

Workplace Relations

September, 06

Industrial and Employment News

Independent Contractors: New Rules of Engagement

Many businesses desire the flexibility of being able to structure their workforce using a combination of employees and non-employees. However, existing workplace laws sometimes require that non-employee workers be treated as employees for particular purposes. The Federal Government has sought to overcome the uncertainty this can cause for business by introducing two Bills which aim to deregulate laws governing the engagement of independent contractors.

If passed by Parliament, the new laws will apply to all independent contractor arrangements which involve a Constitutional corporation, the Commonwealth or a Territory. The main effect will be that:

- independent contractors will be excluded from laws regulating “workplace relations matters” including minimum standards of remuneration, leave entitlements, hours of work, unfair termination, dispute resolution and most industrial action
- a single national “unfair contracts” jurisdiction will be introduced (for the first time in South Australia) allowing the variation or revocation of contracts which are harsh or unfair having regard to matters including market forces and equivalent employee conditions
- penalties may be imposed on businesses that use sham arrangements which disguise employees as independent contractors or that coerce employees into independent contracting arrangements, and threatening to dismiss employees for the sole or dominant purpose of re-engaging them as independent contractors will also be unlawful.

The Bills do not affect existing laws concerning anti-discrimination, superannuation, occupational health & safety or workers compensation, and businesses will continue to have obligations under these laws with respect to some categories of independent contractor

The Bills are likely to be debated in the current session of Parliament. Finlaysons will keep its clients apprised of developments.

This Alert is intended as an alert only. It does not purport to be a comprehensive advice. Readers should seek professional advice before acting in relation to these matters.

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Independent Contractors Bill 2006; Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006

Compensation News

Waiting for Mr Wright

On 14 August 2006 judgement was handed down in the matter of *Wright v Department of Education of Children Services* [2006] SAWCT 65.

The Facts

Mr Wright, a school teacher (“the worker”), suffered a closed head injury when his car hit a tree while travelling from the school he worked at to his home.

The worker stated that on the night of the subject collision he had intended to spend his evening marking mathematics tests and preparing for classes and there was a tub of school work in his car at the time of the collision.

The Principal and Supervisor noted in their statements that they were aware that the worker took work home in the evenings and it was an expectation that a teacher at his level did so. The worker could not remain on the premises as security arrangements at the school required teachers to leave by 5:00pm so that the alarm system could be activated.

Mr Wright claimed compensation and the Department of Education & Children Services rejected his claim.

The Decision

Her Honour Deputy President Farrell considered that the act of transporting school work home combined with the worker's *intention* to work that night necessarily involved the worker doing something that he was employed to do. Consequently her Honour concluded that the worker's journey home was incidental to being able to carry out work at

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home and therefore that the journey was undertaken in the course of carrying out the duties of employment.

Given this finding, her Honour considered it unnecessary for to decide whether there was a real and substantial connection between employment and the accident.

Outcomes

It therefore appears that where there is an expectation of a worker to complete work after hours at home and the worker has a sufficient intention to do that work, the worker may be able to satisfy the requirement that the journey was undertaken in the course of carrying out duties of employment.

This is a significant decision which appears to stretch the boundaries of journey claims to include “workplace to residence” travel where a worker is reasonably expected to work at home.

Although in this case the worker was obliged to leave the workplace for security reasons, the reasoning of the decision may also open the door for workers to argue that their workloads are

The decision has been appealed. Finlaysons will keep its clients updated.

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Safety News

Important Decision on Vicarious Liability

His Honour Judge Gilchrist has handed down a important decision on the parameters of responsibility for corporate employers pursuant to s19 of the OHS & W Act (the Act). The decision goes a significant way to addressing the tension between holding a corporate employer responsible only for the narrow range of safety measures that they have direct control over (e.g. the promulgation of policies) and the broader approach of holding a corporate employer responsible for each and every act of their employees and the principles of vicarious liability.

In the decision of *Dinko Tuna Farmers Pty Ltd [2006] SAIRC 39* His Honour set aside a conviction for a breach of s19 on appeal.

The Facts

The worker was a 20 year old deck hand on a boat owned by the defendant and engaged in the tuna farming industry. On the relevant date he had been working for the defendant for approximately five weeks. Left alone on the deck and not wearing a personal flotation device, the worker fell overboard and was rescued by another passing boat.

The defendant was charged and initially convicted of a breach of its obligations pursuant to s19 of the Act for:

- a. failing to provide or maintain a system that ensured the worker was wearing a personal flotation device;
- b. failing to ensure that the sea door of the boat was closed when at sea;
- c. failing to provide a system of work that ensured at least two employees were on deck and in sight of each other whilst at sea;
- d. failing to provide such instruction and training as necessary to ensure the worker was safe from injury and risk whilst on board the boat.

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The Decision

In his decision upholding the appeal and setting aside the convictions, his Honour discussed in detail how corporate responsibility for safety was to be determined. He concluded that decentralising responsibility for safety away from the directing mind and will of the company whilst still holding the Company responsible for the actions of **all** of its employees **all** of the time was “casting the net too wide”.

His Honour stated:

What is the social benefit of punishing a corporation for the neglect of an employee where that employee does not exercise any control over the corporation and that neglect could not reasonably be anticipated or prevented by those in control? How would this encourage those in effective control of a corporation to act differently? It would in my view be punishing for the sake of it and that is all.

His Honour concluded that a more appropriate test was simply to ask what a reasonable and prudent employer had done at the relevant time. In his view “There will be circumstances where an employee of an employer can though his or her action or lack of them have exposed a co-employee to an unacceptable risk of injury that do not reflect culpability in the employer for the purposes of prosecution under section 19”.

Outcomes

Ultimately His Honour found that the employer’s attitude to safety, whilst not perfect, reflected a genuine commitment to safe work practices, and on the evidence presented found the employer had put in place reasonable measures to protect the worker. In addition His Honour found that the employer was entitled to expect the employees on board the boat would also provide appropriate measures to protect the worker, and importantly had no way of policing their compliance with safety measures once they had left shore.

The decision will impact on the potential liability of employers prosecuted under the OHS & W Act where it can be demonstrated that all prudent

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steps had been taken with respect to safety and the intervention of another employee results in a workplace accident. This is particularly the case where work parties are more remote from the direct control of management.

Please contact our Workplace team if you would like to discuss the implications of this decision on your own workplace safety policies and procedures.

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Announcements

Congratulations, South Australian Wine Industry Association

The South Australian Wine Industry Association Inc (**SAWIA**) has recently successfully defended an appeal against a decision of the South Australian Industrial Relations Commission granting it registration as an association of employers under the *Fair Work Act 1994* (SA).

Finlaysons has been closely involved in this litigation over the last three years, having successfully represented SAWIA both at first instance and on appeal. The outcome, which required consideration of legal principles which have not been litigated in South Australia for many years, provides formal recognition that there is no other registered employer association to which wine industry employers can conveniently belong and confirms SAWIA's right to represent such employers in workplace relations matters in the Industrial Relations Court & Commission of South Australia.

Congratulations, SAWIA!

Workchoices & Compliance

The recent WorkChoices reforms have made fundamental changes to many aspects of day-to-day workplace relations. In addition to introducing a maze of new obligations, significant financial penalties may now be imposed for non-compliance.

Finlaysons is pleased to announce that it has designed a plain English WorkChoices Compliance Checklist designed to assist employers cut through the detail and identify their obligations precisely quickly. The Checklist comes as a stand alone product or can be readily adapted to suit your specific workplace requirements.

Copies of the WorkChoices Compliance Checklist may be purchased by contacting any member of our Workplace team.