on behalf of the notifying corporation by a trade union, or an officer of a trade union, or a person acting on the direction of a trade union.[47] That is an extraordinary curtailment of the rights of independent contractors to choose their representatives, and of the rights of trade unions to represent their members. Contractors are legally entitled to enroll for membership of the CFMEU. Many contractors are members. Under the TPLA Bill they can be represented by an employer organization, with the obvious potential for a conflict of interest. But the only person or body that is not allowed to represent them is a trade union or union officer, etc. Besides being discriminatory, it makes third party representation impractical for many subcontractors in the building and construction industry. This issue cannot be divorced from the Independent Contractors Bill.

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[46] s.93AB(7)
[47] s.93AB(9)

The IC Bill provides for an application to be made to the Court to review a services contract on either or both of the grounds that the contract is unfair or harsh.[48] An application may only be made by a party to the services contract.[49] Whilst this does not exclude any person or organization from providing advice and representation for an applicant, it may operate to prevent an application being made by a third party on behalf of a party to the contract. Moreover, s.13 provides that an application to review a services contract must not be made in circumstances prescribed by the regulations. No regulations have been issued, but this provision has the potential to allow for the arbitrary intervention by the Minister. For example, regulations could be issued to prevent a trade union from representing a contractor in proceedings concerning unfair contracts.

The CFMEU and its predecessor trade unions have for many years represented various classes of tradespersons and other building workers in collective bargaining negotiations and other work-related matters. The union has the necessary expertise to represent workers, and workers have the necessary confidence in the union to represent their interests. Irrespective of whether their working arrangements are based on employment or genuine contracting, the union should not be precluded from representing them in any matter, including collective bargaining under the *Trade Practices Act*.

In the building and construction industry, many contractors move between employment and contractual arrangements, and are ongoing union members. They naturally seek advice and assistance from the union on contracting matters. It cannot be seriously claimed that the Government is legislating to protect the freedom of contractors, if contractors cannot freely choose who will represent them in any matter that affects their interests as workers.

Conclusion

A national legislative framework which recognizes and validates the working rights of employees and independent contractors is desirable. However, Commonwealth legislation in this area should not over-ride State/Territory laws. Rather, there should be harmonization of federal/state/territory laws.

Notwithstanding the commercial nature of genuine independent contracting, the *Independent Contractors Bill 2006* deals with workplace matters which could appropriately be regulated by the *Workplace Relations Act*. Whilst the CFMEU would not wish to add to the complexity of the WR Act, and strongly disagrees with many of the provisions of that Act, we believe that all workplace arrangements should be regulated by the same legislative instrument. Accordingly, we do not see the need for separate independent contractors legislation.

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[48] s.12(1)
[49] s.12(2)

In the likely event that the present Government disagrees with that view, we would draw attention to the principles contained in the ILO Recommendation of June 2006, - *'Protection for Workers in an Employment Relationship'*. These principles should be incorporated into the *Independent Contractors Bill* (and indeed, into the *Workplace Relations Act*).

Security of payments should also be comprehensively addressed in any legislation concerning independent contracting.

As there are situations where it is difficult to characterize a working arrangement, and as there is a need for ongoing certainty about the appropriate test, the IC Bill should prescribe the multi-factor (indicia) test currently applied by the courts. The Bill should also incorporate a simplified 80:20 test.

The Bill should expressly state that an apprentice can never be an independent contractor. Likewise, the holder of a subclass 457 visa, or similar visa, should always be treated as an employee, and not as an independent contractor.

The Bill and/or the relevant superannuation legislation must ensure that compulsory superannuation contributions are made by or on behalf of all independent contractors.

Appropriate legislation should be introduced to ensure that there is equality of taxation for employed and self-employed workers, for example, by allowing employees to make the same deductions as contractors, and to be taxed at the same rate.

The 'sham arrangements' amendments to the WR Act should be strengthened by placing a heavier burden of proof upon an employer who misrepresents an employment situation. Further, it should be sufficient to establish a breach of the dismissal provisions if a purpose (rather than the sole or dominant purpose) of the dismissal or threat is to engage the worker as an independent contractor.

The IC Bill and the Trade Practices Act should provide that an independent contractor can be represented in any matter by a person or organization of the contractor's choice. Section 93AB(9) of the *Trade Practices Amendment Bill 2006* should be amended to ensure that contractors have the freedom to choose a trade union to make collective bargaining arrangements on their behalf.

The Government should reconsider the role that the AIRC could play in regard to the settlement of disputes about contracts, including unfair contracts. The AIRC would provide a quicker, more accessible, and less expensive option for self-employed contractors.

Finally, the CFMEU urges the Committee to recommend that the Bills not be passed. Before Parliament gives this matter any further consideration, the Government should establish a forum which includes *'the most representative organizations of employers and workers on an equal footing'* (as per the ILO Recommendation), DEWR, and representatives of the Australian Tax Office. The forum should consider ways and means of harmonizing the various Commonwealth, State and Territory laws which currently impact upon employment and independent contracting. In particular, the forum should be asked to make recommendations concerning an appropriate national policy for protection for workers, consistent with the ILO Recommendation.

Table: Comparison of ILO Recommendation with National Legislation

ILO Recommendation	Independent Contractors Bill/ WR Act
1. Members should formulate and apply a national policy ... in order to guarantee effective protection for workers who perform work in the context of an employment relationship.	Effective protection for workers in an employment relationship has been generally reduced by Work Choices. Sham contracting arrangements in WRLA(IC) Bill have too many loopholes to be effective.
2. The nature and extent of protection given to workers in an employment relationship should be defined by national law or practice, or both, taking into account relevant international labour standards. Such law or practice ... should be clear and adequate to ensure effective for protection for workers in an employment relationship.	As this Table indicates, the relevant ILO standards have not been taken into account in the WR Act and IC Bill.
3. National policy should be formulated and implemented in accordance with national law and practice in consultation with the most representative organizations of employers and workers.	Trade union organizations have not been consulted. The Government is openly hostile to trade unions, and generally ignores whatever views they express.
4(a). National policy should at least include measures to 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.	The common law meanings of employment and independent contracting have been imported into the proposed provisions. While these do provide guidance, there is no certainty as to how the courts will apply the common law test to a particular workplace situation.
4(b). National policy should at least include measures to 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 situations can arise where contractual arrangements have the effect of depriving workers of the protection they are due.	The only measures proposed are the sham contracting provisions of the WRLA (IC) Bill. As mentioned above, these provisions contain too many loopholes to be effective.
4(c). Ensure standards applicable to all forms of contractual arrangements, including those involving multiple parties so that employed workers have the protection they are due.	No standards are prescribed for workers on independent contracting arrangements. Proposed regime constitutes incentive for employed workers to lose their protections by being re-engaged as contractors.
4(d). Ensure that standards applicable to all forms of contractual arrangements establish who is responsible for the protection contained therein.	No standards prescribed for independent contractors. Court may only review unfair/harsh contract.
4(e). Provide effective access of those concerned, in particular employers and workers, to appropriate, speedy, inexpensive, fair and efficient procedures and mechanisms for settling disputes regarding the existence and terms of an employment relationship.	No speedy, inexpensive and efficient procedures for settling such disputes. Access to Court does not constitute 'effective' access for workers with limited resources.
4(f). Ensure compliance with, and effective application of, laws and regulations concerning the employment relationship.	Under IC Bill, limited powers of Workplace Inspectors exercisable only in relation to contract outworkers in TCF industry.

4(g). Provide for appropriate and adequate training ... for the judiciary, arbitrators, mediators, labour inspectors, and other persons responsible for dealing with the resolution of disputes and enforcement of national employment laws and standards.	While not specifically provided for in this legislation, appropriate and adequate training is available and has been undergone in most cases. The exception being some blatant political appointments.
5. Ensure effective protection to workers especially affected by the uncertainty as to the existence of an employment relationship, including women workers, as well as the most vulnerable workers, young workers, older workers, workers in the informal economy, migrant workers and workers with disabilities.	No specific protection for such workers.
6(a). Take special account to address the gender dimension in that women workers predominate in certain occupations and sectors where there is a high proportion of disguised employment relationships, or where there is a lack of clarity of an employment relationship.	No special account taken to address the gender dimension in respect of women workers in such occupations.
6(b). Have clear policies on gender equality and better enforcement of the relevant laws and agreements at national level so that the gender dimension can be effectively addressed.	Not specifically covered in this legislation. *Sex Discrimination Act 1984* is relevant, and the Office for Women contributes to national policies. There is little evidence that this results in better enforcement.
7(a). After consulting the most representative organizations of employers and workers ... provide effective protection to and prevent abuses of migrant workers who may be affected by uncertainty as to the existence of an employment relationship.	Trade unions not consulted. No effective protection of migrant workers under present and proposed laws.
7(b). Where members are recruited in one country for work in another ... consider concluding bilateral agreements to prevent abuses and fraudulent practices which have as their purpose the evasion of the existing arrangements for the protection of workers in the context of an employment relationship.	No such bilateral agreements. On the contrary, free trade agreements are giving rise to pressures to relax the ineffective protections that currently exist.
8. National policy for protection of workers in an employment relationship should not interfere with true civil and commercial relationships, while at the same time ensuring that individuals in an employment relationship have the protection they are due.	True civil and commercial relationships have never suffered interference from laws which protect workers in an employment relationship. IC Bill does not alter that situation.
9. The determination of the existence of [an employment 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.	That is how the common law test is meant to operate. The Bills do not specifically address the question of how the relationship is characterized by the parties.
10. Promote clear methods for guiding parties as to the determination of the existence of an employment relationship.	The Bills contain no clear method.

11(a). [For the purpose of determining the existence of an employment relationship], allow a broad range of means for determining the existence of an employment relationship.	The indicia under the common law test constitute a broad range. However, it is arguable that this is an insufficiently broad range.
11(b). [For the purpose of determining the existence of an employment relationship], provide for a legal presumption that an employment relationship exists where one or more relevant indicators is present.	The common law test does not provide for that legal presumption.
11(c). [For the purpose of determining the existence of an employment relationship], workers with certain characteristics, in general or in a particular sector, must be deemed to be either employed or self-employed.	The IC Bill eschews deeming provisions, and over-rides the State deeming provisions that currently exist.
12. Clearly define the conditions applied for determining the existence of an employment relationship, for example, subordination or dependence.	The IC Bill contains no such definitions.
13(a). [Define in laws and regulations] specific indicators, including the fact that the work: is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials and machinery by the party requesting the work.	The relevant laws and regulations do not define specific indicators. The common law test is narrower than the one proposed in this ILO recommendation.
13(b). {Define and laws and regulations] specific indicators, including: period payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker.	As above.
14. The settlement of disputes concerning the existence and terms of an employment relationship should be a matter for industrial or other tribunals or arbitration authorities to which workers and employers have effective access in accordance with national law and practice.	Settlement of such disputes is exclusively a matter for the courts. The Bills strip State industrial tribunals of their powers in relation to unfair contracts, etc.
15. Adopt measures with a view to ensuring respect for and implementation of laws and regulations concerning the employment relationship ... for example, through labour	Workplace Inspectors have limited powers, and there is an insufficient number of inspectors in the federal jurisdiction. There is little co-ordination and collaboration

inspection services and their collaboration with the social security administration and the tax authorities.	between the various government agencies. The Bills do nothing to improve that situation.
16. In regard to the employment relationship, national labour administrations and their associated services should regularly monitor their enforcement programmes and processes. Special attention should be paid to occupations and sectors with a high proportion of women workers.	There is no legislation to ensure that such monitoring occurs on a regular basis.
17. Develop ... effective measures aimed at removing incentives to disguise an employment relationship.	No effective measures exist, nor are they proposed by the Bills.
18. Promote the role of collective bargaining and social dialogue as a means, among others, of finding solutions to questions related to the scope of the employment relationship at the national level.	Collective bargaining has been undermined by Work Choices. Individual workplace agreements and contracts are promoted at the expense of collective bargaining.
19. Establish an appropriate mechanism, or make use of an existing one, for monitoring developments in the labour market and in the organization of work, and for formulating advice on the adoption and implementation of measures concerning the employment relationship within the framework of the national policy.	No such mechanism exists, and none is proposed.
20. The most representative organizations of employers and workers should be represented, on an equal footing, in the mechanism for monitoring developments in the labour market and the organization of work. In addition, these organizations should be consulted under the mechanism as often as necessary and, wherever possible and useful, on the basis of expert reports or technical studies.	Current federal government policy excludes trade unions from any real representation and consultation.
21. Members should, to the extent possible, collect information and statistical data and undertake research on changes in the patterns and structure of work at the national and sectoral levels, taking into account and distribution of men and women and other relevant factors.	Limited research is carried out by bodies such as the Productivity Commission, but this is done on an irregular basis.
22. Establish specific national mechanisms in order to ensure that employment relationships can be effectively identified within the framework of the transnational provision of services. Consideration should be given to developing systematic contact and exchange of information on the subject with other States.	No such mechanisms exist. Contact with other States is generally limited to ILO forums.

(End of submission).