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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**WORKPLACE RELATIONS LEGISLATION AMENDMENT
(INDEPENDENT CONTRACTORS) BILL 2006**

EXPLANATORY MEMORANDUM

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

WORKPLACE RELATIONS LEGISLATION AMENDMENT (INDEPENDENT CONTRACTORS) BILL 2006

OUTLINE

The Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006 (the Bill) will provide amendments and consequential and transitional provisions for the *Workplace Relations Act 1996* (the WR Act).

The key provisions of the Bill will:

- insert a new Part relating to the prevention of sham employment arrangements and providing penalties where sham arrangements occur;
- make consequential and transitional amendments relating to textile, clothing and footwear (TCF) outworkers; and
- provide consequential amendments relating to unfair contracts in the WR Act and the *Building and Construction Industry Improvement Act 2005* (the BCII Act).

Clauses 1 to 3 deal with preliminary matters such as the short title of the Bill and commencement provisions for the Schedules of the Bill.

Schedule 1 inserts a new part into the WR Act, which contains provisions relating to sham arrangements. These provisions will prohibit a range of conduct including:

- misrepresenting an employment relationship as an independent contracting arrangement; or
- making false statements to a worker with the intention of persuading or influencing that worker to become an independent contractor, where that person knows the statement to be false and misleading; or
- dismissing or threatening to dismiss a person where the sole or dominant purpose is to engage the person as an independent contractor to perform substantially the same work.

Part 1 of Schedule 2 makes consequential amendments and transitional provisions for TCF outworkers. This is to ensure that contracted outworkers continue to be afforded protections arising under existing State and federal provisions.

Part 2 of Schedule 2 makes consequential amendments to the unfair contracts provisions in the WR Act and the BCII Act. As the federal unfair contracts jurisdiction will be contained in the Independent Contractors Bill 2006 (the IC Bill) and will allow eligible independent contractors to make unfair contracts applications to the Court, sections 832 to 834 of the WR Act and section 47 of the BCII Act will be repealed.

FINANCIAL IMPACT STATEMENT

The Financial Impact Statement for this Bill is contained in the Independent Contractors Bill 2006.

REGULATION IMPACT STATEMENT

The Regulation Impact Statement for the Independent Contractors Bill 2006 covers the measures contained in this Bill.

NOTES ON CLAUSES

Clause 1 – Short title

1. This is a formal provision specifying the short title of the Act which may be cited as the *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006*.

Clause 2 – Commencement

2. This clause 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 subclause 2(1).

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

4. Item 2 of the table would provide that Schedule 1 would commence immediately after the commencement of the provisions covered by table item 3.

5. Item 3 of the table would provide that Schedule 2 would commence at the same time as Part 2 of the *Independent Contractors Act 2006* commences.

6. 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. The table will not be expanded to deal with provisions that may be inserted in this Act after commencement.

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

Clause 3 – Schedule(s)

8. This clause would provide that each Act that is specified in the Schedules to this Act is amended or repealed as set out in the applicable Schedules. Any other item in a Schedule to this Act has effect according to its terms.

SCHEDULE 1 – SHAM ARRANGEMENTS

Part 1 – General provisions

Workplace Relations Act 1996

Item 1 – After Part 21

1. Item 1 would amend the *Workplace Relations Act 1996* to include a new Part 22.

Part 22 – Sham arrangements

2. Proposed Part 22 would provide civil penalties for sham arrangements and related matters with respect to employment and independent contracting relationships.

3. The proposed provisions import the common law meanings of employment and independent contracting. Independent contracting arrangements are commonly described as ‘contracts for services’ whereas employment contracts are known as ‘contracts of service’. The common law relies on the multi-factor (indicia) test to make the distinction between employment and independent contracting. The courts come to a decision about the true nature of a working relationship by examining the relationship against this indicia test. The leading Australian High Court authorities outlining this test, and the indicia to be used, 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. The indicia test operates by looking at the totality of the relationship between the parties, including, not only any written contract between the parties, but also implied terms and the conduct of the parties. The courts have also demonstrated a willingness to look beyond the “labels” parties may apply to their contracts in determining the true nature of the relationship.

Section 900 - Misrepresenting an employment relationship as an independent contracting arrangement

4. Proposed section 900 would allow a civil penalty to be imposed by a *Court* on persons who misrepresent an employment relationship as an independent contracting arrangement.
5. Subsection 900(1) would describe the circumstances under which a person will be liable to a civil penalty for misrepresenting an employment relationship as being an independent contracting arrangement. The person would need to have entered into a contract with an individual and have made a representation to that individual that the contract was a contract for services under which the individual would perform work as an independent contractor. The person will have contravened this section if, at the time the representation was made, the contract was one of employment unless they can prove the matters in proposed subsection 900(2).
6. A legislative note to subsection 900(1) refers the reader to the meanings of *employer* and *employment* at subsections 6(1) and 7(1) of the *Workplace Relations Act 1996*. These definitions provide the constitutional links for the application of the provisions in this proposed Part.
7. Subsection 900(2) would provide a defence to the civil penalty in subsection 900(1). Subsection 900(2) would provide that a person would not contravene the civil penalty if, when they made the representation that there was an independent contracting relationship, they believed the contract was for independent contracting and could not have reasonably been expected to know that the contract was one of employment. The onus to prove the defence in subsection 900(2) would rest with the person who made the representation. This is a reversal of the burden of proof; the burden of proof normally rests with the person making the civil remedy application. The reason for this reversal is that the matter in subsection 900(2) would be peculiarly within the knowledge of the defendant and would be significantly easier for the defendant to disprove than for the person making the application to prove. Because this is a civil

penalty, the civil standard of proof applies; that is, matters will need to be proved on the balance of probabilities.

8. A legislative note to subsection 900(2) refers the reader to paragraph 4(2)(pa) of Schedule 2 of the *Workplace Relations Act 1996* which provides that *employment* has its ordinary meaning for the purposes of subsection 900(2).

9. Subsection 900(3) would provide that subsection 900(1) is a civil remedy provision.

10. A legislative note to subsection 900(3) refers the reader to Division 3 of Part 14 of the *Workplace Relations Act 1996* which contains other provisions relevant to civil remedies.

Section 901 - Misrepresenting a proposed employment relationship as a proposed independent contract arrangement

11. Proposed section 901 would provide a civil penalty for attempting the conduct outlined in proposed section 900 in that this conduct would occur at the time a person offers to enter into a contract with an individual.

12. Subsection 901(1) would describe the circumstances under which a person would be liable to a civil penalty in the context of offering to enter into a contract with an individual. Firstly, the person would need to make a representation to the individual that the contract would be a contract for services under which the person would perform work as an independent contractor. Secondly, the contract, if entered into, would need to be an employment contract. Unless the person could prove the relevant circumstances outlined in subsection 901(2) the person would be liable to a civil penalty.

13. A legislative note to subsection 901(1) would provide that the terms *employer* and *employment* have the meanings given by subsections 6(1) and 7(1) of the *Workplace Relations Act 1996*. These definitions provide the constitutional links for the application of the provisions in this proposed Part.

14. Subsection 901(2) would provide a defence to the civil penalty in subsection 901(1). Subsection 901(2) would provide that a person would not contravene the civil penalty if, at the time they made the misrepresentation, they believed the offer was for independent contracting and not employment, and they could not have reasonably been expected to know that the offer was for employment. The onus to prove the defence in subsection 901(2) would rest on the person who made the representation. This would create a reversal of the onus of proof, consistent with the approach taken for subsection 900(2), for the same reasons outlined above. The civil standard of proof would also apply to subsection 901(2).

15. A legislative note to subsection 901(2) refers the reader to paragraph 4(2)(pb) of Schedule 2 of the *Workplace Relations Act 1996* which provides that the term *employment* has its ordinary meaning for the purposes of section 901.

16. Subsection 901(3) would provide that subsection 901(1) is a civil remedy provision.

17. A legislative note to subsection 901(3) refers the reader to Division 3 of Part 14 of the *Workplace Relations Act 1996* which contains other provisions relevant to civil remedies.

Section 902 - Dismissal etc. for purpose of engaging certain persons as independent contractors

18. Proposed subsection 902(1) would provide that a civil penalty could apply if an employer dismisses, or threatens to dismiss, an employee with the sole or dominant purpose of re-engaging that employee as an independent contractor to do the same, or substantially the same, work.

19. Subsection 902(2) would provide that subsection 902(1) is a civil remedy provision.

20. A legislative note to subsection 902(2) refers the reader to Division 3 of Part 14 of the *Workplace Relations Act 1996* which contains other provisions relevant to civil remedies.

21. Subsection 902(3) would provide that, where proceedings are being taken for an alleged contravention of subsection 902(1), it is presumed that the employer's sole or dominant purpose for dismissing the employee was to re-engage them as an independent contractor performing the same, or substantially similar, work under a contract for services. The effect of this section is that the employer bears the onus of proof (on the balance of probabilities) to establish that the sole or dominant purpose for dismissing the employee was not a contravention of subsection 902(1)(b). The onus of proof in subsection 902(3) is reversed to fall on the employer because of the substantial evidentiary difficulty an employee would face if they were required to prove what the "purpose" of an employer was in engaging in certain conduct. The reason for this reversal is that the matter in subsection 902(1) would be peculiarly within the knowledge of the defendant and would be significantly easier for the defendant to disprove than for the person making the application to prove. Because this is a civil penalty, the civil standard of proof applies; that is, matters will need to be proved on the balance of probabilities.

Section 903 - Prohibited conduct for purpose of engaging certain persons as independent contractors

22. Proposed section 903 would provide a civil penalty for making a false statement to a worker to influence them to become an independent contractor, where that person knows the statement to be false.

23. Subsection 903(1) would provide that a person contravenes a civil penalty if they knowingly make false statements to a current or former employee with the intention of persuading or influencing that worker to become an independent contractor to do the same, or substantially the same, work.

24. Subsection 903(2) would provide that subsection 903(1) is a civil penalty provision.

25. A legislative note to subsection 903(2) refers the reader to Division 3 of Part 14 of the *Workplace Relations Act 1996* which contains other provisions relevant to civil remedies.

Section 904 - Penalty for contravention

26. Proposed section 904 would provide that, on application, the Federal Court or the Federal Magistrates Court could make an order imposing a penalty for a contravention of proposed subsections 900(1), 901(1), 902(1), or 903(1).

27. Subsections 904(2) would set the maximum penalty for contraventions of the civil penalty provisions referred to in subsection 904(1) at 60 penalty units for an individual and 300 penalty units for a body corporate. (*Penalty unit* is defined in section 4AA of the *Crimes Act 1914* and is currently set at \$110 per unit).

28. Subsection 904(3) would define an *eligible person* for the purposes of making an application for a penalty under subsection 904(1). Subsection 904(3) would provide that a *workplace inspector* (paragraph 904(3)(a)), an individual affected by the contravention (paragraph 904(3)(b)), or an *organisation* of employees that has the written consent of a member or an intended member who is affected by the contravention (paragraph 904(3)(c)), may apply to the court for the imposition of a penalty under subsection 904(1).

29. Proposed section 904 provides parties with standing to bring an application under the proposed section in addition to the Commonwealth. This is consistent with the approach adopted in similar provisions in the *Workplace Relations Act 1996* (for example sections 400, 401, 789 and 790). The list of eligible persons reflects the persons who are most likely to 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.

Section 905 - Meaning of Court

30. Proposed section 905 would define *Court* to mean the Federal Court of Australia or the Federal Magistrates Court. This definition would allow parties to bring legal actions relating to proposed Part 22 in either court.

Item 2 After paragraph 4(2)(p) of Schedule 2

31. Item 2 is consequential upon subsections 900(2) and 901(2) and would insert proposed subclauses 4(2)(pa) and (pb) to subclause 4(2) of Schedule 2 of the *Workplace Relations Act 1996*.

Part 2 – Provision relating to Victoria

Workplace Relations Act 1996

Item 3 After Division 11 of Part 21

Division 11A – Sham arrangements

Section 886A - Additional effect of Act – sham arrangements

32. Proposed section 886A would provide that proposed section 902 (Dismissal etc. for purpose of engaging certain persons as independent contractors) would apply to an employer in Victoria. Paragraph 886A(a) would provide that references to ‘employer’ in proposed section 902 is to be read as a reference to an employer in Victoria. Paragraph 886A(b) would provide that a reference to an ‘employee’ in proposed section 902 is to be read as a reference to an employee in Victoria.

SCHEDULE 2 – CONSEQUENTIAL AMENDMENTS AND TRANSITIONAL PROVISIONS

33. Schedule 2 of the Bill makes consequential amendments and transitional provisions to the *Workplace Relations Act 1996* (the WR Act) and the *Building and Construction Industry Improvement Act 2005* (the BCII Act). This is necessary to accommodate the changes made by the *Independent Contractors Act 2006* (the IC Act) and to ensure that references to the IC Act are inserted into relevant provisions of the WR Act.

Part 1 – Consequential amendments and transitional provisions relating to TCF outworkers

Workplace Relations Act 1996

34. Schedule 2 proposes amendments to the WR Act consequential upon the commencement of the IC Act, in particular, the shifting of protections relating to TCF outworkers from the WR Act to the IC Act.

Item 1 Subparagraph 169(1)(a)(v)

35. Item 1 would make a consequential amendment to subparagraph 169(1)(a)(v) of the WR Act to omit a reference to ‘(other than section 905)’. Section 169 sets out certain powers of inspectors. This includes powers in relation to investigating the observance of requirements of the WR Act. Subparagraph 169(1)(a)(v) excludes section 905 (Minimum rate of pay for outworkers) from these powers. This is because the framework for Victorian TCF outworkers contains its own provisions in relation to inspector powers. Because section 905, along with the other outworker provisions in Part 22, is to be repealed from the WR Act and moved to the IC Act, there is no need to retain this reference to section 905 in section 169. It is proposed that under Part 4 of the IC Act, a workplace inspector could make an application to the Court seeking the imposition of a penalty on a person who breaches proposed subsection 20(1). Section 819 of the WR Act creates an offence for non-compliance with a requirement made by an inspector that relates to the production of documents. This offence extends to cases where inspectors require the production of documents in relation to observance requirements set out in Part 22 of the WR Act which provide a minimum rate of pay of outworkers in Victoria.

Item 2 Subsection 819(1)

36. Item 2 would make consequential amendments to subsection 819(1) of the WR Act to omit a reference to ‘or subparagraph 906(2)(b)(iv), paragraph 906(2)(c) or subsection 906(4)’ and substitute ‘or subparagraph 22(2)(b)(iv), paragraph 22(2)(c) or subsection 22(4) of the *Independent Contractors Act 2006*’. Section 906 refers to outworkers under Part 22 and this Part will be transferred to the IC Act on commencement. Therefore, section 819 would be updated to give continued effect to the provisions under section 22 where a person contravenes a requirement made by an inspector.

Item 3 Part 22

37. Item 3 would make a consequential amendment by repealing Part 22 of the WR Act, which refers to outworkers in Victoria. This is necessary because the provisions relating to TCF outworkers will be incorporated in a modified form in the IC Act.

Item 4 Saving – regulations under section 913

38. Item 4 of this Schedule would make a savings provision for subsection 913(1) of the WR Act. Subsection 913(1) provides that regulations may prescribe the making, inspection and the giving of outworker records. Section 913 is located within Part 22 of the WR Act which is to be repealed by this Schedule. Item 4 would therefore provide that a regulation in force under

section 913 immediately before the commencement of the IC Act continues in force after that commencement as if it had been made under subsection 30(1) of the *Independent Contractors Act 2006*.

Item 5 Saving – investigations and proceedings under the Workplace Relations Act 1996 in progress at the reform commencement

39. Item 5 of this Schedule would provide a transitional mechanism for investigations or proceedings in relation to a breach, or suspected breach, of subsection 905(1) of the WR Act. Section 905 relates to the minimum rate of pay for Victorian contracted outworkers. Section 905 of the WR Act is contained in Part 22, which will be repealed by this Schedule, as provisions of this type will be contained in the IC Act. This item would allow investigations or proceedings which commenced before the *reform commencement* under Part 22 of the WR Act to continue operating, if the proceedings or investigations were not completed or finally determined before the *reform commencement*. *Reform commencement* means the commencement of Part 2 of the IC Act.

Part 2 – Consequential amendments relating to unfair contracts

Building and Construction Industry Improvement Act 2005

Item 6 Section 47

40. Item 6 would make a consequential amendment to repeal section 47 of the BCII Act. Section 47 of the BCII Act provides that a reference in sections 832 to 834 (the unfair contracts provisions) of the WR Act to the Federal Court of Australia includes a reference to the Federal Magistrates Court. The unfair contract remedy under the WR Act is available only in the Federal Court of Australia not the Federal Magistrates Court. Part 3 of the IC Act which would contain the unfair contracts provisions previously listed in section 832 to 834 of the WR Act provides that the definition of *Court* includes the Federal Magistrates Court. Section 47 of the BCII Act will therefore become redundant.

Workplace Relations Act 1996

Item 7 Sections 832 to 834

41. Item 7 would make a consequential amendment by repealing sections 832 to 834 of the WR Act. Sections 832 to 834 currently prescribe circumstances in which a party to a contract for work can seek court orders to set aside the whole or part of the contract and/or to vary the contract on the basis that the contract is harsh or unfair. Similar provisions in the IC Act would replace sections 832 to 834.

42. A legislative note would be inserted at the end of item 7 to inform the reader that section 40 of the IC Act is a transitional provision relating to this item.