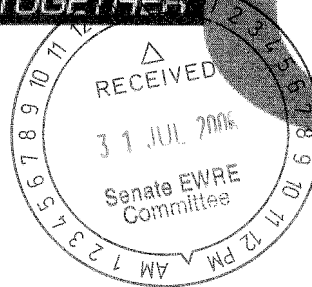


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BILL SHORTEN
National Secretary

Mr John Carter
Committee Secretary
Senate Employment, Workplace Relations and Education Committee
Department of the Senate
Parliament House
CANBERRA ACT 2600

31 July 2006

Dear Mr Carter

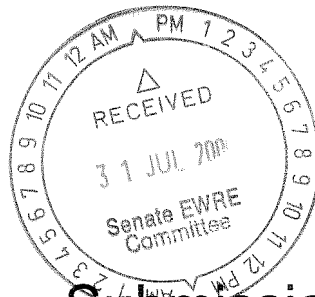
Re: **Inquiry into the provisions of the Independent Contractors Bill
2006 and Workplace Relations Legislation Amendment
(Independent Contractors) Bill 2006**

Please find enclosed a submission from the Australian Workers' Union in response to the above inquiry by the Senate Employment, Workplace Relations and Education Legislation Committee.

I would also like to offer the opportunity to address the committee in person regarding the issues raised in this submission, and be available for any questions that the committee may wish to ask on these vital matters.

Yours in Unity,

BILL SHORTEN
National Secretary



Submission

to

Senate Employment, Workplace Relations and Education
Legislation Committee

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

Submitter: Bill Shorten
National Secretary

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Independent Contractors Bill 2006

Purpose of the Bill

The Senate has referred to its Employment, Workplace Relations and Education Legislation Committee an inquiry into provisions of the Independent Contractors Bill 2006 (IC Bill) and the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006. The committee is expected to report on 25 August 2006.¹

This legislation is intended to allow independent contractors to enter into commercial arrangements outside the framework of workplace relations laws. Through the exercise of the Corporations Power, the Independent Contractors Bill **overrides state and territory laws** where they are in conflict with this bill, but continues the operation of state laws which protect owner-drivers in the road transport industry in New South Wales and Victoria and outworkers in the clothing and textile industry. The IC Bill also provides for new contract review processes. Amendments to the Workplace Relations Act 1996 are required as a consequence of the IC Bill, and provide for, among other things, penalties for bogus contract arrangements.

The Independent Contractors Bill 2006 and the Workplace Relations Amendment (Independent Contractors) Bill 2006 were tabled in Parliament on 22 June, 2006.

What is being proposed?

The principal Bill legislates for independent contractors to be regulated under commercial laws and institutions rather than being subject to any form of regulation under employment law. The objects of the Act are to protect the freedom of independent contractors to enter into services contracts, to recognise independent contracting as a legitimate form of work arrangement that is primarily commercial, and to prevent interference with the terms of genuine independent contracting arrangements. The secondary Bill amends the Workplace Relations Act and legislates for penalties for sham arrangements.

The AWU recommends that the Bill be rejected for reasons set out below:

Key points:

- The Government claims that it supports more flexible work arrangements but nothing in the Bill in fact assists flexibility over and above existing arrangements.
- Nothing currently stands in the way of individuals seeking out independent arrangements should they choose to do so. Minister Andrew's second reading speech acknowledges this referring to the increasing incidence of

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independent contractor type arrangements with numbers ranging from 800,000 to 1.9 million.²

- Of the million Australians currently deemed 'contractors', University of Melbourne research³ suggests up to 40 per cent do all their work for one boss - they are 'dependent contractors'⁴ not 'independent' entrepreneurs. A dependent contract is one where one party is not truly independent, and work under the contract is in reality performed in a similar way to work under a contract of employment⁵. Compared to truly independent contractors these workers tend to be those who are more vulnerable in the labour force - they work in lower skilled occupations⁶; are young⁷; and female⁸.
- The Bill is really designed to provide an opportunity for employers to designate employees as independent contractors and thereby reduce the entitlements of the employees and the financial obligations of employers. Protections under the legislation like under the WorkChoices legislation will not deter employers from such practices as the incentives will be too great.
- Like the Government's flawed AWA's which are now enshrined in the WorkChoices legislation at the cost of all other workplace arrangements, in particular collective agreements, this legislation aims to make independent contractors the main category of employment in place of employees.⁹
- These laws are designed to break the link between labour law and contractors. It is this link that has provided some protection for workers forced from secure jobs onto sham contract arrangements in recent years. Is an independent contractor a small businessperson or a worker? The answer depends upon whether the contractor is genuinely 'independent' or not.
- By allowing contractors who are dependent on a single business for work to be 'deemed' as employees, industrial tribunals have ensured these workers have had access to superannuation, workers compensation and some legal recourse when treated unfairly. Under the legislation these rights are lost. Independent contractors will be by definition outside employment regulation and protections of industrial instruments such as awards, health and safety legislation, long service leave legislation and superannuation.
- Industrial tribunals lose the right to 'deem' contractors as employees and the unfair contracts jurisdiction is abolished, meaning any disputes have to go through the altogether more expensive avenues of Supreme Court action.
- The laws also continue the attack on unions. If you are contractor you will have no 'choice' about being represented by a trade union in negotiating a contract. You will be truly on your own.
- The law will force people into an unfair legal double bind. Unscrupulous employers could use the laws to shed staff and rehire them as contractors, avoiding their employment obligations. But under tax law,

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the contractors will remain employees, so they will be unable to claim the extra money they will be forced to spend on managing their own insurance, workers' compensation, superannuation and leave pay.

- The changes will not benefit small business. Larger businesses that held prime contracts would benefit, while small subcontractors would simply be forced to take on all the risk for no economic gain.¹⁰ Multiple groupings previously employees (hairdressers, gym instructors, etc.) are now being offloaded from employee status to relieve the employer of obligations. The people still do the same job for the same employer. Pay cuts are expected.¹¹
- Current protection for independent contractors will be swept away. These workers will be denied access to the Workplace Relations Act, industrial instruments such as awards, occupational health and safety legislation, long service leave legislation, superannuation and protection from unfair contracts.
- The Government will override state arrangements in an effort to seize further control of the industrial relations agenda.

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Key aspects of the Bill:

1) Removing protections provided by State IR laws (deeming provisions under state IR laws)

The Bill uses the Corporations Power to override state legislation which deems certain classes of contractors to be employees. The legislation provides for the removal of protections at the state level over a period of three years and at the conclusion of this three year period, state-based deeming provisions will cease to have effect. This will affect workers in NSW, QLD, SA and Tasmania.

Comment: Stripping state industrial commissions of their so-called deeming powers - which allow them to treat some independent contractors as employees - will result in a "race to the bottom", by creating an underclass of workers who come in and are paid less, and undercut those workers who are represented collectively.¹²

NSW Workplace Relations Minister Della Bosca has identified that the 'new' protections greatly diminished real protections contained in State and Territory laws for contractors such as building workers, cleaners and security guards. He points to the long-standing and well-established unfair contracts protections of the state (NSW) industrial jurisdiction which are lost, replaced by untried legislation and the more formalistic Magistrate's Court, with access for only 'genuine cases'.¹³ Where these workers and small business people had recourse to our industrial tribunals to settle disputes and recover unpaid wages or deal with unfair treatment, the Howard Government is cutting them free to look after themselves.¹⁴

2) Unfair contracts

The unfair contracts provisions which were formerly part of the Workplace Relations Act (Sections 832-834) have been transferred to the Independent Contractors Act. The legislation extends the jurisdiction of the Federal Magistrates Court to hear cases associated with dispute resolution of unfair contracts for service.

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The provisions contain a cap on damages of \$10,000.

Section 15(1)(a)-(c) provide for the relative strengths of the bargaining positions of the parties to the contract, for undue pressure, influence or unfair tactics used against a party, as well as the total remuneration of contractors compared to employees, to be taken into consideration.

Comment: With the Government deciding to rely on the Common law test of whether or not a worker is an employee or independent contractor, and the establishment of an unfair contracts jurisdiction in the Federal Magistrates Court, determining the status of employee versus independent contractor is likely to result in increased common law litigation. As outlined in an APESMA briefing note, drawbacks include expense, length and the extent of complex legalistic argument required to argue these matters. Pursuing an action means applicants may be subject to a costs order.¹⁵

3) Voluntary code of practice

The Government has indicated that DEWR will have a key role in developing a voluntary code of practice for independent contracting.

Comment: Self-regulation has failed in a number of other cases, including in the regulation of media standards and mines safety. This case is expected to be no exception.

4) Common law definition

The legislation has not defined independent contracting beyond its meaning under common law.

Comment: The Bill is likely to impact on both contractors and employees and is likely to mean further uncertainty, greater reliance on common law litigation, and reduced protection for the increasing number of independent contractors and consultants.

A recent University of Melbourne study found that up to 400,000 workers currently classified by the Government as 'independent contractors' are actually employees that do all their work for the one employer or client. The study found that as many as four out of every ten contractors are 'dependent' not 'independent'. The Independent Contractors Bill does not solve the problem of defining and more importantly protecting these individuals who are at the

intersection of employment and commercial law, and will simply allow more employers to avoid their responsibility for paying superannuation, workers compensation, annual leave and other basic entitlements.

Those covered by state deeming provisions - which aimed to provide protections for "dependent" contractors working largely for a single client by regulating for such items as workers compensation and superannuation - will have these protections removed over a three-year period.

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5) Occupational health and safety

The legislation is silent on the obligations of labour suppliers and host employers' responsibilities for occupational health and safety.

Comment: This is a major concern with wide-ranging implications for employees, contractors and the broader community. This is a major shortcoming of the legislation as it adds to the assault by WorkChoices on OHS training, in particular, training provided by unions, proscribed under that legislation.

6) Protections retained for outworkers and owner-drivers

The legislation retains protections for textile and clothing outworkers who will be deemed to be employees. The Bill provides for a default minimum rate of pay for contract outworkers. In addition, the status of transport industry owner-drivers - responsible for about 75% of all interstate road freight¹⁶ - will be protected on the basis that while they may be engaged by a single client, their income is derived from their truck or vehicle rather than labour or skills. The Government has signalled its intention to review these arrangements in 2007 with a view to national uniformity and has indicated that it does not intend to replicate these exclusions for any other parties.

Comment: Outworkers in the textile industry and transport industries have won exemption from the laws for time being, following effective lobbying of the Coalition back bench. The question must be asked, if these laws are bad for outworkers and truckies, why aren't they bad for everyone? ¹⁷ There is little protection afforded for others including professionals.

7) Interface with WorkChoices legislation

Work Choices overrides a decision by the Australian Industrial Relations Commission last year that industrial agreements could include a restriction on the proportion of contractors used, and a requirement that contractors be offered permanent employment under certain circumstances.

Under Section 515 of the Workplace Relations Act, restrictions on the engagement of independent contractors and requirements relating to the conditions of their engagement, and restrictions on the engagement of labour

hire workers, and requirements relating to their engagement, became non-allowable award matters.

The secondary Bill amending the Workplace Relations Act provides for penalties for employers who "disguise" employees as independent contractors, coerce them into operating as independent contractors or who make false statements to employees to persuade them to accept contracting arrangements.

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The Bill amending the Workplace Relations Act 1996 provides for the Office of Workplace Services to investigate and prosecute sham independent contracting arrangements with offenders exposed to civil penalties. The penalty for misrepresenting an employee relationship as a contracting arrangement is a maximum \$33,000 for a body corporate and \$6,600 for an individual. Employers will bear the onus of establishing that the sole or primary purpose of dismissing an employee was not to re-engage them as a contractor.

Comment: With the WorkChoices legislation outlawing any regulation or restrictions on the use of contractors or labour hire workers by employers, there will be an impact on the security of employment for collectively represented employees whose salaries and conditions of employment may be undercut.

According to the national legal Officer of the APESMA, Joseph Kerr, "The Bill creates an entire different class of workers, and the normal rules do not apply to these people.

"This legislation has the potential to create an underclass of workers who come in and are paid less, and undercut those workers who are represented collectively."¹⁸

In addition, the degree to which the Office of Workplace Services will be transparent and open to public scrutiny is yet to be demonstrated.

The new measures in the Bill will require expensive and complex litigation, beyond the reach of most ordinary independent contractors.

8) Alienation of Personal Services Income legislation (PSI)

The Alienation of Personal Services Income legislation which became effective on 1 July 2000 removed most of the potential tax advantages for personal services contractors. Independent contractors must cover expenses such as salary continuance or income protection, superannuation, professional indemnity insurance themselves, but they are not necessarily regarded by the ATO as determinants of whether contractors are operating a personal services business.¹⁹

While the PSI legislation was intended to prevent individuals who generate income from their personal services from reducing their liability to taxation by

diverting income through a company, partnership or trust, the legislation and related ATO Rulings saw the ATO denying personal services business status and therefore legitimate business deductions to many professionals operating as independent contractors including professional engineers and IT professionals.

Comment: The PSI legislation has had the unintended consequence of denying access of legitimate contractors to business deductions on the basis that they work to a single client for a period of time greater than 12 months and did not therefore pass the 80/20 income test while at the same time engaging in commercial arrangements which did not allow them to pass the results test. The lack of understanding of the legislation amongst those who may in future choose to operate as independent contractors is a major concern.

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For example, professionals legitimately operating as independent contractors may gain multiple or ongoing contracts with a single client, and may undertake major infrastructure projects over a period of three to five years. These individuals are penalised under the PSI legislation. The extent of individuals including professionals affected by this contradiction is likely to increase with the introduction of the Independent Contractors Bill. The Government has not satisfactorily resolved this issue but has provided the legislative basis for potentially thousands of workers to move into independent contracting.

9) Professional development and the skills shortage

Independent contractors will be responsible for their own professional development.

Comment: Skills development and training levels may fall, compounding an already critical skills shortage in a range of industries.

Fresh concerns about the shortage of skilled technology workers have surfaced. Universities across the country are being forced to cull academic staff after declines in student enrolments in IT courses. Enrolments have fallen by up to 48 per cent at some universities in the past five years, while demand for IT skills has continued to climb.²⁰

Meantime....

- o India turns out 110,000 IT professionals every year;
- o China produces 600 000 engineering graduates every year;
- o And together, they produce four million new graduates annually.²¹

This will mean that the Australian economy will be even more import dependent for ICT products and services. Business investment in ICT is already below the OECD average. This is why the ACS is calling for swift action in the wake of the latest ICT Trade Update, which reveals that Australia's balance of trade in ICT

products and services has fallen to a deficit of \$19 billion, representing an increase of 3.7 per cent in the past 12 months and highlighting our heavy and growing dependence on imported technology and associated services.²² Only Kim Beazley and Labor appear to be listening.²³

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10) Diminishing tax revenue

The movement of many workers across to independent contracting brings with it difficulties in the form of diminished tax revenues for Government.

APESMA concurs with Professor Andrew Stewart from Flinders University who in July last year asked the question - does the Government really want thousands of workers to suddenly "self-declare" as contractors?²⁴

The Government has 'given away' all of its windfall gains in revenues from the resource boom, through tax cuts and ad hoc spending without really creating anything of lasting value. At the same time the household savings ratio was negative again in the March quarter 2006 (-2.6 per cent) as household consumption continues to outstrip household disposable income since the March quarter 2002.²⁵

11) Retirement savings

Independent contractors will be responsible for their own superannuation planning.

Comment: Retirement savings may be negatively affected at a time when there is record dissaving in the community.

Conclusion

The AWU is opposed to regressive labour market deregulation which seeks to remove or override mechanisms currently in place to ensure that persons within disguised employment relationships have access to the protections they are due. The AWU shares concerns expressed by other unions, including APESMA²⁶ and oppose employers contriving to place segments of workers outside the framework of standard employment protections, rights and benefits. That view is also shared by the ILO.²⁷ We are committed to industrial regulation in cases where employers are attempting to avoid their employment obligations by way of artificial or contrived arrangements which may be specifically designed to place workers outside the regulatory protective framework.

With the WorkChoices legislation outlawing any regulation or restrictions on the use of contractors or labour hire workers by employers, there will be an impact on the security of employment for collectively represented employees whose salaries and conditions of employment may be undercut. Independent contractors will be by definition outside employment regulation and protections of industrial instruments such as awards, health and safety legislation, long service leave legislation and superannuation.

Continuing uncertainty surrounding the definition of employee vs contractor and the complex litigation likely to arise from it, the lack of understanding and potential impact of the PSI legislation on the personal services business status of the growing number of contractors, the impact of diminishing tax revenue, declining participation in professional development activities and its potential impact on current skills shortages, the removal of State deeming provisions and the interface with WorkChoices legislation, are all of major concern to the AWU.

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What guiding principles should govern employment of independent contractors?:

The AWU broadly agrees with the following guidelines developed by APESMA²⁸, that contractors should be used by employers on the following conditions:

- the security of employment of employees is not to be prejudiced;
- contractors should not be used to meet developing work demands that are of a permanent and ongoing nature;
- contractors should not be used as a device to avoid delivery of training to permanent employees and the development of an in-house capacity to undertake the work;
- the relevant union/employee associations should be consulted before contractors are engaged;
- contractors should be required to comply, as a condition of engagement, with all relevant awards, enterprise agreements, legislation, codes of practice and quality standards;
- the engaging organisation should develop appropriate contract management skills of its permanent staff;
- in the event that a dispute arises over the engagement of contractors or in relation to a particular contract or contractor it will be resolved through an appropriate dispute settling procedure which includes provision for matters unresolved to be referred to the AIRC for settlement; and
- contractors themselves should be entitled to contract terms that are not harsh or unfair but which are based on the minimum entitlements under awards and
- enterprise agreements for permanent employees in the establishment doing the same or similar work.

July 2006

Endnotes

¹ http://www.aph.gov.au/Senate/committee/eet_ctte/contractors06/info.htm

² http://workers.labor.net.au/305/editorial_editorial.html

³ APESMA, CONNECT e-NEWS – June/July 2006,
http://www.apesma.asn.au/connect/newsletters/2006/news_jun_jul_2006.htm

⁴ Defined as employees who are operating under disguised employment arrangements which allow an employer to avoid costs arising out of employment obligations. See **Independent Contractors Act: employees to contractors - why is it an issue?**, by Kim Rickard <http://www.apesma.asn.au/employment/connect/ica/index.htm>

⁵ ~Waite and Will in Pocock, B *The Work/Life Collision*, (pVII) The Federation Press 2003 as reported in ACT Government Submission of the Minister for Industrial Relations to the House of Representatives Standing Committee on Family and Human Services Inquiry into Balancing Work and Family, <http://www.aph.gov.au/house/committee/fhs/workandfamily/subs/sub111.pdf>

⁶ Waite and Will Ibid P 46;

⁷ Waite and Will Ibid P 41;

⁸ Waite and Will Ibid P 41

⁹ http://workers.labor.net.au/305/editorial_editorial.html

¹⁰ <http://www.melbourne.indymedia.org/print.php?id=115581>

¹¹ A plasterer, who spoke to the Herald on the condition of anonymity yesterday, said he believed the law would lead to his pay being cut from just over \$47 an hour to about \$35. <http://www.melbourne.indymedia.org/print.php?id=115581> "The people who have the nous to negotiate might push it up to around \$35, \$38," he said. He rejected the Government's assertion that the laws would give small business people the freedom to expand their work., See Nick O'Malley, Workplace Reporter, *The Sydney Morning Herald*
Date: 23 June 2006, NEW LAW THREATENS PAY RIGHTS OF WORKERS

¹² **Association of Professional Engineers Scientists and Managers Australia**, national legal officer Joseph Kelly, Independent Contractors Act - where's the protection? As reported in an article in *Australian IT*, by Simon Hayes 2 May 2006

¹³ <http://www.industrialrelations.nsw.gov.au/whatsnew/a0c1dde0-2807-4837-8002-696da7c5b509.html>

¹⁴ As above

¹⁵ **Association of Professional Engineers Scientists and Managers Australia**
<http://www.apesma.asn.au/employment/connect/ica/index.htm>

¹⁶ *Australian Financial Review* (Kean Wong, 30 September)

¹⁷ <http://alertandalarmed.blogspot.com/2006/06/independent-contractors.html>

¹⁸ **Association of Professional Engineers Scientists and Managers Australia**, national legal officer Joseph Kelly, Independent Contractors Act - where's the protection? As reported in an article in *Australian IT*, by Simon Hayes 2 May 2006

¹⁹ Nick O'Malley, Workplace Reporter, *The Sydney Morning Herald*
Date: 23 June 2006, NEW LAW THREATENS PAY RIGHTS OF WORKERS

²⁰ **AFR 11 July Mark Jones and Rachel Lebihan Skills loss seen as risk to economy**
21 Turning Aussie Brilliance Into Dollars, Kim Beazley, Speech, **INNOVATION BLUEPRINT NUMBER SEVEN BRISBANE TECHNOLOGY PARK - 10th July 2006**, <http://www.alp.org.au/media/0706/speloo100.php>

²² Australian 11 July Denis Furini Services the key to trade deficit

²³ Turning Aussie Brilliance Into Dollars, Kim Beazley, Speech, **INNOVATION BLUEPRINT NUMBER SEVEN BRISBANE TECHNOLOGY PARK - 10th July 2006**, <http://www.alp.org.au/media/0706/speloo100.php>

²⁴ Independent Contractors Act - where's the protection?, <http://www.apesma.asn.au/employment/connect/ica/index.htm>

²⁵ ABS Cat No 5206.0: Australian National Accounts: National Income, Expenditure and Product, March 2006

²⁶ The Independent Contractors Bill will mean further uncertainty, ambiguity and, greater reliance on litigation to resolve contractor status, APESMA Acting CEO, Geoff Fary, <http://www.apesma.asn.au/employment/connect/ica/index.htm>

²⁷ In considering contracting and the employment relationship at its meeting in Geneva in June 2006, the International Labour Organisation resolved that while genuine commercial and independent contracting arrangements should not be interfered with, there is a need for mechanisms to ensure that persons within disguised employment relationships have access to the protection they are due. <http://www.apesma.asn.au/employment/connect/ica/index.htm>

²⁸ <http://www.apesma.asn.au/employment/connect/ica/index.htm>

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