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Penalties will deter 'unscrupulous' employers: Feds

New civil penalties under independent contractors legislation (*Workforce Daily* [this morning](#)) will be more of a deterrent to unscrupulous employers seeking to disguise employment relationships as contracting arrangements than current remedies under the WR Act, the Fed Govt has said.

"A sham arrangement is an arrangement through which an employer seeks to cloak a work relationship to falsely appear as an independent contracting arrangement in order to avoid responsibility for legal entitlements due to employees," the explanatory [memorandum](#) to the Independent Contractors [Bill](#) said. "Employees in disguised employment relationships should have appropriate remedies available to them as they are not, in reality, independent contractors."

A person or body corporate will have contravened the legislation if they: **misrepresent** an employment relationship as an independent contracting arrangement; **misrepresent** a proposed employment relationship as an independent contracting arrangement; **dismiss** someone for the purpose of re-engaging them as an independent contractor; or **knowingly** make a false statement about the arrangement. Penalties for breaches are \$6,600 for individuals and \$33,000 for bodies corporate. The OWS will prosecute offences.

Penalties for sham arrangements should apply to labour hire companies that employ workers who are "on-hired" to host businesses, as well as to other employers, it said.

Civil penalties offer a "cost-neutral" option for independent contractors, it said. They should have little impact on current independent contractors (between 800,000 and 1.9 million) as those employed under "sham" arrangements are thought to be "minimal", it said. "While an employee would be able to pursue a case individually, legal costs would generally be incurred by the Commonwealth which would pursue these cases on behalf of the employee," it said.

Current remedies available under the WR Act provide only for the recovery of wages and damages for loss, with some possibility of a penalty against an employer, it said.

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Test to determine independent contractor status

Decisions about what is a contracting relationship as opposed to an employment relationship will involve “complex and unravelling” factual situations, the Fed Govt has said. “Courts and tribunals need to carefully examine all the evidence against the settled multi-factor (indicia) test in coming to a decision about the true nature of the particular relationship.”

The explanatory [memorandum](#) to the Independent Contractors [Bill](#) outlines the multi-factor test to be used to distinguish between a contract of service (employment) and a contract for services (independent contract). The test is that outlined in the 1986 High Court decision [Stevens v Brodribb Sawmilling Co.](#)

The High Court found a “prominent factor” in determining the nature of the relationship is the degree of control the engager exercises over the engagee. The importance of control lies not so much in the right of the employer to exercise control, or whether work is done subject to direction and control and supervision, “but whether ultimate authority” over the person in the performance of their work resides in the employer so the employee is subject to the employer’s orders and directions.

Other criterion to be applied in determining the relationship are: the mode of remuneration; the provision and maintenance of equipment; the obligation to work; the hours of work and provision for holidays; the deduction of income tax; and the delegation of work by the employee to someone else.

(*Stevens v Brodribb Sawmilling Co Pty Ltd.* [HCA 1 of 1986](#). 13/2/86)

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Labour market just got more complex, confusing and costly: Combet

Today’s independent contractors legislation will make the labour market more complex and confusing, and will introduce a new generation of costly litigation, ACTU sec Greg Combet said this morning.

Sham arrangements would be “easier for business to force on employees”, who would be increasingly vulnerable as they were barred from collective bargaining. “It is very clear that one of the goals of this legislation is to make it extremely difficult for independent contractors to seek union representation,” Combet said.

It was estimated that up to 400,000 people were contractors who had only one principal contractor with whom they dealt, Combet said. “That certainly does not help contractors have a bit more muscle in their negotiations,” he said.

The ACTU would continue to include independent contractors in its ads and general campaign against IR reforms. “There is no doubt we are going to be focusing on the way in which Australian working people are continuing to be put in an increasingly vulnerably position by this govt,” he said.

Combet said the ACTU was still reading through the legislation but he was sceptical about protections WR Minister Kevin Andrews said were included to prevent sham arrangements and offer protection from unfair contracts. “Quite frankly, I reckon those protections are about as good as John Howard’s protections for employees confronted with AWAs and told to sign them,” he said.

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'Responsibility for everything' now falls on contractors: Della Bosca

The new Independent Contractors Bill will see workers assume responsibility for all things over which the employer currently has responsibility, NSW IR Minister John Della Bosca said today, in condemning the Bill.

Workers who become independent contractors will be “stripped” of minimum rates of pay; annual, sick and long service leave; super; workers’ comp; and public holidays, Della Bosca said. “Instead, the worker assumes responsibility for all of these things, pays the costs, and shoulders all the risks,” he said. “Genuinely ‘independent’ contractors are already well-protected from unfair treatment by state legislation so this new Bill is totally unnecessary.”

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Unions look to law for new ways to represent ICs

A number of unions are understood to be developing legal means to serve the needs of individual contractors who are barred from union representation and collective bargaining.

CEPU communications div Vic sec Len Cooper told *Workforce* today his union would press ahead to find a form of assistance for individual contractors within the new law. The union already had a “significant” number of members working as independent contractors, many of whom “had not seen a pay rise for the past 10 years”, Cooper said.

“We are in the throes of getting legal advice about creating an association - we believe it probably needs to be an association - to provide support in some way to the people who want it,” Cooper said. “We would work as the law allows us to work.”

Cooper said the union was speaking to members to establish their needs and feelings about the creation of such a group. “It is obvious that we are seeing people who are not able to fight increasingly poor conditions and dangerous demands being made of them,” he said.

Meanwhile, Information Technology Contract & Recruitment Assoc exec dir Norman Lacy told *Workforce* today union reaction to the new legislation would be “predictable for a movement which is losing numbers”. “It might be a better strategy for them to establish unions for independent contractors, rather than standing with their backs to the wall throwing bricks at anyone who approaches - although I am not trying to give them advice,” he said.

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