

## □ WORKCHOICES UPDATE

## Unfair dismissal: the gate remains open

There was much said about that part of the WorkChoices legislative package that sought to stop employees from challenging their dismissals where those dismissals arose from “genuine operational reasons” (section 643(8)).

Now the Australian Industrial Relations Commission (AIRC) has made it clear that just calling a termination a “redundancy” will not of itself be good enough to stop an unfair dismissal claim i.e. it must be a genuine redundancy.

The case which has decided this is *Perry v Savills (Vic) Pty Ltd*. In this case, Savills terminated the employment of its Finance and Administration Manager Ms Perry (who had recently been diagnosed as having a long-term illness). The company positioned the termination as a redundancy but Senior Deputy President Watson did not buy that. The result for

Savills is that Ms Perry’s unfair dismissal claim can now proceed.

What does this mean for employers? The previous assumption had been that, provided an employee was paid out as redundant, the termination could not be challenged. That assumption no longer applies. The redundancy must be objectively genuine and the AIRC has the power to investigate the case in order to determine that it is indeed genuine. So for employers who thought that the unfair dismissal gate had been firmly shut on redundancies: the gate just swung open.

## □ INDEPENDENT CONTRACTORS BILL

Independent Contractors Bill:  
‘freedom’ on the agenda

When we look back at the history of the early part of the 21st century we will find the word “freedom” all over the place. Whether it is the fight against terrorism, the war in Iraq or border security issues, governments across the western world have loudly pronounced “freedom” as the justification for almost every action they take.

Which brings us to the new independent contractors legislation (foreshadowed in our last *Workplace Relations Law Bulletin*) that the Commonwealth Government has now brought into the Parliament. There it is again, our old

friend “freedom”: in his second reading speech the Minister for Workplace Relations Kevin Andrews says that the Bill “...protects the freedom of independent contractors to enter into the contracts of their choice”.

## in brief

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## Orders against industrial action

Ebsworth & Ebsworth recently acted for a company which was affected by some lightning industrial bans. The bans arose from a dispute over redundancy pay and the union involved decided that it would not bother with the new laws which compel participants in industrial action to first obtain Australian Industrial Relations Commission (AIRC) approval.

The result was that an application was made to the AIRC for orders under section 496 of the *Workplace Relations Act 1996*. This was significant and the AIRC duly issued the orders. The bans were lifted straight away so the application was not only successful in a legal sense but the practical outcome was also achieved.

So the new laws are having an effect. The AIRC now has **no option** when an application for orders is made if the industrial action is occurring and the action is illegal (i.e. not approved by the AIRC and voted on in a secret ballot by the employees) the AIRC **must** issue orders stopping the action.

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## What does the Bill really do?

Here is a quick summary:

### i. Unfair contract proceedings

The Bill establishes a new regime that allows parties (both natural persons and corporations) to make application to either the Federal Magistrates Court or the Federal Court itself in respect of contracts which are alleged to be “unfair or harsh”. Where a corporation makes such an application either a director or family member of that director must perform the work in question.

Interestingly, under section 16 of the Bill, it would seem that the court can make an order either varying the contract or setting it aside but we cannot find a specific power to make an order of monetary compensation. How this enshrines “freedom” is unclear.

### ii. State laws

State laws dealing with independent contractors are now excluded if they deem an independent contractor to be an employee, or if those laws deal with “workplace relations matters” in the context of an independent contract. This would seem to blow section 106 of the New South Wales legislation out of the water at least where independent contracts are concerned.

However the Government has preserved (at least for the moment) the state laws relating to lorry owner drivers in New South Wales and Victoria. Those laws will be looked at again in 2007 (presumably after the election). No doubt the TWU will be campaigning vigorously to ensure that these state laws remain untouched for the long-term.

### iii. Sham arrangements

The second part of the Bill (which actually makes amendments to the *Workplace Relations Act 1996*) specifically prevents parties from entering into “sham” independent contracts. The Federal Magistrates Court and the Federal Court are empowered to deal with complaints under this division.

Essentially this will provide some specific legal remedies where so-called independent contracts are in place. A number of industries have been rife with such arrangements, particularly in recent years, so it will be interesting to see how busy the Federal Magistrates Court becomes.

### iv. Outworkers in the textile, clothing and footwear industry

There are specific protections for these workers and they get a minimum wage guarantee which is on par with the minimum guarantee for employees under WorkChoices. There are record keeping requirements as well to ensure that those who engage outworkers must keep proper records.

What we cannot find anywhere is a statutory definition of “independent contractor”. This will mean that the common law tests still apply, that is, the degree of control over the work will largely determine whether it is a genuine independent contract.

Obviously this is a very significant piece of legislation. It will greatly affect the building industry and also industries such as cleaning, catering and security where independent contractors appear in heavy numbers. It is foreseeable that the Federal Magistrates Court may be used as a testing ground even though costs orders will be difficult to obtain there.

We caution all our clients who are contemplating entering into independent contracts to take advice before doing so.

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