



Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006

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Law and Bills Digest Section

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Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006

Date introduced: 22 June 2006

House: House of Representatives

Portfolio: Employment and Workplace Relations

Commencement: The formal provisions commence on Royal Assent. Schedule 1, dealing with sham arrangements commences immediately after Schedule 2 which commences at the same time as the proposed *Independent Contractors Act 2006*.

Purpose

The proposed independent contractors legislation is made up of two Bills: the Independent Contractors Bill 2006 (the Principal Bill) and the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006 (the Consequential Bill).

The purpose of the Consequential Bill is to:

- create in the *Workplace Relations Act 1996* (WR Act) new offences to discourage and prevent sham independent contractor arrangements
- make consequential amendments relating to textile, clothing and footwear (TCF) outworkers, and
- provide consequential amendments relating to unfair contracts in the WR Act and *Building and Construction Industry Improvement Act 2005* (BCII Act). These amendments are consequential upon the commencement of the proposed *Independent Contractors Act 2006*.

Background

A detailed *Background* is provided in the accompanying [Bills Digest](#) on the Independent Contractors Bill 2006.¹

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Main provisions

Schedule 1—Sham arrangements

Protection from sham arrangements

The explanatory material accompanying the Bills states that a ‘sham arrangement’ in the context of employment 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.²

It further states:

Employees in disguised employment relationships should have appropriate remedies available to them as they are not, in reality, independent contractors.³

The Minister for Employment and Workplace Relations in his Second Reading Speech states that the independent contractors legislation includes penalties for misrepresenting an employment relationship as an independent contracting relationship and for dismissing an employee with the sole or dominant purpose of re-engaging them as an independent contractor. The purpose being that:

These penalties will send a clear message to employers that this sort of unscrupulous behaviour will not be tolerated.⁴

The Consequential Bill amends the *Workplace Relations Act 1996* (WR Act) by introducing various ‘prohibitions’ on sham arrangements. The prohibitions include:

- misrepresenting an employment relationship as an independent contracting arrangement or attempting to do so (**new section 900**)
- misrepresenting a proposed or future employment relationship as an independent contracting arrangement or attempting to do so (**new section 901**)

A person does not contravene these sections if the person proves that when making the representation or statement, he or she:

- believed that the contract being entered into, would have been an independent contracting arrangement rather than an employment contract, and
- could not have been reasonably expected to know that the contract was an employment contract rather than an independent contracting arrangement (**new subsections 900(2) and 901(2)**).

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The onus of proof under these two provisions has been reversed— it usually falls upon the person making the complaint to prove the breaches. However with these provisions, the person making the false representation is required to prove a defence on the balance of probabilities in order to escape liability.

The Bill also prohibits:

- dismissing or threatening to dismiss an employee with the *sole or dominant purpose* of re-engaging them as an independent contractor (**new section 902**). Employers will bear the onus of establishing that the *sole or dominant purpose* of dismissing an employee was not to re-hire them as an independent contractor
- making false representations to an employee to persuade or influence an employee to become an independent contractor when knowing the representation to be false (**new section 903**)

These prohibitions attracts civil penalties of 60 penalty units (\$6 600) for individuals and 300 penalty units (\$33 000) for corporations (**new section 904**).

Office of Workplace Services inspectors will be empowered to police these provisions and enforce any breaches. The employee concerned, or a relevant trade union (with written authorisation from the employee) will also be able to take action (**new subsection 904(3)**).

Breaches of the legislation will be dealt with by the Federal Court of Australia or the Federal Magistrates Court (**new section 905**).

Reaction to the sham penalty provisions

As the accompanying Digest notes, both the Consequential Bill and the Principal Bill have been referred to the Senate Employment, Workplace Relations and Education References and Legislation Committee (Senate Committee Inquiry) for inquiry and report. A number of submissions to the Inquiry consider these sham penalty provisions in some detail. For the purposes of this Digest, only two submissions are chosen to reflect the variety of views.

The New South Wales Government in its submission to the Senate Committee Inquiry states that the barriers to using these provisions are considerable and therefore are likely to be of very limited use, if any, to workers seeking redress from unscrupulous employers.⁵ More specific criticisms in the submission include:

- the requirement that re-engagement as an independent contractor be the *sole or dominant reason* for dismissal may create a serious barrier for applications. For example restructuring the enterprise or financial difficulties may be reasons which prompt a desire to cut labour costs, and the change of status may be a subordinate result of these larger considerations

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- applications for relief must be made to the Federal Court or the Federal Magistrates Court— both costly jurisdictions and therefore unlikely to be available to the majority of employees who these Bills should be protecting
- an applicant would be first required to demonstrate that the contracting arrangement was in fact an employment arrangement, presumably by means of applying the common law test.⁶

The New South Wales Government's submission notes that in order to mount a successful application, the worker would have to:

- convince the court that the contract was, or was intended to be, in fact a contract of service rather than a contract for services, and
- rebut any claims by the contractee that they either believed that the contract was a contract for services and that they could not have been reasonably expected to know that the contract was a contract of employment.

By way of contrast, the Australian Chamber of Commerce and Industry (ACCI) in its submission to the Senate Committee Inquiry has serious concerns with the breadth of the proposed offences. ACCI argues that there is no need for these new offences because there is no widespread evidence of sham arrangements, and to the extent that they occur, there is already sufficient law dealing with sanctions against sham contracts. Some of the specific difficulties ACCI point to are:

- there are judicial differences and interpretive difficulties when evaluating contractor status
- it is wrong for a business to be unable, even with the best will and intention, to create contract arrangements free from the risk of penalty. Perceptions of risk in attempting to enter into contracting, and the very real prospect of getting it wrong and incurring a penalty (above the existing penalty of back pay etc.) could reduce the capacity and appetite of individuals to enter into contracting
- the offence relating to misrepresentation of an employment relationship is a strict liability offence and the defences carry a reverse onus of proof, and
- the offence relating to dismissal of employees and making them contractors is drafted too broadly and is the most objectionable of the three offence provisions.⁷

Schedule 2—Consequential amendments and transitional provisions

Schedule 2 proposes amendments to the WR Act and the BCII Bill consequential upon the commencement of the Independent Contractors Act. The most significant amendments are:

- **item 3** which repeals Part 22 of the WR Act which refers to outworkers in Victoria. The provisions relating to TCF outworkers will instead be incorporated in the proposed Principal Act

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- **item 7** which repeals section 832 to 834 of the WR Act, the provisions currently dealing with review of unfair contracts. Similar provisions in the proposed Principal Act will replace these sections

Endnotes

1. Mary Anne Neilsen, Independent Contractors Bill 2006, *Bills Digest No. 19, 2006–07*, Parliamentary Library, Canberra, 4 September 2006.
<http://www.aph.gov.au/library/pubs/bd/2006-07/07bd019.pdf>
2. *Explanatory Memorandum* to the Independent Contractors Bill 2006, pp. 9–10.
3. *ibid.*
4. Minister for Employment and Workplace Relations, Independent Contractors Bill 2006, House of Representatives, *Hansard*, 22 June 2006, p. 5.
5. NSW Government submission to the Senate Committee Inquiry, paragraph 207.
6. This is discussed in the Digest to the Principal Bill.
7. ACCI Submission to the Senate Committee Inquiry, pp. 33–39.

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