

December 2006

## Independent Contractors Bills Amended by the Senate

The Federal Government has passed 2 bills - the *Workplace Relations Legislation Amendment (Independent Contractors Bill) 2006* (WR Bill) and the *Independent Contractors Bill 2006* (IC Bill) that will alter the laws governing independent contractors for those businesses governed by the WorkChoices regime (ie constitutional corporations).

Previous CK Alerts' have outlined the content of these Bills. This Alert outlines the key features of the Senate amendments that will become law once they undergo the formality of Royal Assent.

### SHAM ARRANGEMENTS

'Sham arrangements' occur if an employment relationship is misrepresented as an independent contract for services. The WR Bill clarifies that the defence of recklessness applies to its prohibitions against sham arrangements. This allows the person making the representation to show that they did not know and were not reckless as to whether the contract (or proposed contract) was an employment rather than a service contract.

The *Building and Construction Industry Improvement Act 2005* will also be amended to allow the Australian Building and Construction Commissioner and Inspector to investigate and bring court proceedings against the sham penalty provisions.

### REMEDIES FOR DISMISSAL

Under the WR Bill, a re-engagement penalty applies if an employee is dismissed (or threatened with dismissal) for the sole or dominant purpose of re-engaging them to perform the same work as an independent contractor. The Bill amends the remedies available to include reinstatement, an order of compensation and interim injunctions to prevent contraventions of the proposed provision.

### UNFAIR CONTRACTS

The IC Bill makes a slight change to the provision that excludes State unfair contracts jurisdictions, stating that only those State laws that expressly provide for a court to make a contract void are excluded. This narrows the State laws excluded by the Bill and does not override laws (such as *Industrial Relations Act 1996* (NSW) s406(2)) that state provisions of a contract do not have effect to the extent that they provide an employee with a benefit that is less favourable than the benefit to which they would have been entitled to under an industrial instrument.

Future unfair contract claims must be brought under the unfair contracts provisions in Part 3 of the IC Bill that allows the Federal Magistrates Court and the Federal Court to vary or set aside services contracts that are harsh or unfair. The Court can take into account relative bargaining power; undue influence; and any other relevant matter.

The Senate amendments make it no longer mandatory for the Court to consider whether the contract provides total remuneration that is less than that of an employee performing similar work, although this may be taken into consideration.

A further amendment clarifies the Court's powers stating that in reviewing a services contract it must only have regard to whether the contract was unfair or harsh at the time the contract was made. Consequently, any subsequent changes affecting fairness are irrelevant in the Federal unfair contract jurisdiction; this necessarily restricts the operation of 'other matters' that the Court can consider.

A new subsection codifies the common law position that a 'services contract' includes a new contract varying an old contract and therefore, these are also capable of review.

## **OUTWORKERS**

The above changes to the IC Bill do not affect the right of outworkers to recover their full entitlement arising from relevant State instruments as there was a unanimous recommendation by the Senate Employment, Workplace Relations and Education Committee to ensure this 'anti-avoidance' legislation was not overridden.

The Bill also removes the minimum remuneration guarantee for independent contractor outworkers in the textile, clothing and footwear industry as they are adequately covered by the State laws.

## **Queensland Government's Response to WorkChoices**

In the wake of the High Court upholding the constitutional validity of the Federal Government's WorkChoices regime, the Queensland Government has proposed legislation that would strengthen child labour laws and good faith collective bargaining provisions. This is only possible because WorkChoices preserves state governments' right to legislate in the area of child labour.

The Queensland Government has also attempted to protect minimum entitlements; established an advisory hotline and a proposed Workplace Rights Office to advise workers, promote fair practices and investigate illegal activity by employers.

The Queensland Industrial Relations Commission is also undertaking an inquiry into WorkChoices. We will keep you updated on its progress.

### **HOW DOES THIS AFFECT YOU?**

- Ensure that you properly characterise your workers relationships as employees or independent contractors so they will not be classed as a 'sham'. If you are unsure, contact us and we will review your arrangements.
- The express unfair contract jurisdiction in State law is overridden and replaced by the Federal Government's own unfair contracts regime.
- Be alert as to upcoming changes in relation to Queensland child labour laws.



Lisa Honeychurch  
Senior Associate

