

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Employment

Subject – *Independent Contractors Act 2006*

Independent Contractors Regulation 2016

The *Independent Contractors Act 2006* (the Act) and accompanying *Independent Contractors Regulations 2007* (the 2007 Regulations) protect the freedom of independent contractors to enter into contracting arrangements.

Section 43 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary and convenient to be prescribed for carrying out or giving effect to the Act.

Section 7 of the Act excludes State and Territory laws that require independent contractors to be treated as employees or provide employment-like rights or entitlements. Paragraph 7(2)(c) of the Act provides that regulations can be made to preserve laws that would otherwise be excluded.

Section 33(3) of the *Acts Interpretation Act 1901* provides that where an Act confers a power to make regulations the power shall, unless the contrary intention appears, be construed as including a power to repeal, rescind, revoke, amend or vary the regulations.

The purpose of the *Independent Contractors Regulation 2016* (the Regulation) is to repeal and replace the 2007 Regulations. The 2007 Regulations are due to sunset on 1 April 2017 in accordance with Part 6 of the *Legislation Act 2003* (the Legislation Act).

The Regulation has the same substantive effect as the 2007 Regulations, subject to technical amendments and machinery provisions that:

- repeal the 2007 Regulations;
- replace references to the *Trade Practices Act 1974* and State and Territory fair trading laws with a reference to the Australian Consumer Law; and
- update the terminology and structure of the 2007 Regulations in line with current drafting practices.

Details of the Regulation are set out at Attachment A.

The Department of Employment consulted with the States and Territories. No objections were raised.

The Act specifies no conditions that need to be satisfied before the power to make the Regulation may be exercised.

A Statement of Compatibility with Human Rights has been completed for the Regulation in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement's assessment is that the Regulation is compatible with human rights. A copy of the Statement is attached (Attachment B).

The Regulation is a legislative instrument for the purposes of the Legislation Act.

A self-assessment certification letter has been prepared by the Department of Employment and will be published on the Office of Best Practice Regulation (OPBR) website once the Regulation commences (OPBR ID: 21551).

The Regulation commences on 2 January 2017.

Details of the *Independent Contractors Regulation 2016*

Section 1 – Name

This section sets out the name of the regulation as the *Independent Contractors Regulation 2016* (the Regulation).

Section 2 – Commencement

This section provides that the Regulation commences on 2 January 2017.

Section 3 – Authority

This section provides that the Regulation is made under the *Independent Contractors Act 2006* (the Act).

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Section 5 – Definitions

This section provides a list of definitions relevant to the Regulation.

Section 6 – State and Territory laws affecting parties to service contracts

This section specifies laws that are not excluded under subsection 7(1) of the Act to the extent they are specified.

Subsection 7(1) of the Act excludes the operation of State and Territory laws to the extent that those laws affect, or would affect, the rights, entitlements, obligations or liabilities of a person who is a party to a services contract (as defined in section 5). The Act excludes State and Territory laws that:

- deem common law independent contractors to be employees in respect of a workplace relations matter (as defined in section 8);
- provide employment-like rights to independent contractors in respect of a workplace relations matter; and
- expressly allow a court, commission or tribunal to rewrite or render unenforceable the terms of a contract with an independent contractor on an unfairness ground.

Paragraph 7(2)(c) of the Act provides that subsection 7(1) does not apply to a law of a State or Territory that is specified in regulations made for the purposes of the paragraph to the extent that the law is so specified.

Section 6 specifies that the following state and territory laws are not excluded by the Act:

- *Building and Construction Industry Security of Payment Act 1999* (NSW);
- parts of the *Health Services Act 1997* (NSW);

- *Building and Construction Industry Security of Payment Act 2002* (Vic);
- *Building and Construction Industry Payments Act 2004* (Qld);
- *Queensland Building and Construction Commission Act 1991* (Qld);
- *Construction Contracts Act 2004* (WA);
- *Owner-Drivers (Contracts and Disputes) Act 2007* (WA);
- *Building and Construction Industry Security of Payment Act 2009* (SA);
- *Building and Construction Industry Security of Payment Act 2009* (Tas.);
- *Building and Construction Industry (Security of Payment) Act 2009* (ACT); and
- *Construction Contracts (Security of Payments) Act* (NT).

Section 7 – Circumstances in which application must not be made to review services contract as harsh or unfair

This section sets a time limit in which an unfair contract application must be brought by an applicant under section 12 of the Act. It is made under section 13 of the Act which allows regulations to be made to prescribe circumstances in which an application cannot be made under subsection 12(1).

This section provides that a person can only make an application for review of a services contract within 12 months after the date on which the services contract ends, unless there are exceptional circumstances justifying the making of the application.

Section 8 – Provisions for other review proceedings preventing or prevented by application to review services contract as harsh or unfair

This section prevents a person making an unfair contracts application under section 12 of the Act where they have sought a similar remedy under legislation prescribed in the regulation.

Section 14 of the Act provides that an unfair contracts application cannot be made if other review proceedings have been brought in respect of the contract, unless those other proceedings have been discontinued or failed for want of jurisdiction.

This section is made under paragraph 14(3)(b) of the Act which enables the making of regulations to prescribe Commonwealth, State or Territory laws as ‘other review proceedings’.

This section prescribes for the purposes of ‘other review proceedings’ the Australian Consumer Law (ACL). A note to this section provides that the reference to the ACL is a reference to the ACL as a law of the Commonwealth and as applied as a law of each State and Territory.

Schedule 1 – Repeals

Item 1 of Schedule 1 repeals the 2007 Regulations.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Independent Contractors Regulation 2016

This Regulation is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Regulation

The *Independent Contractors Act 2006* (the Act) sets up a national unfair contracts scheme for independent contractors where they can seek relief from a court to set aside a services contract (being a contract that has the necessary constitutional connection and has an independent contractor as a party) if it is harsh or unfair.

The Act overrides the effect of certain state and territory laws which would otherwise have applied to independent contractors in relation to those services contracts. Those state and territory laws deem independent contractors to be employees, impose employment-like rights and obligations on those independent contractors, or allow the making of orders concerning unfair contracts.

The Regulation:

- preserves access to some state and territory laws (in particular, state and territory security of payment laws);
- prescribes a time limit on applications to review contracts for unfair terms; and
- prevents a person making an unfair contracts application under the Act where they have sought a similar remedy under the Australian Consumer Law (ACL).

Human rights implications

The Regulation engages the right to access to justice, which is implied in the right to an effective remedy under Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR).

Article 2(3) of the ICCPR provides the right to an effective remedy, including the right to have that right determined by competent judicial, administrative or legislative authorities, or any other competent authority.

The Regulation may limit the right to access to justice because it prevents concurrent claims in respect of the same services contract. The scope of this restriction is narrow and a person is able to choose between bringing a claim for unconscionable conduct under the ACL or bringing an unfair contracts claim under the Act. The Regulation includes a twelve month time limit to bring an action under the Act. This can be waived in exceptional circumstances and does not affect alternative actions under the ACL.

The Regulation will not prevent genuine claims from being pursued. It is appropriate and proportionate to address the time and expense that claims may cause another party to incur and

the unfairness that may result from a person recovering a remedy more than once in respect of a particular services contract.

The Regulation promotes the right to access to justice by preserving the operation of certain state and territory laws for independent contractors. Relevantly, the Regulation preserves:

- access to a range of remedies under security of payment legislation in all states and territories;
- the operation of certain protections for visiting medical officers in New South Wales under the *Health Services Act 1997* (NSW); and
- employment-like protections for owner-drivers in Western Australia in relation to their services contracts under the *Owner-Drivers (Contracts and Disputes) Act 2007* (WA).

Conclusion

This Regulation is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* and to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

Senator the Hon. Michaelia Cash, Minister for Employment