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**Independent
Contractors**
The New Legal
Environment

INDEPENDENT CONTRACTORS THE NEW LEGAL ENVIRONMENT

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INTRODUCTION

A new legal regime to govern independent contractors is to come into operation on 1 March 2007.

In a further exercise of the "corporations" power in the Constitution, the Federal Parliament has enacted laws which have four main effects:

- to supplant laws in some States which have enabled an independent contractor to seek review of "harsh" or "unfair" contracts in State tribunals;
- to continue, with some variations, the established "unfair contract" review mechanisms in Federal Courts as the sole means by which an independent contractor may seek review of an unfair contract;
- to override certain State laws which deem persons who are independent contractors to be employees for some purposes;
- to establish prohibitions on 'sham' independent contractor arrangements.

THE INDEPENDENT CONTRACTORS ACT

Aims

According to the Explanatory Memorandum, the aim of the *Independent Contractors Act 2006* ("the IC Act") is to "recognise and protect the unique position of independent contractors in the Australian workplace." It does this by asserting that these types of contracts are primarily commercial and should not be regulated by industrial law. It seeks to ensure that the States' unfair contracts jurisdictions, and some provisions of State laws deeming certain arrangements to be in the nature of employment, are overridden by the new Commonwealth "unfair contracts" regime.

To whom does the IC Act apply?

The IC Act applies to a contract for services:

- to which an independent contractor is a party; and
- that relates to the performance of work done by the independent contractor; and
- that has the "requisite constitutional connection".

The "requisite constitutional connection" exists where at least one party to the contract is a constitutional corporation, the Commonwealth or a Commonwealth Authority or a body corporate incorporated in a Territory. Alternatively, the requisite constitutional connection



will exist where the work under the contract is wholly or principally performed in a Territory, the contract entered into is in a Territory or at least one party resides in or has a principal place of business in a Territory.

A "constitutional corporation" is a trading or financial corporation or a foreign corporation but is not further defined in the IC Act. The scope of the legislation in this respect will therefore be governed by the established factors to determine whether a corporation is, in particular, a "trading" corporation or some other form of constitutional corporation.

So, for example, an individual who enters into a contract to provide IT services as an independent contractor to a commercial manufacturing company would be covered by the IC Act.

However, the IC Act does not provide a definition of 'independent contractor'. Rather, it relies on the established common law multi-factor test which assesses the totality of the relationship between the parties. The determination of whether a contract is "for services" (i.e. establishes an independent contractor relationship) or is "of service" (establishes an employment relationship) is complex, and heavily reliant on judgements about the factual matrix. The continued reliance by the IC Act on the common law definition does nothing to reduce the level of uncertainty in its application.

Exclusion of State and Territory laws

The IC Act is designed to ensure that, in the majority of circumstances, "genuine" independent contractors will be governed by the terms of their contracts (i.e., subject to the common law) and the laws of the Commonwealth's new unfair contracts regime.

The IC Act aims to prevent State law restrictions on "genuine" independent contracting arrangements by excluding certain State and Territory laws which limit the ability of independent contractors to enter into "commercial" agreements e.g. by deeming an independent contractor to be an employee for certain purposes.

The excluded laws are:

- some that treat a party to a contract for services (a services contract) as an employee or employer in relation to "workplace relations matters"¹; and
- those that relate to workplace relations matters and confer or impose rights or obligations on a party to a services contract.

However, those State and Territory laws which relate to outworkers and owner-drivers are intended to continue in their operation.

The IC Act does not affect any State or Territory law (even if it treats an independent contractor as an employee) unless that law deals with "workplace relations matters". There are many State and Territory laws dealing with the employment relationship and

¹ Workplace relations matters are defined to include remuneration, allowances, leave entitlements, hours of work, enforcing or terminating employment contracts, making, enforcing or terminating agreements relating to employment, disputes, industrial action and any other matter relating to employees or employers that is dealt with under the *Workplace Relations Act 1996*. Laws whose operation is not excluded by the IC Act include, but are not limited to, those relating to discrimination, superannuation, workers compensation, occupational health and safety, wage or salary deductions, consumer rights or taxation.



In common with some provisions under the Work Choices legislation, the Court is not permitted to award costs except in very limited situations. This provision removes some of the usual disincentives to pursuit of legal action.

Given the limited use of similar Federal law provisions in the past, it remains to be seen how frequently and extensively unfair contract claims are made under the IC Act.

Transitional Arrangements

State and Territory laws which deem independent contractors to be employees will continue to apply to an existing contract between parties during a 3 year transitional period. These laws will apply until either the contract comes to an end, the parties to the contract elect to bring the transitional period to an end, or at the end of the 3 year transitional period.

There is also provision for regulations in relation to transitional matters.

Preventing 'sham' independent contractor arrangements

The *Workplace Relations Act 1996* ("the **WR Act**") has now been amended so as to prevent 'sham' independent contracting arrangements – that is, where an employer seeks to avoid responsibility for legal entitlements due to employees by "disguising" the employees as independent contractors – by introducing penalties where these arrangements occur.

The new statutory provisions prohibit the following conduct:

1. misrepresenting an employment relationship or a proposed employment relationship as an independent contracting relationship (sections 900 and 901);
2. dismissing or threatening to dismiss an employee where the sole or dominant reason is to then engage that employee again as an independent contractor performing the same or substantially the same work (section 902);
3. knowingly and intentionally making false statements in order to persuade or influence an employee to become an independent contractor performing the same or substantially the same work (section 903).

These provisions attract civil penalties of \$6,600 for an individual or \$33,000 for a body corporate if contravened. An application for an order imposing these penalties may be made by a workplace inspector, a person affected by the contravention or a union of which the affected individual is a member.

There is no express or direct remedy in the new provisions for the benefit of the individual employee who is affected by the "sham" arrangement. However, if as a consequence of the sham arrangement an employee does not receive their full entitlements as an employee, those entitlements could be recovered in other ways.



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Where that leaves small business (perhaps most likely to be at risk of penalty) is anyone's guess. Interestingly, the very vagueness of the legal test may make it easier for a small business to prove that it could not be expected to know the nature of the contract at law.

The operation of the IC Act and WR Act provisions is most likely to be tested in industries with substantial use of independent contractors including building and construction, cleaning and catering and information technology.

Employers should be aware of these changes, particularly when considering issues in relation to restructuring their commercial operations.

In relation to more specialised employment-related matters, the line between who is an employee and who is an independent contractor remains blurred, in the absence of a statutory definition. Employers would be prudent to seek legal advice - not only to ensure that their contractual arrangements do not fall foul of the "sham" provisions, but also to assist with determining that the contracts are not susceptible to challenge, as being "harsh" or "unfair".