Submission to Federal Treasury's Consultation Paper

Extending Unfair Contract Term Protections to Small Businesses

July 2014

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Contents

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Unfair Contract Protections for Small Business People

This submission responds to the proposal by the Federal Government to implement its policy to extend unfair contract protections to small business people. The policy is in fact a 2013 Coalition election commitment which was again committed to in the 2014 Federal Budget.

The Federal Treasury released a Consultation Paper, 'Extending Unfair Contract Term Protections to Small Businesses' in May 2014, inviting responses to the policy and various implementation options.

Independent Contractors Australia (ICA) is a strong supporter of the policy. Specifically, ICA strongly endorses the policy to extend to small business people the unfair contract protections currently available to consumers under Australian Consumer Law (ACL).

This submission is in three parts:

Part One: Overview of ICA's views. The principles of unfair contract protections.
Part Two: Responses to specific questions in the Treasury Consultation Paper.
Part Three: Examples of unfair contracts and situations.

PART ONE
Overview of ICA's views
The principles of unfair contract protections

1.1. The specific idea of 'unfair' being proposed

There is considerable misunderstanding, even fear, about the meaning of 'unfair' under the proposed laws. That fear is based on the notion that the proposed laws would interfere with, and prevent parties from freely entering and engaging in, commercial contracts. This is not what is proposed. ICA would object to any such proposal.

The idea of 'unfair' in the proposal, and which ICA supports, is quite specific and should be clearly understood. The proposed definition is taken from ACL and, as such, 'unfair':

- only applies to those items identified under the ACL for consumers (see below);

- does not and should not extend to issues of price; and
- only applies to standard form contracts.

1.2 Codifying common law

In a simplified, layperson's understanding of the ACL unfair contract laws, the laws largely codify what is contained in the understanding of a commercial contract under common law. The same understandings operate under Roman law. (See Note A at the end of this submission.)

Basically, the 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.

A commercial contract (as opposed, say, to an employment contract) is one in which the 'structure' of the contract under common law does not impose 'control' or 'dependency' of one party over the other. In other words, the parties have equal rights under the contract. [That this 'equality of control' is part and parcel of the commercial contract is most clearly demonstrated by the ILO's determination, in 2006, about the nature of the commercial contract as it applied to self-employed people. More information on this can be found in Note A at the end of this submission.]

The current ACL provides a raft of protections in commercial contracts between businesses and consumers. The proposal is to apply the same protections to contracts between businesses where one or both businesses are small.

To summarise, for a contract to have the legal structure of a commercial contract it must be one in which both parties have equal rights to control the terms of the contract. This idea of equality to control the contract leads to a series of practical tests to which courts (across the globe) will generally look, to see if the contract is a *bona fide* commercial contract. These subtests are, in fact, the sort of items which identify unfairness under Australian Consumer Law.

The following list is taken (and edited for meaning) from the ACL.

A term of a contract is unfair if it:

- Would cause a significant imbalance in the parties' rights and obligations arising under the contract.
- Is not necessary in order to protect the legitimate interests of the party who would be advantaged by the term.
- Would cause financial or other detriment to one party if it were applied or relied on.

More particularly, a contract term is unfair if it gives one party, but not the other, the ability to:

- Avoid or limit the performance of the contract.
- Terminate the contract.
- Apply penalties against the other party for a breach or termination of the contract.
- Vary the terms of the contract.
- Renew or not renew the contract.
- Vary the price payable under the contract without the right of the other party to terminate the contract.
- Unilaterally vary the characteristics of the goods or service to be supplied under the contract.
- Unilaterally determine whether the contract has been breached or to interpret its meaning.
- Limit one party's vicarious liability for its agents.
- Permit one party to assign the contract to the other party's detriment without their consent.
- Limit one party's right to sue the other party.
- Limit the evidence one party can adduce in legal proceedings in respect to the contract.
- Impose the evidential burden on one party in legal proceedings in respect to the contract.

The foregoing items make it clear that the idea of 'fairness' depends on each party having equal rights over the contract itself. It is the idea of the 'structure' of the contract that is being examined for fair/unfair items. That is, fairness exists if both parties have the same rights. Unfairness exists if one party has a right that cannot be exercised by the other party.

ICA believes that when a person without legal training looks at the list above, this assessment of fair/unfair strikes a chord of common sense and reasonableness. This is really the basis upon which 'common law' has been created over the centuries. It is a test of what is 'common' sense for the 'common' person.

1.3 Commercial contract: The legal base-rock of a market economy

This idea of equality under the *structure* of the commercial contract is in fact the legal bedrock of a market economy. It is the primary institutional process by which 'trust' in commercial transactions is secured in an economy.

Without 'trust', transactions in an economy descend into chaos where bullies, thugs and thieves command and control transactions for the purposes of maximizing their personal accumulation of wealth and power to the detriment of others. Such economies are not 'market' economies but rather 'wild west'.

A society with a culture that displays and values high levels of trust in commercial transactions will generate high levels of economic activity. The economy that evolves is one in which both wealth creation and wealth distribution are maximised for the largest number of people.

Trust operates through two mechanisms:

- *Behavioural*: Where a person's word is his or her 'bond'. That is, what people say they will do, they do! This is the most important mechanism for the promotion of trust.
- *Legal*: Where an independent legal system operates to ensure that people do what they said they would do. The legal mechanism is the back-up to the behavioural. In commercial transactions it is the law of contract that the courts apply. Where the legal system operates effectively to apply contract principles, people are more inclined to operate with trust in their commercial dealings.

The essence of the legal process is that when any two parties enter a commercial contract, the courts will look to see if the *structure* of the contract embodied the crucial feature: did both parties have equal rights to control the contract? Typically, courts will look to the types of issues identified in ACL as listed above.

For example, if the structure of a contract gives equal rights to both parties when deciding the price under the contract, and if the price cannot be changed unless both parties agree, then the contract is 'fair'.' If, however, the 'contract' allows one party to change the price under the contract without the other party agreeing, then the contract is one of inequality, and is 'unfair'.

1.4 Equality/fairness of process/structure versus equality/fairness of outcome

This equality/fairness of contract structure and process should not be confused with equality/fairness of outcome.

A further element of a market economy that makes it successful is that people have the right to take risks and to benefit or lose as a result of risk-taking. Therefore, commercial transactions and the processes of commercial contract law are not concerned with (nor should they be concerned with) whether one party has achieved better outcomes from a transaction than the other party.

That is, if an individual enters a commercial contract at a price which might be thought detrimental to that individual, that alleged detrimental price is not of concern or interest to the processes of the law. What the law must protect is the integrity/fairness of the contract structure, as discussed above.

Societies that operate market economies operate a balancing act. All individuals have a right to take risks and benefit or lose from risk-taking. However, when taking commercial risks, the contracts they enter and the law and institutions that support/apply the law must ensure that those persons are treated with equity and fairness under the structure of the contract.

The proposal to extend unfair contract protections currently available to consumers under ACL to small business people is one that will improve the quality of the legal processes in Australia in relation to commercial contract law. This will further strengthen the operation of trust in business-to-business commercial transactions in the Australian economy. The benefits to the community and the economy are

considerable, although difficult to quantify.

What should eventuate, over time, is that people who are or seek to be in business for themselves will have a higher level of 'trust' that they can engage in business and be treated with fairness. They will be more inclined to be in business or to start a business. That is, the proposal will help improve both the quality and the quantity of small business activity in the Australian economy. With small business constituting some 96 per cent of all businesses and employing some 60–70 per cent of the workforce, the likely positive impact on the Australian economy and society should be significant.

1.5 Why the protection is required for small business people

In Part Three of this submission Independent Contractors Australia provides a large number of case studies involving examples of unfair contract terms and circumstances. Over some fifteen years of operation, ICA has accumulated these case studies and many more (not included in the submission). We can say with certainty that, in the Australian economy, unfair contracts (as defined by ACL) are a normal feature of commercial transactions where small business people are doing business with large organizations—both private sector and government entities.

What happens as a matter of routine is as follows:

- Large or medium businesses that engage numbers of small business people (mostly independent contractors) put in place standard form contracts drafted by legal advisers that are designed to protect the interests of the engaging party.
- The standard form contracts form the basis of the larger firms' management processes and in fact dictate the form of the management systems and the authority levels of the managers in the firms.
- The standard form contracts give the engaging party significant power over and above that necessary to operate the business and to disadvantage the small business person in critical areas.
- The larger firms and their legal advisers justify this power on the basis that the contracts are 'offer and acceptance' and therefore legitimate contracts. Further, larger firms sees themselves as 'reasonable' and 'fair' and are convinced that they will always do the right thing.
- When aggrieved as a result of treatment under a contract, small business people are in a 'no-win' situation. They do not have the money to mount a legal challenge. Moreover, they fear that if they challenge the larger firm, they will be harassed by the managers of the firm, and risk losing their contract and their income. They therefore stay quiet. The larger firms rely on this acquiescence as an integral part of their business model.
- In ICA's experience, the government sector, including the Commonwealth government, operates under these sorts of 'unfair contract' arrangements as much if not more than the private sector does. There is some evidence, however, of improvement in the Commonwealth government's approaches in recent times.

The implementation of the ACL unfair contract protections will, ICA believes,

provide a sea change in the working/contractual relationships between small and larger organizations in the Australian economy.

A comment on unconscionable conduct
Where small business people have suffered unfair treatment and it has been widespread, attempts have been made to use the unconscionable conduct provisions of the *Trade Practices Act* to address the issue. However, the common experience is that the unconscionable conduct provisions are next-to-useless in providing practical protections for small business people. Proving unconscionable conduct is a highly complicated and technical legal process that usually extends over many years and requires extremely large sums of money to be spent on lawyers. Small business people cannot afford either the time or the money and instead have to 'move on'. This failure of the unconscionable conduct provisions to be of any practical assistance to small business people further demonstrates the need for the ACL unfair contract provisions to be made available to small business people.

1.6 Government entities must be subject to unfair contract laws

The government sector often talks about being a 'model' of good business practice and acting as 'model' litigants. Based on evidence, however, the reality is that, in their commercial dealings, government entities behave no differently from businesses in the private sector. Some government entities are excellent to deal with, but others can be plain horrid. Government entities will and do create contract terms that are designed to avoid and transfer liability from the government entity to the contracted party. This often occurs in a way that is unreasonable given the commercial realities and requirements of any particular job being contracted. It happens most often where government entities make use of standard form contracts.

It is imperative, therefore, that when the ACL unfair contract protections are extended to small business persons that the law applies equally to all government sectors and entities in the same way it applies to private-sector businesses. There should be no dispensation or special treatment for government. When governments engage in commercial transactions with the private sector, the rules that apply to the private sector should apply equally to government. This should apply to all levels of government—Commonwealth, state and local.

ICA does not know if Commonwealth unfair contract legislation would or could have constitutional reach to state and local governments. If Commonwealth law does not have such reach, ICA recommends that the Commonwealth government engage in discussions with the state governments with a view to ensuring that the unfair contract laws would apply to state and local governments.

1.7 Identifying 'small business'

For the purposes of the ACL proposal and the identification of a 'small business', ICA recommends the approach taken by the Small Business Commissioner (SBC) models operating in Victoria, New South Wales, South Australia and Western Australia.

The SBC's most important role is to provide cheap, easy dispute-resolution processes for disputes involving small business people. In each state, the Commissioners have the legislative authority to apply their discretion as to who they identify as a small business on a case-by-case basis.

ICA recommends that whatever law enforcement instrumentality has the power to review alleged unfair contracts also has the discretionary power to determine who is a small business for the purposes of the law on a case-by-case basis.

The alternative is to apply numerical 'cut-off' points—for example, the number of employees or dollar turnover. Such definitions are unnecessarily restrictive, run the risk of excluding 'small business' people on arbitrary grounds, create the potential for larger businesses to require small business people to structure in ways to avoid the law and can't cover the full variety and diversity of business situations in the economy.

1.8 No application to instances where the contract has been fully negotiated

It is important to note that the existing ACL for consumers and the law as proposed for small business people only applies to standard form contracts. That is, contracts that are on offer to consumers/small business people but in which the consumer/small business person has little or no capacity to negotiate the terms of the contract. This is an important aspect of the proposal.

Standard form contracts are a 'take it or leave it' type of contract. The unfair contract protections for consumers primarily came into being because of experience and concern with standard form contracts in the consumer area, principally with financial services and telecommunication (phone etc.) contracts. The evidence was that consumers were being 'screwed' by terms in the contracts that they could not negotiate.

The same situation applies to small business people who are in a very consumer-like situation, most commonly being individuals running a business.

On the other hand, where a contract has been fully negotiated, legal advice by the small business person has been sought and the contract has been designed specifically for the circumstances of a particular situation, it must be assumed that the process of 'offer and acceptance' has been fully applied in practice and not just theory. That is, that both parties have fully and freely entered the contract, aware of and agreeing to all the terms. In these situations, ICA would not support the application of the ACL unfair contract protections and this is not part of the proposal.

1.9 Retail tenancy leases

Subject, perhaps, to further discussion, Independent Contractors Australia does not believe that the ACL unfair contract protections for small business people need to be applied to the area of retail tenancy leases.

Retail tenancy leases—particularly those used by the large retail shopping centre conglomerates—are in every sense standard form contracts. There is a long history over several decades of these leases being ethically questionable and 'unfair' as defined in this submission. Considerable controversy has raged over the leases, with many examples of unfair contracts in place and unfair behaviour by landlords.

However, in response to unfair leases, state governments have responded with what are now advanced and well-developed retail tenancy laws with strong enforcement procedures. The laws are designed to ensure 'fair' retail tenancy leases and have effective dispute-resolution processes. In several states, these laws are administered and enforced by the state Small Business Commissioners.

ICA is cautious about overlaying a new Commonwealth law over the state retail tenancy laws given that the state laws appear to be effective. Such an overlay and duplication could constitute an intrusion of Commonwealth law into an area already being effectively governed by state law.

ICA would, however, support a 'desk audit' of state retail tenancy laws to see if any of the state laws allowed aspects of ACL-style 'unfairness' to slip through. ICA suspects that a desk audit would not discover any such issues. However, if issues were identified, the preferred process would be to work with the states on a harmonization process to rectify them.

1.10 Franchise Agreements

Franchise laws in Australia lie mostly within the Commonwealth's jurisdiction. However, perceived failures of the laws over a decade or more have led a number of the states to become involved. Independent Contractors Australia has not been impressed with the federal franchise laws to date, believing that many legal 'holes' exist which make many franchise agreements 'unfair'. Further, the dispute-resolution processes have verged on being a 'sham', effectively giving the franchisor in any dispute total superiority.

Nonetheless, the Commonwealth laws have recently been under review and new laws are pending. ICA has not yet had the opportunity to consider those proposed new franchise laws and so reserves judgment and commentary. However, the proposed new franchise laws should have the 'ruler' of the ACL unfair contract protections run over them to ensure that 'fairness' is assured.

PART TWO
Responses to specific questions in the Treasury Consultation Paper

The Treasury Consultation Paper offers four options for feedback:

Option 1 — The status quo. No action is taken, contrary to the Commonwealth Government's policy commitment.

Option 2 — Light touch or non-regulatory responses.

Option 3 — Legislative amendment to extend the existing UCT provisions to contracts involving small businesses, in accordance with the Commonwealth Government's policy commitment.

Option 4 — Legislation to require contracts with small business to be negotiated on request.

ICA supports option 3—that is, legislative amendment to extend the existing UCT provisions to contracts involving small businesses, in accordance with the Commonwealth Government's policy commitment.

ICA does not comment on the other options.

Option 3 should be

- Implemented for standard form contracts only.
- Needs to be coupled with dispute-resolution services.
- Should cover both the acquisition and supply of goods and services.

ICA supports the following statement from the Consultation Paper:

> "Such an approach (Option 3) would use the enforcement architecture around the unfair contract terms law regarding consumer contracts. It would be relatively less complex to implement and administer given consumer agencies' and businesses' experience to date with the current provisions regarding consumer contracts."

The following are brief replies to a selection of the questions raised in the Consultation Paper. Not all questions are answered.

THE PROBLEM

[Questions raised on page 3 of Treasury Consultation Paper (PDF version)]

1. How widespread is the use of standard form contracts for small business and what are their benefits and disadvantages?

Answer: The use of standard form contracts is significant and widespread and can particularly be found in the following service areas:

- transport for owner-drivers;
- contract cleaning and maintenance;
- commercial construction, particularly subcontracting to trades small business people and engineering and related consultancy services;
- information technology consultancy services; and
- medical services and support.

The government sector makes substantial use of standard form contracts.

Advantages: More effective management of transactions, including reducing

transactions costs. Greater clarity in work requirements if done well.

Disadvantages: The engaging party often constructs contracts to protect only the interests of the engaging party—frequently to an unreasonable extent and beyond what is necessary given the specifics of the work being done. This involves a major transfer of liability from the engaging party to the engaged party.

3. To what extent are businesses reviewing standard form contracts or engaging legal services prior to signing them? Does this depend on the value or perceived exclusivity of the transaction?

Answer: Small business people will often read the contract on offer. However, contracts are often written in heavy 'legalese' which makes comprehension by laypeople difficult or near impossible. People will obtain a 'sense' of the contract, but not be sure if they fully understand the meaning and implications of many of the clauses.

It is not common for small business people to engage legal advice to explain standard form contracts. Legal advice is expensive and the value of the contracts is not sufficiently high to warrant the expense. Further, small business people know that the engaging party will rarely, if ever, be prepared to negotiate key clauses and that therefore the expense of legal advice does not lead to a better contract.

4. To what degree do small businesses try to negotiate standard form contracts?

Answer: Small business people rarely try to negotiate standard form contracts because they are told up-front that the contracts are 'take it or leave it'. A further problem arises when, as is often the case, the engaging party wants work to start quickly but is tardy in offering the contract for consideration up-front. People often start work without a contract being signed. This is a source of many disputes.

5. Is it the terms or the process by which some contracts are negotiated that is the main concern for small businesses?

Answer: Standard form contracts are rarely negotiated. Where clauses are 'unfair', the unfairness delivers unreasonable levels of power to the managers of the engaging party. This commonly results in unreasonable and arrogant behaviour by managers which in turn can become a cause of disputes.

6. How do small businesses differ from consumers in relation to their interaction with standard form contracts?

Answer: There is no difference between consumers and small business people. Small businesses are not small versions of big business. Small businesses are run by individual people, the operative word being 'people'. Big businesses, including government instrumentalities, are run through management systems. The people who own and run small businesses have the totality of 'management' wrapped up in themselves as an individual.

Small business people are in a consumer-like situation. Their situation is more

akin to consumers than the theoretical notion of 'business' as a management system.

7. What terms are businesses encountering that might be considered 'unfair'?

Answer: The main areas of 'unfairness' include:

- Inappropriate transfer of liability from the engaging party to the engaged party.
- Power to terminate without cause by the engaging party with the engaged party locked in.
- Engaging party able to change the terms of the contract, including price, without the agreement of the engaged party.
- Lack of affordable, quick and independent dispute-resolution processes.

8. What detriment have businesses suffered from unfair contract terms?

Answer: Loss of income. Exposure to unreasonable levels of liability. Inability to secure commercial rights. Reputational damage.

9. What protections do businesses currently have when they encounter unfair contract terms and are they sufficient?

Answer: No protections are effectively available. The only option is not to engage in the contract. But once 'hooked' into a contract, if a dispute occurs, the cost of engaging the legal system is prohibitive and unlikely to deliver a 'fair' outcome. Most people walk away from a dispute situation, writing off any losses.

10. What regulatory responses are already in place that aim to protect small business from unfair contract terms and how effective are these mechanisms?

Answer: There are no effective regulatory mechanisms currently in place. For the most part, the only recourse is to the courts and that is expensive. The *Independent Contractors Act* was introduced in 2006 with a view to addressing 'unfairness' but has proven ineffective from a practical perspective. The court cases conducted under the *IC Act* have shown that:

- The legal expense of using the Act is high.
- Decisions of the courts are limited to preventing 'unfair' terms in the future. The court is unable to declare a contract term unfair and provide retrospective relief.

The operation of the Small Business Commissioners (SBCs) in Victoria, New South Wales, South Australia and Western Australia has been positive in relation to processes for dispute mediation. ICA strongly supports the SBCs believing they have made a big difference to resolving disputes in a cheap and speedy manner. However, the SBCs do not have specific jurisdiction over unfair contracts and can do nothing to prevent unfair contract terms. The introduction of unfair contract protections combined with the activities of the SBCs should significantly improve the quality of small business activity in the community.
There are systems in place for retail tenancy leases under each state's retail tenancy laws, which is a positive.

THE POLICY RESPONSE

[Questions raised on pages 3–4 of Treasury Consultation Paper (PDF version)]

11. What responses (including by government or industry) could be implemented to help businesses with ensuring contract terms respect the legitimate business objectives and interests of both big and small contracting parties?

> *Answer*: Extend the consumer unfair contract protections to small business people.

13. Given the Commonwealth Government's commitment to extend existing unfair contract term provisions to small businesses, what should be the scope of the protections?

> *Answer*: The scope should be the same as that which applies currently to consumer unfair contract protections.

14. Should the Australian Consumer Law UCT provisions be extended to cover small businesses defined using contracting party characteristics or transaction size? Should small business to small business contracts be included?

> *Answer*: The identification of 'small business' for the purposes of unfair contract protections should be left to the discretion of the authorities responsible for enforcement of the protections. The powers of the states' Small Business Commissioners in this respect should be used as a model.
> *Small business-to-small business contracts should also be included*.

15. Should the extension of the UCT provisions provide protection for small business when they both acquire and supply goods or services?

Answer: The protections should apply both to the acquisition and the supply of goods and services.

Focus questions

[Questions raised on pages 13–19 of Treasury Consultation Paper (PDF version)]

10. How do unfair terms in standard form small business contracts impact on confidence and trust in the market?

> *Answer*: Unfair contract terms have significant negative impact on trust and confidence in the market. Unfair contract terms reduce levels of trust thereby making transactions in the economy more difficult. Fewer people engage in business activity when trust is low which reduces potential economic activity. For a fuller explanation, see our comments on 'trust' in Part One of this submission.

11. Who is including 'unfair' terms in contracts to small businesses? Is it larger business and/or a third party (such as a lawyer) drawing up the contract?

> *Answer*: Both the lawyers and larger business play a role.
>
> - Lawyers take the approach that, when engaged to draft contract terms, their task is to do everything to protect the interests of the party paying them. Although no doubt not fully intended, this predisposition can skew the contract towards unfairness.
> - Some managers in large firms also take the same view. Their motivation

is to ensure that, as a manager, they have maximum flexibility to run their operation and that their liability as a manager is limited or diminished. This is classic 'protecting one's patch and career' motivation. It is in fact a process that leads to poor management. Good management is about ensuring that responsibilities fall to the persons who make decisions and who have control. Bad managers seek to avoid responsibility.

Good managers will give instructions to lawyers to draft balanced contracts which maximize fairness. Such managers understand that commercial transactions that are structured around equality deliver higher quality results.

14. Are there examples of instances where risks have been unfairly shifted to small businesses in contracts?

Answer: Yes—see Part Three of this submission for examples.

18. To what extent are businesses relying on/enforcing unfair contract terms?

Answer: There are some businesses that have structured their entire business model around unfair contracts. See, for example, the Aussie Home Loans and Coca Cola and PepsiCo owner-driver contracts below. Not all large businesses have taken this approach, but many do.

Scope of legislation

[Questions raised on page 31 of Treasury Consultation Paper (PDF version)]:

127. An issue is how small businesses or small business transactions should be defined. Four options include extending UCT provisions to:

127.1. businesses that are not publicly listed companies;
127.2. transactions that are below a certain threshold;
127.3. businesses that have an annual turnover below a certain threshold; or
127.4. businesses that employ less than a certain number of employees.

Answer: As per question 14 above, the identification of 'small business' for the purposes of unfair contract protections should be left to the discretion of the authorities responsible for enforcement of the protections. The powers of the states' Small Business Commissioners in this respect should be used as a model.

129. A further issue is whether to extend UCT provisions only to large business contracts with small businesses, or to also include small business to small business contracts.

Answer: Unfair contract protections should apply to both large business (including government)-to-small business and small business-to-small business contract/transactions.

It is essential that in their dealings with small business, government entities should be subject to the unfair contract laws just as big businesses should or will be. ICA's experience is that government bodies can sometimes be the worst offenders when in comes to engaging in unfair practices and contracts. There should be no exclusion or special treatment for governments when they engage in commercial transactions. All government entities should be subject to the

same rules as those the government intends to apply to the private sector.

130. A final issue is whether to extend UCT provisions to contracts for financial products and services.

Answer: In principle the answer is 'yes'. However, financial services and products underwent considerable change with the introduction of the unfair contract protections for consumers. Specific provisions relating to financial services and products were created around that time.

ICA has had discussions with the Australian Bankers Association on this issue. ICA is open to discussion as to whether further reform to financial services and products is required. If existing unfair contract protections for consumers adequately capture small business people, there should be no need to add further regulations.

However, Part Three of this submission provides a case study of a major scam and fraud conducted against small business people who signed telco contracts that locked them into allegedly unfair contract arrangements with Macquarie Bank. ICA would want to understand further the issues surrounding financial products or services before making a commitment on this issue.

Focus questions

[Questions raised on page 32 of Treasury Consultation Paper (PDF version)]

32. Would the benefits of a targeted legislative response (such as only deeming specific unfair terms offered to small business as void) outweigh the costs of such an approach?

Answer: We are not sure of the implications of this question. ICA supports the extension of the full consumer unfair contract protections to small business people. The experience with the consumer protection laws has demonstrated a high level of success. This experience leads us to the conclusion that these protections are effective. ICA would not support a selection of terms if it diminished the current list under ACL. (See our comments in Part One of this submission.)

34. Are particular types of terms in standard form contracts (such as unilateral contract variation, or termination rights) more likely to be considered 'unfair' by small businesses?

Answer: As per our answer in question 7 above, the main areas of 'unfairness' include:

- Inappropriate transfer of liability from the engaging party to the engaged party.
- Power to terminate without cause by the engaging party with the engaged party locked in.
- Engaging party able to change the terms of the contract, including price, without the agreement of the engaged party.
- Lack of affordable, quick and independent dispute-resolution processes.

See, further, our comments in Part One of this submission.

PART THREE
Unfair contract examples/situations

This section provides examples of unfair contract situations and unfair contract clauses. Included here are:

- **1. Stories from the small business (contract) frontline:** Some examples of contractual disputes where the contracts may have arguably been 'fair', but the way in which the subsequent disputes unfolded or were handled has the effect of creating perceived unfairness by the small business people concerned. These examples are included to give a backdrop to the practical way in which contractual disputes can unfold.

- **2. Examples of unfair contract clauses**: taken from actual contracts affecting small business people, where the clauses could arguably be considered 'unfair' under the proposed unfair contract laws. Some clauses considered below would not be 'unfair' but would instead set a 'tone' for the commercial relationship.

3.1 Stories from the small business (contract) frontline

Over many years self-employed small business people have provided us with details of situations in which they believed they had been treated unfairly. ICA sought to provide assistance where we could—mostly by talking the situations through with the individuals concerned. These discussions were directed to assisting them to clarify their position and what they wanted to achieve, how it might be possible to remove emotion from the situation, and how to focus on achieving the best possible commercial solution to their problems.

The examples we include in this section, some short and others with more detail, are intended to give a 'taste' of the practical business situations in which people can find themselves. In these examples the contract may or may not be 'unfair'. The point in this section is to provide a background to contractual disputes. Section 3.2 (below) examines unfair contracts (and clauses) in specific detail.

Situation 1
Tangling with the Federal Department of Education (DEEWR)

> "I was engaged for an assignment where the client (DEEWR) was not entirely sure what they wanted. I was brought in to perform a project management role but then asked to perform a business analyst role. I was forming the distinct impression that the department was in a state of chaos.
>
> I had signed a 6-month contract. In about week four I was asked to perform work that was not only outside the scope of the contract but not within my skill set. At the end of that week the responsible officer called me in and said that the section had changed its mind and did not think that I was really needed for the role.

I stated that I had a contract and was relying on the work. I was told that the Department could terminate my contract with no notice. I objected to this and asked to speak with the SES officer responsible.

The discussion with the SES officer went along the lines of the Department needing to reconsider what they really needed done. I was thanked for my contribution but simply asked to leave. I stated that I relied on the contract for my income but was told that it was just one of the exigencies of contracting and that the department could terminate at will.

When I made representations to the deputy secretary I was told that the assistant secretary needed to handle the matter and it appeared that he did not want to be involved."

Situation 2
Lost Battle with Department of Defence

"A recruitment firm contacted me and asked whether I could urgently take up a role at the Department of Defence. I attended an interview and was asked if I could start the following week.

I advised the recruitment firm that I had a holiday planned and was not wanting to start work so soon. When I explained that I would be going to Europe for 2 weeks after the next week, I was asked to start anyway and resume when I returned from overseas. I worked for a week before going on my pre-booked holiday.

While overseas a problem emerged with being able to return to Australia. I contacted the recruitment agent and explained my situation. I was asked to contact the Defence officer and advise when I would return. At my expense I did so and explained that I could be back by Thursday (rather than Monday). I was subsequently sent an email by the recruitment firm stating that the contract had been terminated.

Defence subsequently refused to pay for the week of work I did."

Situation 3
Driven to distraction by Education Department school bus service

"Gosh Ken, where do I start? My wife and I drive a country school bus under contract to the NSW government Education Department.

Our contract is not only unfair, it is neither clear nor transparent. It's embedded with ambiguities and even acknowledged by one of the Principals I deal with as being "draconian". We have been downtrodden for many, many years but our new contract takes the cake. Not only do they breach the terms, they now use to their advantage those very ambiguities they deliberately included.

The contract opposes every code applicable to both the industry (transport)

and the Government Guidelines they are meant to follow. Being a Government Department (Education) they ignore any complaints simply because they can.

You may be questioning the above references (transport and education), but it is in fact the reason for the problems. Ex-school teachers are managing a transport business. Anyone else could see the problem here but, well ..... it appears school teachers believe their background in education makes them experts in every field.

We asked for guidelines to accurately clarify terms to prevent staff 'misinterpretations'. Boy did *that* backfire. Those same guidelines are now used by them to 'formalize' their desired amendments. It's now open slather for them to change whatever they like and it makes not one iota of difference if we disagree.

Going to the Minister is no help. He advises that we must address the issues with those creating the issues. Go figure that logic? It is especially odd behaviour for a Minister who not long ago came under fire in the media for problems his staff caused, yet he is still burying his head.

It is relentless persecution with the abuse of power by low-level public servants at the helm. Daily threats for loss of contract means the encumbered operator must succumb or be left with no contract and huge debts.

The big hoo-hah 2 years ago saw the Premier bring in the 'Big Guns' to rectify things with all the lovely promises highly publicized. Once the media circus had died down it was 'back to business' for this Department undermining the Premier's work making sure operators saw none of what was promised.

Perhaps if we were contracted to a private company things would be different, but when contracted to the government, you haven't got a chance in hell of being treated fairly."

Situation 4

I owe you money, but 'get lost'

ICA member and independent contractor Domenic (we've changed his name), came to us with a contract dispute. He's owed money by a client. He worked on a commission arrangement selling real estate and seems to have been successful. When he left a business he worked for he was owed money on sales he'd made, but commissions weren't paid until the transaction with the homebuyer finally went through. (That's fair enough!)

Domenic supplied us with email correspondence with the builder that clearly shows the builder accepted that commissions were owed to Domenic. (We've changed the name of the builder too.) After almost 12 months of correspondence, however, the builder says a clause in the contract means he no longer needs to pay Domenic. (Check emails 9, 10 and 11 below.)

'Domenic' is the self-employed sales person. 'Albert' is the home builder.

“1) **From**: Domenic **To**: Albert Sunday April 2011
Hi Albert
Can you please send through my commission statement, as we discussed on my exit from your business. There is commission outstanding which I have full records of.

2) **From**: Albert **To**: Domenic Monday, April, 2011,
Here is it Domenic.
No commissions for April but given the (A) clients should be settling land in the next couple of weeks and the (B) client in early May, there should be commissions payable in May.

3) **From**: Domenic **To**: Albert Tuesday, 19 July 2011
Hi Albert,
How's business? Could you please give me an update on my outstanding commission balance(s). When they are likely to settle, what’s owed etc.

4) **From**: Albert **To**: Domenic Wednesday 20 July 2011
So in summary.
We have paid you a refundable retainer of $34,000.
If every live job of yours above went to site, we would have paid/will pay you $37,000

5) **From**: Albert **To**: Domenic Wednesday, 20 July 2011,
Hi Domenic
All is well here. I’ll give you a summary. The table below is a summary of all jobs you took a deposit on. The jobs highlighted in blue have cancelled (I’m sure you’re already are aware of these as they were cancelled jobs before you left.)

6) **From**: Domenic **To**: Albert 2 November 2011
Hi Albert
Hope you are well. I noticed George is working for you guys, say g’day for me. I'm still up here in Qld. Just wondering if the final commission on the additional sold land is payable yet? Can you please update me. Below is the sales spreadsheet.

7) **From**: Albert **To**: Domenic 3 November, 2011
Hi Domenic
Stage 3 at ….. is titling only in March 2012 so I’d suggest diarise to touch base with me in March 2012 again

8) **From**: Domenic **To**: Albert 27 March 2012
Hi Albert,
Apparently Stage 3 at ….. has titled. Please find attached a final invoice for Lot 348.

9) **From**: Albert **To**: Domenic 27 March, 2012,
Hi Domenic
You’re 100% correct - this morning we were advised by phone that land had titled (it’s not yet on land data, but we’ll take the developer’s word that it has

titled).
However I'd like you to review your agreement, specifically Schedule 3 Item b) and advise me if you still believe that commission is payable. I think we might have a problem here where the job has not become a converted sale and more than 6 months has passed since the termination of the Independent Contractor Agreement.

10) **From**: Domenic **To**: Albert 28 March 2012
Hi Albert
I have just received independent legal advice regarding the nature of my agreement with you. Schedule 3 - item b is legally unenforceable and therefore I have been directed to the Small Business Commissioner (Vic). If I do not have confirmation of your intentions to pay the outstanding invoice by close of business, Friday ……. the Commissioner's office will be in contact with your company regarding mediation and may elect to investigate your sub-contractor agreements in general and or take the matter to VCAT or a higher jurisdiction. I look forward to a positive outcome.

11) **From**: Albert **To**: Domenic 28 March 2012
Dear Domenic
So what you're saying is that for the last two years, your contract was valid but now it's not. We won't be paying your invoice for several different reasons.
Anytime, it's pointless sending more e-mails so here's what I propose:-
1. Lodge your case in whatever legal format you choose.
2. We will respond accordingly.
Do not contact me directly again. Please direct all communication via your solicitor/lawyer at which point we'll have our legal representatives respond."

Situation 5
Telco Scam 2012

This case involved a high profile 'telco' scam targeted at small businesses in regional Australia. The scam involved a telco company approaching small business people selling them telecommunications equipment and services. However, once a large number of businesses had been signed up, the telecommunications company 'disappeared' and services were not supplied. Yet the small business people discovered that they had become committed to highly expensive leasing agreements with Macquarie Bank. The bank proceeded to prosecute the small business people. In many instances the financial contracts had been fraudulently created. That is, the small business people had not actually signed the financial contracts or the contracts had been changed after signing. The scam was exposed on an ABC *Four Corners* program before regulators moved in.

It would appear (and it is arguable) that the small businesses had been targeted instead of consumers because the ACL unfair contract protections for consumers would have made the 'scam' financial contracts void. But without these protections for small business people the scam was possible.

Here's one piece of correspondence, among many, in which ICA was engaged to see if we could assist.

"Hi Ken,
I am the President of the ….. and association an I am the first point of call for most victims caught up in this scam.

I am asked for advice from these victims and I point them in the right direction to seek help, and maintain a data-base on the victims.

I will leave the legal talk to the solicitors, but would appreciate a rundown of how the Independent Contractors Act may help and how it differs from the Trade Practices Act and Consumer Credit Law – in layman's terms of course. Would these types of Contracts be covered as an Independent Contractor Contract as I assume these would be mainly for the Building and Construction Industry.

Of particular help would be your opinion on these types of clauses:
The contracts that are signed are predominantly for a 60-month period, however, there is a clause that states 6 months' written notification of termination must be given prior to the expiry date (and no more than 9 months) otherwise the contract will roll over for another 6-month period, and then notice has to be given within 3 months, etc. ie this is a never-ending contract rather than a 60-month contract.

The victims are told the equipment is theirs to buy for $1.00 + GST at the end of the contract period by the sales rep and this can't be written into the contract, otherwise it isn't a 100% Tax deduction and it would be a HP instead of rental agreement, which means only the interest is tax deductible. At the end of the contract, they are then told they have to pay 3 – 10 times the new cost of the equipment as a payout figure. The ones where the Telco closed that continued to pay have already paid $30,000 for a $2000 TV and then have to pay another $5000 to buy it back. On top of this being misleading and deceptive conduct, the Finance Company says the equipment belongs to them and the victim has only been renting it.

There is another clause that says the Renter is responsible to fix the item if it breaks down during the contract period. If the renter owned the equipment for $1.00 + GST at the end of the period, I could understand that. However, the Finance Company will not honour the (mainly) verbal buyout agreement. If it was a true Rental agreement and the Finance company was receiving rental income on a monthly basis from the equipment, surely it is their responsibility to repair and maintain their equipment. If equipment was rented from Kennards and it broke down, they would either repair or replace the faulty unit, and not charge rental for the period it was not working. Can they have it both ways??? Surely this is also an unfair clause in the contract.

Under Consumer Credit Laws, in Victoria, if a "Domestic" item is supplied to a business it is still classed as a Consumer Contract and certain conditions must be met like minimum 10pt font and a Cooling Off period, otherwise the contract is unenforceable. In other States it excludes Business contracts.

If you have other ideas that may be able to help us that would be great and I

look forward to hearing from you."

Situation 6
Commercial fisherman caught in a net

"I am a wife of a Commercial Skipper (prawn and live trout), and have been for the last month trying to find information or help with Trawler owners of how they pay us.

We have been back in the fishing industry full time in the 7 years and can't understand how owner's are getting away with charging their crew for fuel. We can't claim it back on Tax as we need a special permit/license to obtain fuel tax back.

Once the owners have taken their percentage of fuel or the whole amount of fuel off, whatever is in the owners "Share Fisherman's Agreement" (I have copies of some of these) the amount the crew is getting is extremely low (our deckhand got paid $890 for a months work), then is stated in this "Agreement" that crew are to pay their own super and tax whether they are on TFN/ABN.

The fuel is taken off the top of the catch, so if they work 30 days, $30,000 for fuel, if they catch $45,000 worth of product they get fuel taken off, some only take a percentage off, then they get their percentage of the $15,000.This is not how it used to be, we never use to get charged for fuel. We used to have the unload invoice of how much the product was sold for but apparently that isn't done these days.

I have contacted and reported to ATO and they said all they get is the final amount of what they are getting paid and that the owners are double dipping into the system.

Fairwork had no idea that owners were doing this and even if the owner's have "Share Fisherman's Agreement", that fuel should not be deducted and have had no information that the fishing Industry was doing this.

I have rung every Fishing Industry Govn section and EVERY union trying to find someone who helps rights of Skippers and Deckhands and couldn't believe it when they all said that NO-ONE is looking after Commercial Fishing Employees. Not even in the Trawler Assoc, all the owners are protected and helped but nothing for Fishing Employees. Industrial Relations had nothing.

I have started a Facebook page Queensland Skippers, Deckhands and Crew trying to inform the fishermen of their rights and they cannot believe the information that I have found in a month, some of the skippers said they have been trying to fight this for 7 years but only getting info off Govn sections and not actually reporting it. I have found all info myself, but something has to be done, with most of the Skippers and Deckhands being out for long periods of time and not getting paid much they find it very hard to follow up on complaints.

My father owns truck company and he said it'd be like charging his drivers for fuel before they got paid.

It seems that Fishing Owners have their own rules and are the only one's to benefit these days.

But something has to be done to HELP the Skippers and Deckhands rights, they seem to be the FORGOTTEN WORKFORCE of Australia.

Please help! Any information or help getting this changed would be appreciated..."

Situation 7
Refused copy of contract

"FROM: Kelvin
I am the owner of a small beer delivery business which I have been doing for over 20 years. I have just been looking at your website and was wondering if you could help answer a question for me. I am being made to fill out a new form titled Pre Trip Declaration. I filled my section out and signed it. The staff would not complete the form in front of me and give me a copy. Am I entitled to a copy of a completed declaration form?

Without a copy of the complete form, which I will never see again, how could I defend myself against any allegations in the future?"

Situation 8
Impractical local council

"G'Day Ken,

Jeff from …... I must say that I find the info in your newsletter emails very interesting. Also that the problem facing contractors is worldwide.

Any way I spoke to you, some time ago now, about some issues we have with some local gov. contracts. Hopefully I've got one attached.

I would call it an 'employment' agreement rather than a contract because there is no provision for any contractor terms and conditions, it is all councils terms & conditions.

We feel that their demands for details of our financial affairs very intrusive (some actually want permission for periodic access to accounts). One reason they want to know this is because it could be 3-4 months down the track before they pay anything. So they want to know whether the contractor can survive long enough to get the job done. (If you get any house renovations done tradies often want some upfront payment for materials and progressive payments as well.)

Also it is one thing to ask for references but it is another thing altogether to

ask for the financial details of our dealings with other clients.

Varying amounts of public liability is also a nuisance and I'm not sure that it is not used as a means for eliminating some applicants.

The big bugbear is OH&S. Some councils just seem to go overboard and again it is very intrusive. What we do within our business, against what is pertinent to the actual job in hand.

Again small one or two person businesses do not need some of requirements of larger employers and often feel that they are discriminated against because they are small & efficient. Also councils are usually unionised and the conditions in tenders are made so council inefficiency is not shown up.

It is only the bigger city type councils that go on & on with all this paperwork. The only paperwork rural councils ask for is currency of workcover, public liability & operating licence. They show you what they want done, we give a rough costing, they make out a purchase order for x dollars and we start. All done in half a day.

Another point about the …. contract is that half the work is actually on ***private*** land and I would question the extent of their authority. Their knowledge of farming practice is next to nothing. The …. feel that a lot of this "contract" is unfair or at least negotiable but we don't know how to go about challenging it."

Situations 9 and 10
Preliminary ICA comment

The following two case studies of disputes involved IT specialists working for Australian government departments. Both were engaged through third party (on-hire) entities under contract arrangements as described above. That is, the contract between the Australian government entity and the on-hire company was the 'Centrelink' standard form contract. The on-hire entities had their own contracts that reflected the Centrelink contract.

In each of these examples, the contracts were not specifically called into question in terms of their fairness, but because the way in which the disputes unfolded or were handled has created the perception of unfairness by the small business persons concerned.

Situation 9
Case Study 1: Commercial dispute with Australian Competition and Consumer Commission

ICA wrote about this case in 2010. We can now reveal that the government instrumentality concerned was the Australian Competition and Consumer Commission. In June 2010, we wrote to the head of the ACCC explaining the case, hoping that some sort of commercial outcome could be achieved. There was never a reply from the ACCC.

When we published the letter in 2010 the case was proceeding to the courts. Therefore our published letter removed identification of all parties. The published letter read as follows:

> 1 June 2010
> Dear Y,
>
> We would like to draw to your attention, and seek your review of, a situation concerning the managerial practices of the government department in the way it engages self-employed people and whether those practices are by their nature unfair.
>
> The specific situation concerns a self-employed IT specialist, Mr Contractor, who was engaged to undertake work for the government department through a contract management company.
>
> Arguably, Mr Contractor has been subject to unfairness in the way he has been engaged and treated. He is in dispute with the contract management company, but it affects the government department. The specifics of Mr Contractor's situation raise broader issues of managerial fairness in the way the government department conducts its affairs with self-employed people. We seek your review of the government department's practices in this respect.
>
> By way of background, Independent Contractors Australia is a not-for-profit advocacy and lobbying group dedicated to securing fair and equitable treatment for self-employed people in Australia. Our primary focus is public policy issues, but we also look at how commercial custom and practice affects self-employed people in practical ways. Our interest is the achievement of good contractual arrangements that work to the mutual benefit of all parties.
>
> We do not act for or represent Mr Contractor. Mr Contractor is a member of ICA but that membership (which is $50 per year) does not extend to us providing professional advice or representation over an individual's contractual circumstances.
>
> Looking at the IT sector across Australia in more general terms, it is common for IT contractor engagement to occur through third-party contract management companies. The end user does not have a contract with the supplier of the services (the self-employed person) but with the contract management company. This is a legitimate and mostly efficient commercial arrangement. However, we (that is, ICA) receive regular complaints from IT self-employed people who say that the contracts that they are required to sign are inherently unfair. The contract management companies say that the contracts that they have reflect the terms forced on them by the end user.
>
> When receiving complaints from self-employed people, it is rare for them to be prepared to commit to paper, as they fear reputational damage and being frozen out of work opportunities. In the case of Mr Contractor, he has been prepared to stand up for his contractual rights---which is why we write to you.

In summary, we think this is Mr Contractor's position:

- The government department has a contract with the contract management company (we presume) for the supply of IT specialists from time to time.
- The contract management company engages the IT specialists who do the work for the government department.
- In this instance Mr Contractor sought to engage with the contract management company under his standard conditions of service in the absence of any other contract being provided.
- The contract management company sought to impose a contract on Mr Contractor after he began work for the government department, some of the terms of which Mr Contractor was not prepared to accept.
- Primary amongst the terms, we understand, was a clause that allowed the contract management company to terminate the contract at its sole discretion, even though the contract was for a fixed term. It is this clause, amongst others, that raises our concerns about unfairness.
- Mr Contractor was dismissed by the contract management company after he began work for the government department because, fundamentally, he would not accept the terms of the contract which he considered to be unfair.
- Mr Contractor is now in dispute with the contract management company.

We appreciate that in the strict legal sense the government department is not party to the dispute between the contract management company and Mr Contractor. There is presumably no contract between the government department and Mr Contractor, for example. However, from a practical and managerial perspective, Mr Contractor was doing work for the government department. It was the fact of this work that caused Mr Contractor to be engaged, and from which the question of unfairness arises.

Mr Contractor is in an odd situation. He is, like all self-employed people, the supplier of services/products but he is also in a consumer-like position. He is the weaker party presented with a take-it-or-leave-it, standard form contract. That contract has arguably inherently unfair terms in it---for example, the capacity of the corporate buyer to terminate the contract immediately and often without cause, even where the contract is for a fixed term/result. He has no practical capacity to negotiate the contract or to enforce any rights under the contract because the contract terms give him no rights.

If this were judged to be unfair, (for example, in a court) the government department is indirectly and probably inadvertently a party to the arguable unfairness.

In considering what is 'fair' for self-employed people, we draw in part from the principles established under the unfair contract provisions of the *Independent Contractors Act*. We see strong parallels with the ideas of fairness that apply under the franchising code. There are also strong, similar concepts of fairness under consumer law. Broadly, the principle is that the potentially weaker party in the transaction processes is entitled to measures of reasonable protection

through the terms of the commercial contract.

The issue is one of ensuring reasonable balance in commercial relationships. Both parties should have responsibilities and liabilities towards each other. In relation to self-employed people, we do not seek special treatment or privilege for them but rather the right to secure reasonable terms in their contracts. This is the right we believe Mr Contractor was and is seeking.

In writing to you and raising Mr Contractor's situation we seek the following:

- We would like to see a commercial resolution of Mr Contractor's situation without recourse to legal avenues. If it were appropriate for the government department to encourage a commercial settlement, we would be pleased for this to occur. But that is for the government department to judge what is appropriate.
- We believe that the government department would be concerned should its managerial practices have indirect and inadvertent unfair outcomes. We would be pleased if the government department reviewed the way it engages self-employed people with a view to ensuring that fairness is operative in the contractual arrangements it employs. We would be particularly keen for the government department to ensure that the practices of those third parties its uses for engagement purposes (such as contract management companies) also comply with the fairness principles to which the government department subscribes.
- There is a broader public policy issue of what constitutes contractual fairness for self-employed people. We believe that discussion of this is only in its infancy. We would be pleased if the government department were to place this as a key item for consideration in its ongoing policy development work and how this relates to good public policy design and outcomes.

As previously stated, our motivation is to see a successful resolution to Mr Contractor's situation, along with improvements in commercial custom and practice, together with good public policy design which may assist this.

We are available to assist where this might be constructive and would be happy to meet with the government department should this be thought desirable.

With thanks.

Regards

Ken Phillips
Executive Director
Independent Contractors Australia

Situation 10

Case Study 2: "Tom" vs Department of Education, Employment and Workplace Relations (DEEWR)

These are the facts as ICA understood them in 2009:

- 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 2009 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.

3.2 Examples of 'Unfair' contract clauses

These clauses are taken from actual contracts. Note that, on the surface, the clauses may look quite benign and simple in the context of an entire contract. But the effect of the clauses can dramatically affect the entire contract structure and hence the way the commercial contract functions.

Contract situation 1
Ship pilots contracts

> "7.1 The quantum of the Service Fee may be reviewed annually by the Principal…The Principal may, but is not obliged to, increase the quantum of the Service fee as a consequence of the review or otherwise."

Impact: This would not be considered 'unfair' but it does set a circumstance in which it appears that the price of the contract is entirely controlled by the Principal. Again it's not 'unfair' but sets a certain tone to the relationship.

> "9.1 Regardless of whether a legally enforceable claim is threatened or made, the Contractor indemnifies the Principal for all Claims that the Principal incurs or is liable for in connection with …etc"

Impact: This is an attempt by the Principal to remove liability almost entirely from himself and to transfer all liability under the contract to the Contractor. It's most likely an 'unfair' term.

Contract situation 2
IT contractors

- Information technology contractors are quite commonly engaged through third-party (on-hire) entities. This is routinely the case with the government sector. The 'Client' is a government department.
- The "Contractor' is the on-hire entity.
- The 'Principal Person' is the individual IT specialist who actually does the IT work.

The examples below are from Australian government contracts and/or the contract of the on-hire entity. The examples given below have been selected to show the impact on the Principal Person, the individual at the end of the contract chain and the one actually doing the work.

- The Australian government has a standard form contract organized through Centrelink that applies it to the on-hire entity.
- The on-hire entity transposes the terms of the government contract into standard form contract/s that the IT specialist is required to sign.
- Quite understandably, the on-hire entity replicates any potential unfairness in the government contract in the IT specialist contract—particularly where liability transfer issues exist.

In effect, where possible 'unfairness' exists, it cascades throughout the contract chain.

Examples

> "3.3 The Contractor shall, if requested by the Client, rectify at no cost to the Client any work that, in the reasonable opinion of the Client, is not fit for purpose."
>
> "3.4 Should the Contractor fail or be unable to rectify any faulty work described in clause 3.3, the Client may have the rectification carried out and the cost recovered from the Contractor ."

Impact: The clauses arguably look reasonable but the question is: who decides if the work done is 'not fit for purpose'? The absence of a quick and cheap dispute-resolution process means that the Client is able to make an accusation in a situation where the Contractor has limited effective capacity to counter such accusations.

> "7.1.1 The services of the Principal Person may be terminated by notice in writing if the Client notifies the Contractor that the services of the Principal Person are no longer required for any reason other than those described in 7.2. In this case, The Contractor will terminate this agreement in writing on the same terms as it receives from the Client."
>
> "7.1.2 The Contractor must complete the full term of the assignment."

Impact: These two clauses combined (7.1.1 & 7.1.2) enable the IT specialist's

contract (Principal Person) to be terminated at a moment's notice but do not give the same power to the IT specialist. As such, the clauses are 'unfair'. And the unfairness operates through a cunning legal device. In effect the Contractor is required to complete the assignment but required also to terminate the Principal Person if the Client is not happy with the Principal Person even though the Client does not have a contract with the Principal Person. It gives the Client (the Federal government) the power to terminate the Principal Person's contract while at all times arguing that the Client (Federal government) does not have legal liability.

> 7.1.3 "If the Principal Person breaches this agreement and fails to complete the full term of the assignment and the Client intends to claim compensation from The Contractor, The Contractor may, at its sole discretion, deduct from the Fees payable to the Principal Person an equivalent amount."
>
> 7.3 No Compensation
> "Upon termination of this Agreement in accordance with its express terms the Principal Person is not entitled to claim any compensation or damages from the Contractor or the Client in relation to that termination howsoever caused."

Impact: Clauses 7.1.3 and 7.3 flow from the unfairness of 7.1.1 and 7.1.2 and add another dimension to the unfairness. That is, the IT contractor (Principal Person) becomes liable for alleged damages and must pay an amount which can be deducted automatically from the IT contractor without agreement from the IT contractor or even a process where the IT contractor can challenge the alleged damages. However, the reverse right does not apply to the IT contractor, who cannot seek damages him/herself under like circumstances. As such the clauses are 'unfair'.

Contract situation 3
Contracts for owner-drivers in the vendor machine filling business

Across Australia there are tens of thousands of food and drink vending machines. These are typically stocked by small business owner-drivers under contract to companies who own the vending machines and who produce, promote and market the well-known brand products stocked in the machines. This 'retail' sector is dominated by Coca-Cola and PepsiCo, with a few smaller players involved. Thousands of owner-drivers stock the machines under contracts that normally tie them to working exclusively for the one client and impose on them requirements to have a truck in the company's/client's livery. They normally have trade restrictions placed on them if they cease working for the client.

The contract examples below are from actual current contracts. There are clauses that would presumably be 'unfair' under the proposed new laws. The contracts are 'standard form' and the companies will not entertain variations to them.

The clauses that give rise to the unfairness are as follows:

> *"Company can change the terms of the contract at will*
> - "…operating policies, as notified and issued to the Contractor and Customer Service Operator by (the Company) from time to time."
> - "Route means the area contained …(in)… this Agreement, as amended by (the Company) from time to time."

- "The Company reserves the right to replace, withdraw or alter the terms of the Procedures and Practices Manual, including any such benefits from time to time at its sole discretion"
- "The Company may (at its absolute discretion) upon reasonable notice amend or add to the Rules of Operation from time to time."
- "The Contractor agrees that the (Company) Policies as varied from time to time shall form part of this agreement and as such strict adherence to the Policies is required…" (note that the Policies are not annexed to the agreement).
- "… in order to ensure that high quality Customer service is delivered, (The Company) may, during the Term, vary its requirements in respect of the Services…"

Contractor has unknown liabilities when company changes the contract

- "The Contractor must at its expense, ensure that the Vehicle complies with (The Company) policies."

Withholding of payments to Contractor

- "The Contractor acknowledges that (The Company) is entitled to withhold payment of the whole of, or a proportion of, the Management fee where the Customer Service Operator fails to meet the Customer Service Operator Performance Measures". (Note that the Measures are not annexed to the Agreement and can be varied by the Company.)

Compulsory acquisition of contractors' property

- "On expiry of this Agreement or termination of this Agreement pursuant to Clause 13 (The Company) …will have the right to purchase the Vehicle at the purchase value on terms as determined by The Company…"

Contractor responsible for taxes even where the law imposes taxes on the Company

- "The Contractor is solely responsible for all salaries…. payroll tax … The Contractor indemnifies (The Company) in respect of all such … liabilities"

The Company has no liability for its failures

- "So far as the law permits, The Company is not liable for any indirect or consequential loss or damage or loss of profit arising out of the Company's performance of, or failure to perform the Agreement"

Restraint of trade

- "The Contractor covenants that it will not for a period of 6 months after the termination of the Agreement …engage in any activity that directly or indirectly involves the sale of Goods through vending machines, mobile food vans or honesty boxes within 5 kilometres …"

Contractors rights to operate can be usurped

- "Without prejudice to (The Company's) rights under this Agreement, (The Company) has the right exercisable at its discretion, to arrange for a party other than the Contractor within the Route … where (The Company)

determines that the service levels are not being met…"

On our reading, the contracts have the following features. They:

- Allow the company to change the terms of the contract exclusively at its discretion and without reference to, or approval from, the independent contractors.
- Allow the company to change the price at which it pays the independent contractors without securing agreement from them.
- Allow 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.
- Allow the company at its absolute discretion to change and order where, how and when the independent contractors undertake the work.
- Require the independent contractors to invest in 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 $90,000.
- Allow the company to terminate the contract at its exclusive discretion, removing from the independent contractors any right to external appeal or seek redress for compensation for loss of their business.
- Give the company the exclusive right, upon termination of the contract, to acquire the independent contractor's equipment from the contractor as determined by the company.
- Impose 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).
- Require 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.
- Allow the company to withhold payments from the independent contractors.
- Require the independent contractors to indemnify the company against losses or damages, whether those losses or damages are proven or not.
- Require the independent contractors to indemnify any costs that the company may be obliged by law to incur in relation to workers' compensation premiums and payroll tax.
- Do not have an independent dispute-resolution procedure.

Contract situation 4
Finance Sector sales agents Aussie Home Loans

Background
The contract in this case study is a standard form contract used by the high-profile lender Aussie Home Loans 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 *ACL* for consumers.

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's] policies'.
Clause17.1 (l) 'you engage in any conduct that is in the sole opinion of [The Company] likely to injure [The Company's] 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.

Contract situation 5
Driving with transport company Toll

ICA received the following email from an owner-driver then read the contract provided.

"I am writing to you in regards to your email on unfair treatment from big business. I would like to thank you for your advice at a time that I needed it.

I am 2nd generation small business. My parents have owned 3 businesses since 1966. In 1981 they purchased a small brewery run with no contract and the business was recognised by areas. The area was purchased and the cartage rates were set by the TWU. As we had a connection with Woolworths from a previous business, and they were opening their ….. outlet in ……, my mother wrote to Woolworths in September 1982 offering to deliver beer to their new outlet. This is how we started.

Regarding unfair contracts. I do not work in any capacity for either Tooheys or Carlton United (I am paid by my customers). In 2003, I was somewhat surprised to be asked to sign a 3-year contract by Toll, who at the time were running both Tooheys and Carlton United depots in Newcastle.

As I own my business, clause .. was of some interest. A lot of discussion took place at the time with other owners wanting to sign this contract. In the end nothing happened. This contract would have finished in 2006. If this is the kind of contract that is offered to small business, it is no wonder we are a dying breed.

In 2008, big business changed the way we operate. Woolworths decided to contract out their delivery of beer. It's good to see that some people are offered real contracts.

Toll Transport Pty Ltd- Service Agreement 2003

Clause 6: Contract Carrier Induction: "The Carrier agrees that the Company's Induction for Contract Carriers, a copy of which is attached, as varied from time to time, shall form part of the contract of engagement and as such adherence to its terms is required."

Clause 7 Performance Indicators: : "Performance indicators are to be developed with reference to …. It is intended that targets will be set and measured to determine productivity performance improvements …"
"The Parties to this Agreement further recognize that if the Carrier fails to reach these measures as agreed the Carrier will be required to rectify such service failures as instructed by the Company. Should the Carrier not adequately rectify these service failures the Carrier will then be subject to disciplinary action which may also lead to the termination of the Carrier's contract of carriage."

Clause 22. Withdrawal of Services: "The Carrier undertakes that it will not withdraw its services during the period of operation of this Agreement other than in accordance with the terms of the Agreement."

Clause 25. Entire Agreement. "This Agreement shall constitute the entire Agreement between the Parties …" [Note: but clearly it is not because it is subject to the 7 Performance Indicators that have not been developed.]

> *Clause 28.2 Termination of contract of carriage:* "The company may terminate the Contract of Carriage with respect to the Carrier immediately and without the payment of compensation if… (then lists loss of driver's license, insurance, 'serious misconduct', damage to the reputation of the Company, etc) [Note: This clause, particularly 'serious misconduct' is not defined and is at the determination of the company, which gives the Company the effective power to terminate at its whim. There is no such similar clause applying against the Company. Yet under Clause 22 the Carrier cannot withdraw services.]

Effect of these 'unfair' clauses
Toll can change the terms of the contract (including price) at any time through its Induction for Contract Carriers.

The contract is not complete because the KPI's have not been established. Therefore the owner-drivers do not know the terms of the contract they are entering.

The owner-driver cannot withdraw his or her services (end the contract), yet Toll can terminate the contract on a concocted excuse of 'misconduct' or of damaging the company's 'reputation'.

Note A: Equality of Rights Under the Commercial Contract

Between 1996 and 2006 the International Labour Organisation (ILO) engaged in one of its most contested debates ever, over whether labour law extended to covering self-employed people. Critical to the debate were arguments that the definitions of employee versus self-employed were vague, unknown and confusing. However, in 2005, the ILO presented the research findings of the most comprehensive investigation of the issue, identifying definitions used across some 70-plus national jurisdictions. Their finding was that, rather than confusion, the law in all jurisdictions is clear and the same.

In the first instance the ILO 2005 Report stated
http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-v-1.pdf

> "*What is surprising is the amount of convergence between the legal systems* of different countries in the way they deal with this [distinguishing employment] and other aspects of the employment relationship, even between countries with different legal traditions or those in different parts of the world.... Irrespective of the definition used, the concept of a worker in an employment relationship has to be seen in contrast to that of a self-employed or non-dependent worker..." (Paragraphs 86-87)

Further, the same report explained that,

- An *employee* is an individual working under a contract of control or dependency—in other words, an *employment contract*.
- An *independent contractor (self-employed person*) is an individual working under a *commercial or civil contract*. Such contracts are not denoted by control or dependency.

(Note: This was consistent with a 2003 ILO 'Conclusion' on the issue.)

That is, that for the purposes of this discussion on 'unfair' contracts, the commercial or civil contract is a contract in which *the structure of the contract is not denoted by control or dependency but rather one in which both parties are 'equal'*.