

Industrial Relations & Employment Alert

December 2006

Independent Contractors Bill 2006

The essential features of the new federal regulatory regime for independent contractors were set out in our June 2006 [*Industrial Relations & Employment Alert*](#). The Bill has now passed through Federal Parliament and will become law, although the date of effect has not yet been announced.

To briefly recap, the main features of the Bill are:

- **The new laws will apply to a "services contract"**; ie a contract to which an independent contractor is a party which relates to the performance of work by that contractor, and where there is a "requisite constitutional connection". The requisite constitutional connection exists where one party to the contract is a constitutional corporation or the Commonwealth, or where the contract relates to work in a Territory.
 - With a limited number of exceptions, and subject to the transitional provisions, it **excludes the operation of State and Territory laws which alter the status of independent contractors** by treating them as employees, or which otherwise confer rights, entitlements, obligations and liabilities on a party which in an employment relationship would be "workplace relations matters" as defined. A transitional period of up to 3 years applies for existing contracts of this type.
 - The establishment of a **national services contract review scheme** to be administered by the Federal Court or Federal Magistrates Court, which can decide whether a contract is unfair and/or harsh and, if so, make certain remedial orders.
 - **Prohibitions on sham contracting arrangements, and coercive conduct** relating to such arrangements.
 - **Special protections for out-workers** in the textile, clothing and footwear industry.
 - **Continuation for now of specific legislation for vehicle owner drivers** under New South Wales and Victorian industrial law.
- In passing through Parliament the Bill was subject to some amendments, principally relating to the "sham arrangements" provisions, including:
- providing a defence, if the principal is not reckless, to what would otherwise be breaches of the civil remedy provisions relating to sham arrangements; and
 - providing for the Federal Court or Federal Magistrates Court to order

Key Points

- **The federal *Independent Contractors Bill* has now been passed and will commence on a date to be announced.**
- **There are a number of steps which companies need to take to assess the effects of the new laws for them and to determine what further actions they should take.**

the reinstatement of a person, or payment of compensation to a person dismissed in breach of the sham arrangements provisions.

As noted in our June Alert, the Bill also provides for regulations to prescribe some important details. These regulations are not yet available and, if the implementation of the Bill is similar to the Work Choices amendments to the *Workplace Relations Act*, the regulations may not be available until shortly prior to commencement of the Bill. For a more detailed account of the Bill please refer to our June Alert.

Risks and opportunities

This Alert identifies some of the issues which companies party to services contracts need to consider. Companies should recognise that the legislation may present some risks to be managed, as well as some potential opportunities.

Reviewing existing contracting arrangements

It will be appropriate for companies to review their existing contracting arrangements to assess the impact of the legislation, which may include:

- assessing whether persons engaged as independent contractors truly have that status, or may on closer

analysis be found to be employees. The Bill itself does not define an independent contractor, but relies on the common law multi-factor test. Where an assessment indicates a person is correctly characterised as an employee, the *Workplace Relations Act* will apply, and the operation of the Australian Fair Pay and Conditions Standard or applicable industrial instruments will need to be considered;

- considering how the terms of existing services contracts would be viewed by a court in the event of claims that they are unfair or harsh under the new contract review scheme; and
- assessing the effectiveness of current precautions or controls to ensure that the company is not exposed to claims that a contract is unfair or harsh, or to claims under the anti-sham provisions.

Some particular issues and potential choices

Companies should also give consideration to particular issues, that will arise for deemed employees (especially in New South Wales and Queensland) or other contractors afforded employee like entitlements under State laws, including:

- Will it be appropriate to continue with existing contracting arrangements when current contracts expire, or at the end of the transitional period?
- What will be the most appropriate arrangements for the future?
- Should the company seek to “opt in” to the new independent contracting arrangements prior to the expiry of current agreements, or wait for the expiry of the transitional period?
- Upon opting in or transition what will become of any accumulated entitlements such as annual leave or long service leave?
- Will trade unions still be eligible to represent independent contractors? This will depend on the rules of the particular union. Companies also need to be mindful of the application of freedom of association law to independent contractors;
- Whether negotiations with independent contractors are to be collective or individual.

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