THE 2006 INDEPENDENT CONTRACTORS LEGISLATION: AN OPPORTUNITY MISSED

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1 INTRODUCTION

The *Independent Contractors Act 2006* (Cth) ('IC Act') and the *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006* (Cth) ('Amendment Act') implement further key aspects of the federal government's workplace relations policy, following the passage of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) ('Work Choices Act'). The Work Choices Act substantially amended the *Workplace Relations Act 1996* (Cth) ('WR Act'), introducing a national workplace relations system for employers who are (in the main) 'constitutional corporations' or federal public sector departments or agencies, and their employees.[1] Through the Work Choices Act, the government also: transferred responsibility for minimum wage-setting from the Australian Industrial Relations Commission ('AIRC') to a new body, the Australian Fair Pay Commission; provided five minimum statutory employment conditions for all workers covered by the national system; removed much of the procedural regulation relating to workplace agreements and substantive requirements such as the 'no disadvantage' test; and exempted businesses with 100 employees or less from unfair dismissal regulation.[2]

Running parallel with these sweeping reforms affecting the main type of working relationship in the Australian labour market — that of *employer* and *employee* — the government has for some time expressed a strong interest in transforming the

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1 In doing so, the Work Choices Act's reliance on the 'corporations power' in s 51(xx) of the *Australian Constitution* was upheld as constitutionally valid by the High Court of Australia in *New South Wales and Others v Commonwealth* (2006) 231 ALR 1 ('*Work Choices Case*'); see Andrew Stewart and George Williams, *Work Choices: What the High Court Said* (2007).

2 Further details regarding these and other aspects of the Work Choices Act (for example, changes to the awards system, and new restrictions on industrial action and union activity) may be found in the special issues of the following journals: (2006) 19 (2) *Australian Journal of Labour Law*; (2006) 16 (2) *Economic and Labour Relations Review*.

regulatory arrangements for *independent contractors*.[3] In 2004, it was estimated that 8.2 percent of the Australian workforce (some 787,600 workers) were engaged as self-employed contractors.[4] While the number of contractors in the workforce fell between 1998 and 2004,[5] it is widely considered that independent contractor relationships form a share of the steadily growing 'atypical' or 'non-standard' segments of the labour market.[6] Particular concern has been expressed about the increasing incidence of 'dependent' (as opposed to *in*dependent) contractor relationships — that is, workers who are formally engaged as contractors, but who in reality are more like employees (for example, because they are reliant on only one main source of income, or are subject to extensive control by their 'principal').[7]

However, in the government's view, the use of contractors and related phenomena such as 'labour hire' arrangements, in place of conventional employment relationships, is an important element of labour market flexibility: '[f]acilitating the use of independent contractors and the flexible arrangements afforded by them is imperative to … the dynamic efficiency of the economy.'[8] The traditional system of award regulation and rights of union intervention were seen as major impediments to the freedom of business to utilise contractor and labour hire arrangements. Accordingly, following a House of Representatives Committee Report in 2005,[9] the government introduced prohibitions on provisions in awards or workplace agreements that purport to restrict employers' use of contractors or labour hire workers, or that specify requirements as to their working conditions.[10]

A further obstacle to independent contracting identified by the government was the extension of employment protections to contractors through a web of State and Territory legislation.[11] Removing that obstacle, and generally providing greater policy and legislative support for independent contracting, thus became a major focus of the government's workplace relations reform agenda in 2006. Following their introduction into federal Parliament as bills in late June and reference to a Senate Committee,[12] both the IC Act and the Amendment Act were passed by Parliament on 5 December 2006.

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3 For convenience, independent contractors will generally be referred to herein as 'contractors'.

4 Productivity Commission, *The Role of Non-Traditional Work in the Australian Labour Market* (2006).

5 Ibid; see also Matthew Waite and Lou Will, 'Self-Employed Contractors: Incidence and Characteristics' (Productivity Commission Staff Research Paper, 2001).

6 See, eg, Ian Watson et al, *Fragmented Futures: New Challenges in Working Life* (2003) ch 6.

7 Ibid 64, 71–2.

8 Explanatory Memorandum, Independent Contractors Bill 2006 (Cth) ('Explanatory Memorandum of the IC Bill') 6.

9 House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, Parliament of Australia, *Making it Work: Inquiry into Independent Contracting and Labour Hire Arrangements* (2005); see further Joellen Riley, 'A Fair Deal for the Entrepreneurial Worker? Self-Employment and Independent Contracting Post Work Choices' (2006) 19 *Australian Journal of Labour Law* 246, 249–50.

10 See, eg, WR Act ss 356 and 515(1)(g)–(h) (introduced by the Work Choices Act); *Workplace Relations Regulations 2006* (Cth) reg 2.8.5(1)(h)–(i).

11 See Riley, above n 9, 250.

12 See Senate Employment, Workplace Relations and Education Legislation Committee, Parliament of Australia, *Provisions of the Independent Contractors Bill 2006 and the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006* (2006).

Most provisions of the IC Act, and relevant provisions of the Amendment Act,[13] were proclaimed to take effect on 1 March 2007.

In the remainder of this article, the purposes of the IC Act and its constitutional underpinnings are examined, along with the types of independent contracting arrangements that it covers (section 2). This is followed by a close consideration and analysis of the provisions of the IC Act that override certain State and Territory laws relating to contractors, and transitional provisions that operate in this respect (section 3). Attention then turns to the new federal scheme for review of unfair contracts implemented by the IC Act (section 4), and the new prohibitions on 'sham' contracting arrangements introduced by the Amendment Act (section 5). Finally, some concluding observations are made (section 6), including the author's view that the government has passed up the opportunity to properly address the long-standing concern in labour law as to where and how to draw the distinction between employees (who have traditionally been regarded as deserving of the protection afforded by labour regulation) and independent contractors (who have been considered more like entrepreneurs, and thus have fallen outside that protective umbrella).

2 OBJECTS, CONTRACTS COVERED BY THE IC ACT AND CONSTITUTIONAL BASIS

The IC Act aims to further 'free up' the capacity of employers and workers to enter into contractor arrangements, and reduce the level of regulatory intervention in those arrangements, by protecting the freedom of contractors to enter into 'services contracts', and excluding State and Territory laws that provide employee-like entitlements to contractors. The IC Act also seeks to recognise the legitimacy of independent contracting as a primarily commercial form of work arrangement, prevent interference with the terms of genuine contractor relationships, and provide for the regulation of those relationships by commercial law (rather than industrial law) including the applicable contract, the common law, and relevant legislation.[14]

The IC Act applies to services contracts, which are defined as contracts *for* services (as distinct from employment contracts, or contracts *of* service), to which an independent contractor is a party, that relate to the performance of work, and that have the requisite constitutional connection.[15] That connection is satisfied where at least one party to the contract is a 'constitutional corporation' (that is, a trading, financial or

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13 The original bill for the Amendment Act contained provisions that were complementary to the proposed provisions regarding independent contractors in the bill for the IC Act. However, in November 2006, a series of broader proposed amendments to the WR Act was added to the bill for the Amendment Act, and these formed part of the bill as finally passed by Parliament: see Kevin Andrews, Minister for Employment and Workplace Relations, 'Amendments to Workplace Relations Legislation and Regulations' (Media Release, 13 November 2006). Only those provisions of the Amendment Act relating to independent contractors are discussed in this article.

14 See IC Act ss 3(1)–(2); Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 22 June 2006 (Kevin Andrews, Minister for Employment and Workplace Relations) ('Workplace Relations Minister's Second Reading Speech on the IC Bill'); Explanatory Memorandum of the IC Bill, 29.

15 IC Act s 5(1); note also that under s 5(4), '[a] condition or collateral arrangement that relates to a services contract is taken to be part of that services contract'.

foreign corporation),[16] or the Commonwealth, or a business incorporated in a Territory.[17] The constitutional connection requirement may also be satisfied where the work under the contract is mainly to be performed in a Territory; or the contract was entered into in a Territory; or at least one party to the contract is a resident in, or an incorporated business mainly located in, a Territory. Therefore, like the WR Act,[18] the IC Act applies to companies and incorporated businesses that have significant trading or financial activities; public or proprietary companies incorporated under the *Corporations Act 2001* (Cth); some local councils, non-profit bodies and State government entities; Commonwealth departments and agencies; and Territory-based businesses.[19]

Although it does not explicitly state as much, the IC Act adopts the common law approach to determining what constitutes a 'contract for services', or principal/contractor relationship that is covered by the legislation.[20] The common law relies upon a 'multi-factor' or 'multiple indicia' test to distinguish between contracts for services and employment contracts.[21] This approach involves considering factors such as the employer's (or principal contractor's) right of control over the worker, the mode of remuneration (for example, regular wages or invoice for payment), and whether 'PAYG' tax instalments are deducted on the worker's behalf. Other relevant factors include whether the worker supplies his or her own tools or equipment, is free to perform other work, carries financial risk or stands to gain profit, or can delegate some of the work under the contract to others. The courts will also have regard to what the parties have expressed in their contract about the nature of the relationship, in determining whether the contract is one of employment or an independent contracting arrangement.

Concerns have been raised that the common law approach creates uncertainty, and makes it difficult for employers to determine whether a worker is an employee or a contractor in a given case.[22] Arguably, a more potent criticism is that the common law test is open to manipulation by either party (but more often, by the employer/principal) to construct 'sham' contractor arrangements in order to avoid award, statutory or other legal obligations to employees, or (for example) to obtain

16 Within the meaning of s 51(xx) of the *Australian Constitution*.

17 IC Act s 5(2).

18 Following the Work Choices Act amendments.

19 Following the High Court's decision in the *Work Choices Case* (see above n 1), to the extent that the IC Act applies to constitutional corporations in reliance on the corporations power in the *Australian Constitution*, it is likely to be considered a valid exercise of that power.

20 The term 'contract for services' is not defined in the IC Act. However, the Explanatory Memorandum of the IC Bill, 30, states that: '[i]t is intended that the term "contract for services" is to take its common law meaning.'

21 As set out in the leading High Court authorities, *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 and *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; see further the discussions in Breen Creighton and Andrew Stewart, *Labour Law* (4th ed, 2005) 284–93; Rosemary Owens and Joellen Riley, *The Law of Work* (2007) 136–44; Andrew Stewart, *Understanding Independent Contractors* (2007) ch 2.

22 See, eg, Shirley Murphy, *Independent Contractors Bill — Is there Now Certainty for Employers?* (2006) WorkplaceInfo <http://www.workplaceinfo.com.au> at 23 July 2007.

advantageous taxation treatment for the worker.[23] And, at a more fundamental conceptual level, the traditional legal distinction between employees and independent contractors has been called into question on the basis that it is premised on early twentieth century notions of work organisation. These notions have been challenged since the 1980s by the rise of 'new economy' workers (for example, franchisees, home-based workers, or those carrying out work through trusts, partnerships or corporate entities).[24]

The 2005 House of Representatives Committee Report recommended the retention of the common law test for determining employment status and the employee/contractor distinction, combined with components of the 'alienation of personal services income' tests utilised by the Australian Taxation Office to determine contractor status for the purposes of income tax laws.[25] However, the government considers that the common law test (on its own) is more appropriate, as it allows the entirety of individual circumstances to be taken into account, and is consistent with the approach taken under the WR Act.[26]

3 OVERRIDING STATE AND TERRITORY LAWS

3.1 Exclusion of State and Territory 'deeming' provisions, employment-like benefits for contractors and unfair contracts review

Part 2 of the IC Act puts into effect the government's intention to override State and Territory laws that accord the benefits of employment relationships to contractors. Specifically, s 7(1) of the IC Act provides that the rights, entitlements, obligations and liabilities of a party to a services contract are not affected by State or Territory laws that:

- 'deem' a party to a services contract to be an employer or employee, or otherwise treat a party as if they were an employer or employee, for the purposes of a law relating to a 'workplace relations matter'; or
- confer or impose rights or obligations on a party to a services contract in relation to matters that would be workplace relations matters in an employment relationship; or
- provide for a services contract, in whole or part, to be set aside or made void or unenforceable, or to be amended or varied, by a court or tribunal on an unfairness ground. The unfairness grounds, as defined in s 9(1), include that the contract is: unfair, harsh or unconscionable, unjust, or against the public interest. Further

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23 See Creighton and Stewart, above n 21, 291–2; Andrew Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15 *Australian Journal of Labour Law* 235, especially 242–51.

24 See, eg, Owens and Riley, above n 21, 145–6, 173–81; Joellen Riley, *Employee Protection at Common Law* (2005) 9–11. These issues are considered further in section 6 of this article, below.

25 House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, above n 9, 56–66 (recommendations 2–4).

26 Workplace Relations Minister's Second Reading Speech on the IC Bill; the Minister explained that the government rejected the personal services income approach as one that 'has been developed to address the specific requirements of taxation law', and was 'easily manipulated to achieve the desired outcome if a worker is seeking to be classified as an independent contractor rather than an employee'.

> unfairness grounds are that the contract provides for remuneration less than that for an employee performing similar work, or is designed to avoid provisions of the WR Act, a State or Territory industrial law, or an award or agreement made under one of those laws.[27]

For the purposes of s 7(1), workplace relations matters are defined in s 8(1) to include matters such as remuneration, allowances or other payments, leave entitlements, working hours, and enforcing or terminating employment contracts.[28] Further, s 8(2) specifies certain matters as *not* being workplace relations matters for the purposes of s 7(1), including anti-discrimination or equal employment opportunity (except where these are dealt with in a State or Territory industrial law), superannuation, workers compensation, and occupational health and safety (including union right of entry for safety purposes).[29]

Importantly, s 7(2) of the IC Act provides that the exclusion of State and Territory laws in s 7(1) does *not* apply to: laws relating to outworkers (other than those providing for outworkers' contracts to be varied or set aside by a court or tribunal on an unfairness ground); ch 6 of the *Industrial Relations Act 1996* (NSW) ('NSW IR Act'), and the *Owner Drivers and Forestry Contractors Act 2005* (Vic) ('Vic OD Act') (see further below); and any State or Territory laws specified in regulations.[30]

Finally, s 10 of the IC Act provides that regulations can be made excluding the operation of State or Territory laws, even if their operation is 'saved' by s 7(2), or they relate to matters specified not to be workplace relations matters in s 8(2). This is intended to enable the federal government to override changes to State and Territory laws that might be implemented in response to the IC Act (for example, amendments that the Victorian government might make to the Vic OD Act to include employee-like protections that are dealt with in the WR Act).[31]

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27 Note also that s 9(2) provides that a ground listed in s 9(1) is not an unfairness ground to the extent that it is defined *not* to be a workplace relations matter under s 8(2) (see below); the effect of this is that the exclusion under s 7(1) of State and Territory laws providing for the review of services contracts on grounds of unfairness etc, does not apply to the extent that those laws provide for the review of contracts in respect of issues that are specified not to be workplace relations matters in s 8(2): see Explanatory Memorandum of the IC Bill, 37.

28 The other workplace relations matters defined in s 8(1) are the making, enforcing or terminating of agreements (other than employment contracts) that set down employment terms and conditions, disputes between employers and employees and dispute resolution, industrial action, any other matter relating to employees and employers dealt with by the WR Act or a State or Territory industrial law, and any other matter specified in regulations.

29 The other matters specified in s 8(2) as *not* being workplace relations matters are child labour, public holidays (except rates of pay for public holiday work), deductions from wages, industrial action affecting essential services, jury service, professional or trade regulation, consumer protection (including laws protecting small businesses from the unconscionable conduct of suppliers of goods and services – see further Supplementary Explanatory Memorandum, Independent Contractors Bill 2006 (Cth) ('Supplementary Explanatory Memorandum of the IC Bill') [20]–[23]), taxation, and any other matter specified in regulations.

30 See further *Independent Contractors Regulations 2007* (Cth) ('IC Regulations') reg 4, discussed in Stewart, above n 21, 28–9.

31 Explanatory Memorandum of the IC Bill, 37.

3.2 Analysis of Part 2 of the IC Act

The effect of the provisions in Part 2 of the IC Act examined above is to exclude the operation of the following types of State or Territory laws, in respect of contractor relationships covered by the IC Act. Firstly, 'deeming' provisions in State or Territory industrial laws that generally alter the status of common law contractors or their principals, and require them to be treated as employees or employers, are excluded by Part 2 of the IC Act. For example, s 5(3) and sch 1 of the NSW IR Act, which define people performing particular types of work as employees (for example, bread and milk distributors, contract cleaners, swimming pool supervisors) and provide them with leave entitlements, minimum or maximum working hours, rights of redress for termination and the like, would be excluded.[32]

Secondly, laws that provide a process for a party to a services contract to be deemed to be an employee or employer are overridden by Part 2 of the IC Act — for example, s 275 of the *Industrial Relations Act 1999* (Qld) ('Qld IR Act'), which allows the Queensland Industrial Relations Commission to declare a person or class of persons performing work under a contract for services to be employee(s) for purposes of the Qld IR Act.[33]

Thirdly, laws that impose employee-like rights or employer-like obligations on a party to a services contract in relation to what would be workplace relations matters, if the parties were in an employment relationship, are excluded by Part 2. As indicated earlier, this appears to be aimed at State and Territory laws that might be enacted in response to the IC Act, which seek to circumvent the exclusion of 'deeming' provisions by providing rights and entitlements to common law contractors through other mechanisms.[34]

Fourthly, Part 2 of the IC Act would exclude laws that allow a court or industrial tribunal to review, vary or set aside a services contract on unfairness and related grounds once the parties have agreed on the terms of that contract — for example, s 276 of the Qld IR Act and s 106 of the NSW IR Act. Contractors will instead be able to utilise the federal services contract review process under Part 3 of the IC Act[35] (see further section 4 of this article, below). However, State and Territory laws that, of themselves, provide for the variation or setting aside of service contracts (rather than by reference to a court or tribunal) are not overridden by Part 2 — for example, s 406(2) of the NSW IR Act, which provides that contract terms do not have any effect to the extent that they provide less favourable benefits than those under an applicable industrial instrument.[36]

On the other hand, Part 2 of the IC Act would *not* exclude the continued operation of the following types of State or Territory laws in respect of contractor relationships. Firstly, laws that affect outworkers who are parties to services contracts are expressly preserved from the exclusion of State or Territory laws effected by Part 2[37] — for example, the *Outworkers (Improved Protection) Act 2003* (Vic). This includes laws deeming outworkers to be employees, providing them with employee-like

32 Explanatory Memorandum of the IC Bill, 32.
33 Ibid 33.
34 Ibid.
35 Ibid 34.
36 Supplementary Explanatory Memorandum of the IC Bill, [1]–[8].
37 See IC Act s 7(2), discussed above.

entitlements, preventing them from contracting out of applicable industrial instrument entitlements, and/or providing them with enforcement mechanisms. However, State or Territory laws providing outworkers with rights to have their contracts reviewed by a court or tribunal on unfairness grounds *are* excluded by the IC Act. Those outworkers will instead have recourse to the new federal services contract review process.[38] Further, Part 22 of the WR Act, which provided outworkers in Victoria with certain minimum remuneration protections (for example, where they were not covered by the provisions of relevant State legislation or a federal award), has been repealed.[39]

Secondly, certain State laws that provide protections for owner drivers and other contractors in the transport industry — the Vic OD Act, and ch 6 of the NSW IR Act — are also expressly 'saved' from the Part 2 exclusion of State or Territory laws.[40] Chapter 6 of the NSW IR Act allows the NSW Industrial Relations Commission to make contract determinations setting rates and other conditions for road transport industry contractors, to register collective agreements between transport owners and unions representing owner drivers, and to resolve disputes including the making of 'goodwill' compensation payments.[41] The Vic OD Act provides for a more restricted scheme of tribunal regulation of owner driver rates than the NSW Act, but also requires written contracts specifying minimum working hours and rates of pay where an owner driver is engaged by the same party for more than 30 days.[42]

Despite some business concerns that these laws impinge on the commercial relationship between principal contractors and sub-contractors, the government decided to preserve their operation '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'.[43] However, this saving of State laws regulating owner drivers does *not* extend to similar legislation enacted in WA after the IC Act came into effect,[44] with the result that the WA legislation has no application as it is overridden by s 7(1) of the IC Act.[45] Further, the federal government has indicated that State regulation of owner drivers will be reviewed in 2007, with a view to rationalising these laws and achieving national consistency. The review process will include consultation with the transport industry, following the release of a government discussion paper. The former Minister for Workplace Relations, The Hon Kevin

38 Supplementary Explanatory Memorandum of the IC Bill, [12].

39 Ibid [41]–[47]. The outworker provisions of the original bill for the IC Act were the subject of considerable attention in the Senate Committee Inquiry into the bill. The government subsequently adopted the Committee's unanimous recommendation to remove proposed provisions that were considered to provide inadequate protection to outworkers, and (generally) leave this as a matter for State and Territory regulation: see Senate Employment, Workplace Relations and Education Legislation Committee, above n 12, 1–4 (Report of the Whole Committee); Laura Tingle and Mark Skulley, 'A Stitch in Time for Clothing Outworkers', *The Australian Financial Review* (Sydney), 28 August 2006, 7.

40 See IC Act s 7(2), discussed above.

41 Explanatory Memorandum of the IC Bill, 7.

42 Ibid.

43 Ibid; Workplace Relations Minister's Second Reading Speech on the IC Bill.

44 See *Owner Drivers (Contracts and Disputes) Act 2007* (WA).

45 The federal Labor Opposition has introduced a bill into the federal Parliament, seeking to exempt the WA legislation from the federal override in the same way that the Victorian and NSW owner drivers' legislation are exempted: see Independent Contractors Amendment Bill 2007 (Cth).

Andrews MP, has stated that 'it is not … the government's intention to replicate these [ie the State] arrangements' under federal law.[46] Given that there has also been disquiet among some members of the government over the IC Act's preservation of NSW and Victorian owner drivers' legislation,[47] that outcome could well be overturned as a result of the upcoming review process.

Thirdly, State or Territory laws dealing with non-excluded matters — for example, equal opportunity, superannuation, health and safety[48] — are not overridden by Part 2 of the IC Act. So, for example, Victorian legislation such as the *Accident Compensation Act 1985*, *Child Employment Act 2003*, *Fair Trading Act 1999*, and *Occupational Health and Safety Act 2004* (in so far as they apply to contractors) would not be excluded, along with similar legislation in other States. It follows, therefore, that Part 2 of the IC Act may have the effect that some State or Territory laws could be excluded from operation in respect of a particular contractor, while others continue to operate. For example, the general deeming provisions in the Qld IR Act regulating working hours and other aspects of work for a contractor based in Queensland would be excluded by Part 2 of the IC Act, but health and safety obligations under the *Coal Mining Safety and Health Act 1999* (Qld) would continue to operate.[49]

3.3 Transitional provisions

Part 5, Division 1 of the IC Act sets out transitional arrangements for the operation of the federal override of State or Territory laws effected by Part 2 of the IC Act. The effect of the transitional provisions is as follows.[50] Parties to a services contract covered by the IC Act and which was on foot as at the commencement of Part 2 ('reform commencement'),[51] have a transitional period of up to three years from reform commencement to arrange their affairs in anticipation of the override of State or Territory laws in respect of their contract. The actual transitional period will be the end of the services contract, if that is within three years of reform commencement;[52] or the end of three years after reform commencement (if the contract does not end sooner);[53] or an earlier time agreed to by the parties, by entering into a 'reform opt-in agreement'.[54]

Therefore, State or Territory deeming provisions and laws providing contractors with employment-like entitlements (which are otherwise overridden by ss 7 and 10 of the IC Act) continue to operate in respect of a services contract in operation as at reform commencement, for the relevant transition period.[55] However, if the parties

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46 Workplace Relations Minister's Second Reading Speech on the IC Bill.

47 See, eg, Adrian Rollins, 'Tuckey Revs up Andrews over Drivers', *The Australian Financial Review* (Sydney), 18 August 2006, 9.

48 See the full list in IC Act s 8(2), summarised above.

49 As the latter does not constitute one of the 'workplace relations matters' within the meaning of s 8(1) of the IC Act, and is in fact excluded from the definition of such matters by s 8(2)(d); this example is taken from Explanatory Memorandum of the IC Bill, 36.

50 The following discussion is based on Explanatory Memorandum of the IC Bill, 52–4.

51 That is, 1 March 2007; see section 1 of this article, above.

52 However, note the position in respect of 'continuation contracts', discussed below.

53 That is, 28 February 2010.

54 Reform opt-in agreements are discussed further below.

55 See the excruciatingly complex arrangements set out in IC Act s 35.

enter into a reform opt-in agreement during the transitional period,[56] then the exclusion provisions in ss 7 and 10 would commence operating in respect of their services contract, thus precluding the operation of relevant State or Territory laws. Further, once the parties opt-in to the federal system (by entering into a reform opt-in agreement), they cannot restore the operation of State or Territory laws. Civil penalties are in place to prevent principal contractors from coercing, or making misrepresentations with intention to coerce, a contractor into signing (or not signing) a reform opt-in agreement.[57] When the State or Territory laws cease operation in respect of a contractor (either by agreement, or upon the expiry of the three year transitional period), the contractor must be paid out any entitlements that he or she is owed under those laws (for example, award wages or leave entitlements).

While the termination of a services contract and entering into a new one will ordinarily bring the transitional period to an end, this is not the case if the new contract is a continuation contract — that is, where the parties continue to contract in a largely unbroken chain with respect to the performance of the same work.[58] However, intervals between contracts that are consistent with the parties' regular pattern of contracting can be disregarded for these purposes. For example, if the regular pattern is for 'month on, month off' arrangements, or 'three months on and two weeks off', the commencement of each new working period would be regarded as a continuation contract, meaning that relevant State or Territory laws would continue to apply until the end of the transitional period. However, if a contract was terminated and the contractor re-engaged outside the regular pattern of contracting, State or Territory laws would cease to operate in respect of the new contract.

4 NEW FEDERAL UNFAIR CONTRACTS SYSTEM

4.1 Rationale for and coverage of the new system

Part 3 of the IC Act implements a new unfair contracts jurisdiction under federal law, replacing that previously operating under ss 832–4 of the WR Act[59] (and prior to the Work Choices amendments, former ss 127A–127C), and overriding State and Territory unfair contracts laws.[60] The rationalisation of laws in this area builds on the measures introduced by the Work Choices Act, aimed at achieving the government's goal of a national workplace relations system.[61] It is also intended to remove the perceived confusion arising from concurrent operation of the federal unfair contracts jurisdiction, and relevant NSW and Queensland laws.[62]

The WR Act contains provisions (introduced by the Work Choices Act) overriding State unfair contracts laws in so far as they apply to *employees*.[63] Part 3 of the IC Act extends this federal 'override' to State or Territory unfair contracts laws applicable to

56 See IC Act s 33.
57 IC Act s 34.
58 IC Act s 32.
59 These provisions are consequentially repealed by sch 2, pt 2, Item 7 of the Amendment Act.
60 Subject to the exceptions outlined in pt 2 of the IC Act, summarised in section 3 of this article, above.
61 See above n 1, and accompanying text.
62 Workplace Relations Minister's Second Reading Speech on the IC Bill.
63 See, eg, WR Act s 16(1)(d).

contractors, replacing these with a national system for the review of services contracts. This new system will apply to services contracts,[64] where the contractor is a natural person or (in limited circumstances) an incorporated entity,[65] but not services contracts where the work performed by the contractor is for private and domestic purposes.[66] The services contracts that may be reviewed under s 12 of the IC Act include any contract to *vary* a service contract,[67] reflecting the common law position that a contract variation is generally treated as a new contract.[68]

Regulations may be made under s 13 of the IC Act, limiting the capacity of parties to bring applications for review of unfair or harsh contracts (although no such regulations have yet been made). For example, the regulations could prescribe a 'financial cap' applicable to such applications, if there is a demonstrated need.[69] Further, s 14(1) provides that applications cannot be made under s 12 where 'other review proceedings' are on foot in respect of a services contract — that is, proceedings under a State or Territory unfair contracts law that is not affected by the exclusion provisions,[70] or proceedings under State or Territory laws specified in regulations. Similarly, these other proceedings cannot be commenced by a party that has an application under s 12 on foot. These provisions are aimed at preventing 'double dipping' by applicants. However, they would not preclude an applicant from bringing concurrent claims under the federal services contract review provisions, and common law or equity proceedings under State or Territory law (for example, for breach of contract).[71]

4.2 Applications for review of services contracts: grounds of review, remedies, costs and transitional provisions

Section 12 of the IC Act enables a party to a services contract to bring an application to the Federal Magistrates Court or the Federal Court for review of the contract[72] on the grounds that it is 'unfair' or 'harsh' (these terms take their common law meanings).[73] In

64 As defined in IC Act s 5(1), discussed above.

65 That is, only if the work covered by the contract is mainly performed by a director of the body corporate, or a family member of a director (IC Act s 11(1)(b)); therefore, incorporated contractors will generally only be able to utilise the federal services contract review process where they operate a small family business: see Explanatory Memorandum of the IC Bill, 38.

66 IC Act s 11(1)(a).

67 IC Act s 12(4).

68 Supplementary Explanatory Memorandum of the IC Bill, [29].

69 Explanatory Memorandum of the IC Bill, 39; Workplace Relations Minister's Second Reading Speech on the IC Bill. In 2002, an income cap of $200,000 per annum was introduced to restrict unfair contract claims under s 106 of the NSW IR Act: see Creighton and Stewart, above n 21, 383.

70 See section 3 of this article, above.

71 Explanatory Memorandum of the IC Bill, 39; see also Supplementary Explanatory Memorandum of the IC Bill, [34].

72 Section 39 of the IC Act makes it clear that such an application can be made even in respect of a contract entered into before the legislation came into effect. On the other hand, under reg 5 of the IC Regulations, no application can be brought after 12 months from the end of the contract (unless a court decides there are exceptional circumstances).

73 Explanatory Memorandum of the IC Bill, 38.

reviewing a services contract[74] for harshness or unfairness, a court can consider factors such as the relative bargaining strengths of the parties to the contract and their representatives, and whether undue influence or pressure, or unfair tactics, were used against a contract party.[75] Other relevant factors include whether the contract provides total remuneration less than that of an employee performing similar work,[76] and any other matter that the court considers relevant. However, the court must only have regard to the terms of the contract, and the other relevant circumstances outlined above, as at the time the contract was made.[77]

If a court finds that a services contract is harsh or unfair, it can make an order setting aside the whole or part of the contract, and/or an order varying the contract.[78] Any such orders must seek to return the contract parties as closely as possible to the position they were in before the contract became unfair or harsh.[79] Interim orders can be made to preserve the position of a party while an application under s 12 is pending.[80] Orders made under s 16 of the IC Act are enforceable by injunctions.[81] An appeal can be brought to the Federal Court from a judgment of the Federal Magistrates Court.[82] Alternative dispute resolution processes available in the Federal Magistrates Court and Federal Court (for example, mediation) may be used to deal with an application under s 12.[83]

Costs will not generally be ordered in proceedings brought under s 12 of the IC Act. Each party will usually bear their own costs, unless a party has instituted such proceedings 'vexatiously or without reasonable cause', or a party has 'by unreasonable act or omission' caused another party to incur costs.[84]

Part 5, Division 2 of the IC Act provides for the continuation of certain proceedings on foot as at the commencement date of Part 3 of the IC Act,[85] until they are fully determined. These proceedings are, firstly, applications (including appeals) under

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74 Given that the definition of services contracts extends to conditions or collateral arrangements (see above n 15), matters covered by separate agreement(s) to the 'main' contract could also be the subject of an application for contract review; see further Stewart, above n 21, 67–8.

75 See IC Act s 15(1).

76 A provision requiring a court to have regard also to the terms and remuneration provided under other services contracts for the performance of similar work in the relevant industry was deleted from the original bill for the IC Act. The omission of that provision means that a court would be permitted, but not required, to consider this factor in reviewing a services contract for harshness or unfairness; see Supplementary Explanatory Memorandum of the IC Bill, [38].

77 IC Act s 12(3); see also Supplementary Explanatory Memorandum of the IC Bill, [26]–[28]; see further below.

78 IC Act s 16(1).

79 IC Act s 16(2); Explanatory Memorandum of the IC Bill, 41.

80 IC Act s 16(3).

81 IC Act s 16(5).

82 See the legislative note to IC Act s 16(6).

83 See the legislative note to IC Act s 15(4).

84 IC Act s 17.

85 That is, 1 March 2007; see section 1 of this article, above.

former ss 832–4 of the WR Act,[86] and secondly, applications (including appeals) under State or Territory unfair contracts laws that are overridden by Part 3 of the IC Act.

4.3 Analysis of Part 3 of the IC Act

In summary, the new federal services contract review jurisdiction implemented by Part 3 of the IC Act can be seen as a significantly 'watered down' version of the unfair contracts regimes operating under the NSW IR Act[87] and the Qld IR Act.[88] The main differences between the new federal contracts review provisions and these State unfair contracts review jurisdictions are as follows.

Firstly, the grounds on which services contracts may be reviewed by a court under ss 12 and 15 of the IC Act are much narrower than those applicable under the NSW IR Act and Qld IR Act. For example, under s 106 of the NSW IR Act, the grounds for review include not only harshness and unfairness, but also 'unconscionability'.[89] Further, the factors that may be considered in determining whether any of the grounds are made out go beyond those specified in s 15 of the IC Act, to include (for example) whether the contract is against the public interest, or is designed to, or does, avoid an award, enterprise agreement or contract determination.[90]

Secondly, in applications under the federal provisions, the consideration of harshness or unfairness of a services contract is limited to the time at which the contract was made.[91] In contrast, under the NSW IR Act, 'almost everything about [a contract] becomes reviewable', including the way it was entered into, its content, and how it has operated (so that a contract that was fair at the outset could be found to have become unfair over time).[92] Indeed, over the last few years, the unfair contracts jurisdiction operating under s 106 of the NSW IR Act has expanded considerably, both in terms of the scope of the contracts that have come within its purview (including many commercial, rather than work, contracts), and the reach of remedial orders that can be made (for example, varying a former executive's share option plan, or providing redress for unfair superannuation, severance or notice provisions).[93] This extended

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86 That is, the federal unfair contracts jurisdiction that has been replaced by pt 3 of the IC Act; see above n 59 and accompanying text.

87 Section 106.

88 Section 276.

89 Although, the author notes the observation, by one of the anonymous referees of this article, that the term 'unconscionability' has been given a constrained interpretation by the High Court (in the trade practices context) in *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51; see further Riley, above n 24, 157–60.

90 Creighton and Stewart, above n 21, 379.

91 This is expressly provided for in s 12(3) of the IC Act, reflecting the position established by relevant cases under the former WR Act unfair contracts provisions: see Supplementary Explanatory Memorandum of the IC Bill, [26]–[28]; Creighton and Stewart, above n 21, 384–5; Stewart, above n 21, 69.

92 Creighton and Stewart, above n 21, 381.

93 See, eg, the cases discussed in Creighton and Stewart, above n 21, 380–2; Owens and Riley, above n 21, 210–11; for further detail, see Jeffrey Phillips and Michael Tooma, *The Law of Unfair Contracts in NSW: An Examination of Section 106 of the* Industrial Relations Act 1996 *(NSW)* (2004); Joellen Riley, 'Regulating for Fair Dealing in Work Contracts: A New South Wales Approach' (2007) 36 *Industrial Law Journal* 19.

operation of the NSW legislation has clearly motivated the federal government's override of State unfair contracts laws through Part 3 of the IC Act.[94]

Thirdly, a broader range of remedies is available under the NSW IR Act and Qld IR Act compared to those available under s 16 of the IC Act. For example, the NSW IR Act provides not only for orders setting aside or varying contracts, but also orders for the payment of money and orders to preclude further unfair contracts being made.[95] However, while the IC Act does not explicitly provide for the making of compensation orders, it is arguable that s 16(1) might enable such orders to be made, in that it picks up the wording of former s 127B(1) of the WR Act (prior to the Work Choices Act amendments). Under that provision, compensation orders were made in some cases by the court 're-writing the contract' to include a term for payment of money to the contractor upon termination of the contract, and consequent upon the unfairness being identified.[96]

Finally, while unions and employer bodies, and the relevant State Minister, have standing to bring applications under the NSW IR Act, only a party to a services contract can do so under the IC Act.

On the other hand, the new federal unfair contracts review scheme expands upon the former WR Act provisions, by allowing a limited category of incorporated contractors to bring claims, and by introducing a potentially cheaper, more accessible process than the Federal Court for applicants to make claims — that is, through the Federal Magistrates Court.

It should also be noted that Part 3 of the IC Act does not *fully* negate the operation of State or Territory unfair contracts review laws. These laws continue to operate in respect of parties not covered by the IC Act — for example, unincorporated businesses and the contractors they engage (unless these relationships are carried out in the ACT or NT).[97]

5 NEW PROHIBITIONS ON 'SHAM ARRANGEMENTS'

5.1 Introduction

The Amendment Act inserts new provisions into the WR Act aimed at preventing employers from entering into 'sham contracting arrangements'. According to the government, these arrangements arise: '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.'[98] Through the Amendment Act, prohibitions are also imposed on employers falsely seeking to persuade employees to become independent contractors, and sacking employees with the sole or dominant purpose of re-engaging them as independent contractors.

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94 See, eg, Explanatory Memorandum of the IC Bill, 7–9.

95 Creighton and Stewart, above n 21, 379.

96 See, eg, *Buchmueller v Allied Express Transport Pty Ltd* (1999) 88 IR 465; see further Stewart, above n 21, 70.

97 See the discussion of the constitutional coverage of the IC Act in section 2 of this article, above.

98 Workplace Relations Minister's Second Reading Speech on the IC Bill, 8.

The provisions introduced by the Amendment Act now form Part 22 of the WR Act (new ss 900–5), which also adopts the common law meaning of the terms 'employment' and 'independent contracting'[99] (and, therefore, 'employer', employee' and 'independent contractor').[100] The government has indicated that the new provisions should also apply to 'labour hire agencies that employ workers who are 'on-hired' to host businesses'.[101]

5.2 Misrepresenting employment relationships as contractor arrangements

Section 900(1) of the WR Act prohibits a party to an employment contract (effectively, the employer) with an individual (effectively, the employee) from representing to the individual that the contract is a contract for services under which he or she works as a contractor. The employer may have a defence under s 900(2) if it can prove that, when the representation was made, it did not know that the contract was an employment rather than a contractor arrangement, and was not 'reckless' as to the nature of the contract.[102] The reverse onus of proof applicable under s 900(2) is considered necessary because the matters that need to be made out to establish the defence would be more likely to be within the employer's knowledge, and are therefore easier for the employer to prove than for the employee to disprove.[103] Section 901 contains a similar prohibition to that in s 900(1) in respect of misrepresenting a proposed employment contract as a proposed contractor arrangement, with a similar defence to that under s 900(2).

5.3 Dismissal of employees and re-hiring as contractors

Section 902(1) of the WR Act prohibits an employer from dismissing, or threatening to dismiss, an employee, where the employer's sole or dominant purpose is to re-engage the employee as a contractor, to perform the same (or substantially the same) work as the employee performed under the employment contract. Under s 902(3), it is presumed that the employer acted for the sole or dominant purpose prohibited under s 902(1). The employer must prove that it did not dismiss the employee in order to re-engage him or her as a contractor (once again, this reverse onus of proof applies because these are matters peculiarly within the knowledge of the employer).[104] Further, under s 903, an employer is prohibited from making false statements to an

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99 Explanatory Memorandum, Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006 (Cth) ('Explanatory Memorandum of the Amendment Bill') 5.

100 Notes to relevant provisions of the new pt 22 also provide that 'employer' and 'employment' have the meanings given by ss 6(1) and 7(1) of the WR Act. This provides the constitutional link for determining to whom pt 22 applies: see ibid; that is, it applies to all employers, and their employees and contractors, covered by the WR Act and the IC Act (see section 2 of this article, above).

101 Explanatory Memorandum of the IC Bill, 10; for an examination of strategies adopted by employers in this respect, see Stewart, above n 23, 251–6.

102 Supplementary Explanatory Memorandum of the IC Bill.

103 Explanatory Memorandum of the Amendment Bill, 5.

104 Explanatory Memorandum of the Amendment Bill, 7. However, the reverse onus will not apply in an application for an interim injunction under s 902; see WR Act s 902(3); Supplementary Explanatory Memorandum of the IC Bill.

employee or a former employee, with the intention of persuading or influencing him or her to enter into a contractor arrangement.[105]

5.4 Penalties and other remedies

Sections 900–3 of the WR Act are all specified as civil remedy provisions. The maximum penalty for a breach of any of these provisions is $33,000 for a corporation, and $6,600 for an individual.[106] An application for the imposition of a penalty for breach of ss 900–3 may be made to the Federal Court or the Federal Magistrates Court.[107] Such an application may be brought by: an inspector from the federal Office of Workplace Services ('OWS');[108] an individual affected by the breach (that is, an employee or former employee); or a union to which the individual belongs, acting with his or her written consent.[109] For all matters that need to be proven under ss 900–3, the civil standard of proof applies (that is, the balance of probabilities).[110]

In addition to civil penalty orders, a court can grant an injunction following a breach of s 902(1) (dismissal of an employee and re-engagement as a contractor), and any other orders necessary to stop such a breach or remedy its effects.[111] This may include orders for the reinstatement of, or payment of compensation to, a dismissed employee.[112] Applications for injunctions and other orders may be made by the same persons that may apply for civil penalties (see above).

5.5 Analysis of Part 22 of the WR Act

The new provisions in Part 22 of the WR Act will require employers to take care, in their dealings with employees, not to enter into contractor arrangements where the relationship between the parties is really that of employer and employee. In that sense, they also offer greater protection to employees against the abuse, or potential abuse, of contractor arrangements. However, the wording of ss 900–1 may make it difficult to establish on which side of the prohibited line an employer's representation falls. This may come down to a consideration (based on the common law 'multi-factor' test)[113] of whether the particular working arrangement in question was truly an employment contract, or a contractor relationship. It is also unclear how an employer might show

105 For example, a misleading statement as to the taxation benefits that a worker might receive as a contractor: see Stewart, above n 21, 20.
106 WR Act s 904(2).
107 WR Act ss 904(1) and 905.
108 At the time of writing, the author is aware of one legal proceeding instituted by the OWS, seeking the imposition of penalties against an employer for alleged breach of the s 900 prohibition on misrepresenting an employment relationship as an independent contracting arrangement: see OWS, 'OWS Court Action to Protect Young Worker & Deter 'Sham Contracts'', (Media Release, 25 May 2007).
109 WR Act s 904(3).
110 Explanatory Memorandum of the Amendment Bill, 5–7.
111 WR Act s 904(2A).
112 WR Act s 904(2B).
113 See the discussion in section 2 of this article, above.

(for purposes of the ss 900(2) and 901(2) defences) that it was not 'reckless' as to the true nature of the contract. It might be possible to prove this by showing that the employer obtained legal advice to the effect that the worker in question was an employee, rather than a contractor.[114]

Section 902 is probably the most significant of the new provisions in Part 22. The prohibition on employers terminating employees and re-hiring them as contractors comes in the wake of one of the most controversial examples of the operation of the Work Choices Act, soon after it took effect in March 2006: the Cowra Abattoir case.[115] This case, along with several other examples that followed it, involved allegations that employers had allegedly utilised the removal of unfair dismissal protections (effected by the Work Choices Act)[116] to move their workforces onto independent contractor arrangements.

However, the Cowra Abattoir case indicates that it may be difficult to show that an employer acted for the 'sole or dominant purpose' proscribed by s 902(1). Or, more accurately, it may not be hard for an employer to disprove that it acted for such a purpose. In the Cowra Abattoir case, the employer dismissed 29 employees and offered to re-engage them as contractors. It was alleged that the employees were dismissed because they were entitled to the benefit of an award and/or a workplace agreement, in breach of ss 792(1)(a) and 793(1)(i) of the WR Act.[117] Section 792(4) requires it to be shown, where the prohibited reason in s 793(1)(i) is alleged, that it was the sole or dominant reason for the employer engaging in the prohibited conduct (in this case, the dismissal of the employees). After investigating the matter, the OWS found that Cowra Abattoir had acted *not* for the sole or dominant reason proscribed in s 793(1)(i), but rather, for (legitimate) reasons related to the financial viability of the company.[118]

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114 See, eg, Riley, above n 9, 257–8; Stewart, above n 21, 19, 21.

115 See, eg, *Cowra Abattoir Becomes Work Choices Battleground* (2006) Workplace Express <http://www.workplaceexpress.com.au> at 4 April 2006; Editorial, 'Work Choices Law Faces the First, Crucial Tests of Fairness', *The Age* (Melbourne), 4 April 2006, 14. The term 'case' is used rather loosely here to describe what occurred at Cowra Abattoir — that is, this episode did not lead to any court or tribunal decision, but rather, an investigation and brief report by the OWS (see further below).

116 The Work Choices Act changes included exempting employers with 100 employees or less from exposure to unfair dismissal claims, and precluding such claims where they are related to 'genuine operational reasons' or where the dismissal occurs in the first six months of employment: see, eg, Marilyn Pittard, 'Back to the Future: Unjust Termination of Employment under the Work Choices Legislation' (2006) 19 *Australian Journal of Labour Law* 225.

117 These provisions form part of the 'freedom of association' laws, now found in pt 16 of the WR Act; for discussion of how these laws were affected by the Work Choices Act amendments, see Anthony Forsyth and Carolyn Sutherland, 'From 'Uncharted Seas' to 'Stormy Waters': How will Trade Unions Fare under the Work Choices Legislation?' (2006) 16 *The Economic and Labour Relations Review* 215, 227–9.

118 OWS, 'Summary of the Investigation into Alleged Breaches of the *Workplace Relations Act 1996* at Cowra Abattoir', (Media Release, 7 July 2006); for a discussion (and a critique of both the law and the process through which it was applied in this case), see John Howe and Jill Murray, *What the Cowra Decision Means for Industrial Relations* (2006) Australian Policy Online <http://www.apo.org.au/webboard/results.chtml?filename_num=89350> at 2 August 2006.

Applying the same reasoning to the sole or dominant person test in the new s 902 prohibition, it is wide open for employers to argue that although they dismissed employees, this was not done for the sole or dominant purpose of re-hiring them as contractors. Even if that is what in fact occurred, the employer may be able to avoid liability by arguing that its main purpose was not to re-engage the workers as contractors, but rather, to restructure the business more generally in order to meet competitive pressures or to address financial difficulties. This substantially reduces the level of protection offered to employees by the new provisions ostensibly outlawing sham contracting arrangements in Part 22 of the WR Act.

6 CONCLUSION

In summary, three main points can be made about the new legal arrangements for independent contractors introduced by the IC Act and the Amendment Act. Firstly, these new laws add another layer of complexity to the workplace relations system, continuing a trend that some observers contend was exacerbated (rather than reduced, as the government contended) by the Work Choices reforms.[119] For example, the provisions of Part 2 of the IC Act are very confusing (particularly the transitional provisions), with the result that it could be quite difficult to determine which State or Territory laws are overridden in respect of a particular contractor, and which are not. In Stewart's view, the 'many exceptions' to the IC Act's ousting of State laws mean that 'in practice relatively few laws will actually be overridden'.[120] The provisions will also lead to some anomalous outcomes — for example, owner drivers continue (for the time being) to be covered by the protections provided by State laws in NSW and Victoria, but not elsewhere (for example, WA). As with the Work Choices Act, the 'patchwork' regulatory scheme for contractors introduced by the IC Act falls far short of the government's objective of delivering a simpler, national workplace relations system.[121]

Secondly, as it did with the Work Choices reforms,[122] the government has again used the rhetoric of 'choice' to advocate the need for changes to the regulatory arrangements for contractors. For example, it has argued that: '[a] workplace relations framework is needed which recognises and validates the choices people make to be either employees or independent contractors.'[123] However, this misses the point that for many workers, there is in reality *no choice* about whether to enter into contracting relationships.[124] And the real effect of the IC Act is to significantly reduce the levels of legal protection provided to contractors — both those who freely choose to be categorised in that way, and (of greater concern) those for whom this is presented as a *fait accompli*. For these workers, protections through deeming and similar provisions in

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119 See, eg, Andrew Stewart, 'A Simple Plan for Reform? The Problem of Complexity in Workplace Regulation' (2005) 31 *Australian Bulletin of Labour* 210.

120 Stewart, above n 21, 22; see also 30–1, 132–4.

121 See, eg, Commonwealth of Australia, *WorkChoices: A New Workplace Relations System* (2005); cf Stewart, above n 119.

122 See Commonwealth of Australia, above n 121.

123 Explanatory Memorandum of the IC Bill, 10; see also Workplace Relations Minister's Second Reading Speech on the IC Bill.

124 This is often the case in respect of 'dependent' contractors: see above n 7 and accompanying text; cf House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, above n 9, 12–13.

State or Territory legislation are rendered inoperative by the IC Act, and the new federal unfair contracts review mechanism is a pale imitation of that operating under NSW and Queensland law. This diminution of the safeguards traditionally provided to contractors adds to the impression of a general downgrading of the protective function of labour law, in favour of an agenda premised on notions of business efficiency and competitiveness.[125]

Thirdly, and most importantly, the IC Act's preservation of the common law test for distinguishing employees from independent contractors really amounts to a failure on the government's part to address an issue of fundamental concern to modern systems of labour regulation — that is, the question as to *which* workers should be the subject of 'the law of work'.[126] As indicated earlier in this article, profound changes (over the last 30 years or so) in the way in which work is organised and carried out have challenged the traditional distinction between employees and independent contractors, and the assumptions that went with it as to who was 'deserving' of labour law protection.[127] For many observers, the focus on the contract of employment as the 'touchstone' for determining the scope of labour regulation ignores the fact that power imbalances also arise in many of the new forms of work relationship adopted by entrepreneurial workers, especially those that force workers into the realm of commercial law.[128] Various policy responses have been suggested, most of which centre around the idea of re-defining the distinction (or tests for distinguishing) between employees and contractors, to reflect the realities of the modern labour force. For example, Stewart has argued for a refinement of the common law definition of 'employee', to take into account 'those who work for someone else in a subordinate and dependent capacity, but not those who are genuinely in business on their own account'.[129] Others have

125 See, eg, Creighton and Stewart, above n 21, 5–10; Hugh Collins, 'Regulating the Employment Relation for Competitiveness' (2001) 30 *Industrial Law Journal* 17.

126 See Owens and Riley, above n 21, 133–6.

127 See section 1 above; see also Stewart, above n 23, 238–9, 260–1; Commission of the European Communities, *Green Paper: Modernising Labour Law to Meet the Challenges of the 21st Century* (COM(2006) 708 final, 2006) 10.

128 See, eg, Owens and Riley, above n 21, 173–5, 178.

129 See Stewart, above n 23, 269, (for further detail on this proposal) 268–75, note also 264–8, where the author examines several other policy responses in Australia and internationally. Stewart's proposed re-definition of the boundaries between employees and independent contractors has received support from the Australian Democrats in their responses to various legislative proposals put forward by the government in recent years: see, eg, Senate Employment, Workplace Relations and Education Legislation Committee, above n 12, (Australian Democrats' Minority Report) 29–31, (Attachments 1 and 2) 40–2.

proposed that the broader concept of 'worker' should replace that of 'employee' as the determinant of whether labour regulation applies,[130] or that such regulation should focus on the performance of 'economically dependent work'.[131] However, the government has chosen not to enter into this debate at all, and to that extent, the IC Act and Amendment Act represent a missed opportunity to grapple with a major preoccupation of contemporary labour law.[132]

130 See, eg, Owens and Riley, above n 21, 178–9.

131 See Commission of the European Communities, above n 127, 11–12.

132 On present indications it seems that the federal Labor Opposition does not intend to address the employee-contractor distinction in any meaningful way either: see 'ICA Likes What it Hears from Labor' (2007) 1593 *Workforce* 8, reporting that the relevant Labor spokesperson has said that it has no plans to change the current common law test. Labor has announced only that (in a significant shift from its initial opposition to the IC Act) it intends to *retain* the regulation of genuine independent contractors through commercial rather than industrial law, and protect them from sham arrangements, if it wins the federal election due to be held in late 2007: see Adrian Rollins, 'Independence Day Arrives', *The Australian Financial Review* (Sydney), 30 April 2007, 5; Brad Norington, 'ALP Wins on Contractors', *The Australian* (Canberra), 14 May 2007, 2; Patricia Karvelas, 'Applause for Labor IR Pledge', *The Australian* (Canberra), 6 July 2007, 2.