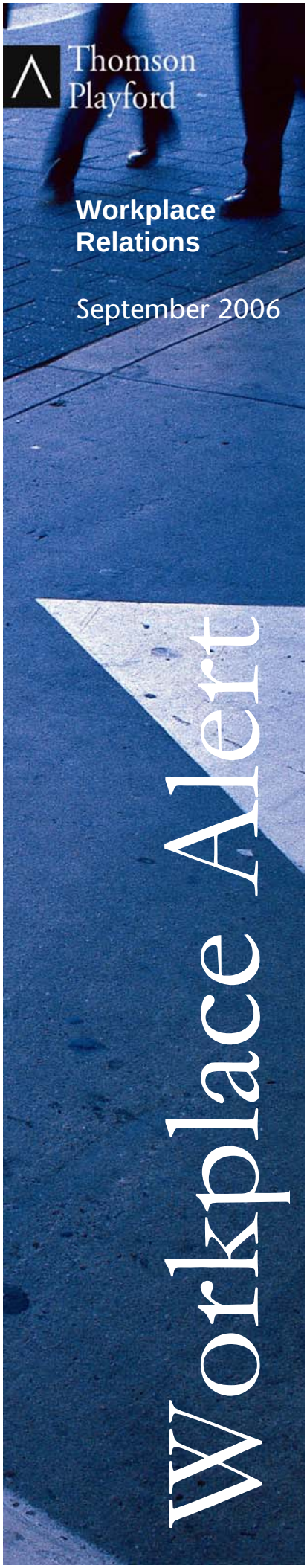

The Independent Contractors Bill 2006

In line with its intention to foster and promote flexible work arrangements, on 22 June 2006 the Federal Government introduced the *Independent Contractors Bill 2006* (Cth) ("**the Bill**") with an aim to ensure that independent contractors are as free from statutory interference as possible. This is to be achieved by overriding State laws that deem independent contractors to be employees, overriding State laws that deal with the unfair contracts jurisdiction and establishing a Federal unfair contracts jurisdiction outside of *the Workplace Relations Act 1996* (Cth) ("**the WR Act**").

The Bill only applies to services contracts that have a constitutional connection. This requirement will usually be met where at least one party to the contract is a constitutional corporation.

As part of the proposed independent contracting arrangements, the WR Act will also be amended by the *Workplace Relations Legislation (Independent Contractors) Bill 2006* (Cth) ("**the Amending Bill**") so that parties engaged in sham contracting arrangements akin to an employment relationship will be penalised.

What is an Independent Contractor?

Surprisingly, the Bill does not provide a definition of "independent contractor". In circumstances where one party alleges an employment relationship and the other denies that relationship, the way to identify an independent contractor as opposed to an employee is based on tests developed by the courts. These tests look at aspects of the relationship such as whether one party controls the other and the extent of that control, which party pays for expenses such as tax, workers compensation or superannuation, and whether the worker performs services solely for the other party in question or whether the worker has other clients.

Often an independent contractor will allege an employment relationship to assert a right to employee entitlements. The fact that the Bill does not provide a definition of an independent contractor means that a relevant court or tribunal will still need to assess the nature of the contested relationship, and may even reach a finding that is at odds with what the parties might have understood the arrangement to be.

What does the Bill say?

Essentially, the Bill provides that any State or Territory laws that affect the rights, entitlements, obligations and liabilities of a party to a services contract will be rendered void where those laws either:

- relate to a "workplace relations matter"; or
- provide for mechanisms to alter contracts on the grounds of unfairness.

Workplace Relations Matters

What the phrase "workplace relations matters" effectively means is that where State laws provide that certain workers are deemed to be employees, no matter what the intended relationship between the parties is, such laws will no longer apply. For example, in New South Wales a person who sells or delivers milk from vehicles or people who cut, deliver or supply timber are deemed to be employees for the purposes of the *Industrial Relations Act 1996* (NSW) ("**the IR Act**") notwithstanding that these people may be engaged as independent contractors. If the Bill is enacted, then those who are true independent contractors will be excluded from State and Federal industrial relations laws (with the exception of clothing outworkers and lorry owner-drivers who are presently specifically excluded from the deeming provisions of the Bill and will remain covered by State industrial relations laws).

However, while deeming provisions in State industrial relations laws are excluded by the Bill, other deeming provisions, for example, superannuation laws which deem independent contractors to be employees for the purpose of superannuation are not excluded. This would mean that the identity of an independent contractor would still be uncertain.

Unfair Contracts Jurisdictions

The second limb of the proposed amendments is that any State unfair contracts jurisdictions will not be accessible for independent contractors.

Independent contractors and employees in NSW have been able to bring section 106 unfair contract claims under the IR Act. In March 2006, the unfair contracts jurisdiction was closed off to employees of constitutional corporations as a result of the recent WorkChoices amendments to the WR Act. If the Bill is enacted it will also be closed off to claims from independent contractors.

State unfair contracts jurisdictions will, however, still apply to contracts that do not have the requisite constitutional connection, for example where a partnership engages a contractor who is a natural person and not an incorporated entity. In NSW it will still apply to lorry owner-drivers and clothing outworkers who are presently excluded from the operation of parts of the Bill.

New Federal Unfair Contracts Jurisdiction

The Bill introduces a new Federal unfair contracts jurisdiction for independent contractors. It is proposed that where a services contract is alleged to be unfair or harsh, an application may be made to the Federal Court, or the Federal Magistrate's Court for relief. The Bill provides that where the Court finds unfairness, the Court will be able to set aside the whole or part of the services contract or vary the services contract.

While there is no mention in the Bill that the Court is able to award compensation, the Court may only make an order to set aside or vary the services contract for the purpose of placing the parties in a position where the unfairness no longer applies. Whether this means that the Court could award monetary compensation remains to be seen. The Bill provides that the jurisdiction will be a "no costs jurisdiction" but the Court may award costs where proceedings were instituted vexatiously or without reasonable cause.

Transitional Period

The Bill provides for a three year transitional period. Where an independent contractor was previously deemed an employee the three year period will allow the parties to negotiate a new arrangement, whether it be an employment relationship or an independent contracting relationship. After the three year period has elapsed, the reform provisions will automatically commence.

Sham Arrangements

The Amending Bill, which was introduced into Parliament at the same time as the Bill, proposes to insert new provisions in the WR Act that addresses three types of "sham arrangements". Under the proposed amendments a person will be prohibited from:

- misrepresenting an employment relationship, or a proposed employment relationship, as an independent contracting arrangement;
- dismissing or threatening to dismiss an employee for the sole purpose of engaging the employee thereafter as an independent contractor to perform the same or substantially the same work under a services contract; and
- making false statements to persuade or influence an individual to become an independent contractor.

A maximum fine of $33,000 for a body corporate and $6,600 for an individual is proposed for a contravention of these provisions. The Amending Bill provides that an application will be able to be made by an eligible person, being a workplace inspector, an individual affected by the contravention and an organisation of employees of which the individual affected by the contravention is a member.

Workplace Alert

Status of the Bills

The Bill and the Amending Bill were introduced to the House of Representatives by Kevin Andrews, Federal Minister for Employment and Workplace Relations, on 22 June 2006.

The Bill and the Amending Bill were criticised by both industry groups and State Governments during a recent Senate Committee Inquiry. Industry groups were concerned about the penalties for "sham arrangements" and the fact that lorry owner-drivers have not been excluded from the State deeming provisions. The New South Wales State Government indicated its concern that the Bill provides little protection from an abuse of superior bargaining power.

The Senate Committee delivered its report on the Bill and Amending Bill on 25 August 2006. All members of the Senate Committee agreed that the part providing specific protections for clothing outworkers should be excised from the Bill to avoid unnecessary duplication with State laws and to let the States protect clothing outworkers in totality. On other aspects of the Bill the Senate Committee disagreed, divided along political party lines. The main source of discontent expressed by the Opposition Report and the Minority Report was the lack of definition of an "independent contractor".

The Bill and Amending Bill will now be remitted back to the House of Representatives.

Contact Details

For advice on the *Independent Contractors Bill 2006* (Cth) and associated amendments, please contact:

Malcolm Davis – Partner
T: 02 8248 5831
E: mdavis@thomsonplayford.com.au

Richard Lund – Partner
T: 02 8248 5834
E: rlund@thomsonplayford.com.au

John Murray – Partner
T: 08 8236 1139
E: jmurray@thomsonplayford.com.au

Gary Punch – Special Counsel
T: 02 8248 5859
E: gpunch@thomsonplayford.com.au

Stephen Clibborn – Senior Associate
T: 02 8248 3436
E: sclibborn@thomsonplayford.com.au

Megan Foster – Senior Associate
T: 02 8248 5839
E: mfoster@thomsonplayford.com.au

Thomson Playford

101 Pirie Street · Adelaide · SA 5000
T: (08) 8236 1300 · F: (08) 8232 1961

140 William Street · Melbourne · VIC 3000
T: (03) 8608 7000 · F: (03) 8608 7199

Australia Square Tower
264 George Street · Sydney NSW 2000
T: (02) 8248 5800 · F: (02) 8248 5899

www.thomsonplayford.com.au