

Submission

to

Senate Employment, Workplace Relations and Education
Legislation Committee

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

Submitter: State of Victoria
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Part 1 - Introduction

Victoria's 2005 Submission

1. Victoria welcomes the opportunity provided by the Senate Employment, Workplace Relations and Education Legislation Committee to make a submission in response to the Independent Contractors Bill 2006 (**the IC Bill**). In May 2005 Victoria made a Submission to the House of Representatives Committee *Inquiry into Independent Contracting and Labour Hire Arrangements*. Victoria repeated its submission to the Departmental review also conducted in May 2005. ("**the 2005 Submission**").
2. In its 2005 Submission, Victoria strongly opposed any steps by the Commonwealth to override Victorian laws dealing with vulnerable groups of workers. In particular, Victoria urged that the Commonwealth not override the *Outworkers (Improved Protection) Act 2003 (Vic)*. Victoria also submitted that the proposed IC Bill should be expressed to operate concurrently with the laws of the States, and not exclude the operation of State laws that were aimed at persons falling outside the common law definition of employment. Victoria submitted that this field of small business regulation was traditionally and appropriately a matter for the States, and that any action by the Commonwealth to use the corporations power to override such State laws would be an extreme proposition. The submission referred to the *Small Business Commissioner Act 2003 (Vic)* and the *Fair Trading Act 1999 (Vic)* as state laws that should be expressly preserved.

Owner Drivers and Forestry Contractors Act 2005 (Vic)

3. Victoria also urged that the Commonwealth not exclude the *Owner Drivers and Forestry Contractors Act 2005 (Vic)* (**ODFC Act**). The ODFC Act applies to owner drivers in the transport industry and to harvesting and haulage contractors in the forestry industry. These are small businesses that provide significant capital assets. The ODFC Act was made after extensive research and clear evidence of market failure. The ODFC Act is broadly modelled on retail tenancies legislation and:
 - Provides for information products to be provided to these small businesses;
 - Provides for low cost commercial mediation by the Small Business Commissioner and determination by the Victorian Civil and Administrative Tribunal; and
 - Proscribes unconscionable conduct and certain harsh business practices.
4. The ODFC Act is clearly a law that deals with small businesses *as businesses*. It uses a framework of commercial laws and institutions, not an industrial or employment based framework. The Victorian Government is advised on the Act by representative industry councils. The Act has the endorsement of industry representatives of both the owner drivers and their hirers, who are keen to see a fair and efficient market for transport.
5. Victoria welcomes the Commonwealth's decision to include the ODFC Act within clause 7(2) as a state law that is not excluded, and strongly supports the maintenance of this position. Victoria will willingly participate in the national review proposed by Minister Andrews on owner driver laws.

6. Victoria's key concerns over the IC Bill are that the complex exclusionary and savings provisions contained in clauses 7 and 8 of the IC Bill may operate to override State legislative protections that are not expressed in the Explanatory Memorandum as intended to be excluded. In particular, the IC Bill as drafted:

- Appears to override key protections for textile, clothing and footwear (TCF) outworkers under the *Outworkers (Improved Protection) Act 2003* (Vic); and
- Appears to override provisions of the *Fair Trading Act 1999* (Vic) that allow small businesses to access a small claims jurisdiction.
- Fails to provide a simple and low cost means of obtaining a declaration from the Federal Magistrate's Court on the status of a particular working arrangement, that is, whether or not it is employment.

7. This submission is in five parts:

Part 1 – Introduction

Part 2 – Sham Contracting

Part 3 – Impact of the Bill on Outworker Protection Laws

Part 4 – Drafting- Excluded State Laws

Part 5 – Impact of the Bill on Fair Trading Laws

Appendix – Summary of Recommendations

Part 2 – Sham Contracting

- 7 In the 2005 Submission, Victoria submitted that protections to prevent sham contracting relationships would be welcome and necessary. There have been a number of recent examples of exploitative and blatant sham arrangements that demonstrate the need for such protections.
- 8 Victoria again submits that in addition to any civil penalty provision, there should be a simple and inexpensive mechanism for individual workers or employers to seek a declaration from a Court as to their employment status. Victoria continues to urge that the Bill be amended to provide such a mechanism. Such a mechanism will provide certainty for both employers and workers on the lawfulness of their arrangements.

Recommendation 1:

That the Federal Magistrate's Court be given a specific jurisdiction to make a declaratory judgement as to whether a worker is an employee or an independent contractor as defined in the Act. Application may be made to the Court by an affected person, their organisation, the Department, or any other person with a proper interest in the matter.

Part 3 – Impact of the Bill on Outworker Protection Laws

- 9 As presently drafted, the IC Bill radically alters the status quo in Victoria by removing the operation of Victorian laws which go far beyond the federal law in providing protections to clothing outworkers. Whilst the Explanatory Memorandum accompanying the IC Bill states that the exclusion provisions operate to *preserve* state and territory laws that affect outworkers who are party to a services agreement, the provisions of the IC Bill clearly do *not* achieve that end.
- 10 Pursuant to the savings provision in clause 7(2)(a) of Part 2 of the IC Bill, clause 7(1) (exclusion of state and territory laws) provides:
- “...does not apply in relation to ... a law of a State... to the extent that the law:
- (i) applies to a services contract to which an outworker is a party;
 - (ii) makes provision, other than as mentioned in paragraph 1(c), in relation to such a contract.”
- 11 The curious wording of clause 7(2) (a) makes it far from certain as to which Victorian laws are excluded by clause 7(1) of the IC Bill. The *Outworkers (Improved Protection) Act 2003 (Vic) (O(IP)Act)* was enacted to provide statutory protection to outworkers working in the clothing, textile and footwear industry. The evidence of exploitation of outworkers in this industry is incontrovertible, including extremely low rates of pay, serious health and safety problems and non-payment of outworkers by the intermediary companies in the supply chain.
- 12 The O(IP)Act seeks to redress the vulnerable position of outworkers by applying the benefits of certain Victorian laws to them through a definitional device of “deeming” them to be employees for the purpose only of those laws. Clearly, this does not alter the common law status of outworkers or their status under any other legislation, such as federal taxation laws. The “deeming” mechanism is simply a definitional mechanism of achieving an outcome to extend the protections of certain state laws to outworkers, such as the *Long Service Leave Act 1992 (Vic)*, the *Occupational Health and Safety Act 1985 (Vic)* and the *Public Holidays Act 1993 (Vic)*.
- 13 The Act then provides a means of pursuing claims for unpaid remuneration and for liability for unpaid income to be assumed by the principal contractor in the manufacturing chain. The outworker’s legislation established the Ethical Clothing Trades Council, made up of representatives of outworkers, industry and community interests to advise the government on the implementation of the Act and industry issues generally. Activities of the Council include advising the Minister, monitoring compliance with the Act, and advising on a mandatory code of industry standards.
- 14 It appears however, that the mechanism by which the Commonwealth has purported to preserve the operation of state outworker laws will, in effect, operate to *exclude* significant aspects of the O(IP)Act, leaving outworkers in a far more vulnerable position than is the case under State law. Those aspects of the O(IP)Act which, it could readily be argued, fall outside the saving provision in 7(2)(a), because they do not fall within the characterisation of a law that “applies to” and “make provision in relation to” a services contract, are:

- a) Section 6 of the O(IP) Act which provides for an outworker to claim unpaid remuneration from an “apparent employer” – in circumstances where the apparent employer is not the other party to the services contract.
- b) Similarly, section 12 of the O(IP) Act which makes a principal contractor liable for payment of remuneration owed by a sub-contractor to the (subcontractor) outworkers.
- c) Section 14A of the O(IP) Act which confers an entitlement on an outworker to the same benefits, terms and conditions as would apply under a Federal Award as if the Federal Award applied and the outworker were an employee, is unlikely to be a law that “applies to a services contract” or “makes provision in relation to such a contract”. To the contrary, such a provision is more probably construed as a State law that establishes a statutory right to certain benefits, which may be recovered by the outworker in proceedings under the O(IP) Act.
- d) Section 25 of the O(IP) Act which makes it an offence not to comply with a “mandatory code of practice” creates a statutory obligation enforceable as an offence, but is unlikely to be a law that “ makes provision in relation to a services contract”.
- e) Parts of Divisions 1 & 2 of Part 4 of the O(IP) Act which create rights of entry and inspection for information services officers and union officials;
- f) Section 50 of the O(IP) Act which creates an offence of victimisation of an outworker.
- g) Part 4 of the O(IP) Act, insofar as it provides for the recovery of money owed to an outworker by a person not a party to a services contract or for an amount not owed pursuant to the terms of the services contract eg) amounts owed under 14A of the O(IP) Act.

15 Arguably therefore, the effect of clause 7 of the IC Bill is to exclude the operation of most of the provisions of the O(IP) Act in its application to the parties to a “services contract” within the meaning of the Bill.

Recommendation 2:

To ensure certainty and clarity, and given the express intention of the Commonwealth to preserve the operation of state and territory laws with respect to outworkers as expressed in the Explanatory Memorandum:

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

16 In the absence of such amendments, the protections afforded to Victorian outworkers will be radically reduced by the IC Bill. Currently, Part 22 of the *Workplace Relations Act 1996* provides a limited mechanism to enable outworkers to recover a minimum rate of pay from their principal (referrable to the amount payable under the Australian Fair Pay and Conditions Standard), but expressly preserves the concurrent operation of

the Victorian Act which goes far beyond the federal law in providing protections to outworkers. Preservation of the concurrent operation of the O(IP)Act has not been carried over into Part 4 of the IC Bill.

- 17 There has been no indication from the Commonwealth that it intended to radically reduce the protections afforded to Victorian outworkers, and to do so appears contrary to the intention expressed in the Explanatory Memorandum which confirms the need to maintain special arrangements for textile, clothing and footwear outworkers.
- 18 In Victoria's submission the recommended amendments are critical and can be readily made to maintain the status quo of protections afforded these most vulnerable of workers.

Part 4: Drafting - excluded state laws

- 19 Victoria is concerned that the provisions in the IC Bill which purport to preserve the operation of state and federal laws are, at best, unclear, and due to the broad description of the subject field intended to be covered, appear to inadvertently override some State laws. Presently, the interaction between the excluding provisions in clauses 7(1)(a) and (b) of the IC Bill in respect of "workplace relations matters" and the exclusions *from* the definition of "workplace relations matters" in clause 8(2) of the Bill, is far from clear.
- 20 Victoria notes that the Commonwealth has enunciated an intention to override long-standing Queensland and New South Wales unfair contracts laws. While Victoria does not support this objective, it could be achieved by expressly nominating and overriding particular State laws, rather than attempting to stake-out a very broad subject matter field that in fact goes beyond the subject matter and intention of the Bill. The current drafting of sections 7 and 8 is unduly complex and confusing.

Recommendation 3:

In the interests of clarity, clause 7 should be amended to make it clear that subclauses 7(1)(a) and (b) of the IC Act do not apply to State and Territory laws to the extent they deal with the matters listed in clause 8(2) of the Bill.

Part 5 – Impact of the Bill on fair trading laws

- 21 All States and Territories have fair trading statutes which reflect to varying degrees, and extend the application of, Federal consumer protection laws under the *Trade Practices Act 1974* (Cth). In Victoria, this is the *Fair Trading Act 1999* (Vic) (**the FT Act**). This Act has been in place for many years, and has not been used in any manner to regulate independent contractors in the manner impugned by the IC Bill, that is, as if they were employees. The Fair Trading Act is designed to, and has operated to, provide a fair business environment and to assist businesses (as businesses, not as employees) to resolve disputes.

22 Fair trading laws operate at both a State and Federal level to deal with the potential vulnerability of businesses in dealings with their trading partners, using mechanisms including unfair contract review, powers to declare void or to vary unjust contracts, measures to address unconscionable conduct and prescription in relation to industry specific harsh commercial terms and business practices. The FT Act applies to all business and trading contracts, including to “independent contractors” and “service contracts” as defined by the IC Bill. In summary, relevant provisions of the FT Act include:

a) “Services” to which the *Fair Trading Act 1999* applies

The definition of “services” for the purposes of the FT Act, includes any rights, benefits and privileges that are to be provided, granted or conferred in trade or commerce, including under a contract for or in relation to the performance of work (including work of a professional nature, but not including rights or benefits being the performance of work under an employment contract) (s.3). This includes services provided by “independent contractors”.

b) Unconscionable conduct

Section 8A of the FT Act provides protections for small business suppliers of goods or services (including independent contractors) against unconscionable conduct by the acquirer of those services. This provision mirrors section 51A of the *Trade Practices Act 1974* (Cth). Section 8A(4) lists matters to which the court or the Victorian Civil and Administrative Tribunal (VCAT) may have regard. These include the relative strengths of their bargaining positions, whether undue influence or pressure was applied, the amount for which the “small business supplier” could have supplied identical services to another person, the requirements of applicable industry codes, and the extent to which the “acquirer” was willing to negotiate.

c) Misleading and deceptive conduct in relation to working arrangements

Section 9 of the FT Act prohibits a person, in trade and commerce, engaging in misleading or deceptive conduct. Section 13 of the FT Act makes it an offence for a person, in relation to employment, to engage in conduct that is liable to mislead persons seeking the employment as to the availability, nature, terms and conditions of, or any other matter relating to, the employment. Where a breach is found, the Court is empowered under s158 to make certain orders (see below).

d) “Consumer / trader” and “trader/ trader” disputes

There are two special procedures provided by the FT Act that would allow at least some disputes involving independent contractors and those who engage them to be dealt with by the Victorian Civil and Administrative Tribunal. These provisions originally derived from what was originally the *Small Claims Act 1973* (Vic).

“Consumer / trader disputes”

Part 9 of the of the FT Act establishes a small claims for “consumer and trader disputes”, including disputes or claims arising between a purchaser of services and supplier of services. In hearing and determining such a dispute, orders that VCAT

may make include orders for payment of an amount for money owing, damages, or restitution, orders to vary any term of a contract, to declare terms of a contract void, for specific performance or rescission of a contract, and declaring that a debt is or is not owing (s.108).

“Trader / trader disputes”

In addition, the “trader/ trader” disputes allow VCAT to determine disputes between a purchaser and supplier of services in trade and commerce. The jurisdiction is limited to where the claim for payment or performance of work is for an amount not exceeding \$10,000. VCAT may make any order it considers fair, including declaring void any unjust term of a contract or otherwise varying a contract to avoid injustice (s.109). This jurisdiction would cover for example, a dispute between an independent contractor (eg a painter) and his or her hirer (eg another business).

The Tribunal can make a wide range of orders, in either the supplier or the acquirer’s favour, including: ordering money be paid (eg a debt), varying or voiding a contract or terms to avoid injustice, rescission, rectification or variation of terms of a contract, and orders that a person do or not do something. In determining such a dispute, the Tribunal may have regard to the factors listed in s109 of the *Fair Trading Act 1999* (Vic). These criteria include: the intelligibility of the contract, the extent to which the term was explained, the relative bargaining power of the parties to the contract, whether the party obtained independent legal advice, whether unfair pressure, undue influence or unfair tactics were used to obtain the relevant party’s consent, whether the term is unconscionable, harsh or oppressive and range of like matters

e) Powers of the Court, Tribunal and the Director of Consumer Affairs

Pursuant to section 158 of the FT Act, if the Court finds a person has committed an offence against or contravention of the FT Act and as a result another person has suffered loss or damage, the court may make any order that it considers fair, including orders that the whole or part of a contract between the persons or any collateral agreement is void, or that the contract is varied as specified, and orders to pay damages.

A range of powers is vested in the Director of Consumer Affairs under the FT Act in relation to the above jurisdictions including:

- Advise, receive complaints, conduct education campaigns, conduct research and report to the Minister (s100).
- Investigate breaches of the FT Act (including compulsive powers to require the production of information and documents) (Part 8, Division 4).
- Conciliation of disputes involving a matter of public interest (s104).
- The power to commence proceedings on behalf of a person (ss105, 106) and to prosecute (Part 11, Division 3), or to accept undertakings (s146).

Exclusion of provisions of the FT Act by the IC Bill

23 Aspects of the FT Act are seemingly excluded by the IC Bill, as they fall within the description of either:

- “State and territory laws” in clause 7(1)(b) of the IC Bill; or
- Clause 7(1)(c), as providing for the whole or part of a services contract to be void or set aside, amended or varied on an “unfairness ground” that the contract is

unfair, harsh or unconscionable or unjust. (See s108, 109, 8A and 158 of the FT Act as described above).

- 24 However, pursuant to clauses 8(2)(k) and 9(2) of the IC Bill, clause 7(1) will not apply to the FT Act to the extent that the FT Act deals with “consumer rights”. The Explanatory Memorandum gives the *Fair Trading Act 1987 (WA)* as an example of a law that would fall within clause 8(2)(a) being a law relating to “consumer protection” (EM para.43). Given the similarities between the *Fair Trading Act 1987 (WA)* and the FT Act, it is accepted that the reference in clause 8(2) to laws dealing with “consumer rights” is similarly intended to preserve the operation of the FT Act.
- 25 However, Victoria notes that in common usage, the term “consumer rights” may generally be understood to mean consumer protection laws only in as much that these laws regulate the rights of *domestic* purchasers of goods and services. If narrowly construed, the reference to “consumer rights” in clause 8(2) may not extend to the broader notion of “consumer protection” laws as laws having general application to both purchasers and suppliers of goods and services in a business to business context (in trade and commerce) that would be familiar to those with an understanding of the origins of laws such as the TP Act and the FT Act.
- 26 There seems to be no logical reason to exclude “independent contractors” from laws which provide benefits, protections and dispute resolution for businesses generally. This would have the unusual and unexpected outcome of treating independent contractors, the smallest and thus perhaps the most vulnerable businesses, in a *less* favourable way than larger businesses are treated under Victoria’s fair trading regime. This would be a incongruous outcome.

Recommendation 4:

In the interests of clarity, and in order to give effect to the intent of the drafters as expressed in the Explanatory Memorandum, the Bill should be amended to:

- a) Make explicit that State and Territory fair trading laws are not caught within the description of excluded of State laws set out in subclauses 7(1)(a), (b) or (c);
- b) “Fair trading” should be listed as matter in clause 8(2) of the Bill;
- c) The *Fair Trading Act 1999 (Vic)* should be listed in clause 7(2)(b) as a law that is not overridden by the IC Bill.

Dated: 24 July 2006

APPENDIX

SUMMARY OF RECOMMENDATIONS BY THE STATE OF VICTORIA

Recommendation 1: Sham contracting

That the Federal Magistrate's Court Industrial Court be given a specific jurisdiction to make a declaratory judgement as to whether a worker is an employee or an independent contractor as defined in the Act. Application may be made to the Court by an affected person, their organisation, the Department, or any other person with a proper interest in the matter.

Recommendation 2: Outworkers protection

To ensure certainty and clarity, and given the express intention of the Commonwealth to preserve the operation of state and territory laws with respect to outworkers as expressed in the Explanatory Memorandum:

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

Recommendation 3: "Public interest" laws

In the interests of clarity, clause 7 should be amended to make it clear that clause 7(1)(a) and (b) of the IC Act do not apply to State and Territory laws to the extent they deal with the matters listed in clause 8(2) of the Bill.

Recommendation 4: Fair trading laws

In the interests of clarity, and in order to give effect to the intent of the drafters as expressed in the Explanatory Memorandum, the Bill should be amended to:

- a) Make explicit that State and Territory fair trading laws are not caught within the description of excluded of State laws set out in subclauses 7(1)(a), (b) or (c);
- b) "Fair trading" should be listed as matter in clause 8(2) of the Bill;
- c) The *Fair Trading Act 1999 (Vic)* should be listed in clause 7(2)(b) as a law that is not overridden by the IC Bill.