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Submission to
Standing Committee on Employment, Workplace Relations and Workforce Participation.
Inquiry into Independent contractors and labour hire arrangements
11/3/05

When it comes to independent contractors and government policy the issue is not one of regulation versus deregulation. It is instead a consideration of the appropriate type of regulation. Independent contractors are individuals who are businesses in their own right. They are regulated within commercial/business regimes. They are not employees.

Independent contractors: ***21% of total workforce***
28% of private-sector workforce

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Independent contractors have clear OHS responsibilities under all relevant State OHS legislation, although legislative structures vary across the States.

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Independent contractors have clear responsibilities and protection under EEO legislation. Legislative structures are similar. The industrial relations system, however, creates systemic bias against independent contractors because it restricts access to work opportunities for independent contractors.

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Independent contractors operate in free markets and are subject to both the obligations and protections afforded under commercial law, the *Trade Practices Act* and State Fair Trading Acts.

12. Industrial relations system

Independent contractors are not employees. Independent contractors have an entitlement not to be forced into the industrial relations system and employment law.

Part C: Strategies to ensure that independent contractor arrangements are legitimate.

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By making sure that the common-law processes are respected and secured, government ensures that independent contractor arrangements are legitimate. Government can further assist by introducing sustained education processes on the simplicity of the common-law identification of independent contractor status.

About Independent Contractors of Australia (ICA)

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

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

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

ICA operates through its Website at **www.contractworld.com.au.**

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

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

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

The Inquiry

ICA is pleased that the Federal Parliament is inquiring into independent contractor issues. For too long independent contractors have been under sustained academic and political attack, from those who allege that independent contractors are not legitimate and/or that the status of independent contractors is not clear. The attacks have been based on conjecture, not facts. The attacks have led to considerable legislative assaults whose aim is to prevent independent contractors from existing. ICA was formed with the purpose of dealing with the facts about independent contractors and defending their rights.

When the facts are investigated:

- The status of independent contractors is clear.
- Independent contractors are legitimate.

ICA has the only Website in Australia dedicated to independent contractor issues. The range and quality of material is recognized as high. ICA will arrange access to the full Website for the Committee to facilitate its investigations. To assist the Committee's investigations, this submission takes edited and summarized extracts from the Website and provides links to relevant Website content.

Part A: Status of independent contractors and labour hire.

1. Definitions: What is an independent contractor?

An independent contractor is a person who organizes his or her work through the commercial contract (contract *for* services). Independent contractors can do this as an individual or as a structure. They are, as individuals, businesses in their own right. The status is defined and protected through the common-law process. ICA has explained the common-law process using the imagery of a 'swinging pendulum'. Further information on the 'swinging pendulum' explanation may be found at: http://www.contractworld.com.au/members/articles/ica-subs-T1.php [Note: subscriber access required for this document.]

1.1 Discussion:

Independent contracting is one of those things that, when understood, appears so simple. Yet when not understood, it appears unfathomably complex. And it is on the basis of alleged complexity and confusion that many of the anti-independent contractor arguments are mounted. But in many respects the complexity is not that of independent contracting but rather that of employment. When people accustomed to the paradigm of employment seek to comprehend independent contracting, the complexity of employment comes into sharp relief because independent contracting is everything that employment is not.

Independent contracting is the achievement of an individual's desire to have control of his or her own working life. This reality is reflected in its legality.

Independent contracting comprises both an attitude and a set of behaviours.

Independent contractors are, by definition, people who want and have achieved independence in their thoughts and actions in their working lives. They have adopted business attitudes as their working life's motivations. They accept the disciplines of the commercial contract, in which they exercise equal rights to control the terms of their contract/s, as the process by which they organize their work.

And it is only when the reality of this organized independence (based as it is on the commercial contract) is in clear evidence, that the common-law courts will accept that independent contracting exists. Where the tag of independent contracting is used but the real-life evidence presented to a court indicates control of the traditional employment type, the courts reject the independence tag and state the truth.

The process and the tests that the courts use to undertake examinations of contractual independence or dependence are well known and publicly available. Many labour academics, lawyers, unions, industry organizations and public policy bodies, however, claim that the definition of employment/independent contracting is vague and uncertain. They are wrong.

Consequently, it is not surprising that people without specialist knowledge of employment law can be confused. This is one of the reasons that ICA came into existence. ICA's Website seeks to create clarity on the definition of independent

contracting by describing the major sub-tests (there are approximately 21of them) that the courts use for making their determinations. ICA describes the application of these sub-tests as the 'swinging pendulum' test. [See the previous weblink for details.] It suggests that people review their behaviour in light of each test and see which way the overall pendulum swings—towards employment or towards independent contracting. If a person wishes to be an independent contractor or use independent contractors, they must first ensure that the real-life conduct exhibited in their working arrangements points strongly to independent contracting.

And, of course, in the final analysis, that sort of assessment can and should only be conducted by independent courts. On the balance of evidence, an individual will be either an independent contractor or an employee. A person is either independent in their thoughts and actions (independent contractor) or they are subject to potential control by another (that is, they are an employee) and dependent.

2. Free society: The commercial contract = free market

The commercial contract is a contract (contract *for* services) where the parties have equal rights to control the terms of the contract. It is a contract that captures basic freedoms in a society. It is the legal underpinning of free-market economies.

What is rarely recognized is the importance of the commercial contract to a free market and free society. In fact, the commercial contract is the legal bedrock of a free market. Without it, a free market cannot operate. This fact is found in the necessary elements that go to make up the commercial contract. These include:

1. parties enter such contracts of their own free will based on offer and acceptance. Parties cannot be forced into the contract.
2. the terms of the contract cannot be altered without agreement of the parties.

Commercial law, the common law courts, and the *Trade Practices Act* and various State Fair Trading Acts declare void commercial contracts that to not conform to these principles. These are core and basic protections that underpin free markets in free societies.

When people earn their income through the commercial contract they are, by definition, independent contractors. And in making use of the commercial contract they access the core basic protections afforded by the commercial contract. This is why, when independent contractors are attacked by those who seek to strip them of their rights, the attacks are in effect attacks against freedom in society.

3. Rejecting the 'dependent contractor' allegation and its legislative consequences

The 'dependent' contractor argument is an academic musing. When used to justify the changing of the law of commercial contract it is a confidence trick which attacks basic freedoms.

3.1 Discussion

ICA submits that 'dependent contractor' is a notion which at law and in reality has no meaning, is illegitimate, and confuses rather than clarifies issues. It is an artificial creation for the purpose of lending credence to attempts to pull independent contractors into the sphere of industrial relations legislation.

The dependent contractor argument was:

- Used as the justification for Queensland's *Industrial Relations Act*, section 275.
- Used as the justification for similar legislation in Victoria, New South Wales and South Australia.
- The basis for arguing that ILO conventions extend the definition of employee in the Federal *Industrial Relations Act*.
- Used, in modified form, to argue the case for bringing clothing outworkers working as independent contractors into the New South Wales Industrial Relations Act.

The Committee should anticipate that the dependent contractor argument will be used in submissions to it.

Wherever Australian-based dependent contractor arguments arise, the intellectual source most often quoted is Canadian academic H.W. Arthurs, and his article published in *The University of Toronto Law Journal* in 1965 titled 'The Dependent Contractor: A study of the legal problems of countervailing power'. Arthurs described 'dependent contractors' as follows:

> they are often economically vulnerable as individuals because of the dominance of a monopoly buyer or seller of their goods or services, or because of disorganised market conditions… They are dependent economically, although legally contractors… They are prisoners of the regime of competition.

In demonstrating his point, Arthurs case-studied disputes around the 1950s between newspaper vendors at odds with their newspaper suppliers, and fishermen working off the coast of Canada who, because of geographic considerations, could only sell their produce through one canning works. Arthurs reasoned that these 'prisoners of competition' deserved the legislative protection of employment law to breach competition rules and collectively collude against their sole supplier or buyer.

In the creation of the Australian version of the dependent contractor argument, Arthurs' reasonings have been adopted and simplified to an extraordinary degree by highly respected economic statisticians and economic organizations. This simplification has led to a statistical definition of 'dependent contractor'—namely, that of a 'contractor' who works for only one client. This is simplistic and naive in the extreme. It is a definition that completely ignores the law of contract. Further, the use of the term by respected economists has added weight to those arguments that seek to pull independent contractors into industrial relations legislation.

The dependent contractor argument is fundamentally flawed. It ignores the economic and legal fact that an independent contractor has escaped the imprisonment of the employment contract and has found freedom in the regime of competition.

The simple fact is that the common-law definition of employment involves a process of finding the truth of economic and commercial contract relationships. If, in a common-law investigation a person is found to be economically dependent, their contract is of an employment nature. Yet some economists and lawyers choose to ignore this truth and pretend that a person can be a contractor and dependent, both at the same time.

But even if the ICA's position on this matter is not accepted and the dependent contractor argument is found to have some intellectual force, then it must also follow that the reverse argument must apply—namely, that there are persons who are 'independent employees'. An independent employee would be a person who had all the desires and attitudes of independence but was forced to be an employee either through duress (as can be argued applies in the Australian commercial building sector) or because of the lack of opportunity to become a contractor. If the logic of 'independent employee' is valid, the reach of the *Trade Practices Act* should be extended, for example, to include independent employees.

ICA rejects both notions—'dependent contractor' and 'independent employee'—either as a contractual or legislative possibility. Both ideas deserve to remain in the realm of academic musings. Neither should be used as the basis for the development of legislation and regulation.

3.2 Queensland s275 provisions

The Queensland provisions are the only industrial relations employment deeming provisions operating in Australia. Both NSW and Victoria considered, but rejected, similar clauses. South Australia has considered s275 type provisions but so far rejected them. The President of the Queensland Commission has twice publicly declared the provisions of the Queensland Act to be unworkable. (See the speeches made to Australian Industrial Relations Society National Conferences, September 2001 and March 2003.)

The reason that the Queensland s275 provisions (and others modelled on it) are bad law is that the provisions accept the existence of the commercial contract (and hence independent contractor status) then seek to turn common law on its head by declaring the commercial contract to be an employment contract as well. Seeking to declare something to be what it is not is legal nonsense.

Only three applications under the Queensland Act's s275 provisions have been attempted. The first application against contract shearers was dismissed by the Commission, with the shearers found to be genuine independent contractors. But it cost the 300-plus shearers subject to the application $325,000 in legal fees to defend their status. A second application, involving a security business, resulted in a *corporation being declared an employee*. The third application (still ongoing after 4 years) involves many hundreds of contract transport drivers, is still in dispute over procedural matters, and has not yet reached a substantive hearing. Each application has proven highly expensive, both for the applicants and the defendants (independent contractors), and each has involved long, drawn-out legal debate over the incoherent meaning of new phrases that have been sundered from their common-law meanings. Independent contractors see this attack against them as oppressive, aggressive and an affront to their independence.

4. Independent Contractors and Labour Hire

Labour hire entities offer a commercial networking service to independent contractors and labour requirers. ICA only makes comment on labour hire in relation to labour hire involving independent contractors. Most labour hire probably involves employment. The most noted form of labour hire for independent contractors in Australia are the 'Odco' arrangements.

This can be referenced on the ICA Website at http://www.contractworld.com.au/members/articles/ica-subs-T31.php [Note: subscriber access required for this document.]

Odco is a form of labour hire where independent contractors work through a very specific format created as a consequence of Australian High Court decisions in the early 1990s.

The key features of Odco are:

- It is a form of labour hire.
- The contracts are commercial contracts and daily hire.
- There are clear operational arrangements drawn from the court judgments.
- If the operational arrangements are complied with, the workers are independent contractors. If not complied with, the workers are likely to be found to be employees.
- There is no contract between the user of the contractor's services and the independent contractor. There is a contract between the independent contractor and the labour hire agency. There is a separate contract between the user and the labour hire agency.

It is also clear that if one works as an independent contractor under Odco arrangements, legislative requirements determine that:

- PAYG tax must be paid by the agency to the ATO.
- OHS obligations continue to exist.
- Workers' compensation insurance is required in most States. The details can vary.
- Equal opportunity and anti-discrimination laws continue to apply.

These obligations must be seen within the general legislative obligations that apply to all persons—whether they are employees or not. In the context of independent contracting, these generally constitute business-type obligations not employee-type obligations.

The Odco arrangements are backed by a long line of important legal test cases of independent contractor status. It has, perhaps, been the most legally tested of all independent contractor systems in Australia and in most instances found to be solid.

The real interest for ICA is that several important points come through the cases that continue to reinforce the true nature of independent contracting and continue to reinforce the 'swinging pendulum tests' as mentioned earlier.

- In each of the Odco-type cases, the courts have consistently looked at the totality of the arrangements. No one factor overrides any other and the decisions are made on the balance of evidence.
- Written documents describing the contracts as independent contracting have only been found to be valid to the extent that their content has been consistent with the actual behaviours of the parties.

The original court cases were conducted in the early 1990s and involved six judgments, two of which involved appeals to the Australian High Court. These cases describe the operational arrangements of Odco.
Two of the key cases are:

- The High Court judgment Accident Compensation Commission vs. Odco Pty Ltd F.C. 90/040 of 22 October 1990.
- Odco Pty Ltd and BWIU Federal Court of Australia No VG 151 of 1988; Justice Woodward. Date of Order 24/8/89

The word 'Odco' comes from the name of the company involved in the case. Odco Pty Ltd was a labour hire company supplying building tradespeople to the construction sector. It was interesting that the High Court found that, under Victorian workers' compensation legislation, Odco contractors could be within the workers' compensation scheme even though the workers were not common-law employees.

In the late 1990s and into the 2000s, Odco arrangements emerged in areas outside the building trades and now seem to operate in a vast variety of occupations. The arrangements have been re-tested on several occasions and found to be solid. The two most important and more recent cases were:
Kangan TAFE. *(Kangan v Fox U No34844 of 1998)*

- This was a case involving a school teacher who was found to be an independent contractor. Importantly, it was the first case outside the building industry. Of most interest was the Commission's finding that there was no contract between the independent contractor and the client for whom she worked.

Queensland Shearers:

- This was the first test case of the Queensland 'employment deeming' provisions (s275) and involved a union application against some 300 shearers working through Odco arrangements. After a long and high-profile case, the shearers were found in fact to be independent contractors and that it was not appropriate to call them employees.

4.1 ICA comment

From all reports, the Odco arrangements are growing and have become a widely used system of engagement for independent contractors. Independent contractors have choices and can operate directly with clients or make use of labour hire arrangements.

Not all independent contracting through labour hire involves Odco. Odco, however, has probably the strongest and longest history of legal cases behind it of any independent contractor arrangements in Australia. But it is clear that the arrangements

are only solid to the extent that the operational requirements are consistent with the eight-or-so key Odco legal decisions.

Labour hire arrangements can provide administrative benefits for independent contractors when compared to direct engagement, for example, under PAYG. Whether a person wishes to use a labour hire agency or not will, however, depend on consideration of each person's commercial circumstances.

5. International Labour Organisation; International attack/defence

The ILO has in the past been used as a forum to attack independent contractors and the commercial contract, but it came to their defence in 2003. The 'triangular relationship' agenda item, due to be debated in 2006, is another attempt at an attack.

The ILO has had the issue of the status of independent contractors on its agenda since about 1996. The debate at the ILO on this issue has been one of the most prolonged and hard-argued of all issues in the organization's history. The ILO came to a significant 'Conclusion' in June 2003, which represents the international high-watermark statement on the issue.

In summary, the ILO Conclusion states that:

1. The nature of labour market changes is such that significant numbers of people across the globe are choosing to work as independent contractors who are controlled and regulated through commercial contract regulation and law.
2. Where independent contracting/self-employment is genuine, the shift of people away from employment is legitimate. Where independent contracting/self-employment is not genuine, the shift is not legitimate.
3. Governments should look to ensure appropriate regulation of the emerging work arrangements by forming policy that respects the status of independent contractors and the self-employed.
4. Independent contractors/self-employed persons and commercial contracts are not within the scope of industrial relations/employment regulation. Industrial relations/employment laws should not attempt to regulate independent contractors/self-employed persons and commercial contracts.

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

In the settlement of this 2003 debate, however, the ILO left open the question of the 'triangular relationship'. This is set to be debated in 2006 and ICA believes that this is yet another attempt to deny independent contractors their legitimate status through the ILO processes.

The triangular relationship argument is another academic musing that sees something wrong with people entering into 'cascading contract arrangements'. The explanation is that when work is organized through a series of contract arrangements, then, somehow, these arrangements are exploitative. The argument squarely attacks all forms of labour hire (employment and independent contracting), contracting out,

outsourcing, the commercial contract, independent contractors and ultimately the operations of a free market. ICA rejects the ‘triangular relationship’ thesis and any legislative or regulatory construction that may be attempted as a consequence. ICA is happy to discuss this emerging anti-contract agenda with the Committee.

Part B: Ways in which independent contracting can be pursued consistently across State and Federal jurisdictions.

6. Commonwealth Tax

Independent contractors have for a long time been falsely accused of ripping off the tax system. The tax reforms of 2000 and thereafter have resolved any alleged issues.

a) Withholding tax

Under PAYG, independent contractors are fully within the withholding regimes. But it was once the fact that, under PAYE, independent contractor were not within withholding because PAYE was dependent upon common-law employment. The withholding tax reforms of 2000 under PAYG, however, were designed to (and have created) a catch-all system for withholding. Whether an independent contractor is incorporated or unincorporated, directly contracted or contracted through labour hire is of no consequence to withholding obligations, apart from some variations in administration.

b) Income tax. Deductions/rates/alienation

Under the Personal Service Income tax laws, most tax issues regarding independent contractors are resolved, with a small area requiring judicial clarification.

Assess to business-type tax deductions, retention of profit in companies and so on have formed an area of considerable past debate. ICA believes that this is now substantially resolved at law—although our experience is that considerable confusion continues to exist in the accountancy and independent contractor communities over the facts of PSI.
In an attempt to clarify the issues: ICA has, with the assistance of the ATO, developed a PSI layperson's explanation. The final document (with ATO Website links) was placed on ICA's Website in early October 2004. ICA takes the view that business tax deduction issues are now relatively clear both for incorporated and unincorporated contractors. The explanation is available at http://www.contractworld.com.au/members/articles/ica-subs-T34.php [Note: subscriber access required for this document.]

Independent contractors should be aware that if they incorporate and seek to split income or retain profit, however, they may be subject to the catch-all anti-avoidance provisions (Part IVA) of the Tax Act. As of March 2005, these provisions were still undergoing a judicial testing programme by the ATO. Independent contractors should be aware of the potential, retrospective application of Part IVA. It may be some years before the judicial testing programme has finally clarified the situation.

6.1 A note on Superannuation guarantee payments: SGA obligations are legislatively the same as the old PAYE withholding arrangements. If an independent contractor is unincorporated, SGA does not strictly apply. If an independent contractor is incorporated, SGA does apply because the contractor is an employee/director of her/his structured entity.

7. Payroll tax
State governments have some difficulty sorting out who is 'in' and who is 'out' for threshold calculation purposes. Judicial testing and legislative changes have settled many issues.

8. Workers' Compensation.
All State workers' compensation regimes exclude independent contractors from cover, but then try to 'deem' many independent contractors back into their schemes.

The essential difficulty common to Australian workers' compensation schemes is as follows:

- Workers' compensation is an insurance scheme that does not follow standard insurance structures. Most usually, a person covered by an insurance policy initiates coverage and directly pays the premium.
- Workers' compensation, instead, requires other entities (businesses) to pay the premiums for people who are covered (workers). The business is not insured but the worker is. The business pays.
- Workers' compensation schemes then take the view that persons who in their own right are businesses (that is, independent contractors) are to be refused workers' compensation cover and prevented from paying premiums for themselves.
- However, when independent contractors perform work for other businesses (as they must do), the workers' compensation scheme then tries to declare (deem) a wide range of work situations where the party doing the engaging must pay premiums for the independent contractor.

In effect, workers' compensation in one breath states that a whole range of persons are *not* to be within the scheme, yet a whole range of those same persons are to be *within* the scheme. This is the cause of the confusion and uncertainty.

'Deeming' is an unhelpful term and a less-than-useful approach to resolving this structural problem and its concomitant confusion.

The conclusion is that deeming creates confusion. Workers' compensation deeming not only makes it near-impossible to understand the law for those who try to comply, but creates opportunity for those whose intent is to break the law.

9. Occupational Health and Safety
Independent contractors have clear OHS responsibilities under all relevant State OHS legislation, although legislative structures vary across the States.

10. Equal Opportunity and Anti-discrimination
Independent contractors have clear responsibilities and protection under EEO legislation. Legislative structures are similar. The industrial relations system, however, creates systemic bias against independent contractors because it restricts access to work opportunities for independent contractors.

***11. Trade Practices Act* and State Fair Trading Acts**

Independent contractors operate in free markets and are subject to both the obligations and protections afforded under commercial law, the *Trade Practices Act* and State Fair Trading Acts. ICA holds the view that independent contractors should be regulated and offered protections through the *Trade Practices Act* and State Fair Trading Acts.

11.1 Discussion: Is labour a commodity?

ICA recognizes that there are academic objections to having independent contractors within *TPA* regimes. Most such arguments are based on a view that a person's labour cannot be treated as a commodity. ICA holds a different view based on an understanding that an independent contractor's labour is not being treated as a commodity for very specific reasons.

An essential feature of a 'commodity' is that someone owns 'it', that 'it' does not have control of 'its' destiny and that 'it' can be traded, and ownership changed without 'it' having any say in the trade. When a commodity is an inanimate object, this trade is of little consequence to the object. For people, however, the consequence is enormous, because treating a human being as a commodity in this sense is slavery.

On this issue the legal nature of contracts is important. People who sell their labour under the *employment* contract find themselves in a similar situation to a commodity. They enter a contract where their right to control themselves has legally been transferred to another person. With the employment contract, the legal possibility exists that a person can be 'traded'. In fact, under Australian industrial relations law (transmission of business) this occurs. The fact is that, in legal terms, 'employed' people are treated as types of commodities and the industrial relations system regulates the trade that occurs.

Independent contractors, on the other hand, are not commodities—either legally or in reality. Independent contractors cannot be traded precisely because the legal nature of the contract they have, being based on offer and acceptance, gives them control of their destiny. Freedom from being a commodity is one reason why independent contracting is attractive to so many people.

From this perspective, objections to independent contractors being within the *TPA* regime seem to misunderstand the 'labour-commodity' argument. There is an inference that to subject labour to the *Trade Practices Act* would amount to turning labour into a commodity. The reverse is the fact. The regulation of labour under the *TPA* is an important legislative tool which releases people from being treated as a commodity. This is why the *TPA* is important to independent contractors.

11.2 Insolvency situations.

ICA was invited to, and made a submission to, the Senate Select inquiry into insolvency laws in 2003. The submission is available on our Website at: http://www.contractworld.com.au/reloaded/ica-insolvency.php [Public access document.] In that submission we made the point that independent contractors are most frequently unsecured creditors when faced with the insolvency of a client. This applies whether the contractor is incorporated or not. ICA believes that independent contractors should only provide credit with great caution. The best credit is no credit, and a client

that does not pay is not a client but rather a liability. ICA believes that independent contractors should only agree to trading terms consistent with quick administrative handling of their invoices. As detailed in our submission, ICA would support consideration of an extension of the Small Business Commissioner's jurisdiction to assist with quick and speedy resolution of payment/contract disputes.

11.3 Contract dispute resolution. A major problem faced by independent contractors is the difficulty associated with litigating to recover bad debt. ICA believes that problems exist for independent contractors in achieving quick and effective legal resolution of contract disputes or in enforcing payment of an unpaid invoice.

An effective and efficient economy depends heavily on trust in contract transactions. Yet, when trust diminishes, people will be less inclined to engage in business activity. Integral to trust is the ability of legal systems to ensure that contracts freely entered into are enforceable. If an independent contractor is owed money outside of an insolvency situation, the general view is that the ultimate recourse is litigation. If an unpaid bill is less than $3,000, it is unlikely that the cost of litigation would warrant the exercise of recovering the money. Because litigation is expensive, slow and generally ineffective, commercial trust breaks down, thus damaging economic activity.

ICA strongly support the development and use of small claims-type processes for independent contractors involved in contract disputes.

12. Industrial relations system

Independent contractors are not employees. Independent contractors have an entitlement not to be forced into the industrial relations system and employment law.

One key difference between employees and independent contractors can be demonstrated by looking at the issues surrounding loss of employee entitlements when a business becomes bankrupt.

Full- and part-time employees have money withheld from their regular remuneration for holidays, sick leave, long service leave and other items. These are usually referred to as employee 'entitlements'. ICA views these not as entitlements but as forced loans made by employees to employers as a condition of entering an employment contract. In effect, these forced loans place the employee in a position of being a permanent creditor of their employer. The debate which has occurred for several years concerning the security of employee entitlements has, in fact, missed the key point of forced employee loans. Instead, it has sought to address the problem of security of employee 'entitlements' by creating special trust funds, supplying government hand-outs and so forth. In fact, the security of entitlement problem is a creature of the nature and management of permanent employment. The solutions so far suggested have never addressed this fundamental flaw of employment, namely, the forced withholding of money.

Independent contractors do not suffer from the same forced withholding of money, other than statutory requirements for tax under PAYG. The non-withholding of employee-like monies is a key benefit of being an independent contractor.

Independent contractors invoice their clients and are (normally) paid fully for the invoice. If an invoice is not fully paid, it would most likely relate to a dispute over the invoice amount or the quality of tasks undertaken. But when an independent contractor is faced with a bad debt as a result of an insolvent client, the independent contractor is normally in the position of an unsecured creditor.

Independent contractors are not party to the system of government-imposed employment law which facilitates employee-forced loans to employers and should not be forced to become part of that regime.

Employment regulation is debated within a linguistic regime which talks of 'employee benefits'. But what is ignored in the employee regulation debate is that the delivery of employee 'benefits' through regulation is mostly the delivery to employees of rights taken away from them by systems of employment. It is a debate which consequently runs in unresolved circles.

Within this context, all people must be secured the common-law right to escape the employment regime. Independent contracting gives people this right, which is not an escape from 'protections' or 'benefits', but an escape from 'rights removal'.

As a consequence of this reasoning, ICA strongly supports the proposed Independent Contractors Act. ICA has produced a discussion document which is available at http://www.contractworld.com.au/members/articles/ica-subs-T37.php [Note: subscriber access required for this document.]

Part C: Strategies to ensure that independent contractor arrangements are legitimate.

13. ICA's recommendations

By making sure that the common-law processes are respected and secured, government ensures that independent contractor arrangements are legitimate. Government can further assist by introducing sustained education processes on the simplicity of the common-law identification of independent contractor status.

13.1 Comment on the definition and regulation 'problem'

Since the Second World War, governments world-wide have developed taxing and labour regulation regimes of wide variety. The legislative structures used to empower regulators and taxing authorities have relied almost entirely on 'employment' language for their effect, simply because the vast bulk of people earned their income through being 'employed'. As the 20th Century came to a close, the true meaning of 'employment'—namely, that it is based on a contract of control—was increasingly ignored and instead assumed to mean any 'work for pay' situation. Regulators and taxation bodies have complicated and confused this linguistic truth about 'employment' and have layered a vast array of complex and contradictory language in legislation to give other meanings to the words 'employment' and 'employee'. This 'muddying' of the language was an evolutionary process—it did not occur by intent.

Regulators have, however, created further complexity over the last five years or so by seeking to deny people the right not to be an employee. Regulatory and legislative aggression has sought to force all people to earn income through the one contract type (employment)—a contract type which suits the regulators' view of the world. This aggression is unacceptable.

Within this context, the emergence of the independent contractor community has challenged the taxing and regulatory structures and edifices created since WW2. Independent contractors now constitute some 21 per cent of the total Australian workforce and 28 per cent of the private-sector workforce. The rise of independent contractors is not some social conspiracy orchestrated and designed to deny taxing and regulatory authorities their legitimate and necessary functions in society. Independent contracting has emerged through millions of individual people making their own decisions to organize their own working lives in ways that suit them. And they do this through the commercial contract.

And it is the identification of the use of the commercial contract (the contract *for* services) that is indisputably the trigger that defines an independent contractor. The finding of the commercial contract is a clear and simple process. The alleged complexity that is said to surround it arises simply from an unwillingness to acknowledge its clarity and simplicity because of our historical ways of thinking about work and employment.

***** The strongest strategy that government can implement to ensure that independent contractor arrangements are legitimate is to ensure the integrity of, and respect for, the common-law process for the finding of the commercial contract.

13.2 A linguistic paradigm for regulation and legislation

Government has an urgent need to free its legislative and regulatory structures from an artificial dependence on the word 'employment'.

- The Australian income tax reforms of 2000 achieved this and are probably a world first. Tax is now collected and tax rules applied under tax-specific language which focuses on achieving the practical outcomes that tax administrators require.
- The 2004 OHS Act in Victoria has moved substantially in this direction.

In all areas of regulation, the necessary objectives can be achieved by focusing on the specific, practical outcomes needed, using those outcomes as the starting point and constructing appropriate legislative and regulatory structures using specific legislative language.

Relying on 'employment' as a short-cut, catch-all phase is destined to lead regulation to clash with the social movement that we see in the rise of independent contractors. Worse, it will thwart and distort the achievement of high quality regulation and regulatory outcomes.