ACCI Submission

to

Senate Employment, Workplace Relations and Education Legislation Committee

Inquiry into the provisions of the Independent Contractors Bill 2006 and Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006

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ACCI

- The Australian Chamber of Commerce and Industry (ACCI) is Australia's peak council of business associations.

- ACCI is Australia's largest and most representative business organisation.

  - Through our membership, ACCI represents over 350,000 businesses nationwide, including:

    - Australia's top 100 companies.

    - Over 55,000 medium sized enterprises employing 20 to 100 people.

    - Over 280,000 smaller enterprises employing less than 20 people.

- Businesses within the ACCI member network employ over 4 million working Australians.

- ACCI members are employer organisations in all States and Territories and all major sectors of Australian industry.

- Membership of ACCI comprises State and Territory Chambers of Commerce and national employer and industry associations. Each ACCI member is a representative body for small employers and sole traders, as well as medium and larger businesses.

- Each ACCI member organisation, through its network of businesses, identifies the policy, operational and regulatory concerns and priorities of its members and plans united action. Through this process, business policies are developed and strategies for change are implemented.

- ACCI members actively participate in developing national policy on a collective and individual basis.

- As individual business organisations in their own right, ACCI members also independently develop business policy within their own sector or jurisdiction.

ACCI and the Contracting Debate

- ACCI represents Australian business in all major facets and operations. This is not restricted to addressing only employment regulation, but includes representing:

- Businesses in their capacities as employers (when they enter contracts of service with individuals as employees);

- Businesses operating as commercial entities wanting to enter commercial contracts for services with other commercial entities to deliver particular tasks and functions (i.e. when businesses enter contracts for services with other businesses as principals);

- Businesses of all sizes operating as commercial entities wanting to take up commercial contracts offered by other businesses (principals) to deliver key tasks and functions (i.e. when businesses enter contracts for services with other businesses (principals) as contractors). This includes, but is not restricted to, representing subcontractors;

- Businesses seeking to use the services of labour hire agencies;

- Labour hire agencies seeking to offer workers (be they contractors or employees) on commercial terms to companies on a short term, contract or project basis as required.

- In July 2005 the General Council of ACCI, comprising the Presidents of each member employer organisation, unanimously adopted, for the first time, a collective policy statement on the issue of contracting and labour hire. The ACCI 'Contracting and On-Hire Policy' is available on the ACCI web site www.acci.asn.au.

- In 2005 ACCI also made substantive submissions to, and appeared before, the two national inquiries which have preceded these Bills – inquiry by the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation into 'Independent contractors and labour hire arrangements' and the Department of Employment and Workplace Relations Inquiry into 'Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements'.

- ACCI, as the organisation most representative of employers, is also recognised internationally as the representative of Australian industry in debates concerning labour issues in the forums of the International Labour Organisation (ILO). ILO debates on the topic of the 'employment relationship' have been held in 1998, 2003 and 2006. ACCI was actively involved in the debates on behalf of Australian business.

ACCI Member Submissions

- A list of ACCI member organisations appears on the final page of this submission.

- Through both state/territory based and industry based membership, ACCI represents some of the major industry users of contractors. This includes the construction, housing, manufacturing, mining and transport industries.

- However, there are also less well understood areas in which contractors make a substantial contribution. This includes for example the important role they play in the entertainment industry, and the role consulting contractors play in all industries (e.g. IT, accounting etc).

- This ACCI submission has been developed following the collective work of member organisations through an ACCI working party established following the introduction of the Bills.

- Various ACCI member organisations will make their own separate submissions to this inquiry, including in particular from the construction, housing, entertainment and vehicle retail industries.

- We commend the detail of these industry specific submissions to the Committee. These submissions of ACCI member organisations should be considered in conjunction with this submission.

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EXECUTIVE SUMMARY

Key Principles

1. A number of key principles should guide a consideration of the Independent Contractors Bill 2006 and the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006 ('the Bills'). These include:

2. Recognition that the underlying principle of freedom of contract is the basic pillar on which our system of commerce and industry operates;

3. That persons genuinely and freely entering into contracts for the provision of their personal services as contractors should, provided those contracts are lawful, not have them varied, redefined, reshaped, annulled, downgraded or otherwise interfered with by persons or bodies (including governments, regulators, tribunals or courts) who are not parties to those contracts;

4. That the common law generally provides a proper and sufficient basis on which the law should give legal recognition to a contract for services and a proper basis for setting out the necessary elements of a contract for services, although additional certainty can be provided by statute so long as common law rights are not prejudiced;

5. That contracts of employment where employees are labelled as contractors, but where in fact and law they are really employees, are sham contractor arrangements and do not have legal recognition as contracts for services at common law;

6. That arrangements which are non consensual or which are tainted by coercion or undue influence are not enforceable and do not have legal recognition as contracts for services at common law;

7. That genuine and consensual contracts for services under which work is performed as principal and contractor are in and of themselves a legitimate, welcome and beneficial form of commercial arrangement that adds value to the Australian economy, and in particular is no less welcome than contracts of employment;

8. That genuine and consensual contacts for services are not inherently exploitative, unfair or otherwise requiring the attention of consideration of governments, parliaments or regulators;

9. That contracts for services provide a flexibility, efficiency and productivity that is of real value to the parties and the economy and society as a whole;

10. That the values of entrepreneurship, risk taking, investment and choice which underpin contracts for services are values that should be welcomed, encouraged and highly regarded by policy makers.

11. Governments should not be in the business of deciding what working arrangements suit a business or individuals. Regulating true independent contractors as employees is a regulation of entrepreneurship, and not something that even the International Labour Organisation has recommended.

Key Recommendations

12. The Independent Contractors Bill 2006 ('the principal Bill') and the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006 ('the supplementary Bill') are supported in principle. Prior to their passage by the parliament, certain amendments to both Bills should be made. Those amendments are necessary to giver further or clearer effect to the objects of the principal Bill.

13. The most fundamental area where the principal Bill should be amended is in respect to the powers of a court to make orders concerning unfair contracts in Part 5. Those powers should not relate to harshness or unfairness having regard to remuneration as between contractors and employees, and certainly not as between contractors themselves. This requires as re-draft of clause 15(2) of the principal Bill.

14. In addition, and equally as fundamental, clause 12 should be amended to expressly provide that a court is only able to assess fairness or harshness as at the time the contract was entered into, and not by reference to circumstances arising during the life of the contract. Courts should not be in a position where they re-write a lawful commercial arrangement between consenting parties after or during the contract merely because one party or the other has formed a view at that later time that its provisions are no longer acceptable or satisfactory.

15. The most fundamental area where the supplementary Bill should be amended is to require as an element of the new offences (if they are to be enacted, which we do not consider warranted) a relevant intention on the part of the wrongdoer. The offences should not be strict liability offences. There should be no reverse onus of proof to make out defences. Such an approach renders a commercial entity 'guilty until proven innocent' – an approach wrong in principle, and one that does not accord with the objects of the principal Bill.

16. Clause 902 of the supplementary Bill should be redrafted so that engaging an employee as an independent contractor is not be an offence where a business restructure is genuine and not tainted by fraud, misrepresentation or breach of contract.

17. Further, the supplementary Bill should be amended so that offences are only able to be prosecuted by a public authority with the requisite independence from industrial matters or industrial objectives. Trade unions should not have a right to prosecute such offences.

INDEPENDENT CONTRACTORS BILL 2006

Objects – Part 1 - clause 3

18. Clause 3(1) sets out the objects of the principal Bill.

19. In considering the objects of Bill it is important to recognise that it follows a number of important changes made earlier in WorkChoices which are also significant, and which are matters that ACCI and industry has supported – for example, rendering non allowable any awards or orders of the Australian Industrial Relations Commission that regulate contractors, making it unlawful for contractors to be discriminated against, and making unlawful clauses in union agreements that prohibit or limit or regulate the use or terms of engagement of contractors (and thereby making industrial action in support of such claims unlawful).

20. ACCI supports the objects in clause 3(1). The principal Bill is needed because of the prevalence of contracting, its beneficial contribution to the labour market, its fundamentally different character from employment, and the gradual intrusion of industrial law into the freedom of contracts between principals and contractors, and into the distinction between contracting and employment.

21. ACCI has outlined to the 2005 parliamentary and departmental inquiries that contracting is an emerging phenomenon, touching on a wide and increasing range of areas of the Australian economy, and largely beneficial to both the economy and the individuals concerned. An efficient economy will have a dynamic mix of contractors and employees. The trend has been that many skilled and productive employees continue to participate in the labour market but as contractors rather than employees. The modern labour market needs to be flexible and competitive to allow businesses to respond to clients, consumers and competitors. Independent contracting may not be for every job or the preference of every worker. However it meets important economic and social goals.

22. These developments are not all the product of demand by industry. Workers themselves today are generally more skilled, more mobile, more individual, aspirational and one size does not fit all. Preferences over how, where and when to work differ markedly. One worker might want to maximise earnings whilst another will use flexibility to maximise time off for themselves, for family, for parenting, for personal study or simply for leisure. Individuals can have different views on these matters at different points in their own working life.

23. Our emerging challenges, such as population ageing are also assisted by flexible forms of work that enable mature aged workers to more easily transition from work into retirement.

24. The objects of the principal Bill therefore reflect a contemporary situation in which:
    i. There is a clear demand from businesses and individuals for independent contract arrangements, and for alternatives to the traditional employment paradigm.
    ii. There is a clear recognition that independent contracting offers real benefits to businesses and individuals.
    iii. There is an increasing mess of legal complexity and regulatory 'speculation' in this area (generally at the state level) which is retarding the capacity of interested parties to enter contracts for services, is creating additional uncertainty and costs, and is doing so with little or no policy benefit or regulatory justification.

25. The objects are also consistent with the government's intention before the 2004 general election 'to establish an Independent Contractors Act to support the status of independent contractors; ensure parties' freedom to contract is upheld and that there is certainty in commercial relationships; prevent the workplace relations system from being used to undermine the status of independent contractors and prevent unions from seeking orders from the Australian Industrial Relations Commission which would impose limits, constraints or barriers on the freedom to contract, the freedom to operate as a genuine independent contractor, or the freedom to engage work through labour hire arrangements.'

26. Legislating for these purposes is also supported by a recent Productivity Commission report released in May 2006 on 'The Role of Non Traditional Work in the Australian Labour Market'. That report highlights the positive role non-traditional work plays in the labour market for employers and employees. A warning was made against attempts to regulate and restrict access to non-traditional employment. The Productivity Commission found that non-traditional work fulfils two important roles in the labour market:
    i. it frequently provides a bridge between not working and being in ongoing employment for those who prefer ongoing to non-traditional work; and
    ii. non-traditional work provides a way for those who for reasons related to choices about education, child rearing or partial retirement derive relatively more benefit from non-work activities to achieve objectives not related to work.

27. Clause 3(2) of the principal Bill seeks to explain how the objects of the Bill are sought to be achieved. The first three lines express an object (that the 'rights, entitlements, obligations and liabilities of parties to services contracts be principally governed by the terms of those contracts'). As this sub clause does not, of itself, create any substantive rights, it may be better for its first three lines be included in 3(1), and the remainder situated in the explanatory memorandum. ACCI would recommend an amendment of that type.

TYPES OF CONTRACTS COVERED – PART 1 - CLAUSE 5(1)

Contracts for services at common law

28. The definition of 'services contract' in clause 5(1) relies upon the common law distinction between employees and contractors by defining a services contract as a 'contract for services'. This is a well established common law concept.

29. ACCI considers that the common law generally provides a sufficient basis on which the law should give legal recognition to a contract for services and is a proper basis for setting out the necessary elements of a contract for services, although additional certainty can be provided by statute so long as common law rights are not prejudiced.

30. At common law the courts look to find if a person is either:
    i. Working under a contract in which they have the right to control the contract terms and hence control their own actions (that is, an independent contractor); or
    ii. Working under a contract in which they do not have the right to control the contract terms and hence do not have control of their own actions (that is, an employee).

31. The finding of employment or independent contracting is not some artificial or mysterious legal creation. The courts use a process in which they apply a series of sub tests to each set of circumstances. When a dispute occurs, the people in dispute come before a court and give evidence. The court considers the evidence in the light of each sub test. Normally, some behaviour indicates employment and other behaviour points to independent contracting. A court makes a decision based on the 'total matrix' and the balance of the evidence before them.

32. Factors a common law court considers include: Intent of the parties; remuneration; degree of control; provision of equipment; obligation to work; hours of work; deduction of tax; holidays and leave entitlement; other regulation; contractual obligations; how the work is performed; risk; rectification; expenses; appointment; dismissal/termination; written documents; integration.

33. All the sub tests investigate the core 'right to control' issue and look at this from many different angles. In other words:
    i. If someone has the 'right to control' you, you tend to be an employee.
    ii. If you have the 'right to control' yourself, you tend to be an independent contractor.

34. An important sub test is the 'intent of the parties' because people's intent tends to be reflected in all other sub tests. Not all of the tests are used in all legal judgements.

35. The advantage of this approach as the primary position is that it allows case by case circumstances to be considered, without being ruled in or out by some arbitrary definition. Rulings by the common law courts are specific to the circumstances brought before them and do not predetermine outcomes in any other circumstance. But rulings do provide pointers which enable the community to become educated on how to apply the sub tests themselves.

Need to supplement common law tests

36. However, there is an important advantage in having some up front certainty, particularly in some industries – it minimises the risk of litigation and disputes after the contract is entered into. It is also particularly important if there are to be offences such as those in clauses 900 to 903 of the supplementary Bill – where incorrect statements or inducements relating to the status of a party are rendered unlawful.

37. However no contractor who is a contractor at common law should be denied that status by For example, those contractors who have established their status under taxation laws derive certainty from that approach and should be able to use that status as conclusive evidence of their standing as contractors for the purpose of other laws (whether under statute or the common law).

i. Under taxation law someone is a contractor if:
ii. they satisfy the 'results test', that is:
iii. they work to produce a result(s);
iv. they provide the tools and equipment necessary (if any) to produce the result(s); and
v. they are liable for the cost of rectifying any defective work;
vi. none of their clients pays them 80 per cent or more of their personal services income in a year of income and they have 2 or more unrelated clients (who were obtained as a result of making offers to the public at large or to a selection of the public);
vii. none of their clients pays 80 per cent or more of their personal services income and:
viii. they engaged an individual(s) or an unrelated entity(ies) to perform 20 per cent or more (by market value) of the principles of work (i.e. the work that generates the personal services income; or
ix. they have an apprentice for at least half a year; or

x. none of their clients pays 80 per cent or more of their personal services income in a year of income, and they exclusively use business premises that are physically separate from their home, or from premises of the person for whom they are working.

38. These tests will be very useful to provide clarity for some contract arrangements. However in other areas such as longer term contracting for IT services or professional consulting, they appear less applicable (particularly in regard to the 80:20 rule).

39. At the very least there should be greater clarity that can be drawn from the explanatory material and use of statutory notes to assist parties being certain of the distinction between employees and contractors.

CONSTITUTIONAL COVERAGE – PART 1 - CLAUSE 5(2)

40. The constitutional basis of the principal Bill is derived from clause 5(2). There is no general head of power in the Australian Constitution for the federal parliament to legislate with respect to independent contractors. The corporations power (section 51(20) of the Constitution) and the territories power (in section 122 of the Constitution) are used in clause 5(2). The Act will appear to apply where (at least) one party to the services contract is a 'constitutional corporation', or in other specified circumstances (such as the contract entered into in a territory or principally performed in a territory, or one party is a resident of a territory).

41. Aside from considering the use of the external affairs power, this appears to be as extensive a coverage as reasonably possible based on current constitutional analysis – subject, of course, any implications arising from the pending High Court decision in the state and territory challenge to the WorkChoices legislation (which is also substantially enacted in reliance on the corporations' power).

42. ACCI supports clauses 5(2), (3) and (4) of the principal Bill.

EXCLUSIONS OF STATE AND TERRITORY LAW – PART 2 - CLAUSES 6 TO 10

43. Clause 7(1) provides for the overriding of state and territory laws relating to deeming contractors to be employees; laws that would impose workplace relations obligations on services contracts; and unfair contract laws.

44. This clause, and Part 2 generally rely upon definitions in clause 6. ACCI supports the definitions in clause 6.

45. Clause 7(1) is supported. For the statutory objects of the principal Bill to be given effect, it is necessary for this Commonwealth legislation to override certain state and territory laws. This is because a variety of state workplace relations / employment based laws affect contractors and contracting and in particular seek to restrict capacities to contract. The variety of mechanisms used in these laws include deeming provisions; contract declarations; notions of dependent contracting; unfair contracts jurisdictions; definitions of employees / industrial matters specifically extending to contract relationships (allowing awards to be made regulating contract work and contract conditions); and statutory or award provision of minimum contract terms.

46. In the 2005 parliamentary and departmental inquiries ACCI expressed the concern of industry at these State processes / developments. The state measures generally proceed on what we consider a flawed assumption - that there is a nuisance or wrong in the operation of labour hiring which warrants additional legislative redress / additional regulation. ACCI supported legislative action by the Commonwealth to redress these state measures.

State and territory deeming laws

47. Clause 7(1)(a) of the principal bill is particularly important, and strongly supported. It would have the effect of overriding state and territory deeming laws (subject only to the transitional provisions in the Bill).

48. As the Productivity Commission has noted in a 2001 staff research paper 'Self Employed Contractors in Australia: Incidence and Characteristics:

> "Deeming provisions are different from common law tests because they are designed to classify groups of workers with for service contracts as employees. Common law tests can only be applied to individuals on a case-by-case basis. In the Queensland legislation, the Industrial Relations Commission can deem employees if it is demonstrated that the contract has been designed to avoid the terms of an award or agreement. The Commission also has to consider the established common law tests of the nature of an employment arrangement when making a decision.
>
> At the time of writing (August 2001), there had been little opportunity for the practical effect of the Queensland legislation to be demonstrated. The test case for the legislation (AWU and Hammonds Pty Ltd No. B885 of 1999), demonstrated the reluctance of the Queensland Industrial Relations Commission to apply the deeming provisions contained in S275 of the Queensland Industrial Relations Act 1999. Rather, this case demonstrated the preference for the courts to utilise the already established common law tests to determine the contractual status of groups of workers. However, in a subsequent case (ALHMWU and Bark Australia Pty Ltd No. B 1064 of 2000) the Commission deemed a group of subcontractors to be employees."

49. This notion of deeming has not operated in a satisfactory manner, and could not do so. The notion of deeming erroneously seeks to apply a collective assumption or conclusion (i.e. that contractors should be treated as something other) in direct opposition to the will of parties in entering into the contract arrangement. It is at odds with the choices and preferences of individuals. It is also at odds with the capacity of businesses to choose to structure their operations around employment within the firm, or based on a model of commercial contracting.

50. Page 12 of the explanatory memorandum (under paragraph (a)) requires clarification. It suggests that there would be tax implications for previously deemed employees. This should not be the case, and further explanation from the government on what this means should be sought, given that the Bills do not in any way vary tax laws, and tax laws do not depend on definitions sourced from workplace relations law or state deeming provisions.

State and territory laws imposing workplace relations style regulation

51. Clause 7(1)(b) of the principal bill is also very important, and strongly supported. It would have the effect of overriding state and territory laws that would impose on contractors and principals rights and obligations that in an employment relationship would be 'workplace relations matters' within the meaning of clause 8(1).

52. The efficacy of this exclusion is, however, dependent on the definition of 'workplace relations matters' in clause 8, and in particular the exclusions from that definition in clause 8(2). ACCI advocates some relatively minor amendments to clause 8(2). Those matters in clause 8(2) are specifically expressed as not workplace relations matters – meaning state and territory laws on these topics are not overridden by the new law.

53. ACCI does not oppose the continuation of state and territory law regulating principals and contractors on the subjects of discrimination (paragraph (a)), workers compensation (paragraph (c)), occupational health and safety (paragraph (d) – but not right of entry – see below) and taxation (paragraph (l)). Paragraphs (e), (h), (i), (j) and (k) also appear appropriate.

54. Clarification is needed in relation to the need for 8(2)(c). It is not clear that there are state laws regulating superannuation payments between principals and contractors, or state and territory laws on this subject that need to be retained – given the Commonwealth intention to have superannuation wholly governed by commonwealth law from 2008 when superannuation ceases to be an allowable award matter under federal awards. Considering should be given to limiting this provision, if only limiting its application until 2008.

55. However, ACCI does not agree with clause 8(2)(f) (public holiday regulation of contractors) and (g) (wage and salary deductions of contractors). They should be deleted. They are matters that pertain to employment relationships, not contract relationships. There should be no scope for state and territory governments to legislate such matters as they relate to principals and contractors.

56. Nor does ACCI support state and territory laws regulating trade union right of entry on occupational health and safety in relation to contractors given that commonwealth law on right of entry exists. ACCI is concerned that contractors will be subject to the same union right of entry and inspection that applies to employment relationships on the basis of health and safety considerations. Laws relating to union right of entry and inspection are inextricably linked with the concept of employment as unions largely function to protect the rights of their members who are employees. These laws should not impinge on the commercial arrangements of independent contractors by requiring them to be accountable to union officials when other forms of regulation exist with which they must comply. This

notion is reinforced when it is recognised that inspectorates have the fundamental duty of enforcing compliance with State and Territory OHS laws, not unions.

57. ACCI does not support clause 8(2)(m) – a catch all regulation making power for the purposes of these exclusions. There is no evidence that this is, or may be necessary, given that it may be used to give effect to an exclusion that is not consistent with the primary objects of the Bill.

State and territory unfair contract laws

58. Clause 7(1)(c) of the principal bill is also strongly supported. It would have the effect of overriding state and territory laws that establish unfair contract jurisdictions. This is necessary to not provide dual or conflicting regulation between state and territory laws on the subject and the Commonwealth laws proposed by Part 3 of the principal Bill. It is also necessary because the state and territory laws on the topic are inconsistent with the objects of the principal Bill. The Productivity Commission in its 2001 staff research paper summarised these state and territory laws in the following terms:

> "An alternative approach to deeming contractors as employees has been the use of provisions to declare contracts void or varied under certain circumstances. For example, Section 106 of the Industrial Relations Act 1996 (NSW) gives the Industrial Relations Commission of New South Wales power to declare void or varied any contract "whereby a person performs work in any industry" if that contract is found to be unfair. Unfair contracts are defined in the Act as harsh or unconscionable, or against the public interest or, if that contract 'provides a total remuneration that is less than a person performing the work would receive as an employee performing the work' (Industrial Relations Act 1996 (NSW), s. 105)."

59. These unfair contract laws are not restricted to self-employed contractors. They apply to a wide variety of commercial operations including franchise agreements, partnerships and commercial leases, copyright agreements and even superannuation agreements.

60. The definition of 'unfairness ground' in clause 9(1) of the principal Bill is created for the purposes of defining this exclusion. That definition is supported. However, 9(2) – which in turn refers to clause 8(2) - is only supported to the extent that clause 8(2) is amended in the terms set out in this submission.

Treatment of outworkers

61. Under the scheme of the principal Bill, clauses 7(2) and clause 8(2) are critical – because they, in combination, limit the override of state and territory laws. This will have the effect of retaining coverage of some (new or existing) state and territory jurisdictions where principals and contractors are regulated.

62. Under clause 7(2)(a) state and territory outworker laws are retained. These contractors are generally in the textile, clothing and footwear industry (TCF), and are paid according to the output produced. They often work from home using their own tools or specialist equipment. Reasons attributed to growth of TCF outwork have said to have been increasing competitive pressures on firms to reduce costs (due to cuts in protective tariffs); increases in the labour costs of continuing employees; the need for small product runs (for specialist markets); and a belief that contract labour is better quality than core factory labour.

63. It is generally regarded that TCF contract outworkers are of a character in the labour force where particular vulnerabilities exist. State, territory and some commonwealth legislation already exists to confer some protections beyond normal contractual principles. ACCI does not oppose the exclusion of TCF outworkers from the provisions of the principal Bill. However the phrase 'outworkers' in clause 7(2)(a) is not defined. It should be defined in terms set out in Part 4, subject to the amendments ACCI suggests to the definitions in that Part 4. This would mean that the exclusion of outworkers for the purposes of the principal Bill relates only to TCF outworkers, given that TCF outworkers (only) are the subject of Part 4. It would be desirable for those definitions to be included in clause 6.

Treatment of owner drivers in NSW and Victoria

64. Clause 7(2)(b) provides that State laws concerning contract owner drivers in New South Wales and Victoria would be retained.

65. This is not supported by ACCI. ACCI does not agree with the proposition that contract owner drivers (in these states or any other state or territory) are of such a class of vulnerable providers of labour, that they should not be covered by the protections that the principal Bill confers on other commercial contractors. Such an approach is at odds with the objects of the Bill.

66. It also creates anomalies and differential treatment as and between contractors and principals engaging contractors, given that the road transport industry by definition involves contractors moving across state borders. The most common form of self-employed contractors are owner–drivers and couriers. These are self-employed workers

who use their own vehicle to deliver goods. The road transport industry is a highly fragmented industry due to the different distances covered (interstate, local and intrastate), types of goods moved (either general or specialist) and the needs of different transport operators (in particular the large freight forwarders, fleet operators and owner–drivers).

67. Firms utilise transport contractors for a number of reasons. These can be summarised as cost, risk and flexibility. Owner–drivers, as opposed to employee–drivers offer cost savings as the owner–driver is only used when required for a specific task. Additionally, the cost of maintenance and purchase of capital is borne by the contractor.

68. Owner–drivers are characterised by varying degrees of dependence on their clients. Some owner–drivers are required to follow rules of conduct, paint their vehicles in the client's company livery, work only set periods of time for their client and refuse to work for other companies. Others operate on an irregular basis for multiple clients with no set working arrangement for any individual client.

69. Those that are truly contractors and not employees should not be governed by state and territory laws akin to employment relationships.

70. The case for owner driver contractors being included in the principal Bill is strengthened by the fact that there is substantial regulation of contracting under state laws and awards, regulation which ACCI considers inappropriate for true contract owner drivers. There are also contract declarations under the NSW system. These generate highly specific and detailed industrial instruments regulating contracting, and attaching special conditions to contracting. That regulation includes prices for contracts; deductions for breakages and damage by contractors; who bears the costs of accidents (the principal not the contactor); capacities for re-contract where contracts are not completed; the capacity of principals to investigate contractors' conduct including a requirement that any investigation occur only after discussion with a union official; minimum provision of tyres by the principle and reimbursement of the contractor where tyres are faulty; supply and provision of radio equipment; an obligation to repaint the contractor's vehicle at contract's end; union notification and preference provisions.

71. These laws have the effect that mandated contract terms are set across the State. The uniform industry regulation of contracting ensures there is substantial prejudice to the commercial freedom of contract between parties. Both principal and contractor are robbed of capacities to negotiate by the detailed one-size-fits all model being set by an industrial tribunal. Further, the Trade Practices Act 1974 (Cth) does allow small business owner drivers to collectively bargain and therefore the retention of these laws is unnecessary.

72. In the event that the parliament decides to exclude contracts between principals and owner driver contractors from the purview of the Bill, ACCI believes that the Bill should be amended to allow for owner drivers and their principals excluded to opt into the protections of the Commonwealth law by agreement. This should be done either by a specific amendment in clause 7(2) qualifying the operation of 7(2)(b), or by expanding the opt in provision in clause 33 that applies to transitional arrangements. This would be an important amendment and one that ACCI believes would give express effect to the objects of the principal Bill, without undermining the prima facie effect of its exclusions.

73. Further, and of a more minor character, ACCI believes that (if the exclusion is to remain, which we do not support) the drafting of clause 7(2) creates a potential loophole for the relevant NSW or Victorian legislature to amend its legislation referred to in (b)(i) or (b)(ii) to include other categories of contract between principals and contractors than those currently covered by that legislation. The re-drafting should specifically limit these provisions to those contracts that are of the intended character (owner drivers) and no other.

74. Without in any way diminishing our opposition to the exclusion of contract owner drivers, ACCI notes that the provisions in regard to owner-drivers in Chapter 6 *Industrial Relations 1996* (NSW) and the *Owner Drivers and Forestry Contractors Act 2005* (Vic) (and instruments made under these Acts) would be reviewed by a ministerial taskforce in 2007 with a view "to rationalise the laws and achieve national consistency if possible." We support that process of review as the most minimal option of having this exclusion re-examined. That review, if it is conducted, should conclude (on the facts as we know them) that the exclusion should not continue.

Saving state and territory laws by regulation

75. Clause 7(2)(c) would allow a commonwealth regulation to be made that excludes other state and territory laws from the commonwealth law. ACCI does not support this sub clause. There are no known established state or territory laws regulating principals and contractors that otherwise warrant exclusion from the principal Bill. To the extent it is considered appropriate, the exclusions in clause 7(2)(a) and (b) suffice. It is not necessary to have an open ended regulation making power that could further weaken the overall objects of the new law.

76. In considering the exclusions it is also necessary to bear in mind the transitional provisions in Part 5 of the principal Bill. These are discussed below.

77. Excluding state and territory laws by regulation: Clause 10 provides a regulation making power to exclude specified state and territory laws concerning principals and contractors, with the effect that such parties would be governed by the operation of the new

commonwealth law. This is supported, as it is a regulation making power that could, if used, give effect to the objects of the principal Bill – not detract from them.

UNFAIR CONTRACTS – PART 3 – CLAUSES 11 TO 17

78. Part 3 of the principal Bill establishes a national unfair contracts jurisdiction.

79. It is, in part, based on the (pre-WorkChoices) sections 127A, 127B and 127C of the Workplace Relations Act 1996 (now sections 832, 833 and 834). Those provisions have been rarely used. This appears to have been for five reasons:

i. In most commercial contracts problems do not generally arise, as parties each meet their respective obligations to the other;
ii. Where disagreements concerning the operation of contracts arise they are generally resolved privately between the parties given the cost and inconvenience of litigation;
iii. Parties to commercial contracts generally invoke commercial remedies (such as those in trade practices law, fair trading law or contract law), not industrial remedies as they themselves recognise that they are not employers and employees;
iv. The commonwealth provisions have been limited to contractors that are natural persons (pre WorkChoices – section 4(1A)); and

80. Some state and territory laws have provided alternative remedies.

81. Given the relative low incidence of usage of the former sections 127A, 127B and 127C, and given the existence of alternative remedies under trade practices law, fair trading law and contract law it is not clear why these provisions should continue to be part of a statutory scheme, whether under state and territory law (provisions of which are to be overridden by the principal Bill), or under commonwealth law.

82. Of further concern is the fact that the proposed new unfair contracts jurisdiction under commonwealth law is to be broader than the former commonwealth jurisdiction, principally by:

i. Extending the definition of contractor beyond a natural person, to include a body corporate where the labour services are provided by a director or family member (clause 11(1)(b));
ii. Giving the court a power to asses 'unfairness' having regard to remuneration as between contractors (clause 15(2)); and
iii. Providing access to the Federal Magistrates Court for litigation, not simply the Federal Court.

Does a Need Exist for National Contracts Review Laws

83. Caution should be exercised in the framing of such laws. The experience of unfair dismissal laws has been that once access is opened wide, then even the most well intended laws are subject to abuse and misuse, resulting in pressure on parliaments to tighten and restrict the jurisdictions, and also resulting in other counter productive effects in the labour market.

84. An excessively broad jurisdiction can also undermine contractual certainty. Freedom to contract and contractual certainty, together with property rights, are cornerstones of a functioning market economy.

85. The undermining of contractual certainty by inappropriate legislation can arise in two ways – by a party to a commercial contract being able, once a contract is freely entered into, being able to disagree with the appropriateness of its terms they themselves had agreed; and by a third party (a court, inspector or other litigating authority) being able to pass judgment on the terms of the contract and its performance after it is created and in operation, and in some circumstances re-write it or set it aside simply because they consider it harsh or unfair.

86. This is a concern in industries where there is a traditionally high level of engagement of commercial contractors (construction, housing, mining, and manufacturing). It is also a significant concern in the entertainment industry, where many artists perform work as contractors and through bodies corporate. Specific industry submissions are being put to the parliament by that industry seeking to exempt performing artists in the entertainment industry from these provisions of the principal Bill. The concerns of these industry sectors are supported by ACCI. On the other hand there are legitimate circumstances where fundamentally unacceptable conduct in business relationships (especially in some specific industry sectors) occurs, and a proper role – within defined boundaries – for the law to provide well targeted remedies and sanctions. The concerns of these sectors are also supported by ACCI.

87. To the extent that there needs to be attention by the state to the form or quality of commercial contracts, a far superior approach than creating a general open-ended jurisdiction for contract review would be to better equip principals and contractors to enter better quality contracts, which are not only technically superior at law, but also more completely foresee and address issues likely to arise during the course of labour contracting. In short, information resources and promotion of best practice contracts (for example though codes of practice and guidance material) appear a superior approach to any avenue for multi sector contractual review. Any statutory law should be limited to specific circumstances where there is market failure warranting intervention by the state, and it is established that all other mechanisms of regulation have failed. This accords with

the principles of good regulatory practice adopted by the Office of Regulation review, and recently reaffirmed by recommendation 7.1 of the Prime Ministerial Taskforce report of January 2006 'Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business'.

88. ACCI advocates a number of amendments to Part 3 of the principal Bill.

Definition of family member

89. As noted above, clause 11(1)(b) extends the scope of the Commonwealth unfair contracts jurisdiction to independent contractors that are bodies corporate where the work is performed by a director or family member. There is no definition of 'family member'. ACCI recommends that the definition of 'immediate family' in section 240 of WorkChoices (the Workplace Relations Act 1996 as amended in December 2005) be adopted for this purpose. That is a reasonably broad, but not completely open-ended definition.

Aligning the new law to trade practices law

90. A further problem with Part 3 (and the Bill generally) is that it does not deal at all with the interface with common law, trade practices law or fair trading laws that provide remedies for contractual disputes. The Commonwealth significantly amended the Trade Practices Act in 1998 to introduce unconscionable conduct laws, and to provide a basis for unconscionable conduct claims to be pursued (including but not limited to voluntary and mandatory codes, such as in the franchising area). These unconscionable conduct provisions overlap with the new unfair contracts provisions contemplated by Part 3 – a ground of unfairness or harshness (clause 12) could also be said to be unconscionable under the Trade Practices Act. They were substantive 'black letter law' amendments which went well beyond the common law concept of unconscionability or breach of contract.

91. Steps should be taken to better align the two Acts. This goes not only to the question of forum shopping and multiple remedies, but also to aligning the concept of unfairness and harshness in the principal Bill to the concept of unconscionability in the Trade Practices Act. This would return the focus on moral elements and the fairness of the process by which a contract was made, as in the Trade Practices Act. The existing Trade Practices Act provisions have not lent themselves to this type of abuse, and the closer the two Acts are aligned in this area, the lower will be the likelihood of the processes under the principal Bill being abused as indicated.

92. Amendments are needed to clauses 12 and 15 to achieve this purpose. Those amendments should add considerations to clause 15(1) that more closely match the existing section 51AC criteria in the Trade Practices Act that are used for judging unconscionability. An

added benefit of this would be that these provision of the new law would then be able to draw on the existing case law relating to the similar Trade Practices Act provisions.

93. Provisions should also be included which identify factors that would mitigate against a finding that the contract is harsh or unfair, for example factors such as calculated business risk made in fair circumstances, an applicant's lack of performance; misrepresentation by an applicant; frustration by a third party; delay in bringing an action and requiring an applicant to have clean hands when coming before a court. Some of these factors in mitigation have been developed by the courts over the years.

Need to prevent changes of mind or the re-writing of contracts

94. Clause 12 should be amended so that unfairness or harshness is assessed at the time the contract was made, including reasonably foreseeable future events, but not unexpected developments. ACCI is concerned that litigants will come to the court complaining that what was a fair contract has become unfair due to subsequent developments. This is not acceptable if the developments were reasonably foreseeable at the time the contract was entered into. That is part of the state of mind of the parties at the time they entered into the contract, and any contract review should accordingly be brought back to the issue of was the contract unfair at the time it was made, having regard to all factors including the individual knowledge of each of the parties.

95. Unless the principal Bill is amended in this way, perverse results could occur. A contract which was fair when made could be varied by a court because of a parties changed desires or because of unexpected events occurring subsequently. In such cases the actions of the parties themselves tend to become irrelevant and the moral element is entirely lost. All that remains is for a court to substitute its own commercial judgement, which is quite inappropriate.

96. In the event of unexpected events, the law of frustration of contract is the most appropriate common law mechanism to deal with those circumstances arising during the life of the contract.

Unfairness not to be judged by remuneration

97. Clause 15 should be amended so that the powers of a court to make orders concerning unfair contracts do not relate to harshness or unfairness having regard to remuneration as between contractors and employees, and certainly not as between contractors themselves.

98. Clause 15(2) of the principal Bill is new, and should be deleted. It would give a court the power to have regard to contractual rates payable in agreements between other contractors

and principals when assessing fairness. A notion of 'comparative remuneration' between parties to commercial arrangements is wrong in principle, and not necessary in practice.

99. Clause 15(1)(c) is a related provision, but is not new. It gives a court, when deciding unfairness, to have regard to contractual remuneration between the contractor and employees performing similar work. ACCI does not support this provision. Requirements that contractors be engaged on the same terms and conditions of employment as employees effectively forces businesses to remunerate contractors as employees, even though that is not the nature of their relationship. Of course, as the unions and other proponents of such a provision intend, this undermines financial incentives to prefer contract work to direct employment.

100. ACCI believes that both clauses 15(2) and 15(1)(c) should be deleted. At the very least clause 15(2) must be deleted as it is an excessive and inappropriate extension of clause 15(1)(c) that undermines the very objects of the principal Bill – to respect contractual freedom. Contractual freedom must include freedom to agree terms that are foundation-stones of contracts – such as terms relating to remuneration. This is a fundamental matter to industry. What a contractor will charge for the same work in one case may be very different from that in another, because of location, access, timing, availability of other work, desire to maintain continuity of future work for the same head contractor, and a myriad of other local factors.

101. A consequential amendment would need to be made to clause 15(1)(d) to expressly exclude the possibility of matters relating to contractual remuneration as between contractors being brought into consideration through the back-door as 'another matter the court thinks is relevant'. In any event, ACCI is concerned clause 15(1)(d) gives too broad and open-ended a discretion to the court that may undermine the certainty of contracts. This catch-all criterion should not be part of the relevant assessment.

Giving effect to the objects is necessary

102. Clause 15(5) requires a court to exercise its powers to further the objects of the Act 'as far as practicable'. The phrase 'as far as practicable' should be deleted. The objects of an Act should be given effect to by each and every discretionary judgment made by a court under the Act. Requiring a court to adhere to the objects of the Act only where a court considers it practicable is inviting decisions that sidestep the statutory objects. There is already a broad discretion available to the court, as noted above. This phrase is not needed.

Addressing problems of multiple remedies

103. There is a strong argument that business should not be subject to multiple causes of action being able to be taken over one dispute, nor to an open ended basis for a party in dispute to forum shop for the best jurisdiction. In particular, an alteration could be made to the Bill requiring an election by a party to either bring an unfair contract claim under the Bill or an unconscionable conduct claim under s.51AC TPA but not both. On the other hand, contractor interests argue that there is no major problem if dual causes of action are pleaded in one piece of litigation.

104. To accommodate these competing approaches, the Bill could be amended to expand clause 14 so that this clause allows dual pleading but bars multiple proceedings in respect of the same dispute that have been commenced either at common law, or under the Trade Practices Act or Fair Trading Acts, or some other law of the state (e.g. discrimination laws) or Commonwealth. It is also important that the principal Bill does not give rise to abuse through cross-claims of unfairness as a way of obstructing ordinary actions to enforce contracts or as a response to payment claims under (for example) existing building industry security of payments legislation.

Access to Federal Magistrates Court

105. Part 3 of the principal bill also differs from the current Commonwealth jurisdiction by allowing unfair contract claims to be brought in either the Federal Court of the Federal Magistrates Court. The Federal Magistrates Court may provide easier or less costly access. Provided appropriate limits are places on the nature of the new jurisdiction, as outlined above, ACCI does not oppose both courts being able to exercise jurisdiction.

Costs orders

106. Clause 17 of Part 3 provides that costs can only be awarded where proceedings are instituted vexatiously. This is a limitation on the general power of courts to award costs, and may act to encourage claims of an arguable nature. ACCI believes that this being a commercial jurisdiction, ordinary principles relating to costs should apply – that costs are at the discretion of the court but generally follow the event. Clause 17 should be amended.

CONTRACT OUTWORKERS – PART 4 - CLAUSES 18 TO 30

107. Commonwealth law itself has blurred the distinction between textile clothing and footwear contract outworkers and employed outworkers for a number of years, with provisions in schedule 1A of the Workplace Relations Act 1996 setting a minimum hourly rate for TCF contract outworkers (not less than the minimum award hourly rate). This principle has been carried over in WorkChoices.

108. As mentioned above, ACCI does not oppose the fact that the Bill does not override state or territory laws concerning contract outworkers, so long as this is limited to TCF outworkers. The definitions in Part 4 should be amended so that the commonwealth jurisdiction is similarly structured. There is no need for the definition of 'contract outworker' in clause 19 to be other than the definition of 'TCF outwork' in that same clause. Consequential changes should also be made to the relevant provisions in Part 4 to delete the phrase 'contract outworker', and insert in lieu 'TCF outworker'.

PART 5 – TRANSITIONAL PROVISIONS – CLAUSES 31 TO 43

109. The transitional provisions in the principal Bill are complex, and not easily understood – even with reference to the explanatory memorandum.

110. Division 1 provides that contractors presently deemed to be employees under state or territory law retain existing rights and obligations for a period of three years, unless they opt into the Commonwealth law (and return to their contractor status). ACCI does not oppose this provision, supports the opt-in concept for contractors and principals in this circumstance but (as discussed below) the opt-in provision in Part 5 is too narrow.

111. This arises from the fact that the transitional provisions of Part 5 only apply to the circumstances of clauses 7(1)(a) and 7(1)(b) (see definition of exclusion provisions' in clause 4), in other words, only to contractors who have, prior to the operation of the Commonwealth law, been deemed as employees, or have had workplace relations rights imposed on them by virtue of state and territory law.

112. The effect of this is that contractors not of the type covered by clauses 7(1)(a) and (b) who remain under state and territory law after the operation of the principal Bill (i.e. because of clause 7(2)) will have no opt-in rights. ACCI does not agree that those contractors should be denied opt-in rights. The opt-in provisions in clause 33 should apply to all contractors excluded by clause 7(2)(b) (that is, including contracts between principals and owner-drivers in NSW and Victoria).

113. Division 2 allows unfair contract matters under state and territory law to proceed to completion. Clause 41(1) refers to proceedings commenced before the commencement of (Part 2 of) the Bill. This would simply require matters to be lodged, not be listed or substantially part heard. ACCI believes that the transitional provisions should limit existing litigation under state or territory law to matters substantially part heard. This would prevent applications being lodged but not proceeded with simply in anticipation of the new law coming into effect.

PART 6 – REGULATIONS - CLAUSES 42 AND 43

114. These clauses do not appear controversial. However, 42(1) appears to only contemplate regulations of a 'transitional, savings, or application nature'. The Commonwealth should satisfy itself that the regulation making powers specifically referred to elsewhere in the Bill are caught by that phrase, if they need to be.

WORKPLACE RELATIONS LEGISLATION AMENDMENT (INDEPENDENT CONTRACTORS) BILL 2006

115. This Bill is supplementary to the principal Bill. However it is not of an incidental character. It establishes substantive rights and obligations and is vitally important to business as it sets out new offences concerning (so-called) sham arrangements between a business and provider of labour services.

116. A matter of general comment is that this Bill seeks to amend the Workplace Relations Act 1996, rather than include its provisions in the principal Bill. It is not clear why this is so. The Bill is as much directed at the conduct of persons who engage contractors, seek to engage contractors, or honestly believe they have engaged a contractor, as it does to employers.

117. More particularly, the supplementary Bill would have the effect of picking up generally operating definitions, inspectorate powers etc that apply to employment relationships. The new provisions in the Bill do not have any specific definitions attached to them. They should. It is appropriate that the definitions accord with the definitions in the principal Bill once enacted. There should be statutory cross referencing of these definitions. The supplementary Bill should be amended to this effect.

118. It is apparent from the matters discussed below that ACCI has serious concerns with the breadth of the proposed offences, even if they are enacted. These concerns are magnified by the fact that all of the provisions of sections 727 to 735 of the Workplace Relations Act 1996 (post WorkChoices) would apply to proceedings under these new offences. For example, section 728 would have the effect that any person who 'aids, abets or counsels' the contravention commits an offence. Persons acting in good faith who do not even deal with the other party to the contract but who deal only with their business partner would be caught by the proposed new offences. This underscores the reasons set out below why the offences should not be strict liability offences.

MISREPRESENTATIONS – PROPOSED SECTIONS 900 AND 901

119. Proposed sections 900 and 901 create offences for misrepresenting an employment relationship as an independent contracting arrangement and vice versa.

120. These are new statutory offences.

121. Sham contract arrangements, where a person is at law an employee but treated as or labeled as a contractor, are obviously requiring legal sanction. This does not, however, mean that new offences are necessary. It certainly does not mean new offences of the type proposed in the supplementary Bill.

New offences not needed

122. There is no need for these new statutory offences because firstly, there is no widespread incidence of sham arrangements; and (to the extent they occur) there is already sufficient law dealing with sanctions against sham contracts.

123. The explanatory memorandum does not point to any evidence of widespread sham arrangements nor of any widespread pattern of dishonesty or exploitation. It is not satisfactory or appropriate to repeat the errors of the state policymakers by shaping regulation based on very isolated incidents.

124. If a business has entered into a sham arrangement there is already a substantial penalty. That person is in all likelihood going to have obligations as an employer of the person purportedly engaged as a contractor. This generally involves substantial back-pay, restitution and an ongoing obligation to employ. In financial terms this hurts any business and is a substantial disincentive to enter into sham arrangements.

125. The common law provides that contracts of employment where employees are labeled as contractors, but where in fact and law they are really employees, are sham contractor arrangements and do not have legal recognition as contracts for services at common law. Contracts that are non consensual or which are tainted by coercion or undue influence are not enforceable and do not have legal recognition as contracts for services at common law.

126. A business in such circumstances may also face actions under:

a. Common law for breach of contract;

b. Common law for misrepresentation;

c. Trade Practices Act duties not to indulge in misleading and deceptive conduct in trade or commerce;

d. Fair trading laws.

127. If a contract is a sham, the courts are already active and well equipped to find accordingly.

128. The offences in clauses 900 and 901 of the supplementary Bill suffer from a further defect. They presume that persons of good faith can readily know with certainty if the status of another person is an employee or an independent contractor. If an express terms of a contract stating a person was an employee or a contractor put this beyond doubt, then this would be so. However, it is apparent from the principal Bill (and also the operation of common law) that the intention of the parties is not decisive in establishing status. A person of good faith could enter into a contract with an employee (at law) where both parties believe it to be a contract between a principal and an independent contractor.

129. There are judicial differences and interpretive difficulties when evaluating contractor status – evidenced by split decisions of courts, or the overturning of judges on appeal. This is a complex area and differing interpretations and understandings can pervade.

130. It is wrong for a business to be unable, even with the best will and intention, to create contract arrangements free from the risk of penalty. The risk of prosecution or the imposition of penalties in an uncertain area of law where intention and good faith do not suffice can mean that the Bills operate inimically to their objects. Perceptions of risk in attempting to enter into contracting, and the very real prospect of getting it wrong and incurring a penalty (above the existing penalty of back pay etc), could reduce the capacity and appetite of individuals to enter into contracting.

131. The case for additional regulation in the form of penalties has not been made out. A far preferable approach to addressing any incidence of sham contracting would be to put resources into securing appropriate restitution for the individual worker affected, including securing monies outstanding and appropriate coverage by any laws being deliberately avoided. This could include measures to assist in determining the arrangements for any employment arrangement which may be found to apply (i.e. a problem solving approach to recovering monies and clarifying any ongoing employment conditions).

132. In the event that the parliament decides, notwithstanding the above, to create these new offences, they should be amended.

Strict liability and reverse onus of proof is wrong

133. As they currently stand, they are strict liability offences. No intention bears on whether the offence is committed. In an area of law where this uncertainty over status exists, this is quite inappropriate.

134. Nor is it an adequate response to point to the defences in clause 900(2) and 901(2). These defences carry a reverse onus of proof. A business acting in good faith will have committed an offence and only be able to relive itself from a penalty if it can establish to

the satisfaction of a court a requisite state of mind ('believed', or 'could not reasonably have been expected to have known' that the representation was not a misrepresentation).

135. In summary, clauses 900 and 901 should be amended to:

a. Include intention to commit a misrepresentation as an element of the offences; and

b. Eliminate the reverse onus of proof in the defences.

136. If these amendments are not made, then at the very least the defence should be amended so that it is made out where there is an express term of the contract that is consistent with the representation.

137. It should also be prohibited for a person to take proceedings against a business under clauses 900 or 901 where there are other proceedings for misrepresentation that have been made under trade practices law, fair trading law or at common law.

DISMISSING EMPLOYEES AND MAKING THEM CONTRACTORS – PROPOSED SECTION 902

138. Clause 902 creates a new offence relating to dismissing a person who is an employee where the 'whole or dominant purpose' is to engage them as an independent contractor.

139. Drafted as broadly as it is, this is unacceptable, and the most objectionable of all of the new offences proposed to be created by Part 22. Although the offence focuses on dismissal or the threat of dismissal, it has the effect of prohibiting an offer of work as an independent contractor to an existing employee – because dismissal as an employee is in practice a precondition to accepting the offer of work as a contractor. Considered in this light, the offence intrudes excessively on commercial decision making and commercial freedom.

Offence as drafted intrudes on legitimate business restructure

140. The fact that a person takes entrepreneurial risk and establishes a private business as an employer, should not mean that the same person is unable at any time to decide that their business should cease to be an employing business but rather a business that has services provided through contract labour only. Providing services through contract labour is not in and of itself a bad thing; the very premise of the principal Bill suggests that this is accepted as a good thing. It is therefore incongruous to consider that some form of inference should exist in law that employment should not be terminated, and a business established on a different lawful basis for the provision of its labour. An offence of this type implies that employment carries some form of ongoing right akin to a property right. This is not so, and should not be so. No government or parliament should prevent a business from calling in its risk, or establishing its commercial operations and labour supply on an alternative basis. The fact is that a genuine business restructure could involve the 'sole or dominant purpose' referred to in clause 902(1)(b), and involve the offering of work as a true contractor to a former employee. There is no public policy reason why an offer of work as a contractor should not be made to a person that has or is working as an employee, if there is a genuine business restructure to this end.

Offence should be redrafted

141. Compounding this situation is the fact that clause 902 is a strict liability offence as well. In addition, there is a reverse onus of proof in the form of a statutory presumption in clause 902(3) that the person has acted for an unlawful purpose, unless they can prove otherwise.

142. For the reasons set out above:

i. ACCI is not satisfied that there is a need for a new offence of this character having regard to the rare incidence of such conduct, and the existence of other remedies should it occur;
ii. The offence should be redrafted so that it does not apply to a business restructure where there the business restructure is genuine and not tainted by fraud, misrepresentation or breach of contract;
iii. The offence should not be a strict liability offence;
iv. There should be no reverse onus of proof.

MAKING FALSE STATEMENT TO INDUCE INDEPENDENT CONTRACTING – PROPOSED SECTION 903

143. Proposed section 903 creates a new offence relating to conduct where a person makes a false statement to an employee or former employee with the intention of persuading that person to work as an independent contractor.

144. Again, for reasons discussed above, there is a serious question about the need for such an offence. False statements made when entering into contracts for services are governed by the common law of misrepresentation. A contract can be rescinded at common law if a fraudulent misrepresentation is made. In addition the Trade Practices Act already contains provisions relating to misrepresentations in trade and commerce.

145. The excessive breadth of the offence is highlighted by two factors:

i. the proposed offence applies to a person who has employed the individual 'at any time' in the past, and not merely a current employee.

ii. the offence relates to a statement in respect of something that is lawful - clause 903(1)(b) outlines a purpose that is wholly what the principal Bill would say is an object to be lauded – to engage persons as independent contractors if they freely seek to do so.

146. It is however recognised that the offence is not a strict liability offence - knowledge of the false character of the statement is an element of the offence itself.

147. An offence like that in the proposed section 903 again highlights the need for certainty in establishing the status of a contractor and an employee at the time of entering into the contract.

PROSECUTIONS AND PENALTIES – PROPOSED SECTION 904

148. Prosecutions for offences in proposed sections 900, 901, 902 and 903 can be brought by a trade union which has the person concerned as a member, by the individual person or by an inspector (904(3)).

149. ACCI does not support trade unions having this power of prosecution. Trade unions are materially different from inspectors for these purposes. Trade unions – by their very nature - are motivated by multiple considerations, including broader industrial objectives. They are formed for purposes and must act in accordance with their constitutional purposes. Prosecutorial discretion by inspectors does not involve these broader motivations. Public law should be enforced and prosecuted, where it needs to be prosecuted, by independent inspectorates that operate on well established and objective prosecutorial guidelines.

150. Clause 904(3) should be amended to this end.

151. The maximum level of penalties for commission of these new offences are 60 penalty units per offence for individuals ($6,000) and 300 penalty units per offence for corporations ($33,000). These generally accorded with penalty offences as they have been increased by WorkChoices.

ACCI MEMBER ORGANISATIONS

STATE/TERRITORY ASSOCIATIONS

ACT and Region Chamber
of Commerce and Industry

Australian Business Limited/State Chamber

Business SA

Chamber of Commerce and
Industry Western Australia

Chamber of Commerce
Northern Territory

Commerce Queensland

Employers' First ™

Tasmanian Chamber of
Commerce and Industry

Victorian Employers' Chamber of
Commerce and Industry

NATIONAL INDUSTRY ASSOCIATIONS

Agribusiness Employers' Federation

The Association of Consulting Engineers Australia

Australian Beverages Council

Australian Consumer and Specialty Products Association

Australian Entertainment Industry Association

Australian Hotels Association

Australian International Airlines Operations Group

Australian Made Campaign Limited

Australian Mines and Metals Association

Australian Paint Manufacturers' Federation

Australian Retailers Association

Housing Industry Association

Insurance Council of Australia

Investment and Financial Services Association

Master Builders Australia

Master Plumbers and Mechanical Services Association Australia

National Electrical and Communications Association

National Retail Association Limited

NSW Farmers Industrial Association

Oil Industry Industrial Association

Pharmacy Guild of Australia

Plastics and Chemicals Industries Association

Printing Industries Association of Australia

Restaurant and Catering Australia

Standards Australia Limited

Victorian Automobile Chamber of Commerce