



## Independent Contractors Bill 2006

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### Contents

Purpose. . . . .	1
Background. . . . .	1
Basis of policy commitment. . . . .	1
Key features of the Bill . . . . .	2
Parliamentary Committee Inquiries. . . . .	3
Differentiating between employees and independent contractors. . . . .	3
Common law . . . . .	4
Other ways of distinguishing between an employee and an independent contractor—The <i>Making It Work</i> Report . . . . .	5
Deeming provisions in State and Territory laws. . . . .	6
Advantages and disadvantages of deeming . . . . .	7
Special deeming categories . . . . .	8
Outworkers . . . . .	8
Owner drivers. . . . .	8
Unfair contracts. . . . .	9

Financial implications . . . . .	11
Main provisions. . . . .	11
Definition of a services contract . . . . .	11
Part 2—Exclusion of certain State and Territory laws . . . . .	12
Exclusion of State and Territory unfair contracts legislation . . . . .	13
Exemptions for outworkers and owner drivers . . . . .	13
Regulations to <i>either</i> add further exemptions <i>or</i> to further exclude State and Territory laws. . . . .	13
Outworkers . . . . .	13
Part 3—Unfair contracts . . . . .	14
Part 4—Contract outworkers in the textile, clothing and footwear industry.. . . .	16
Part 5—Transitional provisions . . . . .	17
Part 6—Regulations . . . . .	18
Concluding comments . . . . .	18
Postscript—Senate Committee report and recommended changes affecting outworkers . .	19
Endnotes. . . . .	19

## Independent Contractors Bill 2006

**Date introduced:** 22 June 2006

**House:** House of Representatives

**Portfolio:** Employment and Workplace Relations

**Commencement:** The formal provisions (clauses 1 and 2) commence on Royal Assent. The substantive provisions (clauses 3 to 43) commence six months after Royal Assent unless commenced earlier by proclamation.

### Purpose

The proposed independent contractors legislation is made up of two Bills: the Independent Contractors Bill 2006 (the 'Principal Bill' or 'Bill') and the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006 (the 'Consequential Bill').

The purpose of the Principal Bill is to move contracting relationships as far as possible away from the realm of employment and to place these relationships as far as possible under commercial regulation.

### Background

#### Basis of policy commitment

The Government made a commitment to the introduction a separate Independent Contractors Act during the 2004 federal election campaign. The Coalition's policy paper, *Protecting and Supporting Independent Contractors* stated:

A re-elected Coalition Government will introduce the Independent Contractors Act to prevent the workplace relations system from being used to undermine the status of independent contractors. [...]

While the courts have developed tests to uncover 'sham' independent contractor arrangements, there is a view in the community that these tests have gone too far and that too frequently, the honest intentions of parties are disregarded and overturned.

A party's freedom to contract must be upheld and there must be certainty in commercial relationships. The Independent Contractors Act will seek to ensure that these principles are enshrined and protected.<sup>1</sup>

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The Minister for Employment and Workplace Relations, when introducing the Bills to Parliament, reflected a similar commitment to ensuring that independent contracting is encouraged without excessive regulation, stating that:

[...] the attraction of independent contracting is to operate independently, not to work as an employee. The flexibility that independent contractors provide the workplace is an important component of a modern and dynamic economy.

The Independent Contractors Bill (the Principal Bill) reflects the Government's commitment to ensuring that independent contracting is encouraged without excessive regulation. The Principal Bill is built on the principle — a principle this Government believes in — that genuine independent contracting relationships should be governed by commercial not industrial law.<sup>2</sup>

## Key features of the Bill

The Bill:

- does not define the term 'independent contractor' beyond its meaning under the common law (the Personal Services Income test used by the Australian Tax Office to identify independent contractors was not adopted)
- applies to 'services contracts' (contracts for the performance of work by an independent contractor) with the 'requisite constitutional connection'
- overrides the 'deeming provisions' contained within State and Territory industrial legislation which deem certain categories of independent contractors to be employees and provisions which bestow employee related entitlements on independent contractors. This is subject to a three year transitional period
- preserves existing protections for outworkers contained within State and federal legislation
- provides a default minimum rate of pay for contract outworkers in the textile, clothing and footwear (TCF) industry where an outworker is not guaranteed a minimum rate of pay under State and Territory laws
- preserves existing protections for owner drivers in the road transport industry in Victoria and New South Wales. This is to be reviewed in 2007 with a view to rationalising and nationalising the laws
- establishes a national services contract review scheme for the review of unfair contracts, and
- excludes State and Territory unfair contracts provisions as far as constitutionally possible.

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## Parliamentary Committee Inquiries

On 24 January 2005, the House of Representatives Employment Workplace Relations and Workforce Participation Committee announced an Inquiry into independent contracting and labour hire arrangements (the Inquiry). The terms of reference sought submissions regarding:

- the status and range of independent contracting and labour hire arrangements
- ways independent contracting can be pursued consistently across State and federal jurisdictions, and
- strategies to ensure independent contract arrangements are legitimate.

The Inquiry received 77 submissions and the Committee's report [Making it Work: inquiry into independent contracting and labour hire arrangements](#) (*Making it Work* Report) was released on 17 August 2005.

The proposed legislation has been referred to the Senate Employment, Workplace Relations and Education References and Legislation Committee (Senate Committee Inquiry) for inquiry and report by 25 August 2006. Submissions can be found at:

[http://www.aph.gov.au/Senate/committee/eet\\_ctte/contractors06/submissions/sublist.htm](http://www.aph.gov.au/Senate/committee/eet_ctte/contractors06/submissions/sublist.htm)

The Digest draws on material both from the *Making it Work* Report and the submissions to current Senate Committee Inquiry.<sup>3</sup> Since completion of the Digest, the Senate Committee has tabled its report. For further information, the reader is referred to the [report](#) and to the postscript in the Concluding Comments of the Digest.

## Differentiating between employees and independent contractors

An important task of the law of employment is to categorise the different types of working relationships that may arise, in order to determine how they should be regulated.

There is no fixed definition of an independent contractor, however it is generally accepted that such workers are not employees at law. In contrast to employees, who are subject to a contract *of* service, independent contractors operate under a contract *for* services to produce an agreed result. The focus of a contract for services is the nature of the service delivered by the contractor, rather than both the service delivered and the manner in which it is delivered. Importantly, the independent contractor is regarded as being in business on his or her own account, rather than being an employee of the principal's business.

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## Common law

The Bill relies on the common law to distinguish between an employee and an independent contractor. It is therefore useful to consider in some detail the basis of this common law distinction.

It is generally recognised that the common law has utilised a number of tests in its attempt to find a suitable basis for distinguishing employees from those performing work on some other basis. The most durable of these centres on the concept of ‘control by the employer’. However, the judgments in *Steven v Brodribb Sawmilling Co Pty Ltd* recognised as the leading authority on the issue, confirmed a trend towards a more sophisticated conception of employment.<sup>4</sup> On this approach, the presence or absence of a right of control is just one of a number of factual elements or ‘indicia’— some characteristic of a contract of service, others suggesting a non-employment relationship — that may be examined before a decision is reached. The approach was perhaps best summed up by Bray CJ:

There is no magic touchstone. The court has to look at a number of indicia and then make up its mind into which category the instant case should be put. It is a question of balancing the indicia pro and con ... But the power of control over the manner of doing the work is very important, perhaps the most important of such indicia.<sup>5</sup>

Creighton and Stewart in their text, *Labour Law*, comment:

The balancing exercise is necessarily impressionistic, since there is no universally accepted understanding of how many indicia, or what combination of indicia, must point towards a contract of service before the worker can be characterised as an employee. In effect then, this ‘multi-factor’ test proceeds on the assumption that the courts will know an employment contract when they see it!<sup>6</sup>

There are also no hard-and-fast rules as to which indicia should be examined.<sup>7</sup> However, in addition to looking at the extent of any authority to control, it is especially relevant to ask whether the worker:

- supplies their own tools or equipment
- is free during the engagement to perform similar work for other ‘employers’
- carries a risk of financial loss, or by the same token, an opportunity to make a profit from the work, or
- is paid according to task completion, rather than receiving wages based on time worked.

Positive answers to any of these questions will militate to some degree *against* a finding that the contract is one *of* service (i.e. an employee). If the answer is negative, it is more likely the worker *is* an employee.

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According to Creighton and Stewart, the most substantial difficulty with the prevailing judicial approach, however, is that it permits one or both of the parties to a work relationship (but usually the employer) to evade obligations that would otherwise be imposed by awards or statutes. This is a consequence that some courts have been at pains to resist, claiming, for instance, that 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’<sup>8</sup> However, as Creighton and Stewart continue:

with a modicum of care and ingenuity it remains possible for businesses to obtain work from individuals who are virtually indistinguishable from employees, in terms of their close connection to the organisation and subordination to its managers and supervisors, yet whom the common law does not characterise as ‘employees’. This can in most instances be achieved simply through a well-drafted contract that is designed to look as much like a client’ contractor agreement as possible. Especially if it includes an unqualified right of delegation, few judges will be prepared to look behind its terms.

There is nothing wrong in principle with allowing the parties to categorise their contractual arrangements as they choose. But in many cases it is only the ‘employer’ who both understands the nature and effect of the arrangement, and stands to gain from it. The advantages accruing to a worker who ‘freely’ agrees to a non-employment arrangement are often illusory. While it may in some cases be possible to earn more as a contractor than as an employee, and even to reap certain tax advantages, it is important not to underestimate the real value of the statutory and award benefits foregone. This becomes all the more anomalous where the substance of the relationship remains identical to what it would have been had the contract been worded differently and another label attached.<sup>9</sup>

Other ways of distinguishing between an employee and an independent contractor—The *Making It Work* Report

The *Making It Work* Report noted the difficulties with the common law distinction between employee and independent contractor. In addition, the Report also analysed other methods that could be used to distinguish an employee from an independent contractor. In particular, the Report looked at the possibility of using a statutory definition or alternatively, relying on the alienation of personal services’ tests as stipulated in the *Income Tax Assessment Act 1997*.<sup>10</sup> The reader is referred to Chapter 4 of the *Making It Work* Report for a fuller discussion of these alternate approaches.

The *Making It Work* Report did recommend that when drafting independent contractor legislation, the Government maintain the common law approach to determine employment status and distinguish between employees and legitimate independent contractors. However, the Report made a further recommendation that when drafting legislation the Government should, in addition to the common law position, adopt components of Australian income tax assessment alienation of personal services income legislation tests to identify independent contractors.<sup>11</sup> The Bill does not implement this second

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recommendation— the Minister in his Second Reading Speech arguing that this test is a self-assessment test and easily manipulated to achieve the desired outcome if a worker is seeking to be classified as an independent contractor rather than an employee.<sup>12</sup>

## Deeming provisions in State and Territory laws

‘Deeming’, in the context of employment law, involves the power to declare persons who work under a contract for service, such as independent contractors, to be employees. Due to concerns about worker welfare, State Governments have introduced deeming legislation to ensure that such workers have protections under their industrial relations legislation. They consider that many of these workers are dependent contractors or ‘disguised employees’.<sup>13</sup>

Deeming provisions are different from common law tests because they are designed to classify as employees groups of workers with service contracts. Common law tests can only be applied to individuals on a case-by-case basis.

Queensland and NSW have been the more prominent advocates in introducing deeming legislation.

The Queensland Government states that:

The increasing move away from the conventional employee/employer relationship towards workers engaged under labour hire arrangements and under dependent contractor status, has effectively taken these workers outside of the industrial relations system and the benefits and protections associated with being defined as an employee under relevant industrial laws.<sup>14</sup>

Section 275 of the *Industrial Relations Act 1999* (Qld) gives the Queensland Industrial Relations Commission the power to declare persons who work under a contract for services to be employees (employee ‘deeming’). The list of criteria that section 275 allows the Commission to declare a class of contractors to be employees includes:

- the relative bargaining power of the class of persons
- the economic dependency of the class of persons on the contract
- the particular circumstances and needs of low-paid employees
- whether the contract is designed to, or does, avoid the provisions of an industrial agreement
- whether the contract is designed to, or does exclude the operation of the Queensland minimum wage, and
- the particular circumstances and need of employees including women, persons from a non-English speaking background, young persons and outworkers.

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Persons or workers that this deeming applies to includes: outworkers, lessees of equipment or vehicles, drivers wholly or partly owning their vehicles and persons working as partners in a business or association.<sup>15</sup>

In New South Wales, schedule 1 of the *Industrial Relations Act 1996* (NSW) deems certain types of workers to be employees. The NSW Government states that the deeming provisions recognise that a number of categories of workers exist who are often in weak negotiation positions. In many instances, the relationship which exists is not substantively different to that of employee and employer, and hence should be covered by the protection of generally accepted standards of industrial regulation.<sup>16</sup> The NSW legislation includes:

- a range of specific occupations, such as cleaners, carpenters, bread and milk vendors, joiners or bricklayers, plumbers, drainers or plasterers, painters and clothing outworkers deemed to be employees
- power to deem others to be employees by regulation
- a system of contract determination, and
- a process to test if employment contracts are unfair.

The NSW Government considers that if there were not deeming provisions, there may be a significant degree of inequality in bargaining power between the worker and the provider of work.<sup>17</sup>

As an aside, it is also common to find lists of ‘deemed employees’ in other laws. For example, workers compensation legislation and statutes dealing with discrimination of various kinds also tend to apply to independent contractors and other workers who would not be employees at common law. Legislation dealing with occupational health and safety likewise imposes duties that extend beyond the traditional concept of employment in a variety of ways. The Bill will not override State legislation containing deeming provisions in matters such as workers compensation, occupational health or discrimination. However the Bill does contain provisions that would enable regulations to be made to do this.<sup>18</sup>

## Advantages and disadvantages of deeming

These are summarised well in the *Making It Work* Report:

**Supporters** of deeming provisions generally point to the need to protect workers from unequal bargaining power to negotiate reasonable contract conditions. Submissions of support were mainly received from state governments and unions. The advocates of deeming highlight that this approach ‘overcomes some of the shortcomings of a rigid definition’ and case law to identify who is an employee.<sup>19</sup>

In contrast, **detractors** of deeming approaches included employer organisations, independent contracting bodies and some in the law profession. Critics cite the piecemeal approach, disregard of the common law distinction, and the lack of

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consideration of the substantive nature of working relationships as being of considerable concern.<sup>20</sup>

## Special deeming categories

### Outworkers

There are currently a range of protections available to outworkers in the textile, clothing and footwear (TCF) industry both in the federal and State jurisdictions and applying to both employee and contract outworkers. As the Explanatory Memorandum states, these special arrangements are in place for TCF outworkers as they are considered to be particularly vulnerable because they tend to lack bargaining power in relation to their rights and entitlements. The Explanatory Memorandum also states:

As most jurisdictions currently deem contract outworkers to be employees, overriding State deeming laws through the Independent Contractors legislation may particularly disadvantage contract outworkers who are currently entitled to employee protections under State industrial relations laws. Further, it would not be consistent with the approach taken under the Work Choices legislation which has maintained special arrangements for TCF outworkers.<sup>21</sup>

It is on the basis, that the Bill makes special arrangements for outworkers designed to preserve existing protections for outworkers contained within State and federal legislation.

However, submissions to the Senate Committee Inquiry indicate reaction to these provisions has been mixed. While State Governments, unions and organisations representing outworkers generally support preservation of outworker protections, several submissions have questioned whether the drafting of the provisions is wide enough and whether it actually supports the Government's stated intention to 'retain existing State and federal protections relating to contract outworkers'.<sup>22</sup> A fuller discussion of the provisions affecting outworkers is found in the Main Provisions section of the Digest.

### Owner drivers

The most common type of independent contractors in the transport services industry are owner-drivers. Owner-drivers supply their own vehicle to deliver goods for a client. In 1998, 5.4 per cent of all self-employed contractors worked in the transport and storage industry.<sup>23</sup> Submissions to the Inquiry noted that owner-drivers have working conditions similar to employees, and are often referred to as *dependent* contractors (as opposed to the traditional notion of *independent* contractors who work for many clients) or as 'disguised employees'. State Government, particularly Victoria and New South Wales, have specific legislation setting rates and other employment-like conditions for independent contractors in the road transport industry, including truck owner drivers and taxi drivers. The Explanatory Memorandum states that overriding state protections for owner-drivers in New South Wales and Victoria would represent a significant cost for independent

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contractor owner-drivers in these jurisdictions. It is on this basis that there is provision in Part 2 of the Bill to protect Victorian and New South Wales owner driver legislation from the general override provisions. This protection is subject to review in 2007.

## Unfair contracts

An ‘unfair contract’ is a contract that is harsh, unconscionable or is against the public interest. Factors considered when deciding whether a contract is unfair are: the relative bargaining power of the parties, whether any undue influence or pressure or unfair tactics has been exerted, or whether the contract became unfair due to the conduct of the parties or variation to the contract.<sup>24</sup>

Under sections 832 and 833 of the WR Act, the Federal Court of Australia is empowered to examine contracts for services binding on an independent contractor which relate to performance of work and provide appropriate remedies. The remedy is currently limited to an independent contractor who is a natural person. There are also Constitutional limits— it is also required that one of the parties be a Commonwealth authority, or a financial trading or foreign corporation, or relate to matters that take place in or are connected with a Territory.

The unfair contracts review jurisdiction proposed by Part 3 of the Principal Bill is in similar terms to the scheme for unfair contracts as set out in sections 332-4 of the WR Act. The Bill differs from the current provisions in certain respects including:

- the reach of the unfair contracts regime will be extended from natural persons to include incorporated independent contractors (although access to the remedy is limited to circumstances where a director or family member of a director is personally required to perform work under the contract)
- an obligation on the Federal Court when determining the issue of unfairness to consider relevant contract rates when comparing remuneration under the contract with that of an employee in similar circumstances (**clause 15(2)**)
- excluding contracts relating to the performance of work for the private and domestic purposes of another party to the contract, and
- excluding industrial organisations of employers or employees from access to the jurisdiction on behalf of their members.

Unfair contracts legislation also exists at State and Territory level.<sup>25</sup> Part 2 of the Principal Bill contains provisions that propose to generally exclude State and Territory law that allows services contracts to be reviewed, varied or amended on unfair grounds.<sup>26</sup>

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The New South Wales Government, in its submission to the Senate Committee Inquiry states that its unfair contracts jurisdiction is a broader and more flexible jurisdiction than that proposed under the principal Bill. The submission provides the following comparison:

Pt 3 of the Bill:

- only applies to services contracts (not employment contracts)
- has a more limited scope for review of unfair or harsh dealings in that it applies to legally valid contracts and not to the broader concept of arrangements for the performance of work
- does not expressly give the Federal Court or Federal Magistrates Court the power to make orders for the payment of money
- allows an applicant to seek an injunction to protect his or her position but, unlike the IRC in the New South Wales scheme, does not give the Court the more extensive power to make orders prohibiting absolutely or conditionally a party or associated person from entering into further unfair contracts
- does not permit industrial organisation of employers or employees to access the jurisdiction on behalf of their respective members
- does not specifically proscribe contracts designed to avoid industrial instruments in contrast to the statutory concept of unfair contract under the New South Wales scheme
- assigns the jurisdiction to the Federal Court rather than a body such as the IRC with specialised industrial knowledge and arbitral experience.

The submission notes that the obligation imposed on the Federal Court to effectively take market rates into account may be difficult to discharge since evidence of relevant contract rates and conditions will be difficult to gather because of commercial confidentiality considerations and the lack of transparency in these types of arrangements.<sup>27</sup>

By way of contrast, the Australian Chamber of Commerce and Industry (ACCI), in their submission to the Senate Committee Inquiry argue that these provisions, along with the State unfair contracts provisions are not needed. They note with concern the fact that the proposed new federal unfair contracts jurisdiction is in fact broader than the existing scheme and argue that an excessively broad jurisdiction can undermine contractual certainty.<sup>28</sup> The submission states:

Freedom to contract and contractual certainty, together with property rights, are cornerstones of a functioning market economy.<sup>29</sup>

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## Financial implications

The expected costs associated for both the Principal Bill and the Consequential Bill are \$15 million over the next four years.<sup>30</sup>

## Main provisions

**Clause 3** sets out the objects of the Bill. The objects are:

- to protect the freedom of independent contractors to enter into services contracts
- to recognise independent contracting as a legitimate form of work arrangement that is primarily commercial, and
- to prevent interference with the terms of genuine independent contracting arrangements.

## Definition of a services contract

Central to the new legislation is the term ‘services contract’. Both Bills apply to ‘services contracts’ as defined in **clause 5** of the Principal Bill. A ‘services contract’ is a contract for services to which an independent contractor is a party, that relates to the performance of work by that contractor and has the requisite Constitutional connection. The Bill does not provide a definition of independent contractor; instead the term takes its common law meaning.

A contract for services is only subject to the Bills if it has the ‘requisite constitutional connection’. This requires<sup>31</sup>:

- at least one party of the services contract to be either a:
  - constitutional corporation
  - commonwealth authority, or
  - body corporate incorporated in a Territory, or
- the services contract to have a sufficient connection to a Territory which requires one of the following conditions to be satisfied:
  - the work under the services contract is wholly or principally to be performed in a Territory in Australia
  - the services contract was entered into in a Territory in Australia, or
  - at least one party to the services contract is a natural person who is resident in, or body corporate that has its principal place of business in, a Territory in Australia.

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## Part 2—Exclusion of certain State and Territory laws

**Part 2** deals with the exclusion of State and Territory laws. Under **clause 7(1)(a) and (b)** of the Bill, a State or Territory law that affects the rights, entitlements, obligations or liabilities of a party to a services contract will be excluded to the extent that it either:

- takes or deems a party to that contract to be an employer or an employee for the purposes of a *workplace relations matter*, or
- confers or imposes rights, entitlements, obligations or liabilities on a party to that contract in relation to matters that would be workplace relations matters if the parties were in an employment relationship.

The meaning of ‘workplace relations matter’ is critical to the operation of these exclusion provisions. A State or Territory law cannot be excluded under these provisions unless it affects the parties to the services contract for the purposes of a *workplace relations matter*.

Clause 8 provides definitions of what is and what is not a *workplace relations matter*.

A *workplace relations matter* **is**:

- remuneration and allowances
- leave entitlements
- hours of work
- enforcing or terminating contracts of employment or agreements determining terms and conditions of employment
- disputes between employees and employers
- industrial action
- matters relating to employees or employers that are dealt with by or under the WR Act or State or Territory industrial law, or
- any other matter specified in regulations (subclause 8(1)).

Amongst other things, a *workplace relations matters* **is not**:

- superannuation,
- workers’ compensation,
- occupational health and safety
- taxation, or
- any other matter specified in regulations (**subclause 8(2)**).

As a result, contracting parties with a relationship of independent contractor and employee, may still continue to be deemed ‘employers’ or ‘employees’ for the purposes of

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making workers compensation insurance premium payments, liability for payroll tax, superannuation guarantee liability, or liability under equal opportunity and OHS legislation. However, where a common law independent contractor relationship exists, State laws will no longer be able to deem a party to be an ‘employee’ for the purposes of annual leave, sick leave, long service leave, termination and redundancy payments, minimum hourly rates and allowances, and many other common employee entitlements.<sup>32</sup>

Exclusion of State and Territory unfair contracts legislation

**Clause 7(1)(c)** excludes State or Territory laws that allow services contracts to be set aside or varied on the grounds of unfairness. An unfairness ground is defined in **subclause 9(1)**.

**Subclause 9(2)** clarifies that the override of State and Territory unfair contracts jurisdiction will not affect matters that are not *workplace relations matters*. For example the State unfair contracts jurisdiction would still be available in relation to a services contract in an occupational health and safety matter.

Exemptions for outworkers and owner drivers

**Subclause 7(2)** provides that the exclusion provisions in subclause 7(1) do not apply in certain circumstances. In particular, the Commonwealth override does not apply to:

- State and Territory laws that apply to a services contract to which an outworker is a party **and** which make provision in relation to such a contract (**paragraph 7(2)(a)**)
- State laws concerning contract owner drivers in the transport industry in New South Wales and Victoria, specifically Chapter 6 of the *Industrial Relations Act 1996* (NSW) and the *Owner Drivers and Forestry Contractors Act 2005* (Vic) (**paragraph 7(2)(b)**).

The Explanatory Memorandum states that outworkers in services contracts and owner drivers will not have access to State and Territory unfair contracts legislation in relation to workplace relations matters. The rationale being that the new federal unfair contracts regime to be established under Part 3 of the Bill would apply.

Regulations to *either* add further exemptions *or* to further exclude State and Territory laws

Regulations can be made to add further categories of State and Territory laws that would not be affected by the exclusion provisions (**paragraph 7(2)(c)**).

Regulations can also be made to further exclude State and Territory laws in relations to the rights and obligations of a party to a services contract (**clause 10**). **Subclause 10(2)** clarifies that override by regulation could also effect the outworker and owner driver exemptions.

Outworkers

The Explanatory Memorandum states that the effect of clause 7(2)(a) is to preserve State and Territory laws that affect outworkers who are party to a services contract. However,

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several submissions to the Senate Committee Inquiry expressed concern that the drafting of this clause is more restrictive than the Explanatory Memorandum has indicated. For example the TCF Union of Australia states the exception for outworkers is deficient because it will only apply where:

- there is a direct services contract with an outworker (this means that laws which regulate services contracts between parties further up the contracting chain, such as a fashion house and a head contractor are overridden)
- the law in question applies to and makes provision in relation to that services contract (as opposed to the rights and liabilities of the parties to it), and
- insofar as the law applies and makes provision in relation to the services contract, it does not provide for the services contract to be varied, set aside or rendered unenforceable on fairness grounds, including grounds that the contract seeks to avoid industrial laws, awards or other instruments.

The submission goes on:

Put simply, the range of laws which are protected by section 7(2)(a) is such a small subset of the range of laws which are excluded by 7(1) that the effect will be to render outworker protection regimes under state laws largely ineffective.<sup>33</sup>

The Victorian Government noted a similar problem with the drafting and argues that significant sections of the *Outworkers (Improved Protection) Act 2003* (Vic) would be excluded, leaving outworkers in a far more vulnerable position than is the case under State law.<sup>34</sup> The Victorian Government further states that the provisions as drafted appear to be contrary to the intention in the Explanatory Memorandum which confirms the need to maintain special arrangements for TCF outworkers. In view of this perceived problem, the Submission proposes the following amendments:

- a) Clause 7(2)(b) of the IC Bill should be amended to include the *Outworkers (Improved Protection) Act 2003* (Vic) (and other State outworker Acts), as laws that are not excluded; and
- b) Clause 7(2)(a) of the IC Bill should be amended to provide, in effect, that clauses 7(1)(a) and 7(1)(b) do not apply to the extent that the State or Territory law applies to outworkers.<sup>35</sup>

### Part 3—Unfair contracts

**Part 3** provides a scheme permitting a relevant Court (either the Federal Court of Australia or the Federal Magistrates Court) to order that services contracts be wholly or partly set aside or varied on the grounds that they are harsh or unfair. The existing unfair contracts review provisions in the WR Act located in sections 832-834 are to be repealed by the accompanying Consequential Bill.

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**Clause 11** provides that Part 3 applies in relation to a services contract, although it excludes contracts relating to the performance of work for the private and domestic purposes of another party to the contract. The Part will apply to incorporated independent contractors, but access to the remedy is limited to circumstances where a director or family member of a director is personally required to perform work under the contract. The Explanatory Memorandum states that large bodies corporate would be excluded from accessing this Part as directors would not usually personally perform all or most of the work under their services contracts.<sup>36</sup>

**Clause 12** provides that an application could be made to the Court to review a services contract on the grounds that the contract was unfair and/or harsh. The concepts of ‘unfair’ or ‘harsh’ would take their common law meanings. Subclause 12(2) provides that an application may only be made by a party to the services contract. By way of comparison the existing provision in the WR Act provides that an application may also be made by an industrial organisation of the employee or employer on behalf of the party.

**Clause 13** authorises the making of regulations to prescribe circumstances in which applications could *not* be made to the Court to review a services contract. The Explanatory Memorandum explains that for example, the regulations could prescribe a mechanism, such as a financial cap, to limit the scope of applications made under subsection 12(1).<sup>37</sup> As an aside, the Master Builders Australia, in their submission to the Senate Committee Inquiry recommends that the Regulations should provide a monetary cap of \$200,000 over which sum contracts cannot be reviewed.<sup>38</sup>

**Clause 14** would have the effect of preventing an application to review a services contract where other review proceedings have also commenced in another jurisdiction in relation to the same contract.

**Clause 15** provides a number of matters that the Court may have regard to in determining whether a services contract is unfair and/or harsh. The Court would be permitted to consider:

- the relative strength of the bargaining positions of the parties to the contract, and if applicable, any persons acting on behalf of the parties
- whether a party to the services contract was subjected to any unfair tactics, undue influence or pressure in determining if the contract was unfair and/or harsh
- whether the total remuneration under the services contract was less than the total remuneration under a contract where an employee performs similar work, and
- any other relevant matter.

In addition subclause 15(2) provides that, if the Court has regard to comparative employee remuneration as provided in paragraph 15(1)(c), it must also consider:

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- whether the terms of, and the total remuneration provided under the services contract are proportionate with the terms of, and remuneration provided under, other services contracts relating to the performance of similar work in the particular industry.

**Subclauses 15(3) to 15(5)** replicate existing provisions in the WR Act and relate to the responsibilities on the Court in forming an opinion about whether the contract is unfair and/or harsh.

As far as remedies are concerned, the Court is able to set aside or vary part or all of the contract (**subclause 16(1)**). The Court also has the power to make interim orders so as to preserve the position of a party to a services contract. The Court may also enforce an order by injunction or otherwise as the Court considers appropriate. The orders that the Court may make are essentially the same as those set out in the existing unfair contracts provisions in the WR Act.

**Clause 17** provides that proposed Part 3 creates a ‘no costs’ jurisdiction except in relation to proceedings which have been vexatiously brought.

#### **Part 4—Contract outworkers in the textile, clothing and footwear industry.**

The object of **Part 4** of the Bill as set out in **clause 18** is to ensure that individuals who are independently contracted textile, clothing and footwear (TCF) outworkers are afforded a minimum rate of pay as determined by what an employee would received under the Australian Fair Pay and Conditions Standard or the applicable minimum rate of pay the TCF outworker would receive under State or Territory law.

Australian law recognises two types of outworkers: employee outworkers and outworkers who are independent contractors or contracted outworkers.

Under the WR Act as amended by the Work Choices legislation, minimum wages for employee outworkers are set under the Australian Fair Pay and Conditions Standard. For contracted outworkers, Part 22 of the WR Act provides a minimum remuneration guarantee to contracted TCF outworkers in Victoria, again set at the Australian Fair Pay and Conditions Standard. Part 22 does not apply to outworkers engaged outside Victoria.<sup>39</sup>

State protections for contracted TCF outworkers are different. Most State legislation contains provisions that deem contracted outworkers to be employees and thus award and agreement making systems in those states will apply to those workers. In addition to deeming provisions, Queensland, New South Wales and Victoria have specific legislation to further protect contracted outworkers.

As stated above, the Government in the Explanatory Memorandum acknowledges that TCF outworkers are a particularly vulnerable class of workers who deserve greater protections than are afforded to other workers. The Explanatory Memorandum further states that the Government does not wish to replace or interfere with the existing State

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frameworks, and therefore, the outworker provisions in the Bill (which are based on the Victorian provisions) are minimalist and designed to operate as a ‘default’ in states and territories which have not put their own outworker protections in place.

The provisions in Part 4 will therefore essentially replicate the Part 22 provisions of the WR Act, currently designed to protect only Victorian TCF contracted outworkers. Part 22 of the WR Act is to be repealed by the accompanying Consequential Bill.

**Clause 20** imposes an obligation on a person who engages ‘contract TCF outworkers’ to pay those workers at least the statutory amount as set by the Australian Fair Pay and Conditions Standard. ‘Contract outworkers’ are defined so that only those TCF outworkers who are engaged as independent contractors under a services contract would be included. TCF outwork is defined as work that comprises packing, processing or otherwise working on articles for the textile, clothing or footwear industry performed in or about private residential premises or premises that are not business or commercial premises of anyone who is obliged under the contract to pay for the work performed.

**Clause 21** provides that the minimum rate of pay proposed would not apply where a State or Territory law provides contract outworkers a minimum rate of pay for TCF outwork. In these cases the minimum rate of pay specified by the State or Territory law would operate.

**Division 3 (clauses 22–29)** provides workplace inspectors with certain powers to investigate compliance with the minimum rate of pay obligations in clause 20. The provisions substantially replicate the provisions in Subdivisions C and D of Part 22 of the WR Act which provide for inspector powers and an enforcement regime in Victoria.

It is of note, that there are indications the Government is proposing amendments that would remove Part 4 of the Bill. For further detail, the reader is referred to the Postscript in the Concluding Comments of the Digest.

## Part 5—Transitional provisions

Part 5 creates transitional arrangements for those who, at the time of commencement of the legislation are independent contractors at common law but who have been deemed under State or Territory law to be employees, or who are afforded employee style entitlements by State or Territory laws that are to be disappplied by the Bill. The provisions would provide that, where the transitional arrangements cover a person, the relevant State or Territory laws continue to have effect in relation to the contract between the parties.<sup>40</sup> The transitional period lasts up to 3 years unless the contract ends earlier (**subclause 35(4)**). The parties to a services contract can elect to opt into the federal system at any time during the transitional period by executing a reform opt-in agreement (**clause 33**). If no such agreement is reached and the contract period runs until the transition date the deemed employment arrangement will be terminated at the end of the period (**subclause**

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**35(8)**). The transitional provisions are complex and for further detail the reader is referred to the Explanatory Memorandum at pages 52–63.

The New South Wales Government in its submission to the Senate Committee Inquiry noted the complexity of these transitional provisions stating:

Independent contractors caught up in these complex and potentially confusing arrangements will very likely need legal advice to clarify their rights and obligations during the transitional period and in relation to entitlements which will arise under State law as a result of the operation of Part 5. The provisions are highly prescriptive, technical and introduce a confusing array of concepts. There are, for example, pre-reform commencement contracts, continuation contracts, related continuation contracts, remedy contracts, test contracts and a contractor law test designed to clarify the continued application of the State contractor law (deeming provisions) to relevant services contracts.<sup>41</sup>

## Part 6—Regulations

**Part 6** provides a general regulation making power for the purposes of the Independent Contractors Act. **Subclause 42(2)** clarifies that the regulations may include modifications of the Transitional provisions contained in Division 1 of Part 5 of the Bill (the provisions affecting State and Territory laws). These modifications may also have retrospective application (**subclause 42(3)**). The Explanatory Memorandum states that the rationale for such a broad regulation making power is that the transitional provisions are complex and novel: ‘[...] a broad regulation making power allowing retrospective legislation to be made is desirable to ensure that the accrued entitlements of formerly deemed employees are not unintentionally lost’.<sup>42</sup>

## Concluding comments

Some of the issues that the proposed independent contractors legislation raises are as follows.

- The legislation relies on the corporations power, section 51(xx) of the Constitution, to essentially oust States from exercising their concurrent powers over industrial relations. How successful in ousting the States the Commonwealth can be, will depend upon the findings of the High Court in relation to the scope of this power in the challenge to its Work Choices legislation: a broad reading of the power will expand the reach of this law, a narrower construction will contract it.<sup>43</sup> It is widely expected that this decision will be handed down later this year. The constraints of this Bills Digest prevent a more detailed discussion of the often very complex constitutional arguments and analysis surrounding section 51(xx). Instead, the reader is referred to the following publication of the Parliamentary Library which provides a detailed discussion of the constitutional background to the workplace relations reform: P.

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Prince and T. John, '[The Constitution and industrial relations: is a unitary system achievable?](#)', *Research Brief*, no. 8, Parliamentary Library, Canberra, 2005–06).

- This legislation complicates an area of law unnecessarily. The preservation of State laws in some areas and in some States, reliance on the common law test of employee/independent contractor and the introduction of very complex transitional provisions, which will last for three years, will compromise the hope that this legislation will cut through red tape for business.
- Related to this complexity, the legislation also provides a costly system of redress for small business and workers. While the Bills contain protections to prevent unfair contracts and sham arrangements, they only provide the remote option of taking an employer/contractee before the Federal Magistrates Court or the Federal Court, both costly jurisdictions and therefore unlikely to be available to the majority of workers who these Bills should be protecting.
- Finally, the legislation leaves open the opportunity to significantly expand its scope by a heavy reliance on regulation making. The legislation confers very broad law-making power upon the Executive, including provisions which enable the Executive to make, for example, regulations capable of overriding states laws as well as of changing this proposed law itself.<sup>44</sup>

## Postscript—Senate Committee report and recommended changes regarding outworkers

Since completion of the Digest, the Senate Committee report has been tabled. The Reader is referred to the [full report](#) for further detail. Significantly, the report notes that the Committee, which took the unusual step of convening private negotiations between the Department of Employment and Workplace Relations (DEWR) and outworker lobbyists on August 17, said it had been reassured by strong indications from the Department that the removal of Part 4 of the Principal Bill is likely to be agreed to by the Government. The report also suggested the Government would change clause 7(1)(c) of the Principal Bill to clarify that it would not override State anti-avoidance provisions protecting TCF outworkers. It said DEWR had proposed confidential draft amendments directly excepting outworkers, or a legislative note or extra explanatory memorandum on the section.<sup>45</sup>

## Endnotes

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1. Federal Government Election 2004 Policy, *Protecting and Supporting Independent Contractors*.
2. Minister for Employment and Workplace Relations, Independent Contractors Bill 2006, House of Representatives, *Hansard*, 22 June 2006, p. 5.

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3. Since completion of the Digest, the Committee has tabled its report. A copy can be found at: [http://www.aph.gov.au/Senate/committee/eet\\_ctte/contractors06/report/index.htm](http://www.aph.gov.au/Senate/committee/eet_ctte/contractors06/report/index.htm)
4. (1986) 160 CLR 16.
5. *R v Allan; Ex parte Australian Mutual Provident Society Ltd* (1977) 16 SASR 237 at 248.
6. Breen Creighton and Andrew Stewart, *Labour Law*, 4<sup>th</sup> ed., Federation Press, 2005, p. 286.
7. Creighton and Stewart do however suggest that the list in *Abdalla v Viewdaze Pty Ltd* (2003) 122 IR 215 at 229–31 is very helpful.
8. *Re Porter* (1989) 34 IR 179 at 184.
9. Breen Creighton and Andrew Stewart, *op. cit.*, p. 293.
10. The *Income Tax Assessment Act 1997* provides that certain independent contractors are to be taxed as employees. However, they will not be taxed as employees if they are found to be running a personal services business, which will be the case if any of the following applies:
  - They satisfy the ‘results test’ for at least 75 per cent of income, that is:
    - they work to produce a specified result or outcome(s) under the contract or arrangement
    - they provide the tools and equipment necessary (if any) to produce the result(s) (if no tools or equipment are required they meet this component of the test)
    - they are liable for the cost of rectifying any defective work
  - less than 80 per cent or more of personal services income (PSI) in an income year comes from each client and must meet one of the other three personal services business tests. These are the:
    - unrelated clients test: having two or more unrelated clients
    - employment test: having employees or subcontractors that perform 20 per cent of the work, or apprentices for at least half of the year
    - business premises test: having business premises that are physically separate from their home, or from premises of the person for whom they are working, or
    - receive a personal services business determination from the Commissioner of Taxation. (Extracted from the *Making It Work* Report, pp. 61-62).
11. Recommendation 3.
12. Minister for Employment and Workplace Relations, Independent Contractors Bill 2006, House of Representatives, *Hansard*, 22 June 2006, p. 5.
13. A dependent contractor is generally recognised as one who works for only one employer as opposed to an independent contractor who works for many different employers.
14. Queensland Government submission to the *Making It Work* Inquiry, paragraph 5.9 of the Report.
15. *Making It Work* Report, paragraphs 5.10–5.11.

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16. NSW Government submission to the *Making It Work* Inquiry, paragraph 5.13 of the Report.
17. *ibid.*, paragraph 5.15.
18. For further discussion see the Main Provisions section of the Digest.
19. *Making It Work* Report, paragraph 5.16.
20. *ibid.*, paragraph 5.17
21. Explanatory Memorandum, p. 13.
22. Explanatory Memorandum, p. 1.
23. *Making it Work* Report, paragraph 2.46.
24. *Making it Work* Report, paragraphs 5.76–5.77.
25. The *Making It Work* Report provides a summary of unfair contracts legislation across the States and Territories, pp. 111.
26. For further information see page 14 of the Digest.
27. NSW Government submission to the Senate Committee Inquiry, paragraph 136.
28. The current scheme affects only natural persons.
29. ACCI Submission to the Senate Committee Inquiry, paragraph 84.
30. DEWR Submission to the Senate Committee Inquiry, p. 16.
31. The constitutional powers underpinning the legislation are the corporations power, section 51(xx) and the Territory power, section 122. The corporations power enables the Commonwealth to make laws with respect to foreign, trading and financial corporations in Australia. The scope of this power will depend upon the findings of the High Court in relation to the challenge to the federal Government's Work Choices legislation: a broad reading of the power will expand the reach of this law, a narrower construction will contract it. It is widely expected that this decision will be handed down later this year. The constraints of this Bills Digest prevent a more detailed discussion of the often very complex constitutional arguments and analysis. The reader is referred to the following publication of the Parliamentary Library which provides a detailed discussion of the constitutional background to the workplace relations reform: P. Prince and T. John, '[The Constitution and industrial relations: is a unitary system achievable?](#)', *Research Brief*, no. 8, Parliamentary Library, Canberra, 2005–06).
32. *CCH industrial law news*, issue 7, 31 July 2006, p. 6.
33. TCF Union of Australia submission to the Senate Committee Inquiry, paragraphs 77–81.
34. Industrial Relations Victoria submission to the Senate Committee Inquiry, paragraph 14.
35. *ibid.*, Recommendation 2.
36. Explanatory Memorandum, p. 38.
37. *ibid.*, paragraph 61.
38. Master Builders Australia submission to the Senate Committee Inquiry, Recommendation 3.

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39. This is because Victoria referred its workplace relations powers to the Commonwealth and therefore is covered by federal legislation.
40. Explanatory Memorandum, p. 52.
41. NSW Government submission to the Senate Committee Inquiry, paragraph 246.
42. Explanatory Memorandum, p. 64.
43. Professor Greg Craven in an article, 'Industrial Relations, the Constitution and Federalism', *UNSW Law Journal*, v.29(1), 2006, pp. 203–214, refers to the concept of opportunistic federalism when he says that a comprehensive finding by the High Court in favour of WorkChoices will have long-term implications for Australian federalism both theoretically and practically. In a practical sense it would render Australia's federal balance vastly more flexible and realistically, there could be relatively few desirable objects within the Commonwealth's ambitions that could not be approached via a combination of the corporations power and some other power contained in section 51 of the Constitution. Professor Craven continues: 'The potential of these realities would be to usher in a period of 'opportunistic federalism', under which the Commonwealth would be free to cherry-pick those areas of activity which it chose to regulate. These choices often would be made not primarily on the basis of specific constitutional responsibility, or indeed settled policy objectives, but rather by reference to impermanent considerations of political advantage and convenience. Under such a regime, the position of the States would be substantially undermined by Canberra in an on-going and random manner. Australia doubtless would continue to be a federation, but one in which the federal balance was a political calculation to be made on a weekly basis.'
44. Examples are: clauses 8(1), 10, 13 and 42(2). In so far as these provisions permit subordinate legislation to change the law of the enabling Act, the provisions can be referred to as Henry VIII clauses. A fuller discussion of this concept is found in the [Digest](#) for the Workplace Relations Amendment (Work Choices) Bill 2005 at pp 120–122.
45. Reported in *Workplace Express*, 28 August 2006, 'Senate inquiry recommends changes to Independent Contractors Bill to keep state protections for clothing outworkers'.

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