

## SUMMARY – INDEPENDENT CONTRACTORS ACT 2006

### I. INTRODUCTION

The Independent Contractors Act 2006 (*the Act*) commenced on 1 March 2007. Section II summarises the main provisions of the Act. Of note are the sections which relate to jurisdiction, the continued use of the common law test for independent contracting arrangements, the exclusion of State and Territory laws and the transitional arrangements. Also outlined are the new provisions relating to unfair services contracts and the penalties for sham contracting arrangements. Finally, Section III analyses the contradictions that appear between the objects of the Act and its implementation.

### II. SUMMARY OF MAIN PROVISIONS

#### A. *Jurisdiction*

The Act applies to workers under a *'services contract'*. Section 5 defines a services contract as a contract for services where at least one party is an independent contractor and the contract relates to performance of work by the independent contractor. The Act uses a range of constitutional powers including the corporations power. As a result there is a third requirement that there must be a *'requisite constitutional connection'*. This means that, outside of the Australian Territories, one party to the contract must be a corporation, the Commonwealth or a Commonwealth Authority.<sup>1</sup> This results in the Act having incomplete coverage of independent contracting arrangements but will cover the majority of contracts including your company's contractors.

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<sup>1</sup> *Independent Contractors Act 2006* (Cth) s 5

**B. Common Law Definition of ‘independent contractor’**

The legislation does not provide a statutory definition of independent contractor. Amendments seeking to include such a definition were rejected (e.g. the amendment proposed by Democrat Senator Andrew Murray). This means the question of whether a worker is an employee or an independent contractor continues to be determined by the common law multi-factor test, outlined in cases such as *Stevens v Brodribb Sawmilling*<sup>2</sup> and *Hollis v Vabu*<sup>3</sup>. In this way the Act reflects the 2005 recommendation of the Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation. According to the Second Reading Speech, the rationale behind maintaining the *status quo* is that the tests developed by the court ‘allow for the entirety of individual circumstances to be taken into account’.<sup>4</sup>

**C. A Uniform System: Excluding State and Territory Industrial Laws**

One of the primary operations of the Act is to exclude certain State and Territory laws. The Act overrides State laws that deem independent contractors to be employees.<sup>5</sup> This law is especially relevant to workers covered by the New South Wales *Industrial Relations Act 1996* or the Queensland *Industrial Relations Act 1999*. Furthermore, the Act also excludes any law which would confer or impose rights, entitlements, obligations or liabilities that would be considered ‘workplace relations matters’ in an employment relationship.<sup>6</sup> Transitional provisions will apply for up to three years to assist parties to services contracts to arrange affairs.<sup>7</sup> Finally, State laws which empower courts, commissions or tribunals to set aside or vary a services contract on an unfairness ground are overridden.<sup>8</sup> No transitional provisions apply in regards to State unfair contract laws.

A number of State and Territory laws are not excluded. These ‘saved’ laws are listed in Section 7(2) of the Act and Section 4 of the Independent Contractors Regulations 2007. Most relevant for Victoria is the saving of the *Owners Drivers and Forestry Contractors Act 2005*, the *Building and Construction Industry Security of Payment Act 2002* and laws relating to outworkers.

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<sup>2</sup> (1986)160 CLR 16

<sup>3</sup> (2001)207 CLR 21

<sup>4</sup> Independent Contractors Bill 2006 Second Reading Speech ,p 4

<sup>5</sup> *Independent Contractors Act 2006* (Cth) s 7(1)(a)

<sup>6</sup> *Independent Contractors Act 2006* (Cth) s 7(1)(b)

<sup>7</sup> *Independent Contractors Act 2006* (Cth) Part V

#### **D. Unfair Contracts**

The Act allows services contracts to be reviewed by the Federal Magistrates Court on the grounds that the contract is unfair and/or harsh.<sup>9</sup> The Court may have regard to matters including the relative bargaining position of the parties and whether undue influence or pressure was exerted. Furthermore, the court may consider whether the total remuneration received under the services contract was less than that an employee would receive performing similar work.<sup>10</sup> If the Court finds the services contract is harsh or unfair, they have the power to set aside or vary the whole or part of the contract.<sup>11</sup> However, an order may only be made for the purpose of putting the parties in the position they would be if the contract was not unfair or harsh.<sup>12</sup>

Only a party to the services contract can apply for review.<sup>13</sup> (Interestingly, the use of the term '*party*' envisions applications being made by both Principal and Contractor.) Applications must be made within the time limit of 12 months starting on the date a service contract ends to make the application.<sup>14</sup> A further limitation is that an application for review cannot be made if other review proceedings have been commenced.<sup>15</sup>

#### **E. Sham Contracting Arrangements – Penalty Provisions**

The Workplace Relations Act 1996 has been amended to include four compliance provisions aiming to prevent sham independent contracting arrangements. The amendments make it unlawful for a party to a contract to misrepresent a contract for services as a contract of employment<sup>16</sup> or to misrepresent an employment contract as a contract for services.<sup>17</sup> In addition, it is now unlawful for employers to dismiss, threatened to dismiss or knowingly make false statements to employees in order to re-engage them as independent contractors to do the same or substantially similar work.<sup>18</sup>

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<sup>8</sup> *Independent Contractors Act 2006* (Cth) s 7(1)(c)

<sup>9</sup> *Independent Contractors Act 2006* (Cth) s 12(1)

<sup>10</sup> *Independent Contractors Act 2006* (Cth) s 15

<sup>11</sup> *Independent Contractors Act 2006* (Cth) s 16(1)

<sup>12</sup> *Independent Contractors Act 2006* (Cth) s 16(2)

<sup>13</sup> *Independent Contractors Act 2006* (Cth) s 12(2)

<sup>14</sup> *Independent Contractors Regulations 2007* (Cth) s5(3)

<sup>15</sup> *Independent Contractors Act 2006* (Cth) s 14

<sup>16</sup> Workplace Relations Act 1996 (Cth) s900

<sup>17</sup> Workplace Relations Act 1996 (Cth) s901

<sup>18</sup> Workplace Relations Act 1996 (Cth) s902, s903

In the event of a contravention, either a workplace inspector from the Office of Workplace Services (OWS), an affected individual or a union (with the employee's written consent) may make an application to the Federal Court or Federal Magistrates Court. A pecuniary penalty of up to \$33,000 may be imposed. In addition, remedies including injunction, reinstatement and compensation are available to the affected party.<sup>19</sup>

### **III. ANALYSIS: PHILOSOPHY IN PRACTICE**

The Act actualises the Government's 2004 election promise to protect the rights of independent contractors. The motivation behind the amendment is reflected in the Second Reading Speech. This emphasises the Government's intention to move independent contracting arrangements away from industrial regulation and into the commercial sphere.<sup>20</sup> The rationale is that choice, flexibility and freedom from prescriptive regulation will foster entrepreneurship and economic prosperity.<sup>21</sup>

The objects outlined in Section 3 of the Act largely reflect this rationale. Firstly, the Act aims to protect the freedom of independent contractors to enter into services contracts. Secondly, it aims to recognise independent contracting arrangements as a legitimate form of workplace arrangement which is primarily commercial in nature. Finally, the Act aims to prevent interference with the terms of 'genuine independent contracting arrangements'.<sup>22</sup>

However, in practice the Act may not achieve these goals. The burden of regulation will not be decreased for independent contractors whose services contract does not have the requisite constitutional connection. In this circumstance State regulation will still apply. Moreover, it is not unimaginable that independent contractors (outside of Victoria and the Territories) will work for both constitutional corporations and non-constitutional corporations, meaning they will have to negotiate both State and Federal laws.

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<sup>19</sup> Workplace Relations Act 1996 (Cth) s904

<sup>20</sup> Independent Contractors Bill 2006; Workplace Relations Amendments (Independent Contractors) Bill 2006) Second Reading Speech, p 8

<sup>21</sup> See the Second Reading Speech and Explanatory Memorandum

<sup>22</sup> *Independent Contractors Act 2006* (Cth) s 3

Importantly, in addition, although the Act seeks to move away from industrial regulation and ensure freedom of contracting, the increased Federal unfair contracts jurisdiction may result in the creation of *de facto* minimum terms and conditions for independent contractors. For example, Section 15 states the Court may consider whether the total remuneration received under the services contract was less than that an employee would receive performing similar work. This may result in what is effectively a 'minimum wage' for independent contractors.

Finally, the failure of the Act to provide a statutory definition for independent contractors may create confusion for employers and Principals. Coupled with the compliance provision penalising misrepresentation and false statements, on going use of the common law definition of contractor may deter entrepreneurship.

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