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# 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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## LHMU SUBMISSION – INDEPENDENT CONTRACTORS

### INTRODUCTION

1. The Liquor, Hospitality and Miscellaneous Union (LHMU) is a diverse union with membership and industrial coverage across a wide range of sectors and industries, including in hospitality and tourism, community services and health, contracting services such as cleaning, catering and security, and in manufacturing.
2. The LHMU has considerable experience in contracting industries – particularly in cleaning, security and catering where markets are volatile and contracts regularly change hands. Much of our work in these sectors is directed at protecting and defending the rights of employees of contracting companies.
3. Our experiences include defending members against attempts by their employers to force them into independent contractor arrangements. The leading case of *Damevski v Giudice* ([2003] FCFC 252) cited at p. 10 of the Explanatory Memorandum accompanying the *Independent Contractors Bill 2006*, was illustrative of the unreasonable pressure sometimes placed on vulnerable employees by unscrupulous employers.

### THE DAMEVSKI CASE

4. The LHMU funded the successful application to the Federal Court (on remittal from the High Court) for a writ of certiorari to issue to the Australian Industrial Relations Commission quashing a Full Bench decision refusing leave to appeal against a decision of a single member of the Commission that the Commission did not have jurisdiction to hear and determine an application by Riste Damevski for unfair dismissal. The Full Court of the Federal Court also issued a writ of mandamus to the Commission, directing it to hear and determine the unfair dismissal application according to law.
5. Riste Damevski was a Canberra cleaner. He commenced employment with a Canberra-based cleaning contractor, Endoxos Pty Ltd, in August 1998 and was a full-time employee on a variety of cleaning contracts held by Endoxos until 19 August 2001. As Marshall J determined:

[12] *On 19 August 2001, Mr Damevski “resigned” from his employment with Endoxos. Mr Damevski was given the “choice” by Endoxos to resign and “contract” his services to a company called MLC Workplace Solutions (“MLC”) or not be provided with any work by Endoxos....*

6. The letter setting out the “choice” was on Endoxos letterhead, dated 16 July 2001, and was reproduced in the judgment of Merkel J. Reluctantly, Damevski signed the pre-prepared “resignation” letter and resumed work the next day – doing exactly the same work, working with and accepting the same directions from the same supervisors, wearing the same uniform and driving the same car. Nothing had changed, except the identity of the company paying Damevski’s wages.

7. As Marshall J determined:

[50] *Mr Damevski was not a “bona fide” independent contractor who “did not wish to be bound by the constraints of the wages system”.*

8. In fact, the motivation for the forced resignation was Endoxos’ desire to “remove costs associated with its role as an employer (such as increases in public liability insurance premiums”<sup>1</sup>.

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<sup>1</sup> Per Marshall J, para [101]

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This motivation was articulated in May 2002 by one David Morphett, then the Workplace Relations Director of the ACT and Region Chamber of Commerce and Industry, in a newsletter to members of the ACT Contract Cleaners Guild (of which the managing director of Endoxos, Lindsay Burke, was president):

*The sub-contracting system used by Endoxos gives benefits to both the company and the workers. The company receives relief from workers compensation insurance premiums, long service leave levies, payroll tax, superannuation, and other employment related imposts, The worker, as an independent contractor, has a higher net take-home income than when he/she was an employee, and also receives additional financial and non-financial benefits such as significant tax advantages.*

9. Marshall J determined:

[58] *Mr Damevski was not carrying on a business of his own. In truth the relationship between Endoxos and Mr Damevski was one of mutual dependence and involved no-one else, other than MLC in a confined capacity which related entirely to the manner of effecting Mr Damevski's remuneration....*

10. The LHMU acknowledges that for some workers, becoming an independent contractor by choice will bring real benefits – for example, by giving them access to flexible work patterns and genuine choice in the work they undertake (or decline). Our concern is for employees – like Riste Damevski – who are given no effective choice; and who stand to lose access to statutory and award protections. While the Endoxos/MLC arrangement was found to be ineffective and was struck down by the Full Court, we suspect that more sophisticated legal advisors will by now have found new schemes designed to achieve the true aims of that failed scheme – the relocation of employment-related “imposts” from employers to workers<sup>2</sup>.

### THE CONTENTS OF THE BILLS

11. In light of its experiences with Endoxos and similar cases, the LHMU does not accept the premise of the *Independent Contractors Bill* that independent contracting has grown in Australia as a result of workers making a free choice to become self-employed. We acknowledge that genuine choice has been made by some workers, but our experience is that in many other cases, the “choice” has been a forced one.

12. The LHMU is particularly concerned that the Bill intends to remove State legislative safeguards for workers who are vulnerable to coercion and to unfair “contracting” arrangements. In our view, this will accelerate the growth of *dependent* contracting.

13. The LHMU acknowledges that the legislative package includes new penalties for employers who coerce employees into accepting sham contracting arrangements. In addition, the *Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006* will impose civil penalties on employers who misrepresent an employment relationship as an independent contracting relationship; who dismiss an employee in order to re-engage the person as an independent

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<sup>2</sup> See the observation of the Victorian Government in its May 2005 submission to the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation inquiry into Independent Contracting and Labour Hire Arrangements:

“... a close reading of the *Damevski* decision indicates that with the benefit of hindsight it would not have been difficult for *Endoxos* to tweak the arrangements to ensure that the cleaners were found to be independent contractors. In this case, the fact that the primary motivation remained to avoid employment entitlements would be irrelevant. (at p. 36)

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contractor doing the same work; and who knowingly make false statements with the intention of persuading a person to alter their status.

14. While the LHMU accepts these new penalties as a positive step, it is concerned that victims of coercion do not have an effective remedy – by way of injunction or access to an order for reinstatement.

15. When seen in light of the new limitations imposed on the Commission’s unfair dismissal jurisdiction – notably, those imposed by sections 638 and 643 of the *Workplace Relations Act 1996* – the opportunity for redress will be limited to those (former) employees who can craft an action for unlawful termination (see section 793 of the *Workplace Relations Act*).

### CONCLUSION

16. The LHMU submits that the Committee should consider ways for employees who are victims of such coercion to have access to speedy and low-cost redress – including the right to have themselves placed in the position in which they were before the offensive conduct. The Committee should also consider recommending the retention of State legislative protections for wronged employees.

17. The LHMU is an affiliate of the Australian Council of Trade Unions and adopts and supports the submission to this inquiry from the ACTU, and the recommendations made therein.