



[www.contractworld.com.au](http://www.contractworld.com.au)

[office@contractworld.com.au](mailto:office@contractworld.com.au)

ABN: 54 403 453 626

September 2004

**Submission to: Tasmania Industrial Relations Act 1984 .  
Proposed Amendments to the Act. A Discussion Paper**

Independent Contractors of Australia (ICA) is pleased to have the opportunity to make comment on the Discussion Paper. ICA is further heartened to note that the proposals are only for discussion, thereby enabling a period of genuine consultation.

ICA makes comment on one section in the paper, namely, Section 7, concerning "Contract labour, contracts for service and labour hire employees".

Section 7 has direct and detrimental potential impact on independent contractors in Tasmania. If implemented, it would replicate the legislative errors made in Queensland (and partly rejected in NSW), but not repeated in Victoria, Western Australia, New Zealand or in Federal legislation. Similar proposals have been mooted in South Australia (2004), and are currently subject to community consultation, but even at this stage it is fair to say that they have received universal condemnation from all business associations in South Australia.

In ICA's view, Section 7:

- Faces significant legal difficulties given the Electrolux High Court decision of 2nd September and the Solution 6 Supreme Court of Appeal (NSW) decision of 21 July. The impact of both of these decisions has yet to be properly felt in NSW and Queensland.
- Would fly in the face of the most recent (2003) International Labour Organisation statement on the rights of independent contractors and would strongly conflict with the ILO statement that the commercial contract has no place within employment contract regulation.

ICA fully supports the apparent intent of section 7:

"...the Commission should be able to examine the arrangement in place and decide if it is a 'genuine' contract for service, or a contrivance to avoid award obligations..."

But we reject the methods proposed to implement it.

ICA submits that the investigation of whether a contract for services is genuine or not is a power already within the jurisdiction of the Commission and one which the Commission can (and does) exercise on a regular basis. The processes of investigation are well-established under common law and are highly effective. ICA supports these continuing common-law powers of the Commission. The section 7 proposals, however, would cause a commercial contract to be regulated as an employment contract, thus denying independent contractors their right to be independent contractors and thereby damage commercial activity in Tasmania.

## **Independent Contractors of Australia Background**

ICA is the first (and probably only) organisation in Australia exclusively dedicated to the interests and rights of independent contractors.

ICA was formed in July 2001 and incorporated as a non-profit organisation under the South Australian *Associations Incorporation Act*. ICA has three principal aims:

- 1) To conduct education campaigns to assist independent contractors and the community at large to understand the legitimate status of independent contractors and the important issues relating to them.
- 2) To act as a network for industries structured around or dependent upon independent contractors.
- 3) To lobby for the rights of independent contractors.

ICA operates through its Website at [www.contractworld.com.au](http://www.contractworld.com.au).

ICA is truly a 'virtual' organization. Through its Website:

- The public can access significant quantities of information about independent contracting, including submissions made by ICA to government reviews.
- People can subscribe (\$50 per year) and access the 'subscribers only' section of the site, where core legal, tax and other information is stored.
- Subscribers can engage in discussion on independent contractor issues and have policy input.
- Subscribers and interested registered persons can receive regular e-mail alerts on independent contractor issues.

The ICA committee is drawn from across Australia with representatives from a range of industries including farming, IT, housing/construction, transport, labour hire and others.

ICA came into existence in response to the needs of the 28 per cent of the private-sector workforce who work but are not employed. ICA is dedicated to exploring the issues and interests of this significant, growing, but largely unrepresented sector of the working population.

ICA recently conducted the first ever National Summit on independent contracting issues in Canberra on 24 August 2004. The Summit attracted a wide audience of senior policy bureaucrats from across all sections of government, State and Federal. Summit presentations and papers are available at [www.contractworld.com.au](http://www.contractworld.com.au)

## 1. General Comment

The proposals raised in section 7 cut to the heart of the jurisdictional reach and intent of the Industrial Relations Act and the jurisdiction of the Commission. In Australia, the general issue of jurisdictional reach has become a matter of great controversy and is fraught with legal difficulty. Tasmania has the advantage of observing the experiences of the other States on this proposal.

Section 7 proposes to adopt section 275 (and others) of Queensland's *Industrial Relations Act 1999* which "empowers a full bench of the Commission to 'declare persons to be employees or employers'".

The key public policy issues are:

- Industrial relations law, both domestically and internationally, has always sought to regulate relationships between employees and employers. (the 'contract of service').
- Commercial law, including the common law, trade practices and fair trading laws, and insolvency law (amongst many others) regulates the commercial contract (the 'contract for services')
- Industrial relations commissions and courts and commercial courts both have the capacity to investigate any contract to determine if it is 'of service' or 'for services'. This occurs regularly.
- The Queensland Act's section 275 plays legal trickery by accepting the concept of a commercial contract but nonetheless seeking to regulate the contract as if it were one of employment. This is the equivalent of a food regulator accepting that an apple is an apple but requiring it to be cooked as if it were a lemon.
- The policy implication is the creation of wholesale regulatory confusion within an economy, with no-one in a position to be sure of their contractual and regulatory obligations, either under common law or statute law. The Queensland Act's Section 275 creates legal conflict between trade practices and fair trading laws on the one hand, and employment laws on the other.

## 2. Queensland s275 provisions

The Queensland provisions are the only industrial relations employment deeming provisions operating in Australia. Both NSW and Victoria considered, but rejected, similar clauses. The President of the Queensland Commission has twice publicly declared the provisions of the Queensland Act unworkable. (See the speeches made to Australian Industrial Relations Society National Conferences, Sept 2001 and March 2003)

Only three applications under the Queensland Act's s275 provisions have been attempted. The first application against contract shearers was dismissed by the Commission, with the shearers found to be genuine independent contractors. But it cost the 300-plus shearers subject to the application \$325,000 in legal fees to defend their status. A second application, involving a security business, resulted in a *corporation being declared an employee*. The third application (still ongoing after 2 years) involves many hundreds of contract transport drivers, is still in dispute over procedural matters, and has not yet reached a substantive hearing. Each application has proven highly expensive, both for the applicants and the defendants (independent contractors), and each has involved long, drawn-out legal debate over the incoherent meaning of new phrases that have been sundered from their common-law meanings. Independent contractors see this attack against them as oppressive, aggressive and an affront to their independence.

## 3. New South Wales & Supreme Court (Solution 6. NSWCA 200 21 July 2004)

At one stage, NSW attempted to introduce Queensland-type provisions into their Act. (2001 under Minister Della Bosca) Having discovered the implications of s275 type legislation, business in NSW became alarmed and lobbied hard against the attempt. It

became stalled in the Upper House. The government withdrew the Bill and has not attempted to reintroduce it.

Section 7 of the Tasmanian Discussion Paper also raises the idea of introducing unfair contracts provisions similar to those in NSW and Queensland which are both based on the same model. This unfair contracts model is substantially different from the Federal unfair contracts provisions contained in the *Workplace Relations Act*. The different NSW provisions have been in place since 1996. The NSW unfair contract provisions have led to the NSW IRC intruding into franchise agreements, the sale of business contracts and retail leasing contracts. The provisions have become well known for being used almost exclusively by the rich in their disputes with the rich. The depth of the shortcomings and confusion created by the IRC intruding into commercial contracts has raised the ire of NSW's highest court, the Supreme Court of Appeal.

In an extraordinary judicial intervention, the Supreme Court has publicly chastised the NSW IRC for use of unfair contracts provisions in a way that allowed them to intrude into commercial contract areas. The Appeal Court said "Few, if any members of the Commission have substantial experience of commerce or commercial law."

#### **4. Victoria**

Victoria sought to implement Queensland-style s275 type provisions in 2000 but was blocked in the Upper House. However business opposition was so widespread that the government changed their policy and went to the subsequent election promising not to introduce the legislation. Even after winning control of the Upper House, they have not sought to reintroduce the Bill.

#### **5. South Australia (2004)**

SA has floated a draft Bill (for discussion) parts of which are heavily modelled upon Queensland's s275. The business community's position is universal opposition to its provisions. The SA Government does not control the Upper House.

#### **6. Western Australia.**

WA has not introduced a Queensland-style s275 or proposed such a move, even within their 2002 IR changes.

#### **7. New Zealand**

Changes to New Zealand's Industrial Relations Act considered Queensland-style s275 legislation some years before the Queensland legislation was enacted. After considerable public opposition and debate and an extensive parliamentary inquiry, however, the proposals were dropped. New Zealand's industrial relations legislation confines itself to the employer-employee relationship.

#### **8. International Labour Organisation (ILO)**

The issues that section 7 raises are the same ones faced globally and have involved extensive consideration by the peak global labour organisation, the ILO, since about 1996. The debate at the ILO on this issue has been one of the most prolonged and hard-argued of all issues in the organization's history. The ILO came to a significant 'Conclusion' in June 2003, which represents the international high-watermark statement on the issue.

In summary, the ILO Conclusion states that:

- The nature of labour market changes is that significant numbers of people across the globe are choosing to work as independent contractors who are controlled and regulated through commercial contract regulation and law.

- Where independent contracting/self-employment is genuine, the shift of people away from employment is legitimate. Where independent contracting/self-employment is not genuine, the shift is not legitimate.
- Governments should look to ensure appropriate regulation of the emerging work arrangements by forming policy that respects the status of independent contractors and the self-employed.
- Independent contractors/self-employed persons and commercial contracts are not within the scope of industrial relations/employment regulation. Industrial relations/employment laws should not attempt to regulate independent contractors/self-employed persons and commercial contracts.

The June 2003 ILO Conclusion is contained in the ILO's "Provisional Record Ninety-First Session Geneva 2003. Fifth Item on the Agenda. The Scope of the Employment Relationship." The full 57-page document is available at [www.contractworld.com.au/pages/PDFs/ILOJune03.pdf](http://www.contractworld.com.au/pages/PDFs/ILOJune03.pdf)

Pages 52 to 57 contain the 25-clause statements of principles which form the Conclusion.

The key ILO statements of direct relevance to the discussion paper section 7 are:

1 ... The term *employee* is a legal term which refers to a person who is party to a certain kind of legal relationship which is normally called an employment relationship. The term *worker* is a broader term that can be applied to any worker, regardless of whether or not she or he is an employee. *Employer* is used to refer to the natural or legal person for whom an employee performs work or provides services within an employment relationship. The employment relationship is a notion which creates a legal link between a person, called the "employee", with another person called the "employer", to whom she or he provides labor or services under certain conditions in return for remuneration.  
Self employment and independent work based on commercial and civil contractual arrangements are by definition beyond the scope of the employment relationship.

3...Changes in the structure of the labour market and in the organization of work are leading to changing patterns of work within and outside the framework of the employment relationship...

13...While laws and regulations should be sufficiently clear and precise leading to predictable outcomes, they should avoid creating rigidities and interfering with genuine commercial or genuine independent contracting arrangements.

### **9. The Electrolux High Court Ruling** (2004 HCA 40. 2 Sept 2004)

This ruling has profound relevance for the Section 7 proposals because it raises the real possibility that Queensland-style s 275 provisions are not legal.

The High Court considered the legality of bargaining agents' fees in federal enterprise agreements and ruled that the fees were illegal because they did not pertain to the employee-employer relationship. The decision is still being studied, but it appears that the Court ruling may be more expansive than just the legislated jurisdictional reach of the *WRA*. It may also apply to the scope of industrial relations law in the common-law sense.

At minimum the High Court has made it clear that the federal industrial relations legislation relates to matters between employees and employers. Anything outside that relationship is beyond the jurisdictional reach of the Act.

Queensland-style s275 legislation does not relate to the employee-employer relationship. It is, by design, structure and wording, an attempt to capture the commercial contract. In the light of Electrolux, its legal validity must be under a cloud given the central purpose of the Queensland act is to regulate employee-employer contracts.

## **10. Conclusions.**

Tasmania has the advantage being able to consider its section 7 proposals in the light of several years' knowledge of the 'on the ground' application of s275 and the various, by-and-large unsuccessful attempts to apply the model in other jurisdictions. Further, much is already known about the application of the NSW unfair contract provisions.

- The only jurisdiction where s275 has been applied is Queensland, and the President of the Commission there has declared it unworkable.
- Every other jurisdiction that has tried s275 implementation has withdrawn the attempt after broad community opposition.
- The NSW unfair contract provisions have fallen foul of the NSW Supreme Court and have created commercial complexity of a high order.
- Rulings of the High Court and the Supreme Court of NSW raise serious doubts over the legality of the section 7 proposals.
- The section 7 proposals run directly counter to international principles developed at the ILO.

ICA does not support the application of section 7 proposals to the Tasmania Industrial Relations Act.

ICA does support the ability of the Tasmanian Commission to apply common-law tests to investigate if a contract is a contract 'of service' (employment) or 'for services' (commercial).