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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

INDEPENDENT CONTRACTORS BILL 2006

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment and Workplace Relations, the Honourable Kevin Andrews MP)

INDEPENDENT CONTRACTORS BILL 2006

OUTLINE

The Independent Contractors Bill 2006 will, for the first time, recognise and protect the unique position of independent contractors in the Australian workplace. This Bill will enshrine the freedom of independent contractors to enter into arrangements that are primarily commercial relationships, free from prescriptive workplace relations regulation.

This Bill will:

- exclude 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 workplace relations regulation;
- provide a fairer and more accessible national services contract review mechanism for independent contractors;
- retain existing State and federal protections relating to contract outworkers; and
- provide a transitional scheme for workers deemed by State or Territory laws to be employees.

Part 1 contains the principal objects of the Bill. The Part also contains definition provisions that explain meanings of terms used throughout the Bill.

Part 2 provides for the exclusion of State and Territory laws which seek to interfere with the rights, entitlements, obligations and liabilities of parties to genuine independent contracting arrangements. Such State and Territory laws include those which are considered workplace relations matters and unfair contracts laws based on unfairness grounds. These terms are defined in this Part.

This Part would permit the continued operation of certain State and Territory laws which would otherwise be overridden by the general exclusion provisions, such as laws dealing with outworkers and laws dealing with owner-drivers.

Part 3 establishes a national services contract review scheme, for the first time. This is to enable applications to be made to the Court for the review of services contracts on the ground that they are unfair or harsh. This scheme would offer efficient and easily attainable access to reasonable remedies for parties with contracts which are found to be harsh or unfair.

Part 4 would provide for a default minimum rate of pay for contract outworkers in the textile, clothing and footwear (TCF) industry. This statutory entitlement will operate where an outworker is not guaranteed a minimum rate of pay under relevant State and Territory laws.

Part 5 will create transitional arrangements for persons who, at the time these provisions commence, are independent contractors at common law but who have been deemed under State or Territory law to be employees, or who are afforded employee style entitlements by State or Territory laws. It would provide that, where the transitional arrangements cover a person, the exclusion provisions do not apply, meaning that State or Territory contractor laws which deem or treat independent contractors as employees, continue to have effect in relation to the contract between the parties. This transitional period can apply for up to three years, however, the parties can choose to bring the transitional period to an end earlier if they wish.

Part 6 will provide for regulation making provisions for transitional matters.

FINANCIAL IMPACT STATEMENT

Estimated costs associated with the proposed Independent Contractors Bill 2006 and the proposed Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006 are as follows:

	2006-07 $'000	**2007-08 $'000**	**2008-09 $'000**	**2009-10 $'000**	**Total**
Compliance	1,505	1,538	1,572	1,607	6,222
Communications	4,001	1,458	1,373	2,019	8,851
Total	5,506	2,996	2,945	3,626	15,073

REGULATION IMPACT STATEMENT

This Regulation Impact Statement relates to a package of reforms contained in the Independent Contractors Bill 2006 and the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006.

Background[1]

Who is an independent contractor?

An 'independent contractor' is a person who contracts to perform services for others without having the legal status of an employee. The term is generally used to refer to a person who is engaged by a principal, rather than an employer, on a labour only contract. Under such a contract, the principal pays the independent contractor a one-off flat rate. There are generally no legislatively prescribed minimum entitlements or other employee-style benefits and the independent contractor is responsible for a number of aspects of the relationship that would usually be the responsibility of an employer (for instance, remitting income tax to the Australian Tax Office and contributing to a superannuation fund). Independent contractors' work arrangements take a variety of forms, for example, they may have a direct relationship with another enterprise or work through an intermediary (such as a labour hire firm), and they may or may not employ staff.

The common law has traditionally maintained a distinction between 'employees' and 'independent contractors'. Employees are engaged under a contract *of* service (an employment contract), whereas independent contractors are engaged under a contract *for* services. Historically, independent contractors have been perceived as running their own business and working under commercial, not employment, contracts. In contrast, employees have been seen as subject to control and direction. The courts have adopted a multi-factor test to determine whether a person is an employee or independent contractor. No single issue concerning control, economic independence or the description of the relationship in a contract will be determinative, however, courts will place greater weight on some matters, in particular, on the right to control the manner in which the work is performed.

Numbers of independent contractors

Determining the precise number of independent contractors in Australia is difficult.

The Productivity Commission estimates that there were approximately 843,900 self-employed contractors in Australia in 1998, equating to 10.1 per cent of all employed persons.[2] It has estimated that this number has dropped slightly to 739,500 (or 8.2 per cent of all employed) in 2001, and risen slightly to 787,600 (still 8.2 per cent of all employed) in 2004.[3]

The Productivity Commission has based its estimates on ABS *Forms of Employment Survey* (FOES) data – however, this data is not ideal as it includes self-employed contractors in all five categories of workers that it covers:

[1] Most of this section is drawn directly from the Department's Discussion Paper, *Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements*, Commonwealth of Australia, 2005.
[2] Productivity Commission, *Self-Employed Contractors: Incidence and Characteristics*, February 2002.
[3] Productivity Commission, *The Role of Non-Traditional Work in the Australian Labour Market*, May 2006.

- employees with paid leave;
- self-identified casuals;
- employees with no paid leave who do not identify as casuals;
- owner managers of incorporated enterprises; and
- owner managers of unincorporated enterprises.

Moreover, some questions asked in FOES 2001 were not asked in FOES 2004. The groups among self-employed contractors that cannot be identified in 2004 are:

- employees (excluding owner managers of incorporated enterprises) with paid leave;
- employees (excluding owner managers of unincorporated enterprises) with no paid leave who do not identify as casuals; and
- some owner managers of unincorporated enterprises.

The Productivity Commission has applied a number of tests and compared 2001 and 2004 data (which are not strictly comparable) to infer the growth of independent contractors between 2001 and 2004. They estimate a 6 per cent increase on 2001.[4]

It is important to note that the Productivity Commission does not categorise owner managers who employ other people as self-employed contractors.

Independent Contractors of Australia has used Productivity Commission and FOES 2004 data to claim that the share of independent contractors in total employment in Australia has grown from 16.4 per cent of total employment in 1978 to 19.9 per cent in 2004 (or 1.9 million).[5] This estimate is based on the total number of owner managers in incorporated and unincorporated enterprises, and therefore includes owner managers with employees, which the Productivity Commission argues should not be included in the estimate.

Accordingly, estimates range from approximately 800,000 to 2 million independent contractors in 2004 (or from approximately 8 per cent to 20 per cent of all Australian employed persons).

Industry distribution

Independent contractors comprise a diverse group – they can be anyone from an IT or accounting professional to a factory worker, cleaner or fruit picker.

Self-employment in the construction industry is common, especially in housing as opposed to commercial construction.[6] The construction industry is sensitive to the economic cycle which means that the demand for labour fluctuates with the peaks and troughs of the cycle. In 1998, almost one quarter of self-employed contractors worked in this industry.

[4] Productivity Commission, *The Role of Non-Traditional Work in the Australian Labour Market*, May 2006.
[5] http://www.contractworld.com.au/reloaded/ica-numbers.php.
[6] This section draws on data in Productivity Commission, *Self-employed Contractors in Australia: Incidence and Characteristics*, 2002.

Computer services such as help desk services, hardware installation and system design and maintenance are often contracted out to skilled workers in Australia. This industry accounts for 19.7 per cent of all self-employed contractors in the workforce.

The most common type of independent contractors in the transport services industry is owner-drivers. Owner-drivers are workers who supply their own vehicle to deliver goods for a client. In 1998, 5.4 per cent of all self-employed contractors worked in the transport and storage industry.

There are several different types of contract workers in manufacturing, ranging from business-to-business relationships (where the contractor supplies finished parts or components for the production process), to contractors whose input is not directly related to the finished product (for example, cleaners and maintenance), to the self-employed contractors who are paid according to their output and produce part, if not most, of the finished good. In 1998, the manufacturing industry accounted for 8.6 per cent of self-employed contractors.

Occupational distribution

Tradespersons and related workers are by far the largest group of self-employed contractors: 27 per cent of all self-employed contractors are from this occupation.[7] Tradespersons and related workers account for only 11.9 per cent of all employees, a considerably lower proportion.

Professionals are the second largest group of all self-employed contractors at 18.3 per cent. The proportion of professionals who work as employees is similar to those who work as self-employed contractors (18.9 per cent).

The occupational categories of intermediate production and transport workers, and labourers make up 10.6 per cent each of the total amount of self-employed contractors in the Australian workforce. The proportion of employee labourers and related workers to all employees is also 10.6 per cent. The proportion of intermediate production and transport workers who work as employees is 9.6 per cent.

Benefits of independent contractors

The flexibility that independent contractors provide is essential to Australian business. Businesses can use specialist contractors for a range of non-core activities, as needed, allowing them to focus on their core business more effectively. This can enable business to compete more effectively in Australian and international markets and to adapt to changing economic conditions. It also facilitates businesses engaging workers on a short-term basis to address fluctuating work levels.

For the independent contractor, it can provide more freedom to choose working hours, to decide when to take holidays, who to work for and what type of work to undertake. High demand for specialist contractors in particular industries contributes to higher wages and ease of worker mobility. These factors can make independent contracting attractive to many workers. For professionals and tradespeople, this may equate to gaining higher pay without the managerial responsibility that tends to accompany higher paying jobs in large organisations.

[7] The statistics in this section are derived by the Productivity Commission in 2002 from unpublished FOES data.

Problem

Facilitating the use of independent contractors and the flexible arrangements afforded by them is imperative to contributing to the dynamic efficiency of the economy. State laws which create barriers to the use of independent contractors in Australian workplaces mean that these flexible arrangements are stifled.

Under the Work Choices legislation, awards and agreements can no longer contain clauses which restrict engaging labour hire workers or impose conditions or limitations on their engagement.

However, contracting relationships continue to be dragged into the sphere of employment law by virtue of State deeming provisions which determine certain independent contractors to be employees. This distorts flexibility and choice and interferes with the intention of the parties to the original contract.

Similarly, remedies for independent contractors in relation to unfair contracts in New South Wales and Queensland rest in industrial relations laws when they actually relate to commercial arrangements. This is also currently the case with regard to the federal unfair contracts jurisdiction. There is duplication in unfair contracts jurisdictions which leads to uncertainty and confusion. Furthermore, remedies in relation to unfair contracts in New South Wales and Queensland go beyond merely considering the terms of a contract and the process by which it was made.

Illegitimate practices can also occur, such as disguising genuine employment relationships as contract relationships. Such sham contracting arrangements avoid existing laws and impact negatively on workers who should be entitled to the protection of employment laws. Similarly, inappropriate pressure may be brought on employees to become independent contractors, for example, by employers threatening to dismiss them unless they do so.

Each of these issues are elaborated on below.

'Deeming'

There has been a growing trend on the part of State Governments towards regulating independent contractor relationships through industrial law, rather than through commercial law. One way this has been achieved has been through provisions in State industrial relations legislation which 'deem' certain types of workers to be employees for the purposes of the legislation. For example, the *Industrial Relations Act 1999* (Qld) (the Qld IR Act) deems outworkers and partners in some businesses to be employees. In addition, the Queensland Industrial Relations Commission has the power to declare a class of contractors to be employees, based on such criteria as the relative bargaining power and economic dependency of the class of persons, and whether the contract is designed to, *or does*, avoid the provisions of an industrial instrument.

There are problems with deeming provisions which seek to change the nature of a working arrangement from independent contractor to employee, and thereby draw independent contractors into the net of workplace relations regulation. Deeming provisions have the effect of invalidating individual choice and flexibility in choosing working arrangements. They infringe on individuals' freedom to choose from a diversity of workplace relationships, including their right to negotiate conditions of work that suit their own individual needs. Further, deeming

provisions undermine the legitimate desire of many employers to increase efficiency by allowing for a flexible workforce they can augment or restrict to meet their requirements.

Deeming provisions can also result in arbitrary distinctions, where, for example, driving a bus makes an independent contractor an employee, but driving a taxi does not, or cleaning premises makes one an employee but cleaning cars does not. Such an approach makes it almost impossible to maintain a principled distinction between employees and independent contractors, and only serves to drag independent contractors into the workplace relations regulation net regardless of their preference or actual circumstances.

It is not possible to quantify the proportion of independent contractor arrangements that are affected by these deeming provisions, as it is not possible to quantify how many workers are currently 'deemed' to be employees. A list of classes of workers deemed to be employees in each State and Territory is at **Attachment A**, which provides some idea of the types of industries in which deemed employees are engaged.

Special arrangements for independent contractor owner-drivers

Chapter 6 of the *Industrial Relations Act 1996* (NSW) (the NSW IR Act) allows the New South Wales Industrial Relations Commission (the NSW Industrial Relations Commission) to make contract determinations setting rates and other employment-like conditions for independent contractors in the road transport industry, including truck owner-drivers and bailee taxi drivers. It allows the Commission to register collective agreements between transport operators and groups of owner-drivers (who may be represented by a union). It provides a dispute resolution mechanism, and includes provisions for goodwill compensation payments.[8]

New South Wales is the only jurisdiction with laws protecting owner-drivers to this extent. However, Victoria recently passed the *Owner Drivers and Forestry Contractors Act 2005*, which will provide lesser protection including:

- potentially allowing a tribunal to regulate remuneration rates for owner drivers; and
- requiring owner-drivers to have written contracts if engaged by the same party for more than 30 days, which specify terms such as minimum hours of work and rates to be paid under the contract.

Some businesses which engage owner-drivers, particularly in New South Wales, argue that these protections impinge on the commercial relationship between a principal contractor and sub-contractor. On the other hand, the Transport Workers' Union argues that guaranteed rates and goodwill compensation are fundamental to owner-drivers in the industry and losing these protections would lead to lower remuneration and genuine hardship for these workers due to the tight business margins in which they operate.

Unfair contracts

The federal, NSW and Queensland jurisdictions all have specific unfair contracts provisions in their industrial relations laws. In so far as unfair contracts provisions relate to contracts for

[8] Goodwill applies where one owner-driver sells a business to another and the purchase price includes a goodwill component for work to a particular principal contractor. Compensation can be sought in certain circumstances where the principal contractor ceases to offer the new owner-driver work or terminates the contract.

independent contractors, they represent an anomaly in industrial relations law because they relate to commercial, not employment, relationships.

Section 106 of the NSW IR Act allows the NSW Industrial Relations Commission to review 'any contract whereby a person performs work in any industry' which includes independent contractor arrangements. The Commission can consider whether the contract is unfair, harsh or unconscionable; or is against the public interest; or provides remuneration less than the person performing the work would have received as an employee; or is designed or does avoid the provisions of an industrial instrument. If any of these characteristics are identified the Commission may vary the contract or declare all or part of it to be void. The Commission can also make orders for the payment of money. In 2002, provisions were introduced to limit this jurisdiction to employment contracts which have a remuneration package of less than $200 000 per annum.

The Commission is not confined to considering the content of the contract nor the process of its making, but can also look at a contract which has become unfair as the result of one party's conduct under the contract. This adds to uncertainty as a contract which was made fairly and was fair in its terms could later be held to be unfair.

The New South Wales unfair contracts jurisdiction has been criticised for its breadth of coverage and the generosity of its payouts. The broad nature of the provisions was noted by Sheldon J in *Davies v General Transport Development Pty Ltd*.[9] The NSW Commission has used section 106 of the New South Wales IR Act to vary contracts in a variety of ways including varying share option plans in the much publicised case of *Canizales v Microsoft Corporation,*[10] where a former Microsoft executive was allowed to exercise share options worth $14 million. In this decision, Peterson J said:

> *It is difficult on the facts of this case to see how the applicant is a person who could be said to have been bargaining under some restraint or inequality or who was being oppressively exploited. It appears that the past earnings of the applicant, apart from those claimed in this case and taking into account share options already exercised, are of the order of more than $10 million. For income at that level to be earned between the ages of approximately 21 to 31 years hardly suggests unfairness.*

However, Peterson J found he was bound by the terms of the provision and previous authority to consider 'money benefits of this lavish kind'.

Queensland also has specific unfair contract provisions. Section 276 of the Qld IR Act gives the Queensland Industrial Relations Commission power to investigate contractual remedies. It covers both contracts of service not covered by an industrial instrument and independent contracting arrangements. In determining unfairness, the Commission is to have regard to the relative bargaining strength of the parties, the minimum wage and whether undue pressure or unfair tactics were applied against a party to the contract. The Commission may vary or void a contract either from its commencement or its later application. Orders may be made for payment of amounts for contracts amended or declared void. The provisions of the QLD IR Act prevent persons who are public servants or who earn an annual wage of $94 900 or more per annum from bringing unfair contracts claims.

[9] (1967) AR (NSW) 371.
[10] (2000) 99 IR 426.

An unfair contracts jurisdiction has been proposed in the Australian Capital Territory under its Fair Work Contractors Bill 2004, which has similarities to the New South Wales unfair contracts regime. The Bill has not yet been passed by the Australian Capital Territory Legislative Assembly.

The current federal *Workplace Relations Act 1996* (WR Act) also contains provisions which provide a remedy for independent contractors in relation to unfair contracts. Section 832 allows a party to a contract to apply to the Federal Court of Australia on the grounds that the contract is unfair and/or harsh. The provision applies to a contract for services that is binding on an independent contractor and relates to the performance of work (other than private or domestic work). The remedy is limited to an independent contractor who is a natural person. Reflecting constitutional limitations, it is also required that one of the parties to the contract be the Commonwealth, a Commonwealth authority, or a financial trading or foreign corporation; alternatively, the contract must relate to work in international or interstate trade or commerce, or to matters that take place in or are connected with a Territory (section 834). In reviewing a contract, the Court may have regard to the parties' relative bargaining power, whether any undue influence or pressure was exerted or unfair tactics were used against a party, whether the contract's remuneration provision is less than for an employee performing similar work and any other matter the Court considers relevant.

Under the *Workplace Relations Amendment (Work Choices) Act 2005* (Work Choices legislation), State unfair contracts regimes have been overridden by the federal system as far as they extend to employees of constitutional corporations. This does not, however, apply to independent contractors.

The problem with current unfair contracts arrangements is that there are duplicate systems in place in New South Wales and Queensland along with the federal jurisdiction. A harmonised system whereby one federal jurisdiction was available (as far as constitutionally possible) would avoid this duplication and represent a further step towards a unified workplace relations system in Australia.

Sham arrangements

Decisions about whether an arrangement is one of employment or independent contracting can involve complex and unravelling factual situations. Contracts are not always clearly written and they do not always reflect the real relationship between the parties. Courts and tribunals need to carefully examine all the evidence against the settled multi-factor (indicia) test in coming to a decision about the true nature of the particular relationship. They are required to balance the need to uphold and protect the parties' rights in genuine independent contracting arrangements with the need to protect workers from sham arrangements. This is a delicate balance and inevitably courts and tribunals face criticism from both sides of the debate that they have gone too far or not far enough in making these decisions.

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.

The courts have held that in these circumstances, the documented characterisation of the relationship will not be determinative: 'The parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck'

(*Re Porter*[11]). Similarly, Marshall J in *Damevski v Guidice*[12] said: 'There is no legitimacy in arrangements which merely attempt to exploit difficult areas of law and create vehicles designed, inter alia, to enable employers to avoid their award and statutory obligations'.

Employees in disguised employment relationships should have appropriate remedies available to them as they are not, in reality, independent contractors. The only remedies currently available for these employees are in provisions in the WR Act which relate to recovery of wages and damages for loss suffered from not receiving entitlements. Penalties may be sought against employers who fail to pay their employees the correct wages. While these penalties are not ineffective, they are different from a specific penalty for sham contracting arrangements. Legal sanctions, such as civil penalties for those employers found to have disguised genuine employment relationships, represent a definitive protection for the employees affected, and would send a clear message to employers that sham arrangements are unlawful. This is more likely to deter sham arrangements than the current penalties available under the WR Act.

A further scenario which is sometimes characterised as creating sham arrangements is where an existing employee is pressured by their employer to become an independent contractor. This could occur, for example, where an employer dismisses or threatens to dismiss an employee for the purpose of re-engaging that person as an independent contractor to perform substantially the same work. This could also occur where an unscrupulous employer knowingly makes false statements to an employee with the intention of persuading that employee to become an independent contractor. In both these circumstances, legal sanctions should apply to act as a deterrent.

Penalties for sham independent contracting arrangements should apply to labour hire agencies that employ workers who are 'on-hired' to host businesses in the same way as they apply to other employers.

Objective

The Coalition's 2004 election policies included creating a new Independent Contractors Bill to enshrine and protect the status of independent contractors and encourage independent contracting as a wholly legitimate form of work. Accordingly, as the Government has already indicated that it will regulate in this area to address the problems outlined above, non-regulatory options have not been considered in this Regulation Impact Statement.

A workplace relations framework is needed which recognises and validates the choices people make to be either employees or independent contractors. If genuine independent contracting arrangements were to be given separate status in law rather than allowed to continue to be drawn into regulation which essentially governs the employer/employee relationship, the growth of independent contracting in Australia would be encouraged.

This could be achieved by removing deeming provisions in State laws, while at the same time ensuring that employees are protected from sham contract arrangements by unscrupulous employers. Unfair contracts provisions currently in New South Wales and Queensland could also be removed from employment law, and replaced with a narrower federal jurisdiction under

[11] (1989) 34 IR 179.
[12] [2003] FCAFC 252.

commercial law that establishes (as far as constitutionally possible) one 'national' system for unfair contracts.

Options

Removing State deeming provisions

One option would be to leave the situation as is. This is not a viable option as the Coalition made a commitment in the 2004 federal election to prevent State workplace relations systems being used to undermine the status of independent contractors.

Another option would be to liaise with State governments to persuade them to change their laws to remove deeming provisions. This is not a viable option given the current views of the State governments.

A further option would be to legislate to override State deeming provisions.

Removing State protections for owner-drivers

One option would be to leave the situation as is.

Another option would be to liaise with the New South Wales and Victorian governments to persuade them to remove existing protections for owner-drivers. This is not a viable option given the current views of these State governments.

A further option would be to legislate to override State protections for owner-drivers.

Removing unfair contracts provisions relating to independent contractors from employment law

One option would be to leave the situation as is.

Another option would be to liaise with State governments to persuade them to remove unfair contracts provisions from their industrial relations laws, and allow the federal Government to legislate in this sphere. This is not a viable option given the current views of the State governments.

A further option would be to legislate to introduce a national unfair contracts regime, as far as constitutionally possible, and override current State unfair contracts provisions, moving the current federal unfair contracts provisions into legislation separate from the federal WR Act. A further option within this would be to give the Federal Magistrates Court the jurisdiction to hear unfair contract cases.

Protections against sham contracting arrangements

One option would be to leave the situation as is.

Another option would be to introduce civil penalties to apply to employers found guilty of using sham contracting arrangements to disguise what should really be described as an employer-employee relationship. Penalties could also apply where employers inappropriately

pressure employees to become independent contractors by dismissing, threatening to dismiss, or by knowingly making false statements with the intention that the employee re-engage as independent contractors performing substantially similar work.

Impact analysis

(a) Introduce separate legislation to override State 'deeming' provisions

Costs and benefits to contractors

Overriding State deeming provisions would benefit independent contractors to a certain degree. Contractors would be free to contract in a manner that best suits them with the business for whom they perform the work. They would not be forced into accepting an employment relationship, but would have the freedom to choose to be an independent contractor or an employee. Where a worker chose to be an independent contractor, they would still have protections through unfair contracts remedies, remedies under the *Trade Practices Act 1974* and at common law.

On the other hand, these contractors would no longer benefit from conditions and protections available to employees under workplace relations legislation. They will become responsible for their own taxation and superannuation arrangements, and lose any future entitlements they might have received as employees. However, there is anecdotal evidence that independent contractors generally tend to be paid more to compensate them for having to take responsibility themselves for remitting tax and contributing to superannuation. Nevertheless, these responsibilities may be particularly difficult for contract outworkers in the textile, clothing and footwear industry (TCF) who have long been acknowledged as particularly vulnerable to exploitation. (See separate section on TCF outworkers below). Difficulties also arise in the owner-driver sector (see separate section on owner-drivers below).

There will be tax implications for previously deemed employees becoming independent contractors who therefore move out of the PAYG tax system. However, this impact is difficult to quantify. Taxation legislation makes the distinction between those who carry on a business and those who do not. Those who carry on a business are not considered to be employees for tax purposes. Income from conducting a genuine personal services business (i.e. a business conducted by an independent contractor) is exempt from the personal services income (PSI) provisions in the *Income Tax Assessment Act 1997*. Where an individual satisfies the PSI test[13] they are required to pay tax on the same basis as employees. The PSI provisions are designed to capture those contractors who are so-called 'dependent contractors' in that they may be independent contractors but who resemble employees (for example, they may be operating under a contract for services, but perform work for, and be subject to the control of, only one client).

Workers currently deemed to be employees who essentially provide labour services for one client may fall under the PSI provisions. Others will be considered genuine independent contractors for tax purposes and will therefore be exempt from the PSI provisions.

[13] The PSI test is made up of a number of other tests, including the 'results test', the '80% rule' and declarations from the Commissioner for taxation. The PSI test is also referred to as the alienation of personal services income test (the APSI test).

Overriding State deeming provisions could increase the number of independent contractors, and inversely decrease the number of employees in relevant States. However, there is also the possibility that, because deemed employees have been working under 'employee' like arrangements, that they will continue to be employees once deeming is removed. It is difficult to predict how previously deemed employees would be considered by the courts once they are no longer deemed. It is impossible to quantify the numbers of people affected as we do not know how many employees are currently 'deemed' under State laws.

Transitional arrangements could be introduced so that those deemed by State provisions would continue to be deemed for a three year period, unless they elect to become independent contractors during that time by agreement with their employer. This would allow a sufficient transitional period in which deemed employees (and relevant employers) could be informed about the impact of 'undeeming'. A further benefit of transitional arrangements would be that any significant change in numbers of deemed employees immediately becoming independent contractors would be unlikely.

Costs and benefits to TCF contract outworkers

There are currently a range of protections available to outworkers in the textile, clothing and footwear (TCF) industry, both in the federal and State jurisdictions, and applying to both employee and contract outworkers. Special arrangements for employee outworkers have been made in the Work Choices legislation under which State protections for employee outworkers are not overridden. Further, outworker protections in federal awards are maintained under the Work Choices legislation. In addition, contract TCF outworkers engaged in Victoria have the benefit of minimum remuneration entitlements by virtue of Part 22 of the WR Act.

These special arrangements are in place for TCF outworkers as they are considered to be particularly vulnerable because they tend to lack bargaining power in relation to their rights and entitlements. According to the Productivity Commission, outworkers are typically women from East Asian backgrounds, with low proficiency in the English language and limited formal education. Lacking alternative employment opportunities, they may have limited negotiating power over their pay and working conditions.[14] The Textile, Clothing and Footwear Union of Australia has claimed that outworkers are often not paid for the work they do and receive no sick or annual leave, superannuation or overtime rates of pay. Because the supply chain consists of numerous subcontractors, outworkers often may not know the identity of the principal manufacturer, making it difficult for them to pursue any unpaid monies and/or other entitlements.[15] Furthermore, outworkers work outside of normal business premises. All of these factors combine to identify TCF outworkers as a special group of workers requiring specific employment protections.

As most jurisdictions currently deem contract outworkers to be employees, overriding State deeming laws through the Independent Contractors legislation may particularly disadvantage contract outworkers who are currently entitled to employee protections under State industrial relations laws. Further, it would not be consistent with the approach taken under the Work Choices legislation which has maintained special arrangements for TCF outworkers.

Costs and benefits to employers

[14] Productivity Commission, *Review of TCF Assistance*, Report No. 26, 2003.
[15] Ibid.

Where a common law independent contractor is deemed to be an employee by a State or Territory law, they become subject to the award or agreement making system of that State or Territory. This imposes a burden on those who engage deemed employees to meet certain obligations such as payment of award wages and entitlements under employment legislation. Accordingly, the proposal to override deeming provisions means that these obligations would no longer be imposed on employers engaging contractors who are deemed by legislation to be employees. This will remove a significant regulatory burden on employers who engage certain classes of contractor.

However, there would be a one-off cost to employers in the form of paying out entitlements of previously deemed employees they had accrued as employees, when these workers are effectively 'undeemed'. There is also the potential for significant confusion around the status of these workers. All previously deemed employees will not automatically become independent contractors once the State provisions are overridden – their status will depend on a number of factors and the underlying common law contract between the parties. However, this could be significantly alleviated by introducing a three year transitional period in which deemed employees continue to be deemed, thereby allowing a sufficient period of time for employers and employees to be educated about the changes, and for employers to budget for paying out employee entitlements.

Costs and benefit to employees

The direct impact on common law employees of removing State deeming provisions would be negligible. Employees will remain covered by existing protections under employment law.

A common law independent contractor who has previously been deemed by State and Territory law to be an employee would, however, now be classed as independent contractor, depending on their circumstances. These workers would no longer be covered by protections under employment law. As stated above, this would present particular difficulties for contract TCF outworkers.

There would be some initial confusion around the status of previously deemed employees and a need for information and education about their rights and obligations as independent contractors.

Costs and benefit to consumers and the Australian economy

Independent contracting provides a flexible labour source for employers. If employers can hire specialist staff to undertake specific tasks when needed, on a contract basis, it stands to reason that their business will operate more efficiently, thereby contributing to a more productive economy. This productivity will also be passed on to consumers in the form of cheaper goods and services.

Current prescriptive regulation which deems certain classes of contractors to be employees represents a cost to employers and does not result in a flexible labour market. There is no benefit to the Australian economy or the Australian consumer in maintaining these prescriptive arrangements.

(b) Owner-drivers

(i) override State protections for owner-drivers

Costs and benefits to owner-drivers

Overriding State protections for owner-drivers in New South Wales and Victoria would represent a significant cost for independent contractor owner-drivers in these jurisdictions. Many owner-drivers work for only one principal and are fully dependent on them for their work volume. This is coupled with having to operate within very tight business margins; many owner-drivers take out large loans to pay off their vehicles and require a steady income to pay off these debts. These independent contractors could receive lower rates of remuneration given that they would no longer be guaranteed the minimum rates of pay set by a tribunal. This would also impact on the value of goodwill. It could result in owner-driver businesses failing because they would no longer be able to absorb the lower remuneration rates.

While owner-drivers would be free to contract with principals on a purely commercial basis, this benefit may not outweigh the cost of losing their existing protections.

Costs and benefits to employers

Employers who engage owner-drivers would benefit from this option to override State protections. They would be able to contract freely with owner-drivers without having to meet obligations imposed on them by owner-driver specific State laws, such as minimum rates of pay set by a tribunal.

They could also benefit to a certain degree in that owner-drivers would no longer have the right to collectively bargain with union representation, although the *Trade Practices Act 1974* does allow small businesses to collectively bargain. This process, however, is more complex than the process allowed by Chapter 6 of the NSW IR Act.

Some businesses who engage owner-drivers as sub-contractors argue that the arrangement should be entirely commercial and should not be encroached on by State regulation which provides these workers with employee-type protections.

Costs and benefits to employees

Overriding State owner-driver specific laws would have no impact on common law employees. Employee owner-drivers would remain protected under employment law.

Costs and benefits to consumers and the Australian economy

It can be argued that the economy and consumers would benefit from deregulation of owner-driver laws. If businesses are able to contract freely with owner-drivers, presumably paying them lower rates, this would be of benefit to consumers in the form of lower costs for products and to the economy in general.

There would be a cost however if owner-drivers were to be forced to go out of business because they were not earning enough income to pay off their debts. Furthermore, there have been claims that safety in the transport industry would be directly compromised if owner-drivers were forced to work longer hours and drive at higher speeds in order to stay in business.

(b) Owner-drivers

(ii) maintain the status quo and do nothing

Costs and benefits to owner-drivers

This option benefits owner-drivers in New South Wales and Victoria. They continue to enjoy the special protections afforded them by these specific laws.

Costs and benefits to employers

This option does not benefit employers who engage owner-drivers. They would continue to be required to pay set rates to owner-drivers and, in some circumstances, goodwill compensation in States with these protections in place.

This could be alleviated to a certain extent if the Government were to conduct a comprehensive and consultative review of all the regulation of owner-drivers with a view to streamlining these protections in the longer term.

Costs and benefits to employees

This option would have no impact on employees. Employee owner-drivers would remain under the protection of employment law.

Costs and benefits to consumers and the Australian economy

Current conditions would be retained so that maintaining these protections would have little impact on consumers and the Australian economy. Owner-drivers would benefit, while contractors of owner-drivers would not.

If, as a result of a future review of owner-drivers laws, regulation in this area was simplified and made more consistent on a national basis, the Australian economy and consumers would naturally benefit.

(c) Unfair contracts

(i) Override State unfair contracts provisions and establish national unfair contracts regime in separate legislation

Costs and benefits to contractors

Overriding State unfair contracts regimes for independent contractors and establishing a single 'national' (as far as is constitutionally possible) unfair contracts jurisdiction would move unfair contracts provisions away from workplace relations laws into a stand alone Act, where they more appropriately rest.

Independent contractors in New South Wales and Queensland would benefit from a federal system replacing the existing regimes in those States. By adopting one unfair contracts jurisdiction there would be less potential for confusion.

A cost, however, is that while the New South Wales and Queensland unfair contracts regimes rest with the respective State Industrial Relations Commissions, the federal jurisdiction resides

with the Federal Court. This jurisdiction adopts a narrower meaning of 'unfairness', is more expensive and represents a more formal process than State Commissions.

To counter this cost, a jurisdiction for a national unfair contracts regime could be conferred on the Federal Magistrates Court (in addition to the Federal Court) which would make seeking redress cheaper and more accessible for independent contractors. This would also implement one of the recommendations made by the House of Representatives Committee's *Making it Work* report, in which the Committee acknowledged that this would provide a simpler and more accessible alternative to litigation in the Federal Court alone.[16] It would also be consistent with approach taken in the federal *Building and Construction Industry Improvement Act 2005* which allows unfair contracts proceedings to be heard in the Federal Magistrates Court as well as the Federal Court.

Establishing a national unfair contracts regime for all independent contractors with jurisdiction conferred on the Federal Magistrates Court, is likely to make the jurisdiction more readily accessible to independent contractors, because the Federal Magistrates Court is a lower cost jurisdiction. An even better option is to establish a concurrent jurisdiction in both the Federal Magistrates Court and the Federal Court. This would allow proceedings to be transferred from the Federal Magistrates Court to the Federal Court where, for example, they raise particularly complex legal issues.

The proposed federal unfair contracts regime could also be extended to independent contractors who are incorporated entities, otherwise under this option incorporated independent contractors, who can currently obtain a remedy under State laws, will be excluded from the federal jurisdiction.

Costs and benefits to employers

Introducing a 'national' unfair contracts jurisdiction which overrides State regimes would be beneficial to employers.

There would no longer be duplicative unfair contracts regimes in New South Wales and Queensland as well as the federal jurisdiction, but rather one 'national' system vested in the Federal Magistrates Court and Federal Court. There would be one consistent uniform unfair contracts jurisdiction in place across the States to avoid confusion.

Moreover, a federal unfair contracts regime would have a narrower set of considerations when determining unfairness than the current regimes in New South Wales and Queensland. It would also require the Courts to consider market forces, not just employees' pay rates, when considering unfairness.

Costs and benefits to employees

Establishing a national unfair contracts regime by overriding State unfair contracts provisions would have no impact on employees. Employees would remain protected under employment law.

[16] House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, *Making it Work: Inquiry into Independent Contracting and Labour Hire Arrangements*, 2005, paragraph 6.94.

Costs and benefit to consumers and the Australian economy

The existing regulatory arrangements for unfair contracts do not benefit consumers and the Australian economy. There are different unfair contracts remedies in workplace relations legislation in New South Wales, Queensland and the Commonwealth, while in other State jurisdictions, these contracts are subject to commercial and common law. This is confusing and inconsistent. While the costs to the economy and consumers of the existing unfair contracts regime is negligible, introducing one national system covering as many independent contractors as possible would be of benefit to independent contractors and employers alike in terms of reducing confusion and inconsistency. This cost-saving could have a minor flow-on effect to consumers and the economy.

(c) Unfair contracts

(ii) maintain status quo and do nothing

Costs and benefits to contractors

Under this option, the current unfair contracts regimes in the federal, New South Wales and Queensland jurisdictions would be maintained. These regimes are not uniform, and there would be continuing duplication with the federal regimes in these jurisdictions.

The federal unfair contracts provisions would be retained in the WR Act under this option, providing remedies only in the Federal Court. This jurisdiction is more costly for applicants than the Federal Magistrates Court.

Table A shows the cost of commencing a claim in the Federal Court and the Federal Magistrates Court. The Table also compares the cost of commencing an unfair contracts claim in the New South Wales and the Queensland Commissions.

Table A: Unfair contract Jurisdictional cost comparison

Cost Comparison (Individual)	**Federal Court**	**Federal Magistrates Court**	**NSW IRC**	**QLD IRC**
Filing fee for filing documents or commencing proceedings/application	$606.00	$288.00	$638.00	$52.50
Fee for allocation of hearing date	$1211.00/$242 per day	$345.00	$1216.00/ $227 for each half day on or after 11th day.	n/a
Fee for mediation	$303.00	$230.00	n/a	n/a

The federal jurisdiction's current limitation on extending unfair contracts provisions only to existing natural persons would be retained under this option. Incorporated independent contractors would continue to be excluded from accessing the federal unfair contracts regime.

On the other hand, however, independent contractors in New South Wales and Queensland would continue to have access to the more expansive unfair contracts regimes in those States (see below).

Costs and benefits to employers

Lack of uniformity between the New South Wales, Queensland and federal unfair contracts jurisdictions means lack of consistency in regulation and creates uncertainty, something of which business is often highly critical. This would continue under the status quo option.

Moreover, the current New South Wales and Queensland provisions are more expansive than the federal unfair contracts regime. The NSW Industrial Relations Commission is not confined to considering the content of the contract nor the process of its making, but can also look at a contract which has become unfair as the result of one party's conduct under the contract. The New South Wales regime has also been criticised for its breadth of coverage and the generosity of its payouts. The Queensland provisions extend to contracts of service not covered by an industrial instrument, and contracts for service. The provisions are modelled on the New South Wales provisions. Like the New South Wales provisions, a determination can be made that a contract became unfair after it was entered into because of the conduct of the parties. The Commission can also make any order it considers appropriate about payment of an amount.

For employers in these jurisdictions, remaining within the State provisions represents a cost when compared to the less interventionist federal provisions that would be implemented under a national regime.

Costs and benefits to employees

Maintaining the current unfair contracts provisions would have no impact on employees. Employees would remain protected by employment law.

Costs and benefits to consumers and the Australian economy

The existing regulatory arrangements for unfair contracts do not benefit consumers and the Australian economy. Having differing unfair contracts provisions in three jurisdictions is confusing and inconsistent. However, the cost to consumers and the Australian economy is likely to be minimal.

(d) Sham arrangements

(i) introduce civil penalties for employers found guilty of using sham contracting arrangements to disguise employment arrangements

Costs and benefits to contractors

This option is cost-neutral for independent contractors, as it does not have an impact on genuine contractors. Those who are found to have been disguised as contractors under sham arrangements are really employees rather than contractors. It only impacts on the numbers of independent contractors to the extent that those 'contractors' previously operating under sham arrangements who are found to be genuine employees would no longer be considered independent contractors. It is estimated that these numbers would be minimal.

Costs and benefits to employers

Introducing civil penalties for sham independent contracting arrangements would have a direct cost for a small proportion of employers found to be disguising a genuine employment relationship. There would be legal costs involved for employers defending these cases in the Federal Court. However, we consider that this is a necessary protection for those workers who are really employees rather than contractors, and outweighs any costs to a few unscrupulous employers.

This protection is considered to be particularly necessary if the Government is to override State deeming laws and State unfair contracts provisions through the Independent Contractors legislation. It is important to send a clear message to industry that while employment law may no longer apply to independent contractor relationships, the Government will not tolerate exploitation of workers who should be treated as employees under industrial laws.

Costs and benefits to employees

This measure is clearly beneficial for employees as it represents a disincentive for employers to disguise employees under sham contracting arrangements. It will provide a clear message to employers that disguising genuine employment relationships can result in sanctions, thereby acting as a deterrent to engaging in deceptive arrangements to avoid employer obligations under industrial instruments.

While an employee would be able to pursue a case individually, legal costs would generally be incurred by the Commonwealth which would pursue these cases on behalf of the employee.

Costs and benefits to consumers and the Australian economy

This measure is unlikely to have any impact on consumers or the Australian economy.

(d) Sham arrangements

(ii) maintain status quo and do nothing

Costs and benefits to contractors

This option is cost-neutral for independent contractors, as it does not have an impact on genuine contractors. Those who are found to have been disguised as contractors under sham arrangements are really employees rather than contractors.

Costs and benefits to employers

This option would represent a cost for honest and law-abiding employers as it would offer no deterrent to unscrupulous employers who disguise common law employees and independent contractors. This would allow unprincipled employers to avoid paying their workers their legal entitlements. Consequently, unscrupulous employers could undercut honest employers when providing similar services resulting in significant disadvantage to those law-abiding businesses.

Costs and benefits to employees

Introducing penalties for deceptive contracting arrangements acts as a disincentive for employers to engage in these practices. By maintaining the current situation, these practices can continue without sanction. Employers of contractors found by courts to be really employees are only subject to meeting employer obligations under employment law. There is currently no further penalty for making use of sham contracting arrangements. Accordingly, maintaining the status quo is of no benefit to employees.

There is no direct cost to employees of not introducing such penalties, as penalising employers does not have any bearing on whether or not employees disguised as contractors receive the protections under law that has been denied to them. Once a court decides that contractors are really employees, they become entitled to employee protections under law. Application of penalties to employers is a separate matter.

Costs and benefits to consumers and the Australian economy

This measure is unlikely to have any impact on consumers or the Australian economy.

Conclusion and recommended option

Summary of each option

(a) Introduce separate legislation to override State 'deeming' provisions

This option would benefit independent contractors by allowing them to contract freely without being caught by employment law. On the other hand, they would lose protections under that employment law and it is likely that removing State deeming provisions would have a significant detrimental impact on TCF outworkers given their particular vulnerability for exploitation.

Employers would benefit significantly if deeming provisions were removed because they would be free to engage independent contractors as contractors rather than as deemed employees. They may, however, be subject to a one-off cost of paying out entitlements to those previously deemed employees who are no longer considered to be employees.

There would be some initial need for information and education about the new arrangements. Transitional arrangements could be established to allow deemed employees and relevant employers to be sufficiently informed of the impact of 'undeeming'.

(b) Owner-drivers

(i) override State protections for owner-drivers

This option would impose a significant burden on independent contractor owner-drivers in New South Wales and Victoria. They would lose all of their current protections under Chapter 6 of the *Industrial Relations Act 1996* (NSW) and the *Owner Drivers and Forestry Contractors Act 2005* (Vic). They would be required to compete for lower rates of remuneration and would only

have remedies at commercial and common law available to them. Any collective bargaining would have to be done in accordance with provisions of the *Trade Practices Act 1974*.

(b) Owner-drivers

(ii) maintain status quo

This option leaves untouched provisions in State laws that provide protections for owner-drivers.

While it benefits owner-drivers, it does not benefit those businesses who engage owner-drivers who would prefer that the contract relationship be unhindered by employee-like entitlements and left to the commercial sphere of law.

(c) Unfair contracts

(i) Override State unfair contracts provisions and establish national unfair contracts regime in separate legislation

This option would override existing New South Wales and Queensland unfair contracts jurisdictions and replace them with a federal jurisdiction in the Federal Magistrates Court as well as the Federal Court. This option would also remove the current unfair contracts provisions of the WR Act.

This option would be beneficial to independent contractors as well as those who engage them as there would be one 'national' unfair contracts system (as far as constitutionally possible) enshrined in commercial rather than employment law. While the federal jurisdiction adopts a narrower meaning of 'unfair' and is more expensive and formal than the New South Wales and Queensland jurisdictions, the cost would be mitigated by providing the Federal Magistrates Court with jurisdiction. The federal jurisdiction could be extended to cover incorporated independent contractors (who are currently excluded).

Employers would benefit more from the less interventionist federal jurisdiction than the current New South Wales and Queensland jurisdictions which are more expansive. However, independent contractors who currently benefit from the broader coverage of the New South Wales and Queensland regimes would only have access to the narrower federal system under this option.

(d) Unfair contracts

(ii) maintain status quo

This option would leave current unfair contracts regimes in place in New South Wales and Queensland, as well as leaving the federal provisions under the WR Act. Other States would be free to legislate in this area. There would be differing regimes across some jurisdictions.

Independent contractors in New South Wales and Queensland may benefit from the broader coverage and generous payouts of the current unfair contracts regimes in those States. However, lack of uniformity in these jurisdictions creates uncertainty and confusion for employers.

The federal jurisdiction would remain in the Federal Court rather than the Federal Magistrates Court, being a more costly and formal process for applicants. Incorporated independent contractors would continue to be excluded from the federal jurisdiction.

(e) Sham arrangements

(i) introduce civil penalties for employers found guilty of using sham contracting arrangements to disguise employment arrangements

This option would create civil penalties for sham contract arrangements which would introduce sanctions for this behaviour which do not currently exist. It would send a clear message to employers that disguising employment relationships as contract relationships will not be tolerated, and discourage the practice.

This option would result in legal costs for employers defending these cases in the Federal Court. However, the penalties would provide an important protection for employees, particularly if the options to override State deeming and unfair contracts provisions are adopted.

(f) Sham arrangements

(ii) maintain status quo

This option would not introduce civil penalties for sham contracting arrangements. This would allow unscrupulous employers to go unpunished for disguising the employment relationship as something else.

There would be no direct effect on employees of maintaining the status quo because they would still be able to recover their legal entitlements under the separate remedies provided by the WR Act. However, sham contract arrangements would be allowed to continue without specific sanction. Employers who disguised employment relationships would merely have to meet the obligations to the employee under employment law. There would be no further penalty.

Preferred option

The main assumption on which the preferred option is based is that the Australian Government has announced, as an election commitment, its intention to introduce independent contractors legislation to 'protect and enhance the freedom to contract and to encourage independent contracting as a wholly legitimate form of work'. This is why non-regulatory options have not been considered.

Options to maintain the status quo have generally been rejected because they do not meet the objectives to remove deeming provisions in State laws while ensuring that employees are protected from sham contract arrangements. Nor do they allow for a 'national', narrower federal jurisdiction under commercial law, extended as far as constitutionally possible, to replace existing unfair contracts regimes in New South Wales and Queensland. The status quo options do nothing to address the issues outlined in the Problem section.

Accordingly, the preferred option is to move contracting relationships away from the realm of employment law and to place these relationships as far as possible under commercial regulation where they belong, through introduction of an Independent Contractors Bill (and related Workplace Relations Legislation Amendment (Independent Contractors) Bill).

Deeming provisions

Under this legislation, the Government would remove deeming provisions by overriding them in State legislation (primarily using the corporations power) with the exception of State laws that deem contracted TCF outworkers. This would leave untouched State laws that deem contract TCF outworkers to be employees as well as specific State laws that provide additional protections for outworkers. This is in recognition of particular difficulties faced by contract outworkers. It would also align the protections for outworkers under the WR Act, including those established by the Work Choices legislation, with those in the Independent Contractors legislation. It would be consistent with the way employee outworkers, and contract outworkers in Victoria, are currently treated under the WR Act.

Furthermore, the minimum remuneration guarantee provided by Part 22 of the WR Act which is currently confined to TCF contract outworkers in Victoria could be extended to all contracted TCF outworkers in Australia. This guarantee, which would be set as part of the Australian Fair Pay and Conditions Standard, would only apply where an individual outworker is not already covered by State or Territory legislation that provides some form of remuneration guarantee regardless of whether the State or Territory protection is more than the Standard. This would leave outworker protection as primarily a State matter, but would allow the Commonwealth to provide a 'safety net' which guarantees a minimum income for these workers. It would also provide a consistent approach across the States.

In addition, a three year transitional period could be established in which those workers who are currently deemed by State laws remain deemed unless they elect to become an independent contractor by agreement with their employer. These transitional arrangements would allow a sufficient period of time for affected employers and employees to be made aware of the changes and to arrange their affairs accordingly. These transitional arrangements would not apply to new independent contractors who start work after the commencement of the Independent Contractors legislation.

Owner-drivers

Similar to the exception made for TCF outworkers, the legislation would also refrain from overriding specific owner-driver protections under State law at this stage, given that they, too, have been historically recognised by both Liberal and Labor State governments as facing particular challenges as independent contractors. The Government could, however, conduct a review of these regulations in the short-to-medium term in order to develop national consistency in these arrangements.

Unfair contracts

Under this legislation, the Government would introduce a 'national' federal unfair contracts regime by overriding State unfair contracts provisions as far as constitutionally possible. The federal unfair contracts regime would be removed from the WR Act and re-enacted in the Independent Contractors Bill. The new federal jurisdiction would:

- provide concurrent jurisdiction in the Federal Magistrates Court and the Federal Court to hear unfair contract matters;
- allow independent contractors who are incorporated to access the jurisdiction;
- be limited to applications relating to contracts for service that are binding on an independent contractor and relate to work performed by that independent contractor; and

- broaden the criteria the Court may consider in determining whether a contract is unfair, so as to focus on market rates in addition to equivalent employee wages.

Penalties for sham arrangements

The proposed legislation would also introduce penalties for employers who seek to use 'sham' independent contracting arrangements to avoid obligations to their employees. Penalties for employers would cover the following circumstances:

- misrepresenting an employment relationship as an independent contracting relationship, or attempting to do so at the time a contract is entered into;
- making statements to an employee to persuade or influence that employee to become an independent contractor where the employer knows the statement to be false; and
- dismissing, or threatening to dismiss, an employee with the sole or dominant purpose of re-engaging them as an independent contractor.

Impact on small business

The proposed changes would benefit small business as a result of effectively deregulating the contract relationship. Small businesses which engage contractors would be freed of obligations imposed on them by industrial legislation through deeming provisions, except in the case of TCF contract outworkers who are considered to be in particular need of the protections afforded by State deeming provisions, and owner-drivers in the road transport industry in New South Wales and Victoria who are also in need of special protections under State laws. In general, in relation to certain types of contractors they engage, small business operators would no longer be responsible for superannuation, taxation deductions, provision of leave and any other obligations which apply to employees. While there may be a one-off cost involved in paying out any previously deemed employees their accrued entitlements, a transitional period could be implemented to allow a sufficient lead time to absorb the cost.

Overall, the preferred option will result in less cost to small business operators who, for whatever reason, may need to take on contractors or labour hire workers.

Introducing a federal unfair contracts regime in the Federal Magistrates Court which overrides the New South Wales and Queensland provisions will benefit small business operators. The federal system is likely to be less interventionist than the existing State systems, and small business operators in New South Wales and Queensland, covered by the federal arrangements, will only have one federal unfair contracts regime to deal with. The fact that the federal jurisdiction will be in the Federal Magistrates Court will be of further benefit by providing a cheaper and more accessible jurisdiction than currently exists in the Federal Court.

The proposed civil penalty for sham contracting arrangements represents a cost to those employers that attempt to disguise employment relationships. However, the cost is outweighed

by the benefit of sending clear messages to employers that sham contracting arrangements are not appropriate.

Consultation

The Department of Employment and Workplace Relations released a discussion paper in March 2005 entitled 'Proposals for Legislative Reform in Independent Contracting and Labour Hire Arrangements'. The paper put forward a series of reform options and called for stakeholder comments. Submissions in response to the paper closed in May 2005 and over 60 written submissions were received from a range of individuals, unions, employer groups, and State governments.

At the same time as the Department conducted its consultation process, the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation conducted its inquiry into independent contracting and labour hire arrangements. The Committee tabled its report, *Making It Work*, on 17 August 2005, making 16 recommendations, many of which relate to occupational health and safety issues, but also including some recommendations in relation to federal independent contractors legislation. A dissenting report was also made by Opposition members of the Committee.

Implementation and review

The proposed options would override State deeming provisions and unfair contracts regimes through the implementation of the independent contractors legislation. The legislation would provide remedies for the parties to unfair contracts and introduce civil penalties for sham contracting arrangements. The same inspection and compliance mechanisms which have been established under the WR Act through the Office of Workplace Services (OWS) would be used to enforce the proposed civil penalty. There would be a need for increased investigations by OWS staff to enforce the sham penalties.

An education campaign would be conducted for employers and contractors to inform them of the new arrangements, particularly in relation to overriding State deeming provisions. It would also include specific information on how to make sound contracts. A three year transitional period would apply to overriding State deeming provisions.

Funding has been sought, and approved, through the 2006-07 Budget process for these education and compliance measures.

A review of owner-driver regulation would be conducted by the Department of Employment and Workplace Relations in 2007, involving full consultation with all relevant stakeholders.

The Department will also monitor and evaluate the impact of the proposed changes, once the proposed measures are fully implemented.

Attachment A

Workers affected by State deeming laws

New South Wales

Schedule 1 of the *Industrial Relations Act 1996* (NSW) deems workers in the following industries to be employees:

- milk vendors;
- cleaners;
- carpenters, joiners or bricklayers;
- painters;
- bread vendors;
- outworkers in clothing trades;
- timber cutters and suppliers;
- plumbers, drainers or plasterers;
- blinds fitters;
- council swimming centre managers or supervisors;
- ready-mixed concrete drivers;
- RTA lorry drivers; or
- others prescribed by the regulations.

Queensland

The *Industrial Relations Act 1999* (Qld) deems workers to be employees through the definition of 'employee' and via the Full Bench of the Queensland Industrial Relations Commission making a declaration that classes of workers are employees. The following classes have been so declared:

- outworkers;
- apprentices and trainees;
- persons engaged on piece rates; and
- workers in the security industry who are engaged by Bark Australia Pty Ltd.

South Australia

The *Fair Work Act 1994* (SA) deems workers to be employees via the definition of 'contract of employment'. The Act deems persons engaged on the following types of contracts to be employees:

- contracts under which a person (the employer) engages another (the employee) to:
    - drive a vehicle that is not registered in the employee's name to provide a public passenger service (even though the contract would not be recognised at common law as a contract of employment), but not a taxi;

- carry out personally the work of cleaning premises (even though the contract would not be recognised at common law as a contract of employment; and
- carry out work as an outworker (even though the contract would not be recognised at common law as a contract of employment).

Tasmania

The *Industrial Relations Act 1984* (Tas) deems outworkers, apprentices and trainees to be employees.

Others

There are no deeming provisions in ACT, NT and Victoria, and while the Industrial *Relations Act 1979* (WA) expands the common law definition of 'employee' to include persons who do work for hire or reward, this is not broad enough to be considered a deeming provision.

PART 1 – PRELIMINARY

Section 1 - Short title

1. This is a formal provision specifying the short title of the Act which may be cited as the *Independent Contractors Act 2006*.

Section 2 - Commencement

2. Proposed section 2 would specify when the various provisions of the Act are to commence. The time of commencement for particular provisions would be set out in a table in subsection 2(1).

3. Item 1 of the table in subsection 2(1) would provide that the preliminary provisions of the Act (short title and commencement) would commence on Royal Assent.

4. Item 2 of the table would provide that sections 3 to 43 would commence on a single day to be fixed by Proclamation. However, if any of the provisions are not proclaimed to commence within six months of the Act receiving Royal Assent, they would commence on the first day following that period of six months. It is expected that sections 3 to 43 would be proclaimed to commence before the expiration of the six month period.

5. A legislative note would be inserted below the table to indicate that the table relates only to the provisions of this Act as originally passed by the Parliament and assented to by the Governor-General. The table would not be expanded to deal with provisions that may be inserted in this Act after Assent.

6. Subsection 2(2) would provide that Column 3 of the table contains additional information that is not part of the Act. Information in this column could be added to or edited in any published version of this Act.

Section 3 - Objects of this Act

The main objects of the Act would be to set out in proposed subsection 3(1). They are:

- to protect the freedom of independent contractors to enter into services contracts; and
- 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.

7. Proposed subsection 3(2) provides a summary of the principal way in which the Bill would achieve these objects. The Bill would operate to exclude State and Territory laws which provide employee-like entitlements to independent contractors (see proposed Part 2), allowing the contract, common law and Commonwealth law (including this Bill) to govern independent contractor relationships. Proposed subsection 3(2) therefore states that the Bill would provide for the rights, entitlements, obligations and liabilities of parties to a *services contract* to be governed by the terms of those contracts, subject to:

- the rules of common law and equity as applying in relation to those contracts;
- the laws of the Commonwealth as applying in relation to those contracts; and
- the laws of the States and Territories as applying in relation to those contracts, other (in general) than any such laws that confer or impose rights, entitlements, obligations or liabilities of a kind more commonly associated with employment relationships. State and Territory laws would apply 'in general' because in some cases, laws which are of a kind more commonly associated with employment relationships would not be excluded by the operation of this Bill. These include laws under proposed subsection 7(2).

Section 4 - Definitions

8. Proposed section 4 would define the terms used in the Bill. These are common terms used throughout the Bill. Other Parts may contain definitions used for a specified Part or Parts.

9. The proposed definition of *Commonwealth authority* would define the expression to mean both a body corporate established for a public purpose by or under a Commonwealth law and a body incorporated under a law of the Commonwealth or a State or Territory in which the Commonwealth has a controlling interest.

10. The proposed definition of *constitutional corporation* would define the expression to mean a corporation to which paragraph 51(xx) of the Constitution (the corporations power) applies. The corporations power applies to a trading or financial corporation formed within the limits of the Commonwealth and to foreign corporations.

11. The proposed definition of *Court* would mean the Federal Court of Australia or the Federal Magistrates Court.

12. The proposed definition of *exclusion provisions* would mean State and Territory laws that are excluded by the operation of proposed subsection 7(1) or regulations under proposed subsection 10(1) that may specify State and Territory laws that are excluded by this Bill.

13. The proposed definition of *independent contractor* would define the expression to mean that it is not limited to a natural person. The question of whether a worker is an employee or an independent contractor would continue to be determined by the common law.

14. The proposed definition of *organisation* would have the same meaning as in the *Workplace Relations Act 1996* (the WR Act). This means an organisation registered under the Registration and Accountability of Organisations Schedule of the WR Act.

15. The proposed definition of *penalty unit* would have the same meaning as expressed in section 4AA of the *Crimes Act 1914*. A penalty unit is currently defined under that Act to mean $110.

16. The proposed definition of *services contract* would define the expression to have the meaning given by section 5.

17. The proposed definition of *workplace inspector* has the same meaning as in the WR Act. This means a person appointed as a workplace inspector under section 167 of the WR Act.

Section 5 - Services contract

18. Proposed section 5 would provide a definition of *services contract*.

General meaning

19. Subsection 5(1) would provide that *services contract* is defined to mean a contract for services:

- to which an independent contractor is a party;
- that relates to the performance of work by the independent contractor; and
- that has the requisite constitutional connection, which is specified in subsection 5(2).

20. It is intended that the term ‘contract for services’ is to take its common law meaning. The common law relies on the multi-factor (indicia) test to make the distinction between a contract of employment (contract of service) and a contract for services. The leading Australian High Court authorities outlining this test and the indicia are the cases of *Stevens v Brodribb Sawmilling Co*

Pty Ltd (1986) 160 CLR 16 and *Hollis v Vabu Pty Ltd (Crisis Couriers No. 2)* (2001) 207 CLR 21.

21. A legislative note under subsection 5(1) would refer the reader to subsection 5(4) in relation to conditions or collateral arrangements relating to a services contract. Under subsection 5(4) a contract or collated agreement that relates to a *services contract* would be taken to be part of that *services contract*.

The requisite constitutional connection

22. Subsection 5(2) would provide the circumstances in which a *services contract* would have the requisite constitutional connection for the purposes of subsection 5(1) and subsection 5(4). The *requisite constitutional connection* identifies the constitutional bases for the Act. This includes the corporations power (paragraph 51(xx) of the Constitution), the Commonwealth's power to regulate entities of the Commonwealth and Commonwealth authorities and the Territories power.

23. Paragraph 5(2)(a) would provide that a contract for services has the requisite constitutional connection if at least one party to the contract is:

- a constitutional corporation (defined in section 4); or
- the Commonwealth or a Commonwealth authority; or
- a body corporate incorporated in a Territory in Australia.

Paragraph 5(2)(b) would provide that irrespective of paragraph 5(2)(a), the requisite constitutional connection could also be satisfied if under the services contract:

- the work concerned is wholly or principally to be performed in a Territory in Australia;
- the contract was entered into in a Territory in Australia;
- at least one party to the contract is a natural person who is resident in, or a body corporate that has its principal place of business in, a Territory in Australia. The phrase 'Territory in Australia' includes the Territory of Christmas Island and the Territory of the Cocos (Keeling) Islands (see paragraphs 17(a) and (p) of the *Acts Interpretation Act 1901*).

24. Subsection 5(3) would provide that where at least one party to the *services contract* is a constitutional corporation, the *requisite constitutional connection* is satisfied in circumstances where a reference to a constitutional corporation was, by express provision, confined to a constitutional corporation that has entered into the contract for the purposes of the business of the corporation.

Conditions and collateral arrangements

25. Subsection 5(4) would provide that a condition or collateral arrangement that relates to a *services contract* is to be included as part of that *services contract* if, were the condition or arrangement itself a contract for services, it would have the requisite constitutional connection. For example, this would mean that a side agreement that refers to the operation of the services contract could be treated itself as part of the *services contract*. This ensures that technical distinctions do not need to be drawn between the *services contract* and other agreements between the parties that are likely to impact on the operation of the *services contract*. A similar provision currently exists in subsection 832(1)(b) of the WR Act in relation to the present Commonwealth unfair contracts jurisdiction.

PART 2 – EXCLUSION OF STATE LAWS

Section 6 - Definition

26. This proposed section would define relevant terms used by this Part. It would provide an extended definition of *party* in relation to a *services contract* by including a person who is an *officer* of a body corporate where that body corporate is a party to a *services contract*. The meaning of *officer* is derived from the *Corporations Act 2001*.

Section 7 - Exclusion of certain State and Territory laws

27. This proposed section would exclude the operation of certain types of State and Territory laws to the extent that those laws affect, or would affect, the rights, entitlements, obligations or liabilities of a person who is a party to a *services contract* (defined by proposed section 5). This proposed provision would exclude the operation of State or Territory laws that:

- seek to alter the status of common law independent contractors or their principals and require them to be treated as employees or employers;
- confer rights, entitlements, obligations and liabilities on a common law *independent contractor* or principals that are similar to those of employees or employers in an employment relationship; and
- allow a body to review, vary or set aside a *services contract* on the ground that it is unfair.

28. State and Territory deeming laws would be excluded from affecting the rights, entitlements, obligations or liabilities of parties to a *services contract* by proposed paragraph 7(1)(a). This provision would apply to laws that take, deem or otherwise treat a party to a *services contract* to be an employee or employer for the purposes of a *workplace relations matter* (defined in proposed section 8). State or Territory laws that deem parties to a *services contract* to be employees or employers for other than a *workplace relations matter* would continue to apply (that is, they would not be affected by the operation of this proposed paragraph).

29. This proposed provision would allow people working in industries subject to State or Territory deeming laws to choose the type of working arrangement that best suits them. It would remove existing (and potential future) requirements under State and Territory laws that prevent them from electing to be an *independent contractor*.

30. An example of a State law that would be excluded by operation of paragraph 7(1)(a) is certain aspects of the definition of 'employee' and Schedule 1 of the New South Wales *Industrial Relations Act 1996* (the NSW IR Act). Under the NSW IR Act, persons performing work in particular jobs or vocations are defined to be employees for the purposes of that Act. Because the NSW IR Act treats these people as employees, they have the same rights and entitlements as common law employees under that legislation. For example, independent contractors who are deemed to be employees are entitled to leave, have their minimum and maximum hours of work set by legislation and are entitled to seek remedies for the unlawful termination of employment contracts. As such, the NSW IR Act deems common law independent contractors to be employees for the purposes of one or more *workplace relations matters* (see proposed paragraph 8(1)(b)) and the relevant provisions of that Act would be excluded from affecting the rights and liabilities of parties to a *services contract*.

Illustrative example

Michael is a common law *independent contractor* who is engaged on a *services contract* by Hot Crossed Bakery Pty Ltd to deliver bread rolls to a series of shops. Under the relevant workplace relations legislation in the jurisdiction in which Michael works, bread vendors are deemed to be employees. This means that Hot Crossed Bakery must offer Michael pay and conditions in line with the relevant State workplace relations legislation despite the fact that, at common law, there would be no legal requirement to do so.

However, because Michael's rights and entitlements (and Hot Crossed Bakery's obligations and liabilities) are affected by the deeming provisions in the relevant State workplace relations legislation for *workplace relations matters*, proposed paragraph 7(1)(a) would apply. This would mean that the provisions of the State law have no effect in relation to the *services contract* between Michael and Hot Crossed Bakery. Under the proposed provisions, Michael and Hot Crossed Bakery could choose whether he is engaged as an employee or an independent contractor, depending on what best suits their needs.

31. Proposed paragraph 7(1)(a) would also exclude the operation of State or Territory laws that provide a mechanism or process by which a party to a *services contract* can be taken or deemed to be an employee or employer. This would exclude the operation of laws such as section 246 of the *Queensland Industrial Relations Act 1999* which allows a Full Bench of the Queensland Industrial Relations Commission to declare a person, or class of persons performing work in an industry under a contract for services, to be an employee for the purposes of that Act.

32. Proposed paragraph 7(1)(b) would exclude the operation of State or Territory laws that confer or impose rights, entitlements, obligations or liabilities on a party to a *services contract* in relation to a matter that, in an employment relationship, would be a *workplace relations matter*. This paragraph would exclude the operation of State or Territory laws that confer 'employee-like' rights (or 'employer-like' obligations) on a common law *independent contractor* (or a common law principal) who is party to a *services contract*. However, for the exclusion to apply, the State or Territory law must affect rights, entitlements, obligations or liabilities in relation to matters that would be *workplace relations matters*, were the parties considered to be in an employment relationship.

33. This provision would prevent the State and Territory laws which attempt to circumvent the exclusion in proposed paragraph 7(1)(a) by providing rights and entitlements to common law independent contractors that are equivalent to those of employees, but do this through a mechanism other than that described in paragraph 7(1)(a).

Illustrative example

Following the commencement of the IC Act, a State Government passes the *Bread Vendor Protection Act 2007* (the BVPA), a fictitious Act, to provide protections to people like Michael (the bread vendor from the example above). This Act does not deem bread vendors to be employees, however it allows the relevant State Industrial Relations Commission to set minimum remuneration and conditions (including maximum hours of work and leave entitlements) for bread vendors via award-like determinations.

Proposed paragraph 7(1)(b) would exclude the operation of the BVPA in relation to Michael's *services contract* with Hot Crossed Bakery. This is because the BVPA confers rights and entitlements and imposes obligations and liabilities on both parties to the *services contract* in relation to matters that, were the parties in an employment relationship, would be *workplace relations matters* (in this case, remuneration, allowances or other amounts payable to employees, leave entitlements and hours of work). Under the proposed provisions, Michael and Hot Crossed Bakery could choose whether he is engaged as an employee or an independent contractor, depending on what best suits their needs.

34. Proposed paragraph 7(1)(c) would exclude the operation of State and Territory laws that allow the whole or part of a *services contract* to be amended or varied, declared to be void or set aside (either in part or whole) on an *unfairness ground* (defined in proposed section 9). This provision would prevent the operation of a State or Territory law that allows the terms of a *services contract* to be interfered with to remedy alleged unfairness once the parties have agreed on the terms of that *services contract*.

35. A federal *services contract* review mechanism is provided under proposed Part 3 of this Bill.

Illustrative example

Shamim is an *independent contractor* who works with Move It Pty Ltd as a removalist in Queensland. Move It has engaged Shamim on a *services contract*. Shamim feels that, although the *services contract* was negotiated and executed fairly, the contract is unfair because employee removalists performing the same work are paid more for the same type of work. Shamim wants to bring an application to have his contract varied under the Queensland unfair contracts provisions in the *Industrial Relations Act 1999* (Qld).

Proposed paragraph 7(1)(c) would prevent these Queensland laws applying to Shamim meaning that he would be unable to bring an unfair contracts application in Queensland. However, Shamim would be able to bring an application under the new federal unfair contract provisions in proposed Part 3.

36. Legislative notes 1 and 2 under proposed subsection 7(1) would refer the reader to the areas of the Bill in which *workplace relations matter* and *unfairness ground* are defined. Legislative note 3 would alert the reader that there are transitional arrangements which apply in relation to proposed paragraphs 7(1)(a) and (b).

37. Proposed subsection 7(2) would provide that the exclusion provisions in proposed subsection 7(1) do not apply in some circumstances. This would mean the laws described in this subsection would not be affected by the exclusion provisions, rather they would continue to apply. Paragraph 7(2)(a) would provide that the exclusion provisions do not affect a State or Territory law applying to a *services contract* to which an outworker is a party and which makes provision in relation to such a *services contract*. As mentioned in subparagraph 7(2)(a)(ii), however, the exclusion provisions in proposed subsection 7(1) would not apply to State or Territory laws applicable to outworkers that allow a *services contract* to be amended or varied, declared to be void or set aside (either in part or whole) on an *unfairness ground*. As such, paragraph 7(2)(a) would operate to preserve State and Territory laws that affect outworkers who are party to a *services contract*. However, these outworkers would not have access to State or Territory laws which allow a contract to be set aside or varied on the grounds that it is unfair. However, the outworkers may have access to the federal unfair contracts jurisdiction under proposed Part 3.

38. This non-application of the exclusion provisions to laws concerning outworkers would be a recognition of the unique and vulnerable position of outworkers within the Australian working community. These protections would be consistent with those provided for outworkers in the *Workplace Relations Act 1996*.

39. Proposed paragraph 7(2)(b) would further limit the application of the exclusion provisions. This provision would prevent the application of subsection 7(1) to State or Territory laws that provide protections for certain independent contractors in the transport industry, including owner drivers. Subparagraphs 7(2)(b)(i) and (ii) would identify existing State laws which provide this type of protection – Chapter 6 of the New South Wales *Industrial Relations Act 1996* and the Victorian *Owner Drivers and Forestry Contractors Act 2005*. Any instrument made under these

New South Wales and Victorian laws would also be unaffected by the exclusion provisions in accordance with subparagraph 7(2)(b)(iii).

40. Proposed subsection 7(2) would also authorise the making of regulations which provide that specified State and Territory laws are not affected by the operation of the exclusion provisions. Under paragraph 7(2)(c), the Governor-General may make regulations which specify that a State or Territory law (or part of such a law) is exempt from the effect of the exclusion provisions in proposed subsection 7(1).

Section 8 - What are workplace relations matters

41. This proposed section would define what are and are not *workplace relations matters*. This definition is pivotal to the operation of the exclusion provisions, particularly proposed paragraphs 7(1)(a) and (b). For a State or Territory law to be excluded under those exclusion provisions, the law must affect the rights, entitlements, obligations or liabilities of a party to a *services contract* for the purposes of one or more *workplace relations matters*. The definition of *workplace relations matter* is also important for the operation of proposed paragraph 7(1)(c) as a ground for review and variation of a *services contract* cannot be an *unfairness ground* under proposed section 9 to the extent that the ground is defined not to be a *workplace relations matter* under proposed subsection 8(2).

42. Proposed paragraphs 8(1)(a)-(h) list those matters that are *workplace relations matters*. These matters relate primarily to rights and entitlements of a type that would be available under workplace relations legislation to a person who is recognised as an employee. These proposed paragraphs would list a number of types of industrial regulation including minimum (and other) terms and conditions of employment, settling of industrial disputes, regulating industrial action and regulating termination of employment.

43. Proposed subsection 8(2) lists those matters that are not *workplace relations matters*. This provision would ensure that laws dealing with non-excluded matters could continue to apply to parties to *services contracts.* This proposed subsection would provide that the following types of laws are not about matters that are *workplace relations matters*:

- laws for the prevention of discrimination or promotion of EEO, but only if the State or Territory law concerned is neither a State or Territory industrial law nor contained in such a law (for example, the Queensland *Equal Employment in Public Employment Act 1992*);
- laws concerning superannuation (for example, the Western Australian *Coal Industry Superannuation Act 1989*);
- laws concerning workers compensation (for example, the Australian Capital Territory *Workers Compensation Act 1951*);
- law concerning occupational health and safety, including the entry of a trade union representative on a premises for a purpose connected with occupational health and safety (for example, the South Australian *Occupational Health, Safety and Welfare Act 1996*);
- laws relating to child labour (for example, the Victorian *Child Employment Act 1993*);
- laws relating to the observance of a public holiday, except the rate of payment of an employee for the public holiday (for example, the Northern Territory *Public Holidays Act 1981*);
- laws concerning deductions from wages or salaries (for example, the New South Wales *Teaching Services Act 1980*);

- laws which make provision for industrial action affecting essential services (for example, the South Australian *Essential Services Act 1981*);
- laws relating to attendance for service on a jury (for example, the Queensland *Jury Act 1995*);
- laws relating to professional or trade regulation (for example, the Queensland *Legal Profession Act 2004*);
- laws relating to consumer protection (for example, the Western Australian *Fair Trading Act 1987*);
- laws relating to taxation (for example, the Queensland *Pay-roll Tax Act 1971*); or
- any other matter specified in regulations made for the purposes of this paragraph.

Illustrative example

Kate is engaged on a *services contract* by Tonka Trucks Pty Ltd to perform maintenance work on large dump trucks at a coal mine in Central Queensland. The Full Bench of the Queensland Industrial Relations Commission has declared people like Kate to be employees for the purposes of the Queensland *Industrial Relations Act 1999* (the IR Act). There are two separate Queensland laws that affect the rights, entitlements, obligations and liabilities of both Kate and Tonka Trucks. The IR Act deems maintenance workers like Kate to be employees for the purposes of regulating, among other things, her maximum and minimum hours of work. Additionally, the Queensland *Coal Mining Safety and Health Act 1999* (the CMSH Act) imposes occupational health and safety obligations on both Tonka Trucks and Kate in relation to Kate's work at the mine site. Both of these laws are potentially excluded from operating in relation to Kate's *services contract* by subsection 7(1) of this Bill.

The definition of *workplace relations matter* means that only the provisions of the IR Act would not apply to Kate. That law would be excluded from operating by paragraph 7(1)(a) because it affects her contract by deeming her to be an employee for the purposes of regulating her rights and entitlements, including her hours of work (a *workplace relations matter* under paragraph 8(1)(c)).

However, the CMSH Act would not be excluded (that is, it would still apply to Kate's contract with Tonka Trucks) because it is not a law relating to a *workplace relations matter*. State laws that impose obligations and liabilities on a party to a *services contract* are excluded by paragraph 7(1)(b), but only where they relate to *workplace relations matters*. Because the CMSH Act relates to occupational health and safety, it is not a *workplace relations matter* under paragraph 8(2)(d).

Section 9 - What is an unfairness ground

44. This proposed provision would define *unfairness ground*. This definition is pivotal to the operation of paragraph 7(1)(c) which excludes the operation of State or Territory laws which provide for the whole, or part, of a *services contract* to be amended, varied or set aside on an *unfairness ground*.

45. The grounds defined to be *unfairness grounds* under paragraphs 9(1)(a)-(h) would reflect the language of State and Territory unfair contracts laws which allow contracts to be reviewed, set aside or varied. They would include grounds that the contract is unfair, harsh or unconscionable, unjust or against the public interest. The proposed subsection would also define an *unfairness ground* to include grounds that the contract is designed to avoid the operation of employment laws or that the contract provides remuneration that is less than that which an employee would receive for the same work. Any ground that is substantially the same as a ground set out above

would also be defined by this proposed subsection to be an *unfairness ground*. Regulations would also be able to specify additional grounds to which this definition applies.

46. Proposed subsection 9(2) would limit the meaning of *unfairness ground*. It would provide that a ground listed in subsection 9(1) is not an *unfairness ground* to the extent that it is defined not to be a *workplace relations matter* by subsection 8(2). This means that where the law of a State or Territory provides a ground that meets the definition of an *unfairness ground*, but relates to a matter that is defined to not be a *workplace relations matter*, that law would not provide a ground for setting aside or varying a *services contract* which is an *unfairness ground*. As such, the exclusion in paragraph 7(1)(c) would not apply to such a State or Territory law.

Section 10 - Regulations may specify laws that are intended to be excluded

47. This proposed section would allow the making of regulations which specify that certain State or Territory laws are excluded. Under proposed subsection 10(1), the Governor-General would be able to make regulations which provide that the rights, entitlements, obligations and liabilities of a party to a *services contract* are not affected by prescribed State or Territory laws. Regulations made under this subsection would also be able to specify the extent to which particular State and Territory laws are excluded from affecting the rights, entitlements, obligations and liabilities of parties to a *services contract*.

48. Proposed subsection 10(2) clarifies that regulations made under subsection 10(1) may prescribe that a State or Territory law is excluded even if that law:

- is a law referred to in paragraphs 7(2)(a) or (b); or
- deals with matters that are not *workplace relations matters* within the meaning of subsection 8(2).

49. This would also allow the Commonwealth to clarify that particular laws are to be excluded even where other parts of the Bill expressly preserve their operation

Illustrative example

Following the passage of the IC Act, the Victorian Parliament passes amendments to the *Owner Drivers and Forestry Contractors Act 2005* to include a range of matters that are substantially the same as matters that relate to employees and employers and which are dealt with by the Commonwealth *Workplace Relations Act 1996*. Proposed paragraph 10(2)(a) would clarify that the Governor-General could make regulations excluding the operation of those amendments to the Victorian Act.

PART 3 – UNFAIR CONTRACTS

50. Proposed Part 3 would provide a scheme permitting a Court to order that eligible *services contracts* be wholly or partly set aside or varied on the grounds that they are harsh or unfair. '*Services contract'* is defined in proposed section 5. It is intended that other rights, for example, common law remedies and other remedies such as under the *Trade Practices Act 1974* in relation to unfair contracts, would not be excluded by this Part. This Part would provide a national *services contract* review mechanism. Federal contract review provisions at sections 832 to 834 of the *Workplace Relations Act 1996* (the WR Act) would be repealed by the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006. The operation of provisions under State law allowing *services contracts* to be reviewed, varied or amended on *unfairness grounds* would generally be excluded under Part 2 of this Bill.

Section 11 - Application of Part

51. Proposed section 11 would outline the circumstances in which proposed Part 3 would apply.

52. Subsection 11(1) would provide that this Part applies in relation to a *services contract*, subject to the exceptions in paragraphs 11(1)(a) and 11(1)(b).

53. Under paragraph 11(1)(a), Part 3 would not apply to a *services contract* which relates to work performed by an *independent contractor* for the private and domestic purposes of another party. The term 'another party' would cover situations where there may be two or more parties to the *services contract*.

54. Under paragraph 11(1)(b), Part 3 would not apply to a *services contract* which relates to work performed by an *independent contractor* that is a body corporate unless the work is performed wholly or mainly by:

- a director of the body corporate (subparagraph 11(1)(b)(i)); or
- a family member of a director of the body corporate (subparagraph 11(1)(b)(ii)).

55. This contemplates that large bodies corporate would be excluded from accessing this Part as directors would not usually personally perform all or most of the work under their *services contracts*. However, this Part does contemplate situations where a spouse of the director of the body corporate performs all or most work under a *services contract*, such as in a family business arrangement.

56. Subsection 11(2) would provide a definition of *director* for the purposes of this Part. This would be the same definition as used in the *Corporations Act 2001*.

Section 12 - Court may review services contract

57. Proposed section 12 would provide the grounds for making an unfair contracts application and set out the courts to which an application may be brought under proposed Part 3.

58. Subsection 12(1) would provide that an application could be made to the Federal Court of Australia or the Federal Magistrates Court to review a *services contract* on the grounds that the contract was unfair and/or harsh. The concepts of 'unfair' or 'harsh' would take their common law meanings.

59. A legislative note under subsection 12(1) would indicate that under Part 5 of the *Federal Magistrates Act 1999*, a proceeding waiting to be heard in the Federal Magistrates Court may be transferred to the Federal Court of Australia.

60. Subsection 12(2) would provide that an application made to the *Court* to review a *services contract* on the grounds that the contract is unfair and/or harsh may only be made by a party to the *services contract*.

Section 13 - Limitation on applications for review of services contracts – prescribed circumstances

61. Proposed section 13 would authorise the making of regulations to prescribe circumstances in which applications could not be made to the *Court* to review a *services contract*. For example, the regulations could prescribe a mechanism, such as a financial cap, to limit the scope of applications made under subsection 12(1). This could apply to independent contractors with *services contracts* generally, or to specific independent contractors, such as those in partnerships.

Section 14 - Limitation on applications for review of services contracts - other proceedings on foot

62. Proposed section 14 would limit the circumstances in which an application could be made to the *Court* to review a *services contract* on the basis that it is unfair and/or harsh. In particular, this provision would prevent 'double dipping' where an application to review a *services contract* has been made to the *Court* and other review proceedings have also been commenced in relation to the same contract.

63. Proposed subsection 14(1) would prevent an application to the *Court* for a review of a *services contract* if other review proceedings had commenced in relation to the same contract. Proposed paragraphs 14(1)(a) and 14(1)(b) would provide an exception to subsection 14(1), to allow an application for a review of a *services contract* under subsection 12(1) if the other review proceedings:

- had been discontinued by the person who commenced them; or
- had failed for want of jurisdiction.

64. Proposed subsection 14(2) would prevent a person from commencing other review proceedings in relation to a *services contract* if an application to review the contract has already been made under proposed section 12(1). It is intended to prevent a person from commencing a proceeding under a non-excluded State or Territory law which permits an application to be made to review a *services contract* on an unfairness ground as well as commencing a proceeding under proposed section 12(1). Proposed paragraphs 14(2)(a) and 14(2)(b) would provide an exception to subsection 14(2), to allow a party to commence other review proceedings in relation to a *services contract* if:

- they commenced an application for review under proposed subsection 12(1) which they subsequently discontinued; or
- the proceedings in relation to the application to the Court have failed for want of jurisdiction.

65. Proposed subsection 14(3) would provide a definition of *other review proceedings*. This is defined as proceedings in relation to a *services contract* under a provision of a State or Territory law (as mentioned in paragraph 7(1)(c)) that provides for the whole or a part of a *services contract*:

- to be void, set aside or otherwise unenforceable;
- to be amended or varied, or to have effect as if it were amended or varied; or
- on an unfairness ground

and is not affected by the exclusion provisions in sections 7(1) and 10(1).

66. It is not intended that *other review proceedings* include proceedings that may be available at common law or equity in relation to a *services contract* under a law of a State or Territory that makes provision as mentioned in paragraph 7(1)(c).

Section 15 - Powers of Court

67. Proposed section 15 would provide a number of matters that the *Court* may have regard to when reviewing a *services contract*.

68. Proposed subsection 15(1) would provide that the *Court*, in reviewing an application for a review of a *services contract*, may have regard to a number of matters which may assist its decision making in determining whether a contract is unfair and/or harsh. The *Court* would be permitted to consider:

- the relative strength of the bargaining positions of the parties to the contract, and if applicable, any persons acting on behalf of the parties, (such as an *organisation* of employees of which the *independent contractor* is a member, or an association of employers of which a party to the *services contract* is a member) (paragraph 15(1)(a));
- whether a party to the *services contract* was subjected to any unfair tactics, undue influence or pressure in determining if the contract was unfair and/or harsh (paragraph 15(1)(b));
- whether the total remuneration under the *services contract* was less than the total remuneration under a contract where an employee performs similar work (paragraph 15(1)(c)); and
- any other relevant matter in determining whether a *services contract* is unfair and/or harsh (paragraph 15(1)(d)).

69. Subsection 15(2) would provide that, if the *Court* has regard to comparative employee remuneration as provided in paragraph 15(1)(c), it must also consider:

- whether the terms of, and the total remuneration provided under the *services contract* are proportionate with the terms of, and remuneration provided under, other *services contracts* relating to the performance of similar work in the particular industry.

70. The effect of this subsection would be to ensure that the commercial considerations of the contracting parties, such as the market forces operating in the relevant industry affecting their rates and conditions, are taken into account when the *Court* reviews the contract.

71. Subsection 15(3) would provide that, if the *Court* forms the opinion that all or part of the *services contract* was unfair and/or harsh under subsection 12(1), it must record its opinion, stating whether the opinion relates to the whole or specified part of the contract.

72. Subsection 15(4) would provide that the *Court* may form the opinion that all or part of the *services contract* was unfair and/or harsh under subsection 12(1), regardless of whether the ground was canvassed in the application.

73. Subsection 15(5) would provide that the *Court* must exercise its powers under section 15 in a way that furthers the objects of this Act, as far as practicable.

74. A legislative note would be inserted at the end of subsection 15(5) to make clear that the *Court* may encourage or advise parties to the application to use alternative dispute resolution processes, such as mediation, to deal with some or all of the matters in dispute. This note would highlight the relevant legislative sections providing for alternative dispute resolution processes. They are section 53A of the *Federal Court of Australia Act 1976* and Part 4 of the *Federal Magistrates Act 1999*.

Section 16 - Orders that Court may make

75. Proposed section 16 would provide for the circumstances in which the *Court* may make and enforce an order.

76. Subsection 16(1) would provide that after the *Court* records an opinion in relation to a *services contract* under proposed section 15, the *Court* may make:

- an order setting aside the whole or a part of the contract in relation to the opinion (paragraph 16(1)(a)); and/or
- an order varying the contract in relation to the opinion (paragraph 16(1)(b)).

77. Subsection 16(2) would provide that the *Court's* sole purpose for making an order is to place the parties to a *services contract* as closely as possible to the position they were in before the contract became unfair and/or harsh.

78. Subsection 16(3) would provide that if an application under this Part has not yet been determined, the *Court* may make an interim order to preserve the position of a party to the *services contract*.

79. Subsection 16(4) would provide that an order made by the *Court* takes effect on the date of the order or on a later date specified in the order.

80. Subsection 16(5) would provide that a party to the *services contract* may apply to the *Court* for an injunction, or other sanction as the *Court* considers appropriate, to enforce an order.

81. Subsection 16(6) would provide that section 16 does not limit any other rights of a party to the *services contract*. Other rights might include common law or equitable remedies. However, this is subject to proposed section 14 which prevents applications being made to review a *services contract* if other proceedings in relation to the same *services contract* have commenced. Two legislative notes would follow subsection 16(6).

82. Note 1 to proposed subsection 16(6) would refer the reader to the exclusion provisions in proposed sections 7 and 10 which may limit other rights that a party may have under the *services contract*, in addition to section 14.

83. Note 2 would draw the reader's attention to section 24 of the *Federal Court of Australia Act 1976* which provides that an appeal may be brought from a judgment of the Federal Magistrates Court to the Federal Court of Australia.

Section 17 - Costs only where proceeding instituted vexatiously

84. Proposed section 17 would provide that proposed Part 3 creates a 'no costs' jurisdiction except in relation to proceedings which have been vexatiously brought. The intention is to enhance the accessibility of the jurisdiction for those wishing to make applications.

85. Subsection 17(1) would provide that the first party to a proceeding, which includes an appeal proceeding in a matter arising under Part 3, must not be ordered to pay costs incurred by any other party to the proceeding, unless the first party instituted the proceeding vexatiously or without reasonable cause.

86. Subsection 17(2) would provide that even where the first party did not institute a proceeding vexatiously or without reasonable cause, other circumstances may arise where the first party may be ordered to pay costs. It is intended that the *Court* may order the first party to pay all or some of those costs where the first party has, in a matter arising under Part 3, unreasonably caused another party to the proceeding, including an appeal proceeding, to incur costs in connection with the proceeding.

87. Subsection 17(3) would define *costs* for the purposes of this section to include all legal and professional costs and disbursements, and expenses incurred by witnesses.

PART 4 – CONTRACT OUTWORKERS IN THE TEXTILE, CLOTHING AND FOOTWEAR INDUSTRY

88. Proposed Part 4 would replace Part 22 of the WR Act which contains the protection provisions for outworkers who are independent contractors in the Victorian textile, clothing and footwear (TCF) industry. Part 22 would be repealed by the consequential provisions of the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006.

89. Proposed Part 4 would provide a default minimum rate of pay protection for all TCF outworkers who are independent contractors, not just those in Victoria. This Part would only apply where there is no minimum pay specified for outworkers under a relevant State or Territory law. These protections only apply to contracted outworkers. Employee outworkers are covered by the WR Act or by State industrial legislation. Neither this Bill or the WR Act exclude the operation of State or Territory laws dealing with outworkers (paragraph 16(3)(d) WR Act). This means, for example, that an outworker who is deemed to be an employee under a State or Territory industrial law may be covered by the minimum rate of pay set in those laws. Because of the proposed new national application in proposed Part 4, some of the provisions would be framed differently to those in the repealed Part 22 of the WR Act.

Division 1 – Preliminary

Section 18 - Object of Part

90. Proposed section 18 would describe the object of proposed Part 4. This Part would ensure that individuals who are independently contracted TCF outworkers are afforded a minimum rate of pay. This minimum rate of pay would be determined by reference to what an employee would receive under the Australian Fair Pay and Conditions Standard or the applicable minimum rate of pay the TCF outworker would receive under a law of a State or Territory.

Section 19 - Definitions

91. Proposed section 19 would define terms to be used in proposed Part 4.

92. The proposed definition of *Australian Fair Pay and Conditions Standard* is included for the purposes of establishing the applicable minimum rate of pay for TCF outworkers who are independent contractors and would have the same meaning as in the WR Act.

93. The term *breach* would be defined for the purpose of imposing and recovering penalties and would have the same meaning as in the WR Act.

94. The proposed definition of *contract outworker* would be used to include only those TCF outworkers who are engaged as *independent contractors* under a *services contract* defined by proposed section 5. This definition would not include TCF outworkers who are employees in the TCF industry.

95. The proposed definition of *eligible court* would be used to mean the Federal Court of Australia, the Federal Magistrates Court, a District, County, Local Court or a magistrates court. This definition would allow parties to bring legal actions relating to Part 4 in any of these courts.

96. The proposed definitions of *judgment, legal practitioner, occupier* and *premises* would be defined as having the same meaning as in the WR Act.

97. The proposed definition of *TCF outwork* would specify which activities would be considered TCF work for the purposes of proposed Part 4. The definition would also specify the circumstances in which that work could be considered outwork. To be considered outwork, the work would have to be performed in or about private residential premises or premises that are not the business or commercial premises of anyone obliged under the contract to pay for services.

Division 2 – Protection of contract outworkers in the textile, clothing and footwear industry

Proposed Division 2 would set out the extent to which the minimum rate of pay obligation in proposed Part 4 would apply to contract TCF outworkers.

Section 20 - Minimum rate of pay

98. Proposed subsection 20(1) would establish the core obligation of this Part. It would impose an obligation on a person who engages *contract outworkers* to pay those workers at least the statutory minimum rate of pay provided by subsection 20(3). Subsection 20(1) would also operate where the first contract outworker has an individual perform some of the *TCF outwork* under an arrangement, other than employment or a *services contract*. For example, the arrangement between the individual and the first contract outworker may be for gratuitous service provided by a family member where there is no formal contract between the first contracted outworker and the family member.

99. Subsection 20(2) limits the circumstances in which the obligation in subsection 20(1) applies in 'chain of contract' situations. A chain of contract situation is where one party, in the position of the head contractor, contracts with an outworker (the first outworker) to perform *TCF outwork*, and the first outworker then engages or sub-contracts one or more outworkers (the second contract outworker) to perform some of the work.

100. Subsection 20(2) would operate where the first contract outworker engages the second contract outworker on a services contract. Subsection 20(2) would provide that the head contractor is only obliged to pay the statutory amount to the first outwork contractor in relation to work done by the first contract outworker. Subsection 20(2) would remove any obligation on the head contractor to the second contract outworker. The first contract outworker is then obliged, by virtue of subsection 20(1), to pay the statutory amount to the second contact outworker.

Illustrative Example

Belinda (the head contractor) runs a clothes manufacturing company. Belinda enters into a *services contract* with Andrew (the first contract outworker) to make and pack 300 business shirts. Andrew decides to do all the packing of the shirts himself and enters into a *services contract* with Kurt (the second contract outworker) to sew the shirts.

Subsection 20(2) would oblige Andrew (the first contract outworker) to pay Kurt (the second outworker) for sewing the shirts at a rate not less than the minimum statutory rate for TCF sewing outwork. If Andrew pays Kurt less than the statutory amount, Kurt can seek to recover his pay only from Andrew and not from Belinda. In this situation, Belinda is not obliged to Kurt.

Under the contract, Belinda is obliged to pay Andrew the contract price for the 300 shirts. As Andrew performed some of the work by packing the shirts, the price paid on the contract for the 300 shirts must be at least the minimum statutory amount for the TCF packing outwork done by Andrew.

However, if Andrew did not perform any of the contract work himself and had given all the sewing and packing work to Kurt, then according to subsection 20(2), Belinda's only obligation would be to pay the amount in the contract for the 300 shirts, whether or not the contract price was less than the statutory minimum amount for the work done. In this situation, Andrew would be in the position of the head contractor, and would therefore be obliged under subsection 20(1) to pay Kurt at least the minimum statutory amount for sewing and packing the 300 shirts.

101. Subsection 20(3) would provide the minimum rate of pay owed to a *contract outworker* for the work they perform. This provision would define the amount payable to a TCF outworker by

reference to what an employee would receive for doing the same work under Division 2 of Part 7 of the WR Act.

102. A legislative note under subsection 20(3) would refer the reader to Division 2 of Part 7 of the WR Act which sets out the provisions of the Australian Fair Pay and Conditions Standard relating to wages.

103. Subsection 20(4) would provide that the person in the position of the head contractor, would have discharged their obligation to pay the individual by paying the first contract outworker an amount for the benefit of that individual.

104. Subsection 20(4) sets out how head contractors discharge their obligation to pay the statutory minimum amount to an individual who is not a *contract outworker*. This would include situations where, for example, the first contract outworker has a member of his or her family (the individual) perform some of the work without there being a formal contract between them. In this example, subsection 20(4) would enable the obligation on the head contractor with respect to the individual, to be discharged by paying the statutory amount to the first contract outworker, for the benefit or the individual.

Illustrative Example

Belinda (the head contractor) runs a clothes manufacturing company. Belinda enters into a *services contract* with Jana (the contract outworker) to make 150 dental uniforms. Jana is having difficulty completing the uniforms in time for delivery and requests the help of her sister Anne (the individual) to make 40 uniforms.

Belinda would be obligated to pay Anne by virtue of subparagraph 20(1)(a)(ii). However, under subsection 20(4) Belinda would have discharged her obligation to Anne by paying Jana (the contract outworker) at least the minimum rate of pay amount for the 150 uniforms; 40 uniforms worth of which was paid to Jana on Anne's behalf.

Belinda has discharged her obligation to Anne by paying Jana at least the minimum rate of pay for the 150 uniforms.

Section 21 - State or Territory minimum rates of pay

105. Proposed section 21 would provide that the minimum rate of pay provided by proposed section 20 would not apply where a law of a State or Territory provides the *contract outworker* with a minimum rate of pay.

106. Subsection 21(1) would provide that where a State or Territory law operates to provide *contract outworkers* a minimum rate of pay for *TCF outwork*, the obligation in proposed subsection 20(1) would not apply. The minimum rate of pay specified by the State or Territory law would operate.

107. Subsection 21(2) would clarify that the minimum rate of pay provided by a law of a State or Territory would operate even if that amount is less than the amount provided for in proposed subsection 20(3). The minimum rate of pay in subsection 20(1) therefore operates as a default rate of pay for outworkers where State or Territory laws do not provide one.

Division 3 – Enforcement and compliance

Subdivision A – Workplace inspectors

108. Proposed Subdivision A would provide a *workplace inspector* with the necessary powers to investigate compliance with the minimum rate of pay obligation in proposed section 20. A *workplace inspector* is appointed under the *Workplace Relations Act 1996.*

Section 22 - Powers of workplace inspectors

109. Proposed section 22 would provide *workplace inspectors* with certain powers to investigate compliance with the minimum rate of pay obligation in proposed section 20.

Purpose for which powers of workplace inspectors can be exercised

110. Subsection 22(1) would provide that *workplace inspectors* may exercise the powers provided in proposed section 22 only for the purpose of investigating compliance with the minimum rate of pay obligation in proposed section 20.

Powers of workplace inspectors

111. Subsection 22(2) would provide that *workplace inspectors* have the power to:

- enter premises, without force, where the *workplace inspector* reasonably believes that work, to which the obligation in proposed section 20 applies, is being, or has been performed (subparagraph 22(2)(a)(i)); or
- enter a place of business, without force, where the *workplace inspector* reasonably believes there are relevant documents (subparagraph 22(2)(a)(ii)). For example, relevant documents may include worker time sheets and pay records.

112. Subsection 22(2) would provide that *workplace inspectors*, upon lawfully entering premises, have the power to:

- inspect any work, materials, machinery, appliance, article or facility on such premises (subparagraph 22(2)(b)(i)), and take samples of goods or substances (within power as prescribed by regulation) (subparagraph 22 (2)(b)(ii));
- interview any person on the premises (subparagraph 22(2)(b)(iii)), require production of documents (subparagraph 22(2)(b)(iv)), and inspect, make copies of or take extracts from produced documents (subparagraph 22(2)(b)(v)); and
- require a person to reveal the identity of another person who has relevant documents (subparagraph 22(2)(b)(vi)).

113. Paragraph 22(2)(c) would provide a *workplace inspector* with the power to require, by notice, the production of a document (paragraph 22(2)(c)). The documents provided under this paragraph would be subject to the limited use immunity in subsections 22(9) and (10).

114. A legislative note to subsection 22(2) provides that contraventions of a requirement under proposed section 22 may be an offence under section 819 of the WR Act.

When may the powers be exercised?

115. Subsection 22(3) would provide that a *workplace inspector* may exercise his or her powers under this subdivision at any time during ordinary business hours or at any other time as necessary to investigate compliance with the minimum rate of pay obligation in proposed section 20.

Production of documents

116. Subsection 22(4) would provide that where a person fails to produce a document they were required to produce under subparagraph 22(2)(b)(iv) a *workplace inspector* could, by serving that person with a written notice, require production of those documents at a specified place and time. Subsection 22(4) would provide that the written notice must not require production in less than 14 days from the date of service.

117. A legislative note to subsection 22(4) would provide that contravening a requirement to produce a document under proposed section 22 may be an offence under section 891 of the WR Act.

118. Subsection 22(5) would provide that in relation to documents delivered as a result of a notice to produce documents under proposed subsection 22(4), *workplace inspectors* would have the power to:

- inspect, make copies of, or take extracts from the document (paragraph 22(5)(a)); and
- retain those documents for as long as necessary for the *workplace inspector* to ascertain whether proposed section 20 is being, or has been, observed (paragraph 22(5)(b)).

119. Subsection 22(6) would provide that while a *workplace inspector* retains a document, the person who produced, previously had rightful access to, or custody of the document, or their authorised agent, would be permitted to inspect, make copies of or take extracts from the documents at all reasonable times.

Notices under paragraph (2)(c)

120. Subsection 22(7) would provide the required form for notices to produce documents issued under proposed paragraph 22(2)(c). This subsection would require the notice to be in writing, be personally served, and would allow the person served not less than 14 days to produce the documents. This subsection would also provide that personal service can be achieved through fax.

Person must produce document even if it may incriminate him or her

121. Subsection 22(8) would provide that a person who is served with a notice to produce a document under paragraph 22(2)(c) must do so regardless of whether producing that document to the *workplace inspector* would tend to incriminate that person.

Limited use immunity for documents produced

122. Subsection 22(9) would provide that any document produced under paragraph 22(2)(c) is inadmissible in evidence in any criminal proceedings against the person who produced the document. Subsection 22(9) would provide that any information or thing obtained, directly or indirectly, as a result of the document would be subject to the limited use immunity. This subsection would not extend the immunity to offences against section 819 of the WR Act.

123. Subsection 22(10) would provide that a *workplace inspector* entering premises for the purpose of subsection 22(1) must produce his or her identity card if the occupier requests evidence of the inspector's authority. Failure to do so would mean the *workplace inspector* could not enter or remain on the premises.

Subdivision B – Penalties

Section 23 - Imposition and recovery of penalties

124. Proposed section 23 would provide that an *eligible court* could impose a civil penalty against a head contractor for a contravention of proposed section 20. An application to impose this penalty could be brought by a *workplace inspector* or an individual to whom the minimum rate of pay obligation in proposed subsection 20(1) was owed.

125. Paragraphs 23(2)(a) and (b) would provide that where a person breaches the obligation in proposed section 20 more than once, and those breaches occur out of the same course of conduct, the breaches would be taken to constitute a single breach. This would prevent a person being punished multiple times for the same breach of proposed section 20.

Illustrative Example

Wellon Pty Ltd (Wellon), a *constitutional corporation*, is a shoe manufacturing business that makes sports shoes. Wellon engaged Nigel, Colin and Ray, all contract TCF outworkers, to make a certain model of shoes. Nigel, Colin and Ray have all been paid less than the statutory minimum amount for making that particular model of sport shoes.

Under subsection 23(2), for the purpose of imposing a penalty for breaches of the obligation in proposed section 20, Wellon may be found to have breached this obligation only once. Despite the fact that the Wellon has breached the obligation three times in relation to the contracts with Colin, Nigel and Ray, all breaches arose out of the same course of conduct. It is likely that a court would apply the penalty in subsection 23(3) only once. Therefore, Wellon Pty Ltd could be liable for a penalty up to 300 penalty units.

Proposed section 23 would deal only with the penalty that could be imposed on a person who breaches the minimum rate of pay obligation in proposed section 20, and would not affect Nigel, Colin or Ray's rights to seek an amount for underpayment under subsection 23(5) nor would it affect their right to recover amounts of pay owed to them by Wellon Pty Ltd under proposed section 24.

126. Under paragraph 23(2)(c) multiple breaches which occur out of the same course of conduct would constitute a single breach only if a court had not previously imposed a penalty on the person for any breach that forms part of the course of conduct. Under paragraph 23(2)(c) an order of an *eligible court* would 'reset the counter' allowing a fresh penalty to be imposed for any new breaches of proposed section 20.

Illustrative Example (continued)

Continuing the previous example, if Nigel, Colin and Ray had obtained an order from an *eligible court* under proposed subsection 23(1) to impose a penalty on Wellon Pty Ltd, any subsequent breaches of the minimum rate of pay obligation in proposed section 20 would make Wellon Pty Ltd liable for an additional penalty.

For instance, if after the order was made, Colin and Ray were not paid the required minimum rate of pay, they could apply for another penalty against Wellon Pty Ltd for the breach of proposed section 20.

127. Subsections 23(3) would set the maximum penalty for contraventions of proposed subsection 20(1) at 60 penalty units for an individual and 300 penalty units for a body corporate.

128. Subsection 23(4) would provide a *workplace inspector* or an individual to whom the minimum rate of pay obligation was owed, the power to apply to the court for the imposition of a penalty under subsection 23(1).

129. Subsection 23(5) would provide that an *eligible court*, hearing an application to impose a penalty under proposed section 23, could order the person who contracted for *TCF outwork* to pay the TCF outworker any amount of underpayment the person was required to pay the outworker.

130. Subsection 23(6) would provide that an *eligible court* must not make an order for underpayment under subsection 23(5) where the alleged underpayment occurred six years before the commencement of the action under proposed section 23.

131. Subsection 23(7) would provide that proceedings in relation to a breach of proposed subsection 20(1) must not be commenced after six years from the date the minimum rate of pay obligation was allegedly breached.

132. Subsection 23(8) would provide penalties imposed under subsection 23(1) are payable to the Commonwealth or to some other person if the *eligible court* so directs. Subsection 23(8) would provide that penalties under subsection 23(1) could be recovered as debts.

Section 24 - Recovery of amounts of pay

133. Proposed section 24 would provide that a *workplace inspector*, or the person to whom the minimum rate of pay obligation in proposed section 20 was owed, could sue to recover any underpayment made in respect of *TCF outwork* under proposed section 20.

134. Subsection 24(2) would provide that proceedings in relation to a breach of proposed subsection 20(1) for the recovery of underpayment must not be commenced six years from the date the payment was required to be made to the *contract outworker* under the *services contract*.

Section 25 - Interest up to judgment

135. Proposed section 25 would provide that an *eligible court* must, on application, order an amount of interest be paid under proposed section 23 or 24 for the period up until *judgment*.

136. Subsection 25(1) would provide that an *eligible court*, hearing an application under proposed sections 23 or 24 must, on application, make an order relating to the payment of a sum for interest for the period from the date the cause of action arose to the date of *judgment*. Subsection 25(1) would provide that the court could make an order for interest on all, or any part, of the money ordered in the *judgment*, or for all, or any period of time up to the date of *judgment*. Paragraph 25(1)(b) would provide that the court could make an order for a lump sum payment instead of any interest calculated under proposed section 25.

137. Subsection 25(2) would provide that an *eligible court* could not order interest on interest (paragraph 25(2)(a)), or make an order for interest on a debt by virtue of an agreement or otherwise (paragraph 25(2)(b)), or make, without the consent of the party benefiting from the order, an order for a lump sum payment of interest separate to the *judgment* or order amount (paragraph 25(2)(c)).

138. Subsection 25(3) would provide that the requirement for an *eligible court* to make an order relating to interest in subsection 25(1) would not apply if good cause was shown to the contrary.

Section 26 - Interest on judgment

139. Proposed section 26 would provide that interest on an order or *judgment* would be payable from the date which the *eligible court* makes the order or *judgment*, to the date that order or *judgment* is paid or otherwise satisfied. The rate of interest would be calculated in accordance with section 52 of the *Federal Court of Australia Act 1976.*

Section 27 - Plaintiffs may choose small claims procedure in magistrates courts

140. Proposed section 27 would provide the process a plaintiff, in proceedings in a magistrates court under proposed section 24, would follow to elect to have the matter run under the 'small claims' procedure (subsection 27(1)).

141. Subsection 27(1) would provide that a person who commences an action in a magistrates court under proposed section 24 could elect to run the matter under the small claims procedure if the person does so in accordance with subsection 27(5).

142. Subsection 27(2) would provide that if a plaintiff elects to use the small claims procedure, the court:

- could not make an order exceeding $10 000 (paragraph 27(2)(a));

- could act in an informal manner without regard to legal forms and technicalities and would not be bound by the rules of evidence (paragraph 27(2)(b));
- would be able to amend the papers initiating the proceedings, providing notice where required (paragraph 27(2)(c));
- could order that a party is not entitled to legal representation (paragraph 27(2)(d)); or
- could make an order prescribing the circumstances which a party can have legal representation to ensure no other parties are disadvantaged (paragraph 27(2)(e)).

143. Subsections 27(3) and (4) would provide for regulations to prohibit legal representation in small claim matters brought in the court of a State or Territory despite the operation of subsection 27(2). These regulations could only be made to the same extent as a State law that prohibits or restricts legal representation under small claims procedures.

144. Subsection 27(5) would provide that a party who elects to run an action under proposed section 24 must:

- endorse papers electing the small claims procedure when they commence proceedings (subparagraph 27(5)(a)(i)); or
- lodge a paper with the court identifying the action and stating that the small claims procedure is to apply (subparagraph 27(5)(a)(ii)).

145. Paragraph 27(5)(b) would provide that where a person elects to run an action under the small claims procedure, they must serve a copy of the document outlining their intention to do so on all other parties to the matter.

146. Subsection 27(6) would provide that where a magistrates court has its own rules relating to the notification of an election to run a matter as a small claim, those rules of the magistrates court would apply. The rules of the magistrates court would apply with respect to the method of notifying the court and the other parties to the matter that an election has been made to run the matter as a small claim.

Section 28 - Enforcement of penalties etc.

147. Proposed subsection 28(1) would provide that where an *eligible court* orders a sum of money be paid either as a penalty (paragraph 28(1)(a)), as payment of an amount for underpayment under proposed sections 23(6) or 24 (paragraph 28(1)(b)), or makes an order for costs or expenses (paragraph 28(1)(c)), the registrar could issue a signed certificate which outlines the amounts to be paid to a party, and which party or parties are to pay that amount.

148. Subsection 28(2) would provide that certificates of the court signed by the registrar are enforceable as final judgments of the court.

149. Subsection 28(3) would provide that where there are two or more people to whom a debt:

- under proposed Part 4 must be paid (paragraph 28(1)(a)); or
- payment of an amount under subsection 23(6) or section 24 is owed (paragraph 28(1)(b)); or
- payment of costs or expenses are ordered (paragraph 28(1)(c));

the registrar could issue two or more certificates.

Section 29 - General provisions

150. Proposed section 29 would provide that, subject to proposed section 27, breaches of proposed subsection 20(1) would be treated as if they were a *breach* of a civil remedy provision

dealt with by Division 3 of Part 14 of the WR Act. Division 3 of Part 14 sets out a range of general provisions relating to civil remedies and includes provisions that set out the application of the rules or evidence, the rules relating to when a person, other than a principal offender, would be liable to a civil penalty and the double jeopardy rules.

Division 4 – Record - keeping

Section 30 - Records relating to services contracts with contract outworkers

151. Proposed section 30 would provide that regulations could be made relating to:

- the making of *outworker records* by a person who is obliged under proposed subsection 20(1) (paragraph 30(1)(a));
- the making of *outworker records* by a person who is owed the obligation under proposed subsection 20(1) (paragraph 30(1)(b));
- the inspection of the above records (paragraph 30(1)(c));
- the giving of copies of the above records to parties to a *services contract* (paragraph 30(1)(d)); and
- the retention of the above records by parties to a *services contract* (paragraph 30(1)(e)).

152. Proposed subparagraph 30(1)(f)(i) would provide that the maximum penalty for a contravention of a regulation made under proposed Part 4 would be 5 penalty units in the case of an individual, or 25 penalty units in the case of a body corporate.

153. Subsection 30(2) would define *outworker records* for the purposes of subsection 30(1) to mean records which relate to the *TCF outwork* to be performed by a contract TCF outworker under a *services contract*.

154. Regulations made under repealed section 913 of the *Workplace Relations Act 1996* which relate to the record keeping provisions for TCF outworkers in repealed Part 22 are saved and continue to apply to the record keeping provisions in proposed Division 4. These regulations are saved by the consequential provisions in Part 1 of Schedule 2 of the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006.

PART 5 – TRANSITIONAL PROVISIONS

Division 1 – State and Territory laws other than unfair contracts laws

General overview

155. This proposed Division would create transitional arrangements for persons who, at the time these provisions commence, are independent contractors at common law but who have been deemed under State or Territory law to be employees, or who are afforded employee style entitlements by State or Territory laws that are to be disapplied by this Bill. The provisions would provide that, where the transitional arrangements cover a person, the relevant State or Territory laws continue to have effect in relation to the contract between the parties.

156. The transitional scheme is designed to give parties to *services contracts* a transitional period to arrange their affairs pending the disapplication of State or Territory laws to their relationship. The transitional period lasts:

- to the end of the contracting relationship if that is within 3 years of *reform commencement*; or
- the end of 3 years after *reform commencement* if the contracting relationship does not end before then; or
- any earlier time agreed on by the parties before the end of their contracting relationship.

157. The disapplication of the State or Territory laws would generally result in the contractor not being entitled, for the future, to employee-like entitlements such as award wages and leave. The disapplication would, however, trigger an obligation to pay out any accrued entitlements that would not continue where the State or Territory laws are disapplied. The transitional period would allow for preparation for this event.

158. Where the parties' contracting relationship ends during the transition (i.e. before 3 years or any earlier agreement) and the parties enter into a new contract, the transition would not apply to the new contract unless the contracts are consecutive or part of a regular pattern of contracting. This means that, in some circumstances, a contract could be terminated or not renewed during the transitional period of 3 years without agreement and the same parties could enter into a new contract which is not subject to State or Territory law.

159. However, the termination or non-renewal of the contract would be subject to State or Territory law so that the party who terminated or failed to renew could be subject to a remedy at State or Territory law, including a reinstatement or re-engagement remedy. The parties would, for this purpose, remain subject to State or Territory law. Thus, for example, an independent contractor who is deemed to be an employee under a State law could have a remedy for termination of employment under State law in respect of the termination or non-renewal. The independent contractor could be awarded damages in respect of the termination, but any further contract with the principal would not be subject to the State deeming law or any other law giving the contractor employee-like entitlements.

160. In some circumstances, the transitional period would continue even though there has been a transfer to a new principal of the business for which the independent contractor works. The effect that the transfer would have on the entitlements of the independent contractor would continue to depend on the application of State or Territory law. If the transitional period did not continue for the contract with the new principal, the same consequences for the contractor's entitlements would ensue as for any other ending of a contracting relationship during the transition.

Technical overview

161. These transitional arrangements would apply to contracts that are *pre-reform commencement contracts* or *continuation contracts*. These provisions are defined in proposed sections 31 and 32 respectively. In general, a *pre-reform commencement contract* is one which was on-foot at the time of the commencement of these provisions and at least some or all of the *contract period* occurred after the commencement of these provisions in relation to which a *State or Territory contactor law* (defined in proposed section 31) applied. A *continuation contract* would generally include contracts in which the same parties, as those of the *pre-reform commencement contract*, continue to contract in a largely unbroken chain with respect to the performance of the same work. However, the provisions in relation to a *continuation contract* would allow an interval between contracts that is consistent with the regular pattern of contracting between the parties. This would take account of situations such as 'month-on, month-off' arrangements.

162. Where a contract meets the definition of a *pre-reform commencement contract* or a *continuation contract*, this Division would provide that the exclusion provisions in proposed section 7 and 10 do not apply to that contract. This would mean that *State or Territory contractor laws* would continue to have effect with respect to that contract. In practice, this would mean that the effect of State or Territory laws which deem independent contractors to be employees, or provide them with employee-like entitlements, would continue to have effect in relation to those contracts.

163. The proposed Division would allow the continuation of the transitional system for a maximum of 3 years, at which point the exclusion provisions would automatically commence applying to the contract between the parties (this would prevent the further application of *State or Territory contractor laws*). Parties to a *pre-reform commencement contract* or a *continuation contract* would be free, under the proposed provisions, to opt-into the federal system at any time during that 3 year period by executing a *reform opt-in agreement*. Upon the execution of such an agreement, the exclusion provisions would commence applying to the contract between the parties, preventing the continued application of *State or Territory contractor laws*. Once the parties have agreed to opt-in to the federal system, it would not be possible to return to the State or Territory system.

164. Upon the cessation of the effect of *State or Territory contractor laws* (either by agreement or the end of the 3 year transitional period) the consequences resulting from the ending of that contract would be determined in accordance with relevant State or Territory laws. For example, if the parties to a relevant contract execute a *reform opt-in agreement* 1 year after the commencement of these provisions, the employment entitlements accrued by that worker under *State or Territory contractor laws* would be payable under the relevant *State or Territory contractor law* of the jurisdiction in which that worker performed their work. That worker's entitlements would be owed in respect of both the pre-commencement period and the year worked under the transitional arrangements.

165. The proposed Division would also include provisions making it unlawful for a person to coerce or to make misrepresentations to a person with the intent to coerce, that person into signing, or not signing, a *reform opt-in agreement*. These provisions would ensure that parties to the relevant contract could exercise a genuine choice about whether or not to opt-into the federal system.

166. The proposed Division would also include provisions which prevent a transfer of the principal's business (the deemed employer's business under a *State or Territory contractor law*) from breaking a chain of *continuation contracts* and thereby removing a person from the transitional period by operation of law. Under these provisions, a post-transfer contract between the *independent contractor* and the new principal could, subject to certain conditions, still be a

continuation contract meaning that *State and Territory contractor laws* would continue to have effect.

Illustrative example

Jenny is a roof tiler in New South Wales working a regular pattern of 3 months work, 2 weeks off for Jim's Tiling Ltd at the time the IC Bill commences. Under the New South Wales *Industrial Relations Act 1996* (the IR Act), Jenny is deemed to be an employee for the purposes of that Act. However, her contracts with Jim's Tiling Ltd are, at common law, contracts for services. In other words, at common law she would be recognised as an independent contractor.

The effect of the IC Bill, apart from these transitional provisions, would be to 'undeem' Jenny so that she would not be treated as an employee for IR Act purposes. However, because Jenny and Jim's Tiling Ltd have a contract in force at reform commencement, the 'undeeming' does not occur in relation to that contract. Nor does it occur in relation to the next contract which continues the pattern of contracting between Jenny and Jim's Tiling Ltd.

However, if Jim's Tiling Ltd decides not to offer Jenny a third contract after reform commencement, the consequences of the failure to enter into a further contract are to be determined by New South Wales law - i.e. the IR Act and any other relevant NSW law. Because Jenny is treated as an employee at New South Wales law, the failure to offer a further contract might be treated as a termination of employment and might require payment of accrued leave entitlements, redundancy or notice (as on a termination of employment of an employee). It might also give rise to a remedy for unfair or unlawful termination, again because New South Wales law treats Jenny as an employee.

If Jim's Tiling Ltd offers Jenny a further contract in the future (outside the previous pattern of contracting), that contract will not be subject to the transitional provisions. Jenny will not be treated as a deemed employee.

It is therefore open to Jim's Tiling Ltd to seek to exit the transitional system before the end of 3 years without the consent of Jenny, but the exit will be subject to all New South Wales entitlements and remedies associated with the ending of the relationship on State law terms (i.e. as if Jenny were an employee).

Section 31 – Definitions

167. This proposed section would set out the meaning of certain phrases to be used in this Division. It would contain a number of 'sign post' definitions that refer the reader to other provisions in which the meaning of particular phrases is set out in full. The proposed section would contain sign post definitions for:

- *continuation contract;*
- *covers;*
- *date of effect;*
- *reform opt-in agreement; and*
- *related continuation contract.*

168. This proposed section would define *contract period* to mean the period in relation to which a contract has effect. Depending on the terms of the contract between the parties, this may or may not commence from the date the contract is signed.

169. *Pre-reform commencement contract* would be defined by this proposed section to mean a *services contract* which was entered into before the commencement of the IC Act.

170. The proposed section would define *reform commencement* to mean the date of commencement of Part 2.

171. The proposed section would define *State or Territory contractor laws* to mean the laws of a State or Territory, as in force at any time after the commencement of these provisions, to the extent that they would, apart from this proposed Division, be affected by the exclusion provisions. The proposed definition excludes State and Territory laws that provide for the whole or part of a *services contract* to be made void, set aside or varied on an *unfairness ground* from the scope of this proposed definition. This exclusion would make clear that the phrase *State or Territory contractor laws* is only intended to cover laws to which proposed paragraphs 7(1)(a) and (b) would, but for the operation of this Division, apply. These are laws which operate to treat common law independent contractors like employees either by taking or deeming them to be employees, or by conferring employee-like rights upon them.

Section 32 – Continuation contracts and related continuation contracts

172. This proposed section would define *continuation contract* (see proposed subsections 32(1) and (2)) and *related continuation contract* (see proposed subsection 32(3)).

173. For a contract (the later contract) to be considered to be a *continuation contract* of a *pre-reform commencement contract*, that contract must meet the following criteria:

- the parties to the later contract are the same as the parties to the *pre-reform commencement contract*;
- one or more of the following is true:
    - the later contract is entered into in accordance with an option, or similar right, contained in the *pre-reform commencement contract* or another contract that is a *continuation contract* which preceded the later contract;
    - the *contract period* of the later contract immediately follows the *contract period* of the *pre-reform commencement contract*;
    - the *contract period* of the later contract immediately follows the *contract period* of another contract that is a *continuation contract* which preceded the later contract; and
- the later contract is for the performance of the same kind of work as the *pre-reform commencement contract*.

Illustrative example

David is a carpenter who is engaged by Good 'n' Wood Pty Ltd as an *independent contractor*. At the time the provisions of the IC Act commenced, David was engaged on a *pre-reform commencement contract*. That contract has subsequently expired. David's *pre-reform commencement contract* contains a provision allowing the parties to, by agreement, extend the term of the contract for an additional 12 months. Because both David and Good 'n' Wood are satisfied with the relationship, they agree to exercise this option and retain David to perform the same work. However, David negotiates a remuneration increase in relation to the new contract.

This second contract between David and Good 'n' Wood would be a *continuation contract* because the parties to that contract are the same as the parties to the *pre-reform commencement contract* (this satisfies paragraph 32(1)(a)), the contract is entered into pursuant to an option to extend the arrangement under the terms of the *pre-reform commencement contract* (this satisfies

one of the subparagraphs in paragraph 32(1)(b)) and the contract is for the performance of the same type of work as the *pre-reform commencement contract* (this satisfies paragraph 32(1)(c)).

The remuneration increase does not affect the status of the second contract as a *continuation contract*. This is because there is no requirement in proposed section 32 that the terms of the second contract be the same as those to the *pre-reform commencement contract* – merely a requirement that the parties and the type of work be the same.

174. Proposed subsection 32(2) would clarify the operation of subparagraphs 32(1)(b)(ii) and (iii) which relate to circumstances in which the *contract period* of the later contract immediately follows the *contract period* of either a *pre-reform commencement contract* or another contract that is a *continuation contract*. This provision would provide that the *contract period* of the later contract would be taken to immediately follow that of the preceding contract where there is a break between the two contracts if that break is consistent with the regular pattern of contracting between the parties or is covered by regulations made for the purposes of this proposed paragraph.

175. This provision is designed to cover circumstances in which the parties regularly contract in a manner that would result in the later contract not immediately following the *contract period* of the preceding contract. This would, for instance, cover a situation in which an *independent contractor* worked a roster in which there were extended breaks between working periods (such as workers who operate on a 2-week on, 1-week off arrangement).

176. The regulation making power that would be contained in proposed paragraph 32(2)(b) would allow certain circumstances that result in an interval occurring between a *pre-reform commencement contract* and a later contract to be prescribed as being immediate for the purposes of proposed subparagraphs 32(1)(b)(ii) and (iii). Regulations made under this proposed provision could clarify, for example, that a break in time between the *pre-reform commencement contract* and a subsequent contract is to be ignored where it occurs because the *independent contractor* is ill or has taken approved annual leave which they have accrued as a deemed employee under relevant *State or Territory contractor laws*.

177. Proposed subsection 32(3) would define the term *related continuation contracts*. Under this provision, a *services contract* (the relevant contract) would be a *related continuation contract* of another *services contract* if:

- either of the following apply:
  - the other *services contract* is a *pre-reform commencement contract*;
  - the relevant contract is a *continuation contract* of another contract; or
- the two services contracts (the related contract and the other contract) are *continuation contacts* of the same *pre-reform commencement contract*.

Section 33 – Reform opt-in agreement

178. This proposed section would define what constitutes a *reform opt-in agreement*. The *reform opt-in agreement* would be the mechanism by which the parties agree to remove themselves from the transitional provisions provided for by this proposed Division. By executing such an agreement, the exclusion provision would commence applying to the relevant contract between the parties and applicable *State and Territory contractor laws* would cease to apply.

179. Proposed subsection 33(1) would provide that a *reform opt-in agreement* is an agreement in writing and signed by the parties to one or more of the following effects:

- that the parties no longer want *State or Territory contractor laws* to apply to the contract specified in the agreement, or to any *related continuation contracts* of the specified contract that the parties have previously entered into or may in the future enter into;
- that the parties no longer want *State or Territory contractor laws* to apply to any contracts of a specified class, or any *related continuation contracts* of a specified class, that the parties have previously entered into or may in the future enter into; or
- that the parties no longer want *State or Territory contractor laws* to apply to any contracts that they had in the past or may enter into in the future.

180. Proposed paragraphs 33(1)(a) – (c) would allow the parties some flexibility in relation to how they refer to the contract (or contracts) in relation to which they no longer want the *State or Territory contractor laws* to apply. Under these proposed provisions, a *reform opt-in agreement* would be effective where the parties specify their intention that the *State or Territory contractor laws* cease having application to a single contract and any *related continuation contracts* that flow from that single contract; a class of contract and any *related continuation contracts* that flow from that class; or all contracts between them.

181. A legislative note under proposed subsection 33(1) would clarify that an agreement between the parties that *State or Territory contractor laws* cease to apply in relation to a contract or contracts would only constitute a valid *reform opt-in agreement* if the operation of those *State or Territory contract laws* was wholly excluded. This means that the parties would be unable to selectively disapply individual *State or Territory contractor laws* in relation to their contract or contracts.

182. Proposed subsection 33(2) would clarify that the *date of effect* of a *reform opt-in agreement* is not limited to the date on which the agreement is signed. Rather, a *reform opt-in agreement* would be able to take effect on either the date of signing by the parties, or some later date as agreed by the parties in the terms of the agreement.

183. Proposed subsection 33(3) would define when a *reform opt-in agreement covers* a *services contract*. Under this proposed definition, a *reform opt-in agreement* between the parties to a contract would cover a contract where that agreement is to the effect the parties to the contract no longer want *State or Territory contractor laws* to apply to that contract and that intent is expressed in a manner that reflects proposed paragraphs 33(1)(a), (b) or (c).

184. Proposed subsection 33(4) would make clear that a *reform opt-in agreement* cannot be revoked or varied. Such changes to the agreement are not permissible under these provisions because once the parties elect to leave the transitional system, they are not entitled to return to it. This means that from the time a *reform opt-in agreement* takes effect in relation to a contract or contracts, the exclusion provisions would prevent the application of *State or Territory contractor laws* to that contract or contracts.

Section 34 – Prohibited conduct in relation to a reform opt-in agreements

185. Under this proposed section, a person would be prohibited from engaging in certain conduct with the intent to improperly pressure another person into signing, or refraining from signing, a *reform opt-in agreement*. Such conduct would make a person liable to a civil penalty.

186. This proposed section would prohibit two forms of conduct – coercion (see proposed subsection 34(1)) and misrepresentation (see proposed subsection 34(2)). Under the coercion provision, a person would have breached that proposed subsection if they take (or threaten to take) any action or refrain (or threaten to refrain) from taking any action with the intent of coercing the targeted person to enter, or refrain from entering, a *reform opt-in agreement*. Under the misrepresentation provisions, a person would have breached the proposed subsection if they

knowingly make a false statement with the intent to persuade the targeted person to enter into, or not enter into, a *reform opt-in agreement*.

187. The concept of a *reform opt-in agreement* exists to provide the parties covered by proposed Division 1 of Part 5 with a genuine choice regarding the laws that regulate their contracts. The prohibition of the type of conduct described in proposed subsections 34(1) and (2) in relation to *reform opt-in* agreements would ensure freedom to make genuine choice about whether the exclusion provisions would take effect within the 3 year transitional period.

188. A breach of either of these proposed subsection 34(1) or (2) would make a person liable for a civil penalty (see proposed subsection 34(3)) the maximum penalties for which would be set out in proposed subsection 34(4). Under that provision, the maximum penalty for a breach of either proposed subsection 34(1) or (2) would be 300 penalty units for a body corporate and 60 penalty units in other cases.

189. Those persons with standing to apply to a *Court* for the imposition of a penalty under proposed subsection 34(3) would be set out in proposed subsection 34(5). This provision would provide standing to a *workplace inspector*, the targeted person and an organisation of employees or an organisation or association of employers in certain circumstances. This is consistent with the approach adopted in similar provisions in the *Workplace Relations Act 1996* (for example, sections 790, 792 and 807). The list of persons with standing to seek a penalty reflects the persons who are most likely to be, or become, aware of a breach of the proposed provisions and, consequently, are best placed to ensure that the compliance framework operates as an effective deterrent.

190. Proposed subsection 34(6) would allow a *Court* to order that payment of a penalty under proposed subsection 34(4) could be made to persons other than the Commonwealth. This proposed provision would allow a *Court* to order, for example, that a penalty be paid to the person who brought the proceedings (such as the targeted person).

191. Proposed subsection 34(7) would provide Division 3 of Part 14 of the *Workplace Relations Act 1996* has effect as if a breach of subsections 34(1) or (2) were a contravention of a civil remedy provision within the meaning of that Division. This would ensure that the general rules in relation to civil remedy provisions in the *Workplace Relations Act 1996* also apply to breaches of these provisions.

Section 35 – Continued application of the State or Territory contractor laws to certain services contracts

192. This section would be the operative provision of the proposed Division. It would create the transitional period by providing that the exclusion provisions in sections 7 and 10 do not apply during the transitional period. The proposed provision would achieve this by providing that *State and Territory contractor laws* have effect until the transitional period comes to an end or a *reform opt-in agreement* is executed by the parties and takes effect. Further, the proposed section would set out the consequences of the ending of contracts at this point or if the *contract period* ends before then.

193. Proposed subsections 35(1) and (2) would set out the circumstances in which this section would apply. It would provide that the proposed section has application to a contract which is a *pre-reform commencement contract* or *continuation contract* of a *pre-reform commencement contract* of which some or all of the *contract period* occurs after the *reform commencement* and in relation to which the contractor law test is satisfied.

194. The contractor law test is set out in proposed subsection 35(2). In order for proposed section 35 to apply to a contract, this test, in addition to proposed subsection 35(1), must be

satisfied. Under the terms of proposed subsection 35(2), the contractor law test would be satisfied in relation to a contract if one of the following conditions is met:

- if the *contract period* of the contract had not begun before *reform commencement* – one or more *State or Territory contractor laws* would have applied before the *reform commencement* in relation to the contract as if the *contract period* of that contract were taken to have commenced when the contract was entered into; or
- if the *contract period* of the contract commenced prior to *reform commencement* – one or more of the *State or Territory contractor laws* applied before the *reform commencement* in relation to the contract.

195. Proposed subsection 35(3) would clarify how subsection 35(2) operates. This proposed provision would provide that a reference to *State or Territory contractor laws*, in relation to a time before the *reform commencement*, should be read as a reference to laws that would have been *State or Territory contractor laws* if:

- this proposed Division had been in force at that time; and
- the *reform commencement* had occurred before that time.

196. These provisions allow a situation where the parties have entered a contract before *reform commencement*, but the *contract period* of that contract does not start until after *reform commencement*, to be covered by proposed section 35. To achieve this, proposed subsection 35(3) would apply the concept of *State or Territory contractor laws* (which refer to the laws of a State or Territory as in force after reform commencement) to a period of time prior to *reform commencement*. This would allow the requirement that the contract be affected by a *State or Territory contractor law* (under proposed subsection 35(2)) to be satisfied.

197. If a contract is one to which this proposed section applies, subsection 35(4) would provide that the exclusion provisions have no effect in relation to so much of the *contract period* of that contract as occurs after *reform commencement* and before the first of the following days (the transition day):

- the date of effect (not necessarily the date of signing) of any *reform opt-in agreement* entered into between the parties that *covers* the contract; or
- the first day after the end of the 3 year transitional period (that is, 3 years after the date on which *reform commencement* occurred).

198. This would mean that, where a contract is one to which this proposed section applies (see proposed subsections 35(1) and (2)), the exclusion provisions have no effect in relation to that part of the *contract period* of the contract that occurs after *reform commencement* and until the time that a *reform opt-in agreement* takes effect or the transitional period ends. For the period that the exclusion provisions do not apply to the contract between the parties, *State or Territory contractor laws* would have application. This is clarified in a legislative note under proposed subsection 35(4).

199. Proposed subsection 35(5) would operate as an exception to subsection 35(4). This proposed provision would allow the making of regulations which provide that the exclusion provisions continue to have effect in relation to specified *State or Territory contractor laws* either generally or as specified in the regulations. This means that the regulations would be able to prescribe that certain *State or Territory contractor laws* (or parts of those laws) do not have effect during the transitional period, despite the operation of proposed subsection 35(4). Regulations made under this provision could, for example, exclude the operation of new *State or Territory contractor laws* made by State or Territory Parliaments or Legislative Assemblies.

200. Proposed subsection 35(6) would set out the consequences which would follow the ending of a *contract period* before the transition day (that is, the first day before the date of effect of a *reform opt-in agreement* or the end of the 3 year transitional period). This proposed provision would provide that where the *contract period* of a contract ends before the transition day and there is no further contract between the parties that meets the definition of a *continuation contract*, then the consequences that result from the ending of that relationship are to be determined in accordance with:

- the terms of the relevant contract;
- relevant *State or Territory contractor laws*; and
- any other relevant laws.

201. This proposed provision emphasises the fact that, during the transitional period, contracts between the parties remain within the relevant State or Territory system. As a result, the consequences which flow from the ending of the contract are to be determined, primarily, by State or Territory laws. For example, if the deemed employee considers the ending of the contracting relationship to be unfair, a re-engagement remedy would only be able to be sought under the terms of the relevant contract, a relevant *State or Territory contractor law* or any other relevant law.

202. Other examples of consequences which may flow from the ending of a *contract period* prior to the transition day are explained in the legislative note that would appear under proposed subsection 35(6).

203. Proposed subsection 35(7) would provide for a situation in which, after the ending of a contract under subsection 35(6), the *independent contractor* obtains a reinstatement or re-engagement remedy. This provision would ensure that the new contract with the principal that results from the reinstatement or re-engagement remedy would be taken to be a *continuation contract* if it has effect before the transition day.

204. This proposed provision would apply where, in a situation to which subsection 35(6) applies, the *independent contractor* obtains a remedy requiring the principal to reinstate or re-engage the *independent contractor* with effect from the time, or before the time, that the contract previously ended. In such a case, where the new contract arising as a result of the reinstatement of re-engagement remedy could not otherwise be described as a *continuation contract* of a previous contract between the *independent contractor* and their principal, the provision would treat, for example, the new contract between the parties as a *continuation contract*. This means that the *independent contractor* would not fall out of the transitional system because of the inappropriate conduct of an employer unfairly dismissing a deemed employee.

205. Proposed subsection 35(8) would set out the consequences that flow from a situation in which the parties to a contract do not choose to end their relationship before the end of the transitional period (that is, the parties remain in the State system until the end of the 3 year transitional period). This proposed provision would provide that, if the *contract period* of the contract had not ended prior to the transition day, then on the transition day, the contract would be treated for the purposes of *State or Territory contractor laws* as though it had ended by agreement between the parties. The provision would make clear that, in such a situation, the ending of the relationship would not be construed as being ended unilaterally.

206. The effect of this provision would be to make clear that, upon the ending of the *contract period* of the contract between the parties, neither party would be able to seek remedies for reinstatement, re-engagement or breach of contract. These are not consequences that could be

expected to flow from the removal of employee or employee-like entitlements by operation of this Bill. However, a right to payment of accrued entitlements to an *independent contractor* who is deemed to be an employee would be triggered by operation of this section. The deemed employer or other principal would be required, in accordance with relevant *State or Territory contractor laws*, to make good that entitlement. A legislative note after proposed subsection 35(8) would explain this.

Section 36 – How section 35 applies is there is a transfer of business

207. This proposed section would explain how the provisions of this Division should be modified in circumstances in which there is a transfer of the business of the principal during the transitional period. In general, this proposed section would provide that the transfer of the business of a principal does not result in an *independent contractor* exiting the transitional system, despite the fact that the new contract between the new principal and that *independent contractor* could not otherwise be a *continuation contract* of a previous contract given the difference in the parties.

208. Proposed subsections 36(1) and (2) would explain the circumstances in which this section applies to a post-transfer contract. Proposed subsection 36(1) would establish the general rule in relation to such circumstances with proposed subsection 36(2) providing an exception in cases where the parties to the original contract have executed a *reform opt-in agreement* which is in effect before the transfer of business.

209. Under proposed subsection 36(1), section 36 would apply to a contract (a post-transfer contract) where the following criteria can be satisfied:

- under the first contract between the *independent contractor* and the former principal, the *independent contractor* performed work of a particular kind;
- that first contract was either a *pre-reform commencement contract* or a *continuation contract* of a *pre-reform commencement contract*;
- at some time after *reform commencement*, there was a transfer of all or part of the business of the former principal to another person; and
- the post-transfer contract is a contract entered into between the *independent contractor* and the new principal for the performance of the same type of work as under the first contract for that business or part of that business which was transferred to the new principal.

210. Proposed subsection 36(2) would create an exception to subsection 36(1) in circumstances where the parties to the first contract entered into a *reform opt-in agreement* which had come into effect prior to the transfer of the business to the new principal. Where this occurs, the contract between the original parties would already be regulated by federal law leaving no contract for this proposed section to operate on. Once a *reform opt-in agreement* has been executed and passed its *date of effect*, it is not possible for the parties to that contract (a *continuation contract* or a transferred contract) to subsequently choose to reapply the *State or Territory contractor laws* in relation to that contract.

211. The operation of this proposed subsection would not cover a situation in which the parties to the first contract executed a *reform opt-in agreement*, but prior to that agreement passing its *date of effect*, the business of the former principal is transferred. In such a case, this proposed subsection would not prevent the section from applying. If the new principal and the *independent contractor* still wanted to opt-in to the federal system for the purposes of the post-transfer contract, they would need to execute a new *reform opt-in agreement*.

212. Proposed subsection 36(3) would be the operative provision in this section. It would provide that, if the section applies to the post-transfer contract, then for the purpose of determining whether that post-transfer contract is a *continuation contract* in relation to a preceding contract, the following provisions apply:

- the parties to the post-transfer contract are taken to be the same as the parties to either the *pre-reform commencement contract* or a *continuation contract* of a *pre-reform commencement contract* (whichever is relevant); and
- subsection 32(2) (which allows certain intervals between the *contract period* on one contract and the next to be treated as immediately following a preceding contract) is to be construed as containing a paragraph referring to an interval being because of the transfer of the business or part of the business.

213. In effect, this allows a post-transfer contract to which this section applies to be treated as a *continuation contract* of the first contract. This would prevent an *independent contractor* from falling out of the transitional system because of a transfer of the former principal's business.

Section 37 – Application of the State or Territory contractor laws in relation to pre-reform commencement matters not affected by exclusion provisions

214. This provision would clarify that the exclusion provisions in proposed sections 7 and 10 do not affect the operation of *State or Territory contractor laws* as they applied in relation to matters before *reform commencement*. The exclusion provisions would only exclude the operation of *State or Territory contractor laws* prospectively from the date of the *reform commencement*.

Division 2 – Unfair contracts laws

215. Proposed Part 5 would provide a transitional mechanism to allow applications under State, Territory and federal unfair contracts laws, including appeals, that had been initiated before the commencement of proposed Part 3 to continue until they are finally determined. Therefore, laws which allow an application to be made in relation to a *services contract* on any of the *unfairness grounds* would, for example, continue to operate until the application is finally determined.

Section 38 - Definition

216. Proposed section 38 would provide a definition of *reform commencement*. *Reform commencement* means the commencement of Part 3.

Section 39 - New applications relating to unfair contracts

217. Proposed section 39 would provide that an application to the *Court* to review a *services contract* on the grounds that it is unfair and /or harsh may be made under Part 3 even if the contract was entered into before the *reform commencement*.

Section 40 - Applications under the *Workplace Relations Act 1996* in progress at the reform commencement

218. Proposed section 40 would provide a transitional mechanism for applications, including appeals, that commenced under sections 832 to 834 of the WR Act before the operation of Part 3 to continue until they are finally determined.

219. Subsection 40(1) would provide that this section applies to an application made under section 832 of the WR Act in relation to a contract for services that was made before the *reform commencement* if the proceeding, including any appeal to a court in relation to the proceeding, was not finally determined before the *reform commencement*.

220. Subsection 40(2) would provide that sections 832, 833 and 834 of the WR Act would continue to apply to an application after the *reform commencement* as if they had not been repealed by Schedule 2 to the *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006*. This is intended to ensure that applications made under the WR Act which are 'on foot' at the time of the *reform commencement* are not required to be discontinued and restarted under Part 3.

Section 41 - Applications under an excluded State or Territory law in progress at the reform commencement

221. Proposed section 41 would provide a transitional mechanism for proceedings, including appeals, that commenced before the *reform commencement* under a State or Territory law to continue operating until the application is finally determined.

222. Subsection 41(1) would apply to a proceeding, including any appeal, in relation to a contract for services that was commenced though not finally determined before the *reform commencement* under a State or Territory law, as mentioned in paragraph 7(1)(c). Paragraph 7(1)(c) excludes a State or Territory law that makes provision for the whole or a part of a *services contract*:

- to be void, set aside or otherwise unenforceable; or
- to be amended or varied, or to have effect as if it were amended or varied;
- on an unfairness ground (as defined in proposed section 9).

223. Subsection 41(2) would provide that paragraph 7(1)(c) does not apply to the law of a State or Territory, including any law relating to appeals, to the extent that it relates to the proceeding, including any appeal.

PART 6 – REGULATIONS

224. This proposed Part would provide a regulation making power in relation to transitional and other matters.

Section 42 – Regulations may make provision for transitional matters

225. Under these proposed provisions, the Governor-General would be able to make regulations dealing with matters of a transitional, savings or application nature in relation to the IC Act or the Workplace Relations Legislation Amendment (Independent Contractors) Act 2006 (see proposed subsection 42(1)).

226. Proposed subsection 42(2) would clarify that, in relation to Division 1 of Part 5 (transitional provisions for State and Territory laws other than unfair contracts), the regulations would be able to make modifications to those provisions. The meaning of the term 'modifications' would be provided for in proposed subsection 42(5) and would include the making of additions, omissions and substitutions. The regulation making power under this section would be further enlarged by proposed subsection 42(3) that would allow regulations made under these provisions to have retrospective effect. This broad regulation making power in proposed subsection 42(3) would, however, be confined by operation of proposed subsection 42(4). Under that proposed provision, the power to make retrospective regulations would not extend so far as to allow the Commonwealth to create, modify or otherwise affect a provision that makes a person liable to an offence or civil penalty.

227. The provisions of Division 1 of Part 5 would be complex and novel. It is conceivable that unforseen circumstances could arise which have not been provided for by these provisions. If this were to occur, the accrued entitlements of independent contractors who have been deemed by State or Territory laws to be employees could be lost. Such lost entitlements would only be capable of being reinstated through law with retrospective effect. Consequently, a broad regulation making power allowing retrospective legislation to be made is desirable to ensure that the accrued entitlements of formerly deemed employees are not unintentionally lost.

Section 43 – Power to make regulations

228. This proposed provision would allow the Governor-General to make regulations about matters that are required or permitted by the IC Act to be made or which are necessary or convenient to be prescribed for the purpose of giving effect to the provisions of the Act.