



51 Walker Street,
North Sydney NSW 2060
Australia

ABN 76 369 958 788

Tel: 02 9466 5566
Fax: 02 9466 5599

21 July 2006

Mr John Carter
Secretary
Senate Employment, Workplace Relations and Education Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Via Email: eet.sen@aph.gov.au

Dear Mr Carter

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

Ai Group welcomes the opportunity to express its views on the above Bills to the Senate Employment, Workplace Relations and Education Committee.

Ai Group is one of the largest national industry bodies in Australia, representing employers in manufacturing, construction, automotive, transport, printing, IT, telecommunications, labour hire, call centres and other industries. The membership of Ai Group includes several hundred companies in the construction, IT and transport industries which engage a high proportion of their labour as independent contractors.

This submission is made by Ai Group and also on behalf of its affiliated organisation, the Engineering Employers Association, South Australia (EEASA).

Ai Group supports the Bills, with the amendments outlined in this submission. The Bills enhance protection for genuine independent contracting arrangements and deserve the support of all political parties.

Genuine independent contracting arrangements are a legitimate way for work to be performed. Many people prefer to work as independent contractors because it suits their lifestyle, income and other preferences, and because it gives them the ability to establish and build their own businesses.

The Bills complement the important changes made within the *WorkChoices* legislation, as proposed by Ai Group, that prevent workplace agreements and awards containing provisions which restrict the engagement of independent contractors.

The *Independent Contractors Bill 2006*

In summary, the *Independent Contractors Bill 2006*:

- Leaves the common law to deal with the distinction between contracts of service (employees) and contracts for services (independent contractors);
- Does not limit the term "independent contractor" to natural persons;
- Applies to contracts for services:
 - to which an independent contractor is a party and that relate to the performance of work by the independent contractor; and
 - where at least one party to the contract is a constitutional corporation or the Commonwealth, or where the contract relates (in one of a number of defined ways) to the ACT or Northern Territory;
- Provides for the rights, entitlements, obligations and liabilities of parties to a contract for services to be governed by the terms of the contract, subject to:
 - the rules of common law and equity;
 - the provisions of the Bill and other relevant Federal legislation;
 - relevant State and Territory laws except those excluded by the Bill;
- Excludes certain State and Territory laws which:
 - deem independent contractors to be employees for the purposes of various "workplace relations matters";
 - confer rights, entitlements, obligations and liabilities on independent contractors or principals that are similar to employers and employees in an employment relationship; and
 - allow a body to review, vary or set aside a contract on the ground that it is unfair;
- Does not exclude:
 - the legislation in place in NSW and Victoria to protect owner drivers;
 - State and Territory laws protecting outworkers in the TCF industry;
 - laws which apply to independent contractors that are not about "workplace relations matters" such as laws relating to EEO, workers' compensation, OHS, and payroll tax;

- Provides a three year transitional period for independent contractors who have previously been deemed to be employees (NB. the parties to a contract can agree in writing to waive this transitional period and for the provisions of the Bill to apply immediately);
- Establishes a new federal unfair contracts jurisdiction which enables remedies to be pursued in the Federal Court or the Federal Magistrates Court.

Common law definition

Ai Group supports the Bill's approach of leaving the common law to deal with the distinction between employees and independent contractors.

The Courts over the years have developed well-established tests to identify legitimate independent contracting arrangements. These tests provide guidance to principals and independent contractors when forming contractual relationships. Any change to the definitions, through legislation, could disrupt a large number of existing contractual arrangements which are legitimate under common law.

The common law is well equipped to assess diverse factual circumstances in determining the substance of a particular relationship. In contrast, the "one size fits all approach" of defining an "independent contractor" within legislation would not allow all of the facts of an individual case to be duly considered.

Exclusion of State and Territory Laws

Ai Group supports the Bill's exclusion of State and Territory laws which deem independent contractors to be employees for the purposes of various "workplace relations matters".

Deeming provisions exist under the following legislation, amongst others:

- *Industrial Relations Act 1996 (NSW)* - See s.5(3) and Schedule 1. "Deemed employees" include milk vendors, cleaners, carpenters, joiners, bricklayers, painters, bread vendors, outworkers in the clothing trades, timber cutters and suppliers, plumbers, drainers, plasterers, blinds fitters, Council swimming centre managers, ready-mixed concrete drivers and RTA lorry drivers;
- *Industrial Relations (General) Regulations 2001 (NSW)* – See 41 and 42. "Deemed employees" include security industry workers;
- *Long Service Leave Act 1955 (NSW)* - See s.3. Persons "deemed" to be employees under the *Industrial Relations Act 1996 (NSW)* are deemed to be an employee under this Act;
- *Industrial Relations Act 1999 (QLD)* - See s 5. A person who "wholly or partly owns a vehicle used to transport goods or passengers" is deemed to be an employee;

The deeming provisions in State and Territory laws are an unreasonable intrusion upon the freedom of parties to enter into contractual arrangements. The Bill has been drafted to avoid harsh outcomes for vulnerable workers, ie. outworkers in the Textile, Clothing and Footwear industry.

Ai Group opposes the preservation of the NSW and Victorian State laws relating to owner drivers (ie. Chapter 6 of the *Industrial Relations Act 1996 (NSW)* and the *Owner Drivers and Forestry Contractors Act 2005 (Vic)*). Such laws impose unnecessary restrictions on independent contractors and principals in the transport industry, and on the users of transport services. A consistent approach should be adopted within the Bill and such State laws should be excluded.

Unfair contracts jurisdiction

Ai Group supports the Bill's exclusion of State and Territory unfair contracts laws.

The unfair contracts provisions in the NSW *Industrial Relations Act 1996* have proved to be highly problematic. The provisions have become a de facto unfair dismissal system for senior managers wishing to challenge the quantum of their termination payments. In several cases, multi-million dollar compensation payments have been awarded. Despite several attempts by the NSW Government to amend the legislation to address the problems, the provisions remain a significant and unreasonable burden on NSW employers.

The Queensland provisions have been in operation for a shorter period of time than the NSW provisions and it is still unclear whether or not they will prove to be as damaging as those in NSW.

The *Workplace Relations Act* presently allows independent contractors who are natural persons (not corporations) to claim that contracts for the performance of commercial work are unfair or harsh and to obtain remedies. The Bill expands this jurisdiction to include corporations where the work is wholly or mainly performed by a director of the independent contractor or the family of such a director. Whilst Ai Group would prefer that the unfair contracts jurisdiction not be expanded beyond natural persons, the proposed scope is far more acceptable than the wide scope of the NSW State provisions.

The Workplace Relations Amendment (Independent Contractors) Bill 2006

The Bill amends the *Workplace Relations Act* to provide for civil penalties of up to \$33,000 for persons who dismiss or threaten to dismiss an employee for the sole or dominant reason of engaging the individual as an independent contractor to perform the same or substantially similar work.

The Bill also amends the *Workplace Relations Act* to provide for civil penalties of up to \$33,000 for persons who are a party to a contract or proposed contract with an individual and who misrepresent that the contract is a contract for services rather than a contract of employment. This offence does not apply where persons can prove that they could not reasonably have known that the contract was a contract of employment. This proposed offence is unfair upon principals. It can be difficult in

some circumstances to discern what the nature of a relationship is, as it relies not only upon the intention of the parties involved, but also the circumstances surrounding the relationship. Consistent with recognised principals of justice:

- the penalty should only apply where a person has deliberately and intentionally sought to avoid obligations under a contract of employment; and
- the onus should be on the individual who alleges that misrepresentation has occurred, to prove that the offence has been committed.

Ai Group urges all political parties to support the passage of the Bills, with the amendments set out in this submission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Heather Ridout', with a horizontal line underneath.

Heather Ridout
CHIEF EXECUTIVE