

MANPOWER®

PARLIAMENT OF AUSTRALIA

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON EMPLOYMENT, WORKPLACE
RELATIONS AND WORKFORCE PARTICIPATION

INQUIRY INTO INDEPENDENT CONTRACTORS AND LABOUR HIRE
ARRANGEMENTS

SUBMISSION BY:

MANPOWER SERVICES (AUSTRALIA) PTY LTD

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EXECUTIVE SUMMARY

Each week Manpower places over 6,500 Australians into paid work. Manpower overwhelmingly enters into an employment relationship with its workforce, however, where appropriate, Manpower enters into a commercial relationship with independent contractors for the provision of their services.

The flexibility to employ or to engage must remain a fundamental right when operating within the Australian economy. It is important for relevant standards in respect of parties' rights to be met, however the parties themselves are generally best left to determine the most appropriate form of their relationship.

The role of labour hire within the modern Australian economy is largely driven by market demand, and in recent decades, the use of labour hire has increased to meet the needs of the market. Public and private enterprise is looking for efficient ways to perform in an international arena, and the prevalent use of labour hire internationally reflects an overwhelming trend towards a flexible labour market across all industries.

Manpower supports measures to ensure independent contract arrangements are legitimate, and are made for the benefit of both parties entering into the arrangement, which prevent unconscionable conduct by parties.

1. STATUS AND RANGE OF INDEPENDENT CONTRACTING AND LABOUR HIRE ARRANGEMENTS

1.1 The status of Independent Contracting

1.1.2 It is generally considered the common law provides the ultimate test as to whether parties have in place a principal/independent contractor relationship, or that of an employer/employee.

1.1.3 The indicia considered by various courts, including the High Court, provide for the following. It is generally considered not all indicia need be met, but overall, the following indicia should generally be met:

- A principal does not have the right of control over performance of work by a contractor;
- Contractors are not subject to precise hours of work;
- Contractors usually provide materials and/or equipment in addition to their labour;
- Contractors are responsible for their own tax, WorkCover, superannuation, insurances etc.;
- Contractors are usually paid by results or on completion of job – not generally time based or hourly rates;
- Contractors invoice for payment for work;
- Contractors have a right to employ staff and delegate work;
- Contractors take responsibility for risks;
- Contractors operate as an independent business identity; and
- There is a legal intention to be engaged as a contractor.

Table 1: General indicia used to determine a contracting relationship

1.1.4 Various High Court decisions have found in some circumstances the indicia to be met, and a finding that a principal/independent contractor status exists (*Stevens v Brodribb Sawmilling Company Pty Ltd (1986) 160 CLR 16*). In other circumstances, the High Court has held that an employment relationship does exist (*Hollis v Vabu Pty Ltd (2001) 207 CLR 21*).

1.1.5 Whilst in earlier common law decisions the ‘control test’ was considered to be the major test in determining the relationship between the parties, quite sensible it is now only one part of the relevant test. In *Stevens v Brodribb Sawmilling Company Pty Ltd (1986) 160 CLR 16*, Mason J stated:

"the common law has been sufficiently flexible to adapt to changing social conditions by shifting the emphasis in the control test from the actual exercise of control to the right to exercise it, 'so far as there is scope for it', even if it be 'only in incidental or collateral matters': Zuijs v Wirth Brothers Pty Ltd (1995) 93 CLR 561 at 571. Furthermore, control is not now regarded as the only relevant factor. Rather it is the totality of the relationship between the parties which must be considered."

1.1.6 With each matter falling on its own merits or factual circumstances, there can indeed be some uncertainty between the parties (or with third party intervention) as to their respective rights and responsibilities.

1.1.7 Vicarious liability is an issue of importance when determining the relationship between parties. Both contracting parties need to, from the outset, be aware of all risks and responsibilities, and it’s important for uniformity in the way vicarious liability is addressed.

1.1.8 In *Northern Sandblasting Pty Ltd v Harris (1997) 188 CLR 313 at 366-367*, McHugh J referred to the force of arguments, which would justify the imposition of liability on employers for the acts of independent contractors. It has long been accepted, as a general rule, that an employer is vicariously liable for the tortious acts of an employee but that a principal is not liable for the tortious acts of an independent contractor.

1.1.9 In *Boylan Nominees Pty Ltd t/as Quirks Refrigeration v Sweeney [2005] NSWCA 8*, it was held the principal was not vicariously liable for the contractor for the following reasons:

- The principal did not exercise control over the work carried out by the contractor
- There was an absence of mutuality of obligation to provide work for a particular period and to work for that period;
- The contractor carried out work under his own business name (incorporated);
- The contractor provided its own equipment and tools;
- The contractor bought spare parts from other suppliers;
- The contractor was paid on a piece work basis;
- The contractor provided its own workers compensation, public liability insurance and superannuation;
- The contractor did not wear a uniform of the principal
- The contractor conducted its own business, drove a business-owned and branded vehicle.

Table 2: *Boylan Nominees Pty Ltd t/as Quirks Refrigeration v Sweeney [2005] NSWCA 8*

1.1.10 In *Hollis v Vabu Pty Ltd (2001) 207 CLR 21*, the High Court found bicycle couriers performing work on behalf of Vabu were indeed employees. Despite some indicia indicated a principal/independent contractor relationship, the Court found the following indicia to be of enough importance to declare an employment relationship;

- the bicycle couriers were not provided skilled labour or labour which required special qualifications;
- the couriers had little control over their work. Evidence did not show whether they could delegate the work, the High Court thought not.
- the couriers wore Vabu's livery – not in itself a test, but together with the other matters, important.
- deterrence – Vabu knew of reckless behaviour of couriers – policy consideration.
- Vabu superintended the courier's finances – made deductions etc. The couriers had no bargaining power to set the pay.

Table 3: *Hollis v Vabu Pty Ltd (2001) 207 CLR 21*

1.1.11 The majority held the bicycle couriers to be employees, and accordingly, the employer is vicariously liable. The common law provided for a test – although obviously an uncertain test in that the relevant case (the case of compensation, not a direct question as to whether one is an employee or independent contractor) was examined.

1.1.12 In *Stevens v Brodribb Sawmilling Company Pty Ltd (1986) 160 CLR 16*, the High Court held a principal/independent contractor relationship existed for the following reasons:

- the contractor provided and maintained their own equipment
- the contractor set their own hours of work and were not guaranteed work,
- the contractor was left to own skill and judgement (besides some minor instructions), the Principal made payments in relation to work performed, not as a fixed salary.
- the contractor had the power to delegate and did do so

Table 4: *Stevens v Brodribb Sawmilling Company Pty Ltd (1986) 160 CLR 16*

1.1.13 Arguably the common law is a fair test, and through the courts, the decisions can keep up with society's attitude towards this matter. However it is argued that the common law is slow to move, and it may not adequately address the fast-changing economic principles of the market. With a very large number of non-traditional work structures in place, the common law may not address parties' intentions, and may result in a determination unwelcomed by the parties involved.

1.2 THE RANGE OF INDEPENDENT CONTRACTING

1.2.1 Manpower is aware of a very wide variety of independent contracting within the economy. We understand with the advent of ODCO-type promotion of independent contracting, this form of engagement may be ideologically opposed by many, and in some limited circumstances, Manpower supports this opposition.

1.2.2 Manpower only undertakes independent contracting with bona fide contractors. Manpower will form a relationship of principal/independent contractor with the following organisations:

- Sole traders / partnerships
- Corporations
- Management organisations

Sole traders / partnerships

1.2.3 The following criteria needs to be met for Manpower to enter into a contracting arrangement with a sole trader / partnership where the sole trader / partnership provides contracting services for the benefit of Manpower's client;

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| <ul style="list-style-type: none"> • The entity must have a registered business name in the state/territory in which the work is to be performed; • The entity must be registered for ABN • The entity must invoice for all work performed, and charge GST where applicable • The entity must have all relevant insurances – generally this includes public liability, professional indemnity and workcover/salary continuance cover • The work performed by the entity must be of a reasonable skill level (i.e. trade / professional / IT) • The entity has the ability to delegate the work with the approval of the principal • Superannuation is paid only by virtue of the SGL requiring superannuation to be made payable where the contract for service is principally for labour and the independent contractor is not a corporation. |
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Table 5: Sole traders/partnerships

Corporations

1.2.4 The following criteria needs to be met for Manpower to enter into a contracting arrangement with a corporation where the corporation provides contracting services for the benefit of Manpower's client;

- The entity must be incorporated (Pty Ltd);
- The entity must be registered for ABN
- The entity must invoice for all work performed, and charge GST where applicable
- The entity must have all relevant insurances – generally this includes public liability, professional indemnity and workcover/salary continuance cover
- The work performed by the entity must be of a reasonable skill level (i.e. trade / professional / IT)
- The entity has the ability to delegate the work with the approval of the principal

Table 6: Corporations

Management Organisations

1.2.5 The following criteria needs to be met for Manpower to enter into a contracting arrangement with a management company where the management company provides labour for the benefit of Manpower's client;

- The contract is between Manpower and the management organisation;
- The entity must be registered for ABN
- The entity must invoice for all work performed, and charge GST where applicable
- The entity must have all relevant insurances – generally this includes public liability, professional indemnity and workcover/salary continuance cover
- The work performed by the entity must be of a reasonable skill level (i.e. trade / professional / IT)
- The entity has the ability to delegate the work with the approval of the principal
- The entity must pay the wages, superannuation and make all relevant deductions from the payment made to the individual performing the work

Table 7: Management Organisations

1.2.6 Manpower supports independent contracting only with organisations where the work performed by the entity is of sufficient skill (e.g. trade qualified, specialist, professional, IT). Manpower does not support purported independent contracting where the work performed is semi-skilled or low skill (e.g. individual cleaners, clerical employees etc.).

- 1.2.7 Manpower notes the claims made on the website of ODCO (www.odco.com.au), describing the ODCO system of independent contracting:

It is an ideal means to engage labour for most industries, particularly where there is a need for a productive workforce. The system is appropriate for a wide range of industry sectors where there are professional contractors (eg. in medicine, teaching, IT, etc.), semi-professional contractors (eg. office administrative assistants, customer service operators, etc.), trades contractors and unskilled contractors (eg. for process labour needs, etc.).

- 1.2.8 Manpower respectfully disagrees with ODCO, and strongly disputes it is appropriate, equitable, fair or arguably even conscionable to enter into an independent contracting arrangement with process workers, administrative assistants and the like.

Manpower's experience

- 1.2.9 In Manpower's experience, high skilled individuals choose, elect and demand to be engaged as independent contractors rather than employees. Manpower's IT on-hired subsidiary, ELAN IT Recruitment, engages approximately 25 percent of its workers as independent contractors, rather than employees.
- 1.2.10 Our experience is that these workers and entities are in high demand, earning significant remuneration. These organisations have their own insurances, and remain responsible for the work performed by them.
- 1.2.12 An additional benefit, of course, is the beneficial tax treatment of independent contractors. Those entities that are incorporated enjoy tax at the corporation rate - only 30% - whereas high-earning individuals are taxed at a marginal rate of 48.5% (including the Medicare levy).
- 1.2.13 To further complicate the considerations made by an independent contractor in choosing the way in which it wishes to be engaged, the alienation of personal services income tests (in respect of income deductions) may adversely affect an independent contractor's decision. If an independent contractor is offered a large project role for 12 months or more, and accordingly receives all of its income from the one source, it may be severely disadvantaged in respect of taxation payable. This may have an effect on the length of assignment the independent contractor accepts.

1.3 The Status and Range of Labour Hire Arrangements

- 1.3.1 Manpower is principally an on-hired labour provider – that is, supplying labour to work in the premises of Manpower’s clients. The term on-hired labour provider is preferred to the term ‘labour hire’. For consistency, we shall use the term ‘labour hire’.
- 1.3.2 Manpower has enjoyed significant growth since it first commenced operations in Australia in 1965. Manpower now engages over 6500 workers on a weekly basis, and in excess of 25,000 per annum (both employees and independent contractors). Manpower’s internal workforce is in excess of 600.
- 1.3.3 Throughout the 1990’s, Manpower’s operations grew at an exponential rate. Up until 1996, Manpower was a franchised operation in Australia, and subsequent to this, the US operation, Manpower Inc. acquired the franchises. Manpower Services (Australia) Pty Ltd now operates out of 40 offices, with an annual turnover of \$500 million.
- 1.3.4 The recent report by the Productivity Commission, *The Growth of Labour Hire in Employment in Australia*¹, indicates exponential growth in the industry and employment of labour hire employees throughout the last decade. Labour hire employees are now said to constitute 2.9% of all employed persons.
- 1.3.5 Manpower is a member of the Recruitment, Consulting and Services Association (RCSA), and recognises the RCSA as the peak employer within the on-hired labour industry. The RCSA’s publications provide a very detailed examination of the industry.

¹ Productivity Commission, *The Growth of Labour Hire Employment in Australia*, Laplagne, P.; Glover, M.; Fry, T.; February 2005

2. WAYS INDEPENDENT CONTRACTING CAN BE PURSUED CONSISTENTLY ACROSS STATE AND FEDERAL JURISDICTIONS

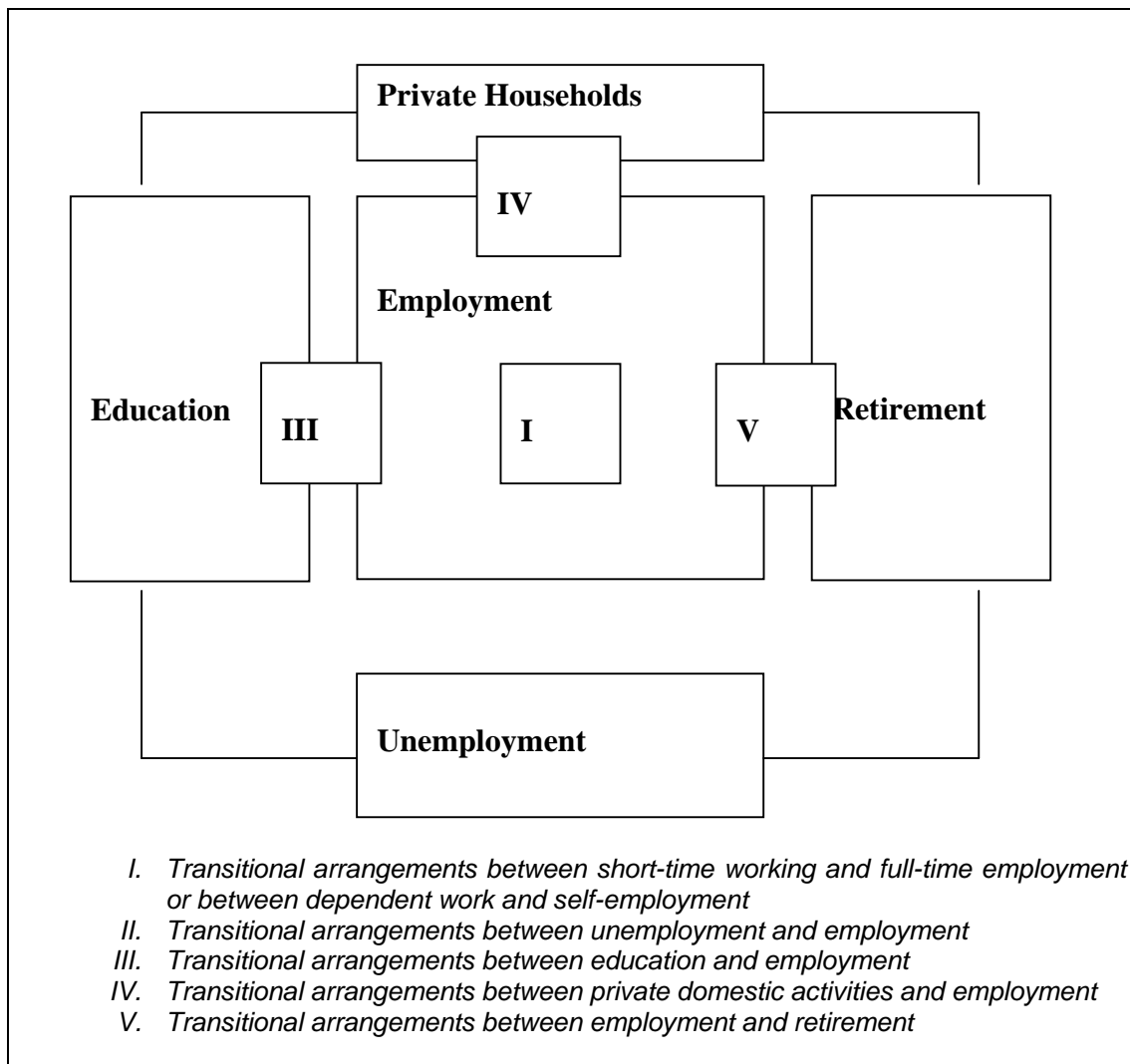
- 2.1 It would be extremely helpful to all parties involved if more certainty prevailed in respect of the use of independent contractors. If one suitable examination of two parties' relationships to each other could be measured and determined by the parties, it would allow each party to suitably assess their future rights and responsibilities to the other party, and to interested third parties (for example where a third party attempted to argue against the relationship said to be established between the parties).
- 2.2 What might that examination of the parties' relationship look like? Arguably the common law has worked reasonably well to determine parties' relationships to each other over many, many years. However it's clear that various decisions of various state, territory and federal courts can, at times, be in variance to earlier thinking or precedent. There still abounds an enormous amount of uncertainty as to what validly constitutes a bona fide principal/independent contractor relationship, and the parties are presently in the hands of a relevant court for it to determine if the relationship is that of an independent contractor or that of an employment relationship.
- 2.3 It might be possible, by use of the Corporations power, for the Commonwealth Government to legislate a test to be used to satisfy parties that they have validly entered into a principal/independent contractor relationship. This would of course not cover all contracting relationships (for non-incorporated organisations), however the Government might choose to seek constitutional law advice as to whether only one party need be incorporated for the party to be effectual under the above proposed law. If this were to be the case, this arguably might cover the very vast majority of parties who ordinarily enter into independent contractor arrangements.
- 2.4 The test need not be an exhaustive checklist, and might cover most of the common law indicia. The test need not require every single item to be in place, but would allow the parties to use the legislated indicia or items to move towards satisfying themselves they have validly formed a bona fide contracting relationship (and not that of an employment relationship).
- 2.5 The test might expressly exclude purported independent contracting relationships where clearly there is excessive bargaining power held by one party, and that party acts unconscionably in respect of the other party. An example of this might be where an employer of labour advises its current employees they must become independent contractors, and there is no clear expertise or skill held by those employees.
- 2.6 Manpower does not suggest or recommend a body be established to register independent contracting relationships. This would not be efficient in a busy economic environment, and would add additional costs to the parties and to the administration of such body.

- 2.7 If the Commonwealth Government is not inclined to initiate commonwealth legislation for the benefit of constitutional corporations, all of the various states would need to be encouraged to agree on terms appropriate for confirming a bona fide, valid principal/independent contracting relationship. This would be extremely difficult to coordinate, and it is likely the states will continue to support the common law presently in place.
- 2.8 If there is any commonwealth intervention in respect of validating bona fide contracting relationships, arguably the respective states' intervention into some contracting relationships would need to be addressed. For example, in NSW, even independent contractors can bring claims under the *Industrial Relations Act 1996* for claims that the commercial contract entered into between the parties is unfair. This particular jurisdiction can be frustrating for employers and principals alike, as the broad jurisdiction conferred upon the Industrial Relations Commission in Court Session provides for uncertainty as to whether the agreed commercial terms in place will be later re-written by a judicial tribunal.

3. THE ROLE OF LABOUR HIRE ARRANGEMENTS IN THE MODERN AUSTRALIAN ECONOMY

- 3.1 Manpower is the global leader in the provision of staffing solutions. Our approach is to *partner with clients to drive costs out of their business*. Under these arrangements, our services extend far beyond recruitment and selection. Our team functions as an extension of the client's Human Resource department. Manpower can provide everything from HR outsourcing to complete flexible workforce management and facilities outsourcing. Here in Australia, Manpower provides Managed Staffing Solutions for a number of clients including: The Australian Defence Force, Hewlett Packard and IBM.
- 3.2 Changes in work and family life have a profound implication on people's choice of employment. With the evolvement of the Australian economy from a manufacturing to a service based economy comes the emergence of the requirement for different employment arrangements.
- 3.3 ABS publications have indicated over time a strong downward trend in the numbers of people in full time permanent jobs to the present figure of little more than 50% of the labour force. They have also indicated an increase in the number of people working fixed term contract and or casual contracts, reflecting a much wider variation on the terms and conditions under which people are employed. This is an outcome of the increasing emphasis in the modern economy on flexibility both in terms of hour or terms of employment, as well as in the type of employment being negotiated.
- 3.4 Labour hire arrangements need to provide people with a choice of employment options as they transition in and out of the workforce. Maximisation of the transitioning workforce can be achieved by ensuring that the labour hire arrangements are in place encourage flexibility and adaptability with minimum risk to the individual.
- 3.5 The variety of labour hire arrangements are essential in order to assisting people make changes in their employment status as individuals transit through the various stages of their life cycle.
- 3.6 Gunther Schmid at the Social Science Research Centre in Berlin has developed the concept of "labour market transitions", across the life course as a means of developing a policy framework, which embraces the changing character of work, family and society.

Chart 1: Labour Market policy as a strategy of transitional labour markets



3.7 Transitional Labour Markets are about helping people make changes in their employment status and ensuring that individuals are able to transit between various employment statuses during their lifecycle through a set of employment options.

3.8 **Schmid identifies five major life transitions²:**

1. Transitions between education and employment
2. Transitions between (unpaid) caring and employment
3. Transitions between unemployment and employment
4. Transitions between retirement and employment
5. Transitions between precarious and permanent employment.

² Schmid: *Towards the theory of transitional labour markets*, Schmid and Gazier, 2002 pp151 ff:Schmid

- 3.9 The approach advocated by Schmid suggests a broader more comprehensive to approach labour hire arrangements.
- 3.10 The table below identifies the various labour markets open and the proportion of respondents who change their activities between 2001 and 2002.

Table 8: Transitions involving labour market, caring and study

Activity situation	Per cent changing between 2001 and 2002 (Transition Flow Rate)
Full-time work	11.7
Part-time work (care)	43.3
Part-time work (study)	41.6
Part-time work (other)	45.4
Unemployed	70.5
Not in the labour force (care)	33.5
Not in the labour force (study)	57.3
Not in the labour force (retired)	14.2
Not in the labour force (other)	61.5
Total	30.3

*Table 8: Transitions involving labour market, caring and study
Source: HILDA³*

- 3.11 The table above identifies the various labour market options and the proportion of respondents who changed their activities between 2001 and 2002. The situation with the highest flow rate is unemployment, in which 70.5% who were unemployed in 2001 were no longer unemployed in 2002.

³ HILDA (Household, Income and Labour Dynamics in Australia) 2002, *HILDA Survey Annual Report 2002*, Melbourne Institute of Applied Economic and Social Research, The University of Melbourne

Part time employment

3.12 Australia has a high rate of part time employment, almost double the OECD average. In 2003, part-time employment (less than 30 hours per week) made up 27.9 percent of all employment compared with 14.8 percent for the OECD in total.

Table 9: Proportion of unemployed people who were looking for part time work – July 2003

	Males	Females
Husband or wife with children	5.8	44.2
Husband or wife no dependants	11.2	18.7
Lone parent	21.4	39.5
Dependent student	81.7	89.4
Non-dependent child	5.0	5.4
Other family person	17.7	24.1
Live alone or non-family person	10.0	24.7
Total (All incl. r'ship not determined)	17.1	36.1
Number seeking part time work	53,500	91,000

Source: ABS 2003, Job Search Experience, 6220.0

Table 9: Proportion of unemployed people who were looking for part time work – July 2003
Source: ABS 2003, Job Search Experience, 6220.0

- 3.13 The take-up of part time employment may allow people who would not otherwise have accessed the labour market the opportunity to work because of caring responsibilities or educational studies. Labour hire arrangements need to be encouraged to support the participation of this population sector.
- 3.14 The labour market is dynamic and the role of labour hire companies is to enable the facilitation of the transition of people in and out of the workforce by encouraging as many flexible arrangements as possible.

4. STRATEGIES TO ENSURE INDEPENDENT CONTRACT ARRANGEMENTS ARE LEGITIMATE

- 4.1 Whilst we maintain it's not necessary for exact or equal bargaining power between the parties entering into the contractual relationship (as this will never be the case between parties), it is appropriate for unconscionable conduct to be outlawed.
- 4.2 A clear set of legislated indicia, without the requirement to meet every single indicia would provide the parties with assistance in determining their respective rights and responsibilities.
- 4.3 In the alternative, the parties will need to rely on common law, and the relative uncertainty the common law contains in respect of individual circumstances.
- 4.4 Unconscionable conduct should be prevented by way of punitive measures against the party undertaking the unconscionable conduct.

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