

EMPLOYMENT AND
INDUSTRIAL ALERT

MARCH 2007

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INDEPENDENT CONTRACTORS ACT – THE NEXT STAGE IN THE CHANGING INDUSTRIAL LANDSCAPE

INTRODUCTION

In a year that saw the beginning of a new age in industrial relations, the Federal Government ended 2006 by finally passing the *Independent Contractors Act* (No 162 of 2006). The Act received Royal Assent on 11 December 2006 and commenced on 1 March 2007. The new legislation does not provide guidance for who will be classified an independent contractor, but does set out quite technical transitional provisions which will impact upon contractors and their employers.

This paper will provide a brief outline of the new legislation, however for a more detailed explanation of the provisions and the effect on businesses, contact the Employment and Industrial Team on 3223 6400.

OBJECTS

The objects of the Act are described as:

- a) To protect the freedom of independent contractors to enter into services contracts;
- b) To recognise independent contracting as a legitimate form of work arrangement that is primarily commercial;
- c) To prevent interference with the terms of genuine independent contracting arrangements.

The anticipated goal of the Government was that the Act would allow people to become independent contractors free from unnecessary interference from third parties. The Act begins by defining a *services contract* in section 5 to be a contract for services:

- a) To which an independent contractor is a party;
- b) That relates to the performance of work by the independent contractor;
- c) That has the requisite constitutional connection specified in subsection 2.

This definition, far from making it easier for parties to define their employment relationship, necessitates an examination of common law principles relating to independent contractors, possibly leading to the need for parties to resort to the courts to clarify the nature of the employment relationship.

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INDEPENDENT CONTRACTOR OR EMPLOYEE?

It is important to clarify the nature of the employment relationship, as different rights and obligations flow for each type. Sometimes it may be quite difficult to ascertain the real nature of the relationship, despite the intention of the parties.

The leading case in this area is the 1996 High Court decision of *Stevens v Brodribb Sawmilling Company Pty Ltd*. There it was identified that while the **control** exercised by one party over the other is relevant, it is not the sole determining factor of whether a person is an employee or contractor.

Other relevant factors that can assist in deciding the nature of the relationship include (but are not limited to):

- Mode of remuneration;
- Provision and maintenance of equipment;
- The obligation to work;
- The hours of work and provision for holidays;
- Ability to delegate work;
- Requirement for own insurance for legal risk;
- Deduction of income tax.

While the parties may have intended the relationship to be that of independent contractor, an examination of the indicia of the relationship may reveal one of employee, which will impact upon taxation and legal liability.

For example, while a contractor may have been engaged to provide a service, the fact the company provides the contractor with a uniform, directs the contractor to certain jobs and directs the hours of work, and requires that contractor to represent the company, may indicate the contractor is in fact an employee.

CONSTITUTIONAL CONNECTION

The requisite constitutional connection arises where at least one party to the services contract is a constitutional corporation, the Commonwealth or a body corporate in a territory. A constitutional corporation is one that engages in trade or commerce, usually a company registered with ASIC. Constitutional corporations do not include partnerships or State Government departments.

There will also be the requisite constitutional connection where the work concerned is wholly or principally to be performed within a Territory in Australia, or the contract was entered into in a territory in Australia or at least one party to the contract is a natural person who is a resident in or a body corporate that has its principal place of business in a territory in Australia.

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Section 5 states a *condition or collateral arrangement* that relates to a services contract is taken to be part of that services contract if, were the condition or arrangement itself a contract for services, it would have the requisite constitutional connection.

UNFAIR CONTRACTS

Relying upon the recent ruling from the High Court that upholds the constitutional validity of the *Workplace Relations Act* the Federal Government has now received the boost it needed to oust the jurisdiction of State and Territory laws relating to unfair contract claims.

While section 7 ousts the jurisdiction of State and Territory unfair contract laws, there are a significant range of exceptions and limitations to the operation of section 7. Generally these include:

1. laws that relate to or deal with matters that concern out-workers;
2. Chapter 6 of the *Industrial Relations Act 1996 (New South Wales)* concerning regulated contracts for motor lorry owners and daily taxi drivers and the *Own Drivers & Forestry Contractors Act 2005 (Victoria)*
3. Any law specified in the Regulations (to date there have been no notification of any further exemptions);
4. Any State law that deals with matters that are not *Workplace Relations Act* matters (see section 8(2)).

The operation of section 8(2) is to exclude from the ambit of section 7 the State or Territory laws dealing with the following:

- a) Prevention of discrimination or promotion of equal opportunity (but only if the State or Territory law concerned is neither a State or Territory industrial law nor contained in such a law);
- b) Superannuation;
- c) Workers' compensation;
- d) Occupational health and safety (including entry of a representative of a trade union for the purpose connected with occupational health and safety);
- e) Child labour;
- f) Observation of a public holiday, except the rate of payment of an employee for the public holiday;
- g) Deduction from wages or salaries;
- h) Industrial action affecting essential services;
- i) Attendance for service on a jury;
- j) Professional or trade regulation;
- k) Consumer protection;
- l) Taxation;
- m) Any other matter in the Regulations

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JUDICIAL REVIEW

Part 3 of the Act provides for judicial review of an unfair contract. This judicial review can be undertaken by the Federal Magistrates Court and in some instances the Federal Court of Australia. The Court is only able to review the contract where there is *unfairness at the date the contract was entered into* (see section 12(3)). This is different to the unfair contract provisions in the Queensland legislation, which allow the Queensland Industrial Relations Commission to set aside or vary a particular contract at the time of its inception or if the contract becomes unfair at a later date. Parties to contracts who are not constitutional corporations can still have recourse to the Queensland jurisdiction.

If a Court were to find the contract was unfair under the Act, its power is limited to setting aside the whole or part of the contract, or it may vary the contract. Significantly there is no power to award compensation. There is also no general power to award costs, with section 17 providing costs will only be awarded where there has been vexatious proceedings instituted or where there has been some unreasonable act or omission which caused the other party to incur costs.

Practically, then, it is best for parties to the contract to take independent legal advice prior to entering into the contract to ensure it is not unfair. Our Employment and Industrial Team is available to review contracts and advise on suitable terms to be included or deleted from the proposed contracts.

TRANSITIONAL PROVISIONS

The final Part of the Act contains transitional provisions lasting for up to three years. The transitional provisions apply to all contracts covered by the Act, i.e., where there is the requisite constitutional connection.

The obligations that arise will depend upon when the contract was entered into, and also whether the original contract had concluded with a continuation contract being entered into either before or after the reforms. A continuation contract is one that follows on from the original contract, usually through the exercise of an option in the original contract.

There is an option under this Part for the parties to enter into a *reform opt-in agreement*, a potentially attractive arrangement given the complexity of the transitional provisions. A *reform opt-in agreement* is defined to be an agreement in writing, signed by the parties to the agreement:

- a) That the parties no longer wish the State or Territory contractor laws to apply to a specified services contract,

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- or to any related continuation contracts in relation to the specified contract, which the parties have entered into or may enter into; or
- b) That the parties no longer want the State or Territory contractor laws to apply to any services contracts of a specified class or to any related continuation contracts in relation to any contracts in that specified class, that the parties have entered into or may enter into; or
 - c) That the parties no longer want the State or Territory contractor laws to apply to any services contracts they entered into or may enter into.

The Act does prohibit persons from making threats or coercing another person to either sign or not sign a reform opt-in agreement. Penalties for contravening these provisions may be imposed by the Court, under an application by a workplace inspector, the person targeted by the actions or threats, or an organisation of employees or employers on behalf of the targeted person.

Due to the complexities of the transitional provisions, we encourage contractors or employers who have contracts in place prior to December 2006 and may be concerned about the effect of the new Act to contact a member of our Employment and Industrial Team for a discussion of the impact the new Act may have upon the employment relationship. Our Team is also able to provide legal assistance in drafting new contracts which will comply with the Act.

Whether you are an employer seeking to review your services contracts, or an independent contractor concerned about the impact of this legislation, our Employment and Industrial Team is able to assist you:

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