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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

# INDEPENDENT CONTRACTORS BILL 2006

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be Moved on Behalf of the Government

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

**INDEPENDENT CONTRACTORS BILL 2006**
**(Amendments to be moved on behalf of the Government)**

## OUTLINE

The proposed Government amendments would amend the provisions of the Independent Contractors Bill 2006. The amendments would further enhance the Government's commitment to protect common law independent contractors from the prescriptive nature of workplace relations regulation.

The amendments would:

- amend the exclusion provisions in proposed section 7 of the Bill, as recommended by the Senate Employment, Workplace Relations and Education Committee, to ensure that existing State and Territory outworker protections are not overridden;
- remove the minimum remuneration guarantee for independent contractor outworkers in the textile, clothing and footwear industry as recommended by the Senate Committee on the basis that the proposed provisions are an unnecessary duplication of State and Territory laws;
- amend the unfair contracts provisions in Part 3 of the Bill to ensure that a court assesses the unfairness or harshness of a contract at the time it was made;
- amend the unfair contracts provisions in Part 3 of the Bill to further clarify the powers of the Court in reviewing services contracts; and
- amend the unfair contracts provisions in Part 3 of the Bill to include more comprehensive 'anti-double dipping' provisions.

## FINANCIAL IMPACT STATEMENT

These amendments are budget neutral.

**NOTES ON AMENDMENTS**

**Amendment 1 – Clause 7, page 6 (line 30) to page 7 (line 3)**

1. This amendment would omit proposed paragraph 7(1)(c) of the Bill and substitute a new provision.

2. Currently, proposed paragraph 7(1)(c) provides that the rights, entitlements, obligations and liabilities of a party to a *services contract* are not affected by a law of a State or Territory to the extent that the law provides for the whole or part of a *services contract* to be amended, varied, set aside, void or otherwise unenforceable, on an *unfairness ground*. The purpose of this proposed provision is to exclude the application of State unfair contract jurisdictions.

3. As amended, paragraph 7(1)(c) would provide that the rights, entitlements, obligations and liabilities of a party to a *services contract* are not affected by a law of a State or Territory to the extent that the law expressly provides for a court, commission or tribunal to make an order or determination which amends, varies, sets aside, or declares to be void or otherwise unenforceable, part or all of a *services contract* on an *unfairness ground*.

4. The effect of this amendment would be to narrow the characterisation of the State and Territory laws intended to be excluded by the Bill. It would ensure that only State and Territory laws which expressly give a court, commission or tribunal, the power to amend, vary, set aside, or declare to be void or otherwise unenforceable, part or all of a *services contract*, are excluded to the extent that those laws affect the rights, entitlements, obligations and liabilities of parties to a *services contract*. State and Territory laws which, of themselves, have the effect of allowing a *services contract* to be amended, varied, set aside, or declared to be void or otherwise unenforceable would not be excluded by this amended paragraph 7(1)(c).

5. An example of a State law intended to be overridden by paragraph 7(1)(c) as amended would be section 276 of the Queensland *Industrial Relations Act 1999*. That law expressly allows the Queensland Industrial Relations Commission to amend or declare void a contract for services where that contract is an 'unfair contract'. The term 'unfair contract' in the Queensland legislation meets the definition of an *unfairness ground*.

6. An example of a State law that would not be overridden by paragraph 7(1)(c) as amended would be subsection 406(2) of the New South Wales *Industrial Relations Act 1996*. That law states that the provisions of a contract do not have effect to the extent that they provide an employee with a benefit that is less favourable than the benefit to which they would have been entitled to under an industrial instrument. To the extent that the New South Wales law applies to common law independent contractors, it will not be overridden by new paragraph 7(1)(c) because it is the New South Wales law itself that operates to render a term of the contract unenforceable. Other examples include sections 69-72B of the South Australian *Fair Work Act 1994*, section 85 of the Tasmanian *Industrial Relations Act 1984*, section 114 of the Western Australian *Industrial Relations Act 1979* and similar provisions in respect of mandatory codes or other legislative instruments.

7. With respect to existing State and Territory laws which protect outworkers, nothing in proposed paragraph 7(1)(c) is intended to deprive outworkers (or their representatives) of the right to recover their full entitlements arising from the relevant instruments (such as legislation, regulations, award provisions and mandatory codes) which apply to them.

8. The Senate Employment, Workplace Relations and Education Committee was particularly concerned that paragraph 7(1)(c), as introduced, would override State and Territory laws that prevent a person contracting out of award or industrial instrument entitlements insofar as those entitlements are applicable to outworkers (see page 3 of the Senate Committee's report, tabled in August 2006). The Senate Committee was also concerned that enforcement provisions associated with these 'anti-avoidance' laws would also be overridden by the paragraph as originally proposed. This amendment would implement the unanimous recommendation of the Senate Committee that paragraph 7(1)(c) of the Bill be amended to ensure that State 'anti-avoidance' legislation for the protection of outworkers not be overridden.

**Amendment 2 – Clause 7, page 7 (lines 10 to 14)**

9. This amendment would omit proposed paragraph 7(2)(a) of the Bill and substitute a new provision.

10. Proposed paragraph 7(2)(a) currently provides that subsection 7(1) does not apply in relation to a law of a State or Territory to the extent that the law applies to a services contract to which an outworker is a party and makes provision, otherwise than as mentioned in paragraph 7(1)(c), in relation to such a contract. The intention was to prevent the application of paragraphs 7(1)(a) and (b) to existing State and Territory laws that provide protections to outworkers. This is still the intention of the amended provision. The amendment rewords the provision to better express this intention.

11. As amended, paragraph 7(2)(a) would provide that the exclusion provisions (subsection 7(1)) do not apply to a law of a State or Territory to the extent that the law deals with matters relating to outworkers. This would ensure that all existing State and Territory protections for outworkers are preserved.

12. However, paragraph 7(2)(a) would not prevent the exclusion of a State or Territory law which expressly allows a court, commission or tribunal to make an order or determination which amends, varies, sets aside, or declares to be void or otherwise unenforceable, part or all of a services contract on an unfairness ground (paragraph 7(1)(c)). It is intended that the Bill override State and Territory unfair contracts jurisdictions for all workers (including outworkers). These workers will have access to the new unfair contracts provisions in proposed Part 3 of the Bill.

13. Because paragraph 7(2)(a) would ensure that a State or Territory law that deems an independent contractor outworker to be an employee, or provides employee-like entitlements to an independent contractor outworker is not excluded, the transitional provisions in Division 1 of Part 5 of the Bill, including the capacity to enter a reform opt-in agreement, will not apply to people who are covered by those laws. This is

because the transitional arrangements only apply to services contracts affected by State or Territory laws which are overridden by paragraphs 7(1)(a) and (b).

14. The effect of new paragraph 7(2)(a) would be to preserve State or Territory laws which deem common law independent contractors to be employees or which provide employee-like entitlements to common law independent contractors where those laws deal with matters relating to outworkers. This provision would save not only existing State and Territory laws about outworkers, but also similar laws enacted in the future. Examples of State and Territory laws that would be saved by this proposed provision include laws relating to registration and record keeping requirements of textile, clothing and footwear (TCF) industry participants, laws regulating the giving out of work by parties in the contracting chain, and industry codes of practice which apply to TCF industry participants (such as the New South Wales Ethical Clothing Trades Extended Responsibility Scheme).

15. It is not intended that the Bill override existing State and Territory outworker protections preserved under paragraph 7(2)(a) through the making of regulations under proposed section 10 of the Bill.

**Illustrative example (outworker law)**

Kath is an outworker in Victoria engaged on a *services contract* by Calico Products Pty Ltd to make dresses. Calico Products is itself engaged by Mega Fashion House Inc (Mega) who on-sells the dresses made by Kath to a variety of large department stores around Australia.

Kath has just completed a large order for Calico Products and, in accordance with the terms of her contract, is owed $500. However, the owner of Calico Products has refused to pay Kath for the work she has performed. Kath wants to know if there is another way to recover the money she is owed.

The Victorian *Outworkers (Improved Protection) Act 2003* allows Kath to claim unpaid remuneration from an apparent employer (in this case, Mega). The Victorian Act would not be overridden by the Bill, despite the fact that it deems Kath (a common law independent contractor) to be an employee (see section 4) and confers employee-like entitlements on Kath by providing her an entitlement to the same terms and conditions applicable to an employee outworker (see section 14A) and by providing chain of contracts provisions (see Division 2 of Part 2). The Victorian Act would not be overridden because it is a law that deals with matters relating to outworkers and is therefore saved by paragraph 7(2)(a) of the Bill.

**Illustrative example (unfair contracts law)**

Debbie is a clothing outworker in New South Wales engaged on a *services contract* by Stylish Clothing Pty Ltd (Stylish). Debbie is a migrant from Europe who speaks very little English and has never attended formal education. When she started work with Stylish, she signed a contract which contained a number of adverse terms and conditions. She did not have the contract explained to her. When she asked the owner of Stylish to read the contract to her, he replied that the job offer was a 'take-it or leave-it' offer. Intimidated by this behaviour, Debbie signed the contract.

Debbie has subsequently come to appreciate the adverse nature of some of the terms of her contract and wants to have them amended. She wants to bring an unfair contracts claim in the New South Wales Industrial Relations Commission to have her contract varied under Part 9 of the New South Wales *Industrial Relations Act 1996*.

The Bill will prevent Debbie from bringing an unfair contracts claim under the New South Wales Act. Paragraph 7(2)(a) expressly preserves the effect of paragraph 7(1)(c) which overrides State unfair contracts laws. However, Debbie would be able to bring her claim to amend her contract under the unfair contracts provisions in Part 3 of the Bill. Under these provisions, Debbie would be able to apply to the Federal Magistrates Court to have her contract reviewed.

In addition, Debbie would have a remedy pursuant to State laws in New South Wales which prevent parties from contracting out of the minimum standards to be provided to all outworkers (including independent contractor outworkers).

**Amendment 3 – Clause 7, page 7 (line 21)**

16. This amendment would modify subparagraph 7(2)(b)(ii) by inserting the word ‘or’ at the end of the subparagraph. This amendment is consequential upon Amendment 4.

**Amendment 4 – Clause 7, page 7 (lines 22 and 23)**

17. This amendment would omit subparagraph 7(2)(b)(iii) of the Bill. Subparagraph 7(2)(b)(iii) currently provides that any instrument made under a provision of a law referred to in subparagraph 7(2)(b)(i) or 7(2)(b)(ii) is not affected by the general exclusion of certain State and Territory laws in subsection 7(1).

18. As such, any instrument made under Chapter 6 of the New South Wales *Industrial Relations Act 1996* or the Victorian *Owner Drivers and Forestry Contractors Act 2005* would not be excluded by this Bill. This is the intention of the Bill. However, paragraph 7(2)(b)(iii) is unnecessary because if a law is not excluded (that is, it continues to operate), then instruments made under that law are similarly not excluded (except where a law is excluded by regulations made under section 10 to the extent that the law authorises the making of an instrument).

19. The omission of subparagraph 7(2)(b)(iii) is, therefore, not intended to change the effect of the Bill with respect to instruments made under a law listed in subparagraphs 7(2)(b)(i) and 7(2)(b)(ii). Rather, the amendment would remove subparagraph 7(2)(b)(iii) because it is a redundant provision.

**Amendment 5 – Clause 8, page 8 (line 32)**

20. This amendment would replace the term ‘consumer rights’ in proposed paragraph 8(2)(k) with ‘consumer protection’.

21. As amended, paragraph 8(2)(k) would provide that consumer protection is not a workplace relations matter. By including consumer protection in the list of matters

defined by subsection 8(2) to not be workplace relations matters, State and Territory laws relating to consumer protection that affect the rights, entitlements, obligations or liabilities of parties to a services contract, would not be overridden by the exclusion provisions in subsection 7(1).

22. Laws about consumer protection include those relating to the protection of purchasers of goods and services from excessively high prices, faulty design, and/or injurious side effects. They are not confined to the protection of purchasers of domestic goods and services. Under this provision, the term 'consumer protection' is intended to include laws which protect small business from the unconscionable conduct of suppliers of goods and services.

23. At the time of the passage of this Bill, the following State and Territory laws would be considered to be examples of laws about 'consumer protection':

- the *Fair Trading Act 1992* (ACT);
- the *Fair Trading Act 1987* (NSW);
- the *Consumer Affairs and Fair Trading Act 1990* (NT);
- the *Fair Trading Act 1989* (Qld);
- the *Fair Trading Act 1987* (SA);
- the *Fair Trading Act 1990* (Tas);
- the *Fair Trading Act 1999* (Vic); and
- the *Fair Trading Act 1987* (WA).

**Amendment 6 – Clause 12, page 10 (after line 28)**

24. This amendment would add two subsections and a legislative note to section 12 of the Bill.

25. As amended, proposed subsection 12(3) would provide for the time at which the Federal Court of Australia or the Federal Magistrates Court (the *Court*) may review the terms and matters surrounding the making of a contract for the purposes of Part 3.

26. Proposed paragraph 12(3)(a) would provide that in reviewing a *services contract*, the *Court* must only have regard to the terms of the contract at the time it was made. This would reflect the prevailing Commonwealth case law regarding the interpretation of the existing unfair contracts provisions in the *Workplace Relations Act 1996*. The current case law supports the proposition that the existing federal unfair contracts jurisdiction is concerned only with the unfairness or harshness of a contract at the time the contract is made.

27. These cases further emphasise that considerations of harshness or unfairness at any point after the contract has been entered into by the parties are irrelevant (see *Finch & Ors v Herald and Weekly Times Ltd* (1996) 65 IR 239; *Harding v EIG Ansvar Ltd* [2000] FCA 46; *Aerial Taxi Cabs Co-operative Society Ltd (t/as Canberra Cabs) v Lee* [2000] FCA 1628; and *Jordan v Aerial Taxi Cabs Co-operative Society Ltd (t/as Canberra Cabs)* [2001] FCA 972).

*28.* Proposed paragraph 12(3)(b) would allow the *Court*, when reviewing a *services*

*contract*, to consider other matters as existing at the time the contract was made. This paragraph contemplates that the 'other matters' to which the *Court* may have regard are those listed in subsection 15(1) of the Bill. The intended effect of this paragraph would be to confine the *Court's* consideration of matters relevant to whether a contract was harsh or unfair to matters which occurred at or before the time the contract was made.

29. New subsection 12(4) would provide that for the purposes of Part 3, the term *services contract* would include a contract to vary a services contract. It is intended that this clause would reflect the position at common law, which is that a variation to a contract is generally treated as a new contract in itself. The new contract to vary the old contract would be capable of being reviewed at the time it was made.

30. A legislative note would be inserted at the end of subsection 12(4) to make it clear that a contract to vary a *services contract* can itself be reviewed because it will be treated as a *services contract* for the purposes of Part 3.

**Amendment 7 – Clause 14, page 11 (lines 23 to 26)**

31. This amendment would omit the definition of 'other review proceedings' from subsection 14(3) of the Bill and substitute a new definition.

32. As amended, proposed new subsection 14(3) would provide an expanded definition of *other review proceedings*. These definitions are provided in proposed paragraphs 14(3)(a) and 14(3)(b).

33. Proposed paragraph 14(3)(a) would define *other review proceedings* 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 expressly empowers a court, commission or tribunal to make an order or determination that all or a part of a *services contract* be amended, varied, set aside, or is void or otherwise unenforceable, on an *unfairness ground* if the *services contract* is not affected by the exclusion provisions in subsections 7(1) and 10(1).

34. 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 is described in paragraph 7(1)(c).

35. Proposed paragraph 14(3)(b) would provide an additional class of proceedings which are *other review proceedings* so that the term also means proceedings in relation to a *services contract* under a provision of a law of the Commonwealth, or of a State or Territory, that is specified in regulations made for the purposes of this paragraph.

36. The intention is to enable regulations to be made which prevent a party to a *services contract* making an application under Part 3 if an application under a prescribed Commonwealth, State or Territory law is 'on foot' in relation to the same contract, unless that other application has been discontinued or has failed for want of jurisdiction.

**Amendment 8 – Clause 15, page 12 (lines 11 to 16)**

37. This amendment would modify section 15 of the Bill by omitting subsection 15(2). Subsection 15(2) currently provides 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.

38. The effect of omitting this subsection would be that the *Court* would be permitted, but not required, to consider whether the total remuneration under a *services contract* was less than the total remuneration under a contract where an employee performs similar work.

**Amendment 9 – Clause 15, page 12 (lines 26 and 27)**

39. This amendment would modify proposed section 15 by omitting subsection 15(5).

40. This proposed subsection currently provides that the *Court* must exercise its powers under section 15 in a way that furthers the objects of this Act, as far as practicable. However, the *Court*, in exercising its powers under section 15, would necessarily have regard to the objects of the Act, as set out in proposed section 3. Therefore, subsection 15(5) is unnecessary.

**Amendment 10 – Part 4, clauses 18 to 30, page 15 (line 2) to page 27 (line 26)**

41. This amendment will delete proposed Part 4 of the Bill.

42. Proposed Part 4 of the Bill would have extended the existing remuneration protections for independent contractor outworkers in the TCF industry in Victoria (currently in Part 22 of the *Workplace Relations Act 1996*) to independent contractor TCF outworkers in all States and Territories. It was intended to provide a default minimum remuneration guarantee that would apply to an independent contractor TCF outworker where no similar minimum rate of remuneration was set for that outworker by a State or Territory law.

43. Proposed Part 4 would also have set up a record-keeping regime under which a person who engaged a contract outworker would have been required to keep certain records relating to pay. These record-keeping requirements would have been in addition to any other record-keeping requirements applicable under State or Territory law. The proposed Part would also have contained an enforcement regime allowing for the recovery of unpaid remuneration by an outworker, or their representative.

44. Proposed Part 4 would not have overridden any existing protections for outworkers that operated under State or Territory laws or under federal awards. The remuneration protection was intended (by virtue of proposed paragraph 7(2)(a)) to

apply in addition to any other non-remuneration related protections applicable to a contract outworker in the State or Territory, for instance, minimum leave entitlements.

45. During the Senate Employment, Workplace Relations and Education Committee inquiry into the provisions of the Bill, it became clear that the remuneration guarantee in Part 4 was unlikely to be relied upon to set the minimum rate of pay for independent contractor TCF outworkers. This is because the Bill will not override any obligation to abide by existing state and federal outworker protections, including those retained in federal awards pursuant to the *Workplace Relations Act 1996*. There are numerous sources of wage guarantees for contract outworkers under State or Territory laws and State and federal awards. As the wage guarantee in Part 4 only operates where a State or Territory law, or a federal award, does not set a minimum rate of pay, it was thought that Part 4 has no work to do. Therefore, the Committee unanimously recommended that proposed Part 4 be omitted from the Bill because it 'serves no useful purpose'.

46. The Senate Committee noted that the removal of proposed Part 4 was supported by the Victorian Government and FairWear (a combined union and community textile, clothing and footwear industry interest group).

47. Consistent with its policy to avoid unnecessary regulation, the Government considers that it is preferable to remove proposed Part 4 of the Bill, and repeal Part 22 of the *Workplace Relations Act 1996*. Other outworker protections under the *Workplace Relations Act 1996* and federal awards would continue to apply. The Government considers it appropriate that responsibility for the enactment of any additional protections for independent contractor TCF outworkers be borne by State and Territory Governments.