

Share dairy farming - Unfair and sham contracts

Federal Independent Contractors Act

The Independent Contractors Act 2006 (Cwlth) commenced on 1 March 2007. The main impact of this legislation for farmers is the creation of federal unfair contracts laws which set up a new system for challenging the terms of work contracts. The Act uses a definition of 'independent contractor' which is the same as the common law 'control test'.

The Act also overrides state industrial laws (this does not include workers compensation laws, OH&S laws and discrimination laws) which take some types of contractors to be employees regardless of whether the common law 'control test' applies. However, these changes are not relevant to the farming industry.

The Independent Contractors Act, establishes a process in the federal Magistrates Court to review, vary and/or set aside contracts which are found to be unfair. These laws apply if at least one of the parties to the contract trades as a company and the contract is for performance of work, other than domestic or private work.

However, independent contractors which trade as companies *and* employ others to do the work, cannot take advantage of the federal unfair contracts laws. To be eligible, the contract *must relate to work being done by working directors or family members of directors only*.

Independent contractors who operate as sole traders can take advantage of the laws only if the contract principal (the other party) trades as a company. The Independent Contractors Act also applies if:

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

In deciding whether a contract is unfair, the federal Magistrates 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 payment to the independent contractor is less than an employee doing the same work would have received; and
- any other relevant matters

Note: If the federal unfair contracts laws apply, contractors will not be able to use state and territory unfair contracts laws.

Sham contracts

The federal Fair Work Act prevents employers from engaging employees as contractors just to avoid paying employee entitlements. These are called 'sham contracts'. Penalties of up to \$33,000 apply if a person:

- dismisses an employee for the sole or main purpose of engaging them as an independent contractor;
- represents an employment relationship as independent contracting; or
- makes a false statement for the purpose of influencing or persuading an individual to enter into an independent contract.