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Independent Contractors Act

This fact sheet is intended as a Guide to the provisions of the Independent Contractors legislation introduced into Parliament on 22 June 2006. It was produced by Kim Rickard, Michael Butler, Joseph Kelly and Jocelyn Fredericks and the information contained in it was correct at the time of writing. For further information, please contact the APESMA Branch in your State. Contact details are available from the APESMA website at www.apesma.asn.au.

The Independent Contractors Bill 2006 and the Workplace Relations Amendment (Independent Contractors) Bill 2006 were tabled in Parliament on 22 June, 2006.

Legislation summary

The principal Bill legislates for independent contractors to be regulated under commercial laws and institutions rather than being subject to any form of regulation under employment law. The objects of the Act are 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. The secondary Bill amends the Workplace Relations Act and legislates for penalties for sham arrangements.

Unfair contracts

- The unfair contracts provisions which were formerly part of the Workplace Relations Act (Sections 832-834) have been transferred to the Independent Contractors Act.
- The legislation extends the jurisdiction of the Federal Magistrates Court to hear cases associated with dispute resolution of unfair contracts for service.
- The provisions contain a cap on damages of $10,000
- Section 15(1)(a)-(c) provide for the relative strengths of the bargaining positions of the parties to the contract, for undue pressure, influence or unfair tactics used against a party, as well as the total remuneration of contractors compared to employees, to be taken into consideration.
- The drawbacks of this mode of redress are its expense, length and the extent of complex legalistic argument required to argue these matters. Pursuing an action in this supposedly low-cost jurisdiction means applicants may be subject to a costs order.

Removing protections provided by State IR laws

The Bill uses the Corporations Power to override state legislation which deems certain classes of contractors to be employees. The legislation provides for the removal of protections at the state level over a period of three years and at the conclusion of this three year period, state-based deeming provisions will cease to have effect. This will affect workers in NSW, QLD, SA and Tasmania.

Statutory recognition of ODCO arrangements
The Government has not included in the legislation statutory recognition of ODCO arrangements

Voluntary code of practice
The Government has indicated that DEWR will have a key role in developing a voluntary code of practice for independent contractors and the labour hire industry.

Common law definition
The legislation has not defined independent contracting beyond its meaning under common law. The Bill's Explanatory Memorandum sets out the multi-factor test used to distinguish between employees and contractors. The test is outlined in the 1986 High Court decision Stevens v Brodribb Sawmilling Co (http://www.austlii.edu.au/au/cases/cth/HCA/1986/1.html). The Courts have adopted a multi-factor test to determine employee/contractor status including the mode of remuneration, provision and maintenance of tools and equipment, the obligation/expectation to work, hours of work, provision for holidays, method of deduction of income tax, wearing of company clothing, and capacity to delegate work, but the principal determinative factor is the degree of control the engager exercises over the engagee. For further information on the definition of employee and contractor, refer to the Employee or contractor and The Law of Contract articles on the APESMA Connect website.
http://www.apesma.asn.au/connect/small_business/employee_or_independent.htm
http://www.apesma.asn.au/employment/connect/sbms/employment_contracts.asp

Challenging contractor status
The Bill amending the Workplace Relations Act 1996 provides for the Office of Workplace Services to investigate and prosecute sham independent contracting arrangements with offenders exposed to civil penalties. The penalty for misrepresenting an employee relationship as a contracting arrangement is a maximum $33,000 for a body corporate and $6,600 for an individual. Employers will bear the onus of establishing that the sole or primary purpose of dismissing an employee was not to re-engage them as a contractor. The degree to which the Office of Workplace Services will be transparent and open to public scrutiny is yet to be demonstrated.

Protections retained
The legislation retains protections for textile and clothing outworkers who will be deemed to be employees. The Bill provides for a default minimum rate of pay for contract outworkers. The status of transport industry owner-drivers will be protected on the basis that while they may be engaged by a single client, their income is derived from their truck or vehicle rather than labour or skills. The Government has signalled its intention to review these arrangements in 2007 with a view to national uniformity and has indicated that it does not intend to replicate these exclusions for any other parties.

Occupational health and safety
The legislation is silent on the obligations of labour suppliers and host employers' responsibilities for occupational health and safety. This is a major concern with wide-ranging implications for employees, contractors and the broader community.

Interface with WorkChoices legislation
Under Section 515 of the Workplace Relations Act, restrictions on the engagement of independent contractors and requirements relating to the conditions of their engagement, and restrictions on the engagement of labour hire workers, and requirements relating to their engagement, became non-allowable award matters.

The secondary Bill amending the Workplace Relations Act provides for penalties for employers who “disguise” employees as independent contractors, coerce them into operating as independent contractors or who make false statements to employees to persuade them to accept contracting arrangements.

APESMA holds the view that if used, the following guidelines should be applied:

- the security of employment of employees is not to be prejudiced;
- contractors should not be used to meet developing work demands that are of a permanent and ongoing nature;
- contractors should not be used as a device to avoid delivery of training to permanent employees and the development of an in-house capacity to undertake the work;
- the relevant union/employee associations should be consulted before contractors are engaged;
- contractors should be required to comply, as a condition of engagement, with all relevant awards, enterprise agreements, legislation, codes of practice and quality standards;
- the engaging organisation should develop appropriate contract management skills of its permanent staff;
- in the event that a dispute arises over the engagement of contractors or in relation to a particular contract or contractor it will be resolved through an appropriate dispute settling procedure which includes provision for matters unresolved to be referred to the AIRC for settlement; and
- contractors themselves should be entitled to contract terms that are not harsh or unfair but which are based on the minimum entitlements under awards and enterprise agreements for permanent employees in the establishment doing the same or similar work.

With the WorkChoices legislation outlawing any regulation or restrictions on the use of contractors or labour hire workers by employers, APESMA believes there will be an impact on the security of employment for collectively represented employees whose salaries and conditions of employment may be undercut. Independent contractors will be by definition outside employment regulation and protections of industrial instruments such as awards, health and safety legislation, long service leave legislation and superannuation.

APESMA’s view

APESMA is not opposed to the use of independent contractors to disperse specialist professional skills in short supply throughout industry or to cover peak workloads. Nor are we are opposed to regulation of genuine commercial contracts for service by commercial law.

APESMA is however opposed to regressive labour market deregulation which seeks to remove or override mechanisms currently in place to ensure that persons within disguised employment relationships have access to the protections they are due. APESMA is opposed to employers contriving to place segments of workers outside the framework of standard employment protections, rights and benefits. We are committed to industrial regulation in cases where employers are attempting to avoid their employment obligations by way of artificial or contrived arrangements which may be specifically designed to place workers outside the regulatory protective framework.

In considering contracting and the employment relationship at its meeting in Geneva in June 2006, the International Labour Organisation resolved that while genuine commercial and independent contracting arrangements should not be interfered with, there is a need for mechanisms to ensure that persons within disguised employment relationships have access to the protection they are due. APESMA shares this view.

Note re ODCO

ODCO - how it works

The ODCO system is used in the context of labour hire agencies

In structuring their arrangements with a client, labour hire workers and themselves, labour hire agencies can choose to put in place an employment arrangement with workers which involves them covering the cost of workers compensation, payroll tax, PAYG tax deductions and any other obligations arising from relevant industrial instruments including long service leave, annual leave, etc. The labour hire agency effectively functions as an employer engaging workers as employees. This is not an ODCO arrangement.

The alternative way of structuring the labour hire agency's arrangements between client, workers and themselves is to engage workers as independent contractors (rather than as employees). These arrangements were the arrangements in place and contested in the ODCO matter.

Key features of the ODCO system

The key features of the arrangements between worker and labour hire agency under the ODCO system are:

- the worker signs an agreement with the labour hire agency to the effect that the arrangement between them is not one of employer and employee;
- the workers and labour hire agency agree on a set hourly rate and the worker is paid an amount based on the actual number of hours worked and this hourly rate;
- he worker accepts responsibility and liability for workers compensation, taxation arrangements, public liability and accident insurance and for supplying their own equipment;
- the worker agrees to having no rights which might otherwise accrue under relevant industrial instruments such as sick leave, annual leave, long service leave, etc.;
- the worker agrees that there is no obligation on the part of the labour hire agency to provide an engagement on any given day or at a particular workplace, nor is there an obligation on the part of the worker to accept an engagement offered by the agency.

The key features of the arrangements between labour hire agency and their client under the ODCO system are:

- the labour hire agency agrees to provide labour to the client;
- the client pays the labour hire agency an agreed amount for the workers engaged according to the number of hours worked;
- the client pays the labour hire agency a specified amount should the worker become a direct employee of the client;
- the client can ask the labour hire agency to provide a different worker where they are dissatisfied with them;
- the client will direct the worker to perform the work required.

For a labour hire agency, ODCO arrangements have the advantage of precluding exposure to claims for entitlements under any relevant industrial instrument such as annual leave, sick leave, long service leave and unfair dismissal, and the on-costs incurred by employers such as superannuation, workers compensation, etc.

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