SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION LEGISLATION COMMITTEE

2006-2007 BUDGET SENATE ESTIMATES HEARING
29TH AND 30TH MAY 2006
EMPLOYMENT AND WORKPLACE RELATIONS PORTFOLIO

QUESTIONS ON NOTICE

Outcome 2: **Higher productivity, higher pay workplaces**

Output Group 2.1: **Workplace relations policy and advice**

Output 2.1.2: **Workplace relations legislation development**

Question Number: **W138-07**

Question:
Senator Wong asked in writing:

The (DEWR discussion paper, Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements) notes that unfair contracts provisions such as those in s106 of the Industrial Relations Act 1996 (NSW) create a barrier to the freedom to contract as a 'contract which was made fairly and was fair in its terms could later be held to be unfair' (page 15). This creates the potential for contractual and commercial uncertainty for parties as their initial intentions can be remade during the life of the contract. This has attracted judicial comment. For instance, Sheldon J in Davies v General Transport Development Pty Ltd noted that s88F of the Industrial Arbitration Act 1940 (on which current section 106 is based) ' certainly plays havoc with the classic principles relating to contracts' in that a contract can be remade 'either by omitting parts and retaining the rest or by adding new terms'.

a) on what basis does DEWR contend that a contract reviewed by the NSW Industrial Relations Commission, on application by one of the parties to it, was ‘fair’, if the Industrial Relations Commission later rules that it was unfair?

b) How does this approach differ from Work Choices which gives the federal Minister a Regulation making power to declare any term of a registered agreement to be 'prohibited content'?

c) does this Regulation making power not allow the federal Minister to 'play havoc' with contracts by 'omitting parts and retaining the rest'?

Answer:

The question misrepresents the Department’s discussion paper. The paper does not state that ‘unfair contracts provisions such as those in section 106 of the NSW *Industrial Relations Act 1996* (the NSW Act) create a barrier to the freedom to

contract'. It provides a detailed summary of how the NSW unfair contracts jurisdiction operates and notes one of the seminal cases in this jurisdiction in which Justice Sheldon of the NSW Commission commented on the unique nature of the provisions.

In relation to the ability of the NSW Commission to review contracts which become unfair at a point after they are made, the discussion paper states that:

> *The [NSW] Commission is not confined to considering the content of the contract nor the process of its making, but can also look at a contract which has become unfair as a result of one party's conduct under the contract. This adds to uncertainty as a contract which was made fairly and was fair in its terms could later be held to be unfair.*

Subsection 106(2) of the NSW Act allows the NSW Commission to find that a contract is unfair because of 'any conduct of the parties, any variation of the contract or any other reason'. This is unique because, according to the principles of contract law, it is only the parties to a contact that have the power to remake the terms of a contract between them. Only in limited cases involving duress, fraud or mistake occurring when the contract is made is a court empowered to alter a contract between the parties.

The Government considers the ability of independent contractors to seek to have the terms of their contracts varied if they are unfair, provided that the notion of 'unfairness' appropriately includes commercial considerations. The Government considers this to be appropriate because independent contracting arrangements are primarily commercial agreements – a reflection of the choice on the part of independent contractors not to operate an employees. The Government does not, however, support fairly negotiated commercial arrangements being altered by the or overturned by the courts.

This policy is reflected in the federal unfair contracts jurisdiction to be established in the Independent Contractors Bill 2006 which was introduced into the House of Representatives on 22 June 2006. This bill will, among other things, exclude the operation of State and Territory laws that affect the rights, entitlements, obligations or liabilities of parties to contracts with independent contractors where those laws allow for the voiding, varying or setting aside of those contracts. Under this new federal jurisdiction and in accordance with existing precedent, the Federal Court and the Federal Magistrates Court will only be able to amend or set aside contracts to which independent contractors are party where they were unfair at their point of inception, but not subsequently. The Government considers that this reflects the commercial nature of arrangements between independent contractors and their principals.

The unfair contracts jurisdiction is considerably different to the concept of prohibited content in the *Workplace Relations Act 1996* (the WR Act). The unfair contracts jurisdiction allows a court to retrospectively amend a lawful contract between the parties. The prohibited content provisions, on the other hand, set out those matters that may not be included in workplace agreements from the outset of negotiations for a new agreement. There are some matters which the Government considers should not be enforceable in workplace agreements made under the WR Act.