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Briefing note re Independent Contractors Bill

The Independent Contractors Bill 2006 and the Workplace Relations Amendment (Independent Contractors) Bill 2006 were tabled in Parliament on 22 June, 2006.

Legislation summary

The principal Bill legislates for independent contractors to be regulated under commercial laws and institutions rather than being subject to any form of regulation under employment law. The objects of the Act are to protect the freedom of independent contractors to enter into services contracts, to recognise independent contracting as a legitimate form of work arrangement that is primarily commercial, and to prevent interference with the terms of genuine independent contracting arrangements. The secondary Bill amends the Workplace Relations Act and legislates for penalties for sham arrangements.

Unfair contracts

- The unfair contracts provisions which were formerly part of the Workplace Relations Act (Sections 832-834) have been transferred to the Independent Contractors Act.
- The legislation extends the jurisdiction of the Federal Magistrates Court to hear cases associated with dispute resolution of unfair contracts for service.
- The provisions contain a cap on damages of \$10,000
- Section 15(1)(a)-(c) provide for the relative strengths of the bargaining positions of the parties to the contract, for undue pressure, influence or unfair tactics used against a party, as well as the total remuneration of contractors compared to employees, to be taken into consideration.
- The drawbacks of this mode of redress are its expense, length and the extent of complex legalistic argument required to argue these matters. Pursuing an action in this supposedly low-cost jurisdiction means applicants may be subject to a costs order.

Removing protections provided by State IR laws (deeming provisions under state IR laws)

The Bill uses the Corporations Power to override state legislation which deems certain classes of contractors to be employees. The legislation provides for the removal of protections at the state level over a period of three years and at the conclusion of this three year period, state-based deeming provisions will cease to have effect. This will affect workers in NSW, QLD, SA and Tasmania.

Statutory recognition of ODCO arrangements

The Government has not included in the legislation statutory recognition of ODCO arrangements

Voluntary code of practice

The Government has indicated that DEWR will have a key role in developing a voluntary code of practice for independent contracting.

Common law definition

The legislation has not defined independent contracting beyond its meaning under common law.

Challenging contractor status

The Bill amending the Workplace Relations Act 1996 provides for the Office of Workplace Services to investigate and prosecute sham independent contracting arrangements with offenders exposed to civil penalties. The penalty for misrepresenting an employee relationship as a contracting arrangement is a maximum \$33,000 for a body corporate and \$6,600 for an individual. Employers will bear the onus of establishing that the sole or primary purpose of dismissing an employee was not to re-engage them as a contractor. The degree to which the Office of Workplace Services will be transparent and open to public scrutiny is yet to be demonstrated.

Protections retained

The legislation retains protections for textile and clothing outworkers who will be deemed to be employees. The Bill provides for a default minimum rate of pay for contract outworkers. The status of transport industry owner-drivers will be protected on the basis that while they may be engaged by a single client, their income is derived from their truck or vehicle rather than labour or skills. The Government has signalled its intention to review these arrangements in 2007 with a view to national uniformity and has indicated that it does not intend to replicate these exclusions for any other parties.

Alienation of Personal Services Income legislation (PSI)

The Alienation of Personal Services Income legislation which became effective on 1 July 2000 removed most of the potential tax advantages for personal services contractors. Independent contractors must cover expenses such as salary continuance or income protection, superannuation, professional indemnity insurance themselves, but they are not necessarily regarded by the ATO as determinants of whether contractors are operating a personal services business.

While the PSI legislation was intended to prevent individuals who generate income from their personal services from reducing their liability to taxation by diverting income through a company, partnership or trust, the legislation and related ATO Rulings saw the ATO denying personal services business status and therefore legitimate business deductions to many professionals operating as independent contractors including professional engineers and IT professionals. The PSI legislation has had the unintended consequence of denying access of legitimate contractors to business deductions on the basis that they work to a single client for a period of time greater than 12 months and did not therefore pass the 80/20 income test while at the same time engaging in commercial arrangements which did not allow them to pass the results test.

The lack of understanding of the legislation amongst those who may in future choose to operate as independent contractors is a major issue for APESMA and the professionals we cover.

The situation is that professionals who are legitimately operating as independent contractors may gain multiple or ongoing contracts with a single client, and may undertake major infrastructure projects over a period of three to five years. These individuals are penalised under the PSI legislation. The extent of individuals including professionals affected by this contradiction is likely to increase with the introduction of the Independent Contractors Bill. The Government has not satisfactorily resolved this issue while at the same time providing the legislative basis for potentially thousands of workers to move into independent contracting.

For further information on PSI, visit the Connect website at http://www.apesma.asn.au/connect/bus_tax.htm.

Occupational health and safety

The legislation is silent on the obligations of labour suppliers and host employers' responsibilities for occupational health and safety. This is a major concern with wide-ranging implications for employees, contractors and the broader community.

Interface with WorkChoices legislation

Under Section 515 of the Workplace Relations Act, restrictions on the engagement of independent contractors and requirements relating to the conditions of their engagement, and restrictions on the engagement of labour hire workers, and requirements relating to their engagement, became non-allowable award matters.

The secondary Bill amending the Workplace Relations Act provides for penalties for employers who "disguise" employees as independent contractors, coerce them into operating as independent contractors or who make false statements to employees to persuade them to accept contracting arrangements.

APESMA holds the view that while necessary in some circumstances, contractors should be used by employers within the following guidelines:

- the security of employment of employees is not to be prejudiced;
- contractors should not be used to meet developing work demands that are of a permanent and ongoing nature;
- contractors should not be used as a device to avoid delivery of training to permanent employees and the development of an in-house capacity to undertake the work;
- the relevant union/employee associations should be consulted before contractors are engaged;
- contractors should be required to comply, as a condition of engagement, with all relevant awards, enterprise agreements, legislation, codes of practice and quality standards;
- the engaging organisation should develop appropriate contract management skills of its permanent staff;
- in the event that a dispute arises over the engagement of contractors or in relation to a particular contract or contractor it will be resolved through an appropriate dispute settling procedure which includes provision for matters unresolved to be referred to the AIRC for settlement; and
- contractors themselves should be entitled to contract terms that are not harsh or unfair but which are based on the minimum entitlements under awards and enterprise agreements for permanent employees in the establishment doing the same or similar work.

With the WorkChoices legislation outlawing any regulation or restrictions on the use of contractors or labour hire workers by employers, APESMA believes there will be an impact on the security of employment for collectively represented employees whose salaries and conditions of employment may be undercut.

APESMA's view

APESMA is not opposed to the use of independent contractors to disperse specialist professional skills in short supply throughout industry or to cover peak workloads. Nor are we opposed to regulation of genuine commercial contracts for service by commercial law.

APESMA is however opposed to regressive labour market deregulation which seeks to remove or override mechanisms currently in place to ensure that persons within disguised

employment relationships have access to the protections they are due. APESMA is opposed to employers contriving to place segments of workers outside the framework of standard employment protections, rights and benefits. We are committed to industrial regulation in cases where employers are attempting to avoid their employment obligations by way of artificial or contrived arrangements which may be specifically designed to place workers outside the regulatory protective framework.

In considering contracting and the employment relationship at its meeting in Geneva in June 2006, 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.

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