

SUBS1 ATTACHMENT

1. This submission is supplementary to my earlier submission forwarded to the Committee on 10 November 2005.
2. That submission dealt with the effect of proposed s 7C(1)(d) of the *Workplace Relations Amendment (WorkChoices) Bill* ("the Bill") upon those people who presently are involved in litigation under laws such as section 106 of the *Industrial Relations Act 1996* (NSW) ("the IR Act").
3. Subsequent to my submissions, views have been expressed that my concerns could be addressed by regulations made under the Bill once it is passed into law.
4. It is important to note that no regulation can undo the effect that proposed s 7C(1)(d) will have once enacted because of the operation of s109 of the Constitution.
5. Section 109 of the Constitution would operate *automatically* to invalidate s 106 of the IR Act once the Commonwealth covers the field by passing s7C(1)(d) in its current form (assuming it to be otherwise constitutionally valid): *Wenn v A-G (Vic)* (1948) 77 CLR 84 at 120.
6. Given that no regulation can be passed until after the Act which authorises it to be made, a regulation could only ever seek to undo that which has already been done via the automatic effect of s 109 of the Constitution.
7. No subsequent law can change the characteristic of an earlier law for the purposes of the operation of s 109 of the Constitution: *Wollongong University v Metwally* (1984) 158 CLR 447. That principle would apply with even greater force where the attempt to re-characterise the Commonwealth law is by regulation rather than by legislation.
8. Even if the regulation clarifying the purpose of s 7C(1)(d) was in effect before the enactment of s 7C(1)(d), it is unlikely to influence the meaning of the section or change its effect. Not even Parliament can bind future Parliaments, let alone the Executive through regulation. The intention of Schedule 1 of the Bill (and s 7C(1)(d)) would need to be determined by reference to the intention of the Parliament when that legislation was enacted, not the intention of the Executive before hand.
9. As earlier submitted, there is only one way to prevent the serious injustice which will occur by operation of s 7C(1)(d) on people involved in *current litigation*. That is to amend the section to exclude from its scope any litigation which has been commenced prior to the Bill being enacted.



Shane Prince

Chambers

15 November 2005