

INDEPENDENT CONTRACTORS

Introduction

On 1 March 2007 legislation came into effect which provides for independent contractors to better manage their businesses in accordance with the terms of their commercial arrangements.

Who does the *Independent Contractors Act 2006 (Cth)* apply to?

The *Independent Contractors Act 2006 (Cth)* applies to all independent contractors if at least one party to the contract is a constitutional corporation. If a company engages in substantial trading activities (buying and/or selling goods and/or services) it is likely to be a constitutional corporation.

The independent contractors legislation also applies as follows:

- if at least one party is a resident in a Territory;
- if at least one party is a company that is registered in a Territory;
- if the work to be performed is in a Territory;
- if the contract is entered into in a Territory; or
- if a party to the contract is a Commonwealth authority.

The legislation uses the definition of a contractor that has been adopted by the courts. Before engaging a person to perform work, it is therefore essential to determine whether they are an independent contractor or an employee at common law.

The common law defines an independent contractor as a person who works under a commercial contract or a contract for services. The independent contractor can operate as an individual or through a partnership, company or trust. An employee is defined as a person who works under an employment contract or a contract of service.

At common law, if one party can control the way the work is performed, where and when it is performed and by whom, then the contract is more than likely an employment contract. Over time the courts have identified a number of factors to determine whether the worker is an employee or contractor at common law.

No one factor determines whether a person is an employee or an independent contractor. Instead, the courts have developed a process which weighs up several factors to determine the true nature of the relationship. Relevant factors will include, for example, the level of control the employer has over the worker, the mode of remuneration, the provision and maintenance of equipment, the nature of the obligation to work, the hours of work and provision for holidays, the deduction of income tax and whether the worker can delegate work to others. In the building and construction industry, another factor may be whether the person is obliged to fix defects at their own expense.

Where there is doubt about the status of a worker, independent legal advice should be sought.

A number of State and Territory laws have no legal effect

The legislation sets aside State and Territory legislation which treats independent contractors as employees for 'workplace relations matters'.

There are exceptions as follows:

- owner drivers in New South Wales and Victoria; and
- clothing outworkers.

'Workplace relations matters' is defined to include the following:

- remuneration, allowances or other amounts payable to employees;
- leave entitlements of employees;
- hours of work of employees;
- enforcing or terminating contracts of employment;
- making, enforcing or terminating agreements determining terms and conditions of employment;
- disputes between employees or employers or the resolution of such disputes; and
- industrial action.

Because of this definition, any State or Territory laws which deal with these issues no longer apply if the contractor meets the definition of an independent contractor for the purposes of this legislation. It is important to note, however, that the independent contractors legislation does not affect (amongst others) the following State and Territory laws:

- Workers' compensation;
- Occupational health and safety;
- Anti-discrimination; and
- Equal opportunity.

It is still therefore possible for a building industry subcontractor, for example, to be treated as an employee of a contractor under various State and Territory workers' compensation laws, and these laws must still be examined when engaging subcontractors. They do not apply the common law control test, discussed above, to determine the status of an independent contractor but have other criteria that must be examined.

Transitional period

The independent contractors legislation originally provided for a transitional period of three years. In November 2009 the Government extended the transitional period, which now ends on 1 September 2011. State and Territory laws which deem contractors to be employees (providing entitlements including unfair dismissal) will continue to apply until this date as if the contract was in existence at the time the laws came into effect.

On or after 1 September 2011 any rights or obligations existing as at that time under State or Territory law must be paid out as if the parties had agreed to terminate their relationship.

This means for instance that any accrued leave would be payable but redundancy laws would not apply as the parties have 'agreed' to the termination of the contract.

During the transitional period parties to the contract can agree that they want the federal laws to apply and the State and Territory laws to cease to apply. This is called a 'reform opt-in agreement'.

If the parties agree to opt in and there are existing State or Territory laws deeming the independent contractor to be an employee, the State or Territory laws still apply up until the date of the reform opt-in agreement as if the employee and the employer had agreed to terminate the employment.

This means for instance that any accrued leave would be payable but redundancy laws would not apply as the parties have 'agreed' to the termination of the contract.

The independent contractors legislation allows for civil penalties of up to \$33,000 (for corporations) or \$6,600 (for individuals) to be imposed if a person coerces, threatens or knowingly makes a false statement to another person in relation to a reform opt-in agreement.

Unfair contracts

Individuals can take advantage of the unfair contract provisions unless they are performing private or domestic work. Corporations that are independent contractors may have their contracts (excluding those for private or domestic services) reviewed where the work is wholly or mainly performed by the corporation's director or members of the director's family.

The *Independent Contractors Act 2006* (Cth) replaced various State and Territory unfair contract laws with a new national system. The legislation establishes a process in which the Federal Court or the Federal Magistrates Court can review contracts, and vary or set aside the contract if the contract is found to be unfair or harsh. There is no transitional period for these laws.

In deciding whether a contract is unfair or harsh the Court must consider the following:

- the relative bargaining strengths of the parties to the contract;
- any undue influence, pressure or unfair tactics which may have been used;
- whether the total remuneration paid to the independent contractor is less than an employee doing the same work would have received; and
- any other relevant matters.

Fair Work Act 2009 (Cth) – Sham contracts

The *Fair Work Act 2009* (Cth) (FW Act) continues the protections against sham contracting that were contained in the *Workplace Relations Act 2006* (Cth). The FW Act imposes civil penalties if an employer does any of the following:

- dismisses an employee in order to engage the individual as an independent contractor to perform the same, or substantially the same, work;
- represents an employment relationship as independent contracting; or
- makes a false statement in order to influence or persuade an individual to enter into an independent contract.

Penalties of up to \$33,000 (for corporations) or \$6,600 (for individuals) apply.

A Fair Work Inspector, an employee or a union can commence legal proceedings in respect of a sham contract arrangement.

Workplace inspectors from the Office of the Australian Building and Construction Commissioner (ABCC) are empowered to investigate suspected sham contract offences.

FOR FURTHER INFORMATION

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Disclaimer: This information is provided as general advice on the workplace relations system. It does not constitute legal advice and it is always advisable to seek further information regarding specific workplace relations issues.