Submission

to

Senate Employment, Workplace Relations and Education
Legislation Committee

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

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Australian Government

Department of Employment and Workplace Relations

Senate Employment, Workplace Relations and Education Legislation Committee

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Submission by the Department of Employment and Workplace Relations

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1. Overview

The Independent Contractors Bill 2006 (the Principal Bill) and the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006 (the Amendment Bill) were introduced into the House of Representatives on 22 June 2006. The legislation was referred to the Senate Employment, Workplace Relations and Education Legislation Committee (the Committee) and the Committee has invited submissions from interested parties to comment on the provisions of the legislation.

To assist with the Committee's inquiry, the Department of Employment and Workplace Relations' (the Department's) submission outlines the Australian Government's policy objectives and addresses the main provisions of the Bills.

Scope of legislation

The Principal Bill recognises and protects the unique position of independent contractors in the Australian workplace and economy by supporting the freedom of independent contractors to enter into arrangements outside the framework of workplace relations laws. This will be achieved by:

(a) excluding certain State and Territory laws which seek to limit the ability for genuine independent contractors to enter into commercial agreements or which seek to draw independent contractors into the net of workplace relations regulation;

(b) providing a transitional scheme for workers deemed by State or Territory laws to be employees; and

(c) providing a national services contract review mechanism for independent contractors.

Significantly, the Principal Bill retains existing protections under State legislation for contracted outworkers in the textile, clothing and footwear (TCF) industry. In addition, where contracted TCF outworkers are not covered by a State or Territory law providing for some form of minimum remuneration, they will be covered by the wages guarantee in the Australian Fair Pay and Conditions Standard.

Existing protections under State legislation will also be retained for owner-drivers in the road transport industry in Victoria and New South Wales.

It is also important to note that the Principal Bill will only exclude State and Territory laws in regard to workplace relations matters. The Principal Bill will not interfere with non-workplace relations matters in State or Territory laws. Non-workplace relations matters include taxation, workers' compensation, occupational health and safety and superannuation and any definition of an employee for the purposes of those matters.

The Amendment Bill will complement the Principal Bill by prohibiting sham contracting arrangements where employers seek to disguise the employer/employee

relationship as an independent contracting relationship and thereby avoid the legal entitlements that are due to employees.
Under the Amendment Bill, employers who set up sham arrangements can be penalised for their wrongful conduct. The Amendment Bill also introduces penalties against employers who threaten or deceive employees so that they become independent contractors. These penalties are significant and they reflect the Government's belief that people should be able to choose their working arrangements and that this choice should be genuine.

The Amendment Bill will:

(a) insert a new Part into the *Workplace Relations Act 1996* (the WR Act) that prohibits sham employment arrangements and provides penalties where sham arrangements do occur;

(b) make consequential and transitional amendments relating to TCF outworkers; and

(c) provide consequential amendments relating to unfair contracts in the WR Act and the *Building and Construction Industry Improvement Act 2005* (the BCII Act).

Independent contractors and labour hire arrangements

The Principal and Amendment Bills do not specifically apply to labour hire, although some labour hire arrangements operate under independent contracts and will therefore be covered by measures contained in the Bill. The Department will play a key role in the development of an industry based voluntary code of practice for the labour hire industry. A voluntary code of practice will promote the adoption of employment practices in the labour hire industry that meet recognised minimum standards.

2. Rationale for reform

The incidence of independent contactor arrangements is significant with estimates of the number of Australians working as independent contractors ranging from 800 000 to 1.9 million, or 8% to 19% of the Australian workforce.[1]

Legislation that recognises and validates the special status of independent contractors and ensures that independent contracting is encouraged without excessive regulation, fulfils the Australian Government's 2004 election promise.[2]

The Government's policy position is that genuine independent contractors should be primarily governed by commercial law and not by industrial law because independent

[1] For more information on the incidence of independent contractors in Australia see pages 3 – 5 of the Independent Contractors Bill 2006 Explanatory Memorandum.
[2] *A Stronger Economy. A Stronger Australia. The Howard Government Election 2004 Policy. Protecting and Supporting Independent Contractors:* http://www.liberal.org.au/2004_policy/Sept26_Protecting_And_Supporting_Independent_Contractors.pdf

contractors run their own business and work under commercial and not employment contracts.

Consequently, the Principal Bill recognises independent contracting as a legitimate form of work that is primarily commercial and which should be protected from unnecessary interference, such as by way of workplace relations regulation. To guarantee the freedom to contract without inappropriate regulation, the Principal Bill excludes the operation of certain State and Territory laws (known as deeming laws) which seek to deem certain independent contractors to be employees and therefore subject them to workplace relations regulation.

Although the legislation makes it clear that independent contractors are engaged in commercial arrangements and should not be regulated by workplace relations laws, the Government recognises that outworkers in the TCF industry are in a particularly vulnerable position and need to be protected from exploitation.

To safeguard the status of outworkers in the TCF industry, the Principal Bill maintains protections where they exist under State legislation. Additionally, where a contracted TCF outworker is not covered by a State or Territory law providing for some form of minimum remuneration, the legislation allows for them to be covered by the Australian Fair Pay and Conditions Standard.

Protections for owner-drivers in the road transport industry in New South Wales have been recognised for some time. The Government does not intend to disturb these arrangements at this stage and the Principal Bill does not override the protections for owner-drivers in New South Wales and Victoria (the only States with such legislation). A review into the protections afforded to owner-drivers will be conducted by the Government in 2007.

The Government's policy intention is also to ensure that businesses respect the independent contracting relationship and do not undermine their employees by instigating sham arrangements. Such arrangements occur when employers seek to disguise the employment relationship as an independent contracting one in order to avoid legal obligations and responsibilities that apply to employees.

In order to discourage this, the Amendment Bill will allow for penalties to be imposed on employers who seek to avoid their obligations under employment law by disguising their employment relationships as independent contracting relationships. The Amendment Bill also allows for penalties to be imposed on an employer who knowingly makes false statements to an employee to persuade or influence them to become an independent contractor, and for dismissing or threatening an employee with the sole or dominant purpose of re-engaging them as an independent contractor.

3. Constitutional underpinnings of the provisions

The provisions of the Principal Bill rely, primarily, on the corporations power in section 51(xx) of the Constitution. Section 51(xx) permits the Parliament to make laws with respect to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'. To a lesser extent, the Principal Bill

also relies on the incidental power in relation to the Commonwealth's activities and the Territories power in the Constitution.

The Bill's primary reliance on the corporations power as a means of providing independent contractors with greater protection and freedom, reflects the Government's belief that independent contracting arrangements are commercial arrangements and should not be influenced by workplace relations concepts. Relying on the corporations power will ensure the maximum possible coverage of the Principal Bill.

Constitutional basis

The constitutional underpinnings of the Principal Bill are incorporated into the legislation through the definition of 'services contract' in section 5. This is a key term used throughout the Principal Bill to establish the arrangements to which the legislation will apply.

The Bill will apply where a contract has the requisite constitutional connection. This means the Bill will apply where at least one party to the contract is:

(a) a constitutional corporation;

(b) the Commonwealth or a Commonwealth authority; or

(c) a body corporate incorporated in a Territory in Australia.

The Bill will also apply where one or more of the following is satisfied:

(a) work under the contract is to be performed wholly or principally in a Territory in Australia;

(b) the contract was entered into in a Territory in Australia; or

(c) at least one party to the contract is a natural person who is resident in, or a body corporate that has a principal place of business in, a Territory in Australia.

Where a contract for services between an independent contractor and their principal does not satisfy these constitutional requirements, the provisions of the Principal Bill will not apply.

Parties to contracts that fall outside the coverage of the Principal Bill may be covered by a range of other laws depending on the circumstances of their particular case. These could include, for instance, workplace relations laws, if the contract between the parties is treated as an employment contract, or commercial laws, if the contract between the parties is a purely commercial arrangement.

Additionally, the Principal Bill will also exclude the operation of a number of State or Territory laws to the extent that those laws would otherwise apply to services contracts covered by this Bill.

In particular, the Bill will exclude the operation of State or Territory laws that deem common law independent contractors to be employees or which provide employee-like entitlements to common law independent contractors. In addition, the Bill will exclude the operation of State or Territory laws that allow services contracts to be set aside or varied on the grounds that they are unfair.

4. Operation of the provisions

a. Definition of independent contractor

The definition of independent contractor in the Principal Bill relies on the common law meaning. By contrast, a statutory definition would be extremely complex to draft and less flexible in application. The common law relies on the multi-factor test developed by the High Court in the cases of *Stevens v Brodribb Sawmilling Co* (1986) 160 CLR 16 and *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 to determine whether a person is an employee or an independent contractor.

Under this test, a court will look at the whole of the relationship between the parties and consider a range of indicia, such as control of the worker, economic independence and the description of the relationship in a contract, being determinative. The court will determine the appropriate weight to be attributed to the indicia depending on the circumstances of the case and then come to a considered conclusion about whether the worker is an employee or and independent contractor. Examples of indicia that the courts may have regard to when determining whether a person is an employee or independent contractor is provided at **Attachment A**.

b. Excluding State and Territory deeming laws

The Australian Government's policy is that genuine independent contractors should have the freedom to enter into contracts of their choice. Currently, this choice is undermined by certain State and Territory laws that declare or deem certain classes of independent contractors to be employees. Such deeming laws draw independent contractors inappropriately into the workplace relations system regardless of their actual circumstances and preferences.

The most extensive of the deeming laws in Australia is the New South Wales *Industrial Relations Act 1996*. Under the provisions of that Act, the workers in 12 industries are deemed to be in employment relationships. These provisions also allow the New South Wales Government to prescribe additional industries in which these provisions will operate via regulation. To date, no regulations have been made under these provisions.

Other States use a slightly different mechanism to treat common law independent contractors as employees. For instance, in Queensland, the Full Bench of the Queensland Industrial Relations Commission is empowered to declare a person, or a class of persons performing work in a particular industry, to be regarded as an employee.

A comprehensive list of those workers affected by State and Territory deeming laws is provided at page 27 of the Explanatory Memorandum for the Principal Bill.

Operation of the exclusion provisions

Under section 7 of the Principal Bill, a State or Territory law that affects the rights, entitlements, obligations or liabilities of a party to a services contract will be excluded to the extent that it either:

(a) takes or deems a party to that contract to be an employer or an employee for the purposes of a workplace relations matter; or

(b) confers or imposes rights, entitlements, obligations or liabilities on a party to that contract in relation to matters that would be workplace relations matters if the parties were in an employment relationship.

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

Section 8 of the Principal Bill sets out those matters that are, and are not, workplace relations matters for the purposes of the exclusion provisions. Generally speaking, a workplace relations matter includes those matters that are substantially the same as matters that relate to employers and employees under the WR Act or a State or Territory industrial law (for the full list of matters that are 'workplace relations matters' see subsection 8(1)).

The Principal Bill also sets out those matters that are not workplace relations matters. Under subsection 8(2), matters such as superannuation, workers' compensation, occupational health and safety and taxation are listed as not being workplace relations matters. As such, deeming provisions, or provisions that provide employment-like rights, in State or Territory legislation related to these matters are not affected by the Principal Bill.

The operation of the exclusion provisions, including the concept of workplace relations matters, is explained at pages 32 to 36 of the Explanatory Memorandum for the Principal Bill. In particular, the practical operation of these provisions is demonstrated by the illustrative example on page 36 of the Explanatory Memorandum.

A regulation making power exists under section 10 of the Principal Bill to allow the Government to clarify the meaning of 'workplace relations matter'.

In addition to those State or Territory laws that do not relate to workplace relations matters, the Principal Bill will not disturb the operation of other laws that intend to protect certain classes of workers. For instance, the Principal Bill will preserve those State and Territory laws that apply to outworkers as well as Chapter 6 of the New South Wales *Industrial Relations Act 1996* and the Victorian *Owner Drivers and*

Forestry Contractors Act 2005. The protections afforded to owner-drivers and outworkers are outlined at Part 4(d) of this submission.

Workers who are currently deemed to be employees under State and Territory laws will not automatically become independent contractors when the exclusion provisions in the Principal Bill commence.

The effect of the exclusion provisions in relation to State or Territory deeming laws is that the presumption in these laws that an employment relationship exists between the parties to a services contract is removed. With this presumption removed, the status of a worker will be determined in accordance with the common law multi-factor test that was developed by the High Court in the cases of *Stevens v Brodribb Sawmilling Company Pty Ltd* (1986) 160 CLR 16 and *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21.

c. Transitional period for deemed employees

Operation of transitional provisions

A three year transitional period will apply for workers who, at the time the Principal Bill commences, are independent contractors at common law but who have been deemed under State or Territory law to be employees (known as deemed employees). The transitional period will also apply to workers who, at the time the Principal Bill commences, are common law independent contractors that are afforded employee-style entitlements by State or Territory laws that are to be excluded by the Bill. For workers covered by the transitional arrangements, the relevant State or Territory laws that would otherwise have been excluded by the operation of the exclusion provisions in sections 7 and 10 of the Principal Bill will continue to have effect in relation to the services contract between the parties.

The transitional period is designed to give parties to services contracts time to arrange their affairs pending the disapplication of State and Territory laws by the exclusion provisions. These independent contractors will remain deemed until the transitional period ceases to operate in relation to that worker. The transitional period will cease operating at:

(a) the end of the contracting relationship between the parties if that is within three years of the commencement of the Principal Bill;

(b) the end of three years from the commencement of the Principal Bill if the contracting relationship between the parties has not ended before that time; or;

(c) any earlier time agreed in writing by the parties if this occurs prior to the end of their contracting relationship (these agreements are known as 'reform opt-in agreements').

Where the contracting relationship between the parties ends during the three year transitional period and the parties subsequently enter a new contract, the transitional period will not apply to that new contract unless the new contract is consistent with a regular pattern of contracting between the parties.

If the transitional period does not apply to the new contract, the exclusion provisions will have effect, meaning that the parties to the contract will not automatically be assumed to be in an employment relationship. The status of their relationship will be determined by the application of the common law test, which relies on the multi-factor indicia test developed by the High Court in the cases of *Stevens v Brodribb Sawmilling Co (1986)* 160 CLR 16 and *Hollis v Vabu Pty Ltd (2001)* 207 CLR 21.

The parties to a services contract can elect to opt-in to the federal system at any time during the transitional period by executing a reform opt-in agreement. On commencement of the agreement, the exclusion provisions will come into effect in relation to the contract between the parties.

To protect independent contractors or their principals from being forced into signing reform opt-in agreements, anti-coercion provisions are included in the Principal Bill. Under these provisions, a person can be fined up to 300 penalty units ($33,000) for taking or threatening any action (or refraining or threatening to refrain from taking any action) with the intent to coerce another person to enter a reform opt-in agreement. This provision is designed to provide independent contractors with the freedom to choose the working arrangements that best suit their needs while providing protection against attempts to pressure workers into leaving the State or Territory system.

Irrespective of how the transitional arrangements cease to apply to a services contract, the consequences of this are to be determined in accordance with State or Territory laws. This means, for example, that where the deemed employment relationship comes to an end the formerly deemed employee would be entitled to be paid out their accrued employment entitlements in accordance with State or Territory law.

Similarly, if there were entitlements to such remedies for unfair dismissal or because a deemed employee is dismissed during the transitional period, those allegations would be dealt with in accordance with the relevant State or Territory law.

d. Exceptions to the exclusion of State and Territory deeming laws

Outworker protections

Australian law recognises two types of outworkers – employee outworkers and outworkers who are independent contractors (known as contracted outworkers). Currently, there are a range of protections for contracted TCF outworkers at the State and federal level.

Under the WR Act as amended by the *Workplace Relations Amendment (Work Choices) Act 2005* (the Work Choices Act), minimum wages for employee outworkers are set under the Australian Fair Pay and Conditions Standard. Outworker protections (including provisions dealing with chain of contract arrangements, registration of employers, employer record keeping and inspection of records) that were in federal awards prior to Work Choices will remain in awards as allowable award matters.

Further, workplace agreements covering outworkers will not be able to override award outworker conditions, except where the agreement is more favourable for the outworker than the award. The relevant award outworker provisions will form the 'minimum' for agreements between an employer and an outworker – that is, the award protections will be read into all outworker agreements.

For contracted outworkers at the federal level, Part 22 of the WR Act provides a minimum remuneration guarantee to contracted TCF outworkers in Victoria. The part does not apply to outworkers engaged outside Victoria. A person who engages a contracted TCF outworker under Part 22 is required to pay that outworker at least the amount set as part of the Australian Fair Pay and Conditions Standard for an employee performing the same work.

State protections for contracted TCF outworkers are slightly different from those at the federal level. Instead of providing minimum remuneration protection for these workers, most State legislation contains provisions that deem contracted outworkers to be employees. This deeming of contracted outworkers means that the award and agreement making systems in those States will apply to those workers. In effect, this draws common law independent contractors into the workplace relations jurisdiction.

In addition to deeming provisions, Queensland, New South Wales and Victoria have enacted specific legislation to further protect contracted outworkers. This legislation (Division 3A of Part 2 in Chapter 11 of the *Industrial Relations Act 1999* (Qld), the *Industrial Relations (Ethical Clothing Trades) Act 2001* (NSW) and the *Outworkers (Improved Protection) Act 2003* (Vic)) is designed to protect contracted TCF outworkers remuneration via voluntary and mandatory codes of practice. These State laws are not excluded by the Work Choices Act because that legislation expressly preserves laws that relate to outworkers (refer paragraph 16(3)(d)) of the Work Choices Act).

TCF outworkers are a particularly vulnerable class of workers who deserve greater protections than are afforded to other workers. The Government acknowledges this and does not wish to replace or interfere with the existing State frameworks. Therefore, the outworker provisions in the Bill, which are based on the Victorian provisions, are minimalist and designed to operate as a 'default' in States and Territories which have not put their own outworker protections in place.

The outworker provisions in the Principal Bill will therefore extend Part 22 of the WR Act with amendments, beyond Victoria, to all contracted TCF outworkers in Australia who are, or are engaged by, a constitutional corporation or who are engaged by the Commonwealth or a Commonwealth authority or body corporate incorporated in a Territory.

These provisions will provide:

(a) a default rate of pay for contract outworkers who do not receive a minimum rate of pay under State or Territory legislation;

(b) an enforcement and compliance regime with respect to the minimum rate of pay provisions;

(c) penalty provisions for breaches of the compliance regime; and

(d) regulation-making powers with respect to record-keeping requirements.

The default minimum rate of pay is the amount that the contracted outworker would have received under the Australian Fair Pay and Conditions Standard had the outworker performed the work as an employee. This is provided for at subsection 20(3) of the Principal Bill. However, where a State or Territory law provides for a minimum rate of pay which is less than the Australian Fair Pay and Conditions Standard, the State and Territory law will apply.

Enforcement and compliance

Division 3 Part 4 of the Principal Bill confers a range of powers on workplace inspectors to ensure compliance with the minimum rate of pay provisions in section 20. These provisions substantially replicate Subdivisions C and D of Part 22 of the WR Act which provide for inspector powers and an enforcement regime in Victoria.

Section 22 of the Principal Bill outlines the powers of workplace inspectors. It provides that workplace inspectors can enter premises where they reasonably believe that TCF contracted outwork has or is performed or where documents relating to the performance of TCF outwork are held. Subparagraph 22(2)(b) provides a list of functions that workplace inspectors are permitted to perform once they enter premises. These include asking for the production of documents, such as time sheets and pay records, and inspecting and copying such documents.

Penalties

Section 23 of the Principal Bill would allow a workplace inspector or an individual to whom the obligation was owed, such as a contracted TCF outworker, to seek a penalty where the head contractor did not pay the statutory amount. Proceedings may also be brought for the recovery of monies owed for TCF outwork under a services contract.

Proceedings can be brought in a District, County or Local Court or a magistrates court in addition to the Federal Court of Australia and the Federal Magistrates Court. The maximum penalty that an eligible court can impose is 60 penalty units ($6600) for an individual and 300 penalty units ($33000) for a body corporate.

Section 27 would replicate the small claims procedure in section 911 of the WR Act for proceedings to recover unpaid remuneration. This would enable a workplace inspector or contracted TCF outworker for example to have the proceeding heard in the small claims jurisdiction in a Magistrates court. The advantage of this type of proceeding is that it is more informal and efficient than other types of court proceedings.

Regulations

Part 4 also provides for the making of regulations in respect of the record keeping requirements under services contracts with contracted TCF outworkers. A contravention of these regulations could attract a penalty of up to 5 penalty units ($550) for an individual and 25 penalty units ($2750) for a body corporate.

Protection for owner-drivers

The Principal Bill also refrains from overriding existing State legislation in respect to the protections provided to owner-drivers in the road transport industry.

Owner-driver protections exist in two jurisdictions: Chapter 6 of the *NSW Industrial Relations Act 1996 (NSW)* and the *Victorian Owner-Drivers and Forestry Contractors Act 2005*.

The Government considers that retaining the status quo is the most appropriate action at this stage. However, the Government has announced that a review of owner-driver protections will be undertaken with a view to rationalising and achieving nation-wide consistency of these types of laws. The review will involve industry consultation based on a discussion paper to be issued by the Department in 2007.

e. *Exclusion of State and Territory Unfair Contracts jurisdictions*

Unfair contracts jurisdiction

Unfair contracts laws are concerned with circumstances in which a person performs work under terms which are 'unfair' in the sense that they are unfair, harsh or unconscionable or against the public interest. Parties to such a contract can seek Court orders to set aside the whole or part of the contract and/or to vary the contract. Unfair contracts jurisdictions currently exist federally under the WR Act, and in New South Wales and Queensland.

The New South Wales and Queensland laws apply to both employers and employees and independent contractors and their principals. The WR Act provisions do not.

In the federal jurisdiction, in determining whether a contract is unfair and/or harsh, the Federal Court of Australia may consider a range of prescribed matters including:

(a) the relative bargaining position of the parties to the contract;

(b) whether any undue influence or pressure was exerted on a party to the contract; and

(c) whether the contract provides for remuneration that is less than an employee performing similar work.

The Government has stated on many occasions that the Principal Bill would seek to ensure that independent contracting arrangements are recognised as commercial, not workplace relations arrangements. Therefore, the Principal Bill excludes State and Territory unfair contracts provisions.

By introducing one national system, which covers independent contractors, the Government is seeking to remove confusion and inconsistency.

Sections 832 – 834 of the WR Act currently contain provisions relating to unfair contracts for independent contractors only. Originally, the jurisdiction was vested in the Australian Industrial Relations Commission (AIRC), with appeal rights to the Full Bench. This was later changed with jurisdiction being vested in the Federal Court of Australia.

These provisions confer jurisdiction on the Federal Court of Australia to review contracts on the grounds that they are unfair or harsh. The remedies are not available to workers who are employees and are limited to independent contractors who are natural persons.

Scope of unfair contracts in the IC Bill

The unfair contracts provisions contained in Part 3 of the Principal Bill are modelled on the existing unfair contracts provisions in sections 832 to 834 of the WR Act, which will be repealed by Part 3 of the Principal Bill.

Part 3 of the Principal Bill provides a national scheme for the settling of contractual disputes which involve services contracts. This scheme will operate to the exclusion of State and Territory laws that seek to review, vary or amend services contracts on an unfairness ground. The definition of unfairness ground is located in section 9 of the Principal Bill.

Types of independent contractors that may access Part 3

The unfair contracts scheme will apply to services contracts, which is defined in section 5 of the Principal Bill. More detailed discussion of services contracts is included in Part 3 of this submission.

The unfair contracts scheme will also extend to certain types of incorporated independent contractors. This is because the definition of independent contractor is not restricted to natural persons. However, key restrictions are placed on incorporated independent contractors making unfair contracts applications. This is because large bodies corporate would not personally perform all or most of their work.

Therefore, in relation to incorporated bodies corporate, the unfair contracts jurisdiction only applies where the director of the body corporate or a member of the family of a director of the body corporate performs all or most of the work under the services contract.

Additionally, section 14 of the Principal Bill limits the ability for parties to make federal unfair contracts review applications as well as applications for review of the same contract under State and Territory laws which are not excluded by the Principal Bill. This provision, in effect, prevents parties from ‘double-dipping’ in relation to the same contract.

Concurrent jurisdiction

As the definition of Court has been expanded under the Principal Bill, Part 3 confers jurisdiction on the Federal Magistrates Court (FMC) in addition to the Federal Court of Australia. The purpose of this is to limit, as far as possible, the expense and time that parties incur in bringing applications.

Court criteria

Under the WR Act, in determining whether a contract is harsh and/or unfair the Court may consider factors including:

(a) the relative strengths of the bargaining positions of the parties to the contract and, if applicable, any persons acting on behalf of the parties; and

(b) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, a party to the contract; and

(c) whether the contract provides total remuneration that is, or is likely to be, less than that of an employee performing similar work; and

(d) any other matter that the Court thinks is relevant.

Under the Principal Bill, if the Court considers whether the contract provides total remuneration that is, or is likely to be, less than that of an employee performing similar work, it must also consider whether the terms of the contract and the total remuneration provided under the contract are commensurate with the terms of, and remuneration provided under, other services contracts relating to the performance of similar work in the particular industry. This ensures that commercial considerations of the parties to a contract, such as the market forces operating in the relevant industry affecting their rates and conditions, are taken into account.

f. Protections against sham arrangements

The Amendment Bill includes a series of civil penalty provisions that apply to an employer who seeks to engage a worker under a sham independent contracting arrangement. A sham arrangement is one where an employer seeks to avoid responsibility for the payment of legal entitlements due to employees by disguising an employment relationship as an independent contracting arrangement.

The Bill also includes penalties against the dismissal of an employee for the purpose of re-engaging them to perform the same work as an independent contractor and the making of false or misleading statements with the intention of influencing a person to become an independent contractor.

These provisions import the common law meanings of employment and independent contracting. This means that a court will rely on the multi-factor test developed by the High Court in *Stevens v Brodribb Sawmilling Company Pty Ltd* (1986) 160 CLR 16 and *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 to determine whether a worker is an employee or an independent contractor.

Applications for the imposition of a penalty against a person who has contravened any of these provisions may be made in either the Federal Court or the Federal Magistrates Court. The court will be able to impose a maximum penalty of 60 penalty units ($6,600) for an individual and 300 penalty units ($33,000) for a body corporate that contravenes any of these provisions. Applications for a penalty will be able to be made by:

(a) a workplace inspector;

(b) the individual affected by the contravention of the provision; or

(c) a union of which the individual affected by the contravention is (or has applied) to become a member, provided it is acting with the written consent of the individual.

These provisions exist to safeguard the rights and entitlements of employees. They also ensure that those workers who choose to be independent contractors are making that choice free from undue influence or pressure.

Misrepresentation penalty

The Amendment Bill will insert two new provisions into the WR Act relating to the misrepresentation of an employment relationship, or a proposed employment relationship, as an independent contracting arrangement. A person will contravene these provisions if:

(a) they are party to (or have offered to enter into) a contract with an individual;

(b) they represent to the individual that the contract is (or would be once entered into) an independent contracting arrangement under which the individual performs (or would perform) work as an independent contractor; and

(c) at the time the representation is made, the contract with the individual is (or would be once entered into) in fact an employment contract.

The Amendment Bill provides that there are two defences against these penalty provisions. A person will not have contravened the provisions if:

(a) they believed that the contract was an independent contracting arrangement rather than an employment contract; or

(b) they could not reasonably have been expected to know that the contract was an employment contract rather than an independent contracting arrangement.

The onus of proof under this penalty provision has been reversed. It usually falls upon the person making the complaint to prove the breaches. In the Amendment Bill, however, the person making the representation is required to prove a defence on the balance of probabilities in order to escape liability for a penalty.

The Government supports measures that prevent the use of sham arrangements under which a common law employee is, through misrepresentations, led to believe that they are an independent contractor. This results in the employee being denied their proper entitlements under workplace relations law.

Therefore, if an employee is treated as an independent contractor and this results in the underpayment of wages and conditions, proceedings can be brought for penalties and for the recovery of those underpayments under sections 719 and 720 of the WR Act. These remedies are in addition to the remedies in relation to sham arrangements that are contained in the Amendment Bill.

Re-engagement penalty

The Amendment Bill will insert a new civil penalty provision into the WR Act that applies to an employer who dismisses or threatens to dismiss an employee for the sole or dominant purpose of re-engaging them to perform substantially the same work as an independent contractor. These penalty provisions are modelled on the Freedom of Association protections contained in the WR Act.

Where proceedings are taken for an alleged breach of this provision, it is presumed that the employer's sole or dominant purpose for dismissing the employee was to re-engage them as an independent contractor performing substantially the same work. This is a reversal of the usual onus of proof as the employer is required to prove (on the balance of probabilities) that the dismissal was for another reason.

The reason for this reversal of the usual onus of proof is that it is easier for an employer to prove that the dismissal was for a reason other than to re-engage the employee as an independent contractor performing substantially the same work than it is for an employee to show that this was the sole or dominant purpose.

These are matters that are particularly within the knowledge of the employer and an employee would face substantial evidentiary difficulty in proving the existence of such knowledge (even at a civil standard of proof).

These provisions would not apply in cases where an employee has willingly resigned their position in order to return as an independent contractor to perform the same work.

The Government's policy supports the right to employees to voluntarily elect to become independent contractors. The Government's policy does not support unilateral action by an employer in forcing employees to become independent contractors against their will.

False statements penalty

This penalty provision applies to any person who employs, or has employed, an employee to perform particular work and that person makes a statement to the employee which they know to be false with the intention of influencing that employee into becoming an independent contractor to perform substantially the same work. This provision is designed to apply to a person who makes a false or misleading statement to an employee in order to persuade or influence that employee to enter into an independent contracting relationship.

5. Conclusion

In conclusion, the legislation will:

- recognise and protect the unique position of independent contractors in the Australian workplace;
- override State laws which deem certain categories of independent contractor to be employees for the purposes of State industrial relations legislation;
- maintain existing specific protections under State legislation for owner-drivers in the road transport industry;
- maintain existing specific protections under State legislation for contracted outworkers in the TCF industry;
- replace existing State unfair contracts jurisdictions with a single federal unfair contracts jurisdiction; and
- protect genuine employees from sham contracting arrangements and from threatening or deceptive behaviour aimed at making them change their status to independent contractors.

The passage of the legislation will be accompanied by funding of $15 million over four years. This funding will support enforcement and education activities.

ATTACHMENT A

Indicia of employment under the common law test

In determining whether a person is an employee or an independent contractor, Courts are required to consider factors such as:

- the degree of control the worker has over the work – for example, is the worker subject to direction on how the work is to be performed, not just what the job is;
- the degree to which the worker is integrated into, and is treated as part of the principal's enterprise – for example, if the worker wears the principal's uniform and represents the principal's enterprise to the public, this supports the worker being found to be an employee;
- whether the worker is making a significant capital contribution (such as using his or her own motor vehicle or carrying the maintenance and running costs) to the enterprise – for example, if the worker provides their own truck to haul rock for a principal – this supports the worker being found to be an independent contractor. However, if the worker only brings tools of their trade (such as knives for a butcher) this is not likely to be a significant factor;
- how the principal pays the worker – for example, payment by results supports a finding that a worker is an independent contractor whereas payment on an hourly basis supports a finding that a worker is an employee;
- whether the worker has an obligation to work – if the principal has the right to dictate hours of work and the worker cannot refuse tasks, this supports the worker being found to be an employee;
- the provision of leave, superannuation and other entitlements by the principal to the worker – these entitlements usually apply in employment situations only;
- the place of work – if the worker works at his or her own premises, this supports the worker being found to be a independent contractor;
- whether the workers has the right to delegate work to others – if the worker can employ other people to perform the work (or subcontract the work to another person), this supports the worker being found to be an independent contractor;
- whether income tax is deducted from the worker's pay by the principal – this supports the worker being found to be an employee;
- whether the worker provides similar services to the general public – for example, if a worker advertises his or her services to the public or tenders for work, this supports the worker being found to be an independent contractor;

- whether there is any scope for the worker to bargain for his or her remuneration – the ability to negotiate in this manner supports a finding that the worker is an independent contractor;
- whether the workers is providing skilled labour or labour that requires special qualifications – if so, this supports a finding that the worker is an independent contractor; and
- whether the issue of deterrence of future harm arises – for example, where the principal is in a position to reduce accidents by efficient organisation and supervision, this may support a finding that a worker is an employee.

The court will determine the appropriate weight to be attributed to the indicia depending on the circumstances of the case and then come to a considered conclusion about whether the worker is an employee or and independent contractor.