

Independent Contractors Act: employees to contractors - why is it an issue?

by Kim Rickard

In the world of work, contract is the legal foundation that underpins a relationship of service or services. It is a bundle of binding rights and obligations agreed between the parties in relation to which mutual promises of performance are made. The law of contract is founded on consent, which is presumed to exist between contractual parties, and enforced by the law on the basis that people who make promises to others who rely on them ought to be held to their commitments. The law however takes no formal account of differences in bargaining power. The law assumes the parties are equal in every way and as such freely entered into the contract, wishing it to be performed according to its terms. The presumption stands to bind the parties unless there is evidence of conduct that vitiates the underlying consensus such as, for instance, duress, misrepresentation or unconscionable conduct. The mere fact though that one party, like an employer, is in a stronger bargaining position than the other and exercises power because of that position, is not sufficient to vitiate the underlying consensus.

The formal position was expressed by his Honour Justice Handley of the NSW Court of Appeal in *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1 at 42 when he said:

Parties negotiating for a contract are free to pursue their own interests as they see fit. Within broad limits there is no duty to consider the interest of the other ... Negotiations are conducted at the discretion of the parties. They may withdraw or continue; accept, counter-offer or reject; compromise or refuse, trade-off concessions on one matter for gains on another and be as unwilling, willing or anxious and as fast or as slow as they think fit ..."

It is mainly because of the bargain-centred focus of contract and its historical failure to deliver fair outcomes to employees and protect them from the consequences of employer power, that a remedial system of industrial law based around organised labour developed in industrialised countries.

There are two basic contractual categories in the world of work: a contract of service and a contract for services. The first describes an employment relationship, the second describes a relationship of principal and independent contractor.

The distinction between an employee and independent contractor is highly significant, not only because of the differences in the relationship it suggests, but more importantly, because of the significantly different rights and obligations that attach to each. Industrial awards and workplace agreements made under Federal and State legislation typically only apply to employees who are generally entitled to legislative rights such as annual leave, parental leave, unfair dismissal and workers compensation.

As part of its 2004 election platform, the Coalition announced its intention to amend the general objectives of the Workplace Relations Act to "ensure the concept of freedom to contract is protected, promoted and enhanced". The specifics would be set out in an Independent Contractors Act. While the supposed object of the Act is to protect contractors, in fact working as an independent contractor potentially excludes those

working under these arrangements from legislative rights and protections afforded by employment legislation. In fact, the object of the Act as outlined by the Government can be seen to be removing these fundamental protections and rights in the name of modernity and flexibility.

The proposed Act is also a response to the difficulties with so-called “dependent contractors” which sit at the intersection of commercial and labour law. These contractors may be employees who are operating under disguised employment arrangements which allow an employer to avoid costs arising out of employment obligations.

Proposals set out in the Government’s Discussion Paper consider options to ensure such workers are regulated by commercial rather than labour law. These include overriding State deeming provisions and unfair contracts provisions. These provisions are often a response to unscrupulous employers contriving to place individuals outside workplace regulations to avoid their employment obligations. They aim to provide protection to those working in disguised employment relationships. The Government’s legislation would effectively remove these protections. Again, in contrast to the stated intent of the Act, the aim of the Independent Contractors Act appears to be to effectively remove these protections and sanction unscrupulous employers operating outside the standard regulatory protections.

In considering the paper “The Scope of the Employment Relationship” at its meeting in Geneva in 2003, 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.

APESMA is not opposed to the use of independent contractors for covering workflow peaks, meeting deadlines and to disperse specialist professional skills in short supply throughout industry where there are genuine choices in forms of employment, but is opposed to labour market deregulation which allows unscrupulous employers to contrive to place segments of workers outside the framework of standard employment protections, rights and benefits.

APESMA is committed to a system of industrial regulation which acknowledges the potentially more powerful bargaining position of employers, and which will deliver **fair outcomes, genuine choices and flexibility to employees**. The proposals set out in the Government’s Discussion Paper suggest that the proposed Independent Contractors Act will undermine protections afforded by employment law. Whatever your political leanings or ideological beliefs, the Independent Contractors Act is sure to be more about removing protections than enshrining them.

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