

PARLIAMENT *of* AUSTRALIA



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**INDEPENDENT CONTRACTORS BILL 2006  
WORKPLACE RELATIONS LEGISLATION AMENDMENT (INDEPENDENT  
CONTRACTORS) BILL 2006**

**SUBMISSION BY THE INFORMATION TECHNOLOGY CONTRACT &  
RECRUITMENT ASSOCIATION (ITCRA)**

**TO**

**THE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION REFERENCES  
COMMITTEE AND LEGISLATION COMMITTEE OF THE AUSTRALIAN SENATE**

**21 July 2006**

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**There are 1.9 million independent contractors in the Australian workforce (ABS)**

**135,000 IT professionals are independent contractors (55% of total)**

**Being independent is the new way of doing business. IT contractors are businesses of one. They are their own boss. IT contractors have a right to have their business and tax status clearly recognised like every other commercial enterprise. Accepting the risks of being a business, IT contractors deserve recognition in commercial law.**

**The Government's election policy was to introduce legislation to protect all independent contractors. (September 2004).**

**The ILO Conference recommendation is that "National policy for protection of workers in an employment relationship should not interfere with true civil and commercial relationships" (Clause 8, ILO communiqué, 22 June 2006)**

**We expect nothing less than that [our politicians] will amend the Government's legislation so that it fulfills the elected government's undertaking for all Australians without exemption.**

**ITCRA President Penny Coulter**

*"ITCRA has an established place and a voice in our industry consulting with both Federal and State Governments, other industry associations and our customers. All these stakeholders want to hear our point of view and what we have to say. They are listening to us. In the past 2 years, it has been my pleasure to see ITCRA broaden its role to not only provide support to our members, but also to express the views of those members in other industry and Government forums.*



*One of the big challenges for us in 2006 is to ensure that through our steadfast effort, the Independent Contractor's Bill is passed by the Commonwealth Parliament*

*The 135,000 IT contractors in the Australian workforce want the protection of the Commonwealth Government's promised Independent Contractors Act. Being independent is the new way of doing business. IT contractors are businesses of one. They are their own boss.*

*IT contractors have a right to have their business and tax status clearly recognised like every other commercial enterprise. If drafted in accord with the Government's promise at the 2004 election, the Independent Contractors Act will ensure that government authorities accept their business status.*

*Accepting the risks of being a business, IT contractors deserve recognition in commercial law. The Independent Contractors Act will give them that recognition.*

*I think we can all now recognise why the establishment of ITCRA has been important for our industry. Firstly, it has significantly contributed to raising the level of professionalism in our industry. Recruitment consultants and our customers are acknowledging this. And secondly, ITCRA has raised the profile and given voice to the IT recruitment and contractor management industry."*

**21 July 2006**

**INDEPENDENT CONTRACTORS BILL 2006**

**Preamble**

The Independent Contractors Bill was introduced into the Commonwealth Parliament by the Minister for Employment and Workplace Relations on Thursday 22 June. We understand that it will be debated by the House of Representatives and if passed, by the Senate when it resumes sitting in August for the spring session.

The Bill represents the product of a campaign this Association has conducted for two years.

It was August 2004 when we first sought to convince the Commonwealth Government that this Bill was needed to protect IT professionals who are independent contractors from the actions of particularly Industrial Relations Commissions and State Governments who would have them "deemed" to be employees.

We have argued strongly with anyone who would listen that independent contractors want to be recognised in law for what they choose to be - commercial enterprises operating in their own industry for which they happily accept all the statutory obligations that entails.

We have worked closely with Associations such as the ACCI, HIA, AMMA and the NFF to provide advice to the Department of Employment and Workplace Relations Legal Policy Groups in the preparation of the legislation before the Senate Committee. This advice is generally reflected in the current bill.

The industry representatives on this Working Party are strongly in agreement in regard to the objectives of the Bill and its constitutional and common law basis.

The legislation is highly significant because of its reach, its uniqueness and its impact. ITCRA believes that it represents a watershed in commercial and industrial relations law in Australia and possibly the world. So far as we are aware it will be the first time that a nation has taken a defining stand for independent contractors to be corralled out of employment law into commercial law and had their status enshrined and protected there.

The Commonwealth Parliament has strongly embraced independent contractors whilst maintaining their business status. PAYG is just one example. It resolved problems over the ATO's tax withholding powers. The Independent Contractors Bill will secure the right of independent contractors to be a business. Both are world-firsts.

## **Workforce Dimensions**

According to analysis of Australian Bureau of Statistics figures, there are 1.9 million independent contractors in the Australian workforce. They make up 20 per cent of the total workforce and 28 per cent of the private-sector workforce. The size and rate of growth of this sector of the workforce alone makes this Bill highly significant.

More than 135,000 of these independent contractors are IT professionals. ITCRA member companies place 93% of these IT contractors with their clients.



## **ILO Recommendation**

On 15 June the ILO Conference adopted its recommendation on the employment relationship that is highly significant for the Independent Contractors Bill.

The Recommendation (Clause 8 of the ILO communiqué) is that "National policy for protection of workers in an employment relationship should not interfere with true civil and commercial relationships"

The passing of the recommendation occurred with objection from employer groups due to three other clauses that created some technical difficulties in interpretation. However we understand that these clauses have little if any application to the Australian situation.

Any Australian government that claims that independent contractors are not legitimate or seeks to introduce anti contractor legislation in the future will have to do so in direct opposition to the adopted recommendation of the International Labour Organisation.

The ILO resolution is strong support for the campaign to secure independent contractors rights in Australian law. This has been achieved in a way that gives the legislation before the Senate international credibility. It is now clear that the broad thrust of the Independent Contractors Bill is generally in accord with this recent ILO Recommendation.

If the owner-driver exclusion is removed from the proposed bill as we argue here, the parliament is in a position to claim that the proposed Bill is consistent with the ILO Recommendation.

Furthermore it would appear that 'Section 275' of the Queensland Industrial Relations Act is now contrary to the ILO Recommendation as are the provisions in the NSW Industrial Relations Act that treat independent contractors as employees.

### **ITCRA supports the basic provisions of the Bill**

The legislation before the committee does not reflect everything we sought but it does reflect most of it.

We believe that this Bill represents a significant advancement for the status and role of independent contractors as a workforce option for 1.9 million Australian's.

The Bill will secure the rights of most independent contractors to be their own boss. State industrial relations laws have been used to deny self-employed people this right.

In ITCRA's view, the Commonwealth is doing the right thing by securing this basic right as a realistic option for all Australians.

- 1.** ITCRA supports the key objectives of the legislation as:
  - a) to enshrine, protect and enhance the freedom of Australians to engage in work as independent contractors;
  - b) to recognize and protect the right of Australians to be independent contractors free from interference; and
  - c) to provide the parties to independent contractor arrangements with relief in relation to unjust contracts.
- 2.** We support the use of the constitutional hook of the legislation which is that it applies to an independent contractor who has a contract with:
  - a) a corporation
  - b) the Commonwealth or a Territory
  - c) a non-corporation that is established or headquartered in a Territory. We understand that this concept includes natural persons.
- 3.** We support that the common law definition of an independent contractor is being used and that it will apply to individuals, partnerships and directors of small corporations.
- 4.** We support the Bill overriding State laws that would pull independent contractors into their provisions by defining or "deeming" them to be employees.

## **INFORMATION TECHNOLOGY CONTRACT & RECRUITMENT ASSOCIATION**

- 5.** We support the defining and settling of a dispute outside of an industrial jurisdiction. Accordingly, we support the small claims style dispute resolution process envisaged. We also support the provisions that will see the unfair contracts provisions of the State's legislation over ruled and the unfair contracts provisions of the Work Choices legislation repealed.
- 6.** We support the provision that a Court is only empowered to change or nullify a contract or part of a contract to the extent of the unfairness identified by the Court.
- 7.** We support the reach of Bill in respect to its jurisdiction being located in commercial law in particular the Trade Practices Act, specifically that it will block industrial relations and employment regulation.
- 8.** We support the legislation not extending to Taxation, Equal Opportunity, Workers' Compensation or Occupational Health and Safety legislation.
- 9.** We support the unfair contracts provisions which enable consideration of an unfair contract to occur on application to the Federal Magistrates Court. The terms 'harsh' or 'unfair' have an established common-law meaning. A contract paying less than the total remuneration of an employee can be considered 'unfair'. Consideration of what is 'less' must take account of what is being paid generally across industry sectors. These will override State provisions. Large companies may not use these provisions and applicants will cover their own costs unless a claim is 'vexatious'.

### **ITCRA recommends that some changes be made to the Bill**

**1.** We are concerned that the Bill does not apply to owner-drivers in NSW and Victoria, thereby denying these workers the right to independent contractor status. This is not consistent with the Government's election promise in 2004, nor with the principles of the Bill, nor with the ILO Recommendation.

We therefore recommend that this exemption be removed.

If the Senate Committee does not agree with this removal, we recommend:

- a) that the 'opt-in' provisions be made available to owner drivers in NSW and Victoria. This would enable owner-drivers in these States to directly express their intent as to whether they considered the NSW and Victorian state laws were of benefit them.
- b) That the exclusions from the protections of the Bill be subject to a one year sunset clause. This would provide owner drivers with sufficient time to adjust.



**2.** We are concerned that the Bill allows for it to be decreed by regulation that other state employment laws may not be overridden. We think it is bad legislation for such an abrogation of the purpose of the Bill to be able to be achieved without amendment by the Parliament.

**3.** We are concerned that the Bill does not provide a 'Statement of Intent' as a means for a person to indicate his / her intention to operate in the workforce as an independent contractor. Such a 'Statement of Intent' would clearly create a presumption of being an independent contractor to be recognised by the courts in the event of a dispute regarding a workers status.

We therefore recommend that such a 'Statement of Intent' be included as a Schedule to the Bill. The effect of the statement when signed would be that it would put the onus of proof on the third party disputing the status of that person.

**4.** We are concerned that the provisions that enable consideration of an unfair contract to occur when most disputes under commercial contracts for independent contractors would occur even where the contract was considered fair. Most disputes would ordinarily relate to the non-payment of contract fees. Quick resolution of such disputes enhances confidence in commercial contract transactions.

Most states have small claims dispute mechanisms available for independent contractors under provisions of the Fair Trading Acts. These typically reflect consumer small claims processes such as legal representation being prohibited for disputes below \$10,000, and decisions not able to be appealed.

We therefore recommend that parallel small claims processes be made available in the Federal Magistrates jurisdiction in addition to the state jurisdictions to handle the likely volume of claims.

**5.** We are concerned at the length of time that has been provided for businesses and others to adjust and alter their arrangements. Three years for State IR laws covering independent contractors to be overridden seems to be inordinately long period.

Unless substantial reasons can be provided for such a long transition period, we recommend that it be reduced to one year.



## Attachment: About ITCRA

ITCRA is the lead organisation of the IT recruitment and contractor management industry. The Association has 148 member companies in Australia and New Zealand.

### Mission

ITCRA's mission is to be the pre-eminent body in the IT contract and recruitment industry in Australia and New Zealand, setting the direction for the industry and influencing its standards and code of practice.

### Objectives

ITCRA's Objectives are to:

- Enhance and promote the information technology contract and recruitment industry
- Promote the professionalism and image of the Industry
- Maintain a Code of Conduct consistent with good practice and sound business objectives
- Represent its member's interests to government, employers and employees
- Provide industry specific and cost efficient forums and programs.
- Conduct training and educational activities for the industry

### Strategies

ITCRA pursues the accomplishment of its objectives by:

- developing technologies to assist members to lower costs such as the **IT2** job board
- arranging discounts to members for business related services such as **IT Super** through Tower Life and **ITCRA Liability Insurance** through OAMPS and Chubb
- developing business issues papers and standard clauses for contracts with clients and contractors
- providing **ITCRA Certification** for recruitment consultants and approving suppliers who deliver high quality recruitment skills training courses to members



With Tower Life, More than 8,500 fund members with \$55 million under management.



More than 110 advertisers of 7,500 jobs daily. Source of 23% of successful candidates.



With Chubb Insurance professional indemnity and public liability insurance. More than 40 members are currently holding policies



Launched in June 2003, more than 300 recruitment consultants from 40 member companies have enrolled.

## Board

ITCRA is managed by a Board elected by the members annually, and is administered by an Executive Director who reports to it. The Board meets bi-monthly. Between meetings the President, Vice President and Executive Director act as the Executive of the Association.

<b>President:</b>	<b>Penny Coulter</b>	<b>General Manager, Nova IT</b>
<b>Vice-President</b>	<b>Colin Whyte</b>	<b>Executive Chairman, Infopeople Recruiters</b>
<b>Board Members:</b>	<b>Peter Acheson</b>	<b>Managing Director, Ambit Recruitment</b>
	<b>Tony Cooke</b>	<b>Managing Director, Paxus</b>
	<b>Chris Digby</b>	<b>CEO, Greythorn</b>
	<b>Malcolm Dunford</b>	<b>Group General Manager, Sapphire Technologies</b>
	<b>Russell MacDonald</b>	<b>Managing Director, RMA</b>
	<b>Deborah Howard</b>	<b>Managing Director, Diversiti</b>
	<b>Leon Lau</b>	<b>CEO, Peoplebank</b>
	<b>Kim Moeller</b>	<b>General Manager, Patriot Alliance</b>
	<b>Cyrus D’Cruz</b>	<b>Executive General Manager, IT&amp;T, Hudson</b>
	<b>Duncan Thomson</b>	<b>Director, Finite IT Recruitment Solutions</b>
	<b>Ben Wood</b>	<b>Managing Director, CCS Technology Recruiters</b>

**Executive Director: Norman Lacy**

## National ICT Skills Monitoring Establishment Project

On 22 June 2006, the Australian Government (through the Department of Communications IT and the Arts) commissioned ITCRA to create a *National ICT Skills Monitoring Project* based on the research project the Association has conducted for the Victorian Government since 2003.

ITCRA was invited to get this new enlarged research project established for the Commonwealth because there is currently a lack of consolidated national data on the ICT skills gap. This, along with the poor dissemination of the detailed information which is available, prevents labour market participants gaining a well informed understanding of the ICT skills market and future skills demand.



The *National ICT Skills Monitoring Establishment Project* will improve ITCRA's current data collection and dissemination processes. As a result, ITCRA and its Consortium partners (that include *DEWR* and *AIIA*), will be able to greatly improve the data collection process, to align the data with the new ANZSCO occupation classification and to include questions on the remuneration of IT professionals.

**ITCRA Members**

**Australian Members:**

Abraxas Technologies, Accel Group, ADAPS, Affinity IT Recruitment, Albany Asia Pacific, Ambit Group, Ambition Group, Aristotle Corporation, Aurec, Barbara Hoadley Learning & Development, Candle, CarmanWhite, CCS Technology Recruiters, Chubb Insurance, CIT Professionals, Coachwood Computer Recruitment, Command Recruitment Group, Consultants Exchange, Data#3, Davidson Recruitment, DBAInc, Diversiti, Dowrick Recruitment, EAM Recruitment, e.bit, ecareer Employment Services, eJobs Recruitment Specialists, Entity Solutions, Exclaim IT, FastTrack, Fairfax Digital, Fenton Consulting, FGT Recruitment, Finite IT Recruitment Solutions, FreeSpirit International, Fresh Recruitment, Gap IT Consulting, Gel Group, Genesis IT Search, Global Consulting Services, Glotel, GMT Consulting Group, Greythorn, Gryphon Consultants, Hays IT Personnel, Headway Recruitment, HRM Recruitment, Hubnet, Hudson, Human Touch Resources, Icon Recruitment, Imagination Training, Infinite Consulting, Infocraft Technology, Infopeople Recruiters, Infosys, Innovative Business Computing, Interlogic Placements, Interpro, ITG, I.T. Matters Recruitment Services, ITRAC Resources, IXP3, Jenny Barbour & Associates, Kent Douglas & Associates, Key IT, Link Technology, Manpower Professional, Mantech International, Mentaura Recruitment, Michael Page International, Monroe Systems, Murphy Recruitment, M&T Resources, Neal Andrews + Associates, Nova IT, OAMPS, Paragon Recruitment Services, Patriot Alliance, Paul Ingle & Associates, Paxus, Pegasus, Peoplebank Australia, PeopleHunt Recruitment Group, People in Computers, Primex Solutions, Professional People, Professional Recruitment Australia, PS Consulting, Pursue IT, QPL Limited, RecruitLive, Recruitment One, Resource Agility, Resource Solutions Group, RMA, Robert Walters, RSP Group, Rusher Rogers, Sapphire Technologies, Scott Recruitment Services, Sherborne Consulting, Sirius Technology, SkillSearch Computing, Smartworker, Speller International, Stratagem Computer Placements, Strategy Solutions, Talent International, Tecsys IT Recruitment, The Tennyson Group, Texel, The Brooklyn Group, Tower Australia, Trilogy Resources, Unicom Systems, Verossity, VTR Consulting, Wizard Information Services.

**New Zealand Members:**

Absolute IT, Agility Group, Candle, Consultants Exchange, De Winter International, Icon Recruitment, IT Job Search, Manpower Professional, Neal Andrews + Associates, PeopleSearch Consulting, Pinnacle Recruitment, Protocol Personnel Services, Robert Walters, Sabre Systems, Sapphire Technologies, Verossity, Vision Recruit.

**ITCRA Members at 20 June 2006**

## The Government's Election Commitment

The Commonwealth Government committed itself during the 2004 Federal election campaign to introduce legislation to protect independent contractors.

The government's policy document says that the legislation is intended to:

- 'enshrine and protect the status of independent contractors' so that 'a party's freedom to contract must be upheld and there must be certainty in commercial arrangements.'
- prevent situations where 'the honest intentions of parties are disregarded and overturned.'
- 'prevent the industrial relations system from being used to undermine the status of independent contractors.'
- 'prevent unions from seeking orders from the Australian Industrial Relations Commission which would impose limits, constraints or barriers on the freedom to contract, the freedom to operate as a genuine independent contractor, or the freedom to engage work through labour hire arrangements.'

INFORMATION TECHNOLOGY CONTRACT & RECRUITMENT ASSOCIATION

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