

INDEPENDENT CONTRACTORS BILL 2006

WORKPLACE RELATIONS AMENDMENT (INDEPENDENT CONTRACTORS) BILL 2006

SECOND READING SPEECH

Today, in introducing the Independent Contractors Bill and the Workplace Relations Amendment (Independent Contractors) Bill, I remind the House that

[E]veryone's life opportunities are diminished by...restrictions on the freedom to work.

Over the past twenty five years Australia has been witnessing one of the most important, yet least remarked upon, shifts in the history of our labour market – the rise of the independent contractor.

The incidence of independent contractor-type arrangements is significant, with estimates as to the numbers of Australians now working as independent contractors ranging from 800,000 (as estimated by the Productivity Commission) up to 1.9 million.

These Australians have already chosen to work for themselves to gain the benefits of the choice and flexibility that self-employment provides.

Their choice should be respected.

Unions which are struggling for relevance and faced with declining membership have failed to see the advantages that many workers have accepted of more flexible working arrangements.

As a result, unions are opposed to independent contractors and have used industrial relations and political tactics to try to restrict its natural growth and force contractors into the traditional industrial relations system.

Australia's continued prosperity in the twenty first century requires systems of regulation that encourage rather than restrict creativity, that reward rather than confine initiative. Australia deserves a system that responds to the needs of individuals including those who have made the deliberate choice to become an independent contractor and their families.

Independent contractors are entrepreneurs and, of course, the one-person micro-businesses of today are often the employing small businesses of tomorrow.

For many, the attraction of independent contracting is to operate independently, not to work as an employee. The flexibility that independent contractors provide the workplace is an important component of a modern and dynamic economy.

The Independent Contractors Bill (the Principal Bill) reflects the Government's commitment to ensuring that independent contracting is encouraged without excessive regulation. The Principal Bill is built on the principle- a principle this Government believes in - that genuine independent contracting relationships should be governed by commercial **not** industrial law. This is reflected in our approach of having a stand-alone Independent Contractors Bill, rather than including the reforms in workplace relations legislation.

In contrast, the Labor party and the union movement are trying to legislate to force independent contractors to be treated as employees, irrespective of the circumstances or the wishes of those involved.

The Government will put a stop to this regulatory excess and deliver on its promise made during the last federal election to introduce this legislation.

The Principal Bill represents a further element in the Australian Government's reform agenda for workplace relations, building on the Work Choices legislation last year. Work Choices has facilitated greater choice and flexibility in our workplaces, a process begun over a decade ago, by making it easier for employers and employees to make arrangements that best suit their needs. The legislation that I introduce today provides Australians with an even wider range of choices about how they work and ensures their choice is respected.

The Independent Contractors Bill enshrines, as part of its objects, the status of independent contracting as a wholly legitimate form of work. It protects the freedom of independent contractors to enter into the contracts of their choice.

Importantly, the Principal Bill does not define the term 'independent contractor' beyond its meaning under common law. I note that the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, in its 2005 report on independent contracting and labour hire arrangements, recommended that the common law approach to determining employment status be maintained by the Government, and that is what we have done.

However, we have not included in the definition components of the Personal Services Income test used by the Australian Tax Office to identify independent contractors, despite the Committee's recommendation that we do so. This test has been developed to address the specific requirements of taxation law.

It is a self-assessment test and is easily manipulated to achieve the desired outcome if a worker is seeking to be classified as an independent contractor rather than an employee.

The Government considers that the courts should continue to apply the long established common law tests to establish the status of the worker. These tests have been developed by the courts over a number of years and allow for the entirety of the individual circumstances involved to be taken into account. This is also consistent with the approach taken in the Workplace Relations Act, where the terms ‘independent contractor’ and ‘employee’ import their common law meanings.

As with the Work Choices legislation, the Principal Bill will use a range of constitutional powers, including the corporations power, to override certain provisions of State industrial relations legislation in order to remove restrictions on the use of independent contractors.

State deeming provisions

The Principal Bill will override State provisions which deem certain classes of independent contractors to be employees. These provisions effectively change the nature of a working arrangement at State law from independent contractor to employee, thereby drawing independent contractors into the net of industrial relations regulation where they do not belong.

State deeming laws have become so absurd that they can result in completely arbitrary distinctions – an independent contractor who drives a bus can be deemed to be an employee, while a taxi driver is not; or a person who packages goods under a contract for services is deemed to be an employee if they do so at their home, but not if they do so on business premises; a blind installer is deemed to be an employee but a plumber is not.

The existing regulation of independent contracting across many of the States is a regulation of entrepreneurship. It is job destroying.

The Principal Bill will remove these arbitrary distinctions and allow independent contractors to be just that – independent.

There will be a three year transitional period before the State deeming provisions will be overridden. This will allow adequate time for ‘deemed’ employees and the businesses that engage them to be made aware of the changes, and to adjust their business affairs accordingly.

Protections

Both Bills also contain important protections. For instance, the Principal Bill preserves existing protections for certain groups, in particular textile, clothing and footwear (TCF) outworkers and owner-drivers. In addition, the Workplace Relations Amendment (Independent Contractors) Bill provides for penalties to be imposed on employers who seek to avoid their obligations under employment law by disguising their employees as independent contractors, or who coerce their employees to become independent contractors. The Principal Bill also provides for a single unfair contracts jurisdiction.

Outworkers

Just as Work Choices did not override State protections for employee outworkers, the Independent Contractors Bill will not override State protections for contract outworkers.

Moreover, existing federal provisions under the Workplace Relations Act, which provide guaranteed minimum remuneration for contract outworkers in Victoria, will be extended to all contracted TCF outworkers in Australia, and set as part of the Australian Fair Pay and Conditions Standard. This guarantee will 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.

Owner-drivers

The Principal Bill will maintain existing legislation in New South Wales and Victoria with respect to owner-drivers in the road transport industry.

While the Victorian legislation has only recently been passed, in New South Wales there has long been bi-partisan support for special arrangements for owner-drivers. These arrangements include allowing owner-drivers to bargain collectively with transport operators, and have minimum rates of pay and goodwill compensation set by a tribunal. These provisions in State legislation will remain, given the special circumstances of owner-drivers in having to operate within very tight business margins because of the large loans they have to take out to pay for their vehicles. However, let me be clear - it is not the Australian Government's intention to replicate these arrangements.

As I have announced, I will be reviewing State regulation of owner-drivers in 2007 with a view to rationalising these laws and achieving national consistency if possible.

Sham contracting arrangements

The Workplace Relations Amendment (Independent Contractors) Bill provides civil penalties for 'sham' contracting arrangements. A sham arrangement is one where an employer seeks to avoid taking responsibility for the legal entitlements due to employees by seeking to disguise as an independent contracting relationship what is in reality an employment relationship.

In addition to penalties for misrepresenting a genuine employment relationship as an independent contracting relationship, there will also be penalties for an employer knowingly making false statements to an employee to persuade or influence them to become an independent contractor, and for dismissing or threatening to dismiss an employee with the sole or dominant purpose of re-engaging them as an independent contractor.

These penalties will send a clear message to employers that this sort of unscrupulous behaviour will not be tolerated.

The Office of Workplace Services will be empowered to pursue these matters on behalf of employees. Extra funding of \$6.2 million was allocated in the federal Budget for the next four years to enable the Office to undertake this function in addition to its other compliance responsibilities.

.Unfair contracts

The current federal unfair contracts provisions will be removed from the Workplace Relations Act and placed in the Independent Contractors Bill. As they relate to commercial contracts, they more appropriately sit with the Independent Contractors legislation.

State unfair contracts jurisdictions will be overridden, as far as constitutionally possible primarily using the corporations power, and there will be one single federal unfair contracts jurisdiction. This will alleviate the current confusion of having concurrent state and federal unfair contracts jurisdictions operating in New South Wales and Queensland.

The Principal Bill will provide a cheaper and more accessible unfair contracts regime than the current federal system, as the Federal Magistrates Court will be vested with jurisdiction to hear unfair contracts cases though the Federal Court will continue to have a role. This implements another of the recommendations of the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation in its 2005 report.

The federal unfair contracts jurisdiction will be extended to include incorporated independent contractors, meeting another of the recommendations made by the House of Representatives Committee. We are concerned that this not become a remedy for the 'big end of town'.

To this end, it will only be available to corporations where a director of the corporation or member of the director's family personally performs the work under the contract. This kind of arrangement would be in keeping with family business operations.

The jurisdiction will be limited to contracts for services that are binding on an independent contractor and that relate to work performed by that independent contractor. The Principal Bill would allow a financial cap to be imposed on unfair contracts claims, by regulation, if there is a demonstrated need.

Labour hire code of practice

The Department of Employment and Workplace Relations will play a key role in facilitating the development of an industry based voluntary code of practice for the labour hire industry. This is consistent with the House of Representatives Committee's recommendation that the Government establish a voluntary code of practice for labour hire arrangements.

Conclusion

These Bills move genuine independent contracting relationships away from the realm of industrial regulation and into the commercial sphere where they should have been all along.

An efficient modern economy should have a dynamic mix of working arrangements with the flexibility to respond to the changing demands of clients, consumers and competitors.

Independent contractors are an important part of this mix. The flexibility to employ or engage must remain a fundamental right when operating within the Australian economy. It is important that relevant standards are met, however the parties themselves are generally best left to determine the most appropriate form of their relationship.

These Bills will reduce the current arbitrary restrictions on how independent contractors are to be treated under the law. They will create, as far as possible, one uniform unfair contracts jurisdiction in the Federal sphere with clear parameters for the courts to judge whether a contract is harsh or unfair.

They will ensure that unprincipled employers will not be allowed to avoid their legal obligations to employees by using independent contracting as a mask.

In the case of genuine independent contractors, however, they will put a stop to the undue interference of prescriptive regulation in state industrial relations systems that effectively turns them into employees regardless of their wishes.

In 2004 the Coalition said we would protect the right of independent contractors to work the way they want and we will do so.

The Coalition believes everyone's life opportunities are diminished by restrictions on the freedom to work.

I commend these Bills to the House.