

**THE EFFECT OF THE ACT FAIR WORK CONTRACTS
BILL 2004 ON THE CANBERRA BUSINESS
COMMUNITY, AND THE AUSTRALIAN
GOVERNMENT'S PROPOSED INDUSTRIAL
RELATIONS REFORMS**

Prepared by the Canberra Business Council

February 2005

**EFFECT ON THE ACT FAIR WORK CONTRACTS BILL 2004 AND THE
AUSTRALIAN GOVERNMENT’S PROPOSED INDUSTRIAL RELATIONS
REFORMS – SUBMISSION TO GOVERNMENT**

TABLE OF CONTENTS

Request..... 3

Background..... 4

Doing Business in Canberra is becoming harder..... 6

**Principal reason for intervention - the inglorious nature of “half
pregnancy”..... 7**

**Secondary Reason - A Unified Industrial Relations System, and the
proposed Independent Contractors Act..... 9**

FAIR WORK CONTRACTS BILL 2004 – SUBMISSION TO GOVERNMENT

Request

The Council requests the proposed Independent Contractors Act govern disputes between all independent contractors in the ACT (irrespective of whether they are incorporated or not), by way of removing any doubt that the Commonwealth is “covering the field” and is completely regulating the manner by which independent contractor disputes are to be determined.

As these disputes are with contractual disputes between business people, they should be dealt with by people with judicial training.

Given the statutory requirement to:

- **proceed with matters without undue formality; and**
- **ensure that the proceedings are not protracted**

the Council would suggest the Federal Magistrates’ Court.

This is a more natural forum to consider commercial contracts than a specialist body (the AIRC) that only deals with contracts of employment.

The Council also proposes that (at least for the ACT) a division of the Federal Magistrates’ Court be created and given jurisdiction to hear commercial disputes of a class that the Fair Work Contracts Bill would have vested in the Commercial and Trader Tribunal.

Finally, for the avoidance of doubt, it asks the Independent Contractors Act declare ACT’s *Fair Work Contracts Act 2004* void, and of no effect.

Background

On 9 December 2004, the ACT Government introduced the Fair Work Contracts Bill into the ACT Legislative Assembly.

It attempts to bring into something like the industrial relations system disputes between (amongst others):

- independent contractors and service purchasers;
- franchisors and franchisees;
- partners; and
- agents of large distributors, and the distributors.

The legislation will permit a contract considered to be unfair to be:

- amended;
- voided; or
- if terminated – to be reinstated with the power to make any amendment considered fair or reasonable so that as far as possible the contract ceases to be “unfair”.

A union can represent the independent contractor, franchisee &c. if their rules permit it and the “contract worker”¹ consents – **note the contractor need not be a member of the union.**

¹ The statutory term used in the legislation. This provides an indication that the ACT Government commences from the presumption that an independent contractor, franchisee &c. is a “worker” - an employee (albeit with an exotic employment contract) and not a small businessman.

A “class action” can also be commenced, to determine whether a particular sort of contract used by 1 or more companies is fair.

In the absence of an ACT IRC, disputes will be heard in the Consumer and Trader Tribunal, a specialist administrative tribunal designed principally to settle disputes involving consumers – **but a tribunal not particularly resourced to decide what can be complex contractual disputes.**

In this context, it is particularly noted that in NSW, disputes relating to the engagement of non-employees (such as independent contractors) that can be heard by the NSW IRC can only be heard by the Commission in court session – that is, by judicial officers.²

The proposed legislation and its accompanying explanatory memorandum can be found at:

www.legislation.act.gov.au/b/db_15195

² See the note immediately under section 105 of the *Industrial Relations Act 1996* (NSW)

Doing Business in Canberra is becoming harder

This is one of a number of measures that the Government has imposed, (or proposes imposing) on Canberra's businesses.

During 2004, the ACT Legislative Assembly passed legislation introducing Australia's first law introducing an offence of industrial manslaughter – legislation sufficiently onerous such as to lead the Commonwealth to attempt to legislate to exempt itself from its provisions.³

Legislation was also passed conferring some of the widest powers in Australia which allow trade union officers entry onto premises – irrespective of whether the union has a member working as an employee in the business or not.⁴

It also proposes legislation that will allow long service leave entitlements to be transferred amongst employees generally during 2005.⁵

There is only so long that Canberra business can absorb the costs of being the Australian laboratory rat for industrial relation reforms without becoming uncompetitive.

To assist Canberra business, there are strong reasons for the Australian Government to intervene. The proposed Independent Contractors Act offers the Australian Government a convenient and appropriate opportunity to do so.

³ Sections 49C and 49D of the *Crimes Act 1900* (ACT) was inserted by the *Crimes (Industrial Manslaughter) Act 2003* (ACT) (Act 55, 2003). The Commonwealth introduced the Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2004 to exempt the Commonwealth from the industrial manslaughter law.

⁴ The *Occupational Health and Safety Act 1989*, as amended by the *Occupational Health and Safety Act 2004* (Act 29, 2004)

⁵ Indicated by the ACT Chief Minister in the Autumn 2005 Legislation Program on 15 February 2004. The intention is presumedly to give effect to the ALP platform commitment to allow portability of long service entitlements, including the establishment of an accumulation trust fund to which all employers will be required to contribute – see *ALP Labor Platform 2003 – 2004* p.76. Note some jurisdictions allow a degree of long service portability in the building trade.

Principal reason for intervention - the inglorious nature of “half pregnancy”

The local ACT Senator Gary Humphries has indicated the Australian Government should not, as a general rule, intervene in Territory matters (such as, for example, whether gay couples to adopt children), thinking it better for the Federal Parliament to leave the ACT community to judge the effectiveness of laws themselves through the ballot box, rather than have federal politicians make the judgement.⁶

However, **during the 1990’s**, the Federal Government legislated to give the AIRC jurisdiction to review contracts made by **unincorporated independent contractors** in the ACT. See section 127A – 127C of the *Workplace Relations Act 1996*.

It clearly relied on the so-called territories power of the *Constitution* to give the AIRC jurisdiction in relation to review these sorts of contracts – see in particular paragraph 127C(1)(e) of the *Workplace Relations Act 1996*.

There is a strong argument to say that the Commonwealth has “covered the field” in this area, and so the Legislative Assembly can’t legislate in the area.

If so, it would be inelegant and confusing if unincorporated independent contractors had to go to the AIRC to have disputes reviewed, and others (who may only be incorporated because their accountant advised them to set up a \$5 company) to the Consumer and Trader Tribunal.

Even if this is wrong, having 2 separate bodies capable of making decisions, and possibly developing 2 different standards is a duplication that is a burden for local business.

⁶ See for instance transcript of the *PM* program 8 March 2004

For this reason alone, the Australian Government should act, and place responsibility for dealing with the disputes covered by the ACT's Fair Work Contracts Bill (including disputes relating to independent contractors) in one body.

Given the statutory requirement to:

- **proceed with matters without undue formality; and**
- **ensure that the proceedings are not protracted**

the Council would suggest the Federal Magistrates' Court.⁷

⁷ See section 42 of the *Federal Magistrates' Act 1999*

Secondary Reason - A Unified Industrial Relations System, and the proposed Independent Contractors Act

As recently as 6 February 2005, the Prime Minister went on the record favouring a single national industrial relations system.⁸

The ACT proposes investing the power to determine work contracts in the Consumer and Trader Tribunal.

This is because the Territory doesn't have an industrial relations commission.

Common rules, set by the AIRC, and federal awards regulate contracts of employment in the ACT.⁹

The Commonwealth has largely “covered the field” in the area of workplace relations in the ACT already. And, as previously discussed, Commonwealth IR law already expressly covers disputes relating to unincorporated independent contractors in the ACT.

The Coalition has indicated it will introduce an Independent Contractors Act.

A House of Representatives Committee is considering (amongst other things) ways independent contracting can be pursued consistently across state and federal jurisdictions.

The Committee is also charged to ensure independent contract arrangements are legitimate.

The Canberra Business Council endorses a person's right to organise his or her affairs so they can operate as an independent contractor.

⁸ Interview with Laurie Oakes on *Sunday* - see transcript 6 February 2005

⁹ In relation to common rules, see section 141 of the *Workplace Relations Act 1996*

It therefore welcomes the Government's broad policy on independent contractors, as well as the committee reference.

The Council requests the proposed Independent Contractors Act govern disputes between all independent contractors in the ACT (irrespective of whether they are incorporated or not), by way of removing any doubt that the Commonwealth is "covering the field" and is completely regulating the manner by which independent contractor disputes are to be determined.

Because disputes deal with contractual disputes between individual business people, which should be dealt with by people with judicial training, it would recommend the Federal Magistrates' Court.

This is a more natural forum to consider commercial contracts than a specialist body (the AIRC) that only deals with contracts of employment.

The Council also notes that under the common law, courts can review contracts where:

- there was no real equality between the parties; and
- that was sufficiently evident to the stronger party so it would be unfair or "unconscientious" to go into the contract in the particular circumstances. In that case, the stronger party has to show the transaction was fair, just or reasonable.¹⁰

The Council also proposes that (at least for the ACT) a division of the Federal Magistrates' Court be created and given jurisdiction to hear commercial disputes of a class that the Fair Work Contracts Bill would have vested in the Commercial and Trader Tribunal.

¹⁰ *Commercial Bank of Australia v. Amadio* 151 CLR 447 at 474

Finally, for the avoidance of doubt, it asks the Independent Contractors Act declare the ACT's *Fair Work Contracts Act 2004* void, and of no effect.

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