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Open Submission

to members of the International Labour Organisation discussing
"The Scope of the employment relationship"
at the 91st Session of the ILO, June 2003

The ILO is the peak international labour regulation forum that discusses issues of relevance to workers world-wide and passes resolutions from which it hopes the member states will enact regulation consistent with the ILO resolutions. The ILO is principally concerned with workers' rights, however they may be defined.

The ILO has three distinct representative groups who attend and have voting rights at forums.

1. Governments of member states; and

The two entities that constitute the employer–employer relationship, that is:

1. Peak employer bodies from each nation which represent one party to the contract of service.
2. Peak employee bodies (unions) from each nation which represent the second party to the contract of service.

At the 91st Session of the ILO, meeting in Geneva in June 2003, an important item of discussion on the agenda is one which cuts to the core of why labour regulation exists and, in turn, what the ILO conceives its role to be.

Based around the ILO discussion paper titled, 'The scope of the employment relationship', a proposition is being aired which claims that there exists a class of workers who are being denied the protection of labour laws 'because of the defective formulation of the law or its non-compliance or non-enforcement'. The discussion paper seeks to describe a problem and alludes to a solution whereby:

'dependent contractors' are the class of persons who are denied legal protection and

some sort of remodelling of the idea of 'employment' is necessary to fix the problem.

Independent Contractors of Australia (ICA) is an organisation formed to promote the interests and rights of independent contractors. ICA takes issue with the ILO discussion paper on the grounds that the paper:

1. Imagines a problem and fails to present evidence to verify that problem. In fact, the evidence that is presented indicates no problem.
2. Presents confusing and contradictory information in a process which targets a predetermined position.
3. Alludes to a 'solution' that has proven to be unworkable in at least one jurisdiction and which has detrimental consequences significantly at odds with the stated intent of protecting workers.

ICA is familiar with the arguments in the ILO discussion paper because exactly this same policy debate has been active in Australia for more than five years. ICA and networks of Australian independent contractors been confronted with the regulatory outcomes of this activist legislative agenda and have had to campaign against it. The line

of reasoning contained in the ILO discussion paper has been promoted strongly in Australia and has been found to be false.

In the broad international policy context, ICA submits that:

- The definition of employment as currently applied by courts has a long history of successful application. (The ILO discussion paper shows this even if the paper suggest the opposite.)
- The determination of who is an employee must be left to independent judiciaries.
- The concept of 'dependent contractor' may have emotional appeal but is an invalid concept upon which only detrimental labour regulation can be constructed.
- If the idea of 'dependent contractor' is to be considered by the ILO, the countervailing concept of 'independent employee' must also be considered.
- The idea that worker protections are only available under labour law is wrong. Labour law offers one form of worker regulation. Commercial law also provides strong worker protections and it is to these protections that independent contractors have, or should have, access.

ICA notes that:

- Even though the ILO discussion paper claims that it does not intrude into independent contractors' rights, the content, thrust and suggestions of its paper inevitably amount to an assault upon independent contractors' rights.

- The ILO discussion is being conducted without independent contractors having representative voting rights. Within this context, the ILO risks being seen as unrepresentative of the very people against whom the discussion paper proposes to move.

- If the ILO moves in the direction proposed by the discussion paper, the ILO risks becoming an instrument of denial of workers' rights rather than a protector of workers' rights.

Assaulting commercial principles.
The ILO discussion paper seeks to side-step a most important issue at stake in the debate namely that:

The key distinctions between the commercial contract for services and the employment contract of service are the legal underpinnings of respective commercial and labour regulation. Regulation of the contract for services is aimed to ensure free, fair and competitive trade within and between national borders. Regulation of the contract of service is designed to prevent competition (between employees). The two regulatory environments meet at a juncture where the distinction between the two has long historical development solidified within legal institutions and understandings. To tamper with, or override, the existing distinctions would initiate wide consequences for individuals and national and international trade. The ILO discussion paper does not recognise the significance of that with which it proposes to tamper.

If the ILO were to move in the direction alluded to in the discussion paper, the adverse implications for fair, free and competitive national and international trade are considerable and should be contemplated.

The policy outcome alluded to in the ILO discussion paper is for the creation of new regulation where regulators can selectively declare that a contract for services is employment. The practical and legal illogic of this concept is significant. There is no contract form that is or can sit between the employment and commercial contract. Attempts to create new regulation as suggested is to create legal, regulatory and commercial uncertainty on a large scale.

A Simple Principle of Justice
When considering the scope of the employment issue, ICA asks the ILO to keep one important principle of justice in mind:

- That every worker has a right to freely decide the type of contract they use when working. Either the commercial contract (for services) or the employment contract (of service).

ICA submits that

1. The problem argued in the ILO discussion paper does not exist.
2. The solution alluded to will deny workers the right to freely choose their contract.

BACKGROUND

The Scope of Employment:The Australian lesson
Issues of general principles

Independent Contractors of Australia. Information.

1. What is independent contracting? A general overview.
2. Why the trend to independent contracting.
3. The dependent contractor argument and independent employees.
4. Practical Issues. Australia as a case study.

Independent Contractors of Australia (ICA)

ICA is the first (and probably only) organisation in Australia exclusively dedicated to the interests and rights of independent contractors. ICA was formed in July 2001, it is incorporated as a non-profit organisation and 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 upon 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 information about independent contracting.
- People can subscribe and access the 'subscribers only' section of the site where core legal, tax and other information is stored.
- Subscribers can engage in discussion on issues and have policy input.
- Members 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. Given Australia's federal structure, it also aims to have committee members from across the nation. 28 per cent of the Australian private sector workforce work but are not engaged as employees. With non-employees under such sustained attack for so long, it is little wonder that an organisation such as ICA has come into existence.

1. What is independent contracting? A general overview

The ILO discussion paper presents a view of independent contracting which ICA believes contains significant misunderstandings. ICA presents an alternative view by way of comparison.

Independent contracting is one of those things which, when understood, appears very simple. Yet, when not understood, it appears unfathomably complex. And it is on the basis of alleged complexity and confusion that the ILO discussion paper mounts many of its arguments.

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 held sacred under well developed principles of law.
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 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 organise their work.

And it is only when the reality of this organised independence along contractual lines is in clear evidence, that the 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 traditional employment-type control, the courts reject the independence tag and state the truth.

The process and the tests which the courts use to undertake factual examinations of contractual independence or dependence are well known and publicly available. However, many participants in the public debate claim that the definition of employment/independent contracting is vague and uncertain. The ILO discussion paper makes that error.

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 21 of them) which the courts use for making their determinations. ICA believes that these general sub-tests apply across wide jurisdictions and it describes the application of these sub-tests as the 'swinging pendulum' test. It suggests that people review their behaviour in the 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 of some sort by another (that is, they are a dependent employee).

2. Why the trend to independent contracting?

Given that national institutional arrangements are so heavily employment-focused, why have people moved to become independent contractors? Is it—as its detractors claim—nothing more than a massive orchestrated sham and 'con' for the purposes of imposing exploitation on workers and the avoidance of legal obligations?

ICA rejects these arguments, observing that the rise of independent contractors is a direct and growing part of a phenomenal social movement reflected in other areas, such as the movements for equal rights for women and the disabled, the rise in the demand for justice and the peace movements, and the splintering of politics from a two-polar to multi-polar system. A major single thread exists in each of these movements, namely, the very desire of humans to control their own lives, to not have others tell them what to do or when, whether that be to go to war, to cook and clean, or how to vote, or how to work.

This broad phenomenon poses a huge challenge to the ability of humans to organise themselves into social structures. All government policy-makers face the same dilemma, namely, how to create and manage legitimate organising institutions when authority is diffused and constrained. This impacts on nations to varying degrees.

Businesses are still conceptually driven by the need for hierarchical structures (often portrayed as a 'pyramid' of control with strong overtones of class consciousness and a whiff of class warfare). Unions and employer associations generally believe all businesses want and need this pyramid-like, class conscious form of control. Public policy-makers assume the same. But ordinary working people want something different. Whatever their education level or apparent sophistication, all people are becoming increasingly money-savvy and business-focused. By adopting independent contracting, people compete fully in the capitalist, market system, controlling their own destiny, and willingly allowing true competitive forces and market interaction to determine outcomes. The issue is at the core of a just, market-driven society in which the freedom to contract (or not contract) and to freely choose the type of contract into which one enters, is integral to the existence of justice.

This is what drives independent contractors. This is no sham or con. It would not last if it were. It would not grow in significance in the face of the conservative institutional forces opposing it if it were a sham. It is a movement of substance which neither needs nor wants to be funnelled politically. In fact, it rejects all such moves. Independent contracting is about people getting on with the business of doing business!

3. The 'dependent contractor' argument and 'independent employees'

The ILO discussion paper constructs its thesis around the 'dependent contractor' argument. ICA submits that 'dependent contractor' is a notion which at law and in reality has no meaning, is illegitimate, confuses rather than clarifies issues and is an artificial creation which, if translated into legislative form, creates significant and often unpredictable problems.

In Australasia the dependent contractor argument was:

- Used in New Zealand in the initial proposals of the Labour Government's industrial relations legislation to pull independent contractors into industrial relations regulation. It was rejected after extensive community and parliamentary inquiry. (1990)
- Used as the justification for the State of Queensland's *Industrial Relations Act*, section 275 (1999). That legislation gives the labour regulator (The Commission) the power to selectively declare contracts for services to be employment and is the

type of regulated outcome alluded to in the ILO discussion paper. The Queensland legislation has run into considerable difficulty because of issues encountered in the test cases. The President of the Commission has declared the legislation to be unworkable. In one instance, the Commission declared a corporation to be an employee!

- Used as the justification for similar legislation that was rejected in the State of Victoria and withdrawn in New South Wales following significant community objection. (2000–2001)
- The basis for arguing that ILO conventions extend the definition of employee in the Federal Industrial Relations Act. (The legal arguments were firmly addressed through the federal courts and rejected over a two-year period in the late 1990s.)

The ILO discussion paper makes repeated reference to 'dependent contractors', but does not detail the full content of reasoning behind what is a now fairly old argument which had some currency in some sectors of labour academic thought for a considerable period.

ICA's research shows that wherever Australian-based 'dependent contractor' arguments arise, the intellectual source most often quoted is that of HW Arthurs, a Canadian academic, through the 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 bargain 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 organisations who have created a statistical definition of 'dependent contractor', namely, that of a 'contractor' who works for only one client. This is simplistic and naive to the extreme. It is a definition that completely ignores the law of contract. Unfortunately, it appears to be the very same conceptual structure detailed in the ILO's discussion paper.

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 legal definition of employment involves a process of finding the truth about economic and commercial contract relationships. If, in a legal investigation, a person is found to be economically dependent, their contract is of an employment nature. (The legal cases cited in the ILO discussion paper from across several jurisdictions demonstrate consistency with Australian cases where this search for economic and behavioural truth is apparent.) 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. This is an error repeated in the ILO discussion paper.

But even if 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 converse argument must apply, namely, that there are persons who are 'independent' employees. An independent employee is a person who has all the desires and attitudes

of independence but is forced to be an employee—either through duress or because of the lack of opportunity to become a contractor. If the ILO were to be consistent, proposals to cause 'dependent contractors' to be declared employees should be counter-balanced with proposals to cause 'independent employees' to be declared independent contractors. And the arguments that apply to dependent contractors should be applied also to independent employees but from the counter-perspective.

ICA rejects both notions—'dependent contractor' and 'independent employee'—as either contractual or legislative possibilities. Both ideas deserve to remain in the realm of academic musings.

4. Practical issues. Australia as a case study

If the issues relating to independent contracting are to be properly understood, clarity on definitions is critical. The ILO paper seems to want to stay clear of definitional issues, but this avoidance of facts cannot be sustained. Definitional clarity forces clarity of legislative intent. Without definitional clarity, regulation is confused.

Independent contracting is simply the reverse of employment. Confusion has, however, been created in the minds of some because of a historically developed lazy use of the word 'employment'.

The laziness has developed for simple reasons. After the Second World War, when income tax, payroll tax and workers' compensation regimes were invented, the vast bulk of workers world-wide were 'employed'. That is, people were engaged under the specific type of contract known as the 'employment contract' or contract *of* service, which at that time was highly akin to the 'master–servant' relationship. When income tax, payroll tax, and workers' compensation were invented, it was natural for public policy-makers to structure both the legislation and the schemes around the presumption of master and servant employment. Independent contracting was comparatively little used.

As a swing away from employment began to emerge, perhaps around the 1970s, this created challenges to the near-universal reach of these government-created regimes. The challenge increased as the percentage of employees decreased. The regulatory responses in Australia were perhaps similar to responses experienced in most countries. (The Australian discussion paper (Clayton&Mitchell) supplied to the ILO on this issue quite accurately describes most Australian regulatory responses up to 1999.)

- *Workers' compensation and payroll tax* authorities in Australia responded by legislatively increasing the reach of their regimes through legislative amendments that described other forms of contracts, or specific professions, so that they were caught within the legislation. Foolishly, the term 'deemed employment' was adopted as a generic description of these broadened forms of legislation. The 'deeming' of employment, however, is a misnomer, because the legislation of the different States of Australia does not change the nature of legal non-employment contracts being described, they simply describe them as being within the legislation.

- *Occupational Health and Safety* (OH&S) legislation has not suffered from the same legislative problems of 'employment' dependency because, from the outset, legislation has been modelled largely on outcome descriptions rather than contractual descriptions. OH&S, however, sometimes becomes confused when administered by workers' compensation authorities, because of different legislative models being administered by the same bodies.

- *Equal opportunity and anti-discrimination* legislation is, likewise, largely structured around outcome descriptions rather than contractual descriptions.

- *The Australian Tax Office* (ATO) was challenged on two fronts with the shift to independent contracting, one affecting withholding payments; the other impacting on individuals' entitlements to deductible items. Withholding was the greatest of worries and the ATO responded to the challenge by arguing that the Tax Act legislative wording (where if referred to "wholly or principally for labour") extended the definition beyond accepted legal employment. On some ten occasions over ten years during the 1980s and 1990s, however, the Australian High Court rejected this view, stating repeatedly that the withholding legislative powers under the Tax Act were restricted to accepted legal employment. After a decade of administratively trying to fix the tax collection issue, the entire tax administration system was reorganised in 2000. Now the witholding powers of the ATO are legislatively clear and robust and there is no attempt or need to 'deem' employment. Rather, the contractual models that the government wants captured are individually and specifically described with the appropriate administrative withholding arrangements. These are all detailed within the encompassing Pay As You Go system and are probably world trend-setting. The remaining issue of deductibility entitlement was resolved in 2001 under separate legislation, in as probably a satisfactory manner as could be expected.

- *Regulation of labour contracts* falls into a different area to that of income and payroll tax collection, workers' compensation, occupational health and safety, and equal opportunity and anti-discrimination. Regulation of labour contracts began in Australia at the turn of the 19th Century when the 'employment' contract was 'at will' and was truly that of 'master and servant'. The great nineteenth-century American jurist Oliver Wendell Holmes explained the employment contract this way in 1892: *'There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech, as well as idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered to him."* It was because of this implied suspension of rights to "free speech and idleness" that regulation of labour contracts was created. In essence, 'employment'-regulating legislation removes from the employer the exclusive capacity to control the terms of the employees' contract and gives ultimate control to semi-judicial bodies. This legislative transference of employer control has been so substantial that the legal definition of 'employment' in Australia shifted in the mid-1980s to 'right to control' only (Stevens v Brodribb Sawmilling Co Pty Ltd). The form of regulation of labour contracts seems to be the area of central interest in the ILO discussion paper and deserves additional attention.

Regulation of the terms of labour contracts

Labour regulation under Australian industrial relations law, and perhaps across the globe, derives its moral and legal justification from the implied inequality and suspension of rights contained in the modified master-and-servant contract that is employment as described by Oliver Wendell Holmes. This concept, (whether outdated or modified) of 'employment' continues to be the dominant managerial concept that is perceived to hold 'the firm' together. The idea of 'employment' is inevitably tied to the Fordist or Taylorist concept of the firm.

Even though this definition of 'employment' has remained as the foundation of Australian industrial relations regimes (and of most nations), the rise of independent contractors, particularly in the 1990s, has diminished the influence of industrial relations law as an instrument of social organisation. It is here that the attitudes of labour (employment) lawyers, unions and employer associations against independent contracting can be understood and from where the confused idea of the 'dependent contractor' is born. These groups come from a 100-year tradition of

'managing' the inequality of the 'rights suspension' contract that is employment. They cannot comprehend that the commercial 'contract *for* services' that is the governing contract of independent contractors does not entail any 'rights suspension'. In fact, the contract for services is a deliverer of rights, principally the right of the independent contractor to have control of his or her contract. In Australia, this contract comes under the regulating regimes of common law, and *The Trade Practices Act* and various State Fair Trading Acts.. But even if the attitudes can be understood, that does not mean that the attempts by these same groups to extend their reach beyond legal 'employment' is justified or socially acceptable. Yet they have robustly and aggressively pursued the reach of their powers—sometimes with success.

This is the motivation and agenda apparent in the ILO discussion paper.

- During the late 1990s, activist lawyers mounted arguments in the courts which suggested that obligations under International Labor Organisation treaties extended the definition of 'employment' under the Federal *Industrial Relations Act* beyond that of accepted law. The judicial debate spanned several cases, but the extension argument was ultimately and firmly rejected by the courts.

- In 1999, the State of Queensland introduced industrial relations legislation which, for the fist time, could truly be called 'deeming' legislation. Section 275 of the Queensland *Industrial Relations Act* gives the Queensland Industrial Relations Commission the power to declare persons working under a 'contract for services' to be employees. The nature of this legislation is unprecedented because it accepts that a contract for equality exists (contract for services) but legislatively seeks to regulate it as if it were a contract of inequality (employment). In doing so, it strips independent contractors of rights they would otherwise have. The Queensland Industrial Relations Commission referred to section 275 as 'a legislative provision which deems relationships to be that which they are not'. (ALHMWU and Bark Australia Pty Ltd) In this context a corporation has been declared an employee. The President of the Commission has publicly stated that the provisions are unworkable.

- Following the introduction of this Queensland legislation which declared contractual relationships to be that which they are not, the states of New South Wales and Victoria both introduced legislation in 2000 which was modelled around the Queensland Act. The Victorian Bill failed to pass and the New South Wales Bill was withdrawn.

- The state of New South Wales has industrial relations legislation that allows disputes under commercial contracts to be handled by industrial relations courts. Rather than protecting the weak, the history of the legislation is that it has been used by the rich in dispute with the rich in unseemly jurisdiction-hunting for favourable courts that award massive payouts. New South Wales has attempted to constrain the legislation, but has failed.

The experiences of Australia suggest that the 'scope of employment' proposals being considered at the 91st Session of the International Labour Organisation are fundamentally flawed and inevitably have repercussions and consequences well beyond those covered in the ILO discussion paper.