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Resolution of Small Business Disputes
Submission to Options Paper
June 2011

Independent Contractors Australia (ICA) is pleased that the Federal Government has initiated a discussion on the resolution of commercial disputes affecting small business people. ICA was formed in 2000 and since then has actively called for improved commercial dispute-resolution processes for small business people.

In May 2011, the Federal Government released a discussion and Options Paper on dispute resolution for small business. The paper is available here:
http://www.innovation.gov.au/SMALLBUSINESS/DISPUTERESOLUTION/Pages/default.aspx
This submission is a response to the Options Paper.

Contents

1. Summary

General Principles

- Small business people constitute the dominant sector of the economy.
- Current dispute-resolution processes fail small business people. This lowers trust in commercial activity and damages economic strength and growth.
- Better dispute resolution will fail if small business protections from unfair contracts are not implemented.
- Small business financing will improve if unfair contract protections are introduced, combined with improved dispute-resolution processes.

Specific positions

ICA recommends:

- Keep dispute resolution local. Extend and apply the Small Business Commissioner (SBC) model to all states and territories.
- Government must lead by doing. Government bodies must apply fair contracts and have disputes arbitrated through SBC.
- Parties must attempt resolution before going to SBC.
- No lawyers allowed for disputes below defined dollar amounts.
- SBC (or Advocate/Ombudsman) must be independent of government.
- Mediation at SBC level is compulsory before access to other courts is allowed. If a party fails to act in good faith at SBC level they can bear all legal costs at other court jurisdictions.
- Education programmes are needed to promote contract information and processes and good contract models.

2. Background and principles

Understanding small business people

Concepts

There are 2.1 million self-employed people in Australia. This is the small business community. The key to understanding them is that these 'businesses' are in fact 'people'. They are individuals. They are no different from consumers. They are consumers. They are no different from employees. They are employees, of themselves. This is their uniqueness. They ('we') are businesses, consumers and employees all at the same time. This reality or 'truth' about small business clashes with regulatory concepts of business.

In economic and regulatory policy terms, 'businesses' are traditionally viewed as management systems, operated by employees. In this context, when a business is in dispute with another business, the regulatory conception is that it is not individual people *per se* that are in dispute, but rather the two businesses as systems. It is collectives (of employees) in dispute with other collectives (of employees). In addition, it is the business that is involved in risk, not the individual employees who are taking risks.

This regulatory concept applies to larger private enterprises and applies even more to government undertakings when government is engaged in commercial activity. Government employees are even less exposed to risk than are employees of private-sector businesses. But this concept does not fit with the truth of what a small business is. Small businesses are people. They are individuals. They are personally at risk when 'being a business'.

Key statistics

The 2.1 million self-employed business people in Australia form 19 per cent of the workforce. They comprise:

- 1.1 million who do not employ others.
- 1 million who do employ others. This group employs around 5 to 6 million others.

Combined, they constitute:

- 7 to 8 million of the 11.5 million Australian workforce
- Around 98 per cent of Australian private-sector businesses.

(Statistics available at http://www.contractworld.com.au/research/ica-numbers4.php)

Based on these statistics, small business is the dominant sector of the economy. For the 2 per cent of private-sector businesses that are not small businesses and for government instrumentalities it is not possible to 'do' business without a significant involvement with small business people.

Why a better system is needed: Trust and the economy

The legal and regulatory environment in which business-to-business dispute resolution operates is dominated by the need to use lawyers. The law is highly technical when it comes to process and to have the substance of a case heard requires considerable legal assistance to ensure that a case doesn't 'fall over' because of errors of a technical nature. In practical terms, the result is that if a business is to access the courts for dispute resolution, $10,000 is probably needed as the starting point, simply for legal expenses.

This simple commercial reality means that self-employed small business people are effectively locked out from access to dispute resolution through the courts. Consequently, large organisations—be they businesses or government instrumentalities—exercise dominance over small business people in their commercial dealings with them.

ICA's experience is that, in this environment, self-employed small business people are repeatedly 'screwed over' by larger businesses and government. Most of the time self-employed people accept their fate under this regime because they have no other choice. That is, they do not have the financial resources to defend their commercial positions. This acquiescence in the face of commercial intimidation by large business and government is often interpreted by policy makers as meaning that a problem does not exist. ICA disagrees. The problem is substantial.

For some years ICA has been monitoring the situations of individual self-employed people who've been confronted by this problem. We have followed many cases and have lent assistance where we can. Some of those cases have developed to the stage

where we have been able to conduct case studies and report on them. Four of the cases form the Appendix to this submission. They detail instances where large organizations have exercised considerable power (many would say it amounts to intimidation) over self-employed individuals—simply because they can. The cases involve:

- A large multi-national brand in its engagement of owner-drivers.
- The Department of Employment and Workplace Relations in the engagement of an IT worker.
- A large financial business in the engagement of commission sales contractors.
- The Australian Consumer and Competition Commission in the engagement of a project consultant.

Against this background, ICA's primary focus in this submission is how to achieve a dispute-resolution process for small business people that gives them a measure of equality in their power relationships with large organizations.

Small business people need this outcome to ensure fairness, just as fairness is required for consumers and employees. But there are also sound economic reasons.

An economy is an endless process of commercial transactions. The strength and size of an economy is mostly a product of the volume and quality of the commercial transactions that occur. *Trust* is the primary human trait that facilitates commercial transactions. Societies with low levels of trust have fewer commercial transactions and weaker economies. The law of contract is the institutional feature that supports trust in commercial transactions. For that trust to be supported fully the enforcement of contracts must be something that is readily accessible with low transaction costs. This is not the situation faced by self-employed small business people. Contract enforcement is not a practical option for them in most circumstances. Consequently, small business people have low levels of trust in the system. They do not 'trust' it. Therefore they are less inclined to engage in contracts and to be entrepreneurial.

Yet the self-employed small business sector is the dominant sector in the Australian economy. Poor dispute-resolution procedures for small business people directly damage the Australian economy. They diminish the capacity for entrepreneurship and innovation and hence economic growth. Improving small business dispute resolution is an important and long overdue economic reform.

Unfair Contracts

An improvement in dispute resolution must be accompanied by improved legislation which provides protections to self-employed small business people from unfair contracts.

Whatever dispute-resolution processes are in place, these will only be effective if small business people are operating their businesses using fair contracts. When considering a commercial dispute, the parties to a contract and a mediator or arbitrator must make decisions based on the contract between the parties. The contract is key. But if the contract is unfair, 'resolution' itself will be unfair.

Many lawyers argue that a contract is entirely a matter of 'offer and acceptance'. In ICA's experience, lawyers who think this way are either ignorant of the law of

contract or they have an intention to create unfair contracts to shield their clients from accountability. Many economists also think that commercial activity is entirely based on 'offer and acceptance' of contract. Such economists often have little practical understanding of business or the law of contract.

Contracts must be thought of in two ways. There is

- The *structure* of contracts; and
- The commercial *content* of contracts.

It is the structure of contracts that must be made fair. The commercial content of contracts is where parties take risk under offer and acceptance.

In 2010, the Federal Government passed legislation creating unfair contract protections for consumers. Called the Australian Consumer Law, this requires that standard form contracts supplied to consumers must comply with a structure that is fair. A summary of the laws is here:
http://www.contractworld.com.au/campaigns/ica-integrity-campaign-unfair-contracts-TPA-amendments.php

In the lead-up to the introduction of the new legislation, the Productivity Commission and the parliamentary inquiries all called for these laws to also be applied to small business. There was agreement from all political parties on the matter as well. Yet, following lobbying from big business interests, the Federal Government chose not to make these unfair contract protections available to small business. In our view, this was a grave error of judgment.

Modelled on the Australian Consumer Law, ICA has put together a Charter of Contractual Fairness. It's here:
http://www.contractworld.com.au/pages/PDFs/ICA-Charter-of-Contractual-Fairness.pdf

ICA calls on the Federal Government to immediately extend the unfair contract laws now available to consumers to self-employed small business people.

Small Business Finance

Access to affordable business finance for small business people is a well discussed problem. Finance is generally more expensive for small businesses than it is for big businesses and has to be secured by property. What is never discussed, it seems, is the fact that the predominance of unfair contracts and the lack of access to effective dispute resolution both raise the risk profile of all small businesses in Australia.

- Why would a bank lend money to a small business person when the person earns his or her income through commercial contracts that are unfair and harsh?
- Why would a bank lend money to a small business person when the bank knows that if the person ends up in a dispute, he or she will probably lack the finance to obtain fair resolution through the courts?

Consequently, the system is institutionally stacked against small business people and the banks know it. As a result, small businesses profile as riskier than big businesses. Banks are less inclined to make loans to small businesses and must charge them higher interest rates when they do.

This systemic problem damages the Australian economy. Improving dispute-resolution process and applying unfair contract laws will assist small business to access quality, reasonably priced finance.

3. Specific responses to the Options Paper

Our responses to the Options Paper are heavily focused on making the law effective so that when a small business person is in dispute with a larger organization—either business or government—the focus is on ensuring that the larger organization cannot use its financial or legal power to subvert effective and quick commercial resolution. We are not arguing for a commercial advantage for small business people. Small business people take commercial risks and accept that. Our focus is on dispute-resolutions systems that give each party an equal chance to present its case and for a commercial resolution to be achieved quickly and cheaply.

We recommend the following.

Keep it local
Small business dispute-resolution processes should be handled wherever possible at the local level. We strongly favour the use of the Small Business Commissioner model developed in Victoria, which has produced outstanding results. This model is now being applied in New South Wales, South Australia and Western Australia. We recommend that the other states and territories do the same. There should be no need to duplicate a similar model at the federal level unless it was necessary to apply this to Federal Government departments and instrumentalities.

Government can lead by doing
All governments sectors (federal, state, territory and local) should be required by statute to:

- Comply with fair contract laws and principles when engaging in business with self-employed small business people.
- Refer all disputes with small business people to agreed arbitration processes consistent with the recommendations and principles outlined here.

Referral should be to a Small Business Commissioner when a state/territory or local government has a dispute with a small business person. Commonwealth entities should preferably refer to Small Business Commissioners in the jurisdiction of the residence of the small business person.

Pre-resolution
Parties must demonstrate that they have attempted to resolve their dispute before accessing dispute-resolution procedures.

Limitations on use of lawyers
Where disputes are below a defined dollar amount, lawyers should be prohibited from representing the parties to the dispute.

Commonwealth Small Business Advocate
If the Commonwealth chooses to establish a Small Business Advocate or Ombudsman the Advocate/Ombudsman must have a separate legal structure, be independent from the public service and be appointed directly by the Governor-General. This is, for example, the appointment model for the Small Business Commissioner in Victoria. This will ensure the institutional independence of the Advocate/Ombudsman.

The Advocate/Ombudsman should be charged with giving advice to government departments and instrumentalities on the contracts and processes they have when engaging with small business.

Disputes between small business people and Commonwealth entities should be determined either by

- The relevant State Small Business Commissioners or
- The Commonwealth Advocate/Ombudsman armed with similar processes and powers as a Small Business Commissioner.

Mediation versus arbitration
ICA is aware that the Small Business Commissioner in Victoria favours retaining a mediation service as opposed to extending dispute resolution to arbitration. The reasoning, which we think is sound, is that they prefer to try to keep the parties in a commercial relationship. This is more easily achieved through mediation.

However, ICA is also aware that many larger businesses 'thumb their noses' at the Small Business Commissioner. Government departments we understand, in particular, ignore the mediation process. See our case studies Appendix.

We have already recommended that parliaments require their government instrumentalities to comply with fair contracts and simple dispute-resolution processes with arbitration. If unfair contract protections are applied to small business people, we believe that the number of disputes between big and small businesses will decline. Further, if unfair contract protections apply, it will be considerably more difficult for big business to play 'big lawyer' games to financially intimidate small business people into submission.

Nonetheless, the mediation processes of the Small Business Commissioners could be enhanced through the following changes.

Taking the Victorian Small Business Commissioner model as a guide, the first step in dispute resolution should remain as mediation. However, if mediation fails, parties have access to the Victorian Civil and Administrative Tribunal (VCAT) and/or other courts. Decisions at VCAT are binding on both parties and each person is responsible for their own legal costs.

Amendments to the powers of the Small Business Commissioner should be considered as follows:

- Access to VCAT (for example) should not be allowed until parties have first gone through the mediation process at SBC.
- The SBC mediator should have powers to recommend that all costs for legal counsel (by both parties) when attending VCAT be borne by the party who

fails to act in good faith during mediation—for example, by not attending mediation.

This would strengthen the influence of the SBC and the mediation process, and many more small businesses would give it a go. Big companies who use law firms to represent them would then incur much higher costs to defend claims against them and would be more likely to settle small claims before mediation.

Education and model contracts

Education of small and large business (and government departments) about fair contracts and fair dispute resolution should be a high priority.

ICA is strongly supportive of two booklets produced by the Commonwealth Department of Innovation:

- *Independent Contractors. The Essential Guide*
  http://www.business.gov.au/BusinessTopics/Independentcontractors/Documents/Independentcontractorstheessentialhandbook.pdf
- *Independent Contractors. Contracts Made Simple*
  http://www.business.gov.au/BusinessTopics/Independentcontractors/Documents/Independentcontractsmadesimple.pdf

We understand a third booklet on dispute resolution is in the pipeline. These booklets should be heavily promoted to both small and large businesses.

Good, fair contract models should be developed.

Consult Australia (CA) has developed model contracts for use in its industry (consulting engineers, etc). As CA says:

- "Consult Australia developed through Standards Australia, a new *Australian Standard 4122-2010 General Conditions of Contract for Consultants*. The widespread adoption of this standard with fair and reasonable commercial terms will streamline the process of engagement of consultants, improve clarity and certainty of contractual terms and conditions between clients and consultants and ultimately reduce disputes between clients and consultants based on contractual terms".

More information is available here:
http://www.consultaustralia.com.au/content/default.aspx?ID=387
This type of development should be encouraged. Governments should consider partnering with industry associations in funding the development of such models.

ICA has developed contract template models that identify standard clauses that are unfair or fair. http://www.contractworld.com.au/practical/ica-contract-template-how-to.php

4. Response to the four options

The Options paper offers four specific models. ICA's responses to each are below.

OPTION ONE – NATIONAL INFORMATION AND REFERRAL SERVICE

The National Information and Referral Service would provide a telephone hotline and website to direct small businesses to relevant existing dispute resolution services. This national, centralised referral service would provide information on what services are currently available in the relevant state or territory. Callers to the hotline would be guided through dispute resolution options and then referred to the appropriate existing service in their state or territory. This option could build on the services already offered by the Small Business Support Line and Advisor Finder.

ICA Response: *ICA support this.*

OPTION TWO – NATIONAL DISPUTE RESOLUTION SERVICE

The National Dispute Resolution Service would provide an information and referral service similar to option one, but would also offer a mediation service where no appropriate low cost dispute resolution service exists. This option would provide dispute resolution information through a website and telephone hotline. Operators would discuss dispute resolution with callers and direct them to appropriate existing services in their state or territory. If no appropriate service exists, a mediator drawn from a standing panel would assist small businesses with their dispute. This option would also offer an awareness and education campaign, which would target specific sectors with a high incidence of disputes.

ICA Response: *ICA supports this on the condition that it acts in a supporting, and not duplicating, role for state and territory Small Business Commissioners. See our previous comments*.

OPTION THREE – NATIONAL SMALL BUSINESS TRIBUNAL

A new Commonwealth tribunal, the National Small Business Tribunal, would be established specifically to resolve small business disputes. The tribunal would have the powers of investigation, conciliation and review, which would be backed by new Commonwealth legislation. Whilst it would provide coverage for a wide range of disputes, it would not deal with code of conduct matters or retail tenancy disputes. This option would provide a national network and a one stop shop approach for small businesses with disputes. The tribunal would be based in a capital city and could potentially use existing federal court infrastructure.

ICA Response: *ICA does not support this. This would unnecessarily duplicate and compete with the role of the Small Business Commissioner in each state and territory. Small business dispute resolution should be kept local wherever possible.*

OPTION FOUR – SMALL BUSINESS ADVOCATE

The Small Business Advocate would provide independent representation of small business interests and concerns within the Australian Government. The advocate would have the capacity for investigating and advising the Australian Government on small business issues, including dispute resolution. An initial referral service will utilise existing low cost state or territory dispute resolution mechanisms. Where a gap in existing services is identified, a suitable mediation service would be established (incorporating aspects of Option Two).

ICA response: *ICA supports this. However, in relation to dispute resolution, the Commonwealth should encourage state and territories to establish Small Business Commissioners. Where Commonwealth departments or instrumentalities are in dispute with small businesses, the dispute should be determined either by*

- *State Small Business Commissioners or*
- *The Commonwealth Advocate/Ombudsman armed with similar processes and powers as a Small Business Commissioner*

5. Appendix: Case studies

ICA presents four case studies. These have been taken from ICA's website www.contractworld.com.au

The cases are real-life situations that are ongoing. They represent a selection of the many cases that are bought to ICA's attention. The four cases focus on unfair contracts and give details about how unfair contracts are structured and operate to disadvantage and discriminate against self-employed small business people. The cases also demonstrate how current dispute-resolution processes do not address the systemic commercial unfairness, disadvantage and discrimination to which small business people are subjected. They also show that government is a systemic offender.

- Finance Brokers Screwed http://www.contractworld.com.au/campaigns/ica-integrity-campaign-finance-brokers-unfair-contracts.php
- Guy Forsyth and the Australian Competition and Consumer Commission http://www.contractworld.com.au/campaigns/ica-guy-forsyth-unfair-contracts-trade-practices-act-ACCC.php
- One of the worst contracts we have seen. Owner Drivers http://www.contractworld.com.au/campaigns/ica-integrity-campaign-bad-contract.php
- The case of Tom versus Department of Education Employment and Workplace Relations http://www.contractworld.com.au/campaigns/ica-integrity-campaign-deewr.php

1. Finance Brokers Screwed

22 September 2010

http://www.contractworld.com.au/campaigns/ica-integrity-campaign-finance-brokers-unfair-contracts.php

Background

The contract is a standard form contract used by a high-profile finance business with its commission finance brokers. The contract sets out the arrangements under which the finance brokers will be paid commissions on finance deals they secure with consumers. The commissions include upfront and trailing commissions on long-term finance arrangements.

The 'unfair' contract clauses

We have reviewed the entire contract being used and have extracted those clauses that we believe are 'unfair'. Our criteria for unfairness are the unfair contract provisions in the *Trade Practices Act* for consumers and which ICA believes should apply to self-employed people. [http://www.contractworld.com.au/campaigns/ica-integrity-campaign-identify-unfair-contracts.php]

We have incorporated these principles in our Charter of Contractual Fairness. [http://www.contractworld.com.au/pages/PDFs/ICA-Charter-of-Contractual-Fairness.pdf]

The unfair contract clauses on our evaluation are as follows [our editorial deletions and changes inside square brackets]:

Definitions; '[The Company's] Policies means [The Company's] policies as they may be varied by [The Company] from time to time at [The Company's] absolute discretion.'

Restraint Period; effectively 24 months unless the contractor can litigate.

Clause 2.2 Requires the contractor to work exclusively for [The Company] and 'devote their whole time and attention to the business of [The Company]' And 'must not do any other work unless with the prior consent of [The Company]'

Clause 3.2 (c) '[The Company] may withdraw accreditation to perform the services at any time'.

Clause 3.10 The Contractor agrees to abide with all [The Company's] polices 'as advised by [The Company] from time to time.' [Note: company policies can be changed at any time effectively changing the contract]

Clause 9. (a) contractor will not 'have any interest in or be involved in any business which in the reasonable opinion of [The Company] is engaged or concerned in competition with or provides the same or similar products to [The Company]'

Clause 10 (d) ‘we may vary products available for marketing by you at any time, and we can withdraw your right to market some or all products even if we are still allowing other contractors to sell those products.’

Clause 13.1 ‘You agree that it is a term of this Agreement that you must strictly meet all KPIs [Key Performance Indicators]’

Clause 13.2 ‘You acknowledge that new KPIs and KPI targets may vary as advised by [The Company] from time to time and that compliance with those new KPIs and KPI targets constitutes a condition of this Agreement’

Clause 14.3 ‘You agree that [The Company] may declare and determine the amount or rate of commission payable etc’

Clause 14.4 ‘We reserve the right to vary the basis upon which you are remunerated, the rates of commission and other information etc’

Clause 14.5 ‘[The Company] calculation and determination of any commissions or other benefits payable to you is final.’

Clause 14.8 ‘During the term of this Agreement and at any time after the Termination Date, if any commissions or other payments have been paid to you where in the reasonable opinion of [The Company] you are not entitled to such payment etc such commission or payments must be repaid by you to [The Company] on demand etc’

Clause 16.1 ‘[The Company] may at its discretion immediately suspend your rights to market our products etc’

Clause 17 Immediate Termination; ‘this Agreement may be terminated immediately at any time by us giving notice to you if, in our opinion, any of the following events occurs’

Clause 17.1(b) ‘you breach any of [The Company] policies’

Clause17.1 (l) ‘you engage in any conduct that is in the sole opinion of [The Company] likely to injure [The Company] reputation or commercial interests.’

Clause 17.1 (m) you do not comply with the Minimum Performance Requirements specified in the Addendum’

Clause 19.1 ‘In the event that this Agreement is terminated ... we will notify [specifies a wide number of people and organisations] of the circumstances giving rise to the termination’

Clause 19.2 ‘You agree not to make any claim against [The Company] in respect of an notification made pursuant to clause 19.1’

Clause 20.3 ‘If this Agreement is terminated pursuant to clause 17.1 you will not be entitled to any commission or other payment etc’

Clause 21.4 ‘Subject to the entitlement of [The Company] to unilaterally vary the rates of commission and other information specified in the Addendum ...’

The effect of these clauses

The contract enables the company without reference to, consultation with, agreement from, or appeal by the finance contractors to:

- Change every, and any aspect of the contract.
- Change the key performance indicators used to evaluate the finance contractors' performance.
- Change the calculations upon which the finance contractors' commissions are computed.
- Cease paying the contractor/s.
- Terminate the contract.
- Restrict the finance products the contractors may sell.
- Force the contractors to pay money to the company.
- Potentially harm the reputation of the contractor/s and deny contractor/s the right to defend their reputations.

In addition, the contract:

- Forces the contractor/s to work only for the company.
- Prevents the contractor from having any other business interests in the finance field when working for the company.
- Prevents the contractors from working for anyone else in the finance related field for periods of up to two years after leaving the company.

ICA commentary

This is a shocker of a contract. It is totally oriented towards protecting every and any conceivable interest of the company. It would enable the company to 'thieve' from the finance contractors because it literally turns 'theft' by the company into a permissible and arguably legal action under the contract.

There is absolutely none of the balance in the contract that should give both the contractors and the company mutual rights and obligations towards each other.

This is a master–servant contract under the pretence of a genuine commercial contract. It is this sort of contract that spurs ICA to continue its fair contracts campaigning, no matter how long it takes for us to achieve success

2. Guy Forsyth: The Australian Competition and Consumer Commission

15 June 2011

http://www.contractworld.com.au/campaigns/ica-guy-forsyth-unfair-contracts-trade-practices-act-ACCC.php

Guy's story

Guy Forsyth is like thousands of self-employed consultants. He happens to specialise in project management. Others, like him, specialise in other fields such as engineering, architecture, design and many other professional areas. He (they) are paid well, but work from job to job and do this by choice. There is something else they have in common. When they work for government they are frequently confronted by a contract brick wall, an approach to contracts that is patently unfair.

We know the contracts are unfair because in mid-2010 the federal government amended the *Trade Practices Act* (creating the *Australian Consumer Law Act*) to give consumers protections from unfair contracts. Initially the amendments also proposed to extend unfair contract protections to self-employed small business people. But the government caved in to lobbying from big business interests and decided to deny self-employed people unfair contract protections.

In April 2010, Guy was offered three months' contract work with the ACCC that he accepted. As happens with many government departments, the work was arranged through a labour hire company. He was not shown the labour hire firm's contract until a few days after starting the work. When he received the contract it had a clause saying that the contract could be terminated on the initiation of the ACCC at a moment's notice without any cause, reason or compensation. Yet, on the other hand, under the contract Guy had to give a minimum of 4 weeks' notice to cancel the contract. Guy had been caught out by this type of clause before in working for many other government departments.

Some months earlier he'd worked on another government project. The department was fully satisfied with his work but had a change of business priority and for no reason cancelled his contract before the end date, leaving him without income. In accepting the work Guy had knocked back several other contract opportunities. In this instance with the ACCC he objected to the 'without cause, reason or compensation' cancellation clause. When he tried to assert his rights through the provision of his own conditions of contract, these were rejected. His services were terminated. Normally, Guy would have done what tens of thousands of contractors do in this situation---'suck it up' and move on. Guy decided not to. He initiated an unfair contract action against the ACCC and the labour hire company. As in all matters like this, the legal procedures became highly involved, complex and time-consuming. Guy ran the case himself because legal fees would have been prohibitive. Guy was up against several solicitors, barristers and government advisers.

The labour hire company settled out of court. Guy lost his action against the ACCC.

The court judgment is here. [http://www.austlii.edu.au/au/cases/cth/FMCA/2011/116.html]

It's a long decision but here's a quick summary. The court ruled that

- Guy's application for an unfair contract finding against the ACCC not be heard.
- The relevant contract (if applicable) was between Guy and the labour hire company.
- The labour hire company had a contract with the ACCC using a government 'panel' standard form contract.
- The contract Guy had with the labour hire company reflected the contract the labour hire company had with the ACCC. Guy was expected to know the terms of the ACCC's contract.
- Guy argued that he provided his services to the ACCC at their control and direction and that the labour hire company acted as an 'agent' for the ACCC, hence his contract was really with the ACCC. The court rejected this argument.
- Because the court ruled that there was no agency between Guy and the ACCC, Guy had no basis upon which to argue anything against the ACCC.

The ACCC is now suing Guy for its legal costs of $50,000.

ICA comment: The contract Guy had is an unfair contract

Guy failed to have the fairness or otherwise of the contract tested. This demonstrates how the processes of the law are stacked against the 'little people'. In this instance, as happens so often, the ACCC threw the full force of its legal and (endless) financial power behind the case to protect its position. That's perhaps to be expected.

But on our assessment we allege that the ACCC was arguably protecting its ability and that of the government to engage in institutionalised unfair contracts. It's something they do that is entirely legal, but the outcome is the lessening of competition and the proper functioning of the economy. We would be happy to engage with the ACCC and the government in this debate.

We say the contracts are unfair on the following grounds.

In mid-2010 the *Australian Consumer Law Act* was created which, in part, created protections for consumers against unfair contracts. The original Bill extended those protections to small business people but this was pulled from the legislation by the government, following big business lobbying.

Let us apply the criteria of 'unfairness' under the *Australian Consumer Law Act* to Guy's contract. (Note that this is a standard contract format the government uses.)

The Australian Consumer Law Act says, in part:
[http://www.contractworld.com.au/campaigns/ica-integrity-campaign-identify-unfair-contracts.php]

Meaning of *unfair*

(1) A term of a consumer contract is unfair if:

(a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and

(b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and

(c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

4 Examples of unfair terms

(1) Without limiting section 3, the following are examples of the kinds of terms of a consumer contract that may be unfair:

(a) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;

(b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract; ...

(h) a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;...

The relevant part of the contract that Guy was offered reads:

11 TERMINATION

11.1 In the event that the Client notifies the Company that the Services of the Contractor are no longer required for any reason other than those described in 11.2 below, the Company may terminate this Agreement on the same terms as it receives from the Client.

11.2 Termination Without Notice

The Company may immediately terminate this Agreement by giving written notice to the Contractor if:

a) The Company receives a notice from the Client stating that the Client is dissatisfied with the performance of the Services by the Contractor or its Principal Person and the Client wishes the Contractor or its Principal Person to be replaced or the Assignment terminated, or both; or

b) The Contractor or the Principal Person at any time acts in a manner which prejudicially affects the Company or the Client; or

c) The Contractor at any time breaches the terms of this Agreement; or

d) If any proceedings are instituted for the winding up of the Contractor or if the Contractor enters into any arrangement for the benefit of creditors or there is a administrator or liquidator appointed.

11.3 No Compensation
Upon termination of this Agreement in accordance with its express terms neither the Contractor nor the Principal Person is entitled to claim any compensation or damages from the Company in relation to that termination.

11.4 Termination by the Contractor
The Contractor may terminate this Contract if the Contractor gives the Company at least 4 weeks notice in writing of intention to terminate. The Contract will terminate at the end of the notice period and the Company will pay the Contractor all Fees owing to the Contractor to that date in accordance with the payment arrangements ....

ICA assessment

- Clause 11.1 of the contract clearly gave the ACCC (the client) the ability to terminate the contract that Guy had with the labour hire company at a moments notice with no cause or reason.
- Clause 11.3 of the contract prevented Guy from receiving any compensation in the event of termination.
- Clause 11.4 of the contract required Guy to give at least 4 weeks notice of termination.

The outcome is that the contract breaches clause 4(1)(b) of the *Australian Consumer Law Act* in that it "permits, or has the effect of permitting, one party (but not another party) to terminate the contract" and causes "a significant imbalance in the parties' rights and obligations arising under the contract." If the ACCC contract (through the labour hire company) were a consumer contract, the contract would be unfair.

Lawyers may dispute our interpretation. But ICA is not an organization of lawyers. We are an organization of practical small business people. We know what is needed to make commerce and an economy work and to maximize the potential for entrepreneurship.

To an ordinary person, the contract Guy had, and hence the approach of the ACCC and the government, is unfair. Unfairness decreases commercial trust in a community. It harms the rule the law. It diminishes the willingness and ability of individuals to be entrepreneurs and to add value to our economy and society. It increases the transaction costs of doing business in our community. It favours 'big' over 'little'. We don't want favour for one over the other. We want fairness. We would have thought that the ACCC should be a leader in the community on fairness.

3. One of the Worst Contracts We Have Seen

January 2010

http://www.contractworld.com.au/campaigns/ica-integrity-campaign-bad-contract.php

ICA has been approached by a group of independent contractors worried about their standard form contract with a large firm. We've looked at the contract and talked with the contractors. This is perhaps one of the worst contracts we have seen. It's a perfect example of why at ICA we are dedicated to our 'Contract integrity' campaign. We must encourage change in the commercial and legal culture that seeks advantage through highly unbalanced contracts. Some may see this as 'smart' law. We see it as bad business and questionable ethics.

Below we detail our summary of the contract terms without identifying the company or the independent contractors concerned.

Assess the contract terms for yourself. Would you sign contract based on them? Have you ever been presented with a contract with some or most of these features? We'd be interested in your views and experiences.

The contract

The contract we have sighted is a standard form contract that the company requires independent contractors to sign if they are to work for the company. It appears that variations are not allowed.
In our view, the contract does the following. It:

1. Allows the company to change the terms of the contract exclusively at its discretion and without reference to, or approval from, the independent contractors.
2. Allows the company to change the price at which it pays the independent contractors without securing agreement from them.
3. Allows the company to change at its absolute discretion the key performance indicators against which the independent contractors are assessed to ascertain if they are adequately performing their work or not.
4. Allows the company at its absolute discretion to change and order where, how and when the independent contractors undertake the work.
5. Requires the independent contractors to invest in a equipment which meets the company's specifications. The specifications may be changed at any time by the company. The investment required is in the order of $80,000.
6. Allows the company to terminate the contract at its exclusive discretion, removing from the independent contractors any right to external appeal or redress or compensation for loss of their business.
7. Gives the company the exclusive right, upon termination of the contract, to acquire the independent contractor's equipment from the contractor at a price exclusively determined by the company.
8. Imposes a restriction of trade on the self-employed person such that they are prevented from offering their services to the public at large---either during the life of the contract or on the termination of the contract (for 6 months).

9. Requires the independent contractors to have the company's colours and insignia on their business equipment as stipulated by the company, which can be changed at any time by the company.
10. Allows the company to withhold payments from the independent contractors.
11. Requires the independent contractors to indemnify the company against losses or damages, whether those losses or damages are proven or not.
12. Requires the independent contractors to indemnify (that is, pay for) any costs that the company may be obliged by law to incur in relation to workers' compensation premiums and payroll tax.
13. Does not have an independent dispute-resolution procedure.

Stop for a minute. Before reading our comments, make some notes of your own. What do you think about the genuineness and ethics of a contract with these features?

ICA comment on the contract

We first ask the question: what is a true commercial contract?
Basic commercial law holds that, for a contract to exist, five key elements must be displayed by the parties:

- An intention to create a legal relationship.
- Clear terms understood by all parties.
- Offer and acceptance.
- Consideration. (This is the wide legal idea of payment.)
- Genuine consent by all parties.

In our opinion, much of the contract we describe above may possibly be a valid contract at law, but it is questionable on the grounds of fairness. For example:

- Clear terms understood by all parties: The ability to change the contract terms at the whim of the company and the fact that many terms are contained in unsighted or unreferenced company 'policies' means that the independent contractors, arguably, are not in possession of the full contract terms and could not reasonably be expected to understand the contract terms.
- Genuine consent: if the company policies are included as contract terms but not made available to the independent contractors, the idea of genuine consent being given by the contractors has strange connotations.

The other aspect that ICA argues is a key feature of commercial contracts is that a proper contract creates and holds a balance of power between the parties which gives equity to the relationship and enables the achievement of mutually beneficial outcomes. Broadly speaking, this is the idea of 'fairness' in contract, which itself is a topical item of interest given proposed amendments to the *Trade Practices Act* that will introduce 'fair contract' provisions for business-to-consumer 'standard contracts'.

Our view is that the contract might fail in a number of jurisdictions if it were put to the test.

Unfair contract provisions of the *Independent Contractors Act*: Assuming that a court were to find that the contract was in fact a commercial contract, the contract

could be tested for its 'fairness'. The contract elements we have mentioned above would likely give rise to many arguments that the contract was 'unfair'. The *Independent Contractors Act* was created in 2006 and two cases have been heard under its unfair contracts provisions since then, with both resulting in decisions in favour of the applicants. ICA monitors these court actions.

Unfair contracts action under the *Trade Practices Act*: There appear to be a number of possible mechanisms in the TPA which enable consideration of unfair contract terms and which could possibly be applied in relation to this contract.

Victorian Small Business Commissioner: The Victorian Small Business Commissioner [http://www.sbc.vic.gov.au] has wide authority to investigate contract issues on his own initiative.

Corporate intent and ethics

The Victorian Small Business Commissioner, Mark Brennan, operates in interesting ways. He seeks to resolve contract disputes often by appealing directly to the ethical integrity of firms.

At ICA's conference on 12 November 2009 titled 'Building relationships with the self-employed', Mark Brennan gave an impressive talk about practical ways to fix contract problems. Watch his presentation here: [http://www.contractworld.com.au/about_public/ica-summit2009-videos-2.php -anchor3].

In his talk, Mark spoke of a report he released following a survey he conducted with senior business and corporate leaders from across Australia which explored their approach to achieving quality business-to-business (B2B) relationships.
The corporate leaders identified seven main characteristics for quality B2B relationships:

1. Alignment of the values and ethics of a business internally and with its external business partners
2. A commitment to long-term relationships
3. Working toward achieving mutual interests
4. Clear, transparent communication
5. Mutual accountability and responsibility
6. Professional conduct by all parties
7. Pre-agreed dispute-resolution procedures

From Mark Brennan's survey it's clear that these B2B principles are shared, ethical corporate principles evident in most large organisations. It appears that commitment is strong to such principles---particularly at the senior corporate levels. But as Mark notes, these principles often break down at some levels in organisations in ways that run counter to the intent of the corporate organisation.
We believe that these principles can best be secured within organisations if the principles are reflected in a real way in the B2B contracts through which they operate. Where large organisations engage self-employed people, the initiative really is with the large organisations to secure these principles in their standard form contracts.

4. The Case of "Tom" versus Department of Education, Employment and Workplace Relations

November 2010

http://www.contractworld.com.au/campaigns/ica-integrity-campaign-deewr.php

Update: 25 September 2010

Tom has now been told that if he pursues the matter, he will fail. The story is that the federal government will not be held liable for the actions or undertakings of its employees. The government will spend endless amounts of money on lawyers denying its liability. Yet if Tom's situation happened in the private sector, his case would be strong, as private sector employers are held accountable for their employees' commitments. We thought the Magna Carta had fixed this sort of thing a long time ago!

Originally posted: 17 September 2009

In July 2009 we announced the first phase of our Integrity of Contract campaign. [http://www.contractworld.com.au/campaigns/ica-integrity-campaign.php]

Basically, integrity of contract means that when an independent contractor (a self-employed person) enters a commercial contract, he or she can have certainty that the contract and the behaviours accompanying the contract conform to the common law principles of contract. This is the best way of ensuring 'fairness' under contract. We are preparing concept papers on the issue.

In early September, however, we were contacted by an ICA member who is unhappy with the treatment he has received from a federal government department under a commercial contract. We have looked closely at the case and, given the information we have seen, the member's problem appears to be a perfect example of breach of contract integrity on behalf of the department.

In fact the case is typical of the sort of behaviour that far too frequently occurs when self-employed people are engaged in work with government agencies. In what follows, we describe the case, our views of the basic issues at law, how this relates to 'fairness' and what lessons need to be learned.

Our independent contractor member has been open with the information. Of course, there may be other facts from the department's perspective of which we are not aware and which could change our understanding of the issues.

We shall call our member "Tom" (not his real name).

The facts as we understand them:

- Tom is a high-end information technology specialist. He is, and wants to be, a self-employed independent contractor. He sees independent contracting as central to his professionalism.
- In July a recruitment agency approached him for work under a 9-month contract with DEEWR. He had not dealt with the recruitment agency before.
- Tom attended an interview at DEEWR. After that interview, DEEWR requested that he return as they had a "more important" position that they wished to discuss. At the second interview they informed him that due to his highly specialized skills they would prefer to offer him a different and more specialized contract for 3 months' work with a 3-month extension.
- Tom said that he was interested, subject to the contract details being finalized. DEEWR indicated that they wanted him to start almost immediately.
- After a few days delay, the contract had not been forwarded to Tom. However DEEWR wanted the work to start as there was some apparent urgency to it. Tom began the work on the understanding that a contract would be forthcoming shortly.
- Payments to Tom were managed through the recruitment agency. That is, Tom invoiced the recruitment agency, who invoiced DEEWR. DEEWR paid the recruitment agency, who paid Tom.
- Over the following 6 weeks Tom continued to work but frequently raised concerns about the lack of a written contract with the agency. Tom is a well-organized person, has his own standard contract that he uses with clients which had been prepared for him by a lawyer. Because the recruitment agent had failed to provide him with a contract, Tom supplied his own standard contract before starting the work and, soon after starting, he followed this up with letters. He notified the agency that these were the conditions under which he was prepared to undertake the work. The recruitment agency never responded to Tom about his contract or an alternative contract.
- After 6 weeks of work, the recruitment agency informed Tom that DEEWR was cancelling the work. No explanation was given by the recruitment agency. Tom has had discussions with the supervisors at DEEWR and subsequently more senior DEEWR executives. No complaints or concerns have been raised about the quality of his work. Indeed, the indications are that his work has been of a high standard. The best assessment of why DEEWR were cancelling the work is that there was a change of management priorities in DEEWR in relation to the work.

The position of the three parties:

- Tom's view is that, at minimum, he was engaged for 3 months and took the work on that understanding. He believes the contract with him has been breached and that DEEWR has a contractual obligation to pay him for the balance of the contract plus the promised extension.
- DEEWR has stated that its view is that they had a contract with the recruitment agency which could be terminated at any time.
- The recruitment agency maintains that it had a contract with Tom which enabled them to terminate Tom's contract if DEEWR terminated the contract with them (the agency).

- Tom states that neither the agency nor DEEWR provided him with a contract.

Our view of the issues at law

Given these facts, and based on the documents we have sighted, we believe that there is most probably a clear contract between Tom and DEEWR for at least 3 months' work, possibly 6 months' work. Naturally, it is for a court to decide, but our reasoning is based on our observations of the general approach courts normally take to such matters. We reason as follows:

- A contract does not have to be something that is written. A contract is created by the actions, intent and behaviours of the parties to it. For the most part, written contracts act as clarifications of actual behaviours. Just because no written contract is in place for Tom does not mean a contract does not exist.
- Tom initially attended an interview based on a potential offer of work from the agency for work at DEEWR. However, at DEEWR's request, Tom attended an additional interview where DEEWR made a totally different offer directly to Tom. Tom considered this offer, which he accepted. At the interview Tom was offered 3 months' work with a 3-month extension. As a consequence it is most probable that there exists a direct contract between Tom and DEEWR for at least 3 months' work and probably 6 months.
- In this instance there is no contract between the recruitment agency and Tom—even though the recruitment agency paid Tom. The recruitment agency is most likely acting as an agent for DEEWR—that is, acting on and in the place of DEEWR.
- The failure of DEEWR and the recruitment agency to present Tom with a written contract and Tom's presentation of his standard contract early in the work period give Tom some strong standing to claim that the terms under which he was prepared to work are in fact the terms of the contract he supplied. This is reinforced by the fact that neither DEEWR nor the recruitment agency responded to Tom's contract, but rather allowed him to continue to do the work. By not responding, DEEWR effectively allowed Tom's terms to stand as the *de facto* contract.

In our view Tom has a perfect right to claim payment from DEEWR for the balance of the 3-month contract owed to him. It is probably unlikely that he could claim payment for an additional 3 months, as this was a contract extension that was subject to further agreement.

Our view of the management issues

This situation reflects badly on the management capacities of DEEWR in particular, and the federal public service in general. It reflects ignorance of basic principles of legal contract and managerial arrogance toward compliance with the law of contract.

DEEWR:

- was sloppy in the way it engaged Tom. It did not follow through with its undertakings to ensure a written contract was put in place;
- has acted unfairly and irresponsibly in making representations and undertakings to Tom with which it failed to comply.

Tom appears to have acted in good faith at all times. The same cannot be said of DEEWR.

Remember, DEEWR, the Department of Education, Employment and Workplace Relations, is the federal department charged with overseeing the *Fair Work Act* (FWA). Its responsibility is to oversee the application of the FWA to ensure fair treatment of employees. But in this instance it has not applied the same principles of fairness to its engagement of Tom, an independent contractor.

The practical position of Tom

Tom is in a difficult position. He has tried to resolve the issue by having meetings with appropriate senior people in DEEWR. They have refused to alter their position. Tom has looked at various legal avenues, one being the unfair contract provisions of the *Independent Contractors Act*. This could be an avenue. The case could be fairly simple because this appears to be a straightforward breach of contract by DEEWR.

However, any legal avenue could involve considerable legal expense on Tom's behalf. A simple Magistrates Court action could easily cost Tom $10,000 to $15,000 and an enormous amount of his time, taking him away from his normal income-earning work. For DEEWR, if Tom were to take legal action, the issue would simply be handed to government lawyers with the expense being a budget annoyance. Tom, a lone individual, is confronted by the 'machine' of government.

The other risk for Tom is potential damage to his income-earning capacity through the denial of future contracts. Like any industry, reputation in the IT sector is important. By taking legal action against DEEWR, regardless of his rights, Tom risks being unofficially black banned from future government, and even private-sector, work.

Tom probably has clear legal rights but faces a commercial 'catch 22'. That is, there seems no easy resolution to this for him.

The public policy issues

As we see it, Tom's case is a perfect example of a breach of integrity of contract which ICA has set as one of our core long-term campaigns. ICA has seen plenty of these cases in the past which have adversely affected architects, designers, engineers, trades people, academics, IT professionals and many others. Most of the time, people don't bother pursuing the matter—they give up and move on looking for alternative work. Large organisations, either government or private, rely on this. They have the commercial advantage of being 'big' which allows them to keep behaving badly.

In this instance Tom has been prepared to bring this matter to us and allow us to give it some publicity. He takes a risk. DEEWR will very quickly work out who Tom really is! He may find himself unofficially black banned from future government work. Recruitment agencies might do the same.

But Tom supports our integrity of contract campaign. He believes that by allowing a real, practical example to be publicized that this may trigger some reform. If reform can be achieved, other people may not find themselves in his position. Our hope is the same.

Understanding management and independent contractors/self-employed people
The behaviour of DEEWR is typical of what we often witness in large organisations when they utilize the commercial services of independent contractors. Inside any large organisation the quality of individual managers can and will vary widely. Some managers are good and some are bad. Employment law and all its regulations have created highly complex processes to restrict the uncontrolled decision-making ability of managers so that they cannot act 'unfairly' towards employees.

What sometimes happens in large organisations is that some managers (mistakenly) believe that by engaging services through commercial contracts they can structure the contracts so that they can do what they like. However, commercial contracts do not allow managers to do what they like. Commercial contracts are governed by strict legal principles that require compliance. Commercial contracts impose rights and obligations on both parties equally.

What is it we seek?
a) That large organisations which seek to engage independent contractors:

- Take contracts seriously and ensure that management behaviours conform to the contractual undertakings into which the organisation has entered.
- Ensure that the contracts are even-handed, creating rights and obligations equally for both parties, and are not structured solely to protect the alleged rights of the large organisation.
- Willingly and quickly seek to engage in simple mediation processes in the event of disputes, be prepared to pay for the mediation and comply with mediation recommendations.

b) As the largest of organisations in the country, we call on governments at all levels to set best-practice standards in contract adherence when engaging independent contractors, thereby providing leadership for the rest of the business community.

c) Finally, we urge that simple consumer law-like dispute-resolution procedures be established, similar to those under the Fair Trading Act in Victoria and administered by the Small Business Commissioner in Victoria. Further, that these laws apply not only to the private sector but with equal force to government organisations in their commercial dealings with self-employed people.