Submission

to the

House of Representatives Standing Committee

on

Employment, Workplace Relations

and Workforce Participation

Independent Contracting and Labour Hire Arrangements – Are they Working?

March 2005

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EXECUTIVE SUMMARY

Master Builders Australia's submission outlines the importance of independent contracting to the building and construction industry and the important legal status of independent contractors. The vital role labour hire arrangements play and necessary, but limited, reform to this subject area are discussed. It also outlines the need for the Government's proposed independent contractors legislation to be underpinned by a statutory definition applied to all Commonwealth statutes.

Master Builders believes that the workplace relations system should not seek to regulate contracting and that the proposed legislation should operate to overturn those rules in order to facilitate contractual arrangements.

The submission indicates Master Builders belief that a number of issues outside the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation's terms of reference need to be clarified with regard to the proposed new legislation. The new legislation must detail a method to clearly distinguish between contractors and employees and suggests ways of achieving this in this submission.

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1. INTRODUCTION

1.1 This submission is made by Master Builders Australia Inc (Master Builders).

1.2 Master Builders represents the interests of all sectors of the building and construction industry. Master Builders consists of nine State and Territory builders' associations with approximately 28,000 members. The building and construction industry contributes $81 billion of economic activity annually to the Australian economy.[1]

2. PURPOSE OF THIS SUBMISSION

2.1 Master Builders welcomes the Committee's Inquiry. This submission outlines the importance of independent contracting to the building and construction industry. It then touches upon some of the important elements relating to the legal status of independent contractors and the need for the Government's foreshadowed Independent Contractors legislation be underpinned by a statutory definition that may be applied to all Commonwealth statutes.

2.2 The importance of labour hire arrangements are also noted with a discussion of some of the causes of the growth outlined. The manner in which needed, but limited, reform in this area should proceed is outlined.

2.3 As a governing principle, this submission adopts the approach that the workplace relations system should not seek to regulate contracting and that where such regulation has occurred, the new proposed federal laws should operate to overturn those rules (or at the lease forestall their spread) in order to facilitate the freedom of contractual arrangements.

2.4 For the purpose of this submission, we have used the term 'contractor' or 'subcontractor' to describe any person who performs work other than as an employee, whether they do that as a sole trader, through a company, partnership, trust or other arrangement or in some other capacity.

3.0 THE IMPORTANCE OF THE SUBCONTRACT SYSTEM TO THE INDUSTRY

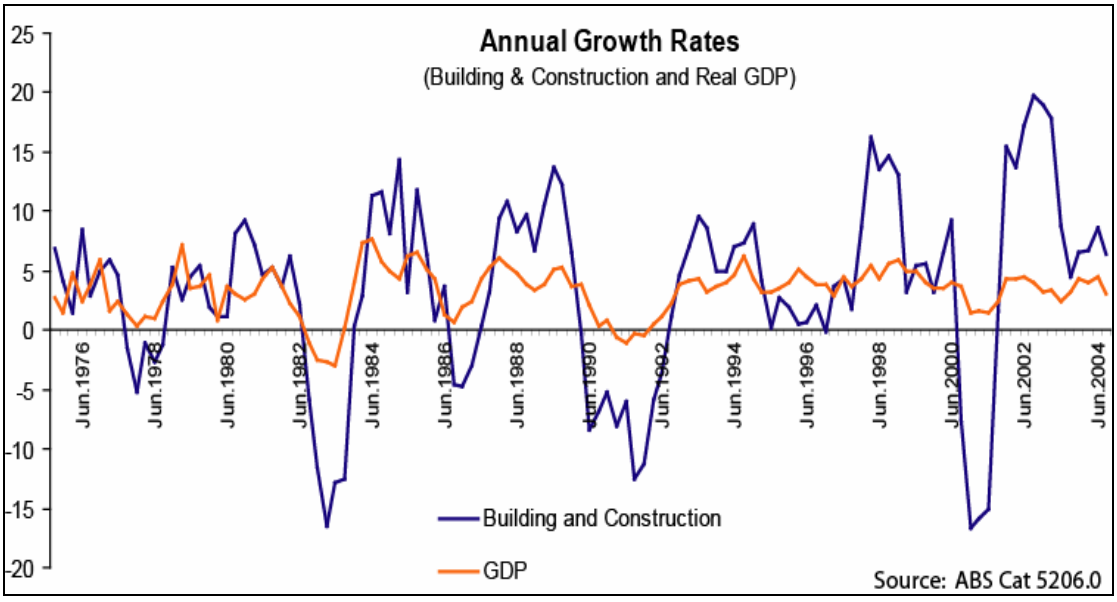
3.1 This section of the submission addresses the first terms of reference concerning the status and range of contracting arrangements. A considerable amount of work in the building and construction industry is performed by

[1] ABS catalogue 8755 "*Construction Work Done"* November 2004

persons other than in the capacity of employee. It is essential that this subcontracting system is not undermined by unclear provisions where the dividing line between an employee and a subcontractor is blurred. (This issue is taken up below – see sections 8 and 9.)

3.2 The volatility and fluctuating nature of the industry (see Figure 1) means that there is limited scope for any degree of permanent employer/employee relationships. This has been recognised over the years, both by the industry and legislatures, through the establishment of industry-based benefit schemes such as portable long service leave funds, centralised redundancy funds, portable superannuation and, most recently, in some areas, portable sick leave. These measures produce the twin effects of greater security of employment for workers and comparatively higher employment costs for employers. However, the underlying volatility of the market means that many industry participants choose to gain continuity of engagement through the conduct of their own businesses and voluntarily enter into contractual arrangements. Other factors contributing to the movement towards the subcontract system include increased labour costs and technological changes which encourage participants in the industry to specialise in a specific aspect of the building and construction process and the economic arguments which follow in this part of the submission. This argument is expanded in section 6.3 of this submission.

Figure 1



3.3 These factors, but principally the fluctuating and uncertain nature of building operations, have contributed to the growth of the contract system. This growth reflects a general acceptance in the industry of the competitive advantage of such a system, a matter explained in more detail in paragraph 3.5 below. The Cole Report[2] recognised that contracting is a legitimate, important form of business activity and working arrangement. The Cole Report did, however, explore allegations of sham contracting.

3.4 The Cole Report extensively analysed the subcontracting system following the earlier release in September 2002 of Discussion Paper No. 11, *Working Arrangements – Their Effects on Workers' Entitlements and Public Revenue*. The Royal Commission's conclusions about sham subcontracting were largely inconclusive. In particular, the following is relevant::

> "The indications of high levels of incorporation and possession of ABNs by contractors in the building and construction industry support the view that there may well be significant illegitimate subcontracting. However, there are no reliable statistics providing a basis to estimate the extent of the problem with any precision."[3]

Further, the notion of "illegitimate subcontracting" is ill-defined, but the activity complained of appears to Master Builders to be in breach of current laws e.g. through outright evasion of obligations[4], a matter that is able to be rectified through enforcement of current laws. The subject of the use of ABNs is, indeed, the subject of investigation by the Australian Taxation Office (ATO) at present.

3.5 Master Builders submits that the growth of the subcontracting system is overwhelmingly a function of market forces rather than a device to avoid the payment of worker entitlements or for any other of the largely spurious reasons proposed by some industry participants. The specialist contract system has consistently been found to be the most efficient and productive method of building. There are a number of reasons for this, including:

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[2] The Final Report of the Royal Commission into the Building and Construction Industry http://www.royalcombci.gov.au/hearings/reports.asp

[3] Supra note paragraph 276 of Chapter 23, Volume 9

[4] This belief accords with the one of the main conclusions of the ILO International Labour Conference in June 2003 concerning the assessment of the scope of the employment relationship. Master Builders believes that in a very small proportion of cases disguised employment occurs. At paragraph 7 of the conclusions concerning the employment relationship published by the ILO , the following is noted: "Disguised employment occurs when the employer treats a person who is an employee as other than an employee so as to hide his or her true legal status. This can occur through the inappropriate use of civil or commercial arrangements. It is detrimental to the interests of workers and employers and an abuse that is inimical to decent work and should not be tolerated. False self-employment, false subcontracting, the establishment of pseudo cooperatives, false provision of services and false company restructuring are amongst the most frequent means that are used to disguise the employment relationship. The effect of such practices can be to deny labour protection to the worker and to avoid costs that may include taxes and social security contributions. There is evidence that it is more common in certain areas of economic activity but governments, employers and workers should take active steps to guard against such practices anywhere they occur".

- contractors can enter the industry with very little capital outlay resulting in a very competitive environment i.e. barriers to entry are low;

- the system provides an important opportunity for a skilled tradesperson with the necessary motivation to significantly increase their earnings with their income directly related to their efficiency in the actual time they work;

- the system is administratively simple and reduces supervision costs considerably as the principal contractor does not incur the administrative overheads of employing staff;

- as contractors do not get paid for delays, there is an incentive to solve problems which develop on site quickly and effectively. Employees, on the other hand, have little incentive to solve such problems;

- a contractor quotes a price for a job which reflects the situation in regard to work on hand. The market price reflects the level of demand;

- results based contracts are generally more efficient than time costed labour working towards the same ends;

- regional variations in prices paid to contractors encourages mobility of those contractors which helps to achieve and improve balance within regional markets; and

- the housing sector, which predominately uses contractors, has, unlike all other sectors in the construction industry, not faced any major stoppages or strikes as a contractor is bound by the contract entered into in respect of the work to be performed and the contractor, therefore, has an incentive to get on with the job.

3.6 The Cole Report also found that "the trend to contracting has been accepted by significant numbers of workers"[5]. This accords with Master Builders' own general experience where there is widespread acceptance of subcontractors as a vital component of the industry. Indeed, because of the widespread use of the subcontracting system in the housing sector, its labour practices

[5]Supra note 2 at paragraph 277, Chapter 23, Volume 9

engender greater efficiency than found in the commercial sector attributable to the general absence of union based enterprise bargains. The translation of the workplace relations practices to the commercial sector would generate greater industry productivity.[6]

3.7 It can be discerned, therefore, that the building and construction industry operates on a subcontract basis for two principal reasons. First, while the nature of construction work is relatively labour intensive, it is also highly specialised. Many of the industry's contractors are sole traders with highly specialised skills focussed on one particular aspect of the construction process. Secondly, competing specialist skills in an environment where work is project based naturally create efficiencies through competition. The subcontracting system, by its very nature, is highly price competitive as just outlined. The move to contracting does not evidence any groundswell of 'sham' arrangements designed to exploit workers or avoid workplace obligations. The subcontracting system exists and operates efficiently for the two principal reasons outlined in this paragraph and as set out in more detail in paragraph 3.5.

3.8 In addition, many individuals prefer to work as subcontractors so that benefits do not accrue and a maximum immediate benefit from payments is made to them from their work. Operating as a subcontractor means that the individual receives the maximum amount of money for their effort in the short-term. Hence, it is often an individual's choice to form a subcontract structure on purely economic grounds, even though this, on the face of it, exposes the individual to greater commercial risk. This freedom of choice with its attendant flexibility should not be circumscribed by regulation.

3.9 The unions have long, wrongly, contended that these contractual arrangements are artificial and that many subcontractors are, in fact, employees. The contention manifests itself in disruptive tactics against contractors and subcontractors from time to time as the unions seek the right to challenge the bona fide legal status of subcontractors. Most complaints emanate from unions as the unions have a direct interest in reducing the number and minimising the growth of independent contractors because that activity decreases the pool of potential members.

[6] C Murphy "*The Construction Industry and the Economy: The Impact of Lifting Construction Productivity*", A paper for the Construction Beyond Cole Conference October 2003

4.0 LABOUR HIRE IN THE BUILDING AND CONSTRUCTION INDUSTRY – GENERAL CONSIDERATIONS

4.1 Sections 4-7 of this submission deal with the Committee's terms of reference relating to the role of labour hire arrangements in the modern Australian economy. Part of the Cole Royal Commission report discusses the extent of the practice of labour hire in the building and construction industry and considers whether changes are required to the law to reflect the reality of contracting arrangements in the building and construction industry.[7] The issue was also discussed in Discussion Paper No. 11 issued by the Royal Commission, referred to in paragraph 3.4 of this submission.

4.2 Part of the Cole Royal Commission's findings are worthy of repetition here given that the fundamental conflict between the common law position as determined by the High Court in the *Odco case*, and the legislative position of the status of labour hire workers under State-based workers' compensation legislation is highlighted in the following extract:

> "Labour hire in the building and construction industry became prominent in the late 1980s. The legal analysis of labour hire appears most clearly in the Odco *Troubleshooters* Case where it was decided that, at common law, there was no contract of employment between the builder and a worker provided by the labour hire firm and the builder was not liable to pay the worker, nor was there a contract of employment between the worker and the labour hire firm because the worker was not subject to the control or direction of the firm. The position differed for the purposes of the Victorian WorkCover legislation, where the High Court held that labourers placed by the labour hire firm were workers of the labour hire firm for workers compensation purposes. Later authority accepts that in some circumstances a labour hire company can be the employer of a worker. In other circumstances the worker could be the employee of the client of the labour hire firm."[8]

4.3 It is this fundamental divergence between the manner in which the law treats labour hire workers that causes real on-ground practical difficulties. This is especially the case where some laws deem the on-site employer to be responsible for certain legal obligations with the off-site employer liable for other matters. Confusion over responsibility for OH&S is the most vexed issue at present with the notion of the method of engagement being incorrectly tainted by inadequate risk management policies being established and implemented.[9] (This issue is taken up in section 7 of the submission.)

[7] Supra Note 2 at Volume 8, Chapter 10
[8] Id at page 81, paragraph 3
[9] see "Contracting and Labour Hire Increase OH&S Risks", OHS Alert, 9 February 2005

4.4 The growth in labour hire is due to a number of factors. These include:

- the need to manage fluctuating labour demand, especially additional labour to meet peak periods; and
- the need to reduce the administrative burden associated with the employment relationship (particularly record keeping).

5.0 LABOUR HIRE AND SKILLS SHORTAGES

5.1 In Master Builders' view, one of the main factors that has necessitated the use of labour hire is the skills shortage experienced in the building and construction industry at present. This view is based upon anecdotal evidence and is deserving of further research. We must of course underline that the formation of labour hire companies does not of itself fix the skills shortage problem for the industry. What it does is mobilise available resources so that particular skills shortages may be more efficiently met at an individual company level from a measured resource. The anecdotal evidence gathered by Master Builders in this regard is, however, substantiated by recent Productivity Commission research[10]. The research indicates that firms have incentives to use labour hire including for the following reason:

> "Delays in, and consequently the cost of, obtaining scarce skills can be reduced, if labour hire agencies are more efficient than many firms at sourcing and assessing persons with desired skills."[11]

5.2 *The Department of Employment and Workplace Relations' National and State Skills Shortages Lists – Australia 2004* reports national skills shortages for carpenters and joiners, fibrous plasterers, bricklayers, solid plasters and plumbers. This is further exacerbated by the limited number of apprentices completing their training. There has been a slight decrease in commencements from 18,190 in September 2003 to 17,440 in September 2004. There has been a marked increase in the number of apprentices withdrawing or cancelling their apprenticeships and has risen from 8,230 in September 2003 to 9,550 in September 2004.[12] Master Builders is active in isolating the cause of this decline and promoting apprenticeships.

5.3 The issue of skills shortages has been the subject of much debate in the past 18 months and Master Builders has been working with the Commonwealth on

[10] P. Laplagne, M. Glover and T. Fry, "The Growth of Labour Hire Employment in Australia", Productivity Commission, February 2005
[11] Id at P1
[12] The Department of Employment and Workplace Relations' National and State Skills Shortages List Australia 2004 – National Centre for Vocational Education Research – Numbers of Apprentices and Trainees in Tradepersons and Related Workers occupation by Contract Status, State/Territory. Based on September 2004 estimates.

a number of initiatives under the National Skills Shortages Strategy. Firstly, there is a need to identify the impedients to introducing more targeted apprenticeship pathways that reflect the specialisation that has occurred primarily due to the sub-contract nature of the industry. For example, traditional apprenticeships in the carpentry area have, in part, given way to contractors who only erect house frames which would not require the full range of carpentry skills. Master Builders believes that training pathways should exist for such trades.

5.4 Secondly, Master Builders is preparing for the launch of a marketing campaign to encourage employers to invest in training to redress the slow take-up of apprenticeships across all vocations in the building and construction industry. Notwithstanding the recent small increase in apprenticeships in the September 2004 quarter, this will not be sufficient to meet the requirements of industry for tradespersons in the future.

5.5 Thirdly, Master Builders is enhancing the development of the Big Plans website (www.bigplans.com.au) which is aimed at encouraging young Australians to join the industry in both the trades and the professions. Each of these initiatives will be undertaken during the first half of 2005.

5.6 In addition, Master Builders has highlighted the lack of labour market data that will inform both the industry and government on future requirements for labour in the industry. In response, the Commonwealth has established a taskforce of the NCVER, DEST, DEWR and the ABS to develop labour market forecasting models that will better inform the industry on expectations for future skill demands. Master Builders, however, recognises that the skill shortages dilemma will not address in the short term the current skill shortages that exist across all trades and the professions including estimators, contract managers, project managers and engineers.

5.7 In addition, as the Productivity Commission's research indicates:

> "If labour hire workers are used because of the unavailability of direct workers with the necessary skills, then the two groups may be regarded as *complements* rather than substitutes."[13]

5.8 Master Builders Australia is pursuing a number of research projects which will assist to identify the causes of the high rate of attrition amongst apprentices. We also note that group apprenticeship schemes should not be included in the deliberations of the Committee. Master Builders perceives no similarity

[13] Supra Note 10 at page 2.

between the circumstances of those employed by a group apprenticeship scheme and those whose employment proceeds through the activities of a labour hire enterprise. The history, character and related contracts of employment are vastly different between these two methods of engagement. The relationship between group apprenticeship schemes and those they employ is the subject of special State and Territory legislation and often involves an indenture. Many of the Master Builders' organisations have established their own apprenticeship schemes in order to smooth out the cyclical 'boom and bust' character of the industry which was discussed earlier in this submission and which actively discourages many employers from engaging apprentices. Group schemes, therefore, enable employers to participate in training despite the uncertainty of future work availability. Whilst care needs to be taken that there are alternative training arrangements in place, the current schemes work well and need not be scrutinised by the Committee.

5.9 Labour hire arrangements do not directly contribute to the pool of skilled labour. They generally do not engender traditional skills formation through the apprenticeship system. This is not a role that suits labour hire firms. However, the issue of mobility and the extent to which labour hire arrangements permit the efficient placement of employees at different time is a subject that the Commonwealth should devote resources to study. The recent Productivity Commission work mentioned in this section of the submission should be followed up with the suggested and more detailed research in this area.

6.0 ECONOMIC MOTIVATION FOR LABOUR HIRE ENGAGEMENT

6.1 The nature of the industry means that there are often mechanisms which are created that are different from the manner in which other industries deal with workplace relations. When those arrangements are formalised and underpin the contract of employment, such as the portable schemes referred to in paragraph 3.2 above, they increase the costs of engaging employees directly and, ironically, exacerbate the problem of fluctuating economic activity and the maintenance of an ongoing employment relationship. Accordingly, this factor of increased costs for direct employment as a means of assisting job security, contributes to the growth of contracting and labour hire arrangements in the industry.

6.2 It is often the case that researchers include all non-traditional work arrangements (such as outsourcing and temporary work) with contracting and labour hire and label then as “precarious employment”. This is not the case. It cannot be assumed that employees engaged by labour hire companies, or persons who choose to enter into contracting arrangements, are unwilling participants in this style of employment and engagement. That characterisation fails to recognise the changing needs of employees. With an increase in the number of working mothers, part-time workers and older workers, the flexibility that labour hire provides adds a supplementary income where, for example, a person is unwilling or unable to work full-time.

6.3 The volatility of the industry that we have spoken off throughout this submission means that labour hire provides greater continuity and ease of obtaining employment for workers within industry. We note that this proposition is substantiated by the submission of the Recruitment and Consulting Services Association to a NSW Taskforce that was convened to examine labour hire in 2000. That organisation showed that 55% of labour hire workers use the opportunity as an entry into full-time employment. This point retains further cogency when it is noted that the construction industry is unique in that it does not have an underlying safety net provision that permits general part-time employment. Under the terms of the *National Building and Construction Industry Award 2000* (NBCIA), employment is either full-time or casual (with a very strict limitation on ongoing casual engagement) or on a daily hire engagement basis. Labour hire engagement, therefore, provides a short-term method of employment that may not otherwise exist and a flexibility that is not made possible by the NBCIA, particularly given its prohibition on part-time employment. As with most markets, the labour market finds mechanisms to overcome distortions.

7.0 REFORM OF LABOUR HIRE AND RELATED REFORM

7.1 In paragraph 4.3, the fundamental issue of the differing legal views about who is the employer of a labour hire worker was raised. This issue and a general concern about OH&S responsibilities for labour hire workers lead the Cole Report to note a specific recommendation for reform of labour hire arrangements.

7.2 The issues to be dealt with by its specific recommendation were summarised by Commissioner Cole as follows:

> "The use of workers provided through labour hire firms has become increasingly common in the building and construction industry. There have been significant issues raised about the use of labour hire businesses as a source of employees in the building and construction industry. These issues include who is the employer of labour hire workers and who is responsible for the safety of their workplace and for the payment of their entitlements. Calls have been made for greater certainty about these issues."[14]

7.3 Accordingly, Recommendation 100 of the Cole Report is as follows:

> "The Commonwealth initiate, through the Workplace Relations Minister's Council, the development of a Code of Conduct and Practice for Labour Hire in the building and construction industry."[15]

7.3 In its first submission on the Cole Report[16], Master Builders supported Recommendation 100. Master Builders supported the development of a Code in order that "prescriptive measures that could change the flexibility and simplicity of labour hire"[17] were not introduced. The Code of Conduct and Practice could be called up by the Commonwealth as a component of the National Code and Guidelines[18] published by the Australian Procurement and Construction Council and the Department of Employment and Workplace Relations. This move would permit the new Code of Conduct and Practice to be given effect on Commonwealth projects and tested by the Commonwealth before it was more broadly implemented, such as through, say, the statutory Code envisaged under the *Building and Construction Industry Improvement Bill* (BCII).

7.4 The content of the Code could be developed by the Commonwealth following input from labour hire companies and other stakeholders at a conference called specifically for that purpose. It is essentially the responsibility of the labour hire industry to develop solutions and standards appropriate for the industry.

7.5 In the context of the development of the envisaged Code, we note that it should be a national document that comprehensively and consistently deals with the intricacies of the three-way relationships founding labour hire arrangements. We believe that the national Code should encompass the OH&S responsibilities associated with labour hire arrangements. Master Builders is concerned that, in the absence of a national Code dealing with OH&S, a plethora of new regulations dealing inconsistently with OH&S

[14] Supra Note 2 at Vol 8, Chapter 10, page 88
[15] Id
[16] Master Builders Australia Inc Submission on the Cole Royal Commission Final Report: Workplace Relations and Occupational Health and Safety, May 2003
[17] Id at paragraph 10.4, page 25
[18] www.dewr.gov.au

arrangements in labour hire will be introduced. This concern is illustrated in the recommendation of the Victorian Economic Development Committee[19] that a minimum set of standards for labour hire OH&S could be expressed in a Labour Hire Code of Practice pursuant to section 55 of the *Occupational Health and Safety Act 1985 (Vic)*[20].

7.6 Clearly, the OH&S duties of labour hirers and host employers overlap and, unusually, the obligations of the labour hirer are not reduced as a result of the obvious lack of control over the host's place of work; a proposition made clear in New South Wales in *Inspector Blume v TMP Workwide eResourcing*[21]. An alternative means of reforming labour hire OH&S, especially in the building and construction industry, would be for the notion of control in OH&S law to govern OH&S obligations. This is certainly the view of Master Builders in the development of the National Standard for Construction on OH&S currently being developed by the National Occupational Health and Safety Commission and a solution which fits with the practicalities of OH&S. Further, as indicated in paragraph 4.3, the overlapping nature of the labour hire obligations should not ameliorate the need for appropriate risk management strategies to be put in place at a construction site **regardless of the method of engagement**.

8.0 REFORM OF THE LAW RELATING TO INDEPENDENT CONTRACTORS – AVOIDING THE DEPENDENT CONTRACTOR TRAP

8.1 This section and section 9 deal with the Committee's terms of reference that call for an examination of the ways independent contracting can be provided consistently across State and Federal jurisdictions. Master Builders supports the introduction of the Federal Government's foreshadowed independent contractors legislation. It is extremely important that the industrial relations systems of the States are not used to undermine the status of independent contractors. Most damaging in this regard is the idea that contractors should be deemed to be employees where they are in a relationship of dependency, a deeming, for example, permitted through the mechanism of section 275 *Industrial Relations Act, 1999 (Qld)* or encapsulated in Schedule 1, *Industrial Relations Act, 1996 (NSW)*.

[19] Parliament of Victoria, Economic Development Committee Interim Report, "*Inquiry into Labour Hire Employment in Victoria*", December 2004
[20] Id at page 76 and page 78 for Recommendation 5.2
[21] [2003] NWIR Comm 37

8.2 For the reasons which follow, we believe that the Commonwealth should erect a system whereby registration as a contractor within that system will defeat the so-called "deeming" of allegedly dependent contractors to be workers. At the point of registration with the relevant Commonwealth agency, the contractor's status, as such, should be unable to be challenged by a State or Territory.

8.3 We note that amongst commentators and academics, there is confusion about the definition of a dependent contractor, which emphasises the conceptual shortcomings of this notion. For example, the definition used by Waite and Will[22] is very different from the definition used by VandenHeuvel and Wooden in their 1995 study.[23] That latter study adopted the definition of dependence based on the provision of services to only, or predominantly, one organisation. This definition is unsatisfactory, to say the least, as a means of categorising a relationship of economic dependency or as a trigger where the normal market mechanisms need to be set aside. The fundamentally flawed assumption is that the so-called dependent contractor is the subject of exploitation. Indeed, the flaw in the assumption is underlined where a so-called dependent contractor may legitimately employ its own workforce.

8.4 This conceptual confusion is able to be demonstrated from the discussion in the Victorian Industrial Relations Taskforce report where the following is said about dependent contractors:

> "There is also a view that somewhere between genuine employees and genuine independent contractors, that a third category of contractors is starting to emerge. This category **is defined as those workers who are self-employed, but at the same time are dependent on the hiring organization to whom they provide their services**. They are basically dependent on a regular employer for work, much like an employee is dependent on an employer for a wage. While workers in this third category may not yet account for a substantial share of the workforce, their numbers look set to grow."[24]

8.5 This passage begs the question of how the notion of dependency is characterised, how it is correlated with a relationship of exploitation for which protection needs to be afforded and whether it is a dynamic or a static concept. If dynamic, why enclose the contractor within a static legal

[22] Waite M and Will L 2001 Self Employed Contractors in Australia: Incidence and Characteristics. Productivity Commission Staff Research Paper, Ausinfo, Canberra.
[23] VandenHeuvel, A and Wooden, M – Self Employed Contractors in Australia: How many and who are they? Journal of Industrial Relations (1995) Vol 37, No. 2, P.263.
[24] The State of Victoria, Independent Report of the Victorian Industrial Relations Taskforce *Part 1: Report and Recommendations,* August 2000, p.146.

framework such as imposed by s.275 *Industrial Relations Act*, 1999 (Qld)[25] or Schedule 1 of the *Industrial Relations Act, 1996 (NSW)*. This is particularly the case for building workers who are often itinerant or who may choose, between different projects or over different time spans (from one week to a year), to act as employees or to act as contractors. In addition, there does not appear to be evidence that people are being **forced** into contractor relationships.

8.6 It is against this difficulty that the current Australian laws regulating dependent contractors and the rationale for their introduction need to be examined. It is also in this context that the utility of deeming dependent contractors to be workers for the purposes of workers' compensation legislation needs to be examined. Whilst we disagree with their ultimate solution to the issue of the definition of worker, we agree with the summary of the law relating to deemed inclusions in the definition Australia-wide as expressed by Clayton, Johnstone and Sceats[26] as follows:

> "The deemed inclusion of a diverse range of workers represents a potpourri of examples without any single defining principle, apart from some inchoate notion that they represent socially desirable areas of coverage."[27]

8.7 What is the mischief against which legislation deeming so-called dependent contractors as employees is alleged to address? The words of one commentator assist:

> "The archetypical dependent contractor…typically relies on work from one source only. The dependent contractor differs from the employee only in that the dependent contractor brings to the exchange financial capital as well as his or her own labour effort."[28]

8.8 This definition brings with it the assumption that one contractual source, with a clear economic dependency on that source, is inherently exploitative. But is that an inviolable proposition and does it embrace the very unclear boundaries of who is and who is not a dependent contractor? Both questions should be answered in the negative. It cannot be the case that, say, one small independent software company would cavil at, for example, a five year Commonwealth Government contract. In some senses, that would be one of the most desirable outcomes for any small business – a long term, secure

[25] See Queensland provision see Queensland Government Department of Industrial Relations 'The Operation of the Industrial Relations Act 1999 – The First 2 Years', esp at p. 21 - http://www.ir.qld.gov.au/reports&submissions/iract-first2yrs.pdf
[26] A Clayton, R Johnstone and S Sceats 'The Legal Concept of Work-Related Injury and Disease in Australian OH&S and Workers' Compensation Systems' April 2003, ANU National Research Centre for OHS Regulation.
[27] Id at p.19.
[28] A Commons 'Dependent Contractors: In from the Cold' Auckland University Law Review, Vol. 8 No. 1 (1996) p.103.

contract with a responsible principal. The same applies in the building and construction industry.

8.9 The point is that dependent contractors, even when they rely on one main source, are not necessarily in a position where they have been or are open to exploitation or where they merely bring financial capital to the relationship. For example, their intellectual capital is often equally, if not more, important. The basic assumption that they have, as a matter of fact, relatively less bargaining power than employers is flawed. The fact that having one client at a particular point in time means that the business, in whatever form, is similarly illegitimate is also not logically sustainable. It is for these reasons that the deeming of so-called dependent contractors as employees will not assist in bringing clarity to the divide between employees and contractors. The entire label should be dismissed as a notion that is misconceived and the solution to the contractor/employee divide should be solved as discussed in section 9 of this submission.

9.0 CONSISTENCY IN INDEPENDENT CONTRACTING

9.1 As is obvious from section 8 of this submission, a great deal of the necessary consistency in this area would arise from a consistent definition of the status of an independent contractor. Rather than opt for a further statutory definition, however, the process of identifying the relevant status is outlined in paragraph 9.3.

9.2 Master Builders does **not** believe that the common law test as to the distinction between a contractor and an employee as currently applied is unclear. However, in many instances, the common law test has been wrongly applied by Courts including in some high profile cases[29]. Accordingly, if it is possible to use a simple, across-the-board definition of the status of an independent contractor, then a statutory definition is preferred. It is achieving this aim that may prove difficult. Hence, the proposed solution is three-fold.

9.3 Master Builders is of the view that the new independent contractor legislation should be drafted with three essential underpinnings:

[29] See for example the discussion in D. Chin, "*Losing Control: The difference between employees and independent contractors after Vabon v Commissioner of Taxation",* Law Society Journal 34:10 (1996) 52.

- That the ordinary common law test as established in *Stevens v Brodbribb Sawmilling Co Pty Ltd*[30] be stipulated as the main basis upon which the distinction between a contractor and an employee is assessed.

- Secondly, external indications of the status of contractor be used as a reinforcement of the common law test or otherwise. A strong indicator, for example, could be the existence of a personal service business determination being in effect for the particular individual (section 87-60 *Income Tax Assessment Act, 1997*).

- Thirdly, having regard to the common law test and other statutorily recognised criteria, the independent contactor could choose to be registered with a dedicated Commonwealth agency. The application for registration could be accompanied by a certificate from, say, a legal practitioner to the effect that, having regard to the statutory criteria, the contractor should be registered and for which particular project or job if the contractor is an individual who also works from time to time as an employee. This process would, therefore, require minimal Government supervision save for some random audits, for example. It would operate to take into account the dynamic nature of the contractor status and would permit registration as a contractor for a limited time period or only in respect of particular projects.

9.4 It is clear that the States and Territories would need to be satisfied in regard to this process, but it would be a good start for all Commonwealth legislation to have the definition of a contractor aligned with this process which would then be, in fact, an alignment with the new independent contractors legislation. Better still, as indicated in paragraph 8.2 of this submission, the Commonwealth should explore whether it is possible to find a legal mechanism by which the status of an independent contractor established in the way just discussed is able to displace the State-based legislation. To date, we have not had discussions with the Commonwealth on this point. However, we believe that, at the least, the Commonwealth should consider using the corporations power of the Constitution to bring about this change in the law. Whilst the use of this power will not deal with all of the issues in contention, it will enable the Commonwealth to establish an appropriate legislative model.

[30] (1986) 160 CLR 16

10.0 CONCLUSION

10.1 A great number of other issues outside the Committee's terms of reference need to be clarified in regard to the proposed independent contractor legislation including some issues that may impinge upon the taxation law. However, the overriding consideration in the new legislation should be a way to clearly and efficiently distinguish between contractors and employees. Master Builders' suggestions of how this could to occur is in accord with the current law, but the suggestions also add further clarity in the practical aspects of the application of the legal tests.

10.2 We believe that the Committee's report will be a useful document in assisting the Government to draft legislation which is practical and appropriate.