

“VISION IN THE WORKPLACE”

Issue Forty, February-March 2009

In this edition of “Vision in the Workplace” we look at a recent Decision by the Federal Magistrates Court where a number of Independent Contractors were found to be “employees” of a Company and follow up on two articles from recent ‘Vision in the Workplace’ Newsletters being the Second Report of the National Review of Occupational Health and Safety Laws and, an appeal from a New South Wales Supreme Court ruling dealing with restraint periods. We also draw your attention to our change of address and new premises which we will occupy from Monday 30 March 2009.

‘Independent Contractor’ deemed an Employee

The Federal Magistrates Court has found that an Employer wrongly categorised some of its workers as ‘independent contractors’ when really, they were ‘employees’. This is so, even though the Employer made it clear to these workers that they would be engaged as independent contractors supplying “their own ABN.” Federal Magistrate Wilson noted “*the mere fact that a person is described as an independent contractor does not mean that the person is an independent contractor.*”

Federal Magistrate Wilson deemed the workers to be ‘employees’ by taking into account such indicia as:

1. they were told by a supervisor what days they were to work and what time they start and finish;
2. the workers worked under direct supervision to complete their tasks; and
3. tools were provided by the Employer to the workers if they required them.

Furthermore, Federal Magistrate Wilson noted that the tasks performed by the ‘workers’ required “*some skill*”, however, they “*could not be described as requiring special skill.*”

In this regard, the Workplace Ombudsman prosecuted the Company for the underpayment of wages and overtime that the deemed Employees were entitled to under their applicable Award. A further hearing will determine what penalty will be imposed on the Employer.

This case highlights the importance of how any contracting arrangement is carried out and even where a contractor’s agreement is signed, a Court may still hold the contractor to be an employee. For information on ways to ensure your independent contractors are not deemed to be employees please contact Nick Stevens or Alicia Mataere.

STEVENS & ASSOCIATES
LAWYERS

Change of Address

Stevens & Associates Lawyers has the pleasure in informing you that it will be relocating to new premises across the road in Pitt St as of **Monday 30 March 2009**. We look forward to working with you at our new premises and celebrating the move.

Watch this space!

New Address:

Level 4, 74 Pitt St
Sydney, NSW 2000

(All other contact details (including emails) have not changed, see below)

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Second Report on the National Review of Occupational Health and Safety Laws Released!

You may recall from our November 2008 'Vision in the Workplace' Newsletter that the First Report, "A National Review into Model Occupational Health and Safety Laws", was released making recommendations on such matters as priority areas of duties of care and the nature and structure of offences, including defences ("**the First Review**"). Earlier this year, the National OHS Review Panel ("**the Panel**") released their second report of their National Review into Model Occupational Health and Safety Laws dealing with matters that were not covered in the Panel's First Review ("**the Second Review**").

A substantive recommendation made by the Panel was that only public officials be able to prosecute breaches of OHS Laws as opposed to union officials. Currently in New South Wales, Union Officers have the same right as Public Officials to prosecute.

Further, the Panel has also recommended that the duty of care standard be lifted for Directors/Officers, recommending a positive obligation on Directors/Officers to implement a "*due diligence*" framework in their Company which is "*significantly higher than the standard of reasonable care.*"

Union Right of Entry was also dealt with by the Panel in the Second Review. The Panel recommended that Unions have the authority to:

- Investigate a suspected contravention of the Model Act or regulations;
- Consult employees on OHS issues; and
- Provide advice to employees and consult with the person in management or control of a business or undertaking or relevant workplace area on OHS issues.

In this regard, the Panel noted that right of entry to consult with employees will be subject to 24 hours written notice, whilst right of entry for investigating suspected breaches of OHS Legislation does not carry the same 24 hours written notice requirement.

However, a Union Official must provide notice as soon as reasonably practical after entry for suspected breaches. Such a provision may see Union Officials wishing to enter the workplace for other reasons doing so by exploiting the 'investigating suspected breaches' proviso.

The Panel also made a recommendation to give Health and Safety Representatives a new power to issue Provisional Improvement Notices to a person in the workplace who is breaching, has breached, and is likely to breach again, the relevant OHS Legislation/Regulation. Such an introduction would be new for the states New South Wales and Tasmania.

We will keep you updated with the progress of the Panel's recommendations and any draft Bill created. In the meantime, for advice or assistance on meeting your OHS obligations please do not hesitate to contact Nick Stevens or Alicia Mataere.

30 Month Restraint Period Against Executive Employee Upheld During Appeal

Our August 2008 Edition of 'Vision in the Workplace' highlighted a New South Wales Supreme Court Ruling where a 30 month restraint period against an Executive was held to be enforceable.

The Executive appealed the decision arguing that the restraint did not protect the Company's "*legitimate business interest*". However, a Full Bench of the New South Wales Court of Appeal, Justice Hodgson, Justice Basten, and Justice Hadley ("**the Full Bench**"), rejected this argument holding that "*it is commercially unreal to suggest that it is merely stifling competition to prevent one particular competitor*" from the "*high level*" of confidential information received by the Executive, especially as this information could "*attack*" the Former Employers weak points in its relationship with Member Firms. The restraint in question was contained in a Deed of Release of which the Executive received independent legal advice. The Court stated that "*although the Court does not regard such an admission as conclusive, the Court gives it considerable weight where the parties have negotiated on equal footing and with the benefit of legal advice.*"

The Appeal was dismissed and the Executive was ordered to pay the Company's costs.

This case shows employers the value of a comprehensive Deed of Release and restraint clause. For more information and/or advice on protecting your confidential information or, drafting a suitable restraint provision to protect your Company and its clients, please do not hesitate to contact Nick Stevens or Alicia Mataere.

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