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Employees or Contractors? Engaging Staff Following Work Choices, and in the Light of the Proposed Independent Contractors Legislation

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Abstract

A number of specific provisions enacted by the Workplace Relations Amendment (Work Choices) Act 2005 (Cth) will liberate employers to engage their staff as independent contractors if they choose to do so. Following the amendments, effective since 27 March 2006, The Workplace Relations Act 1996 (Cth) explicitly clarifies that industrial awards cannot contain any clause restricting employers' choice to engage as many staff as they wish as contractors, nor impose any restrictions on the conditions that can be applied to their engagement. Some anecdotal evidence suggests that some employers have already begun to engage more of their staff as contractors as a consequence of these changes, however at this stage is it too early to determine trends. This paper explores these issues in greater detail.

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Employees or contractors?

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Work Choices and forms of engagement

A number of specific provisions enacted by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (*Work Choices*) will liberate employers to engage their staff as independent contractors if they choose to do so. Following the amendments, effective since 27 March 2006, The *Workplace Relations Act* 1996 (Cth) (*WRA*) s 515(1)(g) explicitly clarifies that industrial awards cannot contain any clause restricting employers' choice to engage as many staff as they wish as contractors, nor impose any restrictions on the conditions that can be applied to their engagement. This means that it is impossible in an award to require an employer to pay the same rates or offer the same conditions to contractors or labour hire workers as are provided to employees. It is now also impossible to include any such restriction in a workplace agreement made under the new Pt 8 of the *WRA*.

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Restrictions on forms of engagement are one of the many matters listed as 'prohibited content' in the *Workplace Relations Regulations (WRR)*.[1] So employers wishing to avoid the requirements of what remains of industrial awards and any pre-reform certified agreements, and indeed who want to escape regulation by any aspect of the *WRA* including the new Australian Fair Pay and Conditions Standard, might elect to engage labour predominantly by independent contracts, and can do so without having to tolerate any protected industrial action over the matter by unions.

Some anecdotal evidence suggests that some employers have already begun to engage more of their staff as contractors as a consequence of these changes, however at this stage is it too early to determine trends. Indeed, some other aspects of the *Work Choices* changes may have reduced incentives to engage staff as contractors. For example, those employers who now fall within the 'small business' exclusion from unfair dismissal laws for employers with 100 or fewer employees, have been relieved of the obligation to answer claims of unfair dismissal from employees,[2] (although they will continue to be bound by the obligation to provide the minimum notice periods stipulated in s 661 unless they can establish grounds for summary dismissal). The abandonment of the no-disadvantage test for Australian Workplace Agreements (AWAs), and the ease with which AWAs can now be made, may encourage employers to use AWAs to escape awards and collective bargains. Employees may become particularly cheap in the future, if real minimum wages fall as a result of policies pursued by the Australian Fair Pay Commission (AFPC) (although certainly, the AFPC's first decision has given no indication of immediate deterioration of real wages[3]). These factors sterilise some of the former incentives for outsourcing work to independent contractors. Only time will tell how employers will respond to these changes.

Nevertheless, the choice of whether to engage workers as employees or independent contractors is now squarely in the hands of the enterprises

[1] See WRA s 356 and WRR reg 8.5(1)(h).
[2] See WRA s 643(10).
[3] The decision can be found at http://www.fairpay.gov.au/fairpay/MinimumWageDecision/.

engaging them. There is no scope for trade unions to exert any kind of industrial pressure to influence those decisions any more.

The regulation of independent contracting relationships

How then will the engagement of these independent contractors be regulated? With the exception of some protection from pressure by unions in the freedom of association provisions in Pt 16 of the *WRA*,[4] and the little used unfair contracts review provisions applying to independent contractors who are natural persons,[5] the WRA largely ignores independent contractors. Up until now, a combination of general contract law, State laws (both industrial and fair trading laws) and the *Trade Practices Act 1974* (Cth) (*TPA*) formed the fabric of regulation of these services contracts. Bills presently before federal Parliament intend to change that regulatory landscape. The *Independent Contractors Bill 2006* (Cth) (*IC Bill*), and the *Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006* (*WRLA (IC) Bill*) propose to change the regulation of this form of engagement in a number of ways. The chief elements of this package of reforms are:

1. Many State industrial laws which would otherwise apply to independent contracting arrangements will have no application so long as the engagement involves a constitutional corporation. This requirement is necessary for the constitutional validity of the proposed laws, which are based, like the *Work Choices* legislation, squarely on the corporations power in s 51(xx) of the *Australian Constitution*.
2. New unfair contracts review provisions would apply to services contracts, including those involving incorporated contractors, so long as the work to be performed under the contract is performed by a company director or director's family member. This would extend the reach of federal unfair contracts review

[4] WRA ss 799-800.

[5] WRA, ss 832-835. The Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006 (Cth) (WRLA IC) proposes to repeal these provisions, and the Independent Contractors Bill 2006 (Cth) proposes to enact new unfair contracts review provisions, discussed below.

provisions beyond contracts through which corporations engage natural persons as contractors. State unfair contracts provisions would have no application to any contract governed by federal law.

3. Provisions to be inserted into the WRA would prohibit 'sham arrangements', that is, arrangements where persons who were really employees were artificially designated as independent contractors in order for the employer to avoid the application of federal workplace relations laws.

These proposed changes are not, in fact, nearly so dramatic as one might imagine from the fanfare surrounding their promotion. Important aspects of the regulation of independent contracting arrangements remain unchanged. Of principal importance is the regulation of the boundary between contracts of employment (contracts of service) and independent contracts (contracts for services). The common law tests continue to police this boundary, so the body of existing (and arguably inconsistent) case law will continue to apply.[6] Senator Andrew Murray on behalf of the Australian Democrats has indicated an intention to propose an amendment to the *WRLA IC Bill* which would have the effect of inserting a set of subsections into s 5 of the *WRA*, to significantly alter the common law test.[7] Given that the Government Senator's report on the Bill specifically endorses the common law test, it is probably unproductive to examine the Democrat's proposal in any detail. In short, it appears to adopt the approach recommended by Professor Andrew Stewart.[8]

Also, the *IC Bill* as presently drafted proposes (in cl 3) that the 'rights, entitlements, obligations and liabilities of parties to services contracts' should be governed by the terms of those contracts subject to three important sources of law: the rules of common law and principles of equity; Commonwealth statutes; and State laws governing commercial (but not

[6] For a detailed critical analysis of the common law see Andrew Stewart 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15 *Australian Journal of Labour Law* 235.

[7] The Current Bills page on the Parliament of Australia Home website carries the latest version of this proposed amendment, dated 18 October 2006.

[8] See Stewart above n 6.

industrial) relationships. This means that the *IC Act*, if eventually passed, will by no means create a complete code for the regulation of service contracts. Contract law (modified as it is by equitable principles), federal trade practices regulation, and State fair trading laws, will continue to apply to independent contracting arrangements.

A new Independent Contractors statute?

The *IC Bill 2006* and the *WRLA (IC) Bill* were introduced into Federal Parliament on 22 June 2006, and were passed by the House of Representatives on 13 September 2006. At the time of writing, both Bills were still before the Senate, and had not been set down for debate on any of the remaining sitting days before Parliament is due to rise for the holiday recess. Some political concerns over certain aspects of the Bill – some reported in the Senate Employment, Workplace Relations and Education Legislation Committee Report on the Bill[9] – may have delayed its progress. Consequently, the following analysis of the Bill comes with the disclaimer that it was written on the assumption that the Bill would pass with no amendments. Senator Andrew Murray has already identified an intention to propose amendments to the provisions in the *IC Bill* dealing with outworkers, and unfair contracts review,[10] in addition to the proposed amendment to the *WRLA (IC) Bill,* noted above.

So why enact a special Act?

Given that the proposed legislation will not be a complete code, and that existing commercial regulation will continue to apply, it is worth reflecting on why the government decided to propose this specific legislation. Some of the government's motivation can be gleaned from a Ministerial statement,[11] which

[9] August 2006.
[10] See Sheet no 5062, 12 october 2006, available from the Parliament of Australia website.
[11] The Hon Kevin Andrews, Minister for Employment and Workplace Relations, *Speech to Independent Contractors of Australia*, Canberra, 7 September 2005.

followed a House of Representatives Standing Committee Report into independent contracting and labour hire arrangements.[12]

It appears, principally from the Ministerial statement, that much of the government's agenda has been driven by a desire to emasculate State legislative initiatives that drew a range of contract workers within the protection of State employment laws. Examples cited in the statement are deeming provisions in the *Fair Work Act 1994* (SA) s 4 definition of 'contract of employment',[13] the *Industrial Relations Act 1996* (NSW) s 5 and Sch 1, and the *Industrial Relations Act 1999* (Qld) s 275, all of which were enacted to sterilise some of the effects of employer strategies to outsource work previously done by employees to armies of tied dependent contractors. The Minister described these State initiatives as 'regulatory excess',[14] although these kinds of provisions are suggested as an appropriate response to the problem of disguised employment in the International Labour Organisation's Recommendation Concerning the Employment Relationship.[15]

Various State enquiries into the labour hire industry[16] also appear to have caused some nervousness in federal government circles and among its employer constituencies. A desire to forestall any further state regulation of labour hire practices may also explain the mission to regulate for all such arrangements at federal level.

Exclusion of State laws

The *IC Bill* expressly purports to exclude many State workplace relations laws from operating in respect of any person bound by the federal legislation, although – perhaps surprisingly – a number of State initiatives have been expressly preserved in the legislation. In particular, state protection of

[12] House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, *Making it work: Inquiry into independent contracting and labour hire arrangement*s, Canberra, August 2005.
[13] This provision deems certain types of work contracts to be contracts of employment even if they would not be so at common law, e.g., drivers of public passenger vehicles, cleaners of premises and outworkers.
[14] See Andrews above n 11 at 12.
[15] See ILO R198 Employment Relationship Recommendation 2006, adopted 15 June 2006, clause 11(c): see http://www.ilo.org.public/english/standards/relm/ilc/ilc95/pdf/pr-21.pdf.
[16] See for example the Economic Development Committee *Inquiry into Labour Hire Employment in Victoria*, GPSV, June 2005.

outworkers (for example, the clothing trade outworkers provisions in the *Industrial Relations Act* 1996 (NSW) Pt 11) has been preserved, and the specific regimes governing owner drivers in the transport industries in NSW and Victoria will remain undisturbed,[17] at least for the time being. Preservation of State owner driver protections has been a politically contentious issue and may well be revisited in the future. There is even scope in the legislation as currently drafted for the government to table regulations removing this carve-out at any time. Proposed cl 10 of the *IC Bill* states that the regulations may specify additional laws to be excluded, and these regulations may even exclude laws that are expressly mentioned as not being excluded in cl 7(2)(a) or (b), i.e., outworker or owner driver provisions.

The exclusion of State workplace relations laws does not mean, however, that engagers of labour can ignore all laws dealing with the rights and obligations of employers at work. Only matters defined in cl 8 of the *IC Bill* are 'workplace relations matters' and thus excluded. These are:

(a) remuneration, allowances or other amounts payable to employees;
(b) leave entitlements of employees;
(c) hours of work of employees;
(d) enforcing or terminating contracts of employment;
(e) making, enforcing or terminating agreements (not being contracts of employment) determining terms and conditions of employment;
(f) disputes between employees and employers, or the resolution of such disputes;
(g) industrial action by employees or employers;
(h) any other matter that is substantially the same as a matter that relates to employees or employers and that is dealt with by or under:
    (i) the *Workplace Relations Act* 1996; or
    (ii) a State or Territory industrial law;
    unless the matter is specified in regulations.

[17] *Industrial Relations Act* 1996 (NSW) Ch 6, and *Owner Drivers and Forestry Contractors* Act 2005 (Vic): see IC Bill cl 7(2)(b) .

On the other hand, a long list of matters is designated as *not* being workplace relations matters, so engagers of labour will continue to be bound to regard those laws. This list names the following:

(a) 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;
(b) superannuation;
(c) workers compensation;
(d) occupational health and safety (including entry of a representative of a trade union for a purpose connected with occupational health and safety);
(e) child labour;
(f) the observance of a public holiday, except the rate of payment of an employee for the public holiday;
(g) deductions from wages and salaries;
(h) industrial action affecting essential services;
(i) attendance for service on a jury;
(j) professional or trade regulation;
(k) consumer rights;
(l) taxation;
(m) any other matter specified in regulations.

Many of the State laws that would fall within this list apply to both employees and some kinds of contractors, and may deem those contractors to be employees or equivalent to employees for the sake of certain protections.

Unfair contracts review

One kind of law which is definitely excluded is any State law allowing for the review of a services contract on the grounds of unfairness.[18] An 'unfairness ground' is defined in the *IC Bill* cl 9 to encompass the range of statutes that allow courts and tribunals to rewrite or declare void contracts which are unfair,

[18] See cl 7(1)(c).

harsh, unconscionable, unjust, against the public interest, or designed to avoid employment obligations under a statute.

The various controversies in recent years over the blossoming of the New South Wales unfair contracts provisions in ss 105 to 109A of the *Industrial Relations Act* 1996 (NSW) are also likely to have contributed to the government's antagonism towards State initiatives in unfair contracts review.[19] These provisions have increasingly been used by highly paid employees in the finance and information technology sectors,[20] and by franchisees and distributors in independent businesses.[21] One of the more notorious controversies involved a decision by a judge of the NSW Industrial Relations Commission to rewrite the terms of a particularly onerous hotel lease, to allow the hotelier tenants to avoid payment of a large amount of deferred rent.[22]

Queensland also allows for unfair contracts review under the *Industrial Relations Act 1999* (Qld) s 276, however this jurisdiction has not attracted so much litigation, nor so much controversy, as the NSW jurisdiction.

Despite the Minister's explicit criticism of State unfair contracts review jurisdictions as an untenable incursion into commercial arrangements,[23] federal legislation continues to include its own unfair contracts review provisions. The WRA under former ss 127A-127C, and new ss 832-834, allowed for the review of 'harsh' or 'unfair' independent contracts where the contractor was a natural person.[24] Following the passage of the *IC Bill* and *WRLA(IC) Bill*, these provisions will be moved to the *Independent Contractors Act*,[25] and will be extended to cover contractors who have incorporated their businesses, so long as the work performed under the allegedly harsh or unfair

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[19] For information on these controversies see I Taylor 'S 106 of the *Industrial Relations Act* 1996 (NSW): Commercial contracts that have an "industrial colour and flavour"' (2004) 17 *Commercial Law Quarterly* 3; J Riley 'Unfair contracts review: Unfair favouritism for high flyers?' (2002) 16 *Commercial Law Quarterly* 15; S Gibson 'Section 106: Calls for legislative reform should be silenced' (2002) 24 *Syd L R* 231.

[20] See for example *Westfield Holdings Ltd v Adams* (2002) 114 IR 241; *Canizales v Microsoft Corporation* (2000) 99 IR 426; *Mitchell-Calvert v Yahoo! Inc* (2001) 106 IR 36.

[21] See for example *Gough & Gilmour Holdings Pty Ltd v Caterpillar of Australia (No 15)* [2003] NSWIRComm 173.

[22] See *Starkey v Mitchforce Pty Ltd* (2000) 101 IR 177 (Hungerford J); *Mitchforce Pty Ltd v Starkey* (2002) 117 IR 122 (Full Bench); *Mitchforce Pty Ltd v Industrial Relations Commission of NSW* (2003) 57 NSWLR 212 (NSW Court of Appeal). For a digest and a critical view of this case see J Phillips and M Tooma *Law of Unfair Contracts in NSW*, Lawbook Co, Sydney 2003, at vii-viii and 21-27.

[23] See Andrews, above n 11.

[24] See WRA s 4(2).

[25] IC Bill Pt 3.

contract is performed by a director of the contractor company or a family member of the director.[26]

Even this extension of protection to small corporations is nothing new, when one considers that such corporations are currently entitled to complain of the unconscionable conduct of the larger businesses who engage their services, where those service contracts are for an amount less than $3 million.[27]

Corporate employers and their contractors who have been subject to State provisions in the past will now be concerned to understand the differences between State and federal review of unfair work contracts. The most obvious difference is that the federal provisions are to be supervised by a federal court (the Federal Court and Federal Magistrates Court), whereas the NSW provisions have been handled by the NSW Industrial Relations Commission sitting in Court Session.[28] Perceptions have been strong in business and federal government circles that this jurisdiction was influenced by the industrial flavour of much of its other work. The Howard government has a clear agenda to impose a commercial law framework on the regulation of independent contracting arrangements, and to shed any association with industrial regulation.

The fact that the federal jurisdiction is to be exercised by federal courts explains the excision of the 'public interest' as a matter to be considered in determining whether a contract ought to be reviewed. Consideration of the 'public interest' risks characterisation as an administrative task, not an exercise of judicial power, and so is an impermissible task for an Australian federal court, for constitutional reasons.[29]

The other word which is notably absent from the federal Independent Contractor provisions – but used in the *TPA* and in the State provisions – is 'unconscionable'. It appears to this writer that it is a curious decision to discard this term, if the intention is to constrain the exercise of judicial

[26] IC Bill cl 11.
[27] TPA s 51AC(9) imposes the $3 million threshold.
[28] The NSW IRC will continue to have a role in reviewing contracts and arrangements between parties where neither is a constitutional corporation. See for example *Re Dingjan; Ex Parte Wagner* (1995) 183 CLR 323; 128 ALR 81.
[29] See *Finch v Herald and Weekly Times Ltd* (1996) 65 IR 239.

discretion. The meaning of 'unconscionable' is expounded in a well-developed High Court of Australia jurisprudence in Equity,[30] and now under the *TPA*.[31] One might have expected a concern with commercial certainty to prompt adoption of a word which has been extensively judicially considered. Instead, the arguably more vague concept of 'fairness' has been adopted. (This does, however, raise the prospect that the extensive jurisprudence developed in the State unfair contracts review jurisdictions may be drawn upon for guidance as to what constitutes unfairness in particular fact situations.)

One of the most significant differences between State and federal provisions lies in the remedies available to the court, once a finding of unfairness is found. The NSW unfair contracts provisions expressly allow for the Industrial Relations Commission to order the payment of money if the Commission considers such an order 'just in the circumstances of the case'.[32] The proposed federal provisions do not explicitly allow for any orders for payment of money. The court must first record its opinion on whether the contract is unfair or harsh, and specify the relevant unfairness or harshness in the contract.[33] Having declared its opinion, the court may go on to make an order setting aside the whole contract or part of it, or varying the contract.[34] Any order must go no further than necessary to address the relevant unfairness.[35] A question arises as to whether these orders indirectly empower the court to order payment of money.

On one view, the court may vary a contract, then go on to determine the rights and obligations under that newly written contract. If the relationship between the parties has already irretrievably broken down, the court may go on to make any appropriate orders for breach of the rewritten contract. This might conceivably involve payment of money, especially if the rewritten terms involved increasing the price of the contract, or providing for a period of notice upon termination. The Federal Court would be relying on its accrued

[30] See *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; *Louth v Diprose* (1992) 175 CLR 621; *Bridgewater v Leahy* (1998) 194 CLR 457.
[31] See for example *ACCC v C G Berbatis Holdings Pty Ltd* (2002) 189 ALR 76.
[32] See Industrial Relations Act 1996 (NSW) s 106(5).
[33] IC Bill, cl 15.
[34] IC Bill cl 16.
[35] IC Bill c16(2).

jurisdiction to hear common law matters, so long as the case involved some question of federal law.

This does appear to be the approach taken in *Harding v EIG Ansvar Ltd*,[36] decided under the former *WRA* unfair contracts provisions (ss 127A and 127B). There, Spender J ordered that the defendant pay to the plaintiff compensation of $5,000 in respect of an unfair term of notice in a contract, on the basis that the newly written term be deemed to have effect at the time of the termination of the contract.

Another view – with highly inconvenient consequences – is that parties obtaining an order varying a contract under this legislation would have to initiate new proceedings to recover a debt owed under the rewritten contract, and that these proceedings would not attract federal jurisdiction and would have to be litigated afresh in the appropriate Local, District or Supreme Court jurisdiction

One of the amendments to be proposed by the Democrats is that the Court would be given an explicit power to order the payment of money in connection with the contract 'as the Court considers just in the circumstances of the case'. It will be interesting to observe how the government Senator's deal with this amendment in debate.

Another significant difference between the federal provisions and the NSW provisions is that costs can be awarded to a successful party under the NSW provisions, but the federal provisions do not allow for costs except where proceedings are brought vexatiously.[37] This is a two-edged sword for the impecunious applicant. It means that the risk of a speculative suit is not so great should it prove unsuccessful, but it also means that the costs of bringing the proceedings are unlikely to be recoverable.

Until there is some litigation to test the new provisions, it is a matter of speculation how these various matters will affect the efficacy of the provisions as a means of redressing unfair treatment of independent contractors.

Coverage of the new legislation

[36] (2000) 95 IR 349. I am grateful to Ron Baragry for alerting me to the existence of this case.
[37] See cl 17. For an explanation of costs under the NSW provisions, see J Phillips and M Tooma *Law of Unfair Contracts in NSW*, Lawbook Co, Sydney, 2004, at pp 205-206.

As has been noted above, one of the most important legal issues of concern to independent contractors and those who engage them has not been explicitly addressed in the statute. There is no statutory definition of an independent contract. The statute (like the *WRA*) relies entirely on the common law (and hence the judiciary deciding cases on their own facts) to distinguish between a contract for service and a contract of services. So – unless the Democrat's proposal to modify the common law tests by amendment of the definitions in s 5 of the *WRA* finds support – the body of case law in this area is still essential reading for all advisers.[38]

This decision suggests that the government is content to allow the courts to continue to influence the development of this difficult area of law. It also suggests that the government has consciously chosen not to go down the route of duplicating the tests for contractor status adopted in income tax legislation. In the *Making it Work* report, the majority recommended that the common law test for what constitutes employment be maintained,[39] but that it be supplemented by provisions adopting a similar approach to that used in the *Income Tax Assessment Act* 1997 (Cth) (*ITAA*).[40]

The Personal Services Income approach used in the *ITAA* to ensure that independent contracts are not used to avoid liability to make PAYG tax deductions uses a number of tests to ensure that the putative independent business person is not in fact a disguised subservient worker, who the government believes ought to be paying tax continuously.[41] These tests include the results test, which asks whether the worker is paid at least 75 per cent of income to produce a result, supplies equipment, and is liable to rectify faults; and the 80 per cent rule, which asks whether more than 80 per cent of income derives from a single client, whether there are at least two unrelated clients, whether at least 20 per cent of work is delegated to others, or whether the putative independent contractor operates from business premises other

[38] See *Stevens v Broddribb Sawmilling Co Pty Ltd* (1986) 160 CLR 13; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 121; *Sweeney v Boylan Nominees PtyLtd* [2006] HCA 19 (16 May 2006).
[39] See *Making it Work* above n.12, Recommendation 2 at par [4.48].
[40] See *Making it Work* above n.12, Recommendation 3 at par [4.48].
[41] See ITAA Part 2-42; Div 87.

than home or the place of business of the enterprise contracting for the labour.

Clearly, this test has been deemed appropriate for the purposes of protecting the federal revenue from erosion, but not for the purposes of clarifying independent contractor status for the many industrial reasons that the distinction is important.

Protection from sham arrangements

The *Making it Work* Report also recommended measures to ensure that there were adequate safeguards against the use of sham arrangements. [42] This recommendation has been adopted by the *WRLA (IC) Bill* which proposes to insert a new Pt 22 into the *WRA*. These provisions – new ss 900- 904 – would make it unlawful for a person to misrepresent to an individual that an engagement was on the basis of an independent contract if it was truly an employment relationship. Section 902 would make it unlawful to dismiss or threaten to dismiss an employee for the 'sole or dominant purpose' of re-engaging the worker as an independent contractor. This wording reflects the wording of *WRA* ss 792 and 793 (in the freedom of association provisions), protecting employees from dismissal or injury in their employment if reason for this treatment is that they are entitled to the benefit of a particular industrial instrument. Like the freedom of association provisions – and also the unlawful dismissal provisions – s 902(3) would provide for a reversed onus of proof. It would be up to the employer to prove that the sole or dominant reason for dismissal was *not* an intention to re-engage the worker as a contractor.

These provisions are civil remedy provisions, and attract penalties of up to 300 penalty units (currently $33,000) for a body corporate.[43] Employers have a defence for breach of these provisions if they can meet a subjective and an objective test of ignorance. Under proposed s 900(2) a person would not contravene the prohibition on making misleading representations if they could show that they subjectively believed that the contract was genuinely a

[42] See *Making it Work*, above n.12 at par 5.124.
[43] See s 904.

contract for services, and if they could also demonstrate that this was an objectively reasonable position to take. Specifically, they must show that they 'could not reasonably have been expected to know that the contract was a contract of employment rather than a contract for services'. This provision raises the prospect of the development of a regular practice of obtaining an advice from a solicitor on each arrangement, as an insurance policy against a subsequent finding that the arrangement was a sham.

The maintenance of the common law approach to distinguishing a contract for services from employment, and the enactment of these penalty provisions discouraging sham arrangements, suggest that the Federal Court decision in *Damevski v Giudice*[44] may remain good law. This case concerned an employed cleaner who was persuaded to formally resign, but to agree to do his usual job ostensibly as a contractor to a labour hire organisation. Mr Damevski was presented by his employer, Endoxos, with instructions to resign his job and sign an agreement to be engaged by a labour hire entity called MLC Solutions. Mr Damevski never had any direct dealings with MLC. He continued to wear Endoxos' livery, to take instructions as to his work from Endoxos' managers, to submit time sheets to Endoxos, and to rely on equipment provided by Endoxos to do his work. He was told at the time he was required to sign the deal that 'nothing would change'. When Endoxos decided that it no longer needed his services, an Endoxos manager fired him, without consulting MLC Solutions.

Although the AIRC (a single Commissioner and a Full Bench on appeal) were persuaded that the written contract with MLC Solutions determined the matter and that Mr Damevski had no standing to bring an unfair dismissal claim, a Full Court of the Federal Court of Australia disagreed. Applying a reality check to all of these arrangements, the Court found that that the purported labour hire arrangement between Endoxos and MLC solutions represented nothing more than a decision by Endoxos to outsource a payroll function. This case would seem on its face to be an example of a sham arrangement – although even here, it is possible that an

[44] (2003) 202 ALR 494.

employer in Endoxos' position might seek to rely on legal advice to claim a genuine and reasonable belief that Damevski was no longer an employee.

Textile Clothing and Footwear Industry Outworkers

The *IC Bill* proposes specific rules for independent contracting arrangements in the textile, clothing and footwear industry, with the apparent intention of ensuring that independent contracting arrangements are not allowed to undermine the protections for this extremely vulnerable class of workers provided in State legislation, and preserved by the *Work Choices* amendments. Part 4 of the *IC Bill* states that the object of these provisions is to ensure that these outworkers are not paid less than the Australian Fair Pay and Conditions Standard, and it includes provisions empowering the Workplace Inspectorate to police compliance.

During the Senate Committee of Enquiry's investigation into the *IC Bill*, these provisions came under considerable scrutiny, and concerns were expressed that the provisions as drafted facilitated avoidance of some of the protections under State laws for outworkers. The Senate Committee of Enquiry had also made recommendations that the entirety of Part 4 concerning Outworkers be removed from the Bill, and that proposed s 7(1)(c) be amended to clarify that State protections for Textile Clothing and Footwear outworkers were not overridden by the Act.[45] At the time of writing, the government had announced that it was contemplating amendments to strengthen protection for these workers against exploitation.[46] The Democrat proposed amendments also touch on these provisions. Outworker protection has been the subject of considerable specialised research, so this paper will not deal in any more detail with these proposals.[47]

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[45] See Employment, Workplace Relations and Education Legislation Committee Report *Provisions of the Independent Contractors Bill 2006 and the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006,* August 2006, at pp3-4.

[46] See Workplace Express "Government Considers Outworker Amendments" 15 August 2006, http://www.workplaceexpress.com.au/news_print.php?selkey=32164.

[47] For a brief explanation of the impact of Work Choices on outworkers, see M Rawling 'The Outworker Problem' in J Riley and K Peterson *Work Choices: A Guide to the 2005 Changes*, pp 33-35. For general discussion of outworker regulation, see RJ Owens 'The Peripheral worker: Women and the Legal Regulation of Outwork' in M Thornton (ed) *Public and Private: Feminist Legal Debates*, OUP, Melbourne, 1995; C Fenwick 'Protecting Victoria's Vulnerable Workers: New Legislative

Transitional provisions

The *IC Bill* also contained comprehensive transitional provisions which would effectively mean that existing independent contract arrangements could be maintained, unaffected by the exclusion of State laws, for up to three years. Parties would be at liberty to renegotiate their arrangements under the federal provisions before the conclusion of the transition period, but this would need to be done consensually. Existing contracts (and this includes arrangements for a rolling series of contracts) could not be terminated unilaterally, without attracting the sanctions currently available under any applicable State law.[48] No doubt any transitional provisions ultimately enacted will produce a considerable deal of complex work for legal practitioners for some time to come, as are the *Work Choices* transitional provisions.

Commercial law controls on contracting arrangements ?

As was noted above, the *IC Bill* as drafted provides (in cl 3) that contract law, equity, Commonwealth statutes, and State statutes governing commercial laws will all continue to apply to independent contracting arrangements. Advisers to employers newly entering this new era of engaging staff by independent contracting will need to bone up on contemporary Australian commercial contract law if they have not already done so. These contemporary developments include the recognition of principles of good faith in the performance of contracts,[49] the development of equitable doctrines around the concept of unconscionable dealing,[50] and statutory provisions enforcing obligations of fair dealing. For example, the *TPA* and

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Developments' (2003) 16 *AJLL* 198; I Nossar, R Johnstone and M Quinlan 'Regulating Supply-Chains to Address the Occupational Health and Safety Problems Associated with Precarious Employment: the Case of Home-based Clothing Workers in Australia' (2004) 17 *AJLL* 137; R Johnstone and T Wilson 'Take Me to Your Employer: The Organisational Reach of Occupational Health and Safety Regulation' (2006) 19 *AJLL* 59; M Rawling 'A Generic Model of Regulating Supply Chain Outsourcing' in C Arup et al *Labour Law and Labour Market Regulation*, Federation, Sydney, forthcoming.

[48] See Part 5.

[49] See generally E Peden *Good Faith in the Performance of Contracts*, LexisNexis Butterworths, Australia, 2003.

[50] These include as doctrines of estoppel, and unconscientious or unconscionable dealing.

complementary Fair Trading statutes passed in each of the States have radically influenced Australian contract law.[51] The present Chief Justice of Australia, Murray Gleeson, has written (extra-judicially) that:

> [F]or a number of reasons, some to do with the work of legislatures, some to do with judicial law making, and some to do with the temper and spirit of the times, we can no longer say, in all but exceptional cases, the rights and liabilities of parties to a written contract can be discovered by reading the contract.[52]

These aspects of contemporary Australian commercial law are discussed at some length in *Employee Protection at Common Law*.[53] That work mounts an admittedly ambitious argument that 20th and 21st century developments in the judge-made and statutory commercial laws in Australia warrant some enthusiasm for the view that an overarching principle of fair dealing will inform the development of the common law in the area of independent work contracts, in line with developments in other fields of commercial law.

Developments in Trade Practices law are perhaps the most promising. Independent contracting arrangements involving deals of less than $3 million would appear to continue to be caught by *TPA* s 51AC (according to the *IC Bill* cl 3) and may also provide some guidance to the Federal Court in exercising its powers to review unfair contracts under the unfair contracts review provisions.

So far there has been insufficient litigation over s 51AC to be categorical about its scope, however some judicial statements[54] and academic commentary have indicated that this section clearly opens a path for judicial review of contracts on the basis of substantive and not merely procedural fairness.[55] With time, and more case law to flesh out the meaning of these

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[51] See D Harland "The Statutory Prohibition of Misleading and Deceptive Conduct in Australia and its Impact on the Law of Contract" (1995) 111 *LQR* 100.
[52] Gleeson, M "Individualised Justice – the Holy Grail" (1995) 69 *ALJ* 421 at 428.
[53] J Riley *Employee Protection at Common Law* Federation Press, Sydney, 2005.
[54] See *ACCC v Simply No-Knead (Franchising) Pty Ltd* (2001) 178 ALR 304 at 316 per Sundberg J; *ACCC v 4WD Systems Pty Ltd* (2003) 200 ALR 491 at 543 per Selway J.
[55] See D Horrigan "Unconscionability Breaks New Ground – Avoiding and Litigating Unfair Client Conduct after the ACCC Test Cases and Financial Sector Reforms" [2002] *Deakin Law Review* 4; "The Expansion of Fairness-based Business Regulation: Unconscionability, Good Faith and the Law's Informed Conscience" (2004) 32 *Australian Business Law Review* 159; P Tucker "Too Much Concern Too Soon? Rationalising the Elements of s 51AC of the *Trade Practices Act*" (2001) 17 *Journal of*

provisions, the courts may realise the Parliament's promises for these reforms. Former Minister, Peter Reith, said in introducing the *Trade Practices Amendment (Fair Trading) Bill* in 1998, that 'the purpose of these historical changes is to induce behavioural change in commercial practices so that small businesses to get a fair go'.[56] Hopefully, this will be the same 'fair go' that industrial tribunals have offered Australian workers in the past.

Nevertheless, we must acknowledge a major difficulty in reliance on common law and even trade practices protection for individual workers – especially those who are carrying all the costs of their own one-person small businesses. The cost of mounting the litigation necessary to vindicate common law and statutory rights can be prohibitive, especially when one factors in the opportunity cost of time dedicated to a litigious dispute. This means that particular individuals are likely to suffer wrongs without a remedy, and it also means that a body of useful precedent may well be slow to develop.[57]

A note to *IC Bill* cl 15(5) states 'An alternative dispute resolution process (for example, mediation) may be used to deal with some or all of the matters in dispute in a proceedings under this Part' and a reference is made to Pt 4 of the Federal Magistrates Act 1999 (Cth) and s 53A of the Federal Court of Australia Act 1976 (Cth). Whether alternative dispute resolution avenues will relieve any of the problems associated with access to justice before the courts is also a matter for speculation at this stage.

Contract Law 1 at 60. For a more developed argument along these lines see Riley above n 53 at pp 218-221.

[56] Hansard, House of Representatives, 6 April 1998, p 1802.

[57] Riley, above n 53, at pp 233-235.