

Independent Contractors Act - where's the protection?

With 2001 Productivity Commission estimates indicating that over 10 per cent self-employed contractors are professionals, APESMA has a particular interest in the Independent Contractors Bill tabled on 22 June, 2006. APESMA provides services to its membership of over 3,500 contractors and consultants through its special interest group Connect (www.apesma.asn.au/connect).

As expected, the Bill is likely to impact on both contractors and employees and is likely to mean further uncertainty, greater reliance on common law litigation, and reduced protection for the increasing number of independent contractors and consultants.

“Dependent” and independent contractors

A recent University of Melbourne study found that up to 400,000 workers currently classified by the Government as ‘independent contractors’ are actually employees that do all their work for the one employer or client. The study found that as many as four out of every ten contractors are ‘dependent’ not ‘independent’. The Independent Contractors Bill does not solve the problem of defining and more importantly protecting these individuals who are at the intersection of employment and commercial law, and will simply allow more employers to avoid their responsibility for paying superannuation, workers compensation, annual leave and other basic entitlements.

Those covered by state deeming provisions - which aimed to provide protections for “dependent” contractors working largely for a single client by regulating for such items as workers compensation and superannuation - will have these protections removed over a three-year period.

Employee vs independent contractor

With the Government deciding to rely on the Common law test of whether or not a worker is an employee or independent contractor, and the establishment of an unfair contracts jurisdiction in the Federal Magistrates Court, determining the status of employee versus independent contractor is likely to result in increased common law litigation. The drawbacks of this mode of redress are its expense, length and extent of complex legalistic argument required to argue these matters.

Exemptions for outworkers and owner-drivers

While APESMA is pleased that protections for contracting outworkers and owner-drivers have been included, there is little protection afforded for others including professionals.

What are the implications for professionals?

While APESMA believes that the use of contractors to disperse specialised professional skills and expertise, and to cover workflow peaks is legitimate, we have major concerns about the long-term impact of this legislation in terms

of the threat to the security of employment and conditions of contractor and employee professionals, to occupational health and safety standards, and the likely increase in the use of contractors to meet developing work demands that are of a permanent and ongoing nature at the expense of the development of an in-house capacity to undertake the work.

Professional development and the skills shortage

APESMA is concerned that skills development and training levels may fall with independent contractors being responsible for their own professional development and this may compound an already critical skills shortage in a range of industries.

Retirement savings

APESMA also has a concern that retirement savings may be impacted with independent contractors responsible for their own superannuation planning.

Investigation of sham arrangements

The Office of Workplace Services has been given responsibility for policing non-genuine disguised employment arrangements. Whether the Office has the independence, resources and sufficient powers to effectively investigate and act on sham arrangements, and whether the penalties it applies will be adequate, will be judged over the coming years.

Alienation of Personal Services Income legislation

Professionals who decide to operate as Independent Contractors may be hit with a double whammy not addressed under the new Independent Contractors Bill. Not only will contractors moving across from employment to contracting arrangements be penalised by not having superannuation, workers compensation, annual leave and other entitlements costs covered, they may also be denied legitimate business deductions when the ATO enforces the Alienation of Personal Services Income (PSI) legislation.

The PSI legislation took effect on 1 July 2000 and 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. However, 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.

Legitimate independent contractors who gain multiple or ongoing contracts with a single client, or undertake major infrastructure projects over a period of time greater than 12 months can be penalised under the PSI legislation. These contractors are often highly specialised professionals whose skills are brought in to an enterprise for a medium to long-term project, but the ATO denies them the status of a personal services business under the PSI legislation on the basis that more than 80 per cent of their earnings are from the one client.

Independent contractors must cover expenses such as salary continuance or income protection, superannuation, professional indemnity and public liability insurance themselves, but payment of these is not necessarily regarded by the ATO as determinants of whether contractors are operating a personal services business. The ATO can make a Determination that the contractor is not a personal services business in spite of these indicators, meaning the contractor has no access to legitimate business deductions. Their only recourse is to appeal through a costly and legalistic process.

The extent of individuals - including professionals - affected by this contradiction is likely to increase with the introduction of the Independent Contractors Bill. Government has not satisfactorily resolved this issue while potentially providing for thousands of workers to move into independent contracting arrangements.

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

Diminishing tax revenue

The movement of many workers across to independent contracting brings with it difficulties in the form of diminished tax revenues for Government. APESMA concurs with Professor Andrew Stewart from Flinders University who in July last year asked the question - does the Government really want thousands of workers to suddenly "self-declare" as contractors? Over the last six years, APESMA has actively lobbied the Government and worked with the ATO to try to gain some transparency in the processes used to determine whether or not a contractor is defined as a personal services business and the extent to which those self-declaring are audited - with little success.

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. 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.

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. The difficulty of enforcing these provisions is likely to become evident in the upcoming 12 months.

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. Independent contractors will be by definition outside employment regulation and protections of industrial instruments such as awards, health and safety legislation, long service leave legislation and superannuation.

These issues have major implications for professionals. Continuing uncertainty surrounding the definition of employee vs contractor and the complex litigation likely to arise from it, the lack of understanding and potential impact of the PSI legislation on the personal services business status of the growing number of contractors, the impact of diminishing tax revenue, declining participation in professional development activities and its potential impact on current skills shortages, the removal of State deeming provisions and the interface with WorkChoices legislation, are all of major concern to your Association.

These changes suggest that independent contractors and professional employees alike need the support, assistance and protection of APESMA more than ever before.

For further information on the Independent Contractors Bill, visit the Connect website at www.apesma.asn.au/connect.

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