



www.contractworld.com.au
office@contractworld.com.au
ABN: 54 403 453 626

Response to the South Australian Industrial Relations Reform (Fair Work) Bill 2004 November 2004

1) Background & Summary

In the week before Christmas 2003, the South Australian Government released a discussion paper with a draft Bill proposing changes to SA's industrial relations legislation and calling for submissions by early February 2004. Independent Contractors of Australia studied the draft Bill and considered it a radical proposal which would severely damage the rights of independent contractors. ICA made a submission to the SA Government on 4 February 2004 which detailed our concerns.

In mid-October 2004, the SA Government introduced into the Parliament a Bill to amend the Industrial Relations Act and has announced its desire to have the Bill passed and made law before the end of 2004.

ICA has studied the October Bill and considers that it still represents a real threat to the rights of independent contractors in South Australia. The core concerns that ICA expressed in February 2004 have not been addressed. Although the wording of the October Bill is different from the draft Bill, the outcome is nonetheless the same.

In February 2004, ICA submitted that;

“...the draft Bill:

- Breaks fundamental principles of justice, fairness and equity currently enjoyed by South Australians through common-law processes relating to integrity of contract, employment and independent contractors.
- Directly assaults the rights of independent contractors to be independent contractors.
- Attacks the certainty of commercial contract and would thereby damage economic activity in South Australia.”

Each of these concerns remains. The October Bill violates basic principles of justice contained within contract law. The Bill also ignores the most recent Statement by the International Labour Organisation on the integrity of the commercial contract and the rights of independent contractors.

ICA continues to believe that the October Bill would have serious detrimental impacts on several South Australian industries including (but not limited to):

- Housing construction and renovation;
- Information technology;
- Home based micro-business sector;
- Accounting and legal professions;
- Transport;
- Government outsourcing;
- Wine and grape industries;
- Tourism and hospitality;
- Farming; and
- Franchising.

**Specific Comments on clauses in the
Industrial Relations Reform (Fair Work) Bill 2004
and
Recommendations for amendments**

[This ICA commentary on the October 2004 Bill should be read in conjunction with information supplied in our February 2004 response to the draft Bill (click [here](#)) and the October Bill (click [here](#))]

On the surface, the Bill appears straightforward enough. In critical areas, however, it plays with traditional common-law approaches to key definitions used in industrial relations legislation. It also introduces new definitions which break the traditional integrity of commercial contract and which, if retained in the Bill, will lead to commercial uncertainty in South Australia.

2) Clause: 7- Insertion of section 4A: Declarations as to employment status

2a)

4A (1). An application may be made to the Court under this section for a declaratory judgment as to whether a person is an employee, or a class of persons are employees.

ICA supports the proposal for Courts to have the power to investigate and declare individuals to be either employees or independent contractors. Only Courts administered by judges with the proper legal background and experience can have sufficient knowledge of the law and the impartiality to make declarations in which the full community can have confidence.

ICA does not, however, support the Bill's persistence with the attempt to change core legal concepts contained within the draft February Bill. The clause allows for a Court to make a declaration "as to whether a person is an employee or a class of persons are employees".

- a) Person. At law, a person can be an individual, a corporation or a trust. The proposed clause would enable a corporation or trust to be declared an employee. This is legislative radicalism. It is not possible for a corporation or a trust to be an employee—only individuals can be employees. The Bill repeats the same error as the Queensland s275 legislation which led to the Queensland IRC declaring a corporation in Queensland "to be something which it is not" [an employee] "...but in the light of legislation that requires us to do so we cannot object."
- b) Class of persons. It is dangerous to give power to declare a "class of persons" to be something. It can so easily lead to breaches of the basic principles of justice. People have rights as individuals and individuals should never be declared by law to be contained within a 'class' when they may not themselves have wished to be so classified. This is particularly true in the realm of employment, as only individuals can be employees. For example, as it stands, the Bill would give a court power to declare all

carpenters to be employees. Clearly this would not be the case. Some carpenters in SA may be employees, but most will probably be independent contractors. To legislate for a power to declare all carpenters to be employees is to deny individual carpenters their legitimate right to be self-employed. It is an attack upon the rights of the self-employed.

Amendment Recommendation:

The clause should be amended to delete “person” and replace it with “individual”, and delete “class of persons”. The clause would read:

4A (1). An application may be made to the Court under this section for a declaratory judgment as to whether an individual is an employee.

2b)

4A (2) In determining an application under this section, the Court must apply common law, and any relevant provision of this Act

ICA supports common law: The requirement for the Court to apply common law is the best method for ensuring justice and it is what a court would ordinarily do. The common-law tests for independent contractors/employees (which protect basic human rights under contracts) are well known and have been developed over centuries of careful legal consideration.

ICA does not support ‘relevant provisions’. The inclusion of the wording ‘relevant provisions’ is not appropriate and turns the provision into an entirely unknown and non-defined test of independent contractor/employee status. It takes the declaratory test far outside the common law. It is unknown which provisions of the Act would be used (and when and how), to define an independent contractor/employee. The clause means that the tests a court is to apply are subject to change whenever the Act is changed. The provision guarantees that the Court’s investigative processes would be locked up in endless appeals over the technical interpretations of the Act, thus creating high-level uncertainty and large-scale legal expense for all parties. In short, it turns the provision into a potentially radical one that has far more unknowns and would prove far more unworkable than the Qld s275 model.

Amendment Recommendation

Delete the words “and any relevant provision of this Act” so that the clause would read:

4A(2) In determining an application under this section, the Court must apply common law.

2c)

4A (3) This clause prevents retrospective application of a declaration by the Court.

ICA supports this clause

2d)

4A (6) An application may be made under this section by (a) a peak entity (b) the Chief Executive of the Department primarily responsible for assisting the Minister in the administration of this Act; or (c) any other person with a proper interest in the matter.

ICA does not support (c) because the words “any other person with a proper interest in the matter” give wide power to any other company, trust or individual to make application without it being known what constitutes a “proper interest”. For example, the phrase could give competitors of a business the ability to seek a ‘declaration’ and create an expensive, litigious process for their rival. Arguments over what constitutes a “proper interest” are guaranteed to be long, expensive and subject to wide appeal. The only additional entity who should be able to seek a declaration is an individual who may be concerned about his or her status.

Amendment Recommendation. Sub clause (c) should be deleted and replaced with “*any individual who wishes to have her or his individual status declared.*”

3) Clause 45- Insertion of new Part. Part 3A – Outworker

ICA views this new provision as an attack upon independent contractors and the certainty of commercial contracts. This is because the definition of outworker, in effect, encompasses many existing types of independent contractors—in particular those who choose to work from home. The word ‘outworker’ is being used as a sleight-of-hand definition for independent contractor.

Further, the amendments are long and cannot be fully understood without reference to the full legislation.

3a) Definition of ‘outworker’

The outworker provisions in the Bill not only cover clothing outworkers but apply to a wide and potentially unrestricted array of self-employed people working from home or in any premises not that of a business client.

- The definition covers all information technology professionals working from home, accountants, bookkeepers, work-from-home salespeople and anyone who may be defined as doing “clerical work” or processing or packing articles or materials.

This is not explained in the Bill, or the Explanatory Information, or the Minister’s Second Reading Speech. The definition of “outworker” is not contained in the Bill but rather in the *Industrial and Employee Relations Act 1994* which defines “outworkers” thus:

“ 5(1) (a) the person is engaged, for the purposes of the trade or business of another (the employer) to (i) work on. Process or pack articles or materials or (ii) carry out clerical work” or (b) covers officers of a “body corporate” who do the same “and the work is carried out in or about a private residence or premises of a prescribed kind that are not business or commercial premises”. The definition also incorporates persons who “negotiate or arrange” work or “distribute” work.

3b) Breaching commercial transactions [Division 3 99D].

The “Fair Work Bill” then adds to this definition and, in a convoluted and complex way, applies a set of legislative provisions which overrides normal commercial contract responsibilities and obligations and imposes financial and other liabilities upon persons who do not have contracts with each other. This is a direct assault upon the integrity and certainty afforded to economic transactions through the commercial contract. Under this ‘Fair Work Bill’, no person entering any commercial contract can be certain where their financial and other liabilities begin or end. The implications are best understood through an example.

Information Technology sector implications

In the IT sector, it is standard practice for work to be organized through a wide variety of cascading commercial contracts, sometimes involving direct engagement and sometimes utilizing the organisational services of IT specializing labour hire businesses. IBM International, for example, may require major new programming worth hundreds of millions of dollars, some of which is done in-house but much of which is outsourced globally.

A specializing IT programming company may win all or part of the job and will engage the services of several IT labour hire type companies to source IT specialists. Some of those specialists may be South Australian-based. The IT labour hire company may contract with one or several South Australian-based specialists to provide several modules of the total job. The local IT specialists may do the work themselves or, in turn, contract out part of the work to other IT specialists.

Under normal contract law and commercial operations, the liabilities and responsibilities of all parties are specified through each and every cascading contract. IBM is responsible for its contractual obligations according to the contracts it has directly with its outsourced suppliers. The local South Australian providers have their responsibilities and liabilities defined according to the contracts each of them has with another entity. This normal commercial process applies in every aspect of business operations and is integral to the operation of any market.

The outcome of the Outworker provisions of the SA Fair Work Bill is to break the operations of normal commercial markets. It would, for example, make IBM (and every other entity in the contract chain) responsible for payments made to the local IT people in South Australia in the event of a dispute, even if IBM and others were not involved in a dispute. The Bill ignores normal commercial transactions by imposing unknown and undefined liabilities on persons who do not have contracts one with the other.

Oddly, the Bill almost seems to recognise the risk, complexity and systemic injustice it will create and attempts to counteract this by offering bureaucratic processes whereby a party removed from the dispute (IBM, for example) could apply for leniency [s 99 E,F,G,H]. The outcome, however, is layer upon layer of bureaucratic and legal complexity which would further confuse, rather than simplify, the processes.

Such a provision puts at risk the supply of outsourced work to IT professionals in SA. Prudent IT organizations would need to make arrangements to ensure that no outsourced work could be supplied to IT professionals resident in SA. More generally, such a scenario could apply to internationally available outsourced work in areas such as bookkeeping, editing, accounting, record keeping and financial services, as well as to any other work that falls within the broad definition of ‘clerical’.

3c) Global implications.

The use of IBM International in this example is appropriate because the Bill clearly makes the initiator of contract work responsible, thus transferring responsibility back through a contract chain to its source. [Part 3A 99B – Responsible contractors] states (1) “*..a person will be taken to be a responsible contractor in relation to an outworker or a group of outworkersif the person is a person who initiates an order for relevant work....*”

3d) Ministerial Codes of Practice: 99c

The Bill gives the Minister power to create “codes of practice” via regulation for any area included in the outworker definition. The provision is wide and allows for the Minister to regulate financial rates of remuneration that will apply to ‘outworkers’ [99c (6) (b)]. This gives the Minister the power to dictate the contract rates which are to apply in the IT, accounting, bookkeeping and other similar industries. This will further induce businesses in these categories not to supply outsourced work to SA residents.

3e) Ministerial declaration of status: 99c

In addition, the Minister may make regulations “*in relation to the work or status of outworkers as the Minister thinks fit.*” [99c (6)(d)] This provision appears to override the Court declaration provisions of the Bill [4A] and gives the Minister the power to regulate that anyone who falls within the broad definition of “outworker” is an employee or anything else the Minister may choose to declare. This is a power given to the Minister for which no process of investigation, representation, justice or appeal appears to exist. It is a provision which breaches basic human rights of freedom of work engagement.

3f) Comparisons with Victoria and NSW

The Minister’s Second Reading Speech claims that the outworker provisions are closely modelled on those in other States. In fact, the SA outworker provisions are a significant and radical development which reaches well beyond outworker legislation in other States. NSW and Victoria are two other States with outworker legislation, but their legislation is specifically directed towards outworkers in the clothing manufacturing industry, where around 96% of what is left of the TCF industries is located. South Australia has a minuscule proportion of Australia’s clothing sector, but this Bill has picked out many of the concepts of the NSW and Victorian clothing outworker legislation and applied them across a wide and unknown range of possible industries.

3g) Recommendation:

The outworker provisions of the Bill are fundamentally flawed and should be removed.

- If the SA Government is seeking to improve commercial contract security and payments, this can be appropriately handled through the Fair Trading Act and other commercial regulations. It is not appropriate for these commercial regulation issues to be included in industrial relations legislation.

The essence of being an independent contractor is that a person, either operating as an individual or through a corporation or trust, engages in work through the commercial contract and has protection afforded to them through the commercial contract. The outworker provisions will destroy those protections for SA independent contractors who happen to fall within the outworker definitions and will further cause them to be denied access to potential clients.

4) Host Employer: [Clause 50 Amendment of section 105 – Interpretation]

These provisions have the same effects as the outworker provisions: they impose financial and other obligations on parties who have no contract with each other and undermine the certainty of commercial contracts in SA.

The host employer concept is directly aimed at employment under labour hire and restricts labour hire provision to periods of engagement of less than six months. Under labour hire, the agency sources, supplies and pays the employee, and has a contract with the employee. The agency has a separate commercial contract with the client where the employee provides services. The client (user of the services) does not have any contract with the employee. This host employer clause effectively outlaws labour hire of longer than six months' duration.

(2) For the purposes of this Part, a person will be taken to be a host employer of an employee engaged (or previously engaged) under a contract of employment with someone else if (a) the employee has (i) performed work for the person for a continuous period of 6 months or more or (ii) performed work for the person for 2 or more periods which, when considered together, total a period of 6 months or more over a period of 9 months and (b) the employee has been in the performance of the work wholly or substantially subject to the control of the person.”

And

(4) The fact that a person is to be taken to be a host employer under this Part does not affect any obligation of another person as an employer under a contract of employment.

ICA does not ordinarily comment on matters relating to employment. However, when these host employer clauses are combined with the independent contractor roping provisions (which themselves flow from the proposed outworker definitions), it raises serious concerns. The host employer provisions automatically declare two entities, (the supplier of labour and the user of labour) to be the simultaneous employer of one employee—something which breaches all employment concepts contained in common law.

- The automatic declaration is done without any investigation by an independent court and it is unclear what processes will apply to establish what (or whether) “control” existed.
- Independent contractors will find themselves caught up in this process.
- The provision conflicts with the common law, judicial processes provided under 4A (and supported by ICA with suggested amendments taken on board).

4a) Recommendation

The concept of host employer and/or the application of commercial liability where no contract exists are fundamentally flawed and should be withdrawn.