NEW SOUTH WALES GOVERNMENT SUBMISSION TO THE SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION REFERENCES AND LEGISLATION COMMITTEE

INQUIRY INTO

THE INDEPENDENT CONTRACTORS BILL 2006 AND THE WRA (INDEPENDENT CONTRACTORS) BILL 2006

21 JULY 2006

EXECUTIVE SUMMARY

1. On 22 June 2006, the federal government introduced its *Independent Contractors Bill 2006* (The principal Bill) and *Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006* (the Consequential Bill). The objects of the principal Bill make it clear that the legislation is underpinned by a notion of 'freedom to contract' rather than the concept of fairness in contracting arrangements. In summary, the Bills:

    - exclude certain State and Territory laws
    - override the deeming provisions contained within the New South Wales *Industrial Relations Act 1996* (IR Act) but provide a three year transitional period before these provisions finally cease to have effect
    - retain existing state provisions for contract outworkers in the textiles, clothing and footwear industries and establish a default minimum wage rate
    - preserve (for the moment) Chapter 6 provisions in the IR Act which provide protection for owner drivers
    - override state unfair contracts provisions
    - establish a National Services Contract Review Scheme for the review of unfair contracts.
    - introduce 'protections' against sham arrangements.

4. The proposed legislation has been referred to the Senate Employment, Workplace Relations and Education References and Legislation Committee for report by 24 August 2006. Two days of public hearings will be held in Canberra on 3 and 4 August, 2006.

5. The New South Wales Government submission comprises the following four distinct parts.

    Part 1 **Background**

    Part 2 **Content of the Bills**

    Part 3 **Legal Framework**

    Part 4 **Issues**

6. The New South Wales Government submits that both Bills should be rejected based on the considerations listed below.

7. The New South Wales Government:

- Recognises that labour hire and independent contracting are legitimate ways of doing business and earning a living (although neither is either as prevalent nor as rapidly expanding a category as has been suggested)
- Asserts that this is subject to the proviso that any such arrangements be freely entered into with a proper understanding on the part of the participants of the nature and incidents of their relationship
- Is concerned about the tendency for such arrangements, if not freely entered into, to undermine security of employment and to inappropriately transfer the burden of risk to the worker rather than the person for whom the work is performed
- Affirms the role of government in protecting persons who enter into such arrangements with limited information or misunderstanding of how the relationship will operate
- Achieves this beneficial goal in this state by a variety of means, including:
    - both general and specially tailored legislative provisions, including the definition of 'employee', expanding the category of employee by deeming certain classes of 'at risk' workers to also be employees, and providing remedies for workers in unfair or exploitative relationships including:
        - unfair contract provisions which provide a remedy where the contract avoids the provisions of an industrial instrument.
        - contract carriers provisions which create a special jurisdiction for dealing with the needs of that industry
        - provisions designed to prevent the exploitation of clothing outworkers.
    - by maintaining an independent umpire, the Industrial Relations Commission (IRC), which is able, after hearing from the parties about the needs of particular industries or occupations, to craft acceptable and lasting settlements on how these issues should be dealt with through awards and agreements
- Confirms that as the labour market evolves and new forms of employment emerge, this legislative and arbitral framework also

needs to evolve to address new issues, without abandoning the core commitment to a fair go for all workers and employers.[1]

8. Further, the New South Wales Government contends that:

- It is difficult to find any reputable research which puts the number of Independent Contractors operating in Australia beyond 10 percent of the workforce (or around a million workers).

- The limitations of relying solely on the common law approach are well documented. The New South Wales Government believes that this limited approach is questionable in both policy and practical terms. The federal government's persistence is all the more remarkable given the alternatives that have been proposed by commentators.

- Leaving aside the exclusion of state deeming provisions (as they apply to constitutional corporations), the overall effect of the Bills introduce little that is new. In fact, the Bills impose an additional layer of complexity, particularly in relation to the transitional provisions dealing with the exclusion of state deeming provisions.

- The barriers to effective use of the protection from sham arrangements provisions appear to be considerable and they are likely to be of very limited use if any, to workers seeking redress from unscrupulous employers.

- The legal framework runs directly contrary to that taken by the ILO in its recent *Employment Relationship Recommendation 2006*.

- The federal government has not made out a convincing or persuasive case for overriding State independent contractor laws as they apply to relevant services contracts.

- The New South Wales Government endorses the view that independent contractors should not be subjected to excessive regulation. The proposed Bills do little more than remove appropriate regulatory controls on the abuse of superior bargaining power.

- The changes outlined in the Commonwealth Government's Independent Contractors Bill will serve to create considerable confusion for State workers and their employers, as an individual may be both a Commonwealth independent contractor

[1] NSW Government Submission to the 2005 House of Representatives Inquiry paragraphs 189-196.

and a New South Wales worker for workers compensation purposes. The Bill will therefore undo the recent, positive work undertaken by WorkCover and small business, employer and union groups that has clarified workers compensation responsibilities in New South Wales for employers.

- The Bills may have unforseen consequences for the work arrangements of Visiting Medical Officers in the New South Wales health system

9. The New South Wales Government's view is that the Bills are neither necessary nor appropriate, and that, like other Work Choices legislation, they are the wrong strategy for dealing with the issues faced by today's Australian workplaces. There is absolutely no reason to override the simple and effective NSW unfair contracts and deeming provisions and the NSW Government rejects this legislative attempt to do so in the strongest possible terms.

10. In the New South Wales Government's submission, the Committee should similarly recommend the rejection of both Bills.

1. BACKGROUND

Independent Contractors

11. While there is no fixed definition of an independent contractor, it is generally accepted that such workers are not employees at law. In contrast to employees, who are said to operate under a contract *of* service, independent contractors operate under a contract *for* services.

12. Employment law in Australian jurisdictions applies, for the most part, to workers in an employment relationship. The characteristic and traditional method of determining whether or not there is an employment relationship is for the court or tribunal to examine the relevant facts and establish firstly whether a contractual relationship is in existence between the parties, and if so, whether the contract is an employment contract, or a contract of service. Contracts *of* service are distinguished from contracts *for* services, which may involve the performance of work, but not as part of an employee/employer relationship.

Disguised Employment

13. An important sub-category of independent contractors are those contractors who work exclusively or predominantly for a single contractee. These are usually referred to as 'dependent contractors' on the basis of their economic dependency on a single organisation. Such relationships are clearly employee-like and are the subject of legal controversy.

14. A Productivity Commission Paper prepared in 2001 acknowledged that a number of important policy issues have emerged in response to the phenomenon of workers being employed as contractors but under working arrangements more similar to those of employees.[2]

15. The International Labour Organisation (ILO) has for many years observed and commented on the phenomenon of workers who are in fact employees but find themselves without the protection of an employment relationship. The ILO has produced many documents which acknowledge that inappropriate use of civil or commercial arrangements (including false self-employment, false subcontracting and false company restructuring) are the most frequent means that are used to disguise the employment relationship.[3]

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[2] Productivity Commission Report - Self Employed Contractors in Australia: Incidence and Characteristics 2001.

[3] International Labour Organisation Report V(2)(a) The Employment Relationship – 2006 and International Labour Conference Agenda Discussion (ILC95-PR21-167-En.doc)

16. Further, the ILO states that such disguised employment relationships are detrimental to the interests of workers and employers and an abuse that is inimical to decent work and should not be tolerated.

17. As part of its investigation of dependent workers, between 1999 and 2001 the International Labour Office commissioned 29 national studies. One of the national studies was conducted by the Centre for Employment and Labour Relations Law at the University of Melbourne in 1999.[4]

18. Overall, the studies revealed that dependent workers experienced many problems arising as a result of disguised or ambiguous employment relationships that either go unnoticed by legislation or are inappropriately regulated or enforced.

19. The annual International Labour Conference has been used as a forum to discuss the possible adoption of a Convention and/or a Recommendation on 'Contract Labour' since 1997. In June 2006, members of the ILO finally endorsed a *Proposed Recommendation on The Employment Relationship,*[5] the objectives and content of which are directly relevant to the proposed Bills and will be discussed in detail in Part 4 of this submission.

Common Law Indicia

20. The ability to distinguish a contract of employment is crucial to identifying whether a particular worker is an independent contractor or not. The Courts take into account a range of factors to determine whether someone is an independent contractor or an employee, including:

- the degree of control the worker has over the work – for example, is the worker subject to direction on how the work will be done, not just what the job is
- the degree to which the worker is integrated into, and is treated as part of, the hirer's enterprise – for example, if the worker wears the hirer's uniform and represents the hirer's enterprise to the public, this supports the worker being an employee
- whether the worker is making a significant capital contribution (such as by using his or her own motor vehicle and carrying the maintenance and running costs) to the enterprise – if the worker is doing this, it supports finding an independent contractor arrangement exists. If all the worker brings, on the other hand, are the ordinary tools of his or her trade, this is not likely to be a significant factor

[4] Clayton A and Mitchell R 'study on Employment Situations and Workers Protections in Australia – Centre for Employment and Labour Relations Law University of Melbourne September 1999
[5] The Employment Relationship Recommendation 2006 ILO ILC95-PR21-167 21/75.

- how the hirer pays the worker – for example, by results or on an hourly basis. If the worker is paid by the results achieved, it supports finding an independent contractor arrangement exists
- the provision of leave, superannuation and other entitlements – these usually apply to an employee and not to an independent contractor
- the place of work – if the worker works at his or her own premises, this supports the worker being an independent contractor
- whether income tax is deducted by the hirer - this supports the worker being an employee
- whether the worker provides similar services to the general public – eg if a worker advertises his or her services to the public or tenders for work, this supports an independent contracting arrangement.[6]

21. The greater the capacity for control vested in the hirer, the more likely it is that the worker is an employee.

The Number of Independent Contractors operating in Australia.

22. It is worth noting at the outset the paucity of detailed data available in relation to the various categories of non-standard employment. While casual employment is reasonably well documented, labour hire employment is less so, and independent contractors even less so. Both identification and quantification of estimates are hampered by varying approaches and inadequate data collection and analysis.

23. The most recent research, presented in the Productivity Commission's paper entitled 'Self Employed Contractors in Australia: Incidence and Characteristics', focused on the groups of employed persons classified as independent contractors by Australian courts, as earners of personal services income by the Australian Tax Office and those identified as self-employed contractors by researchers.

> [A]t the simplest level, an independent contractor can be defined as a person who operates his or her own economic enterprise or engages independently in a profession or trade, and is engaged by a firm or organisation for some predetermined 'all-inclusive' fee to provide a defined service for a specified period.[7]

[6] This information is adapted from a table contained within Stewart, A Redefining Employment: Meeting the challenge of contract agency labour 15 Australian Journal of Labour Law 235 (December 2002).

[7] A Vandenheuvel and M Wooden, Self Employed Contractors in Australia: How Many and Who Are They (1005) 37 JIR, 263, quoted at page 1 of the Productivity Commission Paper Self Employed Contractors in Australia: Incidence and Characteristics 2002

24. The Productivity Commission estimates that there were approximately 843 900 self-employed contractors in Australia in 1998, then equating to 10.1 percent of all employed persons. It has estimated that this number dropped to 739 500 (or 8.2 per cent of all employed) in 2001, and held steady at 8.2 percent to 2004. In other words, the study indicates that the long term trend appears to be that the numbers of independent contractors are in fact falling.

25. Other researchers have somewhat different views. Buchanan et al suggest that the figure may be as low as 600 000, of which 400 000 are independent contractors and 200 000 are dependent contractors.[8] The 200 000 figure corresponds with that quoted by Clayton and Mitchell, who also draw on the work of Vandenheuvel and Wooden..[9] O'Donnell is unwilling to go beyond the aggregate ABS figure of 1 million self employed persons (approx 10% of the workforce) without more data.[10]

26. While there are differing views in the literature, there is however no reputable suggestion that there are 1.9 million independent contractors in Australia as suggested by the federal Minister for Employment and Workplace Relations.[11]

The 2005 House of Representatives Inquiry

27. 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 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
    - strategies to ensure independent contract arrangements are legitimate.

28. The Inquiry received 77 submissions including one on behalf of the New South Wales Government.[12]

[8] Buchanan, Watson, Campbell and Briggs 'Fragmented Futures' (2003) pp16-19.
[9] See Alan Clayton and Richard Mitchell 'Study on Employment Situations and Worker Protection In Australia' (1999))
[10] Anthony O'Donnell 'Non-Standard Workers In Australia: Counts and Controversies' 17 AJLL 89 (May 2004).
[11] Minister Andrews, Second Reading Speech, 22 June 2006.
[12] NSW Government Submission to the 2005 House of Representatives Inquiry which can be viewed at: http://www.aph.gov.au/house/committee/ewrwp/independentcontracting/subs/sub35.pdf

29. The Committee Report *Making it Work*: *inquiry into independent contracting and labour hire arrangements* was released on 17 August 2005. The Chair of the Committee, Mr Phillip Barresi MP said:

> A number of strategies were recommended to provide assistance for establishing and improving genuine arrangements and reduce the opportunities for establishing artificial arrangements that seek to avoid responsibilities.[13]

30. The majority report contained 16 recommendations in total. Among the Committee majority recommendations was a desire to retain the existing multi-faceted common law test to determine the status of independent contractors. However, as well as this the Committee recommended the utilisation of elements of similar tests established within taxation law. Further, the Committee recommended that independent contractors be regulated as commercial entities outside the traditional industrial relations system.

31. The Inquiry report contained a recommendation to the effect that if the federal government legislated to take over the state industrial relations systems using the corporations power, then a nationally consistent regulation of independent contractors should be established via legislation that would define working arrangements and responsibilities and ensure 'accessible' dispute resolution procedures.

32. The majority also recommended that the federal government:

- extend the definition of independent contractor beyond the current limitation of a 'natural person'
- protect independent contractors when drafting its proposed Independent Contractors Act by:
    1. preserving the legal status of independent contractors as small business entities
    2. defining independent contractors broadly 'to cover all forms of small business structures'
    3. regulating independent contractors as small businesses subject to commercial laws and institutions
    4. setting up alternative dispute resolution facilities including the expansion of the jurisdiction of the Federal Magistrates Court to hear unfair contract cases.

33. In particular, there was unanimous agreement on nine of the 16 recommendations. There was dissent from non-government members on a preferred national approach to defining employees, and the need for using the Australian Industrial Relations Commission.

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[13] House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation Report - Making it Work: Inquiry into independent contracting and labour hire arrangements 12 August 2005.

34. Australian Labor Party members of the Committee made additional recommendations including that the federal government:

1. abandon plans to ban clauses in awards and agreements that restrict independent contracting or labour hire
2. remove the proposed amendment to the Trade Practices Act that bars unions from representing independent contractors/small businesses during collective bargaining with larger businesses
3. halt any plans for statutory recognition of Odco independent contracting arrangements[14]
4. legislate to prohibit labour suppliers from undercutting wages and conditions specified in awards and agreements applying to host employers
5. require that labour hire employees who have worked continuously with a host employer for 12 months be given the right to request permanent employment
6. legislate to specify that labour suppliers and host employers share responsibility for occupational health and safety and unfair dismissal.

35. Notwithstanding the House of Representatives Inquiry proceedings the Department of Employment and Workplace Relations (DEWR) released a discussion paper entitled *Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements March 2005*.

36. The paper canvassed the possibility that the (then) foreshadowed independent contractor legislation may:

- bar provisions in awards and agreements that restrict or impose conditions on the engagement of independent contractors or labour hire workers
- add a new object to s3 of the *Workplace Relations Act 1996* providing that independent contractors should be subject to minimal industrial regulation
- use the corporations power to override state industrial relations laws, including unfair contract and contractor deeming provisions, that seek to regulate independent contractors

[14] In such arrangements, a labour supply company provides independent contractors (the original Odco case concerned tradespersons in the construction industry) to perform work for its client enterprises. These arrangements are designed to ensure that, given the current labour law framework, no employee/employer relationship can be deduced or inferred from the terms of the arrangement.

(independent contractors would have to incorporate to take advantage of the laws)

- introduce a civil penalty regime to deter employers from establishing sham independent contractor arrangements
- regulate the labour hire sector, such as by a code of practice, in order to deter sham independent contractor arrangements
- amend the *Workplace Relations Act 1996* to define 'employer' as including a labour hire employer who engages a worker for a third party (this is aimed at ensuring host employers aren't deemed to be the employer)
- give statutory recognition to Odco independent contractor systems.

37. Further, the discussion paper adopted the view that existing laws and tribunal decisions limit and/or inhibit independent contractor arrangements. These criticisms appeared to be directed at deeming provisions, unfair contract provisions and contracts of carriage and bailment.

38. The New South Wales Government made a submission to the House of Representatives Inquiry[15] and wrote to DEWR in response to its Discussion Paper. Our response indicated that many of the issues covered by the DEWR Discussion Paper were already addressed in the state government's response to the House of Representatives Inquiry.

39. In addition, the New South Wales Government strongly rejected the claims made in the Discussion Paper, particularly noting the complete absence of any evidence or instanced cases to support such claims.

40. The New South Wales Government submission said that there is no reason, compelling or otherwise, for overriding well established and effective legislation which appears to be entirely acceptable to all parties using it, strongly urging the federal government not to proceed with any action to override state legislation in these and any other areas.

Rationale for the Bills

41. The federal government first expressed its commitment regarding the introduction of a standalone 'Independent Contractors Act' during its fourth term election campaign. At this time their *Protecting and Supporting Independent Contractors* policy was unveiled. The relevant policy material stated that:

[15] The NSW Government Submission to the 2005 House of Representatives Inquiry which can be viewed at http://www.aph.gov.au/house/committee/ewrwp/independentcontracting/subs/sub35.pdf

> 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.16

42. More recently, the federal government has claimed that:

> Australia's continued prosperity in the twenty first century requires systems of regulation that encourage rather than restrict creativity, that reward rather than confine initiative.[17]

43. When introducing the Bills to Parliament, the Minister for Employment and Workplace Relations stated:

> 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. [18]

44. The Prime Minister has publicly said that the legislation would:

> … build a firewall to protect independent contractors from the depredations of unions and unfriendly Labor governments that were trying to impose limits and constraints on their freedom to contract.[19]

45. In short, the federal government position is that the proposed Independent Contractors Bills released on 22 June 2006 'reflects their commitment to ensuring that independent contracting is encouraged without excessive regulation'.

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[16] Federal Government Election 2004 Policy *Protecting and Supporting Independent Contractors*
[17] Minister Andrews 2nd Reading Speech 22 June 2006 p1.
[18] Minister Andrews 2nd Reading Speech 22 June 2006 p1.
[19] Prime Minister's Address - Coalition Campaign Launch in Brisbane - 26 September 2004.

The Bills cannot be assessed in isolation

46. The Work Choices Act and associated Regulations have already produced a significant interference in matters which have traditionally been state responsibilities. The subject Bills represent a further step towards establishing a workplace relations system based on the corporations power and have significant implications for the use of independent contractor arrangements. They build upon the incursions on independent contracting arrangements introduced on 27 March 2006 which excluded federally covered employees from state unfair contracts regimes and deemed award clauses restricting the use of independent contractors to be prohibited content.

2. CONTENT OF THE BILL

47. The proposed Independent Contractors legislation was introduced in the House of Representatives on 22 June 2006. The proposed legislation is made up of two Bills; the *Independent Contractors Bill 2006* (The principal Bill) and the *Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006* (the consequential Bill).

Objects

48. The stated purpose of the proposed legislation is to codify independent contractors in the Australian labour market. The objects of the principal Bill 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.

Common law definition

49. The Bills apply to 'services contracts' as defined in s5. A services contract is a contract for services to which an independent contractor is a party and relates to the performance of work by the independent contractor. The Bills do not provide a definition of independent contractor; instead the term takes it common law meaning.

Constitutional Basis and Requisite Constitutional Connection

50. A contract for services is only subject to the Bills if it has the 'requisite constitutional connection'. This requires:

- at least one party of the services contract to be either a:
  - i) constitutional corporation
  - ii) commonwealth authority, or
  - iii) 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:
  - i) the work under the services contract is wholly or principally to be performed in a Territory in Australia

ii) the services contract was entered into in a Territory in Australia, or

iii) 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.

Key features

51. The proposed Bills have the following immediate practical effects:

- the exclusion of certain state and territory laws
- the elimination of the State unfair contract jurisdictions as far as constitutionally possible
- the establishment of a national services contract review scheme
- the introduction of penalties for certain conduct including, employers entering into sham independent contractor arrangements.

52. The Bills also override all existing deeming provisions contained in State industrial legislation which deem certain categories of independent contractors to be employees and provisions which bestow employee related entitlements on independent contactors. However, this is subject to a three year transitional period from the date of commencement of the principal Bill..

53. The proposed legislation also retains existing protections for outworkers in the textile, clothing and footwear industry and establishes a default minimum wage rate. It also preserves (for now) existing protections for owner drivers. Each of these provisions are discussed in more detail below.

Exclusion of State laws

54. Part 2 of the principal Bill deals with the exclusion of State and Territory laws. Section 7 of the principal Bill excludes certain State and Territory laws that alter the status of common law independent contractors, affect the rights, entitlements, obligations or liabilities of a person who is party to a contract for services and confer upon a body the right to review, vary or set aside a services contract on the ground that it is harsh or unfair. Section 8 provides a definition of 'workplace relations matters' for this purpose, including:

- remuneration and allowances
- leave entitlements
- hours of work

55. Section 8(2) of the principal Bill preserves certain conditions as non workplace relations matters including:

- discrimination
- superannuation
- workers compensation
- OH&S
- child labour
- observance of public holidays
- wage and salary deductions.

Deeming Provisions

56. The proposed legislation will override State laws which deem certain categories of independent contractor to be employees for the purposes of State industrial relations legislation.

57. This is subject to:

i) a three year transitional period which retains the protection of State legislation for existing contractors, and

ii) the preservation of existing deeming protections for outworkers and owner drivers.

58. This will not apply to contracted textile clothing and footwear outworkers. If such workers are deemed to be employees under State law, they will continue to be so deemed.

59. A three year transitional period will be in place after commencement for independent contractors who were previously deemed employees, to give business and workers time to adjust to the new arrangements. Only deeming provisions in State industrial relations laws will be overridden. Deeming provisions in other State legislation, such as occupational health and safety legislation and workers' compensation laws, remain untouched.

Opt- in provisions and cessation of transitional arrangements

60. State deeming provisions will continue to apply to existing contracts (including a new contract which is a 'continuation of an existing contract' within the meaning of the principal Bill) for a period of three years after commencement of the Act.

61. However, parties may leave this arrangement earlier if they wish. Under s33 of the principal Bill, parties are provided with an ability to enter into a 'reform opt-in agreement' which will result in the State laws ceasing to apply immediately from the date on which such an agreement takes effect.

62. At the conclusion of the three year transitional period the employment relationship which has evolved over time will be terminated. This would appear to trigger an obligation to pay out any accrued entitlements that will not continue when the state laws cease to apply.

63. The explanatory material accompanying the Bills recognises, however, that unforeseen circumstances may arise which lead to the loss of the accrued entitlements of independent contractors who have been deemed by State or Territory laws to be employees. The Bills envisage that retrospective regulations may be required to remedy this problem.[20]

64. Proper consultation with the state and territory governments may prevent unintended consequences and reduce the level of uncertainty associated with the proposed legislation. In this vein the New South Wales Government calls on the federal government to consult with us prior to the successful passage of these Bills.

65. The transitional provisions also provide that proceedings on foot before state tribunals under unfair contract provisions may continue to final determination (s41).

Outworkers

66. Part 4 of the principal Bill provides for a default minimum rate of pay for contractor textile, clothing and footwear (TCF) outworkers which would operate where an outworker is not guaranteed a minimum rate of pay under State and Territory law (s20). The wage is based on the minimum rate applicable to the TCF contracted outworker under the minimum wages guarantee contained in the Australian Fair Pay and Conditions Standard. Contract outworkers along the chain of contract, as well as head contractors, may be liable for the payment of the default minimum rate.

67. Records must be kept for TCF outworkers (s30). Federal workplace inspectors are provided with right of entry powers to inspect compliance under s22.

68. Contracted outworkers will not have access to the relevant state unfair contracts jurisdiction; instead they may have access to the federal unfair contracts scheme (s7(2)).

69. Section 7(2)(a) of the proposed principal Bill will permit a State and Territory law to continue to the extent that the law 'applies to a services contract' in which an outworker is a party. It would seem that this provision will continue the employee deeming provisions under the *Industrial Relations Act 1996* (IR Act) for those outworkers engaged under services contracts by constitutional corporations. The outworker

[20] Explanatory Memorandum to the Independent Contractors Bills 2006 p14.

employment conditions prescribed under s128B of the IR Act will apply to services contracts which have the relevant nexus to New South Wales, except to the extent that those conditions give rise to unfair contracts under proceedings under s106 of the IR Act.

70. Where the provisions of s129B of the IR Act are applied to a services contract, enforcement provisions under the IR Act will apply to the extent excluded under the proposed principal Bill. This will enable an outworker to take remedial action under the IR Act to enforce the prescribed conditions, including the recovery of remuneration which is specifically preserved under s21. However, this jurisdiction will not extend to proceedings relating to unfair contract provisions which will be subject to the federal jurisdiction under the principal Bill.

Protections for Owner Drivers

71. Similar to the exception made for TCF contracted outworkers, s7(2)(b) of the Bills does not override specific owner driver protections which exist under state law. However, the federal government has committed to a 'review' of these legislative provisions in 2007.[21]

Federal Contracts Review Jurisdiction

72. Part 3 of the Bills relocates the unfair contracts regime formerly appearing in ss127A-C of the *Workplace Relations Act 1996* pre Work Choices and ss832-834 post Work Choices. As a consequence of the Bill's reliance on the corporations power, the reach of the proposed federal unfair contracts regime will be extended from natural persons to include incorporated independent contractors.

73. These provisions will 'cover the field' overriding existing State unfair contracts jurisdictions as far as the constitutional powers will allow.

74. The new unfair contract provisions enable a party to a services contract to apply for a review of their services contract on the ground that the contract is 'unfair' or 'harsh'.

75. The National Services Contract Review Scheme will:

- provide concurrent jurisdictions in the Federal Magistrates Court and the Federal Court to hear unfair contract matters
- be limited to applications relating to contracts for services that are binding on an independent contractor and relate to work performed by that independent contractor
- in the case where an independent contractor is incorporated, limit access to the remedy to circumstances where a director or family member of a director is personally required to perform work under the contract

[21] The Independent Contractors Bills 2006 Explanatory Memorandum 22 June 2006 p26.

- allows a financial cap to be imposed on unfair contract claims by regulation, if a need for this is demonstrated.

76. The federal government has stated that the scheme is intended to have a narrower operation than the current New South Wales system. This is reflected in the principal Bill which specifies the criteria that the courts will take into account when determining unfairness which include:

- the relative bargaining strength of the party to the contract
- whether unfair tactics or undue influence/pressure was applied
- whether total remuneration is less than that provided to an employee performing similar work (although a court must have regard to independent contractor rates in a particular industry)
- other matters relevant to deciding harshness or unfairness.

77. Current New South Wales provisions have a broader scope of operation which is discussed in more detail below at paragraphs 115-129.

78. As far as remedies are concerned, the courts are able to set aside or vary part or all of the contract. The court also has the power to make interim orders so as to preserve the position of a party to a services contract and also grant injunctive relief. Costs will only be awarded in limited circumstances, namely, where proceedings are vexatious or unreasonable or where a party unreasonably causes another party to incur loss (s17(2)).

79. The federal government may also make regulations restricting the circumstances in which applications can be made.

Protection from Sham Arrangements

80. The explanatory material accompanying the Bills states that a sham arrangement is:

> an arrangement through which an employer seeks to cloak a work relationship to falsely appear as an independent contracting arrangement in order to avoid responsibility for legal entitlements due to employees.[22]

It further states that:

[22] Independent Contractors Bill 2006 Explanatory Memorandum 22 June 2006 p9.

> Employees in disguised employment relationships should have appropriate remedies available to them as they are not, in reality, independent contractors.[23]

81. The Consequential Bill amends the *Workplace Relations Act 1996* by introducing various 'prohibitions' on sham arrangements. The prohibitions include:

- misrepresenting an employment relationship or attempting to do so (there is an exclusion where the employer reasonably believes the person to be an independent contractor) (s900 and)
- making false statements to an employee to persuade or influence an employee to become an independent contractor when knowing a statement to be false (s901)
- dismissing or threatening to dismiss an employee with the sole or dominant purpose of re-engaging them as an independent contractor (s902).

82. These prohibitions attract civil penalties of $6 600 for individuals and $33 000 for corporations (s904).

83. Office of Workplace Services inspectors will be empowered to police these provisions and enforce any breaches. The employee concerned, or a relevant union (with written authorisation from the employee) will also be able to take action.

84. Breaches of the legislation will be dealt with by the Federal Court or the Federal Magistrates Court. Employers will bear the onus of establishing that the sole or dominant purpose of dismissing an employee was not to re-hire them as an independent contractor.

85. The federal government claims that the provisions:

> … [are] cost-neutral for independent contractors, as it does not have an impact on genuine contractors.[24]

86. However, it is worth noting that a person does not contravene ss900 or 901 if the person proves that when the person made the representation or statement, the person:

(a) believed that the contract being entered into, would have been a contract for services rather than a contract of employment and

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[23] Ibid
[24] Independent Contractors Bill 2006 Explanatory Memorandum 22 June 2006.

(b) could not have been reasonably expected to know that the contract was a contract of employment rather than a contract for services.

3. LEGAL FRAMEWORK

86. In this section the legal background relevant to the Bills is examined by firstly considering the common law test, secondly the New South Wales legislation which the Bills seek to override, and finally, the constitutional basis of these Bills.

3.1 Common Law Test

87. While there appears to be no fixed definition of an independent contractor, 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.

88. Broadly speaking, 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, as is the case in relation to a contract of service.

89. 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. In distinguishing an employee from an independent contractor at common law, courts of construction have applied a test which examined the extent to which a contractor is integrated into the business of the putative employer. If the facts of a particular case reveal that the contractor is working independently of the putative employer's organisation a court is more likely to conclude that the working relationship should be characterised as an independent contracting arrangement. Factors which point to the economic independence of the worker from the principal's organisation and the assumption of entrepreneurial risk may lead a court to find in favour of an independent contracting arrangement.

90. These factors will not be present in all cases. An important sub-category of independent contractors are those contractors who work exclusively or predominantly for a single principal contractor.[25] These are usually referred to as 'dependent contractors' on the basis of their economic dependency on a single organisation.

91. The European Union discussed the concept of economically dependent workers. These workers were said to be

> … those workers who do not correspond to the traditional definition of 'employee' – essentially because they do not have an employment contract as a dependent employee – but who

[25] Creighton B and Stewart A (2000) Labour Law: An Introduction, Federation Press, Sydney 3rd edition

> are economically dependent on a single employer for income …[26]

92. As will be seen below, many of the issues that arise in relation to independent contractors have their origins in the legal dicta on which the categories of employee and non-employee rest, and the manner in which courts and tribunals go about the business of fitting workers into these categories.

93. It is therefore appropriate to spend some time examining the legal basis of these concepts.

94. The established method of determining whether or not there is an employment relationship is for the court or tribunal to examine the relevant facts and establish firstly whether or not there is a legally binding contractual relationship in existence between the parties, and if there is, whether the contract is an employment contract or a contract for services. The prerequisite to the legal characterisation of a contract for the performance of work is to determine whether the contract was legally formed according to the usual tests for a valid contract. This exercise is important in the context of arrangements for the performance of work as not all such arrangements are entered into with the intention to create legal relations. A critical part of the court's function is to identify the legal vehicle, if any, adopted for the purpose of undertaking the work.

95. Stewart summarises these distinctions as follows:

> Over the past century a particular conception of employment has come to act as the primary trigger for various forms of regulation. That conception, rooted in the common law but consistently adopted and legitimated by legislation, requires or assumes the existence of a contract of employment (or contract of service) between the person who pays for work to be performed (the 'hirer') and the person who is to perform that work (the 'worker'). As such, it excludes a range of work relationships which either (a) are not contractual in nature at all, as where work is performed voluntarily or for purely domestic purposes; (b) do not involve a contract directly between the hirer and the worker; or (c) involve a contractual relationship between hirer and worker which is characterised as something other than a contract of employment, as where the worker is said to be an 'independent contractor' engaged pursuant to a 'contract for services'.[27]

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[26] European Industrial Relations Observatory Magazine 'Economically Dependent Workers' (Issue 4/02) August 2002

[27] Stewart, Andrew (2002a) Redefining Employment? Meeting the Challenge of Contract and Agency Labour 15 *Australian Journal Labour Law* 235 (December 2002) .

96. A typical application of this approach can be found in *Advanced Australian Workplace Solutions (AAWS)*[28]. In this 2002 case a teacher sought relief for alleged unfair dismissal, but first had to overcome the fundamental jurisdictional issue of whether or not she was an employee or an independent contractor. The Full Bench overturned the decision at first instance of Simmonds C where he had found an employment contract to exist after applying the control test to the work relationship in question. The Full Bench determined that the threshold issue to be decided before a contract could be characterised as one of employment or otherwise was whether or not there was a valid contract of any type at all between the parties Ms Fox and Kangan.

97. The Full Bench emphasised that the proper preliminary inquiry was to apply the common law relating to the formation of valid contracts and identify the elements that need to be in evidence before the existence of a contract of any kind can be established. Adopting this approach the Full Bench found that:

> **[89]**… it is our view that no contract existed between Ms Fox and Kangan because, of the essential elements for a contract, three were missing; namely:
>
> - an intention between the parties to create a legal relationship, the terms of which are enforceable
> - an offer by one party and an acceptance of the offer by the other party
> - valuable consideration.

98. The Full Bench also took the view that, while there had been some sort of relationship between Ms Fox and Kangan, it was not an employee-employer relationship:

> [88]...We have considered all the evidence before Simmonds C. While there are parts of it that point to a contract between Ms Fox and Kangan, they are, in our view, outweighed by the other parts which, in our view, point to there being no contract…

99. In this case, the elements of reciprocity and common intention to contract with legal consequences that constitute an enforceable legal bargain were found to be absent. The focus of this first area of enquiry is to therefore apply the basic tenets of contract law to the facts of the relationship.

100. If the court or tribunal satisfies itself that there is a contractual relationship between the hirer and the worker its next task is to determine the nature of that contractual relationship and in particular, whether it is a contract of employment or some other type of contract

[28] AIRC Print No R6604, Full Bench Appeal Decision S0253.

providing for the performance of work. This is usually done by applying the multi-indicia test outlined above at Paragraph 20.

3.2 Relevant New South Wales Legislation

101. The Bills propose to override existing New South Wales legislation which provides for deeming of employees and remediation of unfair contracts. Each of these provisions is dealt with below under the relevant heading. In addition, a brief description of other New South Wales provisions relevant to the Bills, such as those provisions addressing owner/drivers and outworkers, are included in the interest of completeness.

Deemed Employment Arrangements

102. In New South Wales, as a consequence of the operation of s5(3) and Schedule 1 of the *Industrial Relations Act 1996*, certain categories of workers are declared to be employees and brought within the scope of industrial regulation even though they may be independent contractors at common law.

103. These deeming provisions cover a fixed range of occupations such as:

- Milk vendors
- Cleaners
- Carpenters, joiners or bricklayers
- Painters
- Bread vendors
- Outworkers in clothing trades
- Timber cutter and supplier
- Plumber, drainer or plasterer
- Blinds fitter
- Council swimming centre manager or supervisor
- Ready mixed concrete driver
- Roads and Traffic Authority lorry driver
- Others prescribed by regulation.

104. These provisions seek to redress the unequal bargaining power of these categories of workers which compromises their ability to negotiate fair and reasonable working conditions.

105. Workers in the deemed categories, when entering into contracting arrangements, often have limited information or understanding of how the work relationship will operate. In many cases their working arrangements are not different, in substance, from those of employees. The deeming provisions reflect the need to offer protections to workers from unilaterally imposed disguised employment relationships that are balanced by the appropriate recognition of bona fide independent contracting arrangements.

106. The New South Wales provisions are established and long standing arrangements which have not been significantly modified in the last 45 years and have received largely bipartisan support. The New South Wales provisions are established and long standing arrangements which have not been significantly modified in the last 45 years and have received largely bipartisan support. This is illustrated by the response of the Hon. Mr R Askin, then Opposition and Liberal Party leader, to the introduction of the then s.88E deeming provisions :

> The Bill will further restrict the contract system…and will deem certain persons performing certain work to be employees…the principle seem sound enough. It is undeniable that there are many abuses under the contract system… Some unscrupulous employers have arranged contracts with persons who are, to all intents and purposes employees, with a view to avoiding their lawful obligations as employers as regards award wages, holidays, long-service leave and such matters.[29]

107. The ability to circumvent the legislative protection of worker entitlements through sham contracting arrangements, and the exploitation of the inferior bargaining position of certain classes of

108. The ability to circumvent the legislative protection of worker entitlements through sham contracting arrangements, and the exploitation of the inferior bargaining position of certain classes of contract workers, led jurisdictions such as New South Wales to adopt deemed employee provisions.

109. On 26 November 1959, the then Minister for Employment and Industry the Honourable J Maloney, when introducing into the New South Wales Legislative Council the then s88E deeming provisions, described their intended effect in the following terms:

> …[They] are designed to close in the existing legislation what might be termed legal loopholes that enable award provisions to be circumvented by various systems of contract…[and] that permit the avoidance of employer-employee relationships and the industrial obligations arising therefrom.[30]

110. This was not the first use of the deemed employee concept in the statute law of the State. Taxi-cab and private hire-car drivers had been deemed employees for workers compensation purposes since 1926. In 1936 the concept was applied in an industrial arbitration context when the then *Factories and Shops Act* was amended to provide deemed employment status for hairdressers in specified circumstances.

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[29] New South Wales Parliamentary Debates, Session1959-60 Third Series Vol 30 p.2216
[30] Ibid p.2351

111. A further change to the *Industrial Arbitration Act 1940* (the Act) in 1943 deemed an employment relationship to exist where certain contractors alleging themselves to be partners are working in association in any industry. This new s88B had little or no operation because the Industrial Commission had restrictively interpreted its scope and it was replaced by 1957 amendments to the *Industrial Arbitration Act* which sought to regulate certain classes of contracts and independent contractor relationships. The Industrial Commission, as it then was and Conciliation Committees were given the authority to approve contracting arrangements for bread carters, milk vendors, hairdressers and carriers. These Committees, the predecessor of industrial committees, made awards fixing wages and conditions for the industry or establishment over which the committee had jurisdiction.

112. The Commission and Conciliation committees could refuse to approve the terms of such contracts if they concluded that the contract was entered into for the purpose of avoiding the operation of an award or agreement, and the benefits accruing to the contract were less favourable than those provided to an employee performing the same work. Any contracts of the specified class made without s88B approval were void.

113. Unfortunately however, the 1957 amendments failed to achieve their intended objectives and the Act was further amended in 1959. As the Honourable Abram Landa, Minister for Labour and Industry observed in his second reading speech of 19 November 1959:

> The amendments have been found necessary because the restrictions imposed on the contract system in 1957 have not proved adequate to deal with the abuses in the trades already prescribed under s88B and the additional trades have been prescribed because of the growth of abuse of the contract system, particularly in the building trades. Very many building projects are now constructed almost entirely under the contract system. This system could only be tolerated if award standards were constantly maintained.[31]

114. The *Industrial Arbitration Amendment Bills 1959* brought an end to this system of contract regulation and placed all persons previously subject to the 1957 regulatory regime in the position of employees for industrial purposes. It also introduced s88F dealing with the review of work contracts by the IRC and Conciliation Committees on prescribed grounds of unfairness (see below).

[31] The Honourable Abram Landa Second Reading Speech, 18 November 1959 New South Wales Parliamentary Debates Third Series Vol 29 s2130.

115. These deeming provisions have been carried forward into the New South Wales *Industrial relations Act 1996* where they appear at Schedule 1.

Unfair Contracts

116. Since 1959, the unfair contracts provisions in New South Wales have provided relief to persons who find themselves bound by unfair work contracts, be they employees or independent contractors with no access to the award jurisdiction. The jurisdiction provides access to an industrial tribunal primarily guided by principles of fairness and justice between the parties.

117. Section 106(1) of the IR Act empowers the IRC in Court Session to make an order declaring wholly or partly void, or varying, any contract whereby a person performs work in any industry if the IRC finds that the contract is an unfair contract.

118. Section 106(2) provides that the IRC may find that a contract was unfair either at the time it was entered into or that it subsequently became unfair because of any conduct of the parties, any variation of the contract or any other reason.

119. An 'Unfair contract' is defined by s105 as a contract:

(a) that is unfair, harsh or unconscionable; or

(b) that is against the public interest; or

(c) that provides a total remuneration that is less than a person performing the work would receive as an employee performing the work; or

(d) that is designed to, or does, avoid the provisions of an industrial instrument.

120. Employees earning greater than $200,000 are excluded from the jurisdiction.

121. As noted earlier, the New South Wales *Industrial Arbitration Act 1940* was amended in 1959 by the insertion of a new s88F establishing a jurisdiction to set aside or vary work contracts which were found to be unfair, harsh or unconscionable. The jurisdiction was vested in the Industrial Commission and Conciliation Committees. Although the Industrial Commission and Committees could vary or set aside contracts impugned for unfairness, they were not empowered to make orders for the payment of money so that successful applicants had to pursue civil recovery actions in the courts.

122. As has been noted above, the amendment reflected concerns that a system of contract labour involving construction workers, milk vendors and bread carters was undermining the arbitration system and award regulation. The observation was made in the course of Parliamentary debate that:

> The abuse of the contract system would lower the standard of wages and working conditions built up over many years of intense union organisation and industrial action. In the event of a recession rival contractors are likely to indulge in cut throat competition which might be expected to lower existing standards.[32]

123. In 1966, the *Industrial Arbitration Act 1940* was amended to give the Commission the capacity to make orders for the payment of money and award costs. The jurisdiction conferred on the Conciliation Committees under s88F was removed.

124. In 1998 s109A was inserted into the IR Act which provided that the unfair contracts scheme does not apply to a contract of employment that is alleged to be unfair for any reason for which an application could have been made under the unfair dismissal provisions.

125. In 2002 the IR Act was further amended to:

- set a remuneration cap in relation to a contract of employment
- set a remuneration cap in relation to partnerships where the share of net profits by the applicant exceeds a prescribed amount
- fix a time limit for the making of an application of 12 months from termination in relation to a contract that has been terminated.

126. The imposition of a remuneration cap was made in response to the way the unfair contracts provisions had been used and interpreted to secure windfalls for highly paid former executives. The amendment was designed to bring the jurisdiction back to its original purpose of safeguarding the award system of minimum conditions.+

127. . Mr Paul Whelan MP, during the Second Reading Speech for the relevant Bill said:

> The original intention of the unfair contracts provisions of the Industrial Relations Act was to protect award terms and conditions from being undermined by artificial contract arrangements. However, because of amendments to the provisions and the way in which they have been interpreted, the operation of the unfair contracts jurisdiction has moved away

[32] Ibid

> from that original intention. In recent times the unfair contracts jurisdiction has been used by highly paid employees as a way to hit the jackpot and obtain compensation after the termination of their employment…This bill will ensure that the Commission is not compelled to award such generous payments to highly paid executives. [33]

128. The IR Act was amended again in 2005 to clarify the scope of the s106 jurisdiction following certain decisions of the Court of Appeal of the Supreme Court. Referring to these decisions in the Second Reading Speech, the Honourable Mr Milton Orkopoulos, Minister for Aboriginal Affairs said:

> In the Mitchforce and Solution 6 cases, the Court of Appeal criticised the IRC for "intruding into the heartland of commercial contracts. The Court of Appeal in these decisions considerably narrowed the interpretation of s.106 that had been adopted previously by appellate courts by holding that the power to declare void or vary a contract as defined in section105 extended only to such aspects of it as closely relate to the performance of work in an industry…The Bill amends section 106 to clarify that if the commission [IRC] finds that there is a contract or arrangement whereby a person performs work in an industry, then it can declare void any related condition or collateral arrangement, even though that related condition or collateral arrangement does not in itself relate to a person's performance of work. The amendment requires however that the performance of work is a significant purpose of the overall contractual arrangements between the parties. [34]

129. The New South Wales Government has adopted a flexible and responsive approach to the unfair contracts jurisdiction modifying the system in order to make certain that the powers of the IRC are sufficient to ensure fairness in work-related contracts and that the minimum conditions are not evaded or undermined by sham arrangements.

130. The s88F jurisdiction, the predecessor to s106, certainly reflected the original legislative design of covering transactions which may be in intention or effect subversive of the scheme and purpose of industrial regulation. The jurisdiction as it has evolved is broader than this, however, and in fact extends to any contract which leads directly to a person performing work in an industry.

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[33] Mr Paul Whelan, Second Reading Speech, Industrial Relations Amendment(Unfair Contracts) Bill 19 June 2002 NSW Legislative Assembly, Hansard No.9 2002 p.3404

[34] Milton Orkopoulos, Minister for Aboriginal Affairs, Second Reading Speech Industrial Relations Amendment Bill, 17 November 2005 NSW Legislative Assembly, Hansard No.47 2005 p20010.

The new Federal and current New South Wales unfair contracts schemes

131. The unfair contracts review jurisdiction proposed by Part 3 of the principal Bill is in similar terms to the scheme for unfair contracts formerly set out in ss127A-C of the WRA and now re-enacted as ss332-4. The Bill differs from the current provisions in certain respects including:

- requiring 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(s15(2))
- excluding contracts relating to the performance of work for the private and domestic purposes of another party to the contract.

132. The New South Wales jurisdiction is a broader and more flexible jurisdiction than that proposed under the principal Bill. It does not exclude any type of contract work, subject to applicants earning less than a prescribed remuneration cap.

133. Chapter 2 Pt 9 of the New South Wales IRA:

- permits the review of employment contracts as well as services contracts on a relevant unfairness ground
- allows the IRC to apply a broad public interest test when determining unfairness
- defines unfair contracts to encompass contracts that are designed to avoid the provisions of an industrial instrument
- allows the IRC to examine arrangements as well as legally valid contracts whereby a person performs work in an industry
- explicitly gives the IRC the capacity to make orders for the payment of money and orders prohibiting persons or parties to the relevant contract(s) from entering into further unfair contracts
- gives relevant industrial organisations of employers and employees standing to make an application
- vests the jurisdiction in a specialised industrial tribunal-The IrC in Court Session..

By contrast the proposed unfair contracts review scheme set out in Pt 3 the Bill:

- only applies to services 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 Federal 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.

134. The IRC is equipped with a flexible range of remedies intended to ensure that justice is done between the parties. Its ability to review arrangements as well as legally valid contracts permits the examination of all kinds of concerted action which, although not legally enforceable agreements, may produce particular results whereby a person performs work in an industry.[35] The broad scope for permissible inquiry strengthens the capacity of the IRC to prevent legal subterfuges designed to avoid proper industrial regulation.

135. In contrast the Federal Court is, in some ways, constrained in its role by the requirement under proposed s15(2) when assessing the comparative remuneration of employees to examine whether the remuneration set by the contract under review is commensurate with that provided by other services contracts in the relevant industry. A proper determination of unfairness based on the contract providing inferior remuneration to that of an employee in similar circumstances can only be impeded by this legislative constraint upon the Federal Court's discretion.

136. This 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. This requirement is, however, consistent with the objects of the principal Bill where the protection of industrial regulation and standards of industrial equity play no part.

[35] Phillips J and Tooma M 'Law of Unfair Contracts in NSW' Lawbook Co 2004 p 11.

Chapter 6 Protections for owner- drivers and taxi-drivers

137. While the principal Bill does not attempt to override the current Chapter 6 provisions, they are to be 'reviewed in 2007'. It is noted, however, that there is substantial backbench pressure to strike out the proposed exemption, with Wilson Tuckey MP threatening to move an amendment to this affect when federal parliament resumes.[36] For the sake of completeness, a brief overview of these provisions follows.

138. Chapter 6 of the *Industrial Relations Act 1996* establishes a regulatory scheme which applies to contracts of bailment (taxi drivers) and contracts of carriage (drivers engaged in transporting goods who own their own vehicle). The IRC is empowered to make contract determinations for these classes of contracts dealing with remuneration and other matters and also approve agreements between parties to such agreements. It has a dispute resolution jurisdiction which helps prevent industry wide disruption.

139. Under the Chapter 6 umbrella of discrete regulatory protection some 170 enterprise specific arrangements are currently in place. Owner-drivers are usually single vehicle operators bound to contracting arrangements characterised usually by exclusive engagement to one principal. Work priorities and operational requirements are closely determined by the principal contractor. This puts these drivers in a position of inferior bargaining power and economic dependency analogous to some employment relationships.

140. The Chapter 6 jurisdiction provides specific remedies tailored to the circumstances operating in the industry. There is, for example, under s314 of the IR Act a capacity vested in the IRC to make a contract determination reinstating contracts of carriage that have been terminated.

141. The owner-driver can also seek an order for compensation from the Contracts of Carriage Tribunal where the carrier paid a goodwill premium for a truck with work when entering into a contract of carriage and the contract has been terminated in circumstances which are adjudged unfair or unconscionable. A common practice in the transport industry is for new entrants to purchase a truck from an existing owner driver and pay also a premium which gives a purchaser access to the regular work performed under the head contract. This specialised jurisdiction enables owner drivers, in prescribed and limited circumstances, to protect the goodwill investment in the contract from being stripped away.

142. The Chapter 6 scheme does not extend to owner-drivers a comprehensive safety net of award-like conditions but is a limited form of regulation offering protections necessary to ensure the viability of the ongoing contract and prevent its essential elements being bargained

[36] 'Coalition MPs attack trucks exemption' Australian Financial Review 17 July 2006 p5.

away. It recognises that certain industry minimum standards should be upheld consistent with viable competition and the normal entrepreneurial assumption of risk entailed in independent contracting arrangements.

143. While the retention of these provisions in the principal Bill is positive, it should be pointed out that the loss of the unfair contracts provisions is a substantial loss to owner-drivers. The unfair contracts provisions provide a further means of addressing unfair arrangements which is accessible to owner-drivers, and their loss means that expensive and complex litigation will be the only recourse available.

Outworkers

144. The *Workplace Relations Act 1996* permits State laws regulating clothing trades outworkers to apply to federal system employees. Section 7(2) of the proposed principal Bill preserves the operation of State deeming provisions as they apply to an outworker who is party to a services contract.

145. It has long been recognised that clothing outworkers are some of the most vulnerable workers in the community, and the most likely of all workers to be subject to unconscionable conduct on the part of clothing contractors. The very notion that home based workers can be 'independent contractors' assumes that they have some bargaining power in the negotiation of contracts with clothing suppliers for the determination of entitlements. The experience in New South Wales has shown the contrary.

146. Clothing outworkers are invariably involved in short term contractual arrangements which are aimed at expediting the production of fashion items for retail stores. A number of contracts can be given out on a monthly basis without any contact with the head contractor. Moreover, clothing outworkers frequently experience difficulty in obtaining award based remuneration and other entitlements for work performed. This has been due largely to the fact that the outworker who performs the work is provided with little or no information for making claims for the payment of remuneration. Work is delivered and picked up by an intermediary without direct contract with the clothing supplier.

147. Problems arise in relation to establishing liability of principals for the payment of outworker entitlements and in securing payment of those entitlements. This led to New South Wales enacting legislation in 2001 to facilitate the identification of employers and the recovery of remuneration and other entitlements. The New South Wales Government has also enacted registration procedures for the giving out of work. None of these provisions are replicated in the Bills in respect of those outworkers whose remuneration will be determined under the Australian Fair Pay and Conditions Standard.

148. Recognising these issues, the New South Wales Government has deployed a multi-faceted strategy to assist outworkers, The New South Wales Government's three year, $4 million dollar Clothing Outworkers Strategy, *Behind the Label,* operated from July 2001 to midway through 2004. However, the New South Wales Government remains committed to addressing the exploitation of the State's most vulnerable workers.

149. One of the most successful initiatives of *Behind the Label* has been the Vocational Education and Training Program, which aims to increase the skills base of the labour force and provide opportunities for those who wish to leave the industry.

150. The OECD has examined the *Behind the Label Strategy* and noted its success in a recent study.[37] This OECD study identified many of the features of *Behind the Label* as 'good practice in the field'.[38]

151. To assist the clothing industry and protect Australian businesses from unethical competitors who exploit outworkers, the New South Wales Government recently introduced a mandatory code of practice for the clothing industry. The Scheme will operate in conjunction with the existing industry developed voluntary code, the Homeworkers Code of Practice.

152. Entitled the Ethical Clothing Trades Extended Responsibility Scheme, the mandatory code places obligations on retailers and suppliers of clothing products manufactured in Australia for retail sale within New South Wales to:

- keep and exchange records about the details of manufacture of those clothing goods, including the use of outworkers;
- require retailers to provide regular summary reports of those records to the Office of Industrial Relations (OIR) and the Textile, Clothing & Footwear Union of Australia (TCFUA);
- provide for the inspection of detailed records kept by retailers to enable OIR and the TCFUA to identify suppliers in order to ascertain levels of compliance with the Award.

153. The Scheme is the first of its kind in Australia and is the product of years of close collaboration between the State Government and all major players in the industry.

154. Inspectors of the Office of Industrial Relations are empowered under the *Industrial Relations (Ethical Clothing Trades) Act 2001* to instigate proceedings for prosecution of contraventions of the Scheme.

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[37] Migrant Women and the Labour Market: Diversity and Challenges OECD and European Commission Seminar 26-27 September 2005. Migrant Women into Work – What is Working? Alexandra Heron

[38] Ibid p3.

155. The outworker strategy demonstrates the superior capacity of the state system to bring about an integrated multi-pronged approach to dealing with an entrenched problem of extreme exploitation. New South Wales built on its legislative power to deem dependent contractors to be employees in order to establish a creative new approach to enforcement and compliance in the clothing industry, integrated with one-on-one assistance to outworkers through established vocational education methods.

156. The 2006 amendments remove from the Clothing Trades (State) Award provisions applying to clothing outworkers, in so far as they are binding on constitutional corporations, and incorporate them into the IR Act. They also preserve the registration and record keeping requirements for the giving out of work by constitutional corporations which enhance the ability of outworkers to enforce their claim for unpaid remuneration.

Summary

157. Successive New South Wales Governments of all political persuasions[39] have sought to deploy different approaches and regulatory methods to ensure that the integrity of the award system of industrial regulation is not subverted. These initiatives were directed at sham independent contracting arrangements and legal subterfuges that would deny those workers in disguised employment relationships access to industrial tribunals and their protective arsenal of remedies.

158. The flexibility of this approach, where the system of regulation is tailored to the labour market characteristics of a particular industry or class of contractors, is illustrated by the case of commercial drivers. In this instance deemed employment arrangements were first used, evaluated and then replaced by a discrete form of statutory contracts regulation. This mode of regulation preserves the essential elements of the industry based independent contracting arrangement while protecting certain classes of transport workers from the potential abuse of superior bargaining power.

[39] For example in response to the 1979 amendments introducing the predecessor to the Chapter 6 owner-driver protections the then Liberal Party spokesman Mr Shipp stated that 'We do not oppose the bill in principle …' (Hansard, Legislative Assembly, 10 April 1979, p.3928). Further, in fact, in 1993 the Fahey Liberal Coalition Government through legislative amendment extended the scope of the protections to explicitly include drivers of cars and motor cycles as well as lorry drivers. In 1994 the Industrial Relations (Contract of Carriage) Amendment Act 1994 established a remedial mechanism relating to unfair termination of head contracts of carriage and compensation for goodwill investments by owner drivers in prescribed circumstances. The Act received largely bipartisan support and the process which brought the legislation into existence was described by Mr Peacock, the Member for Dubbo 'as a model for achieving a consensus piece of legislation'.(see NSW Legislative Assembly Hansard 12 May 1994 Third Series Vol 241 pp 2413-4). For further evidence of bipartisan support to work contracts regulation in New South Wales see paragraph 106.

4. Issues

159. As can be seen from Section 2, the principal legal effects of the Bills are:

- Overriding state deeming provisions
- Providing transitional arrangements for workers subject to state deeming provisions
- Replacing existing state unfair contracts jurisdictions with a new federal regime
- Creation of new offences to discourage/prevent sham arrangements

160. Leaving aside the exclusion of state deeming provisions (as they apply to constitutional corporations), the overall effect of the Bills introduce little that is new. While the principal Bill provides for a new National Services Contract Review Scheme, this replaces the existing federal jurisdiction (ss127A -127C of the WR Act pre Work Choices and ss832-4 of the WR Act post Work Choices) and existing state jurisdictions.

161. The only unprecedented parts of the Bills are therefore the provisions dealing with 'sham arrangements', and to some extent, the transitional arrangements.

162. Importantly, the test for distinguishing between employees on the one hand and independent contractors, on the other, remains the common law test, as it has been applied by Australian courts and tribunals for many years.

163. This then begs the question of what it is that the Bills intended to do and what problem(s) are they intended to solve?

164. According to the Objects of the principal Bill, its intent is:

- 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.

165. Similarly, in the second reading speech, the Minister says that:

> The Independent Contractors Bill (the principal bill) reflects the government's commitment to ensuring that independent contracting is encouraged without excessive regulation…

> The legislation that I introduce today provides Australians with an even wider range of choices about how they work and ensures that their choice is respected…
>
> It protects the freedom of independent contractors to enter into the contracts of their choice….[40]

166. However, genuine independent contractors have always been considered by courts and tribunals to be in 'commercial arrangements' and therefore subject to the provisions of contract law. When called upon to test the validity of a claim to either employee or independent contractor status, courts have applied the relevant common law test, [41] and have been willing to look, at least to some extent, beyond the label put on the relationship by the parties as discussed at paragraphs 87-100.

167. Affirmation of this test and 'the commercial status' of independent contractors therefore adds nothing new to the regulatory framework.

168. While it is true that deeming provisions turn workers who may be independent contractors at law into employees, the extent of these provisions in New South Wales law is limited for the purposes of the *Industrial Relations Act 1996* (NSW) to a selected number of occupations listed at paragraph 103. According to the federal minister, these provisions constitute '…undue interference of prescriptive regulation ….that effectively turns (independent contractors) into employees regardless of their wishes', which appears to suggest that the deeming provisions have in some manner been actively encroaching on, and limiting the expansion of independent contracting arrangements.

169. No evidence to support such a claim has ever been provided to the New South Wales Government, and neither the federal minister nor any of the proponents of the Bills have ever cited any particular decision or case decided by a court or tribunal which would support such a conclusion. The current provisions are well settled, and indeed have been since their introduction in 1959. Any changes to the list of deemed employees would be a matter of normal parliamentary process.

170. Similarly, the Minister claims that 'the current confusion of having concurrent state and federal unfair contracts jurisdictions operating in

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[40] *Independent Contractors Bills* 2006/ *Workplace Relations Amendment (Independent Contractors) Bills* 2006, Second Reading Speech pp2-3

[41] See, for example *Hollis v Vabu Pty Ltd [2001]* HCA 44 (9 August 2001); *Sheahan v Guiseppe Belcaro (T/as Breakaway Security)* [2001] SAIRComm 44 (17 October 2001); *The Construction Forestry Mining and Energy Union of Workers v Personnel Contracting Pty Ltd t/a Tricord Personnel* WA Industrial Relations Commission Full Bench 2004 WAIRC 11445; *Abdalla and Viewdaze Pty Ltd t/as Malta Travel* (2003) AIRC Full Bench PR927971 14 May 2003

New South Wales and Queensland'.[42] It is difficult to understand how such a claim can be substantiated. If anything, the former federal unfair contracts provisions, have, since been found to be constitutionally invalid by virtue of *Dingjans Case*[43] in 1995, been characterised by disuse. How 'confusion' could therefore arise is a mystery.

171. The election material claims that

> 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.[44]

172. However, the substance of these community concerns is a mystery. The New South Wales Government is unaware of any widespread concern about the extent and operation of deeming and unfair contract provisions. It is also unclear who this 'community' is.

173. As such, it is difficult to see any obvious substantive purpose in these Bills, other than perhaps removing state deeming provisions and unfair contracts jurisdictions. This makes the new expenditure of $15 million identified in the Explanatory Memorandum[45] difficult to understand or justify.

Legal Issues – Common Law Test

174. By affirming the existing situation, and in particular, the common law test, the Bills manage to import the limitations of the latter. These are well documented, and were canvassed at length in our submission to the 2005 House of Representatives Inquiry.[46] While it is not proposed to repeat these arguments here, they are summarised in the next few paragraphs.

175. The longevity of the common law test, and its lack of development over time, has limited its usefulness in relation to evolving forms of employment. In policy terms, the Honourable Justice Paul Munro says:

> **[23]** The concept of the employment relationship is the fulcrum upon which the federal arbitral power is exercised. It has never been modified to accommodate mushrooming forms of quasi-employment. It remains to be seen whether it will adapt any

[42] Minister Andrews Second Reading Speech p7.
[43] *Dingjan, Re; Ex parte Wagner* (1995) 183 CLR 323
[44] Federal Government Election 2004 Policy - *Protecting and Supporting Independent Contractors*
[45] *Independent Contractors Bill 2006* Explanatory Memorandum p2. It is noted that the Ministers' Second Reading Speech by contrast, quotes a figure of $6.2 million.
[46] NSW Government Submission to the Standing Committee on Employment, Workplace Relations and Workforce Participation – Inquiry into Independent Contracting and Labour Hire Arrangements, 11 March 2005.

better to the needs of the 'new psychological contract', or meet what Professor (Katherine) Stone describes as 'the misfits between current labour and employment regulation and new workplace practices'…

[24] A concept of employment also operates in other ways through the regime of the Act to prevent regulatory or representational intervention. The common law notion of employment, the contract of service between master and servant, creaks around in the foreground of federal industrial legislative and case-law settings. It thereby effectively governs the content of industrial matters able to be collectively bargained for or subjected to tribunal regulatory intervention. It impacts also upon representation rights and structures. The roots of that governance are the legal reasoning applied at the start of last century. A premise for some of that reasoning was that the civil rights of masters should prevail against the growth of any new province for intervention not expressly authorised by the (Conciliation and Arbitration Act 1904). That and similar reasoning serves today to dictate inflexibility in the arbitral and collective bargaining system. That inflexibility will obstruct the system from dealing with interests and concerns critical to addressing workplace and related livelihood problems associated with the steepening decline in economic security. [47]

176. In practical terms, Professor Andrew Stewart clearly identifies the limitations of the common law approach when he says:

> …What I do understand to be the case, both from published research and anecdotal observation, is that…it is common to find relationships which **in substance** involve the subordination and the dependence characteristic of employment but which have quite lawfully been constructed as subcontracting arrangements.
>
> The fact is that any competent employment lawyer can take almost any form of employment relationship and reconstruct it as something that the common law would treat as a relationship between principal and contractor….thereby avoiding the effect of a wide range of regulation which is typically applicable only to employees, such as industrial awards, registered agreements, leave and superannuation legislation, and unfair dismissal laws.
>
> There are two basic ways to do this. The first is to prepare a written contract for the parties to sign which has as many indications as possible of a contract for services: payment by results rather than a regular wage, the requirement to supply a

[47] Munro, Paul Swings and Roundabouts and allowable award matters' Paper for the Centenary Convention of the IRSA: The Conciliation and Arbitration Journey', 22 October 2004.

> tax invoice when claiming payment, a notional freedom to work for other 'clients', denial of leave entitlements, supply by the worker of their own tools and equipment, a requirement to self-insure against injury - and most importantly, if at all possible, the power to delegate or sub-contract tasks to other workers, a feature the courts have always treated as incompatible with an employment relationship.
>
> The alternative method is to interpose some form of legal entity between the worker and the client business, since in the absence of a direct contract between the two there cannot be an employment relationship. That entity might be a labour hire agency, or a personal company, or a partnership constructed for the purpose between two or more workers.
>
> The point I wish to stress is that in a purely legal sense there is nothing 'illegitimate' about these arrangements. They are quite lawful. On the other hand, I (and many other commentators) have long argued that the law as it stands is deficient, in that form is so readily allowed to prevail over substance. There are many genuine contractors….who quite clearly run businesses of their own and provide services to a range of different clients. They are not the concern. Rather it is the 'dependent contractor' who as a matter of practical reality is indistinguishable from an employee.
>
> It is true that many (though certainly not all) dependent contractors quite happily accept their status. They may believe that they will be better off in financial terms, especially if they are unconcerned with (or fail to take account of) the value of leave entitlements, superannuation contributions and the like. And in symbolic terms, some quite clearly prefer to be regarded as self-employed, even if in truth their degree of independence is minimal.
>
> Nonetheless, I firmly adhere to the view that it should not be possible to contract out of protective regulation. If a contract to pay an employee less than applicable award conditions or to deny them leave entitlements is illegal and unenforceable, why should it be lawful to do the same thing through the device of a delegation clause or an interposed entity – even if the worker freely consents?…[48]

177. Despite this, the common law approach has not developed to rectify the faults identified by Stewart, for example.

[48] Professor Andrew Stewart, letter reproduced at pp11-12 of *Working Arrangements – Their Effects on Workers' Entitlements and Public Revenue – Discussion Paper Eleven* Royal Commission Into the Building and Construction Industry; emphasis in original.

178. In practical terms, the common law test is a two step process: the first step is to determine whether there is a contract of any kind between the parties in question, and if so, the second step is to determine whether the contract is a contract of employment.

179. The standard approach to the first step is clearly expressed by the AIRC Full Bench in *Advanced Australian Workplace Solutions (AAWS)* quoted above at paragraph 96. This approach is founded on concepts from contract law such as:

- an intention between the parties to create a legal relationship, the terms of which are enforceable
- an offer by one party and an acceptance by the other
- valuable consideration .

180. The first task of the court or tribunal then, is to examine the facts of the matter and determine whether it evinces these indicia of a contract between the parties.

181. The second step – determination of whether the contract is a contract of employment – is the application of the multi-factor test set out at paragraph 20 above.

182. Despite a broader approach taken by the Full Court of the Federal Court in *Damevski v Guidice*[49] in 2004, subsequent cases have continued to employ the classic approach, as per *AAWS*.[50]

183. In this connection, it is worth noting that the ILO recognises the limitations of established legal approaches of this nature in its *Proposed Recommendation Concerning The Employment Relationship 2006* in which it notes:

> … the difficulties of establishing whether or not an employment relationship exists in situations where the respective rights and obligations of the parties concerned are not clear, where there has been an attempt to disguise the employment relationship, or where inadequacies or limitations exist in the legal framework, or in its interpretation or application.[51]

184. There is therefore no doubt that the common law approach is 'long established'[52], as the Explanatory Memorandum says, however its flaws and limitations are similarly long established.

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[49] FCAFC 252 (13 November 2003)
[50] See for example Personnel Contracting Pty Ltd t/as *Tricord Personnel v The Construction Forestry Mining and Energy Union of Workers* [2004] Supreme Court of WA WASCA 312 22 December 2004, majority judgement Steytler and Simmonds JJ, EM Heenan J dissenting.
[51] *Proposed Recommendation Concerning The Employment Relationship* ILO ILC95-PR21-167 21/75
[52] Minister Andrews Second Reading Speech 22 June 2006 page 6.

185. Whereas New South Wales has addressed these limitations through legislative modification, including its deeming and unfair contracts provisions, the federal government has chosen to rely solely on the common law approach. This is all the more remarkable, given that alternative approaches have been offered by respected commentators.

186. This point may be clearly illustrated by a moment's consideration of the federal government's rhetoric about the Bills. According to the federal Minister:

> These Bills move genuine independent contracting relationships away from the realm of industrial regulation and into the commercial sphere where they should have been all along.[53]

187. However, if the contracting arrangements subject to the Bills are genuinely 'commercial' in nature, it seems reasonable to expect that contractor performing the work would be in business for her/himself, and would have little difficulty demonstrating that such is the case.

188. In fact, this, in broad terms, is exactly the nature of an alternative test – the genuine business test – proposed by Stewart as an alternative to the common law test. As Stewart explains:

> There does seem to be a fundamental difference, in a capitalist system, between running your own business and working for somebody else's. It is a distinction that has not only been articulated in these terms by the courts, … but that most people in the community would implicitly understand and accept…[54]

189. Indeed, it is easy to see that many of the elements of the common law multi-factor test would be common to such a genuine business test: whether the worker could delegate the work, whether the worker supplies their own tools and equipment, would no doubt be relevant to determining whether the worker is in business for her/himself.

190. Indeed, it is easy to see that many of the elements of the common law multifactor test would be common to such a genuine business test: whether the worker could delegate the work, whether the worker supplies their own tools and equipment, would no doubt be relevant to determining whether the worker is in business for her/himself.

191. The New South Wales Government referred to this test in its submission to the 2005 Inquiry, citing Stewart's work. Professor Stewart himself made a submission to the Inquiry and gave evidence to

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[53] *Independent Contractors Bill* 2006/ *Workplace Relations Amendment (Independent Contractors) Bill* 2006, Second Reading Speech p8

[54] Stewart, Andrews Redefining Employment? Meeting the Challenge of Contract and Agency Labour (2002) at 235 and 261.

it.[55] Yet no mention of it appears in any of the material accompanying these Bills.

192. Another, alternative test could be that deployed in Divisions 84-87 of the *Income Tax Assessment Act* 1997 (Cth), this being the Personal Services Income Test. The primary purpose of this test is to ensure that, inter alia, '… income generated from the supply of personal labour by an entity will be attributed to the individual or individuals who are actually providing that labour, unless once again the entity is a genuine business' (Stewart (2002) at 258). This test was also canvassed in our submission to the 2005 Inquiry, and is discussed by Professor Stewart in detail.[56] The federal minister dismisses this approach as being 'easily manipulated to achieve the desired outcome if a worker is seeking to be classified as an independent contractor rather than an employee'[57] in his second reading speech.

193. The federal government's reliance solely on the common law test despite available alternatives and notwithstanding its failings, and despite the emphasis on the commercial nature of independent contractor arrangements suggests that the federal government has no real interest in protecting workers from hidden employment arrangements.

Legal Issues – Protection from Sham Arrangements

194. The *Workplace Relations Amendment (Independent Contractors) Bill 2006* claims to provide protections from sham independent contracting arrangements, as set out in paragraphs 79-85 above.

195. These provisions create new offences which are designed to address situations where:

- an employer attempts to persuade an employee that her/his existing contract of employment is a contract for services (s900)
- an employer offers an employment contract represented as a contract for services to a prospective worker (s901)
- an employer dismisses or threatens to dismiss an employee in order to (re-)engage the worker under a contract for services (s902).

196. A contractee may evade prosecution under the first two of these provisions if they both acted in good faith and could not have been reasonably expected to know that the contract in question was a contract of employment (ss900, 901).

[55] Submission 69 Committee hearing 26 April 2005 Melbourne.
[56] Ibid, at 258
[57] *Independent Contractors Bills* 2006/ *Workplace Relations Amendment (Independent Contractors) Bills* 2006, Second Reading Speech p4

197. These provisions require a ‘reverse onus of proof’. In other words, once an application has been made, the respondent contractee is required to demonstrate that they acted in good faith and genuinely did not know that the contract in question was in fact a contract of employment, and that they could not reasonably have been expected to know that the contract was an employment contract rather than a contract for services.

198. Prior to doing so however, the applicant must first demonstrate that the contracting arrangement was/would be in fact an employment arrangement, presumably by means of applying the common law test as discussed in paragraphs 87-100 above (proposed ss900(1)(c), 901(1)(c)). If the respondent contractee is able to demonstrate that they either acted in good faith, genuinely believing that contract was a contract for services and could not have been expected to have known otherwise, then no offence is to be found.

199. Thus, in order to mount a successful application under these provisions, the worker would have to:

- convince the court that the contract was, or was intended to be, in fact a contract of service, rather than a contract for services; and
- rebut any claims by the contractee that they either believed that the contract was a contract for services (ss900(2)(a), 901(2)(a)), and that they could not have been reasonably been expected to know that the contract was a contract of employment (ss900(2)(b), 901(2)(b)).

199. Both tasks are onerous for an applicant worker. As the foregoing paragraphs demonstrate, contrived arrangements can survive the common law test, so establishing that a particular contractual arrangement was a contract of service may be difficult. Claims of acting in good faith by an employer may also be difficult to rebut convincingly, absent any compelling evidence to the contrary. Such evidence is likely to be difficult for the worker to obtain unless the contractee is careless or badly advised.

200. It should also be noted that, in many recent cases where the status of a worker has been the focus of litigation, the object of demonstrating employee status has been to allow the worker to sue for unfair dismissal (see, for example, *Damevski v Guidice*, *Advanced Australian Workplace Solutions (AAWS)*. Under the current Work Choices legislative regime, even if the worker was to succeed in demonstrating employee status, unfair dismissal remedies may not be available if the enterprise employs less than 100 employees (WR Act s643(10)). Indeed, this itself may become a matter of considerable litigation if the status of the workers is a matter of controversy.

201. An example may assist in further illustrating the likely operation of these laws in practice. In *Damevski's* case mentioned earlier at paragraph 172, for example, the contractee cleaning company, Endoxos Pty Ltd, and Mr Damevski had an employment relationship prior to Endoxos initiating what it claimed was a contracting arrangement for Mr Damevski to supply cleaning services. Endoxos did so on the advice and with the assistance of MLC Workplace Solutions (MLC)and an associated entity, the Australian Independent Contracting Association (AICA), and submitted to the Court that its intention was to set up a contract for services arrangement with Mr Damevski. This evidence was accepted by the Court, so it seems reasonable to expect that Endoxos, could demonstrate, for the purposes of s900 (2), that it acted in good faith (on the advice of MLC and AICA), and it could not have been reasonably aware that the contract was other than a contract for services. It would thus be likely that the basic finding of the Court (ie that Mr Damevski was in fact an employee) would not change, however any action that Mr Damevski might hypothetically take under s900, for example, would be unlikely to succeed. Further, Mr Damevski's original purpose of obtaining relief for unfair dismissal would be very likely thwarted. This would most likely occur because Endoxos had at the time converted all of its former employees to independent contractors as it had done in Mr Damevski's case, and could therefore argue that it had no employees other than Mr Damevski, which would keep it below the 100 employee limit conferred by s643(10) of the WR Act. The Court's finding regarding Mr Damevski would have no bearing on this point, as the true nature of each contractual relationship between Endoxos and its cleaners would be a matter of fact.

202. In relation to the third of the new offences listed above at paragraph 80, the court's key task is to determine that 'the employer's sole or dominant purpose in dismissing or threatening to dismiss the individual' is to re-engage them as an independent contractor (s902(1)(b)). This section also has a reverse onus of proof, in that it is presumed that the employer's sole or dominant purpose was that in s902 (1) (b), unless the employer proves otherwise (s902 (3)).

203. The worker's task in actions brought under this provision may also be onerous. This in fact may be as much a result of the reverse onus of proof, as much as anything else. The provisions of former Part X of the WR Act contained provisions prohibiting certain types of conduct by employers (eg dismissal of an employee for being a union member or having the benefit of an industrial instrument etc)[58] However, as the case law around these provisions developed, litigation, and in particular the judicial determination of an employer's motivation for taking a particular action became excessively complicated (see, for example *Maritime Union of Australia V CSL Australia Pty Limited*.[59] As such,

[58] These provisions were moved by Work Choices, with some amendments, to Part 16 of the WR Act.
[59] (2002) FCA 513 – 26 April 2002.

reverse onus of proof may not necessarily assist applicant workers if case law develops in the same way.

204. However the requirement that re-engagement as an independent contractor be 'the sole or dominant reason' for dismissal may create the biggest problems for applications under this provision. It would appear to be fairly simple for an employer to create a situation where the change of status was not the sole reason for dismissal: restructuring of the enterprise or financial difficulties may be reasons which prompt a desire to cut labour costs, and the change of status may be a subordinate result of these larger considerations. Challenging such considerations of this kind may be difficult for the applicant, as has already been pointed out in relation to the WR Act's unfair dismissal provisions,[60] as well as in the recent case of threatened terminations at Cowra Abbottior[61] the latter matter involved the current freedom of association provisions in the WR Act, and in particular s792(4), which is constructed similarly to proposed s902.

205. In any event, applications pursuant to ss900-902 will have to be made in either the Federal Court of Australia or the Federal Magistrates' Court. Given the complexity of the issues involved, and the fact these are both cost jurisdictions, the financial resources available to applicants will need to be substantial, possibly to the level demanded by unlawful termination cases under the WR Act (Division 4 Part C). Such resources are unlikely to be available to the majority of employees who these Bills are ostensibly designed to protect.

206. In this context, it is somewhat ironic to note that the Independent Contractors Association (ICA) has recently taken the view that these provisions should be made even less accessible by confining applicants to the 'appropriate federal government authorities', and removing the ability of unions to prosecute sham arrangements.[62]

207. As such, the barriers to effective use of these of the provisions appear to be considerable and they are likely to be of very limited use, if any, to workers seeking redress from unscrupulous employers.

International Labour Organisation

208. The legal approach described in the preceding sections runs directly contrary to that taken by the ILO in its recent *The Employment Relationship Recommendation 2006* adopted at the 95th Session of the International Labour Conference. The measure was approved by a vote of 329 for and 94 against, with 40 abstentions. The

[60] See *Azwar Koya v Port Phillip City Council* AIRC Print PR973045 13 June 2006. This is the first unfair dismissal case decided in regard to the 'operational reasons' exclusion at s649(1) of the WR Act
[61] See http://www.ows.gov.au/asp/index.asp?page=media_releases_ows&cid=5231&id=505; OWS Report Summary and Key Findings.
[62] Workforce, 1547 14 July 2006, p8.

Recommendation is reproduced in full at Appendix A. In its own words, the Recommendation says:

> National policy should at least include measures to… combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status.[63]

And

> For the purposes of the national policy of protection for workers in an employment relationship, the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties.[64]

209. This has not prevented some commentators, and to some extent, the federal Minister, from claiming that the Bills are consistent with the ILO Recommendation, that it 'paved the way' for the Bills[65], or that 'Australia is the first country to move on the…recommendation'.[66]

> From the perspective of Independent Contractors of Australia, Clause 8 is a vindication of our long-fought campaign to secure independent contractors' rights. This has now been achieved in a way that gives us international credibility. Any Australian government, union, political party or academic who claims that independent contractors are not legitimate will have to do so in direct opposition to the 2006 ILO Recommendation.

Further,

> … the broad thrust of the proposed Independent Contractors Act is in accord with this new ILO Recommendation. If the owner-drivers exclusion is removed, the government should be in a position to claim that the Act is consistent with the ILO Recommendation. Section 275 of the Queensland Industrial Relations Act is now clearly illegitimate in relation to the ILO Recommendation, as are the provisions in the New South Wales IR Act that treat independent contractors as employees.[67]

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[63] (ILC95 PR21 Recommendation Cl4(b))
[64] (ILC95 PR21 Recommendation Cll9)
[65] Ken Phillips, ICA Executive Director, WorkForce 1544, 23 June 2006
[66] Gerard Boyce 'Howard gives contractors opt-out clause' AFR 26 June 2006 p63
[67] Independent Contractors Association Press Release 'ILO supports Independent Contractors' 15 June 2006

210. It is difficult to understand how these views can be seriously advanced. At the very least, the clause referred to in the quotes (Clause 8 of the Recommendation) consists of three lines in a five page document. Examination of the document in full and the debate that preceded its passing[68] compels the conclusion that it is intended to protect workers from disguised employment arrangements, rather than protecting those arrangements from the alleged incursions of industrial law, as the federal Minister and the Bills would have it.

Outworkers

211. The proposed Bills introduce the notion of an outworker being a 'contract worker' even though under New South Wales law the worker may be deemed to be an 'employee'. It is the New South Wales Government's view that this dual characterisation will lead to greater confusion amongst clothing suppliers and outworkers as well as providing an added incentive for those suppliers to circumvent the current system. For instance, it will encourage forum shopping by enabling State outworker entitlements to be enforced under state law whereas any proceedings for review of unfair contracts must be instituted under federal jurisdiction.

212. The proposed dual operation of State and Federal jurisdiction will result in State authorised inspectors having the added burden of determining the extent to which clothing suppliers have genuine defences under the principal Bill. Issues regarding possible conflicts between State and Federal legislation will arise, particularly with the Commonwealth having powers under the principal Bill to negate or modify State outworker legislation.

213. As well as this, there are no provisions in the Bill to aid in the enforcement of State outworkers laws such as the issuing of compliance declaration by companies when engaging outworkers. Nor does the Bill require contractors to inform outworkers of their entitlements under the State law. The Bill presupposes that companies will know and comply with the applicable State law when contracting with, or using, outworkers in the performance of work.

214. To complement this, and to aid in the regulation of State outworkers legislation, the New South Wales Government is of the view that the Bill should contain anti-avoidance provisions. These provisions would render void the terms of any 'services contract' which attempted to exclude an outworker from receiving entitlements under State law. Without such provisions, the Bill provides an easy mechanism for unscrupulous companies to evade State law by classifying outworkers

[68] ILO Report V(I) The Employment Relationship and the 5th item on the agenda of the 95th International Labour Conference http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/pr-21.pdf

as 'contract workers' within the meaning of the Bills, when they are deemed employees under New South Wales legislation.

215. It is the New South Wales Government's contention that these Bills will do little to protect outworkers without the proper application of State based outworker legislation. Given the position of outworkers in the contract process, there is a compelling argument that all relevant matters dealing with the engagement and regulation of outworkers should be removed from the jurisdiction established by the Bills and remain a matter for State regulation.

Impact on Women and Young People

216. The preference for independent contractual arrangements, the removal of state law employment deeming provisions and the weakening of unfair contract review mechanisms will seriously undermine the work rights of women.

217. In New South Wales the rate of female participation in the work force has increased by 6.5% to 55.8% in last 10 years while in the corresponding period, male participation has decreased by 2.5%[69]. Despite this increasing participation in the paid workforce, women continue to carry the significant burden of unpaid parenting, caring and household work of Australian families[70]. In order to accommodate the double shift it is necessary to maintain a safety net of employment arrangements that include fair minimum wages and importantly, working conditions that allow women to accommodate their family responsibilities.

218. As a result of interrupted working patterns and the necessity to accommodate their family responsibilities, the paid jobs women undertake are often low paid, low skilled and insecure. Women are particularly over represented in casual employment and reliant on minimum award conditions[71]. As an example, women represent at least 60% of cleaners, of whom the majority are from non-English speaking backgrounds and have dependent children living at home who are under the age of 15 years[72].

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[69] Australian Bureau of Statistics, 6202.0.55.001 Table 04. Labour force status by Sex - New South Wales, June 2006.

[70] Australian Bureau of Statistics, 1370.0 – Measures of Australia's Progress, 2006; Barbara Pocock 2003, Striking the Balance, Human Rights and Equal Opportunity Commission, 2005.

[71] Masterman-Smith, H, May, R, and Pocock, B 2006, *Living Low Paid: Some Experiences of Australian Childcare Workers and Cleaners*, p. 13. (From a project funded by the Australian Research Council and the Brotherhood of St Laurence, Liquor Hospitality and Miscellaneous Workers Union (LHMU), SA Unions, Unions NSW and the Victorian Trades Hall Council.); Buchanan, J 2006, *Low paid employment- a brief statistical profile*, Overheads prepared for press conference on LHMU - Uni of South Aust- ARC, Project on low paid service sector employment, Workplace Research Centre, University of Sydney.

[72] Herod, A., & Ryan, S. (2006). 'Restructuring the architecture of state regulation in the Australian and Aotearoa/ New Zealand cleaning industries and the growth of precarious employment', *Antipode*, Issue 38(3); Ryan, S. (2001). *Taken to the cleaners? The peculiarities of employment relations in the NSW contract cleaning industry*, paper presented at the AIRAANZ conference, January; Australian Bureau of Statistics, unpublished data from the 2001 Census, for occupation code 9111-11 in industry division L7866 cited in *Cleaners and community: united for*

219. While independent contracting is common in highly specialised or technical fields such as medicine, law, information technology and trades, it is also exists across other industries and occupations including largely feminised industries such as nursing, cleaning and clothing outwork.

220. As discussed elsewhere in this submission, the *Industrial Relations Act 1996* deems certain classes of contractors to be employees thereby ensuring eligibility for relevant award entitlements. Examples include clothing outworkers, cleaners and security guards. These provisions ensure that individuals in these relatively low skill, entry level jobs have protection from exploitative arrangements. However, the federal government's proposed Bill will deny contractors in these occupations their status as deemed employees, consequently removing eligibility for fundamental entitlements such as fair wages and family related leave entitlements.

221. The difficulties women face in order to realise wage and condition gains through individual bargaining is well documented[73]. The purported benefits of independent contracting for women, such as increased self directed flexibility with the ability to choose or negotiate working hours and the potential to earn more than as an employee are not reflected in the initial assessment of Australian Workplace Agreements after the commencement of Work Choices. Given the opportunity the immediate response was to lower overall rates of pay and remove working conditions that accommodate family responsibilities[74].

222. There are disadvantages to working as an independent contractor such as job insecurity, no leave entitlements, risk of not being paid, liability for business debts, poor superannuation contributions and limited access to employer provided workers compensation. These disadvantages carry particular risks to female independent contractors who expose themselves to financial insecurity and poverty in retirement given the precarious nature of independent contracting combined with the responsibilities of being the primary carer of a child or dependent relative and other family responsibilities.

223. As well as this, the Bills do not appear to consider or have regard to any potential effects on the engagement of young people. There should

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justice, a joint publication of the Liquor, Hospitality and Miscellaneous Workers Union, Australia and the Service and Food Workers Union, New Zealand, 2006.

[73] See for example: ABS 6306.0 – Employee Earnings and Hours, Australia, May, 2004; Senate Employment, Workplace Relations and Education Legislation Committee, 2004-2005 Additional Senate Estimates Hearing 17 February 2005, Questions on Notice, W160-05. Statistics provided by the Department of Employment and Workplace Relations (DEWR) for December 2005 quarter; B. Pocock, *The Impact of The Workplace Relations Amendment (Work Choices) Bill 2005 on Australian Families*, paper prepared for Industrial Relations Australia, November 2005.

[74] Senate Employment, Workplace Relations and Education Legislation Committee, Estimates (Budget Estimates) Hearing, 29 May 2006, EWRE 98.

be no doubt that this is a relevant issue given the recent experience of fourteen and fifteen year old food vendors at the Melbourne Cricket Ground.[75] In this matter it was claimed that at least two large catering companies in Victoria are being investigated for potential breaches of the law, for employing children under the age of 15 without a permit and as independent contractors.

Confusion regarding the definition of a worker for workers compensation purposes

224. In response to New South Wales stakeholder concern regarding the definition of a worker for compensation and premium purposes, New South Wales has undertaken considerable consultation with small business, employer and union groups over the past 18 months to clarify the definition of a worker.

225. WorkCover, as a result of this process, amended its legislation providing certainty to independent contractors and employers on worker status for premium purposes. This included providing greater clarity by amending the base definition of a worker and allowing WorkCover to make private rulings where an employer is uncertain as to the status of a worker/independent contractor.

226. The changes outlined in the federal government's Independent Contractors Bill will serve to create considerable confusion for State workers and their employers, as an individual may be both a federal independent contractor and a New South Wales worker for workers compensation purposes. The Bill will therefore undo the recent, positive work undertaken by WorkCover and small business, employer and union groups, that has clarified workers compensation responsibilities in New South Wales for employers. Under the federal government's legislation, these workers may end up being classified as independent contractors.

227. A serious consequence of this situation may arise where a New South Wales worker who is an independent contractor under the federal Bill, mistakenly believes that they cannot access New South Wales workers compensation for a workplace injury.

228. Similarly, employers may not obtain workers compensation insurance for New South Wales workers determined to be independent contractors under the federal Bill. As a result, the employer not holding the correct policy may not only have to pay the outstanding premium, but also the applicable penalties and fines for non-compliance. The increased potential for this to happen under the changes proposed in the Bill could result in substantial pressure being placed on the New South Wales Government's Uninsured Liability and Indemnity Scheme

[75] Australian Broadcasting Corporation Transcript 7.30 Report 12 June 2006.

and increase the exposure of employers, workers and independent contractors to risk.

Concern over 'opt-in' provisions and occupational health and safety

229. It is noted that there will be a three-year transitional period to give stakeholders time to adjust to the proposed changes. At any time during the transitional period, a deemed employee (who is an independent contractor at common law) and their employer may agree to 'opt-in' to the federal system where they will be deemed to be an independent contractor under federal legislation (and cannot return to the State system).

230. It is unclear whether the 'opt-in' provision applies to occupational health and safety and workers compensation. The principal Bill creates the potential for more workers to be defined by the federal government as independent contractors. This will shift most of the duty for workplace safety on to the individual. New South Wales is concerned that workplace safety will begin to suffer. This undesirable outcome would be contrary to the New South Wales Government's commitment to providing safer workplaces.

Potential to override NSW workers compensation and OHS laws

231. It is noted that the *Independent Contractors Bill 2006* seeks to exclude certain State and Territory laws that are not 'workplace relations matters', such as workers compensation and occupational health and safety laws. However, Section 10 of the Bill provides that a regulation can override State laws even if those laws are not workplace relations matters. New South Wales is concerned that State workers compensation and occupational health and safety laws that deem persons to be workers could be overridden by a federal government regulation.

232. If the federal government did embark on a legislative path of taking over or overriding State and Territory occupational health and safety and workers compensation legislation, this could result in a major decline in workplace safety standards. This outcome would not be acceptable to New South Wales.

Effects on the Public Sector

233. While many New South Wales public sector agencies are not constitutional corporations and will thus not be significantly affected by the Bills, it appears that the principal Bill may have unforeseen effects in the New South Wales public health system.

234. The principal components of the public health system are area health services which are statutory corporations. Visiting Medical Officers (VMOs) make a major contribution to the delivery of services in the New South Wales public health system. They provide their services under service contracts with area health services.

235. VMOs are not employees at law. Recognising this, Chapter 8 of the Health Services Act 1997 (HSA) currently provides for a collective regime governing the rates and conditions of VMOs, and where necessary, for the arbitration of these rates and conditions. The parties to this regime are the NSW Minister for Health on behalf of the public health system and the AMA (NSW) on behalf of fee-for-service and sessional VMOs.

236. The principal Bill may render these provisions ineffective, by means of the exclusions at proposed s7. This would in turn mean that VMO terms and conditions would become a matter of individual negotiation for each VMO. This would dramatically increase the complexity of administering VMO remuneration and other conditions, and the cost overheads thereof, and mean the loss of a well-established structure for maintaining discipline and harmony in the health system's relationship with these independent contractors for no obvious reason.

237. This statutory framework has minimised the number of individual disputes between VMOs and health services arising in the New South Wales public health system and provided an equitable outcome for all categories of medical specialists.

238. It may also result in the loss of an appeal mechanism for VMOs aggrieved by adverse decisions by area health services in relation to their appointments made under service contracts. It may also render ineffective the protective regime for patients provided by Chapter 8 of the HAS concerning VMOs who sustain charges or convictions for sex or violence offences.

Numbers of Independent Contractors

239. As has been pointed out in paragraph 11 above, the number of independent contractors in the workforce is not well settled. However, reputable estimates point to the figure being around 10 percent of the workforce, with some researchers estimating that the figure is around 6 percent of the workforce.

240. The most recent research from the Productivity Commission indicates that the long term trend is for a reduction, or possibly stagnation, in the number of independent contractors.

241. The fact remains that over 80 percent of the workforce are employees.[76]

242. It is therefore not clear why legislative action is needed to protect the interests of a small minority of workers whose numbers are either

[76] Australian Bureau of Statistics, Labour Force Australia, Catalogue Number 6291.0.55.003 Detailed, Quarterly May 2006.

falling or stagnating. This is said to be necessary because those interests are said or inferred to be under threat, but no evidence in support of this claim has ever been provided.

Why Overturn Simple and Effective New South Wales Laws?

243. The federal government has not made out a convincing or persuasive case for overriding State independent contractor laws as they apply to relevant services contracts. In his Second Reading Speech the federal minister said:

> 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.

244. The New South Wales Government endorses the view that independent contractors should not be subjected to excessive regulation. The Bills, by overriding State independent contractors laws, do little more than remove appropriate regulatory controls on the abuse of superior bargaining power. They provide little in the way of a legislative framework that would encourage and give authoritative guidance to those wishing to enter genuine independent contracting arrangements.

245. The Bills, in fact, impose an additional layer of complexity, particularly in relation to the transitional provisions dealing with the exclusion of State laws deeming contractors to be employees. The proposed Part 5 transitional arrangements establish a 3 year period during which relevant contractors can agree to opt-in to the new jurisdiction. 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 by the operation of proposed s35(8).

Complexity of regulation

246. 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.

247. Some types of contracts entered into after the commencement of the proposed *Independent Contractors Bill 2006* will be subject to relevant State laws while others will not, depending on the satisfaction of certain technical requirements. Contractors can agree to remove themselves from the operation of relevant State laws as they apply to some or all services contracts to which they are bound, but a valid agreement must be in the required form and have the intended effect. Contractors could, during this transitional period, have some contracts regulated by the relevant State law while opting out of the deeming provisions in relation to other contracts.

248. By contrast, the New South Wales laws regulating independent contractor arrangements are simple, effective and take account of specific industry factors and the type of contract labour involved. The previous discussion of the evolution of relevant NSW laws in this area demonstrates the historic role of the New South Wales parliament in adapting the form of regulation to changing industrial and labour market conditions.

249. In particular, workers such as cleaners and clothing trades outworkers receive the legislative protection of deemed employment arrangements as they are identified as belonging to a category of workers vulnerable to exploitation through sham employment arrangements.

250. Certain classes of drivers and commercial carriers are regulated by different statutory arrangement. Under Chapter 6 of the IR Act the IRC is vested with a dispute resolution jurisdiction and the capacity to make contract determinations and agreements providing for remuneration and other entitlements.

251. This protective jurisdiction implicitly recognises the fact that many industry drivers have entered into what are effectively dependent contracting arrangements with larger transport operators possessing superior market and bargaining power. They are not, however, employees as they are owner- drivers in business on their own account.

252. Although many work-related contracts are entered into with a commercial purpose they also have an industrial flavour. While the stated objects of the principal Bill declare that independent contracting is primarily commercial, such arrangements have often been used to circumvent appropriate industrial regulation. As the commentators Jeffrey Phillips and Michael Tooma have observed in relation to the review of contracts on the grounds of unfairness:

> The unfair contracts jurisdiction is concerned with addressing subterfuges regardless of the vehicle which their perpetrators chose … Commercial contracts have historically been a favourite vehicle for such subterfuges. The sale of business contracts in Agius v Arrow Freightways Pty Ltd [1965] AR

(NSW) 77 and Davies v General Transport Development Pty Ltd [1967] AR (NSW) 371 and the sham partnership arrangements in Federated Miscellaneous Workers Union v Wilson Parking (NSW Pty Ltd (1980) AR (NSW) 352 are examples of such commercial arrangements being used to undermine the entitlements of workers.[77]

253. The principal Bill envisages that independent contractors are to be dealt with in stand- alone legislation incorporating the federal unfair contracts review jurisdiction rather than as part of the workplace relations statutory framework. The federal government's failure to adequately recognise the significant role of regulating independent contractors in preventing the subversion of industrial laws potentially compromises the integrity and effectiveness of its statutory scheme of industrial relations regulation.

254. As the relevant discussion in Part 4 of this submission shows the proposed amendments to the WRA inserting a new Pt 22 dealing with so called sham arrangements are of limited effectiveness in preventing the evasion of industrial obligations by employers. It has also been noted at paragraphs 129-131 that the contracts review jurisdiction established by the principal Bill has significant limitations when compared with the broad and flexible New South Wales Chapter 2 Pt 9 unfair contracts legislative scheme.

255. It is of great concern to the New South Wales Government that effective State legislation protecting vulnerable workers will be overridden and replaced by inadequate and misconceived regulatory mechanisms. The Government believes that its legislative scheme in New South Wales appropriately balances:

- the need to protect the commercial integrity and objectives of genuine independent contracting relationships; and
- the public policy requirement that industrial laws and awards are not subverted and avoided by sham arrangements.

Recourse to the Trade Practices Act

256. The Bills do not exclude the operation of the *Trade Practices Act 1974 Cth* (TPA) in relation to relevant services contracts. The TPA may well provide alternative remedies and statutory procedures for independent contractors who are seeking redress for alleged unconscionable dealings. Section 51AA of the TPA provides that a corporation must not in trade or commerce engage in conduct that is unconscionable. The genesis of this provision has been explained in the following terms:

> It was initially generally accepted that the section came into existence solely in order to enhance the equitable cause of

[77] Phillips J and Tooma M op.cit

action known as unconscientious dealing by linking it to the much more extensive remedies and procedures available under the Trade Practices Act.[78]

257. Under s87 of the TPA the Federal Court can declare a contract void in whole or in part or order the refunding of money as well as payment for loss or damage. The extent of the jurisdiction under 51AA is yet to be conclusively determined. Section 51AA can only be invoked where the complaint is not actionable under s51AB (applying to contracts with consumers) or s51AC.

258. Section 51AC prohibits unconscionable conduct by corporations in trade or commerce in the context of relatively small business transactions. It applies to any transaction involving the supply or acquisition of goods or services (other than to listed public companies) where the price does not exceed $3 million dollars or a prescribed amount and the acquisition of such goods or services was for business purposes. The factors that the court may consider in making a determination under s51AC include:

- the relative strengths of the bargaining positions of the parties involved
- the presence of undue influence or pressure
- the market price of the subject matter of the transaction
- comparable treatment with other suppliers of the acquirer of goods and services.

259. Despite its jurisdictional limits the court may have regard to factors that are similar to the considerations that industrial tribunals may take into account in unfair contracts cases. One commentator has suggested that this jurisdiction goes beyond the s51AA statutory remedy to provide a broader basis for reviewing essentially commercial dealings on unconscionability grounds.[79]

260. One of the limitations of the TPA jurisdiction is that it is not equipped to deal effectively with contracts and arrangements that have an industrial flavour because they directly lead to the performance of work in industry. The main concern of the TPA is with violations of ordinary standards of commercial morality rather than whether the contract subverts industrial regulation by imposing a disguised employment relationship or provides a cover for an oppressive use of superior bargaining power. The Federal Court may not be the most appropriate forum to examine work contracts with an industrial flavour when compared with the specialised arbitral expertise of tribunals such as the New South Wales IRC.

[78] Macken, J O'Grady P, Sappideen C, Warburton G, The Law of Employment LawBook Co 2002 p459.
[79] Macken J et al. pp.459-60

A Missed Opportunity

261. As has been set out in the foregoing paragraphs, the Bills fail on several counts:

- they override simple and efficient state deeming provisions for no apparent reason
- they override state unfair contract provisions for no good reason, replacing them with a new narrower and less accessible federal jurisdiction
- they add nothing new or useful to the regulatory framework
- they misrepresent and run contrary to the recent ILO *Proposed Recommendation Concerning The Employment Relationship*

262. However, some criticism should also be reserved for what the Bill does not do.

263. Despite claiming to do so, the Bills fail to engage, in any positive or meaningful way, with the multitude of changes to the modern workforce, or as Professor Katherine Stone puts it, 'the misfits between current labour and employment regulation and new workplace practices'.

264. Instead, the position adopted is one of benign neglect, in the name of assuring,

> … the flexibility to employ or engage as a 'fundamental right'.[80]

265. If anything, the federal Minister's rhetoric suggests a purpose and execution above and beyond what the Bills actually deliver. As the Minister puts it:

> (This) legislation … provides Australians with an even wider range of choices about how they work …[81]

266. The lack of substantive action however, suggests that, apart from extending the reach of federal legislation into state deeming provisions and unfair contract provisions, these Bills are no more than urging and advertising for independent contractor arrangements.

267. Given the level of workplace change referred to above (and elaborated on in more detail in the New South Wales Government Submission to the House of Representatives Inquiry),[82] this makes the Bill a missed opportunity.

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[80] Andrews Second Reading Speech 22 June 2006.
[81] Andrews Second Reading Speech 22 June 2006
[82] NSW Government Submission to the 2005 House of Representatives Inquiry - Parts 1 and 2.

268. The point of departure for the federal government seems to be its stubborn and unyielding attachment to the notion that it is perfectly acceptable for industrial parties to contract out of protective regulation. The current AWA regime has allowed the parties to do exactly that since its inception in 1996, and the Work Choices amendments to the WR Act are designed to make it even easier to contract out of awards and agreements by removing the no-disadvantage test for AWAs.

269. Independent contractor arrangements further extend this ability by permitting a worker to be entirely removed from the system of employment regulation by removing their employee status, and therefore transferring the risks and cost of employment entirely to the worker. In this sense, independent contracting arrangements might be said to be the endpoint of the 'policy continuum' of individual employment arrangements.

270. In fact, the Bills – philosophically at least – appear intended to elevate the freedom to enter such arrangements above all other considerations. The opening and closing words of the Second Reading speech are 'Everyone's life opportunities are diminished by … restrictions on the freedom to work'[83]. Yet the consequences of encouraging these forms of employment are very likely to be bad for workers, as is squarely recognised by the ILO's *Proposed Recommendation Concerning The Employment Relationship,* and indeed as the New South Wales Parliament recognised as long ago as 1959, in inserting the current deeming provisions into state legislation (see paragraph 102).

271. Consequently any legislation in this area must properly serve the public interest by effectively balancing the ability of parties to enter such arrangements as they please against protections from exploitation, and the integrity of the greater body of protective legislation of the industrial relations system at large. Merely encouraging independent contracting arrangements, removing existing state protections, and erecting a few ineffectual safeguards cannot, and does not, meet this requirement.

272. There are no apparently compelling reasons to go down this policy path. If anything, the relatively low numbers of independent contractors, and the fact that the majority of the workforce continue to be employees, would surely give pause to any notion of creating a workforce composed largely or entirely of workers on individual arrangements. Recent OECD research indicating that greater productivity results from collective arrangements[84] would surely have a similar effect.

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[83] *Independent Contractors Bill* 2006/ *Workplace Relations Amendment (Independent Contractors) Bill* 2006, Second Reading Speech p1

[84] OECD Employment Outlook - Boosting jobs and Incomes 2006. See also ABC Radio National PM 15 June 2006 http://www.abc.net.au/pm/content/2006/s1664197.htm also 'Centralised bargaining

273. The ILO *Proposed Recommendation Concerning The Employment Relationship*, properly understood, provides the federal government with a possible way forward on these issues. It has instead decided to proceed in the opposite direction, to protect independent contracting arrangements regardless, rather than the vast majority of employees and employers who choose not to be in such arrangements, and the increasing numbers of workers who fall victim to disguised employment arrangements.

274. The fact that none of these considerations seem to have had any effect on the federal government's determination to pass these Bills strongly suggests that they are little more than an ideological statement with a $15 million price tag.

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reduces unemployment, says OECD' Workplace Express 15 June 2006
http://www.workplaceexpress.com.au/nav?id=31789&no=273226455

CONCLUSION

275. In the New South Wales Government submission to the 2005 House of Representative Inquiry, the conclusion began as follows:

> In summary, the New South Wales Government:
>
> - Recognises that labour hire and independent contracting are legitimate ways of doing business and earning a living (although neither is either as prevalent nor as rapidly expanding a category as has been suggested)
> - Asserts that this is subject to the proviso that any such arrangements be freely entered into with a proper understanding on the part of the participants of the nature and incidents of their relationship
> - Is concerned about the tendency for such arrangements, if not freely entered into, to undermine security of employment and to inappropriately transfer the burden of risk to the worker rather than the person for whom the work is performed
> - Affirms the role of government in protecting persons who enter into such arrangements with limited information or misunderstanding of how the relationship will operate
> - Achieves this beneficial goal in this state by a variety of means, including:
>   - both general and specially tailored legislative provisions, including the definition of 'employee', expanding the category of employee by deeming certain classes of 'at risk' workers to also be employees, and providing remedies for workers in unfair or exploitative relationships including:
>   - unfair contract provisions which provide a remedy where the contract avoids the provisions of an industrial instrument.
>   - contract carriers provisions which create a special jurisdiction for dealing with the needs of that industry
>   - provisions designed to prevent the exploitation of clothing outworkers.
>   - by maintaining an independent umpire, the Industrial Relations Commission, which is able, after hearing from the parties about the needs of particular industries or occupations, to craft acceptable and

lasting settlements on how these issues should be dealt with through awards and agreements

- Confirms that as the labour market evolves and new forms of employment emerge, this legislative and arbitral framework also needs to evolve to address new issues, without abandoning the core commitment to a fair go for all workers and employers.[85]

276. The New South Wales Government sees no reason to alter these views in relation to the subject Bills, and confirms our earlier views accordingly.

277. To this we would add the following:

- It is difficult to find any reputable research which puts the number of Independent Contractors operating in Australia beyond 10 percent of the workforce (or around a million workers).
- The limitations of relying solely on the common law approach are well documented. The New South Wales Government believes this limited approach is questionable in both policy and practical terms. The federal government's persistence is all the more remarkable given the alternatives that have been proposed by commentators.
- Leaving aside the exclusion of state deeming provisions (as they apply to constitutional corporations), the overall effect of the Bills introduce little that is new. In fact, the Bills impose an additional layer of complexity, particularly in relation to the transitional provisions dealing with the exclusion of state deeming provisions.
- The barriers to effective use of the protection from sham arrangements provisions appear to be considerable and they are likely to be of very limited use if any, to workers seeking redress from unscrupulous employers.
- The legal framework runs directly contrary to that taken by the ILO in its recent *Employment Relationship Recommendation 2006*.
- The federal government has not made out a convincing or persuasive case for overriding State independent contractor laws as they apply to relevant services contracts.

[85] NSW Government Submission to the 2005 House of Representatives Inquiry - pp 51-52

- The New South Wales Government endorses the view that independent contractors should not be subjected to excessive regulation. The proposed Bills do little more than remove appropriate regulatory controls on the abuse of superior bargaining power.

- The changes outlined in the Commonwealth Government's Independent Contractors Bill will serve to create considerable confusion for State workers and their employers, as an individual may be both a Commonwealth independent contractor and a New South Wales worker for workers compensation purposes. The Bill will therefore undo the recent, positive work undertaken by WorkCover and small business, employer and union groups, that has clarified workers compensation responsibilities in New South Wales for employers.

- The Bills will have unforseen consequences for the work arrangements of Visiting Medical Officers in the New South Wales health system

278. The New South Wales Government's view is that the Bills are neither necessary nor appropriate, and that, like other Work Choices legislation, they are the wrong strategy for dealing with the issues faced by today's Australian workplaces. There is absolutely no reason to override the simple and effective NSW unfair contracts and deeming provisions and the NSW Government rejects this legislative attempt to do so in the strongest possible terms.

279. In the New South Wales Government's submission, the Committee should similarly recommend the rejection of both Bills.

APPENDIX A

TEXT OF THE EMPLOYMENT RELATIONSHIP RECOMMENDATION 2006

I. NATIONAL POLICY OF PROTECTION FOR WORKERS IN AN EMPLOYMENT RELATIONSHIP

1. Members should formulate and apply a national policy for reviewing at appropriate intervals and, if necessary, clarifying and adapting the scope of relevant laws and regulations, in order to guarantee effective protection for workers who perform work in the context of an employment relationship.

2. The nature and extent of protection given to workers in an employment relationship should be defined by national law or practice, or both, taking into account relevant international labour standards. Such law or practice, including those elements pertaining to scope, coverage and responsibility for implementation, should be clear and adequate to ensure effective protection for workers in an employment relationship.

3. National policy should be formulated and implemented in accordance with national law and practice in consultation with the most representative organizations of employers and workers.

4. National policy should at least include measures to:

   (a) provide guidance for the parties concerned, in particular employers and workers, on effectively establishing the existence of an employment relationship and on the distinction between employed and self-employed workers;

   (b) combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status, noting that a disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee, and that situations can arise where contractual arrangements have the effect of depriving workers of the protection they are due;

   (c) ensure standards applicable to all forms of contractual arrangements, including those involving multiple parties so that employed workers have the protection they are due;

   (d) ensure that standards applicable to all forms of contractual arrangements establish who is responsible for the protection contained therein;

(e) provide effective access of those concerned, in particular employers and workers, to appropriate, speedy, inexpensive, fair and efficient procedures and mechanisms for settling disputes regarding the existence and terms of an employment relationship;

(f) ensure compliance with, and effective application of, laws and regulations concerning the employment relationship; and

(g) provide for appropriate and adequate training in relevant international labour standards, comparative and case law for the judiciary, arbitrators, mediators, labour inspectors, and other persons responsible for dealing with the resolution of disputes and enforcement of national employment laws and standards.

5. Members should take particular account in national policy to ensure effective protection to workers especially affected by the uncertainty as to the existence of an employment relationship, including women workers, as well as the most vulnerable workers, young workers, older workers, workers in the informal economy, migrant workers and workers with disabilities.

6. Members should:

(a) take special account in national policy to address the gender dimension in that women workers predominate in certain occupations and sectors where there is a high proportion of disguised employment relationships, or where there is a lack of clarity of an employment relationship; and

(b) have clear policies on gender equality and better enforcement of the relevant laws and agreements at national level so that the gender dimension can be effectively addressed.

7. In the context of the transnational movement of workers:

(a) in framing national policy, a Member should, after consulting the most representative organizations of employers and workers, consider adopting appropriate measures within its jurisdiction, and where appropriate in collaboration with other Members, so as to provide effective protection to and prevent abuses of migrant workers in its territory who may be affected by uncertainty as to the existence of an employment relationship;

(b) where workers are recruited in one country for work in another, the Members concerned may consider concluding bilateral agreements to prevent abuses and

fraudulent practices which have as their purpose the evasion of the existing arrangements for the protection of workers in the context of an employment relationship.

7. National policy for protection of workers in an employment relationship should not interfere with true civil and commercial relationships, while at the same time ensuring that individuals in an employment relationship have the protection they are due.

II. DETERMINATION OF THE EXISTENCE OF AN EMPLOYMENT RELATIONSHIP

8. For the purposes of the national policy of protection for workers in an employment relationship, the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties.

9. Members should promote clear methods for guiding workers and employers as to the determination of the existence of an employment relationship.

10. For the purpose of facilitating the determination of the existence of an employment relationship, Members should, within the framework of the national policy referred to in this Recommendation, consider the possibility of the following:

    (a) allowing a broad range of means for determining the existence of an employment relationship;
    (b) providing for a legal presumption that an employment relationship exists where one or more relevant indicators is present; and
    (c) determining, following prior consultations with the most representative organizations of employers and workers, that workers with certain characteristics, in general or in a particular sector, must be deemed to be either employed or self-employed.

11. For the purposes of the national policy referred to in this Recommendation, Members may consider clearly defining the conditions applied for determining the existence of an employment relationship, for example, subordination or dependence.

12. Members should consider the possibility of defining in their laws and regulations, or by other means, specific indicators of the existence of an employment relationship. Those indicators might include:

(a) the fact that the work: is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials and machinery by the party requesting the work;

(b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker.

13. The settlement of disputes concerning the existence and terms of an employment relationship should be a matter for industrial or other tribunals or arbitration authorities to which workers and employers have effective access in accordance with national law and practice.

14. The competent authority should adopt measures with a view to ensuring respect for and implementation of laws and regulations concerning the employment relationship with regard to the various aspects considered in this Recommendation, for example, through labour inspection services and their collaboration with the social security administration and the tax authorities.

15. In regard to the employment relationship, national labour administrations and their associated services should regularly monitor their enforcement programmes and processes. Special attention should be paid to occupations and sectors with a high proportion of women workers.

16. Members should develop, as part of the national policy referred to in this Recommendation, effective measures aimed at removing incentives to disguise an employment relationship.

17. As part of the national policy, Members should promote the role of collective bargaining and social dialogue as a means, among others, of finding solutions to questions related to the scope of the employment relationship at the national level.

III. MONITORING AND IMPLEMENTATION

18. Members should establish an appropriate mechanism, or make use of an existing one, for monitoring developments in the labour market and in the organization of work, and for formulating advice on the adoption and implementation of measures concerning the employment relationship within the framework of the national policy.

19. The most representative organizations of employers and workers should be represented, on an equal footing, in the mechanism for monitoring developments in the labour market and the organization of work. In addition, these organizations should be consulted under the mechanism as often as necessary and, wherever possible and useful, on the basis of expert reports or technical studies.

20. Members should, to the extent possible, collect information and statistical data and undertake research on changes in the patterns and structure of work at the national and sectoral levels, taking into account the distribution of men and women and other relevant factors.

21. Members should establish specific national mechanisms in order to ensure that employment relationships can be effectively identified within the framework of the transnational provision of services. Consideration should be given to developing systematic contact and exchange of information on the subject with other States.

IV. FINAL PARAGRAPH

22. This Recommendation does not revise the Private Employment Agencies Recommendation, 1997 (No. 188), nor can it revise the Private Employment Agencies Convention, 1997 (No. 181).

APPENDIX B

Hypothetical Case Studies

Deeming Provisions

Joan is a cleaner who works for a large cleaning company. Joan is a vulnerable worker from a non-English speaking background with little bargaining power in relation to her working conditions. Under New South Wales industrial relations laws Joan is considered (deemed) to be an employee as she comes within an identified category of workers where sham independent contracting arrangements are common.

As Joan receives statutory protection as an employee she can access the entitlements available under the Cleaning and Building Services Contractors (State) Award. Her employer, a corporation, believes she is a sub- contractor even though she is not in business on her own account, receives a time rate of pay and does not supply her own cleaning equipment.

It would be very expensive and difficult for Joan to access the courts to confirm her common law employee status. This is what she will be forced to do under the proposed independent contractor legislation. She will be stripped of the statutory and award protections currently available under NSW industrial relations laws. At the end of the 3 year transitional period the employment relationship will be terminated by force of law without her consent or indeed the consent of her employer. She will have no remedy under the federal jurisdiction and be precluded from taking any action in the State Commission for reinstatement or in the courts for breach of contract. Not even the minimum conditions of employment of the AFPCS will apply.

Unfair Contracts

Alex is a nanny engaged by an incorporated family business to provide care and supervision for three children. While she is provided with board and lodging, she works extremely long hours for very little pay and is required to be available at all times of the day and night – and unable to enjoy any personal time.

The proposed Independent Contractors Bill would prevent Alex applying to the State Industrial Relations Commission to have her contract for services varied or declared void. Worse still, because she is performing work of a private/domestic nature, she would not be eligible to lodge an application with the proposed National Services Contract Review Scheme either. This means that Alex would not have access to a remedy of any description, despite being subjected to unconscionable working conditions.