

# Industrial Relations & Employment Alert

June 2006

## Independent Contractors Bill 2006

On 22 June 2006 the Federal Government introduced the much awaited *Independent Contractors Bill 2006* (IC Bill) to Federal Parliament. The IC Bill is a continuation of the Government's legislative reform of workplace arrangements, and like the *Work Choices* amendments to the *Workplace Relations Act 1996* (Cth) (WR Act), is founded on the corporations power of the Constitution.

The IC Bill aims to have genuine independent contracting arrangements regulated by federal legislation, common law and equity and to exclude industrial and employment laws which currently influence such commercial arrangements. For the purposes of the IC Bill, an "independent contractor" will be as determined by the common law which applies a multi-factor test including the extent of the worker's control over the manner in which work is performed, and whether the worker supplies equipment and is able to perform work for other employers.

Set out below are the key aspects of the IC Bill.

### Application of the IC Bill

The IC Bill will apply to a "Services Contract". That is, a contract:

- to which an independent contractor is party;
- which relates to the performance of work by the independent contractor; and
- where there is a requisite constitutional connection.

The "requisite constitutional connection" will exist where at least one party to the contract is a constitutional corporation, Commonwealth authority or body corporate incorporated in a Territory.

It will also exist where the work is principally to be performed in a Territory, the contract was entered into in a Territory, at least one party is a natural person who is resident in a Territory, or, where a party is a body corporate, its principal place of business is in a Territory.

A condition or collateral arrangement which relates to a Services Contract is also taken to be part of that Services Contract.

### Exclusion of State and Territory laws

The IC Bill purports to exclude State and Territory laws (subject to the transitional arrangements described below) which:

- alter the status of independent contractors so that they are to be treated as employees;
- confer rights, entitlements, obligations and liabilities on a party to a Services Contract which in an employment relationship would be "workplace relations matters". These are defined to include matters relating to remuneration, allowances, leave entitlements, hours of work, enforcement and termination of contracts, disputes, industrial action and any other matter which substantially relates to employers or employees and is dealt with by the WR Act or a State or Territory industrial law; and

- allow a body to review, vary or set aside a Services Contract on an "unfairness ground", including a finding that the contract is unfair, harsh or unconscionable, unjust, against the public interest or designed to avoid the provisions of a State or Territory industrial law.

The IC Bill does not however exclude the application of laws dealing with such matters as discrimination, superannuation, workers compensation, occupational health and safety (including right of entry), deductions from wages or salaries and taxation.

### Owner-drivers

The IC Bill preserves for now the existing State arrangements and protections for owner-drivers in New South Wales under Chapter 6 of the *Industrial Relations Act 1996* (NSW), and in Victoria under the *Owner Drivers and Forestry Contractors Act 2005* (Vic). The Government has however announced that it will undertake a review of the regulation of owner-drivers in 2007.

### Service contract review scheme

The IC Bill introduces a national Services Contract review scheme which allows parties to a Services Contract to apply to the Federal Magistrates Court or the Federal Court (the Court) for a review on the ground that the contract is unfair and/or harsh. This national scheme will exclude the application of State "unfair contracts" legislation to Services Contracts, and will replace the existing unfair contracts provisions of the WR Act.

The review scheme will not apply to:

- a Services Contract for work for private and domestic purposes; or
- an independent contractor that is a body corporate unless the work is wholly or mainly undertaken by a director or family member of a director of the body corporate.

In reviewing a Services Contract, the Court may have regard to any of the following matters:

- the relative strengths of the bargaining positions of the parties;
- whether there has been any undue influence, pressure exerted or unfair tactics used;
- whether the contract provides total remuneration that is, or is likely to be, less than that of an employee performing similar work; and
- any other matter the Court thinks is relevant.

If the Court forms the opinion that the Services Contract is unfair and/or harsh, it may make an order setting aside the contract in whole or part, or varying the contract for the purpose of placing the parties (as nearly as practicable) on such a footing that the ground upon which the opinion is based no longer applies.

The Court has very limited powers to award costs.

The IC Bill also seeks to prevent a person initiating proceedings which would create "double-dipping" in respect of the Services Contract.

## Contract outworkers in the textile, clothing and footwear (TCF) industry

The IC Bill makes specific provision for minimum payments for independent contractors working as outworkers in the TCF industry.

## Transitional arrangements

The IC Bill prescribes arrangements for a 3 year transitional period for Services Contracts entered into prior to the commencement of the IC Bill (to be known as "pre-reform commencement contracts").

State or Territory laws that deem an independent contractor to be an employee, or otherwise afford employee like entitlements to an independent contractor, will continue to apply until:

- the parties to the contract agree that the transitional scheme should no longer apply (known as a "reform opt-in agreement");
- the contracting relationship ceases (by effluxion of time or by unilateral act); or
- if the contracting relationship has not ceased, at the end of the 3 year transitional period.

The transitional provisions do not however, otherwise extend the operation of existing unfair contracts laws.

Where a contract ends during the 3 year transitional period and the parties enter into a new contract there is some scope for the transitional provisions to continue to apply.

There is a prohibition on persons engaging in conduct with the intent to coerce another person to enter or not enter into a "pre-reform opt in agreement". Penalties apply to such conduct.

## Regulations (details not yet available)

As with the *Work Choices* amendments to the WR Act, the IC Bill provides for Regulations to prescribe some important details associated with the IC Bill, including other laws whose operation may be excluded by the IC Bill and circumstances in which applications for review of a Services Contract cannot be made such as a financial cap.

## Future progress of the IC Bill

Federal Parliament has now retired for its winter recess and does not resume until 8 August 2006. The timing of the progress of the IC Bill through Parliament, together with any potential amendments, is therefore not certain.

## Action points for employers

- **In the interim it would be prudent for businesses to begin reviewing independent contractor arrangements to which they may be a party and consider the potential impact of the IC Bill to such arrangements.**

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