



21st July, 2006

Secretary

Senate Employment, Workplace Relations and Education Committee

Department of the Senate

PO Box 6100

Parliament House

Canberra ACT 2600

Email: eet.sen@aph.gov.au

Dear Secretary,

Re: Submission on Independent Contractor Bill

Further to the Howard Government's referral of the Independent Contractors Bill to an Inquiry by the Senate Employment, Workplace Relations and Education Legislation Committee, we thank you for the opportunity to have this input and attach our Submission.

I would welcome the opportunity to appear before the Committee in Canberra on 3 or 4 August should it be required.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'GEOFF FARY', with a long, sweeping underline.

GEOFF FARY

Executive Director Industrial Relations

Encl.



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

**Inquiry into the proposed
Independent Contractors Bill 2006 and the
Workplace Relations Amendment (Independent Contractors) Bill 2006**

**Association of Professional Engineers, Scientists
and Managers, Australia**

July 2006

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Executive Summary

A key aspect of change in the employment landscape over the last two decades has been the increasing proportion of those working in non-standard work arrangements. According to 2001 Productivity Commission figures, a significant proportion of self-employed contractors - an estimated 10 per cent - are Professionals. Out of a total membership of over 25,000, the Association of Professional Engineers, Scientists and Managers, Australia (APESMA) provides services to more than 3,500 contractors and consultants through its special interest group Connect (www.apesma.asn.au/connect). APESMA maintains a keen interest in and devotes significant resources to protecting and servicing these contracting professionals.

The Independent Contractors Bill 2006 and the Workplace Relations Amendment (Independent Contractors) Bill 2006 were tabled in Parliament on 22 June, 2006. The changes set out in this legislation along with amendments made under Section 515 of the WorkChoices legislation making clauses which restrict the engagement of independent contractors labour hire workers non-allowable award matters, are likely to lead to an increase in the number of professionals operating in non-standard work arrangements. APESMA's view is that the legislative changes may have implications for attracting to, and retaining people in the professions, for professional development, for the job and income security of both employees and contractors as well as for society more broadly. APESMA's view is that the diversification of forms of employment is a complex issue which seriously impacts on workers, contractors, families, communities, businesses and society at large, and which requires considered analysis and policy development which accommodates the complexity and diversity of this growing group of individuals.

APESMA is opposed to regressive labour market deregulation which, in the guise of modernity, flexibility and so-called protection, 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.

APESMA is committed to industrial regulation and maintenance of the powers of the AIRC to make appropriate orders where employers are attempting to avoid their employment obligations by way of artificial arrangements which may be specifically designed to place workers outside the regulatory protective framework.

This Submission should be read in conjunction with the Association's March 2005 Submission to the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation and our May 2005 Submission to the Department of Workplace Relations. The views set out in these Submissions are based on an extensive survey of independent contractors undertaken by the Association of Professional Engineers, Scientists and Managers, Australia in 2004, and draws on information and data available through APESMA's special interest group for contractors called Connect. This Survey report is available on open access at: http://www.apesma.asn.au/employment/connect/pdfs/survey_report_2004.pdf.

Introduction

The Association of Professional Engineers, Scientists and Managers, Australia (APESMA) is an organisation registered under the Workplace Relations Act representing over 25,000 professional engineers, scientists, veterinarians, surveyors, architects, pharmacists, information technology professionals, managers and transport professionals throughout Australia. We are the only industrial association representing exclusively the industrial and professional interests of these groups.

We thank you for the opportunity and outline our submission below.

Response to legislation

1. Removal of protections

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 ostensibly 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. A recent study found that up to 400,000 workers currently classified by the Government as independent contractors actually do all their work for the one employer (O'Donnell, A. 2004, *Non-standard workers in Australia: counts and controversies*, Australian Journal of Labour Law). The proposed legislation does nothing to clarify the status of those workers at the intersection of commercial and employment law, and in fact removes protections already in place for these individuals.

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 means that workers will potentially lose entitlements with no access to any consultation process.

2. Unfair contracts provisions

The legislation extends the jurisdiction of the Federal Magistrates Court to hear cases associated with dispute resolution of unfair contracts for service.

APESMA is of the view that the drawbacks of this mode of redress are its expense with applicants potentially subject to a costs order, its timeliness, and the extent of complex legalistic argument required to argue these matters.

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. APESMA is of the view that this ultimately does little to protect those engaged or employed by labour hire agencies, and provides limited options for redress where unscrupulous employers attempt to avoid their obligations by using labour hire agencies.

4. Challenging contractor status

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. While it is pleasing to see that 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, the degree to which the Office of Workplace Services will be effective in its investigative and prosecution role, transparent in its processes and open to public scrutiny is yet to be demonstrated.

5. Protections retained

While it is pleasing that the legislation retains protections for textile and clothing outworkers and transport industry owner-drivers, it is disappointing that the Government does not intend to replicate these exclusions for any other parties.

6. Alienation of Personal Services Income legislation (PSI)

The Alienation of Personal Services Income legislation which became effective on 1 July 2000 restricted many of the potential tax advantages for professionals operating as independent contractors.

These Professionals are potentially hit with a double whammy and this is of major concern to the Association. On the one hand, by moving across to contractor arrangements professionals may lose employment entitlements and be forced to cover expenses such as accident insurance, professional indemnity insurance and superannuation themselves, and on the other hand, the ATO, in narrowly interpreting the Federal Government's PSI legislation, potentially denies them the

capacity to claim legitimate deductions for the business expenses they are incurring.

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 do not therefore pass the 80/20 income test while at the same time engaging in commercial arrangements which do 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 issue for APESMA and the professionals we cover.

These individuals are penalised under the PSI legislation. The extent of individuals including professionals affected by this contradiction is likely to increase with the passage of the Independent Contractors Bill. The Government has not satisfactorily resolved this issue while at the same time providing the legislative basis for potentially thousands of workers to move into independent contracting. APESMA recommends that the fact that individuals are paying accident insurance, professional indemnity insurance and their own superannuation should be regarded as determinants of contractor and personal services business status for tax purposes.

7. Occupational health and safety

The legislation is silent on the obligations of labour suppliers and host employers' responsibilities for occupational health and safety. This is of major concern with wide-ranging implications for employees, contractors and the broader community.

Conclusion

APESMA considers itself a progressive organisation which recognises that the employment landscape and methods of engagement are changing. We are not opposed to the use of contractors and legislation to codify their roles. We acknowledge that flexibility in working arrangements is sought by employers and employees to both meet the demands of economic growth and competitiveness, and to strike a better balance between work and other responsibilities. However we are concerned that the unfettered growth of non-standard work has the potential to threaten employment stability and the availability of quality secure employment and give rise to longer term skill shortages. The Association rejects the presumption that tribunals and courts have become increasingly interventionist to curtail legitimate contractor growth; rather the evidence suggests that the relevant decisions of these bodies over time have been in response to applications by various and diverse stakeholders as part of their efforts to keep track of and close down the loopholes and contrivances which some unscrupulous operators have used to bypass proper employment obligations.

The proposed legislative amendments are likely to mean further uncertainty, greater reliance on common law litigation and reduced protection for the increasing number of independent contractors and consultants.

In conclusion, the Association reiterates its commitment to supporting the growing number of independent contractors and labour hire workers who form part of our membership, but also restates its opposition to legislation which enables unscrupulous employers to contrive to place segments of workers outside the framework of standard employment protections and regulation.

Submission preparation

This submission was prepared by National Information Officer Kim Rickard. For further comment, please contact Executive Director Industrial Relations, Geoff Fary, APESMA, GPO Box 1272L, Melbourne, Vic. 3001. Telephone: 03 9695 8800. Facsimile: 03 9696 9320. Email: info@apesma.asn.au.