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

Submitter: Robert Durbridge, Executive Director

Organisation: Australian Institute of Employment Rights

Address: Department of Management,
Faculty of Business and Economics,Caulfield Campus,
Monash University, Caulfield East, Vic, 3145

Phone: 03 990 32635 0407 560368

Fax:

Email: Robert.Durbridge@buseco.monash.edu.au

ABN 12 377 614 012

Department of Management
Faculty of Business and Economics
Building N, Caulfield Campus
Monash University
Caulfield East VIC 3145
tel: 03 9903 2635
mobile: 0407 560 368

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The Australian Institute of Employment Rights is an independent body formed and governed by professionals engaged in the field of employment, including academics, unionists, employers, legal representatives and independent community members. Details can be obtained from the Monash University website under the initials AIER.

The Institute is pleased to provide the attached submission as the proposed legislation if enacted would adversely affect the rights of Australian employees and override protections which have been established under Federal and state law.

It is argued that the negative effects of dependent contracting and disguised employment are well established and that the proposed bills will exacerbate these effects on employees' living standards, health and well-being.

The submission has been prepared for the Institute by Ms Elsa Underhill, Senior Lecturer in the Deakin Business School, Deakin University, Melbourne. Ms Underhill's publications and experience are summarised at the conclusion of this submission.

Any enquiries or further information with respect to this submission may be obtained through the Institute at Monash University at the addresses and numbers provided from the Executive Director, Robert Durbridge. The opportunity to complement this submission verbally would also be appreciated.

Introduction

The *Independent Contractors Bill 2006* is founded on the premise that the growth in independent contracting in Australia has arisen from workers making a free choice to become self-employed. It thus seeks to remove the 'regulatory excess' which may impact upon independent contactors. The *Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006*, however, acknowledges that some employees have been coerced into independent contracting arrangements, and offers some protection from this coercion. This is commendable. But it is not sufficient to counter the growth in dependent contracting or disguised employment. Further, the *Independent Contractors Bill* removes legislative safeguards introduced by State governments to protect vulnerable groups of workers through deeming provisions. Combined, these bill fail to respond to the individual and social costs associated with independent contracting when that contracting is in reality disguised employment.

This submission argues that *The Bills* are a retrograde step in several respects. They fail to recognise and distinguish dependent contracting from independent contracting. In so doing, they will enable the continuation and expansion of dependent contracting and disguised employment. Research has consistently identified negative outcomes associated with these practices. These include:

- Absence of minimum employment entitlements designed to protect workers' economic, social and health wellbeing, including a satisfactory work/life balance;
- Excessive working hours without commensurate remuneration;
- Higher risk of occupational injury to contractors;
- Higher risk of occupational injury to those working alongside contractors;
- Shifting the cost of injuries away from workers' compensation systems onto injured workers and their families, and onto the general health system; and
- Absence of investment in skills and training [1].

[1] For example, see Benach et al., 2004; Kochan et al., 1994; Mayhew et al., 1996; Parliament of the Commonwealth of Australia, 2005; Quinlan, 2004; Rousseau & Libuser, 1997; Underhill & Kelly, 1993; Underhill et al., 1997; Underhill, 2005.

This submission focuses on the following components of *The Bills*:

(1) Definition of independent contractor
(2) Definition and process for determining unfair contracts
(3) Steps to prevent sham contracting arrangements
(4) Over-riding of State deeming provisions.

(1) Definition of independent contractor

The *Independent Contractors Bill 2006* proposes that independent contractors be defined according to the common law definition, and broadens that definition so that it is no longer limited to natural persons. This definition of independent contractors is too broad and inexact, and will result in vulnerable workers being excluded from employment protection. The Majority Report of the House of Representatives Standing Committee into Independent Contracting and Labour Hire Arrangements (2005) recommended a narrowing of the definition of independent contractors, whilst the Dissenting Report of the Standing Committee proposed a comprehensive definition of employee to include dependent contactors. Neither of these proposals are incorporated into the Bill.

Governments elsewhere have recognised that the common law definition of employee and independent contractor is no longer suitable for distinguishing between those workers in need of protection and the genuinely self-employed[2]. The ILO *Recommendation Concerning the Employment Relationship* (2006) states that national policy should at least include measures which combat disguised employment which "can arise where contractual arrangements have the effect of depriving workers of the protection they are due" (paragraph 4 (b)). *The Bills* fails to recognise such arrangements beyond the narrower concept of sham arrangements.

Furthermore, the ILO *Recommendation* (2006) also states that national policy should at least "provide effective access of those concerned, in particular employers and

[2] For example, see Davidov, 2005.

workers, to appropriate, speedy, inexpensive, fair and efficient procedures and mechanisms for settling disputes regarding the existence and terms of an employment relationship" (paragraph 4 (e)).

The *Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006* places the process of determining whether a work arrangement is one of independent contracting or an employment contract (in the context of sham arrangements) before the Federal Court of Australia or the Federal Magistrates Court. Neither of these Courts is as appropriate, or as inexpensive, as the Australian Industrial Relations Commission. Nor do they have the same level of specialised expertise and knowledge of work relationships. Whilst the *Explanatory Memorandum to the Independent Contactors Bill* states that "legal costs would generally be incurred by the Commonwealth which would pursue these cases on behalf of the employee" (p.20), dependence upon the willingness of the Commonwealth to fund such cases is inappropriate given the critical importance of employment status to affected workers. Such actions must be affordable independent of state preferences. Also, neither *Bills* offer an "appropriate, speedy, inexpensive, fair and efficient procedures and mechanism" when disputes arise over employment status beyond the provisions relating to sham arrangements.

(2) Unfair contracts

The *Independent Contractors Bill 2006* provides for the determination of unfair contracts, but section 15(2) of *The Bill* requires that the Court have regard to "whether the terms of the contract and the total remuneration provided under the contract are commensurate with the terms of, and remuneration provided under, other services contracts relating to the performance of similar work in the particular industry". This requirement is contradictory to section (9)(1)(f) that states an unfairness ground includes "the contract provides for remuneration at a rate that is, or is likely to be, less than the rate of remuneration for an employee performing similar work".

The House of Representatives Standing Committee *Inquiry into independent contracting and labour hire arrangements* was provided with substantial evidence of under-cutting of contract rates associated with independent contracting. This undercutting contributes to increased work intensification, and a greater risk of injury through corner-cutting, including chronic health problems (such as back injuries). Yet by requiring that markets rates be taken into account in assessing the 'unfair' state of contracts, *The Bill* will enable undercutting to continue unabated, without regard to fair and reasonable rates of remuneration.

Recommendation 9 of the Report of the House of Representatives Standing Committee *Inquiry into independent contracting and labour hire arrangements*' includes to "examine how incentives for independent contractors may discourage compliance with occupational health and safety requirements". The undercutting of rates is a major disincentive to compliance with occupational health and safety requirements, yet is supported by this *Bill*. Without a statutory benchmark, such as the equivalent remuneration for employees, contractors will be forced to continue to accept contract prices which undermine safe and healthy work practices.

The prohibition on parties other than the party to the services contract taking action alleging an unfair contract places independent contractors at risk of discrimination and termination of their contractual arrangements should they take such action (s.12(2)). Also, *The Bill* does not recognise the reality of *groups* of independent contractors experiencing similar or identical unfair contract arrangements. Under these circumstances, allegations of unfair contracts are more appropriately dealt with through representation of the entire group and not each individual contractor.

(3) Sham Contracting Arrangements

The inclusion of penalties for employers coercing employees into accepting sham independent contracting arrangements is a positive step. However, as noted above, this provision draws upon the common law definition of independent contractor and the contract of employment, and does not recognise dependent contracting. It will not prevent coercion in relation to dependent contracting. As also noted above, this

process would be more appropriately placed within the specialised jurisdiction of the Australian Industrial Relations Commission.

(4) Over-riding State deeming provisions

State Parliaments have legislated to deem independent contractors to be employees, or workers, in order that they receive the protections considered necessary given their vulnerable position in the labour market. These provisions are supported by the fundamental principal that workers performing the same or equivalent work as employees should be entitled to the same protections. They are also consistent with international shifts to ensure necessary protection is not lost through disguised employment. The choice of State Parliaments to create a floor of protections in these circumstances should be respected.

Conclusion

The *Independent Contractors Bill 2006* and the *Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006* have been proposed at a time when there is much international debate about the importance of recognising the employment relationship as the foundation of protection standards. On the 14th June 2006, the International Labour Office passed a *Recommendation Concerning the Employment Relationship* which recognises both the potential for contractual arrangements to 'deprive workers of the protection they are due', and the need to facilitate the clear determination of an employment relationship. Yet the intent and form of this *Recommendation* has been largely overlooked in the formulation of these Bills.

These Bills follow on from the findings of the Report of the House of Representatives Standing Committee *Inquiry into independent contracting and labour hire arrangements*. That Report (Majority and Dissenting reports) makes clear that the changing employment patterns are complex, and require a considered and balanced response in order to ensure the maintenance of a skilled, productive, safe

and healthy workforce into the future. Yet these Bills offer little to support such a development. We submit that the definition of independent contractors needs to be reconsidered; that the mechanism for resolving disputes over employment status be reformulated to be consistent with the *ILO Recommendation Concerning the Employment Relationship*; that the unfair contracts provision remove the reference to market rates; and the choices of State Parliaments in relation to deeming provisions be respected.

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Elsa Underhill is a Senior Lecturer in the Deakin Business School, Deakin University, Melbourne. She has a Master of Commerce from the University of Melbourne, and is completing a doctorate on the industrial relations and occupational health and safety implications of labour hire employment at the University of New South Wales. Ms.Underhill is a Vice-President of the Industrial Relations Society of Victoria, for whom she convenes the AIRC Advocacy Training Programme. Her expertise in independent contracting and alternative employment arrangements is extensive.

Ms. Underhill's expertise in independent contracting evolved from a study of independent contracting in the building industry in the 1980s-90s, published as Underhill, E., (1991) "Contract Labour in the N.S.W. and Victorian Building Industry" in Bray, M., and Taylor, V., (eds.) *The Other Side of Flexibility: Unions and Marginal Workers in Australia,* Australian Centre for Industrial Relations Research and Teaching, University of Sydney, Monograph No.3, pp.155-142.

Her research extended to labour hire arrangements involving independent contracting, and in 1993 she published the widely cited article on ODCO employment arrangements: Underhill, E., and Kelly, D., (1993) "Eliminating Traditional Employment: Troubleshooters Available's Activities in the Building and Meat Industries" in *Journal of Industrial Relations,* 35 (3): 398-423.

In 1997, she completed a major study of self-employment in the Victorian building industry for the Victorian Building Industry Redundancy Fund, published as Underhill, E., Worland, D., and Fitzpatrick (1997) *Self-Employment in the Victorian Building and Construction Industry*, Incolink, Melbourne.

In 2005, she authored the report "Changing Hiring Arrangements: Independent Contractors and Labour Hire Employment" for the *Federal Government's Industrial Relations Policy: Report Card on the Proposed Changes* (University of Sydney, www.econ.usyd.edu.au/wos/IRreportchangesreportcard).

Ms. Underhill has completed a number of studies for government agencies, including the National Occupational Health and Safety Commission, on managing occupational health and safety, and the implications of changing employment arrangements for occupational health and safety. These have been published as:

Underhill, E. (2002) *Extending Knowledge on Occupational Health & Safety and Labour Hire Employment: A Literature Review and Analysis of Victorian Worker's Compensation Claims,* WorkSafe Victoria, Melbourne.(www.workcover.vic.gov.au)

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Her research with Gallagher and Rimmer was drawn upon for the *Maxwell Review of the Occupational Health and Safety Act*, Victoria (2004), whilst her research into labour hire employment was cited extensively in the Victorian Parliament's Economic Development Committee Report *Labour Hire Employment in Victoria* (2005) Melbourne.

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