

## **The Independent Contractors Legislation**

On 1 March 2007 the *Independent Contractors Act 2006* (Cth) (IC Act) came into effect, together with certain related provisions in the *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006*.

The same date saw the commencement of the *Independent Contractors Regulations 2007* (IC Regs).

The IC Act is intended to deliver on the Howard Government's 2004 election commitment to protect and encourage independent contracting. Reflecting this, the stated objects of the Act are to "protect the freedom" of contractors to enter into contracts to supply their services, to "recognise independent contracting as a legitimate form of work arrangement that is primarily commercial", and to "prevent interference" with "genuine" contracting arrangements (s 3).

The key parts of the Act prevent the States and Territories from treating contractors as employees for any purposes associated with "industrial" regulation, such as award coverage or leave entitlements. State laws allowing contractors to challenge the fairness of their working arrangements are also overridden, in favour of a new (but weaker) set of national laws.

There are also, on the other hand, new penalties under the *Workplace Relations Act 1996* (WR Act) for businesses that enter into certain "sham" contracting arrangements.

### **"Services contract"**

The central provisions of the IC Act apply to "services contracts", as defined in s 5. A services contract is a contract for services to which an independent contractor is party, and which relates to the performance of work by that contractor. It also includes any "condition or collateral arrangement" that relates to the contract.

The contract must have the "requisite constitutional connection" specified in s 5(2). This requires either that one party to the contract is a "constitutional corporation" (ie, a trading, financial or foreign corporation) or a Commonwealth authority, or that the contract has some connection with a Territory.

The Act does not seek to define the term "independent contractor", other than to indicate in s 4 that an independent contractor need not be a natural person. According to the Explanatory Memorandum (para 13), "[t]he question of whether a worker is an employee or an independent contractor [will] continue to be determined by the common law".

### **Exclusion of State and Territory laws**

Section 7(1) of the IC Act prevents certain State or Territory laws from affecting the "rights, entitlements, obligations and liabilities of a party to a services contract". The laws in question are those that:

- deem a party to a services contract to be an employer or an employee for the purpose of a law relating to a workplace relations matter;

- confer rights or impose obligations on such a party in relation to matters that, in an employment relationship, would be workplace relations matters; or
- allow a services contract to be set aside or varied on the ground that it is unfair.

As defined in s 8, a “workplace relations matter” includes the following matters as they relate to employees or employers: remuneration, leave, hours of work, enforcing or terminating employment contracts or industrial agreements, dispute resolution, industrial action, and any other matter dealt with by the WR Act or a State or Territory industrial law.

This therefore catches deeming provisions of the type that appear in Schedule 1 to the *Industrial Relations Act* 1996 (NSW), as well as the (rarely used) power under s 275 of the *Industrial Relations Act* 1999 (Qld) for the Queensland Industrial Relations Commission to declare certain workers to be employees.

However there is also a lengthy list of matters that are taken *not* to be workplace relations matters under s 8. These include discrimination, superannuation, workers compensation, occupational health and safety, child labour, observance of public holidays, jury service, professional or trade regulation, consumer protection and taxation. Hence State or Territory laws on these matters may still apply to services contracts.

There are also two further exceptions in s 7(2) that preserve existing State laws on workplace relations matters. One protects laws relating to outworkers, especially (though not solely) in the textile, clothing and footwear industries. The other exempts two named provisions: Chapter 6 of the *Industrial Relations Act* 1996 (NSW), which regulates certain contracts in the road transport industry; and the *Owner Drivers and Forestry Contractors Act* 2005 in Victoria.

This second exception was the subject of a great deal of lobbying both before and after the independent contractors legislation was introduced to Parliament. The federal government has made it clear that it intends to conduct a review of the “owner-driver exception” in 2007.

Regulations may specify further State and Territory law exceptions (s 7(2)(c)). For example, reg 4 of the IC Regs provides that legislation dealing with security of payment for building and construction workers, such as the *Building and Construction Industry Security of Payment Act* 1999 (NSW), is not overridden.

Section 10 also allows for the making of regulations that *extend* the exclusions in s 7(1), even if this involves overriding one of the existing exceptions. This may yet be used, for instance, to remove the owner-driver exception.

Under the transitional provisions in Part 5 of the IC Act, the status of workers currently treated as employees when they would otherwise be contractors will not be affected for three years, unless they sign a “reform opt-in agreement” within that period.

### **Review of unfair contracts**

One effect of the exclusions in s 7(1) is that contractors who are party to a services contract are not now able to seek a review of the fairness of their contractual arrangements under certain State or Territory laws. This most obviously affects the

jurisdiction of the NSW Industrial Relations Commission under s 106 of the *Industrial Relations Act 1996*.

Instead, such contractors can seek a review of their contract by either the Federal Court or the Federal Magistrates Court under Part 3 of the IC Act. The court may vary or set aside any contract it finds to be “unfair” or “harsh”.

Part 3 takes the place of the jurisdiction formerly given to the Federal Court under ss 832–834 (and formerly ss 127A–127C) of the WR Act.

There are relatively few differences between the old and new provisions. An application may only now be made by a party to the contract, rather than an organisation acting on their behalf (s 12(2)). On the other hand, incorporated contractors can now seek relief, provided the work under the contract is wholly or mainly performed by either a director of the corporation or a member of their family (s 11(1)(b)).

The IC Regs provide that an unfair contract application may not be made more than 12 months after the relevant contract ends, except where the applicant can satisfy the court that there are “exceptional circumstances justifying the making of the application” (reg 5). Applications are also barred while the applicant is seeking relief under the provisions in the *Trade Practices Act 1974* that relate to unconscionable conduct (see Creighton & Stewart, para [14.06], or under equivalent provisions in State and Territory fair trading legislation (reg 6).

### **Prohibition of “sham” arrangements**

Sections 900 and 901 of the WR Act now prohibit a person from misrepresenting an actual or proposed employment relationship as an independent contracting arrangement. It will, however, be a defence if the person can prove that at the time they made the representation they did not know, and were not reckless as to, the true nature of the relationship. Hence a business that has relied on independent legal advice as to how to engage someone as a contractor should be able to escape liability under these provisions if the advice turns out to be wrong.

Another new provision, s 902, prohibits employers from dismissing or threatening to dismiss an employee where their sole or dominant purpose is to engage the employee to perform the same work as an independent contractor. In any prosecution under this provision the onus is on the employer to prove that they did not act with that purpose. Besides imposing a penalty, a court dealing with a contravention of s 902 may also grant an injunction to restrain the dismissal, or make remedial orders which may include reinstatement or compensation for the dismissed employee (s 904).

Finally, s 903 prohibits an employer from making statements that they know to be false in order to induce a current or former employee to enter into an independent contract arrangement, under which they would do the same work they performed as an employee. As with ss 900 and 901, the imposition of a penalty is the only sanction for breaching this provision.

### **Impact of the new legislation**

It is fair to say that the new independent contractor legislation has succeeded in disappointing almost everybody.

For the business groups who pushed for the legislation in the first place, the IC Act does not do enough to make it easier to engage workers as contractors. Given the breadth of the exceptions, relatively few State laws are affected by the Act, at least outside New South Wales. And while most of the new “sham” contractor provisions are likely to have little impact in practice, businesses will have to be wary of the new s 902 of the WR Act if they wish to convert an existing group of employees into contractors.

On the other hand, for those who believe that it is far too easy under the common law to disguise employees as contractors, the new legislation does little to stem the growth in such arrangements.