

SUBMISSION RE: DEFINITION OF A WORKER

INTRODUCTION

In terms of the WorkCover paper, “definition of a Worker”, the CFMEU (NSW Branch) Construction and General Division, (“the CFMEU”) responds as follows. The heading used in our paper coincide with the Heading used in WorkCover’s paper.

The CFMEU’s overwhelming view is that the status quo should remain and that to introduce the types of changes flagged in the WorkCover paper would create injustice for injured workers in NSW.

Executive Summary (page 3 of the Paper)

1. The CFMEU rejects that there is any need to change or amend the current definition of worker in relation to its application to independent or dependent contractors in the building and construction industry. In the CFMEU’s experience, in an industry that is based on “subcontracting”, there is no crisis in the current definition of worker that requires a departure from it. In fact, the current definition, in conjunction with the common law tests of employment and the deemed worker provisions have operated to protect workers’ interests and by and large ensured that even where a worker is not engaged in a traditional employee/employer relationship, there is access to workers compensation benefits in the appropriate circumstances.
2. Any shift from this position to more explicitly define who is or is not a worker will ultimately act against workers’ interests and will be manipulated by employers to their advantage. It is interesting to note that the push for changes, as reported by WorkCover representatives in a briefing to Unions NSW and its affiliates is coming from employers, not worker representatives. Moreover, more and more workers are pushed into non-traditional working arrangements, be it independent contracting, increased casualisation, or increased use of labour hire. With the further deregulation of the labour market clearly

foreshadowed by the Howard Government the precarious nature of employment will only be exacerbated.

3. The use of non-traditional employment arrangements is done in the building industry, as well as other industries, to cut labour costs, to avoid payroll tax, to avoid workers compensation premiums, to avoid group tax, to avoid paying proper wages and entitlement and to shift responsibility from the employer to employees. In particular, the proposed changes to the test for determining where someone is an independent contractor will provide further incentive for employers to structure employment in such a way as to deprive workers of workers compensation rights and to avoid workers compensation premiums.
4. The CFMEU does not accept that there is any significant dispute about the definition of a worker and its application in our industry for workers. The definition is one that has applied since the very inception of the workers compensation system with the Workers Compensation Act 1926. The CFMEU does not support the changes that are proposed which, in our view, will substantially alter the rights of workers to their detriment. The definition as applies today is a fundamental part of the workers compensation system and any change should be well considered. With all due respect to WorkCover, the proposed changes are not, in our view well considered or tested.
5. If there are specific issues in other industries, they can surely be addressed without an all-encompassing change to the current regime.

2.2 The Principles Governing a Revised Definition (p4 of 30)

6. The objective of certainty and providing a level playing field are worthy objectives. The CFMEU has long argued that employers who do the right thing in terms of their workers compensation obligations should not be put in a disadvantageous position in terms of competitiveness. However, the approach adopted in the WorkCover discussion paper will ultimately disadvantage workers and will not meet the third of WorkCover's stated principles, ie "*that*

no worker be disadvantaged in terms of access to entitlements under the workers compensation system by changes to the definition”.

7. A level playing field will not be achieved by making it easier for employers to deprive workers of benefits, but by increasing compliance efforts by WorkCover and insurers with effective and enforceable sanctions applied against cheats in the system.

3. The Current Definition (page 6 of the Paper)

3.1 The Base Definition

8. The CFMEU does not accept that the current approach “lacks sufficient clarity” as it applies in the building and construction industry. The CFMEU submits that the current definition, and the manner it has been interpreted by courts and tribunals over many years, is one that is adaptable to different circumstances so as to do justice to particular cases and facts. There are many different employment arrangements and any definition must be capable of dealing with different factual circumstances. People cannot be slotted into convenient boxes. Moreover, workers cannot be put in a position where employers can manipulate arrangements to deprive them of workers compensation rights. Workers rights should not be left to the whim of their employer.
9. There is a plethora of settled law on the issue and there is no justification to depart or amend from the current provisions.

3.2 Deemed Workers

10. The CFMEU opposes any attempt to amend the current provisions of the Deemed worker provisions so far as it deals with the issue of subcontracting.

4. Issues of Dependent Contractor

11. The CFMEU does not understand there to be a significant problem in the building industry as to the current approach to determining whether someone is a worker or an independent contractor. The principles that have been developed by the Courts, including the High Court of Australia, are useful and can be adapted to specific factual situations. The current system is capable of dealing with the issues in the event of a dispute which may arise at the time of injury.
12. It is not paramount, we submit for such issues to be necessarily determined at the time of engagement. If employers are unsure about who they should declare for the purposes of their declarations, properly trained and experienced insurer and WorkCover offices should be able to give employers advice on the matter. In the event of a dispute it can be resolved by the relevant tribunal. Employment arrangements can vary from person to person and industry to industry that absolute certainty can never be achieved.
13. Moreover, over time the nature of employment may change. A worker may begin their engagement as a “contractor” but a relationship may develop over time that when, as is just and fair, all circumstances of a relationship are considered an employee/employer relationship is in fact what exists. It would be most unfair to a worker, that if a determination is made at the beginning of their engagement, other factors that emerge over time could not be taken into account. The WorkCover paper implies that a Court or tribunal taking an approach which “looks at the whole circumstances of the relationship” (see p9 of 30) is somehow flawed. If this is intended, the CFMEU rejects any such assertion.
14. It is a flaw in WorkCover’s approach to seek to remedy issues of premium compliance by tampering with injured workers’ rights. The changes introduced to make principal contractors more vigilant to the issue of compliance on the premium side (oddly referred to in this context on page 10 of 30 of the WorkCover paper) and supported by the CFMEU were never intended to then lead to changes which will ultimately see genuine workers locked out of the scheme.

15. The case examples cited in the WorkCover paper at page 10, show how the current system does adequately resolve the definition of worker issue in the event of a dispute.
16. If it is found that someone is a worker, who originally was not so declared by their employer, it is not difficult for WorkCover to then calculate and recover from the employer any necessary adjustment to premium in a timely fashion.
17. The WorkCover paper, rightly identifies that contractual arrangements can be worded to give the appearance that a person is an independent contractor when they are not. We submit that the adoption of “independent contractor tests” as set out in section 6 of the paper will actively encourage such subterfuge.

6. Proposals For Stakeholder Comment (p16 of Paper)

6.1 Base Definition

18. The WorkCover proposal as we understand it is to retain the contract of service definition of worker except where someone may be an independent contractor or where deemed worker provisions apply.
19. The CFMEU supports the retention of the definition of worker as currently contained in Workers Compensation legislation and the operation of current deemed worker provisions.

6.2 Individual Contractors who are deemed workers

20. The CFMEU strongly opposes the introduction of the test as set out in pages 16-17 of the paper.
21. The CFMEU submits that such a regime of tests is more complicated and problematic than existing law and principles.

Test One: the person is paid to achieve a specified task result or outcome, and has to supply the plant and equipments or tools of trade and is liable for the cost of rectifying any defect in the work performed

22. The CFMEU does not support such a confined test. A test which only considers whether a person is paid to achieve a specified task result or outcome, and has to supply the plant and equipments or tools of trade and is liable for the cost of rectifying any defect in the work performed, is nothing more than WorkCover selecting three of many factors that are taken into account in the common law test of employment. There are many other factors including who exercise control, who directs the work in terms of when and how it is done, who provides the material and whether its essentially labour that is being provided to name but a few, which, even if the three elements that WorkCover (apparently arbitrarily) have chosen as the elements are present, would lead to a conclusion that a person is still a worker. To so narrowly confine the common law test of employment, as developed over many years, to three such elements will produce injustice.

23. Many skilled tradesman have their own tool of the trades, carry out work which has a specific outcome and because of their skill and their position are able and required to rectify any defect, this in no makes them independent contractors.

Test Two: the person does not receive more than 80 percent of their income from a single client and:

- **the person engages employees or subcontractors to perform at least 20 percent (by market value) of the work or has engaged an apprentice for at least half of the year; or**
- **the person undertakes work for two or more clients who are not associated with each other or the person; or**
- **the person maintains business premises at all times during the year that meet all of the following criteria:**

- **owned or leased by the entity;**
- **mainly used for the contract work;**
- **used exclusively by the entity;**
- **physically separate from the private residence of the individual doing the contract work and their associates**
- **physically separate from the business address of the entity's clients and their associates**

24. It is not clear whether this test is applied if someone fails the first test or whether this test is independent of the first.

25. Either way, the introduction of a test that is so prescriptive invites employers to structure employment in such a way as to ensure workers are independent contractors. Even under the current system, particularly in the cottage sector, but also in the gyprock, plastering, shop-fitting, wall and floor covering in the commercial sector, workers can only get work if they operate on an ABN, "all-in rates of pay system". Employers engaging these workers do not declare them for the purposes of workers compensation now. The most extreme example of employment being structured to avoid workers compensation and other liabilities is in the roof-tiling sector, where workers are forced to incorporate if they want to secure employment. From our experience the vast majority of workers in these fields of work are not adequately covered for workers compensation or have no coverage at all. It is these issues that WorkCover should address.

26. By so strictly defining the tests, employers can more readily set up systems to avoid workers compensation premiums. Moreover, workers who are essentially employees, and who would be found to be so by a court or tribunal are excluded from the system entirely.

27. In addition the Workers Compensation Act already excludes people who have employees, thus no change is required.

28. In industries characterised by itinerant workforces and in times of economic downturn, workers are often forced to work for more than one person, it would be a travesty if this would, in combination of other factors, preclude them from workers compensation coverage.
29. The current approach already excludes genuine independent business people.
30. The CFMEU considers that the disadvantages to workers by the application of these tests outweighs any benefit that such tests have in “clarifying” any perceived confusion. Indeed further confusion and disputation is inevitable with the application of such arbitrary tests which are open to all sorts of interpretation.
31. The law should be allowed to operate so as to be able to pierce arrangements that serve to deprive workers of their workers compensation rights.

6.3 Contractor Declaration

32. The CFMEU strongly opposes the use of the subcontractor declarations for persons to declare their status to the principal contractor and for such declarations to be used in anyway, as evidence or otherwise, in determining whether someone is a worker or an independent contractor. This is just another way in which employers will be legislatively empowered to force workers into arrangements that deprive them of access to workers compensation benefits. The CFMEU rejects entirely the proposition by WorkCover that such *“statement would also help to avoid disputes that may arise regarding liability after an injury occurs”* (p18). The benefit of the current approach is that all factors are taken into account in determining whether someone is a worker or not. If a worker is placed in a position where they have to sign a document or not receive work, they will sign because of that exercise of economic power over them. In the event they are injured this will then be used to prevent them from making a workers compensation claim. The burden shifts to the employee to convince a tribunal that they were a worker all along. This would be an unfair and onerous burden and should not be contemplated.

33. WorkCover's assurance that it will not "*take action against contractors in circumstances where an employer has used bargaining power to coerce them to sign a false statement*" (p18) and the encouragement by WorkCover to inform them if this occurs is meaningless. The legal tests to prove coercion and whether statements are "false" are set at such a high standard no protection will be given to workers put in this position. It also ignores the economic reality that employers will use their economic power to place workers in a position where they have no real choice but to sign such declarations to secure employment.

6.5 Labour Hire Workers

34. The CFMEU does not oppose this proposal. By and large in the building and construction industry the Act operates already to achieve this result.

35. However, the CFMEU is of the view that this proposal does not deal with the practical difficulties which arise with labour hire workers being, the host employer's capacity to avoid all obligation in terms of rehabilitation and return to work. This is the issue that WorkCover should address to make host employers share the responsibility for injury management and return to work for injured workers.

6.6 Other Deemed Workers

36. The CFMEU's principal interest is in clause 2 Schedule 1 of the Deemed worker provisions. The CFMEU does not support any change to this provision.

37. The CFMEU does not support any change which results in limiting access or reduction in benefits or reduces the efficacy of the deemed worker provisions for workers in NSW.

38. If WorkCover has any specific proposal which arises out of this review it should consult the Unions before any change is made.

CONCLUSION

39. The CFMEU does not support the proposed changes to the Definition of Worker. The CFMEU supports retention of the current approach and definitions in relation to the building and construction industry

40. Should WorkCover consider that changes are required the CFMEU requests that it be further consulted and be given further opportunity to make submissions in response and to have genuine input.