

Extending unfair contract term protections to small businesses



**Professionals
Australia**

**Submission of Professionals Australia to the Treasury's Unfair Contract Terms
Consultation Paper – June 2014**

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Contract law reform has the potential to add to the certainty of genuine commercial relationships ...



Foreword

Professionals Australia (formerly the Association of Professional Engineers, Scientists and Managers, Australia – APESMA) considers it critical that we play an active and considered role in responding to the challenges and changing patterns in the Australian labour market. We support not only those in employment-based work arrangements but provide a comprehensive range of services and information for those in self-managing and commercially-based work arrangements.

Professional Contractors and Consultants - a division of Professionals Australia - assists a range of technology-management and other professionals. We provide support and information to those who opt for self-employment, as well as providing a range of services to professionals engaged as independent contractors - in many cases largely for the provision of labour and identifying more as workers than self-employed. These professionals - including professional engineers, scientists and IT professionals - play a critical role in the dispersal of Australia's professional engineering, science and technology

capability across industries including Defence, IT, Local Government, Mining, Power, Roads, Transport, Water and Telecommunications - particularly important in times of widespread skills gaps and shortages.

We also have a number of Translator/Interpreter members engaged as independent contractors across a range of industries who fall outside the protections of the Fair Work Act as well as having limited power to negotiate fair contract terms.

Contracting and consulting professionals make a profound contribution to Australia's economic growth and productivity, and provide critical labour market flexibility. We are of the view that this review provides an important opportunity to consider protections to ensure the power differential between contracting parties in self-managing and commercially-based work arrangements does not lead to unbalanced or unfair contract terms.

We thank you for the opportunity to make a brief submission to this review on the aspects of contract law which impact our members.



Chris Walton
Professionals Australia CEO



Background

Professionals Australia is an organisation registered under the Fair Work Act 2009 representing over 25,000 professionals including professional engineers, scientists, veterinarians, surveyors, architects, pharmacists, information technology professionals, managers, transport industry professionals and translators and interpreters throughout Australia. In 1995, the Australian Industrial Relations Commission approved the amendment of our eligibility rules to provide coverage for independent contractors and as a result Professionals Australia can cover any professional engaged as an independent contractor who would be eligible for membership of the organisation if they were an employee performing the same work.

In the late 1990s, in response to changes in the labour market¹, extensive outsourcing, downsizing, flexibilising and contracting out largely in state-owned instrumentalities and the Australian Public Service, and the significant and growing number of consulting professionals setting themselves up as independent contractors, Professionals Australia allocated significant resources to providing targeted services to assist these members. Since that time, the number of members operating as independent contractors and consultants has grown to more than 2,000 - around 8 per cent of our membership.

Professionals Australia is the only industrial association to represent exclusively the industrial and professional interests of these professionals. Assisting the self-employed and those who operate as independent contractors is fundamental to our contemporary approach to representing the diverse interests of our membership.

Services are provided via Professional Contractors and Consultants Division and include:

- advice on business startup and managing the transition from employee to consultant;
- review by a solicitor of the terms of contracts for service;
- access to discounted professional indemnity insurance;
- an Award-winning² one-on-one online mentoring program which matches experienced contracting and consulting professionals with those transitioning to self-managing work arrangements – this program has been running for over 10 years;
- information on recommended hourly rates;
- assistance with the Alienation of Personal Services Income tax rules;
- information on business planning, invoicing, preparing cash flow statements, etc.;
- networking services;
- guidance on working through a labour hire agency as a contractor; and
- a professional development scholarship to assist with expanding and updating skills in the absence of a formalised and permanent employee/employer relationship.

We offer these services through its website at

<http://www.professionalsaustralia.org.au/groups/contractors-and-consultants/home/>.

¹ The Australian Bureau of Statistics 2009 *Forms of Employment Survey* found that over one million Australian workers were engaged as independent contractors.¹ Of these, 15 per cent worked in the Professional, Scientific and Technical services industry, second only to the Construction industry. These figures confirm 2001 Productivity Commission data which estimated that around 10 per cent of self-employed contractors were professionals, a high proportion relative to other occupational groups.

² LearnX Foundation 2008 Best Coaching/Mentoring Training Program

Submission

The 2011 ABS Forms of Employment Survey³ found that over one million Australians are engaged as independent contractors. Of these, 13 per cent worked in the Professional, Scientific and Technical services industry, second only to the Construction Industry in which 32 per cent of contractors worked. The significant number of contracting professionals and their relatively high representation in the Professional, Scientific and Technical services industry - confirmed again in these most recent figures - is the reason for Professionals Australia providing services to more than 2,000 independent contractor members, and the basis of our significant interest in the extension of unfair contract term protections to small business.

Professionals Australia recognises, as established by the International Labour Organisation in 2006, that independent contractors are governed by commercial rather than industrial law.⁴ We recognise independent contractors' freedom to operate in the manner they choose where genuine choices exist, that contracting is a normal part of modern business arrangements that can provide flexibility and efficiency, that contracting is a wholly legitimate form of work where fair and mutually-agreed contract terms are in place, and the right of business to engage contractors to meet workflow peaks and overcome skills gaps where a permanent workforce is unavailable or unable to be trained for this purpose.

We also hold the view however that there has been an increase in support for policies providing for the 'flexibilisation' of the workforce, the outsourcing of Government services and contracting out in the private sector over the past decade⁵ bringing with it significant changes to methods of engagement not always well-supported by concomitant rights, obligations and protections - changes that arguably contract law has failed to keep pace with.

The law of contract is founded on consent which is presumed to exist between contractual parties and enforced by the law on the basis that people who make undertakings to others who rely on them ought to be held to their commitments. The law however takes no formal account of differences in bargaining power. The law assumes the parties are equal in every way and as such freely enter into contracts, wishing them to be performed according to their terms. The presumption stands to bind the parties unless there is evidence of conduct that vitiates the underlying consensus such as duress, misrepresentation or unconscionable conduct. The fact that one party is in a stronger bargaining position than the other and exercises power because of that position is not sufficient to vitiate the underlying consensus.

It is mainly because of the bargain-centred focus of contract, and its historical failure to deliver fair outcomes to employees and protect them from the consequences of employer power, that a remedial system of industrial law based around organised labour developed in industrialised countries.

Increasingly independent contractors are negotiating business arrangements with very large corporations and rather than it being a corporation-to-corporation issue, the relative strength and

³ Australian Bureau of Statistics Forms of Employment Survey 6359.0, November 2011

⁴ Employment Relationship Recommendation, 2006 (No. 198), Recommendation concerning the employment relationship. Adoption: Geneva, 95th ILC session (15 Jun 2006). Available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:1188007228371713::NO:12100:P12100_INSTRUMENT_ID:312535:NO

⁵ Quiggin, J. (2002) Contracting out: promise and performance, *Economic and Labour Relations Review*, 13(1), 88-204

resources behind each of the parties is very different. The self-employed and independent contractors are often at a significant practical disadvantage when contracting.

While the common law traditionally enforces bargains regardless of power differential between the parties, it is Professionals Australia's view that the extension of unfair contract term protections to small business would provide a mechanism which would ensure any power differential between contracting parties does not produce an unbalanced or unfair contract, and to consider protections to ensure a basic level of fairness is maintained.

Like the Australian Government, Professionals Australia is committed to a modern national economy that is productive and just, a core legal framework that provides incentives and protections for those in commercially-based work arrangements and contract law which upholds basic standards of fairness in parties' dealings with each other.

This submission will highlight our central concern about the law of contract failing to deliver fair outcomes to independent contractors because of the power differential between the contracting parties.

Unfair contracts

Professionals Australia's main area of concern is the failure of contract law in the area of unfair contracts. More specifically, we have concerns in the following areas:

1. - the lack of protection for independent contractors against outer-limit contracts which purport to be fixed-term contracts;
2. - the lack of opportunity to negotiate mutually agreed terms for those offered contracts on a take it or leave it basis;
3. - the lack of protection for those contractors paid less and engaged under conditions less favourable than if they were employed under the relevant Award or Agreement; and
4. - the lack of clarity around the adequacy of the Independent Contractors Act to provide appropriate remedies for unfair contracts no longer on foot.

1. Lack of protection for independent contractors against outer-limit contracts which purport to be fixed-term contracts

Even where it is stated that a contract is for a particular term, a client or agency's right to terminate at their discretion or convenience means that the contract is not a fixed-term contract but effectively an outer-limit contract. This means that if terminated prior to the conclusion of the stated term, the contractor has no entitlement to damages for the unexpired balance of the contract. Where there is no provision entitling the contractor to terminate the contract, the contractor effectively has no rights at all under the terms of the contract in relation to termination. This also means that in the event that the contractor is unable to fulfil the obligations under the contract, the other party is able to claim damages for the lost balance of the contract, especially where there is no provision for substitution or a sub-contractor to be brought in to complete the work.

This form of contract is not uncommon and demonstrates the significant imbalance in the parties' rights and obligations arising under the contract; such termination terms are not reasonably necessary to protect the legitimate interests of the party that would be advantaged by the term.

2. Lack of opportunity to negotiate mutually agreed terms for those offered contracts on a "take it or leave it" basis

Professionals Australia's experience with many contractors considering an engagement as an independent contractor is that:

- contracts are often prepared by an agency or client prior to any discussion relating to the engagement commences; and
- the contractor is often required to accept or reject the terms on a "take it or leave it" basis.

There is currently little alternative for contractors who are offered a contract on a take it or leave it basis other than to do just that. Such contracts reflect the agency and/or client's preferences but take no account of those of the contractor.

Again, this practice is widespread and demonstrates the substantial imbalance in the parties' rights and obligations; non-negotiable terms are not reasonably necessary to protect the interests of the agency or client, and often cause financial and/or non-financial detriment to the independent contractor being offered the contract.

3. Lack of protection for those contractors paid less than if they were employed under the relevant Award or Agreement

In November 2009, the Industrial Court of NSW ordered Australia Post to pay \$72,450 plus \$9,100 in superannuation payments to contractor Gregory Cartaar after finding the contract under which he was engaged was unfair. Justice Kavanagh found that had Mr. Cartaar been engaged as an employee, he would have earned \$130,240 over three years rather than the \$66,790 he was paid.

Contract law which states that contractors will be engaged under terms no less favourable overall than those covering employees doing the same work would provide a disincentive for unscrupulous employers engaging independent contractors to reduce costs and avoid their employment obligations.

The Cartaar unfair contract ruling highlights the disadvantage at which independent contractors often operate relative to their employee counterparts.

The situation is even more critical for Translators and Interpreters for whom there is either limited or no industrial regulation or recourse in the event of terms of engagement which undermine existing standards and create a 'race to the bottom'. When engaged as independent contractors, they fall outside the protections of the Fair Work Act and National Employment Standards while also having limited power to negotiate fair contract terms due to the profound

differential in bargaining power between labour hire/booking agencies and the individuals they engage.

4. - Problems with the Independent Contractors Act in providing appropriate remedies for unfair contracts no longer on foot

In a 2011 unfair contracts case, Justice Nye Perram found that the Federal Court had no power to make retrospective orders to remedy unfair contracts under the Independent Contractors Act [*Informax International Pty Ltd v Clarius Group Ltd (No 2) [2011] FCA 934*]. Soon after, the Federal Court ruled further on powers under the Independent Contractors Act to provide retrospective remedies [*Informax International Pty Ltd v Clarius Group Limited (No 2) [2011] FCA 934 (18 August 2011)*] and while Justices Besanki, Jagot and Bromberg found that Justice Perram had adopted too narrow an interpretation of the remedies available in not allowing a remedy where the relevant contract had expired, it is possible that this will continue to be a disputed area of law. The unfair contract provisions of the Independent Contractors Act therefore fails to provide the certainty required in this area.

Conclusion

Professionals Australia supports the extension of unfair contract term protections to small business to help address the power differential of parties involved in commercially-based work arrangements. It is our view that contract law reform has the potential to add to the certainty of genuine commercial relationships, to support the major contribution of independent contractors to the dispersal of specialist expertise across Australian industry and to maximise their contribution to Australia's economic growth and productivity.

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