Submission by APESMA's Contractors & Consultants group to the Australian Government Attorney-General's Department's

Review of

Australian Contract Law

Association of Professional Engineers, Scientists and Managers, Australia (APESMA)

July 2012
Contract law reform provides an opportunity to explore mechanisms which would ensure any power differential between the contracting parties does not produce an unbalanced or unfair contract, and to consider protections to ensure a basic level of fairness is maintained ...

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

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.

Connect - APESMA’s special interest group for independent contractors and consultants - 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 the review of contract law 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.

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

Chris Walton
APESMA CEO
Background

The Association of Professional Engineers, Scientists and Managers, Australia (APESMA) 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 APESMA’s eligibility rules to provide coverage for independent contractors. APESMA can cover any professional engaged as an independent contractor who would be eligible for membership of the Association if they were an employee performing the same work.

In the late 1990s, in response to changes in the labour market, 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, APESMA allocated significant resources to providing targeted services to assist these members. Since that time, the number of APESMA members operating as independent contractors and consultants has grown to more than 3,500 - around 14 per cent of our membership.

APESMA 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 the Connect special interest group and include:

- advice on business startup and managing the transition from employee to consultant;
- information and advice on risk management practices and documentation;
- access to discounted professional indemnity insurance;
- an Award-winning one-on-one online mentoring program which matches experienced contracting and consulting professionals with those transitioning to self-managing work arrangements;
- information on recommended hourly rates;
- review of contracts for service by in-house solicitor;
- 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.

APESMA offers these services through its website at www.apesma.com.au/groups/contractors-and-consultants.

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1 The Australian Bureau of Statistics 2009 *Forms of Employment Survey* found that over one million Australian workers were engaged as independent contractors. 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 Survey\(^3\) 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 APESMA providing services to more than 3,500 independent contractor members, and the basis of our significant interest in this review of Australian contract law.

APESMA recognises, as established by the International Labour Organisation in 2006, that independent contractors are governed by commercial rather than industrial law.\(^4\) The Association recognises 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 we acknowledge 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.

APESMA also holds 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 decade\(^5\) 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

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\(^3\) Australian Bureau of Statistics Forms of Employment Survey 6359.0, November 2011


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 APESMA's view that contract law reform provides an opportunity to explore mechanisms which would ensure any power differential between the 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, APESMA 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**

APESMA's main area of concern is the failure of contract law in the area of unfair contracts. More specifically, APESMA has 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 inadequacy 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**

APESMA’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. **Inadequacy of the Independent Contractors Act to provide 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 contradicting an earlier decision made by Federal Magistrate Robert Cameron in the Riteway case. In Riteway, FM Cameron varied the contract, removing unfair contract terms, to take effect "as from the time when the contract was made" confirming his view that the Court had jurisdiction to review contracts which were not on foot at the time the application is filed. He suggested that "it would be pointless to empower the Court to vary contracts but make it impossible to enforce the rights created by such variations". Justice Perram’s judgement found that the Court did not have the power to enforce a remedy for unfair contract terms effectively making the power to vary contracts, in Cameron's terms, pointless.

In this case, the relevant contract law prevented a proper assessment of appropriate compensation and did not provide the power to award costs therefore providing no effective remedy for contracts not on foot. The Perram judgement signals the urgent need for amendment of the Independent Contractors Act 2006 to give the Court powers to provide remedy for those disadvantaged by unfair contracts.

**Conclusion**

APESMA supports reform to contract law which addresses the power differential of parties involved in commercially-based work arrangements. It is our view that such 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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6 Informax International Pty Ltd v Clarius Group Ltd (No 2) [2011] FCA 934
7 Keldote Pty Ltd & Ors v Riteway Transport Pty Ltd [2009] FMCA 319 (5 May 2009)