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June 2009 Newsletter

>> FEATURE ARTICLE — NEW LAWS ON UNFAIR CONTRACTS

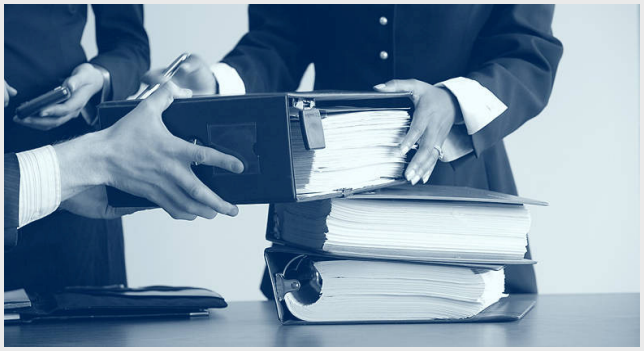
The Independent Contractors Act commenced on 1 March 2007. The Federal Magistrates Court can look at most contracts involving an independent contractor and decide whether the contract is, or is not, unfair.

The Act specifically excludes service contracts for a private or domestic purpose or contracts where the independent contractor is a company, unless the work is mainly performed by a director of the corporation or a member of his or her family.

Because it is Commonwealth legislation one of the parties must be a corporation. The other requirement is that the contract relates to the performance of work by an independent contractor.

The Court can look at whether or not a contract was harsh or unfair and part of its consideration will include the following:

- the relative strengths of the bargaining positions of the parties to the contract;
- whether any of the parties was represented;
- whether any undue influence or pressure was exerted on, or any unfair tactics were used against, a party to the contract;
- whether the contract provides total remuneration that is, or is likely to be, less than that of an employee performing similar work; and
- any other matter that the Court thinks is relevant.



The Act extends to contracts to vary a service contract as well as the contract itself.

If a company is the independent contractor the Act will only apply if the work was done by a director of the company or a member of his or her family. This issue was examined by the Court in the case of Fasbert Pty Ltd v ABB Warehousing (NSW) Pty Ltd. This was a contract between a warehousing business and a corporation which agreed to provide warehouse management services and a container uploading service for a weekly contract fee plus a profit share. The defendant warehousing company terminated the contract without any notice or payment in lieu of notice. Proceedings were commenced including a claim that the contract was unfair.

The services were provided by Mr Foster, his wife and Mr Abbott. Casual labour was also employed for packing and unpacking. Mr Foster was a director for the whole of the contract period but Mr Abbott was only a director for five months of the twenty three month period. Notwithstanding this problem, the Court held that it had jurisdiction to examine whether or not the contract was unfair.

There is some doubt as to whether or not the Act applies if the contract has been terminated. The best view seems to be that it does apply but it would be prudent, in view of some doubts, that proceedings be commenced before the termination of the contract if it is thought that the contract might be terminated.

In an application before the Court, the Court can make orders setting aside the whole or any part of the contract or it can vary the contract. The Court has also power to make interim orders to preserve the position if that is needed.

>> JACKSON LALIC LAWYERS PART OF AUSTRADE SEMINAR IN MADRID

On 20 May 2009, the Madrid office of Austrade held a seminar on Green Building Technology. Australian companies were represented at the seminar promoting the best that Australia has to offer. Jackson Lalic was the only service provider to be part of the Australian contingent.

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>> UNDERTAKING TO DAMAGES

What is an undertaking as to damages? How do you calculate what has to be paid…

It sometimes happens that a party to court proceedings seeks an injunction to restrain or stop the other party from doing a certain thing. For example, if a bank has the right to sell a property, the owner might seek an injunction to prevent that from happening. If the court grants the injunction it will usually only do so if an undertaking as to damages is given to the court.

Because this is an undertaking to the court it is a most serious matter. It means that if, after all of the evidence is heard a decision is made that the injunction should not have been granted, the other party can apply to the court for an order that the loss it suffered, be paid to it by the other party.

While these undertakings are mostly given during proceedings, they are sometimes also given at the time of an appeal. In the case Robb Evans of Robb Evans & Associates - v -the European Bank Limited, an undertaking as to damages was given at the end of the proceedings. The bank was successful in litigation and was entitled to receive a certain amount of money. The unsuccessful party asked for an order that it need not pay the money to the successful party on the basis it gave an undertaking to pay damages if it was unsuccessful at the appeal. The party was unsuccessful and the undertaking as to damages was called on.

The question arose as to how the damages should be calculated.

The European Bank said that because they converted the currency from US dollars to Euros they suffered a higher loss because of currency fluctuations. They argued that they were entitled to this greater loss. The Judges in the Court of Appeal said there was no reason to believe that Robb Evans had any knowledge that the European Bank might change the currency and therefore they could not claim that loss. The European Bank was given interest in US dollars of $3077.71. The European Bank was ordered to pay the costs of the trial and of the appeal. No doubt those costs were far greater than the Australian dollar equivalent of US $3077.71.

>> MORTGAGEE DUTY

Stronger duty imposed on mortgagee when selling land…

Legislation drafted by Peter Jackson of Jackson Lalic Lawyers promises to give a better result to borrowers who complain about the sale of their land by the mortgagee at an undervalue.

Up until the recent change in the law, a mortgagor who complained that land was sold at an undervalue had to prove that the mortgagee acted recklessly and with indifference to the position of the mortgagor. The position is now clearer. The Conveyancing Act has been amended to provide that when a mortgagee or chargee exercises a power of sale in respect of mortgaged land, they must take reasonable care to ensure that the land is sold either for,

- if the land has an ascertainable market value when it is sold – not less than its market value or
- in any other case, the best price that may reasonably be obtained in the circumstances.

This is an important change in the law and will make it easier for mortgagors who complain that their property has been sold at an undervalue to take action.

>> DISCLAIMER

The articles contained in this newsletter are in the nature of general comment only. The articles are neither intended nor should be taken to be, advice in respect of any particular matter. Advice should be sought in relation to particular circumstances.

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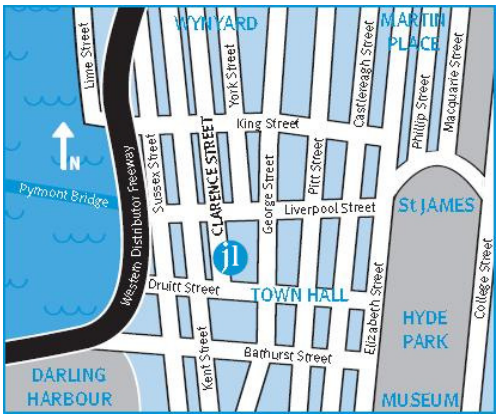

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