Submission of the State of Victoria

House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation

Inquiry into Independent Contracting and Labour Hire Arrangements

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Victoria
The Place To Be

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1 Introduction

Victoria welcomes the Inquiry of the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation on Independent Contracting and Labour Hire Arrangements.

As a major stakeholder in the federal industrial relations system, it is vital that Victoria be given every opportunity to participate in debates and provide input to policy development on the nature of the federal system.

Victoria supports a national unitary system of industrial relations that maintains protection for workers and promotes economic prosperity. The discussion paper contains some significant opportunities to work towards national consistency, and these should not be lost.

Victoria is opposed however to any move to override State and Territory laws with respect to these matters. The Federal Government should work with the States and Territories to develop nationally consistent solutions.

Victoria notes the release by the Department of Employment and Workplace Relations (DEWR) of a discussion paper titled “Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements” (henceforth ”the DEWR Paper”). That discussion paper put forward a number of specific legislative proposals that form a useful guide to the policy debate surrounding labour hire and independent contracting, and to which this submission responds. Victoria has also made a submission in response to the DEWR Paper which is consistent with this submission.

Victoria’s submission focuses on two of the terms of reference of the Inquiry, of particular relevance to Commonwealth /State relations:

- ways independent contracting can be pursued consistently across state and federal jurisdictions;
- strategies to ensure independent contract arrangements are legitimate.

The remaining two terms of reference relate to matters that are currently the subject of an Inquiry of the Victorian Parliament. That Inquiry is discussed in section 2 below. Once the Victorian Inquiry has reported, Victoria will advise the Committee of that report that deal with the remaining terms of reference:

- the status and range of independent contracting and labour hire arrangements;
- the role of labour hire arrangements in the modern Australian economy.

This submission is structured as follows:

Section 1	Introduction
Section 2	Provides a summary of relevant Victorian policy and developments and legislation.
Section 3	Sets out information on the advantages and disadvantages of labour hire and contracting arrangements.
Section 4	Provides an analysis of the policy underpinnings of the workplace relations system.
Section 5	Summarises the proposals made by DEWR for ways independent contracting can be pursued consistently across state and federal jurisdictions.
Section 6	Provides Victoria's specific responses to the legislative proposals made in the DEWR Paper.
Section 7	Raises some additional matters

2 Victorian developments

Set out below are details of recent relevant policy and legislative developments in Victoria that will be of interest to the Committee:

- The Victorian Parliamentary Inquiry into Labour Hire.
- Legislation dealing with outworkers in the clothing and textile industry.
- Legislation dealing with child employment – providing a broad definition of employment.
- Victorian Inquiry into owner drivers and forestry contractors and the introduction of a Bill into Parliament dealing with these small businesses.

2.1 Labour Hire Inquiry

On 3 June 2003, the Victorian Legislative Assembly resolved to require the Economic Development Committee to report on the extent of labour hire employment in the state, and the consequences of its use.

On 20 December 2004 the Committee presented Parliament with an interim report containing a number of recommendations.[1] At the same time, it wrote to a number of stakeholders seeking comment on some of the issues raised in the interim report. The Committee is due to provide a final report by 31 May 2005. A copy of the final report will be provided to the Committee as soon as it is available.

The Committee's interim report notes that since the 1990s, labour hire has become an increasingly prominent feature of the Australian labour market. The Committee was informed that there were currently around 1,200 labour

[1] A copy of the interim report and the full terms of reference can be found at: http://www.parliament.vic.gov.au/edevc/inquiries/Labour_Hire

hire agencies in Victoria. It received evidence that the major reasons for employers to engage labour hire workers were flexibility and cost.

As described by the Committee, themes that emerged in the evidence included:

- Ambiguity in the relationship between agency, host and worker;
- Concern about the high levels of casual employment in the industry;
- A lack of regulation which was claimed to contribute to disreputable practices; and
- The creation of a divisive culture within workplaces.

The interim report notes that some labour hire workers in Victoria are covered by federal industrial relations instruments, but others are only covered by the bare minimum conditions of Schedule 1A of the *Workplace Relations Act 1996* (the WR Act). The introduction of federal common rule awards in Victoria from 2005 will see the number of labour hire employees covered by comprehensive safety net awards increase.

The focus of the interim report is on matters relating to occupational health and safety (OHS) and accident compensation. The Committee found that while a number of labour hire operators achieved best practice standards in OHS, there was persuasive evidence to suggest that OHS outcomes in the labour hire industry were, on average, considerably poorer than in other industries. Reasons for this finding include: constant exposure to new workplaces, the increasingly unskilled type of work that labour hire workers are doing, and higher risk work practices that may result from insecurity of employment.

The Committee was concerned that advertising of some labour hire agencies was misleading in relation to workplace health and safety issues and recommended that the Victorian Workcover Authority (VWA) make reference to advertising standards in guidance material and monitor the issue more closely. Evidence was also presented to the Committee that the current workers' compensation scheme strains to deal with labour hire agencies.

The main recommendation in the Committee's interim report was that an industry-wide registration system aimed specifically at improving the OHS performance of labour hire companies be established, to be located in and managed by the VWA. The Committee believes that the key function of the registration scheme must be the development of minimum labour hire standards and procedures, which it says could be expressed in a Code of Practice.

Victoria is considering its response to the interim report, and will soon be giving consideration to the Committee's final report.

2.2 Child employment

The *Child Employment Act 2003 (Vic)* came into operation on 12 June 2004. The Act seeks to protect the health, safety and moral welfare of children at work and to ensure that work does not adversely affect their education.

Under the new Act, the existing child employment permit system is retained for the employment of children under 15 with some modifications. Now, children working in a family business will not require a child employment permit. Another modification to the previous system, designed to protect a child's moral welfare, is the introduction of a mandatory police check of the criminal record of those people employing and directly supervising children in the workplace. Hours of work are regulated, and penalties and an inspectorate are provided.

Relevantly for this submission, the Act provides a broad definition of employment that is deemed to include contracts for services (independent contractors).

This Act is a prime example of the extension of workplace protections to all workers, regardless of the form of contractual relationships. Here, the obvious policy rationale is the protection of children. The definition provides (in part):

> ***4. What is employment?***
> *(1) For the purposes of this Act, a child is engaged in employment if the child takes part or assists in any business, trade or occupation carried on for*
> *profit—*
>
> > *(a) whether or not the child receives payment or other reward for his or her participation or assistance; and*
> > *(b) whether the child is engaged under a contract of service, a contract for services or any other arrangement.*[2]

That is, the definition of "employment" includes children who work in independent contracting arrangements (contracts for services). Any discussion of freedom of contract and freedom to contract out of protective laws (such as workplace relations laws, or workers' compensation) is clearly inapplicable when talking about minors. A seven-year old actor making a "choice" to be an independent contractor is not a sensible proposition. In determining a scale of workforce vulnerability, children as workers are clearly at one extreme. However, other laws that seek to use such a deeming device to extend workplace protections to non-employees also do so to achieve traditional employee protections for groups of workers demonstrated to have particular vulnerability. A further example is outworkers in the clothing and textile industry.

[2] *Child Employment Act 2003 (Vic)* section 4

2.3 Outworkers

The textile clothing and footwear industry is one of Victoria's largest manufacturing sectors. There are over 140,000 outworkers in Victoria, predominantly of Vietnamese and Chinese origin. In Victoria, outwork tends to be located in areas that coincide with areas of high unemployment, and the workers come from backgrounds making them highly vulnerable in the labour market. There is strong evidence of exploitation of outworkers, including extremely low rates of pay, serious health and safety problems and non-payment of remuneration to outworkers by the intermediary companies in the supply chain.

The *Outworkers (Improved Protection) Act 2003 (Vic)* was enacted to address these problems, and came into force on 1 November 2003. The Act is based on the *Industrial Relations (Ethical Clothing Trades) Act 2001 (NSW)*. It aims to ensure that outworkers in the Victorian clothing industry receive their proper and lawful entitlements and to provide a consistent regulatory regime for the industry across Victoria and New South Wales.

The Act applies the benefits of certain Victorian laws to outworkers through a definitional device of "deeming" them to be employees for the purpose of certain Victorian workplace laws. While using a "deeming" mechanism, it is important to note that this is merely a device of statutory convenience. It does not alter the common law status of outworkers or their status under any federal taxation legislation. The Act could have achieved the same outcome by instead amending each of the Acts listed below by stating they applied to "outworkers as defined in the *Outworkers (Improved Protection) Act".* The other Acts which are applied to outworkers through this definitional device are:

- *Federal Awards (Uniform System) Act 2003* (Vic*)* (thus referring power to the Commonwealth to make common rule awards covering outworkers);
- *Long Service Leave Act 1992* (Vic)
- *Occupational Health and Safety Act 1985* (Vic)
- *Public Holidays Act 1993* (Vic)

The Act then provides a means of pursuing claims for unpaid remuneration, and for liability for unpaid income to be assumed by the principal contractor in a manufacturing chain. The outworker's legislation established the Ethical Clothing Trades Council, made up of representatives of workers, industry and community interests, advises the government on the implementation of the Act and industry issues. Activities of the Council include advising the Minister, monitoring compliance with the Act, and advising on a mandatory code on industry standards.

Victoria passed amendments to the legislation on 20 April 2005. The amendments complement the provision of the *Workplace Relations Act* 1996 dealing with contract outworkers, and ensure that outworkers who are required to establish themselves as a business to obtain work are not excluded from the protections of the Act.

2.4 Owner Drivers and Forestry Contractors

Victoria recently undertook an inquiry into the situation of owner drivers and forestry contractors (harvesting and haulage contractors) in Victoria. Owner drivers are independent contractors or small businesses, operating through a variety of trading entities including as sole traders, companies or partnerships. The key factor that distinguishes them from employees is that they provide a vehicle or vehicles for hire, along with services of driving the vehicle. Forestry harvesting contractors are small businesses employing between 5 and 20 other people who provide services of harvesting forest products, such as sawlogs and woodchips. The Victorian inquiry examined the economic features of these industries and the economic and social position of these small business proprietors relative to employees. The report of the inquiry was published in March 2005.[3] The report includes a range of research that may be of interest to the Committee, including:

- **Volume 1 (Report and Recommendations:**

Chapter B: employees and independent contractors distinguished;
Chapter C: application of existing laws;
Chapter D: industry and contractor characteristics;
Chapter E: causes of low earnings;
Chapter F: forms of legislative and policy intervention.
.

- **Appendices**: Appendix M; Summary of state legislation dealing with contractors.

- **Volume 2, Industry Overviews**: Research findings based on ABS data that compare numbers of workers, hours of work, earnings and financial performance, comparing employees to owner drivers.

- **Volume 3: Case Studies**. Contains a number of case studies that highlight areas of vulnerability inherent in independent contracting arrangements (Volume 3 of the report).

The Report found that in many respects, owner drivers have working conditions similar to employees. The majority work for only one hirer, usually for many years. Many owner drivers are prohibited by contractual terms from working for any other business, or, even if their contract allows this, they cannot or do not do so in practice. This is because supplementary labour is not affordable, or they have a vehicle painted in the main hirer's livery, or the contract requires them to be available to the main hirer for set periods each day. Owner drivers are generally required to work at the direction of their one

[3] *Report of Inquiry into Owner Drivers and Forestry Contractors*, Industrial Relations Victoria, State of Victoria, 2005. A copy of the four volume report can be obtained from www.irv.vic.gov.au. Volume 1 contains discussion and recommendations, volume 2 contains detailed data and information on the workforce and industries and volume 3 contains case studies. A volume of appendices includes a detailed overview of state laws dealing with business to business conduct and independent contractors.

hirer and to wear the company's uniform and logos on their vehicles. Given these characteristics, owner drivers are often referred to as dependent contractors (as opposed to truly *in*dependent contractors who work for many clients), or as "disguised employees". Most owner drivers are subject to "take it or leave it" rates and contracts.

Unlike most other small businesses, these dependent contractors do not have the risks and rewards of running a business. They are not in a position to control their workflow or work practices to create efficiencies and make true profits. On the other hand, many owner drivers have ambitions to grow their business, identify as being small business operators, and want to maintain the taxation advantages and personal satisfaction of being a small business operator. This is despite the evidence that shows that, for this group at least, the perceived advantages of being self-employed are largely illusory.

Following that report, Victoria presented the Owner Drivers and Forestry Contractors Bill 2005 to Parliament on 22 April 2005.[4] The Bill takes a novel approach in dealing with these self-employed workers and small businesses. Based on this research and findings, the policy approach adopted in the Owner Drivers and Forestry Contractors Bill 2005 does not apply a labour law styled-solution to owner drivers. Instead, it accepts that owner drivers are small business operators, and deals with them within a framework of commercial and fair trading laws.

The Owner Drivers and Forestry Contractors Bill 2005 is modelled on Victoria's *Retail Leases Act 2003*. That Act has worked successfully to address similar issues of market failure for small retail tenants, another group of vulnerable small business operators. Owner drivers, like small shop-keepers, are subject to: lack of adequate information on their business cost structures, contract insecurity, harsh or oppressive commercial terms and practices and have a strong need for alternative commercial dispute resolution.

In summary, the Owner Drivers and Forestry Contractors Bill 2005:

- Does not alter the legal status of the contractors as small businesses.
- Contains a broad definition of owner driver to cover all forms of small business structures, including businesses who employ other workers.
- Deals with these small businesses within a framework of commercial laws and institutions, rather than industrial laws and institutions.
- Is focussed on the identified market failure of information imbalance, requiring provision of information to owner drivers on typical business overhead costs and on small business skills.
- The Bill does not prescribe or regulate commercial terms, with the exception of requiring a minimum period of notice of termination. This requirement is included to reduce the currently high rate of business failure caused by sudden termination of contracts where the business operator has high finance costs, and is similar to minimum notice

[4] The Bill and explanatory memorandum can be obtained at: www.dms.dpc.vic.gov.au by following the link to parliamentary documents and Bills.

periods in retail leases designed to protect the business assets of retail tenants.

- Provides for alternative dispute resolution based on existing business-to-business trading laws. Relevant provisions *Fair Trading Act 1999 (Vic)* dealing with trader/trader disputes and unconscionable conduct are drawn down into the Bill, and coupled with low cost mediation by Victoria's Small Business Commissioner.
- Allows for the appointment of agents to conduct contractual negotiations and allows for joint negotiations by groups of owner drivers or forestry contractors with their single hirer.
- The Bill also allows for the making of Codes of Practice on commercial conduct. Codes will be made as regulations after advice from Industry Councils containing representatives of all industry interests.

3 Disadvantages of Independent Contracting and Labour Hire

The DEWR Discussion Paper summarises some of the advantages to business and workers of labour hire and contracting arrangements. Victoria agrees that contracting and labour hirer are legitimate forms of work and can contribute to greater flexibility and efficiency for hiring businesses. However the discussion paper does not fully consider the disadvantages arising from labour hire. Further analysis is required of the benefits provided to workers in independent contracting arrangements against the risks of being an independent contractor.

While Victoria accepts that contracting and labour hire are legitimate and proper forms of work and can contribute to greater flexibility and efficiency for hiring businesses, the benefits of these forms of work need to be analysed against the disadvantages. This section outlines some of those disadvantages, drawing on current research.

Contractors are increasing as a proportion of the labour force (and the taxation revenue base) because:

- There is a very strong trend to engage labour under contracts for services as opposed to employment to reduce exposure to industrial relations regulation.
- There is a strong trend for businesses to engage "just in time" labour. This trend first emerged in the construction industry to avoid having to pay wages for non-productive days, such as bad weather. In more recent times, it is driven by the philosophy of increasingly engaging only core staff on a permanent basis and engaging expertise as required on a contract basis even if this is for extended periods as long as twelve months.
- There has been a strong trend for many higher income earners to become contractors for income tax purposes.

3.1 Dependent Contractors: inability to control working arrangements

Some business groups and Government agencies have dismissed the concept of "dependent" contractors, stating that the common law determines that a person must be either an independent contractor or an employee but cannot be both[5]. There appears to be an underlying assumption that by definition, independent contractors are entrepreneurs, working for numerous clients and generating profits on their investment and effort.

From a legal point of view, the courts' task is to distinguish between those who meet the legal test of employment and those who do not. The term "dependent contractor" is however commonly used in academic discussion and in the collection of information on the Australian labour force by the Australian Bureau of Statistics. It is a term used to describe workers who, while not meeting the legal test of employment, do not enjoy the kinds of choices and benefits in their working arrangements that are assumed to exist for independent contractors.

The criteria commonly used to describe dependency in contracting relationships (lack of control over working procedures, the inability to subcontract and the reliance on one client) have major ramifications for contractors' economic and social positions.

Contractors who have these characteristics of dependency are *not* true entrepreneurs. They can be directed and controlled in the manner work is performed, when work is to be performed, and by whom work is to be performed. Dependent contractors do not have the kinds of flexibilities described at page 8 of the discussion paper, being freedom to choose hours and when to take holidays, freedom to choose for whom they work and what type of work they do. Dependent contractors are *not* able to control the manner in which work is performed, and this means that they cannot create efficiencies and generate true profits. They are working in the same manner as employees, but with different legal underpinnings and taxation treatment.

It is important to undertake an analysis of this group, who while meeting the legal or taxation test of contractor/small business status do not gain all of the benefits of that status. If a contractor cannot choose how to perform the work, or who is to perform the work, or when the work is performed, then they are not truly "running their own business" in the manner in which that expression is commonly understood.

This is the group that falls between two stools, denied the protections of the workplace relations regulation, but not able to secure the control over the work and therefore the profit-making benefits of being an entrepreneur.

[5] See Department of Employment and Workplace Relations (DEWR) discussion paper titled "Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements". at page 11

The Canadian Labour Code uses the expression "dependent contractor" directly, and defines employment to include "dependent contractors", which are in turn defined to include a number of particular occupational groups, and also include:

> *any other person who, whether or not employed under a contract of employment, performs work or services for another person on such terms and conditions that they are, in relation to that other person, in a position of economic dependence on, and under an obligation to perform duties for, that other person.*

How many contractors are dependent?

"*Dependent contractors*" is a term used by the Australian Bureau Statistics (ABS) to describe a sub-set of the total population of contractors. In the ABS *Forms of Employment Survey 1998* (FOES) and *Survey of Employment Arrangements and Superannuation 2000* (SEAS) surveys, dependent contractors were defined as being *in some way dependent* if they satisfied one or more of the following criteria:

- they did not have control over their own working arrangements;
- their contract prevented them for doing similar work with other clients; and
- their contract prevented them from subcontracting their own work.

Data from the SEAS 2000 survey indicates that across all industries, 29.1 per cent of owner managers in Victoria working on a contract basis were dependent (or 36,600 workers). This estimate excluded the owner managers not working on a contract basis (for example persons selling goods). For Australia as a whole, the proportion of owner managers *not working* on a contract basis, who were also classified as dependent, was **29.1 per cent.**

The Productivity Commission Staff Research Paper (Waite and Will 2001)[6] provides a glossary of terms, based on Australian Bureau of Statistics (ABS) and Australian Taxation Office (ATO) definitions of employee, contractor, independent contractor and dependent contractor (see Table 1 below). Within the category of contractor, *independent* and *dependent* contractors are distinguished, with the latter being described as: *Owner managers on a commercial contract but with work arrangements consistent with them being an employee*.

[6] Waite, M and Will, L (2001) *Self Employed Contractors in Australia: Incidence and Characteristics*, Productivity Commission Staff Research Paper, Canberra: AusInfo.

Table 1: Glossary of Terms

Employed persons 'Employed persons' is a particular term used by the ABS to refer to the total number of individuals working in an industry, in any capacity, regardless of their employment contract.	**Employees** Employees are those individuals who have contract of service with their employer rather than a commercial contract for services. These individuals' terms and conditions of employment are regulated under employment law, rather than commercial law. **Employees with leave entitlements** Persons with an employment contract that receive paid holiday and sick leave, also referred to as permanent or ongoing employees. **Employees without leave entitlements.** Casual employees or employees who do not receive paid holiday and sick leave
Contributing family workers Unpaid workers engaged in family run enterprises	**Owner managers** Persons who operate their own unincorporated or incorporated enterprise, with or without hiring employees, or engage independently in a profession or trades (ABS Cat. no. 6203.0). **Owner managers of incorporated enterprise** Persons who operate their own incorporated enterprise, including those who draw a wage or salary from that enterprise (ABS Cat. no. 6359.0). **Owner managers of un-incorporated enterprise** Persons who operate their own unincorporated enterprise, including those engaged independently in a trade or profession (ABS Cat. no. 6359.0).
Contractors Owner managers who operate their own business with or without employees and supply labour services to clients on an explicit or implicit commercial contract basis. **Dependent** Owner managers on a commercial contract but with work arrangements consistent with them being an employee. **Independent** Owner managers on a commercial contract and with work arrangements inconsistent with them being an employee.	**Non-contractors** Owner managers who operate their own business with or without employees and supply labour services to clients not on an explicit or implicit commercial contract basis.

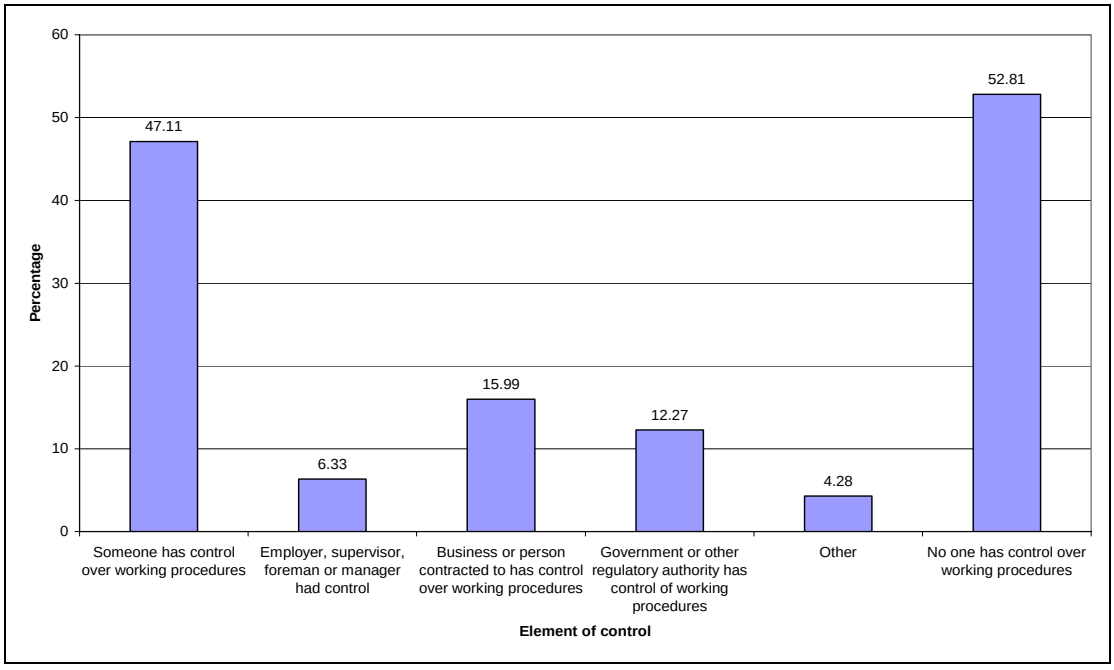
Source: Adapted from Waite and Will (2001)

Set out in figure 1 below is a further analysis of the ABS SEAS data on Victorian contractors (owner managers). It shows Victorian contractors have arrangements consistent with the ABS conclusions drawn from the national data. Despite the ostensibly independent nature of contractors, a notable proportion do not exercise control over working procedures, are unable to subcontract, and are dependent on one client. While just over half of Victorian owner managers (52.81%) stated that no one had control of their working procedures, a total of 47.11% of owner managers stated that 'someone has control over working procedures': with an employer, supervisor, foreman or manager (6.33%), or a business or person contracted to (15.99%), having control over working procedures.

The lack of control over one's own working arrangements for such a highly significant proportion of owner managers shows this group to in fact have working arrangements consistent with an employment relationship. This is made most explicit with 8.23% of owner managers stating they were unable to subcontract because of the terms of their contract. In total, a significant proportion of owner managers (22.17%), were unable to subcontract – or delegate – work to another person or persons. Further, even if the owner manager had control over their working arrangements, nearly one third (29.98%) of owner managers reported that they were in some way dependent on a client. As the ABS (2000: 12) summarises (in relation to national figures):

> *Owner managers were considered dependent on their client if their contract prevented them from subcontracting their own work, if their client had control over their working procedures, or if their contract prevented them from working for multiple clients. In total, 29% satisfied one or more of these criteria and were therefore considered to be in some way dependent on their client.*

Figure 1: Owner managers in Victoria (2000): Control over working procedures



3.2 Profitability of contractors and business insolvency

The profitability of independent contractors, or the rate of business failures among categories of independent contractors who may have traditionally been engaged under employment relationships, informs us of the vulnerability of certain occupational groups in the market compared to others.

Set out in table 2 below is an analysis of business related personal bankruptcies in Victoria by occupational categories, for 2002-2003. A business-related bankruptcy is defined as being one in which an individual's bankruptcy is directly related to his or her proprietary interest in a business. The ranking of business bankruptcies by occupation category reveals that

businesses in skilled agricultural and horticultural, construction, food and road and rail transport (including owner drivers) experienced the highest level of insolvency in relation to the total Victorian workforce; whereas 'white collar' and professional occupational categories of business (such as education, business and administration, and science and engineering) experience the lowest rate of bankruptcies.

These insolvency rates suggest that occupational skills (and therefore market value) is a significant factor in the success or otherwise of independent contractors and other small business operators. While certain occupational groupings with strong market power (such as highly skilled professionals) are highly successful as business proprietors, other small business proprietors / self-employed contractors in less-skilled occupational groupings have relatively high business failure rates.

Importantly for the purposes of this submission, it should be noted that those occupational groups with the highest levels of business-related insolvency are those groups who in the past would generally have been engaged in employment relationships.

There may be a range of factors involved in these insolvency rates for the self-employed, such as:

- low rates of pay;
- insecurity of income;
- non-payment of invoices by hiring businesses or unlawful deductions from payments;
- poor business and financial planning skills;
- difficulty in recovering debts, including unsecured status in insolvency.[7]

Table 2: Ranking of business bankruptcies in Victoria by occupational category, compared with State workforce – 2002-2003[8]

Occupational Category	Business Related Bankruptcies	Workforce 000's	Ratio 1:X	Rank
Skilled Agricultural and Horticultural	**13**	15.3	1,177	1.
Construction	**67**	82.0	1,224	2.
Food	**15**	20.0	1,333	3.
Road and Rail Transport Drivers	**43**	74.3	1,728	4.
Intermediate Sales and Related Workers	**17**	30.5	1,794	5.
Elementary Clerks	**9**	16.6	1,844	6.
Automotive	**14**	28.5	2,036	7.
Other Tradespersons and Related Workers	**27**	55.0	2,037	8.
Generalist Managers	**20**	41.8	2,090	9.
Elementary Service Workers	**11**	23.1	2,100	10.
Cleaners	**19**	43.4	2,284	11.

[7] See for general discussion on earnings and business failure of contractors, *Report of Inquiry into Owner Drivers and Forestry Contractors (Victoria, 2005)and Working Arrangements- Their effects on Workers' Entitlements and Public revenue*, Discussion Paper 11, Royal Commission into the Bui9lding and Construction Industry, September 2002

[8] Adapted from Insolvency and Trustee Service Australia (2003) *Profiles of Debtors 2003* Canberra Australian Government

Other Intermediate Production and Transport Workers	**23**	56.0	2,435	12.
Health and Welfare Associate Professionals	**5**	13.3	2,660	13.
Other Labourers and Related Workers	**29**	87.7	3,024	14.
Managing Supervisors (Sales and Service)	**37**	120.2	3,249	15.
Social, Arts and Miscellaneous Professionals	**20**	75.9	3,795	16.
Factory Labourers	**15**	61.0	4,067	17.
Business and Information Professionals	**36**	149.7	4,158	18.
Intermediate Machine Operators	**6**	30.4	5,067	19.
Other Advanced Clerical and Service Workers	**12**	61.0	5,083	20.
Intermediate Service Workers	**25**	130.0	5,200	21.
Specialist Managers	**16**	90.0	5,625	22.
Mechanical and Fabrication Engineering	**7**	41.6	5,943	23.
Intermediate Plant Operators	**8**	47.9	5,988	24.
Health Professionals	**13**	85.2	6,554	25.
Electrical and Electronics	**7**	47.3	6,757	26.
Science, Building and Engineering Professionals	**7**	52.3	7,471	27.
Farmers and Farm Managers	**6**	46.9	7,817	28.
Other Associate Professionals	**3**	28.1	9,367	29.
Intermediate Clerical Workers	**21**	210.5	10,024	30.
Elementary Sales Workers	**15**	203.7	13,580	31.
Secretaries and Personal Assistants	**2**	41.0	20,500	32.
Education Professionals	**1**	111.5	111,500	33.
Business and Administration	**8**	93.1	111,638	34.
Science, Engineering and Related	**0**	28.8	0	35.

3.3 Retirement savings

Successive Federal Governments have sought to improve self-provision in retirement and reduce reliance on the age pension. This has been done by requiring compulsory saving through mandatory superannuation contributions by employers on behalf of their employees. As a result of this policy, a number of superannuation arrangements exist covering both the private and public sectors. The *Superannuation Guarantee (Administration) Act 1992* (Cth) (SG Act) establishes a minimum level of superannuation contributions.

All workers within the common law definition of employee are entitled to superannuation contributions, currently at the rate of 9 percent of earnings. The SG Act also extends to coverage of other kinds of workers, including contractors. Hirers of contractors must make superannuation contributions for those workers if the contract is wholly or principally for labour, unless either:

(a) the contract allows the work to be done by another person; or
(b) the person is an ‘independent contractor’ as understood in the ordinary common law meaning of the term (s12(3)).

The latter provision is problematic, given the difficulties in common law and statutory interpretation of the term “independent contractor” discussed further in section 6.2 below.

Avoiding requirements to pay superannuation and workers' compensation insurance

The exemption from superannuation obligations for a person working under a contract that allows delegation of work to another, acts as a strong incentive from hiring bodies to draft contracts that allow for delegation of work to another person.

There is logic in the proposition that a contract that allows for work to be done by any person cannot be a contract of employment as understood in the law, as such a contract does not have the requisite flavour of personal service. However, under the superannuation regime, a hirer of labour can generate a saving of nine per cent of labour costs simply by drafting a contract to allow work to be delegated. The hirer can avoid the obligation to pay superannuation even where that right to delegate work is either never or rarely exercised by the contractor.[9] It is difficult to reconcile the outcome of this provision with the policy intention of the superannuation regime which is to ensure individual workers are self-funded in retirement. Many labour-only or dependent contractors (as discussed above) are left without adequate retirement savings, and do not have any business assets to sell to make up that shortfall.

Furthermore, a hirer is not required to make superannuation contributions for incorporated contractors. Nor, at least in Victoria, is a hirer obligated to make payment of workers' compensation premiums on behalf of an incorporated contractor. Many incorporated contractors are left without workers' compensation policies and many do not take out personal income protection insurance policies. The significant financial savings achieved to the benefit of hirers and the detriment of the workers that result from incorporation have prompted a significant trend among the hirers of labour to require contractors to be incorporated.[10] As the Companies Code now also makes provision for sole share-holder /sole-director companies, incorporation is more readily obtained.

The Investment and Financial Services Association Limited (IFSA)[11] estimate the retirement savings gap in Australia to be estimated at $6000 billion. The retirement savings gap is described as:

> *… the difference between the retirement living standard people currently aged 25 to 65 expect to have, and the retirement living standards that current compulsory and voluntary superannuation contributions, combining with the age pension, will eventually produce.*

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[9] See Volume 3, Case Studies, Report of Inquiry into Owner Drivers and Forestry Contractors (State of Victoria , 2005) (www.irv.vic.gov.au). The drivers interviewed each had the right to delegate work. However, the rates paid under the contract were less than the rates that the owner driver would have to pay a substitute driver as an employee. The outcome was that most of the drivers rarely took holidays.

[10] On trends towards incorporation of contractors, see *Report of Inquiry into owner Drivers and Forestry Contractors*, State of Victoria 2005, volume 1 at pages 33-36

[11] Investment & Financial Services Association Ltd (2003) *Retirement Savings Gap*, August 2003. From: http://www.ifsa.com.au/, 20 April 2005.

The most dramatic need is for women in the 40-44 year old cohort, which reflects a number of factors, including the predominance of women in precarious employment and breaks in paid employment to care for dependents. There is a significant widening of the retirement savings gap for men in the 45-49 cohort onwards, and these cohorts reflect the demographics and financial circumstances of owner managers.

3.4 Findings of Victorian Inquiry into Owner Drivers and Forestry Contractors

The Industrial Relations Victoria report on owner drivers and forestry contractors is a detailed and useful examination of the economic conditions applying to one group of independent contractors. The Report found extensive economic and social disadvantage among owner drivers compared to their employee counterparts. Despite performing the same work as employees and in substantially the same manner as employees, the Report[12] found as follows:

- Despite significant business investments (with some heavy vehicles costing up to $450,000) owner drivers work on average significantly longer hours than employee drivers for significantly less money than employee drivers.

- Research by ACIL Tasman found that in 1999-2000, as a group Australia-wide, non-employing road freight transport businesses (that is, sole traders or proprietors of companies that do not employ anyone) earned a profit before tax of $20,637 per business. This sum represents all income for both labour (for an average working week in excess of 55 hours per week) and return on capital and profit. Businesses that employed at least one person and had total gross incomes of less than $50,000 (such as incorporated owner drivers employing themselves, and also owner drivers employing a relief driver during leave or illness) paid out average annual salaries of $23,092 per business, and made an average per business **loss** of $11,605.

- Owner drivers have the fourth highest business-related bankruptcy of any occupational group, and become bankrupt at a rate four times higher than electrical contractors.

- There is evidence of widespread practices in the industry where one contracting party knowingly manipulates the information available to the other for their own commercial benefit. Common unfair or harsh contractual terms and commercial practices identified in the inquiry include improper deduction of administrative costs at inflated rates, many hours of unpaid work, deduction for provision of services without such service actually being provided, discounting of rates to customers and pressure on

[12] See Volume 2, Industry Overviews, *Report of Inquiry into Owner Drivers and Forestry Contractors* (State of Victoria, 2005) (www.irv.vic.gov.au).

drivers to accept lower rates in breach of contract and unreasonable restraint of trade provisions.

- There is significant evidence (from both Australia and internationally) linking the low rates paid to owner drivers and forestry contractors with:
  - very long hours of work (significantly higher hours than employee drivers to earn the same levels of income, and a significantly higher proportion working very long hours (over 73 hours per week);
  - increased levels of fatigue;
  - increased propensity to speed, overload vehicles and breach other road safety rules;
  - poor health outcomes and levels of well-being; and
  - higher rates of chronic injuries; and pressure on family life.

3.5 Sustainable Workforce Participation and Skilled Labour

While acknowledging the purpose of labour hire and the benefits to hiring businesses, Victoria nevertheless notes some of the negative effects on the labour market as a whole.

Labour hire arrangements can be used as a form of *substitution* rather than *supplementation* of an existing, directly employed workforce in a firm. This not only affects labour hire workers in terms of their wages and conditions, as the rates and conditions in awards and certified agreements can be under-cut, can also serve to erode the wages and conditions of directly employed workers. Through attrition, the terms and conditions of the labour hire workers may become the benchmark for directly employed workers.[13]

In short, labour hire, as a form of precarious employment, directly affects the employment quality of the labour hire workers themselves, but indirectly applies pressure and serves to degrade the quality of so called 'standard employment'.

The use of labour hire workers may contribute to the lack of investment in training at the level of the firm, and may in turn contribute to a wider skills shortage which is a current major public policy concern both at state and federal government levels. The option of contracting out labour, the general push to 'downsize', and adoption of 'just-in-time' management techniques, has lead to employer reluctance to take on trainee labour whether directly or through labour hire, which in turn has contributed to diminishing apprenticeship rates.[14]

[13] Campbell, I, Watson, I and Buchanan, J. (2004) 'Temporary agency work in Australia Part I' in Burgess, J. and Connell, J. (2004) *International Perspectives on Temporary Agency Work*, London and New York: Routledge, pp. 129-144.

[14] Toner, P. (2003) *Declining Apprentice Training Rates: Causes, Consequences and Solutions,* Sydney Australian Expert Group in Industry Studies at the University of Western Sydney http://aegis.uws.edu.au/Staff/TEXT/Toner%20pubs/Toner_DecliningApprTR_Jul03.pdf.

In the recently published *Review of National Competition Policy Reforms*,[15] the Productivity Commission notes that the decentralisation of the industrial relations system has delivered "significant benefits to many employees" as well as contributing to strong economic performance. However, the Productivity Commission also notes that not all reforms have been beneficial. Labour hire employment is emphasised as one aspect of industrial reform that while providing flexibility for hiring businesses, has resulted in a reduction in permanent full time jobs, which has lead to decreased employment security and reduced job satisfaction. The Productivity Commission references its own recent analysis of labour hire employment[16] which surmises that utilisation of labour hire workers is a deliberate management strategy to remain competitive by reducing costs, and as a response to the changing industrial relations environment.

4 Policy underpinnings

4.1 Freedom of Contract

The DEWR Paper describes the Federal Government's election policy as seeking to "enshrine and protect the status of independent contractors and encourage independent contractors as a wholly legitimate form of work". At various points, the paper says the Government is opposed to laws which impinge on freedom of choice for employers and employees.

Victoria submits that there is no evidence that this freedom has been materially threatened. Parties are generally free to structure their arrangements and contractual dealings as they see fit.

In any event, the Federal Government's own policy and legislative activity demonstrates that there is a limit to the notion that employers and employees should have an unfettered choice in determining their workplace relationships. As the DEWR Paper outlines, the Federal Government has moved to shore-up the nation's revenue base by extending the categories of workers that are required to pay personal income tax under the *Income Tax Assessment Act 1997*.

This extension of the reach of the tax laws through a deeming type mechanism reflects a policy position that it should not be possible for individuals to artificially structure arrangements to avoid obligations to pay income tax. If the worker is not in substance running his or her own business, then he or she should be taxed as an employee. Victoria submits that equally, it should not be legitimate to disguise what is in substance an employment relationship to avoid the obligations and protections contained in workplace relations legislation.

[15] Productivity Commission (2005) *Review of National Competition Policy Reforms*, Productivity Commission Inquiry Report No. 33, 28 February 2005, Canberra: Commonwealth of Australia.
[16] Laplagne, P, Glover, M. and Fry, T. (2005) *The Growth of Labour Hire Employment in Australia*, Productivity Commission Staff Working Paper, Melbourne: February 2005.

As put by noted academic Andrew Stewart:

> *The principle of freedom of contract should not protect arrangements which clothe workers in the trappings of independence, but do not in any meaningful sense make them entrepreneurs. Whether the worker acquiesces or not, and whether they understand what they are doing or not, a contract or chain of contracts which purports to deny them employment status should not be regarded as having that effect if the practical reality of the arrangement is that they are being employed to perform work. People should have the right to become entrepreneurs, if that is how they wish to make a living – but not to disguise employment.*[17]

It has long been a feature of Australian industrial legislation that it is not lawful for employers to contract with employees to provide entitlements below those contained in statutes, awards and registered agreements. Such contracts are void and unenforceable to the extent of any inconsistency with the statutory instrument. It should not therefore be possible to achieve the same outcome by dressing up an employment relationship, or carefully drafting a contract, to create an artificial independent contractor arrangement.

Stewart (2002) notes that the indicia used to show an employment relationship are capable of manipulation, so that a worker may be held to be a contractor rather than an employee. One means of manipulating these indicia is through clever drafting of contracts. Written contracts between hirers and workers are usually drawn up by the hirer's legal advisers. Contracts can readily be drawn in such a way as to persuade a court that the worker is a contractor. [18] A number of the criteria examined by the common law courts can be manipulated to achieve this result. The most important criterion is the power to delegate or subcontract. The relationship of employment is a personal relationship, a contract to supply one's own labour. Stewart notes that as the case law stands:

> *no amount of authority to control the way in which the work is done can make a person an employee if they are not contracting to supply their own labour. Hence if a worker is free to delegate or subcontract that is almost invariably regarded as inconsistent with the presence of a contract of service.*[19]

The ability to avoid awards and other workplace relations laws and superannuation regulation (discussed above), provide a strong financial incentive for hiring parties to draft contracts to allow for the contractor to delegate work to another. That right to delegate may never be used by the contractor, yet the drafting of the contract in this way denies that worker the benefit of superannuation and possibly of labour law protections (including awards).

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[17] Stewart, A. (2002) "Redefining Employment? Meeting the Challenge of Contract and Agency Labour" 15 *Australian Journal of Labour Law* 235 at 264.
[18] Stewart (2002) at 235-276.
[19] Stewart (2002) p. 244.

4.2 Characterisation of approach

In a recent lecture, Professor Ron McCallum described the purpose of labour law in a democratic state as being:

> *to ensure that the rights and obligations placed on workers and employers mandate just and fair outcomes with respect to remuneration, security of employment, leave, training, occupational health and safety and other terms and conditions of employment.*[20]

The DEWR Paper states that workplace relations policy objectives are driven by notions of workplace flexibility, productivity and choice, and ensuring individual workers are afforded appropriate entitlements and protections in their working life.

Victoria submits that a system which allows or encourages contractual arrangements to be manipulated and structured to avoid employment rights and obligations – and which do not otherwise alter the substance of what are in essence employment relationships – is fundamentally flawed and in need of attention. It follows that any attempt to increase this "encouragement" should be rejected.

4.3 Commercial Law versus Workplace Relations Law

The DEWR Paper states that the Federal Government believes that independent contractors should be regulated by commercial law, not workplace relations law.

As the discussion paper notes, State and Federal governments have relied on a number of enactments to regulate on a variety of subject matters related to work, and for a variety of reasons. Laws regulating discrimination, safety, workers' compensation, tax and unfair contracts are scattered throughout the statute books, and in many instances they apply to relationships beyond the traditional common law formulation of employee/employer. This is entirely appropriate and recognises the different policy aims of the legislation.

The distinction also does not recognise the changing nature of working relationships that has accelerated particularly over the last 20 years. These include the rapid increase in the use of labour hire and contracting out, the casualisation of the workforce and the blurring of distinctions between traditional working arrangements that these developments have produced. The emergence of a category of "dependent contractor" has been recognised by a number of academics and industry stakeholders and should not be ignored in any analysis of contracting and labour hire.

[20] McCallum, R (2005) "Justice at Work: Industrial Citizenship and the Corporatisation of Australian Labour Law", Kingsley Laffer Memorial Lecture, University of Sydney, 11 April 2005.

There appears to be no reason why the *Workplace Relations Act* could not be adapted to take account of these changes. The Federal Government changed the name of the Act in 1996 from “Industrial Relations” to “Workplace Relations”, arguably recognising a broader spectrum of relationships than that encompassed by the original term. The Act has contained provisions regulating independent contractors since 1992, including an unfair contracts review process and protections against discrimination.

5 DEWR proposals for ways independent contracting can be pursued consistently across state and federal jurisdictions

There is a substantial overlap between this term of reference of the Committee’s Inquiry and the issues raised in the DEWR paper. Of particular interest to Victoria, the DEWR paper sets out a number of legislative means by which it is said that independent contracting can be encouraged and pursued consistently across state and federal jurisdictions. This Section of Victoria’s submission sets out Victoria’s views on the proposals put forward by DEWR, structured as follows:

1. Proposals to amend the *Workplace Relations Act* 1996 so that awards/agreements cannot restrict or impose conditions on the engagement of independent contractors or labour hire workers.

2. Proposals relating to the definitions of independent contractor, employee and employer. Options include:
    - Retaining the common law definitions and allowing courts to continue to determine the question using established common law principles.
    - Using the personal services business test under the *Income Tax Assessment Act 1997* as the *sole* definition of “independent contractor”.
    - Using the personal services business test as *part* of the definition of “independent contractor”.
    - Defining a labour hire agency as the employer of workers engaged under a contract of service with the agency.
    - Statutorily recognising the “Odco” independent contracting arrangements.

3. A proposal to establish an “Independent Contracting Registrar” to make declarations about employee/independent contractor status.

4. Adding an object to the *Workplace Relations Act* 1996to the effect that the status of independent contractors should be upheld and subject to minimal industrial regulation.

5. Proposals for Commonwealth laws to override State and Territory laws on independent contracting, particularly:
    - Deeming provisions;

- Unfair contract laws; and
- *workers' compensation*, anti-discrimination, OHS

6. A proposal for the Federal Magistrates Court to be given jurisdiction to review contracts.

7. A proposal for a new civil penalty provision for hirers who deliberately attempt to avoid employer responsibilities by seeking to establish a false independent contracting arrangement.

8. A proposal for the labour hire industry to be regulated to ensure high standards are met by all players.

6 Specific response to DEWR proposals

6.1 Preventing restrictions on independent contracting and labour hire in awards/agreements

The DEWR paper sets out an option of amending the *Workplace Relations Act* 1996 so that awards and certified agreements cannot restrict or impose conditions on the engagement of independent contractors or labour hire workers.

Victoria opposes this proposal.

For many years, Courts and industrial tribunals have recognised the legitimate interest that workers have in the circumstances and the conditions under which independent contractors and labour hire workers are engaged within their workplaces. A recent notable example is the AIRC Full Bench decision in the *Schefenacker* appeals.[21]

One of the issues before the Commission was whether proposed clauses regulating the engagement of labour hire workers pertained to the relationship of South Australian manufacturer Schefenacker Vision Systems Pty Ltd and its direct employees. As described by the Full Bench, the clause in question evidenced "a detailed agreement with the company requiring consultation about the usage of labour hire employees, a specific limitation on the proportion of total weekly paid employees made up by labour hire employees, a requirement that labour hire employees be offered permanent employment in certain circumstances, subject to a probationary period, and a requirement that the company instruct labour hire agencies to pass the increases in the agreement on to their own employees."[22]

[21] *Schefenacker Vision Systems Pty Ltd and Others* (PR956575, 18 March 2005)
[22] Ibid at para 77

The AIRC found that all of the elements of the provision were capable of inclusion in a federally certified agreement as they pertained to the relationship between Schefenacker and its direct employees. The Bench acknowledged that:

> *The number of labour hire employees engaged, it is to be inferred, is likely to have a direct effect upon the amount of work available to Schefenacker's employees and, ultimately, upon the number of employees Schefenacker engages directly. While it is true that cl.17.2 and cl.17.4 may be construed as a partial prohibition on the use of labour hire employees, they are also designed to increase permanent employment by placing obligations upon the employer to engage more permanent employees in the circumstances specified.*[23]

In relation to the provision that obliged Schefenacker to instruct labour hire agencies to increase the wage rates of their labour hire workers engaged at Schefenacker in line with increases of wage rates of its direct employees, the Full Bench found that:

> *The intent of cl.17.6 is that employees of labour hire agencies working at Schefenacker should receive the same increase as the Schefenacker employees will receive under the agreement. This is sought to be achieved by obliging Schefenacker to give that directive to the agencies. Whether that means will be effective or not, the intent is that the relationship between the cost of labour supplied by the agencies and the cost of the labour of Schefenacker's employees will be relevantly the same after the agreement as it was before. For that reason we think that the sub-clause pertains to the relationship between Schefenacker and its employees. It directly concerns the security of employment of the employees covered by the agreement.*[24]

This decision represents an acknowledgment by the AIRC Full Bench of the links between the terms and conditions of employment of labour hire workers and the conditions of directly employed workers in the same workplace.

Stewart (2002) notes that unions in some jurisdictions may have the option of asking their State tribunal to impose such restrictions through awards, but that the AIRC "has long been precluded from doing this, owing to a narrow interpretation of its powers by the High Court". Stewart cites *R v Commonwealth Industrial Court; Ex parte Cocks* (1968) 121 CLR 313, in which the High Court found that the Federal Commission did *not* have power to prohibit employers from having work done by independent contractors outside their factory or workshop. High Court and AIRC authorities since that decision have tended to treat the Act (limited by the Constitution) as barring

[23] Ibid at para 79
[24] Ibid at para 83

the inclusion in awards of an absolute prohibition on engaging contractors, as distinct from the terms on which they are engaged.[25]

With respect to awards, industrial tribunals including the AIRC are well equipped to hear arguments on the merits or otherwise of provisions imposing conditions on the use of contractors and/or labour hire workers. They are in an informed position to weigh up the competing arguments and either grant such provisions, reject them outright or include them in an amended form. Victoria submits that it is therefore inappropriate to restrict an industrial tribunal's dispute settling power by preventing it from awarding particular provisions.

These terms should also not be excluded from certified agreements. The Victorian Government does not support restricting the inclusion in agreements of matters that parties at the enterprise level deem appropriate for their particular workplace. As noted in the DEWR paper, laws should not impinge on freedom of choice for employees and employers.

It is undesirable to limit the bargaining field in this way. Agreements are based on "give and take" in the negotiation process and involve the parties making concessions on some claims to make gains in others. To limit the matters that can ultimately be included in an agreement is to unduly restrict the enterprise bargaining process, and could lead unions and workers to inflate other claims to compensate for the perceived shortfall. It would be totally inappropriate to remove clauses from existing agreements, given that they constitute an existing legal right, and may often have involved one or other party compromising on other claims.

6.2 Definition of independent contractor, employee and employer

Defining "independent contractor"

While the term "independent contractor" is used frequently in the DEWR paper, there is no indication given of what work arrangements are intended to be covered by this term in the discussion. The DEWR paper raises the making of a definition of independent contractor, passing a new Act applying to independent contractors, overriding state legislation on independent contractors, but does so without providing any formulation of what this expression is intended to mean, that is, what working arrangements are intended to be covered by each of the possible policy changes.

There is presently no definition of "independent contractor" in the *Workplace Relations Act* 1996. Section 4(1A) states that: *"to avoid doubt it is declared that a reference in this Act (except in Part XA) to an independent contractor is confined to a natural person"*. While awkward, this provision ultimately appears to mean that only natural persons can use the unfair contracts

[25] For example *R v Moore; ex parte Federated Miscellaneous Workers' Union of Australia* (1978) 140 CLR 470; *Schefenacker,* op. cit.

provisions in section 127A-C, but that where “independent contractor” is used in Part XA (freedom of association) it also includes companies. This is most confusing, as a number of provisions in s298K and 298L are only capable of applying to natural persons. For example, some of the criteria in s298L refer to independent contractors being a member of a union, or being absent without leave. Clearly these cannot apply to a company. The confusion over the term “independent contractor” in the Act shows the difficulty inherent in trying to define the scope of business activities caught within that term.

“Independent contractor” is not a term of legal art in the way that “employee” is, and does not have the same long common law history of interpretation. It has generally been used to distinguish a particular arrangement from employment. It can mean different arrangements in different contexts. For example, depending on the intention of the legal framer for a particular statutory purpose, “independent contractor” could cover:

- A sole trader/natural person who provides only labour under a contract for service;
- A partnership or an incorporated body who provides only labour under a contract of service;
- Any of the above, but only where the trading entity does not engage any subcontractors or employees. (This would mean that a contractor would lose any benefits under such an Act if he or she took a holiday and employed replacement labour, or attempted to expand his or her business, or engaged extra labour to assist in a particular job)
- Any of the above, regardless of whether employees or subcontractors are engaged. Where would the line be drawn? Would a contractor engaging 50 plumbers be “an independent contractor”?
- Contracts that only involve the supply of labour, with the provision of tools or equipment. What if a cleaning contractor supplies cleaning chemicals? A plumber sells and supplies pipes and fittings? A hairdresser sells products?
- Contracts for the supply of both labour and goods or equipment? What if the main focus of the activity is the supply of goods? Could a plant nursery assisting with garden design and selling plants be an “independent contractor”?

The brief examples above show the complexity in trying to formulate a statutory definition of “independent contractor”. The examples we have set out are on a continuum between an individual providing labour only and a fully-fledged business.

Victoria strongly urges *against* any legislative approach that attempts to fix upon a statutory definition of “independent contractor”. To do so would be most confusing and arbitrary in relation to the myriad commercial activities that micro and small businesses engage in. Any such attempt would bring even greater uncertainty to arrangements for businesses and workers than exists at present, as parties would need to examine two definitions: do they meet a test of employee? Do they meet a test of independent contractor? Do they meet neither test? Trying to create a statutory definition of independent

contractor would simply create an entirely *new* set of definitional uncertainties and confusions.

Victoria submits that the correct approach to the issue of the scope of operation of the workplace relations system does not require the formulation of *any* definition of independent contractor. It is only necessary to deal with the issue of who should fall *within* the definition of "employee" and so fall within the framework of labour law and of the *Workplace Relations Act*. That is, the definitional task should be to define who is *within* the labour law framework. There is no need to attempt to define who is outside of that framework.

The issue of the kinds of laws that should apply to those not within the definition of employee is discussed below in the context of the DEWR proposal for federal legislation to cover the field of independent contractors.

Towards a consistent national definition of employment

The DEWR Paper puts forward a number of proposals in relation to the definition of "employee" and "independent contractor", including retaining the common law definitions for the purpose of the WR Act. Victoria considers that there is merit in moving towards nationally consistent definitions of "employee" for certain statutory purposes, such as occupational health and safety, workers' compensation and state and federal taxation. However in the absence of a workable statutory definition for industrial relations purposes, the preferred course at this stage is to maintain the common law approach.

Victoria would be a willing participant in any national discussions on consistent statutory definitions for regulating workplace matters.

The shortcomings of the current common law definitions have been well publicised, and Victoria accepts that the absence of a clear test to determine whether a person is an employee or not has created confusion and inconvenience for businesses, unions and workers alike. The difficulty is that any new statutory definition is not likely to alter the practical reality that parties will still go to the courts to determine which side of the line of a stated formulation they fall on, regardless of whether that formulation is set down by a court or in a statute.

Some attempts have been made to formulate a new definition of employee, including one by Andrew Stewart presented to a recent review of the South Australian industrial relations system[26]. While that definition was not ultimately included in the state's recently amended *Fair Work Act* 1994, it may be a good starting point for a national discussion on a common formulation.

Stewart's definition contains a number of elements. Firstly, it focuses on the reality or substance of the relevant relationship, rather than the form or written

[26] *Review of the South Australian Industrial Relations System* (South Australia 2004) co-ordinated by Greg Stevens,

contractual terms used by the parties. As Gray J said in the well-quoted passage from *Re Porter*:[27]

> *the parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck.*

Secondly, the definition omits some factors that have been given too much prominence in some court decisions on the issue, such as whether certain conditions of employment are provided and what taxation and insurance arrangements have been put in place. These definitional issues are often circular, and are usually resolved in accordance with the label that the parties have given to their relationship. For example, the question of whether annual or sick leave is provided may flow from the fact that a hirer has dressed the relationship as one of contracting to avoid having to provide this entitlement. This criterion as used by the Courts therefore rarely provides meaningful evidence of the substance of the relationship that exists.

As indicated, Victoria is of the view that discussion and debate should continue on whether it is possible to formulate a workable definition of "employee" for industrial relations purposes and welcomes the contribution made by the DEWR Paper and by the Committee's Inquiry into these matters. Pending any consensus on this issue, however, the common law definition should continue to be the determinant of the line between employees and independent contractors.

One of the advantages of the common law definition is that it is by its nature already "nationally consistent".

It follows from our support of the maintenance at this stage of the common law definition that we do not support some of the specific proposals to redefine the relationship set out in the discussion paper. Particularly:

- The proposal to use the personal services business test from the *Income Tax Assessment Act 1997* as the sole definition of "independent contractor" is not supported. However, there are elements to the taxation test that should receive attention in any discussion on a national codified definition of employment, in particular inherent requirement that to be exempt from employment taxation, a person needs to be genuinely carrying on a business. Further, we note that the common law recognises that the taxation treatment of a worker is one of the factors that guide the decision on whether a person is an employee. In turn, the taxation definition contains elements that reflect the common law test of employment. The two definitions are already intertwined to a significant extent.

[27] (1989) 34 IR 179 at 184. This passage was favourably quoted in an ATO draft taxation ruling released on 23 February 2005 (TR2005/D3)

- There is no need to define a labour hire agency as the employer of workers (who are parties to contracts of service with the agency) that it arranges to do work for someone else, as this by and large reflects the common law position. Victoria would also be concerned if such a definition effectively excluded the possibility that workers in some circumstances will be found to be employees of the client (eg *Damevski v Giudice*[28])

- Equally, there is no need to statutorily recognise the *Odco* labour hire arrangements, as they have received common law approval. Furthermore, Victoria would be concerned if statutory recognition encouraged employers to structure working arrangements for the sole or main reason of avoiding employment entitlements.

6.3 Mechanism for determining who is, and who is not, an employee.

Victoria supports the introduction of a low-cost, user-friendly process for making determinations about employee status.

The DEWR paper proposes the establishment of an independent contracting registrar who would make declarations about employee/independent contractor status.

Victoria agrees that there should be an appropriate means of bringing certainty and clarity to the arrangements of the parties. Such a step would be consistent with the *Resolution of the International Labour Organisation Concerning the Employment Relationship 2003.* This ILO resolution and the report on which it is based[29] are a useful analysis of the problems faced by regulators in dealing with disguised employment. The resolution stated at paragraphs 5 and onwards:

> *It is in the interest of all the labour market actors to ensure that the wide variety of arrangements under which work is performed or services are provided by a worker can be put within an appropriate legal framework. Clear rules are indispensable for fair governance of the labour market. This task is difficult in many countries because of one or a combination of the following factors:*
> - *the law is unclear, too narrow in scope or otherwise inadequate;*
> - *the employment relationship is disguised under the form of a civil or a commercial arrangement;*
> - *the employment relationship is ambiguous;*

[28] (2003) FCAFC 252

[29] International Labour Organisation *Resolution Concerning the Employment Relationship*, General Conference of the, 91st session 2003 and International Labour Organisation, Report Number V, *Scope of the Employment Relationship*

- *the worker is in fact an employee, but it is not clear who the employer is, what rights the worker has, and against whom those rights can be enforced;*
- *lack of compliance and enforcement.*

It is agreed that clarity and predictability in the law are in the interests of all concerned. Employers and workers should know their status and, consequently, their respective rights and obligations under the law. To this end, laws should be drafted in such a way that they are adapted to the national context and provide adequate security and flexibility to address the realities of the labour market and to provide benefits to the labour market. While laws can never fully anticipate every situation arising in the labour market, it is nonetheless important that legal loopholes are not created or allowed to persist. Laws and their interpretation should be compatible with the objectives of decent work, namely to improve the quantity and quality of employment, should be flexible enough not to impede innovative forms of decent employment, and promote such employment and growth. Social dialogue with tripartite participation is a key means to ensuring that legislative reform leads to clarity and predictability and is sufficiently flexible.

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.

And further at paragraph 14:

> *Dispute resolution machinery and/or administrative procedures for determining the status of workers is an important service which should be provided by the appropriate agency. Depending upon the national industrial relations systems, such machinery may be tripartite or bipartite. It could have general competence or it may be limited to specified sectors of the economy. It is essential that employers and workers have easy access to fair, speedy and transparent mechanisms and procedures to resolve disputes about employment status.*

Rather than a new jurisdiction in the Court, there may be some merit in exploring the capacity for the Australian Industrial Relations Commission to play this role. The Commission has the experience and expertise to make

judgments on these issues, and an existing convenient infrastructure. There are however constitutional constraints on the Commission's ability to make binding legal declarations on status.

One option for consideration is to use the Australian Industrial Relations Commission as an arbitral body, using the Australian Taxation Office (ATO) model for the making of taxation rulings and their legal consequences under taxation legislation. For example, the AIRC could issue a certificate that stated the parties were (or were not) in an employment relationship. The certificate could not determine as a matter of law the legal status of the parties (only the Court can make a declaration of rights), but the Act could provide that the granting of a certificate could be taken to prevent a party from claiming underpayment of wages. A party could have a right to seek to vary a certificate if the working situation changed, or seek to overturn a certificate in the Federal Court or federal Magistrate's Court.

Alternatively, Victoria supports the creation of a means of obtaining a declaration of employee status from the Federal Magistrate's Court. Any such process must be fast, informal and low cost. [30]

6.4 New object to the Act

Victoria does not support the introduction of a new object into the Workplace Relations Act to uphold the "status of independent contractors". Again, one of the difficulties is attempting to define something that is "other than employee". The *Workplace Relations Act* 1996 is fundamentally about the relationships between employers and employees. It is unclear what such an object would mean in a practical sense, or even a philosophical sense. If parties establish a genuine contracting relationship they are no longer within the purview of the *Workplace Relations Act*. 1996

In the Victorian Government's view, a better course would be to introduce an object to the effect that parties should *not* be able to manufacture working arrangements with the objective of avoiding statutory entitlements and protections applying to employees. This is entirely consistent with existing objects in subsections 3(d) and (e), and with the nature of the legislation as governing employee/employer relationships and granting protections to employees.

[30] This is the approach taken in the *Industrial Law Reform (Fair Work) Act 2004* of South Australia . A new provision (s. 4A) allows the Industrial Court to make a declaratory judgement as to whether a worker is an employee or an independent contract, based on the common law and any relevant provision of the Act. Application may be made to the Court by a union peak body, the Department, or any other person with a proper interest in the matter.

6.5 Consistency across State and Federal Jurisdictions: Should the Commonwealth override State and Territory laws?

The Victorian Government supports a unitary system of industrial relations. However, such as system should be fair for workers and business. It should provide a key role for the independent umpire, the Australian Industrial Relations Commission. Finally, any move to a unitary system should be based on consultation.

Accordingly, while Victoria has referred its powers and supports a national workplace relations system, Victoria is *strongly opposed* to any move to override State and Territory laws dealing with workplace rights. In particular Victoria strongly opposes any steps by the Commonwealth to interfere with Victoria's laws dealing with vulnerable groups of workers/small businesses, such as the laws described in section 2 above dealing with child employees, owner drivers and forestry contractors, and clothing outworkers.

As indicated above, discussions should take place with the States in relation to a nationally consistent definition of "employee" and wherever possible a standard form of drafting across different Acts for the convenience of the public. This step, undertaken in a cooperative manner with the States, would achieve the desired certainty and clarity in arrangements. Victoria is concerned that legislation intended to cover the field in relation to contractors would instead almost inevitably create confusion and uncertainty, with conflicting laws causing difficulties for hiring business and for contracting businesses alike.

There is absolutely no case for seeking to override State and Territory laws dealing with persons performing work, such as laws dealing with workers' compensation, occupational health and safety, state taxation and discrimination.

As the discussion paper acknowledges, these laws are driven by different (albeit overlapping) policy considerations. Moves to standardise definitions to promote ease of usage across the jurisdictions are already in place in relation to workers' compensation and payroll tax, and Victoria will continue to participate in these discussions. For example, to create consistency, a core definition of employee could be used across all state and federal legislation, with the states retaining the ability to add to or subtract from that core definition for the purposes of a particular law.

However, while consistency in terminology is something that should be pursued, it is fundamentally for a State to determine the scope of a State law's application. A number of state laws use an expanded definition of "employment" as a definitional device, to extend the application of a particular law to people outside the traditional common law concept. This is a convenient statutory drafting technique: it does not alter the status of the

employment under the common law or under federal workplace relations or taxation laws.

Whether a State chooses to extend the application of a particular law, such as payroll tax, child employment or occupational health and safety, to persons beyond those who fall within the common law formulation of employment is entirely a matter for that legislature. For the Commonwealth to contemplate a use of its corporations power to override such state laws is an extreme proposition. Victoria reiterates its preferred approach of a national discussion on a common statutory definition of employment, and its view that this process would achieve the desired clarity and consistency between state and federal laws.

6.6 Ensuring independent contracting arrangements are legitimate: proposal to create a national unfair contracts regime

The DEWR Paper raises the issue of whether the Commonwealth should seek to override state laws dealing with unfair contracts and to enact legislation to cover the field.

The narrow scope of "sham" contracting arrangements

The DEWR Paper notes the desirability of discouraging false or sham subcontracting arrangements, and offers the possibility of creating a civil penalty applying to parties who enter such arrangements. This is discussed further in section 6.7 below.

It should be noted here that "sham contracting arrangements" are in law, employment relationships. The term "sham" is used to describe an *attempt* by parties to disguise what is in law an employment relationship as a contracting relationship. "Sham contracting" is thus a narrow concept, as discussed below.

Victoria supports moves to prevent parties structuring workplace arrangements with the intent to avoid employment entitlements. The challenge is to find the most effective way of achieving this objective.

While contracting parties are in theory free to choose the nature of their relationship, the reality is that often the worker is not in a position to exercise any real choice. Evidence from the inquiries and research summarised above shows that hirers often dictate the nature of the contractual dealings and that workers often do not have the bargaining power to influence the outcome.

There is also evidence that this control extends to the hirer demanding contractors use a company as a trading entity. This appears to be motivated by a desire to avoid a finding of an employment relationship, to avoid existing federal unfair contracts laws and to avoid the statutory and common law regulation and costs associated with a finding of employment. The Federal

Government's Small Business Deregulation Taskforce noted this was a common practice:

> *Increasing numbers of larger businesses require small businesses and independent contractors to incorporate so that those contracting their services are able to avoid the costs that flow from deeming provisions. Where small businesses acceded to this requirement, additional compliance costs are inevitable. In these situations, the regulations are working against the viability of small businesses and dictating the structure of their business arrangements.*[31]

The proposal to penalise hirers through a civil penalty where they enter into false independent contracting arrangements would be a positive step, but if this is intended to be restricted to "sham" transactions then it does not go far enough to deter or prevent inappropriate pressure being placed on workers to trade away employment entitlements. This is amply demonstrated by the Federal Court decision in *Damevski v Giudice* (supra).

In that case, a cleaning company, Endoxos Pty Ltd, facing cost pressures decided to abandon its existing employment arrangements and to adopt a contracting system. The company's employees, including Mr Damevski, were told that if they did not agree to resign and be re-engaged as independent contractors through a labour hire agency, the cleaning company would be forced to relinquish its cleaning contracts and the employees would lose their jobs.

Faced with this "choice", Mr Damevski reluctantly agreed to the new arrangements, signing a letter of resignation and receiving payment of his accrued entitlements. But as Merkel J found, nothing changed in relation to the manner in which Mr Damevski provided his services to Endoxos after his resignation.

> *Damevski worked for the same clients, was supplied by Endoxos with the same clothing, vehicle and equipment (with the Endoxos logo) with which he had previously been supplied as an employee. He continued to be provided with the same shifts and to be supervised in respect of his work by the same Endoxos managers and supervisors, albeit that they were now also "independent contractors".*[32]

Less than a year later Mr Damevski was told by Endoxos that they had no more work for him, and he was not provided with any more work by the labour hire agency that had purportedly engaged him after his resignation. Mr Damevski lodged an unfair dismissal claim against Endoxos in the Australian Industrial Relations Commission, but Commissioner Grainger at first instance held that no employment relationship existed with the company. An AIRC Full Bench refused leave to appeal that decision, and Mr Damevski then sought

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[31] Commonwealth Small Business Deregulation Taskforce *Time for Business*: Report of the Small Business Deregulation Taskforce, November 1998., p51

[32] (2003) FCAFC 252 at para 154

prerogative relief in the High Court (with the matter being remitted to the Federal Court).

The Full Court of the Federal Court ultimately held unanimously that Mr Damevksi *was* an employee of Endoxos, despite the attempt to set him up as an independent contractor in accordance with the *Odco* arrangements. Significantly, though, Merkel J noted that it was not claimed that the contractual arrangements were a "sham" and no such finding was made by the Court. Merkel J also made reference to an unreported Supreme Court decision, *Re Willow Fashions*, in which:

> *Hayne J noted that, even if the purpose of the contractual arrangements made by the controllers of the respective employers was unworthy, dishonourable or even dishonest, that "does not demonstrate that the agreements which they caused the companies which they controlled to make were unreal".*[33]

The discussion paper quotes Lockhart J's description of a "sham" transaction from *Sharment Pty Ltd v Official Trustee in Bankruptcy,*[34] a description also relied upon by Merkel J in *Damevski*. If this reference is intended as an indication that the proposed civil penalty would only apply to "sham" arrangements, then it would be too narrowly cast. In the words of Hayne J it would not necessarily apply to conduct considered to be "unworthy, dishonourable or dishonest".

Moreover, a close reading of the *Damevski* decision indicates that with the benefit of hindsight it would not have been difficult for Endoxos to tweak the arrangements to ensure that the cleaners were found to be independent contractors. In this case, the fact that the primary motivation remained to avoid employment entitlements would be irrelevant.

In Victoria's submission, while it supports a civil penalty being provided to discourage sham arrangements, a civil penalty as a sole means of achieving this outcome would be ineffective. If parties can structure arrangements in the way that occurred in the *Damevski* matter and the arrangements are *still* found to not be employment, and not found to be a sham, then a civil penalty is not going to be effective to deter such arrangements. This is particularly so when there are very significant financial benefits for hirers of labour in avoiding employment, award and superannuation regulation.

DEWR will need to be adequately resourced to enforce any such provision.

An additional means of deterring improper arrangements should be used. Victoria submits there are a number of elements that should contribute to achieving this objective:

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[33] Ibid at para 140
[34] (1988) 18 FCR 449 at 454

- The new object to the *Workplace Relations Act* we have recommended be introduced (see section 6.4 above) may encourage the AIRC and the courts to focus more on the commercial reality of a particular relationship rather than its legal form.

- The issue of "dishonest" or "dishonourable" arrangements will need to be considered in a discussion on a nationally consistent definition of employee that seeks to capture these kinds of arrangements. Professor Andrew Stewart's definition is a good starting point in distinguishing employment from other arrangements.

- Finally both state and federal unfair contracts laws are an important element in providing a disincentive to parties to attempt to avoid workplace regulation in arrangements that have the kinds of vulnerability usually associated with employment, but do not meet the legal test of employment.

The role of unfair contract laws in preserving the integrity of the workplace relations system.

Unfair contract laws do not exist in a policy vacuum. . Rather, this jurisdiction acts to preserve the integrity of the workplace relations system, by allowing a court to attach a financial consequence to certain kinds of relationships that have the hallmarks of poor bargaining power, lack of information, undue pressure or vulnerability, but do not meet the legal test of employment. The Court may examine all of the relevant factors, which are listed in section 127(4) as:

- the relevant strength of the bargaining positions of the parties to the contract and, if applicable, any persons acting on their behalf;
- whether any undue influence or pressure was exerted on, or any unfair tactics were used against, a party to the contract;
- whether the contract provides total remuneration that is, or is likely to be, less than that of an employee performing similar work; and
- any other matter that the Court thinks relevant.

In making an order, the court does not alter the legal status of the party performing services, but can attach financial consequences, for example, putting them in the same financial position that they would have been as an employee. Similar criteria are applied in the New South Wales and Queensland jurisdictions.

The DEWR Paper provides an example of a contractor seeking to undercut the rates of others in the market (presumably those employing workers and paying award rates) in order to secure a new market, and proclaims that person should have the right to do so. They do have an existing right to do so, if they are indeed in law a contractor. Where a contractor did this knowingly, without undue influence or pressure, for such a commercial objective then it is extremely unlikely that they would apply for relief, or that such a contract would be found to be unfair on the criteria set out above.

However, allowing the Court to compare the rates paid to a contractor to the rates payable to employees, as part of a consideration of all of the circumstances listed above, is entirely appropriate. The Court is able to examine all of the relevant circumstances to determine whether the contract is unfair, and can make an order with financial consequences that will both remedy injustice to the contractor and will prevent a hirer from gaining an unfair financial advantage against its competitors who do not circumvent workplace entitlements.

Such an unfair contracts jurisdiction, if drafted so as to be effective in discouraging harsh and oppressive market practices, will be far more effective in preventing sham or improper contracting arrangements than a civil penalty. In examining the elements of such a jurisdiction, the experience under the existing provisions needs to be carefully examined.

Problems with the existing unfair contracts jurisdiction in sections 127A-C.

We note the following difficulties with the existing provisions in s127A-C, that have meant the provisions are ineffective and have not acted to effectively protect workers from sham contracting arrangements, or from harsh or oppressive contracting practices. Section 127A-C of the *Workplace Relations Act* are rarely utilised and are not effective, because of the following problems.

- **Incorporation**
  Contractors who are incorporated do not have standing to make application under ss. 127A–C. (See section 4(1A)). This provision has contributed to a trend towards incorporation of contractors.

- **Assessment of fairness is made at time contract entered, by reference to terms of contract itself**
  In reviewing a contract under ss.127A–C, the Court is confined to an assessment of unfairness and harshness at the time the contract was made by reference primarily to the terms of the contract itself (*Finch v. Herald and Weekly Times Limited* (1996) 65 IR 239 per North J). This limitation severely restricts the potential remedial effect of the sections in two ways. Firstly, it means that it is impermissible for the Court to have regard to the conduct of the parties pursuant to the contract. Rather, unfairness or harshness must be assessed in a vacuum by reference to the terms of the contract itself. In practical terms, however, the actual extent of unfairness or harshness evident in a contractual relationship is not so easily delineated between contractual terms and the conduct of the parties. Unfairness or harshness often involves not just the terms of the contract, but the conduct of the parties pursuant to the contract.

  Further, the assessment of unfairness or harshness is to occur at the time the contract was made. In many instances, the contract was entered into many years prior to an application for review under ss.127A–C.

Notwithstanding this, however, the terms of the contract reviewed by the Court are those as entered into initially by the parties, which in many cases are substantially different to the terms observed by the parties at the time of the application to the Court.

- **Only applies to post-1994 contracts**
  A further potentially serious limitation on ss.127A–C is that the provisions only apply to contracts that came into existence after the date upon which the Court was conferred with jurisdiction under the section (30 March 1994). A view to this effect was expressed by Emmett J in a recent decision in *Raisanen v. SBS* [2001] FCA 1525. This view, if followed in subsequent judgments, results in independent contractors engaged on a long-standing basis (i.e. prior to 30 March 1994), being precluded from making applications under ss.127A–C.

- **Court jurisdiction involves costs and delays**
  A further practical difficulty with the ss.127A–C jurisdiction is that, as already indicated, the jurisdiction is vested in the Federal Court of Australia. That jurisdiction necessitates the use of lawyers and the expenditure of substantial resources. In short, the jurisdiction does not offer inexpensive and speedy dispute resolution.

  The Australian Industrial Relations Commission (AIRC) is specifically precluded from conciliating or arbitrating in this area, except that, where the Federal Court has recorded an opinion, the AIRC may make an order setting aside the whole or part of a contract, or may vary the contract. [35]

Relationship between workplace relations based unfair contracts laws and business protection laws.

The approach of the federal Government's policy on independent contractors and of the DEWR Paper is to delineate between relationships which are of employment or sham contracting on the one hand, and arrangements which exist within a commercial framework and which are truly entrepreneurial on the other hand. The argument is that a person should be free to be an entrepreneur and escape the restrictive employment regulation system.

The DEWR discussion paper is focussed on workplace relations legislation and omits any detail on the range of state and federal laws which provide protection for businesses in their dealings with other businesses. If a person is not an employee, then there are a range of laws that already apply to his or her business dealings.

Laws have evolved at both a state and federal level to deal with the potential vulnerability of businesses in dealings with their trading partners, some of which deal with particular areas of market failure, or deal with businesses in their capacity as consumers of the services of other businesses. These laws use mechanisms including unfair contract review, powers to declare void or to

[35] *Workplace Relations Act* 1996 s127B.

vary unjust contract terms, measures to address information asymmetry, alternative dispute resolution, measures to address unconscionable conduct and prescription in relation to industry specific harsh commercial terms and business practices.

Under these laws, an independent contractor falls within the category of a supplier of services, goods or both, and the hiring business falls within the category of a the purchaser or consumer of such services.

Applicable laws include:

- The *Trade Practices Act 1974 (Cth*). This Act contains provisions proscribing unconscionable conduct in business to business dealing, and these provisions are mirrored in state counterpart legislation (such as section 8A of the *Fair Trading Act 1999* (Vic).

- Some states have specific legislation dealing with unjust contractual terms in commercial and consumer contracts. These include s107 and 109 of the *Fair Trading Act 1999 (Vic)* that deals with disputes between traders, and the *Contracts Review Act 1980 (NSW)* which allow for voiding and variation by courts and tribunals of unjust contractual terms between businesses.

- The *Trade Practices (Industry Codes —Franchising) Regulations 1998* made under the *Trade Practices Act 1974*[36] provides detailed rights for franchisees including mandatory contractual terms (such as notice periods), a dispute resolution mechanism and obligations of information disclosure given the commercial vulnerability of franchisees

- The *Trade Practices (Amendment) Bill 2005* contains provisions to make it easier for small businesses to collectively deal with a single large business hirer/purchaser (see further at 7.1 below).

- The *Owner Drivers and Forestry Contractors Bill 2005 (Vic)* (discussed above) imports the powers under s8A (unconscionable conduct) and and ss107 and 109 (trader/trader disputes) of the *Fair Trading Act 1999 (Vic),* and adds in a process of mediation by the Small Business Commissioner. The Bill also requires contracts to be in writing, provides for disclosure of certain information to contractors and prohibits certain harsh and oppressive commercial practices.

- The *Retail Leases Act 2003 (Vic*) provides for information disclosure, prohibition of certain harsh and oppressive commercial practices, and alternative dispute resolution including voiding and variation of unjust terms.

[36] Statutory Rules 1998 No. 162 as amended

Other Acts allowing for variation of unjust contractual terms include the *Home Building Act 1989* (NSW) and *Queensland Building Services Authority Act 1991*(Qld).

The Victorian Government's approach, in part influenced by our referral of industrial relations powers to the Commonwealth, has been to tailor legislation to the particular issues affecting micro or small businesses, regardless of how they are established or described. The Victorian approach is based on a targeted response where a need for intervention is demonstrated, as is evidenced by the *Outworkers (Improved Protection) Act 2003, the Retail Leases Act 2003,* and the recently introduced *Owner Drivers and Forestry Contractors Bill 2005*. The approach has been to examine the particular circumstances of these businesses in the Victorian economy, to identify the precise parameters of any market failure, and to tailor legislative solutions accordingly.

Victoria **strongly opposes** any legislative step that would in anyway override the States' fair trading laws and any other laws dealing with business to business conduct such as those set out above. These are matters properly within the purview of the States.

Victoria is concerned that given the vagueness and uncertainty of the proposals regarding a definition of "independent contractor" there may be inadvertent encroachment on state business-to-business conduct laws as described above. In these circumstances, Victoria submits that any new federal unfair contracts legislation should **not** be expressed to cover the field but should specifically allow for state laws to exist in tandem.

Conclusion on a national unfair contracts law:

- Victoria supports at the minimum the retention of the existing federal workplace relations unfair contracts jurisdiction in ss127A-C of the *Workplace Relations Act* 1996 and the existing criteria in s127A(4).

- Victoria supports the examination of options for amendments to the jurisdiction to remedy the problems described above. In particular, the provisions should apply to incorporated independent contractors and should allow for assessment of the conduct of parties after the contract has been entered into.

- The underlying aim of the unfair contracts review system should be to discourage disguised employment arrangements, or arrangements that have the hallmarks of employment but do not meet the common law test and so avoid the operation of workplace relations laws.

- Victoria submits that based on this policy rationale, the unfair contracts jurisdiction should remain within the *Workplace Relations Act* 1996, and the jurisdiction should be returned to the AIRC. Alternatively, if the

jurisdiction is to remain within the court system, Victoria supports referring the unfair contract review jurisdiction to the Federal Magistrates Court.

- However, the jurisdiction should *not* attempt to cover the field and override state laws, but should operate in tandem. It is most important that any business, regardless of its size (that is, including independent contractors), should retain all existing rights under state fair trading and small business protection laws and that the operation of these state laws should not be interfered with by the Commonwealth.

6.7 Civil penalty for persons seeking to avoid an employment relationship by using sham arrangements

Victoria supports measures to discourage such arrangements, and would support the provision of a civil penalty for such arrangements as one of a number of measures to discourage disguised employment. See discussion in Section 6.6 above.

6.8 Regulating the labour hire industry

As noted above, Victoria is waiting on final recommendations from a State Parliamentary Inquiry on Labour Hire. The final report is to be provided by 31 May 2005, and will be forwarded to the Committee.

7 Other issues

7.1 Collective negotiations by contractors under the Trade Practices Act

Victoria has significant concerns over proposed provisions of the Trade Practices Legislation Amendment Bill (No. 1) 2005. The Bill includes a proposed section 93AB(9) which makes invalid any notification of collective bargaining given on behalf of a corporation by a trade union or a person acting on behalf of a trade union.

It is clear that the amendment, if passed, will detrimentally affect significant groups of small businesses, including independent contractors, such as owner-drivers, small primary producers, building contractors and others. The procedure to obtain an exemption and so allow collective bargaining provided by this Bill merely allow these small businesses to put forward a collective negotiating position. The exemption does not permit action in the nature of 'industrial action'. Many independent contractors are members of trade unions, and the *Workplace Relations Act* specifically acknowledges this (see for example s298L).

There is simply no valid policy reason to prevent a union from lodging a notification on behalf of its independent contractor members. The proposed change is simply anti-union and discriminatory. Neither the Dawson Review [37]that recommended this simplified process for small businesses, nor the Senate Committee that reviewed the Trade Practices Act[38] made any recommendation to exclude trade unions.

The proposed change will make the exemption process ineffectual for significant groups of small businesses that have a very long standing tradition of representation by trade unions and no ready alternative representative. The Bill as submitted to the Parliament prior to the Federal election did not suggest any such policy change. That Bill was the subject of thorough consultation with the States, as is required under the Conduct Code Agreement. This provision of the Bill was not discussed with nor agreed to by the States.

Further, the effect of the proposed section 93AB is anti-competitive. By preventing trade unions from representing independent contractors and other proprietors of small businesses in collective negotiations with larger businesses, trade unions are effectively excluded from participation in the market for these services. It is not clear why small business consumers should be denied a low cost service from a union, within the constraints of the legislative scheme. Many small businesses may well be forced to adopt higher cost alternatives.

7.2 Capacity to apportion damages in unfair dismissal payments between a host employer and labour hire employer.

Victoria submits that the Australian Industrial Relations Commission should have capacity to join a labour hire operator or client to an unfair dismissal application where appropriate, and to apportion any damages to be awarded on a contribution basis. This would not have the effect of making one party or the other the actual employer in law, but would give flexibility to the Commission in determining which entity should meet the payment of any damages awarded by allowing any damages to be shared between the host employer and the labour hire company as appropriate on the facts of the case. This would reduce unnecessary argument about who is in fact the employer. The concept of contribution to damages based on a party's responsibility for the impugned conduct is well known to the legal system.

[37] Australian Government, Dawson, D *Review of the Competition Provisions of the Trade Practices Act 2003*, (the Dawson Report), January 2003
[38] Senate Economics Reference Committee, *"The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business"*, March 2004

7.3 Multi-employer agreements to include labour hire operators

To provide further options to workplace parties, capacity should be provided for multi-employer agreements to be made covering all hirers of workers within a single workplace, such as a labour hire company and the host employer within a single business.

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