

Submission

to

Senate Employment, Workplace Relations and Education
Legislation Committee

Inquiry into Independent Contractors Bill 2006

Submitter: Hon John Bowler JP MLA - Minister for Employment
Protection

Organisation: Government of Western Australia

Address: 19th Floor, 197 St George's Terrace, Perth WA 6000

Phone: (08) 9222 9699

Fax: (08) 9481 0223

Email: john-bowler@dpc.wa.gov.au

Introduction

1. The Western Australian (**WA**) Government has serious concerns with the *Independent Contractors Bill 2006 (IC Bill)*. If enacted in its current form, the IC Bill could affect:
 - (a) WA legislation which currently provides independent contractors in certain industries with security of payment;
 - (b) the proposed *Road Freight Transport Industry (Contracts and Disputes) Bill 2006*;
 - (c) outworker protections; and
 - (d) the WA Government's capacity to legislate future protections for independent contractors.
2. The WA Government submits that the IC Bill should not be proceeded with in its current form. As with its Work Choices legislation, the Federal Government failed to consult with the WA Government about the IC Bill. The IC Bill is another clear example of the Federal Government's disregard for cooperative federalism.

WA legislation which provides independent contractors with security of payment

3. The IC Bill could potentially affect WA legislation which currently provides independent contractors with security of payment, namely:
 - (a) the *Construction Contracts Act 2004 (Construction Contracts Act)*; and
 - (b) the *Industrial Relations Act 1979 (IR Act)*.
4. The Construction Contracts Act applies to construction contracts for the carrying out of construction work and related services. It also covers contracts for the provision of relevant professional services and the supply of goods and materials to construction sites.
5. The primary intention of the Construction Contracts Act is to prevent industry payment practices that would slow the flow of money through the contracting chain. The Construction Contracts Act does this by:
 - (a) prohibiting payment provisions in contracts that slow or stop the movement of money through the contracting chain;
 - (b) implying fair and reasonable payment terms into contracts that are not in writing; and
 - (c) providing an efficient adjudication process for payment disputes.
6. The Construction Contracts Act helps to provide certainty to contracting parties and has engendered good payment practices in the construction industry. It provides contractors with the necessary tools to be self-determining and commercially responsible. It is not the intention of the Construction Contracts Act to unduly

restrict the normal commercial operation of the construction industry. For example, the Construction Contracts Act does not prevent parties from accessing the civil courts or other forms of legal relief to resolve payment disputes.

7. Section 7(1) of the IC Bill could have the effect of excluding the application of the Construction Contracts Act, to the extent that one of the contracting parties was a constitutional corporation. The WA Government is concerned that excluding the Construction Contracts Act could:
 - (a) deny independent contractors the right to security of payment, which in turn could negatively impact upon the delivery of goods and services in the construction industry (as was the experience prior to the Construction Contracts Act being enacted); and
 - (b) create confusion for unincorporated independent contractors. In some instances the Construction Contracts Act would apply to them, while in other instances the IC Bill would exclude its application (depending on whether or not the other contracting party was a constitutional corporation).¹
8. Similarly, section 7(1) of the IC Bill could affect the ability of independent contractors in the entertainment industry to recover contractual benefits under the IR Act. The WA Government amended the IR Act in 2002 in response to payment difficulties commonly experienced by contractors in the entertainment industry.² Such contractors currently have access to the Western Australian Industrial Relations Commission (**WAIRC**) for the limited purpose of enforcing contractual benefits.
9. It should be observed that the IC Bill does not deal with security of payment. The Commonwealth is purporting to exclude State security of payment laws without itself legislating on the subject matter. This is a misuse of the Commonwealth's legislative powers. As with the Work Choices legislation – which also attempts to exclude State laws – it is questionable whether section 7(1) of the IC Bill would be constitutionally valid.
10. The WA Government submits that the IC Bill should not apply to State laws which provide independent contractors with security of payment. In this respect, section 7(2) of the IC Bill could be amended to refer to security of payment (howsoever described).
11. In the alternative, the WA Government submits that the Federal Government should formally undertake to preserve the Construction Contracts Act and the IR Act (to the extent that the IR Act applies to entertainment contractors) through regulations. This capacity exists under section 7(2)(c) of the IC Bill.

¹ The creation of two sets of rules for unincorporated independent contractors would be commercially undesirable. The IC Bill is necessarily limited in its application by virtue of its constitutional underpinnings, namely the corporations power.

² See sections 7(6) and (7) of the IR Act.

Proposed Road Freight Transport Industry (Contracts and Disputes) Bill 2006 (Road Freight Bill)

12. The WA Government has developed proposed legislation in consultation with industry stakeholders with a view to ensuring safe and sustainable rates in the road freight transport industry. The Road Freight Bill is currently in the final stages of drafting.
13. The IC Bill could significantly undermine the efficacy of the Road Freight Bill. In effect, it could paralyse parts of the Road Freight Bill dealing with unfair contracts, dispute resolution and the setting of safe and sustainable pay rates.
14. The IC Bill could affect the Road Freight Bill to the extent that an owner-driver was a constitutional corporation or contracted with a constitutional corporation. Many parties in the road freight transport industry are constitutional corporations and would therefore be caught by the IC Bill.
15. The Road Freight Bill is part of a suite of legislation aimed at improving the safety and viability of the WA road freight industry. The other proposed legislation seeks to provide for enforcement powers for the investigation of road traffic offences and implementation of "chain of responsibility" in respect of mass loading and dimension offences.
16. The Road Freight Bill is partly based on Victoria's *Owner Drivers and Forestry Contractors Act 2005* with modifications to take into account circumstances of the WA road freight industry and legal system.
17. In summary, the Road Freight Bill would:
 - (a) provide owner-drivers with security of payment;
 - (b) require principals to pay owner-drivers a "sustainable rate";
 - (c) establish a Road Freight Transport Industry Council (**RFTIC**);
 - (d) enable the RFTIC to establish a code of conduct, containing guideline rates and other provisions regulating the relationship between the parties; and
 - (e) create a low cost, conciliation focused tribunal, the Road Freight Transport Industry Tribunal (**Tribunal**), to hear disputes regarding breaches of contracts, the code of conduct and the security of payment provisions.
18. The requirement for the payment of a sustainable rate is intended to enable owner-drivers to operate their vehicle on a sustainable commercial basis. The RFTIC would be able to set a guideline rate, which would effectively be a sustainable rate benchmark. Contracting parties would be able to contract for a different rate as long as their agreement as a whole was viewed as being equivalent or better.
19. The WA road freight industry is faced with a number of unique and difficult circumstances, which require specific and localised legislative action. In a State as vast as WA the road freight industry plays a vital role. It is the WA Government's strong view that specific State legislation is required to ensure the ongoing viability of the industry.

20. The Road Freight Bill is not industrial relations legislation. While the WAIRC would resource the Tribunal, the Tribunal would not use arbitral powers to create new rights or deem independent contractors to be employees. The Tribunal's jurisdiction would be limited to resolving commercial contractual disputes and the terms of the code of conduct. The Tribunal would also be limited to using conciliation powers to resolve any collective bargaining matters.
21. The Road Freight Bill is an outstanding example of Government, industry representatives and unions working together to achieve mutually beneficial outcomes. This can be contrasted with the IC Bill which was developed by the Federal Government without any meaningful consultation or regard for local State conditions.
22. The WA Government submits that the IC Bill should not apply to current or future State road freight legislation for the reasons outlined above.
23. In the alternative, the WA Government submits that the Federal Government should formally undertake to preserve the Road Freight Bill through regulations. This capacity exists under section 7(2)(c) of the IC Bill. It is noted that the IC Bill currently preserves existing State laws for owner-drivers in New South Wales and Victoria.³

Outworker protections

24. The WA Government submits that the IC Bill fails to provide adequate protections to contract outworkers. Outworkers are a particularly vulnerable class of worker who should retain the full protection of relevant State laws and industrial instruments.
25. The WA Government is concerned that the IC Bill could:
 - (a) limit the protections afforded to outworkers under the WA Clothing Trades Award 1973 (**Clothing Award**); and
 - (b) limit or prevent the WA Government from legislating future outworker protections.
26. Section 7(2)(a) of the IC Bill seeks to preserve State laws to the extent that they:
 - (a) apply to a services contract to which an outworker is a party; and
 - (b) make provision in relation to such a contract.⁴
27. While WA does not currently have specific outworker legislation, the Clothing Award does provide contract outworkers in the textile, clothing and footwear industry with comprehensive protections. However, not all of those protections would necessarily "apply to a services contract to which an outworker is a party" as required by section 7(2)(a) of the IC Bill. For example, clause 25B of the Clothing Award requires principals who engage contract outworkers to be registered with the

³ See section 7(2)(b) of the IC Bill.

⁴ However, section 7(2)(a) of the IC Bill will not preserve State laws which enable a services contract to be set aside or varied on an unfairness ground.

WAIRC. This registration process is pivotal to ensuring that outworker conditions can be effectively monitored and enforced in the event of breach.

28. Similarly, it is questionable whether the Clothing Award's union right of entry provisions could properly be said to "apply to a services contract to which an outworker is a party" as required by section 7(2)(a) of the IC Bill.
29. Section 7(2)(a) of the IC Bill is ambiguous. It is unclear what State laws (or instruments made under such laws) would fall within the ambit of section 7(2)(a). The wording of section 7(2)(a) of the IC Bill could be amended in line with section 16(3)(d) of the federal *Workplace Relations Act 1996 (WR Act)*.⁵
30. The WA Government is also concerned that the IC Bill could limit the Government's future legislative capacity with respect to outworkers. For example, section 7(2)(a)(ii) of the IC Bill signals an intention to exclude State laws which provide outworkers with unfair contract protections. Part 3 of the IC Bill dealing with unfair contracts is manifestly inadequate.⁶ As such, the WA Government should retain the capacity to legislate more comprehensive protections as required.
31. Part 4 of the IC Bill seeks to provide contract outworkers with a legislated minimum rate of pay – that being the only protection provided. Employers who currently engage outworkers as employees could be encouraged by Part 4 to instead engage them as independent contractors. Part 4 fails to provide contract outworkers with other recognised protections such as those afforded under the Clothing Award (eg. guarantee of sufficient work, payment for public holidays, payment for annual leave).
32. In summary, the WA Government submits that the IC Bill should be amended to clearly preserve the application of relevant State laws and industrial instruments to contract outworkers.

WA Government's capacity to legislate future protections for independent contractors

33. As canvassed above, section 7(1) of the IC Bill could significantly curtail the WA Government's ability to legislate future protections for independent contractors. The WA Government objects to the Federal Government's bare attempt to exclude State laws using the corporations power. In particular, the WA Government objects to section 10 of the IC Bill which enables the making of regulations to exclude State laws. This provides a convenient mechanism for the Federal Government to exclude State laws while avoiding parliamentary scrutiny.
34. Furthermore, it is uncertain whether the Commonwealth can validly exclude the application of State laws in the absence of any inconsistency with the IC Bill. At the

⁵ Section 16(3)(d) of the WR Act seeks to preserve State laws to the extent that they deal with "matters relating to outworkers (including entry of a representative of a trade union to premises for a purpose connected with outworkers)".

⁶ For example, Part 3 of the IC Bill requires unfair contract claims to be pursued through the Federal Court of Australia or Federal Magistrates Court (**the Court**). Realistically, many outworkers would be unable to afford such proceedings (particularly as Part 3 does not enable them to be represented by a union). In addition, the remedies under Part 3 are limited. There is no capacity for the Court to award compensation to remedy an unfair contract.

least, the Federal Government should await the outcome of the High Court challenge to the Work Choices legislation before proceeding with the IC Bill.

State occupational safety and health and workers' compensation laws

35. The WA Government is particularly concerned that the Federal Government could use section 10 of the IC Bill to exclude the application of State occupational safety and health (**OSH**) and workers' compensation laws.⁷ The exclusion of such laws would seriously compromise workplace safety. The WA Government amended the *Occupational Safety and Health Act 1984 (OSH Act)* in 2005 to extend the general OSH provisions to contract work arrangements and labour hire arrangements.⁸
36. A public discussion paper entitled "Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements" issued by the Department of Employment and Workplace Relations in May 2005 drew on a 1998 Productivity Commission Report⁹ which estimated that about 10 percent of people in employment in Australia worked as self-employed contractors at that time. Other data cited indicates that in 1998 about:
- (a) one quarter of self-employed contractors worked in the construction sector;
 - (b) 20% worked in computer related services;
 - (c) 5.4% of all self-employed contractors worked in the transport and storage industry; and
 - (d) 9% worked in the manufacturing sector.
37. With the exception of the computing area, these industry and occupational groupings are of special interest in the OSH arena given they are generally over-represented in injury and disease statistics. As a result, they have been nominated as priority industry areas under the National OHS Strategy.
38. The WA Government submits that the IC Bill should be amended to unconditionally preserve the application of State OSH and workers' compensation laws. It is absurd that the Federal Government should be able to exclude such critical laws through regulations.

Sham contracting arrangements

39. Aside from the IC Bill, the WA Government has concerns with the *Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006 (WRLA Bill)*. The WRLA Bill purports to provide employees with protections against sham contracting arrangements. However, it is highly unlikely that the WRLA Bill will achieve this objective in its current form.

⁷ Such a capacity exists under section 10(2)(b) of the IC Bill.

⁸ Labour hire workers are effectively treated as employees of both the labour hire agency and the client for OSH purposes. The general duties under section 19 of the OSH Act apply "in relation to matters over which the principal has the capacity to exercise control".

⁹ Productivity Commission Research Paper, 'Self-employed Contractors in Australia: Incidence and Characteristics', Ausinfo, Canberra, 2001.

40. Firstly, the WRLA Bill does not address the situation where a worker's status changes from that of an independent contractor to an employee over the course of the engagement. An employer in this situation might be knowingly aware of the change in status, but continues to treat the employee as an independent contractor. The WRLA Bill's failure to proscribe such conduct is a significant deficiency.
41. Secondly, the WRLA Bill provides employers who have engaged in sham contracting arrangements with various "outs". For example, under proposed section 902 an employer could lawfully dismiss an employee, even if one of the motivating reasons for the dismissal was to re-engage the employee as an independent contractor. The employer need only show that the reason was not the "sole" or "dominant" purpose for dismissal.
42. Similarly, a person would only be liable under proposed section 903 if they knowingly made a false statement with the intent of persuading an employee to become an independent contractor. They would not be liable if they made a statement that they suspected was false, or ought to have reasonably known was false. It would also be difficult to establish that the person made the statement with the required intent.
43. Finally, the WRLA Bill fails to provide aggrieved employees with any meaningful remedies. For example, there is no capacity for the Court to award reinstatement or compensation to an employee who has been unlawfully dismissed or discriminated against under the provisions.

Conclusion

44. The WA Government opposes the IC Bill in its current form. In summary, the WA Government submits that:
 - (a) the IC Bill has been developed by the Federal Government in a vacuum, without regard for the needs or circumstances of individual States;
 - (b) the Federal Government has failed to demonstrate a sufficient need for the IC Bill, aside from a thinly-veiled desire to encourage independent contracting and to deny workers employment protections;
 - (c) the IC Bill could exceed the Commonwealth's constitutional powers, at least to the extent that it purports to exclude State laws. The Federal Government should properly await the outcome of the High Court challenge to the Work Choices legislation before proceeding with the IC Bill;
 - (d) the IC Bill will have the effect of creating two sets of rules for unincorporated independent contractors, depending on whether or not they contract with a constitutional corporation;
 - (e) the IC Bill should be amended so as not to exclude State security of payment legislation (in particular the Construction Contracts Act) or the proposed Road Freight Bill. Alternatively, the Federal Government should formally undertake to preserve such legislation through regulations;

- (f) the IC Bill should be amended to unconditionally preserve State laws and industrial instruments that apply to contract outworkers; and
- (g) the IC Bill should be amended to unconditionally preserve the application of State OSH and workers' compensation laws.

45. It is also submitted that the WRLA Bill should be amended to strengthen protections against sham contracting arrangements and to provide meaningful remedies to employees.