

EXPLANATORY STATEMENT

Select Legislative Instrument 2010 No. 134

Subject - *Independent Contractors Act 2006*
Independent Contractors Amendment Regulations 2010 (No. 1)

The *Independent Contractors Act 2006* (the Act) protects the freedoms of independent contractors to enter into contracting arrangements and recognises that these arrangements should be regulated by commercial, not workplace relations, law.

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 or convenient to be prescribed for carrying out, or giving effect to the Act.

Subsection 7(1) of the Act excludes the operation of state and territory (state) laws that require independent contractors to be treated as employees, or requires them to be afforded employee like entitlements. However, state laws that would otherwise be excluded can be saved by regulations made under paragraph 7(2)(c) of the Act.

The *Independent Contractors Regulations 2007* (the Principal Regulations) save the following state laws that provide employment like protections in the building and construction industry:

- *Building and Construction Industry Security of Payment Act 1999* (New South Wales)
- *Building and Construction Industry Security of Payment Act 2002* (Victoria)
- *Building and Construction Industry Payments Act 2004* (Queensland)
- *Construction Contracts Act 2004* (Western Australia)
- *Construction Contracts (Security of Payments) Act* (Northern Territory)

In 2009 security of payment legislation was passed in the following state jurisdictions (the new laws):

- *Building and Construction Industry (Security of Payment) Act 2009* (Australian Capital Territory)
- *Building and Construction Industry Security of Payment Act 2009* (South Australia)
- *Building and Construction Industry Security of Payment Act 2009* (Tasmania)

The *Independent Contractors Amendment Regulations 2010 (No. 1)* (the Regulations) amend the Principal Regulations to prescribe the new laws under paragraph 7(2)(c) of the Act and preserve the application of the new laws to independent contractors. This allows independent contractors in the Australian Capital Territory, South Australia and Tasmania to access the benefits of the new laws. As the Regulations save the new laws from the operation of the Act, independent contractors are afforded the employee like entitlements which are provided by the new laws. These entitlements are similar to those already accessible by independent contractors in other jurisdictions, such as claiming payment for work done up and down the contract chain.

The new laws address the problem of security of payment for contract work undertaken in the building and construction industry. A failure to make payments for contract work has impacts along the contracting chain, including serious ramifications for the cash

flow of subcontractors and suppliers. The effect of the new laws is that there is now a security of payments regime in every jurisdiction in Australia.

When the Principal Regulations were created, security of payment laws existed in all states and territories except for the Australian Capital Territory, South Australia and Tasmania. To ensure that independent contractors in the building and construction industry could access the benefits provided by these laws, all state and territory security of payment laws existing at that time were listed as exempt under the Principal Regulations to prevent them from being overridden by the Act. With the passing of the new laws, all Australian states and territories now have security of payment schemes in place. If the new laws are not listed as exempt under the Principal Regulations an inconsistency would exist. Security of payment laws would apply to independent contractors in New South Wales, Queensland, Victoria, Western Australia and the Northern Territory, but not to those in the Australian Capital Territory, South Australia and Tasmania.

Schedules 1 and 2 of the Regulations amends Regulation 4 of the Principal Regulations. By doing so, the new laws are saved from the operation of the Act, by virtue of paragraph 7(2)(c) of the Act. This allows independent contractors in the Australian Capital Territory, South Australia and Tasmania to access the benefits of the new laws.

In developing the Regulations, the Department of Innovation, Industry, Science and Research has not conducted public consultation. This is consistent with section 18 of the *Legislative Instruments Act 2003* as the exemption of the new laws is minor or machinery in nature and does not substantially alter the law.

The Act does not specify any conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations commence on 1 July 2010 for the Australian Capital Territory and Tasmanian Laws, and will also commence on the commencement of the South Australian law.