NSW Young Lawyers

Independent Contractor Unfair Contract Rights

Ingmar Taylor
Barrister
State Chambers
Level 36, 52 Martin Place
Sydney NSW 2000
DX 410 Sydney
Tel (02) 9223 1522
Fax (02) 9223 7646

NSW Young Lawyers

Independent Contractor Unfair Contract Rights

1. The *Independent Contractors Act* (Cth) ('the IC Act') provides the Federal Magistrates Court and the Federal Court[1] with an unfair contracts jurisdiction in respect of most contracts to which an independent contractor is a party. This paper analyses the nature of that jurisdiction.

2. A recent decision of the Federal Magistrates Court, *Keldote Pty Ltd v Riteway Transport*[2], suggests that many of the principles that have been developed by the Industrial Court of NSW in respect of its unfair contract jurisdiction may be adopted by those Courts in applying this federal jurisdiction.

The legislation

3. The IC Act commenced on 1 March 2007. It contains unfair contract provisions[3] which replaced similar provisions found in the *Workplace Relations Act 1996* (Cth)[4] ('WR Act').

4. The operative provision of the IC Act is s 12, which in the following terms:

> ***"12 Court may review services contract***
>
> *(1) An application may be made to the Court to review a services contract on either or both of the following grounds:*
>
> *(a) the contract is unfair;*
>
> *(b) the contract is harsh.*
>
> *(2) An application under subsection (1) may be made only by a party to the services contract.*
>
> *(3) In reviewing a services contract, the Court must only have regard to:*

[1] The two Courts have co-extensive jurisdiction. This is discussed further below.
[2] (2008) 176 IR 316; [2008] FMCA 1167.
[3] In Part 3.
[4] Sections 832-834, previously numbered ss 127A-127C.

(a) the terms of the contract when it was made; and

(b) to the extent that this Part allows the Court to consider other matters - other matters as existing at the time when the contract was made.

*(4) For the purposes of this Part, **services contract** includes a contract to vary a services contract.*

5. Section 15 provides that in addition to the terms of the contract the Court may also have regard to other matters when determining if a contract is unfair or harsh. Section 15(1) is in the following terms:

> *"In reviewing a services contract in relation to which an application has been made under subsection 12(1), the Court may have regard to:*
>
> *(a) the relative strengths of the bargaining positions of the parties to the contract and, if applicable, any persons acting on behalf of the parties; and*
>
> *(b) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, a party to the contract; and*
>
> *(c) whether the contract provides total remuneration that is, or is likely to be, less than that of an employee performing similar work; and*
>
> *(d) any other matter that the Court thinks is relevant."*

What types of contracts are amenable to relief?

6. The IC Act applies to a 'services contract', which is defined in s 5(1) to mean a "contract for services" to which an independent contractor is a party and:

   a. that relates to the performance of work by independent contractor; and

   b. has the requisite constitutional connection specified in s 5(2). Section 5(2) provides that the requisite constitutional connection arises in various circumstances, including where one party to the contract is a constitutional corporation.

7. The expression 'contract for services' in s 5 of the IC Act is not defined. The explanatory memorandum[5] to the *Independent Contractors Bill 2006* stated the intention that the phrase 'contract for services' is to have its common law

[5] Explanatory memorandum pages 30-31.

meaning. The explanatory memorandum went on to refer to the multi-factor (indicia) test used to distinguish between a contract of employment and a contract for services and to cite the leading authorities of *Stevens v Brodribb Sawmilling Co Pty Ltd*[6] and *Hollis v Vabu Pty Ltd*[7].

8. The IC Act extends the meaning of 'services contract' to include any condition or collateral arrangement that relates to such a contract, provided that condition or collateral arrangement also has the requisite constitutional connection[8]. This formulation is similar to the definition of 'contract' in s 105 of the *Industrial Relations Act 1996* (NSW) ('the IR Act'). The expression 'collateral arrangement' has been defined to not require itself the performance of work[9]. Note, however, unlike the IR Act, it is not sufficient to merely have an arrangement in order to attract jurisdiction.

9. Section 12(4) provides that for the purposes of Part 3, unfair contracts, a 'services contract' includes a contract to vary a services contract. As the legislative note following that sub-section explains, the effect of subsection (4) is that a contract to vary a services contract can be reviewed under Part 3, as the contract to vary will itself be a services contract.

10. Part 3, unfair contracts, does not apply to all 'services contracts'. Section 11 states that it does not apply to:

    a. services contracts for the private and domestic purposes of another party to the contract; or

    b. a services contract where the independent contractor is a corporation unless the work is "mainly performed" by a director of the corporation or a member of his or her family.

Corporations can be independent contractors

11. The definition of 'independent contractor' in s 4 *"is not limited to a natural person"*.

---

[6] (1986) 160 CLR 16
[7] (2001) 207 CLR 21
[8] Section 5(4).
[9] *Bartolacci v Permanent Custodians Limited* (1992) 44 IR 388 at 397.

12. As noted, that a company can be an independent contractor is expressly contemplated by s 11, which deals with the application of Part 3, unfair contracts. Section 11(b) provides that the Part does not apply to:

> *". . . a services contract to which an independent contractor that is a body corporate is a party, unless the work to which the contract relates is wholly or mainly performed by:*
>
> *i. A director of the body corporate; or*
>
> *ii. A member of the family of a director of the body corporate."*

13. This definition of independent contractor captures a broader category of contracts that can be subject of unfair contract proceedings under the IC Act compared with the equivalent provisions in the WR Act. It defined independent contractor in s 4(1A) in a manner that limited it to natural persons[10].

The IC Act ousts State law including s106 of the IR Act

14. Section 7 of the IC Act expresses the intention that the IC Act exclude the operation of State laws to the extent to which such laws provide, *inter alia*, unfair contract rights. As a consequence, pursuant to s 109 of the *Constitution*, the IC Act renders of no effect s 106 of the IR Act in respect of any 'services contract'. The WR Act has provisions to the same effect in respect of employment contracts[11].

15. The Industrial Court of New South Wales continues to have jurisdiction[12] in respect of a contract *"whereby a person performs work in any"*[13] which is <u>not</u> a contract of employment nor a 'services contract' within the meaning of s 5 of the IC Act. This means that a subset of contracts remain within the jurisdiction of the NSW Industrial Court, including franchise and dealership agreements, provided neither party is an 'independent contractor'.

16. As a result of the expression 'independent contractor' being broadened to include a corporation, there may be factual circumstances where there is

---

[10] See *Fitzroy Motors Pty Ltd v Hyundai Automotive Distributors Australia Pty Ltd* (1995) 68 IR 120.
[11] See s 16.
[12] Subject to those jurisdictional limits contained in Chapter 2, Part 9 of the *IR Act*, including ss108A and 108B.
[13] Section 106(1).

some uncertainty as to whether a contract pursuant to which the corporation did work is a 'services contract' enabling a party to bring proceeding alleging unfairness pursuant to the IC Act, or the contract does not involve a party who is an independent contractor and accordingly the IC Act does not oust the jurisdiction of the NSW Industrial Court pursuant to s 106 of the IR Act. This issue has been raised in proceedings between the Bank of Queensland Limited and various persons who entered into agreements with the Bank to operate Bank branches on a franchise-type arrangement[14]. Some of those who contracted with the Bank commenced proceedings under s 106 of the IR Act. The Bank commenced Federal Court proceedings seeking a declaration that, as a consequence of the IC Act, the Industrial Court of New South Wales had no jurisdiction. Following various interlocutory judgments[15], and an appeal[16], the various proceedings have now been cross vested to New South Wales Supreme Court[17]. In the course of those proceedings, a Full Court of the Federal Court expressed a view that the expression 'independent contractor' in s 5 of the IC Act was unlikely to have been intended to mean a contractor that is not a 'dependent' contractor. Rather, the expression may be intended to reflect the common law concept of what is an 'independent contractor' and accordingly it may be relevant to consider evidence as to the way in which the parties carry out or give effect to a contract in order to determine that question rather than simply relying on the terms of the contract itself[18].

When will a corporate independent contractor be permitted to take unfair contract proceedings?

17. As noted, s 11(b) contemplates that a corporation may be an independent contractor, but provides that such a contract can only be the subject of unfair contract proceedings to those where the work to which the contract relates is

---

[14] *Bank of Queensland Ltd v Industrial Court of New South Wales* [2008] FCA 324; *Bank of Queensland Ltd v Industrial Court of New South Wales (No 2)* [2008] FCA 1435; *Rossmick No 1 Pty Ltd v Bank of Queensland Ltd* [2008] FCAFC 81; *Rossmick No 1 Pty Ltd v Bank of Queensland Ltd* [2008] FCA 1632.
[15] *Bank of Queensland Ltd v Industrial Court of New South Wales* [2008] FCA 324; *Bank of Queensland Ltd v Industrial Court of New South Wales (No 2)* [2008] FCA 1435.
[16] *Rossmick No 1 Pty Ltd v Bank of Queensland Ltd* [2008] FCAFC 81.
[17] *Rossmick No 1 Pty Ltd v Bank of Queensland Ltd* [2008] FCA 1632.
[18] *Rossmick No 1 Pty Ltd v Bank of Queensland Ltd*[2008] FCAFC 81 at [9]-[10].

wholly or mainly performed by a director of the body corporate or a member of the family of the director of the body corporate. The application of that subsection was considered in *Fasbert Pty Ltd v ABB Warehousing (NSW) Pty Ltd*[19]. In that case the relevant contract was between a warehousing business and a corporation which agreed to provide warehouse management services and a container unloading service for a weekly contract price plus a profit share. The respondent warehousing company terminated the contract without notice or payment in lieu of notice. The applicant commenced proceedings pleading various causes of action, including that the contract was an unfair contract pursuant to the IC Act.

18. The applicant's management services were provided by Mr Foster and his wife and Mr Abbott. Further, the applicant engaged casual labour for packing and unpacking goods. The Federal Magistrate determined that the casual labour could be disregarded.

> *"In my view, the engagement and use of casual and other labour for the packing and unpacking of goods does not dilute the provision of warehouse management services pursuant to the contract by Mr Foster and Mr Abbott. It was their skill, experience and judgement that was brought to bear in the provision of warehouse management services which were the services to be provided pursuant to the contract."*[20]

19. While Mr Foster was a director of the applicant company for the whole period of the contract, Mr Abbott was only a director for five months of the 23 month contract. The Federal Magistrate considered that the limitation in s 11(1)(b) requires consideration of the whole period of the contract and a determination as to whether the work done during that period was 'mainly' done by the directors. Having determined that Mr Foster and Mr Abbott shared their duties equally, the Federal Magistrate found that on the facts more than half of the services were provided by Mr Foster and Mr Abbott as directors and accordingly there was jurisdiction to consider the claim. The Court ultimately did not uphold the applicant's claim made pursuant to the IC Act on the

[19] [2008] FMCA 1198.
[20] At [29].

merits, finding that there was no unfairness on the argued ground of misrepresentation.

Whether the contract must still be on foot

20. While perhaps there might still be some argument as to whether the unfair contract provisions in the *IC Act* apply to a contract that has already terminated, it would seem the better view is that they do. However it would be prudent in circumstances where a termination is imminent to commence proceedings before the termination occurs.

21. The unfair contract provisions in the IC Act, like their predecessor in the WR Act, are drafted in the present tense: for example, "*a services contract is a contract for services to which an independent contractor is a party*", etc[21]. The relief that the Court can grant is to either vary or set aside a contract, being relief which might be considered applicable to contracts on foot rather than contracts that had already terminated.

22. In *Harding v Ansvar Australia Insurance*[22] Spender J noted that s 127A of the WR Act *"contemplates an application to review a presently subsisting contract on the grounds that it is unfair or harsh"*[23]. That decision concerned an application for an interim injunction preventing the termination of the contract. Spender J determined not to grant the interim relief on the basis that Counsel for the respondent submitted that at final hearing even if the contract had come to an end the Court could still make orders varying the contract.

23. The contract in *Buchmueller*, referred to above, had come to an end at the time that Dowsett J determined to vary it, however, the issue of whether relief was available in respect of a contract that had already been terminated was not argued.

24. In *Keldote Pty Ltd v Riteway Transport* the parties agreed that the Court had jurisdiction to hear and determine the applications even though, by the time the matter came on for final hearing, the contracts had been terminated. In that case, the proceedings had commenced prior to the contracts being

[21] Section 5(1).
[22] (1998) 91 IR 1
[23] At 2.8.

terminated. Cameron FM referred to *Re Transport Workers Union of Australia*[24] where Munro J of the AIRC concluded that a contract could be considered if it was on foot at the time the proceedings commenced. Cameron FM also noted that in respect of the New South Wales unfair contracts jurisdiction there was authority to the effect that contracts could be considered after they had been terminated. The Federal Magistrate concluded: *"the Court has jurisdiction to review the contracts even if, at the time of hearing, they were no longer on foot."*[25]

25. In *Fasbert v ABB Warehousing* Driver FM cited the decision in *Keldote v Riteway Transport* as being authority for the proposition that the IC Act covers contracts that are no longer on foot, stating: *"I do not think anything in particular turns on the use of the present tense in the Act"* and citing s 18A of the *Acts Interpretation Act 1901* (Cth).

26. Regulation 5 of the *Independent Contractors Regulations 2007* is drafted on the presumption that there is jurisdiction in respect of contracts that have already terminated. It provides a time limit for making an application under s 12 of the IC Act, being *"a period of 12 months starting on the date on which a services contract ends"*.

Whether subsequent conduct is relevant

27. The predecessor provisions[26] did not state expressly that a Court, in determining unfairness, could not have regard to conduct after the contract was formed[27]. Section 12(3) makes clear that the Court "must only" have regard to the terms of the contract "*when it was made"* and such other matters as the Court can consider that were *"existing at the time when the contract was made"*.

28. In *Harding v EIG Ansvar Ltd*[28] Spender J noted that much of the evidence went to matters that were irrelevant, stating:

---

[24] (1993) 50 IR 171 at 195.
[25] At [4].
[26] Sections 127A-127C of the *WR Act*.
[27] However it was decided that subsequent conduct could not render a contract unfair if it was fair upon commencement: *Finch v Herald & Weekly Times Limited* (1996) 65 IR 239.
[28] (2000) 95 IR 349.

> *"It is the unfortunate fact that the final hearing of this application was conducted by both sides as if the application was a claim for unfair dismissal. Much of the material canvassed in the course of the evidence on the final hearing was irrelevant to the question of whether the contractual arrangements were unfair or harsh, which are, after all, the only issues that fall to be determined on this application."*[29]

29. However, as discussed below in respect of *Keldote Pty Ltd v Riteway Transport,* in some circumstances a Court may consider evidence of post-contract conduct to evidence unfairness that existed from the time the contract was formed.

30. Further, the Court can consider later variations because, pursuant to s 12(4) each variation is, for the purposes of Part 3, a services contract itself.

Relief that may be granted

31. Section 16 of the IC Act sets out the relief that can be provided by the Federal Magistrates Court and Federal Court. It is in the following terms:

> *"**16 Orders that Court may make***
>
> *(1) If the Court records an opinion under section 15 in relation to a services contract, the Court may make one or more of the following orders in relation to the opinion:*
>
> *(a) an order setting aside the whole or a part of the contract;*
>
> *(b) an order varying the contract.*
>
> *(2) An order may only be made for the purpose of placing the parties to the services contract as nearly as practicable on such a footing that the ground on which the opinion is based no longer applies.*
>
> *(3) If an application under this Part is pending, the Court may make an interim order if it considers it is desirable to do so to preserve the position of a party to the services contract.*
>
> *(4) An order takes effect on the date of the order or a later date specified in the order.*

[29] At [24].

> *(5) A party to the services contract may apply to the Court to enforce an order by injunction or otherwise as the Court considers appropriate.*
>
> *(6) Subject to section 14, this section does not limit any other rights of a party to the services contract.*

32. Section 16 does not contain an express power to award compensation. This can be contrasted to s 106(5) of the IR Act which provides the Industrial Court of New South Wales with an express power in respect of any contract declared void or varied to order such payment of money as the Court considers just in the circumstances of the case.

33. In *Buchmueller v Allied Express Transport Pty Ltd*[30] Dowsett J, applying legislation in similar terms[31], made an order to vary the contract retrospectively that was akin to a compensation order. In that case Dowsett J held that the contract was unfair in that it provided remuneration less than that which would have been paid if the worker had been an employee engaged under a relevant award. Dowsett J calculated the difference in pay, being as being $10,900 and then, allowing for interest, determined that the total shortfall was $13,080[32]. His Honour noted that s 127B contemplated only an order setting aside the relevant contract or an order varying the contract. He considered setting aside the contract, leaving the parties possibly covered by the award, or varying the contract to require the worker to be paid not less than the relevant award rates. His Honour considered that either approach would leave *"considerable room for further dispute"*[33], and determined instead to vary the contract to require on its termination that the sum of $13,080 be paid. Whilst acknowledging that the approach was "somewhat artificial" it had the effect of removing further argument that might exist as to what amount should be paid to remove the unfairness of the contract.

---

[30] (1999) 88 IR 465.
[31] Section 127B of the WR Act.
[32] At [45].
[33] At [44].

Injunctions

34. As can be seen, s 16 provides an express power to grant injunctions. Examples of cases where an injunction has been sought include *Harding v Ansvar Australia Insurance*[34] and *Keldote Pty Ltd v Riteway Transport*[35].

Costs

35. Section 17 of the IC Act provides that a Court cannot order costs unless the proceedings were instituted vexatiously or without reasonable cause. This is consistent with the position in respect of the predecessor provisions in the WR Act[36]. This can be contrasted with the unfair contract provisions in the IR Act where costs are awarded on the usual basis.

Keldote Pty Ltd v Riteway Transport

36. *Keldote Pty Ltd v Riteway Transport*[37] involved applications to vary contracts between companies providing mine haul trucking services and Riteway Transport. The applicants were engaged under contracts which provided Riteway with a contractual ability to require them to replace their vehicles. Riteway wrote to each of the applicants informing them that they were required to start using B/double trailers. The applicants determined the costs of financing the additional trailers would not be met by the proposed increase payments per trip and, accordingly, did not agree to the requirement. Riteway treated their refusal as a breach permitting the contracts to be terminated. The applicants alleged that by so doing Riteway avoided significant termination payments what would otherwise have to be paid.

37. Cameron FM turned first to the meaning of the word 'unfair'. He drew on a body of authority in New South Wales, in particular the leading authorities *Davies v General Transport Development Pty Ltd*[38]*, A & M Thompson Pty Ltd*

---

[34] (1998) 91 IR 1.
[35] [2007] FMCA 1701.
[36] Sections 127A-127C, later numbered ss 832-834; Costs in respect of such proceedings were considered in *Jordan v Aerial Taxicabs Co-operative Society Ltd (No 2)* (2001) 108 IR 280.
[37] (2008) 176 IR 316; [2008] FMCA 1167.
[38] [1967] AR (NSW) 371.

v Total Australia[39] and *Baker v National Distribution Services Ltd*[40]. Those cases, he held, reveal that a determination of whether a contract is unfair will not turn on an analysis of decided cases but will be a matter of individual assessment in each case.

38. Cameron FM relied on New South Wales unfair contract decisions including *Lavings v Barclay Mowlem Construction (NSW) Ltd*[41] to hold that: *"later events may demonstrate that aspects of a contract were unfair or harsh from the outset".* His honour cited the decision of McHugh JA in *West v AGC (Advances) Ltd*[42] where, when considering an application made under the *Contracts Review Act 1980* (NSW) McHugh JA said, Hope JA agreeing:

> *"Under s.7(1) a contract may be unjust in the circumstances existing when it was made because of the way it operates in relation to the claimant or because of the way in which it was made or both. . . . In other cases the contract may not be unjust per se but may be unjust because in the circumstances the claimant did not have the capacity or opportunity to make an informed or real choice as to whether he should enter into the contract. . . . More often, it will be a combination of the operation of the contract and the manner in which it was made that renders the contract or one of its provisions unjust in the circumstances. Thus a contract may be unjust under the Act because its terms, consequences or effects are unjust. This is substantive injustice. Or a contract may be unjust because of the unfairness of the methods used to make it. This is procedural injustice. Most unjust contracts will be the product of both procedural and substantive injustice."*

39. The Federal Magistrate noted that it was relevant for the Court to consider evidence going to the question of: *"whether the contract operated unfairly or harshly in 2007 because it had always been unfair and harsh, perhaps in a respect which had not previously been identified"*[43].

---

[39] (1980) 2 NSWLR 1.
[40] (1993) 50 IR 254.
[41] (1994) 99 IR 247 at 254.
[42] (1986) 5 NSWLR 610 at 620.
[43] At [85].

40. In respect of relief, Cameron FM noted that s 16 gives the Court very wide powers. Cameron FM referred to Barwick CJ in *Stevenson v Barham*[44], who stated in relation to then s 88F of the *Industrial Arbitration Act 1940*:

> *"The legislature has apparently left it to the good sense of the Industrial Commission not to use its extensive discretion to interfere with bargain freely made by a person who was under no constraint or inequality, or whose labour was not being oppressively exploited."*

41. At [94]-[95] Cameron FM contemplated that damages might be claimed in the Court's accrued jurisdiction. He stated that in some cases, it will be practicable to seek contract-based remedies such as damages at the same time as seeking the avoidance or variation of a contract, and in other cases it will be necessary to do so only after the Court has made orders avoiding or varying the contract in question.

42. Cameron FM summed up what he believed to be principles that apply when considering applications for review under the IC Act. It is notable that he did so by reference to the leading NSW unfair contract case of *Port Macquarie Golf Club Ltd v Stead*[45]. Cameron FM set out the principles applicable in the following terms:

> *"a. s.12 directs attention to the particular circumstances of the individual contract concerned. Whether or not a contract is unfair or harsh is a matter to be decided upon examination of the facts of each particular case;*
>
> *b. unfairness or harshness may arise either from the terms of the contract itself or from the circumstances surrounding its formation. That is to say, it may be substantively unfair or harsh or procedurally unfair or harsh;*
>
> *c. the test of unfairness involves the commonsense approach characteristic of the ordinary jury member by applying standards providing a proper balance or division of advantage and disadvantage between the parties who have made the contract;*

[44] (1977) 136 CLR 190 at 192.
[45] (1996) 64 IR 53.

d. if a contract is found to be unfair or harsh then the next question involves the exercise of a discretion, to be performed judicially, as to whether the contract should be avoided or varied;

e. if the Court decides to avoid or vary the contract under s.16 then the Court may be called upon to order relief based upon that avoidance or the terms of the contract as varied; and

f. the discretions which s.16 allows the Court are extensive and the Court should not interfere with a bargain freely made by a person who:

i. is not being exploited by the contract; or

ii. was not in a situation of disadvantage, either by reason of the parties' relative bargaining strengths or because undue influence, pressure or unfair tactics had been brought to bear in the contract negotiations."

43. Cameron FM determined that the contract between Riteway and the applicants was unfair because it gave Riteway the power to require the upgrading of its contractors' vehicle, without being similarly obligated to compensate them for the expenses associated with such an upgrade[46]. He noted that much of the evidence was directed to whether the conduct of Riteway was unfair in requiring the individuals to upgrade and as to the amount of compensation offered. In respect of such evidence the Federal Magistrate held:

> *"This evidence can only be illustrative of the real issue which is not whether the contract was implemented unfairly by Riteway or whether it became unfair because of events subsequent to the making of the contracts but whether it was unfair in the first place because of the power over the applicants which it gave to Riteway."*[47]

44. The applicants had sought a number of variations to the contract which Cameron FM rejected, including that the contract lacked a clause requiring mediation or arbitration of disputes.

---

[46] At [102].
[47] At [103].

45. Cameron FM ultimately determined not to make any of the variations sought by the applicant but to make a variation that had not been sought, namely to limit Riteway's contractual power to require a new vehicle to be purchased to vehicles which have specifications reasonably equivalent to the vehicle being replaced. Following that decision Riteway made an application to set aside the order because it had been denied procedural fairness as a result of the Court determining to make an order which had not been foreshadowed either by the applicant or by the Court. Cameron FM acceded to that application and determined to relist the matter for hearing to determine what order should be made in light of the finding that the contract was unfair[48]

Federal Court or Federal Magistrates Court?

46. The Federal Court or the Federal Magistrates Court have co-extensive jurisdiction. That raises the question, in which Court should an applicant commence unfair contract proceedings?

47. Monetary factors are one relevant consideration. Federal Court filing fees are roughly double the fees charged by the Federal Magistrates Court.

48. Proceedings in the Federal Court are usually more costly, although that is predominantly a reflection of the fact that the matters heard in the Federal Court are usually more complex.

49. As noted above, costs are usually not awarded for unfair contract matters commenced under the *IC Act*, and that is the case regardless of which Court one commences in. If that were not the case then the lower fixed costs that are usually ordered in the Federal Magistrates Court would be a relevant factor (although the Federal Magistrates Court has a discretion to order costs be in accordance with the Federal Court procedure and taxed).

50. Cases are dealt with more informally in the Federal Magistrates Court. Cases normally come on for hearing more quickly in the Federal Magistrates Court.

51. The Federal Court has the power to transfer a matter to the Federal Magistrates Court under s32AB(1) of the *Federal Court of Australia Act 1976*,

[48] *Keldote Pty Ltd v Riteway Transport Pty Ltd (No 2)* [2008] FMCA 1623.

including by its own motion[49]. Such an order would usually be made at an early stage of the proceeding (perhaps on the second directions hearing) after the parties have been given an opportunity to be heard as to why the matter would not be transferred to the Federal Magistrates Court. There is no right of appeal from such an order.

52. The matters to be considered by the Court when considering whether to make such an order are set out in s32AB(6) and Order 82 rules 6(1) and 7: see *Kheir's Financial Services Pty Ltd v Aussie Home Loans Ltd*[50] and *WAAL v Minister for Immigration and Multicultural Affairs*[51]. They include:

a. whether proceedings in respect of an associated matter are pending in the Federal Magistrates Court;

b. whether the resources of the Federal Magistrates Court are sufficient to hear and determine the proceeding;

c. the interests of the administration of justice;

d. whether the proceeding is likely to involve questions of general importance such that it would be desirable for there to be a decision of the Federal Court on one or more of the points in issue;

e. whether, if the proceeding is transferred, it is likely to be heard and determined at less cost and more convenience to the parties than if the proceeding is not transferred;

f. whether the proceeding is likely to be heard and determined earlier in the Federal Magistrates Court; and

g. the wishes of the parties.

53. As a rule of thumb, the types of matters filed in the Federal Court that are likely to be transferred are those which will take less than 2 days to be heard, turn primarily on their facts and raise no new questions of law.

---

[49] Section 32AB

[50] [2008] FCA 1602

[51] [2002] FCA 136

54. There are no cost consequences for commencing in one jurisdiction and being transferred to the other (other than the party's own costs of appearing in the 'wrong' jurisdiction).

55. The Federal Magistrates Court has a complementary power to transfer a matter to the Federal Court under s39(2) of the *Federal Magistrates Act 1999* on its own initiative or on application by a party. The matters to be considered are set out in s39(3) and in Federal Magistrate Court Rule 8.02(4): see *Blanco v Minister for Immigration* [2005] FMCA 136. They are almost identical to the factors the Federal Court considers in respect of a potential transfer to the Federal Magistrates Court (set out above).

Conclusion

56. The decision in *Keldote Pty Ltd v Riteway Transport* demonstrates that, whilst perhaps not quite as broad a power as s 106 of the IR Act, Part 3 of the IC Act provides a broad power to the Federal Magistrates Court and Federal Court to set aside and vary independent contractor contracts.

57. It would appear that the jurisdiction extends to contracts that have been terminated. There is no reason why, as a matter of jurisdiction, the unfairness might not extend to the terms of any termination clause.

58. Unlike s 106 of the IR Act, the Court is restricted to determining whether the contract was unfair at the time it was entered into, rather than being able to also find that it became unfair at some later time[52]. However, as the decision *Keldote* demonstrates, subsequent conduct may well be relevant to demonstrate an unfairness that the Court would find existed from the time the contract was made.

59. The IC Act does not in terms provide power to award compensation to remedy unfairness. However, that may well be addressed varying the contract to require a monetary sum to be paid on termination.

60. In *Fasbert v ABB Warehousing* an application under the IC Act was taken in conjunction with an application for damages for breach of an implied term as to reasonable notice. The latter cause of action was upheld. One might

[52] Compare s 106(2) of the IR Act.

expect that increasingly independent contractors whose contracts have been terminated will seek by way of compensation remedies under both contract and the IC Act.

61. It remains to be seen whether the Federal Magistrates Court and Federal Court are willing to find unfairness as readily as the Industrial Court of New South Wales. The legislative requirement to only consider matters as they exist at the time contract was entered into may lead to more conservative outcomes. However, if the Courts adopt the principles developed by the NSW Industrial Court, as was done by Cameron FM in *Fasbert,* then the jurisdiction will become popular with applicants.

Ingmar Taylor
State Chambers

31 March 2009