

Sep / Oct 2006

Page 1

Independent Contractors Bill - will anything change?

Page 2

WorkChoices - extension of time granted for compliance with new record keeping regulations

WorkChoices - the Australian Fair Pay and Conditions Standard - a moving target?

Profession of love or sexual harassment?

Page 3

Vicarious liability for an independent contractor's negligence

Employment Matters

PIPER ALDERMAN'S EMPLOYMENT RELATIONS SECTION SPECIALISES IN ASSISTING EMPLOYERS TO DEAL WITH EMPLOYMENT AND INDUSTRIAL ISSUES. WE HOPE THAT YOU WILL FIND THE ARTICLES IN EMPLOYMENT MATTERS RELEVANT TO YOUR BUSINESS.

Independent Contractors Bill – will anything change?

The much anticipated Independent Contractors Bill has been introduced into Federal Parliament.

Over many years the rules to distinguish between an employee and an independent contractor have been the subject of numerous court cases, often leaving employers with an uncertain outcome.

Regrettably the Bill does little to simplify this contentious area of the law.

The Bill does not define an independent contractor, instead opting to rely on the common law as developed through the court decisions alluded to above. This means the parties will still have to consider a multi-factor test including the right to control the manner in which the work is performed, the degree of economic independence, the description of the relationship, and the integration of the contractor into the principal's business.

On a positive note, the Bill excludes the operation of various state laws impacting on the independent contractor relationship. These are laws which have the effect of setting terms and conditions of employment, settling industrial disputes, regulating industrial action and regulating termination of employment.

However, a number of other state and federal laws can still apply to the independent contractor relationship. These are laws dealing with payroll tax,

workers compensation, superannuation, discrimination, and occupational health and safety.

In this regard, the Bill does little to change the current confusion which can apply when determining what legal responsibilities apply.

Another potentially worrying aspect of the Bill is the creation of an unfair contracts jurisdiction for independent contractors vested in the Federal Court and the Federal Magistrates Court.

The unfair contracts jurisdiction provides that the terms of a contract may be set aside or varied by the court on the grounds that a provision is harsh or unfair. The terms "harsh" and "unfair" are not defined in the Bill, these concepts being given their common law meaning.

In reality, the court is given a very broad power to review a contract and substitute its own terms if it concludes that a provision is unfair. Given that the WorkChoices legislation has excluded the notorious NSW unfair contracts jurisdiction from most employment relationships, it is difficult to understand the rationale for creating a much broader jurisdiction in relation to contractors.

The associated WorkChoices Amendment Bill introduces penalties for employers who engage workers under "sham" independent contractor arrangements or who dismiss or threaten to dismiss employees with a view to re-hiring them as independent contractors. Maximum penalties will be \$33,000 for corporations and \$6,600 for individuals.

The progress of these Bills and any modifications to them will be carefully monitored and Piper Alderman will keep clients appropriately informed.

WorkChoices – extension of time granted for compliance with new record keeping regulations

In a key amendment to the Workplace Relations Regulations 2006 issued on 21 September 2006, the period of immunity from prosecution for breach of the new record keeping requirements contained in the WorkChoices amendments has been extended until 26 March 2007.

Piper Alderman will be conducting seminars in Sydney, Melbourne, Brisbane and Adelaide in October and November. These seminars will examine some of the quirks associated with the Australian Fair Pay and Conditions Standard and the intricacies of complying with the new regulations on record keeping.

Further information is available from Gretchen Richards, National Event Coordinator on (08) 8205 3448, grichards@piper-alderman.com.au or by clicking on the link to the **Seminar Invitation**.

WorkChoices – the Australian Fair Pay and Conditions Standard – a moving target?

The Standard was also changed by the Workplace Relations Regulations 2006 released on 21 September 2006. The most significant of these amendments concerns the notice periods and evidentiary requirements relating to

personal/carer's leave. The giving of notice and documentary evidence to support a claim for leave are now designated as "particular respects". This means that a term in a workplace agreement or contract which imposes a more onerous notice or documentary evidence obligation on an employee than the Standard will be in breach of the Standard. Imposing a penalty on an employee for a breach of a requirement or condition about notice or documentary evidence is not only in breach of the Standard, but is now also prohibited content for workplace agreements. "Penalty" is defined to mean a deduction from the employee's remuneration or entitlements or a requirement for the employee to make a payment to the employer. Further, a term allowing a penalty to be imposed on an employee for absence from work due to illness, injury or emergency affecting the employee or a member of the employee's immediate family or household is also now prohibited content.

Profession of love or sexual harassment?

A recent decision, *K v S and N Company* decided by the Queensland Anti-Discrimination Tribunal, dealt with whether a declaration of love and an invitation to move in constituted sexual harassment.

Although this decision is based upon Queensland legislation, the test for what constitutes sexual harassment is similar to that of the Commonwealth legislation. Therefore this decision potentially has ramifications nationally.

The Facts:

- > The complainant worked as a receptionist from the home of her employer.
- > Each week, usually a dozen red roses would be left in front of the complainant's working area.

- > While alone with the complainant her employer declared his love for her and invited her to move into his house with her children.
- > The declaration was, "I'm falling in love with you and would like you and your children to move in with me".
- > The employer reduced the complainant's pay and threatened to close the business for 3 weeks without paying her unless she came to work on the weekend to assist with tax work. The complainant refused.

The Decision:

The tribunal found that the declaration and invitation to move in constituted sexual harassment. It found that the declaration by implication was telling the complainant that he wanted a sexual relationship with her and also inviting her to consider having one with him. Consequently this constituted by implication a request for sexual favours, a remark with sexual connotations and it amounted to unwelcome conduct of a sexual nature.

Despite finding that the declaration was not said with intent to offend, humiliate or intimidate the complainant, the Tribunal found that a reasonable person would have anticipated that the complainant would have been offended, humiliated or intimidated by his conduct.

The repeated requests by the employer for the complainant to work on the weekend were found to be unmotivated by sexual harassment and therefore those requests and the reduction in the complainant's pay were not linked to the declaration.

The tribunal awarded \$2,000 for the loss and damage caused by the harassment.

This took account of the fact that the complainant continued working for the employer for some time after the incident and conceded that a number of

other factors played a part in her decision to ultimately leave the employment without another job to go to.

Vicarious liability for an independent contractor's negligence?

The High Court has clarified the extent of a person's vicarious liability for the negligence of another in *Sweeney v Boylan Nominees Pty Limited t/as Quirks Refrigeration* [2006] HCA 19 (16 May 2006).

The case arose from an incident at a service station where Ms Sweeney was injured when she opened a refrigerator to purchase milk and the door fell off, striking her on the head.



Ms Sweeney brought negligence proceedings against both the service station's operators and Quirks Refrigeration, which obliged by way of a lease to maintain the refrigerator.

Shortly before the incident in which Ms Sweeney was injured, the service station told Quirks Refrigeration that the refrigerator door was not closing properly. Quirks arranged for a mechanic to fix the problem. The mechanic was a contractor of Quirks Refrigeration, not their employee.

The issue was whether Quirks was vicariously liable for the mechanic's negligent workmanship.

The High Court observed that the law governing vicarious liability had developed in a way that eluded "clear or stable principle". Nonetheless the Court drew attention to two key principles underlying the determination of vicarious liability, namely:

1. a fundamental distinction between a person's liability for the conduct of their employees compared to independent contractors, because vicarious liability has clear potential application in respect of employees but generally not contractors; and
2. an employer incurs vicarious liability only for negligence occurring in the course of employment.

The High Court resisted this attempt to expand the scope of vicarious liability. It held that vicarious liability does not arise simply because the third party's actions "were intended to benefit" the other party, or because those actions "were undertaken to advance some purpose" of theirs.

Accordingly, the fact that the mechanic was an independent contractor of Quirks, rather than their employee, was the determinative factor.

Consequently, Quirks incurred no vicarious liability for the mechanic's negligence.

Employers need to be aware of their potential vicarious liability for the conduct of their employees, and to take measures to ensure their employees' conduct in the course of their employment is appropriate.

Whilst an employer is not vicariously liable for the conduct of an independent contractor at common law, employers remain subject to statutory obligations, such as in the context of discrimination and occupational health and safety, which require the conduct of independent contractors to be appropriately monitored and regulated by employers.

Since the mechanic was a contractor, not an employee, of Quirks Refrigeration, Ms Sweeney's claim sought to expand these principles by arguing that a person can be vicariously liable for the negligence of a third person if that third person was acting for their benefit or advantage.



Important Disclaimer: The material contained in this publication is comment of a general nature only and is not and nor is it intended to be advice on any specific professional matter. In that the effectiveness or accuracy of any professional advice depends upon the particular circumstances of each case, neither the firm nor any individual author accepts any responsibility whatsoever for any acts or omissions resulting from reliance upon the content of any articles. Before acting on the basis of any material contained in this publication, we recommend that you consult your professional adviser.

Piper Alderman Lawyers

Sydney

Level 23
Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000
DX 10216, Sydney Stock Exchange
Phone: + 612 9253 9999
Facsimile: + 612 9253 9900

Melbourne

Level 24
385 Bourke Street
Melbourne VIC 3000
DX 30829, Collins Street
Phone: + 613 8665 5555
Facsimile: + 613 8665 5500

Brisbane

Level 9
239 George Street
Brisbane QLD 4000
GPO Box 3134
Brisbane QLD 4001
DX 105, Brisbane
Phone: + 617 3220 7777
Facsimile: + 617 3220 7700

Adelaide

167 Flinders Street
Adelaide SA 5000
GPO Box 65
Adelaide SA 5001
DX 102, Adelaide
Phone: + 618 8205 3333
Facsimile: + 618 8205 3300

Email: enquiries@piper-alderman.com.au

www.piper-alderman.com.au

For further information contact:

David Ey
Partner
dey@piper-alderman.com.au

David McLaughlin
Partner
dmlaughlin@piper-alderman.com.au

Stephanie Vass
Partner
svass@piper-alderman.com.au

If you would prefer to receive Employment Matters by email or if you are not on the mailing list and would like to be included please contact publications@piper-alderman.com.au