Securing Independent Contractors' Rights

The International Perspective

The ILO Scope of Employment Debate

Independent Contractors of Australia has for some time been concerned about international campaigns that would damage the rights of independent contractors to be their own businesses. The campaigns have their principal focus at the International Labour Organisation.

ICA has been monitoring the debate and been involved with it at the ILO since 2003. The ILO debate resumes in 2006 with the prospect of reaching finality. What follows is ICA information and commentary on this critical development for independent contractors and for all businesses.

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External resources:

ICA commentary on ILO 2003 Conclusion (click here)
ILO 2005 Report (click here)
ILO Website (click here)

1. ILO Background

1.1 ILO 'Instruments'

The International Labour Organisation is an arm of the United Nations which specializes in international labour regulation issues. Its most important meeting is held in June of each year in Geneva, Switzerland. Representatives from governments, unions and businesses meet to debate and pass motions.

The ILO adopts 'instruments' which establish international principles for labour regulation. These include:

- Convention. This is the strongest instrument. When a government adopts an ILO Convention, it takes on obligations to comply with the Convention.
- Recommendation: This has less force than a Convention, but establishes principles for labour regulation. Nations are expected to report on their compliance with Recommendations.

1.2 Independent contractors and the ILO: Scope of Employment

Since about 1996 the ILO has been debating the legitimacy of independent contractors and people supplying their labour through commercial contracts instead of employment contracts. It has been called the 'scope of employment' debate. The historical thrust of the debate has been oriented towards denying the legitimacy of independent contractors.

1.3 2006 ILO Meeting: The 'Triangular' Relationship

In June 2006, the ILO envisages creating an ILO Recommendation which could finalize the debate on the 'scope of employment'. The initial part of the 2006 ILO debate will focus on 'the problem of the triangular relationship', by which the ILO largely refers to labour hire arrangements. The ILO sees the 'triangular relationship' as a subset of the independent contractor/scope of employment issue. In taking this approach, the ILO has bundled a huge range of issues into one conglomerate.

The final Recommendation will attempt to embrace the full conglomerate of 'scope of employment' issues discussed over the last ten years and make statements on these under one grand 'instrument'. It is grand planning on a grand scale.

The statement will cover commercial activity including:

- Independent contractors/the self-employed.
- Labour hire.
- Contracting out and outsourcing of businesses operations.
- Franchising.
- Outworkers.
- Others unspecified.

In effect, any business activity that involves the use of the commercial contract will likely fall within the ambit of this new ILO Recommendation.

1.4 2005: ILO Report

In the first half of 2005, the ILO office in Geneva produced a 90-page Report and questionnaire in preparation for 2006. (Click here for the link to the Report.)

- Pages 1-41 cover definitional issues.
- Pages 42-58 discuss the triangular relationship.
- The remainder of the Report relates to the questionnaire.

The Report is complex and difficult to read. For example, on occasions it seems to make firm statements about what ILO policies are on a given issue, but will then question or raise doubts about the same issue in apparent contradiction. The Report frequently appears to invite inferences about conclusions or positions, and often proffers suggestions as to problems.

A further ILO discussion paper on the issue is expected in early 2006.

1.5 ICA Commentary

This ICA commentary is based for the most part on the 2005 Report, but also draws on the significant experience that ICA has had in Australia and internationally when lobbying on, or studying, a wide range of government policy issues affecting independent contractors and commercial contract regulation.

ICA commentary attempts to isolate the core issues which the ILO appears to be seeking to address and to give a practical perspective on those issues. Given the complexity of the ILO approach, identifying and clarifying the core issues can sometimes be difficult.

1.6 Some More Detail: The 'Scope of Employment'

For close to a decade, the International Labour Organisation has been debating issues arising from the emergence of the independent contractor community and other non-traditional forms of labour engagement, and the challenge that this poses to labour regulation.

The history of the ILO process has been as follows:

- 1996: The ILO listed the issue for discussion.
- 1998: The ILO experienced a divisive discussion with no outcome, which resulted in the ILO's governing body re-listing the issue for further discussion.
- 2003: The 'Scope of Employment' debate was conducted at the ILO. This resulted in an outcome where a 'Conclusion' was passed confirming the integrity of the commercial contract and the rights of independent contractors. BUT, the final statement declared the 'triangular relationship unresolved'.
- 2006: The matter has been re-listed again for discussion in June 2006 to resolve 'the problem of the triangular relationship'. If resolution of this issue can be achieved, the ILO anticipates confirming a Resolution in June 2006 which will incorporate both the Conclusion of 2003 and the outcome of the 2006 triangular relationship debate.

2. The ILO debate—what is at risk?

2.1 Overview

The thrust of the ILO 'scope of employment' debate has been, and continues to be, an attempt to pull commercial activity into labour regulation regimes.

Traditionally, labour regulation has had the objectives of:

- Legalizing the price-fixing of employment contracts.
- Sanctifying collusive activity to minimize competition in labour markets.

Commercial regulation, on the other hand, has the reverse objectives, namely, to

- Prevent price-fixing.
- Stop anti-competitive collusion.

If commercial contracts were to be regulated as if they were employment contracts (as is the thrust of the ILO debate), this would constitute an assault on the principles of commercial regulation and damage the functioning of economies.

2.2 Specific threats

The ILO 'scope of employment' debate specifically challenges the legitimacy of:

- The commercial contract.
- Independent contractors—that is, the self-employed.
- Labour hire.
- Franchising.
- Contracting out.
- Outsourcing.

- Work-from-home activity.
- Outworking.

2.3 The common thread

Independent Contractors of Australia's primary interest lies with independent contractors. However, because the essence of being an independent contractor is that a person undertakes work using the commercial contract instead of the employment contract, any regulatory issue that affects the commercial contract inevitably directly affects independent contractors. To this extent, ICA must monitor and be concerned with issues of labour hire, franchising, and so on—first, because many independent contractors are involved in these arrangements and, second, because the principles at stake are common to independent contractors.

Over the last few decades, independent contracting has emerged as one of a number of worker-engagement options which differ from the traditional direct employment relationship. Self-employment or independent contracting is the most significant trend, but has been accompanied by the growth of labour hire, franchising, contracting out, outsourcing, home-based work and so on. What typifies and identifies all of these alternative arrangements is that they are structured around the commercial or civil contract instead of the employment contract.

In the eyes of many in the labour regulation business, the use of the commercial contract for worker-engagement purposes confuses, deconstructs and avoids legitimate labour regulation. It threatens to destabilize the certainty of labour regulation as it has developed since the Second World War.

2.4 Commentary on the threat

2.4.1 The global economic rights issue

For most of the twentieth century, there had been an easily understood divide between those who conducted business and those who worked in businesses. 'Workers' were 'employed' as 'employees' by 'employers', where internal control of the firm operated through command-and-control pyramid-type structures. Labour regulation was constructed on the assumption that this traditional structure was the dominant one. Labour regulation offered 'protection' to employees who were in a direct employment relationship of legal control or 'dependency'.

Over the last two decades, this has changed. Direct employment is now only one model of labour engagement, and business structures now operate in diverse and changing ways, in diverse and changing economies. The dominant feature of the shift has been the use of the commercial or civil contract in labour engagement processes and internal business structures.

Independent contracting or self-employment is at the cutting edge of this development because it involves individual workers organizing their work through the commercial contract. It is this which defines the individual as being a business, their own business of one person. The idea of a single person being a business is one of the biggest conceptual shifts challenging both labour and economic regulators worldwide.

The labour regulation community generally refers to independent contractors as being 'unprotected'. But this is wrong. Independent contractors are regulated and protected through commercial law and business-style regulation, but not through employment regulation. Surprisingly, this fact is not generally recognized. The truth is that employees and

independent contractors are both protected—albeit through different regulation models which have different features.

Over the last few decades, many in the labour regulation community have demonized independent contracting and the other alternative forms of labour engagement. The thrust of this demonizing debate has been directed towards disallowing (or neutralizing) independent contracting and labour engagement under the commercial contract. It is as if there has been a desire to pull independent contractors and other labour engagement options into labour regulation regimes—regardless of whether this would destroy their status or capacity to operate. If this were to succeed, enormous harm would be done to global and national economies, let alone the damage done by stripping individuals of their right to be a business and stripping firms of their right to decide how to conduct their business.

Fortunately, the 2003 ILO Conclusion on the 'scope of employment' debate recognized this risk and delivered a successful outcome that struck a balance between recognizing the rights of independent contractors and the integrity of the commercial contract, and the need to continue employment-style labour regulation.

In 2003, the ILO did achieve a step in a positive direction. However, it was not final and it is not certain that that positive step will be reflected in the proposed Recommendation for 2006. The debate on the 'problem of the triangular relationship' scheduled for 2006 has the capacity to revisit all the same issues that were debated and settled in 2003, and to undo that settlement.

This is discussed further in this document at 'triangular relationship' (click here).

2.4.2 Protecting commercial contracts

In 2005, the ILO released a report in preparation for the 2006 debate. The 2005 Report raised the question of protecting commercial contracts.

> Throughout the discussions on the employment relationship, [2003] the concern was expressed that regulation in this area could interfere with the right of a person to contract for services by another person on a civil or commercial basis. (Paragraph 239)

The Report asks '…whether a provision should be included in the new instrument to state expressly that none of the provisions of the new instrument may be interpreted as limiting in any way the right of employers to establish civil or commercial contractual relationships'. (Paragraph 239)

ICA is strongly in favour of this proposal.

But ICA would want to see the proposal *extended and modified* to include 'workers' explicitly. In other words, that any proposed instrument could not be interpreted as 'limiting in any way the right of employers *and workers* to establish civil or commercial contractual relationships'.

2.5 Comment

The right to make use of commercial contracts is not a right restricted to persons working under the legal status of an employer. Any individual, no matter what their legal status, has a

right to decide the type of contract under which they are engaged. This fundamental right is what enables individuals to turn themselves from employees into a business—their own business of one—which in dynamic economies frequently evolve into the businesses of many.

Further, it should not be assumed that business structures require an employment relationship. Business structures can also involve multiple commercial contracts between entities of one, or entities of many, as well as being mixed with employment contracts.

3. Terminology, the ILO and labour regulation

3.1 An employee or not an employee?

In the ILO 'scope of the employment' debate and in debate on labour regulations in general, a key feature has been the imprecise use of language. This has resulted in much confusion.

Historically, the ILO has referred to 'employer', 'employee', 'employment' and other related language in a general way. For example, it has been assumed that an employee is a person who works. But the ILO and labour regulators are in the business of the law. They create regulations via legal instruments. At law, an employee and an employer only exist because they are parties to an employment contract. And an employment contract is a very specific legal object.

The scope of employment debate has suffered from confusion, lack of precision and poor focus because of a poor use of the language of employment. For example, the ILO repeatedly refers to independent contractors as being 'employed'. But this is not possible because independent contractors do not use employment contracts. Independent contractors can only be 'engaged'. They are engaged under commercial contracts.

This is a main reason why the scope of employment debate has dragged on for more than ten years without resolution. Because the ILO and labour regulators have talked of employment as embracing all forms of work, this has led them to infer that all work must be 'employment' and that independent contractors, or at least some independent contractors, are in fact employees. The term 'dependent contractor' has been used in this instance.

Further, there has been a repeated accusation that the definitions of an 'employee' and 'independent contractor' have been inconsistent, unclear and vague.

These two items: the allegations that definitions are vague and that independent contractors are really employees, dominated the debate until recently.

3.2 The ILO 2005 Report. Finding definitional clarity

The ILO 2005 Report (click here), however, has taken a great step forward by identifying the international definitions of 'employment', 'worker' and 'non-employment' and by securing greater clarity of those definitions.

This Report details the results of the first serious and thorough review of employment definitions used across the globe. On the facts, the ILO found that, contrary to expectations, the definitions were clear and consistent around the world.

The document says:

> 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)

3.3 The definitions

The report looked at common-law countries and found that similar terms and definitions were used. Countries it cited, for example, included Kenya, Nigeria, Lesotho, Indonesia, Ireland, New Zealand, Cambodia, China, Malaysia, Australia and Pakistan. These countries used terms such as 'to serve an employer', 'contract of service', 'contract of employment' and so on.

The report also looked at legal definitions used in a range of non-common-law countries. These included Argentina, El Salvador, Chile, Colombia, Cost Rica, Venezuela, France, Benin, Burkina Faso, Democratic Republic of Congo, Gabon, Niger, Rwanda, Portugal, Morocco, Bahrain, Qatar, Angola, Botswana, Slovenia, Mexico and Nicaragua.

The defining terms from these countries included 'dependency', 'subordination', 'permanent dependency', 'delegated direction', 'conditions of subordination', 'direction', 'supervision', 'control', 'orders' and 'for the employer's account'. These terms used in non-common-law countries all point to an idea of employment consistent with that of common-law countries.

The ILO report is significant. For the first time, based on solid research, the ILO has stated that the specific idea of employment is a contractual relationship in which one party (the employee) is 'dependent' on, or in some way subject to the 'control' of, the other party (the employer).

This relationship is normally tested or discovered through a court process, the details of which may vary between countries and jurisdictions. But the discovery process always focuses upon a central theme—namely, indications of dependency or control—and the ILO found a substantial degree of convergence and commonality of approach on that theme.

3.4 'Dependent contractor' idea dropped

As a result of finding this commonality of definition, the ILO document has dropped all reference to 'dependent contractor' as a legal definition.

Consistent with the 2003 ILO Conclusion, the 2005 document approaches the definitions under three elements:

- *Worker*: This is a generic term that can mean an employee or a self-employed person.
- 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.

Significantly, the report drops the term '*dependent contractor*'. It refers to a 'dependent' worker as an employee. This is an important development because the term 'dependent contractor' has been used in the past as the key term by which to attack the legitimacy of independent contractors. The fact is that it is not possible for an individual to be both an independent contractor and dependent. Legal dependency in this area is exclusively denoted by employment.

This finding of definitional consistency and the clear identification that employees and independent contractors are different subsets of the more general class, 'worker', enable the labour regulation debate—and specifically the ILO 2006 scope of employment debate—to move forward in a more constructive way than in the past.

However, more precision is needed, based upon the logical extensions of the finding and of the acceptance of the clear difference between an employee and an independent contractor. To this end:

- The word *employer* should only be used in relation to *employees*. Employers do not employ independent contractors. This is a loose use of the terms which confuses the debate.
- The use of the words *engaging party, user, client* and other such terms should be used in relation to *independent contractors*.
- The use of the words *engage and engagement* should replace the words 'employ' and 'employment' in relation to independent contractors.

4. What is the reason for the scope of employment debate? The ILO says it is to ensure all workers are protected. What is 'protection'? A discussion

4.1 The limited scope of the debate

The 2005 ILO Report reiterates the proposition that the 'protection' of 'workers' is the core purpose of the ILO. 'Protection' is also the core purpose of global labour regulation. Throughout the 'scope of employment' debate during the last ten years, the primary concern expressed is that some workers are missing out on 'protections'. The 'scope of employment debate' has attempted to ensure that 'protections' are extended to all 'workers'.

But there has been a singular lack of clarity about what is meant by 'protection'. There is an assumption within the labour regulation community, and in the ILO in particular, that everyone knows and understands the specific 'protections' that are being offered. In addition, if the tone of the 2005 Report is any guide, it leads unswervingly to the assumption that 'protection' is only afforded by the regulations that circumscribe the employment relationship. It seems to be assumed that individuals who are not employed are not afforded protection.

These assumptions are wrong and do not accord with the facts of economic life. The 2006 debate needs to focus on a broader view of how workers are afforded 'protection'.

4.2 Different ways to protect

The truth is that employees are offered certain types of protections through labour regulation, and independent contractors are offered (sometimes) similar protection, but also other sorts of protections through commercial and civil law.

A proper discussion of worker protection needs to look at the specific types of protections afforded to all people at work and how these function.
For example:

- *Discrimination and equal opportunity:* Regulations in relation to these areas give protection to 'workers' and non-workers alike. The emphasis under law is to prevent discrimination against *people*. Whether someone is an employee or an independent contractor or a consumer is not normally relevant to the level of protection offered. The only major area of difference for workers is that if an employee commits an act of discrimination, then the employer will generally be held liable. But if an independent contractor commits an act of discrimination, there is no such transfer of liability.
- *OH&S:* Work safety laws have the objective of keeping people safe at work. The Robens principles of the UK and ILO Convention 155 emphasize safety at work for employees, independent contractors and people who are not in either of these categories. It is not intended that the status of being an employee or an independent contractor should alter the level of protection offered for work-safety purposes.
- *Taxation:* The issue of taxation is not a 'protection' issue for workers. Rather, it reflects concerns that governments have about their ability to secure the collection of personal income taxation revenue. It is not at all obvious that the collection of such revenue is an item which falls legitimately within the jurisdiction of the ILO.

During the twentieth century, the general approach to labour regulation has been to seek to use the single catch-all term, 'employment', as the legislative trigger to give all regulations—of whatever sort—their jurisdictional reach and power. This has been an ineffective approach which has, in fact, led to confusion about the reach of such regulations.

What needs to occur, instead, as shown in the examples above, is that each form of regulation should look to its own specific objectives and, as a result, be designed accordingly to meet its specific needs. The objectives of tax collection, work safety, anti-discrimination, social security and so on, are all quite separate and distinct. One catch-all notion—'employment'—cannot possibly and successfully perform the multiplicity of diverse tasks required of it. The 'scope of employment debate' and labour regulators have not properly acknowledged this reality.

4.3 Three complementary forms of 'protections'

There are, of course, specific types of protections that are offered only under employment law that may not be available to independent contractors. But what does not seem to have been recognized in the ILO 'scope of employment' debate is that, equally, there are protections afforded to independent contractors that are not available to employees. There are also 'protections' which are common to both employees and independent contractors.

Unless the ILO understands this, it runs the great risk that, by seeking to deliver employee protections to independent contractors, it will automatically deny independent contractors the protections they already have. The threat which looms from the ILO debate is that the delivery of one type of protection will entail the loss of another.

To understand this, it is helpful to specify the protections already available.

Workers (Employees and *independent contractors)* are afforded identical rights and protections as follows:

- Right to have status correctly identified.
- Right to a safe work environment.
- Protection from discrimination.
- Right to equal opportunity.
- Protection from slave labour.
- Right to have the terms of contracts enforced.

Employees have achieved some rights and protections that have largely been enshrined in law only since the Second World War, namely, the

- Right to collectivize the process of contract control.
- Right to collectively set and fix the price of employment contracts.
- Right to permanency in employment contracts (that is, protection from unfair dismissal).

Independent contractors have different rights and protections that have been embedded in commercial and civil law dating from well before the Second World War, including the

- Right to personally control their own contract.
- Right to determine the price of their own contract without interference.
- Right to change the terms of their contract only by mutual agreement.
- Right to enter or reject a contract.

Where differences exist between the rights of employees and the rights of independent contractors, the differences are substantial. But it is wrong to believe or assume that these differing rights are in competition each with the other, or that one set of rights is morally (or in any other way) superior to the other. In a diverse and dynamic world, the differing rights should and can readily coexist. Indeed, it is healthy that they do.

When we look towards the June 2006 ILO debate, it is the achievement of a balanced approach that must be targeted. What needs to be achieved is a situation in which the ILO recognizes and accepts that there are legitimate but differing 'protection' structures through which:

- Generic protections are afforded to all workers.
- Specific types of protections are afforded only to employees under employment law
- Specific but different protections are afforded only to independent contractors under commercial or civil law.

Given this situation, it would be wrong for the ILO to take a stance that took away the legitimacy of any set of protections or sought to push one category of workers into another category of protections.

4.4 A core protection: Protection from 'shams' involves determining the truth about contracts

What is consistent in the ILO 'scope of employment' debate is the desire to eliminate shams. All workers have a right to be protected from shams.

This is identified in the 2005 ILO Report which refers to situations where '…the legal scope of the employment relationship did not accord with the realities of working relationships'. (Paragraph 30)

In other words, the ILO Report suggests that there are occasions when a worker who may have been termed an independent contractor is, in reality, an employee. The ILO Report, however, fails to discuss the matching situation where a person who may have been termed an employee is, in reality, an independent contractor. For a balanced debate, both sides of the equation must be considered.

The ILO Report also highlights situations where contracting out, some models of labour hire and other work-engagement arrangements may mask or confuse the true nature of legal relationship and the obligations and protections that are attached to those legal relationships.

The ILO is right to insist that the true nature of peoples' legal relationships should be clear and obvious. The ILO should do everything in its power to encourage clarity in the framing of laws about contracts, simplicity in their understanding and effectiveness in their enforcement. The legal definition of an individual's engagement status should be an accurate reflection of the reality of his or her engagement. Illegal covers or shams, or situations where the law is ignored, should be dealt with firmly.

The truth is that where work (of whatever sort) is involved, there will always be a contract or series of contracts of some sort. The contracts can be written, spoken or implied. The contracts can be commercial and civil on the one hand, or employment on the other. There can be a series of interlinked contracts involving combinations of commercial and employment contracts. Each contract can and will be readily identified in appropriate courts of law upon investigation of particular facts. The evidence from the ILO 2005 Report—as mentioned before—is that this occurs regularly in fairly consistent ways across many countries around the world.

The ILO should take steps to ensure that contractual undertakings are properly identified and that the obligations that are tied to the contracts are adhered to and respected.
To make it clear, the ILO should reiterate that:

- It *is not* a sham to be in a commercial contract and to comply with commercial law and obligations.
- It *is* a sham to be have an employment contract, disguise it as commercial and seek to avoid employment obligations.
- It *is* a sham to be in a commercial contract, disguise it as employment and avoid commercial obligations.

Unfortunately, there is an overriding impression that emanates from the scope of employment debate which gives the impression that all sham contracts are of only one sort—namely, those which involve disguising employment contracts as commercial or civil contracts. Naturally enough, that perception can lead to the further impression that the ILO views commercial or civil contracts as somehow inherently inferior to employment contracts. It is recognized, however, that this is not the formal position of the ILO.

But when the 2005 ILO Report correctly states that

'The issue is not subcontracting itself but its improper use.' (Paragraph 37)
then, equally, the Report and the ILO could state that
'The issue is not employment itself, but its improper use.'

When looking to prevent shams, the ILO should seek balance and refrain from giving preference to one status over another.

5. The alleged 'problem' of the 'triangular' relationship

At the June 2006 ILO meeting, the issue of the triangular relationship will be a central debate. When this issue is settled, the ILO intends creating a 2006 'scope of employment' Recommendation incorporating the 2003 Conclusion (click here) and the triangular relationship outcome.

5.1 A strange issue to debate

The 'problem of the triangular relationship' seems quite odd. It seems to be a 'problem' existing only within the mindset of the ILO and labour regulators.

For people who organize work through the commercial contract on a daily basis, 'triangular relationships' are a normal, everyday and necessary occurrence. Such relationships are not a 'problem', but are in fact essential for organizing businesses, working individuals and, indeed, whole economies.

5.2 A masked agenda?

The oddity of the ILO's position creates the suspicion that its proposed debate on the triangular relationship may be a back-door attempt to:

- Initiate a new attack against the commercial contract and independent contractors.
- Open a new attack against labour hire.
- Launch fresh attacks on the legitimacy of contracting out and outsourcing.
- Embark on a new attack against franchising.

This may turn out not to be the case, but the difficulty in understanding the ILO's agenda is that the preliminary discussion of the topic, reflected largely in the 2005 Report (click here), is full of insinuations, allusions to and suggestion of problems, with a resulting lack of specificity. This is compounded by statements in some sections of the Report which contradict statements in other sections of the Report. It is vague and non-specific about stating just exactly what the problem is that allegedly needs an ILO solution. This makes participation in the debate extremely difficult.

Although this framework of vagueness and contradiction is a problem in itself, it is nonetheless necessary to try to understand the 'problem' as seen by the ILO and labour regulators if we are to make any progress.

5.3 How does the ILO define the triangular relationship?
What is the intended reach of the debate and Recommendation?

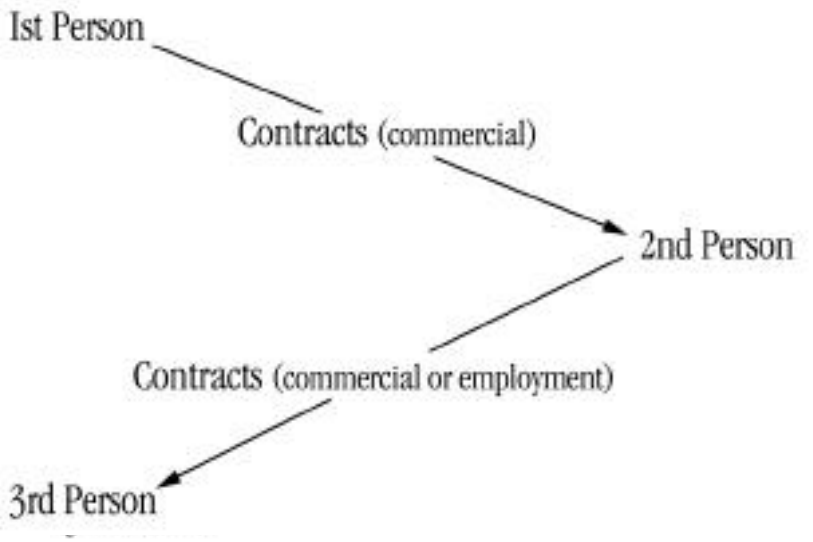
The simplest understanding of a triangular relationship seems to be that it is one in which

- a person contracts with a second person for work to be done.

Then

- the second person contracts with a third person for work to be done.

It looks like this:



What results is a sort of open 'triangle' in which the points (on two sides) are connected by contracts. The first contract is a commercial contract, the second contract can be an employment contract or a commercial contract.

Where all the contracts are commercial, it is quite common for further relationships to be formed in a series of cascading contract chains. In fact, the process of endless and varying cascading contract chains describes the process of how any economy operates. So the first question must be: does the ILO see this as a problem?

On the other hand, the 'problem' to which the ILO refers might only be thought to arise where the first contract is commercial and the second is an employment contract.

The ILO 2005 Report states that:

- 'A triangular employment relationship normally presupposes a civil or commercial contract between a user and a provider.' (Paragraph 51)
- '...triangular employment relationships occur when employees of a person (the provider) work for another person (the user).' (Paragraph 50)

The Report makes it clear that this refers most specifically to labour hire arrangements, but also includes franchising, contracting out, outsourcing, work-from-home activities and others. On the face of it, it also seems to refer to labour hire arrangements involving independent contractors.

In summary: if the 2006 debate is predicated on the belief that there is a problem with all forms of cascading contract chains, then the ILO is targeting a Recommendation of gigantic reach into every aspect of global economic activity.

If, however, as would seem more likely, the ILO is targeting only 'triangular' relationships that involve workers, then the reach of the debate is narrower, but it effects will still be huge for all persons involved in:

- Labour hire, outsourcing, contracting out, franchising, home-based businesses and so on.

Even this is a very broad and sweeping agenda being pursued by the ILO.

5.4 What is the problem?

Although the ILO 2005 Report raises many issues in a conversational style, it is non-specific as to the problems that need to be rectified.

However, some statements do give us a hint. They are as follows:

- The triangular relationship '...can have beneficial effects for the employees of providers in terms of employment opportunities, experience and professional challenges. From a legal standpoint, however, such contracts may present a technical difficulty as the employees concerned may find themselves interacting with two (or more) interlocutors, each of whom assumes certain functions of a traditional employer.' (Paragraph 50)

- 'The problems faced by workers involved in "triangular" relationships pose different legal questions [from objectively ambiguous or disguised employment relationships]. These are workers "employed" by an enterprise (the provider) who perform work for a third party (the user) to whom their employer provides labour or services. For these employees, their employment status is not in doubt, but they frequently face difficulties in establishing who their employer is, what their rights are and who is responsible for them.' (Paragraph 40)

- 'A triangular employment relationship normally presupposes a civil or commercial contract between a user and a provider. It is possible, however, that no such contract exists and that the provider is not a proper enterprise, but an intermediary of the supposed user, intended to conceal the user's identity as the real employer.' (Paragraph 51)

- '...the general problems associated with compliance and enforcement of labour law also affect the employment relationship … there is little evidence of a consistent and determined effort to resolve the problems of lack of compliance and poor enforcement.' (Paragraph 208)

These statements seem to identify the triangular relationship problems for employees that the ILO believes need resolution as follows:

- **Confusion in identifying the employer**: An employee may face confusion about who the employer is. This creates problems about to whom the employee reports, who gives instructions and who has responsibilities and obligations to the employee.

- **Contract does not in fact exist:** The contract between the user and the supplier may appear to be a commercial contract but may in fact not exist, and the supplier may in fact be a division of, or agent of and for, the user. That is, the individual worker may in fact have a contract with the user which is hidden from him because the supplier has concealed the fact that he is ultimately the contracting party.
- **Compliance:** Compliance and enforcement are weak.

Another issue raised by the ILO is where an alleged commercial contract exists with an individual worker but the contract is in fact an employment contract. Even though this issue is raised by the ILO under the heading of the triangular relationship issue, it is really an item covered in the 2003 Conclusion concerning the prevention of sham arrangements.

5.5 Resolving the problems

If these are the problems which the ILO believes need to be addressed, then ICA would strongly encourage the ILO to aim for an outcome that would clarify the contractual chains.

The ILO should accept that there is nothing inherently wrong with triangular relationships or cascading contract chains. In fact, the ILO should look to accept the legitimacy of these arrangements just as it accepted the legitimacy of commercial contracts in 2003. What is needed, however, is to ensure clarity in contracts.

For any economy or any worker (employee or independent contractor) to be successful, it is imperative that transparency in contractual arrangements is secured. All entities, whether they are individuals, partnerships, trusts, companies, governments or government enterprises, need to have clarity in their contractual undertakings, otherwise obligations and benefits cannot possibly be known. This much is common sense.

If clarity can be achieved, then national laws can adequately describe the obligations that apply under and through the contract chain. As discussed earlier in this paper (section 4.2, click here), the obligations will vary according to the regulatory regime and the objectives under consideration. For example:

- Equal opportunity and anti-discrimination laws will usually impose obligations—whether through commercial or employment contracts—both upon engaging parties and the engaged. There may be differences in some of the details and in emphasis between employment and commercial contracts but, in matters of enforcement, the emphasis lies with looking at actual behaviours.
- International principles underpinning work safety laws (OHS) target obligations and responsibilities which individuals and entities have for the matters and events over which they have actual and practical control.
- Taxation laws impose obligations under both commercial and employment contracts—although the details of application vary significantly between countries. In fact, the variations are often offered on purpose by nations in competitive global environments so as to attract investment, business and desired workers.
- Commercial laws impose obligations on parties where commercial contracts exist.
- Employment laws impose obligations on parties where employment contracts exist.

What is important in any ILO outcome in June is that the integrity of the contractual facts and of the contractual chains are strictly respected. As the ILO's 2005 Report says:

- ‘However the major challenge lies in ensuring that employees in such a [triangular] relationship enjoy the same level of protection traditionally provided by the law for employees in a bilateral employment relationship without impeding legitimate private and public business initiatives.’ (Paragraph 56)

Within the ambit of this sensible statement, however, there are passages within the ILO 2005 Report which raise concern.

5.6 Areas of concern

5.6.1 Creation of joint liability

The ILO’s 2005 Report raises the prospect of joint liability under ‘triangular’ relationships.

- ‘Depending on the circumstances and national law, the employer (or provider) and the user may bear joint and several liability…. A number of ILO instruments also address this subject.’’(Paragraph 55)

What the ILO is intending here is not completely clear. But the passage raises the prospect that the ILO could seek to distribute liabilities between parties who do not have a contract between them. This is fraught with great danger because such a distribution has the capacity to throw economies into contractual confusion where persons have liabilities even where they don’t have a contract.

The examples which the Report mentions, however, are for the most part obligations under OHS laws. What the Report fails to acknowledge is that OHS obligations are not a strict function of contractual relationships. OHS applies a different approach to contract law and applies obligations over matters associated with ‘control’. All persons are held liable for what they control under OHS. As discussed earlier (section 4.3, click here), the idea of ‘protections’ (and hence liability) must be considered within the context of each specific objective being targeted under different regulatory regimes. In other words, OHS is different from tax, which again is different from equal opportunity, and so on.

When floating the idea of joint liability, the ILO needs to be careful that it does not suggest that different persons have liability and responsibility for exactly the same function. This could border on the absurd. For example, joint liability for payment of tax could throw forth the possibility that two different parties have obligations to remit the same tax on the same taxable item. This would result in double taxation.

What must be targeted instead is the idea that entities have responsibility for matters appropriate to the relationships that they have with other parties. Entities’ obligations are both a reflection of, and spring from, their contractual undertakings. This may sometimes give the appearance of ‘joint’ liability, but the liabilities in question are in fact separate and distinct ones which are owed under a single objective. It is similar to the application of the rules of the road. Every driver has an obligation to comply with road laws, but no particular driver has responsibility for the driving behaviour of another driver. The obligations to comply with road laws might be common to every driver but the obligations are separate and distinct rather than joint.

Again, the ILO debate to be conducted in June 2006 must take great care when considering the idea of ‘joint’ liability. If the ILO errs in this respect, and suggests the application of the same liability to two or more parties for exactly the same occurrence, it could result in

transference of liability for actions from a party who undertook an action to a party who did not engage in the action.

If a proper debate is to proceed, the ILO's intentions in this respect must be made clear. The negative possibilities are substantial. The ILO could greatly confuse rather than clarify the obligations in question if it does a poor job on this issue.

5.6.2 Presumption

The ILO's 2005 Report raises the question of a presumption of employment forming part of the new ILO instrument to emerge from the June 2006 debate.

- 'The question seeks to ascertain whether the new instrument should also provide that once one or more of the indicators [of employment] has been identified, the relationship between the worker who performs work and the person for whose benefit the work is performed should be deemed, prima facie, to be an employment relationship.' (Paragraph 235)

This suggestion should be strongly opposed. The ILO has no right to assume or presume anything about contractual relationships. The right to a choice of contracts and the forms of contracts entered are fundamental to basic human rights and dignity. This right underpins economic activity.

The discovery of the true nature of any contract involves a full analysis of all the facts by properly constituted independent courts who bring impartiality of judgment to bear on the case. An ILO instrument which simply presumes employment because of the existence of a few indicators would destroy that impartiality and trample individual rights.

5.7 Respecting Existing ILO instruments

Given that a key target of the triangular relationship debate is labour hire, it would be of great concern if the 2006 debate revisited, or in some way challenged, the legitimacy of existing ILO Conventions concerning labour hire.

Fortunately, the 2005 Report clearly recognizes the imperative of maintaining consistency with existing ILO instruments, citing in particular the ILO Private Employment Agencies Convention 1997 (No. 181) and accompanying Recommendation (No. 188).

5.8 Conclusion on the triangular relationship debate

The 'triangular relationship' debate will be important, but it has to be conducted within the parameters of the 2003 ILO Conclusion. At the moment, there is some confusion as to what is being targeted.

What the ILO needs to achieve before the 2006 debate proceeds is:

- Clarity about what is meant by the 'triangular relationship' so that the parameters of the debate may be clearly identified.
- Clear and precise identification of the specific problems that the ILO believes need to be addressed.