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**PROTECTION OF INDEPENDENT CONTRACTORS UNDER
WORKCHOICES AND THE FAIR WORK ACT: IMPROVEMENT
OR CONTINUITY?**

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PROTECTION OF INDEPENDENT CONTRACTORS UNDER WORKCHOICES AND THE FAIR WORK ACT: IMPROVEMENT OR CONTINUITY?

I INTRODUCTION

At the time of the introduction of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) ('*WorkChoices Act*'), the Howard Government's changes to Australian labour law were widely regarded by commentators as the most fundamental in over a century.¹ The original version, however, lasted barely a few months before the government began making substantive changes to the legislation in a bid to abate concerns that its reforms radically undermined employees' entitlements.² The government introduced more than 100 amendments to the legislation and by mid-2007 it had unequivocally abandoned any use of the 'WorkChoices' brand.³ At the same time, it enacted a separate piece of legislation transforming the regulatory arrangements for independent contractors, the *Independent Contractors Act 2006* (Cth). Yet none of this was enough to save the Howard government, its radical industrial relations reforms costing a prime minister his own seat and the Liberal Government an election to a 'resurgent Labor Party'.⁴ The aftermath of the 2007 election was described by Margaret Gardner as an opportunity for 'deliberate institutional change', with the election providing some sort of political mandate for the Rudd government to lay down the base of an industrial relations system 'that should serve for many decades'.⁵

The focus of the policy debates surrounding both the Howard Government's reforms and the Rudd Government's recently enacted *Fair Work Act 2009* (Cth) remains 'unremittingly on employers and employees'.⁶ Virtually nothing has been said about 'the regulation of work performed outside the confines of the traditional employment relationship [despite an] increasing scope of atypical employment arrangements, [including] a large number of workers who provide their personal labour as "self-employed" contractors'.⁷

The aim of this essay is to investigate the impact that this period of radical reform has had on the protection of independent contractors. It begins by setting out the distinction that has developed under Australian labour law between an employee and an independent contractor, and it then explains the key concerns that have arisen in relation to the regulation of independent contractors over the past three or so decades. The essay then examines the various ways in which regulators have sought to meet these concerns, by providing a comparative assessment of key job security protections

¹ Richard Hall, 'Australian Industrial Relations in 2005 – The WorkChoices Revolution' (2006) 48 *Journal of Industrial Relations* 291, 292.

² See, eg, Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (2009) 2.

³ Andrew Stewart, 'A Question of Balance: Labor's New Vision for Workplace Regulation' (2009) 22 *Australian Journal of Labour Law* 3, 5.

⁴ Forsyth and Stewart, above n 2, 6.

⁵ Margaret Gardner, 'Beyond Work Choices: Negotiating a Moment' (2008) 18 *The Economic and Labour Relations Review* 33, 34.

⁶ Andrew Stewart, 'WorkChoices and Independent Contractors: The Revolution That Never Happened' (2008) 18 *The Economic and Labour Relations Review* 53, 53.

⁷ *Ibid.*

afforded to independent contractors through a three-stage process. Firstly, it sets out the key protections afforded to independent contractors before the introduction of the Howard Governments' reforms. It then investigates how these protections were affected by the introduction of the Howard Government's *WorkChoices Act* and *Independent Contractors Act*. It then looks to the responses to these reforms under the Rudd Government's 'Forward with Fairness' policies. The essay concludes with an analysis of these different regimes, ultimately answering the key question of whether, compared with the federal industrial regime governed by the *WorkChoices Act* and the *Independent Contractors Act*, the *Fair Work Act* improves the protection of independent contractors.

II THE EMPLOYEE / INDEPENDENT CONTRACTOR DISTINCTION

The distinction between an employee and an independent contractor originated in the 19th century within the common law doctrine of vicarious liability.⁸ As it happens, this distinction has become fundamental in determining the personal scope of employment laws. Australian employment laws are generally concerned with employees who are engaged in a contract *of* service, rather than independent contractors engaged in a contract *for* services.⁹ Under this conception of employment, the contract of employment forms the "cornerstone" of the edifice of labour law'.¹⁰ As Joo-Cheong Tham has observed, this 'truism' sets up a 'binary divide' between employees who have access to the various protections afforded by employment laws, and independent contractors who generally 'fall outside the envelope of protection'.¹¹ Yet no statutory definition of employment exists; rather, the status of a worker is determined by common law principles, where the courts adopt a 'multi-factor' approach.¹²

For a long time, this contractual distinction served as a 'useful analogue' for the scope of regulatory intervention.¹³ Over the last three decades or so, however, the regulation of independent contractors has been subjected to a renewed legal interest. There are two key reasons for this, which can be gleaned from the International Labour Organization's (ILO) 'Report on the Employment Relationship'.¹⁴ The first relates to the issue of 'disguised' employment. The ILO describes a 'disguised' employment relationship as one that occurs when 'the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee'.¹⁵ The

⁸ Andrew Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15 *Australian Journal of Labour Law* 235, 5.

⁹ Rosemary Owens and Joellen Riley, *The Law of Work* (2007) 136.

¹⁰ O Kahn-Freund, 'Blackstone's Negligent Child: The Contract of Employment' (1977) 93 *Quarterly Law Review* 508 in Rosemary Owens and Joellen Riley, *The Law of Work* (2006) 134.

¹¹ Joo-Cheong Tham, 'Job Security Laws: Constituting "Standard" and "Non-Standard Employment"' in C Arup et al, *Labour Law and Labour Market Regulation* (2006) 657.

¹² See *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 24 ,36-7; *Hollis v Vabu* (2001) 207 CLR 121, 33, 45.

¹³ Anthony O'Donnell, "'Non-Standard" Workers in Australia: Counts and Controversies' (2004) 17 *Australian Journal of Labour Law* 1, 25.

¹⁴ International Labour Organization, *Report of the Committee on the Employment Relationship* (2006).

¹⁵ International Labour Organization, *Report of the Committee on the Employment Relationship* (2006) 76.

second reason, as expressed by the ILO, relates to the principle that industrial relations laws ‘should not interfere with true civil and commercial relationships’.¹⁶

These issues can be conceptualised by accepting that in reality, work relationships sit on what Anthony O’Donnell describes as a ‘continuum’.¹⁷ At one end of the continuum is the employee, defined by notions of dependence, subservience and subordination. At the other end is the truly entrepreneurial, autonomous independent contractor. O’Donnell asserts that significant changes to the structure of business over the past three decades have led to the ‘proliferation of grey areas’¹⁸ on this continuum, where it is left to the common law to determine ‘on which side of the divide the worker falls’.¹⁹ He describes the ‘dependent’ contractor as the paradigmatic example of a worker who occupies this grey area. This worker, who is ‘disguised’ as an independent contractor for the purposes of labour law regulation, but who supplies their labour under the same conditions as an employee, has been the cause of much ire for legal commentators.²⁰

The potential to ‘disguise’ employment lies in the ease with which the indicia used by the courts to determine a worker’s status can be manipulated. Andrew Stewart believes that ‘any competent lawyer knows how to “exploit” these indicia so as to arrive at the right result for their client’.²¹ If an employer can successfully ‘disguise’ an employment relationship, the economic savings can be considerable as the employer is freed from any obligations to provide various forms of paid leave, observe industrial instruments and make superannuation and payroll tax contributions, to name a few.²² However, from the point of view of the worker, these so called ‘dependent’ contractors ‘pose a fundamental challenge to the integrity of the Australian labour law system’²³ by undermining its protective purpose.²⁴ The prevalence of ‘disguised’ employment in Australia was confirmed by research commissioned by the Australian Taxation Office in the 1990s.²⁵ Depending on the methodology used, a research paper prepared for the Productivity Commission, along with surveys produced by the Australian Bureau of Statistics, suggests that at the end of the 20th century, anywhere between 2-4% of workers in Australia were operating as independent contractors but under employee-like arrangements.²⁶

Whilst the use of ‘dependent’ contractors is clearly prevalent in modern labour law systems, an essential difference remains between working for somebody else and running your own business.²⁷ And many people who operate as independent

¹⁶ International Labour Organization, *Report of the Committee on the Employment Relationship* (2006) 77.

¹⁷ O’Donnell, above n 13, 25-6.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Joellen Riley, *Independent Work Contracts* (2007) 14-15.

²¹ Stewart, above n 8, 10.

²² Owens and Riley, above n 9, 144.

²³ Stewart, above n 8, 25.

²⁴ The famous statement of such a purpose is that of Otto Kahn-Freund, that ‘The main object of labour law (is) to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship’: P Davies and M Freedland (eds), *Kahn-Freund’s Labour and the Law* (3rd ed, 1983) 18.

²⁵ Breen Creighton and Andrew Stewart, *Labour Law* (4th ed, 2005) 275.

²⁶ See O’Donnell, above n 13, 46.

²⁷ Stewart, above n 8, 27.

contractors are quite clearly running their own businesses. According to the Productivity Commission, at least 787 600 Australians, or around 8.2% of the total workforce, worked as genuine self-employed contractors in 2004,²⁸ forming a significant share of the steadily growing ‘non-standard’ or ‘atypical’ segment of the Australian labor market.²⁹ Accepted as being fundamentally different from employees, genuine independent contractors are generally thought to be more appropriately regulated by commercial laws.³⁰

The next three sections of this essay focus on three key aspects of workplace relations laws that apply specifically to independent contractors: deeming provisions, unfair contracts provisions, and ‘sham’ contracting provisions. It compares the flow of protection afforded to independent contractors through these provisions firstly under pre-WorkChoices federal and state industrial regimes, then under the *Independent Contractors Act* and its attendant reform to the *WorkChoices Act*, and finally under the *Fair Work Act*. The concluding analysis will look at the extent to which these laws have effectively addressed the recommendations concerning the protection of independent contractors put forth by the ILO. These are:

1. That ‘[n]ational policy should at least include measures to ... combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status’³¹ of the employee; and
2. That ‘[n]ational policy for protection of workers in an employment relationship should not interfere with true civil and commercial relationships’.³²

Finally, this essay concedes that various other important forms of protection are afforded to independent contractors through, for example, freedom of association provisions contained within both the *WorkChoices Act* and the *Fair Work Act*, workers compensation legislation, occupational health and safety legislation and a raft of provisions under the *Trade Practices Act 1974* (Cth), to name a few. These provisions, however, are beyond the modest scope of this essay.

III INDEPENDENT CONTRACTORS UNDER THE PRE-WORKCHOICES REGIME

Prior to the enactment of the *WorkChoices Act*, the common law test of ‘employee’ generally defined the scope of both federal and state industrial relations legislation. Each of the state industrial statutes, however, contained provisions that “‘deem” certain types of workers to be employees within the meaning of the legislation, even though these workers would not otherwise be regarded as having [that] status. [These provisions] reflect a view that in the particular context of the scheme in question, the

²⁸ Productivity Commission, *The Role of Non-Traditional Work in the Australian Labour Market* (2006) 60.

²⁹ Anthony Forsyth, ‘The 2006 Independent Contractors Legislation: An Opportunity Missed’ (2007) 35 *Federal Law Review* 329, 330.

³⁰ Owens and Riley, above n 9, 134.

³¹ International Labour Organization, *Report of the Committee on the Employment Relationship* (2006), cl 4.

³² *Ibid*, cl 8.

workers concerned deserve to be treated in the same way as employees'.³³ For example, in New South Wales, sch 1 of the *Industrial Relations Act 1996* (NSW) lists a number of categories of persons who are deemed to be employees for the purposes of the Act, including milk vendors, contract cleaners, building industry sub-contractors, certain bread deliverers, outworkers in the clothing trade, house painters and security workers engaged as sub-contractors. Categories of 'dependent' contractors are often included on these lists. Further, in Queensland, s 275 of the *Industrial Relations Act 1999* (Qld) confers on the State's Industrial Relations Commission a general power to declare 'a class of persons who perform work in an industry under a contract for services' to be employees.

Under the pre-WorkChoices regime, independent contractors also enjoyed the protection of unfair contracts provisions in the federal,³⁴ New South Wales³⁵ and Queensland³⁶ jurisdictions. The New South Wales Industrial Commission has taken a very broad view of its jurisdiction.³⁷ It has sought to ensure that retrenched contractors receive reasonable severance benefits,³⁸ and contractors in New South Wales have also been able to complain about receiving remuneration that would be less than an employee would get for doing the same work.³⁹ While the Queensland and federal provisions are considerably narrower, decisions under these jurisdictions have found contracts allowing for the termination of a contractor with no or little notice to be unfair where 'there has been heavy capital investment by the independent contractor which sometimes has been accompanied by express assurance of ongoing work'.⁴⁰

IV INDEPENDENT CONTRACTORS UNDER THE WORKCHOICES REGIME

The *WorkChoices Act* involved changes to the 'scope, nature and content of the federal regime'.⁴¹ In terms of scope, application of the legislation was defined by reference to employers who are the subject of the legislative power granted by s 51(xx) of the Australian Constitution.⁴² This meant that the legislation could cover a much larger number of employment relationships and that it could regulate these relationships in a more comprehensive way. It also meant that the Commonwealth could now immunise these employment relationships from the application of certain state and territory employment laws.⁴³ Additionally, those workers who did not satisfy the common law test of employment would generally be excluded from the scope of the legislation.⁴⁴

³³ Andrew Stewart, *Stewart's Guide to Employment Law* (2nd ed, 2009) 45.

³⁴ *Workplace Relations Act 1996* (Cth) ss 127A-127C (pre-*WorkChoices Act*).

³⁵ *Industrial Relations Act 1996* (NSW) ss 105-106.

³⁶ *Industrial Relations Act 1999* (Qld) s 276.

³⁷ Stewart, above n 33, 93.

³⁸ See, eg, *Westfield Holdings v Adams* (2001) 114 IR 241.

³⁹ *Industrial Relations Act 1996* (NSW) s 105(c).

⁴⁰ Tham, above n 11, 673-4.

⁴¹ Forsyth and Stewart, above n 2, 3.

⁴² See generally *Workplace Relations Act 1996* (Cth) s 6 (post-*WorkChoices Act*).

⁴³ See *New South Wales v Commonwealth* (2006) 229 CLR 1.

⁴⁴ *Workplace Relations Act 1996* (Cth) s 5 (post-*WorkChoices Act*).

Along with the sweeping WorkChoices reforms, the Liberal Government's Election 2004 Policy Statement, 'Protecting and Supporting Independent Contractors', committed the government to the enactment of the *Independent Contractors Act*.⁴⁵ The Act aimed to 'protect the freedom of independent contractors to enter into services contracts', to 'recognise independent contracting as a legitimate form of work arrangement that is primarily commercial' and to 'prevent interference with the terms of genuine independent contracting arrangements'. Each of these is listed in s 3 as a 'principal object' of the Act. The Act took effect on 1 March 2007, supported by the *Independent Contractors Regulations 2007* (Cth) and the *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006* (Cth) which also took effect on this date.

The *Independent Contractors Act* applies to 'services' contracts, which are defined as contracts for services to which an independent contractor is a party, and which relates to the performance of work by that contractor.⁴⁶ As with the *WorkChoices Act*, the services contract must have the 'requisite constitutional connection' specified in s 5(2). The Act does not define the term 'independent contractor' except for stating in s 4 that an independent contractor 'is not limited to a natural person'. Thus whether a worker is an independent contractor or an employee will be left to the common law to determine.⁴⁷

As Andrew Stewart observed, the immediate targets of the policy governing the *Independent Contractors Act* were fairly obvious.⁴⁸ The government viewed the various employment protections extended to independent contractors through state legislative regimes, as explained above, as 'inappropriate or excessive'. The main 'thrust' of the legislation was therefore aimed at overriding these laws.⁴⁹ Part 2 of the Act puts into effect this intention. Specifically, s 7(1) provides that the 'rights, entitlements, obligations and liabilities of a party to a services contract are not affected by a law of a State or Territory' that 'deem[s] a party to a services contract to be an employer or employee ... for the purposes of a law that relates to one or more workplace relations matters', 'confer[s] or impose[s] rights, entitlements, obligations or liabilities on a party ... in relation to matters that, in an employment relationship, would be workplace relations matters', or provide a means for either of the above to happen. For the purposes of s 7(1), workplace relations matters are defined in s 8(1) to include matters such as remuneration, leave entitlements, hours of work, industrial action and enforcing or terminating contracts of employment. This will certainly catch the deeming provisions described above in sch 1 of the New South Wales *Industrial Relations Act 1996* (NSW) and similar provisions in other state industrial statutes, where the legislation deals with a 'workplace relations matter' and would otherwise apply to a 'services contract'.⁵⁰ It will also override orders made under s 275 of Queensland's *Industrial Relations Act 1999* (Qld).⁵¹ On the other hand, s 8(2) specifies a lengthy list of matters which are not workplace relations matters for the

⁴⁵ Liberal Party of Australia, *The Howard Government Election 2004 Policy Statement: Protecting and Supporting Independent Contractors* (2004).

⁴⁶ *Independent Contractors Act 2006* (Cth) s 5(1).

⁴⁷ See, eg, *Rossmick No 1 Pty Ltd v Bank of Queensland Ltd* (2008) 178 IR 373.

⁴⁸ Stewart, above n 6, 57.

⁴⁹ *Ibid.*

⁵⁰ Forsyth, above n 29, 335.

⁵¹ *Ibid.*

purposes of section 7(1), including discrimination, superannuation, workers compensation, occupational health and safety, child labour, observance of public holidays, jury service, consumer protection and taxation. Thus State or Territory laws on these matters will still apply to service contracts.

Furthermore, s 7(1) provides that services contracts may not be affected by a State or Territory law that allows for such a contract to be set aside or varied on an unfairness ground,⁵² where an unfairness ground is defined in s 9. These provisions clearly cover both the New South Wales and Queensland unfair contracts provisions.⁵³ Part 3 of the *Independent Contractors Act*, however, implements its own, if not weaker, set of provisions allowing contractors to challenge the fairness of their agreements, replacing the provisions under ss 832-4 (formerly ss 127A-127C) of the *Workplace Relations Act 1996* (Cth) and overriding state unfair contracts laws. This new system applies to services contracts where the contractor is a natural person (or in limited circumstances an incorporated entity),⁵⁴ but not to service contracts where the performance of work is for private and domestic purposes.⁵⁵ An application for review can only be made by a party to the services contract.⁵⁶ This contrasts with both the New South Wales and the former federal unfair contracts provisions, where an application could be made by a registered union or employee association, on the contractor's behalf.⁵⁷

Section 12 permits the Federal Court or Federal Magistrates Court to review a services contract on the grounds that it is 'unfair' or 'harsh' (this includes a power to review an agreement to vary such a contract).⁵⁸ Thus the grounds on which services contracts may be reviewed are narrower than those applicable under the Queensland and New South Wales unfair contracts regimes, which include harshness, unfairness and unconscionability.⁵⁹ On the other hand, the fact that an application can be made to the Federal Magistrates Court should make it cheaper to bring a claim than under the previous federal provisions, where an application could only be made to the Federal Court.⁶⁰ In making its determination, the court may have regard to: the relative bargaining positions of the parties to the contract and their representatives; whether any undue influence or pressure was exerted or any unfair tactics were used against a party to the contract; whether the contract provides for total remuneration that is or is likely to be less than that of an employee performing similar work; and any other matter it considers relevant.⁶¹ Again here, the federal provisions are much weaker than the New South Wales and Queensland provisions. Firstly, the factors that may be considered in making a determination go beyond those listed under the new federal regime to include, for example, where the contract is against the public interest⁶² or whether it is designed to, or does, avoid the provisions of an industrial instrument.⁶³

⁵² *Independent Contractors Act 2006* (Cth) s 7(1)(c).

⁵³ Forsyth, above n 29, 341.

⁵⁴ *Independent Contractors Act 2006* (Cth) s 11(1)(b).

⁵⁵ *Independent Contractors Act 2006* (Cth) s 11(1)(a).

⁵⁶ *Independent Contractors Act 2006* (Cth) s 12(2).

⁵⁷ *Industrial Relations Act 1996* (NSW) s 108; *Workplace Relations Act 1996* (Cth) s 127A(3) (pre-*WorkChoices Act*).

⁵⁸ *Independent Contractors Act 2006* (Cth) s 12(4).

⁵⁹ *Industrial Relations Act 1999* (Qld) s 276(7); *Industrial Relations Act 1996* (NSW) s 105(a).

⁶⁰ *Workplace Relations Act 1996* (Cth) s 4 (pre-*WorkChoices Act*).

⁶¹ *Independent Contractors Act 2006* (Cth) s 15(1).

⁶² *Industrial Relations Act 1996* (NSW) s 105(b).

⁶³ *Industrial Relations Act 1996* (NSW) s 105(d); *Industrial Relations Act 1999* (Qld) s 276(2)(c).

Secondly, in an application under the new provisions, the court must only have regard to the terms of the contract, and any other relevant circumstances, as at the time the contract was made.⁶⁴ Under the New South Wales regime, the Industrial Relations Commission may find that a contract became unfair over time.⁶⁵ Finally, the remedies available under the Queensland and New South Wales provisions are broader than those available under section 16 of the *Independent Contractors Act*.

At the same time as the *Independent Contracts Act* was enacted, the *Workplace Relations Amendment (Independent Contractors) Act 2006* (Cth) amended the *Workplace Relations Act* (as amended by the *WorkChoices Act*) to control certain 'sham' contracting arrangements. The amending provisions attempt to address the concerns posed by 'disguised' employment. As the Minister for Workplace Relations at the time stated, the aim of these provisions is to ensure that 'unprincipled employers will not be allowed to avoid their legal obligations to employees by using independent contracting as a mask'.⁶⁶ The amendments added a new Part 22 to the *Workplace Relations Act*, headed 'Sham arrangements'. Proceedings under this part may be instituted in the Federal Court or the Federal Magistrates Court, by an individual affected by a contravention, a workplace inspector or a registered trade union with the consent of the individual.⁶⁷

Section 900 is contravened where a person, who has entered into a contract with an individual who is to perform work for that person, represents to the individual that the contract is a contract for services and that the individual works as an independent contractor, where the contract is in fact a contract of employment.⁶⁸ Section 901 contains a similar prohibition to s 900 except that it applies to a misrepresentation in relation to a proposed contract.⁶⁹ Under both ss 900 and 901, however, a defence is provided if the employer can prove that at the time they made the representation they did not know, and were not reckless as to, the true nature of the relationship.⁷⁰ Obtaining advice from a solicitor would probably provide an effective defence to these prohibitions.⁷¹ Whether a contract is a contract of employment will be decided using the common law test.⁷²

Section 902 is contravened where an employer dismisses or threatens to dismiss an employee, where the employer's sole or dominant purpose is to then engage them as an independent contractor to perform the same work, or substantially the same work.⁷³ Under s 902(3) it is presumed that the employer acted for the sole or dominant purpose prohibited under s 902(1). Thus to escape liability, the employer must prove that it acted for a different purpose.⁷⁴ Section 903 is contravened where a person makes a statement to an employee or former employee which they know to be false, with the intention of persuading or influencing the individual to perform the

⁶⁴ *Independent Contractors Act 2006* (Cth) s 12(3).

⁶⁵ *Industrial Relations Act 1996* (NSW) s 106(2).

⁶⁶ Second Reading Speech, *Independent Contractors Bill 2006* (Cth) 9.

⁶⁷ *Independent Contractors Act 2006* (Cth) s 905.

⁶⁸ *Independent Contractors Act 2006* (Cth) s 900(1).

⁶⁹ *Independent Contractors Act 2006* (Cth) s 901(1).

⁷⁰ *Independent Contractors Act 2006* (Cth) ss 900(2), 901(2).

⁷¹ Andrew Stewart, *Understanding Independent Contractors* (2007) 19.

⁷² See *Independent Contractors Act 2006* (Cth) notes to ss 900-901.

⁷³ *Independent Contractors Act 2006* (Cth) s 902(1).

⁷⁴ *Independent Contractors Act 2006* (Cth) s 902(3).

same work, or substantially the same work, as an independent contractor.⁷⁵ However, '[i]f the employer genuinely believes what it has told the worker, no matter how careless or even reckless it may have been as to the truth of the statement, there can be no liability under this provision'.⁷⁶

Under s 904, the Federal Court or the Federal Magistrates Court can order penalties of up to \$6 600 for an individual or up to \$33 000 for a body corporate.⁷⁷ Where there is a contravention of s 902, the court can also grant an injunction to stop the contravention, and any other orders necessary to stop a breach.⁷⁸ This may include an order for the reinstatement of the dismissed employee and/or an order for the payment of compensation for loss suffered as a result of the dismissal or threatened dismissal.⁷⁹

V INDEPENDENT CONTRACTORS UNDER THE FAIR WORK REGIME

In its first week of sitting, the Rudd Government introduced the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth), the first stage of its reforms. Following this, on 25 November 2008, the Fair Work Bill was introduced to Parliament to implement the remainder of the government's Forward with Fairness commitments. The bulk of the Act took effect on 1 July 2009, with the provisions concerning the National Employment Standards and 'modern awards' commencing operation on 1 January 2010.⁸⁰ The *Fair Work Act* replaces the *WorkChoices Act*,⁸¹ yet significant parts of the Howard Government's framework will 'live on'.⁸² Importantly, the new 'national' system will continue to draw on the powers granted by s 51(xx) of the Constitution, and the legislation's scope will continue to include only those workers who satisfy the common law test of employment, with the exception of certain outworkers.⁸³

Part 3-1 of the Act contains similar provisions concerning 'sham' contracting arrangements to those included in the *WorkChoices Act*. Section 357 effectively imports the provisions that existed under ss 900 and 901 of the *WorkChoices* legislation, albeit in a more streamlined and easy to follow form. Furthermore, s 357(2) provides for the same defence as that contained under ss 900 and 901. Section 358 of the Act contains a broadly similar provision to what was s 902 of the *WorkChoices Act*. Section 358 states that '[a]n employer must not dismiss, or threaten to dismiss, an individual who ... is an employee of the employer; and performs particular work for the employer ... in order to engage the individual as an independent contractor to perform the same, or substantially the same, work under a contract for services'. One fundamental difference here is that the 'sole or dominant purpose' requirement under s 902 has been excluded from the new legislation.

⁷⁵ *Independent Contractors Act 2006* (Cth) s 903(1).

⁷⁶ Stewart, above n 70, 20.

⁷⁷ *Independent Contractors Act 2006* (Cth) s 904(2).

⁷⁸ *Independent Contractors Act 2006* (Cth) s 904(2A), (2C).

⁷⁹ *Independent Contractors Act 2006* (Cth) s 904(2B).

⁸⁰ *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) s 2.

⁸¹ See *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) sch 1 for exceptions.

⁸² See generally Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (2009).

⁸³ Stewart, above n 3, 6.

Instead, the onus is on the employer to prove that they did not act with the proscribed purpose, or for reasons that included the proscribed purpose.⁸⁴ Finally, s 359 mirrors the prohibition that existed under s 903 of the *WorkChoices Act*, again provided for in a simpler form. Proceedings may be instituted in the Federal Court or the Federal Magistrates Court by a person affected by a contravention, an industrial association or an inspector.⁸⁵ The remedies available are the same as under what was s 904 of the *WorkChoices Act*.

Beyond these changes, the Rudd Government has indicated that it will not disturb the central elements of the *Independent Contractors Act*.⁸⁶ However, the government has made a commitment to develop low-cost dispute resolution procedures for unfair contracts disputes under the *Independent Contractors Act*, in response to complaints of the costly exercise of bringing a claim to the Federal Magistrates Court.⁸⁷ Additionally, the government has indicated that it will review the regulation of owner-drivers in light of the anomalous outcomes produced by owner-drivers in certain states being regulated under state laws, and those in other states being regulated under federal laws.⁸⁸

VI CONCLUDING ANALYSIS

The *Independent Contractors Act* and its attendant changes to the *WorkChoices Act* have been regarded as ‘a disappointing failure of public policy by almost everyone with an opinion on the issue’.⁸⁹ Firstly, the scope of the Act is very limited; only a small proportion of state laws are actually affected by the legislation, with the many exceptions listed in the Act resulting in most of the existing state ‘deeming’ provisions remaining in force. On this issue in particular, the legislation has been viewed as having ‘rather less impact than might have been expected when the Howard government first announced its intention to legislate on this subject’.⁹⁰ More importantly, the State ‘deeming’ provisions that have actually been excluded by the legislation are those that have been described by the ILO as an appropriate response to the issue of ‘disguised’ employment.⁹¹ Secondly, Anthony Forsyth argues that the Act’s preservation of the common law test of employment represents ‘a missed opportunity to grapple with a major preoccupation of contemporary labour law’: the question of which workers should be the subject of the ‘law of work’.⁹² Thirdly, Andrew Stewart believes that the ‘sham’ contracting provisions ‘do not do enough to stem the use of artificially constructed arrangements’.⁹³ He notes that the provisions are unlikely to have much effect against anything but the most ‘cavalier

⁸⁴ *Fair Work Act 2009* (Cth) ss 360-1.

⁸⁵ *Fair Work Act 2009* (Cth) s 539(2).

⁸⁶ Australian Labor Party, Policy Statement, *Forward with Fairness: Labor’s Plan for Fairer and More Productive Workplaces* (2007) <http://www.alp.org.au/download/now/fwf_finala.pdf> at 12 September 2009.

⁸⁷ Stewart, above n 6, 60.

⁸⁸ *Ibid.*

⁸⁹ Stewart, above n 6, 5.

⁹⁰ Stewart, above n 70, 30.

⁹¹ International Labour Organization, *Report of the Committee on the Employment Relationship* (2006).

⁹² Forsyth, above n 29, 347-348.

⁹³ Stewart, above n 6, 5.

arrangements’ or the most ‘blatant’ and ‘careless’ attempts to disguise employment. Moreover, some commentators are sceptical as to whether this approach will be a more effective response to the problem of ‘disguised’ employment than the state deeming provisions which have been overridden by the Act.⁹⁴ Finally, the unfair contracts provisions introduced by the Act have been criticised as a ‘pale imitation’ of both the New South Wales and Queensland unfair contracts regimes.⁹⁵

At its National Conference in 2004, the Howard Government made a commitment to legislate to ‘prevent the workplace relations system from being used to undermine the status of independent contractors’.⁹⁶ What it delivered instead was a piece of legislation that has ‘significantly reduce[d] 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*’.⁹⁷ Much like the government’s radical WorkChoices reforms did to employees, the *Independent Contractors Act* and its accompanying changes to the *Workplace Relations Act* have significantly diminished the ‘safeguards traditionally provided to contractors’.⁹⁸

After its election win in 2007, what confronted the Rudd Government was an industrial relations system that presented both ‘an opportunity and a problem for the party’.⁹⁹ ‘What Kevin Rudd ... opted to do was to reaffirm [his] intention to make significant changes to the Howard Government’s legislation, yet at the same time seek to reassure both the public and the business community that Labor’s own reforms would be economically responsible’.¹⁰⁰ In terms of the Independent Contractors legislation, while the Rudd government originally opposed its passage and opted for an expansion of the definition of ‘employee’, the independent contractors laws introduced by the Howard Government have survived in more or less their current form¹⁰¹.

Small changes, however, have been made in this area, which suggest some sort of improved protection for independent contractors. Firstly, the exclusion of the ‘sole or dominant purpose’ requirement from s 358 of the new ‘sham’ contracting provisions should significantly improve the level of protection afforded by this provision. Under the WorkChoices formulation of this prohibition, even if an employer did dismiss an employee for the purpose of re-engaging them as an independent contractor, there was significant scope for the employer to quite easily disprove that that was their ‘sole or dominant purpose’, by arguing that their purpose included legitimate business reasons, such as restructuring in order to meet competitive pressures.¹⁰² For example, in the *Cowra Abattoir Case*,¹⁰³ the employer dismissed 29 employees, offering to re-engage them as independent contractors. It was alleged that the employer’s purpose in

⁹⁴ See, eg, Riley, above n 20, 7.

⁹⁵ Forsyth, above n 29, 341.

⁹⁶ Liberal and National Parties, *National Conference* (2004).

⁹⁷ Forsyth, above n 29, 347.

⁹⁸ *Ibid.*

⁹⁹ Stewart, above n 3, 2.

¹⁰⁰ Stewart, above n 3, 2.

¹⁰¹ Australian Labor Party, *National Platform and Constitution* (2007) 64.

¹⁰² Forsyth, above n 29, 346.

¹⁰³ See, eg, *Cowra Abattoir Becomes Work Choices Battleground* (2006) Workplace Express <<http://www.workplaceexpress.com.au>> at 4 April 2006 in Forsyth, above n 29, 345.

doing so was to avoid having to comply with an award and/or workplace agreement. The OWS investigated the matter and found that dismissing the employees to re-hire them as independent contractors was not the employer's sole or dominant purpose because the employer's actions involved legitimate reasons relating to the financial viability of the company.¹⁰⁴ Exclusion of the 'sole or dominant purpose' requirement under s 358 should mean that employers like Cowra Abattoir will now be caught by the prohibition. Secondly, the Rudd government's commitment to developing cheaper dispute resolution procedures for unfair contracts claims should make this a more accessible avenue of protection for independent contractors. Finally, the government's review of the regulation of owner-drivers should improve protection for these workers through improved consistency of the regulations.

While these are all welcome changes, the *Fair Work Act* makes no attempt to 'reconceptualise the nature and scope of labour regulation'.¹⁰⁵ It has passed up yet another opportunity to address the fundamental issue of which workers should be afforded the protections of labour laws. Andrew Stuart argues that 'such a step would arguably be far more radical than anything in the *Independent Contractors Act*'.¹⁰⁶ Yet the fact that the Rudd Government effectively retained the Howard Government's independent contractor reforms, and did not go much further in attempting to improve the protection of independent contractors, should not be a surprise; such a policy would seem to be in line with the majority of the government's 'Forward with Fairness' policies, which have been viewed by commentators as 'an exercise in political pragmatism'.¹⁰⁷ Through its attempts to restore 'balance and fairness in Australian workplaces',¹⁰⁸ the Rudd Government's policies have generated disappointment for not being more radical.¹⁰⁹ This is certainly true of the government's minimal attempts to improve the protection of independent contractors.

¹⁰⁴ OWS, 'Summary of the Investigation into Alleged Breaches of the *Workplace Relations Act 1996* at Cowra Abattoir' (Media Release, 7 July 2006).

¹⁰⁵ Stewart, above n 3, 27.

¹⁰⁶ Stewart, above n 70, 134.

¹⁰⁷ Stewart, above n 3, 27.

¹⁰⁸ Second Reading Speech, Independent Contractors Bill 2006 (Cth) 10.

¹⁰⁹ Stewart, above n 3, 27.

VII BIBLIOGRAPHY

1. Articles/Books/Reports

Arup, C and Mitchell, R, 'Labour Law and Labour Market Regulation' in Arup et al *Labour Law and Labour Market Regulation* (2006)

Brooks, A, 'Myth and Muddle - An Examination of Contracts for the Performance of Work' (1988) 11 *University of New South Wales Law Journal* 48

Collins, H, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 *Oxford Journal of Legal Studies* 354

Creighton, B and Stewart, A, *Labour Law* (4th ed, 2005)

Davies, P and Freedland, M (eds), 'Kahn-Freund's Labour and the Law' (3rd ed, 1983)

Forsyth, A, 'The 2006 Independent Contractors Legislation: An Opportunity Missed' (2007) 35 *Federal Law Review* 327

Forsyth, A and Stewart, A (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (2009)

Freedland, M, *The Personal Employment Contract* (2nd ed, 2006)

Fudge, J, 'Precarious Employment in Australia and Canada: the road to labour law reform' (2006) 19 *Australian Journal of Labour Law* 105

Gardner, M, 'Beyond Work Choices: Negotiating a Moment' (2008) 18(2) *The Economic and Labour Relations Review* 33

Hall, R, 'Australian Industrial Relations in 2005 – The WorkChoices Revolution' (2006) 48 *Journal of Industrial Relations* 291

O'Donnell, A, '“Non-Standard” Workers in Australia: Counts and Controversies' (2004) 17 *Australian Journal of Labour Law* 1

Owens, R, 'Working Precariously: The Safety Net After Work Choices' (2006) 19 *Australian Journal of Labour Law* 161

Owens, R and Riley, J, *The Law of Work* (2007)

Rawling, M, 'The Impact of Federal Legislation Upon the Scope of State Jurisdiction to Regulate Outwork' (2009) 22 *Australian Journal of Labour Law* 147

Riley, J, 'A Fair Deal for the Entrepreneurial Worker? Self-Employment and Independent Contracting post Work Choices' (2006) 19 *Australian Journal of Labour Law* 246

Riley J, 'Independent Work Contracts' (2007)

- Stewart, A, 'A Question of Balance: Labor's New Vision for Workplace Regulation' (2009) 22 *Australian Journal of Labour Law* 3
- Stewart, A, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15 *Australian Journal of Labour Law* 235
- Stewart, A, *Stewart's Guide to Employment Law* (2nd ed, 2009)
- Stewart, A, *Understanding Independent Contractors* (2007)
- Stewart, A, 'WorkChoices and Independent Contractors: The Revolution that Never Happened' (2008) 18(2) *The Economic and Labour Relations Review* 53
- Tham, J, 'Job Security Laws: Constituting "Standard" and "Non-Standard" Employment', in C Arup et al, *Labour Law and Labour Market Regulation* (2006)
- Tham, J, 'Towards an Understanding of Standard Employment Relationships under Australian Labour Law' (2007) 20 *Australian Journal of Labour Law* 123
- Watson, I et al, *Fragmented Futures: New Challenges in Working Life* (1st ed, 2003)

2. Case Law

- Hollis v Vabu* (2001) 207 CLR 121
- New South Wales v Commonwealth* (2006) 229 CLR 1
- Rossmick No 1 Pty Ltd v Bank of Queensland Ltd* (2008) 178 IR 373
- Stevens v Brodribb Pty Co Ltd* (1986) 160 CLR 16
- Westfield Holdings v Adams* (2001) 114 IR 241

3. Legislation

- Fair Work Act 2009* (Cth)
- Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)
- Independent Contractors Act 2006* (Cth)
- Independent Contractors Regulations 2007* (Cth)
- Industrial Relations Act 1996* (NSW)
- Industrial Relations Act 1999* (Qld)

Workplace Relations Act 1996 (Cth) (pre-WorkChoices Act)

Workplace Relations Act 1996 (Cth) (post-WorkChoices Act)

Workplace Relations Amendment (Work Choices) Act 2005 (Cth)

Workplace Relations Legislation Amendment (Independent Contractors) Act 2006 (Cth)

4. Other Sources

Australian Labor Party, *National Platform and Constitution* (2007)

Australian Labor Party, Policy Statement, *Forward with Fairness: Labor's Plan for Fairer and More Productive Workplaces* (2007)

Explanatory Memorandum, Fair Work Bill 2008 (Cth)

Independent Contractors Australia <<http://www.contractworld.com.au/>>

International Labour Organization, *Report of the Committee on the Employment Relationship* (2006)

Liberal and National Parties, *National Conference* (2004)

Liberal Party of Australia, *The Howard Government Election 2004 Policy Statement: Protecting and Supporting Independent Contractors* (2004)

Office of Workplace Services, 'Summary of the Investigation into Alleged Breaches of the *Workplace Relations Act 1996* at Cowra Abattoir', (Media Release, 7 July 2006)

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

Second Reading Speech, Fair Work Bill 2008 (Cth)

Second Reading Speech, Independent Contractors Bill 2006 (Cth)

OTHER WORKING PAPERS IN THIS SERIES

1. R Read, *Recognition, Representation and Freedom of Association under the Fair Work Act 2009* (August, 2009)